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## CLIMATE LITIGATION IS SHAPING THE REGULATORY LANDSCAPE IN AUSTRALIA

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### **WHAT DO RECENT CASES TELL US?**

Tidal Marks 1 by Marilyn Wallace-Mitchell

# CLIMATE CHANGE AND ENVIRONMENTAL SUSTAINABILITY CONCERNS CONTINUE TO SHAPE THE LEGAL AND REGULATORY LANDSCAPE IN AUSTRALIA. RECENT COURT ACTIONS PROVIDE IMPORTANT GUIDANCE FOR GOVERNMENT, BUSINESS AND THE BROADER COMMUNITY.

This insight examines three significant developments:

- the Federal Court's decision in *Pabai v Commonwealth (No 2)* [2025] FCA 796 (Pabai);
- the settlement between EnergyAustralia and Parents for Climate; and
- recent actions by the Australian Competition and Consumer Commission (ACCC) targeting greenwashing.

Each of these developments offers valuable insights into the persistence of attempts to use both traditional and novel mechanisms to sheet home accountability for climate harms and green claims.

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# FEDERAL COURT DECISION IN PABAI

## NO DUTY OF CARE FOR CLIMATE HARM

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The Federal Court's decision in Pabai was a landmark ruling addressing whether the Federal Government owes a duty of care to protect communities from climate-related harm. The case was brought by Torres Strait Islander applicants, who argued that the Commonwealth had failed to set adequate greenhouse gas emissions reduction targets and to provide sufficient funding for climate adaptation infrastructure, such as seawalls, to protect their islands from rising sea levels and erosion.

The Court made detailed findings about the severe and ongoing impacts of climate change on the Torres Strait Islands, including environmental degradation and cultural loss. It also found that the Commonwealth had, at most, failed to give genuine consideration to the best available climate science.

However, consistently with previous Federal Court decisions, Justice Wigney ultimately declined to find that the Commonwealth owed a duty of care under the law of negligence. The Court's reasoning was grounded in several key considerations:

### GOVERNMENT POLICY AND JUDICIAL POWER:

The Court held that decisions regarding emissions targets and adaptation funding are matters of core government policy and are not suitable for judicial determination under the law of negligence. The judiciary was reluctant to intrude upon complex policy decisions that require balancing economic, social, and political factors.

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### CAUSATION AND GLOBAL EMISSIONS:

Even if a duty of care were recognised, the Court found it would be difficult to establish that any breach by the Commonwealth materially contributed to the harm suffered by the Torres Strait Islanders, given Australia's relatively small share of global emissions and the cumulative nature of climate change.

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### COMPENSABLE HARM:

The applicants' claims included the loss of fulfilment of Ailan Kastom, the traditional customs and beliefs of the Torres Strait Islanders. The Court found that such cultural loss is not currently recognised as a compensable category of harm under Australian negligence law, which is generally limited to personal injury or property damage.

The decision reflects the judiciary's cautious approach to recognising a positive climate duty owed by the government in the absence of statutory support. While the outcome maintains the status quo in Australian negligence law, Justice Wigney acknowledged that the law may evolve through appellate decisions or legislative reform. The case also highlights the challenges of using common law negligence to address complex, systemic issues such as climate change.

We have also considered this decision and overseas climate obligations in our recent KWM insight article [here](#).

# ENERGYAUSTRALIA AND PARENTS FOR CLIMATE

## NO DUTY OF CARE FOR CLIMATE HARM

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In a separate development, EnergyAustralia reached a settlement with the advocacy group Parents for Climate following allegations that the company's marketing of its "Go Neutral" carbon offset product was misleading or deceptive under the Australian Consumer Law (ACL). The product, which was certified as carbon neutral by the Federal Government's Climate Active scheme, involved the purchase of carbon credits to offset emissions from customers' electricity or gas use, which was still predominantly sourced from fossil fuels.

The legal action centred on concerns that consumers may have been misled about the effectiveness of carbon offsetting and the true climate impact of the product. In May 2025, EnergyAustralia agreed to settle the proceedings and published a statement on its website acknowledging several key points:

### LIMITATIONS OF CARBON OFFSETTING:

EnergyAustralia recognised that carbon offsetting is not the most effective way to assist customers in reducing their emissions and apologised to any customer who felt the marketing of the Go Neutral product was unclear.

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### TRANSPARENCY AND CONSUMER UNDERSTANDING:

The company emphasised the importance of providing clear and transparent information to consumers about the use and impact of offsets and acknowledged legitimate public concern about the efficacy of carbon neutral certification schemes.

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### RELIANCE ON CLIMATE ACTIVE:

This settlement raises questions about the legitimacy of relying solely on Climate Active certification when making carbon neutral claims. The case serves as a reminder that companies must be vigilant in avoiding greenwashing and should prioritise genuine emissions reductions over offsetting.

By focussing on declaratory relief, the claimants were able to achieve behavioural change that may not have been possible had a traditional class action for damages, the settlement of which would have been subject to court oversight, been pursued.

In these circumstances, companies should be looking closely at any claims they make relating to carbon neutral, climate neutral, net zero or similar status and considering whether any changes are required as a result of how they may be understood and viewed by consumers, regulators and other stakeholders.



# ACCC ACTIONS TARGETING GREENWASHING

## INCREASED SCRUTINY OVER MARKETING CLAIMS

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There is growing scrutiny of how organisations communicate their environmental commitments. Claims about being “green” or “carbon neutral” are increasingly under the microscope, with regulators and the public expecting greater transparency and evidence of action and progress.

Recent developments have highlighted the importance of being clear and accurate when promoting carbon neutral or offset products. Questions have been raised about whether consumers fully understand what carbon offsetting means and whether it accurately reflects a company’s overall climate impact. These discussions point to a broader lesson for business: relying solely on certification schemes or offsets is not enough. Genuine emissions reduction, paired with clear and transparent communication, is essential for maintaining trust and credibility.

The ACCC and ASIC have ramped up their focus on environmental claims, taking action where marketing has been found to be unclear or potentially misleading. This includes statements about renewable energy, sustainability and product safety. The expectation is simple: claims must be backed by solid evidence and communicated with honesty.

# CONCLUSION

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These recent developments in Australian climate litigation and regulatory enforcement highlight the increasing legal and reputational risks associated with business activities that impact climate change and making claims about environmental or sustainability credentials. As the legal landscape continues to evolve, organisations should review their climate and sustainability strategies, ensure robust governance of environmental claims and remain alert to emerging legal and regulatory expectations.

**01** Review their climate and sustainability strategies.

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**02** Ensure robust governance of environmental claims.

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**03** Remain alert to emerging legal and regulatory expectations.



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