SUPREME COURT OF QUEENSLAND

CITATION:	*SLB Investments Queensland Pty Ltd (in liq) v Queensland Motorways Management Pty Ltd* [2026] QSC 133
PARTIES:	**SLB INVESTMENTS QUEENSLAND PTY LTD (in liquidation) (ACN 130 096 801)** (plaintiff) **v** **QUEENSLAND MOTORWAYS MANAGEMENT PTY LTD (ACN 010 630 921)** (first defendant) and **STATE OF QUEENSLAND** (second defendant) and **BRISBANE CITY COUNCIL** (third defendant)
FILE NO/S:	BS No 8932 of 2020
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	22 June 2026
DELIVERED AT:	Brisbane
HEARING DATE:	18 August 2025
JUDGE:	Williams J
ORDER:	**The Court directs that:** **1. The parties liaise in relation to draft orders, in light of these reasons.** **2. If the parties agree draft orders, the draft agreed orders are to be emailed to the Associate to Williams J by 3pm on 26 June 2026.** **3. If the parties are unable to agree draft orders, each party is to email their proposed draft orders and brief submissions of no more than four pages outlining the reasons for the differences to the Associate to Williams J by 4pm on 9 July 2026.**

4. **The parties are to confer and agree directions for the provision of submissions and any supporting affidavits in respect of costs and provide the draft directions to the Associate to Williams J by 3pm on 26 June 2026.**

5. **The matter be listed for review at 9am on 30 July 2026 before Williams J.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – GENERALLY – where the former plaintiff to a representative proceeding was replaced by a different group member as the representative plaintiff – where the new representative plaintiff sought to amend the amended claim and amended statement of claim to update the material facts as relevant to the new representative plaintiff – where the plaintiff also sought to make amendments to the claim and statement of claim in response to pleading complaints raised by the defendants – whether the amendments should be allowed

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – JOINDER OF CAUSES OF ACTION AND OF PARTIES – PARTIES – GENERALLY – where the plaintiff to a representative proceeding sought to join two ministers as the fourth and fifth defendants to the existing proceedings, and to new causes of action – where the limitation period has expired – whether the ministers can be joined as defendants pursuant to r 69(a)(iii) or (iv) of the *Uniform Civil Procedure Rules 1999* (Qld)

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – JOINDER OF CAUSES OF ACTION AND OF PARTIES – CAUSES OF ACTION – where the plaintiff to a representative proceeding sought to amend the amended claim and the amended statement of claim – where the amendments introduced new causes of action against the defendants – where the plaintiff contended that they arose substantially from the same facts as the previously pleaded claims – whether leave should be granted pursuant to r 376(4) of the *Uniform Civil Procedure Rules 1999* (Qld)

TORTS – NEGLIGENCE – PURE ECONOMIC LOSS: NEGLIGENT ACTS, OMISSIONS OR MISREPRESENTATIONS – GENERALLY – where the plaintiff to a representative proceeding sought to amend the amended claim and amended statement of claim – where the amendment was to introduce a negligence claim made against the second and third defendants – where the second and third defendants oppose the amendment on the ground that the claim is unmaintainable – where the plaintiff contends that the claim falls within an established category giving rise to a duty of care, or otherwise relies on the salient feature of vulnerability to establish a duty of care – whether the claim falls within an established category giving rise to a duty of care – whether a duty of care arises in respect of the plaintiff's alleged vulnerability

Acts Interpretation Act 1954 (Qld), s 33
Civil Proceedings Act 2011 (Qld), s 103Z
Crown Proceedings Act 1980 (Qld), s 8
Transport Infrastructure Act 1994 (Qld), s 37, s 42, s 73, s 84A, s 84D, s 93, s 94, s 105, s 105G, s 105GA, s 105H, s 105JA, s 105ZB, s 105ZC, Sch 5
Uniform Civil Procedure Rules 1999 (Qld), r 5, r 69, 149, r 150, r 375, r 376

Australian Golf Management Corporation Pty Ltd v Logan City Council [2021] QSC 291; [2022] QCA 86, cited
Alcoa of Australia Ltd v Apache Energy Ltd [2012] WASC 209, cited
Aon Risk Services Australia v Australian National University (2009) 239 CLR 175, considered
AS (by her litigation guardian Arthur) v Minister for Immigration and Border Protection [2016] VSCA 206, cited
Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd (2014) 253 CLR 560, cited
Brisbane Airport Corporation Pty Ltd v Arup Pty Ltd [2017] QSC 232, considered
Byrne v Australian Airlines Ltd (1995) 185 CLR 410, cited
Caledonian Collieries Ltd v Speirs (1957) 97 CLR 202, considered
Combined Property Holdings Pty Ltd v Galea [2020] QSC 338, cited
Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd (1994) 182 CLR 51, cited
Cox Bros (Australia) Ltd v Commissioner of Waterworks (1933) 50 CLR 108, considered
Devine Constructions Pty Ltd v Heinrich Constructions Pty Ltd [2024] QSC 285, considered
East Suffolk Rivers Catchment Board v Kent (1941) AC 74, considered
Firstmac Ltd v Hunt and Hunt [2018] QSC 258, considered
Gladstone Ports Corporation Ltd v Murphy Operator Pty Ltd (2024) 20 QR 1, considered
Great Central Railway Co. v Hewlett (1916) 2 AC 511, considered
Hartnett v Hynes [2009] QSC 225, cited
HNOE Ltd v Angus & Julia Stone Pty Ltd [2024] NSWCA 271, cited
Interline Hydrocarbon Inc v Brenzil Pty Ltd [2006] 2 Qd R 454, considered
Junjie Ou v Xuefei Wang [2025] QSC 52, considered
Lee v Abedian [2017] 1 Qd R 549, cited

Mallonland Pty Ltd v Avanta Seeds Pty Ltd (2024) 98 ALJR 956, cited
Menegazzo v PricewaterhouseCoopers (a firm) [2016] QSC 94, cited
Minister for the Environment (Cth) v Sharma (2022) 291 FCR 311, considered
Monto Coal 2 Pty Ltd v Sanrus Pty Ltd [2014] QCA 267
Northern SEQ Distributor-Retailer Authority (t/a Unitywater) v Monadelphous Engineering Pty Ltd [2025] QSC 253, considered
Pianta v BHP Australia Coal Ltd [1996] 1 Qd R 65, cited
Redland City Council v Kosik (2022) 11 QR 524; (2024) 281 CLR 202, considered
Raging Thunder Pty Ltd v Bank of Western Australia Ltd [2012] QSC 329, cited
Rolleston Coal Holdings Pty Ltd v Deputy Premier, Treasurer and Minister for Aboriginal and Torres Strait Islander Partnerships [2021] QSC 328
Roxborough v Rothmans of Pall Mall Australia Ltd (2001) 208 CLR 516, cited
Shultz v Schmauser [2001] 1 Qd R 540, cited
Southern Cross Mine Management Pty Ltd v Ensham Resources Pty Ltd [2004] QSC 457, cited
Sovar v Henry Lane Pty Ltd (1967) 116 CLR 397, cited
Thomas v State of Queensland [2001] QCA 336, cited
Wolfe v Queensland [2008] QCA 113, considered
Wood v Robertson O'Gorman Solicitors Pty Ltd [2022] QCA 201, cited
Woolcock Street Investments Pty Ltd v CDG Pty Ltd (2004) 216 CLR 515, cited
X (Minors) v Bedfordshire C.C. [1995] 2 AC 633, cited
XBT v State of Queensland [2025] QSC 9, cited
Zonebar Pty Ltd v Global Management Corporations Pty Ltd [2009] QCA 121, considered

COUNSEL: J Stoljar SC and B Ng for the plaintiff
E Goodwin KC for the first defendant
S Couper KC and L Clark and S Amos for the second defendant and the proposed fourth and fifth defendants
J Horton KC and K T Grimshaw for the third defendant

SOLICITORS: Piper Alderman for the plaintiff
King & Wood Mallesons for the first defendant
Crown Solicitor for second defendant and the proposed fourth and fifth defendants
Barry Nilsson for the third defendant

[1] This is a representative proceeding brought by the plaintiff in respect of declarations made by Queensland Government Ministers under the *Transport Infrastructure Act*

1994 (Qld) (**TI Act**), and notices given by the Brisbane City Council, in respect of charges payable by users of certain toll roads in Queensland.

[2] The plaintiff contends that the second defendant, the State of Queensland (the **State**), and the third defendant, Brisbane City Council (the **Council**), breached statutory duties and are liable for loss and damage to the plaintiff and group members arising out of the payment of charges which were not set in accordance with the TI Act.

[3] The plaintiff also claims against the first defendant, Queensland Motorways Management Pty Ltd (**Queensland Motorways**), repayment of the charges paid in the mistaken belief that the charges were in the amount allowed to be charged by, and payable to, Queensland Motorways.[1]

[4] The plaintiff applies for orders including that:

(a) Pursuant to rule 69(1)(b) and/or rule 375(1) and/or 376 of the *Uniform Civil Procedure Rules 1999* (Qld) (**UCPR**):

(i) Craig Andrew Wallace be joined as the fourth defendant; and

(ii) Mark Craig Bailey be joined as the fifth defendant.

(b) Pursuant to rule 375(1) and/or rule 376 of the UCPR the plaintiff be permitted to amend the Amended Claim and Amended Statement of Claim in substantially the form proposed, being the proposed Further Amended Claim and proposed Further Amended Statement of Claim.[2]

[5] Each of Mr Wallace and Mr Bailey was the relevant Minister at the relevant times that the declarations were made under the TI Act.

[6] The plaintiff contends that the amendments should be allowed on the basis that:

(a) To the extent that the amendments raise new causes of action they arise out of the same or substantially the same facts.

(b) To the extent that the amendments join new parties:

(i) They are necessitated because the State contends that the wrong parties have been joined.

(ii) The claims against the new parties arise out of the same or substantially the same facts in relation to the claims currently made against the State.

(c) The proceeding is at the stage where no trial date has been set and the proposed amendments will not affect the expert evidence, which has been the subject of a lengthy conclave process.

[7] The defendants take different positions in response to the application.

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1 The current pleading is the Amended Claim and Amended Statement of Claim dated 21 April 2021. It included a claim against Queensland Motorways for alleged breach of statutory duty under the TI Act. That claim is now not pursued. The only remaining claims against Queensland Motorways are in restitution.

2 The hearing of the application proceeded on the basis of a revised version of the Further Amended Claim and Further Amended Statement of Claim which were marked **MFI B and MFI C** respectively.

(a) Queensland Motorways neither consents to, nor opposes, the application and reserves its right to raise matters in defence in respect of any permitted amendments.

(b) The Council opposes the application on a narrow basis: that it is not appropriate to give leave to include the new cause of action in negligence against the Council as the proposed pleading is deficient as it does not disclose a reasonable cause of action and does not comply with the UCPR pleading rules.

(c) The State, on its own behalf and on behalf of the proposed fourth and fifth defendants (together the **State Related Parties**), contends that leave should not be granted on numerous grounds, including that the new causes of action do not arise out of the same or substantially the same facts and it is not appropriate to grant leave.

[8] It is appropriate to consider what the proceeding is about and the nature of the proposed amendments.

What is this all about?

[9] From 1 July 2009 "free-flow tolling" was implemented on specified roads and bridges by way of payment of tolls by use of electronic tags or transponders affixed to vehicles, rather than by payment at toll booths using physical currency.

[10] Under the TI Act, the "free-flow tolling" applied to toll roads in Queensland, being both State Toll Roads and Local Government Toll Roads. The tolls and charges to be levied on motorists using the State Toll Roads and Local Government Toll Roads are governed by s 93 and s 105ZB of the TI Act respectively.

[11] In respect of State Toll Roads:

(a) Section 93(1) of the TI Act provides that a toll may be payable if a declaration is made by the relevant Minister[3] at the time and notice to that effect has been published in the Queensland Government Gazette.

(b) Pursuant to s 93(2) of the TI Act, the Minister's declaration that a toll may be payable for travel on a State Toll Road was required to include notice of the matters mentioned in Schedule 5 of the TI Act, including the User Administration Charge (**UAC**) and the Administration Charge (**AC**).

(c) The plaintiff contends that in making each declaration and publishing it in the Gazette, the relevant Minister at the time set the toll, UAC and the AC for the State Toll Roads.

[12] In respect of Local Government Toll Roads:

(a) Section 105GA of the TI Act provides that where the relevant Minister receives a request from a local government under s 105G of the TI Act, the relevant Minister has the power to declare that a specified road is a "Local Government Tollway", and a notice is to be published in the Gazette.

3 See s 93 of the TI Act and s 33(2) of the *Acts Interpretation Act 1954* (Qld).

(b) The plaintiff contends that in declaring each of the Local Government Toll Roads as a "Local Government Tollway" under the TI Act, each declaration by the Minister included conditions to the effect that:

(i) the quantum of the AC must be reviewed by an Independent Auditor[4] for the purpose of certifying that the AC reflects the reasonable costs of issuing a notice for, and collecting, an unpaid toll for the Local Government Toll Road, no less than two years after the Tollway becomes operational and no less than once every 5 years after the initial review.

(ii) the quantum of the UAC must be reviewed by an Independent Auditor, for the purposes certifying that the UAC reflects of the reasonable costs of administering and collecting payment of a toll, other than by use of the "E-Toll system",[5] no less than two years after the Tollway becomes operational and no less than once every five years after the initial reviews.

(iii) nothing in the declaration permitted a toll, UAC and AC to be levied on a toll road user in excess of the parameters established in the TI Act and the declaration.[6]

(c) Pursuant to s 105ZB(1) and Schedule 5 of the TI Act, the Council was required to give notice of the matters mentioned in Schedule 5 of the TI Act for a Local Government Tollway before a toll becomes payable for use of the Local Government Tollway, including the UAC and AC (**s 105ZB Notice**).

(d) Pursuant to s 105ZB(2) of the TI Act, a s 105ZB Notice must be given by a notice published in a newspaper circulating generally in the Brisbane City Council area and adjoining local government areas.

(e) The plaintiff contends that in publishing a s 105ZB Notice in a newspaper circulating generally in the Brisbane City Council area and in adjoining local government areas, the Brisbane City Council set the amount payable by the UAC and the AC for Local Government Toll Roads.

[13] In respect of the UAC:

(a) The UAC is the first charge that may be levied on a toll road user under s 93(6) and s 105ZB(6) of the TI Act.[7] The UAC applies if a driver is liable to pay the toll other than in cash or by use of a touch tag or the E-toll system.[8]

(b) For the period from 1 July 2009 to 15 March 2018 the UAC was required to not be more than the reasonable cost of administering and collecting payment of the toll.[9]

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4 As defined in the relevant declarations.
5 As defined in the TI Act.
6 And despite anything to the contrary in any "Interoperability Agreement".
7 Which are now ss 93(8) and 105ZB(8), as amended by the *Corrective Services (Parole Board) and Other Legislation Amendment Act 2025*. References to legislative provisions in these reasons are made as at the time that the submissions were made as that is the applicable law for the purposes of the pleaded causes of action.
8 Sections 94(1)(b) and 105ZC(4) of the TI Act.
9 Sections 93(6) and 105ZB(6) of the TI Act.

(c) For the period from 16 March 2018 onwards the UAC could include the Image Processing Fee and otherwise must not be more than the reasonable cost under of administering and collecting payment of the toll.[10]

[14] In respect of the AC:

(a) The AC is the second charge that may be levied on a toll road user under s 93(5) and s 105ZB(5) of the TI Act.

(b) If a toll road user fails to pay the toll and the UAC, the toll road user is immediately liable to additionally pay the AC.

(c) For the period 1 July 2009 to 15 March 2018 the AC was required to be not more than the reasonable cost of issuing a notice for and collecting the unpaid toll and the AC.

(d) For the period from 16 March 2018 onwards the AC was required to be not more than the reasonable cost of issuing a notice for and collecting the unpaid toll, the Image Processing Fee and the AC.

[15] The current Amended Claim and Amended Statement of Claim include claims by the plaintiff:

(a) for breach of statutory duty by the State and the Council;[11] and

(b) in restitution against Queensland Motorways.

[16] The plaintiff contends that by reason of s 93(6) and s 105ZB(6) of the TI Act, the UAC was required to be not more than the reasonable or market costs of the objectively necessary tasks, steps or activities of:

(a) for the period 1 July 2009 to 15 March 2018, administering and collecting payment of the toll (which did not include an Image Processing Fee for capturing, processing and using an image to identify a vehicle at a Toll Plaza for the toll).

(b) for the period from 16 March 2018 onwards:

(i) if the UAC includes the Image Processing Fee - capturing, processing and using an image to identify a vehicle at a Toll Plaza for the toll; or

(ii) if the UAC does not include the Image Processing Fee - administering and collecting payment of the toll.

[17] The plaintiff contends that the objectively necessary tasks, steps and activities and the reasonable or market costs of these objectively necessary tasks, steps and activities in respect of the UAC are identified in the expert evidence and are set out in Schedule B to the proposed Further Amended Statement of Claim.

[18] Ultimately, the plaintiff contends that the expert evidence establishes that the relevant Minister and the Council had each set, and Queensland Motorways was collecting, UACs in excess of the reasonable cost stipulated in s 93(6) and s105ZB(6) of the TI Act.

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10 Sections 93(6) and 105ZB(6) of the TI Act.

11 It also includes a claim against Queensland Motorways which is not being pursued.

[19] The plaintiff contends that by reason of s 93(5) and s 105ZB(5) of the TI Act, the AC is required to be not more than the reasonable or market costs of the objectively necessary tasks, steps or activities:

(a) for the period 1 July 2009 to 15 March 2018 issuing a notice for and collecting the unpaid toll and the AC (which did not include a UAC for administering and collecting payment of the toll).

(b) for the period from 16 March 2018 onwards issuing a notice about an unpaid toll and collecting the unpaid toll, the Image Processing Fee and the AC (which did not include a UAC for administering and collecting payment of the toll).

[20] Alternatively the plaintiff contends that s 93(5) and s 105ZB(5) of the TI Act requires the AC to be not more than the reasonable or market costs of the objectively necessary tasks, steps or activities:

(a) for the period 1 July 2009 to 15 March 2018 issuing a notice for and collecting the unpaid toll and AC for the toll (which included a UAC).

(b) for the period from 16 March 2018 onwards issuing a notice about an unpaid toll and collecting the unpaid toll, the Image Processing Fee and the AC (which included a UAC).

[21] The plaintiff contends that the objectively necessary tasks, steps and activities and the reasonable or market costs of the objectively necessary tasks, steps and activities in respect of the AC are identified in the expert evidence and are set out in Schedule B to the proposed Further Amended Statement of Claim.

[22] Ultimately, the plaintiff contends that the expert evidence establishes that the relevant Minister and the Council had each set, and Queensland Motorways was collecting, ACs in excess of the reasonable cost stipulated in s 93(5) and s 105ZB(5) of the TI Act.

[23] The proposed Further Amended Claim and the proposed Further Amended Statement of Claim include amendments in four main categories as identified by the plaintiff.

[24] ***Category 1*** is the amendments in relation to the State Related Parties, including:

(a) Pursuant to r 69 of the UCPR, the joinder of the relevant Ministers, Mr Wallace and Mr Bailey as the fourth and fifth defendants.

(b) Pursuant to r 375 and r 376(4) of the UCPR, new causes of action against the Ministers for breach of statutory duty and/or breach of a duty to exercise reasonable care and a claim for damages and aggregated damages.

(c) Pursuant to r 375 and r 376(4) of the UCPR, a new cause of action against the State on the basis that the State is liable for the acts of the Ministers and any damages and aggregated damages in respect of that liability.

[25] ***Category 2*** is a group of new causes of action pursuant to r 375 and r 376(4) of the UCPR:

(a) Against Queensland Motorways:

(i) ***New IPF sub-Group Member Claim***: A claim on behalf of a sub-group of group members alleging that prior to 16 March 2018 they paid an Image Processing Fee (alternatively as a Video Matching Fee) under a mistaken belief that the fee could be properly charged, in circumstances where ss 93 and 105ZB did not provide for an Image Processing Fee to be charged.

(ii) ***New June Travel Incorrect Charge Restitution Claim***: A claim in relation to travel in June where the toll notice or notice of demand was issued after 1 July[12] and the amount paid to Queensland Motorways was the UAC or the AC after 1 July under the mistaken belief that the amount was the UAC or the AC for travel in June. Alternatively, when ignorant that the amount in the toll notice or the notice of demand was not the UAC or the AC for travel in June.

(iii) ***New Legacy Way Restitution Claim***: A claim that Queensland Motorways should repay amounts paid to Queensland Motorways in respect of travel on Legacy Way being tolls, UACs, Image Processing Fees and ACs which were paid:

(A) on the mistaken belief that the Council had given a s105ZB Notice in relation to Legacy Way; or

(B) when ignorant that Council had not given a s 105ZB Notice in relation to Legacy Way.

(b) Against the Council: A new negligence claim that the Council breached a duty of reasonable care and seeking damages and aggregated damages.

[26] ***Category 3*** is the amendments reflecting the substitution of SLB Investments Queensland Pty Ltd as the new representative plaintiff by orders dated 3 August 2023.

[27] ***Category 4*** is a group of miscellaneous amendments, including further particulars of the existing claims against the defendants and also addressing various complaints raised by the defendants in respect of an earlier draft of the proposed Further Amended Statement of Claim. These amendments include:

(a) Defining group members by reference to when Queensland Motorways imposed and collected UACs and ACs starting 1 July 2009.

(b) Particularising the proper construction of ss 93 and 105ZB of the TI Act, including the meaning of "reasonable costs" relevant to the UACs and ACs.

(c) Particularising the loss and damage suffered by the plaintiff in the 2022 financial year.

(d) Updating the corporate chart relevant to Queensland Motorways, the concession agreements and the operation of agreements, and various rights and obligations under those agreements.

(e) Correcting definitions and minor grammatical and typographical errors.

[28] It is convenient to deal with proposed amendments in the order of ***Category 3***, ***Category 4***, and ***Category 2***, before dealing with the more substantive ***Category 1***.

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12 When a new UAC or AC, if adjusted would apply.

[29] Accordingly, the issues to be determined are:

(a) Should leave be granted in respect of the ***Category 3*** amendments?

(b) Should leave be granted in respect of the ***Category 4*** amendments?

(c) Should leave be granted in respect of the ***Category 2(a)*** amendments in relation to the new causes of action in restitution against Queensland Motorways?

(d) Should leave be granted in respect of the ***Category 2(b)*** amendments in relation to the new cause of action in negligence against the Council?

(e) Should leave be granted in respect of the ***Category 1(a)*** amendments to join the Ministers and add new causes of action for breach of statutory duty against the Ministers and vicarious liability against the State?

(f) Should leave be granted in respect of the ***Category 1(b)*** amendments to join the Ministers and add the new causes of action in negligence against the Ministers and vicarious liability against the State?

Should leave be granted in respect of the Category 3 amendments?

[30] On 3 August 2023 orders were made substituting SLB Investments Queensland Pty Ltd as the representative plaintiff in the place of Adeva Home Solutions Pty Ltd. Bradley J (as his Honour then was) also ordered that SLB Investments Queensland Pty Ltd be excused from filing and serving a further amended claim and statement of claim until further order.

[31] It can be inferred that this was done to facilitate the expert conferral process and disclosure occurring before any further amendments to the pleading.[13]

[32] By the substitution of SLB Investments Queensland Pty Ltd as the representative plaintiff it was inevitable that the claim and statement of claim would need to be revised to include the material facts relevant to SLB Investments Queensland Pty Ltd's use of the Queensland Toll Roads and the loss and damage allegedly caused to it. In particular, this includes the material facts relevant to the amounts paid by SLB Investments Queensland Pty Ltd to Queensland Motorways as UACs and ACs.

[33] Queensland Motorways neither consents to, nor opposes, the amendments subsequential to the substitution order.

[34] The Council opposes leave being granted to amend in the form of the proposed Further Amended Claim and the proposed Further Amended Statement of Claim in relation to the proposed amendments in ***Category 2(b)***. However, the submissions on behalf of the Council do not address the proposed amendments in ***Category 3***.

[35] The State submits that the new representative plaintiff seeks to introduce new alleged facts outside the limitation period, including the pleading of toll notices issued on different toll roads and the damages claimed on these new alleged facts. It appears that the State objects to the ***Category 3*** proposed amendments. In the circumstances, it is untenable for the State to oppose the amendments to give effect to the substitution

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[13] See also the Eighth Affidavit of G J Whyte, Sworn 31 March 2025 (CFI #178) ('**Eighth Whyte Affidavit**') at [30] to [35].

of SLB Investments Queensland Pty Ltd as the representative plaintiff on a general basis.

[36] Further, the State's submission in respect of the expiration of the limitation period is unfounded. The substituted representative plaintiff was a group member and relevant limitation periods would have been suspended under s 103Z of the *Civil Proceedings Act 2011* (Qld). To the extent that the proposed amendments articulate the material facts for the substituted representative plaintiff within the existing Amended Claim and Amended Statement of Claim there is no proper basis to object to those amendments.

[37] To the extent that the proposed amendments in ***Category 3*** are in relation to the existing claims for breach of statutory duty and restitution they are consistent with the substitution order and leave to amend is granted.

[38] To the extent that the proposed amendments in ***Category 3*** are in relation to the new causes of action in the proposed amendments in ***Category 1*** and ***Category 2***, whether leave is granted should follow the relevant ruling in respect of the proposed amendments in ***Category 1*** and ***Category 2***.

Should leave be granted in respect of the Category 4 amendments?

[39] The amendments in ***Category 4*** seek to address complaints previously notified to the plaintiff.[14]

[40] The plaintiff submits that these amendments do not introduce any new causes of action but are simply further particulars of the existing causes of action and make the plaintiff's claims clear. Accordingly, it is submitted that it is appropriate that leave be granted to make the amendments in ***Category 4***.

[41] Queensland Motorways neither consents to, nor opposes, the amendments generally.

[42] The Council opposes leave being granted to amend in the form of the proposed Further Amended Claim and the proposed Further Amended Statement of Claim in relation to the proposed amendments in ***Category 2(b)***. However, the submissions on behalf of the Council do not address the proposed amendments in ***Category 4***.

[43] It is difficult to identify the State's position in respect of the proposed amendments in ***Category 4*** as the submissions on behalf of the State Related Parties do not undertake the analysis of the various identified categories but deal with the complaints in a more "rolled up" way.

[44] An issue emerged in respect of the proposed pleading of the particulars of loss and damage. The proposed amendments only particularise the loss and damage in respect of 2017 and 2022. However, those are the two years that were identified as "sample" years for disclosure and the expert reports. The proposed pleading is criticised on the basis that the previous general "holding" particulars have been replaced by the particulars in respect of the two years. Consequently, the State submits that there is

[14] Letters dated 10 February 2025, 6 March 2025 and 17 March 2025.

no basis to say that the charges were wrong for the years other than 2017 and 2022 and the pleading is therefore defective.[15]

[45] The plaintiff's position is that it is unable to give particulars of loss and damage for the other years as it has not been provided with any of the financial information for the period 2014 to 30 June 2017. Counsel for the plaintiff acknowledged that the currently pleaded particulars could be reinstated to avoid any doubt that the plaintiff was maintaining the claim for loss and damage in respect of the balance of the years, along with the proposed amended particulars of the 2017 and 2022 years.[16]

[46] Given the regime that has previously been put in place in relation to 2017 and 2022 being "sample" years for disclosure and the expert analysis, the plaintiff should not be criticised for only being able to fully particularise those years. To avoid any future debate on this issue, the plaintiff should be given the opportunity to revise the proposed amendments to effectively reinstate the general particulars of loss and damage for all of the relevant period, in addition to the more detailed particulars in respect of the 2017 and 2022 years.

[47] Subject to the plaintiff reinstating the general particulars of loss and damage for all of the relevant period:

(a) To the extent that the proposed amendments in ***Category 4*** are in relation to the existing claims for breach of statutory duty and restitution, given the nature of the proposed amendments in ***Category 4***, leave to amend is granted.

(b) To the extent that the proposed amendments in ***Category 4*** are in relation to the proposed amendments in ***Category 1*** and ***Category 2***, whether leave is granted should follow the relevant ruling in respect of the proposed amendments in ***Category 1*** and ***Category 2***.

Should leave be granted in respect of the Category 2(a) amendments in relation to the new causes of action in restitution against Queensland Motorways?

[48] ***Category 2(a)*** are the new claims against Queensland Motorways in restitution.

[49] In respect of the New IPF sub-Group Member Claim:

(a) The plaintiff submits that this claim in restitution arises substantially from the same facts as the claims in the Amended Claim and Amended Statement of Claim and, in particular, whether sections 93 and 105ZB of the TI Act prior to 16 March 2018 provided for an Image Processing Fee to be levied on users who did not pay their toll via the E-toll system.

(b) Further, if there is no entitlement for an Image Processing Fee to be levied and collected prior to 16 March 2018, the users who did not pay their toll via the E-toll system who paid the Image Processing Fee to Queensland Motorways under a mistake or ignorance have a claim for money had and received.

[50] Queensland Motorways neither consents to, nor opposes, the New IPF sub-Group Member Claim.

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15 T1-61 L38 to T1-63 L19.

16 T1-73 L4 – 18.

[51] In respect of the New June Travel Incorrect Charge Restitution Claim:

(a) The plaintiff submits that this is a new aspect of the mistaken payment claim against Queensland Motorways.

(b) In effect the claim is in relation to UACs in toll notices and ACs in notices of demand calculated at July rates for travel that occurred in June, where there was a change in rates from 1 July.

(c) The plaintiff claims that UACs and the ACs were paid under the mistaken belief that the UACs or ACs were for travel in June or were ignorant that the amounts were not the UACs or the ACs for travel in June.

[52] Queensland Motorways neither consents to, nor opposes, the New June Travel Incorrect Charge Restitution Claim.

[53] However, Queensland Motorways does submit that the proposed pleading in respect of the New June Travel Incorrect Charge Restitution Claim does lack clarity and could be improved. There is merit in this submission.

[54] In respect of the Legacy Way Restitution Claim:

(a) The plaintiff submits that this is a new claim that from 26 June 2015, the day after Legacy Way opened for public use, a s 105ZB Notice was not given in relation to Legacy Way. Accordingly, no toll, UAC or AC was set by Council and therefore no toll, UAC or AC was payable for travel on Legacy Way.

(b) Users who did not pay their toll via the E-toll system and who received and paid a toll, UAC or an AC to Queensland Motorways for travel on the Legacy way from 26 June 2015 did so under the mistaken belief that the toll, UAC or AC had been set by the Council or were ignorant of the fact the toll, UAC or AC had not been set by the Council in accordance with the TI Act.

(c) Further, the new claim arises out of substantially the same facts as the claims in the Amended Claim and Amended Statement of Claim.

[55] Queensland Motorways neither consents to, nor opposes, the Legacy Way Restitution Claim.

[56] The Court has power to grant leave to amend pursuant to r 375 and relevantly r 376(4) of the UCPR.

[57] Rule 375 provides:

> "(1) At any stage of a proceeding, the court may allow or direct a party to amend a claim …a pleading … in the way and on the conditions the court considers appropriate.
>
> (2) The court may give leave to make an amendment even if the effect of the amendment would be to include a cause of action arising after the proceeding was started.
>
> …
>
> (4) This rule is subject to rule 376."

[58] Rule 376 deals with amendment after the limitation period and relevantly provides:

> "(1) This rule applies in relation to an application, in a proceeding, for leave to make an amendment mentioned in this rule if a relevant period of limitation, current at the date the proceeding was started, has ended.
>
> …
>
> (4) The court may give leave to make an amendment to include a new cause of action only if –
>
> (a) the court considers it appropriate; and
>
> (b) the new cause of action arises out of the same facts or substantially the same facts as a cause of action for which relief has already been claimed in the proceeding by the party applying for leave to make the amendment."

[59] In submissions the plaintiff and Queensland Motorways did not address the relevant limitation periods. Logically, some of the new claims may be outside the relevant limitation period but some may still be within the relevant limitation periods.

[60] In any event, if the requirements of r 376(4) are met then leave should be granted in respect of the proposed amendments as the threshold is more onerous in respect of amendments after the limitation period has ended.

[61] The relevant circumstances include:

(a) Queensland Motorways does not raise any matters to positively oppose leave being granted, including any matters that would justify striking out the proposed pleading for non-compliance with the UCPR pleading rules.

(b) Queensland Motorways does not raise any prejudice it would suffer if the amendments were allowed.

(c) The New IPF sub-Group Member Claim, New June Travel Incorrect Charge Restitution Claim and the Legacy Way Restitution Claim arise out of substantially the same facts as the claims currently in the Amended Claim and Amended Statement of Claim, particularly the claims in restitution against Queensland Motorways and the background facts to the breach of statutory duty claims.

(d) The question of whether it is appropriate to grant leave is governed by the broad discretion in r 375 of the UCPR, which is informed by the proposed amendments, the circumstances of the case and the objective in r 5 of the UCPR.[17]

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17 *Monto Coal 2 Pty Ltd v Sanrus Pty Ltd* [2014] QCA 267 at [82] to [88]; *Wood v Robertson O'Gorman Solicitors Pty Ltd* [2022] QCA 201 at [52]; *Combined Property Holdings Pty Ltd v Galea* [2020] QSC 338 at [86]; *Rolleston Coal Holdings Pty Ltd v Deputy Premier, Treasurer and Minister for Aboriginal and Torres Strait Islander Partnerships* [2021] QSC 328 at [40].

(e) The existence of an explanation for the delay in applying for the amendment is relevant to the court's discretion.[18] The Eighth Affidavit of Mr Whyte addresses the delay in respect of the proposed amendments. The reasons for the delay include:

(i) The case management order made on 3 August 2023 that the plaintiff be excused from filing and serving a further amended claim and further amended statement of claim until further order. This was understood to facilitate the expert conferral process and any amendment arising out of that to be done at the conclusion of that process.

(ii) The effect of the order was to defer consideration of amendments until a time when the next iteration of the pleadings would include all the amendments to that point in time to avoid multiple amendment applications consistent with r 5 of the UCPR.

(iii) The change in the counsel team representing the plaintiff.

(f) The proceeding is being managed on the Class Actions List. The plaintiff has filed its lay and expert evidence, the defendants have been ordered to file their expert evidence and their lay evidence, an opt out process has not yet occurred, and no trial date has been set.

[62] The plaintiff should be given the opportunity to redraft the New June Travel Incorrect Charge Restitution Claim to make the claim clearer.

[63] Otherwise, it is appropriate to grant leave to amend in respect of the New IPF sub-Group Member Claim, New June Travel Incorrect Charge Restitution Claim and the Legacy Way Restitution Claim substantially in the form set out in the proposed Further Amended Claim and the Further Amended Statement of Claim.

Should leave be granted in respect of the Category 2(b) amendments in relation to the new cause of action in negligence against the Council?

[64] ***Category 2(b)*** is the new negligence claim against the Council.

[65] The plaintiff submits that the new negligence claim against the Council:

(a) Arises from the declaration of the Local Government Toll Roads as Local Government Tollways under the TI Act and giving notices setting the UAC and the AC for Local Government Toll Roads.

(b) Mirrors to a large extent, if not wholly, the statutory duty claim against the Council in that the same omissions or actions are said to comprise the breaches of duty in each case.

(c) Is not expected to require further disclosure or evidence in addition to what is required for the current statutory duty claim.[19]

[66] The Council opposes leave being granted on the basis that the pleading in the proposed Further Amended Statement of Claim is deficient.

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18 *Aon Risk Services Australia v Australian National University* (2009) 239 CLR 175; *Hartnett v Hynes* [2009] QSC 225 at [27]; *Monto Coal 2 Pty Ltd v Sanrus Pty Ltd* [2014] QCA 267 at [73].

19 Eighth Whyte Affidavit at [55].

[67] Rules 375 and 376 of the UCPR are relevant and the relevant principles are discussed above in relation to ***Category 2(a)*** and those principles apply also in respect of the considerations in relation to ***Category 2(b)***.

[68] The Council accepts the following propositions:

(a) The test to ascertain whether a new cause of action arises out of the same facts or substantially the same facts is whether the factual basis for the new cause of action is substantially different from that previously pleaded.[20]

(b) It is not clear whether any relevant limitation period has expired in respect of the new negligence claim against the Council. The limitation period in respect of the loss pleaded for the financial year ending 30 June 2022 has not yet expired. It is not clear whether the new negligence claim includes damages incurred by the plaintiff at an earlier point in time.

(c) The Council accepts that the new negligence claim against the Council arises out of substantially the same facts as the statutory claim already pleaded. As a consequence, any limitation period that may have expired since the commencement of the proceeding would be saved as a consequence of the operation of r 376(4)(b) of the UCPR.

(d) The issue to be determined by the Court is whether for the purposes of r 376(4)(a) it is appropriate to grant leave to include the new negligence claim against the Council. In determining whether it is appropriate requires consideration of the factors relevant to the exercise of the discretion under r 375 of the UCPR.

[69] The Council contends that in respect of the new negligence claim against the Council leave to amend should be refused on the basis that it is not appropriate to do so pursuant to r 376(4) of the UCPR.

[70] Firstly, the Council submits that it is not appropriate as the cause of action in negligence is unmaintainable.[21] This contention relies on the statement by the High Court in *Mallonland Pty Ltd v Avanta Seeds Pty Ltd*[22] in respect of claims in negligence for pure economic loss.

[71] The relevant principles were described by the High Court as follows:

> "As a general rule, damages are not recoverable in negligence for pure economic loss, that is, for loss that is not consequential upon injury to person or property. Ordinarily, a person does not owe a duty to take reasonable care to avoid causing reasonably foreseeable pure economic loss to another.
>
> This general rule reflects the well-established position at common law that the infliction of economic loss does not, by itself, infringe any right or legally protected interest of the plaintiff. The general rule is also said to reflect policy concerns about the potentially excessive scope of liability for financial loss, referred to by Cardozo CJ as

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[20] *Gladstone Ports Corporation Ltd v Murphy Operator Pty Ltd* (2024) 20 QR 1 at [169].

[21] The Council also contends that breach of statutory duty is unmaintainable but concedes that is not the subject matter of the application for leave.

[22] (2024) 98 ALJR 956.

> liability "in an indeterminate amount for an indeterminate time to an indeterminate class". Another policy reason said to justify the general rule is a concern to avoid infringing the legitimate pursuit of personal advantage."[23]

[72] The plaintiff pleads two ways to establish the duty to take reasonable care:

(a) Firstly, that the Council "assumed responsibility" for the setting of the amount of the UAC and the AC compliant with the TI Act which supports a duty of care arising.[24]

(b) Secondly, "vulnerability" of the plaintiff as a basis to satisfy the "salient features" to establish a duty of care.[25]

[73] The Council submits that neither of these is sufficient to establish a duty of care in the circumstances.

[74] In relation to the assumption of responsibility, the Council relies on the following matters in support of its contention:

(a) In considering what is required to give rise to a duty to protect a plaintiff from pure economic loss, the High Court in *Mallonland Pty Ltd v Avanta Seeds Pty Ltd*[26] identified:

> "… an undertaking (whether express or implied) by a person to take on a task or job for another person or class of persons, from which it can be inferred that the first person accepted that he or she would take reasonable care when engaging in that task or job".[27]

(b) The Council's task, being the statutory function, is not properly characterised as setting the UAC and AC for the plaintiff.

(c) This is not a recognised category of cases giving rise to a duty of care to protect a plaintiff from pure economic loss due to an assumption of responsibility by a defendant.

[75] In relation to vulnerability of the plaintiff, the Council relies on the following matters in support of its contention:

(a) It is recognised in the authorities that the absence of vulnerability is often a decisive basis to reject the existence of a duty of care to protect a plaintiff from pure economic loss.[28]

(b) The pleading needs to set out the basis that the plaintiff was unable to protect itself from the economic loss that allegedly occurred as a consequence of the Council's carelessness.

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23 At [30] – [31].
24 At [6.6(b)] of the proposed Further Amended Statement of Claim.
25 At [6.6(g)] of the proposed Further Amended Statement of Claim.
26 (2024) 98 ALJR 956.
27 At [33].
28 See *Mallonland Pty Ltd v Avanta Seeds Pty Ltd* (2024) 98 ALJR 956 and *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at [94].

(c) Vulnerability is not made out by showing a mere likelihood of suffering economic loss if reasonable care was not taken.[29]

(d) Vulnerability is incapable of being pleaded to show the existence of a duty.

[76] The Council identifies a number of ways that practically the plaintiff could have protected itself from the alleged economic loss, including as follows:

(a) The plaintiff's drivers chose to use the toll roads, rather than non-toll roads. The plaintiff had the ability to protect itself from the alleged economic loss by directing driver's not to use the toll roads.

(b) The UAC was only levied if the plaintiff failed to pay the toll by cash, touch tag or the E-toll system. The plaintiff had the ability to protect itself from the alleged economic loss by paying by cash, touch tag or the E-toll system.

(c) Further, no UAC was levied if the user paid the toll within 3 days. The plaintiff had the ability to protect itself from the alleged economic loss by paying the toll to Queensland Motorways within 3 days.

(d) The AC was only levied if the plaintiff failed to pay the toll and the UAC. The plaintiff had the ability to protect itself from the alleged economic loss in respect of the AC by paying the toll and the UAC.

[77] It is further contended that in any event, the plaintiff was not vulnerable to any economic loss arising from the alleged breaches by the Council in circumstances where any payment of an excessive amount in respect of the UAC and AC could only be characterised as a mistaken payment to Queensland Motorways. In this circumstance, the relevant protection was repayment by Queensland Motorways to the plaintiff. This is considered further below in relation to the Council's submission that there is no compensable loss.

[78] Turning to look at the pleading in the proposed Further Amended Statement of Claim, the Council also identifies a number of deficiencies in the pleading of vulnerability, including as follows:

(a) At [6.3(a)] to [6.3(c)]: the plaintiff pleads that the UAC and AC were payable to and collected by Queensland Motorways. This does not go to whether the plaintiff was able to protect itself from the alleged economic loss.

(b) At [6.3(d]: the plaintiff pleads that it was vulnerable to Queensland Motorways levying excessive amounts for the UAC and the AC. However, the Council submits that this could only go to a likelihood of economic loss if reasonable care is not taken, which is not enough to establish vulnerability.

(c) At [6.3(e)]: the plaintiff pleads that it had no recourse under the TI Act to check or confirm that the amounts of the UAC or the AC were not excessive. However, the Council submits that this does not establish vulnerability where the plaintiff could protect itself by not using the toll roads or paying the tolls in any of the permitted ways. Further, the Council submits that this does not establish vulnerability where the plaintiff could recover mistaken payments directly from Queensland Motorways.

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29 *Mallonland Pty Ltd v Avanta Seeds Pty Ltd* (2024) 98 ALJR 956 at [39].

(d) At [6.3(f)]: the plaintiff pleads that it was required to comply with a Notice of Demand. The Council submits that prior to the Notice of Demand stage, the plaintiff was able to protect itself from the imposition of a UAC or AC by the various means identified.

(e) At [6.3(g)] to [6.3(i)]: the plaintiff pleads the obligations of the Council to arrange independent review of the amounts of the UAC and AC. The Council submits that this has no relevance to the issue of whether the plaintiff had the ability to protect itself from the alleged economic loss.

[79] In all of these circumstances, the Council submits the proposed Further Amended Statement of Claim does not, and cannot, support a finding of vulnerability, being a fundamental requirement to establish a cause of action in negligence for pure economic loss.

[80] The Council also identifies a further issue in respect of the new negligence claim against the Council that affects whether the plaintiff can maintain a claim for pure economic loss against the Council. Damage is a necessary element of the cause of action in negligence and the Council submits that the proposed Further Amended Statement of Claim does not plead a viable claim for damage to support a claim in negligence.

[81] Looking at the pleading in the proposed Further Amended Statement of Claim, the Council contends that the allegation of damage is misconceived in the pleading of damage relating to the Council.[30] The reasoning is as follows:

(a) The plaintiff pleads that it suffered loss and damage by reason of the alleged breaches and the Schedule B to the proposed Further Amended Statement of Claim particularises the damages as being the difference between the amount actually paid for the UAC and AC and the amount the plaintiff should have been charged.

(b) The plaintiff's pleaded case is as follows:[31]

(i) The AC and UAC in the toll notices issued to the plaintiff by Queensland Motorways did not reflect the amounts it was liable for on a proper construction of the TI Act.

(ii) When the plaintiff paid those amounts, being in excess of its actual liability, it did so by mistake and in ignorance of the true legal position.

(iii) As a matter of law, Queensland Motorways is obliged to repay those excess amounts.

(c) The plaintiff is contending for two contrary positions:

(i) The plaintiff is legally entitled to be repaid the excess amounts paid by mistake of law.

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30 Paragraphs 6.12 to 6.13 for Clem 7, 6.19 to 6.20 for the Go Between Bridge, 6.25 to 6.26 for Legacy Way and 8.21 and 8.31 in respect of Group Members.

31 At 7.1 to 7.32 of the proposed Further Amended Statement of Claim.

(ii) The plaintiff suffered consequential damage in the form of pure economic loss, being the same excess amounts, as a consequence of the breaches by the Council.

(d) Where the plaintiff is entitled to repayment of the excess amounts it paid in relation to the UAC and AC by mistake of law, the plaintiff suffered no consequential economic loss in relation to those same amounts. There is no damage as the money is not lost and there is a legal entitlement to recover it from Queensland Motorways.

[82] The case of *Redland City Council v Kosik*[32] is relied upon in support of the proposition that there is an entitlement to repayment of an amount paid by mistake of law. That case concerned a claim for the return of monies paid by ratepayers for charges wrongly levied by the Redland City Council. The case also involved the issue whether part of the monies needed to be repaid where the Redland City Council had expended those monies for the benefit of the ratepayers (including the plaintiff in the original proceeding). That second issue does not arise on the facts here.

[83] There was a prima facie entitlement to recover monies paid under a mistake if the monies were paid in the mistaken belief that there was a legal obligation to pay the monies or that the payee was legally entitled to payment of the monies. It was recognised that the same principles apply to governments in respect of overpayments of tax or tax paid under an invalid law.[33]

[84] Here, on the plaintiff's case the payments were made under a mistake of law and accordingly there would be a prima facie entitlement to the repayment of the part of the UAC and AC said to be in excess of the amount payable under the proper construction of the TI Act.

[85] In these circumstances the Council submits that there is no damage in the sense of consequential economic loss pleaded or that could be properly said to arise from the alleged breaches by the Council.

[86] Further, the Council submits that this cannot be remedied by pleading in the alternative as the same non-compliance with the statutory provisions is relied upon to found both the negligence claim against the Council and the moneys had and received claim against Queensland Motorways.

[87] While the issue of damage is relevant to both the breach of statutory duty and the new negligence claim against the Council, the application only requires consideration of the proposed amendment to add the new negligence claim against the Council. The Council submits that leave should be refused as there is no pleading or viable claim for damage that could found a claim in negligence.

[88] Accordingly, the Council submits that leave should be refused in respect of the new negligence claim against the Council as the proposed pleading does not disclose a

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32 (2022) 11 QR 524. An appeal and cross-appeal to the High Court was dismissed by the majority Gordon, Edelman and Steward JJ: (2024) 281 CLR 202.

33 *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 75; *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 529; *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560 at 578 [19] per French CJ.

reasonable cause of action against the Council where there is no basis to establish that:

(a) the plaintiff was vulnerable such as to give rise to a duty of care by the Council to protect against economic loss; and

(b) compensable damage was suffered as a result of the alleged breaches by the Council.

[89] In response to the application, the Council also raises a number of complaints that the proposed Further Amended Statement of Claim does not comply with the requirements of the UCPR. It is submitted that leave should also be refused as a result of these deficiencies, which include:

(a) The common law duty to take reasonable care is not adequately identified.

(i) Paragraph [6.5] pleads the Council was under a duty to exercise reasonable care in setting an amount for the UAC and the AC.

(ii) Then at [6.6(b)] the plaintiff states that when the Council made the s 105ZB Notices it assumed responsibility for "setting an amount that accorded with the proper construction of [UAC] and [AC] [in s 105ZB(6)] of the TI Act". This pleading of assumed responsibility has difficulties given the statutory language.

(iii) To plead an assumption of responsibility, the plaintiff needs to plead the facts, matters and circumstances relied upon to assert that the issuing of notices amounted to an assumption of responsibility. More than the mere statement of the proposition, the plaintiff does not do so.

(iv) Without pleading the required facts, matters and circumstances relied upon, it is not known how the plaintiff contends that the Council's conduct amounted to an assumption of liability such as to give rise to the duty.

(v) The pleading in [6.6(b)] does not comply with r 149(1)(c) of the UCPR.

(b) Further, [6.6(b)] does not comply with r 150(2) of the UCPR. If negligence is to be inferred from facts, it must be specifically pleaded.

(c) In respect of [6.6(d)] of the proposed Further Amended Statement of Claim, the plaintiff pleads that the Council knew or ought to have known that the plaintiff was vulnerable to certain matters relating to the exercise of the alleged duty. In addition to the matters discussed at [75]-[79] above, the pleading of vulnerability is deficient. In particular:

(i) In respect of r 150(1)(k) of the UCPR, the pleading fails to plead the individual or individuals said to possess the relevant state of mind and why that knowledge was that of the Council.

(ii) In respect of r 150(1)(k) and 150(2) of the UCPR, the pleading fails to plead any material facts that could be relied upon to infer that any relevant individual had the alleged state of mind.

(iii) In respect of r 149(1)(c) of the UCPR, the pleading fails to state specifically matters that if not specifically pleaded would take the Council by surprise.

[90] The Council contends that these non-compliances with the pleading rules are in respect of critical components of the plaintiff's case and are of such a nature that the discretion should not be exercised to grant leave in relation to the new negligence claim against the Council.

[91] The plaintiff engaged with the issues raised by the Council in its reply submissions and also in oral submissions at the hearing and rejected the contentions raised by the Council. The plaintiff submits the Court on the current application is not concerned with determining the final outcome of the claims. Consequently, it is only if the new negligence claim against the Council was "untenable" or "manifestly groundless" that leave should be refused.

[92] The plaintiff submits that the new negligence claim against the Council is at least reasonably arguable and to the extent that the claim concerns a "contentious point of novel law" for which there is little or no authority, it would be inappropriate to resolve the issue at the preliminary stage. Further, the Council does not contend that it would suffer any prejudice if leave was granted.

[93] In respect of the issue of whether a compensable loss is pleaded, the plaintiff contends that inconsistent remedies may be pursued in the alternative until judgment, when the plaintiff must elect. The mere fact that there is a claim in restitution against Queensland Motorways does not mean that there is no compensable loss against the Council for negligence.

[94] Further, the plaintiff contends that recovering the excess amount of the UAC and AC from Queensland Motorways does not protect the plaintiff and Group Members from economic loss. The plaintiff suffers a further economic harm in having to expend resources to recover the overpayment of the UAC and AC from Queensland Motorways. The plaintiff submits that the cost of the "additional resources" is causally connected to the Council's failure to set the UAC and the AC in accordance with the requirements of the TI Act.

[95] It should be noted that the Council complains that this cost of the "additional resources" is not what is pleaded as the damage.

[96] The plaintiff contends that this case falls within the established cases in which a duty of care arises: that is, a recognised category of the assumption of responsibility. In this regard the plaintiff relies on *Caledonian Collieries Ltd v Speirs*[34] and in *Minister for the Environment (Cth) v Sharma*.[35] These cases will be considered in more detail below.

[97] In respect of the assumption of responsibility, the plaintiff contends:

(a) The statement at [33] by the High Court in *Mallonland Pty Ltd v Advanta Seeds Pty Ltd*[36] is consistent with the assumption of responsibility applying regardless

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34 (1957) 97 CLR 202 at 220.
35 (2022) 291 FCR 311 at [208].
36 (2024) 98 ALJR 956.

of any other salient features. The duty of care may be established where a defendant has assumed a responsibility to take reasonable care to avoid economic loss. In *Mallonland Pty Ltd v Advanta Seeds Pty Ltd* there was an express disclaimer and as a result no duty of care arose.

(b) Here, the Council undertook the task or function of setting the UAC and the AC, having decided to impose a toll of the Local Government Toll Roads. The plaintiff's case is that this task or function required that the charges be consistent with the TI Act such that those liable to pay the UAC and the AC were not overcharged.

(c) It can be inferred that the Council accepted that the Council would take reasonable care when undertaking the task or function so that users would only be charged a lawful amount.

(d) The language of the TI Act is not that of the assumption of responsibility. However, "it would appear inconceivable that … the [Council] would proceed on the basis that ... the [Council] would not take reasonable care in setting those charges".[37]

(e) It follows that the Council was under a duty to exercise reasonable care to set the UAC and AC in accordance with the statutory requirements of ss 105ZB(5) and (6) of the TI Act.

[98] If this case is outside an established category, then the issue of whether a duty of care is owed is determined by consideration of all of the circumstances. The plaintiff relies on the salient feature of vulnerability as establishing the duty of care.

[99] In respect of vulnerability, the plaintiff contends:

(a) The relevant vulnerability is whether the plaintiff was able to protect itself from the economic loss. It is vulnerability to the relevant harm, causally connected to the breach of duty.

(b) Here the relevant harm is the plaintiff suffering economic harm by being charged a UAC and AC in an amount that was excess of the amount in accordance with the TI Act.

(c) The harm is the loss of the sum of money reflecting the difference between the amount charged for the UAC and the AC and the amount that could have been lawfully charged.

(d) The UAC and the AC paid was set by the Council. The Council caused the risk by setting the UAC and the AC that were not in accordance with the proper construction of the TI Act.

[100] Turning to consider the contentions in respect of whether this claim falls within an established category giving rise to a duty to take reasonable care. The starting point is a consideration of the statement of principle in *Caledonian Collieries Ltd v Spiers*. The Court[38] relevantly stated:

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37 Plaintiff's Outline of Submissions in Reply (CFI #200) at [104].

38 Dixon CJ, McTiernan J, Kitto J and Taylor J.

> "On the assumption stated, the well-settled principle applies that when statutory powers are conferred they must be exercised with reasonable care, so that if those who exercise them could by reasonable precaution have prevented an injury which has been occasioned, and was likely to be occasioned, by their exercise, damages for negligence may be recovered: *Great Central Railway Co. v Hewlett*;[39] *East Suffolk River Catchment Board v Kent*;[40] *Cox Bros (Australia) Ltd v Commissioner of Waterworks*.[41]"[42]

[101] The plaintiff's position is that this quote supports a principle that the exercise of statutory powers is a recognised category of case in which a duty of care arises, and this has subsequently been extended to economic loss.

[102] Looking at what the High Court was considering in *Caledonian Collieries Ltd v Spiers,* this overstates the position. *Caledonian Collieries Ltd v Spiers* was a claim in respect of personal injuries that involved a private railway established under a private statute. There was also an issue of successive statutory authorities that complicated potential liability. The original company had been established under statute "to make construct and maintain a railway".[43] The successor authority conceded that it had the care, control and management of the railway line. One issue was whether the appellant had succeeded to the "authorities and immunities" which the statute conferred on the original company. The statement of the High Court occurred in a discussion of an assumption that it had.

[103] The original hearing had been by way of a jury trial and the High Court went on to consider how the jury was directed on the elements to establish a duty of care to a user of the level crossing. That is, it was a question to be determined whether a duty of care arose.

[104] The appeal was ultimately dismissed on the basis that on the evidence the jury properly found a verdict against the appellant. The practical effect of the decision was that the appellant, in the occupation and management of a railway which crossed a highway, owed a duty of care to users of the highway to exercise reasonable care in respect of risk from the presence of the railway.

[105] Similarly, the cases referred to by the High Court as authority for the principle also need to be considered in context:

(a) *Great Central Railway Co. v Hewlett*[44] involved collapsible gate posts erected by a railway company across a road at the entrance to a station yard. At the relevant time, a statute empowered the railway company to maintain the posts and gates and replace them as necessary. A taxicab was damaged when it hit one of the posts. The taxicab driver claimed damages in negligence.

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39 (1916) 2 AC 511 at p 519.
40 (1941) AC 74 at p 85.
41 (1933) 50 CLR 108 at pp 119, 121.
42 (1957) 97 CLR 202 at 220.
43 At 219.
44 (1916) 2 AC 511 at p 519.

The case turned on the question of law as to whether the railway company was under a duty to take reasonable care for the protection of the public. In considering this issue Lord Parker stated:

> "… it is undoubtedly a well-settled principle of law that when statutory powers are conferred they must be exercised with reasonable care, so that if those who exercise them could by reasonable precaution have prevented an injury which has been occasioned, and was likely to be occasioned, by their exercise, damage for negligence may be recovered."

Then Lord Parker continued:

> "To bring this principle into play in the present case the company must be shown to have been exercising a statutory power the exercise of which was likely to occasion and did occasion the collision. The only statutory power which the company can be said to have been exercising is the power to maintain the posts…".

This required a consideration of the power. In the circumstances, the power included being relieved from the obligation to remove the posts. That is, doing nothing.

There was no act by the railway company that caused the accident, but rather the mere existence of the post which was legalised under the statute and coupled with the required lack of lighting during the war. The statutory power to maintain the post imposed no obligation to take reasonable precautions to warn of the existence of the post. Accordingly, the railway company was not guilty of negligence.

(b) *East Suffolk Rivers Catchment Board v Kent*[45] involved a breach in a sea wall due to a very high tide. The statutory authority undertook repairs but took a long time to complete the works. The respondent's pastoral land was flooded resulting in serious damage. The respondents needed to show that the damage was caused by the statutory authority's negligence.

Viscount Simon LC referred to the general proposition identified in *Great Central Railway v Hewlett* and then concluded in this case the damage by flooding was not due to the exercise of the statutory powers at all. The House of Lords ultimately found that the damage was due to natural causes and the statutory authority was under no liability to the respondents.

(c) *Cox Bros (Australia) Ltd v Commissioner of Waterworks*[46] involved water damage to a neighbouring property from a burst water main. The respondent under a statutory authority laid and maintained the water mains. Ultimately the High Court held that the respondent was not liable for damage done without proof of negligence. Further, the evidence did not establish that the respondent was negligent.

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45 (1941) AC 74 at p 85.

46 (1933) 50 CLR 108 at pp 119, 121.

Dixon J observed:

> "... it follows from the nature of the defendant's statutory authority that he is not liable for damage caused by an escape of water from his pipes unless he has been negligent, and that the proof of negligence lies with the plaintiffs."

[106] All of these cases involved physical damage and also a consideration of the statutory power involved.

[107] The plaintiff further relies on the case of *Minister for the Environment (Cth) v Sharma (by their litigation representative Arthur) and Ors*[47] as authority for the principle being applied in the context of economic loss.

[108] *Minister for the Environment (Cth) v Sharma (by their litigation representative Arthur) and Ors* is an appeal from a single judge decision granting a declaration that the Minister owed a duty of care when exercising the power under s 130 and 133 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) to approve or not approve the proposed coal mine extension to take reasonable care to avoid causing personal injury or death to all people in Australia under 18 years of age at the time the proceedings were commenced. The Full Federal Court undertook an extensive review of the issues and allowed the appeal.

[109] The appeal concerned whether there was a duty to protect the public from personal injury caused by the effects of climate change. The Court extensively considered the terms of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) and the role conferred on the Minister by Parliament. This included identifying the duties, powers and functions of the Minister to assess whether a common law duty of care was "harmonious, compatible and coherent" with them.[48]

[110] It appears that the applicants at first instance relied upon:

> "analogical reference to two categories of negligence. *First*, the applicants referred to the *Spiers* line of authority (*Caledonian Collieries Ltd v Speirs* (1957) 97 CLR 202), which holds that statutory powers must be exercised with reasonable care and that the common law may impose liability for harm caused by their negligent exercise. *Second*, the applicants referred to what they called the *Rylands v Fletcher* line of authority, which holds a person liable for harm caused by dangerous things which escape from that person's land."[49]

[111] The reliance on *Caledonian Collieries Ltd v Speirs* did not automatically give rise to a duty of care. It is apparent that the Court at first instance and on appeal proceeded on the basis that it was necessary to ascertain whether "a novel duty of care" arose. This required consideration of the salient features and the factual circumstances.

[112] The plaintiff relies upon [208] of the reasons of Allsop CJ in support of its contention. The paragraph needs to be considered in the context of the paragraphs before and

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47 (2022) 291 FCR 311 at [208].

48 At [81] and [121] per Allsop CJ.

49 At [122] per Allsop CJ.

after, and also in the factual context of the appeal that concerned the risk of physical injury, not economic loss.

[113] Allsop CJ stated:

> "[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* at [229] –[244] (Kirby J). …
>
> [207] The exposition of the proper approach in Australia in the many High Court cases … and in many other intermediate courts of appeal recognises an approach necessitating a close examination, not only of all the facts attending the relationship between the parties, but also the legal relationship in which they are situated, together with legal policy and principle drawn from analogous or cognate cases. The relationship is not one built by the salient features. Rather, the salient features play their part in considering the relationship and the question of the appropriateness of the imposition of a legal duty of care as the necessary foundation for the potential personal liability of the person to the injured party for damages as a consequence of the impugned act or omission in question."

[114] Allsop CJ then continued at [208]:

> "There is no doubt that government and statutory authorities **may** be liable in negligence, and as a foundation for such be subject to a *legal* duty to take reasonable care for another or another's interests. Relevantly for the foundation for the duty in this case, it can be accepted that a statutory authority **may** be liable for the exercise of a statutory power conferred on it if exercised without reasonable care: *Speirs* at 220 (Dixon CJ, McTiernan, Kitto and Taylor JJ). It is also clear that such liability is not denied on the basis that the exercise of the power was, in public law terms, lawful or without vitiating error."

(emphasis added in bold)

[115] After considering the High Court's comments in *Sullivan v Moody*[50], Allsop CJ went on to observe at [211]:

> "…[it is] clear that the judicial inquiry begins with an identification of the proper focus of attention or perspective to the relationship in question to make sense of the competing factors that may bear upon the relationship and upon the question whether a legal duty should be imposed."

[116] Further at [212]:

> "One must begin with the relationship. This is to be found in the statute properly construed and understood in its context. The nature

50 (2001) 207 CLR 562 at [50].

of the posited duty, its scope and content, must be addressed to understand the nature of the issues to be thrown up at the point of breach. It is against this context that relevant salient features are to be addressed."

[117] This analysis does not support there being an existing category of case giving rise to a duty of care by virtue of the mere exercise of statutory powers as the plaintiff contends. Whether the exercise of statutory powers does give rise to a duty of care depends on further factors.

[118] This is perhaps most clearly articulated by Wheelahan J in separate reasons where his Honour stated:

> "[783] The primary judge treated the case presented by the respondents at trial as inviting the court to find the existence of a "novel" duty of care. A novel duty of care may be distinguished from a duty arising from accepted categories of relationship, such a road users, employer and employee, occupier and entrant to premises, suppliers of professional services and clients, and manufacturers of good and consumers, where there are settled principles of legal responsibility. Those upon whom statutory powers are conferred may have a duty of care because they operate within one of these established categories … Outside the established categories where a duty of care has been held to arise, the common law generally develops by increments, where the legal question whether a duty of care is to be recognised is answered by using the common law technique which looks to precedent, which reasons analogically, and by reference to principles and policy underlying earlier decisions … Those principles include that there be a close examination of any relevant legislative regime where a decision under a statute is involved … The principles also include, to the extent appropriate, the "salient features" analysis…"

[119] The case being considered was "novel". Wheelahan J went on to observe at [784]:

> "… It is the discharge of the Minister's statutory decision-making obligation that is the claimed source and subject-matter of a common law duty of care. The Minister's decision-making function, in its entirety, is a product of statute, and does not involve the performance by the Minister of any practical activities outside that function. The present case is therefore distinguishable from those cases where a statute places a person or a statutory authority in physical control over some space or structure, thereby giving rise to a common law duty of care … This case is also distinguishable from *Caledonian Collieries*, and *Pyrenees Shire Council v Day* (1998) 192 CLR 330 … where the tortfeasors entered upon the exercise of statutory powers which then placed them in a relationship with the claimants, and which required that positive conduct engaged in pursuant to the exercise of those powers be undertaken with reasonable care: see *Caledonian Collieries*

> at 220… , *Pyrenees* at [177] … and *Stuart v Kirkland-Veenstra* at [117] … And the issue that arises in this case is distinguishable from those considered in *Graham Barclay Oysters*, *Stuart v Kirkland-Veenstra* and *Regent Holding Pty Ltd v Victoria* [2013] VSC 601 … which concerned claims based upon omissions to exercise statutory powers."

[120] It was in these circumstances that Wheelahan J stated that the starting point, and "of critical importance" to determining whether a common law duty of care to the respondents attached to the Minister's decision-making obligations, was to examine the legislation.[51] Further:

> "The weight to be given to any relevant salient features of any relationship between the Minister and those to whom the duty of care is allege to be owed, such as the degree and nature of control over the risk of harm, indeterminacy of liability, and the consistency of the recognition of a duty of care with the discharge of the Minister's obligation, must be assessed through the prism of the statute with the result that it is primarily by reference to the legislation that the issue … is to be resolved. The prominence in this case of the provisions of the legislation in determining whether a duty of care is to be recognised renders incremental reasoning, and reasoning by analogy, of mush less relevance than they might be in other cases."

[121] Similar considerations arise here, and even more so given the claim is for economic loss and not involving physical damage.

[122] Further, the Council points to the fact that at first instance in *Minister for the Environment (Cth) v Sharma (by their litigation representative Arthur) and Ors* economic loss was in issue but the judge at first instance found that a duty in terms of pure economic loss did not arise. That was not revisited on appeal.

[123] Consequently, the plaintiff does not identify an existing case which finds that the mere exercise of statutory power in the context of pure economic loss gives rise to a duty to take reasonable care. Accordingly, the current case has to be analysed and considered in accordance with the salient features approach.

[124] The plaintiff's pleading of the assumption of risk does not address the particular features of a pure economic loss case. It is not clear on the plaintiff's pleading what is relied upon for the assumption of risk – other than the mere assertion. Something more is required.

[125] In respect of the salient features, the plaintiff only addresses vulnerability and even then, it is only cursory. The proposed Further Amended Statement of Claim does not grapple with the factors which tend against the plaintiff being in a position of vulnerability.

[126] In deciding whether leave should be granted in respect of the proposed ***Category 2(b)*** amendments, the Court is to consider whether it would be appropriate to grant leave pursuant to r 376(4)(a) of the UCPR. It would not be appropriate to grant leave where

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51 At [785].

the proposed pleading would be struck out for non-compliance with the pleading rules.[52]

[127] The difficulties identified by the Council in respect of the ***Category 2(b)*** amendments are substantive and the contentions of the plaintiff do not satisfactorily address those concerns. The ***Category 2(b)*** amendments would be highly vulnerable, if not likely, to be struck out if leave was granted, consistent with the contentions raised by the Council.

[128] Further, the proposed ***Category 2(b)*** amendments do not disclose a reasonable cause of action against the Council for the reasons identified by the Council.

[129] In all of these circumstances, leave is refused in respect of the ***Category 2(b)*** amendments in relation to the new cause of action in negligence against the Council.

Should leave be granted in respect of the *Category 1(a)* amendments to join the Ministers and add new cause of action for breach of statutory duty against the Ministers and vicarious liability against the State?

[130] The plaintiff seeks:

(a) pursuant to r 69 of the UCPR, to join the Ministers as the fourth and fifth defendants; and

(b) pursuant to r 375 and 376(4) of the UCPR, to amend to add a cause of action for breach of statutory duty and, or alternatively, a duty to exercise reasonable care and seeking damages and aggravated damages for breach of those duties against the Ministers, and vicarious liability against the State.

[131] Before considering the ***Category 1(a)*** amendments in respect of the cause of action for breach of statutory duty it is appropriate to consider some further relevant facts.

[132] Mr Wallace was the Minister for the Department of Transport and Main Roads and administered the TI Act for the period 26 March 2009 to 26 March 2012. Mr Bailey was the Minister for the Department of Transport and Main Roads and administered the TI Act for the period 16 February 2015 to 17 December 2023.

[133] The current Amended Statement of Claim and the proposed Further Amended Statement of Claim plead the declarations made by the Ministers under the TI Act in respect of State Toll Roads. Further, the current Amended Statement of Claim pleads the Minister is responsible for determining the matters required by the notices. The proposed Further Amended Statement of Claim pleads that by making the declarations the Ministers set the UAC and the AC.

[134] The plaintiff contends that the joinder of the Ministers is desirable, just and convenient to enable the Court to adjudicate effectually and completely on all issues in dispute.

[135] Previous correspondence and submissions between the parties in respect of the Ministers was highly contentious. The relevance of the Ministers to the currently pleaded cause of action and the proposed Statement of Claim was considered at a case

52 *Menegazzo v PricewaterhouseCoopers (a firm)* [2016] QSC 94 at [47].

management conference on 18 February 2025 before Bradley J, and also at the hearing of the application.

[136] In support of the contention that the joinder of the Ministers is necessary and desirable, the plaintiff points to a number of matters, including:

(a) The discretion under s 93 of the TI Act is conferred on the Minister to declare a toll and any declaration by the Minister is to include notice of particular matters. Accordingly, the relevant obligation is imposed on the Minister.

(b) An issue that the plaintiff seeks to have determined is whether the UAC and AC set by the Ministers at various times complied with the requirements of the TIA.

(c) The proposed Further Amended Statement of Claim pleads a cause of action against the Ministers for breach of statutory duty and negligence. The relevant conduct relied upon is the Ministers setting the UAC and AC by the Gazette notices in respect of the relevant State Toll Road.

(d) If the Ministers are not joined, the State may avoid liability on the basis that:

(i) The relevant duty was owed by the relevant Minister and not the State; and

(ii) The State is not otherwise responsible in law for the conduct of the Mr Wallace and Mr Bailey in their capacity as Ministers.

[137] The plaintiff accepts that it is necessary to consider r 69(2)(a)(iii) and (iv) of the UCPR as the limitation period for bringing a claim in negligence or breach of statutory duty has expired in respect of many of the claims in the proposed Further Amended Statement of Claim.[53] The Court could only make an order joining the Ministers if the proceedings were commenced against the name of the wrong person, or the Court considers it doubtful that the proceedings were started against the name of the right person.

[138] In all of the circumstances, the plaintiff submits that the Court could be satisfied that:

(a) Adeva Home Solutions Pty Ltd (the original representative plaintiff) incorrectly joined only the State to the proceedings; and or alternatively

(b) it is doubtful that only the State should be joined to the proceedings,

and that the Ministers should be joined.

[139] Similarly, this position is also reached as a result of s 93 of the TI Act imposing the obligation on the Minister. In light of the statutory language, the plaintiff contends that it is likely that the proceedings were commenced against the State only on the basis that:

(a) the Minister and the State were in substance the same; or

(b) the Minister was an emanation of the State, and Minister and State could be used interchangeably.

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53 There will be some claims for which the limitation period has not expired.

[140] The State was joined to the original proceeding by consent and did not object to the joinder. In particular, the State did not object to the joinder of the State on the basis that the relevant Minister should be joined to the proceeding instead of, or in addition to, the State.

[141] Following the joinder of the State by consent, the then plaintiff, Adeva Home Solutions Pty Ltd, filed and served the current Amended Statement of Claim. The plaintiff submits that the current pleading uses Minister and State interchangeably in respect of the claim of breach of statutory duty. In effect, the plaintiff contends that the pleading treats the State as including the Minister.

[142] The plaintiff submits that this was compounded by the State's Amended Defence dated 4 June 2021 and filed 15 June 2021, which also appears to use Minister and State interchangeably.

[143] The plaintiff also points to the letter from Crown Law dated 23 June 2021 following filing and service of the State's Amended Defence as not expressly stating that the State was not a proper party, nor that the relevant Ministers should be joined to the proceedings.

[144] The Eighth Whyte Affidavit outlines that when Mr Whyte became solicitor on the record, he assumed that the proceedings had been properly constituted and there was no need to separately join the Ministers. The basis for this view is set out in the affidavit include:

(a) "the State had agreed to be joined to the proceedings as the second defendant on 16 April 2021";

(b) "the State in letter correspondence in May and June 2021 had not said that it was not a proper party to the proceeding and that the relevant Minister should be joined to the proceedings";

(c) "the Amended Statement of Claim which had been settled by experienced Senior Counsel, used "State" and "Minister" interchangeably and Piper Alderman continued to retain that Senior Counsel in this proceeding";

(d) "the State's Defence to the Amended Statement of Claim (settled by three counsel including Queen's Counsel) also used "State" and "Minister" interchangeably";

(e) "the State did not raise as a defence in its Amended Defence that it was not a proper party to the proceeding and that the relevant Minister should be joined to the proceedings"; and

(f) "when Piper Alderman was retained to act for Adeva on or about 27 September 2022, the State had been a party to the proceedings since 16 April 2021 and no issue had been raised by any party in its pleading as to whether the State was a proper party to the proceedings or that the Minister should be joined to the proceedings".[54]

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54 At [24].

[145] Various directions were made for disclosure and the expert conferral process which became the focus rather than the pleadings, and any amendments in effect took a "back seat" during this period. It was in the period of September to December 2024 that further consideration was given to the pleadings, including after a change in senior and junior counsel for the plaintiff. On 20 December 2024 Piper Alderman wrote to Crown Law about the proposed amendments, including the joinder of the Ministers.

[146] In the Eighth Whyte Affidavit, Mr Whyte also deposes to other relevant matters including:

(a) By letter dated 10 February 2025, Crown Law raised for the first time an issue with the joinder of the State to the proceeding (which had been by consent) and that the relevant Ministers should be joined.

(b) This issue was raised at a case management conference on 18 February 2025 before Bradley J.

(c) Further correspondence was subsequently exchanged between the parties in respect of this issue.

(d) It was "unclear" from the correspondence from Crown Law whether the State would take the position that the wrong defendant had been joined and that "the relevant Minister, not the State, was the relevant party which owed the relevant duty." Relevantly, [61A] of the Amended Statement of Claim pleads that the State owed certain obligations under the TI Act and the State denies that allegation and says that the "TI Act does not, as a matter of law, impose an obligation on the State…". Mr Whyte deposes that from this it was unclear whether the denial was on the basis that the relevant obligation was on the relevant Minister, rather than the State.[55]

(e) The letter from Crown Law dated 6 March 2025 maintains the position but does not clarify the basis of the denial.

[147] In respect of the causes of action against the Ministers, the proposed Further Amended Statement of Claim includes breach of statutory duty and negligence. The plaintiff submits that the breach of statutory duty claim against the Ministers arises out of substantially the same facts as those already pleaded in the current Amended Statement of Claim against the State for breach of statutory duty.

[148] The relevant facts relied upon are:

(a) The declarations by the Ministers published in the Gazette by which the plaintiff alleges the relevant Minister set the toll, UAC and AC.

(b) The proper construction of s 93(6) and s 93(5) of the TI Act in relation to the UAC and the AC, in particular the meaning of "reasonable cost".

(c) The steps, tasks or activities of:

(i) administering and collecting the payment of the toll for the purposes of s 93(6) of the TI Act;

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55 At [52(d)].

(ii) administering and issuing a notice for, and collecting the unpaid toll and AC for the toll for the purposes of s 93(5) of the TI Act; and

(d) the reasonable or market costs of the steps, tasks or activities and the UAC and AC levied on toll road users exceeded those reasonable costs.

[149] In respect of the breach of statutory duty, in the proposed Further Amended Statement of Claim the Ministers effectively replace the State as the primary wrongdoer. The new cause of action is that:

(a) the Ministers owed a duty “individually and personally”.

(b) the “individual and personal” conduct of the Ministers in respect of the declaration of the tolls, the UAC and the AC set the UAC and AC for the relevant State Toll Roads.

(c) the Ministers “individually and personally” breached their “individual and personal” statutory duty to the plaintiff and Group Members.

[150] The plaintiff’s position is that the imposition of the statutory duty by the proper construction of the TI Act is the same whether the matter proceeded by way of the Amended Statement of Claim or the proposed Further Amended Statement of Claim. Ultimately the story remains the same. That is:

(a) The Minister’s setting the UAC and AC in each declaration.

(b) How the Minister’s declarations were made, including what information was before the Minister, what questions were asked or further information requested as to whether the UAC’s and ACs proposed were “reasonable costs” within the proper construction of s 93 of the TI Act.

(c) What, if any answers or information were provided in response.

(d) What analysis, if any, was undertaken by the Minister.

[151] The plaintiff also includes in the proposed Further Amended Statement of Claim a new claim in negligence. There is no currently pleaded negligence claim in the Amended Statement of Claim against the State or otherwise.

[152] The plaintiff contends that:

(a) The negligence claim arises out of the same facts and circumstances as the pleaded statutory duty claim against the State in the Amended Statement of Claim.

(b) The negligence claim largely mirrors the statutory duty claim in that the same omissions or actions relied upon comprise the breaches of duty in both the negligence claim and the statutory duty claim.

[153] In the Eighth Whyte Affidavit, Mr Whyte deposes to not expecting any additional disclosure or evidence if the negligence claim is added to the proceeding.

[154] The ***Category 1(b)*** amendments in the proposed Further Amended Statement of Claim in respect of a new claim in negligence are considered further under the next heading.

[155] The State Related Parties strenuously oppose the joinder of the Ministers and the proposed amendments to plead a cause of action of breach of statutory duty by the Ministers and negligence by the Ministers. The opposition is on a number of bases including:

(a) Rule 69(2) of the UCPR is not met and therefore the joinder of the Ministers is not permitted after the expiration of the limitation periods.

(b) The new causes of action do not arise out of the same facts or substantially the same facts as the pleading in the current Amended Statement of Claim.

(c) In any event, the new causes of action have not been properly pleaded in the proposed Further Statement of Claim and accordingly leave should be refused.

(d) The Ministers will suffer prejudice if they are joined to the proceedings.

[156] Many of the claims are outside the limitation period but there is likely to be some that are not affected. The analysis proceeds on the basis that the applications for joinder and to amend are outside the limitation period. Depending on the outcome of that analysis, the State Related Parties acknowledge that separate consideration may need to be given to whether there is a different position in respect of the claims within the limitation period.

[157] The State Related Parties rely on the chronology as context for these issues, including:

(a) The proceeding was commenced on 18 August 2020 against Queensland Motorways only.

(b) On 16 April 2021, the State was joined as a second defendant by consent.

(c) On 21 April 2021 the original plaintiff filed the Amended Claim and Amended Statement of Claim.

(d) On 25 May 2021, Crown Law on behalf of the State wrote to the then solicitors for the original plaintiff asking for confirmation that the plaintiff did not intend to join the Ministers.

(e) On 9 June 2021, the then solicitors for the original plaintiff wrote to Crown Law and confirmed that it did not intend to join the Minister(s).

(f) On 15 June 2021 the State filed its Amended Defence to the Amended Statement of Claim.[56] The State denied it owed a statutory duty and denied that it had breached the statutory duty.

(g) On 3 August 2023 the Court ordered substitution of the representative plaintiff.

(h) On 24 September 2024 the Court ordered that the plaintiff serve a proposed further amended statement of claim by 16 December 2024 and the State advise whether it consented to the amendments or not, with an explanation, by 10 February 2025.

(i) On 20 December 2024 the plaintiff served a proposed further amended claim and statement of claim, including claims against the Ministers for breach of statutory duty or negligence. There was no claim for damages against the State.

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56 A defence was filed on 4 June 2021 that contained some minor errors and on 15 June 2021 the Amended Defence was filed correcting those minor amendments.

(j) On 10 February 2025 the State informed the plaintiff that it opposed leave being granted to file the further amended claim and statement of claim. The explanation for the opposition included that no application to join the Ministers had been made, the causes of action were time barred and the pleading was deficient.

(k) Between 27 February 2025 and 17 March 2025 there was an exchange of correspondence, including in relation to whether the State was vicariously liable for the Ministers if the Ministers were not joined to the proceeding. The State maintained its opposition as previously articulated.

[158] The position of the State in relation to this issue remained opaque for much of the hearing. Some clarity was achieved at a late stage of the hearing, including as follows:

(a) If the Ministers were not joined but there was a viable case of vicarious liability against the State,[57] then it is not fatal to the claim against the State.[58]

(b) As currently pleaded the State does not owe the obligation.[59]

(c) The State's position is neither the State nor the Minister is responsible.[60] But if the obligation does arise, it would be personal to the Minister and the State "could walk away".[61]

[159] In respect of the proposition that the new cause of action for breach of statutory duty does not arise out of the same facts or substantially the same facts as the pleading in the current Amended Statement of Claim, the State Related Parties analyse the existing pleading and the proposed pleading including as follows:

(a) The key allegations against the State in the current Amended Statement of Claim include:

(i) Pursuant to s 93 of the TI Act the Minister published in the gazette notices in respect of the pleaded State-based Toll Roads.

(ii) By the notices the Minister set the toll payable for different types or classes of motor vehicles, the maximum UAC payable and the maximum AC payable.

(iii) By the giving of the notices the Minister was responsible for determining the pleaded matters.[62]

(iv) The steps that the Minister was required to take to meet the obligation are not part of the plaintiff's case. The Minister's obligation is in the same terms as the pleaded statutory duty of the State.[63]

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57 Which is not conceded, as the State says the pleading is deficient.
58 At T1-70 L19 – 22.
59 At T1-71 L28 – 31.
60 At T1-72 L 5-6.
61 At T1-71 L36 – 46.
62 Amended Statement of Claim at [50(b)] and [50(c)].
63 Further and better particulars in respect of [50(b)] and [50(c)] of the Amended Statement of Claim in response to the request dated 10 May 2021: see Affidavit of Caroline Helman sworn 18 July 2025 (CFI #197) at Exhibit CLH-1 pages 4 to 8.

(v) The State had an obligation imposed by the TI Act to set a UAC and AC not more than the amount as pleaded.[64]

(vi) The composition of the UAC and the AC.

(vii) The UAC and the AC exceeded the maximum that could be charged for the reasons pleaded.[65]

(viii) The invoices issued by Queensland Motorways to the plaintiff exceeded the maximum amount of the UAC and the AC pursuant to s 93 of the TI Act.

(ix) The State acted in breach of the statutory duty.

(x) The State breached the statutory duty each time the Minister made a declaration pursuant to s 93 of the TI Act to set a UAC or AC that exceeded the amount that could be charged.[66]

(b) The key allegations in the proposed Further Amended Claim and Further Amended Statement of Claim (in **MFI B** and **MFI C**) include:

(i) The Ministers personally owe a statutory duty to the plaintiff and the group members, which has been breached.

(ii) The State is vicariously liable for the acts of the Ministers in respect of the declarations made pursuant to s 93 of the TI Act.

[160] The State Related Parties contend that this analysis is supported by a consideration of the common questions. In the Amended Claim, the relevant common questions are:

(a) [2C] and [2D] - directed at whether the State had an obligation not to impose a UAC or an AC that exceeded a specified amount.

(b) [14B] and [15A] - directed at whether the State breached the obligation by setting the UAC or AC in the notices.

[161] In the proposed Further Amended Claim (**MFI B**) the relevant common questions are more diverse and include:

(a) [C6] and [C10] – whether Mr Wallace as Minister, and Mr Bailey as Minister, owed a statutory duty (for the relevant periods).

(b) [C8] and [C12] – whether Mr Wallace as Minister, and Mr Bailey as Minister, breached the statutory duty.

(c) [C9] and [C13] – whether group members suffered loss and damage by reason of Mr Wallace as Minister's, and Mr Bailey as Minister's, breach of statutory duty.

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64 This is pleaded in the alternative in [61A] as not more than a "reasonable amount" on the basis as pleaded.

65 Amended Statement of Claim at [62A] and [62B].

66 Further and better particulars in respect of [102] of the Amended Statement of Claim dated 10 May 2021: see Affidavit of Caroline Helman sworn 18 July 2025 (CFI #197) at Exhibit CLH-1 pages 4 to 8.

(d) [C14] and [C17] - whether Mr Wallace as Minister, and Mr Bailey as Minister, setting the UAC and the AC did so as the State's agent or representative, with the State's express, implied or apparent authorisation.

(e) [C15] and [C18] - whether Mr Wallace as Minister, and Mr Bailey as Minister, breached the statutory duty on the basis that setting the UAC and AC was so unreasonable that it could not be considered a reasonable exercise of the Minister's function.

(f) [C16] and [C19] – whether the State is liable for the acts of Mr Wallace as Minister and Mr Bailey as Minister.

[162] The State Related Parties submit that this clearly illustrates that the "story" is different in the proposed Further Amended Claim and Further Amended Statement of Claim.

[163] Relevantly to a consideration of r 69, 375 and 376 of the UCPR, the State Related Parties contend that the applicable limitation periods have expired. In respect of the declarations made:

(a) by Mr Wallace in respect of the Logan and Gateway Motorways, any cause of action would have accrued over eight years ago.

(b) by Mr Bailey in respect of the Airport Link, any cause of action would have accrued over nine years ago.

(c) by Mr Bailey in respect of the Logan and Gateway Motorway, any cause of action would have accrued over eight years ago.

[164] Accordingly, r 69(2) and r 376 of the UCPR are the applicable provisions.

[165] In respect of r 69(2) of the UCPR, the State Related Parties contend that none of the conditions in r 69(2)(a) to (f) are satisfied and consequently the Court must not include or substitute a party after the end of the limitation period. In particular, the State Related Parties say that r 69(2)(a)(iii) to (iv) relied upon by the plaintiff do not apply here. This is particularly so where the ***Category 1(a)*** amendments seek to advance wholly new claims.

[166] Further, the State Related Parties contend that it is not the position that the plaintiff got the wrong name and is merely substituting the correct party.[67] It is submitted that here:

(a) A direct cause of action against the State for breach of statutory duty was pleaded.

(b) The plaintiff now seeks to pursue a different cause of action for direct statutory breach against the Ministers, being different parties.

(c) The new claims are not causes of action started in the "name of the wrong person as a party".

[167] In respect of r 376 of the UCPR, the State Related Parties contend that the ***Category 1(a)*** amendments do not arise from the same facts or substantially the same facts as

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[67] It is acknowledged that this could be the case if the incorrect portfolio was stated for the Minister or that there were two Ministers in the relevant period and only one was named.

the cause of action already claimed in the proceeding for the purposes of r 376(4)(b) of the UCPR. Relevantly, the State Related Parties submit that the ***Category 1(a)*** amendments seek to relevantly plead:

(a) "a different statutory duty";

(b) "a different breach of statutory duty"; and

(c) "different loss said to arise from the alleged statutory duty".

[168] Further, it is contended that the factual basis of the alleged breaches of duty is also "substantially different" or relies on facts not pleaded. For example:

(a) The alleged statutory duty of the Ministers is pleaded by reference to the "proper construction" of s 93 of the TI Act. Reliance is placed on parts of the expert reports. These are new facts, not in the current Amended Statement of Claim.

(b) The ***Category 1(a)*** amendments plead new facts including in respect of "briefs for decision" provided to the Ministers, a KPMG report and alleged conduct of the Ministers in respect of the briefs for decision and the KPMG.

(c) The facts constituting the alleged breaches of duty are not the same, or substantially the same. Previously the plaintiff's case did not rely on the steps the Minister was required to take to meet the alleged statutory duty. The ***Category 1(a)*** amendments allege new facts, including matters that the Ministers did or did not do in respect of the alleged statutory duty. These matters include:

    (i) The Ministers failed to give reasonable consideration to the matters alleged.

    (ii) The Ministers did not require an independent auditor or an "appropriate expert" to review the quantum of the UAC or the AC.

    (iii) The Ministers included a formula for the UAC and the AC to be indexed to CPI, allegedly contrary to the "proper construction" of s 93 of the TI Act.

    (iv) The Ministers set the UAC and the AC in a manner that "included tasks, steps or activities that were not objectively necessary" or did not include "the reasonable market costs" of collecting unpaid tolls and charges.

    (v) Mr Bailey as Minister, giving consideration to the KPMG report.

(d) Different time periods are relied upon in respect of the alleged breaches. The current Amended Statement of Claim alleges a breach of statutory duty by the State on the date each impugned declaration was published in the Gazette. However, the ***Category 1(a)*** amendments include as part of the breach of statutory duty conduct by the Ministers prior to the declarations being published in the Gazette.

(e) The new claim of vicarious liability against the State is based on new facts, including "express, implied or apparent authorisation" and liability for the Ministers, which is in turn based on new facts, including those summarised above.

[169] Even if the Court determined that the new cause of action in the ***Category 1(a)*** amendments arose out of the same or substantially the same facts, the State related Parties contend that it would not be appropriate to grant leave pursuant to r 376(4)(a) of the UCPR.

[170] The State Related Parties rely on a number of factors to establish that it is not appropriate to grant leave, including:

(a) The proceeding was commenced about five years ago and the State was joined as a party over four years ago. The plaintiff should be bound by the previous forensic decisions that have been made, including not to include the Ministers as parties to the proceeding. The substituted representative plaintiff is bound by the decisions by the original representative plaintiff.

(b) There was a period between January 2024 when a view was formed to join the Ministers and notice being given in December 2024 by way of a proposed amended pleading. Further, the Ministers were not served with the original proposed Further Amended Claim and Further Amended Statement of Claim until 31 March 2025, together with the application.

(c) The Ministers will be prejudiced if they are joined as parties and leave is granted to amend in respect of the ***Category 1(a)*** amendments. The affidavit of Caroline Helman sworn 18 July 2025 is relied on in support of this submission.[68]

[171] The State Related Parties also submit that leave should be refused as the pleading in respect of the ***Category 1(a)*** amendments is deficient and does not fairly disclose the case that the defendants are to meet.

[172] Several different propositions are raised in support of this submission, including:

(a) Whether a breach of statutory duty will give rise to a private action for damages is a matter of statutory construction.[69]

(b) The question is whether on the proper construction the statute imposes an obligation intended to provide a ground of civil liability when the breach of the obligation causes injury or damage of a kind against which the statute was designed to afford protection.[70]

(c) A right for a breach of a public law duty is distinct from a right to a personal civil action in damages.[71]

[173] In *X (Minors) v Bedfordshire C.C.* Lord Brown-Wilkinson observed:

> "The basic proposition is that in the ordinary case a breach of statutory duty does not, by itself, give rise to any private law cause of action. However a private law cause of action will arise if it can be shown, as a matter of construction of the statue, that the statutory duty was imposed for the protection of a limited class of the public and that

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68 See [41], [44], [48], [51], [52] and [53].
69 *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397 at 405.
70 *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 424-425.
71 *X (Minors) v Bedfordshire C.C.* [1995] 2 AC 633 at 730-732.

> Parliament intended to confer on members of that class a private right of action for breach of the duty.
>
> …
>
> The cases where a private right of action for breach of statutory duty have been held to arise are all cases in which the statutory duty has been very limited and specific as opposed to general administrative functions imposed on public bodies and involving the exercise of administrative discretions."[72]

[174] This reasoning has been applied in Australia.[73] Le Miere J in *Alcoa of Australia Ltd v Apache Energy Ltd*[74] outlined the following elements as necessary for a civil cause of action for statutory breach:

> "1. the intention of Parliament to allow an action.
>
> 2. the plaintiff must fall within the "limited class" of the public for whose benefit the statutory provision was enacted;
>
> 3. the damage suffered must also fall within the intended scope of the statute;
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> 4. the obligation under the statute was imposed on the defendant;
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> 5. the defendant must have breached the statute; and
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> 6. that breach must have caused actual damage of some sort to the plaintiff."[75]

[175] The State Related Parties submit that where legislation is passed "primarily for the general good", and where it is not for the benefit or protection of a particular class of persons, that is a strong indication that Parliament did not intend there would be a private right of action.[76]

[176] Further, it is submitted that the cases where it has been found that statutory duty confers a private right of action are where:

(a) a statute identifies a specific precaution for the safety of others; and

(b) the statutory duty exists adjacent to an existing common law duty of care.[77]

[177] Additionally, merely being a person within a class of person to whom parts of an Act are directed is not sufficient to establish an action for breach of statutory duty.[78]

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72 At 731 and 732.

73 *AS (by her litigation guardian Arthur) v Minister for Immigration and Border Protection* [2016] VSCA 206 at [20], [22], [33] – [34] per Warren CJ, Osborn and Beach JJA. See also *Alcoa of Australia Ltd v Apache Energy Ltd* [2012] WASC 209 at [83] per Le Miere J.

74 [2012] WASC 209.

75 At [80].

76 *Gardiner v Victoria* [1999] 2 VR 461 at [24] per Phillips JA and Winneke P agreeing.

77 *HNOE Ltd v Angus & Julia Stone Pty Ltd* [2024] NSWCA 271 at [62] – [63] per Bell CJ, Leeming JA and Payne JA agreeing; *Shultz v Schmauser* [2001] 1 Qd R 540 at [30] – [32] per Pincus JA; *XBT v State of Queensland* [2025] QSC 9 at [59] per Sullivan J.

78 *HNOE Ltd v Angus & Julia Stone Pty Ltd* [2024] NSWCA 271 at [64] per Bell CJ, Leeming JA and Payne JA agreeing; *XBT v State of Queensland* [2025] QSC 9 at [48] per Sullivan J

[178] The State Related Parties submit that the ***Category 1(a)*** amendments do not properly plead a cause of action for damages for breach of a statutory duty. To illustrate this deficiency the proposed pleading in respect of the declaration by the Minister dated 16 December 2016 is considered in detail. The reasoning equally applies to the other pleaded declarations.

[179] The proposed pleading sets out the alleged duty as follows:

(a) Section 93 and Schedule 5 of the TI Act imposed a duty on the Minister to set an amount for the UAC that accorded with the alleged proper construction of s 93(6) of the TI Act.[79]

(b) On a proper construction of s 93(6) of the TI Act the UAC was required to be not more than the reasonable or market cost of the objectively necessary tasks, steps or activities of administering and collecting payment of the toll[80].[81]

(c) Particulars are set out in Schedule B to the proposed Further Amended Statement of Claim. Schedule B includes references to parts of the expert reports and also possible alternatives for the tasks, steps or activities and also the reasonable or market rates for 2017 and 2022 financial years.

[180] The State Related Parties submit that the pleading of the alleged duty is deficient, particularly as:

(a) The proper construction of s 93 of the TI Act is a question of law and the opinions of experts are irrelevant to the issue.

(b) The plaintiff has not identified the material facts and particulars sufficiently to support the allegations, so the defendants know the case they have to meet.

[181] A separate complaint is raised in respect of [5.7] of the proposed Further Amended Statement of Claim which pleads that the TI Act imposed on the Minister "the duty pleaded in [5.5] … and … [5.6] above" to protect non-arranged travellers from actions of Queensland Motorways. The State Related Parties submit that the alleged duty in [5.7] does not follow from the alleged duty in [5.5] and [5.6], the relevant part of the TI Act is not identified and the alleged duty to prevent harm to non-arranged travellers is not sufficiently identified.

[182] Paragraph [5.42] of the proposed Further Amended Statement of Claim deals with the alleged breach of the statutory duty. The State Related Parties submit:

(a) The proposed pleading is not directed to the pleaded statutory duty on the basis of the alleged proper construction. Rather the proposed pleading provides that the Minister breached the duty as he gave no, or no reasonable, consideration to the requirements of the TI Act or whether the UAC "was not more than the reasonable cost". The proposed pleading also asserts that the Minister did not engage an independent auditor or other appropriate expert, when there is no allegation pleaded that the Minister had a duty to do so.

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79 [4.8(a)] and [5.5(a)] of the proposed Further Amended Statement of Claim.

80 From 16 March 2018, also capturing, processing and using an image to identify a vehicle at a toll plaza for the toll if the UAC included an Image Processing Fee.

81 [4.8(a)] of the proposed Further Amended Statement of Claim.

(b) The proposed pleading asserts that the UAC was contrary to the proper construction of the TI Act but does not identify the material facts relied upon to support the allegation.

[183] The State Related Parties also contend that the plaintiff is required to plead the material facts establishing causation.[82] That is, that the loss and damage was caused by the alleged breach of duty. This requires a "direct and unambiguous identification of the material facts relied upon to establish the causal link".[83]

[184] Further, the State Related Parties submit that the plaintiff has not identified or sufficiently identified the material facts or particulars to establish that causal link. Specifically, the facts are not identified which could lead to a reasonable inference that each of the breaches caused the amount of the UAC to exceed the proper construction of s 63 of the TI Act and the loss and damage alleged.[84]

[185] It is submitted that these pleading deficiencies are an additional basis to refuse leave for the ***Category 1(a)*** amendments.

[186] The State Related Parties also submit that the plaintiff should not be given leave to deliver a further proposed pleading that relies on a civil claim for damages for an alleged breach of statutory duty in the following circumstances:

(a) Section 93 of the TI Act does not expressly confer a right to seek damages if the charges notified are not reasonable costs. Such a right could arise by implication but that is rare.

(b) The purpose of s 93 of the TI Act is to provide for the declarations of tolls payable on Queensland roads and provide notice of the charges for use of those roads. The exercise of the power is an administrative decision forming part of the toll road scheme and the regulation of Queensland roads. Consequently, the provision confers a power on the Minister exercised as part of a scheme for the benefit of the public at large, and not for the benefit of non-arranged travellers.

(c) While the UAC and the AC are set by the declaration under s 93 of the TI Act, a person is only liable to pay the charges in certain circumstances. That is, a person is only liable to pay if they do not make a payment other than in cash, or by a touch tag or the eToll system.[85] Further, the toll road operator may elect not to seek payment of the charges or waive the liability. Section 93 in the context of the toll road scheme does not impose a requirement on a Minister to take a specific precaution for the safety of others.

(d) A Minister does not have a pre-existing duty of care to prevent a risk of harm to non-arranged travellers. This is a factor which tends against s 93 of the TI Act conferring a private cause of action.

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82 *Southern Cross Mine Management Pty Ltd v Ensham Resources Pty Ltd* [2004] QSC 457 at [15] per Chesterman J.

83 *Lee v Abedian* [2017] 1 Qd R 549.

84 [5.43(a)] to [5.44] of the proposed Further Amended Statement of Claim.

85 The AC only becomes payable if the UAC is not paid.

(e) There is no other provision in the TI Act which supports a construction of s 93 of the TI Act that it was intended to confer a private civil law right on non-arranged travellers.

(f) Parliament made express provision for compensation to individuals in specific sections of the TI Act: s 37 (owner of land who suffers physical damage), s 42(4) (approved road works by a local government on condition of compensation), s 73 (owner or occupier of land adversely affected by a decision in respect of access between properties and State-controlled roads), s 84D(3) (a person with an interest in land declared to be a State Toll Road corridor under s 84A) and s 105JA (a person who has an interest in land declared to be a local government tollway corridor under s 105H). This supports the proposition that if Parliament had intended for a breach of s 93 of the TI Act to confer a right to compensation, then Parliament would have made express provision for it.

(g) The purpose of s 93 of the TI Act is to permit the imposition of a charge on drivers that do not arrange to pay a toll before travel to ensure fairness for other road users and to act as a deterrent to doing so. It is not a conferral of a private right, but rather a limitation on the exercise of the power. Accordingly, it is unlikely that Parliament would have intended that road users that defer their liability to pay a toll would have a right to damages if charges are imposed that do not represent the reasonable costs of administering the scheme.

[187] In reply the plaintiff says:

(a) The plaintiff seeks to join a defendant and r 69(2)(a)(iii) or (iv) of the UCPR applies. If the State related Parties' construction of r 69(2) was correct, then r 69(2)(a)(iii) and (iv) would have no work to do.

(b) The ***Category 1(a)*** amendments arise out of the same facts or substantially the same facts as the cause of action already pleaded.

(c) The pleading of the ***Category 1(a)*** amendments is sufficient, and it could not be said that the cause of action was "untenable" or "manifestly groundless" in the absence of all the facts.

(d) The plaintiff has not abandoned its claim against the State.

(e) The prejudice that it is claimed that the Ministers will suffer is hypothetical where the State has provided disclosure of documents. Further, the State should have spoken to relevant witnesses already given the existing claim.

[188] In respect of r 69, the plaintiff says that the Minister was always part of the pleaded case, and the current Amended Statement of Claim treats the Minister and the State as effectively the same. The plaintiff contends that the Minister and the State's obligations were one and the same and consequently the ***Category 1(a)*** amendments plead the same cause of action, as it is the same claim.

[189] Further, r 69(2)(a)(iii) and (iv) are remedial and a wide interpretation should be given to those rules.[86] Accordingly, (iii) applies where there has been a misnomer but also where a further party should have been joined.[87] Further (iv) applies where the Court

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86 *Interline Hydrocarbon Inc v Brenzil Pty Ltd* [2006] 2 Qd R 454 at [17].

87 *Interline Hydrocarbon Inc v Brenzil Pty Ltd* [2006] 2 Qd R 454 at [18] to [21].

considers it is doubtful that the proceeding was started against the name of the right person as a party and would extend to the initial defendant remaining a defendant, as well as adding a party. In both scenarios notice is to be given of the intention to make the order.[88]

[190] In respect of r 376(4)(a) of the UCPR, the plaintiff says that any prejudice that may be suffered by the Ministers is not such as to warrant the refusal of leave to amend. The Ministers were always part of the pleaded case, and it is likely that the contemporaneous documents will be the significant evidence rather than recollections of witnesses.

[191] The plaintiff also submits that it would not be appropriate to determine the statutory construction point at this preliminary stage in the absence of the full factual context. It is submitted this also applies to the joinder of the Ministers.

[192] Turning to consider the sub-issues in respect of the ***Category 1(a)*** amendments, namely:

(a) Is one of the matters in r 69(2)(a)(iii) or (iv) satisfied for joinder of the Ministers as defendants after the limitation period has expired?

(b) Pursuant to r 376(4)(b) of the UCPR, does the cause of action in the ***Category 1(a)*** amendments arise out of the same facts or substantially the same facts as the cause of action in the current Amended Statement of Claim?

(c) Pursuant to 376(4)(a) of the UCPR, is it appropriate to grant leave in respect of the ***Category 1(a)*** amendments?

Is one of the matters in r 69(2)(a)(iii) or (iv) satisfied for joinder of the Ministers as defendants after the limitation period has expired?

[193] For the purposes of r 69(1)(b) of the UCPR, on a consideration of the current Amended Statement of Claim and the proposed ***Category 1(a)*** amendments, each of the Ministers would be:

(a) "a person whose presence before the court is necessary to enable the court to adjudicate effectually and completely on all matters in dispute in the proceeding"; and

(b) "a person whose presence before the court would be desirable, just and convenient to enable the court to adjudicate effectually and completely on all matters in dispute connected with the proceeding".

[194] Further, joinder of the Ministers would be consistent with the purpose in r 5 of the UCPR of facilitating "the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense."

[195] However, that analysis does not provide an answer in the current circumstances as the relevant limitation periods have expired.[89] Accordingly, r 69(2) of the UCPR is applicable and that rule provides that "the court must not include or substitute a party after the end of a limitation period" unless one of the matters set out applies.

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88 *Interline Hydrocarbon Inc v Brenzil Pty Ltd* [2006] 2 Qd R 454 at [18] to [21].

89 To the extent that any limitation period has not expired this will need to be considered separately.

[196] The relevant matters are set out in paragraphs (a) to (f). The plaintiff relies upon paragraphs (a)(iii) and (iv). These provisions relevantly provide:

> "(a) the new party is a **necessary party** to the proceeding because –
>
> (iii) the proceeding was started in or against the name of the wrong person as a party, and, if a person is to be included or substituted as defendant or respondent, the person is given notice of the court's intention to make the order; or
>
> (iv) the court considers it **doubtful the proceeding was started in or against the name of the right person as a party**, and, if a person is to be included or substituted as defendant or respondent, the person is given notice of the court's intention to make the order". (emphasis in bold added)

[197] In written and oral submissions much has been said about the role of the relevant Minister as opposed to the State, including that the current pleadings tend to use Minister and State interchangeably.

[198] This is not an entirely unusual issue in proceedings involving the intersection of responsibilities between Ministers, government departments and agencies and the State of Queensland. Often the "correct" party or parties are joined or substituted at an early stage.

[199] It is unfortunate that the issue about the Ministers and the State was not clearly crystalised earlier. While the earlier correspondence confirms that the State was cognisant of the potential different liability of the Ministers and the State, given the way that the matter has progressed, the plaintiff was not. The State's position was explored at the hearing and, even then, it was only clarified in a piecemeal fashion.

[200] The State is sued in "the name of the Crown in right of Queensland and it is liable to be sued under section 8 of the *Crown Proceedings Act 1980* (Qld)".[90] Counsel for the plaintiff acknowledged that the current debate is whether the State, being the Crown in right of Queensland, includes the Ministers or not within the construction of s 8 of the *Crown Proceedings Act 1980* (Qld). The statutory definitions do not expressly include Ministers.[91]

[201] Further, the defence of the State denies liability of the State but does not grapple with the Ministers which is clearly set out in the plaintiff's pleaded case and which intermingles the role, obligation and potential liability of the State and the Ministers. This is something that should have been positively pleaded, particularly with the benefit of hindsight. Otherwise, this distinction between the Ministers and the State clearly had the potential to take the plaintiff by surprise at trial.

[202] The practical effect of the proposed joinder of the Ministers and the ***Category 1(a)*** amendments, at least in part, is to "unpack" the current pleading to differentiate between the role, obligation and potential liability of the Ministers and the State.

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90 At [11A] of the current Amended Statement of Claim.

91 It is submitted this is in contrast to the definitions in the legislation in some other States which expressly includes Ministers: for example, New South Wales.

[203] On this basis, the plaintiff is really submitting that the current party, being the second defendant, incorrectly bundled the State and the Ministers together as the single "entity" of the State. Now the plaintiff seeks to separate out the single party into two parties: the State and the Ministers.[92] This reflects the position articulated by the State in submissions that there is a distinction between them.

[204] The issue is then whether this falls within r 69(2)(a)(iii) or (iv), as one of the preconditions to the joinder of a party outside the limitation period.

[205] The plaintiff submits that the phrases "the wrong person as a party" or "doubtful the proceeding was started …. against the name of the right person as a party" are wide enough to apply here.

[206] Rules 69(2)(a)(iii) and (iv) are remedial in nature and should be given a wide interpretation. This is also consistent with r 5(2) of the UCPR which requires the rules to be applied "with the objective of avoiding undue delay, expense and technicality and facilitating the purpose of [the] rules".

[207] The authority that is of the most assistance in construing these provisions is Muir J's reasons in *Interline Hydrocarbon Inc v Brenzil Pty Ltd.*[93] His Honour reasoned that these two provisions were not limited to cases of misnomer only but were broad enough to include adding an additional party, rather than merely substitution for the existing party.

[208] Further, on the facts of that case his Honour had to consider arguments that the party sought to be joined was an "undisclosed principal" or alternatively the existing party was the party (sought to be joined)'s "alter ego". The applicant had intended to sue the existing party, as the contracting party, but was unaware of many of the facts and the implications of those facts. These facts included that there were common officers and employees between the two companies, as well as the possible agency and "alter ego".

[209] Muir J concluded:

> "[26] … Without attempting to be exhaustive, it is doubtful that the proceeding was started against the name of the right corporation as a party where only one of two corporations potentially liable is sued and the corporation not sued is the holding company of the other, its principal and perhaps its alter ego. It is sufficient for present purposes that the applicants have an arguable case in that regard. Additionally, subr. (iv) operates where the court considers it doubtful that the proceeding was started against the name of the right person."

[210] Analogous reasoning applies here, particularly where the Ministers are already included in the current pleading and the issue of whether the State, in the right of the Crown, included the Ministers appears not to have been fully traversed.

[211] Further, an explanation is given by the solicitor for the plaintiff. While this explanation is complicated by the correspondence flagging whether the Ministers

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92 Or three parties, given each of the Ministers would be joined in their own right.
93 [2006] 2 Qd R 454.

would be joined but not putting the plaintiff on notice of the implications of not joining the Ministers, I accept the plaintiff's explanation.

[212] Accordingly, the Court has reached the view that it is doubtful that the proceeding was started against the name of the right party where only one of two parties potentially liable is a party and the party not sued is effectively the authorised officer of the existing party under the relevant legislation.

[213] In the circumstances, r 69(2)(a)(iv) applies and the Ministers may be joined as parties. However, this must be subject to a consideration of r 376(4) below.[94]

*Pursuant to r 376(4)(b) of the UCPR, does the cause of action in the **Category 1(a)** amendments arise out of the same facts or substantially the same facts as the cause of action in the current Amended Statement of Claim?*

[214] The test in r 376(4)(b) of the UCPR appears straightforward but is often difficult to apply. This is reflected in the authorities considering the practical application of the rule. While the decisions in respect of r 376(4)(b) of the UCPR largely turn on the particular facts in each case, a consideration of the authorities is of some assistance.

[215] In *Firstmac Ltd v Hunt and Hunt*[95] Bond J (as his Honour then was) had to consider whether the proposed amendment was a new cause of action and this required consideration of the line between further particularity and a new cause of action. The case also involved consideration of the dividing line between a new cause of action arising out of the same facts as an existing cause of action, and one which does not. In that regard, Bond J observed:

(a) Questions of degree and fine judgment may arise and "can turn on the level of abstraction at which a plaintiff's case is described".[96]

(b) "… in locating the dividing line, the pleading should not be analysed too critically, nor read pedantically, but broadly, resolving ambiguities or doubtful expressions in favour of the pleader, and allowing inferences to be drawn from incomplete facts. Nevertheless, the required analysis should be informed by an appreciation that the policies underlying the limitation statute may be inappropriately undermined by conducting the analysis at too high a level of generality."[97]

(c) The adequacy of the original pleading will always be relevant.[98]

[216] In *Gladstone Ports Corporation Limited v Murphy Operator Pty Ltd*[99] the Court of Appeal considered r 376(4) of the UCPR in the context of an appeal from a decision allowing an amendment adding a new cause of action in a class action. The Court[100] identified that:

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94 Consistent with the statements of Bowskill SJA (as the Chief Justice then was) in *Australian Golf Management Corporation Pty Ltd v Logan City Council* [2021] QSC 291 at [29] to [32] and [38]. Affirmed on appeal: [2022] QCA 86.

95 [2018] QSC 258.

96 At [21] and [24].

97 At [22] and [24].

98 At [25].

99 (2024) 20 QR 1.

100 Flanagan JA, Buss AJA and Kelly J.

(a) The task under r 376(4) "calls for a comparison between causes of action and material facts contained in the existing pleading and those contained in the proposed pleading".[101]

(b) If an amendment introduces a new cause of action, "the next inquiry is whether the new cause of action arises out of substantially the same facts as those already pleaded".[102]

[217] Some general principles can be distilled from the reasons of the Court of Appeal, including:

(a) The words "substantially the same facts" are not to be read as "tantamount to the same facts".[103]

(b) The "story" is what the plaintiff has to prove, and the Court is to take a "fairly broad brush" comparison of the nature of the original claim and the proposed amendments.[104]

(c) Even where the facts giving rise to a duty of care are the same, where the facts constituting the alleged breaches are quite different, the cause of action does not arise out of the same facts, nor substantially the same facts.[105]

(d) The inquiry is not a "straitjacket" but "at least demands an understanding of the substantive facts underpinning the existing and the new causes of action. The broad brush approach must always be premised upon, and referable to, that required understanding".[106]

(e) The "inappropriate application of the broad brush approach" may be corrected on appeal.[107] In *Thomas v State of Queensland*,[108] the Court of Appeal considered a claim that an injury to a motorcyclist was caused by contemporary construction work, and a proposed amendment that the accident was caused by negligence in the initial construction of the highway. The Court found that while the injury and the incident were the same, the amendment involved a different duty, a different breach, and a different cause of injury.[109] The primary judge had "used rather too broad a brush".[110] The Court of Appeal found that the allegations did not arise out of substantially the same facts as the original claim.

[218] The Court of Appeal's reasoning in *Gladstone Ports Corporation Limited v Murphy Operator Pty Ltd*[111] is of some assistance. In that case:

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101 At [121].
102 At [165].
103 At [165]. See also *Draney v Barry* [2002] 1 Qd R 145; [1999] QCA 491, [57].
104 At [166]. See also *Thomas v State of Queensland* [2001] QCA 336, [19].
105 An example of this is *Pianta v BHP Australia Coal Ltd* [1996] 1 Qd R 65, where the duty arose out of the employer/employee relationship and one breach was an injury alleged to arise from inadequate suspension in a vehicle and the other breach was an injury alleged whilst attempting to repair a dozer.
106 At [169].
107 At [170].
108 [2001] QCA 336.
109 At [16].
110 At [20].
111 (2024) 20 QR 1.

(a) The existing pleading alleged a duty "in managing or using the Bund".[112] There was no allegation of any breaches of duty in the design and construction of the Bund.

(b) The proposed pleading alleged negligence "in the design and construction of the Bund".[113]

(c) Different periods of time were involved in each and the nature of the relevant material facts were "markedly different".[114]

[219] The Court of Appeal further observed:

> "[179] In deciding that the new causes of action arose out of substantially the same facts as the existing causes of action, the primary judge identified "the clearest indicator" as "the same timelines". However, properly characterised, the matters referred to merely referenced matters of historical background, to which the existing pleading attached no significance in alleging the Duty, the Precautions or breaches of the Duty. That is, to the extent that the existing pleading referenced matters concerning design and construction, which it undoubtedly did, those matters were properly characterised as background matters but were not facts relied upon as revealing a breach of duty. To adopt the language of the Court in *Pianta*,[115] "the facts constituting the breaches of duty in each case were quite different; neither the same nor substantially the same".
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> [180] The issue as to whether the new causes of action arose out of substantially the same facts as the existing causes of action involved matters of impression and degree and a point of practice and procedure. The primary judge should be afforded significant deference in relation to discretionary decisions involving practice and procedure in the case management of a very difficult and complex representative proceeding. Even allowing appropriate weight to the primary judge's conclusions, a "fair reading"[116] involving an analysis of "the scope"[117] of the existing pleading and the proposed pleading, demonstrates error in the conclusion that any new causes of action arose out of substantially the same facts as the facts constituting the causes of action in the existing pleading. The proposed pleading sought to include new causes of action which did not satisfy the requirements of r 376(4)(b). The new causes of action were integral to, and permeated, the proposed pleading. Leave to amend in terms of the proposed pleading should have been refused."

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112 At [174].

113 At [176].

114 At [178].

115 *Pianta v BHP Australia Coal Ltd* [1996] 1 Qd R 65, 68.

116 *Wolfe v State of Queensland* [2009] 1 Qd R 97, [11].

117 *Wolfe v State of Queensland* [2009] 1 Qd R 97, [10].

[220] A number of other decisions also provide some assistance in undertaking the necessary analysis.

[221] In *Zonebar Pty Ltd v Global Management Corporations Pty Ltd*[118] the Court of Appeal constituted by Keane JA, with whom White J and Wilson J agreed, considered an appeal from the refusal of an application to allow an amendment to raise a new cause of action after the expiry of the limitation period.

[222] In that case, the existing pleading involved allegations of the failure to exercise reasonable care and diligence in advising Zonebar Pty Ltd in relation to the approvals necessary for the development from the local authority and for loss caused by contraventions of the *Trade Practices Act 1974* (Cth). The pleading included that part of the development, Lot 100, became part of the revised development approval. However, it was not alleged that any loss was suffered as a result of that approval or that such loss was caused by misconduct by the respondents.

[223] The proposed amendment was a claim to recover loss allegedly suffered by Zonebar Pty Ltd as a result of the creation and dedication of Lot 100 as part of the revised development approval. The allegations included that the respondents had failed to advise Zonebar Pty Ltd that it should have opposed rather than consented to the revision of the development approval. Further, Zonebar Pty Ltd alleged that the respondents failed to advise it that it had a right to compensation under the *Integrated Planning Act 1997* (Qld).[119]

[224] Keane JA identified the relevant issue as whether the new allegations in relation to Lot 100 gave rise to a new cause of action, and, if so, whether r 376 of the UCPR permitted the amendment notwithstanding the expiration of the limitation period.[120]

[225] In considering this issue, Keane JA commented as follows:

> "[18] It is clear that Zonebar had not, prior to the disputed amendment, sought to advance a claim based on the respondents' acts or omissions in respect of its dealings with the local authority in respect of Lot 100. Zonebar argues, nevertheless, that it had made claims relating to the failure of the respondents to meet their obligation of reasonable skill, care and diligence in relation to rezoning applications to the local authority. But no allegations had been made in relation to the particular exigencies of the rezoning application in respect of which reasonable skill, care and diligence were required in relation to Lot 100, or the acts and omissions which are now said to have breached that obligation. Nor had Zonebar made an allegation that any loss had been suffered by it as a result of the creation of Lot 100.
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> [19] The only mention made of Lot 100 in Zonebar's statement of claim before the disputed amendment was that its land was subdivided on 29 August 2001 to create Lot 100 and that it was dedicated to the Crown as parkland reserve. There was no

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118 [2009] QCA 121.
119 At [6] to [9].
120 At [11].

> suggestion that the creation and dedication occurred as a result of any act or omission on the part of the respondents much less that such act or omission involved a breach of duty or a contravention of the *Trade Practices Act*. Nor was it alleged that the dedication of the land to the Crown as parkland was a loss suffered by Zonebar."

[226] In respect of r 376(4) of the UCPR, Keane JA observed:

> "[21] Zonebar's previous pleading contained no hint that it was propounding a case that the defaults of the respondents had led to the dedication of the parkland associated with Lot 100 or that this dedication had caused Zonebar loss. Nor was there any allegation that the respondents were duty-bound to advise it of its right to compensation or that they had defaulted in the performance of that duty. Nor was there any allegation that the respondents had misled Zonebar in that regard.
>
> [22] Allegations of acts or omissions on the part of the respondents apt to establish the liability newly asserted by Zonebar in the amendments were simply absent from its previous pleading. Even on the view of r 376(4)(b) of the UCPR most generous to it, these new causes of action do not arise out of the same or substantially the same facts as the causes of action for which relief had already been claimed.
>
> [23] On the approach advanced by Zonebar, in a case where a contract imposes two separate obligations, A and B, upon a defendant, an allegation of a breach of obligation B would be held to arise out of substantially the same facts as were previously pleaded simply because the previous pleading referred to the contract and alleged breach of A.[121] To accept such an outcome would be to make a mockery of the requirement in r 376(4)(b) of the UCPR that the new cause of action must arise out of 'substantially the same facts' as those already pleaded. The substance of the new cause of action is different in terms of the acts or omissions which give rise to it, and the adverse consequences for which damages are claimed."

[227] In *Brisbane Airport Corporation Pty Ltd v Arup Pty Ltd*[122] Applegarth J also considered the operation of r 376(4) of the UCPR. The case concerned a construction dispute with a claim in negligence and in the alternative for contravention of the *Trade Practices Act 1974* (Cth) arising out of alleged representations in relation to the design of the Northern Apron Expansion at Brisbane Airport. An amended statement of claim was delivered, and the issue was whether it introduced a new cause of action in negligence which was statute barred.[123]

[228] Following an extensive review of the authorities and legal principles, his Honour compared the original statement of claim with the amended statement of claim. In

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121 *Wolfe v State of Queensland* [2008] QCA 113 at [18] – [19].

122 [2017] QSC 232.

123 At [4].

considering whether the amendment arose out of substantially the same facts as the existing cause of action, Applegarth J noted:

(a) The pleaded harm by the breaches of duty was the same. That is the risk of excessive consolidation in the material beneath the Northern Apron Expansion. The amendment raised for the first time a particular content of that duty with respect to the compaction of sand.[124]

(b) The fact that different breaches have common consequences is not sufficient to satisfy the test in r 376(4)(b). However, "commonality of consequences" is relevant when considering whether "one is concerned with 'substantially the same story'". That is, the "story may end the same way".[125]

(c) Little is to be gained by attention to the facts of other cases.[126]

(d) This was not a case where a "very different kind of breach" was proposed in the amendment or where the consequences of the newly alleged breaches of duty were different. Both the original and proposed cause of action involved the risk of consolidation of parts beneath the Northern Apron Expansion.[127] Originally it concerned ground material, and the amendment related to the sand subgrade. They were different aspects of how there was a failure to consider the risk of post-construction consolidation, what should have been done about the risk in the design, and the works which would have been required to construct it.[128]

(e) The "new story" involved some additional details and changed focus, taking into account the ground conditions and the materials beneath the surface.[129]

[229] His Honour concluded that the amendments arose out of substantially the same story.

[230] Kelly J in *Devine Constructions Pty Ltd v Heinrich Constructions Pty Ltd*[130] also considered an application for leave to amend pursuant to r 376(4) of the UCPR in the context of a construction dispute. His Honour helpfully reviewed the principles, including the Court of Appeal decision in *Gladstone Ports Corporation Limited v Murphy Operator Pty Ltd,*[131] Applegarth J's decision in *Brisbane Airport Corporation Pty Ltd v Arup Pty Ltd*,[132] and Keane JA's reasons in *Zonebar Pty Ltd v Global Management Corporation Pty Ltd.*[133]

[231] Kelly J concluded on the facts in that case that the proposed amendments were "properly regarded as part of the same story".[134] This was open on the facts, even if a proposed alternative cause of action may be contradictory to existing facts.[135] There were significant facts which were common to the existing pleading and the proposed

124 At [44].
125 At [45].
126 At [46].
127 At [47].
128 At [49].
129 At [52].
130 [2024] QSC 285.
131 (2024) 20 QR 1.
132 [2017] QSC 232.
133 [2009] QCA 121.
134 *Devine Constructions Pty Ltd v Heinrich Constructions Pty Ltd* [2024] QSC 285 at [48].
135 At [47].

causes of action, supporting the conclusion that the "policies underlining limitation periods [were] not undermined" by the characterisation of the "stories" in this way.[136]

[232] Turning to consider current Amended Statement of Claim and the ***Category1(a)*** amendments.

[233] In the current case:

(a) At a general level, both the current Amended Statement of Claim and the ***Category 1(a)*** amendments plead a statutory duty arising from s 93 of the TI Act and an allegation of breach of that statutory duty.

(b) The current Amended Statement of Claim pleads the primary wrongdoer as the State, whereas the ***Category 1(a)*** amendments plead the Ministers as the primary wrongdoers, with the State vicariously liable for the Ministers.

(c) The current Amended Statement of Claim pleads a timeline from the making of the declarations pursuant to s 93 of the TI Act, whereas the ***Category 1(a)*** amendments commence the timeline prior to that with steps taken (or not taken) by the Ministers prior to the making of the declarations.

(d) The ***Category 1(a)*** amendments raise issues that are not raised in the current Amended Statement of Claim, including whether the Ministers owed the alleged duties, whether the Ministers breached those duties, whether the plaintiff suffered loss by reasons of the breaches and whether the State is liable for the acts of the Ministers.

(e) The material facts pleaded giving rise to the alleged statutory duty and the alleged breaches are different, although at a general level arise out of the same events.

(f) While at first glance the stories are similar, they are ultimately quite different. To the extent that there is overlap between the facts in the current Amended Statement of Claim and the ***Category1(a)*** amendments the facts are deployed in a distinctly different way.

(g) While both concern an alleged breach of a statutory duty arising from s 93 of the TI Act, different kinds of breaches are alleged and also different consequences of the breaches.

(h) The "story" is properly characterised as new, particularly given the alleged breach of duty is quite different. The observations of Keane JA in *Wolfe v Queensland* discussed in *Gladstone Ports Corporation Ltd v Murphy Operator Pty Ltd*[137] at [163] – [164] are particularly applicable.

[234] To find that the ***Category 1(a)*** amendments arise out of the same or substantially similar facts would require the Court to consider the issue at too high a level of generality, which would result in the policies of the limitation statutes being undermined.

[235] In all of the circumstances and given the differences of substance between the current Amended Statement of Claim and the ***Category 1(a)*** amendments, the ***Category 1(a)***

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136 At [49].
137 (2024) 20 QR 1.

amendments do not arise out of the same facts or substantially the same facts as the cause of action in the current Amended Statement of Claim. Accordingly, r 376(4)(b) is not satisfied. On that basis, leave to amend must be refused.

*Pursuant to 376(4)(a) of the UCPR, is it appropriate to grant leave in respect of the **Category 1(a)** amendments?*

[236] Given the highly contested nature of this application, it is appropriate to go on to consider the further sub-issue of whether it is appropriate in any event to grant leave in respect of the ***Category 1(a)*** amendments.

[237] The factors to be considered under r 376(a) of the UCPR are broad and depend on the particular circumstances of the case. Commonly issues such as prejudice, prospects, an explanation for any delay, the impact on the progress of the proceeding and the impact on trial dates are considered by the Court. Another factor is whether, if leave to amend was granted, the amended pleading would be liable to be struck out due to deficiencies in the pleading of material facts and/or a viable cause of action.

[238] In *Northern SEQ Distributor-Retailer Authority (t/a Unitywater) v Monadelphous Engineering Pty Ltd*[138] Cooper J summarised the approach in respect of appropriateness as follows:

> "[53] However the inquiry as to appropriateness is a broad one and not confined to questions of prejudice.[139] The court should also have regard to the objectives stated in r 5 of the UCPR, being to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense and to avoid undue delay, expense and technicality, as well as the principles discussed in *Aon Risk Services Australia Ltd v Australian National University*.[140] The stage which the proceeding has reached when the amendments are made may have a bearing on weighing these various considerations.[141]
>
> [54] Further, … the fact that the applications concern the operation of limitations statutes means that it is appropriate to have regard to the policies that underlie such statutes,[142] as identified by McHugh J in *Brisbane South Regional Health Authority v Taylor*:[143]
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> > "The effect of delay on the quality of justice is no doubt one of the most important influences motivating a legislature to enact limitation periods for commencing actions. But it is not the only one. Courts and commentators have perceived four broad rationales for the enactment of limitation periods. First, as time goes by, relevant evidence is likely to be lost. Second, it is

138 [2025] QSC 253.
139 *Brisbane Airport Corporation Pty Ltd v Arup Pty Ltd* [2017] QSC 232, [53].
140 (2009) 239 CLR 175. See the summary of the relevant principles in *Harnett v Hynes* [2009] QSC 225, [27].
141 See, eg, *Brisbane Airport Corporation Pty Ltd v Arup Pty Ltd* [2017] QSC 232, [56].
142 *Brisbane Airport Corporation Pty Ltd v Arup Pty Ltd* [2017] QSC 232, [54].
143 (1996) 186 CLR 541, 552-553.

oppressive, even 'cruel', to a defendant to allow an action to be brought long after the circumstances which gave rise to it have passed. Third, people should be able to arrange their affairs and utilise their resources on the basis that claims can no longer be made against them. Insurers, public institutions and businesses, particularly limited liability companies, have a significant interest in knowing, that they have no liabilities beyond a definite period … The final rationale for limitation periods is that the public interest requires that disputes be settled as quickly as possible."

[55] In *Paul v Westpac Banking Corporation*,[144] the Court of Appeal confirmed the requirement to consider whether granting leave on an application under r 376(4) would inappropriately undermine these policies."

[239] Cooper J went on to consider in the circumstances of that case the course of the proceeding, delay in respect of joinder of a party and certain allegations and prejudice. In respect to prejudice in that case, Cooper J noted:

"[102] As to difficulty in accessing witnesses, I note McPherson JA accepted in *Allonnor Pty Ltd v Doran*[145] that the policies underlying statues of limitation are not usually threatened by an amendment that adds a ground of recovery arising out of the transaction or occurrence already in suit because, in circumstances where a defendant's sense of security concerning the transaction or occurrence has already been disturbed by the commencement of a proceeding, that defendant is likely to have collected and preserved all the evidence relating to the transaction or occurrence, not just those aspects of it that support or defeat a single legal theory."

[240] In *Junjie Ou v Xuefei Wang*[146] Freeburn J helpfully summarised the relevant considerations arising out of *Aon Risk Services Australia Limited v Australian National University* in the context of an application under the equivalent of r 375 of the UCPR. Similar considerations apply in respect of r 376(4)(a) of the UCPR.

[241] His Honour stated:

"The relevant considerations derived from that case may be summarised in this way:

(a) An order that the amending party pay the costs occasioned by the amendment is not necessarily "*a panacea that heals all*";[147]

(b) The strain that the litigation imposes on litigants, including corporate litigants, is a relevant consideration;[148]

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144 [2017] 2 Qd R 96, 103 [15], 105 [21].

145 [1998] QCA 372, 6 [8].

146 [2025] QSC 52.

147 (2009) 239 CLR 175 at [99]; *Cropper v Smith* (1884) 26 Ch D 700 at 711.

148 (2009) 239 CLR 175 at [100], [101].

(c) The objectives of rule 5,[149] that is, the just and expeditious resolution of the real issues at a minimum of expense, does not require that the court refuse applications to amend;

(d) The waste of some costs and some degree of delay are inevitable consequences of amendments; that waste and delay, and the extent of it, are relevant considerations;[150]

(e) The nature and importance of the amendment to the party applying to amend cannot be overlooked;[151]

(f) Factors weighing against allowing an amendment may be:

(i) the extent of the delay;

(ii) the costs associated with the delay;

(iii) the prejudice which might reasonably be assumed to follow;

(iv) any prejudice that is shown.[152]

(g) Much will depend on the point the litigation has reached relative to a trial when the application to amend is made;[153]

(h) A factor to consider is whether the party seeking to amend has had a sufficient opportunity to plead their case and whether it is too late to amend having regard to the other party and other litigants awaiting trial dates;[154]

(i) The exercise of the discretion will invariably require an explanation to be given where there is delay in applying for amendment;[155]

(j) An applicant will need to show that the application is brought in good faith as well as the circumstances giving rise to the amendments so that they may be weighed against the effects of any delay and the requirements of rule 5.[156]"[157]

[242] Turning to consider these factors in the current circumstances:

(a) The proceeding is being case managed on the Class Actions List, and it is still at a relatively early stage, with disclosure having been done in part and expert evidence obtained. No trial date has been set. This factor is neutral and does not tend, for or against the granting of leave.

(b) There have been opportunities to amend before now, as evidenced by the current Amended Statement of Claim. Further, the plaintiff has provided an

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149 In *Aon Risk*, the equivalent ACT rule was *Court Procedure Rules 2006* (ACT) rule 21.
150 (2009) 239 CLR 175 at [102].
151 (2009) 239 CLR 175 at [102].
152 Ibid.
153 Ibid.
154 Ibid.
155 Ibid. The adequacy of the explanation is also a relevant factor.
156 (2009) 239 CLR 175 at [103].
157 At [46].

explanation as to why the application was not brough earlier and in the context of the case management orders the explanation is logical and plausible. This is particularly so when amendments to reflect the substitution of the representative plaintiff would have to be made at an appropriate point in time. This was effectively postponed until after the other case management steps had been completed. This factor is neutral and does not tend for or against the granting of leave.

(c) Further, the plaintiff has provided an explanation for not joining the Ministers, which I accept while acknowledging there are some complicating features of the explanation. This factor tends towards being neutral and does not tend for or against the granting of leave.

(d) The nature of the proposed ***Category 1(a)*** amendments is considered in respect of the previous issue.

(e) The State Related Parties point to prejudice. However, this is likely to be minimised by the State having had to investigate documents and witnesses already given the existing claim raising similar subject matter (although noting the differences). In the circumstances of this case, this factor tends towards being neutral and does not tend for or against the granting of leave.

[243] These factors are not determinative of the question of appropriateness. The consideration of most significance is that if leave were granted, the pleading is vulnerable to being struck out due to the deficiencies identified in the submissions.

[244] The ***Category 1(a)*** amendments are deficient in the respects identified by the State Related Parties and do not fully disclose the case that the defendants are required to meet. This includes the pleading in respect of the statutory duty itself.

[245] While it would not be appropriate to summarily dismiss the application for leave to amend on the basis that no statutory duty arose, there are considerable difficulties that the plaintiff would need to overcome to plead a proper basis for the alleged statutory duty. The ***Category 1(a)*** amendments do not adequately deal with the imposition of the alleged statutory duty, the relevant breaches or causation.

[246] In these circumstances, it is not appropriate to grant leave in respect of the ***Category 1(a)*** amendments. Accordingly, r 376(4)(a) of the UCPR is not satisfied and leave is refused in respect of the ***Category 1(a)*** amendments.

[247] The consequence of that, is there is no basis to join the Ministers in respect of the ***Category 1(a)*** amendments.

Informal application for no leave to replead

[248] The State Related Parties contend that by the application seeking leave for the ***Category 1(a)*** amendments the plaintiff has abandoned its currently pleaded cause of action for breach of statutory duty by the State and leave to replead should be refused. To do so would be to summarily dismiss the plaintiff's claim in respect of the alleged statutory duty and breaches. It would not be appropriate to proceed as proposed.

[249] If the State wants to bring an application to strike out the current Amended Claim and Amended Statement of Claim,[158] it may do so by way of an application with supporting material. That would give the plaintiff the opportunity to properly respond to the concerns raised. It is not appropriate to tack on an informal application for orders with such serious consequences without proper notice and a proper opportunity for the issues to be heard and determined.

[250] Turning to consider the final category of amendments: the ***Category 1(b)*** amendments.

Should leave be granted in respect of the *Category 1(b)* amendments to add the new cause of action in negligence against the Ministers and vicarious liability against the State?

[251] The plaintiff also seeks to join the Ministers and add a new cause of action in negligence and amend the claim against the State by the ***Category 1(b)*** amendments. The ***Category 1(b)*** amendments are further or in the alternative to the ***Category 1(a)*** amendments.

[252] The ***Category 1(b)*** amendments are on the basis that:

(a) The Ministers set the UACs and the ACs as the State's agent or representative with the State's express, implied or apparent authority; and

(b) The breaches were so unreasonable that no public or other authority having the functions of the Minister under the TI Act could properly consider the acts or omissions to be a reasonable exercise of the Minister's function.

[253] The plaintiff contends that:

(a) While the negligence claims against the Ministers are new, they arise out of the same facts and circumstances as the existing statutory duty claim against the State: that is, the making of the Minister's declarations and the giving of notice setting the UACs and ACs for State Toll Roads.

(b) The new cause of action against the State for vicarious liability for negligence involves no new facts and arises out of the same facts as the pleaded breach of statutory duty against the State in the current amended Statement of Claim.

[254] Further, the same omissions or actions are relied upon in respect of the alleged breaches of duty for both the statutory duty claims and the negligence claims.

[255] Issues relevant to the joinder of the Ministers have been considered in respect of the ***Category 1(a)*** amendments above. They equally apply here but will not be repeated.

[256] The submissions and consideration of the ***Category 2(b)*** amendments in relation to the negligence claim against the Council are also relevant here. The same issues, and difficulties, arise here.

[257] In respect of the Ministers, the plaintiff contends that the Ministers each had a statutory power to set the UAC and the AC in accordance with the proper construction

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158 Or any amended claim and statement of claim for which leave to amend is granted.

of those terms in ss 93(5) and (6) of the TI Act and the Ministers exercised that power without reasonable care.

[258] The plaintiff's position is the same in respect of the proposed negligence claim against the Council and the Ministers: that is, it is an established category of case in which a duty of care arises.

[259] However, if the Court finds that the current case is outside an established category, the plaintiff acknowledges that whether a duty of care is owed depends on the consideration of all of the facts and circumstances.

[260] Similar to the proposed negligence claim against the Council, the plaintiff relies upon the assumption of responsibility and vulnerability as giving rise to the duty of care. For the reasons discussed in respect of the proposed ***Category 2(a)*** amendments the authorities relied upon and the facts do not establish any assumption of responsibility and the necessary vulnerability. This is particularly so where it is an economic loss claim.

[261] In respect of the salient features, the plaintiff contends that the posited duty does not give rise to any incoherence and that it is "compatible and harmonious" with the duties and power and functions of the Ministers and with the structure and purpose of the TI Act.

[262] It is also contended that no issue of indeterminacy arises and that it was reasonably foreseeable[159] that the plaintiff and group members would suffer loss in the event that the Ministers failed to take reasonable care in setting the UAC and the AC.

[263] Similarly to the position in respect of the ***Category 1(a)*** amendments, the State Related Parties submit that leave should be refused in respect of the ***Category 1(b)*** amendments. The bases identified include:

(a) In respect of many of the declarations any cause of action would be statute barred. Accordingly, the proposed amendments (to the extent that they are statute barred) need to be considered under r 69 and r 376 of the UCPR.

(b) Pursuant to r 69(2) of the UCPR a party must not be included after the end of a limitation period unless one of rr 69(2)(a) to (f) applies. The plaintiff relies on r 69(2)(a)(iii) and (iv) but the State contends that those rules do not apply in the current circumstances. In respect of the negligence claim, it is an entirely new claim and on no reading could it be said that the Ministers are substituted (or included) as a party when there was no negligence action previously commenced. Accordingly, r 69(2) cannot apply.

(c) For the purposes of r 376(4)(b), the proposed ***Category 1(b)*** amendments do not arise out of substantially the same facts pleaded in the current pleading, including that:

(i) The alleged breaches of duty by the Ministers rely on new facts not previously pleaded. Further, different time periods are relevant. For example, the alleged breach of statutory duty is pleaded as being the date of the publication of each declaration, while the alleged breach of duty

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159 This is an essential factor but is not "sufficient" for the existence of a duty of care to avoid economic loss: *Mallonland Pty Ltd v Advanta Seeds Pty Ltd* (2024) 98 ALJR 956 at [29] and [32].

in the negligence claim includes alleged conduct prior to the declaration being published.

(ii) The alleged vicarious liability of the State relies on new facts not previously pleaded, including an "express, implied or apparent authorisation".

(d) For the purposes of r 376(4)(a) of the UCPR, it is not appropriate to grant leave in respect of the ***Category 1(b)*** amendments, for the above reasons and also including:

(i) A forensic decision over four years ago not to commence an action in negligence against the Ministers and/or the State.

(ii) A further delay in bringing this application for leave to amend.

(iii) The Ministers will be prejudiced if leave is granted and they are joined as parties.

(iv) Even though some allegations may not be statute barred, the proposed pleading would need to be substantially revised to remove the allegations that are statute barred, including within the ***Category 1(b)*** amendments.

(e) The pleading of the proposed ***Category 1(b)*** amendments is deficient.

[264] In respect of the deficiencies in the pleading of a claim in negligence against the Ministers and vicarious liability of the State, it is submitted that:

(a) It is a novel claim, seeking damages for pure economic loss.

(b) In order to establish a duty of care was owed by the Ministers, the plaintiff needs to establish that the relationship between the Ministers and non-arranged travellers[160] was not one of "government and the governed", but rather was of "neighbours", in the sense of being amenable to being responsible under the private law of torts.

(c) There is no proper pleading of a cause of action for damages for breach of duty to exercise reasonable care.[161]

(d) The pleading is also deficient in identifying the basis for the imposition of the alleged duty of care for a number of reasons, including:

(i) While the plaintiff alleges that in making the declaration under s 93 of the TI Act the Minister was "required to exercise that power with reasonable care to prevent any loss to [the plaintiff] occasioned by the exercise of the power", this does not identify the provision(s) in the TI Act that are relied upon to support this assertion.

(ii) The plaintiff also asserts that by exercising the power under s 93 of the TI Act, the Ministers "assumed responsibility" to set an amount of the user administration charge that accorded with the alleged proper construction of the power. The state contends that this is not a relevant

160 Under the TI Act.

161 This needs to be considered in light of the comments at [44]-[47] above in relation to the particulars of loss and damage for 2017 and 2022 only and the plaintiff to be given the opportunity to reinstate the general plea in the particular circumstances of this case.

assumption of responsibility such as to give rise to a duty of care. That is the exercise of the power in s 93 of the TI Act by the Ministers is not an "undertaking (whether express or implied) by a person to take on a task or job for another person or class of persons, from which it can be inferred that the first person accepted that he or she would take reasonable care when engaging in that task or job."[162] Therefore, the proposed amendments that the Minister assumed responsibility for non-arranged travellers is untenable.

(iii) The plaintiff also pleads matters that the Ministers "knew or ought to have known", including that the plaintiff was "vulnerable". However, the plaintiff does not plead, as required by r 150(1)(k) and (2) of the UCPR, the material facts relied on to support the inference that the Ministers knew of ought to have known the matters alleged.

(iv) The plaintiff also pleads that the plaintiff was "vulnerable" and unable to protect itself from the Ministers' failure to exercise reasonable care. However, the State submits that there are no material facts pleaded as to the plaintiff's inability to protect itself. In contrast, to properly plead "vulnerability" the plaintiff is required to plead:

(A) "the precise respects in which they are alleged to have been vulnerable"; and

(B) "comprehensively ... the facts, matters and circumstances relied upon in support of any allegation that the … plaintiff …could not have taken steps to protect itself" from the relevant conduct.[163]

(e) On the facts, it was completely in the power of non-arranged travellers to avoid the UAC and the AC. In particular, the AC could be avoided by paying the toll upon receipt of a toll notice. The State submits that "[v]oluntary self-exposure to a cost does not render the party exposed to that cost vulnerable in the relevant sense."

(f) The ***Category 1(b)*** amendments are deficient in respect of the alleged breaches and make "bare assertions" that the UAC[164] was contrary to the proper construction of the TI Act. It is submitted that the plaintiff does not identify the material facts and particulars relied upon, including in respect if the requirements of the TI Act and whether the UAC was "not more than the reasonable cost".

(g) Further, the ***Category 1(b)*** amendments do not plead the material facts relied on in support of the inference that the Ministers were negligent, as required by s 150(1)(l) and (2) of the UCPR.

(h) The ***Category 1(b)*** amendments do not properly plead causation in respect of the alleged duty of care.

162 *Mallonland Pty Ltd v Advanta Seeds Pty Ltd* (2024) 98 ALJR 956 at [33].

163 *Raging Thunder Pty Ltd v Bank of Western Australia Ltd* [2012] QSC 329 at [114] and [115] as an example of a defective pleading warranting being struck out for defective pleading of vulnerability in a claim of negligence.

164 It can be inferred that this same submission applies in respect of the AC.

[265] Turning to consider the sub-issues in respect of the ***Category 1(b)*** amendments, namely:

(a) Is one of the matters in r 69(2)(a)(iii) or (iv) satisfied for joinder of the Ministers as defendants after the limitation period has expired?

(b) Pursuant to r 376(4)(b) of the UCPR, does the cause of action in the ***Category 1(b)*** amendments arise out of the same facts or substantially the same facts as the cause of action in the current Amended Statement of Claim?

(c) Pursuant to 376(4)(a) of the UCPR, is it appropriate to grant leave in respect of the ***Category 1(b)*** amendments?

[266] Given the previous discussion of the general principles in respect of the ***Category 1(a)*** amendments, the discussion of these sub-issues can be dealt with in a more shorthand way.

Is one of the matters in r 69(2)(a)(iii) or (iv) satisfied for joinder of the Ministers as defendants after the limitation period has expired?

[267] The consideration of the joinder of the Ministers is more complicated in respect of the negligence claim as the "proceeding" currently does not include any claim in negligence and therefore it may be more difficult to say that the "proceeding" was started "against the name of the wrong person" or the court considers "it doubtful the proceeding was started … against the name of the right person".

[268] However, applying the broadest interpretation in accordance with the remedial nature of the rules, it is at least open that there is a basis to join the Ministers.

[269] Accordingly, the court has reached the view that it is doubtful that the proceeding in its broadest sense was started against the name of the right party where only one of two parties potentially liable is a party and the party not sued is effectively the authorised officer of the existing party under the relevant legislation.

[270] In the circumstances, r 69(2)(a)(iv) applies and the Ministers may be joined as parties. However, this must be subject to a consideration of r 376(4) below.[165]

Pursuant to r 376(4)(b) of the UCPR, does the cause of action in the ***Category 1(b)*** *amendments arise out of the same facts or substantially the same facts as the cause of action in the current Amended Statement of Claim?*

[271] The factors discussed in the authorities outlined in respect of the consideration of this issue in respect of the ***Category 1(a)*** amendments are equally applicable. In fact, they are in sharper focus here.

[272] The current amended Claim and Amended Statement of Claim only include a cause of action against the State for breach of statutory duty. There is no claim in negligence.

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165 Consistent with the statements of Bowskill SJA (as the Chief Justice then was) in *Australian Golf Management Corporation Pty Ltd v Logan City Council* [2021] QSC 291 at [29] to [32] and [38]. Affirmed on appeal: [2022] QCA 86.

[273] While at a general level the same subject-matter is pleaded in respect of the proposed negligence action, it is a separate and distinct allegation of duty and breach. The comments of Keane JA in *Zonebar Pty Ltd v Global Management Corporations Pty Ltd*[166] are particularly relevant in respect of the ***Category 1(b)*** amendments: "The substance of the new cause of action is different in terms of the acts or omissions which give rise to it, and the adverse consequences for which damages are claimed."

[274] The reasoning of the Court of Appeal in *Gladstone Ports Corporation Limited v Murphy Operator Pty Ltd*[167] is also of assistance. In that case, the existing pleading alleged one duty, and the proposed pleading alleged a different duty, in negligence. Ultimately it was concluded on appeal that the facts constituting the breaches of duty in each case were quite different; neither the same nor substantially the same. This equally applies here in respect of the ***Category 1(b)*** amendments.

[275] In the current case:

(a) At a general level, both the current Amended Statement of Claim and the ***Category 1(b)*** amendments plead the alleged effects of the declarations made under s 93 of the TI Act and the invoicing and payment of the UAC and the AC.

(b) The current Amended Statement of Claim pleads breach of an alleged statutory duty by the State, and does not plead duty and/or breach in negligence.

(c) The current Amended Statement of Claim pleads a timeline from the making of the declarations pursuant to s 93 of the TI Act, whereas the ***Category 1(b)*** amendments commence the timeline prior to that with steps taken (or not taken) by the Ministers prior to the making of the declarations.

(d) The ***Category 1(b)*** amendments raise factual (and legal) issues that are not raised in the current Amended Statement of Claim.

(e) While at first glance the stories are similar, they are distinctly different. To the extent that there is any overlap between the facts in the current Amended Statement of Claim and the ***Category1(b)*** amendments the facts are deployed in a distinctly different way.

(f) While both allege a duty arising from s 93 of the TI Act, different kinds of duties and breaches are alleged, and also different consequences of the breaches.

(g) The "story" is substantially different given the alleged breach of duty is distinctly different. The observations of Keane JA in *Wolfe v Queensland* discussed in *Gladstone Ports Corporation Ltd v Murphy Operator Pty Ltd*[168] at [163] – [164] are particularly applicable.

[276] To find that the ***Category 1(b)*** amendments arise out of the same or substantially similar facts would require the Court to consider the issue at too high a level of generality, which would result in the policies of the limitation statutes being undermined.

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166 [2009] QCA 121 at [23].
167 (2024) 20 QR 1.
168 (2024) 20 QR 1.

[277] In all of the circumstances and given the differences of substance between the current Amended Statement of Claim and the ***Category 1(b)*** amendments, the ***Category 1(b)*** amendments do not arise out of the same facts or substantially the same facts as the cause of action in the current Amended Statement of Claim. Accordingly, r 376(4)(b) is not satisfied. On that basis, leave to amend must be refused.

*Pursuant to 376(4)(a) of the UCPR, is it appropriate to grant leave in respect of the **Category 1(b)** amendments?*

[278] Similar issues arise as those considered above in respect of the ***Category 1(a)*** amendments.

[279] The pleading deficiencies in respect of the ***Category 1(b)*** amendments are significant. The deficiencies are largely the same as those identified by the Council, with the additional concerns raised in respect of the alleged vicarious liability of the State.

[280] The deficiencies are such that if leave was granted the pleading constituted by the ***Category 1(b)*** amendments would be extremely vulnerable to being struck out for failure to comply with the pleading requirements of the UCPR.

[281] In these circumstances, it is not appropriate to grant leave in respect of the ***Category 1(b)*** amendments. Accordingly, r 376(4)(a) of the UCPR is not satisfied and leave is refused in respect of the ***Category 1(b)*** amendments.

[282] The consequence of that, is there is no basis to join the Ministers in respect of the ***Category 1(b)*** amendments.

[283] Further, similar to the reasons expressed above it would not be appropriate to consider the State's informal application to refuse leave to replead.

Orders

[284] In the circumstances, it is appropriate to hear further from the parties as to the appropriate orders in light of these reasons and also as to costs.

[285] To facilitate this, the Court directs that:

1. The parties liaise in relation to draft orders, in light of these reasons.
2. If the parties agree draft orders, the draft agreed orders are to be emailed to the Associate to Williams J by 3pm on 26 June 2026.
3. If the parties are unable to agree draft orders, each party is to email their proposed draft orders and brief submissions of no more than four pages outlining the reasons for the differences to the Associate to Williams J by 4pm on 9 July 2026.
4. The parties are to confer and agree directions for the provision of submissions and any supporting affidavits in respect of costs and provide the draft directions to the Associate to Williams J by 3pm on 26 June 2026.
5. The matter be listed for review at 9am on 30 July 2026 before Williams J.