# FEDERAL COURT OF AUSTRALIA

## O'Donnell v Commonwealth of Australia [2021] FCA 1223

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| File number: | VID 482 of 2020 |
| Judgment of: | **MURPHY J** |
| Date of judgment: | 8 October 2021 |
| Catchwords: | **PRACTICE AND PROCEDURE** – application to strike-out amended statement of claim pursuant to r 16.21 of the *Federal Court Rules 2011* (Cth) – application for leave to file a proposed second further amended statement of claim – proper approach to adequacy of pleadings having regard to modern case management and information asymmetry between the parties – pleading of misleading or deceptive conduct case held to be adequate at this stage of the case – whether the applicant has standing to bring the other claims in the proceeding – whether the applicant has a real interest and/or a special interest in the subject matter of the litigation – held that the applicant does not have standing to bring the other claims<br><br>**REPRESENTATIVE PROCEDURE** – representative proceeding under r 9.21 of the Rules – whether to exercise discretion to order that the proceeding not continue as a representative proceeding – whether the applicant has the same interest as represented persons – whether represented persons may suffer a detriment through the representative proceeding – whether the applicant should provide notice of the proceeding to represented persons and provide an opportunity to opt out – refusal to order that the proceeding not continue as a representative proceeding |
| Legislation: | *Australian Securities and Investments Commission Act 2001* (Cth) ss 12DA, 12GF<br>*Commonwealth Inscribed Stock Act 1911* (Cth) ss 3, 3A, 51JA<br>*Competition and Consumer Act 2010* (Cth) Sch 2 (*Australian Consumer Law*) s 18<br>*Corporations Act 2001* (Cth) ss 1020AH, 1031D, 1031E<br>*Environment Protection (Impact of Proposals) Act 1974* (Cth)<br>*Federal Court of Australia Act 1976* (Cth) ss 23, 37M<br>*Public Governance, Performance and Accountability Act 2013* (Cth) s 25(1)<br>*Trade Practices Act 1974* (Cth) ss 52, 80, 163A<br>*Federal Court Rules 1979* (Cth) r 6.13(1) |

*Federal Court Rules 2011* (Cth) rr 1.32, 9.21, 9.22, 16.21

*Supreme Court Rules 1970* (NSW) r 13(1)

Cases cited:

*Australian Conservation Foundation v Commonwealth* [1980] HCA 53; 146 CLR 493

*Banque Commerciale S.A. (in liq) v Akhil Holdings Ltd* [1990] HCA 11; 169 CLR 279

*Barclay Mowlem Construction Ltd v Dampier Port Authority* [2006] WASC 281; 33 WAR 82

*Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Lt*d [1998] HCA 49; 194 CLR 247

*Campbell's Cash and Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41; 229 CLR 386

*Carnie v Esanda Finance Corporation Limited* (1995) 38 NSWLR 465

*Carnie v Esanda Finance Corporation Limited* [1995] HCA 9; 182 CLR 398

*Chippendale on behalf of the Wuthathi People #2 v State of* Queensland [2012] FCA 310

*Edwards v Santos* [2011] HCA 8; 242 CLR 421

*Esanda Finance Corporation Ltd v Carnie* (1992) 29 NSWLR 382

*Forster v Jododex Australia Pty Ltd* [1972] HCA 61; 127 CLR 421

*Gall v Domino's Pizza Enterprises Ltd (No 2)* [2021] FCA 345; 391 ALR 675

*Jameson v Professional Investment Services* [2009] NSWCA 28; 72 NSWLR 281

*Kerrison v Melbourne City Council* [2014] FCAFC 130; 228 FCR 87

*Klemweb Nominees Pty Ltd (as trustee for the Klemweb Superannuation Fund) v BHP Group Limited* [2019] FCAFC 107; 369 ALR 583

*Muldoon v Melbourne City Council* [2013] FCA 994; 217 FCR 450

*Murphy v State of Victoria & Anor* [2014] VSCA 238; 289 FLR 337

*Onus v Alcoa of Australia Ltd* [1981] HCA 50; 149 CLR 27

*Plaintiff M61/2010E v Commonwealth* [2010] HCA 41; 243 CLR 319

*Rivercity Motorway Finance Pty Ltd (Admin Apptd) (Recs and Mgrs Apptd) v AECOM Australia Pty Ltd (No 2)* [2014] FCA 713

*Robinson v Western Australian Museum* [1977] HCA 46; 138

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| | CLR 283<br>*Russian Commercial and Industrial Bank v British Bank for Foreign Trade Limited* [1921] 2 AC 438<br>*Sharma v Minister for the Environmen*t [2021] FCA 560<br>*Shop, Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)* [1995] HCA 11; 183 CLR 552<br>*Sister Marie Brigid Arthur (Litigation Representative) v Northern Territory of Australia (No 2)* [2020] FCA 215<br>*Stacey Brothers Plumbing Pty Ltd v Waterco Limited* [2009] FCA 438<br>*Thomson v STX Pan Ocean Co Ltd* [2012] FCAFC 15<br>*Trkulja v Google* [2018] HCA 25; 263 CLR 149<br>*Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* [2000] HCA 11; 200 CLR 591<br>*Vicforests v Kinglake Friends of the Forest Inc* [2021] VSCA 195<br>*Webster (Trustee) v Murray Goulburn Co-Operative Co. Limited (No 2)* [2017] FCA 1260<br>*Wickstead v Browne* (1993) 10 Leg Rep SL 2<br>*Wickstead v Browne* [1992] NSWCA 272; 30 NSWLR 1<br>*Wong v Silkfield Pty Ltd* [1999] HCA 48; 199 CLR 255<br>*WOTCH Inc v Vicforests (No 6)* [2020] VSC 674 |
| Division: | General Division |
| Registry | Victoria |
| National Practice Area: | Commercial and Corporations |
| Sub-area: | Regulator and Consumer Protection |
| Number of paragraphs: | 156 |
| Date of last submissions: | 20 August 2021 |
| Date of hearing: | 28 July 2021 |
| Counsel for the Applicant: | Mr R Merkel QC and Mr T Wood |
| Solicitor for the Applicant: | Equity Generation Lawyers |
| Counsel for the Respondents: | Mr M Hodge QC and Ms K Foley |
| Solicitor for the Respondents: | Australian Government Solicitor |

# REASONS FOR JUDGMENT

**VID 482 of 2020**

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| **BETWEEN:** | **KATHLEEN O'DONNELL**<br>Applicant |
| **AND:** | **COMMONWEALTH OF AUSTRALIA**<br>First Respondent |
| | **SECRETARY, DEPARTMENT OF TREASURY**<br>Second Respondent |
| | **CHIEF EXECUTIVE OFFICER, AUSTRALIAN OFFICE OF FINANCIAL MANAGEMENT**<br>Third Respondent |

**MURPHY J:**

## INTRODUCTION

1 In this application the respondents, the Commonwealth of Australia, the Secretary to the Department of Treasury (**Treasury Secretary**) and the Chief Executive Officer of the Australian Office of Financial Management (**AOFM CEO**), sought orders pursuant to r 16.21 of the *Federal Court Rules 2011* (Cth) (the **Rules**) to strike-out the applicant's Amended Statement of Claim dated 26 February 2021, and to refuse leave to the applicant to file a proposed Second Further Amended Statement of Claim dated 6 August 2021 (**Proposed 2FASOC**).

2 The substantive proceeding is a representative proceeding under r 9.21(1) of the Rules brought by the applicant, Ms Kathleen O'Donnell, on her own behalf and on behalf of all persons who at any time on or since 7 July 2020 have acquired one or more exchange-traded Australian Government Bond (**eAGB**) units in the form of an exchange-traded Treasury Indexed Bond with Australian Securities Exchange (**ASX**) code GSIC50 (**eTib**); and/or one or more eAGB units in the form of an exchange-traded Treasury Bond with ASX code GSBE47 (**eTB**), and who held one or more of those units as at the date of the pleading (**represented persons**).

3 The proceeding alleges that the respondents published information to investors and potential investors in eAGBs, variously described as "Information Statements", "Term Sheets" and

"Information Memorandums", and on www.australiangovernmentbonds.gov.au (**AGB Website**) (**Disclosure Documents**); in which information the respondents failed to disclose:

(a) the existence, nature and extent of the Physical Risk and Transition Risk (as defined) of climate change which will or is likely to lead to significant increases in Commonwealth expenditure and significant decreases in Commonwealth revenue;

(b) that as a result of those risks, prior to the maturity date of the eAGBs held by the applicant and represented persons, there will be or is likely to be a material adverse impact on:

  (i) the Commonwealth's status and reputation as a reliable and safe issuer of sovereign debt securities;

  (ii) the Commonwealth's capacity to maintain its AAA status as an issuer of sovereign debt securities;

  (iii) the Commonwealth's capacity to respond to economic shocks and to sustain balanced economic growth and a balanced budget; and

  (iv) the Commonwealth's capacity to discharge its interest and principal obligations under the eAGBs held by the applicant and by other persons holding eAGBs at the material times; and

(c) the effect or likely effect of those risks and the four matters listed at (i)-(iv) above on the value on the ASX of the eAGBs held by the applicant and represented persons.

4 The information which was allegedly not disclosed is defined as "Material Climate Change Information", being information that would inform holders of eAGBs about significant risks associated with holding the eAGBs that persons would reasonably require to make a decision as to whether to acquire, continue to hold or to dispose of eAGBs; and/or information that might reasonably be expected to have a material influence on decisions by investors as to whether to hold or dispose of their current interests in eAGBs, and decisions by potential investors as to whether to purchase eAGBs.

5 It is alleged that by failing to disclose the Material Climate Change Information:

(a) the Commonwealth, through the Treasurer, the AOFM or otherwise, in trade or commerce, in relation to financial services, has engaged in and continues to engage in conduct that is misleading or deceptive and/or likely to mislead or deceive in breach of

s 12DA(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) (the **misleading or deceptive conduct claim**);

(b) the Commonwealth, having acted as a promoter of eAGBs, owed a fiduciary duty of utmost candour and honesty to investors who acquire or intend to acquire eAGBs (the **Disclosure Duty**), which they have breached and continue to breach (the **disclosure duty claim**); and

(c) the Treasury Secretary and the AOFM have breached and continue to breach the duty in s 25(1) of the *Public Governance, Performance and Accountability Act 2013* (Cth) (**PGPA Act**) (the **PGPA Act claim**).

6 The applicant provided the Proposed 2FASOC to the respondents and the Court on 6 August 2021 and for the purpose of the application I will treat that as the date of the proposed pleading.

7 Acting in a representative capacity, the applicant seeks declarations that between 7 July 2020 and 6 August 2021:

(a) the Commonwealth breached and continued to breach s 12DA(1) of the ASIC Act and the Disclosure Duty through its failure to disclose any Material Climate Change Information (as defined) in the Disclosure Documents; and

(b) the Treasury Secretary and the AOFM CEO breached and continued to breach their duty under s 25(1) of the PGPA Act through their failure to disclose any Material Climate Change Information in the Disclosure Documents.

No claim is made for damages or compensation.

8 Acting in a personal (as distinct from a representative) capacity, the applicant also seeks:

(a) declarations in the same terms as above, except that they concern continuing conduct; that is, conduct which occurred on and from 7 July 2020; and

(b) injunctions to restrain the Commonwealth and its officers, including the Treasury Secretary, the AOFM CEO and the Treasurer from:

(i) further promoting eAGBs; and/or

(ii) further issuing or being involved in the issuing of eAGBs,

until they provide in the Disclosure Documents such information as the Court directs is necessary to inform, in accordance with law, the applicant and potential investors in eAGBs about Material Climate Change Information.

9 For the reasons I explain I consider it appropriate to:

(a) refuse the application for an order that the proceeding not continue as a representative proceeding;

(b) strike-out the disclosure duty and PGPA Act claims on the basis that the applicant has no standing to bring them; and

(c) decline to strike-out the misleading or deceptive conduct claim.

In my view the pleading of the misleading or deceptive conduct claim will require improvement as the proceeding progresses; but I consider it to be sufficient for the case to go forward at this stage. It meets the primary purpose of a pleading by putting the respondents on notice of the case they must meet, at least sufficiently for this early stage, and defines the issues in aid of discovery. The applicant will be directed to put on a revised pleading after discovery.

## THE MATERIALS

10 Four versions of the statement of claim have either been filed or proposed to be filed:

(a) the statement of claim dated 23 Dec 2020;

(b) the amended statement of claim dated 26 Feb 2021 (**ASOC)**;

(c) the proposed further amended statement of claim dated 2 July 2021 (**Proposed FASOC**); and

(d) the Proposed 2FASOC dated 6 August 2021. This version was provided after the strike-out application was heard, pursuant to leave granted during the hearing.

The applicant no longer relied on the earlier versions of the statement of claim and the strike-out application is to be determined by reference to the Proposed 2FASOC, which represents the applicant's best effort at pleading her case, at this stage.

11 The respondents, the applicant in the present application, relied on two affidavits of Mr Christopher Behrens, a Senior Executive Lawyer in the employ of the Australian Government Solicitor, the solicitors for the respondents, sworn 4 June 2021 and 27 July 2021. They relied on three sets of written submissions: (a) submissions dated 4 June 2021, which related to the ASOC; (b) submissions in reply dated 16 July 2021 in relation to the Proposed FASOC; and (c) post-hearing submissions dated 20 August 2021 in response to the Proposed 2FASOC.

12 The applicant, the respondent in the present application, relied on the affidavit Mr David Barnden, solicitor, a principal of Equity Generation Lawyers, the solicitors for the applicant,

dated 2 July 2021, and on the documents annexed thereto; and on written submissions dated 2 July 2021. The written submissions were in relation to the Proposed FASOC rather than the Proposed 2FASOC.

## THE REPRESENTATIVE PROCEEDING ISSUE

13 The respondents sought an order that the proceeding no longer continue as a representative proceeding.

### The relevant Rules and principles

14 Rule 9.21(1) of the Rules authorises an applicant to bring a proceeding in a representative capacity, as follows:

> A proceeding may be **started and continued** by or against one or more persons who have **the same interest** in the proceeding, as representing all or some of the persons who have the same interest and could have been parties to the proceeding.
>
> (Emphasis added).

15 Rule 9.22(1) of the Rules provides that an "order made in a proceeding for or against a representative party is binding on each person represented by the representative party."

16 Rules 9.21(2) of the Rules concerns the appointment of a named respondent to act in a representative capacity (to represent other respondents). It provides:

> The applicant may apply to the Court for an order appointing one or more of the respondents or other persons to represent all or some of the persons against whom the proceeding is brought.

This rule is not directly relevant to the present case, but the authorities in regard to it throw some light on r 9.21(1).

17 Former rule 6.13(1) of the *Federal Court Rules 1979* (Cth) (the **1979 FC Rules**) was the predecessor to r 9.21(1). It provided for representative proceedings in the following terms:

> Where numerous persons have the same interest in any proceeding the proceeding may be commenced, and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.

It was identical to the former r 13(1) of the *Supreme Court Rules 1970* (NSW) (the **1970 NSW SC Rules**), which was considered by the High Court in ***Carnie*** *v Esanda Finance Corporation Limited* [1995] HCA 9; 182 CLR 398 and *Campbell's Cash and Carry Pty Ltd v* ***Fostif*** *Pty Ltd* [2006] HCA 41; 229 CLR 386. Although there are some differences in wording between r

9.21(1) and the previous rule, neither party argued that the difference is material in the context of the present case.

18 The differences between r 9.21(1) of the present Rules and r 6.13(1) of the 1979 FC Rules include that:

(e) the phrase "unless the Court otherwise orders" does not appear in r 9.21(1). Thus, it does not expressly provide a discretion to allow the Court to order that a proceeding not continue as a representative proceeding. It is though common ground between the parties that the Court has such a discretion; and

(f) the requirement for "numerous persons" does not appear in r 9.21(1). Although there is no express requirement for numerosity, I consider an absence of numerous persons would support an order that a proceeding not continue as a representative proceeding. The respondents did not contend that there were not numerous persons who fell within the class description.

19 In *Carnie* (at 404), Mason CJ, Deane and Dawson JJ described r 13(1) of the 1970 NSW SC Rules as being "expressed in broad terms and…to be interpreted in the light of the obvious purpose of the rule, namely, to facilitate the administration of justice by enabling parties having the same interest to secure a determination in one action rather than in separate actions." To similar effect, in ***Muldoon*** *v Melbourne City Council* [2013] FCA 994; 217 FCR 450 at [184], North J stated that the purpose of r 9.21 of the present Rules is "to avoid a multiplicity of proceedings that agitate the same issues". On appeal from the decision in *Muldoon*, that view was endorsed in ***Kerrison*** *v Melbourne City Council* [2014] FCAFC 130; 228 FCR 87 at [104] (Flick, Jagot and Mortimer JJ).

20 *Carnie* establishes that if the applicant and the represented persons "have a community of interest in the determination of some substantial issue of law or fact in the action they have the same interest within the meaning of the rule": McHugh J (at 427) with whom Brennan J agreed (at 408). To similar effect, Toohey and Gaudron JJ said (at 421) that persons would have the same interest in proceedings if there was a significant question common to all members of the class and they stood to be equally affected by the declaratory relief sought by the appellants. Further, Mason CJ, Deane and Dawson JJ said (at 404) that the "same interest" requirement "may … [extend] to a significant common interest in the resolution of any question of law or fact arising in the relevant proceedings."

21 The respondents relied on s 23 of the *Federal Court of Australia Act 1976* (Cth) (the **FCA**) as the source of the power to order that the proceeding not continue as a representative proceeding, and also on r 1.32 of the Rules which provides that the Court may make any order that the Court considers appropriate in the interests of justice. In *Muldoon* (at [173] and [186]) North J accepted that he had a discretion to order that the proceeding not continue as a representative proceeding, apparently in reliance on r 1.32. On appeal in *Kerrison*, the Full Court accepted that the Court has a discretion under r 9.21(1) to order that a proceeding not continue as a representative proceeding (at [8], [103] and [164]).

**The respondents' submissions**

22 The respondents initially submitted (in relation to the ASOC) that two issues arise in relation to the applicant's framing of the proceeding as a representative proceeding under r 9.21, being whether:

(a) the applicant satisfied the commonality of interest requirement in the rule; and

(b) in the exercise of discretion, the Court should permit the proceeding to continue as a representative proceeding.

23 They said that the Proposed 2FASOC sought to address the respondents' criticisms as to the absence of commonality of interest between the applicant and represented persons by:

(a) narrowing the class of represented persons; and

(b) narrowing the relief sought on behalf of represented persons so that declarations with different temporal periods are sought on behalf of the class members as compared with those sought by the applicant.

24 The respondents said that, having regard to the changes in the Proposed 2FASOC, they did not press their submission that the application does not satisfy the threshold requirement of "same interest" under r 9.21, such that the proceeding was not properly constituted under the rule. Rather, they submitted that, combined with the fact that the represented persons have not been given notice of the proceeding, the disparity in the interests of the applicant and represented persons brings into sharp relief the artificiality of the proceeding being run as a representative proceeding, and indicates that the Court should exercise its discretion to order that the proceeding not continue as a representative proceeding.

25 The primary focus of the respondents' argument was that the applicant has failed to give represented persons any notice of the proceeding. In reliance on the decisions in *Muldoon* and *Kerrison* they contended that the absence of notice is an important consideration in the proper exercise of the discretion.

26 *Muldoon* concerned a challenge, brought by protesters engaged in the "Occupy Melbourne" movement, to the validity of the "Notices to Comply" issued by the local council. The applicant sought declarations that the Notices to Comply were invalid together with injunctive relief. Justice North expressed concerns about the adequacy of the notice given to the represented persons in relation to the proceeding (at [175] and [177]) and ordered (at [186]) that the proceeding not continue as a representative proceeding. On appeal, in *Kerrison*, the Full Court held that in circumstances where the declaration sought had "obvious legal and practical consequences" for represented persons as recipients of the Notices to Comply, North J's concerns were valid. Their Honours upheld the decision to order that the proceeding not continue as a representative proceeding (assuming it was properly started as one) on a number of bases, including that represented persons who had been served with Notices to Comply had a real interest in knowing what was purported to be done on their behalf and how it might affect them (at [102]-[103] and [110]).

27 In relation to the absence of notice to represented persons the respondents also relied on:

(a) *Rivercity Motorway Finance Pty Ltd (Admin Apptd) (Recs and Mgrs Apptd) v AECOM Australia Pty Ltd (No 2)* [2014] FCA 713 at [118]-119], in which Nicholas J refused an application for an order under r 9.21(2) for reasons including that there was no evidence that any of the persons who would become represented persons, if the order appointing a representative respondent to the proposed cross-claim were made, had been notified of the application or consented to the making of the order; and

(b) *Chippendale on behalf of the Wuthathi People #2 v State of* Queensland [2012] FCA 310 at [27]-[29], in which Greenwood J did not permit a representative order to be made under rule 9.21 because there was no evidence of a process put in place to enable those who would be represented "to say or resolve that they accept that the applicants for joinder represent their common interest or have their approval to represent their interests."

28 The respondents submitted that the applicant's use of the r 9.21 procedure has real consequences for represented persons as they will be bound by orders made for or against them

(r 9.22(1)) and orders may be enforced against them with the Court's leave (r 9.22(2)). They said that the applicant has failed to explain why notice had not been given to represented persons, and that instead the applicant's submissions focused on the absence of any possible disadvantage that might be suffered by a represented person if the relief sought by the applicant is granted.

29 On the respondents' argument, the applicant is, in effect, running a securities class action in which she alleges that there has been material non-disclosure on the part of the respondents. In order to succeed she must establish that the respondents have failed to disclose some presently non-public information which is material to the price or value of eAGBs on the ASX. On her case, once the material information is disclosed by the respondents it will materially affect the value of the eAGBs held by her and the represented persons.

30 They submitted that if the applicant is successful in the proceeding, the premise of her case is that whatever relief she obtains (whether declaratory or injunctive) is likely to have a detrimental effect on the value of eAGBs. On that basis they argued that the applicant seeks to compel the respondents to take steps to make disclosure of information that would (on her case) result in a diminution of the value of the bonds held by the represented persons, without giving notice to them. Senior Counsel for the respondents said, pithily, that a fundamental problem for the applicant is that she "is not seeking to vindicate anybody's rights based on loss that they have suffered in the past. She is seeking to cause them loss in the future."

31 The respondents submitted that the lack of commonality of interest can also be seen in that, if the applicant is successful in the proceeding, represented persons will suffer a detriment because they will be unable to rely upon the declarations made in this proceeding in any suit against the respondents for loss or damage they have suffered arising from a reduction in the value of their eAGBs. That inability was said to arise because they will be treated as having sought the very declarations that caused them that loss.

32 They contended that the potential detriment to the interests of represented persons must also be seen in the light that there is no legitimate purpose for the applicant in bringing the proceeding in a representative capacity. They said that the following matters are important in relation to the Court's discretion to order that the proceeding not continue as a representative proceeding, noting that the applicant has not:

(a) identified any reason why it is necessary or desirable for her to commence the proceeding as a representative proceeding;

(b) put on any direct evidence to explain why she brought the proceeding on a representative basis;

(c) explained why she has elected not to give notice of the proceeding and its implications to the represented persons; and

(d) explained how she can practically conduct a proceeding as the representative of the class while seeking injunctive relief only on her own behalf because, presumably, she recognises that the represented persons' interests are not served by that relief.

33 The respondents also attacked the applicant's motives in bringing the proceeding in a representative capacity. They said that in circumstances where: (a) it was open to the applicant to seek the same declaratory relief in a personal capacity; (b) she has offered no explanation for commencing the proceeding in a representative capacity; (c) doing so may be detrimental to the interests of represented persons; and (d) she has given no notice to the represented persons; the obvious inference is that the applicant has sought to clothe herself in the seriousness and responsibility with which class actions are conducted in this Court, and to garner media attention through a headline such as "Climate change class action commenced in relation to Australian Government Bonds". Senior Counsel went as far as to describe the case as a "pseudo climate change class action", and argued that the purposes of the r 9.21 representative procedure do not include enabling a party to bring a proceeding in a representative capacity for such purposes.

34 They contended that the purposes of the representative procedure include facilitating the administration of justice by enabling parties having the same interest to secure a determination in one action rather than in separate actions: *Carnie* at 404; *Fostif* at [55]. They said that in circumstances where the applicant has given no notice to the class members she purports to represent, and where she has not put on an affidavit to explain why she has chosen the commence the proceeding in this way, or why the Court should permit the proceeding to continue as a representative proceeding, it cannot be assumed that the administration of justice will be facilitated by permitting the proceeding to continue as a representative proceeding.

35 They also contended that, in the circumstances, the proceeding constitutes an abuse of process as it brings the administration of justice into disrepute, and it should be struck-out as an abuse of process pursuant to r 16.21(1)(f) of the Rules. Their submissions, however, did not set out

any basis for concluding that the proceeding is an abuse of process, and I need not further address that submission.

**Consideration**

36 As I have said, in their reply submissions (made in relation to the Proposed FASOC), the respondents no longer pressed their earlier submission that the applicant did not meet the threshold requirement of having the "same interest" as the represented persons and that the proceeding was therefore not properly constituted under r 9.21. Rather, they submitted that the lack of commonality of interest meant that the Court should exercise its discretion to order that the proceeding no longer continue as a representative proceeding. In their post-hearing submissions (made in relation to the Proposed 2FASOC) the respondents said that the commonality of interest point had been re-enlivened by the applicant's arguments in the hearing; but they still did not contend that the applicant failed to satisfy the "same interest" threshold requirement of the rule. Instead they reiterated their earlier submission that the disparity in the interest of the applicant and represented persons showed that it was appropriate to exercise the discretion to order that the case not continue as a representative proceeding. I proceed on that basis.

37 The discretion to order that a proceeding not continue as a representative proceeding is a broad one, and whether it is appropriate to exercise it may depend, amongst other things, on the facts and circumstances of the particular case. The respondents had the onus to establish that it is appropriate to exercise the discretion. For the reasons I now explain, they did not persuade me that it was appropriate to do so in the circumstances the present case.

38 *First*, the respondents made much of the fact that the applicant did not put on evidence to prove that she had the same interest as the represented persons. Several things should, however, be kept in mind in relation to the respondents' argument.

(a) The respondents did not argue that the applicant failed to satisfy the threshold requirements of r 9.21(1), and the applicant was not therefore required to put on evidence that she did so. Of course, the absence of such evidence is relevant to the exercise of the discretion but the respondents have the onus to show that the Court should order that the proceeding not continue as a representative proceeding;

(b) the "same interest" that the applicant relied on is that she and the represented persons acquired eAGBs with the same specified ASX codes (and thus the same maturity dates), in the same period, and had and have the same interest in receiving information that:

(i) will inform holders of eAGBs about significant risks associated with holding the eAGBs that persons would reasonably require to make a decision as to whether to acquire, continue to hold or to dispose of eAGBs; and/or

(ii) might reasonably be expected to have a material influence on decisions by investors as to whether to hold or dispose of their current interests in eAGBs, and decisions by potential investors as to whether to purchase eAGBs;

(c) The r 9.21(1) procedure can be utilised in circumstances where the members of the represented group have not consented to or even been made aware of the proceeding: *Carnie* at 429 (McHugh J), endorsed by the High Court in *Wong v Silkfield Pty Ltd* [1999] HCA 48; 199 CLR 255 at [14] (Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ). The rule does not require the applicant to ask represented persons in advance of a proceeding to ascertain their views as to whether their interests are coincident with the applicant's interests, and she did not do so. Without having some communication with the represented persons, it is difficult to see what probative evidence the applicant could have adduced in relation to her assertion that she has the same interest as the represented persons; and

(d) Even if it was necessary for the applicant to communicate with represented persons to ascertain whether their interests were coincident with hers it would have been impossible at this stage. I assume that the Commonwealth has a register which records the identity of persons who acquired eAGBs with the specified codes during the relevant period, but the applicant could not yet have had access to it.

39 Finally, save for one assertion (which I do not accept), the respondents did not identify any possible detriment that might be suffered by a represented person if the relief sought by the applicant in a representative capacity is granted.

40 *Second*, the question of whether a representative party has the "same interest" as the represented persons is concerned with "an interest in the proceeding" which must be judged by reference to the effect of the matters at issue on the rights and obligations of the representing party and the represented persons: ***Stacey*** *Brothers Plumbing Pty Ltd v Waterco Limited* [2009] FCA 438 at [25] (Kenny J). In the absence of evidence from either party, the issue as to the

commonality of interest between the applicant and the represented persons falls to be decided largely by reference to the pleadings.

41 The class description encompasses all persons who at any time between 7 July 2020 and 6 August 2021 acquired one or more eAGBs with the specified codes (and thus with the same maturity dates) and who continue to hold one or more of those eAGBs as at 6 August 2021: see paragraph [3] of the Proposed 2FASOC. The class description and the length of the relevant period indicates that the class is likely to comprise a wide range of people. In general terms, it seems likely that the class will include people who do not share the applicant's interests in the proceeding and who wish to have no part of it; others who share the applicant's interests and who wish to participate in the proceeding; and others who are disinterested in the case. Senior Counsel for the respondents accepted, correctly in my view, that there may be represented persons whose interests are aligned with the applicant's interests in the proceeding.

42 *Carnie* establishes that if the applicant and the represented persons have a community of interest in the determination of any substantial question of law or fact in the proceeding, they have the "same interest" within the meaning of r 9.21(1). Mason CJ, Deane and Dawson JJ held (at 404) that for the purposes of the rule, persons having separate causes of action in contract and tort might have the same interest in a proceeding; and Toohey and Gaudron JJ (at 420-21), and McHugh (at 430) held that the fact that represented persons' claims may arise under separate contracts is insufficient to show that they do not have the same interest. Toohey and Gaudron JJ said (at 422) that the onus was on the named plaintiffs "to identify the class with sufficient particularity", without necessarily identifying every member, and that they had done so, noting that "[t]he class is not open ended; it is limited to those persons who have credit sale or loan contracts with the respondent which have been varied in circumstances where the variation has been executed in such a way as to be inconsistent with the [Credit] Act". Here, the respondents made no suggestion that the class of represented persons had not been identified with sufficient particularity.

43 In my opinion it can reasonably be said that the represented persons have the same interest as the applicant in knowing whether the respondents, in the period between 7 July 2020 and 6 August 2021, breached the law in the manner alleged in the proceeding (such that it is appropriate to grant declaratory relief) by failing to disclose the Material Climate Change Information (as defined) to them. To apply the approach of Toohey and Gaudron JJ in *Carnie*

(at 421), the applicant and the represented persons stand to be equally affected by the declaratory relief sought by the applicant in a representative capacity.

44 *Carnie* also establishes that it is unnecessary for the applicant to show that her interests coincide with those of the represented persons in relation to every issue or all forms of relief sought in the proceeding, whether sought personally or in a representative capacity.

45 The respondents' submitted that because the applicant, acting in a personal capacity, sought declarations with a different temporal period to those she sought in a representative capacity, and also sought injunctive relief in a personal capacity, she recognised that the interests of represented persons are not served by such relief. I note that the applicant acknowledged the *possibility* that the interests of the applicant and represented persons might diverge in relation to the injunctive relief sought; however, neither party articulated how represented persons might be disadvantaged by the different relief sought in a personal capacity, and it is not apparent to me what that possible disadvantage or detriment might be.

46 Strictly speaking, the "same interest" requirement applies to the claims brought in a representative capacity, not to any claims brought by an applicant personally. Any such additional claims are not brought on behalf of the represented persons, and the same interest requirement is not required to be satisfied. I respectfully agree with Kenny J's observation in *Stacey* (at [25]), albeit made in the different context of an application for the appointment of a representative respondent (under the predecessor to r 9.21(2)), that "[a] representative proceeding will not necessarily be defeated because some members, or even the representing party, have separate interests additional to a common interest, providing there is a common interest."

47 Further, having regard to my view in relation to the requirement for notice to the represented persons, and in the circumstances of the present case, I consider the different relief sought by the applicant in a personal capacity has little significance in deciding whether to order that the case not continue as a representative proceeding. Provided the applicant gives notice of the proceeding to represented persons including as to the different relief that she seeks in her personal capacity, and represented persons have an opportunity to opt out of the proceeding, the existence of these additional claims does not justify an order that the case not continue as a representative proceeding.

48 *Third*, the respondents submitted that, if the representative proceeding is successful, represented persons will suffer a detriment because they will be unable to rely upon the declarations obtained in any claim for compensation or damages they wish to bring against the respondents. That was said to be so because, as represented persons, they will have sought the very declarations that caused the diminution in the value of their eAGBs.

49 It is unnecessary to decide, but I doubt that submission is correct. It is difficult to see why a represented person - who has the benefit of a declaration that the respondents engaged in misleading or deceptive conduct in contravention of s 12DA of the ASIC Act in relation to eAGBs he or she acquired in the relevant period - would somehow be disentitled from claiming damages under s 12GF of the Act for any loss or damage causally connected to the respondents' contravening conduct.

50 The question is, however, unnecessary to decide because, if the relief sought might potentially cause some detriment to represented persons, they should be given notice of that potential detriment and be provided an opportunity to opt out of the proceeding.

51 *Fourth*, it is plain on the authorities that whether or not represented persons have been given notice of the proceeding may be an important consideration in the exercise of the discretion to order that the proceeding not continue as a representative one. That is particularly so when the granting of the relief sought might be demonstrated to actually, or be likely to, disadvantage some of the represented persons: see the remarks of Gleeson CJ in *Fostif* at [4]-[7] where his Honour discusses *Carnie*; see also *Muldoon* (at [175] and [177]) affirmed in *Kerrison* (at [102] and [110]).

52 But the fact that in the present case the represented persons have not had notice of the proceeding, or of any potential detriment they might suffer through the proceeding, must be seen in context. As is the position in most "open class" representative proceedings, at this early stage of the case it is impossible for the applicant to notify represented persons of the proceeding, or at least to do so effectively. At this early stage of the case, the applicant has not had access to any register which records the identity of persons who acquired eAGBs with the specified codes in the relevant period.

53 In *Carnie* (at 422), Toohey and Gaudron JJ explained that the Court may give directions to enable the proceeding to be determined "with justice to all concerned", and said that:

> The simplicity of the rule is also one of its strengths, allowing it to be treated as a

> flexible rule of convenience in the administration of justice and applied "to the exigencies of modern life as occasion requires" ([*Taft Vale Railway Co. v. Amalgamated Society of Rai/way Servants*, [1901] A.C. 426, at p. 443]). The Court retains the power to reshape proceedings at a later stage if they become impossibly complex or the defendant is prejudiced.

54 To similar effect, Brennan J said (at 408) that it is "precisely because of the flexible utility of the representative action that judicial control of its conduct is important, to ensure not only that the litigation as between the plaintiff and defendant is efficiently disposed of but also that the interests of those who are absent but represented are not prejudiced by the conduct of the litigation on their behalf". Later in that passage his Honour said further:

> …if, for any reason, the court is not satisfied that the interests of the absent but represented class are being properly advanced, the court should exclude the represented persons from the action. That power can be exercised at any time before the judgment is perfected.
>
> (Citations omitted).

55 In the circumstances of the present case, I do not accept that the absence of notice to class members justifies an order that the proceeding not continue as a representative proceeding. Instead, it is appropriate to require the applicant to give notice of the proceeding to represented persons, including as to the relief being sought and its potential impact on them, and of their right to opt out of the proceeding should they wish to do so. Once represented persons have been provided with an appropriate Court-approved notice, they will be well-placed to decide whether their interests in the proceeding coincide with those of the applicant and whether to opt out. Adoption of such a procedure will protect against represented persons being bound by the result in a representative proceeding in which they may not have the same interest as the representative applicant.

56 This approach is consistent with the approach ultimately taken in *Carnie*. As Gleeson CJ explained in *Fostif* (at [4]-[6]), when *Carnie* was before the NSW Court of Appeal the plaintiffs sought a declaration that the relevant variation agreements in relation to the loan agreements of the borrowers, being represented persons, be found to be "null and void and of no effect": see *Esanda Finance Corporation Ltd v Carnie* (1992) 29 NSWLR 382 at 386 (Gleeson CJ). Those variation agreements, to the extent to which they relieved the original loan position, were beneficial to the borrowers, and there was a doubt about whether it was in the interests of all represented persons to have their variation agreements declared null and void. Upon the plaintiff's success before the High Court the case was remitted to the NSW Supreme Court, where Young J said that a "very worrying aspect of [the] case [was] the possibility that [some

borrowers] may, as a result of the plaintiffs' activity, which appears to have been taken without any reference to them, be left with a liability to Esanda": see *Carnie v Esanda Finance Corporation Limited* (1995) 38 NSWLR 465 at 474. His Honour directed that notices be sent to represented persons to advise them of an opt-in procedure that had been devised for use in the proceeding. Subsequently, the plaintiffs announced they were unwilling to incur the expense involved in providing notice to the represented persons and in those circumstances it was ordered, by consent, that the action would not go ahead as a representative proceeding.

57 Here, the applicant does not oppose a direction for a Court-approved notice to be sent to represented persons informing them of the proceeding, of the potential effects of the relief sought, and that they may opt out of the proceeding should they so wish.

58 *Fifth*, the respondents' attack on the applicant's motivation in bringing the proceeding as a representative proceeding, including that is an improper attempt to garner public attention and that the proceeding is a "pseudo climate change class action", has little force. The fact the representative proceeding seeks only declaratory relief and that the applicant may seek to garner media attention for the proceeding is neither here nor there. These days, it is common place for the parties to large litigation to consider, and attempt to influence, the way the litigation is seen in the eyes of the public. There is little or no evidence as to how the applicant has sought to garner media attention regarding the proceeding. But to the extent that she may have done so, it carries little weight in deciding whether to order that the proceeding not continue as a representative proceeding.

59 If, in fact, it is the case that the applicant has sought to garner media attention for the proceeding, it may be open to infer that she did so because she wishes to attract the interest of persons who acquired eAGBs in the relevant period. That inference is supported by evidence that the website of the applicant's solicitors invites people to register their interest in participating in the proceeding as represented persons. There is nothing wrong with the applicant seeking to do so. The purposes of r 9.21 representative procedures include enhancing access to justice: *Jameson v Professional Investment Services* [2009] NSWCA 28; 72 NSWLR 281 at [126], [128], [131] (Spigelman CJ, with Allsop J (as his Honour then was) and Ipp J agreeing). That purpose is largely achieved through aggregation of the claims of represented persons or class members so that their claims can be heard in one proceeding rather than many, at a lower cost because the costs are shared between many, without exposure to adverse costs liability, and so that the uneven playing field in litigation between ordinary citizens and large

corporations or government is rebalanced. Thus, aggregation of claims is central to the utility of representative procedures in promoting efficiency and access to justice. In practice, aggregation is often achieved by solicitation, sometimes through mass media, and solicitation by Australian lawyers has for many years been expressly authorised by the uniform rules of professional conduct. Solicitation by commercial third parties such as litigation funders has also been accepted by the courts. It is inherent in the nature of representative procedures that some solicitation may be required: see generally, Murphy B and Cameron C, "Access to justice and the evolution of class action litigation in Australia" (2006) 30(2) *Melbourne University Law Review* 399.

60 It is relevant too that class actions and other representative procedures are often utilised by individuals, and groups of people, to bring forward cases based in their view of the public interest, doing so on behalf of a class asserted to have the same or similar legal claims and interests. Provided there exists a bona fide legal claim in which the applicant and represented persons have the same interest, it is not impermissible for an applicant in a r 9.21 representative proceeding to seek only declaratory relief, and it is far from uncommon that representative proceedings are so utilised. Some recent examples include *Muldoon*, as well as the following:

(a) *Sister Marie Brigid* ***Arthur*** *(Litigation Representative) v Northern Territory of Australia (No 2)* [2020] FCA 215, in which two Indigenous young people, on their own behalf and on behalf of persons who were charged with a criminal offence on or prior to 24 October 2018 and therefore were at risk of detention in a youth detention centre in the Northern Territory, brought a r 9.21(1) representative proceeding seeking declarations and injunctions in relation to the conditions of detention in the relevant centres; and

(b) *Sharma v Minister for the Environmen*t [2021] FCA 560, in which eight Australian children, on their own behalf and on behalf of children who ordinarily reside in Australia, brought a r 9.21(1) representative proceeding seeking a declaration that the Commonwealth Minister for the Environment owed them and other Australian children a duty of care to protect them from a foreseeable risk of harm arising from climate change, and an injunction to restrain an apprehended breach of that duty.

61 *Sixth*, this issue was not the subject of submissions, but it is plain that, acting in a personal capacity only, the applicant could obtain the same declaratory relief as she seeks in a representative capacity. While any declarations made in a personal proceeding would only

bind her and the respondents, it is reasonable to expect that the Commonwealth would thereafter conduct itself in accordance with the Court's findings. It might be said that allowing this case to continue as a representative proceeding is inconsistent with the overarching purpose of the civil practice and procedure under s 37M of the FCA because it is likely to be slower and more expensive than a proceeding seeking the same relief by the applicant in her personal capacity, particularly having regard to the requirement for notice to represented persons and for Court approval of any settlement: see *Arthur* at [78]-[79].

62 This was not argued, but I would be disinclined to accept s 37M dictates that the proceeding must not continue as a representative proceeding. As the examples given above show, it is commonplace for people to band together to bring a representative proceeding or class action seeking declarations and/or injunctive relief in relation to a legal issue in which they have the same or similar interests. Because they have a common interest in the subject matter of the proceeding they may wish to be represented persons or class members even when the same declarations or injunctions could be obtained by the applicant acting in a personal capacity. Having regard to the access to justice purpose of representative procedures it cannot be a requirement that such cases must only be brought in a personal capacity because to do so would be cheaper and quicker. Further, people may wish to be represented in a representative proceeding because they wish to rely on any declaration made to subsequently claim damages. Thus, declaratory relief obtained in a representative proceeding can have utility for represented persons even though the same declaration could have been obtained more cheaply and quickly in a claim brought by the applicant personally.

63 In the circumstances of the present case I am not persuaded that it is appropriate to order that the proceeding not continue as a representative proceeding.

## THE MATERIAL INFORMATION ISSUE

64 The respondents seek an order striking out the "material information" allegations under r 16.21(c), (d), (e) and (f) of the Rules.

### Summary of the pleading

#### *Australian Government Bonds*

65 The pleading of the statutory framework underpinning the claims in the Proposed 2FASOC may be summarised as follows:

(a) the Treasurer administers the *Commonwealth Inscribed Stock Act 1911* (Cth) (**Inscribed Stock Act**) (at paragraph [17]), and under s 3 of that Act; "stock" includes "Treasury Bonds" (at [19]). Under s 3A(1) of the Inscribed Stock Act, the Treasurer has power to borrow money on behalf of the Commonwealth by issuing stock denominated in Australian currency (at [21]). The power in that provision has been delegated to officers of AOFM pursuant to s 51JA of the Inscribed Stock Act (at [22]);

(b) under s 3A of the Inscribed Stock Act, officers of the AOFM, on behalf of the Commonwealth, can issue Treasury Bonds (**TBs**) and Treasury Indexed Bonds (**TIBs**), collectively, Australian Government Bonds (**AGBs**) (at [29]);

(c) under s13AA of the Inscribed Stock Act, the Consolidated Revenue Fund is appropriated to the extent necessary for the payment of principal secured by stock, and interest on the principal (at [26]). The Commonwealth is obliged to make interest and principal payments on eAGBs in accordance with their terms (at [35]);

(d) there is a wholesale market for AGBs in which financial institutions may participate (at [30]-[31]). Retail investors, through eAGBs, can participate indirectly in the wholesale market by obtaining "depository interests" in AGBs, as defined in the Inscribed Stock Act (at [33]). The Commonwealth has entered into agreements with Computershare Investor Services Pty Ltd, pursuant to which Computershare is a depository interests register operator (at [37]); and also ASX Operations Pty Ltd, pursuant to which eAGBs may be traded on the ASX (at [38]);

(e) the Commonwealth has prepared an Information Statement (within the meaning of s 1020AH of the *Corporations Act 2001* (Cth) (**Corporations Act**)) for each class of eAGB, which is published on the AGB Website page headed "Investor Information Statements" (at [47]-[48]). The AGB Website page headed "How to invest" directs potential investors to read the relevant Term Sheet for the specific series of the underlying AGB, and the relevant Information Memorandum for each class of underlying AGB (at [49]);

(f) the Information Statements for eTBs and eTIBs direct the reader to the relevant Term Sheet and the relevant Information Memoranda for that series or class of AGB. The Information Statements include a summary of risks which prospective investors should consider when deciding whether to invest in such eAGBs, and identifies those risks as changes in market price, conversion by the Australian Government (which, in relation to eTBs, is said to be a reference to the risk of conversion to an indexed bond), and (in

relation to eTIBS) deflation. The Information Statements do not identify *any* other risks associated with investing in them (at [54]-[55]);

(g) the AGB Website includes the subheadings "Risks of eTBs" and "Risks of eTIBs" under which it identifies those risks only as changes in market price, conversion by the Australian government and (in relation to eTIBS) deflation. The AGB Website does not identify *any* other risk associated with investing in them (at [56]-[57]); and

(h) the Term Sheets and the Information Memoranda for each class or series of AGB does not disclose any risks associated with investing in AGBs (at [58]-[59]).

***Alleged climate change risks***

66 Part D of the Proposed 2FASOC is headed "Climate Change Risks". Part D.1 of the 2FASOC sets out the "Physical Risk" that it is alleged Australia will experience as a result of climate change. Part D.2 sets out the "Transition Risk" that it is alleged Australia will face by reason of transitioning to achieve the Commonwealth's publicly announced objective of reducing Australia's greenhouse gas (**GHG**) emissions by 26% to 28% below 2005 levels by 2030, and the target of net zero global GHG emissions by 2050. Part E is entitled "Effect of Risks on eAGBs" and defines the term, Material Climate Change Information, by reference to the terms, Physical Risk and Transition Risk.

***Physical Risk***

67 Physical Risk is defined at paragraph [64C] of the 2FASOC and its meaning is to be understood by reference to paragraphs [60], [61]-[64B]. Those paragraphs are set out in Schedule A to these reasons and may be summarised as follows:

(a) on and since 7 July 2020, there is a significant likelihood that the climate is changing, and will continue to change, as a result of anthropogenic influences (at [60]). Australia is likely to experience a range of "Physical Impacts", being adverse weather events, as a result of climate change over the three decades before the maturity date of the eAGBs held by the applicant and represented persons. These Physical Impacts include matters such as more extremely hot days and fewer extremely cool days; a longer fire season for the south and east of Australia; an increase in the number of dangerous fire weather days; more intense short-duration heavy rainfall events, and serious flooding events; and continued warming and acidification of Australia's surrounding oceans (at [61]);

(b) the Commonwealth relies upon receiving significant revenue, directly and indirectly, from a number of generally identified industries and communities. For example, the agricultural, resources and tourism industries; including industries and communities located in bushfire-prone, drought-prone and heatwave prone areas. It also relies upon receiving revenue from the individuals employed by, or associated with those industries and communities (at [62]);

(c) in the three decades before the maturity dates of the applicant's eAGBs, significant additional expenditure by the Commonwealth will, or will likely, be required to respond to the emergency weather events of the kind referred to as Physical Impacts; and in order to maintain the ongoing financial viability of the industries and communities set out in paragraph [62] (at [63]);

(d) the financial viability of those industries and communities is particularly vulnerable to being, and will be or will likely be, "negatively affected" by the Physical Impacts before the maturity dates of the applicant's eAGBs (at [64]); and

(e) those negative effects will lead, or will be likely to lead, to a substantial reduction in revenue received by the Commonwealth from the relevant industries and communities before the maturity dates of the applicant's eAGBs (at [64B]).

The combination of the increase or likely increase in Commonwealth expenditure set out in paragraph [63]; and the decrease or likely decrease in Commonwealth revenue set out in paragraph [64], is defined as the "Physical Risk".

***Transition Risk***

68 Transition Risk is defined at paragraph [75C] of the Proposed 2FASOC, and its meaning is to be understood by reference to paragraphs [60A] and [68]–[75B]. Those paragraphs are set out in Schedule B and may be summarised as follows:

(a) an objective of the Paris Agreement, which was ratified by the Commonwealth on 10 November 2016, is to hold the increase in the global average temperature 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 (**Paris Objective**) (at [60A]).

(b) under the Paris Agreement, the Commonwealth is obliged to prepare, communicate and maintain nationally determined contributions to reduce its GHG emissions (at [68]);

(c) the Commonwealth has determined to reduce GHG emissions by 26%-28% below 2005 levels by 2030 (at [69]);

(d) to achieve the Paris Objective it will be necessary for global GHG emissions to be net zero by 2050 (**Net Zero Target**) (at [71]);

(e) the implementation of the measures which are necessary for the Commonwealth to pursue in order to reach the Net Zero Target (**Net Zero Measures**) will require significant additional expenditure by the Commonwealth before the maturity dates of the applicant's eAGBs (at [74]);

(f) the less time the Commonwealth has to meet the Net Zero Target after introducing the Net Zero Measures, the more that the Commonwealth will, or will likely be required to, spend on implementing the measures, and countering any adverse impact on the Australian economy as a result of the delayed implementation of those measures (at [75]);

(g) as a result of other countries seeking to achieve their own net zero GHG emissions objectives, global demand for exports of Australia's fossil fuel will decrease, or is likely to decrease, before 2050 (at [75A]); and

(h) the decrease, or likely decrease, in demand for fossil fuel will result, or is likely to result, in a decrease in revenue received by the Commonwealth from the fossil fuel and export industries (at [75B]).

The combination of the increase or likely increase in Commonwealth expenditure set out in paragraphs [74] and [75]; and the decrease or likely decrease in Commonwealth revenue set out in paragraph [75B], is defined as the "Transition Risk".

***Effect of alleged risks on eAGBs***

69 Part E of the Proposed 2FASOC is headed "Effect of Risks on eAGBs". "Material Climate Change Information" is defined in paragraph [77A] and its meaning is to be understood by reference to paragraphs [76] and [77]. Those paragraphs are set out in Schedule C and may be summarised as follows:

(a) (at [76.1]-[76.4]) by reason of the Physical Risk and the Transition Risk, prior to the maturity of the applicant's eAGBs, there will be or is likely to be, a material adverse impact on four matters relating to the Commonwealth, namely:

(i) its status and reputation as a reliable and safe issuer of sovereign debt securities;

(ii) its capacity to maintain its AAA status as an issuer of sovereign debt securities;

(iii) its capacity to respond to economic shocks and to sustain balanced economic growth and a balanced budget; and

(iv) its capacity to discharge its interest and principal obligations under the eAGBs held by the applicant and by the other persons holding eAGBs at the material times;

(b) those four matters, separately and cumulatively, are factors that are, or are likely to be, material to the value of eAGBs on the ASX (at [77]);

(c) (at [77A]), by reason of the matters in paragraphs [76] and [77], information about the existence, nature and extent of the Physical Risk and Transition Risk; and/or the effect or likely effect of those risks:

(i) on the four matters set out in subparagraph (a) above; and/or

(ii) on the value of eAGBs on the ASX, including those held by the applicant and the represented persons,

(**Material Climate Change Information**), is information that:

(iii) will inform holders of eAGBs about significant risks associated with holding the eAGBs, that persons would reasonably require for the purpose of making a decision as to whether to acquire, continue to hold, or to dispose of eAGBs; and/or

(iv) might reasonably be expected to have a material influence on decisions by holders of eAGBs, as to whether to hold or dispose of their current interests in eAGBs; and decisions by potential investors of eAGBs as to whether to purchase eAGBs.

70 It is also alleged that at all material times, each of the respondents were aware, or ought to have been aware, of each of the matters that constitutes Material Climate Change Information (at [77B], which paragraph is also set out in Schedule C).

**The respondents' submissions**

71 The respondents submitted that the applicant had made substantial amendments to attempt to address the problems with her pleading of the material information that she alleges ought to have been disclosed, which amendments failed to address the fundamental problems in the pleading, and in certain respects compounded or highlighted them.

72 As a result of the various changes in the applicant's pleading, and the respondents' failure to clearly identify which of their submissions they wished to maintain having regard to the proposed amendments, it was not always clear to me which submissions the respondents continued to press. Having said that, in their post-hearing submissions in relation to the Proposed 2FASOC, they said that paragraphs [19]-[34] of their submissions dated 4 June 2021 in relation to the ASOC remained largely applicable. The respondents there submitted that there are three steps in the applicant's case on "material information" and none has been properly pleaded.

73 The first step is to allege that climate change will have an effect on the financial position of the Commonwealth. The respondents contended that the applicant made expansive allegations in paragraph [76] about the effect of climate change on four matters relevant to the Commonwealth's financial position, but failed to plead the important facts that would be required for this step.

74 The second step is to allege that the effect of climate change on the financial position of the Commonwealth was not disclosed but if disclosed would have a material effect on the value of the eAGBs. The respondents said that the applicant's case is forward looking and yet the pleading does not attempt to properly explain how the effect will be material or when the material effect is likely to commence. Further, the pleading fails to grapple with the difficulty that the value of eAGBs traded on the ASX will reflect the knowledge of the participants in the market, and the premise of the applicant's case must be that the value of eAGBs will be effected once the market becomes aware of these matters. That is so because if those matters are already publicly known there cannot be a future effect. And yet the premise of the applicant's case is that she knows these matters and she does not suggest that she is in any special position compared to other investors or potential investors. She seems to allege that these generalised matters still have not been revealed to the market even though she has pleaded them. This contradiction reflects the failure to plead any material facts establishing that there would be a likely effect in the future on the value of the relevant eAGBs.

75 The third step is to allege knowledge of the matters giving rise to the first two steps, including the non-disclosure of material information by officers of the Commonwealth. The respondents said that in relation to this step, the applicant had made a serious allegation without any proper factual foundation being pleaded or particularised. In this regard, however, I note that the paragraphs in the ASOC which pleaded knowledge (paragraphs [78] and [79]) have been

deleted in the Proposed 2FASOC, and instead it is alleged (at paragraph [77B]) that the respondents were aware of or ought to have been aware of the Material Climate Change Information. The respondents' post-hearing submissions in relation to the Proposed 2FASOC gave no attention to the issue of "knowledge" and I proceed on the assumption that this earlier objection is not maintained. In any event, as Senior Counsel for the respondents accepted, there is no requirement for the applicant to establish subjective knowledge on the part of the respondents to make out the misleading or deceptive conduct claim. That claim must be established by reference to objective facts which should have been, but were not, disclosed by the respondents.

76 The respondents submitted that the fundamental flaw in the pleading is that each of the three claims advanced by the applicant is founded on an allegation of non-disclosure of material information but the applicant does not identify with specificity what it is she says should have been/ should be disclosed. They said this is highlighted by the fact that the defined term, Material Climate Change Information, is not expressed in a single sentence or even a paragraph. Rather it is pleaded as the information in [77A.1]-[77A.2], which is the "existence, nature and extent of Physical Risk and Transition Risk" and/or the effect or likely effect of those risks on the four matters pleaded in [76.1] to [76.4] and/or the value of eAGBs. Further, the terms "Physical Risk" and "Transition Risk" are themselves defined, and in each case understanding that term requires reference to other allegations in the pleading. Each of those paragraphs can then only be understood by reference to other allegations. On the respondents' argument, the complexity of the pleading is an attempt to obscure that the applicant is not in a position to identify what it is she says the respondents must disclose.

77 They argued that the allegations concerning Physical Risk, Transition Risk and the effect of the risks on eAGBs are pleaded in the most general and high-level terms, and fail to grapple with the temporal aspect of the claims. They provided two examples in this regard.

78 *First*, they submitted that a fundamental factual matter that is absent from the pleadings is the terms of the bonds. They ask, what obligations of the Commonwealth under the bonds is it said that the Commonwealth will not be able to honour? The annual interest or the redemption of the bonds at maturity? And why? And when?

79 *Second*, they said that the pleading fails to grapple with the temporal aspects of the applicant's case. It is uncontentious that the eTIBs acquired by the applicant have a maturity date of 21 February 2050 and that the eTBs acquired by the applicant have a maturity date of 27 March

2047. It is alleged that Australia will experience Physical Impacts "over the coming decades" (at paragraph [61]), has agreed to reduce its GHG emissions by 26% to 28% below 2005 levels by 2030, and has accepted that it must achieve net zero GHG emissions in relation to its role concerning the Net Zero Target in the Paris Objective. But, the pleadings say nothing about the critical issues of timing. For example:

(a) in paragraph [63] it is alleged that significant additional expenditure will or will likely be required, but it is not alleged when;

(b) in paragraph [64] and [64B] it is alleged that "industries and communities" will likely be negatively affected by the Physical Impacts identified in paragraph [61], leading to a substantial reduction in revenue, but it is not alleged when the effects will occur or when the reduction in revenue will begin;

(c) in paragraph [75] it is alleged that the less time that the Commonwealth has to meet the Net Zero Target the greater the expenditure required will be, but it is not alleged when this expenditure is expected to start or finish;

(d) in paragraph [76] it is alleged that the Physical Risk and/or the Transition Risk will or is likely to have a "material adverse impact" on the Commonwealth's "status and reputation as a reliable and safe issuer of sovereign debt securities"; its "capacity to maintain its AAA status"; and its "capacity to respond to economic shocks", but it is not alleged when any of those things will occur; and

(e) in paragraph [77] it is alleged that these matters separately and cumulatively are or are likely to be material to the value of eAGBs on the market, but is not alleged when.

80 Everything else is said to be pleaded at such a level of generality as to be meaningless, including because it is unclear:

(a) what is "substantial" or "significant"?;

(b) how "likely" is it said to be that certain things will happen?;

(c) what are each of the "industries and communities" and how will they be specifically affected?;

(d) what does "negatively affected" mean?; and

(e) what is the "material" effect on the value of eAGBs and why would the four general matters alleged in paragraph [76] have such a material effect?

81 This is said to lead to significant problems of unfairness and prejudice for the respondents. As examples, the respondents referred to:

(a) paragraph [62], which alleges that the Commonwealth relies upon receiving "directly and indirectly, significant revenue" from a number of broadly described industries and communities, as well as "individuals employed by, or associated with, those industries and communities". The respondents contended that the broad scope of the paragraph and the use of general and sweeping language, together with the breadth and generality of other paragraphs, have a cascading effect on the pleading rendering it nigh-on impossible to understand in concrete terms; and

(b) paragraph [64], which alleges that the financial viability of the various broadly described sources of Commonwealth revenue alleged in paragraph [62] will be "or are likely to be" "negatively affected" by the Physical Impacts. They contended that the use of the word "likely" in this paragraph and throughout the pleading makes the allegation that the respondents were aware of certain things too broad and general.

They said that one way these issues may be tested is to ask how the respondents' legal advisors might possibly seek instructions about such broad allegations.

82 On the respondents' submissions, in order to understand any of the claims advanced by the applicant, it is necessary to understand what it is said should have been or should be disclosed, and a clear articulation of the "Climate Change Material Information" is essential. Yet, they contended that it is not possible to understand that core concept because it relies on allegations that are so generally framed they have no content or meaning. For example, in relation to the misleading or deceptive conduct claim, the pleading provides no clear answer to the question of what information the applicant says the respondent should have disclosed, to avoid contravention of s 12DA of the ASIC Act.

83 In their post-hearing submissions in relation to the Proposed 2FASOC, the respondents said there were three important points.

84 *First*, paragraphs [76A] and [77] of the 2FASOC are critical allegations with respect to the identification of the material information, but they plead conclusory allegations and not the material facts necessary to make good the conclusory facts. And even if the conclusory allegations were accepted, their effect is not what the applicant presumably intends.

85 On the respondents' argument, tracing through the revised allegations in the pleading, the Physical Risk and Transition Risk are now defined terms meaning an increase or likely increase in Commonwealth expenditure, and a decrease or likely decrease in Commonwealth revenue, brought about at some unidentified point before 21 February 2050 or 21 March 2047 by certain alleged consequences of climate change. Then, paragraph [76] alleges that this increase or likely increase in Commonwealth expenses or decrease or likely decrease in Commonwealth revenue will or will be likely to lead to the four matters listed in sub-paragraphs [76.1]-[76.4], being:

[76.1] the Commonwealth's status and reputation as a reliable and safe issuer of sovereign debt securities;

[76.2] the Commonwealth's capacity to maintain its AAA status as an issuer of sovereign debt securities;

[76.3] the Commonwealth's capacity to respond to economic shocks and to sustain balanced economic growth and a balanced budget; and;

[76.4] the Commonwealth's capacity to discharge its interest and principal obligations under the eAGBs held by the applicant and by the other persons holding eAGBs at the material times.

86 The respondents said that the immediate difficulty is that the pleading does not plead the necessary material facts linking the alleged increase in expenses or decrease in revenue to those four sub-paragraphs. They argued that many different things may lead to an increase in Commonwealth expenditure or a decrease in Commonwealth revenue. Many policies of Government (to take two recent and prominent examples, Jobkeeper and Jobseeker) lead to substantial increases in Commonwealth expenditure. Many changes in economic conditions (to take two well-known and prominent examples, an economic downturn or a fall in the spot price of iron ore) lead to substantial decreases in Commonwealth revenue.

87 The respondents submitted that the premise of paragraph [76] seems to be that material changes to Commonwealth expenses or revenue might have a material adverse impact on the four matters listed in sub-paragraphs [76.1]-[76.4], but why that is so is not pleaded. Further, even if it was pleaded, it cannot be that the Commonwealth is required to identify every possible event or economic change or government policy that could ever occur over a space of 30 years that might lead to a significant increase in expenses or decrease in revenue. That cannot be the material information.

88 Nor, it was said, having regard to paragraph [77], is it the case that the Commonwealth needs to disclose that there is a risk of an increase in Commonwealth expenditure or decrease in Commonwealth revenue. The respondents submitted that paragraph [77] alleges that the matters alleged in paragraph [76] are likely to be material to the value of eAGBs on the ASX, but the material facts connecting the propositions are not pleaded. For example, there are no material facts pleaded that establish that a material adverse impact on the Commonwealth's capacity to respond to economic shocks and sustain balanced economic growth and a balanced budget (at sub- paragraph [76.3]) is or is likely to be material to the price at which the eAGBs held by the applicant are traded on the ASX. Nothing is said to explain why such a future event, or the other identified matters in the four sub-paragraphs, are or are likely to have an effect on the market price of eAGBs.

89 This is said to lead back to a conceptual difficulty with the applicant's case that is highlighted in the Proposed 2FASOC. Her case, as now framed, is simply that an increase in Commonwealth expenses or decrease in Commonwealth revenue might be material to the price at which her eAGBs trade on the ASX. Even if she pleaded material facts capable of establishing this connection, the relevant risk is that there will be a change in the market price at which her eAGBs trade on the ASX. Yet the Proposed 2FASOC pleads (at paragraphs [54.4], [55.4], [56.3] and [57.3]) that the Information Statements and the AGB Website disclose that a change in the market price is a risk associated with investing in eAGBs.

90 On the respondents' argument, the applicant has not pleaded anything capable of constituting an undisclosed risk. Even if the applicant had pleaded the necessary material facts to connect climate change to the four matters alleged in sub-paragraphs [76.1]-[76.4], and in turn to the matters alleged in paragraph [77], she has not pleaded anything capable of explaining why any one reason that the market price could change needs to be disclosed. They submitted that the applicant has deliberately eschewed pleading any more specific case about change in the market price of eAGBs, or a material risk that the Commonwealth would default on the eAGBs. The case pleaded is no more than an assertion that there is a material risk that the market price of the bonds might change, which cannot be said to be a risk that was not disclosed by the respondents.

91 *Second*, the issue as to whether the applicant's case is that there was and/or is a risk of default or a risk of change in market price was raised in oral argument. Senior Counsel for the respondents said that there were two ways in which the applicant might have pleaded their case

in relation to the risk that faced persons holding eAGBs, being that there is a material risk, which the applicant can identify, that:

(a) the Commonwealth will in the future be unable to discharge its obligations to make the interest payments on the bonds as and when they fall due and/or to repay the principal sum upon maturity of the bonds. The pleading does not, however, plead any material facts capable of establishing a material risk that the Commonwealth will default on its obligations under the bond; and

(b) the eAGBs will trade at a lower price on the ASX. But on the respondents' argument this risk is related to the first risk, because the price of the bonds on the ASX will reflect the underlying value of the security of the Commonwealth's obligation to make the interest payments as and when they fall due and to repay the principal sum upon maturity. The only relevant material risk that could possibly have any bearing on the price at which eAGBs trade on the ASX is the risk that the Commonwealth will in the future be unable to discharge its obligations under the eAGBs and, again, there is no proper pleading of any such matters.

92 The respondents submitted that there is no case properly pleaded as to any material risk that the Commonwealth will default on its obligations. The only case that is pleaded is the case at paragraphs [76] and [77], that the four matters listed in sub-paragraphs [76.1]-[76.4] are likely to be material to the value of eAGBs on the ASX. The general allegation in sub-paragraph [76.4] as to a material adverse impact on "the Commonwealth's capacity to discharge its interest and principal obligations under the eAGBs" is made but that means no more than that its total capacity to discharge its obligations reflects its revenue and expenses. The applicant has not pleaded a risk of default and if she had done so it would have required identification of substantial and specific material facts, not generalised allegations.

93 *Third*, the respondents reiterated their earlier submission that the pleading does not grapple with the difficulty that - if what affects the price at which eAGBs trade on the ASX is the information pleaded in the Proposed 2FASOC - then that information must already be publicly known (if it is true) because the applicant pleaded it. Nothing on the face of the pleading explains why disclosure of information already known by the market for eAGBs would have a material effect on the price of the eAGBs being traded on the market.

**Consideration**

94 I will deal with the "material information" issue only by reference to the misleading or deceptive conduct claim under s 12DA of the ASIC Act because, as I later explain, in my view it is appropriate to strike-out the disclosure duty and PGPA Act claims on the basis that the applicant has no standing to bring them. It is therefore unnecessary to determine the sufficiency of the pleading of the "material information" issue in relation to those claims.

95 I commence by noting that, in 2012, the Federal Parliament passed the *Commonwealth Government Securities Legislation Amendment (Retail Trading) Act 2012* (Cth), which amended the Inscribed Stock Act and the Corporations Act. Relevantly, the purpose of the amendments was to allow for Commonwealth Government Securities, which include AGBs, to be traded on the ASX. In order to protect the interests of retail investors, the amendments required the AOFM to prepare Information Statements to be placed upon a dedicated website, which would operate in place of the product disclosure statements (**PDS**) which are usually provided to retail clients in relation to financial products: see Second Reading Speech for the *Commonwealth Government Securities Legislation Amendment (Retail Trading) Bill 2012*, 27 July 2012, Hon. David Bradbury MP, Assistant Treasurer and Minister Assisting for Deregulation.

96 In introducing the amendments, the Assistant Treasurer said:

> …the government has committed to fostering a deep and liquid corporate bond market. Establishing a strong and liquid retail market in the premium, AAA-rated debt security - Commonwealth Government Securities (CGS) - is a critical step in the formation of a wider retail debt market, including corporate debt….
>
> Making it easier for mums and dads to invest in the safest bonds in Australia is an important step in building up their familiarity with fixed income investments more generally. It will provide retail investors with a visible pricing benchmark for investments they may wish to make in corporate bonds.
>
> The *Commonwealth Government Securities Legislation Amendment (Retail Trading) Bill 2012* contains a number of measures to facilitate trading of CGS on financial markets that are accessible to retail investors.

97 With regard to the proposed amendments to the Corporations Act, the Assistant Treasurer said:

> The second set of amendments in the bill will ensure that the investor protection and market integrity provisions in the *Corporations Act 2001* (the Corporations Act) apply to retail CGS.
>
> …
>
> The amendments in the bill will also require information statements to be provided to retail clients when they are given personal advice about CGS depository interests. The

> information statements will take the place of the product disclosure statement that is usually required for a financial product. The government considers that tailor-made disclosure documents are appropriate for CGS depository interests because they are a particular type of safe and simple investment.
>
> The AOFM will consequently produce information statements providing concise information on CGS depository interests. These documents will be made available to the public on a dedicated website, together with other information related to CGS. Financial advisors will be able to download and print out the information statements from this website and provide them to their clients when they recommend investing in CGS depository interests.

98 Part G of the Proposed 2FASOC alleges, in summary, that:

(a) the Commonwealth, through the Treasurer, the AOFM or otherwise, carries on the business of issuing AGBs and arranging for the issue of eAGBs. It does so for the purpose of borrowing money, on a continuous and repetitive basis, in the same way as a listed corporation might issue corporate bonds which are to be traded on the ASX; it has entered into commercial arrangements with third parties to facilitate those activities, and it has arranged for the eAGBs to be traded on the ASX in common with other financial products (at paragraph [87]);

(b) an eAGB is a "financial service" and a "financial product" for the purposes of Div 2 of Pt 2 of the ASIC Act (at [88] and [89]);

(c) at all material times, the Commonwealth, through the Treasurer, the AOFM or otherwise, has been providing a financial service for the purposes of Div 2 of Pt 2 of the ASIC Act by arranging and continuing to arrange for eAGBs to be used, and therefore it has been and continues to deal in a financial product (at [90]);

(d) at all material times the Commonwealth, through the Treasurer, the AOFM or otherwise, has published the Disclosure Documents in relation to eAGBs (at [91]), for the purpose of informing retail investors about eAGBs who would otherwise ordinarily have had the benefit of a PDS provided under Div 2 of Pt 7.9 of the Corporations Act (at [92]);

(e) pursuant to ss 1031D and 1031E of the Corporations Act, a PDS must include information about any significant risks associated with holding the product as a person would reasonably require for the purpose of making a decision (as a retail client) about whether to acquire the product, and any other information that might reasonably be expected to have a material influence on the decision of a reasonable person (as a retail client) as to whether to acquire the product (at [93]);

(f) at the material times:

(i) through the publication of the Disclosure Documents, the Commonwealth, through the Treasurer, the AOFM or otherwise, has disclosed information they were aware of, or ought to have been aware of, that might reasonably be expected to have a material influence on decisions by holders of eAGBs as to whether to hold or dispose of their current interests in eAGBs; and decisions by potential investors of eAGBs as to whether to purchase eAGBs (**Material Information**) (at [94]);

(ii) the respondents did not publish in the Disclosure Documents any Material Climate Change Information (at [95]);

(iii) there was a reasonable expectation by the applicant, represented persons and potential investors in eAGBs, that the respondents would disclose Material Climate Change Information in the Disclosure Documents (at [95A]); and

(iv) further or alternatively, by disclosing certain Material Information in the Disclosure Documents, but omitting any Material Climate Change Information, the Commonwealth represented that the Material Information relating to eAGBs was only that information contained in the Disclosure Documents (at [96]).

(g) by reason of the matters at paragraphs [85]-[96], the Commonwealth, through the Treasurer, the AOFM or otherwise engaged in, and continues to engage in, conduct that is misleading or deceptive and/or likely to mislead or deceive (at [97]);

(h) the conduct alleged in paragraph [97] is conduct in trade or commerce within s 12DA of the ASIC Act (at [98]); and

(i) in the premises, at the material times, the Commonwealth has contravened and is continuing to contravene the prohibition on misleading or deceptive conduct in s 12DA of the ASIC Act (at [99]).

99 The respondents' complaints about the pleading of material information are not without force, but I am not persuaded that it is appropriate to strike-out this part of the pleading.

100 *First*, that is because pleadings are not an end in themselves, instead they are a means to the ultimate attainment of justice between the parties to litigation: *Banque Commerciale S.A. (in liq) v Akhil Holdings Ltd* [1990] HCA 11; 169 CLR 279 at 293 (Dawson J) citing Isaacs and Rich JJ in *Gould and Birbeck and Bacon v Mount Oxide Mines Ltd (in liq)* [1916] HCA 81; 22 CLR 490 at 517. Their main purposes include giving notice to the respondents of the case they

have to meet, sufficiently for this early stage of the case, and to define the issues in aid of discovery. In that way they are intended to ensure procedural fairness.

101 As I recently said in *Gall v Domino's Pizza Enterprises Ltd (No 2)* [2021] FCA 345; 391 ALR 675 at [19]-[20], in modern times courts have often taken a less strict approach to the application of pleading principles, and prefer to use pre-trial disclosure of evidence, exchange of submissions and interventionist case management techniques to address some of the difficulties sometimes associated with pleadings. I respectfully agree with Martin CJ's approach in *Barclay Mowlem Construction Ltd v Dampier Port Authority* [2006] WASC 281; 33 WAR 82 at [4]-[7], where his Honour said:

> The purposes of pleadings are, I think, well known and include the definition of the issues to be determined in the case and enabling assessment of whether they give rise to an arguable cause of action or defence as the case may be, and apprising the other parties to the proceedings of the case that they have to meet.
>
> In my view, the contemporary role of pleadings has to be viewed in the context of contemporary case management techniques and pre-trial directions. In this Court, those pre-trial directions will almost invariably include; first, a direction for the preparation of a trial bundle identifying the documents that are to be adduced in evidence in the course of the trial; second, the exchange well prior to trial of non-expert witness statements so that non-expert witnesses will customarily give their evidence-in-chief only by the adoption of that written statement; third, the exchange of expert reports well in advance of trial and a direction that those experts confer prior to trial; fourth, the exchange of chronologies; and fifth, the exchange of written submissions.
>
> Those processes leave very little opportunity for surprise or ambush at trial and, it is my view, that pleadings today can be approached in that context and therefore in a rather more robust manner, than was historically the case; confident in the knowledge that other systems of pre-trial case management will exist and be implemented to aid in defining the issues and apprising the parties to the proceedings of the case that has to be met.
>
> In my view, it follows that provided a pleading fulfils its basic functions of identifying the issues, disclosing an arguable cause of action or defence, as the case may be, and apprising the parties of the case that has to be met, the court ought properly be reluctant to allow the time and resources of the parties and the limited resources of the court to be spent extensively debating the application of technical pleadings rules that evolved in and derive from a very different case management environment.

That approach was echoed by the Full Court of this Court in *Thomson v STX Pan Ocean Co Ltd* [2012] FCAFC 15 at [13] (Greenwood, McKerracher and Reeves JJ).

102 It can be accepted that the pleading does not identify with specificity the material facts to show how, prior to the maturity dates of the applicant's eAGBs, the Physical Risk and/or the Transition Risk of climate change will or is likely to lead to:

(a) a material decrease in Commonwealth revenue and a material increase in Commonwealth expenditure; and

(b) a material adverse impact on the Commonwealth's financial position (by reference to the four matters alleged in sub-paragraphs [76.1]-[76.4]).

Nor does it identify with specificity the material facts to show how any material adverse impact on the four matters alleged in sub-paragraphs [76.1]-[76.4] will be or is likely to be material to the value at which eAGBs are traded on the ASX. Nor, subject to what I say below, does the pleading identify with specificity what it is that the applicant alleges should have been disclosed. The definition of Material Climate Change Information is pleaded in broad terms as information about the existence, nature and extent of the Physical Risk and Transition Risk of climate change and/or the effect or likely effect of those risks on the four matters alleged in sub-paragraphs [76.1]-[76.4], and/or the effect or likely effect of those risks on the value of eAGBs on the ASX. Each of those matters are pleaded in broad and general terms.

103 But it is important to keep in mind that the material facts are only required to be pleaded such that they are sufficient to provide the opposing party fair notice of the case to be made against them, and the matters above must be seen in the following context:

(a) First, the misleading or deceptive conduct claim is relatively straightforward. The basis for that claim is founded in well-established legal principles and is readily understandable. The claim also seems unlikely to be factually complex. Importantly, it is not a claim about an alleged *insufficient* disclosure of the risks of climate change and their effect or likely effect on the Commonwealth's financial position and on the value of eAGBs traded on the ASX. As Senior Counsel for the respondents accepted, the Disclosure Documents published by the respondents to the applicant and represented persons said *nothing at all* about any such risk. That puts the case in a different category to those misleading or deceptive conduct cases which are concerned with whether or not a risk has been sufficiently and accurately disclosed. The adequacy of the pleading of material information should be understood in that context;

(b) Second, the respondents' complaints about the pleading, and its cry that the pleading cannot be understood or properly responded to, are exaggerated. For example, it is straightforward to understand the basis of the applicant's claim in sub-paragraph [76.2] and paragraph [77] of the Proposed 2FASOC that, if the risks of climate change cause a material adverse impact on the Commonwealth's ability to maintain a AAA rating,

there will or is likely to be a material impact (I infer a decrease) on the price at which eAGBs are traded on the ASX. The respondents suggested that the applicant had to plead material facts to show that the Commonwealth was or is likely to default on its obligations under the bonds, but the applicant's case does not involve a binary choice between the Commonwealth defaulting or the Commonwealth not defaulting. The proceeding alleges that, in the likely event that the consequences of climate change have material adverse impacts on the Commonwealth's financial position (as set out in subparagraphs [76.1]-[76.4]), the bond market is likely to factor that into the value of eAGBs on the ASX;

(c) Third, the respondents overstated the specificity with which the applicant was required to plead the Material Climate Change Information. The applicant's case is that the Disclosure Documents said nothing at all about climate change related risk, and/or its impact on the Commonwealth's financial position over the next 27-30 years and/or to the value of eAGBs on the ASX. That is a low bar for the applicant to jump. In any event, to make out her claim of misleading or deceptive conduct the applicant is not required to specify what the respondents *should* have said in the Disclosure Documents. She is only required to establish that what was actually disclosed was, in all the circumstances, misleading or deceptive or likely to mislead or deceive; and

(d) Fourth, there is a substantial asymmetry of information between the applicant and the respondents. The applicant submitted, and I accept, that she does not presently have information to put on more fulsome pleadings as to the material facts and is unable to equip herself with the information necessary to assess the nature or extent of the relevant risks. I accept her submission that while she can know (and does allege) that climate change presents Physical and Transition Risks, that those risks will or are likely to have consequences for the Commonwealth's financial position, and consequently the matters set out in sub-paragraphs [76.1]-[76.4] of the Proposed 2FASOC arise; she cannot however presently plead all of the material facts causally connecting those propositions. I also accept her submission that, under the relevant statutory framework, it is the respondents who have the responsibility to assess those risks and who are uniquely placed to be able to assess and provide information in relation to those risks. They are in a similar position to a corporation issuing a financial product which is required to provide a PDS.

104 Having regard to the substantial asymmetry of information between the parties, if the pleading is struck-out at this stage I consider there is a real risk that the applicant will be unable to materially improve the pleading and therefore continue the case.

105 The authorities indicate that asymmetry of information between the parties is a relevant consideration in exercising the discretion to strike-out a pleading or dismiss a case. In ***Murphy v State of Victoria & Anor*** [2014] VSCA 238; 289 FLR 337, it was alleged that the State of Victoria had engaged in misleading or deceptive conduct in contravention of s 18 of the *Australian Consumer Law* in Schedule 2 of the *Competition and Consumer Act 2010* (Cth), through representations in documents it published seeking to justify the economic benefits of the proposed East-West Link toll road. The Victorian Court of Appeal (Nettle AP, Santamaria and Beach JJA) said (at [35]):

> … **It is one thing to make an allegation without any basis for it - which is plainly impermissible - and quite another to make allegations - as the appellant did in this case — which *ex facie* were soundly based on the best particulars which could be given until after discovery** (and which, it should be noted, were not sought to be struck out as being something else). In a case like this, where *ex hypothesi* the documents needed to prove the appellant's allegations were within the respondents' exclusive possession or power, and the respondents refused to produce them, the appellant not only had no option other than to plead his case as he did but was perfectly entitled to do so. The propriety of so proceeding is established by a long line of authority dating back to the nineteenth century.
>
> (Emphasis added).

106 The Honours went on to say (at [37]) that:

> …to foreclose a plaintiff's opportunity of obtaining discovery from the State in order to prove a case which is *ex facie* implied by so many of the documents as are presently available to him would be to subvert the justice process.

107 Similarly to *Murphy*, in circumstances where the Information Statements published by the respondents said nothing at all about any material risks to the Commonwealth's financial position and the value of eAGBs associated with climate change, and having regard to the publicly available material to which I was taken in the hearing, the existence of a case may be implied. The applicant relied upon four publicly available documents, described briefly below:

(a) a report by FTSE Russell, titled "Anticipating the climate change risks for sovereign bonds Part 1: Insight of macroeconomic impacts" dated March 2021;

(b) a report by FTSE Russell, titled "Anticipating the climate change risks for sovereign bonds Part 2: Insights on financial impacts" dated June 2021 (**Part 2 of the FTSE Russell report**). Amongst other things it states that in a "disorderly transition" scenario

in which appropriate climate change policy is not introduced until 2030, leading to deeper emission reductions than in an "orderly transition" scenario, Australia faces a 156% increase in its debt to GDP ratio. The report also states that in a "hothouse world" scenario in which GHG emissions increase until 2080 and global warming exceeds 3°C, Australia faces a 21% increase in the ratio of debt to GDP, but has zero risk of defaulting on its debt obligations at 2050;

(c) an article in the *Australian Financial Review*, headed "Ratings agencies will drive government climate disclosures, says AOFM" dated 9 June 2021 (the **AFR article**). The article summarised a speech made to economists by the third respondent, the AOFM CEO, in which he is reported to have said that "over the next few years…there would be an increased focus from fixed income investors about what governments are doing to react to the [climate change] challenges ahead"; and

(d) the *2021 Intergenerational Report*, dated June 2021, published by the Commonwealth Department of Treasury, which states:

> Climate change is expected to have physical effects and transition effects on Australia's economy. Physical effects are impacts caused directly by a changing climate. Transition effects relate to the impacts of global and domestic efforts to reduce greenhouse gas emissions. This includes the costs of Australia's own mitigation efforts, as well as changes to demands for our exports due to mitigation actions by our trading partners. There could also be impacts on global capital flows.
>
> A reduction in real GDP associated with climate change would have a fiscal impact through reducing taxation revenue, as well as increasing pressure on expenditure. Other revenue sources such as fuel excise and mining royalties could also be affected by changes in demand and consumption related to a global transition away from fossil fuel use.
>
> Any reduction in GDP is likely to be unevenly distributed across sectors and regions. The agricultural sector is particularly vulnerable to the physical effects of climate change, the resources sector is particularly vulnerable to the transition effects, and the financial sector is vulnerable to both.

The parties did not agree as to the effect of the documents and each sought to put its own slant on them. However, for the purposes of a strike-out application it is appropriate to take them at their highest for the applicant.

108 As I have said, the respondents likened the present case to a securities class action. In such cases information asymmetry often results in some obscurity in the pleading prior to the completion of discovery, and the courts deal with any procedural unfairness to the respondent by requiring the applicant to provide a revised pleading after discovery, and/or through other case management orders. As Lee J observed (in the context of discussing the issue of state of

mind/knowledge) in *Klemweb Nominees Pty Ltd (as trustee for the Klemweb Superannuation Fund) v BHP Group Limited* [2019] FCAFC 107; 369 ALR 583 at [84]:

> …Securities class actions necessarily involve allegations of misleading conduct or non-disclosure of one form or another. Speaking very generally, the central issue in the case is often: what did officers of the listed entity know and when did they know it? The answer to the question is often (but not always) somewhat nubilated at the commencement of a proceeding. The case usually commences with an information asymmetry between the parties which dissipates as it passes through interlocutory stages, including the service of evidence and discovery.

109 Beach J made similar remarks in *Webster (Trustee) v Murray Goulburn Co-Operative Co. Limited (No 2)* [2017] FCA 1260 at [6] where his Honour said:

> …Given information asymmetry as between the parties concerning the state of mind of one of them, where the pleadings are at an early stage and before discovery, so long as some particulars of knowledge are given so as to demonstrate that the plea of knowledge is not wholly speculative, it may be appropriate to allow a plea of knowledge to go forward on the basis that full particulars of knowledge will be provided after discovery, reserving to the other party the right to seek a strike out or summary dismissal of the pleaded cause of action relying upon that knowledge at that later stage if that turns out not to be the case.

Notwithstanding the somewhat different context, in my view their Honours' remarks remain apposite in relation to the misleading or deceptive conduct claim.

110 In the present case the forward-looking nature of the allegations accentuates the information asymmetry between the parties. That information asymmetry arises in circumstances where the respondents are in the best position to assess and may have already assessed whether and if so, to what extent and in what manner, in the period 7 July 2020 to the maturity date of the relevant eAGBs (2047 and 2050), the Physical and Transition Risks of climate change will or are likely to have a material adverse impact on the Commonwealth's financial position as alleged in subparagraphs [76.1]-[76.4] and on the value at which eAGBs are traded on the ASX.

111 *Second*, I do not accept the respondents' contention that the applicant failed to grapple with the temporal aspects of the claims. To a large extent that deficiency in the pleading was rectified by the Proposed 2FASOC. The class description now only includes represented persons who acquired eAGBs with the specified codes in the period between 7 July 2020 and 6 August 2021, which bonds have the same maturity dates as the applicant's eAGBs. The Material Climate Change Information which the applicant alleges the respondents failed to disclose, concerns the risks pleaded at paragraph [77A] in the approximately 27-30 year period between the acquisition of those bonds and those maturity dates.

112 I accept the respondents' contention that the Proposed 2FASOC does not plead *when*, within that 27-30 year period that, for example:

(a) the significant additional Commonwealth expenditure (alleged at paragraph [63]) will be required;

(b) the financial viability of the particularly vulnerable industries and communities (alleged at paragraph [64]) will be or will likely be negatively affected, and when those negative effects will lead to a reduction in Commonwealth revenue from those industries and communities (at [64B]);

(c) the increase in Commonwealth expenditure will or will likely commence because of delay in implementing the Net Zero Measures (alleged at paragraph [75]);

(d) the material adverse impact on the Commonwealth's financial position (alleged at paragraph [76]) will or will likely occur; and

(e) the above matters are or are likely to be material to the value of the eAGBs on the market (at [77]).

113 Two things can, however, be said about that:

(a) for the purpose of the application I am not persuaded that the applicant must establish precisely *when*, within the approximate 27-30 year period until the maturity date of the bonds, those matters will or are likely to occur. The applicant's case is that the respondents have provided no information at all to investors in eAGBs about any risks of material adverse impacts on the Commonwealth's financial position and to the value of the relevant eAGBs as a result of climate change. For the purpose of the application I proceed on the basis that it may be enough for the applicant to show that if there is a real risk of any such occurrence, at any point during the period up to the maturity date of the bonds, the respondents were obliged to disclose the risk(s); and

(b) even if it is accepted that the pleading is deficient in this regard, that does not establish that it is appropriate to be struck-out at this early stage, having regard to the asymmetry of information. As I have said, the applicant is not presently in a position to plead such matters, it cannot equip itself to get that information, and any assessments made in that regard, if they exist, are only in the respondents' control.

114 *Third*, I can see little force in the respondents' contention that the pleading seeks to require the Commonwealth to identify and disclose to potential investors in eAGBs every possible event,

economic change, or government policy that could ever occur over the space of thirty years, that *might* lead to a significant increase in Commonwealth expenditure or decrease in Commonwealth revenue. That is not the applicant's case. Paragraphs [77A.1] and [77A.2] of the Proposed 2FASOC allege that the respondents were required to disclose information about:

(a) the existence, nature and extent of the Physical and Transition Risks of climate change (being, in effect, a likely material increase in Commonwealth expenditure and decrease in Commonwealth revenue as a result of the impacts of climate change); and/or

(b) the effect or likely effect of those risks on the Commonwealth's financial position by reference to the four matters identified in paragraphs [76.1]-[76.4] and/or on the value of eAGBs.

It is alleged that such information was required to be disclosed because it is information that will inform holders of eAGBs about significant risks associated with holding the bonds and which might reasonably be expected to have a material influence on decisions to acquire, hold or dispose of the bonds.

115 *Fourth*, I do not accept the respondents' contention that the case pleaded is no more than that there is a material risk that the market price of the bonds might change, which risk cannot to be said to be a risk that was not disclosed by the respondents. It is uncontroversial that the Information Statements and AGB Website disclosed only two risks in relation to eTBs, being changes in market price and conversion by the Australian government; and three risks in relation to the eTIBs, being changes in market price, conversion by the Australian government and deflation. Disclosure of a risk that the price at which eAGBs are traded on the ASX may change for reasons which are unstated, is not the same thing as disclosing a risk that the market price might be materially reduced as a result of a particular identified risk, here, climate change.

116 Nor do I accept the respondents' contention that the pleading fails to grapple with the fact that, if what affects the price at which eAGBs trade on the ASX is the information pleaded in the 2FASOC, then that information must already be publicly known (if it is true), because the applicant has pleaded it. First, as I have said, the information symmetry between the parties means that the applicant does not presently have sufficient information to assess and plead the full nature or extent of the alleged risks or provide all of the material facts comprising the Material Climate Change Information that she alleges should have been disclosed. Second, I accept the respondents' complaint that the pleading is too general at present and the allegations are based on information which is publicly available. But the applicant's case is that it was

misleading or deceptive for the respondents not to have explained the risks of which the respondents were or ought to have been aware of, and the material facts in relation to those risks. Fundamentally, it is that more detailed information which the applicant does not presently have and which the applicant contends is likely, if disclosed, to have a material effect on the value of eAGBs on the ASX. Third, this is not really a pleading complaint. Boiled down, it is a contention that the applicant's case is weak and, absent a summary judgment application, the merits of the case are a matter for trial.

117 For these reasons, I decline to strike-out the misleading or deceptive conduct claim.

## THE STANDING ISSUE

118 The respondents seek an order pursuant to r 16.21(1)(e) and (f) of the Rules to strike-out paragraphs [80]-[84] of the Proposed 2FASOC which plead the disclosure duty claim, and paragraphs [101]-106] which plead the PGPA Act claim, together with paragraph [107] insofar as it refers to relief in relation to those claims. They contended that the applicant has no standing to bring those claims.

### The pleading

119 The Proposed 2FASOC includes a new paragraph [1D] which purports to deal with the issue of standing. It alleges that by reason of her acquisition and holding of nine eAGBs, and by reason of the matters pleaded at paragraphs [76] to [77B], the applicant has "a special interest, being a financial and economic interest in the subject matter of the proceeding", which interest is "greater than that of other members of the public who do not hold eAGBs and thereby do not have a financial and economic interest in the subject matter of the proceeding".

### Standing in relation to the misleading or deceptive conduct claim

120 The respondents did not contend that the applicant lacks standing to bring the misleading or deceptive conduct claim under s 12DA of the ASIC Act. They did not expressly say so, but it appears from the materials that, at least for the purpose of the application, they accepted the applicant's contention that, having regard to ***Truth About Motorways*** *Pty Ltd v Macquarie Infrastructure Investment Management Ltd* [2000] HCA 11; 200 CLR 591, the applicant has standing. That case concerned a claim that the respondents made misleading or deceptive statements in published material in relation to a proposed tollway project. The applicant was a special purpose company which did not claim to have any special interest in the subject matter of the dispute and which had suffered no loss or damage. The question before the Court was

whether the applicant had standing to bring a misleading or deceptive conduct claim pursuant to s 52 of the *Trade Practices Act 1974* (Cth) (**TPA**) seeking only declaratory and/or injunctive relief.

121 Sections 80 and 163A of the TPA expressly provided for the Federal Court to grant injunctive or declaratory relief under that Act on the application of *any person*. The respondent contended that, insofar as those provisions purported to confer standing on the applicant to bring the proceeding, they were invalid because, in the absence of the applicant having a direct or special interest, there was no justiciable controversy and thus no "matter". The Court rejected that argument and held that the applicant had standing. I proceed on the basis that, at least for the purpose of the strike-out application, the respondents accept that the applicant has standing to bring a claim of misleading or deceptive conduct under s 12DA of the ASIC Act seeking only declaratory and injunctive relief.

**The disclosure duty pleading**

122 Paragraphs [80]-[84] in Part F of the Proposed 2FASOC allege that the respondents, as promoters of eAGBs, owed (and owe) a fiduciary duty of utmost candour and honesty to investors who acquire or intend to acquire eAGBs, the "Disclosure Duty". It is alleged that this Disclosure Duty requires the respondents to disclose information of which they are aware, or ought to be aware of, that might reasonably be expected to have a material influence on:

(a) decisions by holders of eAGBs, including the applicant and the represented persons, as to whether to hold or dispose of their interests in eAGBs; and

(b) decisions by potential investors of eAGBs as to whether to purchase eAGBs,

which it is alleged includes Material Climate Change Information.

It is alleged that at all material times the respondents failed to publish in the Disclosure Documents any Material Climate Change Information, and therefore they have breached and continue to breach the Disclosure Duty.

**The PGPA Act pleading**

123 Paragraphs [101]-[106] in Part H of the Proposed 2FASOC allege the PGPA Act claim, which is based in s 25(1) of the PGPA Act, which section provides:

> (1) An official of a Commonwealth entity must exercise his or her powers, perform his or her functions and discharge his or her duties with the degree of care and diligence that a reasonable person would exercise if the person:

(a) were an official of a Commonwealth entity in the Commonwealth entity's circumstances; and

(b) occupied the position held by, and had the same responsibilities within the Commonwealth entity as, the official.

124 Paragraph [106] alleges that by reason of:

(a) the matters specified as the "Effect of the Risks on eAGBs" pleaded in Part E, comprising paragraphs [76]-[77B] of the Proposed 2FASOC , which includes the risk of a material adverse impact on the four matters specified in sub-paragraphs [76.1]-[76.4];

(b) the matters specified in Part F, relating to the Disclosure Duty; and/or

(c) the matters specified in Part G, relating to the misleading or deceptive conduct claim,

the Treasury Secretary and the CEO AOFM have breached and continue to breach their duty under s 25(1) of the PGPA Act , because a reasonable person in their position would not have neglected, failed or refused to disclose the Material Climate Change Information in the Disclosure Documents.

**The applicant's submissions**

125 In relation to the disclosure duty claim, the applicant argued that the respondents erroneously assumed that it was necessary for her to have suffered loss to have standing to bring the claim; but, she is not seeking relief to compensate her for any loss. She is only seeking declaratory and injunctive relief, tied both to the past, and to the ongoing, failure of the respondents to comply with the alleged disclosure duty. She submitted that the question of standing must be viewed through that prism.

126 The applicant conceded that she has no standing in respect of past breaches of the disclosure duty; which Senior Counsel for the applicant said in oral submissions meant that the applicant is not claiming any relief for non-disclosure prior to 5 July 2020. The respondents appeared to misunderstand that concession, and seemed to treat it as a concession that the applicant accepted that she has no standing in relation to any breach prior to the date of judgment in this proceeding. Not much, however, turns on that misunderstanding.

127 The applicant submitted that there is no basis to conclude that she does not have a "real interest" in the rectification of a breach which occurred after purchasing the eAGBs and/or in stopping a continuing breach. On her argument, as the holder of eAGBs, she has a real interest in the

provision of Material Climate Change Information, because (at [77A.3]-[77A.4] of the Proposed 2FASOC) it is information:

(a) which will inform her about significant risks associated with holding the eAGBs that she reasonably requires for the purpose of making a decision about whether to acquire, continue to hold, or to dispose of her eAGBs; and/or

(b) that might reasonably be expected to have a material influence on her decision as to whether to hold or dispose of her current interests in eAGBs.

128 She said that the disclosure of the Material Climate Change Information, may therefore have (or may have had) an impact on the applicant's financial position, and in any event, it can be reasonably expected that such information will have a material influence on her decisions about whether to hold or dispose of her current interests. The same position applies to represented persons who held eAGBs at the material times, and the applicant therefore has standing.

129 In relation to the PGPA Act claim, the applicant accepted that s 25(1) of the PGPA Act does not expressly confer a private right of action for damages, but submitted that she has standing to enforce the public duty imposed by that provision upon the second and third respondents, the Treasury Secretary and the CEO AOFM. She said that there is "no novelty in a plaintiff having standing to sue for the vindication of an interest in the performance of a public duty where he [or she] has no legal or equitable right", citing ***Onus*** *v Alcoa of Australia Ltd* [1981] HCA 50; 149 CLR 27 at 72 (Brennan J).

130 She submitted, and it is uncontroversial, that in such circumstances the test for standing is whether the applicant has a "special interest in the subject matter of the litigation": *Shop, Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)* [1995] HCA 11; 183 CLR 552 (***Shop Employees***) at 558 (Brennan, Dawson, Toohey, Gaudron and McHugh JJ). She said that there is no precise formula for identifying what constitutes such a "special interest", and noted that in ***Bateman's Bay*** *Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Lt*d [1998] HCA 49; 194 CLR 247 at [46], the plurality (Gaudron, Gummow and Kirby JJ) said it was dangerous to attempt to define a precise formula because the consequence "may be unduly to constrict the availability of equitable remedies to support that public interest in due administration which enlivens equitable intervention in public law".

131 On the applicant's argument, she has standing in relation to the PGPA Act claim for the same reasons she has standing in relation to the disclosure duty claim. In particular, she has a financial interest in the ongoing failure of the second and third respondents to comply with the duty imposed by s 25(1) of the PGPA Act, which financial interest is more than a "mere intellectual or emotional concern": *Australian Conservation Foundation v Commonwealth* [1980] HCA 53; 146 CLR 493 (***ACF***) at 530 (Gibbs J as his Honour then was). It is an interest that places her in a different situation to members of the public at large (*ACF* at 527), and it is sufficient to establish her standing.

132 The applicant also argued that the Court should take considerable care if it proposes to strike-out one or more of the applicant's three claims, but allow the remaining claim(s) to proceed. She submitted that, because each of the three claims are founded on the same underlying factual matrix, the proper course in those circumstances is for the Court to allow each of the three claims to proceed to trial, citing *Wickstead v Browne* [1992] NSWCA 272; 30 NSWLR 1 at 5-6 (Kirby P), affirmed on appeal in *Wickstead v Browne* (1993) 10 Leg Rep SL 2; and also *Trkulja v Google* [2018] HCA 25; 263 CLR 149 at [39] (Keifel CJ, Bell, Keane, Nettle and Gordon JJ).

**Consideration**

133 Whether there is a standing requirement at all, and the nature of that requirement where it exists, depends on the relief which is sought. In *ACF* at 511, quoted with approval in *Bateman's Bay* at [47] (Gaudron, Gummow and Kirby JJ) and at [97] (McHugh J), Aickin J explained:

> The "interest" of a plaintiff in the subject matter of an action must be such as to warrant the grant of the relief claimed… [T]he plaintiff's interest should be one related to the relief claimed in the statement of claim.

134 In the disclosure duty claim the applicant seeks declarations in a representative capacity and slightly different declarations and injunctions in a personal capacity. To seek declaratory relief, the question to be decided must be real and not theoretical and the applicant must have a "real interest" in raising the questions to which the declaration would go: *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Limited* [1921] 2 AC 438 at 448 (Lord Dunedin), quoted with approval in ***Forster*** *v Jododex Australia Pty Ltd* [1972] HCA 61; 127 CLR 421 at 437-438 (Gibbs J as his Honour then was)*;* ***Plaintiff M61/2010E*** *v Commonwealth* [2010] HCA 41; 243 CLR 319 at [103] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

135 The applicant also seeks similar declarations and injunctions in the PGPA Act claim. The applicant accepted that to have standing to enforce the public duty imposed upon the second and third respondents under s 25(1) of the PGPA Act she must have "a special interest in the subject matter of the litigation". The applicant did not suggest that there was any difference, in this respect, between an application for a declaration and for an injunction.

136 In *ACF*, the Australian Conservation Foundation brought a proceeding against the Commonwealth and some of its Ministers for declarations, injunctions and other orders to challenge the validity of decisions concerning a proposal to establish a resort and tourist area in central Queensland and exchange control transactions in connection with the proposal. The defendants applied to dismiss the action on the ground that the ACF had no standing to bring it. The ACF accepted that to establish standing it was required to show that it had a "special interest" but it argued that interest need not involve a legal right and need not be an interest peculiar to the plaintiff. It said that it could include "what might be called ideological interests such as beliefs or objectives shared by a number of people or a section of society on a moral, social or environmental question." It contended it had standing to bring the proceeding because of its well-known interest in the preservation and conservation of the environment and because it had lodged a submission commenting on the draft environmental impact statement pursuant to the *Environment Protection (Impact of Proposals) Act 1974* (Cth). The ACF also argued that the question of standing should not have been dealt with as a preliminary issue, as Aickin J did in the proceeding below. Instead, they said standing should have been determined after the evidence, when the merits and relief were being considered: see *ACF* at 515.

137 Gibbs, Steven and Mason JJ held (with Murphy J dissenting) that the ACF had no standing to maintain the action. Gibbs J (as his Honour then was) explained (at 526):

> It is quite clear that an ordinary member of the public, who has no interest other than that which any member of the public has in upholding the law, has no standing to sue to prevent the violation of a public right or to enforce the performance of a public duty. There is no difference, in this respect, between the making of a declaration and the grant of an injunction. The assertion of public rights and the prevention of public wrongs by means of those remedies is the responsibility of the Attorney-General, who may proceed either ex officio or on the relation of a private individual. **A private citizen who has no special interest is incapable of bringing proceedings for that purpose, unless, of course, he is permitted by statute to do so**.
>
> (Emphasis added).

138 Later in his reasons (at 530-1), his Honour elaborated on his understanding of "special interest":

> I would not deny that a person might have a special interest in the preservation of a particular environment. However, an interest, for present purposes, does not mean a mere intellectual or emotional concern. **A person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails. A belief, however strongly felt, that the law generally, or a particular law, should be observed, or that conduct of a particular kind should be prevented, does not suffice to give its possessor locus standi.** If that were not so, the rule requiring special interest would be meaningless. Any plaintiff who felt strongly enough to bring an action could maintain it.
>
> (Emphasis added).

139 In *Onus*, handed down the year after *ACF*, the High Court again considered the "special interest" test, but with a different result. The Court held that members of the Gournditch-jmara Aboriginal people had a special interest in the prevention of construction works on land which contained Aboriginal relics of which the tribe was custodian. Gibbs CJ said the following (at 35-36):

> A plaintiff has no standing to bring an action to prevent the violation of a public right if he has no interest in the subject matter beyond that of any other member of the public; if no private right of his is interfered with **he has standing to sue only if he has a special interest in the subject matter of the action**. The rule is obviously a flexible one since, as was pointed out [in *ACF*], the question of what is a sufficient interest will vary according to the nature of the subject matter of the litigation.
>
> (Emphasis added).

140 Gibb CJ's remarks were approved by Brennan, Dawson, Toohey, Gaudron and McHugh JJ in *Shop Employees* (at 558). Their Honours added that "[t]he rule is flexible and the nature and subject matter of the litigation will dictate what amounts to a special interest."

141 In *Bateman's Bay* at [46], Gaudron, Gummow and Kirby JJ endorsed those observations. The plurality said:

> In the joint judgment of Brennan, Dawson, Toohey, Gaudron and McHugh in *Shop Distributive and Allied Employees Association* v *Minister for Industrial Affairs (SA)*, reference was made to the requirement that the plaintiff have "a special interest in the subject matter of the action". Their Honours stated that the rule is flexible and continued that "the nature and subject matter of the litigation will dictate what amounts to a special interest". This emphasises the importance in applying the criteria as to sufficiency of interest to support equitable relief, with reference to the exigencies of modern life as occasion requires. It suggests the dangers involved in the adoption of any precise formula as to what suffices for a special interest in the subject matter of the action, where the consequences of doing so may be unduly to constrict the availability of equitable remedies to support that public interest in due administration which enlivens equitable intervention in public law. That would be the consequence of the adoption of the approach taken by the primary judge in this litigation. It will be recalled that, in *Onus v Alcoa of Australia Ltd*, Brennan J warned that to deny standing

> may be to "deny to an important category of modern public statutory duties an effective procedure for curial enforcement".
>
> (Citations omitted).

142 The parties did not identify any authority which could be said to be on all fours with the present case, and save for their statements of principle they were of limited assistance. As Mason J (as his Honour then was) said in ***Robinson*** *v Western Australian Museum* [1977] HCA 46; 138 CLR 283 at 327-328, cited with approval by Gibbs CJ in *ACF* at 528, the "cases are infinitely various and so much depends in a given case on the nature of the relief which is sought, for what is a sufficient interest in one case may be less than sufficient in another." But in relation to issues of principle a number of points emerge from the authorities:

(a) an applicant must show a special interest in the subject matter of the litigation;

(b) the need for a special interest reflects the need to show an interest or a position that is different from the public at large;

(c) the expression "special interest" does not supply a ready rule of thumb capable of mechanical application. The test is "flexible";

(d) what suffices as a special interest will vary according to the nature of the subject matter of the litigation, including the relief sought, and it is a question of fact and degree in each case. The application of the special interest test is fact and context specific; and

(e) the need to show a special interest is not merely a function of the depth of feeling but reflects the nature of the relationship between the person and the subject matter of the litigation. The nature of the interest must be more than emotional or merely intellectual.

143 Considered at a level of abstraction and by making some assumptions about matters on which the pleadings and evidence are silent, I could accept that the applicant has a sufficient interest to meet the "real interest" test in relation to the disclosure duty claim, and the "special interest" test in relation to the PGPA Act claim. It is uncontroversial that, a short time before the applicant commenced the proceeding, she purchased nine eAGBs for $1,149.75, which eAGBs she continues to hold. Considered at that high level, it could be said that:

(a) the applicant has an interest related to the relief being sought (see *ACF*). Her interest is in receiving Material Climate Change Information, i.e. information about risks to the Commonwealth's financial position and any effect of those risks on the value of her eAGBs on the ASX, which she says will or might reasonably be expected to inform her decisions about holding or disposing of the eAGBs, and which thereby directly affects

her current financial interests. Such an interest could be said to be appropriately connected to the declaratory and injunctive relief she seeks;

(b) for similar reasons, it could be said that the applicant's interest is not just an emotional or merely intellectual interest (see *ACF* at 530; *Bateman's Bay* at [96] (McHugh J)). Obtaining the relief she seeks could be viewed as giving her an advantage beyond simply righting a wrong or upholding a principle (see *ACF* at 530); and

(c) for similar reasons, the fact that the applicant owns eAGBs, and has a financial interest in their value, could be seen as differentiating her from the public at large, and it could be said that she has an interest greater than the public at large (see *ACF* at 527; *Onus* at 74 (Brennan J); *Bateman's Bay* at [98] (McHugh J)).

144 At that high level, the disclosure duty and PGPA Act claims could be said to involve a question of "real practical importance" for the applicant, rather than it being a hypothetical inquiry (see ***Edwards*** *v Santos* [2011] HCA 8; 242 CLR 421 at [38]-[39], [1] (Heydon J with whom French CJ, Gummow, Crennan, Kiefel and Bell JJ agreed). On this analysis, the applicant may be said to have a "real interest" and also a "special interest" in obtaining the declaratory and injunctive relief she seeks. On that basis she would have standing to bring those claims.

145 However, the "special interest" and "real interest" requirements are fact and context specific: ***Vicforests*** *v Kinglake Friends of the Forest Inc* [2021] VSCA 195 at [61] (Niall, Emerton and Kennedy JJA). Deciding whether those requirements have been met involves an assessment of the importance of the concern which a plaintiff has with the particular subject matter and of the closeness of that plaintiff's relationship to that subject matter. Resolution of the questions of fact or degree in relation to standing may sometimes depend on the resolution of controverted questions of law or fact: *Robinson* at 302 (Gibb J, as his Honour then was).

146 In *Robinson* at 302-3, Gibbs J said that where it is disputed that an applicant has a special interest:

> The Court has a discretion: it is not bound to take one course rather than the other. If the plaintiff's claim to have locus standi is merely colourable, and can easily be exploded, the Court will no doubt proceed immediately to decide the question of standing and, having decided against the plaintiff, will dismiss the action. But if the investigation of the claim requires a consideration of weighty and complex questions which may never fall for decision if the issue of validity decided against the plaintiff, it may be more convenient to proceed immediately to determine the validity of the challenged statute.

147 It is uncontentious that on or about 3 July 2020 the applicant purchased:

(a) five eTIBS with a maturity date of 21 February 2050; with ASX code GSIC50, at an average price of $125.72 per unit for a total consideration of $628.60, which units each have a face value of $100; a coupon interest rate of 1% per annum and coupon payment dates of 21 February, 21 May, 21 August and 21 November each year; and

(b) four eTBs with a maturity date of 21 March 2047; with ASX code GSBE47, at an average price of $127.78 per unit for a total consideration of $521.15, which units each have a face value of $100; a coupon interest rate of 3% per annum and coupon payment dates of 21 March and 21 September each year.

The settlement date for the purchases was 7 July 2020, and on 22 July 2020 the applicant commenced this proceeding.

148 Based on her acquisition of the eAGBs the applicant contended that she has standing to bring the proceeding because disclosure of the material information she alleges should have been and/or should be disclosed to her *may* have an impact on her financial position, and also that it can *reasonably be expected* that the alleged non-disclosed information would have had or will have a material influence on her decisions as to whether to hold or dispose of her current interests.

149 The respondents submitted that while the applicant acquired and holds a small number of eAGBs, purchased for a relatively modest sum just before she commenced the proceeding, she:

(a) does not allege that she was misled in the purchase of the eAGBs;

(b) does not allege that she would have acted differently if the respondents had disclosed Material Climate Change Information to her, whether by not purchasing the eAGBs or by deciding to sell them;

(c) has not pleaded any material facts to support her contention that the information she alleges should have been disclosed may have an impact on her financial position;

(d) has not pleaded any material facts to support the allegation that such information might reasonably be expected to have a material influence on her decision as to whether to hold or dispose of her interests; and

(e) does not allege she has suffered any financial loss by reason of the alleged breach of the disclosure duty or in relation to the PGPA Act claim.

As the respondents contended, those matters are important because they go to the question of whether the applicant has a "real interest" in the relief sought, and/or a "special interest in the subject matter of the litigation".

150 The temporal closeness of the applicant's purchase of a small number of eAGBs, and the commencement of the proceeding suggests that she purchased them for the purpose of bringing the proceeding. If that is true, it may be appropriate to infer that the eAGBs are the vehicle for a proceeding with the aim of pressuring the Commonwealth government in relation to inaction on climate change. If that is the case, it might be inferred that provision of Material Climate Change Information to the applicant would not be likely to have affected or to affect her decisions in relation to holding or disposing of her eAGBs. It is though unnecessary to draw such inferences.

151 It is enough that, from the outset, the respondents have contended that the applicant failed to show either through the pleadings or by evidence that she has standing to bring the disclosure duty and PGPA Act claims. They said, and it is uncontentious, that if the applicant has no standing, the court has no jurisdiction to decide those claims: *Truth About Motorways* at [120] (Gummow J).

152 By way of example of the type of material the applicant should have put on, the respondents relied on the decision in ***WOTCH*** *Inc v Vicforests (No 6)* [2020] VSC 674 (Keogh J). The plaintiff in that case, WOTCH Inc, was a community-based, not-for-profit, incorporated association with an interest in protecting the flora and fauna of Victoria's native forests. It sought declaratory and injunctive relief to protect various forest coupes located in different regions in Victoria, both within the Central Highlands and outside that region. The defendant, VicForests, was a state body which undertook timber harvesting in State forests in Victoria. It accepted that WOTCH had standing in relation to forest coupes within, but not beyond, the Central Highlands and the relevant question for the Court was whether WOTCH had demonstrated that it has a special interest in the subject matter of the proceeding in respect of forest coupes outside the Central Highlands. At [18]-[34] Keogh J summarised the detailed affidavits filed by the plaintiff to establish its special interest. The evidence adduced by the plaintiff to establish standing in *WOTCH* stands in stark contrast to the complete absence of any evidence from the applicant in the present case.

153 Having regard to the respondent's contentions in relation to standing, it should have been straightforward for the applicant to put on evidence to show, for example, that if she had been or is provided with Material Climate Change Information, it would likely have been or would likely be material to her decision as to whether to hold or dispose of the eAGBs; yet she has put on nothing in this regard. In circumstances where the applicant purchased a handful of eAGBs a short time before she commenced the proceeding; and faced as she was with the respondents' strenuous contention that she had no standing, the applicant should have put on evidence in order to establish her asserted "real" and "special" interest.

154 Without the applicant having done so, I am not persuaded that it is appropriate to conclude that the relief the applicant seeks:

(a) has any "real practical importance" for her, or that the questions raised in the proceeding are "concrete and real" rather than hypothetical: see *Edwards* at [38]-[39], [1];

(b) will give her an advantage beyond simply righting the wrong of the respondents' alleged failure to disclose the Material Climate Change Information: see *ACF* at 530;

(c) is not merely an emotional or intellectual interest in protecting the environment from the risks of climate change: see *ACF* at 530; *Bateman's Bay* at [96]. In saying this I do not suggest that such an aim is not worthy or is somehow illegitimate. It is just to note that such an aim alone is insufficient to satisfy the test for standing in relation to the disclosure duty and PGPA Act claims; and

(d) will, in reality, affect her financial interests. Equity is concerned with substance rather than form, and I am not persuaded that the applicant has any real interest in whether the value of her AGBs is materially affected by the risks of climate change. In the absence of any real effect on the applicant's financial interests, her position is no different from any other member of the public: see *ACF* at 527; *Onus* at 74; *Bateman's Bay* at [98].

I am therefore not persuaded that the applicant has any "real interest" or "special interest" in the relief sought in the proceeding, and she therefore lacks standing to bring the disclosure duty and PGPA Act claims.

155 Having regard to the above I do not accept the applicant's contention that it is inappropriate to strike-out the disclosure duty and PGPA Act claims because they are founded on the same underlying factual matrix as the misleading or deceptive conduct claim which remains on foot. Having decided that the applicant lacks standing, she cannot bring the duty of disclosure and PGPA Act claims, and the Court has no jurisdiction to hear them.

## CONCLUSION

156 The parties are directed to confer and endeavour to agree on minutes of orders to give effect to these reasons, within 14 days. The parties shall provide any agreed orders to my chambers, and in the absence of agreement, their competing minutes of order with any short submissions in support (no more than two pages).

I certify that the preceding one hundred and fifty-six (156) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Murphy.

Associate:

Dated: 8 October 2021

## SCHEDULE A – PHYSICAL RISK

60 On and since 7 July 2020, and at the date of delivery of this pleading (the **material times**), there has existed a significant likelihood that the climate is changing and will continue to change, as a result of anthropogenic influences (**Climate Change**).

…

61 At the material times, it has been projected that Australia will experience the following **Physical Impacts** as a result of Climate Change over the coming decades, including before the maturity dates of the eAGBs held by the applicant:

61.1 continued warming, with more extremely hot days and fewer extremely cool days;

61.2 a decrease in cool season rainfall across many regions of the south and east, likely leading to more time spent in drought;

61.3 a longer fire season for the south and east and an increase in the number of dangerous fire weather days;

61.4 more intense short-duration heavy rainfall events, and serious flooding events, throughout the country;

61.5 fewer tropical cyclones, but a greater proportion projected to be of high intensity, with ongoing large variations from year to year;

61.6 fewer east coast lows particularly during the cooler months of the year, and for events that do occur, sea level rise will increase the severity of some coastal impacts;

61.7 more frequent, extensive, intense and longer-lasting marine heatwaves leading to increased risk of more frequent and severe bleaching events for coral reefs, including the Great Barrier and Ningaloo reefs;

61.8 continued warming and acidification of its surrounding oceans;

61.9 ongoing sea level rise;

61.10 more frequent extreme sea level events, which were once per hundred year events becoming, over time, annual events.

…

62 At the material times, the Commonwealth relies upon receiving, directly and indirectly, significant revenue (including taxes) from:

62.1 the agricultural industry;

62.2 the tourism industry;

62.3 industries and communities located on Australia's coastlines;

62.4 industries and communities located in bushfire-prone areas or bushfire smoke-prone areas;

62.5 industries and communities located in drought-prone areas or

heatwave-prone areas;

62.6 the resources industry (including the fossil fuel industry);

62.7 the financial industry;

62.8 the export industries;

and from individuals employed by, or associated with, those industries and communities.

63 Before the maturity dates of the eAGBs held by the applicant, significant additional expenditure by Commonwealth will, or will likely, be required:

63.1 to maintain the ongoing financial viability of the industries and communities referred to in paragraph 62 above;

63.2 to respond to emergency weather events of the kind referred to in paragraph 61 above (that is, extreme temperature days; drought events; fire events; rainfall events; cyclone events; bleaching events; extreme sea level events), including to:

63.2.1 assist industries and individuals adversely affected by those events;

63.2.2 fund recovery and reconstruction operations; and

63.2.3 fund additional emergency services.

64 The financial viability of the industries and communities identified in paragraph 62 above are particularly vulnerable to being, and will be, or will likely be, negatively affected by the Physical Impacts identified in paragraph 61 above before the maturity dates of the eAGBs held by the applicant.

**Particulars**

The *Intergenerational Report 2021* recognises that impacts of climate change are already being felt by the agricultural sector: at 60.

The applicant will provide further particulars if requested by the Respondents, including after discovery.

64B The negative effects referred to in paragraph 64 above will lead, or will be likely lead, to a substantial reduction in revenue received by the Commonwealth from those industries before the maturity dates of the eAGBs held by the applicant.

**Particulars**

The *Intergenerational Report 2021* recognises that climate change is expected to have physical effects on Australia's economy, including by reducing taxation revenue: at page 59. It recognises that the agricultural sector and the financial industry is particularly vulnerable to physical effects: at pages 59-60.

The applicant will provide further particulars if requested by the Respondents, including after discovery.

64C The:

64C.1 increase, or likely increase, in expenditure by the Commonwealth referred to in paragraphs 63; and

64C.2 decrease, or likely decrease, in revenue received by the Commonwealth referred to in paragraph 64 above;

is a **Physical Risk**.

## SCHEDULE B – TRANSITION RISK

60A It is an objective of the Paris Agreement, made on 10 November 2016 and ratified by the Commonwealth, to strengthen the global response to the threat of Climate Change, including by holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels (**Paris Objective**), recognizing that this would significantly reduce the risks and impacts of Climate Change.

**Particulars**

Paris Agreement, Article 1(a).

…

68 Under Article 4(2) of the Paris Agreement, the Commonwealth is obliged to prepare, communicate and maintain successive nationally determined contributions that it intends to achieve, and pursue domestic mitigation measures with the aim of achieving the objectives of such contributions.

69 Pursuant to Article 4(2), the Commonwealth's nationally determined contribution is to reduce greenhouse gas (**GHG**) emissions by 26 to 28 per cent below 2005 levels by 2030 (**Australia's Paris Commitment**).

**Particulars**

Australia's Nationally Determined Contribution, 2015.

70 Pursuant to Article 4(2), the Commonwealth is obliged to pursue domestic mitigation measures with the aim of achieving Australia's Paris Commitment (**Australia's Paris Measures**).

71 To achieve the Paris Objective, it will be necessary for global GHG emissions to be net zero by 2050 (**Net Zero Target**).

**Particulars**

IPCC Special Report: Global Warming of 1.5°C.

72 The Commonwealth has accepted that it must achieve net zero GHG emissions in relation to its role concerning the Net Zero Target.

73 The Commonwealth has indicated that it would be preferable to achieve net zero GHG emissions in relation to its role concerning the Net Zero Target by 2050, but has refused to commit to doing so by that time.

**Particulars**

The *Intergenerational Report 2021* states that the Government has committed to reaching net zero as soon as possible, preferably by 2050: at 61.

74 To reach the Net Zero Target by 2050, the Commonwealth would be required to pursue domestic mitigation measures in addition to Australia's Paris Measures (**Net Zero Measures**), the implementation of which will, or will likely, require significant additional expenditure by Commonwealth before the maturity dates of the eAGBs held by the applicant.

**Particulars**

The *Intergenerational Report 2021* recognises that transition effects relate to the impacts of global and domestic efforts to reduce greenhouse gas emissions, which includes the costs of Australia's mitigation efforts: at 59.

The applicant will provide further particulars if requested by the Respondents, including after discovery.

75 The less time in which the Commonwealth has to meet the Net Zero Target from the time it begins to implement the Net Zero Measures, the progressively greater the amount that the Commonwealth will be, or will likely be, required to expend to:

75.1 implement Net Zero Measures;

75.2 counter any adverse impact to the Australian economy as a result of delayed implementation of the Net Zero Measures.

**Particulars**

The *Intergenerational Report 2021* recognises that early investment in adaptation will mean Australia is better prepared and safer from current and future climate change, and will remain an attractive place to do business: at 63.

The applicant will provide further particulars if requested by the Respondents, including after discovery.

75A As a result of other countries seeking to achieve net zero GHG emissions in relation to their role concerning the Net Zero Target prior to 2050, global demand for exports of Australia's fossil fuel will decrease, or is likely to decrease, before 2050.

**Particulars**

The *Intergenerational Report 2021* recognises that 129 countries have committed to net-zero emissions by 2050, including key trading partners such as Japan and South Korea, while China has committed to carbon neutrality by 2060. In 2019-20, these 3 countries accounted for 87 per cent of Australia's LNG export value, 74 per cent of Australia's thermal coal export value and 55 per cent of Australia's metallurgical coal export value.

The applicant will provide further particulars if requested by the Respondents, including after discovery.

75B The decrease, or likely decrease, in global demand referred to in paragraph 75A above will result, or is likely to result, in a decrease in revenue received by the Commonwealth from the fossil fuel and export industries (referred to in paragraphs 62.6 and 62.8 above) before the maturity dates of the eAGBs held by the applicant.

**Particulars**

The *Intergenerational Report 2021* recognises that revenue sources such as fuel excise and mining royalties could be affected by changes in demand and consumption related to a global transition away from

fossil fuel use: at 60. It also recognises that, if commitments to net zero by 2050 by other countries are fully implemented, those commitments will likely reduce demand for unabated fossil fuels over some decades: at 60.

The applicant will provide further particulars if requested by the Respondents, including after discovery.

75C The:

75C.1 increase, or likely increase, in expenditure by the Commonwealth referred to in paragraphs 74 and 75; and

75C.2 decrease, or likely decrease, in revenue received by the Commonwealth referred to in paragraph 75B above;

is a **Transition Risk**.

## SCHEDULE C – THE EFFECT OF RISKS OF EAGBS

76 By reason of the Physical Risk and/or the Transition Risk there will be, or is likely to be, a material adverse impact on the following matters prior to the maturity dates of the eAGBs held by the applicant:

76.1 the Commonwealth's status and reputation as a reliable and safe issuer of sovereign debt securities;

76.2 the Commonwealth's capacity to maintain its AAA status as an issuer of sovereign debt securities;

76.3 the Commonwealth's capacity to respond to economic shocks and to sustain balanced economic growth and a balanced budget; and

76.4 the Commonwealth's capacity to discharge its interest and principal obligations under the eAGBs held by the applicant and by the other persons holding eAGBs at the material times.

77 The matters in paragraphs 76.1 to 76.4 above, separately and cumulatively, are factors that are, or are likely to be, material to:

77.1 the value of AGBs on the wholesale market for AGBs, and consequentially, a material effect on the value of eAGBs on the ASX, including those held by the applicant and the Represented Persons;

77.2 alternatively, the value of eAGBs on the ASX, including those held by the Applicant and the Represented Persons.

77A By reason of the matters in paragraphs 76 and 77 above, information about:

77A.1 the existence, nature and extent of Physical Risk and Transition Risk; and/or

77A.2 the effect, or likely effect, of those risks:

77A.2.1 on the matters in paragraphs 76.1 to 76.4 above; and/or

77A.2.2 on the value of eAGBs as referred to in paragraph 77 above;

is information that:

77A.3 will inform holders of eAGBs about significant risks associated with holding the eAGBs that persons would reasonably require for the purpose of persons, including the applicant and the Represented Persons, making a decision whether to acquire, continue to hold, or to dispose of eAGBs; and/or

77A.4 might reasonably be expected to have a material influence on:

77A.4.1 decisions by holders of eAGBs, including the applicant and the Represented Persons, as to whether to hold or dispose of their current interests in eAGBs; and

77A.4.2 decisions by potential investors of eAGBs as to whether to purchase eAGBs.

(the information referred to in paragraphs 77A.1 to 77A.2 constitutes **Material Climate Change Information**).

77B. At the material times, each of the Respondents:

77B.1 were aware of, or

77B.2 ought to have been aware of;

each of the matters that constitutes Material Climate Change Information.

**Particulars for paragraph 77B.1**

The applicant refers to the particulars for paragraphs 61, 64, 64B, 73, 74, 75, 75A and 75B above.

The Task Force on Climate-Related Financial Disclosures, *Recommendations of the Task Force on Climate-related Financial Disclosures* (Final Report, June 2017) is a widely available document concerning the disclosure of climate-related financial information for businesses. In the Government Response (dated March 2018) to Recommendations made by the Senate Economics reference Committee, tabled 21 April 2017 ("Carbon risk: a burning issue"), the Government noted the recommendation to implement the recommendations of the Task Force. The Government welcomed the release of the Final Report and encouraged all stakeholders to carefully consider the recommendations. The Government did not consider further law reform was required, because the disclosure requirements in the *Corporations Act 2001* (Cth) are "principles-based and do not impede the implementation of the Taskforce's recommendations".

On or around 9 June 2021, in response to a question concerning climate risk disclosure by sovereign bond issuers, the Third Respondent said that the AOFM was getting "a range of responses particularly from the European investors that ranges from curiosity to finger waving to a bollocking". The CEO said there that the issuer rating rather than the instrument rating in particular will be something that might take on more prominence. He also said that there would be an increased focus from fixed income investors about what governments are doing to react to the challenges ahead, and that the AOFM had discussed the efforts of S&P Global Ratings to incorporate environmental, social and governance risks into their sovereign ratings. He said that as that develops "all countries including Australia will have to make sure that they're aware of what the criteria are and how we are going to sit relative to other countries. Because sovereign issuer ratings through the core ratings agency process will tend to gather more attention than other measures": see Exhibit DLB-5 to the Affidavit of David Barnden.

Having regard to the matters in paragraphs 12 to 16 above, the knowledge of officers and agents within the AOFM, obtained in the course of their duties, are attributable to the Second and Third Respondents. The knowledge of officers and agents within the Treasury, obtained in the course of their duties, are attributable to the Second Respondent and the Treasurer. The knowledge of the Second and Third Respondents, and the Treasurer, obtained in the course of their duties (including as attributed to them), are attributable to the Commonwealth.

The applicant is unable to provide further particulars until after discovery.

**Particulars for paragraph 77B.2**

The applicant refers to the particulars for paragraph 77B.1.

Australia has joined the Coalition for Climate Resilient Investment, working with the investment sector to better consider physical climate risks and create resilient investment solutions: *Intergenerational Report 2021* at 64.

In 2006, the Commonwealth published "Climate Change Impacts & Risk Management: A Guide for Business and Government".

The Commonwealth's financial regulators (including ASIC) have recognised that climate change is exposing the financial system to risks that will rise over time. To respond to these risks, regulators are working on strengthening the identification and management of climate-related risk and improving disclosure: *Intergenerational Report 2021* at 61.

The applicant is unable to provide further particulars until after discovery.