

NOTICE OF FILING

Details of Filing

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File Title:	PABAI PABAI & ANOR v COMMONWEALTH OF AUSTRALIA
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink that reads "Sia Lagos".

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date of the filing of the document is determined pursuant to the Court's Rules.

Amended Concise Statement



No. 622 of 2021

Federal Court of Australia
District Registry: Victoria
Division: General

PABAI PABAI
First Applicant

GUY PAUL KABAI
Second Applicant

COMMONWEALTH OF AUSTRALIA
Respondent

1. Torres Strait Islanders, whose homelands are the islands, reefs, and waters of the Torres Strait, are especially vulnerable to the impacts of climate change.
2. Torres Strait Islanders already experience the effects of climate change by way of sea level rise including storm surges, coastal erosion, inundation and flooding of their villages, contamination of freshwater sources with saltwater; and observe the effects of ocean warming and acidification, coral bleaching and degradation of the marine environment. The projected impacts of climate change are far worse. Torres Strait Islanders face an existential threat from climate change.
3. The Representative Applicants, Pabai Pabai and Guy Paul Kabai, allege that the special relationship that exists between the Respondent, the Commonwealth of Australia, and Torres Strait Islanders, creates a duty of care that is owed by the Commonwealth, to act and protect against the harm that climate change has caused and will likely cause to Torres Strait Islanders' health and safety, their lands and seas, and their way of life.

A. THE PARTIES

4. Pabai Pabai and Guy Paul Kabai have commenced this proceeding as a class action on behalf of all ~~persons of~~ Torres Strait Islanders, whether by descent or by customary adoption, who have suffered ~~and/or may suffer~~ loss and damage as a result of the conduct of the Commonwealth. They claim for the loss and damage they have suffered and may suffer.
5. Pabai Pabai and Guy Paul Kabai are Torres Strait Islanders from the Guda_mMaluyigal Nation.

6. Pabai Pabai is 5~~2~~⁴ years of age. He resides on Boigu Island. He holds native title rights and interests in respect of Boigu Island.
7. Guy Paul Kabai is 5~~4~~⁵ years of age. He resides on Saibai Island. He holds native title rights and interests in respect of Saibai Island.

B. THE CLAIM

B1. The Torres Strait Islands and Torres Strait Islanders

8. The Torres Strait Islands, or *Zenadth Kes*, are the approximately 274 islands in an area of shallow open seas of approximately 48,000km² between the Cape York Peninsula and Papua New Guinea. The population is approximately 4,~~500~~¹²⁵ persons, 90% of whom identify as either Torres Strait Islander or Aboriginal and Torres Strait Islander.
9. Torres Strait Islanders include the Gudang, Kaiwalagal, Maluilgal, Guda~~_m~~^Maluyigal, Kulkalgal, and Kemerker Meriam Nations.
10. Torres Strait Islanders have rights and interests under traditional laws and customs recognised by the common law of Australia. Torres Strait Islanders may hold native title and/or native title rights and interests in relation to various parts of the Torres Strait Islands.
- ~~40.~~^{11.} Torres Strait Islanders have a distinctive culture, known as *Ailan Kastom*, which includes a unique spiritual and physical connection with the Torres Strait Islands and surrounding waters.

B2. Vulnerability of Torres Strait Islanders to Climate Change

- ~~41.~~^{12.} The small and low-lying islands of the Torres Strait are particularly vulnerable to the impacts of climate change. Many sections of villages in the Torres Strait Islands are located barely above high tide and regularly flood.
- ~~42.~~^{13.} Further, Indigenous peoples in Australia are disproportionately vulnerable to harm from climate change, including by reason of location, occupation, connection to the land and environment and social and economic disadvantage.

B3. Harm Caused by Climate Change to Torres Strait Islanders

- ~~43.~~^{14.} Climate change causes a wide range of impacts on the environment, which have direct consequences for human life, health, livelihoods and cultural practices.
- ~~44.~~^{15.} Australian and international scientific bodies, including agencies of the Commonwealth, have documented the current and projected harm caused by climate change to Torres Strait Islanders.
- ~~45.~~^{16.} The current impacts of climate change in the Torres Strait Islands include higher average temperatures; sea level rise (which have increased the impacts of storm surges, resulting in greater coastal erosion and inundation of freshwater with saltwater); ocean warming and ocean acidification (leading to, among other impacts, coral bleaching and impacts on marine ecosystems); and more frequent and severe heatwaves, with impacts on human health.
- ~~46.~~^{17.} Climate change in the Torres Strait is already harming *Ailan Kastom*.

~~17.~~—~~18.~~ The projected impacts of climate change on Torres Strait Islanders are even more severe. These include further sea level rise and associated impacts, including inundation of parts of islands, and contamination of freshwater sources; increased injury, disease, and death due to extreme weather events; increased undernutrition resulting from diminished food production; and increased health harms from food- and water-borne diseases and vector-borne diseases.

~~18.~~—~~19.~~ If unchecked, the projected impacts of climate change in the Torres Strait would render islands in the Torres Strait uninhabitable, causing Torres Strait Islanders to become climate refugees and ~~extinguishing loss of fulfilment of~~ *Ailan Kastom*.

B4. Commonwealth Duty of Care to Torres Strait Islanders

~~19.~~—~~20.~~ The Commonwealth owes a duty of care to Torres Strait Islanders to take reasonable steps to protect them from the harms caused by climate change. In fulfilling its duty, the Commonwealth must have regard to the best available science in relation to climate change.

~~21.~~ Alternatively, the Commonwealth owes a duty of care to Torres Strait Islanders to take reasonable care to avoid causing property damage, loss of Ailan Kastom, loss of Native Title rights, and harm to Torres Strait Islanders arising from a failure to implement reasonable adaptation measures in the Torres Strait Islands.

~~20.~~—~~22.~~ The Commonwealth's duty ~~and alternative duty~~ arises from, amongst other things, the Torres Strait Treaty; the *Native Title Act 1993* (Cth); the unique vulnerability and degree of hazard posed to Torres Strait Islanders from climate change, including to their unique connection to the land and waters of the Torres Strait Islands, personal injury, death and loss of fulfilment of *Ailan Kastom*, from which they cannot protect themselves; the Commonwealth's control and knowledge of the current and projected harm to Torres Strait Islanders; the foreseeability of the harm to Torres Strait Islanders from climate change; the Commonwealth's assumption of the climate risk to Torres Strait Islanders and Torres Strait Islanders' reliance upon the Commonwealth for protection from climate change.

B5. Commonwealth's Breach of Duty of Care

~~21.~~—~~23.~~ Since at least 2014, the Commonwealth has breached its duty of care by acting without regard to the best available science in assessing and addressing the current and projected harm to Torres Strait Islanders from climate change.

~~22.~~—~~24.~~ Mitigation of climate change requires having regard to the best available science including the reduction of greenhouse gas emissions so as to halt further climate change and minimise harms to Torres Strait Islanders.

~~23.~~—~~25.~~ Further, since at least 2014, the Commonwealth has breached its alternative duty of care because Aadaptation measures undertaken by the Commonwealth have been inadequate. For example, the construction of a sea wall on Sabai Island has failed to protect the Island. Rising seas breached the sea wall less than 6 months after its construction was completed in 2018, causing significant damage. ~~24.~~—Global temperature has increased approximately 1.2°C from pre-industrial levels. It is projected to surpass 1.5°C in the next two decades and could rise by 3°C or more by the end of the century unless there are rapid and significant emissions reductions by 2030.

~~25.~~—~~26.~~ The survival of *Ailan Kastom* and Torres Strait Islanders in the Torres Strait depends on limiting global temperature increase:

- (a) Holding the long-term global temperature increase to 1.5°C would prevent or minimise many of the most ~~significant~~ dangerous projected harms to Torres Strait Islanders from climate change.
- (b) A global temperature increase of 2 to 3°C (and above) would have catastrophic implications for the life, health, livelihoods and *Ailan Kastom* of Torres Strait Islanders.
- (c) Further, exceeding 1.5°C temperature increase carries a significant risk of triggering tipping points, beyond which the most severe projected impacts of climate change to Torres Strait Islanders could no longer be avoided.

~~26.~~—~~27.~~ Australia is one of the largest global emitters of greenhouse gases on a per capita basis.

~~27.~~—~~28.~~ In the determination of its greenhouse gas emission reduction targets, the Commonwealth has failed to take into account and take steps in accordance ~~engage~~ with the best available science on emissions, breaching its duty to protect Torres Strait Islanders. More specifically, the Commonwealth has failed to have proper regard to and take steps in accordance with advice from the Australian Climate Change Authority, the independent statutory body tasked with providing the Commonwealth with independent expert advice on the basis of the best available science on emissions.

~~28.~~—~~29.~~ Australia's previous 2030 emissions reduction target of 26-28% below 2005 levels, set in 2015 and re-affirmed in 2020, was below the lower end of the emissions range which the Climate Change Authority advised was appropriate for limiting global temperature increase to 3°C. This means that Australia's previous 2030 emissions reduction target correspondeds with a global temperature increase of *more* than 3°C.

~~30.~~ Australia's current 2030 emissions target of 43% below 2005 levels corresponds with a global temperature increase of approximately 3°C, based upon the Climate Change Authority's advice.

B6. Loss and damage

~~29.~~—~~31.~~ As a result of the Commonwealth's breaches of the duty of care and the alternative duty of care as alleged, the Applicants and all Torres Strait Islanders have suffered loss and damage.

~~30.~~—~~32.~~ Further, unless restrained, the Commonwealth's ongoing breach of duty will cause further loss and damage to the Applicants and all Torres Strait Islanders.

C. THE RELIEF SOUGHT FROM THE COURT

~~31.~~—~~33.~~ The Applicants seek declarations recognising the Commonwealth's duty of care and its alternative duty of care to Torres Strait Islanders and injunctive relief including requiring the Commonwealth to take reasonable care to protect Torres Strait Islanders and *Ailan Kastom* from harm caused by climate change.

~~32.~~—~~34.~~ The Applicants also seek damages and costs.

Date: 15 May ~~31 March~~ 2023

Fiona McLeod SC

Lindy Barrett

Shanta Martin

Certificate of lawyer

I Brett Spiegel certify to the Court that, in relation to the Concise Statement filed on behalf of the Applicants, the factual and legal material available to me at present provides a proper basis for each allegation in the Concise Statement.

Date: ~~31 March 2022~~ 15 May 2023



Signed by Brett Spiegel

Lawyer for the Applicants