Graham Barclay Oysters Pty Ltd v Ryan - [2002] HCA 54

HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

GRAHAM BARCLAY OYSTERS PTY LIMITED & ANOR — APPELLANTS

AND

GRANT RYAN AND ORS — RESPONDENTS

Graham Barclay Oysters Pty Ltd v Ryan

[2002] HCA 54
5 December 2002
S258/2001

ORDER

1. Appeal by Graham Barclay Oysters Pty Ltd allowed in so far as it concerns the issue of negligence.

2. Appeal by Graham Barclay Distributors Pty Ltd allowed with costs.

3. Parties to have 28 days to file draft minutes of consequential orders to be made by this Court in respect of the orders (including costs orders) made by the Full Court of the Federal Court.

4. In default of agreement between the parties to this appeal as to the form of the draft minutes for that appeal, each party is to file within the 28 day period its draft with short written submissions in support, indicating how the drafts of the parties differ.

On appeal from the Federal Court of Australia

Representation:

C R R Hoeben SC with A P Coleman for the appellants (instructed by PricewaterhouseCoopers Legal)

T K Tobin QC with J B R Beach QC and B M Zipser for the first named first respondent (instructed by Slater & Gordon)

No appearance for the second to seventh named first respondents

W H Nicholas QC with T G R Parker for the second respondent (instructed by Coudert Brothers)

B W Walker SC with P W Taylor SC and M J Windsor for the third respondent (instructed by Crown Solicitor for the State of New South Wales)

Intervener:

R J Meadows QC, Solicitor-General for the State of Western Australia with J C Pritchard intervening on behalf of the Attorney-General for the State of Western Australia (instructed by Crown Solicitor for the State of Western Australia)

HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

GRANT RYAN APPELLANT

AND

GREAT LAKES COUNCIL AND ORS RESPONDENTS

Ryan v Great Lakes Council

5 December 2002
S259/2001

ORDER

1. Appeal dismissed with costs.

2. Parties to have 28 days to file draft minutes of consequential orders to be made by this Court in respect of the orders (including costs orders) made by the Full Court of the Federal Court.

3. In default of agreement between the parties to this appeal as to the form of the draft minutes for that appeal, each party is to file within the 28 day period its draft with short written submissions in support, indicating how the drafts of the parties differ.

On appeal from the Federal Court of Australia

Representation:

T K Tobin QC with J B R Beach QC and B M Zipser for the appellant (instructed by Slater & Gordon)

W H Nicholas QC and T G R Parker for the first respondent (instructed by Coudert Brothers)

C R R Hoeben SC with A P Coleman for the second and third respondents (instructed by PricewaterhouseCoopers Legal)
B W Walker SC with P W Taylor SC and M J Windsor for the fourth respondent (instructed by Crown Solicitor for the State of New South Wales)

Intervener:

R J Meadows QC, Solicitor-General for the State of Western Australia with J C Pritchard intervening on behalf of the Attorney-General for the State of Western Australia (instructed by Crown Solicitor for the State of Western Australia)

HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

STATE OF NEW SOUTH WALES APPELLANT

AND

GRANT RYAN AND ORS RESPONDENTS

State of New South Wales v Ryan

5 December 2002
S261/2001

ORDER

1. Appeal allowed with costs.

2. Parties to have 28 days to file draft minutes of consequential orders to be made by this Court in respect of the orders (including costs orders) made by the Full Court of the Federal Court.

3. In default of agreement between the parties to this appeal as to the form of the draft minutes for that appeal, each party is to file within the 28 day period its draft with short written submissions in support, indicating how the drafts of the parties differ.

On appeal from the Federal Court of Australia

Representation:

B W Walker SC with P W Taylor SC and M J Windsor for the appellant (instructed by the Crown Solicitor for the State of New South Wales)

T K Tobin QC with J B R Beach QC and B M Zipser for the first named first respondent (instructed by Slater & Gordon)

No appearance for the second to seventh named first respondents

W H Nicholas QC with T G R Parker for the second respondent (instructed by Coudert Brothers)

C R R Hoeben SC with A P Coleman for the third and fourth respondents (instructed by PricewaterhouseCoopers Legal)

No appearance for the fifth to the fourteenth respondents

Intervener:

R J Meadows QC, Solicitor-General for the State of Western Australia with J C Pritchard intervening on behalf of the Attorney-General for the State of Western Australia (instructed by Crown Solicitor for the State of Western Australia)

CATCHWORDS

Graham Barclay Oysters Pty Ltd v Ryan

Negligence – Local authority – Duty of care – Harvesting of contaminated oysters – Oysters causing Hepatitis A infection – Knowledge of risk on part of officers of the authority – Failure by the authority to exercise statutory powers to control water pollution – Reasonableness – Class to whom duty owed when exercising power to control pollution – Causation – Whether minimisation of pollution and thus risk of viral contamination would have prevented infection.

Negligence – Oyster grower and distributor – Breach of duty of care – Harvesting of contaminated oysters – Oysters causing Hepatitis A infection – Failure to refrain from harvesting and selling oysters during relevant period.

Negligence – The State – Duty of care – Harvesting of contaminated oysters – Oysters causing Hepatitis A infection – Knowledge of risk on part of officers of the State – Failure to exercise general statutory powers – Relevance of State "control" of industry – Reasonableness – Justiciability – Failure to exercise specific statutory power of closure – Whether power enlivened – Class to whom duty owed when exercising power.

Practice and procedure – Federal Court of Australia – Representative action – Declaration of legal right concerning individual entitlement to recovery – Whether the making of such a declaration inappropriate or beyond power – Whether statute and nature of representative proceeding sustain a declaratory order.

1. GLEESON CJ. The principal facts, the nature of the proceedings, and the relevant legislative provisions, appear from the reasons for judgment of Gummow and Hayne JJ ("the joint judgment").

2. In December 1996, Mr Ryan consumed oysters that a relative had purchased from the companies described in the joint judgment as the Barclay companies. The oysters, which had been grown in Wallis Lake, near Forster, were contaminated. In consequence, Mr Ryan contracted the hepatitis A virus ("HAV"). The circumstances of the contamination are explained in the joint judgment. Heavy rainfall over a period in November 1996 had increased the risk of pollution of the lake from a number of sources, and had resulted in cessation of harvesting for four days. In February 1997, an HAV epidemic was notified, and on 14 February 1997 Wallis Lake growers ceased harvesting for the season.

3. In seeking to assign legal responsibility for the harm he suffered, Mr Ryan blamed the growers and distributors of the oysters (the Barclay companies), the Great Lakes Council ("the Council"), which was the local government authority that exercised regulatory functions, including functions designed to protect the environment, under the *Local Government Act* 1993 (NSW) ("the Local Government Act "), and the State of New South Wales ("the State"). Claims were also made under the *Trade Practices Act* 1974 (Cth) ("the Trade Practices Act") against the Barclay companies. That is how the case came to be litigated in the Federal Court. The Trade Practices Act claims were not directly in contest in this Court.

4. In the present appeals, the principal issue in relation to the claims against the Council and the State was whether there was a duty of care of such a nature that any act or omission shown to have been causally related to Mr Ryan's injury constituted a breach. In relation to the claims

in tort against the Barclay companies, the existence of a duty of care was accepted; the principal issue was whether a breach had been established.

5. It is convenient to deal with the claims against the various defendants in the following sequence: the State; the Council; the growers and distributors. There are important differences between claims made against the State and the Council, on the one hand, and those made against the Barclay companies, on the other. A consumer of food suffered personal injury because the food was unfit for human consumption. His case against the growers and distributors of the oysters is essentially a straightforward product liability case. He sued the producers and suppliers of the product, the form of contamination being such that it was not reasonably discoverable upon any intermediate inspection. The existence and content of a duty of care was not in contest. But the nature of the case against the other defendants is far less obvious. The consumer is suing the government; local and State. He seeks to make the government directly liable. Originally there were attempts to establish tortious conduct on the part of persons, authorities or instrumentalities, for whom, or for which, the State might be vicariously responsible, but those attempts failed on the facts, and have not been pursued in this Court. The allegations now pressed against the State, and the Council, do not involve allegations of carelessness in the exercise of a statutory power. The complaint is not about acts, but about omissions. In the particular circumstances of the case, the issues, raised by this assertion of direct governmental liability in negligence, include what are, in the final analysis, issues of justiciability.

6. **Following paragraph cited by:**

    Minister for the Environment v Sharma (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)
    Electro Optic Systems Pty Ltd v State of New South Wales (31 October 2014) (Murrell CJ, Jagot and Katzmann JJ)
    New South Wales v West (05 September 2008) (Higgins CJ, Penfold and Graham JJ)
    State of New South Wales v Ibbett (13 December 2005) (Spigelman CJ, Ipp and Basten JJA)

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

inappropriate for judicial resolution, and that, in a representative democracy, are ordinarily decided through the political process. Especially is this so when criticism is addressed to legislative action or inaction. Many citizens may believe that, in various matters, there should be more extensive government regulation. Others may be of a different view, for any one of a number of reasons, perhaps including cost. Courts have long recognised the inappropriateness of judicial resolution of complaints about the reasonableness of governmental conduct where such complaints are political in nature.

7. **Following paragraph cited by:**

New South Wales v West (05 September 2008) (Higgins CJ, Penfold and Graham JJ)

In *Brodie v Singleton Shire Council* [1] , I took the view that the non-feasance rule which previously applied to highway authorities was an aspect of a wider problem concerning the manner in which the law should relate the public responsibilities of persons or bodies invested by statute with a power to manage public facilities, including the responsibility to apply public funds for that purpose, and the rights of citizens who may be affected by the manner in which those responsibilities are exercised. In that case, three members of the majority expressly accepted that it may be proper and necessary for a court to decide whether the priorities of a local council in dealing with road repairs in various locations were reasonable [2] . The decision in the case required that view. Even so, the scope for judicial examination of the reasonableness of governmental spending priorities was not held to be, and cannot be, at large. Raising and spending money for road repairs involves setting priorities, not only between parts of the road system, but also between all the claims upon an authority's resources, and between the interests of taxpayers and those of road users. My view remains that setting priorities by government for the raising of revenue and the allocation of resources is essentially a political matter, and that, if the reasonableness of such priorities is a justiciable issue, that can be so only within limits. The way in which the case against the State and the Council is put in the present appeals squarely raises the wider problem mentioned above.

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[1] (2001) 206 CLR 512 at 527 [12] .

[2] (2001) 206 CLR 512 at 580-581 [162] .

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8. **Following paragraph cited by:**

Mallonland Pty Ltd v Advanta Seeds Pty Ltd (28 February 2023) (Morrison and Bond JJA; Williams J)
Electro Optic Systems Pty Ltd v State of New South Wales (31 October 2014) (Murrell CJ, Jagot and Katzmann JJ)

The claims against the State and the Council in the present case are based on non-feasance. Expressed in broad terms, they are that the State government, and local government, could and should have done more to prevent the outbreak of HAV. The potential political content of that statement is obvious. It may mean that the oyster industry was under-regulated; or that the local or State government should have introduced more stringent policies to control pollution; or that inadequate resources were devoted to protecting the quality of Wallis Lake as against other aspects of the environment. Expressed in legal terms, the complaint requires specification of a duty of care, breach of which was a cause of Mr Ryan's illness. Accepting that local government authorities, and State governments, have responsibilities for public health and safety, those responsibilities are owed to the public. Mr Ryan must establish that the State, and the Council, owed a duty of care to him, as a consumer of Wallis Lake oysters. If such a duty exists, then presumably a similar duty is owed to all consumers of all potentially contaminated food and, perhaps, to all persons whose health and safety might be affected in consequence of governmental action or inaction. What is the content of the duty owed to Mr Ryan, or to oyster consumers? If it is not possible to answer that question with reasonable clarity, that may cast doubt on the existence of the duty [3] . The se are matters for separate consideration in relation to the State and the Council.

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[3] *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 13 [5] .

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9. **Following paragraph cited by:**

    Karpik v Carnival plc (The Ruby Princess) (29 July 2025) (Markovic, Sarah C Derrington and Jackson JJ)
    Gunns Limited v State of Tasmania (21 September 2016) (Blow CJ and Tennent J)
    Gunns Limited v State of Tasmania (21 September 2016) (Blow CJ and Tennent J)
    Dansar Pty Ltd v Byron Shire Council (27 October 2014) (Macfarlan, Meagher and Leeming JJA)
    Shoalhaven City Council v Pender (10 July 2013) (McColl, Barrett and Ward JJA)
    New South Wales v West (05 September 2008) (Higgins CJ, Penfold and Graham JJ)

One thing is clear. Reasonable foreseeability of harm of the kind suffered by Mr Ryan, whilst a necessary condition for the existence of a duty of care on the part of the Council or the State, is not sufficient [4] . In the case of a governmental authority, it may be a very large step from foreseeability of harm to the imposition of a legal duty, breach of which sounds in damages, to take steps to prevent the occurrence of harm. And there may also be a large step from the existence of power to take action to the recognition of a duty to exercise the power. Issues as to the proper role of government in society, personal autonomy, and policies as to taxation and expenditure may intrude. Even where a statute confers a specific power upon a public authority in circumstances where mandamus will lie to vindicate a public duty to give proper consideration to whether to exercise the power, it does not follow that the public authority

owes a duty to an individual, or a class of persons, in relation to the exercise of the power [5] . In the case of both the State and the Council, it is failure to exercise those powers, not negligence in the manner of their exercise, that is said to constitute the breach.

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[4] *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254 at 268 [35] ; *Sullivan v Moody* (2001) 75 ALJR 1570 at 1575 [25], 1577 [42], 1581 [64]; 183 ALR 404 at 409-410, 412, 418.

[5] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 465 per Mason J.

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10. There is a further question which goes principally to the issue of causation, but which also reflects upon the issues of duty and breach. Let it be supposed that it is fair to say that both the Council and the State could have done more to seek to prevent the HAV outbreak. It does not follow that what they could, and should, have done, would have prevented the outbreak, or the harm to Mr Ryan. The evidence suggests that, where oysters are cultivated in areas of intensive human occupation and activity, there is always a risk of contamination. Depending upon exactly what it is said should have been done by the Council or the State, short of prohibiting the cultivation of oysters in Wallis Lake altogether, there may be difficulty in showing a causal relationship between the alleged shortcomings of government and the injury to Mr Ryan. This difficulty was one reason for the failure to establish tortious conduct on the part of persons or bodies for whom the State or the Council might have been vicariously responsible.

The case against the State

11. What was formerly a Crown immunity from tortious liability disappeared early in the history of New South Wales. Procedures for suing a nominal defendant on behalf of the government were first introduced in 1857[6]. The *Claims against the Government and Crown Suits Act* 1912 (NSW) provided in s 4:

> "The petitioner may sue such nominal defendant at law or in equity in any competent court, and every such case shall be commenced in the same way, and the proceedings and rights of parties therein shall as nearly as possible be the same, and judgment and costs shall follow or may be awarded on either side as in an ordinary case between subject and subject."

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[6] *Claims against the Government of New South Wales Act* 1857 (NSW) (20 Vict c 15).

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12. **Following paragraph cited by:**

Minister for the Environment v Sharma (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)

> 864. In *Graham Barclay Oysters* , Gleeson CJ at [12] stated that the distinction between policy and operational matters was never rigorous, but that the idea behind it remained relevant in some cases. In relation to decisions dictated by financial, economic, social or political factors or constraints that were referred to by Mason J in *Heyman* , his Honour stated at [13] tha t one of the reasons why matters of this kind are inappropriate as subjects of curial judgment about reasonableness is that they involve competing public interests where "there is no criterion by which a court can assess where the balance lies between the weight to be given to one interest and that to be given to another", citing *Home Office v Dorset Yacht Co Ltd* [19 70] AC 1004 at 1067 (Lord Diplock). In relation to the question whether, in not exercising powers, government was accountable through the law of negligence, Gleeson CJ stated at [15] –
>
> > A conclusion that such a duty of care exists necessarily implies that the reasonableness or unreasonableness of the inaction of which complaint is made is a legitimate subject for curial decision. Such legitimacy involves questions of practicality and of appropriateness. There will be no duty of care to which a government is subject if, in a given case, there is no criterion by reference to which a court can determine the reasonableness of its conduct.
>
> Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management (04 April 2012) (McLure P, Pullin JA, Buss JA)

The *Crown Proceedings Act* 1988 (NSW) abolished the nominal defendant procedure but, in s 5, adhered to the formula that proceedings and rights should be as nearly as possible the same as in an ordinary case between subject and subject [7] . That formula reflects an aspiration to equality before the law, embracing governments and citizens, and also a recognition that perfect equality is not attainable. Although the first principle is that the tortious liability of governments is, as completely as possible [8] , assimilated to that of citizens, there are limits to the extent to which that is possible. They arise from the nature and responsibilities of governments. In determining the existence and content of a duty of care, there are differences between the concerns and obligations of governments, and those of citizens. Such differences led to an attempt to distinguish between matters of policy and operational matters. That distinction was never rigorous, and its validity and utility have been questioned [9] . Even so, the idea behind it remains relevant in some cases, such as the present. In *Sutherland Shire Council v Heyman* [10] , Mason J said:

> "The distinction between policy and operational factors is not easy to formulate, but the dividing line between them will be observed if we recognise that a public authority is under no duty of care in relation to decisions which involve or are dictated by financial, economic, social or political factors or constraints. Thus budgetary allocations and the constraints which they entail in terms of allocation of resources cannot be made the subject of a duty of care. But it may be otherwise when the courts are called upon to apply a standard of care to action or inaction

that is merely the product of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness."

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[7] See also *Judiciary Act* 1903 (Cth) s 64 .

[8] *Asiatic Steam Navigation Co Ltd v The Commonwealth* (1956) 96 CLR 397 at 427.

[9] eg *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 393-394 [180]-[184] ; *Stovin v Wise* [1996] AC 923 at 951-953 .

[10] (1985) 157 CLR 424 at 469.

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13. **Following paragraph cited by:**

Electro Optic Systems Pty Ltd v State of New South Wales (31 October 2014) (Murrell CJ, Jagot and Katzmann JJ)

One of the reasons why matters of the first kind are inappropriate as subjects of curial judgment about reasonableness is that they involve competing public interests in circumstances where, as Lord Diplock put it, "there is no criterion by which a court can assess where the balance lies between the weight to be given to one interest and that to be given to another" [11] .

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[11] *Dorset Yacht Co v Home Office* [1970] AC 1004 at 1067.

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14. **Following paragraph cited by:**

Minister for the Environment v Sharma (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)
North Shore City Council v Attorney-General (27 June 2012)

> 74. I touch on some additional considerations which weighed with the Court of Appeal in holding that a duty of care was untenable. Some factors could equally or preferably be considered as bearing on breach. As I mentioned in *Couch* , where liability for negligence is determined at trial it may not matter whether questions of policy are considered as going to duty of care or its breach. [115] On strike out on a threshold question of duty of care, however, it may matter a great deal. [116] The policy

factors held by the Court of Appeal to count against a duty of care[117] are factors which may well be best assessed when considering breach. In referring to policy factors some repetition is inevitable because of the overlap between factors bearing on proximity and policy.

· The imposition of a duty of care and potential liability in negligence does not cut across established principles of law in fields other than negligence or statutory defences or alternative provisions for relief (as was the case in *Fleming* [118] and in *South Pacific* [119]).

· As already indicated in [71], I am unable to accept the view expressed by the Court of Appeal that the imposition of a duty of care should be declined for policy reasons because the prospect of liability would inhibit the free flow of advice from the Authority to the Minister. [120] The review and reporting functions of the Building Industry Authority are a practical check on the exercise of the functions of the territorial authority, directed to the same end as the functions undertaken by the territorial authority: code compliance. There is no conflict in the ends pursued which might inhibit proper review or reporting. And a principal feature of the role of the Authority in the system of administration provided by the Act is to provide assurance to owners and to territorial authorities in the performance of their functions.

· Nor do I accept the significance the Court of Appeal attached to what it described as the "quasi-judicial functions" of the Building Industry Authority, [121] in application of a characterisation adopted in *Sacramento* .[122] I do not think such characterisation should mark off a "no go" zone for liability in tort. [123] But in any event I do not think it accurate in its application to the Authority which was set up to have a central role in the operation of the Act (as the Building Industry Commission had envisaged)[124] and with the functions of disseminating information and providing authoritative determinations and acceptable solutions. The tortious liability recognised by the Act in respect of determinations and accreditations is contrary to such immunity for reasons of policy.

· Although there was speculation in the reasons of the Court of Appeal about the cost implications of liability, I do not consider that such consideration could be determinative in the circumstances. In *Fleming* Co oke P regarded as unconvincing the argument that Parliament could not have intended liability in such a case because the Commission "consisted only of a full-time chairman and four part-time members and had a total staff of only seven". [125] While the resources available to a public body may be relevant if the body is operating at a level of high policy, the Building Industry Authority was not in that camp, for the reasons already given. And, as explained by Gleeson CJ in *Graham Barclay Oysters* , as is referred to in above, private individuals and organisations, too, operate under budgetary constraints and with lack of resources. [126] Any

financial constraints upon the Authority may indeed perhaps be better considered as bearing on breach, as Cory J suggests in *Just v British Columbia* . [127]

· Nor would liability set up incentives contrary to the purpose of the legislation or necessarily entail resources beyond those available to the Authority. It is only in the discharge of its own functions that the Building Industry Authority could have liability. Those functions do not entail discretion to impose higher compliance than is required by the code. And they might have been discharged in the particular case simply by the provision of information.

The claim of knowledge made in the third and fourth causes of action

via

[126] *Graham Barclay Oysters* , above n 33, at [14] .

North Shore City Council v Attorney-General (27 June 2012)

There are forms of governmental activity, which courts in the past endeavoured to describe by the term "operational", where there is no reason for hesitating to assimilate the position of governments to that of citizens in imposing duties and standards of care. Such activity might involve budgetary considerations, but that does not prevent such assimilation. Individuals and corporations also have to watch their budgets, and decisions about what is reasonable may have to take account of that. As the other extreme, the reasonableness of legislative or quasi-legislative activity is generally non-justiciable.

15. **Following paragraph cited by:**

Hoffmann v Boland (06 June 2013) (Basten and Barrett JJA, Sackville AJA)

Here we are concerned with the problem of deciding, in a case where the government had certain powers, whether it is accountable, through the law of negligence, for not exercising its powers, or for not exercising them sufficiently. To apply that form of legal accountability requires the identification, not merely of a power, but also a duty; a duty of care owed to a citizen or a class of citizens. A conclusion that such a duty of care exists necessarily implies that the reasonableness or unreasonableness of the inaction of which complaint is made is a legitimate subject for curial decision. Such legitimacy involves questions of practicality and of appropriateness. There will be no duty of care to which a government is subject if, in a given case, there is no criterion by reference to which a court can determine the reasonableness of its conduct. That negative proposition leaves open other questions as to the circumstances in which the law will treat failure on the part of a public authority to exercise a power as a breach of a private law duty of care; but it is sufficient to resolve a substantial part of the case against the State in these proceedings.

16. **Following paragraph cited by:**

Minister for the Environment v Sharma (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)

In the Federal Court, at first instance, Wilcox J described the primary case against the State as being that it failed to prepare or implement any proper oyster management plan for Wallis Lake. It had no statutory duty to take such action, but there were various powers available to it upon which it could have relied if it had decided to do so. Wilcox J also referred to arguments that sought to make the State responsible for alleged failures on the part of the Environmental Protection Authority and the Health Department. Those arguments were rejected on the facts, and it is unnecessary to say more about them. As to the primary case, it is to be noted that it was expressed in terms of breach. The formulation of the breach implies a legal duty, owed by the New South Wales government to Mr Ryan and all consumers of oysters grown in Wallis Lake, to "prepare and implement [a] proper oyster management plan". That case was later narrowed by reference to certain aspects of management. There was a separate argument that, given the deficiencies of the state of management as at November 1996, the State should have exercised a power to close the fishery. That argument occupied more familiar territory, pointing to a specific statutory power, conferred for a purpose, and asserting a duty to exercise the power in the circumstances [12] .

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[12] cf *Stovin v Wise* [1996] AC 923; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1.

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17. Wilcox J held that, "through various agencies, the New South Wales government exercised substantial managerial control over the Wallis Lake oyster industry". This was a key finding in his acceptance of the case against the State; an acceptance that was upheld by Lee and Kiefel JJ in the Full Court. Kiefel J rested her decision upon what she regarded as an obligation of the State to exercise its statutory power to prohibit harvesting of oysters until the Minister could be assured of the likelihood of the oysters' fitness for consumption. Lee J upheld the conclusion of Wilcox J that the State was under a duty of care to ensure that powers it had created were exercised to reduce the risk of harm being caused to consumers of oysters, and that the State had breached that duty by failing to manage the waters of the Lake by undertaking, or causing others to undertake, appropriate surveys, and by implementing harvesting controls.

18. For the reasons that follow, I prefer the reasoning of Lindgren J, who dissented on the claim against the State.

19. It is convenient to deal first with the matter of management of the fisheries, and to deal later with the argument concerning the power of closure.

20. **Following paragraph cited by:**

State of NSW v Tyszyk (26 May 2008) (Mason P ; Giles JA ; Campbell JA)

> 149 Control has been held to be a relevant factor in existence of a duty of care: ***Graham Barclay*** at [20] , [90]-[95] and [149]-[152] ; ***Modbury Triangle Shopping Centre Pty Ltd v Anzil*** [2000] HCA 61; (2000) 205 CLR 254 at [19] -[21], [42]-[43], [110]-[117] ; ***Brodie v Singleton Shire Council*** [2001] HCA 29; (2001) 206 CLR 512 at [102] .

New South Wales v Godfrey (07 April 2004) (Spigelman CJ, Sheller and McColl JJA)
Valleyfield Pty Ltd v Primac Ltd (08 August 2003) (Williams and Jerrard JJA and Mackenzie J,)
State of New South Wales v Napier (13 December 2002)

The proposition that the New South Wales government exercised substantial managerial control over the Wallis Lake oyster industry requires further analysis. If taken at face value, it virtually forecloses further debate. Control is a well established basis for the existence of a duty of care in a public authority or a private citizen [13] . Managerial control, if it existed, would seem to equate the position of the State with that of the Barclay companies, which admittedly owed a duty of care. But what exactly does it mean to say, in a market economy, that the State has substantial managerial control over an industry conducted by private enterprise? Does it mean any more than that the government has governmental power? Wilcox J referred to the following aspects of control:

> "(a) the State owned, and had powers of control over, the lake;
>
> (b) through the Department of Fisheries, it established, and supervised the operations of, a mosaic of oyster leases;
>
> (c) through the Department of Fisheries, it issued, and enforced the provisions of, aquaculture permits;
>
> (d) through the Department of Health, the State supervised the depuration process, including the nature and location of water intake points and the design, construction and maintenance of depuration tanks and ultra-violet facilities;
>
> (e) through the EPA, the State had powers under the *Clean Waters Act* to remove, disperse, destroy or mitigate pollution of waters (s 27) and to carry out inspections and investigations of premises (s 29);
>
> (f) through a number of agencies, the State was a participant in the Wallis Lake Estuary Management Committee, one of whose objectives was to prepare a management plan designed 'to sustain a healthy, productive and attractive estuary'; and, most importantly,
>
> (g) through the Minister for Fisheries, it had the power - at any time, to prohibit the taking of oysters from the lake."

[13] *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 551-552 ; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 24-25 [43]-[46], 42-43 [104], 61 [166], 82 [227], 104 [304], 116 [357] ; *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254 at 263 [18] ; *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 558-559 [102] .

21. **Following paragraph cited by:**

    Minister for the Environment v Sharma (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)

It has already been noted that Wilcox J did not find the government departments and authorities mentioned guilty of tortious conduct for which the State was vicariously responsible. In order to understand the legal implications of various aspects of governmental control, it is necessary to examine the legislative and regulatory structure set up by the State Parliament, and the executive. This appears in the joint judgment. A statement that the State had managerial control over the oyster industry involves a degree of ambiguity. The State, the body politic, was the government. Its legislature had all the powers given to it by its Constituti on , subject to the Commonwealth Constitution . Its executive had powers given by the legislature. But Mr Ryan seeks to make out a case based on non-feasance. What is the basis for saying that the State owed a legal duty to the consumers of Wallis Lake oysters to exercise to a greater extent governmental powers of regulation over, or affecting, the conduct of producers and distributors of oysters? Why could not the State have relied on self-regulation by the industry itself? The assumption that a State government owes to individual citizens a legal duty to care for the health and safety of all citizens, or all consumers of food, or all consumers of oysters, by exercising its regulatory powers to the extent judged reasonable by a court, has far-reaching implications.

22. It emerged from the evidence that, for some years before 1996, there had been, within government and industry circles in New South Wales, a continuing debate about the appropriate boundaries between government regulation and industry self-regulation.

23. **Following paragraph cited by:**

    Edson v Roads and Traffic Authority (07 April 2006) (Beazley JA at 1; Ipp JA at 2; Hunt AJA at 170)

In April 1992, an Advisory Committee drafted for the Minister for Health Services Management a report entitled "New South Wales Oyster Quality Assurance Program". It supported a large measure of industry self-regulation, with government involvement. It included the following:

> "… inherent in the move towards industry self regulation is a consideration of the role of government agencies, particularly the NSW Health Department because the Minister for Health is charged with a responsibility for protecting the public's health and has appropriate regulations under the Food Act to ensure that foods which reach the consumer are indeed fit for consumption. In short, irrespective of any industry endeavours it is the NSW Health Department that makes the final judgement about the product and has the powers to impose penalties.
>
> … if the industry can achieve via self regulation a situation whereby its product meets the desired standards and offers a high degree of assurance to the public then the active role of government must be greatly reduced with consequent savings to the public purse.
>
> It is hoped that government will recognise this and respond accordingly by fostering the quality assurance objective.
>
> In the Advisory Committee's view, non-participants however few or many they may be, negate the whole concept of a quality control program and will almost certainly compromise its integrity at some stage.
>
> It is recommended therefore that the government amends purification plant permit conditions so that all oysters treated in plants be cultivated, harvested and purified in accordance with an approved quality assurance program.
>
> …
>
> As an incentive for industry to meet the costs of quality assurance programs, oysters produced under a quality assurance program could be appropriately endorsed.
>
> The endorsement is made through the quality assurance program and not the NSW Health Department, enhancing industry self-regulation and quality assurance program integrity."

24. In February 1994 a report to the Minister recorded:

> "The NSW Oyster Quality Assurance Program is based on a concept of industry self-regulation at the estuary level, with a minimum of central supervision."

25. An Advisory Committee made further recommendations as to the detail of a Quality Assurance Program. A Ministerial paper to Cabinet in November 1994 stated:

> "4.14 The QAP is to be industry run and industry funded. Funding for the program is required at three levels:

(i) to pay for meat testing prior to marketing the oysters - this is required now and, as now, will be funded by the individual oyster farmer;

(ii) to pay for the environmental testing required by, and any other costs associated with, the estuary-based program - it is proposed that these funds will be collected at the local level by the local committee responsible for developing and implementing the program;

(iii) to pay for statewide co-ordination of the estuary based programs and other costs associated with the QAP - it is proposed that this requirement would be met through an 'annual contribution' required from all oyster farmers by Regulation made under Section 156 of the *Fisheries Management Act* 1994 ."

26. Other evidence to like effect is set out in the reasons of Lindgren J. It demonstrates that the nature and extent of State government involvement in oyster quality control was a matter of policy, that it received attention at the highest levels, that it had substantial budgetary implications, and that it involved government concern to encourage an important primary industry.

27. This demonstrates two things. First, the proposition that the State government had substantial managerial control over the oyster industry is, at best, an over-simplification. Secondly, the proposition that the State had a legal duty of care, owed to oyster consumers, obliging it to exercise greater control (and, presumably, to permit less industry self-regulation) takes the debate into the area of political judgment. By what criterion can a court determine the reasonableness of a government's decision to allow an industry a substantial measure of self-regulation?

28. This is not a case where past experience, in New South Wales or elsewhere, had demonstrated the inadequacy of a quality assurance program to which the State was a party. It was, of course, known that there were risks to consumers, which was why there was a need for a quality assurance program in the first place. But such knowledge does not warrant a conclusion that the State, as a body politic, directly owed a legal duty to consumers to increase the level of regulation of the industry, or to exercise, to a greater extent, the powers of control available to it.

29. However, there is one respect in which there was said to have been a negligent failure to exercise a specific power.

30. The *Fisheries Management Act* 1994 (NSW) , by s 189 , empowered the Minister to impose a prohibition, called a fishing closure, in relation to the taking of fish under an aquaculture permit if satisfied that the area was in such a condition that the taking of fish ought to be suspended, or that the fish were, or were likely to be, unfit for human consumption. The power was conditioned upon the existence of a certain state of satisfaction. No such state of satisfaction existed at any time relevant to the present proceedings. The Minister cannot have been under a legal duty to impose a fishing closure for the reason that, in the state of affairs that existed, he had no power to do so.

31. Kiefel J considered that, if the Minister had been properly informed, the rainfall in November 1996 must have given him reason to be concerned about the fitness for human consumption of Wallis Lake oysters. She said that "the State thereby came under a duty to exercise its powers and prohibit harvesting until the Minister could be assured of the likelihood of the oysters' fitness for consumption".

32. **Following paragraph cited by:**

New South Wales v West (05 September 2008) (Higgins CJ, Penfold and Graham JJ)

77. The case of *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 (***Graham Barclay Oysters***) is a useful starting point from which to examine the common law liabilities of a statutory body whose role is established by legislation. The respondents can take little comfort from Gleeson CJ's conclusion at [32] that:

> *A legislative grant of power to protect the general public does not ordinarily give rise to a duty owed to an individual or to the members of a particular class.*

It is necessary to distinguish between a public duty, enforceable by mandamus, to give consideration to the exercise of a power, and a legal duty, owed to a citizen, to exercise the power. It is a duty of the second kind that is here asserted. Bearing in mind past experience, and industry practice, as known in November 1996, it is not entirely clear what her Honour had in mind as to the information the Minister would have had if properly informed, or from whom that information might have been expected to come. It appears that her Honour aggregated the sources of information potentially available to "the State" rather than the information actually before the Minister. And "reason for concern" is not the statutory condition for the existence of the power given by s 189 . More fundamentally, however, the legislative grant to a Minister of a power to impose a fishing closure if satisfied of certain matters did not subject the State to a legal duty of care, owed to the plaintiff, or consumers of Wallis Lake oysters. It may be accepted that the reasonableness of a decision to exercise the power of closure would be a justiciable issue, and that the potential for judicial review of such a decision on public law grounds exists. But it is the existence of a common law duty of care that is presently in question. The power given by s 189 is a power to protect the public, not a specific class of persons. Similar powers, covering a wide range of activities, are given to Ministers and government authorities in the interests of public health and safety. A legislative grant of power to protect the general public does not ordinarily give rise to a duty owed to an individual or to the members of a particular class [14] .

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[14] *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 39 [93] .

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33. The duty of care upon which the case against the State was based was not made out.

The case against the Council

34. Part of the basis of the holding in the Federal Court of a duty of care on the part of the State was what was said to be its managerial control over the oyster industry. No such control existed in the Council. However, a different form of control was said to be relevant: powers of control over the activities that constituted potential sources of pollution of Wallis Lake. From those powers, conferred in the main by the Local Government Act , coupled with foreseeability of harm, it was argued that there was a duty on the part of the Council to eliminate or reduce the risk of viral contamination of Wallis Lake; a duty owed to consumers of oysters grown in the lake and, presumably, all others (such as swimmers) who might suffer physical harm in consequence of such contamination.

35. **Following paragraph cited by:**

Minister for the Environment v Sharma (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)

The content of the duty, thus asserted, raises difficulties. A legal duty to eliminate the risk of viral contamination of the waters of the lake seems far-fetched. The evidence showed that such a risk could never have been eliminated. Wilcox J did not accept that there was such a duty. But, if the duty were merely to reduce, or take reasonable steps to reduce, pollution of the lake, the problem of causation earlier mentioned arises. Who is to say that risk reduction would have spared Mr Ryan from illness? That question, in turn, points up the remoteness of the powers of control available to the Council from the cause of harm to Mr Ryan, that is to say, the consumption of oysters produced and distributed by the Barclay companies [15] . Furt hermore, the same problem affects the case against the Council as affected the case against the State: the circumstance that, in the public interest, certain powers of regulation of activity within its area are vested by statute in the Council does not mean that the Council owes a legal duty to individuals or classes of person whose health may be affected, directly or indirectly, by decisions made as to the exercise of those powers.

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[15] cf *Agar v Hyde* (2000) 201 CLR 552.

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36. In the Full Court, Lindgren and Kiefel JJ both concluded that the Council was not subject to a duty of care of the kind alleged. I agree with that conclusion.

37. The starting point for consideration is the statutory provisions conferring on the Council its relevant functions and powers. These provisions are set out in the joint judgment.

38. In considering the powers and responsibilities of the Council, for the purpose of determining whether it owed a duty of care to oyster consumers, an aspect of the facts should be noted. Wallis Lake is large, and there were many different ways in which, and places at

which, human activity on or around the lake could result in pollution of its waters. There was no particular place of pollution that was shown to be responsible, or mainly responsible, for contamination of the oysters. As Lindgren J pointed out, assertions of a duty to reduce or minimise pollution are difficult to give practical content of relevance to the harm suffered by Mr Ryan. As with the State, the complaint is that the Council did not do enough to reduce pollution, but it is not possible to point to any specific act or omission that would have prevented harm to Mr Ryan [16] .

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[16] cf *Bendix Mintex Pty Ltd v Barnes* (1997) 42 NSWLR 307.

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39. **Following paragraph cited by:**

Minister for the Environment v Sharma (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)
Kirkland-Veenstra v Stuart (29 February 2008) (Warren CJ, Maxwell P and Chernov JA)
Kirkland-Veenstra v Stuart (29 February 2008) (Warren CJ, Maxwell P and Chernov JA)

The powers conferred upon the Council, insofar as they are presently relevant, were conferred for the benefit of the public generally; not for the protection of a specific class of persons [17] . In *Pyrenees Shire Council v Day* [18] , there was a clearly identified cause of harm, specific action or inaction on the part of the Council, and, as Kiefel J pointed out, "coincidence between the action which was necessary to prevent the fire, the powers given to the Council and the purpose for which they were given". Here the Council had general powers for the protection of public health, which would have embraced activity of the kind Wilcox J thought should have been undertaken, such as regular and comprehensive surveys of sanitary facilities in areas around the lake, or water testing. But there is nothing in the relevant statutory provisions, or in the circumstances concerning the relationship between the Council and oyster consumers, to justify a conclusion that the Council's powers were given for the protection of oyster consumers, or any other particular class.

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[17] cf *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 39 [93] .

[18] (1998) 192 CLR 330 .

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40. The duty of care upon which the case against the Council was based was not made out.

The case against the Barclay companies

41. Here, the issue is one not of duty, but of breach.

42. Wilcox J said:

> "The Barclay companies acknowledge they owed a duty of care to consumers of their oysters. They deny they breached that duty and assert that, if they did, this did not cause the HAV infection suffered by [Mr Ryan] and relevant group members."

43. There was mention, in the course of argument in this Court, of the possible significance of the Trade Practices Act , and the causes of action it creates, upon the existence of a common law duty of care in the Barclay companies. That is an interesting topic, but in the light of the concession noted above, and the manner in which the case was argued, both in the Federal Court and in this Court, the present is not the occasion to pursue it.

44. Although counsel for Mr Ryan argued that the Barclay companies were negligent in the decisions they made in November 1996 as to when to cease and when to re-commence harvesting, Wilcox J did not accept that there was any causal connection between that conduct and the HAV epidemic. Wilcox J noted that it was accepted that Mr Barclay was at all material times aware of the existence of potential sources of viral pollution to the lake, and he knew that depuration was not adequate to remove viruses, and that oyster meat testing would not necessarily show viruses. Wilcox J summarised the negligence of the Barclay companies in the following sentence:

> "In my opinion, in selling without warning oysters grown in waters known to be subject to possible undetectable viral contamination, both Barclay companies breached their duty of care to ultimate consumers of the oysters."

45. It is not clear what the words "without warning" add to that finding. It is hard to imagine that Wilcox J contemplated that the oysters might have been sold with a warning. Jonathan Swift wrote: "He was a bold man that first eat an oyster"[19]. It would be a bold fish merchant that displayed oysters for sale accompanied by a warning that they might be subject to undetectable viral contamination. The negligence found was in selling the oysters in the prevailing circumstances as known to the Barclay companies. The corollary is that they should have stopped selling Wallis Lake oysters until such time as improved quality assurance procedures made it reasonable to re-commence.

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[19] Swift, *Polite Conversation*, Dialogue 2 (1738).

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46. In the Full Court, Kiefel J decided the case on the basis "that even if the harvesting of oysters had not been prohibited in the circumstances prevailing, as it should have been, the Barclays companies should not have supplied oysters for sale until a sufficient period had elapsed by which the risk of contamination could be regarded as acceptable or tests sufficiently indicated that to be the case". Lee J agreed with Kiefel J.

47. **Following paragraph cited by:**

North Shore City Council v Attorney-General (27 June 2012)

Lindgren J was of a different view. He said:

> "Having regard to the fact that it is not possible anywhere where human beings are to guarantee that purity of the water, it seems to me that the critical question in the present case is whether, as a result of what Mr Barclay knew or should have known about the quality of the water in the Lake, the Barclay companies' duty of care required them to do more than simply to suspend harvesting following a 'fresh', to depurate in accordance with Mr Bird's booklet and to test the flesh of sample oysters before and after depuration.
>
> So far as Mr Barclay in fact knew, subject to the necessity of ceasing harvesting following a 'fresh', the water of the Lake was safe water in which to grow oysters. The Lake's oysters had never previously given rise to an outbreak of hepatitis A or of any other oyster-related disease, although no doubt there had previously been rainfall events similar to that of 23-25 November 1996. Mr Barclay testified that over the four year period from 1989 to 1993, he had regularly taken the Council's Mr Brooker out in his boat to test the water in the Lake at twelve locations and that the results were satisfactory. He said that in the 'paddock' where virtually all Barclay Oysters' harvesting was done, the results were always excellent. Apparently, depuration and suspension of harvesting following a 'fresh' had proved sufficient measures for the Lake's oyster growers to take in the past.
>
> …
>
> > Depuration, suspension of harvesting and flesh testing cannot guarantee that an oyster is safe to eat. As his Honour observed, the starting point was to attack faecal contamination of the Lake at source. Whether it was reasonable for the Barclay companies to involve themselves in that activity requires
> >
> > 'a consideration of the magnitude of the risk and the degree of the probability of its occurrence along with the expense, difficulty, and inconvenience of taking alleviating action …' (*Wyong Shire Council v Shirt...* [20]).
> >
> > His Honour thought that their duty of care required the Barclay companies to conduct their own sanitary survey of that part of the shoreline of the Lake, the rivers and islands that was publicly accessible, then attempt to procure governmental or local governmental involvement to ensure that any faecal contamination revealed by the survey was rectified.

But, with respect, his Honour did not consider the matters referred to in the passage from *Wyong Shire Council v Shirt* set out above from the viewpoint of the Barclay companies. Other particular questions arise. What about the future, would the Barclay companies be obliged to update their sanitary survey frequently and regularly? At what point, if any, would they become entitled to assume that the issue of faecal contamination of the Lake could be left to the authorities? If it is accepted that they would become entitled to make that assumption at some time, why was Mr Barclay not entitled to make it in November 1996?

His Honour had regard to the difficulty that there was no assurance that the authorities would act, saying that if they did not do so, Barclay Oysters should have re-laid the oysters in other waters for a period before sale. But this possibility was not put to any witness and the whereabouts of the other waters and the cost of relaying the oysters were matters not explored in the evidence. I think it appropriate, on the evidence, to regard the alternative as simply one of ceasing business entirely or of marketing the oysters with an effective warning that effectively brought home the risk that the oysters might carry the HAV. But such a warning would have put the Barclay companies out of business. Accordingly, in substance, the true alternative to the course of conduct in fact pursued was to cease business.

It seems to me that on the evidence of the lack of any previous outbreak of health problems arising from the consumption of oysters grown in the Lake and the lack of knowledge otherwise of Mr Barclay of the existence of an actual problem as distinct from potential sources of faecal contamination of the Lake, the Barclay companies' duty of care did not reasonably require them either to take the course that his Honour outlined or to suffer a closure of their business until somehow they could be completely assured that they were putting into the market a product that was free of defects."

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[20] (1980) 146 CLR 40 at 47.

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48. The course of proceedings raises a question as to the approach this Court should take in an appeal where there are concurrent findings of negligence (or absence of negligence) at a trial and in an intermediate appellate court. A recent example of such an appeal was *Woods v Multi-Sport Holdings Pty Ltd* [21] . In that matter, a trial judge in Western Australia had decided that the owner of an indoor cricket facility, who undoubtedly owed a duty of care to an injured player, had not been negligent in failing to provide certain protective equipment and in failing to give a certain warning. That decision was unanimously upheld by the Full Court of the Supreme Court of Western Australia. By majority, a further appeal to this Court

was dismissed. All members of this Court examined in detail the reasoning of the trial judge for the purpose of deciding whether error was shown. The two dissenting judges, McHugh and Kirby JJ, both found that there was error, and favoured reversing the decision of the trial judge and the Full Court.

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[21] (2002) 76 ALJR 483; 186 ALR 145.

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49. **Following paragraph cited by:**

Amaca Pty Ltd v AB & P Constructions Pty Ltd (29 August 2007) (Giles JA; Ipp JA ; Basten JA)
DPP v El Mawas (19 June 2006) (Spigelman CJ, Handley and McColl JJA)
Buller v Black (12 March 2003) (Mason P, Giles and Ipp JJA)

As Hayne J pointed out in *Woods* [22] , although a finding of negligence (or absence of negligence) is conventionally described as a finding of fact, it also involves a normative judgment. The reasons given by the minority in *Woods* in favour of reversing the decision of the Western Australian courts illustrate the point. There was no disagreement with the trial judge on any matter of primary fact. The disagreement was with the judge's appreciation of the reasonableness of the conduct of the respondent, and with the weight given, or not given, by the judge to certain considerations bearing upon that question.

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[22] (2002) 76 ALJR 483 at 506 [137]-[141]; 186 ALR 145 at 176-177 .

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50. Concurrent findings may exist at different levels of particularity, and either with or without an element of normative judgment. In *Bridgewater v Leahy* [23] , a case concerning an allegation of unconscionable conduct, there were concurrent findings that a transferor of land was not under any special disability, and that a transaction was not unconscionable. Both findings were reversed, by majority, in this Court.

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[23] (1998) 194 CLR 457 .

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51. In *Waltons Stores (Interstate) Ltd v Maher* [24] , Deane J, referring to concurrent findings that a party to litigation entertained a certain belief, and had acted on a certain inducement, (findings of primary fact, involving no value judgment), said:

> "This Court should not, in the absence of special reason such as plain injustice or clear error, disturb them. In a context [in which] the cost of litigation has gone a long way towards effectively denying access to the courts to the ordinary citizen who lacks access to government or corporate funding, it is in the overall interests of the administration of justice and of the preservation of at least some vestige of practical equality before the law that, in the absence of special circumstances, there should be an end to the litigation of an issue of fact at least when the stage is reached that one party has succeeded upon it both on the hearing before the court of first instance and on a rehearing before the court of first appeal."

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[24] (1988) 164 CLR 387 at 434-435 .

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52. Later, in *Louth v Diprose* [25] , Deane J added that it was immaterial that the concurrent findings were of primary fact or involved conclusions and inferences drawn from primary facts, or that there were differences in the reasoning of the primary judge and the first appellate court, or that there was a dissentient in the first appellate court. He did not expressly refer to a difference between purely factual conclusions and conclusions that involved the application of standards of behaviour. However, in *Baffsky v Brewis* [26] , Barwick CJ, with whom Stephen, Mason, Jacobs and Aickin JJ agreed, referred to the rule in relation to "concurrent findings of fact or concurrent views as to the exercise of a discretion." There is no reason to deny the application of the rule to a finding of negligence. However, whether there is "plain injustice or clear error" might be affected by the extent to which the decision involves value judgment, explicit or implicit.

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[25] (1992) 175 CLR 621 at 634.

[26] (1976) 51 ALJR 170 at 172; 12 ALR 435 at 438.

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53. The rule that an ultimate court of appeal will only disturb a finding of fact that is shown to be clearly erroneous appears to have originated in the nineteenth century in Privy Council appeals from India, and to have been gradually developed and extended to appeals to the Privy Council from all parts of the British Empire, and then to all courts of last resort [27] . In *Owners of the "P Caland" and Freight v Glamorgan Steamship Co* [28] Lord Watson said:

> "[I]t is a salutary principle that judges sitting in a Court of last resort ought not to disturb concurrent findings of fact by the Courts below, unless they can arrive at - I will not say a certain, because in such matters there can be no absolute certainty - but a tolerably clear conviction that these findings are erroneous. And the principle appears to me to be specially applicable in cases where the conclusion sought to be set aside chiefly rests upon considerations of probability."

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[27] See *Major v Bretherton* (1928) 41 CLR 62 at 68-70 per Isaacs J.

[28] [1893] AC 207 at 216.

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54. The rule exists alongside, but is not co-extensive with, the requirement that an appellate court will recognise the limitations on its capacity to make factual judgments where they depend in part upon the observation of witnesses who have been seen only by the trial judge. It has a different rationale. The legal system does not provide a second level of appeal in order to give any sufficiently determined litigant a third chance of success. Indeed, since the introduction of the requirement of special leave, there is no general right of appeal to this Court. The rule involves an acceptance that it is unjust that a litigant who has twice succeeded on an issue of fact should be deprived of the benefit of the success merely because an ultimate court of appeal would have taken a different view of the facts.

55. **Following paragraph cited by:**

Fitzpatrick v Job t/as Jobs Engineering (20 March 2007) (Steytler P)

A judgment as to the reasonableness of the conduct of the Barclay companies in response to the risk of contamination required an evaluation of "the magnitude of the risk and the degree of probability of its occurrence". It also required an examination of "the expense, difficulty and inconvenience" of the available alternatives. For practical purposes, the alternative was a cessation of harvesting for an indefinite period, or for the remainder of the harvesting season, of the kind that ultimately occurred on 14 February 1997. When Lindgren J said that the alternative was "to cease business", or "to suffer a closure of their business until somehow they could be completely assured that they were putting into the market a product that was free from defects", he can hardly have been referring to something different from that which was done by all growers of Wallis Lake oysters on 14 February 1997. By that time of course, viral contamination was no longer merely a risk; it was an established fact. Even so, the temporary cessation of harvesting in November 1996 was a response to a recognised increase in the risk of contamination. It was followed by a resumption of harvesting and selling over the Christmas and New Year periods. The critical question for the Federal Court was whether, in the light of what was known about the nature and degree of the risk of contamination, that resumption of commercial activity was reasonable. I am not persuaded that any of the four judges in the Federal Court misunderstood, or failed to address, that question. The answer given by the majority was fairly open. Lindgren J answered the question differently; but I am not persuaded that the majority view involved clear error or injustice.

Conclusion

56. I would dismiss the appeals of the Barclay Companies (No S258/2001) and of Mr Ryan (No S259/2001) with costs. I would allow the appeal of the State (No S261/2001) with costs.

57. **Following paragraph cited by:**

Grey v The Queen (20 May 2021) (Loukas-Karlsson and Wigney JJ; McWilliam AJ)

I agree with the concluding paragraph of the orders proposed by Gummow and Hayne JJ.

58. GAUDRON J. I agree with the orders proposed by Gummow and Hayne JJ and with their Honours' reasons. There is, however, one matter upon which I would make separate comment. That matter concerns the relationship between certain specific obligations cast upon a corporation by the *Trade Practices Act* 1974 (Cth) ("the Act") and the general law of negligence.

59. For present purposes it is sufficient to refer to two provisions of the Act upon which Mr Ryan relied unsuccessfully at first instance. The first is s 52(1) which provides:

> " A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive."

Pursuant to s 82 of the Act , a person who suffers loss or damage by conduct that contravenes certain provisions of the Act , including s 52(1) , is entitled to recover the amount of that loss or damage.

60. The second provision of the Act which invites attention is s 75AD, which is in Pt VA of the Act . That Part is concerned with the liability of manufacturers and importers of defective goods. "Manufactured" is defined in s 75AA to include "grown, extracted, produced, processed and assembled."

61. Section 75AD imposes liability on a corporation, which in trade or commerce supplies goods manufactured by it, to pay compensation to any individual who suffers injury because of a defect in those goods. By s 75AK(1), it is relevantly a defence to a claim for compensation under Pt VA of the Act , including s 75AD if it is established that:

> "(a) the defect in the ... goods that is alleged to have caused the loss did not exist at the supply time; or
>
> (b) they had that defect only because there was compliance with a mandatory standard for them; or
>
> (c) the state of scientific or technical knowledge at the time when they were supplied by their actual manufacturer was not such as to enable that defect to be discovered".

62. Were the general law of negligence to develop to a point where, in circumstances in which ss 52 and 75AD operate, it imposed more onerous obligations than are imposed by those provisions, it would, in my view, be necessary to consider whether those provisions had supplanted the general law. And the same may well be true of other provisions in the Act . However, as the reasons of Gummow and Hayne JJ demonstrate, the general law of negligence has not yet developed to that point.

63. To say that it is not yet necessary to consider whether particular provisions of the Act have supplanted the general law in the circumstances in which they operate is not to say that the questions posed by particular provisions of the Act are unrelated to those posed by the general law of negligence. Thus, if the supply of goods by a corporation in trade or commerce without warning as to their possible dangers or defects does not constitute conduct that is likely to mislead or deceive for the purposes of s 52(1) of the Act , as was held at first instance in this case [29] , it is difficult to conceive that, nonetheless, the general law would impose a duty to warn as to those dangers or defects.

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[29] *Ryan v Great Lakes Council* (1999) 102 LGERA 123 at 227 [378] .

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64. Although different concepts inform the law of negligence, ordinarily there is a duty to warn only if there is a foreseeable risk that a person will be led to believe that something is safe when it is not. And if conduct by a corporation would have that consequence, it would seem inevitable that that conduct would be likely to mislead or deceive for the purposes of s 52(1) of the Act .

65. A somewhat different issue is raised by the defence provided by s 75AK(1)(c) to a claim for compensation under s 75AD for injury resulting from defective goods. At first instance, Mr Ryan's claim for compensation under s 75AD was dismissed because, in terms used in s 75AK (1)(c) , "the state of scientific or technical knowledge at the time when [the oysters] were supplied ... was not such as to enable [the] defect to be discovered" [30] . Once it was concluded that scientific or technical knowledge did not permit discovery that the oysters grown at Wallis Lake had been contaminated by the hepatitis A virus, a question then arose as to what, if any, action could have been taken to avoid a risk of injury to Mr Ryan. As Gummow and Hayne JJ point out, the only possible courses, over and above the precautions already taken, were to cease selling oysters grown at Wallis Lake or, which was likely to have the same effect, to warn as to their possible viral contamination.

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[30] *Ryan v Great Lakes Council* (1999) 102 LGERA 123 at 226-227 [377] .

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66. **Following paragraph cited by:**

Karpik v Carnival plc (The Ruby Princess) (29 July 2025) (Markovic, Sarah C Derrington and Jackson JJ)

A duty not to supply goods in circumstances where those goods are not inherently dangerous and neither science nor technology permits discovery of possible defects or dangers is not compatible with the notion that the law of negligence operates by imposing a duty to take

reasonable care to avoid a foreseeable risk of injury. Nor is a duty not to supply goods in those circumstances readily compatible with the terms of s 75AK(1)(c) of the Act .

67. McHUGH J. These appeals arise out of actions in the Federal Court of Australia in which Mr Ryan sued Graham Barclay Oysters Pty Ltd and Graham Barclay Distributors Pty Ltd, the State of New South Wales and the Great Lakes Council for damages for injury suffered when he ate contaminated oysters. The Federal Court found that Graham Barclay Oysters Pty Ltd had contravened ss 74B and 74D of the *Trade Practices Act* 1974 (Cth) [31] and that the Barclay companies breached the duty of care that they admittedly owed to Mr Ryan[32]. The Federal Court also held that the State of New South Wales [33] and the Great Lakes Council [34] had breached duties of care that each of them owed to Mr Ryan. Differently constituted majorities of the Full Court of the Federal Court [35] allowed an appeal by the Great Lakes Council but dismissed appeals by the State of New South Wales and the Barclay companies.

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[31] *Ryan v Great Lakes Council* (1999) 102 LGERA 123 at 224 [365]-[368], 226 [374]-[375] per Wilcox J.

[32] *Ryan v Great Lakes Council* (1999) 102 LGERA 123 at 220-221 [351]-[354] per Wilcox J.

[33] *Ryan v Great Lakes Council* (1999) 102 LGERA 123 at 217 [336], 218 [337] per Wilcox J.

[34] *Ryan v Great Lakes Council* (1999) 102 LGERA 123 at 208 [292], 209 [299] per Wilcox J.

[35] *Graham Barclay Oysters Pty Ltd v Ryan* (2000) 102 FCR 307.

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68. The issues in the appeal are whether the State or the Council owed a duty of care to Mr Ryan and whether the Barclay companies breached the duty of care that they admittedly owed to Mr Ryan. In my opinion, neither the State nor the Council owed a duty of care to Mr Ryan and the Barclay companies did not breach the duty of care they owed to him.

Factual background

69. In December 1996 and early January 1997, Mr Ryan and his family consumed oysters purchased from Barclay Distributors Pty Ltd. The oysters were grown in the Wallis Lake in New South Wales. In late January 1997, Mr Ryan began to feel unwell. Blood tests revealed that he was suffering from the hepatitis A virus ("HAV"). The Department of Health reported that notifications of HAV began to increase in the week commencing 20 January 1997, peaking on 3 February 1997. By 10 February 1997, the Department had established a link between those infected with HAV and the consumption of oysters grown in the Wallis Lake. A New South Wales government taskforce ultimately attributed 444 cases of HAV to the consumption of oysters grown in the Lake.

HAV and oysters

70. HAV is spread by the "faecal-oral route" it is contracted when humans ingest material contaminated with human faeces which contains the virus. It can only be transmitted through human faeces. HAV has an incubation period of between 15 and 50 days; most cases of infection occur within 30 days of contact. It is a resilient virus that can survive in the environment for periods of three months or longer.

71. Oysters are filter feeders, processing 10 to 20 litres of water per hour by sucking water in and excreting particles through the oyster's normal digestive processes. Some particles, including those that contain HAV, are retained while others are excreted. HAV does not attack oysters; ordinarily the virus is retained in the oyster's flesh. Viral contamination of the oyster is likely to be at a level of concentration that far exceeds the concentration of the virus in the water.

The geographic region

72. Wallis Lake is the largest oyster growing area in New South Wales. Although oysters have been grown in the Lake for nearly a century, there was no record of HAV contamination before the outbreak in late 1996. Occasionally, however, faecal contamination occurred in the Lake.

73. The catchment area of the Lake includes the major towns of Forster and Tuncurry, various smaller townships and homes built along the rivers and countryside but which are not part of any township. Sixty-five percent of the area of the Lake is within the boundaries of the Great Lakes Council. Faecal waste from septic tanks and treatment sites could escape at numerous points within the Lake's catchment area and enter the Lake through storm water drains. During the period 1989-1993, the Council occasionally detected faecal contamination when testing water in the Lake. It did no testing in 1996.

74. Faecal waste was more likely to enter the Lake after periods of heavy rainfall. Between 23 and 25 November 1996 shortly before the HAV outbreak occurred heavy rain fell in the Lake catchment area.

Methods of avoiding oyster contamination

75. Since 1983, health regulations required oysters grown in New South Wales to be depurated for a period of at least 36 hours to avoid contamination. Under the depuration process the oysters are placed in tanks of clean and disinfected estuarine water to which ultra-violet light is applied to destroy viruses and bacteria in the water. However, the ultra-violet light does not destroy viruses unless it contacts them. Expert evidence established that while depuration, carefully performed, provides satisfactory results, shellfish can retain viruses after depuration when they are taken from heavily polluted waters. Polymerise chain reaction ("PCR") testing constitutes the only effective method of detecting HAV in oysters. In November 1996, however, that method was still in the research stage. Only a limited number of laboratories could carry out the tests. Moreover, PCR testing was very expensive, destroyed the oyster, and frequently returned false negatives.

76. Following heavy rain known as a "fresh" the practice of the industry was to suspend harvesting until the water had cleared. In accordance with this practice, Graham Barclay Oysters Pty Ltd did not harvest oysters between 23 and 27 November 1996. On 11 February

1997, when the Barclay companies became aware of the HAV outbreak, they ceased harvesting and recalled oysters they had sent to distributors and retailers. On 14 February 1997, all Wallis Lake oyster growers voluntarily ceased harvesting. The Barclay companies did not resume harvesting until the 1997-98 season.

77. Oyster flesh tests revealed that faecal contamination was widely disbursed throughout the estuary. A sanitary survey was conducted to locate the sources of the pollution and to eliminate them. The faecal contamination emanated from multiple points, the vast majority being land-based sources.

Liability of public authorities the Council and the State

78. **Following paragraph cited by:**

State of New South Wales v Cullen (20 December 2024) (Gleeson, White and Kirk JJA)
FRM17 v Minister for Home Affairs (28 August 2019) (Kenny, Robertson and Griffiths JJ)
Dansar Pty Ltd v Byron Shire Council (27 October 2014) (Macfarlan, Meagher and Leeming JJA)
Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management (04 April 2012) (McLure P, Pullin JA, Buss JA)
Precision Products (NSW) Pty Ltd v Hawkesbury City Council (31 October 2008) (Allsop P; Beazley JA ; McColl JA)
Newcastle City Council v Shortland Management Services (18 June 2003) (Spigelman CJ, Mason P and Sheller JA)

Crimmins v Stevedoring Industry Finance Committee (1999) 200 CLR 1 at [27] ; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 77 ALJR 183 at [78] applied. *Hornsby Shire Council v Porter* (1990) 19 NSWLR 717 referred to.

Newcastle City Council v Shortland Management Services (18 June 2003) (Spigelman CJ, Mason P and Sheller JA)

A public body invested with a discretionary statutory power may be in breach of a common law duty of care if it fails to exercise the power for the benefit of an individual or class of individuals. In these cases, failure to exercise the power given constitutes actionable negligence that sounds in damages [36] . In determining whether a public authority has breached a common law duty by failing to exercise a statutory power, it is essential to examine the words and policy of the legislation [37] . That is because the legislation may indicate that the legislature has legislated to cover the field and excluded all common law duties of care [38] . In other cases, the imposition of a common law duty may be inconsistent with or undermine the effectiveness of the duties imposed by the statute [39] . In some cases, the circumstances of the case for example, active intervention by the authority or reliance by the plaintiff may establish a duty of care. But the legislation may give the authority such a wide discretion to exercise the power in question that the tribunal of fact cannot find that the failure to exercise the power constituted a breach of the duty.

[36] ***Sutherland Shire Council v Heyman*** (1985) 157 CLR 424; *Pyrenees Shire Council v Day* (1998) 192 CLR 330; *Romeo v Conservation Commission (NT)* (1998) 192 CLR 431; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1; *Brodie v Singleton Shire Council* (2001) 206 CLR 512.

[37] ***Pyrenees Shire Council v Day*** (1998) 192 CLR 330 at 377 [126] per Gummow J; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 19 [27] per Gaudron J, 59 [160] per Gummow J, 72 [203] per Kirby J; *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 540 [56] per Gaudron, McHugh and Gummow JJ. See also *Stovin v Wise* [1996] AC 923 at 934 per Lord Nicholls of Birkenhead, Lord Slynn of Hadley agreeing, 952 per Lord Hoffmann, Lord Goff of Chieveley and Lord Jauncey of Tullichettle agreeing.

[38] *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 18-19 [26]-[27] per Gaudron J; *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 at 297-298 per Cooke P.

[39] *Sullivan v Moody* (2001) 75 ALJR 1570; 183 ALR 404; *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 at 275-276 per Richardson P, Thomas and Keith JJ, Henry J agreeing.

79. Legislatures often vest discretionary powers in public authorities for the specific purpose of protecting the community. Some powers may be vested in the authorities for the protection of a specific class of persons who may be exposed to risks of harm that they are powerless to avoid and sometimes unable to identify. But the legislature has made these powers exercisable at the discretion of the authorities, and the common law does not seek to convert the statutory discretion into a positive common law duty to exercise it for the benefit of the public or one of its members. This is so even in those cases where *mandamus* will lie to compel the performance of the public duty to give proper consideration to whether a public authority should exercise a power [40] . *Mandamus* lies for breach of a duty owed to the public. Any person with a sufficient interest in the performance of the duty may bring an action for *mandamus* requiring that the public authority comply with the conduct that is the subject of the duty. But common law duties are owed to individuals. Unless the proper inference from the statute is that an individual has "a personal right to the due observance of the conduct, and consequently a personal right to sue for damages if he be injured by a contravention" [41] , breach of the statutory duty does not sound in damages.

[40] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 465 per Mason J; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 35 [82] per McHugh J.

[41] *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397 at 404 per Kitto J, Owen J agreeing.

80. **Following paragraph cited by:**

FRM17 v Minister for Home Affairs (28 August 2019) (Kenny, Robertson and Griffiths JJ)
Drexel London (a firm) v Gove (Blackman) (21 October 2009) (McLure JA; Le Miere and Kenneth Martin JJ)
Kirkland-Veenstra v Stuart (29 February 2008) (Warren CJ, Maxwell P and Chernov JA)
Kirkland-Veenstra v Stuart (29 February 2008) (Warren CJ, Maxwell P and Chernov JA)

Despite this general rule, however, cases often arise where the failure to exercise a power will constitute a breach of a common law duty of care that a public authority independently owes to an individual. If a duty of care exists, discharging the duty may require the authority to exercise the power "to avert a danger to safety or to bring the danger to the knowledge of citizens otherwise at hazard from the danger" [42] . But it invites error to think that the common law has converted the discretionary statutory power into an affirmative duty to exercise the power. The common law cannot interfere with the exercise of the discretion and require the authority to enforce the power. To attempt to do so would bring the common law into conflict with the legislative intention that the exercise of the power be discretionary. The common law avoids the conflict by holding that in the circumstances the failure to exercise the power is a breach of a common law duty existing independently of the statute. The common law duty may or may not be an affirmative duty to take reasonable care to protect the plaintiff from harm. However, the existence of the statutory power does not create the common law duty although in some cases – particularly in reliance cases – it may be an important factor in finding that a duty of care was owed.

[42] *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 559 [102] per Gaudron, McHugh and Gummow JJ.

81. **Following paragraph cited by:**

Gary Nigel Roberts v Westpac Banking Corporation (13 December 2016) (Murrell CJ, Burns and Gilmour JJ)

> 58. A number of general observations as to legal principles may be made at the outset when considering a case such as this. Ordinarily the common law does not impose a duty of care on a person to protect another from the risk of harm unless that person has created the risk: *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54; 211 CLR 540 at [81] per

> McHugh J . A duty of care does not require the prevention of harm; it requires the taking of reasonable care: *Roads and Traffic Authority (NSW) v Dederer* [2007] HCA 42; 234 CLR 330 at [18] . Consideration of the factual matrix in which harm occurs is relevant to the determination of the existence and scope of the duty of care: *Vairy v Wyong Shire Council* [2005] HCA 62; 223 CLR 422 at [118] . However, whether there is such a duty is a different enquiry from the question whether there has been a breach. Furthermore, whether there is a duty is a question of law which is determined at a higher level of abstraction than the factual question of breach: *Wyong Shire Council* at [71] .

Electro Optic Systems Pty Ltd v State of New South Wales (31 October 2014) (Murrell CJ, Jagot and Katzmann JJ)
Electro Optic Systems Pty Ltd v State of New South Wales (31 October 2014) (Murrell CJ, Jagot and Katzmann JJ)
McKenna v Hunter & New England Local Health District (23 December 2013) (Beazley P, Macfarlan JA and Garling J)
State of New South Wales v Spearpoint (30 July 2009) (Allsop ACJ at 19 and 32; Beazley JA at 29; Ipp JA at 1)
New South Wales v West (05 September 2008) (Higgins CJ, Penfold and Graham JJ)
State of NSW v Tyszyk (26 May 2008) (Mason P ; Giles JA ; Campbell JA)

> 146 To the extent that there was a finding of duty of care in that case, it is in my view incorrectly decided. The reasoning does not draw the distinction clearly drawn in cases cited in paras [102], [104], [106]-[109] and [125] above between a duty owed by a police officer as a matter of public law, and a duty of care. It is at odds with the principles stated by McHugh J in ***Graham Barclay*** at [81] .

State of NSW v Tyszyk (26 May 2008) (Mason P ; Giles JA ; Campbell JA)
State of NSW v Tyszyk (26 May 2008) (Mason P ; Giles JA ; Campbell JA)
Kirkland-Veenstra v Stuart (29 February 2008) (Warren CJ, Maxwell P and Chernov JA)
Wagstaff v Haslam (26 February 2007) (Santow JA; Bryson JA; Basten JA)

> 38 In *Cole v South Tweed Heads Rugby League Football Club Ltd* (2004) 217 CLR 469 at [56] Gummow and Hayne JJ, by reference to a passage in the judgment of McHugh J in *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at [81] and [106] noted:
>
> > "His Honour also emphasised that the more specific the terms of the formulation of the duty of care, the greater the prospect of mixing the anterior question of law (the existence of the duty) with questions of fact in deciding whether a breach has occurred. On the other hand, the articulation of a duty of care at too high a level of abstraction provides an inadequate legal mean against which issues of fact may be determined."

Berrigan Shire Council v Ballerini (22 June 2005) (Callaway, Chernov and Nettle, Jj. A)

Ordinarily, the common law does not impose a duty of care on a person to protect another from the risk of harm unless that person has created the risk. And public authorities are in no different position. A public authority has no duty to take reasonable care to protect other persons merely because the legislature has invested it with a power whose exercise could prevent harm to those persons. Thus, in most cases, a public authority will not be in breach of a common law duty by failing to exercise a discretionary power that is vested in it for the benefit of the general public [43] . But if the authority has used its powers to intervene in a field of activity and increased the risk of harm to persons, it will ordinarily come under a duty of care [44] . So also, if it knows or ought to know that a member of the public relies on it to exercise its power to protect his or her interests, the common law may impose a duty of care on the authority [45] . If the authority comes under a duty of care, the failure of the authority to exercise a discretionary statutory power may give rise to a breach of the common law duty of care. But subject to these exceptions, ordinarily the common law will not impose an affirmative duty of care on an authority which would have the result that a failure to exercise a statutory power constitutes a breach of that duty.

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[43] *Stovin v Wise* [1996] 1 AC 923 at 957 per Lord Hoffmann, Lord Goff of Chieveley and Lord Jauncey of Tullichettle agreeing.

[44] *Knightley v Johns* [1982] 1 WLR 349 at 357-358 per Stephenson LJ, Dunn LJ and Sir David Cairns agreeing; [1982] 1 All ER 851 at 857-858]; *Marshall v Osmond* [19 83] QB 1034 at 1038 per Sir John Donaldson MR, Dillon LJ and Sir Denys Buckley agreeing; *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 460 per Mason J; *C apital & Counties Plc v Hampshire County Council* [1997] QB 1004 at 1031, 1042.

[45] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 461 per Mason J.

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82. **Following paragraph cited by:**

Kirkland-Veenstra v Stuart (29 February 2008) (Warren CJ, Maxwell P and Chernov JA)

48. McHugh J goes on to consider some of the situations where the law may or may not impose such a duty. [49] His Honour expressed the view that a public authority is no different from an individual in that the common law does not usually impose a duty to intervene, unless the authority has created or increased the risk. Furthermore:

In most cases, a public authority will not be in breach of a common law duty by failing to exercise a discretionary power that is vested in it for the benefit of the general public. [50]

However, his Honour continues:

> The likelihood of the common law imposing an affirmative duty of care whose content may require the exercise of a statutory power increases where *the power is invested to protect the community from a particular risk and the authority is aware of a specific risk to a specific individual*. If the legislature has invested the power for the purpose of protecting the community, it obviously intends that the power should be exercised in appropriate circumstances. [51]

It is by this reasoning that his Honour explains *Pyrenees Shire Council v Day*. *[52]*

via

[51] *Graham Barclay Oysters* (2002) 211 CLR 540 , [82] (emphasis added).

The likelihood of the common law imposing an affirmative duty of care whose content may require the exercise of a statutory power increases where the power is invested to protect the community from a particular risk and the authority is aware of a specific risk to a specific individual. If the legislature has invested the power for the purpose of protecting the community, it obviously intends that the power should be exercised in appropriate circumstances [46] . If the authority is aware of a situation that calls for the protection of an individual from a particular risk, the common law may impose a duty of care. In that situation, failure to exercise the power may constitute negligence. This seems the best explanation of *Pyrenees Shire Council v Day* [47] where the majority of the Court held that a Council which knew of a fire risk owed a duty of care and breached it by not exercising its powers. Kirby J said [48] :

> "The statutory power in question is not simply another of the multitude of powers conferred upon local authorities such as the Shire. It is a power addressed to the special risk of fire which, of its nature, can imperil identifiable life and property. Therefore, the nature of the power enlivens particular attention to its exercise and to the proper performance of a decision whether to give effect to it or not."

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[46] *Stovin v Wise* [1996] AC 923 at 953 per Lord Hoffmann, Lord Goff of Chieveley and Lord Jauncey of Tullichettle agreeing.

[47] (1998) 192 CLR 330 .

[48] (1998) 192 CLR 330 at 423 [252] .

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83. Similarly, in *Brodie v Singleton Shire Council* [49] , Gaudron, Gummow JJ and I said that:

> "on occasions, the powers vested by statute in a public authority may give it such a significant and special measure of control over the safety of the person or property of citizens as to impose upon the authority a duty of care. This may oblige the particular authority to exercise those powers to avert a danger to safety or to bring the danger to the knowledge of citizens otherwise at hazard from the danger. In this regard, the factor of control is of fundamental importance [50] ."

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[49] (2001) 206 CLR 512 at 559 [102] .

[50] *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 551-552 .

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84. **Following paragraph cited by:**

Minister for the Environment v Sharma (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)
Grills v Leighton Contractors Pty Ltd (27 March 2015) (Beazley P, Barrett and Gleeson JJA)
Electro Optic Systems Pty Ltd v State of New South Wales (31 October 2014) (Murrell CJ, Jagot and Katzmann JJ)
Electro Optic Systems Pty Ltd v State of New South Wales (31 October 2014) (Murrell CJ, Jagot and Katzmann JJ)
Howard Smith & Patrick Travel Pty Ltd v Comcare (03 July 2014) (Beazley P, Basten JA and Sackville AJA)
Howard Smith & Patrick Travel Pty Ltd v Comcare (03 July 2014) (Beazley P, Basten JA and Sackville AJA)
Pritchard v DJZ Constructions Pty Ltd (28 June 2012) (Bathurst CJ, Whealy and Barrett JJA)

Where a plaintiff claims that a public authority owed him or her an affirmative duty of care in a situation that has not yet been recognised by the common law, the court must examine a number of matters to determine whether the duty existed. I pointed to these matters in ***Crimmins v Stevedoring Industry Finance Committee*** [51] :

- Would a reasonable public authority reasonably foresee that its act or omission, including a failure to exercise its statutory powers, might result in injury to the plaintiff or his or her interests?

- Was the authority in a position of control and did it have the power to control the situation that brought about the harm to the injured person?

- Was the injured person or his or her interests vulnerable in the sense that the injured person could not reasonably be expected to adequately safeguard himself or herself or those interests from harm?

- Did the public authority know, or ought it to have known, of an existing risk of harm to the plaintiff or, in some cases, to a specific class of persons who included the plaintiff (rather than a risk to the general public)?

- Would the imposition of the duty of care impose liability with respect to the defendant's exercise of "core policy-making" or "quasi-legislative" functions?

- Is there any supervening policy reason that denies the existence of a duty of care?

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[51] (1999) 200 CLR 1 at 39 [93] . cf Todd, "Liability in Tort of Public Bodies", in Mullany & Linden (eds), *Torts Tomorrow – A Tribute to John Fleming* (1998) 36 at 55.

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85. If the first four of these questions are answered in the affirmative and the fifth and sixth questions in the negative, the court will ordinarily hold that the authority owed a duty of care to the plaintiff [52] . Conversely, if any of the first four questions are answered in the negative or either of the fifth and sixth questions are answered in the affirmative, ordinarily no duty of care will arise.

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[52] *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 39 [94] per McHugh J.

Reasonable foreseeability

86. **Following paragraph cited by:**

Minister for the Environment v Sharma (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)

The first question in these appeals is whether the Council or the State should have reasonably foreseen that a failure to exercise its statutory powers might result in harm to oyster consumers by reason of the faecal contamination of oysters. If that question is answered in favour of the Council or the State, no duty of care existed. It would then be unnecessary to

examine other features of the case to see if they pointed to a duty of care owed by the State or the Council to the plaintiff. In this and other cases, it is somewhat artificial to separate the issue of reasonable foreseeability from the issue whether the persons affected oyster consumers were so closely and directly affected by the conduct of the State or Council that either, or both, of them should have had the oyster consumers in mind when considering to act or not to act. However, in this case, the two issues seem sufficiently separate to warrant separate treatment.

87. **Following paragraph cited by:**

Caltex Refineries (Qld) Pty Ltd v Stavar (31 August 2009) (Allsop P at 1; Basten JA at 149; Simpson J at 242)
Wynne v Pilbeam (21 October 2005) (Steytler P, Wheeler JA, Pullin JA)
Richards v Mills (09 May 2003) (Anderson J, Parker J, McKechnie J)

In determining whether a defendant should have reasonably foreseen a risk of injury, it is not necessary that the defendant should have foreseen the precise risk of injury or how it occurred. It is sufficient that the risk is one of a class of risk that in a general way the defendant should have foreseen [53] . If the authority should have foreseen the class of risk, a further question arises as to whether the risk could be reasonably disregarded [54] . Reasonable foreseeability involves more than a question of fact. It involves a value judgment. Would a reasonable person in the position of the defendant not only have foreseen that his or her conduct including omissions gave rise to a risk of injury, but regarded it as sufficiently serious to consider what steps should be taken to avoid or reduce it?

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[53] ***Thompson v Bankstown Corporation*** (1953) 87 CLR 619 at 630 per Dixon CJ and Williams J; *Caledonian Collieries Ltd v Speirs* (1957) 97 CLR 202 at 222 per Dixon CJ, McTiernan, Kitto and Taylor JJ.

[54] *Tame v New South Wales* (2002) 76 ALJR 1348 at 1367 [108] per McHugh J; 191 ALR 449 at 475.

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88. On the evidence, both the State and the Council should have foreseen that the presence of faecal contamination gave rise to a risk of harm to the consumers of oysters. Oysters grown in waters, subject to the run-off of faecal matter, are subject to the risk of contamination from faecal pollution. That contamination carries with it the risk of HAV infection. Although depuration cleans oysters and makes them fit for human consumption, it does not guarantee the removal of contaminants. Both the State and the Council should reasonably have foreseen the risk of injury to the consumers of oysters from the faecal contamination of the Lake.

89. But would a reasonable public authority think that this risk of harm from faecal contamination was so negligible that it could be reasonably disregarded? In my opinion, although the risk of injury was very low, the consequences of faecal contamination were not so negligible that a

reasonable authority would disregard the risk to anyone with whom it had a direct and close relationship. It is true that, in the history of oyster harvesting in the Wallis Lake region, no outbreak of the kind that occurred in this case had happened. However, health authorities and the industry knew the injurious consequences that could flow from the faecal contamination of oysters. One consequence was HAV infection. The likely effect of a HAV outbreak on oyster consumers makes it impossible to conclude that a public authority such as the State or the Council could reasonably disregard the risks of contaminated oysters being made available for consumption. No reasonable public authority would regard the risk of HAV from contaminated oysters as so small and inconsequential that it could be ignored without inquiring into what reasonable steps could be taken to avoid that risk, if other factors pointed to the existence of a duty of care.

Control the power to control and knowledge of harm to the plaintiff

The State

90. Central to the plaintiff's case that the State owed him a duty of care was the proposition that it exercised managerial control over the Wallis Lake oyster industry. Where an individual has control of land or chattels or undertakes a task, courts will usually find that that individual has a duty to take reasonable care for the safety of those entering the land or affected by the use of the chattels or the execution of the task [55] . Often enough the courts will have little difficulty in holding that a public authority that exercises its power to carry out, or an authority that undertakes to carry out, a task has a duty to take care for the safety of those affected by the task [56] . But the position of the Executive government of a polity is different from the position of individuals and other public authorities.

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[55] *Hargrave v Goldman* (1963) 110 CLR 40 at 66-67 per Windeyer J; *Stovin v Wise* [1996] AC 923 at 944 per Lord Hoffmann, Lord Goff of Chieveley and Lord Jauncey of Tullichettle agreeing; *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 194 [11] per Gleeson CJ.

[56] *Pyrenees Shire Council v Day* (1998) 192 CLR 330; ***Crimmins v Stevedoring Industry Finance Committee*** (1999) 200 CLR 1 at 24-25 [43]-[46] per Gaudron J, 42-43 [104] per McHugh J, 61 [166] per Gummow J, 82 [227] per Kirby J, 104 [304]-[305] per Hayne J, 116 [357] per Callinan J; *Brodie v Singleton Shire* ***Council*** (2001) 206 CLR 512 at 558-559 [102] per Gaudron, McHugh and Gummow JJ.

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91. **Following paragraph cited by:**

Minister for the Environment v Sharma (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)

The powers and functions of the government of a polity are generally invested for the benefit of the general public. In the absence of a statutory direction, the mere existence of such a power in that government imposes no duty to exercise it for the protection of others. In that respect, its situation is analogous to a private citizen who, absent special circumstances, has no duty to take affirmative action to protect another person from harm [57] . Nor does the bare fact that the Executive government has exercised its powers from time to time create any duty to exercise its powers. Such exercises of power do not constitute "control" of an activity in the sense that that expression is used in the law of torts. They are merely particular exercises of powers that were invested in the Executive government for the benefit of the general public to be exercised at the discretion of the Executive government. Unless a particular exercise of power has increased the risk of harm to an individual, the Executive government of a polity does not ordinarily owe any common law duty to take reasonable care as to when and how it exercises its powers. No doubt circumstances may arise where conduct of the government, short of increasing a risk of harm, creates a duty of care. But such cases are less likely to arise than in the case of other public authorities. In particular, knowledge of specific risks of harm or the exercise of powers in particular situations is less likely to be a factor in creating a duty than in the case of an ordinary public authority. This is because the powers and functions of the Executive government are conferred for the benefit of the public generally and not for the benefit of individuals.

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[57] *Hargrave v Goldman* (1963) 110 CLR 40 at 66 per Windeyer J; ***Stovin v Wise*** [1996] AC 923 at 943-944 per Lord Hoffmann, Lord Goff of Chieveley and Lord Jauncey of Tullichettle agreeing.

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92. The learned trial judge nevertheless held that the State owed a duty of care to oyster consumers [58] . This duty arose from the State's "control" of the oyster industry. His Honour pointed to the following matters as indicating that the State "controlled" oyster growing in the Lake [59] :

"(a) the State owned, and had powers of control over, the lake;

(b) through the Department of Fisheries, it established, and supervised the operations of, a mosaic of oyster leases;

(c) through the Department of Fisheries, it issued, and enforced the provisions of, aquaculture permits;

(d) through the Department of Health, the State supervised the depuration process, including the nature and location of water intake points and the design, construction and maintenance of depuration tanks and ultra-violet facilities;

(e) through the EPA, the State had powers under the *Clean Waters Act* to remove, disperse, destroy or mitigate pollution of waters (s 27) and to carry out inspections and investigations of premises (s 29);

(f) through a number of agencies, the State was a participant in the Wallis Lake estuary management committee, one of whose objectives was to prepare a

management plan designed 'to sustain a healthy, productive and attractive estuary'; and, most importantly,

(g) through the Minister for Fisheries, it had the power at any time, to prohibit the taking of oysters from the lake."

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[58] *Ryan v Great Lakes Council* (1999) 102 LGERA 123 at 217 [336] .

[59] *Ryan v Great Lakes Council* (1999) 102 LGERA 127 at 216 [332] .

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93. But these matters mean no more than that the Executive government of the State was exercising or could exercise various powers given to it by its legislature. They do not constitute "control" of the industry in any relevant sense.

94. The judgment of Gummow and Hayne JJ refers to the relevant legislation under which the Executive acted or could act [60] . In a political sense and for public law purposes, this legislation enabled the State to supervise and manage all fisheries in New South Wales and to control fisheries through the issuing of leases. However, supervision, management or control in this sense or for this purpose is different from the sorts of control that, in other cases concerning public authorities, have caused courts to hold that a duty of care existed. In *Brodie* , the legislation empowered the Council to design or construct roads and to carry out works or repairs upon them, powers that councils had frequently used. In those cases, councils had complete control over the state of the roads. They also had power to attend to any defects that would expose road users to injury. It was this combination of power, direct control and the undertaking of functions in accordance with their powers that gave rise to a duty of care. In *Cr immins* , the object of the powers vested in the Authority was to secure the expeditious, safe and efficient performance of stevedoring operations. The Authority could make whatever orders it saw fit including the regulation of stevedoring operations to encourage safe working conditions. The Authority had power to bring proceedings against any employer who did not comply with the provisions requiring safe working practices. But most important of all, the Authority had used its powers to direct waterside workers to places of work that contained reasonably foreseeable risks of injury to the workers. This last point alone was sufficient to create a duty of care although the case was not conducted on that basis. I do not regard *Pyrene es* as a "control" case. Rather it is a case where the Council came under a duty of care because it knew of the risk of harm to specific individuals, it had power to take steps to eliminate the risk and importantly, at an earlier stage, had given directions to eliminate the risk.

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[60] [166]- [173], [177]- [180].

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95. In my opinion, the State had no relationship with the consumers of oysters that imposed on the State an affirmative duty to protect those consumers from harm created by the growers and

distributors of oysters. That is so, even though the State ought to have reasonably foreseen that, unless it acted, oyster consumers might suffer harm. Knowledge or imputed knowledge that harm may result from a failure to take affirmative action is not itself sufficient to create an affirmative duty of care.

The Council

96. The *Local Government Act* 1993 (NSW) granted the Council a wide array of powers to control pollution. Nevertheless, the statutory powers of the Council gave it less "control" over the Wallis Lake oyster industry than the "control" that the State had over the industry. Indeed, the Council, unlike the State, had no specific powers or functions in respect of oysters or the oyster industry. Nor did the fact that the Council had monitored the water quality of the Lake from 1989 to 1993 constitute "control" of those waters for the purposes of this branch of the law. The monitoring was carried out in the exercise of discretionary powers. It was for the Council to decide if and when it should monitor the Lake. Its monitoring created no relationship with oyster consumers such that the failure to continue monitoring was a breach of a common law duty of care. The Council had no control over the industry in any relevant sense.

97. However, the learned trial judge found [61] that the Council owed a duty of care to Mr Ryan because it knew of the risk of harm from faecal pollution and it had the power to deal with the pollution problem. As formulated by his Honour, the Council owed a duty of care to oyster consumers to take reasonable steps to minimise human faecal contamination of Wallis Lake. His Honour pointed to a number of matters within the knowledge of the Council that in his view created the duty. They included [62] :

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[61] *Ryan v Great Lakes Council* (1999) 102 LGERA 123 at 209 [297]-[298] .

[62] *Ryan v Great Lakes Council* (1999) 102 LGERA 123 at 208 [291] .

- Wallis Lake was used for growing oysters for human consumption;
- the catchment area contained many potential sources for contaminating the Lake with human faecal material;
- the HAV virus is commonly transmitted in the faeces of infected persons;
- the HAV virus is capable of surviving for long periods in estuarine waters;
- the HAV virus may concentrate in oysters;
- no procedure (such as depuration or testing) can prevent HAV contaminated oysters reaching the public; and

- the HAV virus can cause serious illness.

His Honour also referred to the Council having extensive statutory powers to control the sources of pollution in the catchment area.

98. However, a public authority does not come under an affirmative duty of care merely because the authority knows that unless it acts an individual will suffer harm [63] . Nor is the present case like *Pyrenees* where the Council knew of a risk of harm to certain individuals from a specific problem.

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[63] ***Sutherland Shire Council v Heyman*** (1985) 157 CLR 424.

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99. **Following paragraph cited by:**

Minister for the Environment v Sharma (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)

851. In *Graham Barclay Oysters* at [99] , McHugh J stated –

> … no duty of care can arise unless the relationship between the parties is one of neighbourhood in Lord Atkin's sense as stated in *Donoghue v Stevenson* . To create a duty, the relationship between the public authority and persons affected by the conduct of the authority must be "so closely and directly affected by [its] act [or omission] that [it] ought reasonably to have them in contemplation as being so affected" when it directs its mind to the relevant conduct in question.
>
> [Footnote omitted.]

Precision Products (NSW) Pty Ltd v Hawkesbury City Council (31 October 2008) (Allsop P; Beazley JA ; McColl JA)
ACQ Pty Ltd v Cook (16 July 2008) (Beazley JA at 1; Giles JA at 2; Campbell JA at 3)
Talbot & Olivier (A Firm) v Witcombe (26 May 2006) (Steytler P)

In my opinion, the learned trial judge erred in finding that the Council owed any duty of care to Mr Ryan. There was simply no relationship between the Council and oyster consumers sufficient to create a duty of care. This Court no longer sees proximity as the criterion of a duty of care. But no duty of care can arise unless the relationship between the parties is one of neighbourhood in Lord Atkin's sense as stated in *Donoghue v Stevenson* [64] . To create a duty, the relationship between the public authority and persons affected by the conduct of the authority must be "so closely and directly affected by [its] act [or omission] that [it] ought reasonably to have them in contemplation as being so affected" [65] when it directs its mind to the relevant conduct in question. In considering whether it should exercise its powers over

pollution, the Council was no more concerned with oyster consumers than any other section of the public or individual. There was no close and direct relationship between oyster consumers and the Council such that it had a duty to take care for the safety of each and every one of them. In that respect, the Council stood in a different position from that of the Barclay companies who had a direct relationship with the consumers of their product. Here there was nothing to suggest that the relationship between the Council and the consumers of Wallis Lake oysters imposed on the Council an affirmative duty to take reasonable care to protect those consumers from harm caused by eating those oysters.

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[64] [1932] AC 562 at 580.

[65] [1932] AC 562 at 580.

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100. Accordingly, the Full Court did not err when it upheld the Council's appeal against the trial judge's finding that the Council owed Mr Ryan a duty of care.

The liability of the growers

101. The Barclay companies accepted that they owed oyster consumers a duty of care to ensure that the oysters were safe for human consumption. The issues in relation to the Barclay companies related to the scope of the duty of care that they owed to oyster consumers and whether there was a breach of that duty.

102. At all material times, Mr Barclay knew that potential sources of viral pollution existed in Wallis Lake, that depuration was not adequate to remove viruses completely and that E-coli oyster meat testing would not necessarily reveal the existence of viruses. On this evidence, the learned trial judge held [66] that a prudent oyster grower needed to do more than depurate and rely on E-coli flesh tests because those steps provided insufficient protection against a known danger. His Honour said that the only real protection to consumers was to prevent viral contamination from occurring and the Barclay companies were obliged to take the steps reasonably open to it to obtain a virus-free growing environment. Failing this, the companies had to refrain from selling oysters unless they contained a warning about the risks of consumption.

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[66] *Ryan v Great Lakes Council* (1999) 102 LGERA 123 at 221 [351] .

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103. His Honour saw the carrying out of a survey of sanitary sources as one way of reducing the risk of a contaminated environment. His Honour recognised that any sanitary survey would require State or local government involvement. But he said that, given that the Barclay companies produced a product that put consumers at risk, they could not say that the making of a sanitary survey was someone else's responsibility. The trial judge said that neither the Barclay companies nor any of the committees with which they were associated had attempted

to procure any governmental involvement in making a survey [67] . His Honour concluded [68] that in selling oysters, grown in waters known to be open to possibly undetectable viral contamination, and without any warning as to this danger, the Barclay companies had breached the duty of care they owed to oyster consumers.

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[67] *Ryan v Great Lakes Council* (1999) 102 LGERA 123 at 221 [352]-[353] .

[68] *Ryan v Great Lakes Council* (1999) 102 LGERA 123 at 221-222 [354] .

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104. In the Full Court, Lee and Kiefel JJ formulated the duty differently from the trial judge but they dismissed the Barclay companies' appeal. Lee J said [69] the content of the duty required the Barclay companies to refrain from harvesting and selling oysters from the Lake when conditions had arisen which they knew had increased the risk of oyster contamination. Until the Barclay companies had taken the necessary steps to show that the resumption of oyster harvesting was safe, sales of oysters should have been halted. His Honour said that, if the trial judge had intended to limit the scope of the duty to the provision of notice to consumers of the nature of the risk at the time of sale, his statement of the duty was inadequate. Kiefel J found [70] that the duty required the Barclay companies to refrain from selling oysters for human consumption until a "sufficient period" had elapsed for the risk of contamination to be regarded as acceptable or testing indicated this to be so.

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[69] *Graham Barclay Oysters Pty Ltd v Ryan* (2000) 102 FCR 307 at 330 [68] .

[70] *Graham Barclay Oysters Pty Ltd v Ryan* (2000) 102 FCR 307 at 461 [608] .

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105. Lindgren J would have allowed the Barclay companies' appeal. His Honour referred to the fact that no previous outbreak of health problems from the consumption of Wallis Lake oysters had occurred. And Mr Barclay did not know "of the existence of an actual problem as distinct from potential sources of faecal contamination of the Lake". Accordingly, the Barclay companies' duty of care did not reasonably require them to take steps to ensure that the Lake was free from contamination or to cease their operations until they could be "completely assured" that they were providing an uncontaminated product [71] .

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[71] *Graham Barclay Oysters Pty Ltd v Ryan* (2000) 102 FCR 307 at 439 [503] .

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106. **Following paragraph cited by:**

Amaca Pty Ltd v Werfel (21 December 2020) (Kourakis CJ; Nicholson and Livesey JJ)
Swift v Wearing-Smith (10 March 2016) (Meagher, Hoeben and Simpson JJA)
WB Jones Staircase & Handrail Pty Ltd v Richardson & Ors (17 April 2014) (Beazley P, Hoeben and Leeming JJA)
BHP Billiton Ltd v Hamilton (15 August 2013) (Kourakis CJ; Blue and Stanley JJ)
Amaba Pty Ltd v Booth (10 December 2010) (Beazley, Giles and Basten JJA)
Western Districts Developments Pty Ltd v Baulkham Hills Shire Council (18 September 2009) (Giles and Campbell JJA, Preston CJ of LEC)
Caltex Refineries (Qld) Pty Ltd v Stavar (31 August 2009) (Allsop P at 1; Basten JA at 149; Simpson J at 242)
Amaca Pty Ltd v AB & P Constructions Pty Ltd (29 August 2007) (Giles JA; Ipp JA ; Basten JA)
Sheather v Country Energy (24 July 2007) (Hodgson JA; Ipp JA; Tobias JA)
McPherson's Ltd v Eaton (16 December 2005) (Mason P, Hodgson and Ipp JJA)
Sutherland Shire Council v Henshaw (10 December 2004) (Sheller, Hodgson and Bryson JJA)
Temora Shire Council v Stein (21 July 2004) (Giles and Hodgson JJA, Pearlman AJA)

The duty of care owed by a manufacturer or producer to a consumer is a duty to take reasonable care to avoid injury to the consumer [72] . To formulate the duty in more specific terms invites error because it is likely to mix a question of law (whether a duty existed) with a question of fact (whether a breach occurred). If the duty is formulated in specific terms, the issue on breach is whether the duty has been performed in accordance with the terms of the duty as formulated. But, as *Wyong Shire Council v Shirt* [73] shows, the question of breach is far more complex than an affirmative or negative answer to the question whether the defendant carried out the duty as formulated. It involves evaluating and weighing a number of competing considerations. Both the trial judge and the majority judges in the Full Court did not attempt to evaluate and weigh the competing considerations. In failing to do so, they erred in law. Because the facts are not in dispute, it is appropriate for this Court to determine the question of breach.

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[72] ***Donoghue v Stevenson*** [1932] AC 562 at 599 per Lord Atkin.

[73] (1980) 146 CLR 40 at 47-48 per Mason J, Stephen and Aickin JJ agreeing.

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107. As I have pointed out, the risk of injury from contaminated oysters was reasonably foreseeable to the State and the Council. The risk was also reasonably foreseeable by the Barclay companies. That they knew of the risk and consequences of faecal contamination appears from the facts that Mr Barclay was aware of potential sources of faecal contamination around the Lake, that he knew of Professor Brown's reports about the potential pollution of the Lake as at August 1994, that they ceased harvesting immediately after the heavy rainfall in November 1996 and they used salinity tests after the rainfall in addition to the usual practice of depuration. So the critical question is what would be the reasonable producer's response to

this risk? As Mason J pointed out in *Shirt* [74] , the reasonable producer would consider the magnitude of the risk of contamination, the degree of probability that such contamination might occur and cause harm to individuals and the expense, difficulty and inconvenience to the Barclay companies of taking the suggested alleviating action.

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[74] (1980) 146 CLR 40 at 47-48 .

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108. The Barclay companies conceded that it was not far-fetched or fanciful to think that oyster consumers could contract a viral disease such as HAV as the result of a "fresh". However, the evidence indicated that the rainfall and resultant fresh in November 1996 was no different to hundreds of others that had occurred for nearly a century. None of them had resulted in an outbreak of viral disease. Accordingly, although the magnitude of the risk was great, the probability of it eventuating was very low.

109. The response of the Barclay companies was to cease harvesting during and immediately after the rainfall in November 1996. They resumed harvesting when they observed the water was clear, salinity tests showed that the fresh was spent and oyster-flesh tests for the E-coli bacteria were within normal limits. In addition, harvested oysters were subjected to depuration for 36 hours. While depuration does not fully protect oyster consumers, in the then state of technology it was the most effective method for doing so. As I earlier indicated, in November 1996 PCR testing was still in the research stage, was expensive and destroyed the oyster tested.

110. Counsel for Mr Ryan contended that harvesting should not have resumed until a "sufficient period" had elapsed after the fresh to make the risk of contamination minimal. However, he accepted that the sufficient period would not elapse until the carrying out of a sanitary survey and the identification of the sources of pollution. The notion that the Barclay companies should have gone to the expense of doing these things and closing down its business in the meantime sounds like a counsel of perfection rather than a reasonable response to a risk of injury that had a low degree of probability of occurring. Be that as it may, the Barclay companies did not have the statutory powers of entry and inspection necessary to render a sanitary survey effective or the legal power to compel others to remedy the defects in sanitary systems that caused the Lake to become faecally contaminated.

111. Given the Barclay companies' lack of power to do these things, it had only two realistic alternatives to what it did. It could have closed down indefinitely until the "sufficient period" elapsed or it could give a warning notice. Given the very low degree of probability of the risk occurring, it was not unreasonable for the Barclay companies to resume harvesting when they did. No doubt the magnitude of the risk, if it eventuated, was high. But so are the magnitudes of many risks that reasonable people run because the alternative is too costly or too inconvenient. The magnitude of the risk of being involved in a motor car accident is very high, and the risk could be minimised, if not eliminated, by no car ever travelling at more than 10 kilometres per hour. But few would contend that travelling at 10 kilometres per hour was the only reasonable response to the risk of a motor car accident.

112. **Following paragraph cited by:**

McPherson's Ltd v Eaton (16 December 2005) (Mason P, Hodgson and Ipp JJA)

> 146 The judge found that, as an alternative to giving a warning, McPhersons should have withdrawn the millboard from sale. This is an extreme position that should only be taken after careful consideration of the effectiveness of a warning and a proper evaluation of the various factors mentioned in ***Shirt*** . See the discussion in ***Graham Barclay Oysters*** by McHugh J at [112] and Gummow and Hayne JJ at [202] . The judge did not embark on any such consideration and evaluation.

The question of reasonableness has to be looked at from the point of view of a reasonable producer considering the matter at the end of 1996 before the outbreak was notified. With great respect to the learned judges in the Federal Court, I do not think that any such producer would have contemplated shutting down his or her business for the "sufficient period". And I certainly do not think that any such producer would have thought it a reasonable response to sell the oysters accompanied by a warning of the danger of eating them. An oyster distributor would have little hope of selling oysters that carried a label stating that the oysters could be subject to viral contamination, for it would be a brave oyster consumer who purchased oysters with such a warning. More importantly, the risk was so low, that it was not unreasonable for the Barclay companies to sell their oysters without such a warning, a warning that would substantially harm, if it did not destroy, their sales.

113. In my opinion, the steps that the Barclay companies took were a reasonable response to a very low risk of viral contamination. Reasonable care did not require them to go to the expense of conducting sanitary surveys even if they could have done so effectively or shutting down their business indefinitely or labelling their oysters with a warning concerning the risk of viral contamination. In nearly a century, no previous outbreak had occurred. What they did was in accordance with industry practice and at the time was a reasonable response to the slight possibility that consumers would suffer harm because of viral contamination caused by the heavy rain that occurred in November 1996.

114. It follows that the appeal by Graham Barclay Distributors Pty Ltd must be allowed. However, Graham Barclay Oysters Pty Ltd did not appeal against the finding that it had breached ss 74B and 74D of the *Trade Practices Act* . Accordingly, the appeal by Graham Barclay Oysters Pty Ltd should be allowed only to the extent that it concerns the issue of negligence. Otherwise, the judgment in favour of Mr Ryan against that company should stand.

Orders

115. I would allow the appeals by the State and by Graham Barclay Distributors Pty Ltd with costs. I would dismiss the appeal by Mr Ryan with costs. I would allow the appeal by Graham Barclay Oysters Pty Ltd in so far as it concerns the issue of negligence but make no order as to costs.

GUMMOW AND HAYNE JJ.

The outline of the litigation

116. These three appeals are brought against a decision of the Full Court of the Federal Court [75] . They involve the alleged liability in negligence of particular growers and distributors of oysters, and relevant local and State governments, for harm suffered by consumers of oysters. The consumers contracted the hepatitis A virus as a consequence of eating oysters grown at Wallis Lake. This is located within the Shire of Great Lakes in New South Wales. The oysters were harvested from waters polluted by human faecal contamination. One consumer, Mr Grant Ryan, instituted a representative action in the Federal Court under Pt IVA of the *Federal Court of Australia Act* 1976 (Cth) , on behalf of himself and other consumers. Additional representative applicants were, by leave, subsequently joined to the proceeding [76] . The respondents were Graham Barclay Oysters Pty Ltd ("Barclay Oysters") and Graham Barclay Distributors Pty Ltd ("Barclay Distributors") (together "the Barclay companies") and other oyster growers and distributors, the Great Lakes Council ("the Council") and the State of New South Wales ("the State"). The Barclay companies, the Council and the State entered cross-claims against one another.

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[75] *Graham Barclay Oysters Pty Ltd v Ryan* (2000) 102 FCR 307.

[76] This followed the decision in *Ryan v Great Lakes Council* (1997) 78 FCR 309.

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117. At first instance, the Federal Court (Wilcox J) held that the Council, the State and the Barclay companies were each liable in negligence to Mr Ryan and (subject to proof of damage) to the other 184 representative group members[77]. The Full Court of the Federal Court (Lee, Lindgren and Kiefel JJ), by differently constituted majorities, upheld an appeal by the Council, and dismissed appeals by the State and the Barclay companies. In this Court, Mr Ryan seeks to restore the initial finding of negligence against the Council, while the Barclay companies and the State seek to have the negligence findings against them overturned. The appeal by the State should be allowed and that by Mr Ryan against the Council should be dismissed. In the appeal by the Barclay companies, the appeal by Barclay Distributors should be allowed. (The appeal by Barclay Oysters raises other considerations with respect to the proper outcome to which reference later will be made.) In general terms, this result follows that favoured by Lindgren J in the Full Court.

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[77] *Ryan v Great Lakes Council* (1999) 102 LGERA 123.

Oyster farming and hepatitis A

118. The hepatitis A virus multiplies, and is symptomatic, only in humans. It is contracted when humans ingest material contaminated by infected human faeces. When grown in contaminated water, oysters retain pathogens, including the hepatitis A virus, in concentrated form. Hepatitis A is capable of surviving in food and in fresh or salt water for prolonged periods. There was evidence before the primary judge that the virus may survive in the environment for months or even years, remaining a potential threat for the whole of that time. The taste and appearance of oysters is not affected by the presence of hepatitis A.

119. The oyster harvesting season at Wallis Lake ordinarily extends from midOctober until April. Barclay Oysters is the largest oyster grower at Wallis Lake. In the period 2225 November 1996, there was heavy rainfall in the region. The runoff caused by heavy rain brings with it an increased risk of viral contamination of oysters. For this reason, oyster growers generally desist from harvesting during or after heavy rainfall. It appears that the Barclay companies ceased harvesting oysters by 9.00 am on 23 November 1996. They did not recommence harvesting until 27 November, two days after the rainfall had finished.

120. Sample oysters tested by the Barclay companies between 26 November 1996 and 9 January 1997 tested negative for Ecoli bacteria. This suggested, but did not establish, that the samples were free from viral contamination. During this period, the Barclay companies continued to harvest oysters and to supply them to distributors for sale to the public. In accordance with their usual practice, the Barclay companies depurated the oysters for 36 hours after harvesting them. Depuration involves the submersion of oysters in clean estuarine water, disinfected by ultraviolet radiation. The primary judge found that this is a useful but not entirely effective means of ensuring the safety of shellfish.

121. On 21 December 1996, Mr Ryan's father purchased six dozen oysters from the Barclay companies. They were consumed by members of the Ryan family, including Mr Ryan, on Christmas Day. Mr Ryan's brother purchased a further 10 dozen oysters from the Barclay companies on 31 December, giving two dozen to Mr Ryan, who ate them a few nights later. On 30 January 1997, Mr Ryan began to feel unwell. On 3 February, he was diagnosed with hepatitis A.

122. Mr Ryan's diagnosis coincided with a general increase in hepatitis A notifications in New South Wales. By about 10 February 1997, the New South Wales Department of Health had established the probability of a connection between the hepatitis A epidemic and Wallis Lake oysters. On 11 February, Mr Barclay was informed of this connection by the Council and the Tamworth Area Health Service. The Barclay companies immediately recalled oysters from their customers. On 14 February 1997, the Wallis Lake growers decided to cease harvesting. The Barclay companies did not resume harvesting until the commencement of the 19971998 season.

123. Flesh tests conducted on oysters harvested between 24 December 1996 and 18 February 1997 established hepatitis A contamination in oysters from widely dispersed sites at Wallis Lake. It is common ground that the Wallis Lake oysters were the source of the hepatitis A outbreak which affected Mr Ryan and the other consumers. Oyster farming had been conducted at Wallis Lake since early in the twentieth century. However, there had been no previous recorded hepatitis A outbreak arising from the consumption of oysters harvested from the region. The significance of that circumstance will appear later in these reasons, particularly when dealing with the position of the Barclay companies.

The decision at trial

124. The trial judge accepted expert evidence that the pollution of the lake emanated from multiple sources. His Honour found that inadequately treated human effluent entered the oyster-growing areas of the lake primarily from land-based locations, although faecal discharge from one or more watercraft may have contributed to the problem. Much of the pollution came from stormwater drains and local sewerage facilities, including septic tanks in caravan parks, tourist facilities and private residences.

125. The Court dismissed claims by Mr Ryan that the Barclay companies were liable under s 74C (false descriptions) or s 75AD (defective goods causing injuries) of the *Trade Practices Act* 1974 (Cth) ("the Trade Practices Act") or had contravened s 52 (misleading or deceptive conduct) or the conditions implied by s 71 (merchantable quality and fitness for purpose) of that statute.

126. As noted, the primary judge held each of the Council, the State and the Barclay companies liable in negligence to the relevant consumers. His Honour further held that Mr Ryan was entitled to succeed in his personal claims against Barclay Oysters under s 74B (fitness for purpose) and s 74D (unmerchantable quality) of the Trade Practices Act . As the application of those provisions to the circumstances of the group members in the representative action required further findings of fact, the Court ordered that the portion of Mr Ryan's representative claim respecting ss 74B and 74D be reserved. Wilcox J awarded damages in Mr Ryan's personal claims at $30,000, apportioned equally between the three respondents.

127. Order 2 of the orders made by Wilcox J was as follows [78] :

> "it be declared that [Mr Ryan] is entitled to succeed against each of [the Council, the State and the Barclay companies] in respect of that portion of his representative claim that alleges negligence, but only on behalf of those group members who prove damage has been suffered by them".

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[78] (1999) 102 LGERA 123 at 231.

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128. **Following paragraph cited by:**

Mir Holdings Pty Ltd v Marina Square Retail Pty Ltd (11 November 2020) (Bathurst CJ, Bell P and Leeming JA)
I.C. Formwork Services Pty Limited v Moir (No 2) (04 September 2020) (Mossop, Loukas-Karlsson and Collier JJ)
Clarence City Council v Commonwealth of Australia (06 August 2020) (Jagot, Kerr and Anderson JJ)
Clarence City Council v Commonwealth of Australia (06 August 2020) (Jagot, Kerr and Anderson JJ)
Gordon v Lever (16 March 2018) (McColl and White JJA, Sackville AJA)

The Secretary of the Treasury (Corrective Services NSW) v Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales (19 December 2014) (Basten and Ward JJA, Rothman J)
Newmont Yandal Operations Pty Ltd v The J Aron Corporation and The Goldman Sachs Group Inc (10 August 2007) (Spigelman CJ at 1; Santow JA at 185; Handley AJA at 194)

It is to be noted that, the dismissal of claims based on s 74C, s 75AD, s 52 and s 71 of the Trade Practices Act apart, the only final judgment at trial was that for Mr Ryan on his personal claims. The remaining claims the subject of the group proceeding were not finally decided. Orders that were made in connection with those other claims were, therefore, interlocutory orders. It then is apparent that it was inappropriate to make the order in the terms set out above which were expressed in the form of a declaration. "Interlocutory declaration" is a form of order not known to the law yet that, in effect, is the nature of the order that was made, expressed, as it was, in declaratory terms [79] . The making of an order in that form in this case was not only wrong, its making may obscure some questions which the claims made in the proceeding inevitably present.

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[79] *International General Electric Company of New York Ltd v Commissioners of Customs and Excise* [1962] Ch 784 at 789790 ; *R v Inland Revenue Commissioners, Ex parte Rossminster Ltd* [1980] AC 952 at 1000-1001, 1014, 1027 ; *Magman International Pty Ltd v Westpac Banking Corporation* (1991) 32 FCR 1 at 15.

The Trade Practices Act and the general law

129. The detailed provisions in the Trade Practices Act which were relied upon in this litigation may raise a question respecting the significance to be attached to comprehensive federal statutory provisions upon a particular subject where it is sought, concurrently, to develop the Australian common law in that field. In *Perre v Apand Pty Ltd* [80] , reference was made to what in the United States is known as a "preemption" doctrine. This restricts the development of the common law of the several States of the Union, in fields such as unfair competition, where federal legislation, respecting such matters as patents, copyright and designs, makes provision. In Australia, s 109 of the Constitution deals only with conflict between federal and State laws. It remains to be seen whether some adaptation of the "preemption" doctrine may apply in the development of the Australian common law.

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[80] (1999) 198 CLR 180 at 247 [183] . See also *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 6263 [25] ; *The Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 532 [134] .

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130. The relationship between claims made for relief in respect of contravention of provisions of the Trade Practices Act and common law claims, whether in negligence, deceit or otherwise, has not been examined in detail in any decision of this Court and was not the subject of detailed argument in the present matters. In those circumstances, we proceed on the assumption (which was not challenged) that a plaintiff may frame alternative claims in negligence and under the provisions of the Trade Practices Act relied on here. But it is to be recognised that claims of the kind which were made in these matters, in negligence and under the Trade Practices Act , were alternative claims, and that, if a group member succeeds in establishing the elements of both claims, that group member must elect which remedy will be taken [81] . That election would have to be made no later than at the time of seeking final judgment in the action.

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[81] *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1 at 19.

The Full Court

131. A majority of the Full Court of the Federal Court (Lindgren J and Kiefel J, Lee J dissenting) allowed an appeal by the Council, holding that it owed no relevant duty of care to the oyster consumers. A differently constituted majority (Lee J and Kiefel J, Lindgren J dissenting) dismissed an appeal by the State, upholding the primary judge's conclusion respecting its liability in negligence to the consumers. By majority, the Full Court (Lee J and Kiefel J, Lindgren J dissenting) also upheld the primary judge's conclusion that the Barclay companies were liable in negligence to Mr Ryan. Further, the Full Court upheld the primary judge's conclusion with respect to the liability of Barclay Oysters under ss 74B and 74D of the Trade Practices Act . In the result, the Full Court reduced the damages awarded to Mr Ryan in his personal claims by $3,000 to correct what the parties agreed was an error in the calculation of the interest payable.

132. The grounds of the appeals to this Court are concerned only with the claims in negligence. It is convenient to consider the claims under three main headings: first, the position of the Council; secondly, the State; and, finally, the Barclay companies.

A. THE COUNCIL

The claims in the Federal Court against the Council

133. These have fluctuated in the course of the litigation. By their reamended statement of claim dated 21 April 1998, Mr Ryan and the other applicants submitted that the Council owed them (i) a duty regularly to monitor and test the waters, sediment and sea grasses of the Wallis Lake region for contamination and to monitor the impact of private landholders and the Council's sewerage systems on the water quality; (ii) at least in and after late November 1996, a duty to warn oyster farmers, wholesalers and retailers and the general public of the likely contamination of Wallis Lake and the likely unsafety of oysters harvested therefrom; (iii) a

duty to take steps, directly or indirectly, to cause oyster farmers in the Wallis Lake region to cease the harvesting or supply of oysters in and after November 1996; (iv) a duty to set up and supervise the Wallis Lake Estuary Management Committee to report on and implement steps in respect of the management of water quality in the Wallis Lake region; and (v) a duty not to contaminate Wallis Lake and to ensure that the lake's water quality was not compromised by the Council's systems for the management of sewage (including by ensuring the maintenance of sewerage facilities in a proper state of repair). As will appear, not all of these claims were ultimately pursued in this Court.

134. At trial, Wilcox J held that the Council owed a common law duty of care to oyster consumers to take those steps that were reasonably open to it to minimise human faecal contamination of the lake [82] . His Honour held that the Council had breached this duty by failing to take steps to identify pollution sources and by failing to take "whatever steps were necessary to ensure the problem was fixed", including through the exercise of certain statutory powers [83] . In particular, his Honour found that the "responsible reaction" to complaints which the Council was receiving in respect of malfunctioning septic tanks would have been to institute a "sanitary survey", especially of premises that drained to estuarine waters [84] . His Honour used the term "sanitary survey" to refer to a comprehensive inspection of the foreshores and tributaries of a waterway, complemented by a programme of water testing, to identify sources of pollution and determine their effect on the quality of the water. The trial judge found that, rather than instituting such a survey, the Council determined, in May 1996, to stop responding to complaints about malfunctioning septic tanks. Before this Court, the Council challenged that finding by Notice of Contention.

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[82] (1999) 102 LGERA 123 at 208-209 .

[83] (1999) 102 LGERA 123 at 210.

[84] (1999) 102 LGERA 123 at 210.

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135. On appeal, a majority of the Full Court of the Federal Court (Lindgren J and Kiefel J, Lee J dissenting) held that the Council owed no relevant duty of care to the consumers. This conclusion followed, in large part, from the difficulties the majority perceived in defining the practical content of the putative duty. Lindgren J referred to the difficulty in identifying any particular class to whom the propounded duty would be owed, the complexity of assessing breach and causation in respect of a duty to "minimise" contamination issuing from numerous unidentified pollution sources, the financial burden of discharging such a duty, and the indirectness of the relationship between the Council and oyster consumers [85] .

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[85] *Graham Barclay Oysters Pty Ltd v Ryan* (2000) 102 FCR 307 at 405-410 .

The statutory provisions

136. Before identifying the precise way in which the alleged duty was formulated by counsel for Mr Ryan in submissions to this Court, it is appropriate to describe the statutory provisions which empowered the Council to act in respect of the situation at Wallis Lake.

137. The Council is constituted as a body corporate under Ch 9 of the *Local Government Act* 1993 (NSW) ("the LG Act"). At the time of the events giving rise to this litigation, s 7 of that statute provided that the purposes of the LG Act included to provide the legal framework for an "environmentally responsible" system of local government (par (a)) and to require councils "to have regard to the protection of the environment in carrying out their responsibilities" (par (e)). Chapter 7 (ss 68185) of the LG Act was headed "What are the regulatory functions of councils?". Section 68 set out a wide range of activities which generally required prior council approval; these included broadly defined categories of conduct in respect of water supply, sewerage and stormwater drainage work and the management of waste. Failure to obtain a requisite approval, and the carrying out of an activity otherwise than in accordance with an approval, were rendered criminal offences by ss 626 and 627. Clause 45 of the Local Government (Water, Sewerage and Drainage) Regulation 1993 (NSW) , made under s 748 of the LG Act , relevantly directed the Council, in determining an application under s 68 of the L G Act for approval to carry out sewerage work, to have regard to, among other things, "the protection and promotion of public health" and "the protection of the environment".

138. Further, the Council was empowered by s 124 of the LG Act to order specified persons to do or to refrain from doing a range of things in prescribed circumstances. The orders contemplated by that provision included: (i) orders requiring owners, occupiers, managers or licensed contractors to bring sewerage systems into compliance with relevant standards or requirements set or made by or under the LG Act (Item 5); (ii) orders requiring owners or occupiers of land to do or to refrain from doing specified things to prevent or to repair environmental damage, in circumstances where work carried out on land had caused or was likely to cause drainage-related environmental damage (Item 11); (iii) orders against any person apparently engaged in promoting, conducting or carrying out an activity that constituted or was likely to constitute a threat to public health or safety (where the activity was not regulated or controlled under any other Act by a public authority) (Item 15); and (iv) orders requiring owners or occupiers of premises not to use or to permit the use of a human waste storage facility on premises after a specified date, where such an order was necessary to protect public health (Item 25).

139. Chapter 17 (ss 672-733) of the LG Act was entitled "Enforcement". Section 678(1) provided that, if a person failed to comply with an order given under Pt 2 of Ch 7 (which included s 124) , the Council could do all such things as were "necessary or convenient to give effect to the terms of the order, including the carrying out of any work required by the order". Any expenses incurred by the Council under s 678 were recoverable in any court of competent jurisdiction as a debt due to the Council by the person concerned (s 678(6)). Section 673 relevantly empowered the Council to bring proceedings in the Land and Environment Court for an order to remedy or to restrain a breach (or a threatened or apprehended breach) of an order under s 124 .

140. Chapter 8 (ss 186203) of the LG Act was headed "What ancillary functions does a council have?". Sections 191 and 192 conferred powers of entry, inspection and investigation on the Council for the purpose of enabling it to exercise its functions. Together, those provisions appear to have empowered the Council to conduct a "sanitary survey" of the type which the

primary judge held was necessary to discharge the duty of care which he identified. Pursuant to s 197, the Council could recover the reasonable costs of entry and inspection where, as a result of that inspection, the Council required any work to be carried out on or in the premises. Section 200 provided that the powers of entry and inspection were not exercisable in relation to residential premises except with the permission of the occupier, unless entry was necessary for the purpose of inspecting work being carried out under an approval or a search warrant had been obtained pursuant to s 201.

141. The Council was also empowered to deal with the pollution of waters by s 27 of the *Clean Waters Act* 1970 (NSW) ("the Clean Waters Act"). That provision stated in subs (1) that "[w]here any waters … are polluted by any person, any … local authority[[86]] may and shall, if directed to do so by the [Environment Protection Authority ('the EPA')], take such action as is necessary to remove, disperse, destroy or mitigate the pollution and may recover all costs and expenses incurred by it in connection with the removal, dispersal, destruction or mitigation of the pollution from that person." Subsection (2) provided that any such costs and expenses could be recovered as a debt in a court of competent jurisdiction. Section 29 conferred on "authorised officers" extensive powers of entry and inspection in relation to specified premises and provided that the wilful obstruction of an authorised officer, or a failure to comply with any requirement made by an authorised officer, were criminal offences. At least one employee of the Council, Mr Brooker, the Senior Environmental Health Officer, was an "authorised officer".

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[86] The Council fell within the definition of "local authority" in s 5 of the Clean Waters Act .

The submissions in this Court

142. Before this Court, counsel for Mr Ryan contended that the Council owed the oyster consumers a duty (i) to exercise the powers conferred by ss 191 and 192 of the LG Act to carry out a sanitary survey of Wallis Lake and its tributaries and (ii) after identifying sources of pollution, to exercise its powers under ss 124 and 678 of the LG Act or s 27 of the Clean Waters Act to remedy those problems.

143. Similarly, counsel for the Barclay companies (in this respect supporting the case made by Mr Ryan) sought to apply to the present appeal a description in the joint judgment in *Brodie v Singleton Shire Council* [87] of the duty owed by authorities of the type considered in that case. There, Gaudron, McHugh and Gummow JJ said [88] , in a passage with which Kirby J agreed [89] :

> "Authorities having statutory powers of the nature of those conferred by the [*Local Government Act* 1919 (NSW)] upon the present respondents to design or construct roads, or carry out works or repairs upon them, are obliged to take reasonable care that their exercise of or failure to exercise those powers does not create a foreseeable risk of harm to a class of persons (road users) which includes the plaintiff. Where the state of a roadway, whether from design, construction,

works or non-repair, poses a risk to that class of persons, then, to discharge its duty of care, an authority with power to remedy the risk is obliged to take reasonable steps by the exercise of its powers within a reasonable time to address the risk. If the risk be unknown to the authority or latent and only discoverable by inspection, then to discharge its duty of care an authority having power to inspect is obliged to take reasonable steps to ascertain the existence of latent dangers which might reasonably be suspected to exist."

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[87] (2001) 206 CLR 512 .

[88] (2001) 206 CLR 512 at 577 [150] .

[89] (2001) 206 CLR 512 at 605 [243] .

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144. By analogy to this reasoning, counsel for the Barclay companies envisaged a duty of care, owed by the Council to oyster consumers, to take reasonable care to identify and to remedy sources of pollution at Wallis Lake and its tributaries. Adopting and adapting the terms used in *Brodie* , the Barclay companies asserted a duty on the part of the Council to take reasonable care that the exercise of or failure to exercise its powers to carry out works and repairs on sewerage installations did not create a foreseeable risk of harm to a class of persons (consumers of produce from the lake, or, more narrowly, consumers of oysters) which included Mr Ryan and the other applicants in the Federal Court. Two factors in particular were said to justify a duty in these terms. These were that (i) the Council was the only party with actual knowledge of the progressive deterioration of the sewerage infrastructure which imperilled the purity of the waters of Wallis Lake, and (ii) the Council had extensive statutory powers to prevent or to redress that deterioration and to mitigate the effects of any pollution.

145. **Following paragraph cited by:**

Minister for the Environment v Sharma (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)

663. Generally, the Minister has made much play of her “many actors” point and the observation of Gummow and Hayne JJ in *Graham Barclay Oysters* (at [145]):

> …As will appear, the common law should be particularly hesitant to recognise such a duty where the relevant authority is empowered to regulate conduct relating to or impacting on a risk-laden field of endeavour which is populated by self-interested commercial actors who themselves possess some power to avert those risks.

Minister for the Environment v Sharma (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)

Electro Optic Systems Pty Ltd v State of New South Wales (31 October 2014) (Murrell CJ, Jagot and Katzmann JJ)
McPherson's Ltd v Eaton (16 December 2005) (Mason P, Hodgson and Ipp JJA)

The accuracy of these two observations may be accepted. However, the coexistence of knowledge of a risk of harm and power to avert or to minimise that harm does not, without more, give rise to a duty of care at common law. The totality of the relationship between the parties, not merely the foresight and capacity to act on the part of one of them, is the proper basis upon which a duty of care may be recognised. Were it otherwise, any recipient of statutory powers to licence, supervise or compel conduct in a given field, would, upon gaining foresight of some relevant risk, owe a duty of care to those ultimately threatened by that risk to act to prevent or minimise it. As will appear, the common law should be particularly hesitant to recognise such a duty where the relevant authority is empowered to regulate conduct relating to or impacting on a riskladen field of endeavour which is populated by self-interested commercial actors who themselves possess some power to avert those risks.

146. **Following paragraph cited by:**

Rock v Henderson; Rock v Henderson (No 2) (28 March 2025) (Kirk, Adamson and Ball JJA)
Minister for the Environment v Sharma (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)
Gunns Limited v State of Tasmania (21 September 2016) (Blow CJ and Tennent J)

50. Counsel for the appellant referred the Court to passages from the joint judgment of Gummow and Hayne JJ in *Graham Barclay Oysters* at [146] and parts of [147] and [149]. He unfortunately omitted a reference to comments in [145]. A combination of that paragraph, those parts of subsequent paragraphs to which counsel referred and [148] was as follows:

> "145 The accuracy of these two observations may be accepted. However, the co–existence of knowledge of a risk of harm and power to avert or to minimise that harm does not, without more, give rise to a duty of care at common law. The totality of the relationship between the parties, not merely the foresight and capacity to act on the part of one of them, is the proper basis upon which a duty of care may be recognised. Were it otherwise, any recipient of statutory powers to licence, supervise or compel conduct in a given field, would, upon gaining foresight of some relevant risk, owe a duty of care to those ultimately threatened by that risk to act to prevent or minimise it. As will appear, the common law should be particularly hesitant to recognise such a duty where the relevant authority is empowered to regulate conduct relating to or impacting on a risk–laden field of endeavour which is populated by self–interested commercial actors who themselves possess some power to avert those risks.

146 The existence or otherwise of a common law duty of care allegedly owed by a statutory authority turns on a close examination of the terms, scope and purpose of the relevant statutory regime. The question is whether that regime erects or facilitates a relationship between the authority and a class of persons that, in all the circumstances, displays sufficient characteristics answering the criteria for intervention by the tort of negligence.

147 Where the question posed above is answered in the affirmative, the common law imposes a duty in tort which operates alongside the rights, duties and liabilities created by statute. In some instances, a statutory regime may itself, in express terms or by necessary implication, exclude the concurrent operation of a duty at common law. …

148 However, contrary to submissions put on behalf of the Attorney–General for Western Australia (as an intervener in this Court), the discernment of an affirmative legislative intent that a common law duty exists, is not, and has never been, a necessary pre–condition to the recognition of such a duty. This may be contrasted with the action for breach of statutory duty, the doctrinal basis of which is identified as legislative intention.

149 An evaluation of whether a relationship between a statutory authority and a class of persons imports a common law duty of care is necessarily a multi–faceted inquiry. Each of the salient features of the relationship must be considered. The focus of analysis is the relevant legislation and the positions occupied by the parties on the facts as found at trial. It ordinarily will be necessary to consider the degree and nature of control exercised by the authority over the risk of harm that eventuated; the degree of vulnerability of those who depend on the proper exercise by the authority of its powers; and the consistency or otherwise of the asserted duty of care with the terms, scope and purpose of the relevant statute …" [Footnotes omitted.]

Counsel for the appellant pointed out that the observations above were made in the context of a failure to exercise a discretionary power which was open to be exercised on the facts.

Electro Optic Systems Pty Ltd v State of New South Wales (31 October 2014) (Murrell CJ, Jagot and Katzmann JJ)

216. NSW's second proposition was that the duty analysis made by Walmsey AJ in *Warragamba Winery Pty Ltd v State of New South Wales (No 9)* [2012] NSWSC 701 (***Warragamba Winery***) is correct. This proposition involved a number of elements.

(1) The case is novel. None of the decisions referred to by the plaintiffs involve a public fire fighting service found liable in negligence for fighting a fire.

(2) The principles relevant to the determination of the issue of when a duty of care is to be identified in a novel case are brought together in *Graham Barclay Oysters* .

(3) Ordinarily, the common law does not impose a duty on a person to protect another from a risk of harm unless the person has created the risk. Accordingly, the mere existence of a statutory scheme to empower an authority to protect the public from a particular harm does not by itself give rise to a duty of care (*Graham Barclay Oysters* at [81]).

(4) The primary judge found two instances of negligence (failing to fight the Baldy spot fire on the morning of 9 January 2003 and failing to clear and back-burn from the River). As there is no appeal from those findings, it is right to characterise the case as one involving a failure to act.

(5) Merely because it is foreseeable that harm may result if a public authority fails to exercise its powers, that does not by itself give rise to a duty of care (*Graham Barclay Oysters* at [145]). In *Sullivan* at [42] the Court said that:

> But the fact that it is foreseeable, in the sense of being a real and not far-fetched possibility, that a careless act or omission on the part of one person may cause harm to another does not mean that the first person is subject to a legal liability to compensate the second by way of damages for negligence if there is such carelessness, and harm results. If it were otherwise, at least two consequences would follow. First, the law would subject citizens to an intolerable burden of potential liability, and constrain their freedom of action in a gross manner. Secondly, the tort of negligence would subvert many other principles of law, and statutory provisions, which strike a balance of rights and obligations, duties and freedoms. A defendant will only be liable, in negligence, for failure to take reasonable care to prevent a certain kind of foreseeable harm to a plaintiff, in circumstances where the law imposes a duty to take such care.

(6) A duty of care does not require the prevention of harm; it requires the taking of reasonable care (*Roads and Traffic Authority (NSW) v Dederer* (2007) 234 CLR 330; [2007] HCA 42 (***Dederer***) at [18]).

(7) The statute that empowers the authority to act must be closely examined (*Graham Barclay Oysters* at [78] and [146]). The purpose is to decide whether the legislation establishes a relationship whereby a duty is owed to specific individuals, as opposed to the public at large (*Graham Barclay Oysters* at [146] and [149]).

(8) Of particular importance are: - (i) the degree and nature of control exercised by the authority over the risk of harm that eventuated, (ii) the degree of vulnerability of those who depend on the proper exercise by the authority of its powers, and (iii) the consistency of the asserted duty of care with the terms, scope and purpose of the relevant statute (*Graham Barclay Oysters* at [84] and [149]).

(9) Also relevant are the considerations of inconsistency of a duty of care with other obligations (*Sullivan* at [60]) and indeterminacy of potential liability (*Sullivan* at [61]).

Dansar Pty Ltd v Byron Shire Council (27 October 2014) (Macfarlan, Meagher and Leeming JJA)
Howard Smith & Patrick Travel Pty Ltd v Comcare (03 July 2014) (Beazley P, Basten JA and Sackville AJA)
McKenna v Hunter & New England Local Health District (23 December 2013) (Beazley P, Macfarlan JA and Garling J)

226. This is appropriate because the existence of a common law duty owed by a statutory authority (such as the Hospital), in the exercise of its statutory power, turns on an examination of the terms, scope and purpose of the relevant statutory regime: *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54; (2002) 211 CLR 540 at [146] per Gummow and Hayne JJ . Whilst this approach concerns the existence of a duty, it also affects the nature and content of a duty.

Australian Capital Territory v Crowley (17 December 2012) (Lander, Besanko and Katzmann JJ)
Western Districts Developments Pty Ltd v Baulkham Hills Shire Council (18 September 2009) (Giles and Campbell JJA, Preston CJ of LEC)
New South Wales v West (05 September 2008) (Higgins CJ, Penfold and Graham JJ)
New South Wales v West (05 September 2008) (Higgins CJ, Penfold and Graham JJ)
CGU Workers Compensation (NSW) Ltd v Garcia (10 August 2007) (Mason P; Hodgson JA; Santow JA)

The existence or otherwise of a common law duty of care allegedly owed by a statutory authority turns on a close examination of the terms, scope and purpose of the relevant statutory regime. The question is whether that regime erects or facilitates a relationship between the authority and a class of persons that, in all the circumstances, displays sufficient characteristics answering the criteria for intervention by the tort of negligence.

147. **Following paragraph cited by:**

Minister for the Environment v Sharma (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)

Where the question posed above is answered in the affirmative, the common law imposes a duty in tort which operates alongside the rights, duties and liabilities created by statute. In some instances, a statutory regime may itself, in express terms or by necessary implication, exclude the concurrent operation of a duty at common law. An example is provided by *Sulliva n v Moody* [90] . The Court there said [91] :

"The statutory scheme that formed the background to the activities of the present respondents was, relevantly, a scheme for the protection of children. It required the respondents to treat the interests of the children as paramount. Their professional or statutory responsibilities involved investigating and reporting upon, allegations that the children had suffered, and were under threat of, serious harm. It would be inconsistent with the proper and effective discharge of those responsibilities that they should be subjected to a legal duty, breach of which would sound in damages, to take care to protect persons who were suspected of being the sources of that harm."

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[90] (2001) 75 ALJR 1570; 183 ALR 404.

[91] (2001) 75 ALJR 1570 at 1580 [62]; 183 ALR 404 at 417.

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148. **Following paragraph cited by:**

State of New South Wales v Cullen (20 December 2024) (Gleeson, White and Kirk JJA)

However, contrary to submissions put on behalf of the Attorney-General for Western Australia (as an intervener in this Court), the discernment of an affirmative legislative intent that a common law duty exists, is not, and has never been, a necessary precondition to the recognition of such a duty. This may be contrasted with the action for breach of statutory duty, the doctrinal basis of which is identified as legislative intention [92] .

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[92] *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397 at 405 ; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 459-461 .

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149. **Following paragraph cited by:**

John XXIII College v SMA (29 June 2022) (Murrell CJ; Loukas-Karlsson J; McWilliam AJ)
Minister for the Environment v Sharma (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)

672. It is vulnerability in this narrower sense that is being considered, and is particularly relevant where a defendant has brought about or exacerbated the relevant risk or at the least been in a position to control the risk (*Grah*

am Barclay Oysters at [149] per Gummow and Hayne JJ and *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at [127] per McHugh J).

Minister for the Environment v Sharma (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)
Brocklands Pty Ltd v Tasmanian Networks Pty Ltd (15 June 2020) (Blow CJ, Estcourt and Pearce JJ)
Ibrahimi v Commonwealth of Australia (19 December 2018) (Meagher and Payne JJA, Simpson AJA)
Gunns Limited v State of Tasmania (21 September 2016) (Blow CJ and Tennent J)
Electro Optic Systems Pty Ltd v State of New South Wales (31 October 2014) (Murrell CJ, Jagot and Katzmann JJ)
Electro Optic Systems Pty Ltd v State of New South Wales (31 October 2014) (Murrell CJ, Jagot and Katzmann JJ)
Electro Optic Systems Pty Ltd v State of New South Wales (31 October 2014) (Murrell CJ, Jagot and Katzmann JJ)
Dansar Pty Ltd v Byron Shire Council (27 October 2014) (Macfarlan, Meagher and Leeming JJA)
McColley v Commonwealth of Australia (20 June 2014) (Murrell CJ, Refshauge, Penfold JJ)
McColley v Commonwealth of Australia (20 June 2014) (Murrell CJ, Refshauge, Penfold JJ)
Polar Aviation Pty Ltd v Civil Aviation Safety Authority (04 July 2012) (Perram, Dodds-Streeton and Griffiths JJ)

20. Kenny J concluded at [69] to [71] of *Polar (No 2)* :

> Because of the approach taken by his Honour, the *Repacholi* decision is most directly helpful in regard to the proposed negligence claims. After surveying the authorities, McKerracher J concluded (at [151]) that, although the claim was inadequately pleaded, “it [was] not possible to conclude that a claim in negligence [was] not open”. In reaching this conclusion, McKerracher J did not find it necessary to engage in a detailed analysis of the particular statutory functions alleged to have been performed without reasonable care. Rather, he relied on general principles, citing, inter alia, Mason J’s statement in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 458–9 ; 60 ALR 1 at 27 that “[i]t is now well settled that a public authority may be subject to a common law duty of care when it exercises a statutory power or performs a statutory duty”.
>
> Acknowledging that the inquiry was “multi-faceted” (at [145], quoting *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540; 194 ALR 337; [2002] HCA 54 at [149] per Gummow and Hayne JJ), his Honour was not prepared to conclude at the strike out stage that a common law cause of action against CASA for negligence in the exercise of its statutory duties was unavailable. Though McKerracher J’s discussion of the issue was limited by the material before him, he observed (at [146]) that “[t]he nature of the control exercised by CASA over the conduct of flight and air operations is substantial” and “the degree of vulnerability of those conducting operations under the auspices of the air operations regime

administered by CASA is significant", indicating that these considerations might support the existence of cause of action in negligence.

McKerracher J's conclusion that the applicants should be afforded a further opportunity to formulate a negligence claim against CASA was primarily based on the nature of the relationship between CASA and the air operators it regulates. These considerations were not particular to the facts in *Repacholi* and apply equally to the present case. Considering the low standard applicable on a leave application under s 47A , subject to matters mentioned immediately hereafter, I would not regard the applicants' negligence claim against CASA as patently untenable in the sense that the pleading does not disclose a legally recognised claim.

Victoria v Richards (12 May 2010) (Nettle and Redlich JJA and Hansen AJA)
Makawe Pty Ltd v Randwick City Council (15 December 2009) (Hodgson and Campbell JJA, Simpson J)

135 Reference was made in the submissions to **Becker** , at [20]-[21], per Giles JA, and **Graham Barclay Oysters Pty Ltd v Ryan** [2002] HCA 54; (2002) 211 CLR 540 (at [149]). Resort to the passages cited does not support the proposition that the approach taken by the trial judge was contrary to that required by either of those (or any other) cases. In **Graham Barclay Oysters** , at [149] , Gummow and Hayne JJ said:

"An evaluation of whether a relationship between a statutory authority and a class of persons imports a common law duty of care is necessarily a multi-faceted inquiry. Each of the salient features of the relationship must be considered."

Makawe Pty Ltd v Randwick City Council (15 December 2009) (Hodgson and Campbell JJA, Simpson J)
Kirkland-Veenstra v Stuart (29 February 2008) (Warren CJ, Maxwell P and Chernov JA)
Kirkland-Veenstra v Stuart (29 February 2008) (Warren CJ, Maxwell P and Chernov JA)
Sutherland Shire Council v Becker (12 December 2006) (Mason P; Giles JA; Bryson JA)

An evaluation of whether a relationship between a statutory authority and a class of persons imports a common law duty of care is necessarily a multi-faceted inquiry. Each of the salient features of the relationship must be considered. The focus of analysis is the relevant legislation and the positions occupied by the parties on the facts as found at trial [93] . It ordinarily will be necessary to consider the degree and nature of control exercised by the authority over the risk of harm that eventuated [94] ; the degree of vulnerability of those who depend on the proper exercise by the authority of its powers [95] ; and the consistency or otherwise of the asserted duty of care with the terms, scope and purpose of the relevant statute [96] . In particular categories of cases, some features will be of increased significance. For example, in cases of negligent misstatement, such as *Tepko Pty Ltd v Water Board* [97] ,

reasonable reliance by the plaintiff on the defendant authority ordinarily will be a significant factor in ascertaining any relevant duty of care.

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[93] *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 377 [126] .

[94] *Howard v Jarvis* (1958) 98 CLR 177 at 183 ; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 550552, 556-557 .

[95] *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 551 ; *Crim mins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 24-25 [44]-[46], 38-39 [91]-[93], 40-41 [100] .

[96] *Sullivan v Moody* (2001) 75 ALJR 1570 at 1580-1581 [55]-[62]; 183 ALR 404 at 416-417 .

[97] (2001) 206 CLR 1 at 1617 [47], 2324 [76] .

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150. **Following paragraph cited by:**

Karpik v Carnival plc (The Ruby Princess) (29 July 2025) (Markovic, Sarah C Derrington and Jackson JJ)
Minister for the Environment v Sharma (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)
State of New South Wales v Napier (13 December 2002)

> 17. The second element is control. Mason P emphasises the significance of the control exercised by the Appellants over the inmates. I agree with his Honour that this is a critical consideration in the present case. Indeed, as Gummow and Hayne JJ have recently said in *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54 at [150] :
>
> *"The factor of control is of fundamental importance in discerning a common law duty of care on the part of a public authority".*

The factor of control is of fundamental importance in discerning a common law duty of care on the part of a public authority [98] . It assumes particular significance in this appeal. This is because a form of control over the relevant risk of harm, which, as exemplified by *Agar v Hyde* [99] , is remote, in a legal and practical sense, does not suffice to found a duty of care.

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[98] *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 551-552 ; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 24-25 [43] -[46], 42-43 [104], 61 [166], 82 [227], 104 [304], 116 [357] ; *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 558559 [102] .

[99] (2000) 201 CLR 552 at 562 [16], 564 [21], 581-582 [81]-[83] .

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151. **Following paragraph cited by:**

Kirkland-Veenstra v Stuart (29 February 2008) (Warren CJ, Maxwell P and Chernov JA)

> 102. These issues of control and knowledge are particularly significant in this case. As Gummow and Hayne JJ said in *Graham Barclay Oysters*, the factor of control 'is of fundamental importance in discerning a common law duty of care on the part of a public authority'. [96] The nature and extent of the control can vary widely, as their Honours illustrated by reference to the decided cases. Of the situation in *Pyrenees* , their Honours said that
>
> > the Shire held a significant and special measure of control over the safety from fire of persons and property at the relevant premises. That degree of control was the touchstone of the Shire's duty to safeguard others from the risk of fire in circumstances where the Shire had entered upon the exercise of its statutory powers of fire prevention and it alone among the relevant parties knew of, and was responsible for, the continued existence of the risk of fire. [97]

via

[97] *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, [151] .

Kirkland-Veenstra v Stuart (29 February 2008) (Warren CJ, Maxwell P and Chernov JA)

In *Brodie* , the council exercised physical control over the condition of the roads which it was empowered by statute to maintain and which themselves constituted the direct source of harm to road users [100] . The council's measure of control over the safety of the person or property of citizens was "significant and exclusive" [101] . So, too, the fact of control over, and knowledge of, land or premises has been significant in identifying the duty of care owed to users of land or premises by a statutory authority which controls and manages that land or premises [102] . Again, in *Pyrenees Shire Council v Day* [103] , the Shire held a significant and special measure of control over the safety from fire of persons and property at the relevant

premises. That degree of control was the touchstone of the Shire's duty to safeguard others from the risk of fire in circumstances where the Shire had entered upon the exercise of its statutory powers of fire prevention and it alone among the relevant parties knew of, and was responsible for, the continued existence of the risk of fire [104] . It will be recalled that, in *Pyr enees* , the only other party with that knowledge was the former tenants. They had not communicated it to the subsequent tenants or adjoining occupiers, who were the relevant parties in this Court.

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[100] (2001) 206 CLR 512 at 558559 [102]-[103], 573574 [140] .

[101] (2001) 206 CLR 512 at 573574 [140] .

[102] See, eg, *Voli v Inglewood Shire Council* (1963) 110 CLR 74 at 89, 91-92 ; *Nagle v Rottnest Island Authority* (1993) 177 CLR 423 at 429-430 ; *Romeo v Conservation Commission (NT)* (1998) 192 CLR 431 at 453-454 [48]-[49], 487-488 [151]-[155] .

[103] (1998) 192 CLR 330 .

[104] (1998) 192 CLR 330 at 389 [168] .

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152. The Council in the present appeal, by contrast, exercised a much less significant degree of control over the risk of the harm that eventuated. At no stage did the Council exercise control, let alone significant or exclusive control, over the direct source of harm to consumers, that is, the oysters themselves. It may be that the predominantly land-based sources of pollution were all ultimately subject to Council control. That, however, is the start, not the end, of the inquiry. Control over some aspect of a relevant physical environment is unlikely to found a duty of care where the relevant harm results from the conduct of a third party beyond the defendant's control. *Modbury Triangle Shopping Centre Pty Ltd v Anzil* illustrates the point [105] . What is significant here is the extent of control which the Council had over the risk of contaminated oysters causing harm to the ultimate consumer; control in that sense is not established by noting the Council's powers in respect of some or most of the sources of faecal pollution.

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[105] (2000) 205 CLR 254 at 263-264 [18]-[21], 270 [43], 291-293 [108]-[113] .

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153. As Lindgren J observed in the Full Court, the relationship between the Council and the oyster consumers is indirect; it is mediated by intervening conduct on the part of others [106] . Betw een the Council on the one hand and the oyster consumers on the other, there stands, in the present case, an entire oyster-growing industry comprising numerous commercial enterprises, each of which, in pursuit of profit, engages in conduct that presents an inherent threat to public safety. That threat arises from the insusceptibility of oysters to effective and reliable tests to identify contamination of the type that eventuated here.

[106] (2000) 102 FCR 307 at 407.

154. In broad terms, the Council's statutory powers enabled it to monitor and, where necessary, to intervene in order to protect, the physical environment of areas under its administration. However, the conferral on a local authority of statutory powers in respect of activities occurring within its boundaries does not itself establish in that authority control over all risks of harm which may eventuate from the conduct therein of independent commercial enterprises. As the course of this litigation itself indicates, control over the safety of the Wallis Lake oysters for human consumption has been fragmented. The conduct of the Council did not "so closely and directly [affect]" oyster consumers so as to warrant the imposition of a duty of care owed by the former to the latter [107] . There were "too many intervening levels of decision-making" between the conduct of the Council and the harm suffered by the consumers [108] . As the trial judge noted, the Council had no direct responsibility for the operation of the oyster industry or the quality or safety of Wallis Lake oysters [109] . It did not control the process by which commercial oyster growers cultivated, harvested and supplied oysters, nor the times or locations at which they did so. The Council has not been given, by virtue of its statutory powers, such a significant and special measure of control over the risk of danger that ultimately injured the oyster consumers so as to impose upon it a duty of care the breach of which may sound in damages at the suit of any one or more of those consumers.

[107] cf *Agar v Hyde* (2000) 201 CLR 552 at 579 [70] .

[108] cf *Agar v Hyde* (2000) 201 CLR 552 at 581 [81] .

[109] (1999) 102 LGERA 123 at 208.

155. The Council owed no relevant duty of care to the consumers. Mr Ryan's appeal should be dismissed.

B. THE STATE

The claims in the Federal Court against the State

156. These claims also have fluctuated in the course of the litigation. By their reamended statement of claim dated 21 April 1998, Mr Ryan and the other applicants contended that the State, in its various manifestations, owed them a range of duties of care. The applicants asserted:

(i) a duty on the part of the Minister for Fisheries ("the Minister") at all material times on and after 13 January 1995 to determine forthwith (1) a New South Wales Shellfish Quality Assurance Program, pursuant to reg 12B of the Fisheries

Management (Aquaculture) Regulation 1995 (NSW) ("the Management Regulation") to which further reference will be made; the requisite programme was to include relevant local shellfish quality assurance programmes, and (2) a programme to ensure that shellfish were taken from estuarine waters to be sold for human consumption only if the shellfish met the quality standards specified in or under the programme and those waters met suitable environmental standards;

(ii) duties on the part of the New South Wales Shellfish Quality Assurance Committee ("the State Committee"), which was formed by the Minister under reg 12C of the Management Regulation , to supervise the administration of any State quality assurance programme, to advise the Minister with respect to any such State or local programmes, and to develop and implement public health and environmental education programmes for aquaculture farmers, including Wallis Lake oyster farmers;

(iii) a duty on the part of the Wallis Lake Shellfish Quality Assurance Committee, which also was formed by the Minister under reg 12C , to establish and administer a local shellfish quality assurance programme for the Wallis Lake region;

(iv) a duty on the part of the EPA [110] to take steps to ensure that the Council did not pollute the Wallis Lake region by its sewage treatment and depot facilities and that private land owners or users of the waters of the Wallis Lake region did not pollute the region, and a duty on the EPA to monitor in conjunction with the Council the quality of the water and environment in the region;

(v) duties on the part of the Director-General of the New South Wales Department of Health ("the Director-General") or the Minister for Health to ensure that (1) purification plant operators processing oysters from the Wallis Lake region complied with the conditions of their permits; (2) purification plants operated in such a way as to ensure that any bacteria or virus was removed from oysters so processed; and (3) Wallis Lake oysters were not harvested, sold or supplied at a time or times when the region was polluted or likely to be polluted such that it was likely that the oysters were not fit for human consumption.

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[110] Constituted as a body corporate by s 5 of the *Protection of the Environment Administration Act* 1991 (NSW) .

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157. The reamended statement of claim asserted that each of these duties had been breached, and that the injury to the consumers was consequent upon those breaches.

158. The trial judge concluded that the State owed a duty of care to oyster consumers to take those steps that reasonably were open to it to minimise the risk of consumers contracting a viral infection from the oysters. This duty was said to arise from the "substantial managerial control" which Wilcox J found the State exercised over the Wallis Lake oyster industry [111] . The "substantial managerial control" was said to lie in the State's ownership of the lake, its grant of oyster leases, its administration of aquaculture permits, its supervision of the

depuration process, its participation in the Wallis Lake Estuary Management Committee, and its statutory powers to mitigate pollution, to carry out inspections and investigations and to prohibit the harvesting of oysters [112] . The Court decided that the State's duty was "clearly breached" by its failure, "[l]ong before November 1996", either to ensure the making of a comprehensive sanitary survey or to close the Wallis Lake fishery [113] .

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[111] (1999) 102 LGERA 123 at 217.

[112] (1999) 102 LGERA 123 at 216.

[113] (1999) 102 LGERA 123 at 218-219 .

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159. A majority of the Full Court (Lee J and Kiefel J, Lindgren J dissenting) dismissed the State's appeal. Lee J held that the State owed the oyster consumers a duty of care to ensure that the powers it had created were exercised to reduce the risk of harm to those consumers [114] . His Honour said that the State breached this duty [115] :

> "by reason of its failure to manage the waters of the Lake by taking steps to have sanitary surveys of oyster-growing waters undertaken and sources of pollution, or potential pollution, identified and rectified and to implement controls on the harvesting of oysters in conditions known to increase the risk of oyster contamination and, in particular, in failing to close the Lake fishery when those conditions occurred in 1996 and keep the fishery closed until circumstances existed that made it safe for the harvesting of oysters for sale to the public to resume".

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[114] (2000) 102 FCR 307 at 326-329 .

[115] (2000) 102 FCR 307 at 329.

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160. Kiefel J posited a narrower duty, which she defined in relation to events immediately subsequent to the heavy rainfall of November 1996. Her Honour expressed the view that, immediately following that rainfall, the Minister was empowered by the *Fisheries Management Act* 1994 (NSW) ("the Fisheries Management Act ") to prohibit the harvesting of oysters from the Wallis Lake region for a specified period. Her Honour concluded that the State "thereby came under a duty to exercise its powers and prohibit harvesting until the Minister could be assured of the likelihood of the oysters' fitness for consumption" [116] . The State's failure to do so, in Kiefel J's view, constituted a breach of that duty.

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[116] (2000) 102 FCR 307 at 460.

161. By notice of contention dated 16 November 2001, Mr Ryan and the other first respondents to the appeal now before this Court submit that the decision of the Full Court should be affirmed on grounds other than those relied upon by that Court. The notice contends that the State owed a duty to the consumers to take reasonable care to protect them from reasonably foreseeable risks of injury as a result of the consumption of oysters. A duty formulated in these terms is said to arise from (i) the State's ownership of Wallis Lake; (ii) its statutory powers of "control" over Wallis Lake and the Wallis Lake oyster industry; (iii) the "substantial managerial control" which Wilcox J found the State exercised over the Wallis Lake oyster industry; and (iv) the State's knowledge of the risk of harm to consumers of oysters taken from Wallis Lake. The State is said to have breached this duty of care by neither (a) taking steps to have sanitary surveys of oyster growing waters undertaken and sources of pollution or potential pollution identified and rectified; nor (b) implementing controls on the harvesting of oysters in conditions known to increase the risk of oyster contamination; nor (c) closing the Wallis Lake fishery when those conditions occurred in 1996 and keeping the fishery closed until circumstances existed that made it safe for the harvesting of oysters for sale to the public.

162. In argument before this Court, the evolution of the case against the State continued. Counsel for Mr Ryan described the State's duty of care in the following terms. It was said that the State had relevantly embarked upon one limb of what was necessarily a two-limbed approach to oyster safety. That is, the State had instituted a system of compulsory 36hour depuration of oysters prior to sale [117] , but it had failed to require what it knew was a necessary precondition to the effectiveness of depuration, being the carrying out of sanitary surveys to detect and to remedy pollution in oyster growing areas. It was submitted that, having embarked upon the management of the oyster industry in the way that it had, the State came under a duty of care to carry out the sanitary surveys that it knew were necessary to effectuate the depuration process. Further, if, after having identified sources of pollution, the safety of a particular oyster growing area could not be assured, the State was said to come under a common law duty to close the relevant fishery until the problem could be remedied.

[117] Food (General) Regulation 1992 (NSW), cl 79A .

163. Thus, as the case for Mr Ryan ultimately was advanced in this Court, the State's duty to consumers to take reasonable care to protect them from reasonably foreseeable risks of injury as a result of the consumption of oysters involved two related elements. These were (i) an obligation to conduct one or more sanitary surveys to identify and to remedy pollution sources and (ii) an obligation to close oyster fisheries that presented an unacceptable risk to public safety. The State was said to have breached its duty by its failure (a) to conduct a sanitary survey of the Wallis Lake region at some unspecified time before November 1996 and (b) to require the Wallis Lake growers to cease harvesting and selling oysters after the heavy rainfall of that month.

164. Before dealing with each element of the duty of care said to be owed by the State, it is convenient to describe briefly the position which the State occupied in respect of the Wallis Lake oyster industry. The State leased areas of the lake for aquaculture purposes and authorised the growing and harvesting of oysters therein through the grant of aquaculture permits. Further, the State was empowered by statute to determine commercial aquaculture industry development plans. Again, by statute, various organs and officers of the State were empowered to prevent or to mitigate pollution or to address threats to public health arising from contamination of waters or food. In some circumstances, the State could require oyster growers to cease harvesting oysters.

165. It is necessary to turn to the particular statutory provisions which are said to bring about a relationship, between the State on the one hand and the oyster consumers on the other, which imports a common law duty of care. It is useful to distinguish between those provisions which relate to the conduct of sanitary surveys and those which enable the State to close down or to suspend the operations of an oyster grower.

Sanitary surveys

166. Through the medium of the EPA, the State [118] has powers under the Clean Waters Act to remove, disperse, destroy or mitigate pollution of waters (s 27), to direct the removal, dispersion, destruction or mitigation of water pollution (s 27A) and to carry out inspections and investigations of premises (s 29). Under cl 21 of the Clean Waters Regulations 1972 (NSW) , the EPA may direct occupiers of premises to undertake measures to control or to prevent the discharge into waters of pollutants from those premises. Together, these provisions empowered the State itself to conduct regular sanitary surveys of oyster growing areas including those at Wallis Lake.

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[118] Section 13 of *Protection of the Environment Administration Act* 1991 (NSW) provides, subject to some exceptions that are not presently relevant, that the EPA is, in the exercise of its functions, subject to the control and direction of the Minister.

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167. Further, the State could require oyster growers to cooperate in the carrying out of a sanitary survey, or could make oyster harvesting in a particular area conditional on the prior completion of a sanitary survey. This could be achieved either as a condition of an aquaculture lease or permit or as an element of a commercial aquaculture industry development plan.

168. Part 6 (ss 142191) of the Fisheries Management Act is headed "Aquaculture management". Division 3 (ss 163180) thereof is entitled "Leases of public water land for aquaculture". Section 163 empowers the Minister, on application or by auction, public tender or ballot, to lease an area of public water land for use for aquaculture[119]. A lease of that type vests in the lessee (i) the exclusive right during the currency of the lease to cultivate within, and to

take from, the leased area the species of fish[120] specified in the lease, subject to the provisions of or made under the Fisheries Management Act and the provisions of the lease and (ii) the ownership of all fish specified in the lease that are within the leased area (s 164). An aquaculture lease may be renewed by the Minister (s 167). The Minister may require as a condition of granting or renewing a lease that the lessee have a survey of the area carried out to a standard approved by the Minister or may, by notice, require the lessee to have such a survey carried out within a specified period (s 169). Failure to comply with such a notice is a breach of a condition of the lease (s 169(4)). The Minister is empowered by s 169(6) to enter into arrangements with representatives of the commercial aquaculture industry for the payment of the cost of carrying out surveys under s 169.

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[119] "Aquaculture" is defined in s 142 to include oyster farming.

[120] "Fish" is defined in s 5 to include oysters.

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169. Section 163(3) provides that an aquaculture lease must specify the species of fish authorised to be cultivated within the leased area, but that this "does not authorise the use of a lease without an aquaculture permit". Aquaculture permits are provided for in Div 2 (ss 144162) of Pt 6 of the statute. Section 144 proscribes the undertaking of aquaculture without an aquaculture permit. Applications for aquaculture permits are to be made to the Minister in the manner prescribed by s 145. Section 146 empowers the Minister to refuse to issue a permit on specified grounds. An aquaculture permit is relevantly subject to such conditions as are specified in the permit or as the Minister notifies to the permit holder while the permit is in force; those conditions may be varied or revoked by the Minister at any time (s 152). A permit holder is guilty of an offence if, without lawful excuse, a condition of the permit is contravened (s 152(3)). Section 156 provides that a permit holder must, if the regulations so require, pay to the Minister an annual contribution towards, among other things, the cost of monitoring the quality of the environment in which aquaculture is undertaken and the cost of testing the quality of the fish cultivated. Pursuant to s 160, the Minister may, by notice in writing to the permit holder, cancel or suspend a permit on a number of specified grounds including the contravention by the permit holder of a condition of the permit.

170. Section 143 of the Fisheries Management Act empowers the Minister to determine plans for the development of the commercial aquaculture industry. Subsection (2) of s 143 provides that a development plan may relate to any aspect of the commercial aquaculture industry, including aquaculture of a particular species or in a particular area. A development plan may include a wide range of matters that the Minister considers appropriate (subs (4)). A development plan is to be published in the *Gazette* (subs (7)) and may be amended or replaced by the Minister (subs (6)). Before determining a development plan (including any amendment or new plan), the Minister is required to give the commercial aquaculture industry and the public an opportunity to make submissions on the proposed plan (or proposed amendment) and to take those submissions into account in determining the plan (subs (8)). The Minister "is to have regard to" any relevant development plan in the exercise of his or her functions under Pt 6 of the Act (subs (3)), but the exercise of a function under that Part is not invalid merely because it is inconsistent with a development plan (subs (9)).

171. Division 4 (regs 12A-12M) of Pt 2 of the Management Regulation is entitled "New South Wales Shellfish Quality Assurance Programs" and commenced operation on 1 May 1995. Regulation 12B states that the Minister "is required to determine", as a commercial aquaculture industry development plan under the Fisheries Management Act , a programme to assure the quality of shellfish taken from estuarine waters for sale for human consumption. The plan is to consist of the New South Wales Shellfish Quality Assurance Program which is to include local shellfish quality assurance programmes. The object of the New South Wales programme is to ensure that shellfish are taken from estuarine waters to be sold for human consumption only if (i) the shellfish meet the quality standards specified in or under the programme and (ii) those waters meet environmental standards so specified (reg 12B(3)).

172. Regulation 12C states that the Minister "is required to appoint" a Statewide advisory committee (the State Committee) and a local shellfish quality assurance committee for each area or group of areas of estuarine waters to which a local shellfish quality assurance programme relates. Four of the six members of the State Committee are to be aquaculture permit holders (reg 12C(2)). The local committees are to consist entirely of local aquaculture permit holders (reg 12C(4)). The Minister may remove from office members of either the local or State committees (reg 12C(6)). The Minister may require those committees to reconsider any decision that they have made but the committees are declared not to be "subject to the control or direction of the Minister" (reg 12C(5)).

173. Each local committee is to be responsible for establishing and administering a local shellfish quality assurance programme for the estuarine waters for which the committee is appointed (reg 12E). The Minister may vary a local programme but only in consultation with the State Committee and the relevant local committee (reg 12F). Each local programme is required to include any minimum standards specified in the State programme for the quality of shellfish cultivated in the relevant estuarine waters and for the purity of those waters (reg 12E(2)). In the event of an inconsistency between the State programme and a local programme, the former is to prevail (reg 12B(5)). Aquaculture permit holders are required to comply with the local programme in respect of the area in which their farm is located (reg 12G).

174. Neither the State programme nor a local Wallis Lake programme had been produced by November 1996. That date and state of affairs are important for the issues in this litigation. It will be recalled that the heavy rainfall in the region occurred late in November 1996.

175. **Following paragraph cited by:**

> Minister for the Environment v Sharma (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)

Lindgren J explained [121] in his reasons for judgment that Div 4 of Pt 2 of the Management Regulation reflects a political decision by the State to enlist shellfish industry participants in a system of industry-funded self-regulation or coregulation, rather than to impose on that industry a publicly funded regulatory regime. In particular, the State decided not to adopt the approach of some other Australian and foreign jurisdictions which require regular sanitary surveys of oyster growing regions pursuant to a classification structure based on water pollution levels. This decision was reached after much consideration and was based in part on

budgetary concerns. In accordance with that decision by the Executive Government of New South Wales, which found partial expression in the Regulations referred to above, the State neither required regular sanitary surveys of oyster growing areas (whether as a condition of aquaculture leases or permits or otherwise) nor undertook to conduct such surveys itself. A decision of that nature involves a fundamental governmental choice as to the nature and extent of regulation of a particular industry. It is in a different category to those public resource allocation decisions which, in the manner described in *Brodie v Singleton Shire Council* [122] , may be considered in determining the existence and breach of a duty of care by a public authority.

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[121] (2000) 102 FCR 307 at 420-423 .

[122] (2001) 206 CLR 512 at 559560 [104] .

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176. Once the nature of the decision by the State is appreciated, its observance by agents of the State in respect of any particular region falls outside the scope of any common law duty of care that may otherwise arise. The evidence did not establish that the State was aware of any particular risk of contamination in respect of the Wallis Lake fisheries. As already emphasised in these reasons, no recorded hepatitis A outbreak had ever occurred there. No particular circumstance indicated that the EPA's powers of compulsory inspection under s 29 of the Clean Waters Act ought to have been exercised in respect of any particular premises which drained into Wallis Lake. The region was a successful oyster growing area which appeared to present no particular or immediate risk of shellfish contamination. In those circumstances, the "failure" on the part of the State to conduct a sanitary survey of Wallis Lake reflected simply a continued adherence to a previously settled policy of general application. The scope of any common law duty that may arise in those circumstances necessarily accommodates itself to, and is controlled by, the insusceptibility of that decision by the State to curial review under the rubric of the tort of negligence [123] . It follows that the State was under no common law duty to conduct sanitary surveys of Wallis Lake.

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[123] *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 393-394 [182] . See also *Dalehite v United States* 346 US 15 at 59 (1953); *Welbridge Holdings Ltd v The Metropolitan Corporation of Greater Winnipeg* [1971] SCR 957 at 967-968 .

Fishing closure

177. Section 189 of the Fisheries Management Act provides:

> "(1) The Minister may, *by a fishing closure under Part 2*, prohibit during a specified period the taking of fish or marine vegetation cultivated under an aquaculture permit from the area to which the permit applies *if satisfied*:

(a) that the area is in such a condition that the taking of fish or marine vegetation from the area ought to be suspended; or

(b) that the fish or marine vegetation are, or are likely to be, unfit for human consumption.

(2) Any such fishing closure does not prevent the taking of fish or marine vegetation for any purpose authorised by the regulations or the fishing closure.

(3) This section does not limit the application of a fishing closure under Part 2 to the taking of fish or marine vegetation from an area subject to an aquaculture permit and to which the permit does not apply." (emphasis added)

178. Part 2 (ss 840) is headed "General fisheries management". Division 1 thereof provides for fishing closures. Section 8 states:

"(1) The Minister may from time to time, by notification, prohibit, absolutely or conditionally, the taking of fish, or of a specified class of fish, from any waters or from specified waters.

(2) Any such prohibition is called a **fishing closure**."

Read in isolation, s 8 does not, in terms, stipulate that ministerial satisfaction is a precondition to the exercise of the power which the provision confers. However, the effect of s 8 in the present context is to give the force of law to action taken by the Minister under s 189 . That latter provision pivots on the existence of ministerial satisfaction of either of the circumstances specified in subpar (a) or subpar (b) of s 189(1) . Where that satisfaction exists, the discretion to prohibit the taking of fish is enlivened and the Minister's decision thereunder becomes, by virtue of s 8, a "fishing closure" enforceable under Div 1 of Pt 2 of the Fisheries Management Act .

179. Section 9 of that statute provides that notification of a fishing closure is to be published in the *Gazette* or, if the Minister considers that the closure is urgently required, in the local media or by notice in a prominent place adjacent to the applicable waters. The closure remains in force for the period (not exceeding five years) specified in the notification (s 10). It may be amended or revoked by the Minister (s 11). A person who takes fish in contravention of a fishing closure is guilty of an offence (s 14).

180. At the time of the contamination at Wallis Lake, Pt 4 (ss 4456) of the *Food Act* 1989 (NSW) (" the Food Act") was headed "Particular powers of the Director-General". Section 45(1)(b) there of conferred power on the Director-General of Health, by order, to "prohibit the cultivation, taking, harvesting or obtaining, from an area specified in the order, of any food or of any food of a class or description so specified". Section 44 provided that any such order could "be made only when the Director-General has reasonable grounds to believe that the making of one or more such orders is necessary in order to prevent or mitigate a serious danger to public health". Successive provisions regulated the manner of making such orders (s 46), conferred a

right of appeal to the District Court against an order (ss 47, 48), and rendered any failure to comply with an order a criminal offence (s 49).

181. Mr Ryan and the other applicants in the Federal Court did not, in terms, plead an independent common law duty on the part of the Minister to prohibit under s 189 of the Fisheries Management Act oyster farming from Wallis Lake during the period of contamination. They did plead in par 47 of their reamended statement of claim, however, that "but for" the negligence said to have occurred by virtue of the breaches of duties (i), (ii) and (iii) set out at the beginning of Pt B of these reasons, the Minister "would have" exercised his powers under s 189 to prohibit oyster farming during the period of contamination of Wallis Lake. The assumption appeared to be that, if the quality assurance programmes said to be required by those duties had properly been implemented by November 1996, they would have required the Minister, in the circumstances then pertaining, to close the fishery.

182. Notwithstanding the absence of a pleading in those terms, a duty to close the Wallis Lake fishery under s 189 formed part of the duty held to exist by the primary judge and by Lee J in the Full Court. Further, the power to close the fishery appeared to comprise the entire content of the duty of care identified by Kiefel J in the Full Court.

183. **Following paragraph cited by:**

Personnel Contracting v Construction, Forestry, Mining and Energy Union (22 December 2004) (Steytler J (Presiding Judge), EM Heenan J, Simmonds J)

In argument before this Court, however, counsel for Mr Ryan disavowed reliance upon the powers of closure conferred by s 189 of the Fisheries Management Act and s 45 of the Food Act . That stance is understandable. The existence of satisfaction by the Minister or the Director-General as to the state of affairs specified in the respective provisions would be a jurisdictional fact upon which the exercise of their statutory powers was conditioned [124] . There was no case made that such a state of satisfaction had existed. There was no evidence, as at November 1996, either (i) that the Minister was satisfied that the Wallis Lake oysters were, or were likely to be, unfit for human consumption (s 189 of the Fisheries Management Act) or (ii) that the Director-General had reasonable grounds to believe that a prohibition on the harvesting of Wallis Lake oysters was necessary in order to prevent or to mitigate a serious danger to public health (s 44 of the Food Act). It follows that neither the discretion conferred by s 189 of the Fisheries Management Act nor that conferred by s 45 of the Food Act was at any relevant time engaged. In the absence of that engagement, the statutory provisions, in the circumstances of this case, supplied no relevant statutory power to which a common law duty of care could attach.

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[124] *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 430, 432 ; *Foley v Padley* (1984) 154 CLR 349 at 353, 370, 375 ; *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 650654 [127]-[137] .

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184. In argument, counsel for Mr Ryan submitted that the State, through its various officers and agencies, enjoyed a range of noncoercive powers beyond those which have explicit legislative force. In particular, it was put that the State may, through its involvement in the oyster industry, persuade oyster fisheries voluntarily to cease harvesting for specified periods in the interests of public safety. This apparently is what occurred when the Wallis Lake fisheries temporarily ceased harvesting shellfish from 14 February 1997. That cessation of harvesting was voluntarily undertaken by the relevant aquaculture permit holders at the initiative of the State, and in particular of Dr Kerry Jackson, the State Coordinator of the New South Wales Shellfish Quality Assurance Program and an official in the Department of Fisheries. This was an instance of effective State action falling short of the invocation of ministerial powers under the Fisheries Management Act . However, the evidence did not establish that the State had assumed (even if it had the legal competence to do so) any day-to-day control of the commercial activities of any oyster growers in the Wallis Lake area or elsewhere.

185. It may readily be accepted that public authorities, armed with statutory powers to compel, prevent or punish conduct, frequently exercise informal and noncoercive influence or persuasion over those persons and organisations against whom they are empowered formally to act. So much follows from the existence of an organised system of sanctions beneath which there is interaction between public authorities and industry participants. But the exercise or potential exercise of powers of supervision or persuasion of this type provides an insecure basis for a duty of care enforceable by the common law. This is so particularly where the duty allegedly is owed not to industry participants but to the ultimate consumer. That the practical content of any such duty would be elusive supports the conclusion that it does not exist [125] . As counsel for the State asked rhetorically during argument, is such a duty to be described as a duty to be persuasive, especially persuasive or successfully persuasive?

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[125] *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 13 [5] .

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186. The State owed no relevant duty of care to the oyster consumers. Its appeal should be allowed.

C. THE BARCLAY COMPANIES

187. The Barclay companies concede that they owed a duty of care to their consumers, including Mr Ryan, to take reasonable care to ensure that the oysters they harvested and supplied were safe for human consumption. The immediate issue before this Court is whether the companies breached that duty. This requires consideration of the circumstances disclosed by the evidence before the primary judge.

188. At trial, Wilcox J concluded that, in selling without warning oysters grown in waters known to be subject to possible undetectable viral contamination, the Barclay companies had breached their duty of care [126] . His Honour suggested that the proper discharge of the duty would have involved procuring, or attempting to procure, governmental agreement to conduct a sanitary survey of the relevant area [127] .

[126] (1999) 102 LGERA 123 at 221-222 .

[127] (1999) 102 LGERA 123 at 221.

189. By majority, the Full Court (Lee J and Kiefel J, Lindgren J dissenting) upheld the primary judge's conclusion that the Barclay companies were liable in negligence to Mr Ryan. Lee J described the duty of care owed by the companies as being to refrain from harvesting and selling oysters from Wallis Lake when conditions had arisen that to the knowledge of the Barclay companies increased the risk of the oysters being contaminated. In his Honour's view, this duty was breached by the sale to the public of oysters before the Barclay companies "had taken the steps that were necessary to show it was safe to resume the harvesting and sale of oysters" [128] . Kiefel J defined the duty and its breach in similar terms. Her Honour held that the companies "should not have supplied oysters for sale until a *sufficient* period had elapsed by which the risk of contamination *could be regarded* as acceptable or tests sufficiently indicated that to be the case" [129] . (emphasis added)

[128] (2000) 102 FCR 307 at 330.

[129] (2000) 102 FCR 307 at 461.

190. **Following paragraph cited by:**

S v State of New South Wales (17 July 2009) (Beazley JA at 1; Giles JA at 2; Macfarlan JA at 3)

The duty of the Barclay companies did not extend to ensuring the safety of oysters in all circumstances [130] . In *Wyong Shire Council v Shirt* , Mason J (with whom Stephen J and Aickin J agreed) stated [131] :

> "In deciding whether there has been a breach of the duty of care the tribunal of fact must first ask itself whether a reasonable man in the defendant's position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. If the answer be in the affirmative, it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk. The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have."

Neither Lee J nor Kiefel J expressed themselves as approaching their task by the sequential reasoning process which *Wyong Shire Council* mandates.

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[130] See *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 577578 [151] .

[131] (1980) 146 CLR 40 at 47-48 .

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191. An analysis of the competing considerations referred to in *Wyong Shire Council* is impeded, not assisted, by formulating the relevant duty of care in terms of its breach, which was the approach that the majority in the Full Court appeared to adopt. The use by Kiefel J in the passage quoted in [189] above of the words "sufficient" and "could be regarded" does not deny the cogency of the submission by the Barclay companies that duty was identified in terms of breach.

192. **Following paragraph cited by:**

Karpik v Carnival plc (The Ruby Princess) (29 July 2025) (Markovic, Sarah C Derrington and Jackson JJ)
Old v Miniter (18 May 2021) (Basten, Macfarlan and Meagher JJA)
Ethicon Sarl v Gill (05 March 2021) (Jagot, Murphy and Lee JJ)
Ethicon Sarl v Gill (05 March 2021) (Jagot, Murphy and Lee JJ)
Williams v Metcash Trading Ltd (03 May 2019) (Meagher and White JJA, Simpson AJA)
Collins v Clarence Valley Council (03 September 2015) (McColl, Macfarlan and Emmett JJA)
Perisher Blue Pty Ltd v Nair-Smith (09 April 2015) (Barrett and Gleeson JJA, Tobias AJA)
Perisher Blue Pty Ltd v Nair-Smith (09 April 2015) (Barrett and Gleeson JJA, Tobias AJA)
Swick Nominees Pty Ltd v Leroi International Inc (No 2) (27 February 2015) (Buss and Murphy JJA; Edelman J)
Jackson v McDonald's Australia Ltd (26 May 2014) (McColl, Barrett and Ward JJA)
Mamo v Surace (13 March 2014) (McColl and Ward JJA, Tobias AJA)
Takla v Nasr (13 December 2013) (McColl, Basten and Hoeben JJA)
Marien v Gardiner (27 November 2013) (Macfarlan, Meagher and Emmett JJA)
Swan & Baker Pty Limited v Marando (24 July 2013) (McColl and Leeming JJA, Sackville AJA)
Shoalhaven City Council v Pender (10 July 2013) (McColl, Barrett and Ward JJA)

> 64. Thus the breach inquiry required the primary judge to identify accurately the actual risk of injury the appellant faced as it was only through the correct identification of the risk that her Honour could determine what a reasonable response to that risk would be: *Roads and Traffic Authority of New South Wales v Dederer* (at [18], [59]) per Gummow J. As Gummow

and Hayne JJ explained in *Graham Barclay Oysters Pty Ltd v Ryan* (at [192]), the inquiry as to breach "involves identifying, with some precision, what a reasonable person in the position of the defendant would do by way of response to the reasonably foreseeable risk". In so saying, their Honours referred with approval to Isaacs A-CJ's observation in *Metropolitan Gas Co v City of Melbourne* [1924] HCA 46; (1924) 35 CLR 186 (at 194), that "[n]o conclusion of negligence can be arrived at until, first, the mind conceives affirmatively what should have been done".

Amaba Pty Ltd v Booth (10 December 2010) (Beazley, Giles and Basten JJA)
Amaca Pty Ltd v AB & P Constructions Pty Ltd (29 August 2007) (Giles JA; Ipp JA ; Basten JA)
Amaca Pty Ltd v Hannell (02 August 2007) (Martin CJ Steytler P McLure JA)
Rickard Constructions Pty Ltd v Rickard Hails Moretti Pty Ltd (14 December 2006) (Handley JA; Giles JA; Bryson JA)
Sutherland Shire Council v Becker (12 December 2006) (Mason P; Giles JA; Bryson JA)
McPherson's Ltd v Eaton (16 December 2005) (Mason P, Hodgson and Ipp JJA)
McPherson's Ltd v Eaton (16 December 2005) (Mason P, Hodgson and Ipp JJA)
Davis v Nolras Pty Ltd (16 December 2005) (Ipp JA, Campbell AJA and Brereton J)
Town of Mosman Park v Tait (04 July 2005) (Steytler P, Wheeler JA, McLure JA)
Sutherland Shire Council v Henshaw (10 December 2004) (Sheller, Hodgson and Bryson JJA)
Sutherland Shire Council v Henshaw (10 December 2004) (Sheller, Hodgson and Bryson JJA)
Temora Shire Council v Stein (21 July 2004) (Giles and Hodgson JJA, Pearlman AJA)

A duty of care that is formulated retrospectively as an obligation purely to avoid the particular act or omission said to have caused loss, or to avert the particular harm that in fact eventuated, is of its nature likely to obscure the proper inquiry as to breach [132] . That inquiry involves identifying, with some precision, what a reasonable person in the position of the defendant would do by way of response to the reasonably foreseeable risk. As Isaacs ACJ observed in 1924, "[n]o conclusion of negligence can be arrived at until, first, the mind conceives affirmatively what should have been done" [133] . The trial judge and the majority of the Full Court in the present case failed to identify with the necessary precision, by reference to considerations of the nature of those indicated in *Wyong Shire Council* , the reasonable response to the risk of harm that existed. In so failing, their Honours fell into an error of law. There is no serious dispute as to the facts to which the law is to be applied. Thus, it is appropriate for this Court to resolve the matter. For the reasons that follow, the proper application of principle requires a conclusion different to that reached in the Federal Court.

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[132] See *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 627628 [309]; 180 ALR 145 at 230-231 .

[133] *Metropolitan Gas Co v Melbourne Corporation* (1924) 35 CLR 186 at 194.

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193. The risk of injury which eventuated in this case was not far-fetched or fanciful; it was real and was therefore foreseeable [134] . The Barclay companies knew that viral contamination of oysters could result from human faecal pollution of the waters in which oysters are cultivated. The companies knew that depuration alone was an inadequate guarantee of oyster safety. They were aware that there existed, in the vicinity of Wallis Lake, septic tanks, stormwater drains and other facilities which, if defective, could cause faecal pollution of the waters. There was some dispute about whether or not the Barclay companies had actual knowledge that any of those facilities were defective, or actual knowledge about the existence of specific pollution problems. Nonetheless, it was reasonably foreseeable that the conduct of the business of the Barclay companies involved a risk of injury to oyster consumers.

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[134] See *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 48.

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194. What was the reasonable response to this risk? The rainfall of November 1996 was not dissimilar to similar rainfall events in previous years. The Barclay companies ceased harvesting during and immediately after the rainfall but otherwise had no reason to suspect that it presented any greater risk of viral contamination than previous rainfalls. The Barclay companies only recommenced harvesting after the water was observed to be clear, salinity tests of the water were above 18 parts per thousand ("p.p.t.") (indicating that the influx of fresh water had passed) and oyster flesh tests for Ecoli were below 5 colony forming units ("c. f.u.") per gram.

195. In assessing the reasonableness of this response, it is noteworthy that no practicable test exists to detect the presence of hepatitis A in estuarine water. Bacteria in water can be detected, but this is an imperfect means of identifying the presence of viruses. The lack of bacterial indicators in water does not indicate the absence of viruses, but high bacterial levels ordinarily equates with high viral levels. Further, no reliable and practicable tests exist to confirm that hepatitis A is not present in oyster flesh. One potentially useful means of detecting hepatitis A in oyster flesh is polymerise chain reaction ("PCR") testing. But this was still in the research stage in November 1996. Tests could only be carried out in a limited number of laboratories by trained personnel and they were expensive. Because a PCR test destroys the oysters tested, it is suitable only for testing samples and cannot establish that other oysters in the same bed are free from viral contamination. There was also evidence that PCR testing frequently gives false negatives.

196. Further, it is possible for shellfish to retain viruses after depuration, depending on variables including the extent of pollution in the waters in which the oysters were grown. Although ultraviolet light, in appropriate conditions, will destroy all viruses with which it comes into contact, it will not destroy those with which it does not come into contact. Wilcox J found that the effectiveness of depuration therefore depends on: (i) the maintenance of the equipment used and the depuration tanks; (ii) the turbidity of the water in which the oysters are depurated; and (iii) the capacity for ultraviolet light to come into contact with each viral or bacterial particle. His Honour concluded that depuration of shellfish for 36 hours is not in itself an adequate protection for oyster consumers against the foreseeable risk of contracting

viral diseases. Nonetheless, his Honour found that there was no deficiency in the Barclay companies' depuration plant in design, construction, maintenance or mode of operation. Further, his Honour found that at all times the Barclay companies endeavoured to implement the State's depuration requirements.

197. Given the state of relevant scientific knowledge at November 1996, it was not possible (and apparently is still not possible) to eliminate entirely the risk of viral contamination of oysters grown at Wallis Lake. The possibility of viral contamination is ever present when oysters are grown in an area where humans live. Only oysters grown in pristine waters will be free from viral contamination.

198. Contrary to the reasoning of Kiefel J in the Full Court, there was no readily identifiable "sufficient period" following the rainfall event of November 1996 after which the risk of contamination could be regarded as acceptable. There was no test of oyster flesh or water quality which would affirmatively establish an "acceptable" risk of contamination. Counsel for Mr Ryan submitted that a "sufficient period" would be at least until (i) a sanitary survey had been carried out, whether by the Barclay companies or by a third party; (ii) identified point sources of pollution were then eliminated or minimised; and (iii) testing demonstrated safety or minimal risk. It is significant that the carrying out of a sanitary survey was, on the case put for Mr Ryan, essential to rendering "acceptable" any risk of contamination.

199. However, it is clear that the Barclay companies alone could not carry out an effective or comprehensive sanitary survey. The companies did not have the statutory powers of entry and inspection held by the Council and the State. Nor could the Barclay companies themselves compel owners or occupiers of land to remedy structural or other deficiencies causing faecal pollution. In the absence of a willingness by either or both the Council or the State to conduct regular and comprehensive sanitary surveys, there was little the Barclay companies could do effectively to address the pollution sources that were contaminating the lake.

200. Counsel for Mr Ryan contended that, if interstate or international quality assurance programmes had been implemented in New South Wales, they would have required the cessation of harvesting at Wallis Lake in November 1996 because no sanitary survey had been conducted. This, however, does not assist in identifying what a reasonable oyster grower or distributor in the position of the Barclay companies would have done. The Barclay companies did not themselves have the capacity to conduct comprehensive sanitary surveys and they operated within a regulatory framework in which neither the local nor the State government was prepared to conduct such surveys. The preparedness of the Barclay companies to do what they could to further the interests of public safety within that regulatory framework is indicated by their involvement in the Wallis Lakes' Oyster Quality Assurance Committee. That body, established in December 1992, functioned as a precursor to the committee that ultimately was given legislative recognition under Div 4 of Pt 2 of the Management Regulation .

201. Therefore, in practical terms, the alternatives open to the Barclay companies were (i) to cease harvesting and selling oysters after the November 1996 rainfall event until a sanitary survey was conducted and testing revealed an acceptable risk; or (ii) to sell oysters with a warning as to their possible viral contamination; or (iii) to cease growing oysters at Wallis Lake entirely, and, perhaps, to establish operations in pristine waters elsewhere. Given the attitude of both the Council and the State, and the apparent similarity between the November 1996 rainfall and

previous rainfall events, option (i) effectively would have required the cessation of harvesting for an unspecified, potentially indefinite, period following any such heavy rainfall. Option (ii) is likely to have had the same effect as ceasing to sell oysters altogether. Option (iii) was not explored in any detail during argument and would have required relocation to some unspecified waterway isolated from human beings. Each of the three courses of action would have been either entirely destructive of, or highly disruptive to, the business of the Barclay companies. Each represents alleviating action of the most difficult, expensive and inconvenient type. According to the settled principles propounded in *Wyong Shire Council* , such alleviating action can only be required by the law of negligence if the magnitude of the risk and the degree of probability of its occurrence are great indeed.

202. Although a risk of viral contamination was ever present, this was the first recorded outbreak of hepatitis A, or any other oyster-related disease, caused by Wallis Lake oysters in almost a century of oyster growing. It was a bare possibility of a known risk which, until the 19961997 season, had never eventuated. Hepatitis A is a serious, and potentially lethal, threat to public health. One person died as a result of the 1997 epidemic. Nonetheless, there was expert virologist evidence at trial that this epidemic was a very rare event in "world terms", and one which resulted from an unusual and random sequence of environmental factors. Notwithstanding the significant magnitude of the risk of harm that eventuated in this case, the degree of probability of its occurrence cannot be said to justify the difficult, expensive and inconvenient alleviating action contended for by the consumers.

203. Indeed, the Barclay companies' response to the risk of viral contamination appears to be consistent with the requirements of the Wallis Lake Shellfish Quality Assurance Program which was ultimately approved by the Minister under Div 4 of Pt 2 of the Management Regulation on 19 March 1997. That programme does not require individual oyster growers or distributors to conduct sanitary surveys. Indeed, the document emphasises that the identification and rectification of potential pollution sources require a collaborative approach involving growers, the Council and the State. Had the programme been in operation at the time of the rainfall event of November 1996, it would have permitted, subject to one possible qualification, the recommencement of harvesting at Wallis Lake at the time the Barclay companies recommenced harvesting. The programme permits harvesting when Ecoli testing returns negative results and salinity tests at 18 p.p.t. or greater. The qualification is that the programme requires this latter result to have been maintained for at least 48 hours before harvesting may recommence; the evidence does not appear affirmatively to establish that this temporal requirement was met in the present case. Nonetheless, the general consistency of the Barclay companies' conduct with the local quality assurance programme, which was itself formulated in response to the 1997 hepatitis A outbreak, reinforces the conclusion that the companies took reasonable care to ensure that their oysters were safe for human consumption.

204. The trial judge and the majority of the Full Court erred in holding that the Barclay companies had breached their duty of care to the oyster consumers. The appeal by Barclay Distributors should be allowed. However, Barclay Oysters is in a different position. Given the finding at trial and in the Full Court, not challenged in this Court, that Barclay Oysters had contravened ss 74B and 74D of the Trade Practices Act , the judgment obtained by Mr Ryan against that company should not be disturbed.

Conclusions

205. Mr Ryan's appeal (No S259/2001) should be dismissed with costs.

206. The State's appeal (No S261/2001) should be allowed with costs.

207. In the appeal by the Barclay companies (No S258/2001), the appeal by Barclay Distributors should be allowed with costs and that by Barclay Oysters allowed in so far as it concerns the issue of negligence but with no order as to costs.

208. The parties to each of these appeals should have 28 days within which to file draft minutes of consequential orders to be made by this Court in respect of the orders (including costs orders) made by the Full Court. In default of agreement between the parties to any of the appeals as to the form of the draft minutes for that appeal, each party is to file within that 28 day period its draft with short written submissions in support, indicating how the drafts of the parties differ.

209. KIRBY J. These appeals come from the Full Court of the Federal Court of Australia [135] . The most important question that they present concerns the principles governing the common law duty in negligence, both of a State of the Commonwealth and of a local government authority, where each is said to be liable for failing to exercise powers conferred upon it by legislation.

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[135] *Graham Barclay Oysters Pty Ltd v Ryan* (2000) 102 FCR 307.

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210. Once again this Court is required to consider whether, in the particular circumstances of the case, the law entitles a person who can prove damage to bring home the consequences not only to any private organisation that owed him a duty of care which it breached but also to public authorities whose breaches are said to lie in their failure to properly discharge their statutory powers [136] .

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[136] Earlier cases include *Sutherland Shire Council v Heyman* (1985) 157 CLR 424; *Pyrenees Shire Council v Day* (1998) 192 CLR 330; *Romeo v Conservation Commission (NT)* (1998) 192 CLR 431; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1; *Brodie v Singleton Shire Council* (2001) 206 CLR 512.

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211. One day this Court may express a universal principle to be applied in determining such cases. Even if a settled principle cannot be fashioned, it would certainly be desirable for the Court to identify a universal methodology or approach, to guide the countless judges, legal practitioners, litigants, insurance companies and ordinary citizens in resolving contested

issues about the existence or absence of a duty of care, the breach of which will give rise to a cause of action enforceable under the common law tort of negligence [137] . Courts such as this should recall the prayer of Ajax[138]:

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It is a supplication that must have occurred to many who have considered recent decisions on the subject of the duty of care: "[S]ave us from this fog and give us a clear sky, so that we can use our eyes" [139] .

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[137] cf *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 286 [288] .

[138] Homer, *The Iliad*, (trans by Murray) (1957) Bk XVII at 645-647.

[139] Homer, *The Iliad*, (trans by Rieu) (1956) at 333; cf *Sorrell v Smith* [1925] AC 700 at 716 where Lord Dunedin offered the translation "Reverse our judgment an it please you, but at least say something clear to help in the future."

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212. **Following paragraph cited by:**

Meyers v Commissioner for Social Housing (07 August 2019) (Elkaim, Loukas-Karlsson and Charlesworth JJ)

The differing approaches to the duty of care issue adopted in *Perre v Apand Pty Ltd* [140] , a case of economic loss, have been described as an instance of "doctrinal chaos"[141]. Such differences concerning claims in negligence against public authorities impose special burdens in finding, understanding and applying the law. These burdens are intolerable. This fact is illustrated by the present case. The unfortunate judges of the Federal Court (including Wilcox J, the primary judge [142]) were obliged to spend many hours (and many pages of their reasons) demonstrating their consideration of the differing approaches adopted in this Court to the questions that had to be solved. Anyone in doubt about these propositions can read the Federal Court's reasons [143] .

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[140] (1999) 198 CLR 180 .

[141] Witting, "The Three-stage Test Abandoned in Australia – or Not?", (2002) 118 *La w Quarterly Review* 214 at 214.

[142] *Ryan v Great Lakes Council* (1999) 102 LGERA 123.

[143] *Graham Barclay Oysters Pty Ltd v Ryan* (2000) 102 FCR 307 at 312-321 [6]-[20] per Lee J, 370-391 [221]-[307] per Lindgren J, 453-455 [576]-[582] per Kiefel J.

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213. Only one unarguable principle emerges from the earlier decisions, reflected in the Federal Court's analysis. It is the self-evident one that any duty of a public authority at common law must be compatible with the legislative powers conferred, and duties imposed, on that authority [144] . It must conform to the apparent purpose of the legislature relating to the authority carrying out its duties according to statute [145] . As Lindgren J said in the Federal Court, the search for what the law expects must commence "with a close examination of the relevant legislation" [146] . As Kiefel J expressed it, "the principal focus must be upon the statutes which confer power on those entities" [147] .

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[144] cf *Sullivan v Moody* (2001) 75 ALJR 1570 at 1576 [36], 1577 [41]; 183 ALR 404 at 411, 412.

[145] *Graham Barclay Oysters Pty Ltd v Ryan* (2000) 102 FCR 307 at 320-321 [18] -[21] per Lee J, 391 [307] per Lindgren J, 455 [582] per Kiefel J.

[146] *Graham Barclay Oysters Pty Ltd v Ryan* (2000) 102 FCR 307 at 391 [307] .

[147] *Graham Barclay Oysters Pty Ltd v Ryan* (2000) 102 FCR 307 at 455 [582] .

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214. In deciding whether a breach of a statutory duty gives rise to a civil remedy for damages at the suit of an individual, Hayne J has pointed out, correctly in my view, that a court "is not assisted by references to the 'intention' of the legislature" [148] . Nor is a court entitled simply to give effect to its own ideas of what is desirable, attributing those ideas to the legislature's "intention" [149] . The same may be accepted as true in relation to the suggestion that a failure by a governmental authority to exercise its powers constituted negligence. However, once a decision-maker passes beyond these elementary principles of agreed doctrine, he or she enters a realm of great uncertainty in which there is no principle that currently commands universal assent, unless it be that such a principle is not presently discoverable [150] .

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[148] *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 633 [325] .

[149] *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 633-634 [325]-[326] referring to *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 458-459 and *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397 at 405.

[150] cf *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 210 [76] ; Luntz, "Torts Turnaround Downunder", (2001) 1 *Oxford University Commonwealth Law Journal* 95 at 106.

The facts, legislation and earlier dispositions

215. The facts are set out in the reasons of the other members of this Court[151]. In broad outline they are simple. Early in 1997, a number of consumers, including Mr Grant Ryan, were diagnosed as suffering from hepatitis A. This is a serious, and potentially fatal, viral infection. Its aetiology is commonly attributed to contact with human faeces. In the case of Mr Ryan and many other persons, the outbreak of this condition was traced to the consumption of oysters harvested from Wallis Lake in New South Wales. The finding about the source of the infection is not disputed; nor that the cause was the pollution of Wallis Lake by human faecal contamination.

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[151] Reasons of Gummow and Hayne JJ at [116]-[127]; reasons of McHugh J at [69]-[77]; reasons of Callinan J at [272]-[277].

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216. Mr Ryan, on his own behalf and on behalf of an expanded group of consumers in a like position whom he represented, commenced proceedings in the Federal Court claiming damages. He named three groups of defendants: the State of New South Wales ("the State"), the Great Lakes Council ("the Council"), a local government authority now deriving its existence and general powers from the *Local Government Act* 1993 (NSW) ("the LGA") and the two Graham Barclay companies responsible for the growing and harvesting of the oysters and for their distribution ("the Barclay companies"). Mr Ryan's proceedings were brought as a representative action [152] . Wallis Lake, where the Barclay companies operated, was within the area committed to the Council under the LGA .

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[152] *Federal Court of Australia Act* 1976 (Cth) , Pt IVA: cf *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255.

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217. Mr Ryan brought a claim against the Barclay company responsible for farming and harvesting the oysters (Graham Barclay Oysters Pty Ltd) ("Barclay Oysters") under the *Trade Practices Act* 1974 (Cth) ("the TPA "). Although, in the Full Court, there were appeals and cross-

appeals in relation to the claims under the TPA , the Full Court confirmed the primary judge's conclusions with respect to the TPA claims. What happened is explained in the joint reasons of Gummow and Hayne JJ ("the joint reasons")[153] . The judgment against Barclay Oysters under the TPA was reduced fractionally for an error found to have been made in its computation [154] . However, this is not a matter that has concerned this Court.

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[153] Joint reasons at [131].

[154] *Graham Barclay Oysters Pty Ltd v Ryan* (2000) 102 FCR 307 at 330 [72], 452 [571], 462-463 [615] .

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218. Mr Ryan brought claims of common law negligence against all the parties. In his claims against the State, Mr Ryan relied on a number of State statutes and regulations affording powers to various officers or agencies of the State to take steps for the control of the production of oysters in State waters, such as Wallis Lake. The relevant provisions of these statutes appear in other reasons[155]. Likewise, powers specific to the protection of the environment, including the water environment such as Wallis Lake, were conferred by and under State legislation on local government authorities, such as the Council. These provisions too are set out in other reasons[156]. I will not repeat any of these details.

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[155] Joint reasons at [166]-[173], [177]-[180]; reasons of Callinan J at [297]-[299].

[156] Joint reasons at [137]-[141]; reasons of Callinan J at [305]-[306].

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219. The issue for decision is whether Mr Ryan (and upon proof of damage, the other persons included in his representative action) can recover under the common law of negligence against the State, the Council and the Barclay companies. The appeals to this Court proceeded on the footing that it was not necessary for us to consider separately the various cross-claims that had been brought at trial as between the several defendants. Presumably, these would sort themselves out following the determination of which, if any, of the parties was liable to Mr Ryan on his common law claim.

220. The course of the proceedings at trial is described in other reasons[157], as are the findings of the primary judge who upheld Mr Ryan's claim in negligence against each of the parties he had sued. There is an even more detailed analysis of the evidence at trial, and of the findings of the primary judge, in the lucid reasons of Lindgren J in the Full Court [158] .

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[157] Joint reasons at [124]-[126].

[158] *Graham Barclay Oysters Pty Ltd v Ryan* (2000) 102 FCR 307 at 334-370 [82] -[220] .

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221. Because of the extended duration of the trial, the mass of complex evidence (including technical and scientific evidence) that the primary judge received and the time that was available to him to consider and absorb all this data, I acknowledge at the outset the caution that must be observed by an appellate court, including this Court, absent established error, before disturbing findings of fact and substituting opinions about the duty of care issue for those which the primary judge adopted [159] . Such hesitation rests not so much upon the advantages often attributed to trial judges concerning the evaluation of the credibility of witnesses. In this case that factor was of minimal, if any, importance. Instead, it rests upon the hesitation of one, sitting in an appellate court and taken to selective passages of transcript, who lacks the same opportunity that the primary judge had to absorb, reflect upon, digest, consider and evaluate the huge mass of evidentiary information that was adduced before him in what was clearly a major enterprise of litigation [160] .

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[159] See *CDJ v VAJ* (1998) 197 CLR 172 at 230-231 [186.1]; cf *Liftronic Pty Ltd v Unver* (2001) 75 ALJR 867 at 879 [65.1]; 179 ALR 321 at 336.

[160] cf *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (In liq)* (1999) 73 ALJR 306 at 330 [89]-[90]; 160 ALR 588 at 619.

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222. Given the uncertainties about the legal principle that differentiates the existence of a duty of care from its non-existence; the "multi-factorial" approach now favoured by this Court for determining the existence of a duty of care by reference to "salient features" of the facts [161] ; and the possible return of legal doctrine to a more generally stated question to resolve contested cases of duty [162] , there are still further reasons for appellate restraint in disturbing the conclusion of the primary judge on the duty issue. Of all people, he or she will normally enjoy the special advantage of having considered all of the evidence and seen it in its entirety and in context as relevant to that issue.

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[161] cf Witting, "The Three-stage Test Abandoned in Australia – or Not?", (2002) 118 *Law Quarterly Review* 214 at 217 referring to *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 253 [198] per Gummow J.

[162] cf *Avenhouse v Hornsby Shire Council* (1998) 44 NSWLR 1 at 8.

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223. The Full Court divided on the questions presented to it in the appeals. The differently constituted majorities in the Full Court are described in other reasons[163]. As a result of the majority that determined each matter, Mr Ryan held on to his judgments at common law against the State and the Barclay companies. He lost his claim in negligence against the Council. Now, by special leave, Mr Ryan appeals to this Court to have his judgment against the Council in negligence restored. The State, the Council and the Barclay companies, by their appeals, seek to resist liability in negligence.

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[163] Joint reasons at [131]; reasons of Callinan J at [281]-[283], [285]-[287], [291]-[295].

The issues

224. Four issues arise, expressed in terms of the suggested errors of the Full Court:

(1) Are the provisions of the TPA such as, in effect, to exclude the concurrent operation of the common law of negligence and therefore to confine Mr Ryan, as a matter of law, to his entitlements under the TPA against Barclay Oysters, which is uncontested in this Court?

(2) If not, in respect of common law negligence, did the State and/or the Council owe a duty of care to consumers such as Mr Ryan with respect to the contamination of the subject oysters (there was no contest that the Barclay companies owed him a duty of care)?

(3) If so (and in any event, in the case of the Barclay companies) did Mr Ryan establish a breach of the common law duty of care causing his damage so as to entitle him to recover damages against any or all of the State, the Council and the Barclay companies?

(4) In any case, did the primary judge err in law in including in his orders an order, in the form of order 2, declaring that Mr Ryan was entitled to succeed against the parties held to be liable to him?

The TPA is not inconsistent with negligence

225. In *Crimmins v Stevedoring Industry Finance Committee* [164] I pointed out that the first question to be decided, in considering whether the provisions of legislation are compatible with the imposition by the common law of a duty of care on individuals, is the ascertainment of whether the two forms of legal liability can co-exist. This is a problem that can arise in any area of the law, including cases having nothing whatever to do with claims for damages in negligence [165] . If, for example, it is clear that a legislature, with full constitutional powers to do so, has, in effect, completely and exhaustively covered the applicable subject matter of legal regulation, it will not be competent for a court to add to the legislative design additional and inconsistent legal duties which the court attributes to general principles of the common

law. In such a case, the statutory provisions will expel the common law's capacity to so prescribe.

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[164] (1999) 200 CLR 1 at 76 [213] .

[165] eg *The Commonwealth v SCI Operations Pty Ltd* (1998) 192 CLR 285.

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226. During argument of the appeal before this Court, a question was raised as to whether the express provision of the TPA with respect to liability to consumers for defective products (such as the subject oysters) constituted such a coverage of the subject field of law as to prevent development of the common law designed to impose other and different legal obligations on other and different parties, not the subject of such federal regulation.

227. In the past, it has been accepted that, notwithstanding the enactment of provisions in the TPA , important aspects of common law doctrine remain applicable and effective. An example is the interaction of the TPA with the common law rule against the restraint of trade [166] . In other areas of the law involving the application of the TPA , questions have arisen as to whether the TPA has covered the relevant field of legal regulation, leaving no room for the application in that field of pre-existing rules of the common law or of equity [167] . The question whether the common law can exist side by side with provisions of the TPA is one that has been noted by this Court in earlier decisions. Analogous issues have also received attention in the context of anti-trust law in the United States of America [168] .

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[166] See eg *Peters (WA) Ltd v Petersville Ltd* (2001) 205 CLR 126 at 130-131 [1], 140-141 [29]-[33] ; *Maggbury Pty Ltd v Hafele Australia Pty Ltd* (2001) 76 ALJR 246 at 263-264 [90]-[91]; 185 ALR 152 at 175-177 .

[167] cf *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 76 ALJR 1461; 192 ALR 1; cf *Henville v Walker* (2001) 206 CLR 459 and *Burke v LFOT Pty Ltd* (2002) 76 ALJR 749 at 761 [66], 767-768 [98]-[99]; 187 ALR 612 at 629, 638 and see the joint reasons in this case at [129]-[130] .

[168] Joint reasons at [129].

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228. Because the issue of statutory "pre-emption" was not expressly raised by any party as a fundamental ground of objection to Mr Ryan's claims based upon the common law, it is appropriate to proceed on the assumption that the claims can exist concurrently. I am content to do this. A claimant could not, of course, recover twice but would be obliged to elect before enforcing judgment [169] .

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[169] cf *United Australia, Ltd v Barclays Bank, Ltd* [1941] AC 1 at 18, 29-30, 43.

Common law negligence and the duty of care

229. *Search for a methodology*: Actions at common law for negligence probably still constitute the largest segment of civil litigation before Australian courts. It is therefore natural, and efficient if it be possible, for the law to afford a methodology or approach to such cases where liability is in dispute. Adopting a methodology encourages consistency and the avoidance of legal error.

230. **Following paragraph cited by:**

Jackson v McDonald's Australia Ltd (26 May 2014) (McColl, Barrett and Ward JJA)

There are certain "standard questions" [170] that dissect the composite notion of common law liability in negligence. Relevantly, those questions analyse the concept in terms of: (1) the duty of care; (2) the scope of the duty; (3) the breach; and (4) the causation of damage. Although these issues are commonly considered separately, it has been pointed out many times that "each element can be defined only in terms of the others" [171] and, for example, that "the actual nature of the damage suffered is relevant to the existence and extent of any duty to avoid or prevent it" [172] . These words teach an important lesson. Excessive analysis and undue intellectual subdivision of what is basically a unitary concept can lead a decision-maker into over-sophisticated elaboration of a notion that is, at its heart, a reflection of practicality and common sense. Long ago and far away, Oliver Wendell Holmes Jr said, correctly, that "the general foundation of legal liability in blameworthiness, as determined by the existing average standards of the community, should always be kept in mind"[173]. Altho ugh that was said years before Lord Atkin wrote his speech in *Donoghue v Stevenson* [174] , it is reflected in what his Lordship said there [175] :

> "The liability for negligence … is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy."

[170] *Romeo v Conservation Commission (NT)* (1998) 192 CLR 431 at 475 [115] .

[171] *John Pfeiffer Pty Ltd v Canny* (1981) 148 CLR 218 at 241-242 .

[172] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 487.

[173] Holmes, *The Common Law*, (1882) at 125.

[174] [1932] AC 562 .

[175] [1932] AC 562 at 580.

231. *The Caparo three-stage test*: Whilst Lord Atkin in *Donoghue v Stevenson,* building on earlier judicial attempts, propounded a unifying concept for liability in negligence at common law, and specifically for the circumstances giving rise to a legally enforceable duty of care, the defect in his analysis and in its acceptance in later cases as a "general unifying proposition" [176] or "statement of principle" [177] is the generality, even circularity, of the touchstone for defining the "neighbour" relationship [178] . The decision in *Donoghue v Stevenson* inevitably gave rise to attempted refinement, so as to retain the advantages of a unifying concept but to flesh out the detail concerning the manner of its application.

[176] *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 541.

[177] *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004 at 1027.

[178] *Donoghue v Stevenson* [1932] AC 562 at 580.

232. A major attempt in that direction was made in England in *Anns v Merton London Borough Council* [179] . Subsequently, the two-stage test expressed in that case was expanded by the House of Lords in *Caparo Industries Plc v Dickman* [180] . That decision was interpreted as establishing a settled approach. In order to decide whether a legal duty of care existed, the decision-maker was obliged to ask three questions. These were: (1) whether it was reasonably foreseeable to the alleged tortfeasor that the particular conduct or omission would be likely to cause harm to a person such as the claimant; (2) whether between that tortfeasor and the claimant a relationship existed that could be characterised as one of "proximity" or "neighbourhood"; and (3) if so, whether it was fair, just and reasonable that the law should impose a duty of a given scope upon that tortfeasor for the benefit of that person.

[179] [1978] AC 728 .

[180] [1990] 2 AC 605 at 617-618 per Lord Bridge of Harwich.

233. **Following paragraph cited by:**

North Shore City Council v Attorney-General (27 June 2012)

The *Caparo* test, sometimes worded in slightly different ways, continues to be applied in England. Variants of it are applied in other Commonwealth countries. As recently as 2001, in a unanimous decision, the Supreme Court of Canada in *Cooper v Hobart* [181] affirmed its adherence to an approach adapted from *Anns* via earlier Canadian decisions [182] . Correctly in my opinion, informed observers have described the Canadian approach as looking "remarkably familiar to the 'classic' incremental approach re-adopted by the House of Lords in cases such as … *Caparo* " [183] .

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[181] (2001) 206 DLR (4th) 193 .

[182] eg *City of Kamloops v Nielsen* [1984] 2 SCR 2.

[183] Neyers, "Distilling Duty: The Supreme Court of Canada Amends *Anns* ", (2002) 118 *Law Quarterly Review* 221 at 221.

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234. *Competing Australian approaches*: Whilst these developments were occurring in other common law countries, Australian courts, led by this Court, continued with their attempts to propound alternative and different tests for establishing the existence of a duty of care. It was obvious that "foreseeability" alone was insufficient to give rise to the potentially onerous obligations of a legal duty to act. Hence the experiments with other concepts such as "proximity" [184] and "reliance" – including the fiction of "general reliance" [185] .

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[184] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 495-498, 505-507 ; *B urnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520; *Bryan v Maloney* (199 5) 182 CLR 609.

[185] cf *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 409 [226]-[227] where the authorities are reviewed.

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235. One by one these attempts, by single or multiple verbal concepts, to encapsulate what was intended when the law imposed a duty of care, collapsed under the demonstration of the inadequacy of the propounded words to perform all of the functions expected of them. This was the point reached in this Court following its decision in *Hill v Van Erp* [186] . It was at that time that a series of cases came before the Court involving disputed claims of negligence concerning contested assertions of a duty of care and, specifically, claims against statutory authorities that included arguments that such authorities had been negligent in failing to perform their powers as they could (and, as it was asserted, should) have done.

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[186] (1997) 188 CLR 159 .

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236. **Following paragraph cited by:**

North Shore City Council v Attorney-General (27 June 2012)
ACQ Pty Ltd v Cook (16 July 2008) (Beazley JA at 1; Giles JA at 2; Campbell JA at 3)

Possible resolution: During the past five years, after "foreseeability", "proximity" and "general reliance" were rejected by this Court as concepts sufficient to establish a duty of care, a contest emerged as to what would replace them. As I view the cases, at least two approaches or "methodologies" for discerning the existence of a duty of care emerged in this Court's decisions. They were locked in mortal combat, intellectually speaking. They were:

(1) The adoption in this country of the three-stage test proposed in England in *Caparo*. This is the approach that I have consistently adopted, in *Pyrenees Shire Council v Day* [187]; *Romeo v Conservation Commission (NT)* [188]; *Perre v Apand Pty Ltd* [189]; *Crimmins v Stevedoring Industry Finance Committee* [190]; *Brodie v Singleton Shire Council* [191], and other cases. The approach has attracted academic favour[192]; but alas, no judicial support where it mattered; and

(2) The adoption of a notion that a range of other factors, sometimes called "salient factors", must be considered in order to determine the existence of a duty of care in a particular case [193]. A cornucopia of verbal riches has been deployed to identify what, in given proceedings, these "salient features" will be. Some of them appear in the Court's decision in *Perre v Apand Pty Ltd* [194]. Many of them are helpfully collected by Callinan J in these appeals ("vulnerability, power, control, generality or particularity of the class, the resources of, and demands upon the authority", the "core, or … non-core" functions or relation to "a matter of policy or executive action" and so on)[195].

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[187] (1998) 192 CLR 330 at 420-427 [246]-[253].

[188] (1998) 192 CLR 431 at 476-477 [117]-[121], 484-485 [138]-[140].

[189] (1999) 198 CLR 180 at 286-291 [289]-[302].

[190] (1999) 200 CLR 1 at 80-86 [223]-[235].

[191] (2001) 206 CLR 512 at 604-605 [241].

[192] Katter, *Duty of Care in Australia*, (1999) at 173; Witting, "The Three-stage Test Abandoned in Australia – or Not?", (2002) 118 *Law Quarterly Review* 214.

[193] *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 253 [198].

[194] (1999) 198 CLR 180 .

[195] Reasons of Callinan J at [321].

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237. *Choosing the new approach*: In 2001 in *Sullivan v Moody* [196] an appeal in which I did not participate, five members of this Court, in a unanimous joint opinion, rejected the three-stage test for a duty of care propounded in *Caparo* . Hints that this outcome was likely had been given in earlier decisions in which individual members of the Court had declined to embrace the *Caparo* approach [197] . It was clear from these earlier decisions, and clearer still from *Sullivan* [198] , that the members of this Court were concerned that the frank acknowledgment, in the third stage of the *Caparo* approach, of the need to consider policy questions, could divert the courts (and decision-makers applying the law) from the clear application of discoverable legal norms into an evaluation of policy that is not properly the business of courts. This concern is a natural one and I understand it. Even in England it has led to the insistence by a number of the Law Lords upon the fact that they are concerned in this regard only with questions of *legal* principle or prescribed *legal* policy [199] . The flaw in the *Caparo* approach, discerned in the joint reasons in *Sullivan* , was that the question of liability might be "reduced to a discretionary judgment based upon a sense of what is fair, and just and reasonable as an outcome in the particular case" [200] . That, it was concluded, would introduce into judicial decision-making an unacceptable unpredictability based on an inappropriate methodology.

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[196] (2001) 75 ALJR 1570; 183 ALR 404.

[197] eg *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 193-194 [9] per Gleeson CJ, 210-212 [77]-[82] per McHugh J, 302 [332]-[334] per Hayne J.

[198] (2001) 75 ALJR 1570 at 1578-1579 [49]; 183 ALR 404 at 414-415 .

[199] *McFarlane v Tayside Health Board* [2000] 2 AC 59 at 76 per Lord Slynn of Hadley, 95 per Lord Hope of Craighead, 108 per Lord Millett; cf at 100-101 per Lord Clyde.

[200] (2001) 75 ALJR 1570 at 1579 [49]; 183 ALR 404 at 415.

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238. In the face of this explicit disapproval of the *Caparo* approach, my duty is to conform to the opinion that the majority of this Court has stated. This is not an area of the law where the interpretation of the Constitution imposes special obligations upon individual Justices to give effect to their opinions about the requirements of the basic law. Nevertheless, I relinquish my adherence to the *Caparo* approach with reluctance. It is, after all, the methodology adopted in the major common law legal systems with which Australian judges are familiar [201] . It at least provides a methodology or approach for the determination of a complex question, which a search for the so-called "salient features" of a case does not. *Sullivan* has been criticised, correctly in my respectful opinion, as involving "serious error"[202]. This Court has been

taken to task for its repudiation of the idea that "policy" has a dominant role to play in the determination of duty issues. It has been castigated for embracing "a chimera"[203]. With the utmost respect, I agree with the comment made that in *Sullivan* this Court[204]:

> "has acted without due care in abandoning [the *Caparo*] test. It is difficult to conceive how duty issues can properly be analysed without resort to each of the three elements in the test. It is clear that courts must look for factors which indicate a minimum ability to avoid the causation of damage and for factors which identify particular persons as being appropriately placed to take care so as to avoid such damage. Foreseeability and proximity, respectively, serve these functions. But the decision whether or not to impose a duty will be, ultimately, a normative one – a question of legal policy, if you like. For this reason, *Caparo* … is likely to remain an irresistible force in the law of negligence."

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[201] Although this is disputed in *Sullivan* by reference to English practice, a glance at the English authorities suggests that it is what the English courts think they are doing: eg *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at 749-751 . It is also what scholars describe them as doing: Handford, "When the Telephone Rings: Restating Negligence Liability for Psychiatric Illness", (2001) 23 *Sydney Law Review* 597 at 618.

[202] Witting, "The Three-stage Test Abandoned in Australia – or Not?", (2002) 118 *Law Quarterly Review* 214 at 215.

[203] Witting, "The Three-stage Test Abandoned in Australia – or Not?", (2002) 118 *Law Quarterly Review* 214 at 215.

[204] Witting, "The Three-stage Test Abandoned in Australia – or Not?", (2002) 118 *Law Quarterly Review* 214 at 220-221.

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239. *The resulting test*: In somewhat different circumstances, Dixon J stated "for a mind that denies the correctness of reasoning" leading to a court's authority, it is "neither safe nor useful … to proceed to expound its meaning and implications" [205] . I share that feeling in this case. However, in order to provide some guidance in eliciting the test for establishing the existence of a duty of care, I must do my best in the situation that has now arisen.

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[205] *Riverina Transport Pty Ltd v Victoria* (1937) 57 CLR 327 at 362-363 .

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240. The development of an approach, hinted at by me in *Pyrenees* [206] , may provide an answer. The statements I made there acknowledged that the verbal attempts at identifying particular criteria for distinguishing cases where a duty of care existed (and where it did not) had failed; that candid policy evaluation was uncongenial to Australian judges or considered

inappropriate; and that liability should therefore be imposed where it was judged that a reasonable person in the defendant's position *could* have avoided damage by exercising reasonable care and was in such a relationship to the plaintiff that he or she *ought* to have acted to do so [207] . Despite its overt circularity, this formulation might at least offer a return to the substance of Lord Atkin's speech in *Donoghue v Stevenson* . It might afford a broad formula that poses a factual (or jury) question and avoids the chaos into which other attempted formulae have lately led the law.

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[206] (1998) 192 CLR 330 at 416-417 [241] .

[207] cf *Jaensch v Coffey* (1984) 155 CLR 549 at 607 ; McHugh, "Neighbourhood, Proximity and Reliance", in Finn (ed), *Essays on Torts*, (1989) 5 at 38; Corbett, "A Reformulation of the Right to Recover Compensation for Medically Related Injuries in the Tort of Negligence", (1997) 19 *Sydney Law Review* 141 at 148-149.

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241. In similar terms, Priestley JA in *Avenhouse v Hornsby Shire Council* [208] was moved to remark in the New South Wales Court of Appeal:

> "Courts … decide, in case after case, whether or not a duty of care exists in new situations. Consideration of all the cases of authority to date leads me to the view that the position in Australia … has returned to (or recognised the continuing applicability of) what it was immediately after the decision in *Donoghue v Stevenson* ; that is, that the courts make decisions by first asking the question 'is the relationship between plaintiff and defendant in the instant case so close that a duty arose?' and then answering 'yes' or 'no' in light of the court's own experience-based judgment."

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[208] (1998) 44 NSWLR 1 at 8 noted by Gummow J in *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 253 [198] .

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242. The difficulty with this formulation is that the reference in it to the relationship of the parties as one "so close that a duty arose" could quite easily slip back into the discredited notion that "proximity", alone, is a sufficient criterion for the assignment of a legal duty. However, so long as the "closeness" of the relationship contemplated is not confined to physical closeness, I see no great difficulty now (and some advantage) in leaving the features of the "relationship" of "neighbourhood" undefined and simply asking whether, in all the circumstances, it is such as to make it "reasonable to impose upon the one a duty of care to the other" [209] . This is always the ultimate question that must be answered in all cases of a disputed duty of care in negligence. Somehow in the end accumulated facts must be turned into an "ought".

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[209] *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 416 [241] .

243. In answering the "ultimate question", in a case involving the alleged neglect of a statutory authority to utilise the statutory powers that it undoubtedly enjoys, it will obviously be essential to analyse those powers carefully. It will be necessary to attempt to derive from the language and structure of the applicable legislation, viewed as a whole, a conclusion as to whether, in the particular case, the *power* conferred on the authority had been converted to the obligations of a *duty*. The reference to the "particular case" will, in turn, invoke a consideration of the multitude of special features of the relationship between the parties that I take it the multi-factorial or "salient features" approach requires. There is an irony that I would not wish to see overlooked. The course of the legal history followed in *Anns* and *Capar o* was actually initiated a few years earlier by the remarks of Lord Denning MR in *Dutton v Bognor Regis Urban District Council* [210] . In that case, Lord Denning suggested that the basis of the Council's liability lay in "control". This was a notion said by his Lordship to lie somewhere between "power" and "duty". Although that explanation was rejected by Lord Wilberforce in *Anns* [211] , it is to be noticed how the concept of "control" on the part of a statutory authority is now re-emerging as crucial in this area of legal discourse[212].

[210] [1972] 1 QB 373 at 391.

[211] [1978] AC 728 at 753-754 .

[212] See, for example, the joint reasons at [152] and the reasons of McHugh J at [90], [96].

244. **Following paragraph cited by:**

Valleyfield Pty Ltd v Primac Ltd (08 August 2003) (Williams and Jerrard JJA and Mackenzie J,)

Perhaps this is the ultimate lesson for legal theory in the attempted conceptualisation of the law of negligence and the expression of a universal formula for the existence, or absence, of a legal duty of care on the part of one person to another. The search for such a simple formula may indeed be a "will-o'-the wisp" [213] . It may send those who pursue it around in never-ending circles that ultimately bring the traveller back to the very point at which the journey began. Thus we seem to have returned to the fundamental test for imposing a duty of care, which arguably explains all the attempts made so far. That is, a duty of care will be imposed when it is reasonable in all the circumstances to do so. That is the test that Gummow J and I adopted in our joint reasons in the recent decision in *Tame v New South Wales* [214] , decided after *Sullivan* . Even if the approach of the other members of the Court in that case does not do so explicitly, it is obvious that the "touchstone" [215] of reasonableness is fundamental to

the way in which they determined the existence or otherwise of a duty of care [216] . So after 70 years the judicial wheel has, it seems, come full circle. In this way only is Ajax's prayer answered [217] .

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[213] *Caparo Industries Plc v Dickman* [1990] 2 AC 605 at 632-633 per Lord Oliver of Aylmerton; cf *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 194 [9] .

[214] (2002) 76 ALJR 1348 at 1380 [185]; 191 ALR 449 at 493.

[215] (2002) 76 ALJR 1348 at 1382 [195], see also at 1409 [331] per Callinan J; 191 ALR 449 at 496, 533.

[216] *Tame v New South Wales* (2002) 76 ALJR 1348 at 1355 [35] per Gleeson CJ, 1367 [109] per McHugh J, 1398 [272] per Hayne J, 1409 [331] per Callinan J; 191 ALR 449 at 459, 475, 518, 533.

[217] Above, these reasons at [211].

The duty of care: the State and the Council

245. *The duty of the State*: In the already extended reasons in these appeals, I do not wish to repeat the features of the legislation and factual circumstances that are relevant to the determination of whether the State and the Council owed a duty of care to Mr Ryan. I have already acknowledged the important advantages that the primary judge enjoyed in considering all of the material. So far as the State is concerned, I am conscious of the fact that the primary judge, and the majority in the Full Court, concluded that a proper consideration of the applicable legislation, together with the factual evidence, imposed a duty of care on the State as the lessor of the oyster leases in Wallis Lake and the ultimate manager of fisheries (including oyster farming) in the State.

246. However, alike with other members of this Court[218] and for generally similar reasons, I have concluded that the State did not owe a duty of care to the ultimate consumers of oysters, such as Mr Ryan, to exercise its powers by and under legislation, in the ways propounded so as to prevent the contamination of the oysters that ultimately infected Mr Ryan and his co-plaintiffs. Once one approaches the matter in the way now suggested, it is difficult to draw from all of the circumstances a conclusion that the common law imposed legal liability on the State with respect to every person, such as Mr Ryan, for the failure of the State to implement the health and protective measures such as are contained in the applicable legislation.

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[218] Joint reasons at [162]-[186]; reasons of McHugh J at [90]-[95]; cf reasons of Callinan J at [320]-[326].

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247. Subject to any relevant substantive exemptions [219] or procedural protections [220] , I agree with the joint reasons that it is not necessary, in order to construct a claim of common law negligence against a governmental entity or public authority in reliance upon that authority's failure to exercise powers conferred upon it by statute, for the claimant to prove that the statute evinced a *specific* purpose that an action at common law was to be included as one of the means of enforcing the statutory purpose. No such rule has hitherto been required by the common law. Where created as a distinct legal entity, a governmental body or public authority, like any other legal or natural person, must comply with the law. This includes the common law of negligence where it remains applicable.

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[219] As in *Field v Nott* (1939) 62 CLR 660 at 675 ; cf *Bropho v Western Australia* (199 0) 171 CLR 1 at 14-15 .

[220] As in *Australian National Airlines Commission v Cassidy* (1964) 110 CLR 172.

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248. When the two substantive claims against the State, into which the case of Mr Ryan ultimately evolved, are examined, namely failure to conduct sanitary surveys and failure to close the Wallis Lake fisheries at the relevant time, the problem of recognising the suggested duty of care on the part of the State is plain. The State Parliament had decided on a system of industry-funded self-regulation or co-regulation. In that context, and in the light of the level of the State's proved knowledge of the risks involved, the postulation of State intervention to conduct sanitary surveys in respect of Wallis Lake appears inconsistent with statute and unreasonable. In the same context, the suggestion that the State owed a duty, enforceable by the tort of negligence, to protect consumers such as Mr Ryan by closing down the Wallis Lake oyster industry for an unspecified time appears completely unreasonable and unrealistic. There was no actual knowledge of the State of a serious risk of infection. There had never been a previous case of infection traced to Wallis Lake oysters, although oysters had been farmed and harvested there for decades. The State and its agencies were not in control of the oysters or their manner of harvesting. In such circumstances, and in the context of the newly introduced form of industry self-regulation, such intervention by the agencies of the State before Mr Ryan became infected would, I believe, have been regarded, rightly, as an over-reaction and unnecessarily intrusive. I agree in this respect with the joint reasons[221].

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[221] Joint reasons at [177]-[186].

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249. *Pyrenees* is distinguishable because of the absence of notification of a precise risk to a public authority with immediate power and functions to act. *Crimmins* is distinguishable by the established evidence of long-term awareness in that case of the safety issues and elements of day-to-day control. *Brodie* is different because of the direct involvement and control of the authority over the relevant subjects of accident prevention. The claim against the State was therefore properly rejected by the Full Court.

250. *The duty of the Council*: Mr Ryan's ultimate claim against the Council is described in other reasons [222] . I agree that the Council's powers were not specifically addressed to the protection of oyster consumers. Its measure of control for that purpose was even less relevant than that enjoyed by agencies of the State. The Council had no direct responsibility for the safety of the oysters grown in Wallis Lake or their consumers. For the Council to have exercised its general powers before the infection broke out in order to protect potential oyster consumers such as Mr Ryan, would have been regarded, correctly, as an excess of the Council's mandate and an undue, certainly premature, intrusion into the lawful responsibilities of others. *Pyrenees* is readily distinguished. There, the powers were specific to the prevention of the spread of fire. They were enlivened by express notice to the local authority, with applicable powers to act, of the risk that eventuated. The Full Court did not err in upholding the appeal by the Council.

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[222] Joint reasons at [142].

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251. When the ultimate question is asked, the answer is that it was not reasonable in the circumstances (including when regard is had to the statutory powers that they respectively enjoyed) to conclude that the State and the Council owed a duty to exercise their respective powers for the protection of consumers like Mr Ryan. Neither the State nor the Council owed a duty of care enforceable by an action on the part of a consumer for negligence at common law. No action lay by statute.

252. In the light of these conclusions, it is unnecessary to consider the alternative, and in my view equally powerful, case which the State and the Council presented. This was that, if either of them was held to owe a duty of care to exercise its respective statutory powers, such duty was not breached in the circumstances by the omission to act so as to ensure the safety of Wallis Lake oysters to the consuming public.

Breach of the duty of care: the Barclay companies

253. The Barclay companies did not contest that they owed a duty of care to Mr Ryan and his co-plaintiffs. They could hardly do so following *Donoghue v Stevenson* . However, those companies submitted that no breach of their duty of care had been proved.

254. In judging the issue of breach, it is obviously necessary to relate it to the precise scope of the duty owed. Each of the Barclay companies was in a direct or indirect relationship with the ultimate consumers of the oysters. Those consumers were vulnerable, in the sense that they were dependent on the Barclay companies and would rarely, if ever, conduct tests of their own on the safety of oysters sold to them for consumption. Each Barclay company therefore had a specific duty, apart from statute, to ensure, so far as was reasonably practicable, the safety of the oysters offered to the market. It was not an absolute duty, as an insurer. But it was a high duty because of the serious (even potentially fatal) consequences of infection by needless exposure of the oysters to waterborne viruses, such as hepatitis A.

255. The issue before this Court is whether error has been shown in the decision of the majority in the Full Court, in refusing to disturb the primary judge's conclusion that a breach of the conceded duty had been proved. Mr Barclay, who spoke for both companies, acknowledged in evidence that he was aware at the relevant time of the existence of potential sources of viral pollution in Wallis Lake. He knew that depuration was inadequate to ensure the removal of such viruses and that flesh testing would not necessarily detect them. The primary judge had accepted that absolute assurance that the oysters were free of the hepatitis A virus was neither possible nor reasonable to expect. It was in these circumstances that the primary judge correctly focussed his attention, for the most part, upon what "significant contribution to risk reduction" [223] the Barclay companies could have instituted.

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[223] *Ryan v Great Lakes Council* (1999) 102 LGERA 123 at 221 [352] .

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256. With the majority judges in the Full Court [224] and the joint reasons in this Court I would reject the hypothesis that the Barclay companies were negligent in failing to provide a warning to consumers of the risk that their oysters might have been contaminated. In particular cases, warnings can and do play an important part in the discharge of a duty of care [225] . However, the proposition that such a warning should have been provided with the subject oysters is unrealistic.

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[224] *Graham Barclay Oysters Pty Ltd v Ryan* (2000) 102 FCR 307 at 330 [68] per Lee J; 461 [607]-[608] per Kiefel J; cf at 439 [502]-[503] per Lindgren J.

[225] This was examined in *Woods v Multi-Sport Holdings Pty Ltd* (2002) 76 ALJR 483 at 488-489 [40]-[41], 495 [80]-[81], 504-505 [126]-[132]; 186 ALR 145 at 152-153, 161-162, 174-176 .

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257. Similarly, I regard it as unrealistic and unreasonable to propound the suggestion that the Barclay companies should have ceased growing and harvesting oysters in Wallis Lake because of the awareness of the possible risks of contamination. The absence of previous cases, over many decades, although not conclusive, suggests that such a response would have been an extreme and unreasonable one which the law of negligence would not require. It is as unrealistic as suggesting that the agencies of the State or the Council should have intervened before Mr Ryan was infected.

258. Nevertheless, in the circumstances of the knowledge that must be attributed to the Barclay companies and the uncontested control which they enjoyed over the entire process of farming, harvesting and distributing the oysters, there remain a number of particular factors that sustain the conclusion of the primary judge that the Barclay companies breached the duty of care that they owed to consumers like Mr Ryan. Knowing of the risk and of the lack of publicly conducted sanitary surveys in the catchment of Wallis Lake, the Barclay companies could

have delayed the supply of oysters for sale after heavy rains had stopped until, in the words of Kiefel J, "a sufficient period had elapsed by which the risk of contamination could be regarded as acceptable or tests sufficiently indicated that to be the case" [226] . The expert evidence called at trial supported this view. Cessation of harvesting and distribution of oysters during and up to a few days after the heavy rainfall in November 1996 was insufficient. Likewise, 36 hours of depuration of the oysters after that period was insufficient.

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[226] *Graham Barclay Oysters Pty Ltd v Ryan* (2000) 102 FCR 307 at 461 [608] .

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259. Of course, there cannot be certainty that a lengthier interruption in the marketing of the oysters would have prevented the viral outbreak that ensued, affecting Mr Ryan and his co-plaintiffs. But in the circumstances of Mr Barclay's knowledge that heavy rain would have increased the viral load in the lake's waters (because of the run-off from adjoining areas carrying pollution with septic tank effluent into the lake's catchment area [227]) the conclusion was open that insufficient was done by the Barclay companies to protect consumers in the face of specific awareness of a known and potentially serious risk and that, if more had been done, it could have reduced or eliminated that risk. There is no acceptable way to differentiate the common law liability of the respective Barclay companies. Both were therefore properly found liable in common law negligence.

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[227] *Graham Barclay Oysters Pty Ltd v Ryan* (2000) 102 FCR 307 at 323 [30] .

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260. There are always pressures upon a commercial enterprise to maintain the production and supply of its product to the market. But where, as here, the product was known to be highly vulnerable, after heavy rains, to contamination with potentially serious consequences, the duty of care owed to consumers, as required by the common law, was a heavy one. I am unpersuaded that error has been shown in the concurrent findings of fact at trial, and in the Full Court, that the Barclay companies were in breach of their common law duty of care to consumers. Especially in the context of the known capacity of heavy rains to carry more effluent than usual into Wallis Lake and the consequent need for delay to permit natural cleansing of the water, the conclusion reached at trial and on appeal is an unsurprising one. Absolute certainty about safety could not be guaranteed. Nor was it required by the common law. But it was open to the primary judge and the Full Court to conclude that the two-day interruption in the harvesting of oysters after the rain stopped [228] was insufficient and that it represented a breach of the duty of care that caused, or materially contributed to, the infection suffered by Mr Ryan and other consumers.

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[228] *Graham Barclay Oysters Pty Ltd v Ryan* (2000) 102 FCR 307 at 437 [491] .

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261. In the Full Court, Lindgren J, who dissented, recognised correctly that the issue of breach of a duty of care presented "a question of fact and depends on the circumstances" [229] . His Honour accepted that, in some cases, the discharge of such a duty "might require and demand that the product be withdrawn from the market so as to prevent it being used" [230] . The Barclay companies could not themselves carry out public sanitary surveys. They enjoyed no public power to do so. However, to some extent, the withdrawal of the public authorities, specifically the agencies of the State, and the implementation of a system of industry self-regulation or co-regulation, increased the requirement of care and vigilance on the part of oyster farmers and distributors, such as the Barclay companies. They could not look to, and blame, the public authorities for neglect of safety and infection prevention. They were obliged themselves to fill any gap to assure reasonable consumer safety in the consumption of their oysters.

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[229] *Graham Barclay Oysters Pty Ltd v Ryan* (2000) 102 FCR 307 at 437 [493] .

[230] *Graham Barclay Oysters Pty Ltd v Ryan* (2000) 102 FCR 307 at 437 [493] quoting *Thompson v Johnson and Johnson Pty Ltd* [1991] 2 VR 449 at 491.

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262. As the question of breach was an issue of fact and degree, it is one normally left to the judgment of the trial court. I am not persuaded that error has been shown in the finding of breach made at trial. The judgment in negligence at common law against the Barclay companies should not be disturbed by this Court, substituting itself for the fact finding of the courts below, with all the advantages that the trial court and the Full Court enjoyed.

The declaration in respect of Mr Ryan

263. A comment is made in the joint reasons that may be read as critical of the action of the primary judge in providing an order in the form of a declaration of legal right that Mr Ryan was entitled to succeed against named parties "in respect of that portion of his representative claim that alleges negligence, but only on behalf of those group members who proved damage has been suffered by them" [231] .

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[231] *Ryan v Great Lakes Council* (1999) 102 LGERA 123 at 231.

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264. No objection appears to have been raised by any party at trial, or in the Full Court, to the making, or form, of that order. For all that this Court knows, the order may have followed the preparation of draft minutes of orders submitted by the parties, as is the usual course and the course contemplated by this Court's own orders in disposing of these appeals.

265. The making of the order is not a question raised by the appeals to this Court. I see no reason why this Court should initiate an objection of its own. Because it was not an issue, the point

was not the subject of detailed written or oral submissions. At most, the question could have arisen in certain contingencies in settling any final orders of this Court. However, it would not arise in the disposition favoured by the joint reasons in the course of which the criticism is mentioned. I am far from convinced that it was beyond power, or "inappropriate" [232] , for the primary judge to provide by his order as he did.

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[232] Joint reasons at [128].

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266. Under the *Federal Court of Australia Act* 1976 (Cth) , that Court is constituted as a superior court of record and a court of law and equity[233]. It has national jurisdiction in a large number of matters, some of them with novel public interest features. As this case illustrates, the Federal Court enjoys specific and additional statutory powers to decide representative proceedings[234]. By s 33Z(1), which relates to the powers of the Federal Court to give judgment in representative proceedings, it is provided that (with emphasis added):

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[233] s 5(2).

[234] Pt IVA.

"The Court may, in determining *a matter* in a representative proceeding, do any one or more of the following:

(a) determine an issue of law;

(b) determine an issue of fact;

(c) *make a declaration of liability*;

(d) grant any equitable relief;

(e) make an award of damages for group members, sub-group members or individual group members …

(f) award damages in an aggregate amount without specifying amounts awarded in respect of individual group members;

(g) make such other order as the Court thinks fit."

267. **Following paragraph cited by:**

Gomeroi People v Attorney-General of New South Wales (30 May 2016) (Reeves, Barker and Bromberg JJ)

From these provisions, it is clear that the Parliament intended to arm the Federal Court with a wide and flexible armoury of powers, capable of being adapted to the particular needs and novel circumstances of representative proceedings and any matter in such proceedings. Representative proceedings are not traditional litigation; nor should they be subjected to all of the requirements of such litigation. To confine the grant of such a statutory power is incompatible with the oft-repeated statements in this Court concerning the construction of grants of such powers to superior courts [235] . In particular, it is inappropriate to impose upon such grants of power strictures derived from earlier times and traditional powers in litigation between individual parties.

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[235] *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 205 per Gaudron J; *Re JJT; Ex parte Victoria Legal Aid* (1998) 195 CLR 184 at 201 [41.3] ; *Gerlach v Clifton Bricks Pty Ltd* (2002) 76 ALJR 828 at 831 [14], 842-843 [75]-[76]; 188 ALR 353 at 357, 373-374 .

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268. Where the Federal Court is engaged, as it was here, in novel proceedings, this Court, in my view, should refrain from imposing limitations that are uncalled for [236] . The only authority cited to support the criticism of the primary judge's order relates to proceedings that have nothing to do with representative proceedings. For my own part, I can see no good reason why, in disposing efficiently of potentially complex representative proceedings, declarations of legal right as to a particular "matter" in the proceedings might not be appropriate at an interlocutory stage in order to clear away a part of the proceedings that has been finally decided [237] . But whether that is right or wrong, there is no reason why this Court should volunteer its opinion on the subject which, until properly challenged in this Court and necessary for decision, belongs to the procedural powers of the Federal Court as conferred by special statutory provision.

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[236] cf *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 367-371 [80]-[89] ; cf 355-360 [45]-[59].

[237] cf *Yuill v Corporate Affairs Commission (NSW)* (1990) 20 NSWLR 386 at 389-390 .

Orders

269. In relation to Mr Ryan's appeal (No S259/2001) and the State's appeal (No S261/2001), I agree in the orders proposed by Gummow and Hayne JJ, including the provision of time in which the parties may file draft minutes of consequential orders.

270. The appeal of the Barclay companies (No S258/2001) should be dismissed with costs.

271. CALLINAN J. The principal question which these appeals raise is whether the conferral of various statutory powers to regulate uses of land and waters, creates duties of care, in respect of the non-exercise or breach of which, affected persons may sue: in short, in what circumstances are statutory powers and functions to be regarded as duties?

Facts

272. Oysters are cultivated and thrive in Wallis Lake, which lies north of the Hunter River in New South Wales. There, holders of permits cultivate and harvest oysters from aquaculture leases granted by the State of New South Wales ("the State"). When heavy rain falls in the catchment of the lake run-off increases, and with it does the potential for pollution of waters and marine life growing in them, including oysters. These crustaceans, which daily ordinarily ingest and expel large quantities of water are particularly susceptible to contamination by faecal matter which may be carried by run-off into lakes and streams. This is so because changing conditions of temperature and salinity may reduce the creature's capacity to excrete contaminated water. Accordingly, harvesting is customarily suspended during, or for a relatively short period after rain. A question arises in this case as to the appropriate duration of the suspension of harvesting. One consequence of the contamination of oysters is that they may become a source of Hepatitis A which is a highly infectious disease. It can survive for long periods in marine sediments. There is no practicable test to detect its presence in waters, or in the flesh of an oyster.

273. In the catchment, for which the Great Lakes Council ("the Council") was responsible and to its knowledge, there were defective septic tanks and other sources of faecal contamination. Before May 1996 the Council's policy was merely to respond to complaints about inadequate treatment of waste. After that month, the Council discontinued even that policy. This discontinuation was not motivated by an insufficiency of resources.

274. In November 1996, heavy rain fell on the catchment area of the Wallis Lake. Oysters were thereafter harvested from it. In the first three months of 1997 there was a surge in the number of reported Hepatitis A cases in New South Wales. The source of this infection was fairly clearly shown to be oysters taken from Wallis Lake after November 1996. This was the first recorded event of the high incidence of an infection originating in the lake. There had however been a similar occurrence in the Tweed River in New South Wales in 1989 to 1990.

275. A class action was brought in the Federal Court on behalf of Mr Ryan and 184 other people who became ill from Hepatitis A as a result of the consumption of contaminated oysters. They claimed in negligence and for breach of the *Trade Practices Act* 1974 (Cth) ("th e Act"). The action was brought against growers (leaseholders) and suppliers of the oysters, the Council and the State of New South Wales ("the State"). No distinction was drawn in these proceedings between the growing company and the related distributing company so far as negligence is concerned, and it is therefore convenient to treat them as one on that issue.

276. At first instance the Federal Court (Wilcox J) gave judgment in favour of Mr Ryan, apportioned liability equally among the defendants and made the following orders [238] :

[238] *Ryan v Great Lakes Council* (1999) 102 LGERA 123 at 125.

"1. Judgment be entered in favour of the first applicant, Grant Ryan, in respect of his personal claim, in the sum of $30,000 against each of the following respondents:

– Great Lakes Council;

– State of New South Wales;

– Graham Barclay Oysters Pty Ltd; and

– Graham Barclay Distributors Pty Ltd.

2. It be declared that the first applicant is entitled to succeed against each of the said respondents, in respect of so much of his representative claim as alleges negligence, but only on behalf of those group members who prove damage has been suffered by them.

3. The first applicant's representative claim of breaches by Graham Barclay Oysters Pty Ltd of ss 74B and 74D of the *Trade Practices Act 1974 (Cth)* be reserved.

4. Otherwise the first applicant's representative claim of breaches of the *Trade Practices Act* be dismissed.

5. The said respondents pay to the first applicant his costs of the action incurred to date, whether in relation to his personal or representative claim.

6. The burden of orders (1), (2) and (5) be apportioned between the said respondents as follows:

(a) Great Lakes Council – one third;

(b) State of New South Wales – one third;

(c) Graham Barclay Oysters Pty Ltd and Graham Barclay Distributors Pty Ltd – together one third;

and judgment be entered on the cross-claims accordingly.

7. The matter be listed for further directions at 9.30am on Friday 9 April 1997 or such other time as my Associate may notify the parties."

277. Appeals and cross-appeals were heard by the Full Court of the Federal Court constituted by Lee, Lindgren and Kiefel JJ. In the result, the State, as to one half of the damages, the Council as to one quarter, and Barclay, also as to one quarter, were held to be liable for the loss and damage caused to Mr Ryan by the consumption of the contaminated oysters.

The liability of the State

278. Wilcox J summarized the case against the State in this way [239] :

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[239] *Ryan v Great Lakes Council* (1999) 102 LGERA 123 at 213 [316]-[319] .

"There are four elements to the applicant's case against the State. First, what counsel describe as their client's 'essential case' is that the State failed to prepare or implement any proper oyster management plan for the lake. This has a number of aspects.

Secondly, the applicant claims [the NSW Environment Protection Authority] failed properly:

(a) to carry out its functions in relation to land, buildings thereon and discharge therefrom so as to ensure they were not sources of pollution; or

(b) appropriately to monitor the water quality of the lake.

Thirdly, the applicant says the Health Department failed to properly monitor and regulate the depuration facilities of oyster farmers; 22 out of the 32 facilities being found defective after the HAV outbreak.

Fourthly, it is said the Heath Department failed to ensure that appropriate water was used for depuration. The suggestion is that Barclay Oysters' depuration intake pipe was too close to the lake floor, so the depuration water was likely to contain virus-bearing sediment."

279. It is unnecessary to deal with the third and fourth of the bases because his Honour summarily dismissed them and no complaint is made about that. He dealt in greater detail with the first two elements in this way [240] :

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[240] *Ryan v Great Lakes Council* (1999) 102 LGERA 123 at 213-214 [322][325] .

"In developing the first point, counsel for the applicant note that cl 12B of the *Fisheries Management (Aquaculture) Regulation* 'required' the Minister to 'determine

... a program to assure the quality of shellfish taken from estuarine waters for sale for human consumption'. This was to be the New South Wales shellfish quality assurance program. There was also to be a local program for each estuary. Counsel observe this Regulation took effect on 1 May 1995; but when the Wallis Lake 'rainfall event' occurred 18 months later, there was not yet either a New South Wales program or a Wallis Lake local program; and this notwithstanding the years of work that preceded the making of the Regulation and the development of a Tweed River quality assurance program following the Norwalk virus epidemic in that estuary in September 1996. Counsel point out that State officers had always known depuration was an inadequate protection against viruses. The fact that a Wallis Lake quality assurance program was approved by the Minister on 19 March 1997, only five weeks after the cause of the HAV outbreak was established, demonstrates the delay was not due to policy or budgetary considerations or the need for extensive consultation. Indeed, they say, the relevant policy had been formulated before the Regulation was promulgated: the program had to 'assure' quality. Given the known limitations of depuration, this meant a quality assurance program would need more than depuration; in practical terms, a sanitary survey and water monitoring. As we have seen, the program approved in March 1997 included both these features. Counsel argue this program could, and should, have been approved earlier. Had it been approved and implemented before November 1996, they suggest, the HAV outbreak would not have occurred.

In relation to the EPA, counsel say that authority failed properly to regulate pollution from the caravan parks; if it be accepted that pollution from that source significantly contributed to the contamination of Wallis Lake and the HAV outbreak, the State is responsible for EPA's neglect.

(ii) Council's and growers' submissions

> The council, the Barclay companies, Sciacca and Tadeven all support the applicant's claim against the State.
>
> Counsel for the council say this is not a case of a government being involved in an undertaking only to the extent of determining general policy and making legislation; through the Department of Fisheries, the State was actively involved in the day to day management of the fishery. The State leased the oyster leases to the growers, stipulated the terms of the aquaculture permits under which they operated and received and retained the rentals they paid. Through the Department of Fisheries, it was represented on the Wallis Lake oyster quality assurance committee which, on 22 February 1993, laid down what the Committee Chairman, Mr Moran, called 'stringent guidelines ... regarding the harvesting of oysters in Wallis Lake'. Officers of the Department of Health supervised the depuration process and, for that purpose, required growers to maintain oyster purification log books. They approved and inspected growers' depuration facilities. However, importantly in counsel's submission, those officers were aware of the limitations of the depuration process; in

particular its limited effectiveness against viruses. In his publication '*Purification Technology for New South Wales Oysters*', Mr Bird had pointed out purification 'is not a perfect system and will not guarantee the absolute public health safety of raw oysters'; depuration was justified as the 'only alternative' on 'a cost risk basis'. Mr Bird had referred to the need to warn consumers about the risks associated with the consumption of raw seafood: '[e]ducation of consumers [about those risks] should be on-going and effective'. Yet there is no evidence of any warning to oyster consumers, whether generally or in relation to Wallis Lake oysters, still less on-going 'education'; and this despite the fact that the Department knew there was no oyster management plan or water testing program for Wallis Lake."

280. His Honour stated his reasons for holding the State liable as follows [241] :

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[241] *Ryan v Great Lakes Council* (1999) 102 LGERA 123 at 216 [331] .

"The substance of the only case against the State that seems open to the applicant is not unlike that which I have upheld against the council: that the State failed to exercise its management powers in such a way as to minimise the risk of HAV infection of oyster consumers. I accept the submission that neither the *Fisheries Management Act* [1994 (NSW)] nor the *Fisheries Management (Aquaculture) Regulation* imposed an obligation on the Minister to approve a quality assurance program within any particular period of time. In any event, I would not be prepared to say a delay of about 18 months, between the making of the Regulation and the Wallis Lake 'rainfall event', was so excessive as to constitute a breach of the Minister's obligation, under cl 12B of the Regulation, to approve a quality assurance program. Section 143 of the Act requires consultation with the industry and the public prior to the making of a 'development plan' – a term that seems to include a local quality assurance program. While the evidence does not suggest frenetic activity in relation to the preparation of the New South Wales program or any local program, I cannot say the pace was unreasonably slow."

His Honour continued [242] :

"This is not a case where the alleged negligence of a government lies in failing to enact appropriate legislation. It is not a case, like *McMullin v ICI Australia Operations Pty Ltd* [243] , where the claim made against government depended on policy, rather than operational, factors [244] . What ought to be the content of a New South Wales shellfish quality assurance program was, no doubt, a matter of policy; to be determined at a political level by the responsible Minister. The same comment may be made about any decision by the Minister to approve or not approve a local quality assurance program. Decisions of that nature fall within Gummow J's description 'quasilegislative activity of public authorities' [245] . They are not cognisable by the law of negligence. Consequently, it would have been

immaterial, if it were the fact, that a New South Wales or local program had been made that did not include a requirement of a sanitary survey.

However, it does not follow that the absence of a sanitary survey is irrelevant to the case against the State. Although the State cannot be made liable for failing to make a general prescription for sanitary surveys, it may be made liable for ignoring the necessity of a sanitary survey in relation to its management of a particular oyster growing area. In the present case, the State did more than lay down rules and leave the industry to manage itself. Through various agencies, the State actively involved itself in the management of the Wallis Lake oyster industry. This is understandable. The State had a direct financial interest in the industry, as a lessor of oyster leases, as well as indirect financial interests and (presumably) social and political concerns. The determination by the Fisheries Department of the areas to be leased to oyster growers, and the supervision of their use, were activities within the operational area; as were the depuration activities of the Health Department and any decisions by the Minister as to the closure or non-closure of the fishery. The EPA was involved in inspections and directions in relation to premises in the Wallis Lake catchment area. Decisions by EPA regarding the necessity to inspect premises for the purpose of determining whether they were sources of water pollution were decisions in the operational area. In sum total, through various agencies, the New South Wales government exercised substantial managerial control over the Wallis Lake oyster industry. It exercised that control by day-to-day operational decisions.

It is interesting to note that State functionaries themselves recognised the State's managerial role in relation to oyster fisheries. The advisory committee that prepared the 1992 New South Wales oyster quality assurance program included Mr Bird and an officer of the Department of Fisheries. In discussing the concept of quality assurance, the Committee referred to the Health Department's 'powers of enforcement, investigation and if necessary, prosecution' …. In his Second Reading Speech [for the *Fisheries Management Act*], the Minister for Fisheries spoke about aquaculture permits becoming 'the tool by which the industry is managed' …. Aquaculture permits were to be issued by his Department, managing on behalf of the State.

It seems to me the State's involvement in the management of the Wallis Lake oyster fishery was so extensive and significant as to warrant the conclusion that it gave rise to a duty of care to oyster consumers. As with the council, the State was not obliged to undertake a quality assurance role or guarantee the safety of the oysters harvested in the lake. But it was under a duty to take those steps that were reasonably open to it to minimise the risk of consumers contracting a viral infection from the oysters.

If the State was under a duty of care, that duty was clearly breached. In the extract from their submission … counsel for the State describe 'the requirements for sanitary surveys' as being 'notorious in the industry'. This description accords with the evidence in this case. There is overwhelming evidence as to the desirability of investigation of possible sources of pollution of a shellfish growing area. Although the Americans and Europeans adopt different methods of

monitoring water quality, they agree on the need for regular sanitary surveys. As the witnesses made clear, there ought to be a sanitary survey *before* an area is used for commercial shellfish production. The stated reason is compelling. Depuration cannot be relied on to remove viruses from shellfish. The only way of safeguarding consumers is to prevent the shellfish becoming contaminated in the first place; that means preventing human faecal contamination of growing area waters. Although it may rarely be possible to eliminate the *possibility* of water contamination, a thorough initial shoreline survey will go a long way towards this, provided it is supplemented by regular subsequent surveys."

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[242] *Ryan v Great Lakes Council* (1999) 102 LGERA 123 at 216-218 [333]-[337] .

[243] (1997) 72 FCR 1 .

[244] (1997) 72 FCR 1 at 93-98 .

[245] *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 394 [182] .

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281. In the Full Court of the Federal Court, Lee J, after summarizing the relevant legislation, expressed his conclusion in the following paragraphs [246] :

> "The State was aware that oyster growers may harvest oysters during or after heavy rain and that no controls had been implemented by the State to prevent such action. In 1981 the State had imposed the depuration system on growers after oysters contaminated by the Norwalk virus had harmed the health of approximately 2,000 people in 1978. The State was aware that depuration alone was not a sufficient safeguard against harm resulting from oysters taken from polluted waters. In 1989/1990 1,200 people suffered harm to health after consuming oysters contaminated by Norwalk or Parvo viruses taken from the waters of the Tweed River. The State understood that pollution of the waters of the Tweed River from which the oysters were taken was caused by human sewage originating either from sewerage systems and septic tanks adjacent to the waters or from vessels navigating the waters. The State closed the Tweed River for a period of not less than two months after the outbreak.
>
> The foregoing amply supports conclusions that the risk of harm being caused to consumers of oysters taken from the Lake was foreseeable; that the State had knowledge of or ought to have known facts that defined the magnitude of that risk; and that in the absence of action by the State to reduce that risk of harm by steps available to it and reasonable in the circumstances, consumers would be exposed to a greater risk of harm than they would either expect or be able to ascertain. No question of 'core policy' was involved in the foregoing nor any decision by the State not to legislate in respect of the matter.

Accordingly, it was open to his Honour to conclude, as he did, that the State was under a duty of care to ensure that powers it had created were exercised to reduce the risk of harm being caused to consumers of oysters and further, to find that the State had breached that duty of care by reason of its failure to manage the waters of the Lake by taking steps to have sanitary surveys of oyster-growing waters undertaken and sources of pollution, or potential pollution, identified and rectified and to implement controls on the harvesting of oysters in conditions known to increase the risk of oyster contamination and, in particular, in failing to close the Lake fishery when those conditions occurred in 1996 and keep the fishery closed until circumstances existed that made it safe for the harvesting of oysters for sale to the public to resume.

Further, it was open to his Honour to conclude that on the balance of probabilities it was the failure of the State to act as described and meet the duty of care imposed upon it, that caused Mr Ryan to suffer injury."

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[246] *Graham Barclay Oysters v Ryan* (2000) 102 FCR 307 at 328329 [60]-[63].

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282. Kiefel J, who was of the same opinion as Lee J, in affirming the finding of negligence by the primary judge, summarized her opinion in this way [247]:

"The rainfall in the catchment in November 1996 created a known and significant risk of faecal contamination of oysters, carrying with it a risk of viral infection including HAV. The purpose of the powers given to the Minister to prohibit the harvesting of oysters from an area for a specified period clearly had, as its purpose, the protection of members of the public who might be consumers of oysters, where the Minister had reason to be concerned about the fitness of the oysters for human consumption, as he must have had here if properly informed. In my view, the State thereby came under a duty to exercise its powers and prohibit harvesting until the Minister could be assured of the likelihood of the oysters' fitness for consumption. It was reasonably able to do so, as the letter from the NSW Shellfish Quality Assurance Programme affecting a ban, after reports of the diagnosis of HAV in persons, shows.

In submissions the State complained that, in some respects, his Honour's findings towards a conclusion of negligence went beyond the case as pleaded by its opponents. The power of the State to effect a closure was, however, squarely raised. There was, in any event, little by way of evidence which could have been addressed to it."

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[247] *Graham Barclay Oysters v Ryan* (2000) 102 FCR 307 at 460 [603]-[604].

283. Lindgren J was of a different opinion [248] :

[248] *Graham Barclay Oysters v Ryan* (2000) 102 FCR 307 at 431-434 [463]-[479] .

"My conclusion that the State was not shown to be liable is, I think, supported by various approaches to the issue. First, I do not think that the array of statutory powers referred to, including the power given by s 189(1) of the *Fisheries Management Act* to close an oyster fishery where the Minister was satisfied that, relevantly, oysters were, or were likely to be, unfit for human consumption, gave rise to the duty. A duty to exercise that power would, in my view, in accordance with *Pyrenees* [249] and *Lutz* [250] , not arise unless, at least, the State knew that the oysters to be harvested would be, or would be likely to be, unfit for human consumption. But there had not previously been an outbreak of hepatitis A arising from the consumption of oysters harvested from the Lake. The Lake's growers' practices of depuration and suspension of harvesting for a sufficient period following a 'fresh' had apparently worked in the past. Of course, the possibility of the irresponsible grower was always of general concern, but this did not rise to the required level to impose a duty to exercise statutory powers. Similarly, although, no doubt, instances of faecal contamination over time can be pointed to, the evidence did not establish that the standard of purity of the Lake's water was known to the State to be dangerous by being, for example, significantly lower than that of the water in which oysters were satisfactorily grown and harvested elsewhere in the State or overseas.

[249] (1998) 192 CLR 330 .

[250] *Parramatta City Council v Lutz* (1988) 12 NSWLR 293.

But let it be assumed that the standard throughout the State was lower than the standard insisted upon in Europe and the United States of America. It may be said that the State government failed in its duty to the public in this respect. That is, it may be said that in the interests of public health the State should have adopted a different régime from that which it did adopt. In particular, it may be said that the State should have adopted a system involving sanitary surveys of the estuaries or flesh testing or both. I do not think, however, that a failure of that kind, which I would characterise as a failure of policy, necessarily indicates breach of an actionable duty of care to those members of the public who consume oysters.

A further point in relation to 'fishing closures' under s 189 of the *Fisheries Management Act* is that the duty proposed would have to be understood as one requiring the Minister to consider the question whether he should be satisfied that the Lake's oysters were or were to be likely to be unfit for human consumption. To my mind this highlights, at least in relation to that particular power, the fact that what is involved is a question of priorities and allocation of resources.

I accept the State's submission that, rightly or wrongly, the government of the day took a policy decision in 1994-1995 to the effect that the State would distance itself from the day to day management of the oyster industry in favour of a system of industry-based control to be implemented through two bodies representative of the industry: a State QAP Committee and local estuary-based QAP committees. I do not mean to suggest that by merely recording a policy of 'noninvolvement', a public authority can necessarily avoid incurring legal liability. It is hard to accept that the formal adoption of a policy of nonintervention would have saved the Shire in *Pyrenees* or the Council in *Lutz* . The nature of their legislative powers and the facts and circumstances of their knowledge of the particular danger and the steps taken in relation to it would have prevailed to render them liable nonetheless. But in the present case the State did act consistently with its policy. It did not, for example, embark upon testing the growing waters of the Lake's oyster fishery or the flesh of oysters taken from it. There is no scope for saying that partial action gave rise to 'a common law duty to take care which is to be discharged by the continuation or additional exercise of [partially exercised] powers' [251] .

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[251] *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 391-392 [177] per Gummow J.

The State's policy is to be contrasted with the learned primary judge's finding that the State 'managed' the oyster fishery in the Lake. A question arises as to the meaning of the notion of 'management' in the present context. The State had ultimate control but this is not management of a kind that would generate a duty of care. Moreover, I do not think the State's roles of licensing and inspecting depuration facilities, inspecting premises from an environmental viewpoint through the EPA, granting oyster leases, issuing aquaculture permits, participating in the Lake's Oyster Quality Assurance Committee as from 14 December 1992, or providing the State's employee, Dr Kerry Jackson, to coordinate the State QAP as from 2 September 1996, constituted 'management' of the day to day oyster and harvesting activity of a kind that would give rise to a duty of care.

I do not accept Mr Ryan's submission that his Honour should have found that the State owed him a duty to ensure that the local QAP was in place by November

1996. His Honour felt unable to reach that conclusion on the evidence and I do not think it is shown that this was a finding of fact at which he was not entitled to arrive.

Mr Ryan submits that control of the fishery was 'ceded' to the State. But in one sense, so is virtually every aspect of the control of the production of food. The individual consumer cannot protect himself or herself and so is 'vulnerable' and hopes that someone will have taken steps to minimise the risk to his or her health. But is it to be said that in every case of 'food poisoning', the State must be liable for having failed to exercise its statutory powers? It seems to me that as a matter of policy the law refrains from imposing the kind of duty on which Mr Ryan is obliged to rely.

I would not conclude, so far as it may remain relevant, that Mr Ryan 'specifically relied on' the State to protect him. There was no dealing between the State and Mr Ryan before he consumed the oysters. As noted earlier, the doctrine of 'general reliance' no longer enjoys support in the High Court as a touchstone of the existence of a duty of care of a public authority to exercise statutory powers.

In my view, on the evidence the State did not 'manage' the shellfish industry in the Lake in any way that might have given rise to a duty of care in favour of Mr Ryan.

Breach of duty

> If I had thought that the State owed a duty of care to Mr Ryan, I would have held that the State was not shown to have breached it. The case would have called for consideration of what steps the State, acting reasonably, would have taken. This would have immediately raised considerations of the kind referred to by Mason J in *Wyong Shire Council v Shirt* [252] … as discussed in the context of breach in relation to the Council's appeal. I have referred to some of these considerations as relevant to the State in the context of my treatment of the duty issue above. In the case of the State, questions of the magnitude of the risk, the fact that the Lake's oysters had not previously caused a problem and the cost to the State of taking (and maintaining) the course of action described by his Honour in all of the State's oyster-growing estuaries would have arisen.

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[252] (1980) 146 CLR 40 at 47-48 .

Causation

> For the reasons I gave for allowing the Council's appeal, it is not shown that the course of action that his Honour decided was required

(the taking of the steps that were reasonably open to minimise faecal contamination of the Lake) would have prevented Mr Ryan from contracting hepatitis A.

A suggested alternative ground of the State's liability

Because I have held that the State did not owe Mr Ryan a duty of care at all, I need not consider whether it was required to exercise its power to close the fishery (exercise of that power would have prevented Mr Ryan from contracting hepatitis A). But I would not have been prepared to find on the hearing of this appeal that it was required to do so. The issue is one that would call for the making of findings by the primary judge, particularly as to the reasonableness of the State's being required to monitor pollution at the shoreline of all its oyster-growing estuaries and closing oyster-growing businesses from time to time, in the light of the magnitude of the risk in question.

Mr Ryan's notice of contention

This leaves to be dealt with Mr Ryan's notice of contention insofar as it relates to the State's appeal.

I gave reasons for not accepting Mr Ryan's contention relating to causation based upon a duty to minimise faecal contamination of the Lake when dealing with the Council's appeal.

Another contention relating to the State is that his Honour should have found the State owed to Mr Ryan a duty of care to implement a specific local QAP which required:

(i) a comprehensive and competent sanitary survey of the Lake's oyster fishery 'and surrounding area'; and

(ii) in the absence of such a survey, a closure of the fishery, particularly after a heavy rainfall episode, until such a survey was carried out and it was then safe to reopen the fishery.

I would not accept the contention. For the reasons given above, it was not incumbent upon the State to exercise its powers at all, in my view.

The remaining contention relating to the State is that his Honour should have found that the State, through the EPA, breached a pleaded duty to ensure that, relevantly, 'the relevant caravan parks' did not pollute the Lake. His Honour rejected the submission by reference to *Bendix* [253] , that is, because although the escape of sewage effluent from caravan parks increased the risk, this was not enough: it would have to be shown that it materially contributed to the actual suffering of the illness by Mr Ryan. With respect, I agree with his Honour."

[253] *Bendix Mintex Pty Ltd v Barnes* (1997) 42 NSWLR 307 .

The liability of the supplier

284. Wilcox J held the associated Barclay companies as grower and supplier to be liable. He said [254] :

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[254] *Ryan v Great Lakes Council* (1999) 102 LGERA 123 at 220-222 [349]-[355] .

"Notwithstanding the attention given to the matter at the hearing, I am not persuaded there was a causal connection between the HAV epidemic and the harvesting undertaken by Barclay Oysters on 23 November 1996 or on 27 November and the immediately succeeding days. The cause of the epidemic was the widespread HAV contamination of the lake. I see no reason to believe the date of harvesting was a critical factor in relation to any particular consumer contracting the disease.

I accept Mr Barclay's evidence that, at all times, he endeavoured to implement the requirements set out in Mr Bird's publication. There is no evidence of any deficiency in Barclay Oysters' depuration plant, in design, construction or maintenance, or in relation to its manner of operation. However, this does not mean the Barclay companies must be exonerated of negligence.

The existence of a duty of care is conceded; the only issues relate to breach of duty and damage. As to breach, it seems to me the applicant is able to establish his case out of matters conceded by Mr Barclay himself. Mr Barclay agreed he was at all times aware:

(a) of the existence of potential sources of viral pollution of the lake;

(b) that depuration was not adequate to remove viruses; and

(c) that E-coli oyster meat testing would not necessarily show viruses.

In this situation, it seems to me apparent that a prudent oyster grower needed to do more than depurate and rely on E-coli flesh tests; ex hypothesi those steps would be an insufficient protection against the known danger. I do not agree with the State's submission that Barclay Oysters' omission lay in its failures further to defer harvesting after the November rain and to carry out PCR flesh testing and faecal coliform water testing. Useful though these measures might have been, they would not necessarily have protected consumers of the oysters. As already explained, viruses could have remained in the water, or in unharvested oysters, for

many weeks after cessation of the rain, and after faecal coliform levels had dropped back to normal limits; and their existence would not necessarily have been revealed by PCR testing. The only real protection to consumers was to prevent viral contamination in the first place. As is the case with the council and the State, Barclay Oysters was not obliged to *ensure* the absence of viruses, but it was obliged to take the steps reasonably open to it to obtain a virus-free growing environment and, if this was impossible, to refrain from selling oysters for human consumption, except perhaps with a warning about the risk in eating them.

> Counsel for the Barclay companies cross-examined the witnesses who urged the need for a sanitary survey by obtaining their agreement that they would not ordinarily expect this to be undertaken by a single producer. Counsel seemed to assume that this agreement absolved their clients from any responsibility for the absence of a sanitary survey. I do not see the matter that way. The Barclay companies could have made a significant contribution to risk reduction by having a few men walk that part of the foreshores of the lake, rivers and islands that is publicly accessible – and that is most of it – and list all items of apparent concern. However, a satisfactory sanitary survey required access to all premises and possession of enforcement powers. Governmental or local governmental involvement was essential. This does not let the Barclay companies off the hook; neither they nor any of the committees with which they were associated attempted to procure governmental or local governmental involvement. The evidence does not reveal any approach to the council or a State agency for the making of a sanitary survey, with or without support (manpower or financial) from the local industry. The Barclay companies (and, apparently, the other local oyster producers) were as oblivious to the need for a sanitary survey as was the State. Given that they actually produced the product that put consumers at risk, they cannot escape some responsibility for the lack of a sanitary survey.
>
> If the oyster producers had endeavoured, and failed, to persuade the council or the State to undertake a proper sanitary survey, they would have needed to consider other options. One option – presumably expensive – might have been to relay the oysters in other waters for a period before sale. There may have been other possibilities. It is not necessary to go into them. It is enough to say it was not sufficient for the Barclay companies (or any other producer) to shrug off their knowledge of the possible pollution of the lake by saying this was someone else's responsibility.
>
> In my opinion, in selling without warning oysters grown in waters known to be subject to possible undetectable viral contamination, both Barclay companies breached their duty of care to ultimate consumers of the oysters. Because it is apparent that the viral infection sustained by Mr Ryan, and the group members who became ill after consuming Barclay oysters, stemmed from the contamination of the lake, there is a clear causal connection between the breach and the damage.

> It does not follow that all distributors of Wallis Lake oysters are liable in negligence to HAV infected consumers of their oysters. Barclay Distributors is in the unusual position of being controlled by a person (Mr Graham Barclay) who is also the controller of a grower company. Barclay Distributors is therefore fixed with an unusual degree of knowledge about the circumstances of production of the oysters it distributes. Its knowledge may exceed that of distributors based elsewhere; and, even more so, people (perhaps including restaurateurs) who purchase oysters for commercial purposes without knowledge of the circumstances, even location, of their production."

285. Lee J and Kiefel J in the Full Court agreed with the conclusion of the primary judge that the Barclay companies were negligent. Lindgren J was of a different opinion.

286. Kiefel J, with whom Lee J generally agreed on the issue of Barclay's negligence said this [255] :

> "His Honour the primary judge referred to the evidence of Mr Barclay, that he was aware of the existence of potential sources of viral pollution of the lake; that depuration was not adequate to remove viruses; and that flesh testing would not necessarily detect viruses. His Honour referred to what the Barclays companies should have done and focussed, principally, upon the 'significant contribution to risk reduction' it could have made. For the reasons I have given with respect to steps which his Honour found might have been undertaken by others, but which were not likely to amount to prevention or detection, I am respectfully unable to agree that this was the proper measure of the duty owed by the Barclays companies. His Honour however also identified, as an alternative to attempts to prevent contamination, and in the event that it proved impossible to obtain a virus-free growing environment, the requirement that the Barclays companies refrain from selling oysters for human consumption, except perhaps with a warning about the risk in eating them. Ultimately, it was the absence of warning when selling which his Honour held to constitute negligence.
>
> It follows from the view I have expressed above concerning the State's duty, and the basis for it, that even if the harvesting of oysters had not been prohibited in the circumstances prevailing, as it should have been, the Barclays companies should not have supplied oysters for sale until a sufficient period had elapsed by which the risk of contamination could be regarded as acceptable or tests sufficiently indicated that to be the case. That was the effect of the expert evidence. A cessation of harvesting and supply during and up to a few days after the rainfall could never suffice; nor could 36 hours of depuration thereafter. His Honour determined liability, ultimately, on the basis that a warning was not given of the danger which remained in consuming oysters from the area. The requirement of a warning would of course render nugatory the supply of oysters for sale."

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[255] *Graham Barclay Oysters v Ryan* (2000) 102 FCR 307 at 461 [607] -[608] .

287. Lindgren J summarized his dissenting opinion in this way [256] :

> "It seems to me that on the evidence of the lack of any previous outbreak of health problems arising from the consumption of oysters grown in the Lake and the lack of knowledge otherwise of Mr Barclay of the existence of an actual problem as distinct from potential sources of faecal contamination of the Lake, the Barclay companies' duty of care did not reasonably require them either to take the course that his Honour outlined or to suffer a closure of their business until somehow they could be completely assured that they were putting into the market a product that was free of defects."

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[256] *Graham Barclay Oysters v Ryan* (2000) 102 FCR 307 at 439 [503] .

Liability of the Council

288. In dealing with the position of the Council, the local authority in whose jurisdiction the Lake lay, Wilcox J first summarized its powers and duties. Not surprisingly, these included extensive powers to supervise and manage the treatment of effluent, and to insist upon the abatement of sources of it. Next, his Honour referred to the Council's awareness of problems of seepage from septic tanks and the need to take steps to deal with them. His Honour's reasons for holding the Council liable in negligence are to be found in the following passage [257] :

> "The applicant need not prove the particular source or sources of the HAV contamination. The HAV oyster contamination came from human faecal pollution of the lake. The expert evidence establishes the probability that this pollution came from multiple points, predominantly land-based. All of those points were subject to council control. The pollution occurred because the council did not exercise its powers in a responsible manner; although it knew there was a problem, the council allowed the continuation of pollution from those points. It does not matter that it is impossible to say which of those pollution points introduced the HAV contaminated faeces into the lake.
>
> It is not necessary to determine whether the council owed a duty of care to the oyster growers. It was certainly not obliged to undertake general quality control of the oysters harvested from the lake. However, if the content of the supposed duty of care is defined merely as being an obligation to exercise the Council's statutory powers in such a manner as to minimise pollution of the lake, I see no reason for rejecting such a duty; like Mr and Mrs Day in *Pyrenees* [258] , the growers were entitled to expect the council to exercise its powers in such a manner as to avoid a nuisance that would damage their property (the oysters) and cause them consequential loss.

If there was a duty of care to oyster consumers, as I hold, there can be little doubt it was breached. Prior to the HAV epidemic, the council took no steps to identify point pollution sources. Although the 1989-1993 water tests showed high faecal coliform levels after rain, including in stormwater drains, council took no steps to ascertain – for example by Ecoli tests of that water – whether human sewage effluent contributed to those high levels. Given that the drains served the towns of Forster and Tuncurry, this was at least a distinct possibility. If tests had revealed significant E-coli levels, this would have indicated a problem of discharge from sewerage pumping stations or septic tanks. Armed with that information, the council could have taken samples from various locations along the stormwater drains to trace the source of the pollution and then taken whatever steps were necessary to ensure the problem was fixed. All this would have been no more than good housekeeping for a local government authority that took its responsibilities seriously. It is the Shoalhaven Council approach, according to Mr Papworth.

However, it is not necessary for the applicant to depend upon council's failure to trace effluent emissions. The evidence establishes council was aware of serious sewage effluent problems in the villages (Nabiac and Cooloongolook) draining to the lake's tributaries. Anybody who gave the matter thought would have realised there was a possibility that viruses in that effluent might reach the lake and contaminate the oysters. That suspicion would have been heightened (at least in relation to Nabiac) if the person read the Laxton report, a copy of which was in council's possession.

Closer to home, numerous sites were contributors, or potential contributors, to estuarine pollution; for example, the two caravan parks, the Little Street public toilet, the toilet pits on the islands and the houseboats on the lake. If council did not know about these problems, that was because it chose not to look. Until May 1996, council's policy was merely to respond to complaints; and this despite the fact that council's officers knew the complaints they received represented only the tip of the iceberg, that pollution from septic tanks was a widespread problem. The responsible reaction to such knowledge would have been to institute a sanitary survey, especially of premises that drained to estuarine waters. Astonishingly, in May 1996 council's officers took the opposite course, determining not even to respond to complaints. It may not be coincidence that the HAV outbreak occurred shortly after the first heavy rain of the next oyster season."

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[257] *Ryan v Great Lakes Council* (1999) 102 LGERA 123 at 209-210 [297]-[301] .

[258] (1998) 192 CLR 330 .

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289. Later, his Honour said this [259] :

"Counsel for the Council submit the establishment in 1993 of the Wallis Lake oyster farmers quality assurance committee brought to an end any responsibility council might have had for ensuring the estuarine water quality was satisfactory for the growing of oysters; the oyster farmers took over responsibility for water quality, in conjunction with relevant State officers.

One difficulty about this submission is that council was a major participant in the committee; Mr Chadban and Mr Powell were members and Mr Chadban acted as Secretary. The membership of the committee reflected the fact that the oyster growers, the council and various State agencies all saw themselves as having an interest in the safety of Wallis Lake oysters. The committee's deliberations show its members recognised this involved attention to water quality."

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[259] *Ryan v Great Lakes Council* (1999) 102 LGERA 123 at 211 [308] -[309] .

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290. His Honour continued [260] :

"I find the council breached its duty of care to the applicant and group members. As it is clear the breach occasioned damage to the applicant, he is entitled to recover against the council in respect of his personal claim. He is also entitled to recover against the council in relation to his representative claim, subject to proof of the damage suffered by group members."

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[260] *Ryan v Great Lakes Council* (1999) 102 LGERA 123 at 212-213 [315] .

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291. The Full Court upheld the Council's appeal. Kiefel J said this [261] :

"It is clear from his Honour's reasons that it was considered that there was much that the Council could have done. So much can, I think be accepted. That does not however, in my respectful view, answer the question whether it came under a duty to take action."

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[261] *Graham Barclay Oysters v Ryan* (2000) 102 FCR 307 at 457 [590] .

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292. Her Honour continued [262] :

"A conclusion that the Council was under an obligation to use the powers it had to protect oyster consumers from injury cannot, in my view, be reached without ascertaining the nature of those statutory powers and what they were directed to. It will be recalled that in *Pyrenees* [263] there was coincidence between the action which was necessary to prevent the fire, the powers given to the Council and the purpose for which they were given. In my view the provisions here referable to water pollution and public health, whilst no doubt sufficient to authorise the undertaking of surveys or water testing, were not such as to place the Council in a position where it was obliged to prevent the risk of injury, assuming for present purposes that it could have done so effectively. His Honour set out the relevant statutory provisions. The *Local Government Act* 1993 (NSW) , pursuant to which the Council obtained its wider powers, had amongst its stated purposes the provision of the legal framework for an effective and environmentally responsible local government. More specifically, the Council had the power to approve the carrying out of 'sewerage work', which was defined to include works relating to septic tanks or effluent systems and Council sewers. In that connexion, it was to have regard to 'the protection and promotion of public health'. It had power to require compliance to 'relevant standards' relating to sewerage systems and to require that owners or occupiers of premises (a term widely defined) do or refrain from doing, specified things 'to prevent environmental damage' or to cease an activity which was a threat to public health. It had the power to abate a nuisance, or to require that it be abated. It had powers of entry into premises in aid of its other powers. It had a general power to remove, disperse, destroy or mitigate the pollution of water, at the direction of the Environmental Protection Authority. There was, however, no statutory provision which had as its apparent purpose the prevention of contamination of oysters, the water in which they were grown, or the protection of consumers, and which required the Council to use one or more of its powers in a given circumstance to achieve those ends. The powers given to the Council, referred to above, which allowed it to undertake some action and which might have had some effect upon the risk in question may be contrasted with those in *Pyrenees* , by which the Council could be said to have been obliged to act so as to ensure the defective fireplace was remedied or not used. It may also be observed that the Council's argument, concerning the lack of definition of the content of any alleged duty, reflects the lack of an obligation directed to a specific end."

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[262] *Graham Barclay Oysters v Ryan* (2000) 102 FCR 307 at 457458 [593] .

[263] (1998) 192 CLR 330 .

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293. Then her Honour said [264] :

"Had the Council undertaken the management strategies referred to by his Honour it would follow from the evidence that the best outcome would have been a

reduction of the risk. A finding that it would actually 'minimise' is not, with respect, apparent and in any event the Council could not have acted such as to prevent the viral contamination and the injury in question.

In order to involve liability, action or inaction must be sufficiently important and closely connected with the incident in question so as to make it reasonable, on a broad commonsense view, to regard its author as responsible for it in law: *Fitzgerald v Penn* [265] . As to the possibility that any inaction on the Council's part could be said to have materially increased the risk of injury, the Council referred to the decision of Mason P in *Bendix* [266] , where his Honour held that the law did not equate that situation with one where it could be said the defendant materially contributed to it (as to which see *March v E & MH Stramare Pty Ltd* [267]). It does not seem to me that the Council's position is to be determined by such considerations, for in my view any general omission on its part could only be said to have left oyster consumers exposed to the same risk. The only relevant increase in risk arose not from its conduct, but from the effect of heavy rainfall. Tested another way, one could not say, on balance, that the performance of the duty identified would have averted the harm" [268] .

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[264] *Graham Barclay Oysters v Ryan* (2000) 102 FCR 307 at 458459 [595]-[596] .

[265] (1954) 91 CLR 268 at 275-276 .

[266] *Bendix Mintex Pty Ltd v Barnes* (1997) 42 NSWLR 307.

[267] (1991) 171 CLR 506 at 532.

[268] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 467 per Mason J.

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294. After discussing the cases, Lindgren J stated his conclusion in this way [269] :

"In my respectful opinion, it would be not an incremental development but a major change of direction in the law if we were to hold that the Council owed an actionable duty of care to the oyster consuming public in the circumstances of this case.

The Council would be under a duty to exercise each of its powers where injury to members of the public was foreseeable if it did not do so, even if, as here, the exercise of the power could do no more than reduce the risk of the injury. The Council would have to take all steps reasonably available to it in respect of all of the powers or be subject to the risk of indeterminate and potentially huge liabilities, the extent of which was beyond its control."

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[269] *Graham Barclay Oysters v Ryan* (2000) 102 FCR 307 at 414 [376] -[377] .

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295. Lee J agreed with the primary judge. His Honour was of the opinion that the proper application of the reasoning of this Court in *Crimmins v Stevedoring Industry Finance Committee* [270] dictated that result.

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[270] (1999) 200 CLR 1 .

The State's powers and functions

296. Because the primary judge's finding of negligence against the State was made on the basis that the State was "the ultimate manager of the fishery" [271] , it is necessary to consider the statutory powers and functions of the agencies of the State to which the parties referred.

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[271] (1999) 102 LGERA 123 at 219 [340] .

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297. In the *Fisheries Management Act* the statutory definition of "fish" includes "oysters" (s 5). Commercial oyster growers were required to hold an aquaculture permit (s 144).

298. The responsibility for the grant of oyster leases and the issue of aquaculture permits was the Minister's (s 146). He or she had power to determine commercial aquaculture industry development plans (ss 58 and 143) as well as a general power to close any fishery, and a specific power to prohibit harvesting if satisfied that fish (including oysters) were, or were likely to be, unfit for human consumption (s 189).

299. On 1 May 1995 the Fisheries Management (Aquaculture) Regulation (NSW) came into force. It required the Minister to determine a commercial aquaculture industry development plan to assure the quality of shellfish taken for human consumption (reg 12B). It also required the Minister to appoint State and local Shellfish Quality Assurance Committees (reg 12C), the latter having responsibility for the establishment and administration of local shellfish quality assurance programs in designated growing areas (reg 12E).

300. By November 1996, the State Committee had been appointed but the New South Wales Shellfish Quality Assurance program had not been developed. In December 1992 however, local oyster growers established a voluntary local shellfish quality assurance committee.

The State's submissions

301. The principal submission of the State was that changes to the legislation and the regulations in 1994 and 1995 indicated considered rejection of any idea that the State would assume responsibility for quality control management in any local oyster growing area: that this was not only a policy decision, it was also a disavowal of any active day-to-day role in any local growing area.

302. The introduction of these regulations, the State submits, brought to fruition a long discussed regime for quality assurance to be funded and administered by the industry itself.

303. It follows, the State submits, that the regulatory changes, because they rejected any requirement for classification of oyster growing areas, and because they did not require mandatory sanitary surveys, must be taken to have recognized the existence of foreseeable risks in every oyster growing area. Moreover, they must be taken to have recognised the likely continuation of those risks, at least until the establishment of a quality assurance program. Those matters, the State contended, are incompatible with the existence of a duty of care to consumers of oysters.

304. The State's regulatory powers were not therefore powers of day-to-day control. They were regulatory powers, the exercise of which depended on the evaluation of competing economic and community interests inconsistent with the existence of a common law duty of care requiring their exercise [272] .

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[272] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 441 per Gibbs CJ, 457 , 459, 469 per Mason J.

The Council's powers and functions

305. Mr Ryan drew attention to several of the provisions of the *Local Government Act* 1993 (NSW) ("the Local Act") as manifesting in sum a statutory obligation on the part of the Council to take steps for the prevention of contamination of the lake in default of which an infected consumer such as he might sue. First, reference was made to stated purposes of the Act : "to provide the legal framework for an effective, efficient, environmentally responsible … system of local government in New South Wales" (s 7(a)); "to give councils … a role in the management … of the resources of their areas" (s 7(d)); and, "to require councils … to have regard to the principles of ecologically sustainable development in carrying out their responsibilities" (s 7(e)). Mr Ryan also pointed out that s 68 of the Local Act provided that certain activities, including the disposal and management of waste within the area of the local authority, could only be undertaken with the prior approval of the Council. Reference was also made to s 125 which empowered the Council to abate a nuisance, and s 191 which authorized the Council, by its employees or others, to enter premises in order to carry out a function, which would include the abatement of an effluent nuisance. Similarly, s 192 made provision for inspections and investigations by the Council and the recovery of the cost

thereof pursuant to s 197. Other sections and regulations of the Act , such as s 678 and s 697, and reg 45, were also the subject of submissions because they enlarged the powers of the Council to take steps for the abatement of nuisances, and the protection of public health.

306. Mr Ryan also drew the attention of the Court to the *Clean Waters Act* 1970 (NSW) . Section 27 of that Act conferred upon the Council power to do such things, and to take such action as might be necessary to remove, disperse, destroy, or mitigate pollution, and to enter and inspect places and premises at the expense of a person responsible at that person's expense.

Mr Ryan's submission

307. Mr Ryan's submission is that there is no doubt that the Council did have statutory power to protect him and other consumers of oysters: the fact that the Council's powers are not expressed to be duties should not be fatal to his claim. As to the nature and purpose of the powers of the Council, he draws attention to s 7 of the Local Act , from which the true legislative purposes may be inferred. These, together with the powers granted by the interconnected provisions of that Act and other legislation, amount not only to a formidable array of power, but also a duty to exercise that power. So to hold would not, it is argued, be to produce an incompatibility with other functions and powers of the Council: nor would recognition of a duty of care in these circumstances distort the law or impinge upon the exercise of other statutory powers. Mr Ryan further argues that the class to which he belongs is not an indeterminate one, that its members can be clearly identified, and that it is a class for whose benefit it should be accepted the Council would, and should exercise its powers. The exercise of the relevant powers would not involve the taking of legislative, or quasi-legislative steps, and would not relate to a "core-policy" [273] function. Mr Ryan made the further point that the injury that he suffered was physical injury, and not pure economic loss, towards the former of which the law has more consistently been tender than the latter. The Council had a large measure of control over the situation, that is to say the state of sanitary containment in the area of the Council. Consumers were particularly vulnerable and had little or no means of self-protection against contaminated oysters.

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[273] See Mason J in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 469. S ee also McHugh J in *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 393 [180] .

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308. Mr Ryan's submission which I have summarized adopts much of the language and some of the tests which have been formulated by various justices of this Court in other cases.

309. However, as will also appear, the tests have not commanded unanimous support, and the situations in which their application has been considered may all be distinguished from one another.

The tests for liability of statutory authorities

310. **Following paragraph cited by:**

Meyers v Commissioner for Social Housing (07 August 2019) (Elkaim, Loukas-Karlsson and Charlesworth JJ)
Meyers v Commissioner for Social Housing (07 August 2019) (Elkaim, Loukas-Karlsson and Charlesworth JJ)

As long ago as 1880 Earl Cairns LC said this: [274]

> "[t]here may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so."

It may, with respect, be doubted whether it is possible to make a more accurate or better statement in relation to the powers and obligations of a statutory authority. Another way of expressing his Lordship's view is to say that there has to be something either unique (as it was in *Crimmins* [275] case) or special about the role, or involvement of the authority, or the relationship between it and the affected person, or special about the non-exercise of the power such as marked irrationality in abstention from employing it [276] , before liability may be sheeted home to the former [277] . It is of course understandable that courts should strive to find and state a principle capable of universal application, but so far such a principle has remained just as elusive as has any alternative formula to "beyond reasonable doubt" in criminal cases, although from time to time various opinions have held sway. The test propounded by Mason J in *Sutherland Shire Council v Heyman* [278] , of general reliance which I would read to be little different from that stated by Deane J in that case, enjoyed a considerable amount of support. It was adopted and applied by McHugh JA in the Court of Appeal in New South Wales in *Lutz* ,[279] and restated by his Honour in the High Court in *Pyr enees* [280] albeit with some qualifications. But *Pyrenees* also sounded its demise on its express disapproval by three of the Justices, Brennan CJ [281] , Gummow [282] and Kirby JJ [283] . The Chief Justice in that case was influenced by the speech of Lord Hoffmann (with whom Lord Goff of Chieveley and Lord Jauncey of Tullichettle agreed) in *Stovin v Wise* [284] , which had been decided shortly before the Court was called upon to reconsider what had been said by Mason J in *Sutherland* . Lord Hoffmann said [285] :

> "In the case of a mere statutory power, there is the further point that the legislature has chosen to confer a discretion rather than create a duty. Of course there may be cases in which Parliament has chosen to confer a power because the subject matter did not permit a duty to be stated with sufficient precision. It may nevertheless have contemplated that in circumstances in which it would be irrational not to exercise the power, a person who suffered loss because it had not been exercised, or not properly exercised, would be entitled to compensation. I therefore do not say that a statutory 'may' can never give rise to a common law duty of care. I prefer to leave open the question of whether the *Anns* case [286] was wrong to create any exception to Lord Romer's statement of principle in the *East Suffolk* case [287] and I shall go on to consider the circumstances (such as 'general reliance') in

which it has been suggested that such a duty might arise. But the fact that Parliament has conferred a discretion must be some indication that the policy of the act conferring the power was not to create a right to compensation. The need to have regard to the policy of the statute therefore means that exceptions will be rare.

In summary, therefore, I think that the minimum preconditions for basing a duty of care upon the existence of a statutory power, if it can be done at all, are, first, that it would in the circumstances have been irrational not to have exercised the power, so that there was in effect a public law duty to act, and secondly, that there are exceptional grounds for holding that the policy of the statute requires compensation to be paid to persons who suffer loss because the power was not exercised."

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[274] *Julius v Lord Bishop of Oxford* (1880) 5 App Cas 214 at 222223 .

[275] *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1.

[276] See Lord Hoffmann in *Stovin v Wise* [1996] AC 923 at 954.

[277] Compare the need to find a special relationship discussed in *Annetts v Australian Stations Pty Ltd* (2002) 76 ALJR 1348 at 1407 [324]; 191 ALR 449 at 531 per Callinan J citing Barwick CJ in *Mutual Life & Citizens' Assurance Co Ltd v Evatt* (1968) 122 CLR 556 at 569-570 and *Jaensch v Coffey* (1984) 155 CLR 549 at 583 per Deane J.

[278] (1985) 157 CLR 424 at 461-464 .

[279] *Parramatta City Council v Lutz* (1988) 12 NSWLR 293 at 328331 .

[280] *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 369-371 [103] -[110] .

[281] (1998) 192 CLR 330 at 344 [20] .

[282] Gummow J compared it with the test of legitimate expectation but criticised it as a legal fiction, anachronistic on that account, and therefore discordant with a modern preference for substance. So far, however, "legitimate expectation" appears to have survived as a test: see *Sanders v Snell* (1998) 196 CLR 329 at 347-348 [45] .

[283] (1998) 192 CLR 330 at 411 [231] .

[284] [1996] AC 923 .

[285] *Stovin v Wise* [1996] AC 923 at 953, cited in *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 345 [21] per Brennan CJ.

[286] *Anns v Merton London Borough Council* [1978] AC 728.

[287] *East Suffolk Rivers Catchment Board v Kent* [1941] AC 74.

311. Another test altogether, and indeed a potentially far-reaching one, was stated by Gibbs CJ in *Sutherland* . His Honour said [288] :

> "Once it is accepted, as it must be, that the ordinary principles of the law of negligence apply to public authorities, it follows that they are liable for damage caused by a negligent failure to act when they are under a duty to act, or for a negligent failure to consider whether to exercise a power conferred on them with the intention that it should be exercised if and when the public interest requires it."

[288] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 445.

312. Only Wilson J agreed with the Chief Justice in *Sutherland* , and the statement that I have just quoted has not been adopted or applied in this Court since *Sutherland* .

313. In *Pyrenees* , Kirby J was attracted to a third test which involved three stages and which had been expressed and applied by the House of Lords in *Caparo Industries Plc v Dickman* [289] . It involves the asking of three questions, as to foreseeability, relationship, and what should be regarded as fair, just and reasonable in the circumstances. His Honour was the only Justice to embrace that test in *Pyrenees* , and it has been expressly rejected in this country subsequently in *Perre v Apand Pty Ltd* [290] .

[289] [1990] 2 AC 605 .

[290] (1999) 198 CLR 180 at 193-194 [9] per Gleeson CJ, 210-212 [77]-[82] per McHugh J.

314. I will put to one side for the time being the decision of this Court in *Crimmins* [291] and go to the more recent case of *Brodie v Singleton Shire Council* [292] in which this Court effectively abolished the distinction between nonfeasance and misfeasance on the part of road authorities upon which the "highway rule" was based. There, Gaudron, McHugh and Gummow JJ in adopting a test of control, said this [293] :

> "The decisions of this Court in *Sutherland Shire Council v Heyman* [294] , *Pyrenees Shire Council v Day* [295] , *Romeo v Conservation Commission (NT)* [296] and *Crimmins v Stevedoring Industry Finance Committee* [297] are important for this litigation. Whatever may be the general significance today in tort law of the distinction between misfeasance and non-feasance, it has become more clearly

understood that, on occasions, the powers vested by statute in a public authority may give it such a significant and special measure of control over the safety of the person or property of citizens as to impose upon the authority a duty of care. This may oblige the particular authority to exercise those powers to avert a danger to safety or to bring the danger to the knowledge of citizens otherwise at hazard from the danger. In this regard, the factor of control is of fundamental importance [298] .

It is often the case that statutory bodies which are alleged to have been negligent because they failed to exercise statutory powers have no control over the source of the risk of harm to those who suffer injury. Authorities having the control of highways are in a different position. They have physical control over the object or structure which is the source of the risk of harm. This places highway authorities in a category apart from other recipients of statutory powers."

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[291] *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1.

[292] (2001) 206 CLR 512 .

[293] *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 558559 [102]-[103] .

[294] (1985) 157 CLR 424 . See also *Northern Territory v Mengel* (1995) 185 CLR 307 at 352-353, 359-360, 373.

[295] (1998) 192 CLR 330 .

[296] (1998) 192 CLR 431 .

[297] (1999) 200 CLR 1 .

[298] *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 551-552 .

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315. Their Honours did not see the possibility that courts might be called upon to examine the allocation of resources by a highway authority as reason to maintain the highway rule [299] . The formulation which their Honours adopted is set out in the following paragraph [300] :

"The duty which arises under the common law of Australia may now be considered. Authorities having statutory powers of the nature of those conferred by the LG Act upon the present respondents to design or construct roads, or carry out works or repairs upon them, are obliged to take reasonable care that their exercise of or failure to exercise those powers does not create a foreseeable risk of harm to a class of persons (road users) which includes the plaintiff. Where the state of a roadway, whether from design, construction, works or non-repair, poses a risk to that class of persons, then, to discharge its duty of care, an authority with

power to remedy the risk is obliged to take reasonable steps by the exercise of its powers within a reasonable time to address the risk. If the risk be unknown to the authority or latent and only discoverable by inspection, then to discharge its duty of care an authority having power to inspect is obliged to take reasonable steps to ascertain the existence of latent dangers which might reasonably be suspected to exist."

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[299] *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 560 [105] -[106] and especially at 580-581 [162] .

[300] *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 577 [150] .

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316. Although Hayne J was also in favour of the abolition of the highway rule, his Honour's formulation of the duty of care to replace it was somewhat different from the formulation in the joint judgment. In a passage which resonates with the statement of Earl Cairns LC and the speech of Lord Hoffmann that I earlier quoted, his Honour said this [301] :

"Rather, reference must be made [302] to 'the nature, scope and terms of the statute, including the nature of the evil against which it is directed, the nature of the conduct prescribed, *the pre-existing state of the law*, and, generally, the whole range of circumstances relevant upon a question of statutory interpretation' (emphasis added). Ordinarily, the more general the statutory duty and the wider the class of persons in the community who it may be expected will derive benefit from its performance, the less likely is it that the statute can be construed as conferring an individual right of action for damages for its non-performance. In particular, a statutory provision giving care, control and management of some piece of infrastructure basic to modern society, like roads, is an unpromising start for a contention that, properly understood, the statute is to be construed as providing for a private right of action."

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[301] *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 633634 [32 6] .

[302] *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397 at 405.

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317. **Following paragraph cited by:**

Sydney Water Corporation v Abramovic (14 September 2007) (Mason P; Santow JA ; Basten JA)

> 104 In my view the imposition of a duty on the Board to impose a safe system of work on independent contractors, is not justified in circumstances where the Board gave no direction as to the manner in which they were to carry out their work and no question of overall co-ordination or organisation arose. To take that step would require the application of the principle defined by Callinan J, and possibly by Gaudron J, in *Crimmins* out of the context of the case so as to apply it in circumstances which were, in legal terms, quite different. That Callinan J intended to place reliance on the special role of the Authority within the stevedoring industry is clear from his Honour's comments on *Crimmins* in *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at [317] ; see also *Randwick City Council v T&H Fatouros Pty Ltd* [2007] NSWCA 177 at [46]-[58] (Ipp JA, Giles and Tobias JJA agreeing), and generally *Amaca Pty Ltd v New South Wales* [2005] NSWCA 124; (2004) 132 LGERA 309 at [52] .

Crimmins does, I think, stand apart from the other cases to which I have referred. Whilst it was a case in which the Court effectively treated powers and functions as giving rise to duties of care, the factual and statutory contexts were both very special. What distinguished the powers and functions there was that if they were not in fact exercised, then the industry which was a uniquely organized one, would hardly have been able to function at all, or with any degree of efficiency [303] .

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[303] *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 113-114 [343]-[345], 115 [351] and in particular 115 [353].

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318. The most recent case which has some bearing upon this one is *Modbury Triangle Shopping Centre Pty Ltd v Anzil* [304] . Its relevance lies in the Court's reluctance, and ultimate refusal there, to impose upon an occupier, a duty to take reasonable care to prevent harm inflicted by the criminal behaviour of a third party. It is not without significance in these appeals, that almost certainly those persons within the area of the Council who failed to prevent the run-off of faecal effluent were guilty of offences against regulations or enactments, as indeed may the Council itself have been in respect of areas which it occupied. However, as to these, a caravan park and other public areas it cannot be established that they alone, or at all, were the source of the faecal matter which caused the contamination and illness.

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[304] (2000) 205 CLR 254 .

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319. In my opinion, the authorities to which I have referred do not stand for one clear test which is applicable to this case. Even though the Council here did have some measure of control of the land, and the management of waste on it in its area, it was not in the same position as a

highway authority. The reasoning of the three Justices responsible for the joint judgment in *Brodie* [305] depends in part at least upon the fact that highway authorities stand in a different position from other authorities in that they have actual physical control and occupation of the dedicated road area the source of the risk of harm. In that sense they are in a similar position to occupiers and in a category apart from other recipients of statutory power.

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[305] *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 559 [103] per Gaudron, McHugh and Gummow JJ.

Statement of the principle

320. I return to where I started in this section of my reasons, to the statement of Earl Cairns LC which requires that there be something in all of the circumstances, including of course the terms of the conferral of the powers, which requires that the power be coupled with a duty; or, as Hayne J put it in *Brodie* , "[something in] the whole range of circumstances relevant upon a question of statutory interpretation" [306] ; or as Lord Hoffmann put it in *Stovin v Wise* , irrationality in an abstention from exercising the power [307] or some other exceptional matter, or indicator of an intention to permit a person to sue. Unless these conditions are satisfied, in my opinion no relevant duty of care will arise.

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[306] (2001) 206 CLR 512 at 633 [326] .

[307] [1996] AC 923 at 954.

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321. True it may be, that vulnerability, power, control, generality or particularity of the class, the resources of, and demands upon the authority, may each be, in a given case, a relevant circumstance, but none should, I think, of itself be decisive. Nor do I think it convenient or satisfactory to pose a test whether a particular function of an authority involves a core, or a non-core function, or relates to a matter of policy or executive action [308] . Not the only problem about such a test is the inevitable difficulty of distinguishing functions, and the need for statutory authorities to make a political assessment of priorities.

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[308] Gummow J rejected such a distinction in *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 393-394 [180]-[182] .

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322. In my opinion, no better test can be stated than that of Earl Cairns LC modified to take account of Lord Hoffmann's opinion as to irrationality of abstention from exercise, or other exceptional circumstance, and which in form only, but not in substance I would regard as

being similar to that of Hayne J in *Brodie* . It was, it may also be observed, a test which quite clearly appealed to Brennan J in *Sutherland* as appears from his Honour's citation of it in that case.

The liability of the State

323. Applying the test to which I have just referred, I would conclude that the State is not liable. There had been no previous serious outbreak of Hepatitis A as a result of faecal contamination of the waters of the lake. There was a management council in place which had been supported by both the Council and State which, not unreasonably, could be expected to ensure that the industry regulated itself in a way that not only would protect the public as oyster consumers, but also would, in the interests of oyster growers and suppliers themselves, take steps to maintain control of quality and purity. There seems to be no suggestion that the rainfall in November 1996 was unprecedented. What I have just said also bears upon the submission that the State should have exercised its power under s 189 of the *Fisheries Management Act* to close the oyster fishery in the lake for a longer period than the growers themselves did. The absence of previous outbreaks, and the apparently satisfactory nature of what had been done in the past provides an answer to this. I do not think that in the circumstances, that elsewhere, and on other occasions, for instance the infectious contamination had occurred in the Tweed River in 1989 to 1990, meant that the State should have adopted further measures and caused the fishery to be closed for longer than it was. That might mean that an outbreak in the lake was foreseeable, but foreseeability alone is not enough to establish liability. It is an overstatement in my opinion to say, as the primary judge did, that the involvement of the State in the management of the fishery was so extensive that it gave rise to a duty of care to oyster consumers. His Honour the primary judge dwelt at some length on the need for regular sanitary surveys. No doubt these were highly desirable. But with all due respect, they were not the answer, although they might have been the first step in providing it. Their particular utility would lie only when effect was given to them by the taking of all necessary steps to abate the potential sources of contamination which they revealed. Such a process, however desirable it might be, would require time, money, labour, other resources, and possibly the deferral of other highly desirable measures. The State, furthermore, was not in the position of a highway authority having actual physical control of the land from which the effluent was released.

324. It follows that I do not think that there is any particular circumstance in this case which gives rise to a duty of care, a breach of which by the State would entitle an infected oyster consumer such as Mr Ryan to sue it. I do not overlook such important features as that the State did have and exercised a measure of control over the industry, that a matter of public health was involved, and that an oyster consumer is vulnerable and without any personal means whatsoever of guarding against a contaminated oyster. These are all relevant considerations. But they are not unique ones. Daily, agencies of the State and local authorities are concerned with issues of public health. In practical terms it would be impossible for any authority to police all potential sources of dangerous food just as it would be for such an agency to identify and eradicate all potential sources of danger of any kind. What distinguished the source of danger in *Pyrenees* is not present here: its precise identification by the Council and inadequate attempts by it to remove it. The massive obligation of the State to which a contrary view would give rise is a relevant and important

circumstance to which I should have regard, and which, although not decisive, weighs in the balance. In abstaining from doing more than it did the State was not, in my opinion, acting irrationally.

325. In truth, Mr Ryan did not belong to a particular class of persons in the sense in which that expression has from time to time been used in the cases. All members of the community (as well, perhaps, as people overseas) except perhaps infants and those who either do not like or are allergic to oysters, are potential consumers of them. Nor can I find anything special in the conditions under which contamination of oysters may be prevented which would require the imposition of a relevant duty upon the State. I am unable therefore to couple even the extensive powers of the State here, of control over the oyster industry, with a duty to do any particular act in this case which would have prevented Mr Ryan from contracting Hepatitis A from the contaminated oysters.

326. It follows that I would disallow Mr Ryan's appeal so far as it affects the liability of the State and I would uphold the appeal of the latter.

The liability of the Council

327. For the purposes of this case I am unable to distinguish in any significant way between the State and the Council. In form only, rather than in substance (with three exceptions only) their powers were much the same. The first two exceptions are that the State could have been a great deal more interventionist in the management of the oyster fishery had it wished, and it did have the power of closure. However, had the Council brought to the attention of both the participants in the industry and the public, facts which it knew as well as the State, as to the sources of potential contamination, and the risks to which they gave rise, the practical consequence would probably have been the same, that oysters from the lake would not have been consumed by members of the public until their quality could be reasonably assured. It is correct, as Kiefel J put it in the Full Court there was no doubt much that the Council could have done. The third exception is that unlike however in the case of the State, there was no statutory provision which had as its particular purpose the possible management of the industry or the prevention of contamination of oysters. There was no direct and active involvement by the Council in the control of the industry in anything like the same way as the Council involved itself in the attempt to eradicate the potential source of a fire in *Pyrenees* . A sking the same questions and applying the same test as I have in relation to the State, I conclude that the Council is not liable. The disposition of the appeals involving the Council should result in its not being held liable to Mr Ryan.

The liability of Barclay

328. The law so far as the liability of Barclay is concerned is well settled. It was obliged to take reasonable care for the safety of persons who consumed its oysters. So much was conceded by Barclay. Bearing upon that matter are these facts: of most importance that Barclay was carrying on a commercial activity in the cultivation and sale of oysters, that Barclay was not only obliged to have, but also had a great deal of knowledge about the cultivation and harvesting of oysters, and in particular of the potential for infection after heavy rain; that oysters were susceptible to faecal contamination; and that there were numerous potential

sources of such contamination in the catchment of the lake. Useful measures were available and had been adopted by Barclay but they could provide no complete defence against Hepatitis A infection.

329. The trial judge made a finding that Barclay could have made a significant contribution to the reduction of risk by causing an inspection to be made of the foreshores of the lake. Barclay was armed with the knowledge of outbreaks of Hepatitis A on other occasions in other places. Hepatitis A is a particularly unpleasant and dangerous illness. By a combination of inspections (as held by the primary judge) and a suspension of harvesting for longer than a few days, the risk might have significantly been reduced. As grower and supplier for profit, Barclay could and should be expected to provide safe oysters. These matters led the trial judge to make what was essentially a finding of fact, that in failing to adopt those measures Barclay was in breach of its duty of care to Mr Ryan.

330. I might not perhaps have reached the same conclusion myself. As Starke J pointed out in *Aust ralian Knitting Mills v Grant* [309] untoward results or accidents cannot with the greatest of care be wholly eliminated in any industrial process, an observation which could be made with at least equal force to a process of production of natural products. There were however facts upon which his Honour was entitled to reach the conclusion as to the liability of Barclay that he did. There are now concurrent findings of fact to a similar effect by two judges of the Full Court. Notwithstanding therefore the evidence of an absence of any previous outbreak by reason of contaminated oysters from Wallis Lake, and Barclay's incapacity itself to remove the sources of contamination, relevant factors which Lindgren J in dissent thought decisive, I am not prepared to depart from the holding of negligence against Barclay by the primary judge and the majority in the Full Court.

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[309] (1933) 50 CLR 387 at 410.

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331. The consequence of my decision is that both Barclay companies should be solely liable for Mr Ryan's loss and damage in negligence and with respect to costs. Barclay Oysters Pty Ltd has also been held to be liable, an unchallenged holding, to Mr Ryan for breaches of ss 74B and 74D of the *Trade Practices Act* in respect of those and the claim in negligence he will in due course be obliged to elect.

Disposition of the appeals

332. The judgment and orders of the Full Court of the Federal Court should be quashed and judgment and orders as follows substituted:

1. Judgment be entered in favour of Mr Ryan in the sum of $25,000 with interest of $2,000 against Graham Barclay Oysters Pty Ltd and Graham Barclay Distributors Pty Ltd ("Barclays");

2. Order that Barclays pay Mr Ryan's costs of the trial, and the appeals to the Full Court of the Federal Court and this Court confined to the litigation of the issues between them;

3. Order that Mr Ryan pay the costs of the State of New South Wales and the Great Lakes Council, of the trial, the appeals to the Full Court of the Federal Court and this Court;

4. Order that Barclays pay to Mr Ryan a sum equal to the additional costs incurred by him by reason of the litigation of issues arising solely between Barclays and the State and the Council or any of them inter se, at and of the trial, the appeal to the Full Court of the Federal Court and this Court; and

5. Order that the matter be remitted to the primary judge for the trial of any outstanding issues and disposition of the action.

Cited by:

Karpik v Carnival plc (The Ruby Princess) [2025] FCAFC 96 -
Karpik v Carnival plc (The Ruby Princess) [2025] FCAFC 96 -
Karpik v Carnival plc (The Ruby Princess) [2025] FCAFC 96 -
Karpik v Carnival plc (The Ruby Princess) [2025] FCAFC 96 -
Rock v Henderson; Rock v Henderson (No 2) [2025] NSWCA 47 -
Rock v Henderson; Rock v Henderson (No 2) [2025] NSWCA 47 -
State of New South Wales v Cullen [2024] NSWCA 310 (20 December 2024) (Gleeson, White and Kirk JJA)

> Graham Barclay Oysters Pty Ltd v Ryan (2002) 211 CLR 540 ; [2002] HCA 54 Robinson v Chief Constable of West Yorkshire Police [2018] AC 736 ; [2018] UKSC 4

State of New South Wales v Cullen [2024] NSWCA 310 (20 December 2024) (Gleeson, White and Kirk JJA)

> "[70] ... The broad thrust of the reasoning underlying Lord Reed's judgment is not entirely consistent with the approach dictated in this country by cases such as Graham Barclay Oysters , which requires, in determining whether there is a common law duty of care owed to particular persons by a statutory authority, 'a close examination of the terms, scope and purpose of the relevant statutory regime.' If Robinson were to be accepted, it may be on a narrower basis identified by Lord Mance, namely that 'we should now recognise the direct physical interface between the police and the public, in the course of an arrest placing an innocent passer-by or bystander at risk, as falling within a now established area of general police liability for positive negligent conduct which foreseeably and directly inflicts physical injury on the public.'" (Footnotes omitted)

State of New South Wales v Cullen [2024] NSWCA 310 -
State of New South Wales v Cullen [2024] NSWCA 310 -
State of New South Wales v Cullen [2024] NSWCA 310 -
State of New South Wales v Cullen [2024] NSWCA 310 -
State of New South Wales v Cullen [2024] NSWCA 310 -
State of New South Wales v Cullen [2024] NSWCA 310 -
Footscray Football Club Limited (ACN 005 226 595) v Adam Kneale [2024] VSCA 314 (12 December 2024) (Emerton P; Beach JA; J Forrest AJA)

265. However, an affirmative finding by the jury of reasonable foreseeability alone does not determine the fate of this ground. [36] As the authorities we have referred to make clear, it is also necessary for this Court to determine whether the relationship between Hobbs, Footscray and Mr Kneale was sufficient to found a duty of care and its content in the form of the judge's direction to the jury.

via

[36] *Sullivan v Moody* (2001) 207 CLR 562, 576 [42] (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ); *Graham Barclay Oysters* (2002) 211 CLR 540, 555 [9] (Gleeson CJ) .

Footscray Football Club Limited (ACN 005 226 595) v Adam Kneale [2024] VSCA 314 -
Commonwealth of Australia v Sanofi [2024] HCA 47 (11 December 2024) (Gordon A-Cj, Edelman, Steward, Jagot and Beech-Jones JJ)

28. In challenging concurrent findings of fact in this Court, an appellant confronts a high bar — a difficult task. [28] The appellant carries the burden of establishing "special reasons such as plain injustice or clear error". [29] The high bar is implicit in the requirement that there be *pla in injustice* or *clear error*, not merely error. [30] If the findings of fact made in the courts below *appear* to be correct, the high bar is not cleared and the appellant will not have discharged its burden. [31] The point that the ultimate appellate court must reach is that it holds a "clear conviction" [32] that the findings made at trial *and* confirmed by the intermediate appellate court, understood in light of the arguments put by the parties at trial and on appeal, are clearly wrong. [33] It is not enough that an ultimate appellate court would simply reach a different conclusion of its own. [34] It is irrelevant if there were differences in the reasoning of the primary judge and the intermediate appellate court, or if there was a dissentient in the intermediate appellate court. [35] By contrast, where the errors made in the courts below lay in fundamental errors of law, then concurrent findings of fact are no insulation. [36]

via

[33] *Roads and Traffic Authority of New South Wales v Dederer* (2007) 234 CLR 330 at 334-335 [6] , citing *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 568-569 [53]-[54] , which, in turn, quoted *Owners of the "P Caland" and Freight v Glamorgan Steamship Co* [1893] AC 207 at 216.

Commonwealth of Australia v Sanofi [2024] HCA 47 -
Commonwealth of Australia v Sanofi [2024] HCA 47 -
Commonwealth of Australia v Sanofi [2024] HCA 47 -
Mallonland Pty Ltd v Advanta Seeds Pty Ltd [2024] HCA 25 -
DPP v Richardson [2023] VSCA 241 -
AZC20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2023] HCA 26 -
Scenic Tours Pty Ltd v Moore [2023] NSWCA 74 -
Mallonland Pty Ltd v Advanta Seeds Pty Ltd [2023] QCA 24 -
Mallonland Pty Ltd v Advanta Seeds Pty Ltd [2023] QCA 24 -
Mallonland Pty Ltd v Advanta Seeds Pty Ltd [2023] QCA 24 -
Seiffert v The Prisoners Review Board [2023] WASCA 15 -
Seiffert v The Prisoners Review Board [2023] WASCA 15 -
Seiffert v The Prisoners Review Board [2023] WASCA 15 -
Electricity Networks Corporation v Herridge Parties [2022] HCA 37 (07 December 2022) (Kiefel CJ, Gageler, Gordon, Edelman and Steward JJ)

26. This appeal is concerned with the existence and content of a duty of care that is owed in the *exercise* of statutory powers. But although this appeal does not concern a failure by a statutory authority to exercise particular statutory powers – powers that the statutory authority had, and which it could have exercised but did not [15] – that does not mean that those powers that were not exercised are irrelevant. As explained below, in determining the existence and content of a duty of care arising from the statute, the whole statutory regime must be considered, including powers which have not been exercised but are interconnected with powers which have been exercised.

via

[15] cf *Sutherland Shire Council* (1985) 157 CLR 424 at 443, 460-461, 479, 501-502 ; *Graham Barclay* (2002) 211 CLR 540 at 574 [78] ; *Stuart* (2009) 237 CLR 215 at 225 [11], 253 [108], 256 [118] . See also *Crimmins* (1999) 200 CLR 1 at 18 [25] .

Electricity Networks Corporation v Herridge Parties [2022] HCA 37 (07 December 2022) (Kiefel CJ, Gageler, Gordon, Edelman and Steward JJ)

23. But a statutory authority may, by its conduct, assume a responsibility to exercise the power [9] . In that case, the statutory authority may owe a common law duty which requires it to exercise a power which it is under no statutory obligation to exercise. The approach to whether a statutory authority has assumed responsibility to exercise a power, such that it can be tortiously liable for an omission to exercise that power, has sometimes been considered by reference to notions of "control" [10] .

via

[10] See, eg, *Pyrenees* (1998) 192 CLR 330 at 347 [25], 376 [124], 389 [168] ; *Crimmins* (1999) 200 CLR 1 at 24-25 [43]-[46], 4243 [104]-[107], 61 [166], 82 [227], 104 [304]-[305], 116 [357] ; *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 558-559 [102] ; *Graham Barclay* (2002) 211 CLR 540 at 598-599 [150]-[152] ; *Stuart* (2009) 237 CLR 215 at 254 [113][114], 262 [138] . See also *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 551-552 .

Electricity Networks Corporation v Herridge Parties [2022] HCA 37 -
Electricity Networks Corporation v Herridge Parties [2022] HCA 37 -
Electricity Networks Corporation v Herridge Parties [2022] HCA 37 -
Electricity Networks Corporation v Herridge Parties [2022] HCA 37 -
Electricity Networks Corporation v Herridge Parties [2022] HCA 37 -
Electricity Networks Corporation v Herridge Parties [2022] HCA 37 -
Electricity Networks Corporation v Herridge Parties [2022] HCA 37 -
Electricity Networks Corporation v Herridge Parties [2022] HCA 37 -
Electricity Networks Corporation v Herridge Parties [2022] HCA 37 -
John XXIII College v SMA [2022] ACTCA 32 -
John XXIII College v SMA [2022] ACTCA 32 -
Thoms v The Commonwealth [2022] HCA 20 -
Minister for the Environment v Sharma [2022] FCAFC 35 (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)

663. Generally, the Minister has made much play of her “many actors” point and the observation of Gummow and Hayne JJ in *Graham Barclay Oysters* (at [145]):

> ...As will appear, the common law should be particularly hesitant to recognise such a duty where the relevant authority is empowered to regulate conduct relating to or

> impacting on a risk-laden field of endeavour which is populated by self-interested commercial actors who themselves possess some power to avert those risks.

Minister for the Environment v Sharma [2022] FCAFC 35 (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)

672. It is vulnerability in this narrower sense that is being considered, and is particularly relevant where a defendant has brought about or exacerbated the relevant risk or at the least been in a position to control the risk (*Graham Barclay Oysters* at [149] per Gummow and Hayne JJ and *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at [127] per McHugh J).

Minister for the Environment v Sharma [2022] FCAFC 35 (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)

864. In *Graham Barclay Oysters* , Gleeson CJ at [12] stated that the distinction between policy and operational matters was never rigorous, but that the idea behind it remained relevant in some cases. In relation to decisions dictated by financial, economic, social or political factors or constraints that were referred to by Mason J in *Heyman* , his Honour stated at [13] that one of the reasons why matters of this kind are inappropriate as subjects of curial judgment about reasonableness is that they involve competing public interests where "there is no criterion by which a court can assess where the balance lies between the weight to be given to one interest and that to be given to another", citing *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 at 1067 (Lord Diplock). In relation to the question whether, in not exercising powers, government was accountable through the law of negligence, Gleeson CJ stated at [15] –

> A conclusion that such a duty of care exists necessarily implies that the reasonableness or unreasonableness of the inaction of which complaint is made is a legitimate subject for curial decision. Such legitimacy involves questions of practicality and of appropriateness. There will be no duty of care to which a government is subject if, in a given case, there is no criterion by reference to which a court can determine the reasonableness of its conduct.

Minister for the Environment v Sharma [2022] FCAFC 35 (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)

612. First, the present context is not in the realm of a scenario where the legislation explicitly or implicitly enshrines one policy and the posited duty of care is inconsistent or in tension with such a policy; *Graham Barclay Oysters* provides such an example, and in any event is not a third scenario type case.

Minister for the Environment v Sharma [2022] FCAFC 35 (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)

632. So, apart from some general statements by Gleeson CJ which were broader than the context dealt with in *Graham Barclay Oysters* and not expressly endorsed by others at that level, that case does not strongly point against the posited duty because of matters of high policy.

Minister for the Environment v Sharma [2022] FCAFC 35 (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)

236. These difficulties and the clear contestability in many cases of the assertion of immunity of decisions of public authorities (cf *Brodie* 206 CLR at 558–560 [102]–[106] (Gaudron, McHugh and Gummow JJ)) do not undermine or deny the legitimacy, and acceptance, of the central idea to which Mason J was referring in *Heyman* : that there will be in some decisions of a public authority factors that make the law of negligence an inapposite or unsuitable vehicle for examining the choices and judgements involved. Such circumstances can be described as "core area of policy-making" or "quasi-legislative or regulatory in nature": *Heyman* 157

CLR at 469 (Mason J) and 500 (Deane J); *Pyrenees Shire Council* 192 CLR at 393–394 [180]–[182] (Gummow J); *Crimmins* 200 CLR at 37–38 [87]–[90] (McHugh J, with Gleeson CJ agreeing); *Dorset Yacht* [1970] AC at 1067–106 8 (Lord Diplock); and see the discussion of the question in *Bienke v Minister for Primary Industries and Energy* (1996) 63 FCR 567 at 593–596 (Black CJ, Davies and Sackville JJ) referred to with approval by Gummow J in *Pyrenees Shire Council* at 394 [182] and by McHugh J in *Crimmins* at 37 [87] . I have already set out what Gleeson CJ said in *Graham Barclay Oysters* 211 CLR at 553–554 [6]. Regard should also be had to the following in the Chief Justice's reasons at 556–557 [12]–[15]:

> [12] [Referring to the limits of the extent to which it is possible to assimilate the tortious liability of governments to that of subjects] ...They arise from the nature and responsibilities of governments. In determining the existence and content of a duty of care, there are differences between the concerns and obligations of governments, and those of citizens. Such differences led to an attempt to distinguish between matters of policy and operational matters. That distinction was never rigorous, and its validity and utility have been questioned [citing *Pyrenees* and *Stovin v Wise*]. Even so, the idea behind it remains relevant in some cases, such as the present.
>
> [13] [After referring to Mason J in *Heyman* at 469] One of the reasons why matters of the first kind are inappropriate as subjects of curial judgment about reasonableness is that they involve competing public interests in circumstances where, as Lord Diplock put it, "there is no criterion by which a court can assess where the balance lies between the weight to be given to one interest and that to be given to another" [citing *Dorset Yacht* at 1067].
>
> ....
>
> [14] There are forms of governmental activity, which courts in the past endeavoured to describe by the term "operational", where there is no reason for hesitating to assimilate the position of governments to that of citizens in imposing duties and standards of care. Such activity might involve budgetary considerations, but that does not prevent such assimilation. Individuals and corporations also have to watch their budgets, and decisions about what is reasonable may have to take account of that. As the other extreme, the reasonableness of legislative or quasi-legislative activity is generally non-justiciable.
>
> [15] [After referring to the matter before the Court]... A conclusion that such a duty of care exists necessarily implies that the reasonableness or unreasonableness of the inaction of which complaint is made is a legitimate subject for curial decision. Such legitimacy involves questions of practicality and of appropriateness. There will be no duty of care to which a government is subject if, in a given case, there is no criterion by reference to which a court can determine the reasonableness of its conduct. That negative proposition leaves open other questions as to the circumstances in which the law will treat failure on the part of a public authority to exercise a power as a breach of a private law duty of care; but it is sufficient to resolve a substantial part of the case against the State in these proceedings.

See also 211 CLR at 561 [26]–[27] (Gleeson CJ also), 579–580 [90]–[91] (McHugh J) and 606–607 [175]–[176] (Gummow and Hayne JJ, with whom Gaudron J agreed at 573 [58]).

Minister for the Environment v Sharma [2022] FCAFC 35 (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)

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as "core area of policy-making" or "quasi-legislative or regulatory in nature": *Heyman* 157 CLR at 469 (Mason J) and 500 (Deane J); *Pyrenees Shire Council* 192 CLR at 393–394 [180]–[182] (Gummow J); *Crimmins* 200 CLR at 37–38 [87]–[90] (McHugh J, with Gleeson CJ agreeing); *Dorset Yacht* [1970] AC at 1067–106 8 (Lord Diplock); and see the discussion of the question in *Bienke v Minister for Primary Industries and Energy* (1996) 63 FCR 567 at 593–596 (Black CJ, Davies and Sackville JJ) referred to with approval by Gummow J in *Pyrenees Shire Council* at 394 [182] and by McHugh J in *Crimmins* at 37 [87] . I have already set out what Gleeson CJ said in *Graham Barclay Oysters* 211 CLR at 553–554 [6]. Regard should also be had to the following in the Chief Justice's reasons at 556–557 [12]–[15]:

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> [14] There are forms of governmental activity, which courts in the past endeavoured to describe by the term "operational", where there is no reason for hesitating to assimilate the position of governments to that of citizens in imposing duties and standards of care. Such activity might involve budgetary considerations, but that does not prevent such assimilation. Individuals and corporations also have to watch their budgets, and decisions about what is reasonable may have to take account of that. As the other extreme, the reasonableness of legislative or quasi-legislative activity is generally non-justiciable.
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Minister for the Environment v Sharma [2022] FCAFC 35 (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)

206. The search for a principled approach to the imposition of a duty to take reasonable care for others and their interests has not led in Australia to any analytical formula capable of mechanical application: see *Graham Barclay Oysters* 211 CLR at 622–629 [229]–[244] (Kirby J). In part, that is because of the need to draw out from the detail and context of human and societal relationships a legal duty that requires the exercise of reasonable care in some

> fashion. Taxonomy and definition play their part, but ultimately the law of negligence concerns itself with the protection of certain human interests against certain types of human (mis)conduct where it is reasonable and in accordance with standards of the day to impose a duty that may lead to personal responsibility for compensation to a person harmed by the (mis)conduct. The notion of neighbourhood taken from *Donoghue v Stevenson* [1932] AC 562 at 580 is built on the human and societal relationship between the parties: *Mutual Life & Citizens' Assurance Co Ltd v Evatt* [1968] HCA 74; 122 CLR 556 at 566.

Minister for the Environment v Sharma [2022] FCAFC 35 (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)

851. In *Graham Barclay Oysters* at [99] , McHugh J stated –

> ... no duty of care can arise unless the relationship between the parties is one of neighbourhood in Lord Atkin's sense as stated in *Donoghue v Stevenson* . To create a duty, the relationship between the public authority and persons affected by the conduct of the authority must be "so closely and directly affected by [its] act [or omission] that [it] ought reasonably to have them in contemplation as being so affected" when it directs its mind to the relevant conduct in question.
>
> [Footnote omitted.]

Minister for the Environment v Sharma [2022] FCAFC 35 -
Minister for the Environment v Sharma [2022] FCAFC 35 -
Minister for the Environment v Sharma [2022] FCAFC 35 -

Minister for the Environment v Sharma [2022] FCAFC 35 -
Minister for the Environment v Sharma [2022] FCAFC 35 -
Minister for the Environment v Sharma [2022] FCAFC 35 -
Belconnen Lakeview Pty Ltd v Lloyd [2021] FCAFC 187 -
Herridge Parties v Electricity Networks Corporation t/as Western Power [2021] WASCA 111 -
Herridge Parties v Electricity Networks Corporation t/as Western Power [2021] WASCA 111 -
Grey v The Queen [2022] ACTCA 2 -
Grey v The Queen [2022] ACTCA 2 -
Grey v The Queen [2022] ACTCA 2 -
Old v Miniter [2021] NSWCA 92 -
Old v Miniter [2021] NSWCA 92 -
Ethicon Sarl v Gill [2021] FCAFC 29 -
Ethicon Sarl v Gill [2021] FCAFC 29 -
Amaca Pty Ltd v Werfel [2020] SASCFC 125 -
Amaca Pty Ltd v Werfel [2020] SASCFC 125 -
Mir Holdings Pty Ltd v Marina Square Retail Pty Ltd [2020] NSWCA 286 -
Mir Holdings Pty Ltd v Marina Square Retail Pty Ltd [2020] NSWCA 286 -
BWO19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCAFC 181 (29 October 2020) (Rangiah, SC Derrington and Abraham JJ)

13. It follows that, for the granting or refusal of a protection visa under s 65 , the Minister must be satisfied (or, for refusal, "not so satisfied") of a number of matters including that the applicant meets the refugee or the complementary protection criteria. Where the Minister reaches the relevant state of satisfaction (or otherwise), she or he is obliged to issue (or refuse) the visa. In that sense the Minister does not have any decisional discretion. The structure of the *Migration Act* requires the Minister to consider the application for a visa (s 47 (1)) and, after doing so (s 65(1)), if reaching (or not reaching) the required state of satisfaction, to act accordingly. The state of mind, being either satisfaction or non-satisfaction, is a pre-condition to granting or refusing the visa. This structure was articulated by Gummow and Hayne JJ in *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* [2004] HCA 32; (2004) 78 ALJR 992 at [37] :

> The satisfaction of the Minister is a condition precedent to the discharge of the obligation to grant or refuse to grant the visa, and is a "jurisdictional fact" or criterion upon which the exercise of that authority is conditioned (*Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 609 [183]).

I.C. Formwork Services Pty Limited v Moir (No 2) [2020] ACTCA 44 -
I.C. Formwork Services Pty Limited v Moir (No 2) [2020] ACTCA 44 -
Clarence City Council v Commonwealth of Australia [2020] FCAFC 134 -
Clarence City Council v Commonwealth of Australia [2020] FCAFC 134 -
Brocklands Pty Ltd v Tasmanian Networks Pty Ltd [2020] TASFC 4 -
Brocklands Pty Ltd v Tasmanian Networks Pty Ltd [2020] TASFC 4 -
Brocklands Pty Ltd v Tasmanian Networks Pty Ltd [2020] TASFC 4 -
Allied Pumps Pty Ltd v Hooker [2020] WASCA 72 -
Allied Pumps Pty Ltd v Hooker [2020] WASCA 72 -
Allied Pumps Pty Ltd v Hooker [2020] WASCA 72 -
Cornwall v Jenkins as Trustee for the iSpin Family Trust [2020] ACTCA 2 -
Cornwall v Jenkins as Trustee for the iSpin Family Trust [2020] ACTCA 2 -
Singh v Minister for Home Affairs [2020] FCAFC 7 -
FRM17 v Minister for Home Affairs [2019] FCAFC 148 -
FRM17 v Minister for Home Affairs [2019] FCAFC 148 -
FRM17 v Minister for Home Affairs [2019] FCAFC 148 -
FRM17 v Minister for Home Affairs [2019] FCAFC 148 -
Meyers v Commissioner for Social Housing [2019] ACTCA 19 (07 August 2019) (Elkaim, Loukas-Karlsson and Charlesworth JJ)

Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54; 211 CLR 540
Harris v Commissioner for Social Housing; Towney-Kilby v Commissioner for Social Housing; Sullivan v Commissioner for Social Housing

Meyers v Commissioner for Social Housing [2019] ACTCA 19 -
Meyers v Commissioner for Social Housing [2019] ACTCA 19 -
Meyers v Commissioner for Social Housing [2019] ACTCA 19 -
Meyers v Commissioner for Social Housing [2019] ACTCA 19 -
Meyers v Commissioner for Social Housing [2019] ACTCA 19 -
Meyers v Commissioner for Social Housing [2019] ACTCA 19 -
Jennings v Police [2019] SASCFC 93 (30 July 2019) (Kourakis CJ; Stanley and Parker JJ)

Tavitian v Commissioner of Highways [2015] SASC 108; *Re Luck* (2003) 78 ALJR 177; *Macantangay v The State of New South Wales (No 2)* [2009] NSWCA 272; *Rogers v Legal Services Commission* (1995) 64 SASR 572; *Spencer v Commonwealth* (2010) 241 CLR 118; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 ; *Hill v Chief Constable of West Yorkshire* [1989] AC 53; *Knightley v Johns* [1982] 1 WLR 349; *Rigby v Chief Constable of Northamptonshire* [1985] 1 WLR 1242; *Robinson v Chief Constable of West Yorkshire* [2018] AC 736; *State of New South Wales v Tyszyk* [2008] NSWCA 107; *Cran v State of New South Wales* (2004) 62 NSWLR 95; *Halech v State of South Australia* (2006) 93 SASR 427; *Fuller-Wilson v State of New South Wales* [2018] NSWCA 218, considered.

Jennings v Police [2019] SASCFC 93 -
Jennings v Police [2019] SASCFC 93 -
Jennings v Police [2019] SASCFC 93 -
Jennings v Police [2019] SASCFC 93 -
Jennings v Police [2019] SASCFC 93 -
Williams v Metcash Trading Ltd [2019] NSWCA 94 -
Williams v Metcash Trading Ltd [2019] NSWCA 94 -
Clubb v Edwards [2019] HCA 11 -
Clubb v Edwards [2019] HCA 11 -
Osborne Park Commercial Pty Ltd v Miloradovic [2019] WASCA 17 -
Osborne Park Commercial Pty Ltd v Miloradovic [2019] WASCA 17 -
Ibrahimi v Commonwealth of Australia [2018] NSWCA 321 (19 December 2018) (Meagher and Payne JJA, Simpson AJA)

Graham Barclay Oysters Pty Ltd v Ryan (2002) 211 CLR 540; [2002] HCA 54 ; *Agar v Hyde* (2000) 201 CLR 552; [2000] HCA 41 applied.

Ibrahimi v Commonwealth of Australia [2018] NSWCA 321 -
Ibrahimi v Commonwealth of Australia [2018] NSWCA 321 -
Ibrahimi v Commonwealth of Australia [2018] NSWCA 321 -
Ibrahimi v Commonwealth of Australia [2018] NSWCA 321 -
Lightfoot v Rockingham Wild Encounters Pty Ltd [2018] WASCA 205 -
Lightfoot v Rockingham Wild Encounters Pty Ltd [2018] WASCA 205 -
Fuller-Wilson v State of New South Wales [2018] NSWCA 218 -
Fuller-Wilson v State of New South Wales [2018] NSWCA 218 -
Fuller-Wilson v State of New South Wales [2018] NSWCA 218 -
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Fuller-Wilson v State of New South Wales [2018] NSWCA 218 -
Fuller-Wilson v State of New South Wales [2018] NSWCA 218 -
D&v Services Pty Ltd v SA Power Networks [2018] SASCFC 92 (04 September 2018) (Kourakis CJ; Kelly and Lovell JJ)

45. The question then becomes what would be a reasonable response to that identified risk. This question is to be answered by considering the (non-exhaustive) factors set out in s 32(a)-(d) . Whether reasonable care was exercised in any particular case is a question of fact going to the breach of duty not to the existence of the duty. [14] The inquiry into breach involves a

court identifying with some precision "what a reasonable person in the position of the defendant would do by way of response to the reasonably foreseeable risk". [15]

via

[15] *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 611-612 [192].

D&v Services Pty Ltd v SA Power Networks [2018] SASCFC 92 -
D&v Services Pty Ltd v SA Power Networks [2018] SASCFC 92 -
D&v Services Pty Ltd v SA Power Networks [2018] SASCFC 92 -
D&v Services Pty Ltd v SA Power Networks [2018] SASCFC 92 -
Apostolic Church Australia Ltd v Dixon [2018] WASCA 146 -
Apostolic Church Australia Ltd v Dixon [2018] WASCA 146 -
Taylor v Fisher [2018] WASCA 126 (01 August 2018) (Martin CJ, Murphy JA, Beech JA)

105. A failure to eliminate a reasonably foreseeable risk does not establish negligence. [75] Proper enquiry at the breach stage involves identifying with some precision what a reasonable person would have done by way of response to the foreseeable risk. [76] It is fundamental that the question of whether a defendant breached its duty to exercise reasonable care is to be approached prospectively, not with the benefit of hindsight. [77]

via

[76] ***Graham Barclay Oysters Pty Ltd v Ryan*** [2002] HCA 54; (2002) 211 CLR 540 [192]; ***Amaca*** [356].

Taylor v Fisher [2018] WASCA 126 -
Coles Supermarket Australia Pty Ltd v Harris [2018] ACTCA 25 -
Coles Supermarket Australia Pty Ltd v Harris [2018] ACTCA 25 -
Hevilift Limited v Towers [2018] QCA 89 -
Gordon v Lever [2018] NSWCA 43 -
Gordon v Lever [2018] NSWCA 43 -
Optus Administration Pty Limited v Glenn Wright by his tutor James Stuart Wright [2017] NSWCA 21 -
Gary Nigel Roberts v Westpac Banking Corporation [2016] ACTCA 68 (13 December 2016) (Murrell CJ, Burns and Gilmour JJ)

58. A number of general observations as to legal principles may be made at the outset when considering a case such as this. Ordinarily the common law does not impose a duty of care on a person to protect another from the risk of harm unless that person has created the risk: *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54; 211 CLR 540 at [81] per McHugh J. A duty of care does not require the prevention of harm; it requires the taking of reasonable care: *Roads and Traffic Authority (NSW) v Dederer* [2007] HCA 42; 234 CLR 330 at [18]. Consideration of the factual matrix in which harm occurs is relevant to the determination of the existence and scope of the duty of care: *Vairy v Wyong Shire Council* [2005] HCA 62; 223 CLR 422 at [118]. However, whether there is such a duty is a different enquiry from the question whether there has been a breach. Furthermore, whether there is a duty is a question of law which is determined at a higher level of abstraction than the factual question of breach: *Wyong Shire Council* at [71].

Gary Nigel Roberts v Westpac Banking Corporation [2016] ACTCA 68 (13 December 2016) (Murrell CJ, Burns and Gilmour JJ)
Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54; 211 CLR 540
Hunter and New England Local Health District v McKenna

Gunns Limited v State of Tasmania [2016] TASFC 7 (21 September 2016) (Blow CJ and Tennent J)

50. Counsel for the appellant referred the Court to passages from the joint judgment of Gummow and Hayne JJ in *Graham Barclay Oysters* at [146] and parts of [147] and [149]. He unfortunately omitted a reference to comments in [145]. A combination of that paragraph, those parts of subsequent paragraphs to which counsel referred and [148] was as follows:

> "145 The accuracy of these two observations may be accepted. However, the co–existence of knowledge of a risk of harm and power to avert or to minimise that harm does not, without more, give rise to a duty of care at common law. The totality of the relationship between the parties, not merely the foresight and capacity to act on the part of one of them, is the proper basis upon which a duty of care may be recognised. Were it otherwise, any recipient of statutory powers to licence, supervise or compel conduct in a given field, would, upon gaining foresight of some relevant risk, owe a duty of care to those ultimately threatened by that risk to act to prevent or minimise it. As will appear, the common law should be particularly hesitant to recognise such a duty where the relevant authority is empowered to regulate conduct relating to or impacting on a risk–laden field of endeavour which is populated by self–interested commercial actors who themselves possess some power to avert those risks.
>
> 146 The existence or otherwise of a common law duty of care allegedly owed by a statutory authority turns on a close examination of the terms, scope and purpose of the relevant statutory regime. The question is whether that regime erects or facilitates a relationship between the authority and a class of persons that, in all the circumstances, displays sufficient characteristics answering the criteria for intervention by the tort of negligence.
>
> 147 Where the question posed above is answered in the affirmative, the common law imposes a duty in tort which operates alongside the rights, duties and liabilities created by statute. In some instances, a statutory regime may itself, in express terms or by necessary implication, exclude the concurrent operation of a duty at common law. ...
>
> 148 However, contrary to submissions put on behalf of the Attorney–General for Western Australia (as an intervener in this Court), the discernment of an affirmative legislative intent that a common law duty exists, is not, and has never been, a necessary pre–condition to the recognition of such a duty. This may be contrasted with the action for breach of statutory duty, the doctrinal basis of which is identified as legislative intention.
>
> 149 An evaluation of whether a relationship between a statutory authority and a class of persons imports a common law duty of care is necessarily a multi–faceted inquiry. Each of the salient features of the relationship must be considered. The focus of analysis is the relevant legislation and the positions occupied by the parties on the facts as found at trial. It ordinarily will be necessary to consider the degree and nature of control exercised by the authority over the risk of harm that eventuated; the degree of vulnerability of those who depend on the proper exercise by the authority of its powers; and the consistency or otherwise of the asserted duty of care with the terms, scope and purpose of the relevant statute ..." [Footnotes omitted.]

Counsel for the appellant pointed out that the observations above were made in the context of a failure to exercise a discretionary power which was open to be exercised on the facts.

Gunns Limited v State of Tasmania [2016] TASFC 7 -
Gunns Limited v State of Tasmania [2016] TASFC 7 -
DC v State of New South Wales [2016] NSWCA 198 -
DC v State of New South Wales [2016] NSWCA 198 -
DC v State of New South Wales [2016] NSWCA 198 -
Gomeroi People v Attorney-General of New South Wales [2016] FCAFC 75 -
Swift v Wearing-Smith [2016] NSWCA 38 -
Marsh v Baxter [2015] WASCA 169 (03 September 2015) (McLure P; Newnes and Murphy JJA)

704. In relation to the appellants' allegations with respect to ground 2, we would make the following observations. First, his Honour expressly recognised that at law, the test of reasonable foreseeability does not require foresight of the particular mechanism by which the damage ultimately occurred. [222] Nevertheless, his Honour, in seeking to apply that principle, does seem to have proceeded on the basis that the appellants were required to establish the particular mechanism by which the loss eventually occurred,[223] insofar as he found there to be a relevant distinction between transference of GM plant material by rabbits and transference of GM plant material by wind. That would, with respect, appear to involve a misapplication of the correct principle stated by his Honour. However, his Honour also observed, in effect, that in any event, reasonable foreseeability of the risk of economic loss was not in itself sufficient to generate a duty of care in these circumstances.[224] That proposition is correct. [225] Further and in any event, any error on the part of his Honour in the respect identified is immaterial to the disposition of the appeal if his Honour's ultimate finding of the absence of a duty were correct.

via

[225] *Caltex* (555), (558 559), (592), (598); *Perre* [4], [7], [27], [71] ; ***Graham Barclay Oysters Pty Ltd v Ryan*** [2002] HCA 54; (2002) 211 CLR 540 [9], [86]; ***Woolcock Street Investments Pty Ltd v CDG Pty Ltd*** [2004] HCA 16; (2004) 216 CLR 515 [21].

Collins v Clarence Valley Council [2015] NSWCA 263 -
Marsh v Baxter [2015] WASCA 169 -
King v Philcox [2015] HCA 19 -
King v Philcox [2015] HCA 19 -
Perisher Blue Pty Ltd v Nair-Smith [2015] NSWCA 90 -
Perisher Blue Pty Ltd v Nair-Smith [2015] NSWCA 90 -
Perisher Blue Pty Ltd v Nair-Smith [2015] NSWCA 90 -
Grills v Leighton Contractors Pty Ltd [2015] NSWCA 72 (27 March 2015) (Beazley P, Barrett and Gleeson JJA)

Caltex Refineries (Qld) Pty Ltd v Stavar [2009] NSWCA 258; 75 NSWLR 649; *Hoffman v Boland* [2013] NSWCA 158; *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54; 211 CLR 540 ; *Crimmins v Stevedoring Industry Finance Committee* [1999] HCA 59; 200 CLR 1; *Cole v South Tweed Heads Rugby League Football Club Ltd* [2004] HCA 29; 217 CLR 469; *Roads and Traffic Authority of NSW v Dederer* [2007] HCA 42; 234 CLR 330; *Brodie v Singleton Shire Council* [2001] HCA 29; 206 CLR 512; *Sullivan v Moody* [2001] HCA 59; 207 CLR 562; *Hunter & New England Local Health District v McKenna* [2014] HCA 44.

Grills v Leighton Contractors Pty Ltd [2015] NSWCA 72 -
Swick Nominees Pty Ltd v Leroi International Inc (No 2) [2015] WASCA 35 -
Swick Nominees Pty Ltd v Leroi International Inc (No 2) [2015] WASCA 35 -
Swick Nominees Pty Ltd v Leroi International Inc (No 2) [2015] WASCA 35 -
Swick Nominees Pty Ltd v Leroi International Inc (No 2) [2015] WASCA 35 -
The Secretary of the Treasury (Corrective Services NSW) v Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales [2014] NSWCA 446 -
Hunter and New England Local Health District v McKenna [2014] HCA 44 -

216. NSW's second proposition was that the duty analysis made by Walmsey AJ in *Warragamba Winery Pty Ltd v State of New South Wales (No 9)* [2012] NSWSC 701 (***Warragamba Winery***) is correct. This proposition involved a number of elements.

(1) The case is novel. None of the decisions referred to by the plaintiffs involve a public fire fighting service found liable in negligence for fighting a fire.

(2) The principles relevant to the determination of the issue of when a duty of care is to be identified in a novel case are brought together in *Grah am Barclay Oysters* .

(3) Ordinarily, the common law does not impose a duty on a person to protect another from a risk of harm unless the person has created the risk. Accordingly, the mere existence of a statutory scheme to empower an authority to protect the public from a particular harm does not by itself give rise to a duty of care (*Graham Barclay Oysters* at [81]).

(4) The primary judge found two instances of negligence (failing to fight the Baldy spot fire on the morning of 9 January 2003 and failing to clear and back-burn from the River). As there is no appeal from those findings, it is right to characterise the case as one involving a failure to act.

(5) Merely because it is foreseeable that harm may result if a public authority fails to exercise its powers, that does not by itself give rise to a duty of care (*Graham Barclay Oysters* at [145]). In *Sullivan* at [42] the Court said that:

> But the fact that it is foreseeable, in the sense of being a real and not far-fetched possibility, that a careless act or omission on the part of one person may cause harm to another does not mean that the first person is subject to a legal liability to compensate the second by way of damages for negligence if there is such carelessness, and harm results. If it were otherwise, at least two consequences would follow. First, the law would subject citizens to an intolerable burden of potential liability, and constrain their freedom of action in a gross manner. Secondly, the tort of negligence would subvert many other principles of law, and statutory provisions, which strike a balance of rights and obligations, duties and freedoms. A defendant will only be liable, in negligence, for failure to take reasonable care to prevent a certain kind of foreseeable harm to a plaintiff, in circumstances where the law imposes a duty to take such care.

(6) A duty of care does not require the prevention of harm; it requires the taking of reasonable care (*Roads and Traffic Authority (NSW) v Dederer* (2007) 234 CLR 330; [2007] HCA 42 (***Dederer***) at [18]).

(7) The statute that empowers the authority to act must be closely examined (*Graham Barclay Oysters* at [78] and [146]). The purpose is to decide whether the legislation establishes a relationship whereby a duty is owed to specific individuals, as opposed to the public at large (*Graham Barclay Oysters* at [146] and [149]).

(8) Of particular importance are: - (i) the degree and nature of control exercised by the authority over the risk of harm that eventuated, (ii) the degree of vulnerability of those who depend on the proper exercise by the authority of its powers, and (iii) the consistency of the asserted duty of

care with the terms, scope and purpose of the relevant statute (*Graham Barclay Oysters* at [84] and [149]).

(9) Also relevant are the considerations of inconsistency of a duty of care with other obligations (*Sullivan* at [60]) and indeterminacy of potential liability (*Sullivan* at [61]).

Electro Optic Systems Pty Ltd v State of New South Wales [2014] ACTCA 45 (31 October 2014) (Murrell CJ, Jagot and Katzmann JJ)

207. In *Graham Barclay Oysters* the claim was, as the plaintiffs put it, "that the government defendants should have, but did not, exercise their statutory powers to regulate the oyster industry more rigorously".

Electro Optic Systems Pty Ltd v State of New South Wales [2014] ACTCA 45 (31 October 2014) (Murrell CJ, Jagot and Katzmann JJ)

369. The plaintiffs acknowledged that the primary judge did not consider breach by reference to the provisions of the Civil Liability Act . They said his findings were correct nevertheless. In this regard, the plaintiffs pointed out the similarity between the common law and ss 5B and 5C of the Civil Liability Act . They said:

Thus, in *Council of the City of Greater Taree v Wells* [2010] NSWCA 147, Beazley JA cited the following passages from *Waverley Council v Ferreira* [2005] NSWCA 418, Ipp JA (Spigelman CJ and Tobias J agreeing) with approval:

(i) at [27]: "At common law, the court is required to identify what a reasonable person in the position of the defendant would do by way of response to the reasonably foreseeable risk: *Graham Barclay Oysters* . This is consistent with s 5B(1) of the CLA..."

(ii) at [47]: "The explanation for the enactment of s 5B(2) appears from paras 7.5 to 7.18 of the Negligence Review. The Negligence Review expressed the opinion that the factors now set out in s 5B(2) should be given statutory force so that courts would focus more directly on the issue "whether it would be reasonable to require precautions to be taken against a particular risk" and to avoid conflation of the concept of foreseeability of risk with the conclusion that a reasonable person would have taken precautions against it."

(iii) at [51]: Section 5B(2) provides a framework for deciding what precautions the reasonable person would have taken to avoid the harm and involves weighing the factors set out in ss 5B(2)(a) and (b) against those in ss 5B(2)(c) and (d) (subject, of course, to each being applicable in the particular circumstances of the case)."

Electro Optic Systems Pty Ltd v State of New South Wales [2014] ACTCA 45 (31 October 2014) (Murrell CJ, Jagot and Katzmann JJ)

216. NSW's second proposition was that the duty analysis made by Walmsey AJ in *Warragamba Winery Pty Ltd v State of New South Wales (No 9)* [2012] NSWSC 701 (***Warragamba Winery***) is correct. This proposition involved a number of elements.

(1) The case is novel. None of the decisions referred to by the plaintiffs involve a public fire fighting service found liable in negligence for fighting a fire.

(2) The principles relevant to the determination of the issue of when a duty of care is to be identified in a novel case are brought together in *Graham Barclay Oysters* .

(3) Ordinarily, the common law does not impose a duty on a person to protect another from a risk of harm unless the person has created the risk. Accordingly, the mere existence of a statutory scheme to empower an authority to protect the public from a particular harm does not by itself give rise to a duty of care (*Graham Barclay Oysters* at [81]).

(4) The primary judge found two instances of negligence (failing to fight the Baldy spot fire on the morning of 9 January 2003 and failing to clear and back-burn from the River). As there is no appeal from those findings, it is right to characterise the case as one involving a failure to act.

(5) Merely because it is foreseeable that harm may result if a public authority fails to exercise its powers, that does not by itself give rise to a duty of care (*Graham Barclay Oysters* at [145]). In *Sullivan* at [42] the Court said that:

> But the fact that it is foreseeable, in the sense of being a real and not far-fetched possibility, that a careless act or omission on the part of one person may cause harm to another does not mean that the first person is subject to a legal liability to compensate the second by way of damages for negligence if there is such carelessness, and harm results. If it were otherwise, at least two consequences would follow. First, the law would subject citizens to an intolerable burden of potential liability, and constrain their freedom of action in a gross manner. Secondly, the tort of negligence would subvert many other principles of law, and statutory provisions, which strike a balance of rights and obligations, duties and freedoms. A defendant will only be liable, in negligence, for failure to take reasonable care to prevent a certain kind of foreseeable harm to a plaintiff, in circumstances where the law imposes a duty to take such care.

(6) A duty of care does not require the prevention of harm; it requires the taking of reasonable care (*Roads and Traffic Authority (NSW) v Dederer* (2007) 234 CLR 330; [2007] HCA 42 (***Dederer***) at [18]).

(7) The statute that empowers the authority to act must be closely examined (*Graham Barclay Oysters* at [78] and [146]). The purpose is to decide whether the legislation establishes a relationship whereby a duty is owed to specific individuals, as opposed to the public at large (*Graham Barclay Oysters* at [146] and [149]).

(8) Of particular importance are: - (i) the degree and nature of control exercised by the authority over the risk of harm that eventuated, (ii) the degree of vulnerability of those who depend on the proper exercise by the authority of its powers, and (iii) the consistency of the asserted duty of care with the terms, scope and purpose of the relevant statute (*Graham Barclay Oysters* at [84] and [149]).

(9) Also relevant are the considerations of inconsistency of a duty of care with other obligations (*Sullivan* at [60]) and indeterminacy of potential liability (*Sullivan* at [61]).

Electro Optic Systems Pty Ltd v State of New South Wales [2014] ACTCA 45 -

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Electro Optic Systems Pty Ltd v State of New South Wales [2014] ACTCA 45 -
Lorrimar v Serco Sodexo Defence Services Pty Ltd [2014] NSWCA 371 -
Dansar Pty Ltd v Byron Shire Council [2014] NSWCA 364 -
Dansar Pty Ltd v Byron Shire Council [2014] NSWCA 364 -
Dansar Pty Ltd v Byron Shire Council [2014] NSWCA 364 -
Dansar Pty Ltd v Byron Shire Council [2014] NSWCA 364 -
Dansar Pty Ltd v Byron Shire Council [2014] NSWCA 364 -
Barreto v McMullan [2014] WASCA 152 -
Australian Postal Corporation v D'Rozario [2014] FCAFC 89 -
Australian Postal Corporation v D'Rozario [2014] FCAFC 89 -
Howard Smith & Patrick Travel Pty Ltd v Comcare [2014] NSWCA 215 -
Howard Smith & Patrick Travel Pty Ltd v Comcare [2014] NSWCA 215 -
Howard Smith & Patrick Travel Pty Ltd v Comcare [2014] NSWCA 215 -
Howard Smith & Patrick Travel Pty Ltd v Comcare [2014] NSWCA 215 -
Howard Smith & Patrick Travel Pty Ltd v Comcare [2014] NSWCA 215 -
McColley v Commonwealth of Australia [2014] ACTCA 21 (20 June 2014) (Murrell CJ, Refshauge, Penfold JJ)

> *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540
> *Gruber v Backhouse*

McColley v Commonwealth of Australia [2014] ACTCA 21 -
McColley v Commonwealth of Australia [2014] ACTCA 21 -
McColley v Commonwealth of Australia [2014] ACTCA 21 -
Jackson v McDonald's Australia Ltd [2014] NSWCA 162 -
Jackson v McDonald's Australia Ltd [2014] NSWCA 162 -
WB Jones Staircase & Handrail Pty Ltd v Richardson & Ors [2014] NSWCA 127 -
Mamo v Surace [2014] NSWCA 58 -
McKenna v Hunter & New England Local Health District [2013] NSWCA 476 (23 December 2013) (Beazley P, Macfarlan JA and Garling J)

> 226. This is appropriate because the existence of a common law duty owed by a statutory authority (such as the Hospital), in the exercise of its statutory power, turns on an examination of the terms, scope and purpose of the relevant statutory regime: *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54; (2002) 211 CLR 540 at [146] per Gummow and Hayne JJ . Whilst this approach concerns the existence of a duty, it also affects the nature and content of a duty.

McKenna v Hunter & New England Local Health District [2013] NSWCA 476 -
McKenna v Hunter & New England Local Health District [2013] NSWCA 476 -
Takla v Nasr [2013] NSWCA 435 -
Marien v Gardiner [2013] NSWCA 396 -
Bernadt v Medical Board of Australia [2013] WASCA 259 -
Bernadt v Medical Board of Australia [2013] WASCA 259 -
Perfection Fresh Australia Pty Ltd v Melbourne Market Authority [2013] VSCA 254 -

Apache Energy Ltd v Alcoa of Australia Ltd [No 2] [2013] WASCA 213 (17 September 2013) (McLure P, Buss JA, Newnes JA)

287. In *Graham Barclay Oysters* , McHugh J explained why the relevant statutory framework is of vital importance in cases where a duty of care is sought to be imposed on a public authority:

> A public body invested with a discretionary statutory power may be in breach of a common law duty of care if it fails to exercise the power for the benefit of an individual or class of individuals. In these cases, failure to exercise the power given constitutes actionable negligence that sounds in damages (*Sutherland Shire Council v Heyman* (1985) 157 CLR 424; *Pyrenees Shire Council v Day* (1998) 192 CLR 330; *Romeo v Conservation Commission (NT)* (1998) 192 CLR 431; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1; *Brodie v Singleton Shire Council* (2001) 206 CLR 512). In determining whether a public authority has breached a common law duty by failing to exercise a statutory power, it is essential to examine the words and policy of the legislation (*Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 377 [126], per Gummow J; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 19 [27], per Gaudron J; at 59 [160], per Gummow J; at 72 [203], per Kirby J; *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 540 [56], per Gaudron, McHugh and Gummow JJ. See also *Stovin v Wise* [1996] AC 923 at 934, per Lord Nicholls of Birkenhead, Lord Slynn of Hadley agreeing; at 952, per Lord Hoffmann, Lord Goff of Chieveley and Lord Jauncey of Tullichettle agreeing). That is because the legislation may indicate that the legislature has legislated to cover the field and excluded all common law duties of care (*Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 18-19 [26] -[27], per Gaudron J; *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 at 297-298, per Cooke P). In other cases, the imposition of a common law duty may be inconsistent with or undermine the effectiveness of the duties imposed by the statute (*Sullivan v Moody* (2001) 207 CLR 562; *AttorneyGeneral (NZ) v Prince and Gardner* [1998] 1 NZLR 262 at 275276, per Richardson P, Thomas and Keith JJ, Henry J agreeing). In some cases, the circumstances of the case for example, active intervention by the authority or reliance by the plaintiff may establish a duty of care. But the legislation may give the authority such a wide discretion to exercise the power in question that the tribunal of fact cannot find that the failure to exercise the power constituted a breach of the duty [78].

Apache Energy Ltd v Alcoa of Australia Ltd [No 2] [2013] WASCA 213 (17 September 2013) (McLure P, Buss JA, Newnes JA)

134. Since *Perre* , determining whether a duty of care exists in a novel category of case requires a 'multifaceted inquiry' or 'salient features' analysis, with a close examination and evaluation of the facts pertinent to the relationship between the plaintiff and the defendant. As Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ observed in *Sullivan* :

> Different classes of case give rise to different problems in determining the existence and nature or scope, of a duty of care. Sometimes the problems may be bound up with the harm suffered by the plaintiff, as, for example, where its direct cause is the criminal conduct of some third party (eg, *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254). Sometimes they may arise because the defendant is the repository of a statutory power or discretion (eg, *Crimmin s v Stevedoring Industry Finance Committee* (1999) 200 CLR 1; *Brodie v Singleton Shire Council* (2001) 206 CLR 512). Sometimes they may reflect the difficulty of confining the class of persons to whom a duty may be owed within reasonable limits (eg, *Perre v Apand Pty Ltd* (1999) 198 CLR 180) . Sometimes they may concern the need to preserve the coherence of other legal principles, or of a statutory scheme which governs certain conduct or relationships (eg, *Hill v Van Erp* (1997) 188 CLR 159 at 231, per Gummow J). *The relevant problem will then become the focus of attention in a judicial evaluation of the factors which tend for or against a conclusion, to be arrived at as a matter of principle* [50]. (emphasis added)

See also *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54; (2002) 211 CLR 540 [149] (Gummow & Hayne JJ).

Apache Energy Ltd v Alcoa of Australia Ltd [No 2] [2013] WASCA 213 -
Apache Energy Ltd v Alcoa of Australia Ltd [No 2] [2013] WASCA 213 -
Ibrahim v Davis [2013] VSCA 238 (10 September 2013) (Maxwell P, Bongiorno JA and Robson AJA)

TORT – NEGLIGENCE – Jury trial – Motor vehicle accident – Duty of care – Jury directions – Whether judge erred in directions as to existence and scope of relevant duty – *Neindorf v Junkovic* (2

005) 80 ALJR 341; *Vairy v Wyong Shire Council* (2005) 223 CLR 422; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 ; *Wyong Shire Council v Shirt* (1980) 146 CLR 40, applied – Jury directions appropriate – Appeal dismissed.

Ibrahim v Davis [2013] VSCA 238 -
Ibrahim v Davis [2013] VSCA 238 -
Ibrahim v Davis [2013] VSCA 238 -
Ibrahim v Davis [2013] VSCA 238 -
BHP Billiton Ltd v Hamilton [2013] SASCFC 75 -
BHP Billiton Ltd v Hamilton [2013] SASCFC 75 -
Swan & Baker Pty Limited v Marando [2013] NSWCA 233 -
Shoalhaven City Council v Pender [2013] NSWCA 210 (10 July 2013) (McColl, Barrett and Ward JJA)

64. Thus the breach inquiry required the primary judge to identify accurately the actual risk of injury the appellant faced as it was only through the correct identification of the risk that her Honour could determine what a reasonable response to that risk would be: *Roads and Traffic Authority of New South Wales v Dederer* (at [18], [59]) per Gummow J. As Gummow and Hayne JJ explained in *Graham Barclay Oysters Pty Ltd v Ryan* (at [192]), the inquiry as to breach "involves identifying, with some precision, what a reasonable person in the position of the defendant would do by way of response to the reasonably foreseeable risk". In so saying, their Honours referred with approval to Isaacs A-CJ's observation in *Metropolitan Gas Co v City of Melbourne* [1924] HCA 46; (1924) 35 CLR 186 (at 194), that "[n]o conclusion of negligence can be arrived at until, first, the mind conceives affirmatively what should have been done".

Shoalhaven City Council v Pender [2013] NSWCA 210 -
Hoffmann v Boland [2013] NSWCA 158 -
Hogno v Racing Queensland Ltd [2013] QCA 139 (31 May 2013) (Muir and White JJA and Ann Lyons J)

46. The primary judge mistakenly placed undue reliance on *Graham Barclay Oysters Pty Ltd v Ryan* [36] and *Hunter Area Health Service v Presland* ,[37] which were concerned, not with the negligent exercise of a power, but with a claim that the failure to exercise a statutory power gave rise to an action in negligence for damage that was alleged would not have occurred had the power been exercised.

via

[36] (2002) 211 CLR 540 .

Hogno v Racing Queensland Ltd [2013] QCA 139 -
Hogno v Racing Queensland Ltd [2013] QCA 139 -
Hogno v Racing Queensland Ltd [2013] QCA 139 -
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Hogno v Racing Queensland Ltd [2013] QCA 139 -
Hogno v Racing Queensland Ltd [2013] QCA 139 -
Australian Capital Territory v Crowley [2012] ACTCA 52 -
Australian Capital Territory v Crowley [2012] ACTCA 52 -
Australian Capital Territory v Crowley [2012] ACTCA 52 -
Lederberger v Mediterranean Olives Financial Pty Ltd [2012] VSCA 262 -
Polar Aviation Pty Ltd v Civil Aviation Safety Authority [2012] FCAFC 97 (04 July 2012) (Perram, Dodds-Streeton and Griffiths JJ)

20. Kenny J concluded at [69] to [71] of *Polar (No 2)* :

Because of the approach taken by his Honour, the *Repacholi* decision is most directly helpful in regard to the proposed negligence claims. After surveying the authorities, McKerracher J concluded (at [151]) that, although the claim was inadequately pleaded, "it [was] not possible to conclude that a claim in negligence [was] not open". In reaching this conclusion, McKerracher J did not find it necessary to engage in a detailed analysis of the particular statutory functions alleged to have been performed without reasonable care. Rather, he relied on general principles, citing, inter alia, Mason J's statement in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 458–9 ; 60 ALR 1 at 27 that "[i]t is now well settled that a public authority may be subject to a common law duty of care when it exercises a statutory power or performs a statutory duty".

Acknowledging that the inquiry was "multi-faceted" (at [145], quoting *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540; 194 ALR 337; [2002] HCA 54 at [149] per Gummow and Hayne JJ), his Honour was not prepared to conclude at the strike out stage that a common law cause of action against CASA for negligence in the exercise of its statutory duties was unavailable. Though McKerracher J's discussion of the issue was limited by the material before him, he observed (at [146]) that "[t]he nature of the control exercised by CASA over the conduct of flight and air operations is substantial" and "the degree of vulnerability of those conducting operations under the auspices of the air operations regime administered by CASA is significant", indicating that these considerations might support the existence of cause of action in negligence.

McKerracher J's conclusion that the applicants should be afforded a further opportunity to formulate a negligence claim against CASA was primarily based on the nature of the relationship between CASA and the air operators it regulates. These considerations were not particular to the facts in *Repacholi* and apply equally to the present case. Considering the low standard applicable on a leave application under s 47A , subject to matters mentioned immediately hereafter, I would not regard the applicants' negligence claim against CASA as patently untenable in the sense that the pleading does not disclose a legally recognised claim.

Pritchard v DJZ Constructions Pty Ltd [2012] NSWCA 196 -
North Shore City Council v Attorney-General [2012] NZSC 49 (27 June 2012)

74. I touch on some additional considerations which weighed with the Court of Appeal in holding that a duty of care was untenable. Some factors could equally or preferably be considered as bearing on breach. As I mentioned in *Couch* , where liability for negligence is determined at trial it may not matter whether questions of policy are considered as going to duty of care or its breach. [115] On strike out on a threshold question of duty of care, however, it may matter a great deal. [116] The policy factors held by the Court of Appeal to count against a duty of care[117] are factors which may well be best assessed when considering breach. In referring to policy factors some repetition is inevitable because of the overlap between factors bearing on proximity and policy.

· The imposition of a duty of care and potential liability in negligence does not cut across established principles of law in fields other than negligence or statutory defences or alternative provisions for relief (as was the case in *Fleming* [118] and in *South Pacific* [119]).

· As already indicated in [71], I am unable to accept the view expressed by the Court of Appeal that the imposition of a duty of care should be declined for policy reasons because the prospect of liability would inhibit the free flow of advice from the Authority to the Minister. [120] The review and reporting functions of the Building Industry Authority are a practical check on the exercise of the functions of the territorial authority, directed to the same end as the functions undertaken by the territorial authority: code compliance. There is no conflict in the ends pursued which might inhibit proper review or reporting. And a principal feature of the role of the Authority in the system of administration provided by the

Act is to provide assurance to owners and to territorial authorities in the performance of their functions.

· Nor do I accept the significance the Court of Appeal attached to what it described as the "quasi-judicial functions" of the Building Industry Authority, [121] in application of a characterisation adopted in *Sacramento*.[122] I do not think such characterisation should mark off a "no go" zone for liability in tort. [123] But in any event I do not think it accurate in its application to the Authority which was set up to have a central role in the operation of the Act (as the Building Industry Commission had envisaged)[124] and with the functions of disseminating information and providing authoritative determinations and acceptable solutions. The tortious liability recognised by the Act in respect of determinations and accreditations is contrary to such immunity for reasons of policy.

· Although there was speculation in the reasons of the Court of Appeal about the cost implications of liability, I do not consider that such consideration could be determinative in the circumstances. In *Fleming* Cooke P regarded as unconvincing the argument that Parliament could not have intended liability in such a case because the Commission "consisted only of a full-time chairman and four part-time members and had a total staff of only seven". [125] While the resources available to a public body may be relevant if the body is operating at a level of high policy, the Building Industry Authority was not in that camp, for the reasons already given. And, as explained by Gleeson CJ in *Graham Barclay Oysters* , as is referred to in above, private individuals and organisations, too, operate under budgetary constraints and with lack of resources. [126] Any financial constraints upon the Authority may indeed perhaps be better considered as bearing on breach, as Cory J suggests in *Just v British Columbia* . [127]

· Nor would liability set up incentives contrary to the purpose of the legislation or necessarily entail resources beyond those available to the Authority. It is only in the discharge of its own functions that the Building Industry Authority could have liability. Those functions do not entail discretion to impose higher compliance than is required by the code. And they might have been discharged in the particular case simply by the provision of information.

The claim of knowledge made in the third and fourth causes of action

via

[126] *Graham Barclay Oysters* , above n 33, at [14] .

North Shore City Council v Attorney-General [2012] NZSC 49 -
North Shore City Council v Attorney-General [2012] NZSC 49 -
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North Shore City Council v Attorney-General [2012] NZSC 49 -
North Shore City Council v Attorney-General [2012] NZSC 49 -
Warren Shire Council v Kuehne [2012] NSWCA 81 -
Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management [2012] WASCA 79 -
Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management [2012] WASCA 79 -

Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management [2012] WASCA 79 -
Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management [2012] WASCA 79 -
Karatjas v Deakin University [2012] VSCA 53 -
Kudrin v City of Mandurah [2012] WASCA 65 -
Kudrin v City of Mandurah [2012] WASCA 65 -
Kudrin v City of Mandurah [2012] WASCA 65 -
Amaca Pty Ltd v King [2011] VSCA 447 -
Juric v State of Victoria [2011] VSCA 419 -
Plaintiff M70/2011 v Minister for Immigration and Citizenship [2011] HCA 32 (31 August 2011) (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ)

57. The term "jurisdictional fact" applied to the exercise of a statutory power is often used to designate a factual criterion, satisfaction of which is necessary to enliven the power of a decision-maker to exercise a discretion. The criterion may be "a complex of elements" [64] . When a criterion conditioning the exercise of statutory power involves assessment and value judgments on the part of the decision-maker, it is difficult to characterise the criterion as a jurisdictional fact, the existence or non-existence of which may be reviewed by a court [65] . The decision-maker's assessment or evaluation may be an element of the criterion or it may be the criterion itself. Where a power is expressly conditioned upon the formation of a state of mind by the decision-maker, be it an opinion, belief, state of satisfaction or suspicion, the existence of the state of mind itself will constitute a jurisdictional fact [66] . If by necessary implication the power is conditioned upon the formation of an opinion or belief on the part of the decision-maker then the existence of that opinion or belief can also be viewed as a jurisdictional fact. The primary submission on the part of the plaintiffs, however, looked to the existence of the matters set out in s 198A(3)(a) as conditioning the Minister's power to make a declaration.

via

[66] *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 651-654 [130] -[137] per Gummow J; [1999] HCA 21 ; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 609 [183] per Gummow and Hayne JJ ; [2002] HCA 54 .

Plaintiff M70/2011 v Minister for Immigration and Citizenship [2011] HCA 32 -
Burton v Brooks [2011] NSWCA 175 -
Divjakoski v Boral Window Systems [2011] WASCA 134 -
Divjakoski v Boral Window Systems [2011] WASCA 134 -
Kuhl v Zurich Financial Services Australia Ltd [2011] HCA 11 -
Kuhl v Zurich Financial Services Australia Ltd [2011] HCA 11 -
Kuhl v Zurich Financial Services Australia Ltd [2011] HCA 11 -
Miller v Miller [2011] HCA 9 -
Miller v Miller [2011] HCA 9 -
Miller v Miller [2011] HCA 9 -
Miller v Miller [2011] HCA 9 -
Miller v Miller [2011] HCA 9 -
Amaba Pty Ltd v Booth [2010] NSWCA 344 (10 December 2010) (Beazley, Giles and Basten JJA)
[Graham Barclay Oysters Pty Ltd v Ryan] [2002] HCA 54; 211 CLR 540
[HG v The Queen]

Amaba Pty Ltd v Booth [2010] NSWCA 344 -
Amaba Pty Ltd v Booth [2010] NSWCA 344 -
Wilson v State of New South Wales [2010] NSWCA 333 -
Burns v Pearce [2010] WASCA 214 -

Burns v Pearce [2010] WASCA 214 -
Meshlawn P/L v State of Qld [2010] QCA 181 (20 July 2010) (McMurdo P, Chesterman JA and Fryberg J,)

104. Gleeson CJ's observation in *Graham Barclay Oysters* , which I have set out earlier, that there can be no duty of care to which a government is subject if in a given case there is no criterion by reference to which a court can determine the reasonableness of the conduct in question provides, a criterion. It is, however, general and allows for disagreement as to whether it is or is not possible to judge the reasonableness of the conduct in question, as is evident from the debate with respect to the allocation of resources.

Meshlawn P/L v State of Qld [2010] QCA 181 (20 July 2010) (McMurdo P, Chesterman JA and Fryberg J,)

61. The test formulated by the appellants is, I think, an accurate distillation of what was said by Gummow, Hayne and Heydon JJ in *Stuart* . Their Honours said (254):

> "There can be no duty to act in a particular way unless there is authority to do so. Power is therefore a necessary condition of liability but it is not a sufficient condition. Statutory power to act in a particular way, coupled with the fact that, if action is not taken, it is reasonably foreseeable that harm will ensue, is not sufficient to establish a duty to take that action. Rather, as was pointed out in *Graham Barclay Oysters Pty Ltd v Ryan* ... the existence or otherwise of a common law duty of care owed by a statutory authority ... 'turns on a close examination of the terms, scope and purpose of the relevant statutory regime'. Does that regime erect or facilitate 'a relationship between the authority ... and a class of persons that, in all the circumstances, displays sufficient characteristics answering the criteria for intervention by the tort of negligence' ... ?
>
> Evaluation of the relationship between the holder of the power and the person ... to whom it is said that a duty of care is owed will require examination of the degree and nature of control exercised over the risk of harm that has eventuated ..., the degree of vulnerability of those who depend on the proper exercise of the relevant power ..., and the consistency or otherwise of the asserted duty of care with the terms, scope and purpose of the relevant statute ... . Other considerations may be relevant ... ." (footnotes omitted)

Meshlawn P/L v State of Qld [2010] QCA 181 (20 July 2010) (McMurdo P, Chesterman JA and Fryberg J,)

62. The test propounded may not be definitive. Crennan and Kiefel JJ said in their joint judgment (260-261):

> "No guiding principle, by which an authority might be considered to be obliged to exercise its powers at common law, has been identified; the search continues ... . There is agreement that the statutory powers in question must be directed towards some identifiable class or individual, or their property, as distinct from the public at large ... .
>
> Different factors have been identified, from time to time, as relevant to the existence of a duty of care. Not all have continued to be regarded as useful. Notions of proximity and general reliance are no longer considered to provide the answer to the question of whether an authority should be considered to have been obliged to exercise its powers. ...
>
> The vulnerability of a plaintiff was referred to in *Pyrenees Shire Council v Day* ... as an aspect of the plaintiff's supposed reliance upon an authority

> to use its powers … . A focus on vulnerability may in part explain the decision in *Crimmins v Stevedoring Industry Finance Committee* … . It has not been universally accepted as a useful analytical tool … . In *Graham Barclay Oysters Pty Ltd v Ryan* , Gummow and Hayne JJ treated the degree of a plaintiff's vulnerability as part only of an evaluation as to whether a relationship may be seen to exist between a statutory authority and the class of persons in question … . Establishing the existence of a relationship between a plaintiff and a public authority has the advantage of coherence with the exceptions, already recognised by the common law, to the general rule that there is no duty of affirmative action". (footnotes omitted)

Meshlawn P/L v State of Qld [2010] QCA 181 -
Meshlawn P/L v State of Qld [2010] QCA 181 -
Meshlawn P/L v State of Qld [2010] QCA 181 -
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Meshlawn P/L v State of Qld [2010] QCA 181 -
Meshlawn P/L v State of Qld [2010] QCA 181 -
Meshlawn P/L v State of Qld [2010] QCA 181 -
Council of the City of Greater Taree v Wells [2010] NSWCA 147 -
Minister for Immigration and Citizenship v SZMDS [2010] HCA 16 -
Victoria v Richards [2010] VSCA 113 -
Vining Realty Group Ltd v Moorhouse [2010] NZCA 104 -
AED Oil Ltd v Puffin FPSO Ltd [2010] VSCA 37 -
DAVIES v Tomkins [2009] WASCA 228 (18 December 2009) (Pullin JA, Buss JA, Newnes JA)

69. It is unnecessary that a defendant should have foreseen the precise risk of injury or damage, or how it occurred. It is sufficient if the risk is within a class of risks that the defendant should, in a general way, have foreseen. See ***Graham Barclay Oysters Pty Ltd v Ryan*** [2002] HCA 54; (2002) 211 CLR 540 [87] (McHugh J).

DAVIES v Tomkins [2009] WASCA 228 -
Makawe Pty Ltd v Randwick City Council [2009] NSWCA 412 (15 December 2009) (Hodgson and Campbell JJA, Simpson J)

135 Reference was made in the submissions to **Becker** , at [20]-[21], per Giles JA, and **Graham Barclay Oysters Pty Ltd v Ryan** [2002] HCA 54; (2002) 211 CLR 540 (at [149]). Resort to the passages cited does not support the proposition that the approach taken by the trial judge was contrary to that required by either of those (or any other) cases. In **Graham Barclay Oysters** , at [149] , Gummow and Hayne JJ said:

> "An evaluation of whether a relationship between a statutory authority and a class of persons imports a common law duty of care is necessarily a multi-faceted inquiry. Each of the salient features of the relationship must be considered."

Makawe Pty Ltd v Randwick City Council [2009] NSWCA 412 -
Makawe Pty Ltd v Randwick City Council [2009] NSWCA 412 -
Jasmina Investments Pty Ltd v Vlahos [2009] WASCA 190 (03 November 2009) (Wheeler, Buss and Newnes JJA)

10. It is unnecessary that a defendant should have foreseen the precise risk of injury or how it occurred. It is sufficient if the risk is within a class of risks that the defendant should, in a general way, have foreseen. See ***Graham Barclay Oysters Pty Ltd v Ryan*** [2002] HCA 54; (2002) 211 CLR 540 [87] (McHugh J).

330. The following considerations, from the overall factual circumstances of the December 1996 incident, assessed in the context of the statutory framework of the 1966 Strata Act as a whole, together bring me to a conclusion that ground 1 of the City's appeal should be dismissed. Like the trial judge, my view is that the City, on analysis, did owe a common law duty of reasonable care to the injured plaintiffs, who were together present as visitors gathered on the first floor outside balcony of strata unit No 1, on New Year's Eve 1996:

(a) There is no difficulty in a conclusion that the injured plaintiffs fall within a foreseeable class of person to whom physical injury of the kind sustained would be envisaged by the City, at the time the Certificate was issued in November 1982. Foreseeability as to the harmed plaintiffs as a class is essential. But that of course is not the sole ingredient in making good a duty of reasonable care.

(b) The range of foreseeable plaintiffs likely to sustain injury by harm of the character encountered here, embraces, as a class, visitors to the strata unit, injured when the outdoor balcony suddenly gave way. That class of plaintiff is not unduly broad or ill defined.

(c) The loss sustained here is in the character of personal injury by trauma. This is not a case of pure economic loss - to which more onerous or constricting policy considerations may apply.

(d) Unlike for the failed case against the third defendant (the Strata Company), which was based upon arguments of strict liability for breach of a private statutory duty said to arise from the New Strata Titles Act, the plaintiffs do not contend for any private statutory duty in their favour as against the City. Nor, in prevailing circumstances, would I have found such a private cause of action in their favour, arising under that Act. The ramifications of such a conclusion are so significant (ie strict liability), that legislation argued to found such private rights of action needs to be assessed as sufficiently explicit to render the conclusion as to a private right of action, and as to the class of person to whom such a private duty is owed, very clear. That is not the case with s 5(6)(c) of the 1966 Strata Act.

> Absence of a private right of action for strict liability in the injured plaintiffs is another relevant consideration in a distinct exercise of ascertainment of a common law duty of reasonable care. But, again, that aspect is not, of itself, determinative of the issue. Axiomatically, the lesser threshold of (reasonable) care raises different considerations. The statute is the setting for a common law duty, rather than its source: see ***Stuart v Kirkland-Veenstra*** [2009] HCA 15 [130] (Crennan and Kiefel JJ).

(e) There can be circumstances in which a common law duty of reasonable care is excluded by statute, either explicitly, or implicitly: see ***Sullivan v Moody*** (2001) HCA 59; (2001) 207 CLR 562. This is not such a case.

(f) Nor does this case present as a scenario of omission or nonfeasance by a public authority (in the position of the City) - a factual consideration highly relevant to the ascertainment of a common law duty of reasonable care, in

circumstances where a statutory power or function has been conferred, but is not exercised. To the contrary, the present is a more routine case over positive acts of misfeasance raised as against the City. Cases of misfeasance against public authorities - where powers, functions or duties have been actively exercised, are less problematic in terms of the ascertaining of an existence of a duty of reasonable care by a public authority: ***Stuart v Kirkland-Veenstra*** at [117] [118] (Gummow, Hayne and Heydon JJ).

(g) In reviewing the global statutory framework which sets the scene for the evaluation of a common law duty, it must be accepted that s 5(6)(c) of the 1966 Strata Act is not wholly concerned from a policy perspective with the issue of public safety. But that is not to say that the issue of public safety does not remain an inseparable consideration, inherent in any process of building inspection and the next stage of certification by a public body - for consistency as between approved building plans and specifications with the finished product. Public safety is not a consideration to be undersold in an analysis of evident purposes underlying s 5(6)(c), as the City, in effect, submitted at the appeal. Public safety is, in my view, a consideration inherent in the regulatory context for elevated structures that will potentially be used for human habitation for generations of occupant. Safety in occupation, over time, is an important component policy consideration, also to be weighed in an overall analysis of the statutory framework of the 1966 Strata Act, as a whole.

(h) Factually, what falls for consideration at this level of the ascertainment of a common law duty of reasonable care, are all relevant circumstances surrounding the inspection of the building, from a perspective of ascertaining the consistency of the constructed building against the plans and specifications, earlier submitted to and approved by the City. The issue of the Certificate by the City was a culmination of a series of preceding acts, all to be evaluated. This calls for a perspective wider than a bare evaluation of falsity in aspects of the Certificate issued by the City.

(i) It is correct that there has been no suggestion here that the injured plaintiffs, as visitors to the strata unit, placed specific or knowing reliance upon the City's Certificate - issued some 14 years previous - concerning consistency of the completed building with plans and specifications as lodged with and approved by the City. Nevertheless, in cases of this genre, absence of direct reliance is no obstacle to finding a duty of reasonable care. No doubt each injured visitor made an assumption in a very general sense by entry, that public authorities responsible for monitoring the conversion of the building and its plans would have competently gone about completing and discharging their responsibilities. This is not a case of negligent misstatement against the City, like ***MLC v Evatt*** (1968) 122 CLR 556 or ***Shaddock and Associates Pty Ltd v Parramatta City Council [No 1]*** (1980-81) 150 CLR 225 raising direct reliance requirements, as regards advice. Rather, this is a case of orthodox misfeasance in the active exercise of a public power. Nor is it a case of pure economic loss where, as I have observed, reliance, particularly in a circumstance of prevailing vulnerability in a plaintiff, is material as a consideration. This case presents more, in my view, as of an orthodox class as was considered by Mason J (as he then was) in ***Sutherland Shire Council v Heyman*** [1985] HCA 41; (1985) 157 CLR 424, at 464, where his Honour observed:

> Reliance or dependence in this sense is in general the product of the grant (and exercise) of powers designed to prevent or minimize a risk of personal injury or disability, recognized by the legislature as being of such magnitude or complexity that individuals cannot, or may not, take adequate steps for their own protection. This situation generates on one side (the individual) a general expectation that the power will be exercised and on the other side (the authority) a realization that there is a general reliance or dependence on its exercise of power.

(j) The formulation of the precise duty of reasonable care that the injured plaintiffs contend was owed to them by the City here, is a duty to inspect the building for the purpose of determining that it was consistent with the approved plans and specifications. That formulation is not in terms so general as to be unhelpful, or at too high a level of abstraction: ***Cole v Tweed Heads Rugby League Football Club Ltd*** [2004] HCA 29; (2004) CLR 469 [57], [81] (per Gummow & Hayne JJ).

(k) Nor, in my assessment, is a converse parameter infringed in that formulation of the duty. The formulation does not, in my view, carry with it a level of narrowness or confinement so as to, in effect, preempt a later application of the criterion of reasonableness under the Shirt calculus in a manner which is fair to the City, at the stage of breach evaluation, once this duty of reasonable care is found; compare par 85 of the joint reasons of Gummow, Hayne and Heydon JJ, in ***KirklandVeenstra*** .

> At a stage of breach analysis, numerous distinct considerations arise, including magnitude of risk, the response to the risk, as well as considerations applicable to the limited resources of a public authority, as evaluations of fact. But I see no 'virtually automatic' 'slide' into a finding of negligence (per McHugh J in ***Tame*** [99]) in the formulation of this duty of reasonable care. In an assessment of all circumstances surrounding the inspection and ensuing issue of the Certificate by the City, it no doubt would be properly weighed in consideration that the City's inspector did not take with him the relevant plans and specifications to the site of the Old Soap Factory as he made the inspection. His capacity to inspect effectively was thereby fettered from the outset, rendering it difficult to argue that reasonable efforts were made.
>
> The unauthorised substitution of jarrah hardwood timber with oregon softwood that occurred, created a significant structural deficiency in the constructed outdoor first floor balcony. That unauthorised balcony timber substitution should have been apparent to an inspector's naked eye, during a competent inspection. A comparative analogy to the obviousness of the difference between red wine and white wine, as was invoked by Professor London at trial (recorded by the trial judge at [223] of his reasons), remains illuminating for me as to what a competent inspection by the City's inspector ought to have brought into focus.
>
> There remains with this duty as formulated, in my view, sufficient latitude and scope at a breach level analysis applying the Shirt calculus, for a court to recognise and excuse (as is appropriate) reasonable, albeit imperfect, endeavours towards meeting this formulated duty of reasonable care by the City, within its overall inspection and certification conduct.

(l) On my analysis (bearing in mind capacity for appeal against a refusal by the City to issue the Certificate), refusal of the Certificate by the City, grounded upon unauthorised substitution of oregon timber for jarrah as a structural issue, was likely, in my assessment to have been a significant negative for Lavender Bay. Refusal would have interrupted the processes pursuant to which separate certificates of title were sought to be obtained by Lavender Bay, in the course of its redevelopment and strata titling subdivision by conversion of the Old Soap Factory to individual strata units with separate certificates of title. The City appears to have lacked a specifically conferred power, under the 1966 Strata Act,

to directly compel a timber substitution by Lavender Bay, of the unauthorised softwood timber. Nevertheless, I assess the likely commercial effects of a denial by the City of the Certificate, on this basis, to be adverse and significant for Lavender Bay's commercial interests as a developer. Nor is it easy to envisage how any appeal by Lavender Bay could hope to succeed against the City's denial of a Certificate, in circumstances where the adverse structural ramifications of an unauthorised substitution of oregon for jarrah was properly articulated.

> Essentially then, the City in commercial terms held, in my assessment, a 'whiphand' here upon a refusal of its Certificate, until the unauthorised substitution of softwood for hardwood issue was properly addressed and corrected by Lavender Bay. This afforded the City, in my view, the required element of potential control to generate a correction of the unauthorised balcony timber situation which had arisen. Existence of the element of effective control in the City over the problematic issue: see ***Graham Barclay Oysters Pty Ltd v Ryan*** (2002) 211 CLR 540 [151] (Gummow and Hayne JJ); and ***Kirl andVeenstra*** [113], [114] (Gummow, Hayne and Heydon JJ), in circumstances where power is being affirmatively exercised by the City, favours the ascertainment of this duty of reasonable care in the City, towards these injured plaintiffs.

(m) Reasonableness is now another vital touchstone in any assessment of the appropriateness of an imposition of a duty of reasonable care, as formulated: (see ***Tame v The State of New South Wales*** [2002] HCA 35; (2002) 211 CLR 317 [9], [12], [14], [35] (Gleeson CJ), [109] (McHugh J), [185] (Gummow & Kirby JJ), [272] (Hayne J), and [331] (Callinan J)).

> In weighing considerations of reasonableness surrounding the potential imposition of this duty of reasonable care, in the overall factual and statutory surrounding contexts, I factor in a significant and obvious potential here for grave injury to anyone subjected to the trauma of a 5 m balcony collapse. It is fortunate indeed that this incident is not one where the court is faced with a more distressing scenario of deaths or catastrophic injuries to multiple persons, in the wake of such a balcony collapse - a wholly unacceptable outcome as regards building standards in Australia, and against which dedicated public competence in the exercise of statutory powers cannot be an unreasonable imposition.

Drexel London (a firm) v Gove (Blackman) [2009] WASCA 181 -
Drexel London (a firm) v Gove (Blackman) [2009] WASCA 181 -
Drexel London (a firm) v Gove (Blackman) [2009] WASCA 181 -
Drexel London (a firm) v Gove (Blackman) [2009] WASCA 181 -
The Quadriplegic Centre Board of Management v McMurtrie [2009] WASCA 173 -
The Quadriplegic Centre Board of Management v McMurtrie [2009] WASCA 173 -
The Quadriplegic Centre Board of Management v McMurtrie [2009] WASCA 173 -
Roads and Traffic Authority (NSW) v Refrigerated Roadways Pty Ltd [2009] NSWCA 263 -
Roads and Traffic Authority (NSW) v Refrigerated Roadways Pty Ltd [2009] NSWCA 263 -
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Roads and Traffic Authority (NSW) v Refrigerated Roadways Pty Ltd [2009] NSWCA 263 -
Western Districts Developments Pty Ltd v Baulkham Hills Shire Council [2009] NSWCA 283 -
Western Districts Developments Pty Ltd v Baulkham Hills Shire Council [2009] NSWCA 283 -
Western Districts Developments Pty Ltd v Baulkham Hills Shire Council [2009] NSWCA 283 -

Caltex Refineries (Qld) Pty Ltd v Stavar [2009] NSWCA 258 (31 August 2009) (Allsop P at 1; Basten JA at 149; Simpson J at 242)

> 107 The above statement of approach can be seen in: *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* [1976] HCA 65; 136 CLR 529 at 576-577 per Stephen J; *Perre v Apand* at 192 [5], 194 -195 [11] -[15] per Gleeson CJ, at 218-231 [100]-[133] per McHugh J, at 252-261, [196]-[221] per Gummow J, 300-307 [330]-[348] per Hayne J, at 326-327 [406]-[413] per Callinan J; *Crimmins* at 13 [3] per Gleeson CJ (agreeing with McHugh J), at 23-24 [42]-[43] per Gaudron J, at 39-51 [93]-[133], per McHugh J, at 96-97 [270]-[272] per Hayne J, at 113-117 [343]-[360] per Callinan J; *Modbury Triangle* at 262-267 [13]-[30] per Gleeson CJ, at 288 [98], 291-294 [108]-[118] per Hayne J; *Sullivan v Moody* at 577-583 [43]-[63] per Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ; *Tame* at 329-335 [6]-[28] per Gleeson CJ, at 341 [54] per Gaudron J, at 361-362 [123]-[125] per McHugh J, at 397-399 [237]-[241] per Gummow and Kirby JJ, at 425-431 [323]-[336] per Callinan J; *Graham Barclay Oysters* at 555-564 [9]-[40] per Gleeson CJ, at 570 [58] per Gaudron J (agreeing with Gummow and Hayne JJ), at 577- 583 [84]-[99] per McHugh J, at 596 -610 [145]-[186] per Gummow and Hayne JJ, at 617 [213] , 629-631 [245]-[251] per Kirby J, at 663-664 [320]-[321] per Callinan J ; *Woolcock Investments* at 529-533 [19]-[33] per Gleeson CJ, Gummow, Hayne and Heydon JJ, at 547-560 [74]-[116] per McHugh J; *Thompson v Woolworths (Qld) Pty Ltd* [2005] HCA 19; 221 CLR 234 at 243 [24] per Gleeson CJ, McHugh, Kirby, Hayne and Heydon JJ; *Vairy* at 442-448 [58] -[78] per Gummow J; *Roads and Traffic Authority v Dereder* [2007] HCA 42; 234 CLR 330 at 345 [44] per Gummow J; *Stuart v Kirkland-Veenstra* [2009] HCA 15; 237 CLR 215 at 248-254 [87]-[114] per Gummow, Hayne and Heydon JJ, at 259-262 [130]-[138] per Crennan and Kiefel JJ.

Caltex Refineries (Qld) Pty Ltd v Stavar [2009] NSWCA 258 -
Caltex Refineries (Qld) Pty Ltd v Stavar [2009] NSWCA 258 -
Caltex Refineries (Qld) Pty Ltd v Stavar [2009] NSWCA 258 -
Caltex Refineries (Qld) Pty Ltd v Stavar [2009] NSWCA 258 -
State of New South Wales v Spearpoint [2009] NSWCA 233 -
State of New South Wales v Spearpoint [2009] NSWCA 233 -
S v State of New South Wales [2009] NSWCA 164 -
S v State of New South Wales [2009] NSWCA 164 -
Bostik Australia Pty Ltd v Liddiard [2009] NSWCA 167 (26 June 2009) (Beazley JA at 1; Ipp JA at 113; Basten JA at 128)

> 87 The High Court held that notwithstanding the plaintiff's status as an independent contractor, the supermarket (Woolworths) owed her a duty of care in circumstances where she was required to conform to a delivery system established by Woolworths and was subject to its direction. A similar approach was taken in *Tolhurst v Cleary Bros (Bombo) Pty Ltd* [2008] NSWCA 181. 88 There comes a point where reference to the multitude of decided cases ceases to provide assistance in the determination of the question in issue and it is necessary to return to principle. As Gummow and Hayne JJ observed, at [145] , in *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54; (2002) 211 CLR 540 , the " *totality of the relationship between the parties ... is the proper basis upon which a duty of care may be recognised* ". 89 In my opinion, the following matters are relevant to the question whether Bostik owed Mr Liddiard a duty of care. First, Mr Liddiard, although employed by Brolton, was undertaking work as a general hand for Bostik. Bostik paid Brolton for those services. In that sense, the arrangement was akin to the labour hire cases exemplified in *Christie* , although this case was different in that his employer had a presence on the premises. Bostik was the principal occupier of the premises and had the overall control of the activities that were engaged in on the premises. It required the premises to be maintained and kept clean. That work included rubbish removal from the smoko shed. Bostik was aware of the method of rubbish removal from the smoko shed. It permitted its forklifts to be used for that purpose. It was also aware of, and permitted, its empty 44 gallon drums to be used as rubbish receptacles for the smoko shed. Mr Pearce accepted that it was part of his responsibilities as Bostik's site manager to ensure that proper safety measures were in place, including in relation to the removal of rubbish bins from the smoko shed. 90 Mr Liddiard, for his part, was not in a position to organise his own method of work. He was subject to direction, although it is reasonable to infer that he would have expected that direction to have come from Brolton. However, that is not determinative of the question whether Bostik had a duty of care. He did not provide his own equipment. He had no control over any aspect of the workplace. 91 In my opinion, Bostik owed Mr Liddiard a duty of care that was akin to the duty owed to an employee.

Bostik Australia Pty Ltd v Liddiard [2009] NSWCA 167 -
Bostik Australia Pty Ltd v Liddiard [2009] NSWCA 167 -
Central Goldfields Shire v Haley & Ors [2009] VSCA 101 -
Central Goldfields Shire v Haley & Ors [2009] VSCA 101 -
Stuart v Kirkland-Veenstra [2009] HCA 15 (22 April 2009) (French CJ,Gummow, Hayne, Heydon, Crennan and Kiefel JJ)

112. There can be no duty to act in a particular way unless there is authority to do so. Power is therefore a necessary condition of liability but it is not a sufficient condition. Statutory power to act in a particular way, coupled with the fact that, if action is not taken, it is reasonably foreseeable that harm will ensue, is not sufficient to establish a duty to take that action. Rather, as was pointed out in *Graham Barclay Oysters Pty Ltd v Ryan* [110], the existence or otherwise of a common law duty of care owed by a statutory authority (or in this case the holder of statutory power) "turns on a close examination of the terms, scope and purpose of the relevant statutory regime". Does that regime erect or facilitate "a relationship between the authority [here the holder of statutory power] and a class of persons that, in all the circumstances, displays sufficient characteristics answering the criteria for intervention by the tort of negligence" [111] ?

via

[110] (2002) 211 CLR 540 at 596597 [146] .

Stuart v Kirkland-Veenstra [2009] HCA 15 (22 April 2009) (French CJ,Gummow, Hayne, Heydon, Crennan and Kiefel JJ)

139. The evident purpose of statutory provisions, which might be utilised to prevent or minimise harm, has been identified as relevant to the existence of a duty of care in cases in this Court. The powers given to the Council in *Pyrenees Shire Council v Day* were considered by Gummow J to have been provided to further the legislative purpose of fire prevention [165] . I n *Crimmins v Stevedoring Industry Finance Committee* and again in *Graham Barclay Oysters Pty Ltd v Ryan* , McHugh J observed that some powers are clearly enough conferred because the legislature intends that the power will be exercised, in appropriate circumstances, to protect the specific class of persons or property [166] . His Honour considered that the judgment of Lord Hoffmann in *Stovin v Wise* [167] should be understood in this way [168] .

Stuart v Kirkland-Veenstra [2009] HCA 15 (22 April 2009) (French CJ,Gummow, Hayne, Heydon, Crennan and Kiefel JJ)

129. In principle a public authority exercising statutory powers should not be regarded by the common law any differently from a citizen. It should not be considered to have an obligation to act [138] . But the position of a public authority is not the same as that of a citizen and the rule of equality is not regarded as wholly applicable [139]. It has public functions and it has statutory powers which the citizen does not. Some powers might be effective to avert or minimise a risk of harm to particular persons or their property, but the statute might not oblige their use. The relevant concern of the common law is whether a public authority might nevertheless be considered to be under a duty of care which obliges it to exercise its powers in a particular way [140] .

via

[138] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 459460 per Mason J; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 580 [91] per McHugh J ; [2002] HCA 54 .

Stuart v Kirkland-Veenstra [2009] HCA 15 -

Stuart v Kirkland-Veenstra [2009] HCA 15 -
Stuart v Kirkland-Veenstra [2009] HCA 15 -
Stuart v Kirkland-Veenstra [2009] HCA 15 -
Stuart v Kirkland-Veenstra [2009] HCA 15 -
Stuart v Kirkland-Veenstra [2009] HCA 15 -
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Stuart v Kirkland-Veenstra [2009] HCA 15 -
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Stuart v Kirkland-Veenstra [2009] HCA 15 -
Stuart v Kirkland-Veenstra [2009] HCA 15 -
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Stuart v Kirkland-Veenstra [2009] HCA 15 -
Stuart v Kirkland-Veenstra [2009] HCA 15 -
Stuart v Kirkland-Veenstra [2009] HCA 15 -
Stuart v Kirkland-Veenstra [2009] HCA 15 -
Stuart v Kirkland-Veenstra [2009] HCA 15 -
Stuart v Kirkland-Veenstra [2009] HCA 15 -
Stuart v Kirkland-Veenstra [2009] HCA 15 -
Portelli v Tabriska Pty Ltd [2009] NSWCA 17 -
Portelli v Tabriska Pty Ltd [2009] NSWCA 17 -
Precision Products (NSW) Pty Ltd v Hawkesbury City Council [2008] NSWCA 278 (31 October 2008) (Allsop P; Beazley JA ; McColl JA)

> 76 The "well settled principle" is not, however, a stand-alone unitary test for the identification of a duty of care or the ascertainment of its scope. It is not a basis for concluding that whenever an authority, here a Council, decides to exercise any statutory power, it owes a duty of care to any person who might foreseeably be detrimentally affected in any way by the exercise of the power. The existence and the scope of any duty must be analysed by reference to the principles governing such tasks. The principle is, however, a reflection of one of the competing themes in this area – the importance of the notion of equality of citizen and state in the working through of rights and obligations in society: see *Graham Barclay Oysters Pty Limited v Ryan* at 553-554 [6] ; and *Northern Territory v Mengel* at 348 ; and compare the *Judiciary Act 1903* (Cth), s 64 in the exercise of federal jurisdiction.

Council of the City of Liverpool v Turano [2008] NSWCA 270 -
Precision Products (NSW) Pty Ltd v Hawkesbury City Council [2008] NSWCA 278 -
Precision Products (NSW) Pty Ltd v Hawkesbury City Council [2008] NSWCA 278 -
Council of the City of Liverpool v Turano [2008] NSWCA 270 -
Precision Products (NSW) Pty Ltd v Hawkesbury City Council [2008] NSWCA 278 -
Council of the City of Liverpool v Turano [2008] NSWCA 270 -
Precision Products (NSW) Pty Ltd v Hawkesbury City Council [2008] NSWCA 278 -
Mount Isa Mines Ltd v Hare [2008] QCA 328 -
Mount Isa Mines Ltd v Hare [2008] QCA 328 -
The State of South Australia v Ellis [2008] WASCA 200 -
The State of South Australia v Ellis [2008] WASCA 200 -
BI (Contracting) Pty Limited v University of Adelaide [2008] NSWCA 210 -
New South Wales v West [2008] ACTCA 14 (05 September 2008) (Higgins CJ, Penfold and Graham JJ)

> 173. In his oral submissions, senior counsel for the applicant placed considerable reliance upon the decision of the High Court in *Graham Barclay Oysters Pty Limited v Ryan* (2002) 211 CLR 540 ('Graham Barclay Oysters') and the judgment of the New South Wales Court of Appeal in *State of New South Wales v Klein* (2006) Aust Tort Reports 81-862 ('Klein').

New South Wales v West [2008] ACTCA 14 (05 September 2008) (Higgins CJ, Penfold and Graham JJ)

84. A result of that kind would not necessarily be inconsistent with the range of possibilities left open under *Graham Barclay Oysters.* It may be possible, by reference to *Graham Barclay Oysters* , to say, for instance:

> (a) that there is no common law duty to any individual member of the community to manage the Rural Fire Service in a particular way, to allocate resources such as funding for fire fighting equipment in a particular way, or to issue or not issue particular delegations in connection with particular fires; but
>
> (b) that in some cases, having regard to the tests articulated by McHugh J, there might be a common law duty owed by the Rural Fire Service to a particular landholder onto whose land Rural Fire Service officers had entered in the course of their fire fighting activities.

New South Wales v West [2008] ACTCA 14 (05 September 2008) (Higgins CJ, Penfold and Graham JJ)

77. The case of *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 (***Graham Barclay Oysters***) is a useful starting point from which to examine the common law liabilities of a statutory body whose role is established by legislation. The respondents can take little comfort from Gleeson CJ's conclusion at [32] that:

> *A legislative grant of power to protect the general public does not ordinarily give rise to a duty owed to an individual or to the members of a particular class.*

New South Wales v West [2008] ACTCA 14 -
New South Wales v West [2008] ACTCA 14 -
New South Wales v West [2008] ACTCA 14 -
New South Wales v West [2008] ACTCA 14 -
New South Wales v West [2008] ACTCA 14 -
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New South Wales v West [2008] ACTCA 14 -
New South Wales v West [2008] ACTCA 14 -
New South Wales v West [2008] ACTCA 14 -
New South Wales v West [2008] ACTCA 14 -
Imbree v McNeilly [2008] HCA 40 (28 August 2008) (Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ)

39. *Cook v Cook* was decided in 1986. It was one of a large number of decisions made by this Court during the 1980s about the law of negligence. Many of those cases focused upon duty of care. Thus this Court considered [45] what duty of care a public authority owed in exercising or not exercising its powers [46] and spoke of a "general dependence" upon public authorities to perform their functions with due care [47] . This Court also reexpressed [48] th e duty of care owed by an employer to an employee as a nondelegable duty: a duty to ensure that reasonable care and skill was exercised [49] . And this Court rejected [50] a theory of concurrent general and special duties owed by an occupier of land to an entrant in favour of determining only whether, in all the relevant circumstances, the defendant owed a duty of care under the ordinary principles of negligence.

via

[46] See now *Pyrenees Shire Council v Day* (1998) 192 CLR 330; [1998] HCA 3; *Romeo v Conservation Commission (NT)* (1998) 192 CLR 431; [1998] HCA 5; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1; [1999] HCA 59; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540; [2002] HCA 54 .

Imbree v McNeilly [2008] HCA 40 -
Tolhurst v Cleary Bros (Bombo) Pty Ltd [2008] NSWCA 181 (12 August 2008) (Beazley JA ; Giles JA ; Tobias JA)

64 Thus in *Rockdale Beef Pty Ltd v Carey* [2003] NSWCA 132 Ipp JA, with whom Mason P and McColl JA agreed, said -

> "79 The judgments of Wilson and Dawson JJ and Deane J in *Stevens* are authority for the proposition that an entrepreneur may owe a duty of care to an independent contractor when, according to the general law of negligence, the circumstances are such that a duty arises. The existence of the duty is not conditional on the existence of any particular factual element. It is the substantive content of the relationship between the parties that is decisive. As it was put by Gummow and Hayne JJ in *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 194 ALR 337 at 375 , albeit in relation to a different context, the "totality of the relationship between the parties ... is the proper basis upon which a duty of care may be recognised.'
>
> ...
>
> 84 In my opinion, nothing said by Mason J or Brennan J in *Stevens* , or Heydon JA in *Kolodziejczyk* prevents the general law of negligence imposing on an entrepreneur a duty of care owed to an independent contractor. Such a duty may arise in circumstances where there is no need for the entrepreneur to give directions as to when and where the work is to be done and to co-ordinate the various activities, but where, for other reasons, reasonable care on the part of the entrepreneur affects the way in which the work is to be undertaken and the safety of the work site, and where other considerations (not applicable in *Stevens* and *Kolodziejczyk*) such as vulnerability, inequality of bargaining power, control, and the other manifold factors that the law recognises as being relevant to the existence of a duty of care, are present."

ACQ Pty Ltd v Cook [2008] NSWCA 161 -
ACQ Pty Ltd v Cook [2008] NSWCA 161 -
ACQ Pty Ltd v Cook [2008] NSWCA 161 -
State of NSW v Tyszyk [2008] NSWCA 107 (26 May 2008) (Mason P ; Giles JA ; Campbell JA)

149 Control has been held to be a relevant factor in existence of a duty of care: ***Graham Barclay*** at [20] , [90]-[95] and [149]-[152] ; ***Modbury Triangle Shopping Centre Pty Ltd v Anzil*** [2000] HCA 61; (2000) 205 CLR 254 at [19]-[21], [42]-[43], [110]-[117] ; ***Brodie v Singleton Shire Council*** [2001] HCA 29; (2001) 206 CLR 512 at [102] .

State of NSW v Tyszyk [2008] NSWCA 107 (26 May 2008) (Mason P ; Giles JA ; Campbell JA)
Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54 ; (2002) 211 CLR 540
Greenwood v Papademetri

State of NSW v Tyszyk [2008] NSWCA 107 (26 May 2008) (Mason P ; Giles JA ; Campbell JA)

146 To the extent that there was a finding of duty of care in that case, it is in my view incorrectly decided. The reasoning does not draw the distinction clearly drawn in cases cited in paras [102], [104], [106]-[109] and [125] above between a duty owed by a police officer as a matter of public law, and a duty of care. It is at odds with the principles stated by McHugh J in ***Graham Barclay*** at [81] .

State of NSW v Tyszyk [2008] NSWCA 107 -
State of NSW v Tyszyk [2008] NSWCA 107 -
Alinta LGA Ltd v Mine Subsidence Board [2008] HCA 17 -
Kirkland-Veenstra v Stuart [2008] VSCA 32 (29 February 2008) (Warren CJ, Maxwell P and Chernov JA)

102. These issues of control and knowledge are particularly significant in this case. As Gummow and Hayne JJ said in *Graham Barclay Oysters*, the factor of control 'is of fundamental importance in discerning a common law duty of care on the part of a public authority'. [96] The nature and extent of the control can vary widely, as their Honours illustrated by reference to the decided cases. Of the situation in *Pyrenees* , their Honours said that

> the Shire held a significant and special measure of control over the safety from fire of persons and property at the relevant premises. That degree of control was the touchstone of the Shire's duty to safeguard others from the risk of fire in circumstances where the Shire had entered upon the exercise of its statutory powers of fire prevention and it alone among the relevant parties knew of, and was responsible for, the continued existence of the risk of fire. [97]

via

[97] *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, [151] .

Kirkland-Veenstra v Stuart [2008] VSCA 32 (29 February 2008) (Warren CJ, Maxwell P and Chernov JA)

127. In those circumstances, the imposition of a common law duty on such a police officer – being something for which the appellant contends – would amount to what the majority of the Court of Appeal in *Hunter Area Health Service v Presland [122]* described as a 'distorting' influence on the discretionary power created by the Act and would be inconsistent with the abovementioned aspect of the legislative scheme. In my opinion, the imposition of a common law duty of care on a police officer who must decide whether to exercise the statutory discretion under s 10(1) would create a situation of the kind identified by Spigelman CJ in *Presland*. [123] In that case, his Honour noted the circumstances where a common law duty would be inconsistent with the legislative scheme or would be otherwise inappropriate by reason of the scope and purpose of the legislation, namely:

> · liability in tort may "distort [the] focus" of the statutory decision-making process; (*Crimmins* (at 101 [292]))
>
> · the decision may be made in a "detrimentally defensive frame of mind"; (*Hill v Chief Constable of West Yorkshire* [1989] 1 AC 53 at 63D)
>
> · a common law duty should not be imposed if it "would ... have a tendency to discourage the due performance of ... statutory duties"; (*X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at 739D)

- the imposition of a duty of care may “undermine the effectiveness of the duties imposed by the statute”; (*Graham Barclay Oysters Pty Ltd* (at 574 [78])).

…

Kirkland-Veenstra v Stuart [2008] VSCA 32 (29 February 2008) (Warren CJ, Maxwell P and Chernov JA)

48. McHugh J goes on to consider some of the situations where the law may or may not impose such a duty. [49] His Honour expressed the view that a public authority is no different from an individual in that the common law does not usually impose a duty to intervene, unless the authority has created or increased the risk. Furthermore:

> In most cases, a public authority will not be in breach of a common law duty by failing to exercise a discretionary power that is vested in it for the benefit of the general public. [50]

However, his Honour continues:

> The likelihood of the common law imposing an affirmative duty of care whose content may require the exercise of a statutory power increases where *the power is invested to protect the community from a particular risk and the authority is aware of a specific risk to a specific individual*. If the legislature has invested the power for the purpose of protecting the community, it obviously intends that the power should be exercised in appropriate circumstances. [51]

It is by this reasoning that his Honour explains *Pyrenees Shire Council v Day. [52]*

via

[51] *Graham Barclay Oysters* (2002) 211 CLR 540 , [82] (emphasis added).

Kirkland-Veenstra v Stuart [2008] VSCA 32 -
Kirkland-Veenstra v Stuart [2008] VSCA 32 -
Kirkland-Veenstra v Stuart [2008] VSCA 32 -
Kirkland-Veenstra v Stuart [2008] VSCA 32 -
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Kirkland-Veenstra v Stuart [2008] VSCA 32 -
Kirkland-Veenstra v Stuart [2008] VSCA 32 -
Gittani Stone Pty Ltd v Pavkovic [2007] NSWCA 355 -
Gittani Stone Pty Ltd v Pavkovic [2007] NSWCA 355 -
Director of Public Prosecutions (Vic) v Le [2007] HCA 52 -
Em v The Queen [2007] HCA 46 -
Sydney Water Corporation v Abramovic [2007] NSWCA 248 (14 September 2007) (Mason P; Santow JA ; Basten JA)

> 104 In my view the imposition of a duty on the Board to impose a safe system of work on independent contractors, is not justified in circumstances where the Board gave no direction as to the manner in which they were to carry out their work and no question of overall co-ordination or organisation arose. To take that step would require the application of the principle defined by Callinan J, and possibly by Gaudron J, in *Crimmins* out of the context of the case so as to apply it in circumstances which were, in legal terms, quite different. That Callinan J intended to place reliance on the special role of the Authority within the stevedoring industry is clear from his Honour's comments on *Crimmins* in *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at [317] ; see also *Randwick City Council v T&H Fatouros Pty Ltd* [2007] NSWCA 177 at [46]-[58] (Ipp JA, Giles and Tobias JJA agreeing), and generally *Amaca Pty Ltd v New South Wales* [2005] NSWCA 124; (2004) 132 LGERA 309 at [52] .

Sydney Water Corporation v Abramovic [2007] NSWCA 248 -
Sydney Water Corporation v Abramovic [2007] NSWCA 248 -
Roads and Traffic Authority of NSW v Dederer [2007] HCA 42 (30 August 2007) (Gleeson CJ, Gummow, Kirby, Callinan and Heydon JJ)

> 164. Nevertheless, more than a passing nod is required to a sense of "trepidation" against interfering in concurrent findings of fact [182] . Reasons in this Court in recent times have repeatedly explained why this is so [183] . It is not ordinarily the function of this Court to perform the tasks of fact-finding and factual review. The Court lacks advantages that other courts possess in this respect. Under the Constitution , the "appeal" we hear has been held to be a strict "appeal", concerned with error. It is not an appeal by way of rehearing, still less a trial [184] .

via

> [183] cf *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254 at 274 [58] ; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 634 [262] ; *Aktiebolaget Hässle v Alphapharm Pty Ltd* (2002) 212 CLR 411 at 447-448 [95] ; *Nominal Defendant v GLG Australia Pty Ltd* (2006) 80 ALJR 688 at 702 [74]; 225 ALR 643 at 660 ; *Fahy* (2007) 81 ALJR 1021 at 1052 [153] .

Roads and Traffic Authority of NSW v Dederer [2007] HCA 42 -
Roads and Traffic Authority of NSW v Dederer [2007] HCA 42 -
Roads and Traffic Authority of NSW v Dederer [2007] HCA 42 -
Roads and Traffic Authority of NSW v Dederer [2007] HCA 42 -
Roads and Traffic Authority of NSW v Dederer [2007] HCA 42 -
Amaca Pty Ltd v AB & P Constructions Pty Ltd [2007] NSWCA 220 (29 August 2007) (Giles JA; Ipp JA ; Basten JA)

> 54. *Graham Barclay Oysters Pty Ltd v Ryan* had many parties, but the oyster grower and the consumer of oysters were in the relationship of manufacturer and user. It was accepted that a general duty of care was owed, and the contest was over breach of duty, see at [41]-[42] per Gleeson CJ . [187] per Gummow and Hayne JJ, [253] per Kirby J. McHugh J at [101] referred to the scope of the duty owed, but by his [106] determined the scope as the general duty of care.

Amaca Pty Ltd v AB & P Constructions Pty Ltd [2007] NSWCA 220 -
Amaca Pty Ltd v AB & P Constructions Pty Ltd [2007] NSWCA 220 -
Amaca Pty Ltd v AB & P Constructions Pty Ltd [2007] NSWCA 220 -
Amaca Pty Ltd v AB & P Constructions Pty Ltd [2007] NSWCA 220 -
Amaca Pty Ltd v AB & P Constructions Pty Ltd [2007] NSWCA 220 -
Amaca Pty Ltd v AB & P Constructions Pty Ltd [2007] NSWCA 220 -
CGU Workers Compensation (NSW) Ltd v Garcia [2007] NSWCA 193 -
CGU Workers Compensation (NSW) Ltd v Garcia [2007] NSWCA 193 -
Newmont Yandal Operations Pty Ltd v The J Aron Corporation and The Goldman Sachs Group Inc [2007] NSWCA 195 -
CGU Workers Compensation (NSW) Ltd v Garcia [2007] NSWCA 193 -
Newmont Yandal Operations Pty Ltd v The J Aron Corporation and The Goldman Sachs Group Inc [2007] NSWCA 195 -
CGU Workers Compensation (NSW) Ltd v Garcia [2007] NSWCA 193 -
Amaca Pty Ltd v Hannell [2007] WASCA 158 -
Amaca Pty Ltd v Hannell [2007] WASCA 158 -
Amaca Pty Ltd v Hannell [2007] WASCA 158 -
Amaca Pty Ltd v Hannell [2007] WASCA 158 -
Sheather v Country Energy [2007] NSWCA 179 -
Sheather v Country Energy [2007] NSWCA 179 -
Alinta Gas Networks Pty Ltd v James [2007] WASCA 155 -
Randwick City Council v T & H Fatouros Pty Ltd [2007] NSWCA 177 -
Alinta Gas Networks Pty Ltd v James [2007] WASCA 155 -
Randwick City Council v T & H Fatouros Pty Ltd [2007] NSWCA 177 -
Randwick City Council v T & H Fatouros Pty Ltd [2007] NSWCA 177 -
Randwick City Council v T & H Fatouros Pty Ltd [2007] NSWCA 177 -
Alinta Gas Networks Pty Ltd v James [2007] WASCA 155 -
Randwick City Council v T & H Fatouros Pty Ltd [2007] NSWCA 177 -
Randwick City Council v T & H Fatouros Pty Ltd [2007] NSWCA 177 -
White v Director of Military Prosecutions [2007] HCA 29 -
New South Wales v Fahy [2007] HCA 20 -
New South Wales v Fahy [2007] HCA 20 -
Shire of Toodyay v Walton [2007] WASCA 76 (10 April 2007) (Steytler P)

> Graham Barclay Oysters Pty Ltd v Ryan (2002) 211 CLR 540

Shire of Toodyay v Walton [2007] WASCA 76 -
Fitzpatrick v Job t/as Jobs Engineering [2007] WASCA 63 -
Fitzpatrick v Job t/as Jobs Engineering [2007] WASCA 63 -
Fitzpatrick v Job t/as Jobs Engineering [2007] WASCA 63 -
Fitzpatrick v Job t/as Jobs Engineering [2007] WASCA 63 -
Leichhardt Municipal Council v Montgomery [2007] HCA 6 -
Leichhardt Municipal Council v Montgomery [2007] HCA 6 -
Leichhardt Municipal Council v Montgomery [2007] HCA 6 -
Wagstaff v Haslam [2007] NSWCA 28 (26 February 2007) (Santow JA; Bryson JA; Basten JA)

> 38 In *Cole v South Tweed Heads Rugby League Football Club Ltd* (2004) 217 CLR 469 at [56] Gummow and Hayne JJ, by reference to a passage in the judgment of McHugh J in *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at [81] and [106] noted:
>
> > "His Honour also emphasised that the more specific the terms of the formulation of the duty of care, the greater the prospect of mixing the anterior question of law (the existence of the duty) with questions of fact in deciding whether a breach has occurred. On the other hand, the articulation of a duty of care at too high a level of abstraction provides an inadequate legal mean against which issues of fact may be determined."

Wagstaff v Haslam [2007] NSWCA 28 -
R.T & Y.E. Falls Investments PTY. LTD. v State of New South Wales [2007] NSWCA 18 -
R.T & Y.E. Falls Investments PTY. LTD. v State of New South Wales [2007] NSWCA 18 -
Rickard Constructions Pty Ltd v Rickard Hails Moretti Pty Ltd [2006] NSWCA 356 -
Rickard Constructions Pty Ltd v Rickard Hails Moretti Pty Ltd [2006] NSWCA 356 -
Sutherland Shire Council v Becker [2006] NSWCA 344 -
Sutherland Shire Council v Becker [2006] NSWCA 344 -
Sutherland Shire Council v Becker [2006] NSWCA 344 -
Sutherland Shire Council v Becker [2006] NSWCA 344 -
Sutherland Shire Council v Becker [2006] NSWCA 344 -
Sutherland Shire Council v Becker [2006] NSWCA 344 -
Sutherland Shire Council v Becker [2006] NSWCA 344 -
Sutherland Shire Council v Becker [2006] NSWCA 344 -
Sutherland Shire Council v Becker [2006] NSWCA 344 -
Sutherland Shire Council v Becker [2006] NSWCA 344 -
Sutherland Shire Council v Becker [2006] NSWCA 344 -
State of New South Wales v Klein [2006] NSWCA 295 -
Great Lakes Shire Council v Dederer [2006] NSWCA 101 (05 October 2006) (Handley JA at 1; Ipp JA at 67; Tobias JA at 325)

179. A major difference is the fact that, unlike in *Palmer* , the RTA is to be regarded as having created the danger constituted by the bridge. In *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 Mason J at 460 observed that a public authority may by its conduct place itself in such a position that it attracts a duty of care. His Honour said:

"A common illustration is provided by the cases in which an authority in the exercise of its functions has created a danger, thereby subjecting itself to a duty of care for the safety of others which must be discharged by an exercise of its statutory powers or by giving a warning ... ."

His Honour observed that it was the conduct of the authority in creating the danger that attracted the duty of care.

See also the remarks of McHugh J in *Graham Barclay Oysters Pty Limited v Ryan* (2002) 211 CLR 540 at 575 to 576 , [81] and his Honour's observations at 580 , [91] concerning the consequences of a public authority increasing the risk of harm to individuals.

Great Lakes Shire Council v Dederer [2006] NSWCA 101 -
Seltsam Pty Ltd v Mcneill [2006] NSWCA 158 (26 June 2006) (Handley JA at 1; Tobias JA at 8; Bryson JA at 9)

106 Passages in the evidence of Mr Stewart to which the Trial Judge referred at Judgment paras [18], [19] and [20], dealt with notification of hazard by labelling, and Mr Stewart said (Judgment [19] Red 19E):

> ... Given that such label would effectively communicate to the end user that the product contained asbestos, that asbestos was harmful if inhaled, and the following procedures could be used to mitigate or eliminate the risk. Given that the label did all these things, effectively then a label such as that should have been attached in my opinion in 1960 (T61.42-47).

Otherwise the Trial Judge did not refer to a basis in the evidence for his formulation, which does not fulfil what Mr Stewart contemplated. It is striking and strange that in the huge body of material in evidence, including evidence of the respondent himself about the effect that a warning would have had on him, the terms of the warning were not spelt out. As with any case where negligence is alleged, clear statement and understanding of what it was that the alleged tortfeasor did or did not do which

constituted negligence is basal to comprehensible debate or fair proceedings about whether there was negligence or not, and I find it remarkable that the terms of the warning the absence of which is complained of were not articulated in evidence, most importantly in the oral evidence of the respondent himself. Compare *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 611-612 [192] (Gummow and Hayne JJ) . (Another part of these reasons deals more fully with the reference to a warning in the respondent's evidence, and with its admissibility).

Seltsam Pty Ltd v Mcneill [2006] NSWCA 158 -
DPP v El Mawas [2006] NSWCA 154 -
DPP v El Mawas [2006] NSWCA 154 -
Talbot & Olivier (A Firm) v Witcombe [2006] WASCA 87 (26 May 2006) (Steytler P)

26 I am unable to find any support, either in principle or in authority, for the contention that these facts are arguably sufficient to make it reasonable (see ***Graham Barclay Oysters Pty Ltd v Ryan*** (2002) 211 CLR 540 at [242] - [243] ; ***Tame v New South Wales*** (2002) 211 CLR 317 at [8] - [9] ; and ***Gifford v Strang Patrick Stevedoring Pty Ltd*** (2003) 214 CLR 269 at [51], [86]), in the circumstances, to impose a duty of the kind alleged. They do not establish that the appellant assumed any responsibility to Mrs Witcombe to prosecute her husband's claim with diligence. Its only responsibility in that respect was to her husband. That Mrs Witcombe was married to Mr Witcombe, and acted as his agent under power of attorney, does not alter that fact. Nor, in my opinion, does it matter that Mrs Witcombe might have been known by the appellant to be dependent upon her husband or that she would benefit from and be supported by any damages recovered by him. There is no basis for a proposition which would support the existence of a duty of care owed by a lawyer to third parties to be diligent or expeditious in the conduct of the client's action merely because they are dependants of the client whose action for damages is being handled by the lawyer. There is no plea that the appellant knew or should have known that, if his claim was not pursued expeditiously, the deceased was likely to die before his claim could be finalised. As I have said, nothing has been pleaded to suggest that the appellant assumed any responsibility to Mrs Witcombe, as a dependant of her husband or otherwise (see ***Hedley Byrne v Heller*** [1964] AC 465; and ***White v Jones*** [1995] 2 AC 207). Nor has anything been pleaded to suggest that Mrs Witcombe relied upon the appellant to look after her interests in any capacity.

Talbot & Olivier (A Firm) v Witcombe [2006] WASCA 87 -
Talbot & Olivier (A Firm) v Witcombe [2006] WASCA 87 -
Talbot & Olivier (A Firm) v Witcombe [2006] WASCA 87 -
Talbot & Olivier (A Firm) v Witcombe [2006] WASCA 87 -
Ho v Grigor [2006] FCAFC 72 -
Ho v Grigor [2006] FCAFC 72 -
Harriton v Stephens [2006] HCA 15 -
Harriton v Stephens [2006] HCA 15 -
Harriton v Stephens [2006] HCA 15 -
Harriton v Stephens [2006] HCA 15 -
Harriton v Stephens [2006] HCA 15 -
Harriton v Stephens [2006] HCA 15 -
Harriton v Stephens [2006] HCA 15 -
Edson v Roads and Traffic Authority [2006] NSWCA 68 -
Edson v Roads and Traffic Authority [2006] NSWCA 68 -
Edson v Roads and Traffic Authority [2006] NSWCA 68 -
Edson v Roads and Traffic Authority [2006] NSWCA 68 -
Nominal Defendant v GLG Australia Pty Ltd [2006] HCA 11 -
Marsden v Ydalia Holdings (WA) Pty Ltd [2006] WASCA 52 -
Marsden v Ydalia Holdings (WA) Pty Ltd [2006] WASCA 52 -
McPherson's Ltd v Eaton [2005] NSWCA 435 (16 December 2005) (Mason P, Hodgson and Ipp JJA)

35 The scope or content of any duty of care found to have existed is also a question of law and again, the determination of that issue is dependent partly largely on factual findings made by the

trial judge. The principal arguments in this connection are whether the judge erred in law by applying the wrong standard or measure of care in determining the reasonable response to the risk of harm: *Dovuro Pty Ltd v Wilkins* (2003) 215 CLR 317, and whether his Honour erred in law by failing to identify with the necessary precision, by reference to considerations of the nature of those indicated in *Wyong Shire Council v Shirt* (1980) 146 CLR 40, the reasonable response to the risk of harm that existed: *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 .

McPherson's Ltd v Eaton [2005] NSWCA 435 (16 December 2005) (Mason P, Hodgson and Ipp JJA)

79 In *Graham Barclay Oysters Pty Ltd v Ryan* the distributors grew and harvested the oysters (that being the additional factor).

McPherson's Ltd v Eaton [2005] NSWCA 435 (16 December 2005) (Mason P, Hodgson and Ipp JJA)

146 The judge found that, as an alternative to giving a warning, McPhersons should have withdrawn the millboard from sale. This is an extreme position that should only be taken after careful consideration of the effectiveness of a warning and a proper evaluation of the various factors mentioned in *Shirt* . See the discussion in *Graham Barclay Oysters* by McHugh J at [112] and Gummow and Hayne JJ at [202] . The judge did not embark on any such consideration and evaluation.

McPherson's Ltd v Eaton [2005] NSWCA 435 -
McPherson's Ltd v Eaton [2005] NSWCA 435 -
McPherson's Ltd v Eaton [2005] NSWCA 435 -
A D & S M McLean Pty Ltd v Meech [2005] VSCA 305 -
McPherson's Ltd v Eaton [2005] NSWCA 435 -
Davis v Nolras Pty Ltd [2005] NSWCA 379 -
McPherson's Ltd v Eaton [2005] NSWCA 435 -
Davis v Nolras Pty Ltd [2005] NSWCA 379 -
State of New South Wales v Ibbett [2005] NSWCA 445 (13 December 2005) (Spigelman CJ, Ipp and Basten JJA)

267 Dealing with the latter case first, the principles upon which reliance was placed in *Graham Barclay Oysters* concerned the inaction of the Government and the Local Council in failing to exercise powers available to them under relevant State statutory provisions allowing control of pollution in Wallis Lake and its tributaries, in order to prevent threats to public health and to provide environmental protection. It was in that context that Gleeson CJ commented on the difficulty in "inviting the judicial arm of government to pass judgment upon the reasonableness of the conduct of the legislative or executive arms of government". Although, as his Honour noted, three members of the majority in *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at [162] accepted that it may be "proper and necessary for a court to decide whether the priorities of a local council in dealing with road repairs in various locations were reasonable", nevertheless, his Honour noted that "the scope for judicial examination of the reasonableness of governmental spending priorities was not held to be, and cannot be, at large". The thrust of these comments, however, was not concerned with a liability which may be imposed on a State government for the tortious acts of its police officers. Indeed, such liability has been expressly accepted by the State pursuant to the *Vicari ous Liability Act* , s 8 . Nor was it argued that the liability of the State under that legislation did not extend to exemplary damages. Accordingly, there is nothing in *Graham Barclay Oysters* , which provides assistance with respect to the present question.

State of New South Wales v Ibbett [2005] NSWCA 445 -
State of New South Wales v Ibbett [2005] NSWCA 445 -
State of New South Wales v Ibbett [2005] NSWCA 445 -
State of New South Wales v Ibbett [2005] NSWCA 445 -
State of New South Wales v Ibbett [2005] NSWCA 445 -
New South Wales v Bujdoso [2005] HCA 76 (08 December 2005) (Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ)

41. The appellant submitted that Ipp JA in the Court of Appeal misused the existence, or knowledge, of risk as the basis for a finding that the appellant had a positive duty to take "additional steps" to alleviate it. In doing so, it was argued, his Honour did not indicate what additional steps should have been taken by the appellant, or evaluate whether any such additional steps were reasonably required in the circumstances. In so doing, the appellant contended, Ipp JA fell into an error of the kind which Gummow and Hayne JJ identified in *Graham Barclay Oysters Pty Ltd v Ryan* [10], of formulating a duty of care retrospectively as an obligation purely to avoid the particular act or omission said to have caused loss [11]. Reliance was also placed upon what Gaudron J said in *Bennett v Minister of Community Welfare* [12] that "a precaution is not classified as 'reasonable' unless it can be said that its performance would, in the ordinary course of events, avert the risk that called it into existence." [13]

Neindorf v Junkovic [2005] HCA 75 -
New South Wales v Bujdoso [2005] HCA 76 -
New South Wales v Bujdoso [2005] HCA 76 -
Neindorf v Junkovic [2005] HCA 75 -
Attorney-General v Body Corporate 200200 Ca30/05 [2005] NZCA 296 (01 December 2005)

[44] It is not difficult to find cases in which Courts have reasoned backwards from apparent negligence to a conclusion that in the context of the particular risk which eventually crystallised, there was a duty of care, addressed to the amelioration of that particular risk. An example is *Pyrenees Shire Council v Day* (1998) 192 CLR 330 as explained in *Graham Barclay Oysters Pty Ltd* at 576 and 581 by McHugh J. Reference can also be made to the speech of Lord Pearson in *Home Office v Dorset Yacht Club Ltd* [1970] AC 1004 at 1052 which was adopted by this Court in *Wilson & Horton Ltd v Attorney-General* [1997] 2 NZLR 513 at 517. It would be wrong, therefore, to suggest that this is an illegitimate reasoning process.

Waverley Council v Ferreira [2005] NSWCA 418 (01 December 2005) (Spigelman CJ, Ipp and Tobias JJA)

27 A critical question in this case is the content of the duty of care the Council owed Mr Ferreira: ***Romeo v Conservation Commission of the Northern Territory*** (1998) 192 CLR 431 at 475 and 487 ; ***Jones v Bartlett*** (2000) 205 CLR 166 at [166] to [167], 213. At common law, the court is required to identify what a reasonable person in the position of the defendant would do by way of response to the reasonably foreseeable risk: ***Graham Barclay Oysters Pty Ltd v Ryan*** (2002) 211 CLR 540 . This is consistent with s 5B(1) of the *Civil Liability Act* which provides:

> "5B(1) A person is not negligent in failing to take precautions against a risk of harm unless:
>
> (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known), and
>
> (b) the risk was not insignificant, and
>
> (c) in the circumstances, a reasonable person in the person's position would have taken those precautions."

Attorney-General v Body Corporate 200200 Ca30/05 [2005] NZCA 296 -
Attorney-General v Body Corporate 200200 Ca30/05 [2005] NZCA 296 -
Waverley Council v Ferreira [2005] NSWCA 418 -
Di Vincenzo v McKrill [2005] WASCA 222 -
Di Vincenzo v McKrill [2005] WASCA 222 -
Di Vincenzo v McKrill [2005] WASCA 222 -
Di Vincenzo v McKrill [2005] WASCA 222 -
Travel Compensation Fund v Tambree [2005] HCA 69 (16 November 2005) (Gleeson CJ, Gummow, Kirby, Hayne and Callinan JJ)

64. *Rejection of the three-stage approach*: This is not an occasion to resume the argument over the suggested three-stage approach to the resolution of the duty question in negligence cases,

adopted by the House of Lords in *Caparo Industries Plc v Dickman* [57] . That approach is now followed, in substance, in most common law countries [58] . I have acknowledged that, for the time being, it has been rejected in Australia by a majority of this Court in *Sullivan v Moody* [59] and that it is my duty to conform [60] . (It would be a duty easier to fulfil if, in the place of the candid evaluation of applicable considerations of "whether it was fair, just and reasonable that the law should impose a duty of a given scope upon that tortfeasor for the benefit of that person" [61] some alternative methodology had been adopted by this Court that was equally clear and agreed). We are now buffeted, rudderless, on a rough sea and we have no sure compass [62] .

via

[61] *Ryan* (2002) 211 CLR 540 at 623 [232] .

Travel Compensation Fund v Tambree [2005] HCA 69 -
Travel Compensation Fund v Tambree [2005] HCA 69 -
Travel Compensation Fund v Tambree [2005] HCA 69 -
Fortuna Seafoods Pty Ltd v The Ship "Eternal Wind" [2005] QCA 405 -
Fortuna Seafoods Pty Ltd v The Ship "Eternal Wind" [2005] QCA 405 -
Fortuna Seafoods Pty Ltd v The Ship "Eternal Wind" [2005] QCA 405 -
Fortuna Seafoods Pty Ltd v The Ship "Eternal Wind" [2005] QCA 405 -
Mulligan v Coffs Harbour City Council [2005] HCA 63 (21 October 2005) (Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ)

28. GUMMOW J. Many of the significant decisions of this Court in the field of negligence, particularly in recent years, have concerned alleged liability for failure to take preventative action – in particular, the failure of public authorities to exercise their legislatively based powers to regulate or to control human activity, or to attempt to do so. The authorities include *Pyrenees Shire Council v Day* [19] , *Romeo v Conservation Commission (NT)* [20] , *Crimmins v Stevedoring Industry Finance Committee* [21] , *Brodie v Singleton Shire Council* [22] , and *Graham Barclay Oysters Pty Ltd v Ryan* [23] . This appeal, like that in *Vairy v Wyong Shire Council* [24] , is one more such case. As was the case in *Romeo* , the failure in these appeals is said to lie in a failure to warn of danger to those using public lands for recreational or sporting activities. Two further aspects of the development in negligence law thus are implicated: the occupation of land for public not private use, and the efficacy warnings would have had if they had been given.

Mulligan v Coffs Harbour City Council [2005] HCA 63 -
Vairy v Wyong Shire Council [2005] HCA 62 -
Mulligan v Coffs Harbour City Council [2005] HCA 63 -
Vairy v Wyong Shire Council [2005] HCA 62 -
Wynne v Pilbeam [2005] WASCA 200 -
Vairy v Wyong Shire Council [2005] HCA 62 -
Vairy v Wyong Shire Council [2005] HCA 62 -
Wynne v Pilbeam [2005] WASCA 200 -
Vairy v Wyong Shire Council [2005] HCA 62 -
Vairy v Wyong Shire Council [2005] HCA 62 -
APLA Ltd v Legal Services Commissioner (NSW) [2005] HCA 44 -
APLA Ltd v Legal Services Commissioner (NSW) [2005] HCA 44 -
Town of Mosman Park v Tait [2005] WASCA 124 -
Town of Mosman Park v Tait [2005] WASCA 124 -
Town of Mosman Park v Tait [2005] WASCA 124 -
Town of Mosman Park v Tait [2005] WASCA 124 -
Thompson v Vincent [2005] NSWCA 219 -
Berrigan Shire Council v Ballerini [2005] VSCA 159 (22 June 2005) (Callaway, Chernov and Nettle, Jj.A)

38. The Council contends that even if it owed some duty of care to Mr Ballerini the judge was in error in imposing a duty which extended beyond the central concept of reasonableness. [45] It says that his Honour failed to have regard to:

1) The fact that the Council did not create the actual danger. The Council contends that *Graham Barclay Oysters Pty Ltd v Ryan* [46] is authority that a duty of care will not ordinarily be imposed in such a case.

2) The fact that there was no evidence to implicate the Council in the placement of the log in the position it was and accordingly it did not create the access to the place of danger.

3) That the particular danger, if one existed, was the product of a transient act of nature, ie. a flood, which caused the bed of the lagoon to suffer a significant reduction in depth.

4) The fact that the log was not the only entry point into the swimming hole from Collie Park. Entry could be gained from any part of the park by descending the bank, which may have been easier or more difficult depending upon the depth of water in the swimming hole.

5) That there was no evidence that the Council was aware of any previous serious injuries being suffered by users of the log.

6) The fact that the park was an area set aside for passive recreation.

It is convenient to deal with those points in turn.

via

[46] (2002) 211 C.L.R. 540 at 575-576 [81] .

Berrigan Shire Council v Ballerini [2005] VSCA 159 (22 June 2005) (Callaway, Chernov and Nettle, Jj.A)

73. In terms of the "fact-value complex" there are also good reasons of "fairness, policy, practicality, proportion, expense and justice" for concluding that the Commission did not owe to Mr Ballerini a specific duty to take reasonable steps to guard against the risk of harm resulting from the use of the log for diving. [80] The Commission had responsibility for a vast area of forest, it could not control entry on to it, it could not be expected to supervise or maintain areas of it in the way in which the Council could be expected to supervise and maintain recreational facilities in the middle of Barooga, and it did not encourage and would not have wished to encourage the use of the Barooga swimming hole for swimming. It did not create the danger to which use of the log gave rise, and while it could have removed the log at negligible cost, the burden of the obligation needs to be assessed in light of the totality of the Commission's obligations to supervise and exploit literally thousands of hectares of state forests. It is surely not enough to impose a specific duty of care on the Commission to guard against the risks of diving into a length of river under the Commission's management and control that a person might make use of one of the thousands of logs that overhang that length of river. In my opinion it is also not enough to impose such a duty on the Commission in respect of a particular log that the log may emanate from a point of particular development (not under the Commission's management and control) such as the many parks, camping grounds and caravan parks that are dotted along the river. From the Commission's frame of reference, and judged by reference to its charter, each such area is of no more significance that any other along the thousand kilometres of river in which it has an

interest, and although a particular development may make it more foreseeable that harm will be suffered at that point, foreseeability is not sufficient basis for the imposition of a duty of care. [81]

via

[81] *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 C.L.R. 540 at 555 [9] ; *Secretary, Department of Natural Resources v Harper* (2000) 1 V.R. 133 at 149 [48] .

Berrigan Shire Council v Ballerini [2005] VSCA 159 -
Berrigan Shire Council v Ballerini [2005] VSCA 159 -
Berrigan Shire Council v Ballerini [2005] VSCA 159 -
Berrigan Shire Council v Ballerini [2005] VSCA 159 -
Berrigan Shire Council v Ballerini [2005] VSCA 159 -
Berrigan Shire Council v Ballerini [2005] VSCA 159 -
Commissioner of Main Roads v Jones [2005] HCA 27 -
Doubleday v Kelly [2005] NSWCA 151 (12 May 2005) (Bryson JA, Young CJ in Eq and Hunt AJA)
Graham Barclay Oysters Pty Ltd v. Ryan (2002) 211 CLR 540

Doubleday v Kelly [2005] NSWCA 151 -
Hunter Area Health Service v Presland [2005] NSWCA 33 (21 April 2005) (Spigelman CJ, Sheller and Santow JJA)

7 There is no authoritative guidance from the High Court for the determination of when a common law duty of care exists with respect to the exercise of statutory power. A number of different approaches are discernible in the authorities. (See *Pyrenees Shire Council v Day* (1998) 192 CLR 330; *Romeo v Conservation Commission (NT)* (1998) 192 CLR 431; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1; *Brodie v Singleton Shire Council* (2001) 206 CLR 512; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 . See Stephen Todd "Liability in Tort of Public Bodies" in Nicholas J Mullany and Allen M Linden (eds) *Torts Tomorrow: A Tribute to John Fleming* (1998) at 36; Martin Davies "Common Law Liability of Statutory Authorities: *Crimmins v Stevedoring Industry Finance Committee*" (2000) 8 *Torts LJ* 133.)

Hunter Area Health Service v Presland [2005] NSWCA 33 (21 April 2005) (Spigelman CJ, Sheller and Santow JJA)

322 Sheller JA set out the scope of the appeal in terms which it is convenient to repeat:

> "In broad terms, as argued, the submissions on appeal were directed to the nature and content of the duty of care owed by the defendants to patients who presented for psychiatric assessment and treatment; the appropriate test for determining whether a breach of any such duty had occurred; the interaction between the common law duty and the MHA [the *Mental Health Act* 1990] and the role it played in the formulation of any common law duty; breach of duty and causation. As to the findings of fact that Adams J made, the appellants, in particular, challenged the trial judge's findings about the material available to Dr Nazarian to be taken into account at the time that he assessed the plaintiff and his findings about whether the plaintiff and [the Respondent's brother] Mr Allan Presland, or either of them, wished the plaintiff to remain as an informal patient at JFH. The appellants submitted that the trial judge erred in failing to find that Mr Allan Presland demanded, or alternatively requested, in a forceful manner the release of the plaintiff.

The appellants also challenged his Honour's findings about the contents of the police escort form. The challenge to many of the findings of fact fed into the appellants' submissions that Adams J wrongly rejected the opinion of the defendants' expert Dr Milton and failed to attach significance to the divergence of opinion between the various medico-legal experts. The appellants submitted that the award of general damages was manifestly excessive and not supported by adequate reasons.

Duty of Care

What may, in some respects, be regarded as an unconditioned power to discharge an informal patient, bearing in mind, for example s 18(a) (though compare s17), led Mr Walker [senior counsel for the respondent] to emphasise that the plaintiff alleged general negligence. The plaintiff pleaded that by reason of his admission to JFH as an informal patient, there arose on the part of the defendants a duty of care to exercise, in respect of his assessment, management and treatment, the care and skill to be expected of a specialist psychiatric hospital and of a psychiatrist. However, the relevant power to be exercised in due care for the patient, while to be considered as part of the necessary care, treatment or control of the patient for the patient's own protection from serious physical harm or for the protection of others from serious physical harm, was subject to a statutory constraint designed to ensure that the patient received the best possible care and treatment in the least restrictive environment enabling the care and treatment to be effectively given. The facts of this case were such that no question turned upon any difficulty in determining the balance. According to the trial judge, such was the negligence of Dr Nazarian that he was never able properly to determine whether or not the plaintiff was a mentally ill person or a mentally disordered person within the meaning of the MHA. Dr Nazarian, who was acting as medical superintendent, had the conditioned power on the morning of 4 July 1995 to detain the plaintiff in JFH pursuant to s 18(b) of the MHA. Whether Hunter's negligence or the negligence of Dr Nazarian enabled the plaintiff to recover damages for that negligence required further consideration of the circumstances in which Dr Nazarian was called upon to exercise the statutory power to detain.

Hunter and Dr Nazarian accepted that each owed the plaintiff a general duty of care at common law of the nature pleaded. That concession inevitably recognised that if the plaintiff should have been detained because he was mentally ill or mentally disordered and there were reasonable grounds for believing that his detention was necessary for the protection of others from serious harm, the defendants could scarcely argue that they should not have foreseen the risk of injury of the kind which in fact occurred; compare *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 578 [87] . ..."

Hunter Area Health Service v Presland [2005] NSWCA 33 -
Hunter Area Health Service v Presland [2005] NSWCA 33 -
Hunter Area Health Service v Presland [2005] NSWCA 33 -

Hunter Area Health Service v Presland [2005] NSWCA 33 -
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Hunter Area Health Service v Presland [2005] NSWCA 33 -
Hunter Area Health Service v Presland [2005] NSWCA 33 -
Hunter Area Health Service v Presland [2005] NSWCA 33 -
D'Orta-Ekenaike v Victoria Legal Aid [2005] HCA 12 -
Pack-Tainers Pty Ltd v Moore [2005] NSWCA 43 -
Pack-Tainers Pty Ltd v Moore [2005] NSWCA 43 -
Smith v Eurobodalla Shire Council [2005] NSWCA 89 -
Smith v Eurobodalla Shire Council [2004] NSWCA 479 -
Smith v Eurobodalla Shire Council [2005] NSWCA 89 -
Smith v Eurobodalla Shire Council [2004] NSWCA 479 -
Personnel Contracting v Construction, Forestry, Mining and Energy Union [2004] WASCA 312 -
Personnel Contracting v Construction, Forestry, Mining and Energy Union [2004] WASCA 312 -
Personnel Contracting v Construction, Forestry, Mining and Energy Union [2004] WASCA 312 -
Sutherland Shire Council v Henshaw [2004] NSWCA 386 -
Sutherland Shire Council v Henshaw [2004] NSWCA 386 -
Sutherland Shire Council v Henshaw [2004] NSWCA 386 -
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Sutherland Shire Council v Henshaw [2004] NSWCA 386 -
Ruhani v Director of Police [2005] HCA 42 (09 December 2004) (Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ)

196. In matters of ordinary public and private law, judges of this Court normally submit to the considered exposition of the law as stated by the majority [184] . However, in the interpretation of the fundamental law of the Constitution , a different rule prevails [185] .

via

[184] See, for example, *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 626 [238] (with reference to the *Caparo* principle); *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 79 ALJR 755 at 798 [242]; 214 ALR 92 at 152.

Hillpalm Pty Ltd v Heaven's Door Pty Ltd [2004] HCA 59 -
Hillpalm Pty Ltd v Heaven's Door Pty Ltd [2004] HCA 59 -
Parissis v Bourke [2004] NSWCA 373 -
Parissis v Bourke [2004] NSWCA 373 -
Miller v Paua Nominees Pty Ltd [2004] WASCA 220 -
Miller v Paua Nominees Pty Ltd [2004] WASCA 220 -
Miller v Paua Nominees Pty Ltd [2004] WASCA 220 -
Cook v R and M Reurich Holdings Pty. Ltd [2004] NSWCA 268 -
Cook v R and M Reurich Holdings Pty. Ltd [2004] NSWCA 268 -
Sheppard v Swan [2004] WASCA 215 -
Sheppard v Swan [2004] WASCA 215 -
Geroheev Pty Ltd v Wheare [2004] WASCA 206 -
Geroheev Pty Ltd v Wheare [2004] WASCA 206 -
McDonald v Girkaid Pty Ltd [2004] NSWCA 297 -
McDonald v Girkaid Pty Ltd [2004] NSWCA 297 -
McDonald v Girkaid Pty Ltd [2004] NSWCA 297 -
Woolworths (WA) Pty Ltd v Berkeley Challenge Pty Ltd [2004] WASCA 196 -
Woolworths (WA) Pty Ltd v Berkeley Challenge Pty Ltd [2004] WASCA 196 -
Woolworths (WA) Pty Ltd v Berkeley Challenge Pty Ltd [2004] WASCA 196 -

Boroondara City Council v Cattanach [2004] VSCA 139 -
Edwards v Attorney General [2004] NSWCA 272 -
Edwards v Attorney General [2004] NSWCA 272 -
Temora Shire Council v Stein [2004] NSWCA 236 -
Temora Shire Council v Stein [2004] NSWCA 236 -
Temora Shire Council v Stein [2004] NSWCA 236 -
Minister for Immigration and Multicultural and Indigenous Affairs v SGLB [2004] HCA 32 -
Cole v South Tweed Heads Rugby League Football Club Ltd [2004] HCA 29 (15 June 2004) (Gleeson CJ, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

56. In *Graham Barclay Oysters Pty Ltd v Ryan* [12], McHugh J observed:

> "Ordinarily, the common law does not impose a duty of care on a person to protect another from the risk of harm unless that person has created the risk."

His Honour also emphasised [13] that the more specific the terms of the formulation of the duty of care, the greater the prospect of mixing the anterior question of law (the existence of the duty) with questions of fact in deciding whether a breach has occurred. On the other hand, the articulation of a duty of care at too high a level of abstraction provides an inadequate legal mean against which issues of fact may be determined.

Cole v South Tweed Heads Rugby League Football Club Ltd [2004] HCA 29 (15 June 2004) (Gleeson CJ, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

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via

[13] (2002) 211 CLR 540 at 585 [106].

Cole v South Tweed Heads Rugby League Football Club Ltd [2004] HCA 29 -
Amaca Pty Ltd v The State of New South Wales [2004] NSWCA 124 -
Amaca Pty Ltd v The State of New South Wales [2004] NSWCA 124 -
Amaca Pty Ltd v The State of New South Wales [2004] NSWCA 124 -
New South Wales v Godfrey [2004] NSWCA 113 -
New South Wales v Godfrey [2004] NSWCA 113 -
Timbs v Shoalhaven City Council [2004] NSWCA 81 (01 April 2004)
Graham Barclay Oysters Pty Ltd v Ryan (2002) 211 CLR 540
Jones v Dunkel

Timbs v Shoalhaven City Council [2004] NSWCA 81 (01 April 2004)

Graham Barclay Oysters Pty Ltd v Ryan (2002) 211 CLR 540 distinguished;

Woolcock Street Investments Pty Ltd v CDG Pty Ltd [2004] HCA 16 -
Timbs v Shoalhaven City Council [2004] NSWCA 81 -
Timbs v Shoalhaven City Council [2004] NSWCA 81 -

Woolcock Street Investments Pty Ltd v CDG Pty Ltd [2004] HCA 16 -
Woolcock Street Investments Pty Ltd v CDG Pty Ltd [2004] HCA 16 -
Newcastle City Council v Mason [2004] NSWCA 108 -
Newcastle City Council v Mason [2004] NSWCA 108 -
Scott v Pedler [2004] FCAFC 67 -
Scott v Pedler [2004] FCAFC 67 -
Shire of Brookton v Water Corporation [2003] WASCA 240 -
Shire of Brookton v Water Corporation [2003] WASCA 240 -
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Shire of Brookton v Water Corporation [2003] WASCA 240 -
Dovuro Pty Ltd v Wilkins [2003] HCA 51 (11 September 2003) (Gleeson CJ,McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ)

124. In response to the suggestion that the primary judge also erred in entering an interlocutory judgment in favour of the Wilkins in the form of declarations relating to the matters of liability determined by him, I can only repeat what I said on this subject in *Graham Barclay Oysters Pty Ltd v Ryan* [156].

Dovuro Pty Ltd v Wilkins [2003] HCA 51 (11 September 2003) (Gleeson CJ,McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ)

26. In the result, as in the case of *Graham Barclay Oysters Pty Ltd v Ryan* , while I accept the force of the dissenting opinion in the Full Court, I am not satisfied that the majority view involved clear error or injustice, and I would not disturb the concurrent findings of negligence.

Dovuro Pty Ltd v Wilkins [2003] HCA 51 (11 September 2003) (Gleeson CJ,McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ)

2. In *Graham Barclay Oysters Pty Ltd v Ryan* [3] I set out my views on the approach this Court should take where there are concurrent findings of negligence (or absence of negligence) at a trial and in an intermediate court of appeal. It is unnecessary to repeat what was said there. The problem that arises in the present case (coincidentally also involving a decision of the same trial judge and a division of opinion in the intermediate court of appeal) is of a similar nature.

via

[3] (2002) 77 ALJR 183 at 194-196 [48]-[55] ; 194 ALR 337 at 351-353 .

Dovuro Pty Ltd v Wilkins [2003] HCA 51 -
Dovuro Pty Ltd v Wilkins [2003] HCA 51 -
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Dovuro Pty Ltd v Wilkins [2003] HCA 51 -
Dovuro Pty Ltd v Wilkins [2003] HCA 51 -
Valleyfield Pty Ltd v Primac Ltd [2003] QCA 339 (08 August 2003) (Williams and Jerrard JJA and Mackenzie J,)

116. These matters have been described as salient factors in determining if a duty of care exists [50] . More general considerations also identified in recent authoritative judgments include a concern to avoid the imposition of liability in an indeterminate amount for an indeterminate time to an indeterminate class [51] , expressed by the quotation cited in *Perre v Apand* by

Gummow J (at [170]) that "a single overturned lantern may burn Chicago". There is likewise recognition of the necessity to ensure that the imposition of a duty to take care does not unreasonably interfere with the commercial freedom of the person upon whom it is imposed, or, as observed in the joint judgment in *Sullivan v Moody* (at [53]), cut across other legal principles. That consideration, and the necessity to avoid imposing an indeterminate liability, are examples of matters of policy, which matters are increasingly articulated as something sufficient in themselves for denying the existence of a duty of care. [52] Kirby J in *Graham Barclay v Ryan* described policy considerations as having returned to the fundamental test, that a duty of care will be imposed when it is reasonable in all the circumstances to do so.[53]

via

[50] See the comments of Kirby J in *Graham Barclay v Ryan* at [236] ; and the listing of some of those features by Callinan J at [321] in that judgment. See too Gummow J in *Perre v Apand* at [201] .

Valleyfield Pty Ltd v Primac Ltd [2003] QCA 339 -
Valleyfield Pty Ltd v Primac Ltd [2003] QCA 339 -
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Valleyfield Pty Ltd v Primac Ltd [2003] QCA 339 -
Cattanach v Melchior [2003] HCA 38 -
Newcastle City Council v Shortland Management Services [2003] NSWCA 156 (18 June 2003) (Spigelman CJ, Mason P and Sheller JA)

Perre v Apand Pty Ltd (1999) 198 CLR 180; *Sutherland Shire Council v Heyman* (1985) 157 CLR 424; *Caledonian Collieries Limited v Speirs* (1957) 97 CLR 202; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 77 ALJR 183 ; *Sullivan v Moody* (2001) 207 CLR 562 discussed. *Craig v East Coast Bays City Council* [1986] 1 NZLR 99 not followed.

Newcastle City Council v Shortland Management Services [2003] NSWCA 156 (18 June 2003) (Spigelman CJ, Mason P and Sheller JA)

Crimmins v Stevedoring Industry Finance Committee (1999) 200 CLR 1 at [27] ; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 77 ALJR 183 at [78] applied. *Hornsby Shire Council v Porter* (1990) 19 NSWLR 717 referred to.

Newcastle City Council v Shortland Management Services [2003] NSWCA 156 -
Newcastle City Council v Shortland Management Services [2003] NSWCA 156 -
Newcastle City Council v Shortland Management Services [2003] NSWCA 156 -
Newcastle City Council v Shortland Management Services [2003] NSWCA 156 -
Rockdale Beef Pty Ltd v Carey [2003] NSWCA 132 -
Rockdale Beef Pty Ltd v Carey [2003] NSWCA 132 -
Rockdale Beef Pty Ltd v Carey [2003] NSWCA 132 -
Richards v Mills [2003] WASCA 97 -
Richards v Mills [2003] WASCA 97 -
Richards v Mills [2003] WASCA 97 -
Richards v Mills [2003] WASCA 97 -
Roads and Traffic Authority of NSW v Palmer [2003] NSWCA 58 (28 March 2003) (Spigelman CJ, Handley and Giles JJA)

122 The central significance of control in a statutory context such as the one under consideration in the present case, has been emphasised in the most recent relevant judgment of the High Court, *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54 . In that case a number of persons had contracted Hepatitis A from oysters contaminated by human faeces. The contamination occurred as a result of run-off which entered Wallis Lake after heavy rainfall. The defendants were the producers and distributors of the oysters (Barclay), the State Government (on the basis of its responsibility to control the oyster industry and environmental quality generally) and the Great Lakes Council (on the basis of its responsibility for the lake environment).

Roads and Traffic Authority of NSW v Palmer [2003] NSWCA 58 -
Roads and Traffic Authority of NSW v Palmer [2003] NSWCA 58 -
Roads and Traffic Authority of NSW v Palmer [2003] NSWCA 58 -
Coatz v Westcourt Ltd [2003] WASCA 49 -
Buller v Black [2003] NSWCA 45 -
Roads and Traffic Authority of NSW v Jackson [2003] NSWCA 40 (05 March 2003) (Mason P, Stein and Santow JJA)

24 Mr Maconachie also submitted that the evidence never adequately explored the argument that the RTA should have provided a warning sign and lighting and his Honour's finding thereon was not open to be made. With regard to this submission the decision of *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 194 ALR 337 is of some relevance (see para 192 per Gummow & Hayne JJ).

Roads and Traffic Authority of NSW v Jackson [2003] NSWCA 40 -
New South Wales v Lepore [2003] HCA 4 -
State of New South Wales v Napier [2002] NSWCA 402 (13 December 2002)

17. The second element is control. Mason P emphasises the significance of the control exercised by the Appellants over the inmates. I agree with his Honour that this is a critical consideration in the present case. Indeed, as Gummow and Hayne JJ have recently said in *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54 at [150] :

"The factor of control is of fundamental importance in discerning a common law duty of care on the part of a public authority".

State of New South Wales v Napier [2002] NSWCA 402 -
State of New South Wales v Napier [2002] NSWCA 402 -
Aktiebolaget Hassle v Alphapharm Pty Ltd [2002] HCA 59 -