

## NOTICE OF FILING

### Details of Filing

Document Lodged:	Affidavit - Form 59 - Rule 29.02(1)
Court of Filing	FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment:	17/02/2023 11:09:22 AM AEDT
Date Accepted for Filing:	17/02/2023 11:09:25 AM AEDT
File Number:	VID622/2021
File Title:	PABAI PABAI & ANOR v COMMONWEALTH OF AUSTRALIA
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



*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.



Form 59  
Rule 29.02(1)

## Affidavit

No. VID622 of 2021

Federal Court of Australia  
District Registry: Victoria  
Division: General

**PABAI PABAI AND GUY PAUL KABAI**

Applicants

**COMMONWEALTH OF AUSTRALIA**

Respondent

Affidavit of: **Mark Herbert Warusan**

Address: [REDACTED]

Occupation: Ranger

Date: 15 December 2022

I, **MARK HERBERT WARUSAN** of [REDACTED]  
[REDACTED] Ranger, say on oath:

1. I make this affidavit from my own knowledge unless otherwise stated. Where I make statements on the basis of information provided to me, I set out the source of my information and my belief that that information is true.

### Personal Background

2. My full name is Mark Herbert Warusan.
3. I was born on [REDACTED] 1974, and I am currently 48 years old. I was born in Cairns but moved to Saibai three months later. I have lived on Saibai ever since.

Filed on behalf of	Pabai Pabai and Guy Paul Kabai, Applicants
Prepared by	Brett Spiegel, Phi Finney McDonald
Law firm	Phi Finney McDonald
Tel	[REDACTED] Fax
Email	[REDACTED]
Address for service	Phi Finney McDonald, Level 3, 325 Flinders Lane, Melbourne VIC 3000

CB H.W

4. My wind is the *jay gub* (southwestern) wind. My clan is *dhibau* (wild yam). This clan, together with dog and cassowary, make up *koey buai*, one of the two groups of clans on Saibai. The other clan group is snake, swamp bird, Saibai crocodile and Ait crocodile. The *dhibau* clan lands are down the middle of Saibai. We are yam people, so we hold traditional ecological knowledge about planting. We are the only clan that has a plant totem.
5. I am a traditional owner and hold native title over Saibai.
6. My parents are also from Saibai. I was brought up by my grandparents, Jack and Wabana Muid Warusan.
7. I am married to Sarbe Yont. Together we have 6 children, who all live with me on Saibai. All of my children are under the age of 13.
8. I have been a Ranger with the TSRA since 2012. We operate under the Saibai Prescribed Body Corporate. In this role I travel around Saibai, using traditional methods to manage the environment, including dugongs and turtles and monitoring seagrass. For example, we encourage people not to use motors or spotlights to hunt. Instead, we encourage people to go upwind and float with the wind like a canoe. This traditional method for hunting is approved by the elders. I am worried about Torres Strait Islanders and Papua New Guinea people using netting and modern motors to hunt dugong and turtles, which is a threat. We use fire management for the ecosystem. It's used as a tool instead of a ride on lawn mower. We gather traditional ecological knowledge and stories from Saibai people. We gather language names for animals, birds and insects, and we teach these to children. We also do data collection on the ecosystem, and we store that data for future generations.

### Impacts of climate change

#### Erosion

9. In the late 1980s, I used to swim on the beach in front of the Saibai village. The tide was decent and the water would get warm from September onwards.
10. But since around 2000, the tide has become too deep, and people have stopped swimming there. The sand has eroded and the beach is now just rocks.
11. In my language, the place where the beach meets the mud of the island is called *kapapa/ thawal*, the 'toe' of the beach. This is now gone from the area in front of Saibai village.

GB H.W

There are still portions of it left on the western end of the island. When they put in the seawall, it took away the last of the *kapapal thawal* in front of the village.

12. Traditionally, when we caught a dugong or a turtle, we used the beach to wash the bodies in seawater as we butchered them, before throwing the waste intestines and shells back into the ecosystem. Now, we have to pull the dugongs and turtles up on a trailer and wash them with a hose in our own backyards. When we butcher the dugongs and turtles, we have to do it in our own clan lands. We can't butcher them in lands of another clan. Each clan used to have a place on the beach out the front of the Saibai village to butcher dugongs and turtles. That was significant for us. Now those places are gone.
13. I have witnessed changes in the mangrove habitats on Saibai and surrounding islands in my role as a Ranger. Because of high tides, the mangrove seeds are dispersed and are taken way inland into the freshwater country. When the water recedes, the seeds are left there and they grow. That is why the mangrove trees are well inland. Mangrove trees only grow in saltwater. The saltwater has taken over the freshwater country and it's so evident by the mangroves.
14. I go diving in the mangroves to catch fish with a spear. I have made spears for my children and I teach them how to catch fish with a spear. Hopefully they can know the mangroves.
15. I know each mangrove individually. When a mangrove tree falls, a bit of you is squashed in your soul. On the land, everything is part of our soul.
16. When I go hunting, I talk to the place. I say, 'I love you'. I say positive things about this country.
17. But the sands are shifting dramatically around the southwestern side of Saibai, which faces the island of Dauan, and this is killing the mangroves. This is because of the rising sea level. And there is more sand coming up the creek.
18. Near this area, there are many fishing camp areas which are eroding away, such as *Surum*, which is my clan's camping space. There are around 20 fishing camps for the different families.
19. In the last fifteen years, my clan's camping spaces at *Surum* have eroded and become mangroves. We have used these places as camping sites for hundreds of years. It used to be ok to camp there all year round. We used to stay there for weeks. Now we can only

CB H.W



camp there in a tiny bit of the year. ~~There are more mosquitoes,~~ the salt is invading and the sand has shifted. It has become a harsh environment.

20. We used to have garden places at our camping sites. But now we can't plant root vegetables at our camp sites anymore. Because of the erosion and the salt. We are also losing the language of the camping places – the names of the trees, the fish, and the birds. Camping places help us to stay on the island, they are the only places we can stay outside the village.
21. This means my children are cut off and they won't experience these camping places. They won't experience the work of managing the gardening places at the camping grounds, and the different foraging we did in the mangroves, for shells and mud crabs. They will miss the detail of learning this. My children will miss out on the experience of the birds, the fish, all the different species of the mangroves. They will miss the feeling in the soul of camping there. They will miss the fun of it. I am concerned about my children. I know how it was handed down to me, and what they will miss.

*Warul Kawa and the spirit world*

22. *Warul Kawa* is an important spiritual place for the people of Saibai, and it is the worst eroded island in the Torres Strait.
23. *Warul* means green sea turtles and *Kawa* means island. People hunt for turtles and turtle eggs on *Warul Kawa*. It is a sanctuary for turtles. People don't take too much. People also fish and catch cray fish there. It's a special island. It has a wide reef area around a small island, and less human footprint. You don't get that on Saibai.
24. For us, we are made of three elements, the physical, the spiritual and the soul. Dance, for example, is physical, and happiness is the soul of it. But the songs themselves are spiritual, and *Warul Kawa* is the only place that our spiritual songs are preserved.
25. The best place to go is in the spirit world, it's a secret place, the best songs are composed there. I operate in the spirit world. Not everyone is in the spirit, it's only the leaders. In the old times, only one person operated in the spirit world, that was the chief. The chief could tell when Saibai was going to be raided, or where Saibai needed to raid. He would read the sunset in the west over *Warul Kawa* and he would know what to do. That person could make the right decisions for Saibai, even when the decisions were difficult. Today, I am

CB H.W

second in line to operate in the spirit world. My father, Thomas Warusan, is first in line. He still lives on Saibai.

26. We conduct cultural spirit ceremonies on Saibai, facing west towards *Warul Kawa*. *Warul Kawa* is the grand sunset. There is geography in the spirit, that is why we face west. We make a big corroboree with headdresses, and someone stands up and speaks into the ancestral realm. These ceremonies take place in the spiritual world. The ceremonies have dancing and feasting, but the most important part is when the leader speaks into the spiritual world.
27. Nothing happens on Earth in the physical world without it first happening in the spiritual world. That's why there are so many rats on *Warul Kawa*, because there is so much uncertainty in the spiritual world. There is uncertainty in the spiritual world because of colonisation and massacres that happened in the past, and other actions by people who aren't operating in the spirit world. We have to speak into the spiritual world so that there is good change in the physical world. By speaking into the spiritual world, we reduce the uncertainty there. We can affect the future by speaking into the spiritual world.
28. On the west coast of *Warul Kawa*, almond trees and the heritage wongai trees have been eroded by *kuki* (the monsoon wind storm surges). One hundred-year-old trees have fallen. The land and soil have been pulled from underneath these trees. The tide is slamming the west coast. The tide and the salt also seep into the sand.
29. In around 2012, I built a shed on *Warul Kara* on the shoreline that now has sand all pushed up inside it from the tides.
30. I have not been to *Warul Kawa* in the last three years, because the erosion makes me sad and has a profound spiritual effect on me. If we lose *Warul Kawa*, we lose two thirds of ourselves: the physical and the soul.

#### Inundation

31. Every month the big tides come in. They are getting bigger and more frequent. It wasn't like that before. The frequency makes me sad. This is a real fear for me. It is a burden for me to know this is happening.

CB H.W

32. My house has been flooded during the monsoon. The last time was in February and March 2021. It damaged my car, my motorbike, and my tools. It sickened the banana trees and the leaves turned yellow for months afterwards.

#### *Gardening*

33. Saibai people used to have their root vegetable gardens behind the village, but this is no longer the case. Almost all of the gardens are gone because of the inundation and salt.
34. There is one community garden left behind the village. It was built in 2013. There are still some yams, cassava, banana and sweet potato there. I am the last person who gardens there. When it rains too much the garden is too soggy, because the swamps flood the garden with salt water. This kills the vegetables. And when it is not raining, it is too hot and too dry. I still get vegetables from the garden, but it is hard work.
35. Saibai clans have traditional fishing camps located in sandy cays in mangroves, such as *Surum*, as I described above. On these lands there used to be gardening sites as well. But these gardens are all destroyed because of the inundation and salt.
36. From around 1981, my grandparents took me gardening at *Surum*. This is a sacred place, you encounter special things like voices. When I was there, I remember my grandfather hearing spirit voices from nature. It was a bird song, but it was a man from the spirit world talking to him.
37. When I was young during the 1980s, I never witnessed *kuki* (the monsoon wind storm surges) inundate *Surum*. I was able to plant cassava at *Surum* in around 2020, but the sands shifted, and the waters came in. The cassava was flooded. Now I don't plant vegetables there anymore.

#### *Swamps and rivers*

38. Apart from the higher inland freshwater country, everywhere has been impacted by inundation. The swamps used to be freshwater. Now the swamps and rivers, the tentacles of the island, are salty. All the swamps are salty.
39. In big inundation times, we rely on heavy rainfall to dilute the saltwater, so the salt goes to the bottom and the freshwater stays at the top. But the salt doesn't get washed out anymore. The freshwater fish survive in the freshwater on top, like the milky mullet and the barramundi.

#### Marine life

AB H.W



40. High tides shift sands from the mangrove habitats and cover the seagrass on my sea country to the western side of Saibai and further south. In my job, I've travelled around the eastern side of the island and seen the same effect there.
41. Dugongs use the seagrass as food. They used to stay in the same areas, but now they go and return, looking for food. This is because the seagrass where they feed has been covered by sand.
42. Prawns and barramundi live in the *gawats*, the place where the freshwater meets the mangroves. The *gawats* are affected by saltwater inundation and frequent high tides. This makes it hard for the fish to behave because the ecosystem isn't normal. Before, the fish used to get trapped in the mangroves. Now they just come out of the mangroves because there's too much salt water and high tides. Barramundi used to live all stages of its life in freshwater, but not anymore. The *gawats* have been destroyed by the salt water.

#### Seasons

43. We have a song and ceremony for all the seasons. The seasons are locked in the language – so the language is changing as they do.
44. The seasonal migratory patterns of different bird species have changed. There are fewer magpie geese, pelican ducks, Burdekin ducks and whistling ducks, which have been on Saibai for thousands of years.
45. The magpie geese migrate west, but now it's totally changed. They used to arrive after the big rain on Saibai because they would eat the sugar in the swamps, but they are two thirds gone now.
46. We have a seasonal calendar that used to be accurate. Like clockwork, for all 12 months.
47. For example, the big rains should come around 20 November when the spear of the *tagai* (warrior) constellation touches the ground. Although the stars are the same, the weather is different. It just rains constantly now. In October it's turtle mating season because the water is warming up, it should be dry and still, but it is raining.
48. The seasonal calendar tells us to plant yams on 20 October when it is dry. You plant the yam so its back faces the sun and its nose faces downwards, where the shoot comes out. But now it's not dry in October. The rain makes the yams soggy and ruins them. It is out of balance.

CB H.W



49. We still put the root vegetable in the ground, but we're just guessing now. It's not according to the seasonal calendar from before time. This also harms the language, because the language comes from the seasonal calendar.

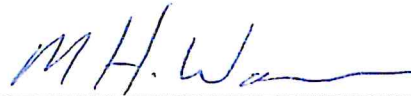
#### **Displacement and cultural loss**

50. In 1947, most people left Saibai after the king tide event. The songs lost their vibrancy. It was once said that you could cooee anywhere in the mangroves and someone would answer you. Now, you would be shouting into the void.
51. If we had to leave, we could not take the language and culture with us. Language and culture are tied to the land. Our culture is strong. It would be like a woman remembering a song and having goosebumps because she thinks of her husband who has passed.
52. The richness of my culture is clear when you analyse our language. Language is a spirit. Saibailgau language is Saibailgau spirit. We are the body, soul and spirit of Saibai. The details of my culture are depicted in songs. I call language the soul of Saibai; all of these things are locked in the language.
53. One of the saddest things for me is that the old people, who are asleep now, are being made weak by the erosion. That's why we hold on to them. I talk to them – I can do that anywhere. I always say esso (thank you) because I'm now walking forward and need them to show me things.
54. We don't want to lose the physical and soul elements of who we are. It is becoming harder and harder for us to be in the spirit world. It's just not fair, separating us.
55. My conviction is hard as steel. I could not leave Saibai.

CB H.W

Sworn by the deponent  
at Saibai Island  
in Queensland  
on 15 December 2022

)  
)  
)  
)  
)



Signature of deponent

Before me:



Signature of witness

Grahame Best

An Australian Legal Practitioner within the meaning of the Legal Profession Uniform Law  
(Victoria).