

## NOTICE OF FILING

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### Details of Filing

Document Lodged: Statement of Claim - Form 17 - Rule 8.06(1)(a)  
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File Title: PABAI PABAI & ANOR v COMMONWEALTH OF AUSTRALIA  
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A handwritten signature in blue ink that reads 'Sia Lagos'.

Registrar

### Important Information

As required by the Court's Rules, 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.

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Form 17  
Rule 8.05(1)(a)

### Statement of Claim

Federal Court of Australia District Registry: Victoria Division: General	No.	VID	of 2021
<b>PABAI PABAI</b>			First Applicant
<b>GUY PAUL KABAI</b>			Second Applicant
<b>COMMONWEALTH OF AUSTRALIA</b>			Respondent

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## I. PARTIES

### *The Applicants and the Group Members*

1. This proceeding is commenced as a representative proceeding pursuant to Pt IVA of the *Federal Court of Australia Act 1976* (Cth), by the Applicants on their own behalf and on behalf of all persons who at any time during the period from about 1985 and continuing, are of Torres Strait Islander descent and suffered loss and damage as a result of the conduct of the Respondent described in this Statement of Claim (**Group Members**).
2. The Applicants are people indigenous to the Torres Strait Islands (**Torres Strait Islanders**). They are from the Gudamalulgal Nation.
3. The First Applicant is 52 years of age. He resides on Boigu Island. He holds native title rights and interests in respect of Boigu Island.
4. The Second Applicant is 54 years of age. He resides on Saibai Island. He holds native title rights and interests in respect of Saibai Island.
5. As at the commencement of this proceeding, there were more than seven Group Members.

### *The Respondent*

6. The Respondent (**Commonwealth**) is:
  - a. the Crown in right of the Commonwealth of Australia;
  - b. capable of being sued pursuant to Pt IX of the *Judiciary Act 1903* (Cth); and
  - c. bound by the provisions of the *Native Title Act 1993* (Cth) (**NTA**).

## II. CLIMATE CHANGE

### *Overview*

7. Following the industrial revolution, the increased emission of greenhouse gases (primarily carbon dioxide (**CO<sub>2</sub>**) and including but not limited to methane and nitrous oxide) (**GHGs**) into the atmosphere from human activities has resulted in their accumulation in the atmosphere. Through a series of processes, this has resulted in the rapid heating of the Earth's lower atmosphere, increasing the temperature of the Earth's surface and lower atmosphere, and many other changes to the Earth's climate.

### **Particulars**

The Applicants refer to the Intergovernmental Panel on Climate Change's Sixth Assessment Report, Report of Working Group One (2021) (**IPCC Sixth Assessment Report**).

8. Due to human activities, global average surface temperature has increased by approximately 1.2°C above pre-industrial levels.

### **Particulars**

The Applicants refer to the IPCC Sixth Assessment Report and the World Meteorological Organization, Report on the State of The Global Climate 2020.

9. Absent immediate and significant reductions in global GHG emissions, increase in global average surface temperature above pre-industrial levels (**Global Temperature Increase**) will surpass 1.5°C in the next two decades, and could rise to 3°C or more by the end of the century based on the current rate of release of GHGs. Stabilising the Global Temperature Increase at 1.5°C will limit catastrophic impacts including sea level rise, species extinction, ecosystem destruction, extreme weather events such as heatwaves, droughts, bushfires, tropical cyclones, severe storms, and flooding, human displacement, injury, disease and death.

### Particulars

The Applicants refer to the IPCC Sixth Assessment Report, the Intergovernmental Panel on Climate Change's Special Report on Global Warming of 1.5°C (2018) (**IPCC Special Report on 1.5°C**), and the United Nations Environment Programme's Emissions Gap Report 2020 (**UNEP Emissions Gap Report 2020**).

10. At all material times:

- a. the human-related emission of GHGs results in an increase in the concentration of these heat-trapping gases in the global atmosphere;
- b. the accumulation of GHGs in the atmosphere results in heating of the lower atmosphere and Global Temperature Increase, as well as many other changes to the Earth's climate;
- c. about a quarter of human emissions of CO<sub>2</sub> are dissolved in the ocean, creating carbonic acid and thus increasing ocean acidity;
- d. Global Temperature Increase has the following impacts, amongst others:
  - i. increase in the global average ocean surface temperature (**Ocean Temperature**);
  - ii. melting ice on land and sea, and permafrost;
  - iii. changing precipitation patterns;
  - iv. sea level rise and inundation of coastal lands;
  - v. increase in the frequency, size and intensity of extreme weather events, such as heatwaves, droughts, bushfires, tropical cyclones, severe storms, and flooding;
  - vi. harm and destruction of ecosystems and non-human species; and
  - vii. greater likelihood of injury, disease, and death to humans due to extreme weather events; increased likelihood of undernutrition resulting from diminished food production; and increased risks from food- and water-borne diseases and vector-borne diseases.

(jointly, (c) and (d), **Impacts of Climate Change**)

**(Climate Change).**

#### **Particulars**

The Applicants refer to the IPCC Sixth Assessment Report, the IPCC Special Report on 1.5°C, the Intergovernmental Panel on Climate Change's Special Report on the Ocean and Cryosphere in a Changing Climate (2019) (**IPCC Special Report on the Ocean**), and recent peer-reviewed literature in climate science.

11. At all material times:

- a. The following causal relationships inform scientific understanding of Climate Change:
  - i. there is a near linear relationship between the accumulation of GHGs in the atmosphere and Global Temperature Increase, that is: the greater the accumulation of GHGs in the atmosphere, the greater the Global Temperature Increase. Every tonne of GHG emissions adds to Climate Change;
  - ii. there is a causal relationship between Global Temperature Increase and the Impacts of Climate Change, that is: the greater the Global Temperature Increase, the greater the frequency and severity of the Impacts of Climate Change;
  - iii. further accumulation of GHGs in the atmosphere may also trigger one or more tipping points, which may cause additional abrupt and irreversible Climate Change, magnifying the Impacts of Climate Change, and driving further Global Temperature Increase, even if human GHG emissions are reduced or eliminated;

#### **Particulars**

Tipping points include the destabilisation of the West Antarctic and Greenland ice sheets; the complete destruction of coral reefs; the melting of the permafrost; the collapse of the Amazon and boreal forests, and changes in ocean circulation (**Tipping Points**).

- iv. the greater the Global Temperature Increase, the greater the risk of triggering Tipping Points; and
  - v. due to the time lag that exists between the release of GHGs and certain Impacts of Climate Change, even if all GHG emissions were to cease today, many Impacts of Climate Change (particularly sea level rise) would continue to manifest, and would increase in frequency and severity, for hundreds of years to come.
- b. Climate Change occurs due to the cumulative effect of GHGs in the atmosphere and is largely irreversible, as follows:

- i. the atmospheric lifetimes of different GHGs vary significantly: CO<sub>2</sub> persists in the atmosphere for many hundreds of years, whereas other GHGs, such as methane, have shorter atmospheric lifetimes but are much more potent in trapping heat;
  - ii. at any point, further Global Temperature Increase may be stopped if a balance is reached between the GHGs emitted and removed from the atmosphere (**Net Zero Emissions**), but this is subject to:
    - 1. the risk of triggering Tipping Points, which may cause abrupt and irreversible Climate Change;
    - 2. the further exchange of CO<sub>2</sub> and heat between the atmosphere and the ocean after Net Zero Emissions is achieved; and
    - 3. scientific uncertainty;
  - iii. once the Earth reaches Net Zero Emissions, the atmospheric concentration of CO<sub>2</sub> will decline for a short period before stabilising at an elevated level that will last for many hundreds or thousands of years; and
  - iv. in general, the higher the atmospheric GHG concentration when Net Zero Emissions is reached, the higher the Global Temperature Increase, thus, the greater the frequency and severity of the Impacts of Climate Change, and the risk of triggering Tipping Points.
- c. Due to the above causal relationships, climate science is able to determine the following:
- i. the likelihood of future Global Temperature Increase based on current and projected GHG emissions;
  - ii. the projected impacts and risks (e.g. Tipping Points) of Climate Change at future Global Temperature Increase levels;
  - iii. the cumulative amount of global GHG emissions remaining to hold Global Temperature Increase at a given level; and
  - iv. the GHG emissions reductions that are required to stabilise Global Temperature Increase at a given level.

### **Particulars**

The Applicants refer to the IPCC Sixth Assessment Report, the IPCC Special Report on 1.5°C, and recent peer-reviewed literature in climate science.

12. Unless otherwise specified:

- a. all references to temperature increase (whether global or otherwise) are measured by reference to average global surface temperature in the pre-industrial period, which is defined by the Intergovernmental Panel on Climate Change (**IPCC**) and most other scientific analyses as the 1850-1900 average;

- b. temperature increase is measured in degrees Celsius; and
- c. accumulation of GHGs in the atmosphere is measured by the concentration of CO<sub>2</sub>-equivalent GHGs (**CO<sub>2</sub>-e**) in parts per million.

### **Best Available Science**

13. Many international and domestic organisations model the current and projected Impacts of Climate Change, and the necessary actions to avoid the most dangerous of those impacts.
14. The IPCC was established in 1988 under the auspices of the United Nations Environment Programme (**UNEP**) and the World Meteorological Organisation (**WMO**). It operates as an independent scientific organisation and intergovernmental body with 195 member countries, including the Commonwealth.
15. The IPCC studies and assesses the most recent scientific, technical, and socio-economic information relevant to the understanding of Climate Change. The IPCC prepares reports on the basis of the most up-to-date peer-reviewed scientific literature on Climate Change, including assessments of the degree of agreement on critical scientific issues. The IPCC's work is produced by dedicated working groups in reports drafted by a team of authors from member countries. Reports are peer reviewed by experts, and government representatives from member countries approve line-by-line the Summary for Policymakers that accompanies each report, which distils the main findings of the underlying report.
16. The WMO is an intergovernmental scientific organisation with 193 Member States and Territories, including the Commonwealth. The WMO produces an annual "State of the Global Climate" report.
17. The UNEP is the specialist agency of the United Nations for environmental matters. The Science Division of UNEP is responsible for monitoring and reporting on the state of the global environment. The UNEP publishes an annual "Emissions Gap" report on the difference between projected global GHG emissions and the GHG emissions reductions required to avoid the most dangerous Impacts of Climate Change.
18. The Commonwealth Scientific and Industrial Research Organisation (**CSIRO**) is an Australian Government agency responsible for scientific research, constituted under the *Science and Industry Research Act 1949* (Cth).
19. The Bureau of Meteorology (**BOM**) is Australia's national weather, climate and water agency, constituted under the *Meteorology Act 1955* and the *Water Act 2007* (Cth).
20. The CSIRO and the BOM produce joint reports on Climate Change in Australia, including the "State of the Climate" report (2020).
21. The Australian Climate Change Authority (**CCA**) is an independent statutory body established under the *Climate Change Authority Act 2011* (Cth). Until approximately 2015, it provided the Commonwealth with independent, expert advice on Climate Change, including conducting regular and specifically commissioned reviews, regarding the necessary actions to avoid the most dangerous Impacts of Climate Change.
22. Reports of the IPCC, WMO, UNEP, CSIRO, BOM, CCA and peer-reviewed scientific literature represent the best available science on the causes and Impacts of Climate

Change and the necessary actions to avoid the most dangerous Impacts of Climate Change (**Best Available Science**).

23. Specifically, there is Best Available Science on:

- a. the current and projected Impacts of Climate Change at a global level, as outlined in paragraphs 24 to 27 below;
- b. the current and projected Impacts of Climate Change for the Torres Strait Islands, as outlined in paragraphs 57 to 59 below; and
- c. the necessary actions, including GHG emissions reductions at the global level and for Australia, to avoid the most dangerous Impacts of Climate Change, as outlined in paragraphs 39 to 49 below.

### ***Global Impacts of Climate Change***

#### *Current Impacts of Climate Change*

24. As a result of human activities:

- a. the concentration of GHGs in the atmosphere has increased significantly in the last 150 years;

#### **Particulars**

In 2019, atmospheric CO<sub>2</sub> concentrations were higher than at any time in at least 2 million years. The Applicants refer to the IPCC Sixth Assessment Report.

- b. the current Global Temperature Increase is approximately 1.2°C above pre-industrial levels (**Current Warming Level**);

#### **Particulars**

The Applicants refer to and repeat the particulars to paragraph 8.

- c. the Current Warming Level is unprecedented in at least 125,000 years;

#### **Particulars**

The Applicants refer to the IPCC Sixth Assessment Report.

- d. the concentration of GHGs in the atmosphere have continued to increase year on year and will continue to do so until Net Zero Emissions is reached; and

#### **Particulars**

The Applicants refer to the IPCC Sixth Assessment Report.

- e. throughout the past decade, the amount of GHGs released globally has continued to increase.

#### **Particulars**

Annual global GHG emissions increased at a rate of approximately 1.3% each year over the period 2010-2019. The Applicants refer to the UNEP Emissions Gap Report 2020.

25. At the Current Warming Level, the following Impacts of Climate Change, among others, have occurred globally:

- a. ocean acidification;

**Particulars**

The global ocean has become increasingly acidified and the rate of ocean acidification has significantly increased. The Applicants refer to the IPCC Sixth Assessment Report and the IPCC Special Report on the Ocean.

Further particulars to be provided.

- b. increase in Ocean Temperature;

**Particulars**

The global ocean has warmed unabated since 1970 and the frequency of marine heatwaves has doubled since 1982. The Applicants refer to the IPCC Sixth Assessment Report and the IPCC Special Report on the Ocean.

Further particulars to be provided.

- c. changing precipitation patterns;

**Particulars**

The frequency and intensity of heavy precipitation events have increased since the 1950s. The Applicants refer to the IPCC Sixth Assessment Report.

Further particulars to be provided.

- d. sea level rise and inundation of coastal lands;

**Particulars**

Across the globe, sea level is rising. Global mean sea level has increased by approximately 20 cm between 1901 and 2018. There is high confidence that the increase in global mean sea level since 1900 is faster than over any preceding century in at least the last 3000 years. The rate of sea level rise has increased significantly since 1900, and in particular over recent decades. Sea level rise on many coastlines has increased the impacts of inundation from coastal storm surges. The Applicants refer to the IPCC Sixth Assessment Report.

Further particulars to be provided.

- e. increase in the frequency, size and intensity of extreme weather events, such as heatwaves, droughts, bushfires, tropical cyclones, severe storms, and flooding; and

#### **Particulars**

Human-induced climate change is already affecting many weather and climate extremes in every region across the globe. Evidence of observed changes in extremes such as heatwaves, heavy precipitation, droughts, and tropical cyclones, and, in particular, their attribution to human influence, has strengthened since 2007. The Applicants refer to the IPCC Sixth Assessment Report.

Further particulars to be provided.

- f. harm and destruction of ecosystems and non-human species.

#### **Particulars**

Tropical coral reefs (high sensitivity to present warming and ocean acidification), tropical forests (vegetation shifts due mainly to drying), and coastal ecosystems (exposed to multiple factors) are among the most vulnerable ecosystems of the world. They are already highly impacted by Climate Change, and require robust intervention to maintain and enhance their adaptive capacity.

The scope and severity of coral bleaching and mortality events have increased in recent decades (Hughes et al., 2018), with profound implications for the recovery of coral climate archives from new and existing sites.

Extinction risks are highest on island-like biodiversity hotspots such as mountains, islands, coral reefs and coastal embayments.

Biodiversity loss disproportionately impacts those communities and societal groups that are most directly dependent on nature.

The Applicants refer to the Joint Report of the IPCC and the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (**IPBES**), Scientific outcome of the IPBES-IPCC co-sponsored workshop on biodiversity and climate change (2021).

Further particulars to be provided.

#### **(Current Impacts of Climate Change).**

#### *Projected Impacts of Climate Change*

- 26. With continued Global Temperature Increase, the Impacts of Climate Change and the Current Impacts of Climate Change are projected to increase in their frequency and severity, and the risk of triggering Tipping Points increases (**Projected Impacts of Climate Change**).

## **Particulars**

With every additional increment of Global Temperature Increase, changes in climate and weather extremes continue to increase. For example, every additional 0.5°C of Global Temperature Increase causes clearly discernible increases in the intensity and frequency of hot extremes, including heatwaves (very likely), and heavy precipitation (high confidence), as well as agricultural and ecological droughts in some regions (high confidence). The Applicants refer to the IPCC Sixth Assessment Report.

If the Global Temperature Increase stabilised at 1.4°C by the end of the century, the global mean sea level would likely rise 0.44-0.71 meters by 2100 and 0.53-1.02 meters by 2150, compared to 1900 levels.

The IPCC determined that in very high emission scenarios in which Global Temperature Increase is between 3.3-5.7°C, global mean sea level would likely rise 0.79-1.17 meters by 2100 and 1.14-2.04 meters by 2150, compared to 1900 levels.

Under very high emission scenarios, global mean sea level rise of around 2 meters by 2100 and 5 meters by 2150 cannot be ruled out.

Sea level rise will continue for centuries after Global Temperature Increase stabilises.

The risk of triggering Tipping Points increases with Global Temperature Increase. Exceeding a Global Temperature Increase of 1.5°C runs a greater risk of triggering Tipping Points, beyond which certain Impacts of Climate Change can no longer be avoided even if global temperatures are subsequently reduced. The Applicants refer to the IPCC Special Report on 1.5°C.

Further particulars to be provided.

27. By reason of paragraphs 25 and 26, the Projected Impacts of Climate Change are significantly worse at a Global Temperature Increase of 2°C compared with an increase of 1.5°C.

## **Particulars**

At a Global Temperature Increase of 1.5°C, coral reefs are projected to decline by a further 70-90%, and by more than 99% at 2°C.

Sea level rise is projected to be higher at a Global Temperature Increase of 2°C compared with 1.5°C, and higher with every additional increment of Global Temperature Increase.

Relative to present-day conditions, changes in the intensity of temperature extremes would be at least double at 2°C, and quadruple at 3°C, compared to changes at 1.5°C of Global Temperature Increase.

Limiting Global Temperature Increase to 1.5°C compared with 2°C could reduce the number of people exposed to climate-related risks and susceptible to poverty by up to several hundred million by 2050.

The Applicants refer to the IPCC Sixth Assessment Report, the IPCC Special Report on the Ocean and the IPCC Special Report on 1.5°C.

Further particulars to be provided.

### ***Compounded Impacts of Climate Change***

28. Small and low-lying islands are particularly vulnerable to the Current and Projected Impacts of Climate Change.

#### **Particulars**

Sea level rise continues to be a major threat to small islands and atolls and can exacerbate other Impacts of Climate Change on low-lying coastal communities and infrastructures, ecosystems, and freshwater resources.

There is high confidence of Climate Change creating the risk of human displacement, injury, disease, and death, and disrupted livelihoods in low-lying and small islands, due to storm surges, saltwater intrusion, coastal flooding, damage to infrastructure and sea level rise.

There is high confidence that Torres Strait Island communities and livelihoods are vulnerable to major Impacts of Climate Change from even small sea level rises.

The Applicants refer to the IPCC Sixth Assessment Report, the IPCC Special Report on 1.5°C and the Intergovernmental Panel on Climate Change's Fifth Assessment Report (**IPCC Fifth Assessment Report**).

Further particulars to be provided.

29. Indigenous peoples, and particularly those in Australia, are especially vulnerable to the Current and Projected Impacts of Climate Change.

#### **Particulars**

Shifts in lifestyles and loss of traditional knowledge leave many Indigenous peoples more vulnerable to Climate Change.

Due to a heavy reliance on climate-sensitive primary industries and strong social connections to the natural environment, Indigenous peoples in Australia have higher than average exposure to Climate Change and face particular constraints to adaptation.

The Applicants refer to the IPCC Sixth Assessment Report and the IPCC Fifth Assessment Report.

Further particulars to be provided.

### ***Global Temperature Limit***

30. There is no 'safe' level of Global Temperature Increase.

#### **Particulars**

The Applicants refer to and repeat paragraphs 25 to 29.

31. The international scientific consensus is that holding the long-term Global Temperature Increase to below 1.5°C would prevent many of the most severe Projected Impacts of Climate Change (**Global Temperature Limit**).

#### **Particulars**

The Applicants refer to the IPCC Sixth Assessment Report, the IPCC Special Report on 1.5°C and the United Nations Framework Convention on Climate Change's Report on the Structured Expert Dialogue on the 2013-2015 Review (2015).

### ***International Framework on Climate Change***

32. The United Nations Framework Convention on Climate Change (**UNFCCC**) is a treaty established in 1992 with the objective of preventing dangerous Climate Change.

#### **Particulars**

The Applicants refer to the UNFCCC Art 2.

33. The Commonwealth is one of 197 parties to the UNFCCC.

#### **Particulars**

The UNFCCC was entered into force in Australia on 21 March 1994.

34. The UNFCCC requires the Commonwealth to, *inter alia*, adopt national policies and take corresponding measures on the mitigation of Climate Change, by limiting its anthropogenic GHG emissions.

#### **Particulars**

The Applicants refer to the UNFCCC, Article 4(2)(a).

35. The Paris Agreement is a treaty established in 2015 to enhance the implementation and objective of the UNFCCC (**Paris Agreement**).

#### **Particulars**

The Applicants refer to the Paris Agreement, Article 2(1).

36. The Paris Agreement aims to enhance the implementation of the UNFCCC by, among other measures, holding Global Temperature Increase to 'well below 2°C' and pursuing 'efforts to limit the temperature increase to 1.5°C', recognising that this 'would significantly reduce the risks and impacts of climate change'.

### **Particulars**

The Applicants refer to the Paris Agreement, Article 2(1)(a).

37. The Commonwealth is one of 191 parties to the Paris Agreement.

### **Particulars**

The Paris Agreement was entered into force in Australia on 9 December 2016.

38. Each party to the Paris Agreement is required to prepare, communicate and maintain successive nationally determined contributions (**NDCs**), and to pursue domestic mitigation measures to achieve the objectives of the Paris Agreement.

### **Particulars**

The Applicants refer to the Paris Agreement, Articles 3 and 4.

### ***Best Available Science on Emissions Reductions***

#### *Best Available Science on Global Emissions Reductions*

39. Climate science can determine the total global GHG emissions that can be released into the atmosphere in order to limit Global Temperature Increase to a specified level (**Global Emissions Budget**).

### **Particulars**

The Applicants refer to and repeat paragraph 11.

40. At all material times:

- a. a Global Emissions Budget can inform the level of GHG emissions reductions that are needed at different points in time in order to maintain Global Temperature Increase below a specified level;
- b. early and strong GHG emissions reductions lead to a slower depletion of a Global Emissions Budget, and a longer time period before Net Zero Emissions needs to be reached; and
- c. delays in GHG emissions reductions lead to a faster depletion of a Global Emissions Budget, and a shorter time before Net Zero Emissions needs to be reached.

### **Particulars**

The Applicants refer to and repeat paragraph 11.

41. The IPCC has determined a Global Emissions Budget for a 50% chance of holding Global Temperature Increase to the Global Temperature Limit (**the Global 1.5°C Budget**).

### **Particulars**

The Applicants refer to the IPCC Sixth Assessment Report.

42. Based on the current rate of global GHG emissions, the Global 1.5°C Budget is projected to be depleted in the next two decades.

#### **Particulars**

The Applicants refer to the IPCC Sixth Assessment Report.

43. Even if global GHG emissions stay within the Global 1.5°C Budget, there remains a 50% chance of exceeding the Global Temperature Limit, with the risk of triggering Tipping Points and the Projected Impacts of Climate Change, as outlined in paragraphs 27 and 28.

#### **Particulars**

The Applicants refer to the IPCC Sixth Assessment Report.

44. Holding Global Temperature Increase below the Global Temperature Limit by the end of the century requires that:
- a. all countries do their part to rapidly reduce GHG emissions to Net Zero Emissions at a rate that reduces total global GHG emissions consistent with staying within the Global 1.5°C Budget; and
  - b. global Net Zero Emissions need to be achieved by mid-century at the latest.

#### **Particulars**

The Applicants refer to the IPCC Special Report on 1.5°C.

45. The necessary GHG emissions reductions for each country to do its part consistent with staying within the Global 1.5°C Budget can be determined on the basis of Best Available Science (**Best Available Science Target**).
46. A national GHG emissions budget to hold Global Temperature Increase to 1.5°C and 2°C, respectively, can be derived from Global Emissions Budgets.

#### *Best Available Science on Australia's Emissions Reductions*

47. In 2014, the CCA provided expert scientific advice to the Commonwealth on Australia's share of the Global Emissions Budget to hold Global Temperature Increase below 2°C and the corresponding GHG emissions reductions required by 2030 by Australia.

#### **Particulars**

The Applicants refer to the Climate Change Authority, *Reducing Australia's Greenhouse Gas Emissions – Targets and Progress Review. Final Report* (February 2014).

The CCA determined a national GHG emissions budget for a 67% probability of staying below a Global Temperature Increase of 2°C to be 10.1 Gt CO<sub>2</sub>-e for the period 2013 – 2050.

On this basis, the CCA advised that Australia's GHG emissions need to be reduced within the range of 40 to 60% by 2030 compared with 2000 levels (**Emissions Range**).

The CCA advised that the upper end of the Emissions Range (60% by 2030) was appropriate for limiting Global Temperature Increase to 1.5°C, and the lower end of Emissions Range (40% by 2030) was appropriate for limiting Global Temperature Increase to 3°C.

48. Since 2014, Australia's GHG emissions have further depleted its available GHG emissions budget.

49. By reason of paragraphs 39 to 48, Australia's GHG emissions budget to hold Global Temperature Increase to 1.5°C can be determined on the basis of Best Available Science (**Australia's Emissions Budget for 1.5°C**).

#### *Conduct of the Commonwealth*

50. At all material times:

- a. The Commonwealth has set and maintained an Australian GHG emissions reduction target for 2030 without regard to Best Available Science on the GHG emissions reductions required of Australia to hold Global Temperature Increase below the Global Temperature Limit.

#### **Particulars**

In 2015, the Commonwealth adopted a GHG emissions reduction target of 26-28% below 2005 levels by 2030 (**Australia's 2030 Target**).

Australia's 2030 Target falls below the lower end of the Emissions Range, which the CCA advised was appropriate for limiting Global Temperature Increase to 3°C.

Further, Australia's 2030 Target was determined in respect of a baseline year of 2005, whereas the Emissions Range was determined in respect of a baseline year of 2000. Australia's GHG emissions in 2005 were substantially higher than in 2000.

In 2020, the Commonwealth re-affirmed Australia's 2030 Target.

The Applicants refer to paragraphs 47 above and 69 below and the particulars thereto.

Further particulars to be provided.

- b. Further, the Commonwealth is not on track to meet Australia's 2030 Target.
- c. At Australia's current rate of GHG emissions reductions, Australia's Emissions Budget for 1.5°C would be depleted within the next decade.
- d. Further, even if the Commonwealth meets Australia's 2030 Target, Australia's Emissions Budget for 1.5°C would still be depleted in approximately the next decade.

- e. By reason of the above, Australia's 2030 Target is not a Best Available Science Target.

#### *Consequences of Exceeding the Global Temperature Limit*

51. At all material times, failure to limit Global Temperature Increase to the Global Temperature Limit will:
- a. result in an increase in the frequency, size and severity of the Impacts of Climate Change; and
  - b. increase the likelihood of triggering Tipping Points, resulting in further severe, abrupt and irreversible Climate Change, magnifying the Impacts of Climate Change.

### **III. THE TORRES STRAIT ISLANDS AND ITS PEOPLES**

#### ***Torres Strait Islands***

52. At all material times, the Torres Strait Islands, or *Zenadth Kes*:

- a. refers to an area of approximately 48,000km<sup>2</sup> between the Cape York Peninsula and Papua New Guinea of shallow open seas and approximately 274 islands (**Torres Strait Islands**);
- b. includes the following island groups:
  - i. Eastern Volcanic – including the islands of Ugar, Erub and Mer;
  - ii. Northwestern – including the islands of Boigu, Dauan and Saibai;
  - iii. Central – including the islands of Iama, Masig, Poruma and Warraber;
  - iv. Nearwestern – including the islands of Mabuiag or Gumu, Badu and Moa; and
  - v. Inner – including the islands of Keriri, Waiben, Muralug and Ngurapai;
- c. includes islands that are surrounded by coral reefs, which are fundamental to marine biodiversity and productivity, and provide coastal protection from waves on low-lying cay islands;
- d. includes several uninhabited islands within the island groups listed at paragraph 52(b);
- e. has a population of approximately 4,500 persons; and
- f. are primarily occupied by Torres Strait Islanders.

53. At all material times:

- a. the location of dwellings, structures and other significant sites, such as cemeteries, on the Torres Strait Islands is finely adjusted to current sea levels.

Many sections of villages are located only marginally above high tide and are regularly subject to flooding; and

- b. many of the Torres Strait Islands have been, and continue to be, subject to inundation events, often resulting in the loss of cultural heritage.

#### **Particulars**

Saibai, Boigu, Masig, Warraber and Iama are regularly affected by seawater inundation.

In 2012 and 2018, Saibai suffered significant inundation events impacting the local cemetery.

On Boigu, a sacred site where Torres Strait Islanders' ancestors conducted ceremonies, camped and spied on New Guinean warriors, is now completely submerged.

Graveyards on the no longer inhabited island of Tudu have been impacted by flooding.

Warraber has suffered significant inundation events impacting skeletal remains of the local cemetery.

In 2016, Masig suffered a significant inundation event, impacting skeletal remains of the local cemetery.

Poruma and Masig have suffered the erosion of coastal coconut trees, the leaves of which are used in cultural ceremonies.

In 2018, Iama suffered a significant inundation event, forcing residents to flee their homes.

Further particulars to be provided.

#### ***Torres Strait Islanders and Ailan Kastom***

54. Torres Strait Islanders:

- a. occupy and reside in areas which include the Torres Strait Islands and/or other parts of Australia;
- b. include the *Gudang, Kaiwalagal, Maluiligal, Gudamalulgal, Kulkalgal, and Kemerker Meriam* Nations;
- c. hold native title and/or native title rights and interests (as defined in the NTA) in relation to various parts of the Torres Strait Islands (**Native Title Rights**);

#### **Particulars**

Native Title Rights include rights to possession, occupation, use and enjoyment of the determination areas to the exclusion of all others. This includes non-exclusive rights in relation to the waters of the Torres Strait Islands to hunt, fish in or on, and gather from the Torres Strait Island waters for the purpose of satisfying personal, domestic or non-

commercial communal needs; and to take, use and enjoy the water for the purpose of satisfying personal, domestic or non-commercial communal needs.

*Mabo v Queensland (No 2)* (“Mabo Case”) [1992] HCA 23.

*Andrew Passi on behalf of the Meriam People v State of Queensland* [2001] FCA 697 (14 June 2001).

*Mye on behalf of the Erubam Le v State of Queensland* [2004] FCA 1573 (8 December 2004).

*Stephen on behalf of the Ugar People v State of Queensland* [2004] FCA 1574 (9 December 2004).

*Saibai People v State of Queensland and Others* [1999] FCA 158.

*Gibuma on behalf of the Boigu People v State of Queensland* [2004] FCA 1575.

*Dauan People v State of Queensland* [2000] FCA 1064.

*David on behalf of the Iama People and Tudulaig v State of Queensland* [2004] FCA 1576 (13 December 2004).

*Masig People v State of Queensland* [2000] FCA 1067.

*Poruma People v State of Queensland* [2000] FCA 1066.

*Warraber People v State of Queensland and others* [2000] FCA 1066.

*Nona on behalf of the Badulgal v State of Queensland* [2004] FCA 1578.

*Mabuiag People v State of Queensland* [2000] FCA 1065.

*Mualgal People v State of Queensland* [1999] FCA 157.

*Kaurareg People v Queensland* [2001] FCA 657 (23 May 2001).

*Mr Billy Wasaga and Others on behalf of the Kaurareg People v State of Queensland & Ors* [2001] FCA 657.

*Pearson Wigness & Ors on behalf of the Kaurareg People #3 and State of Queensland & Ors* (ongoing).

Further particulars to be provided.

- d. have a distinctive customary culture, known as *Ailan Kastom*, which creates a unique spiritual and physical connection with the Torres Strait Islands and surrounding waters (***Ailan Kastom***); and
- e. include the Applicants and the Group Members.

55. *Ailan Kastom* is the body of customs, traditions, observances and beliefs of Torres Strait Islanders generally, or of a particular community or group of Torres Strait Islanders. It includes, among other things:

- a. connection to the marine and terrestrial environment, including as part of cultural ceremony;
- b. participating in cultural ceremony;
- c. use of plants and animals for food, medicine and cultural ceremony;
- d. burying Torres Strait Islanders in local cemeteries and performing mourning rituals;
- e. visiting sacred sites, including on uninhabited islands; and
- f. dugong and marine turtle hunting, and other marine hunting and fishing.

56. At all material times:

- a. Connection to sea country and marine hunting is integral to *Ailan Kastom* in the Torres Strait Islands.

#### **Particulars**

The Applicants refer to:

- i. Torres Strait Regional Authority, *Dugong and Marine Turtle Teaching Resource and Information Package* (2009);
  - ii. Carter et al, Torres Strait Regional Authority, *The Effects of Climate on Seagrass in the Torres Strait* (2014); and
  - iii. H.A. Taylor and M.A. Rasheed, Fisheries Queensland, *Badu Island Seagrass Baseline Survey* (2010).
- b. Marine hunting and fishing, and sourcing other food, in the Torres Strait Islands is an important food source for Torres Strait Islanders.

#### ***Impacts of Climate Change in the Torres Strait Islands***

##### *Current Impacts of Climate Change in the Torres Strait Islands*

57. At the Current Warming Level, the following Impacts of Climate Change have occurred in the Torres Strait Islands, among others:

- a. Higher average surface temperature than the Current Warming Level;

#### **Particulars**

The region surrounding the Torres Strait Islands has warmed at a faster rate than Global Temperature Increase.

Queensland's average surface temperature had increased by 1.69°C compared to pre-industrial levels in 2020.

In nearby Papua New Guinea, average surface temperature had increased by 1.81°C compared to pre-industrial levels in 2020.

Further particulars to be provided.

- b. ocean acidification and increase in Ocean Temperature;

#### **Particulars**

The Applicants refer to and repeat paragraphs 25(a) and (b) and the particulars thereto.

Ocean Temperature in Australia has increased by more than 1°C since 1900, which is above the global average rate.

The average pH of surface waters in the Torres Strait Islands has decreased (thereby increasing acidity) compared to pre-industrial levels. Among other impacts, this has significantly reduced coral calcification and growth rates, in turn affecting corals' ability to recover from bleaching events.

Further particulars to be provided.

- c. sea level rise, with consequential impacts including flooding and coastal erosion;

#### **Particulars**

The Applicants refer to and repeat paragraph 25(d) and the particulars thereto.

The rate of sea level rise to the north of Australia has been significantly higher than the global average.

Between 1993 and 2019, sea level in the Torres Strait has risen by approximately 6 cm per decade.

Rising sea levels in the Torres Strait Islands have increased the impacts of storm surges, resulting in greater coastal inundation, inundation of freshwater with saltwater and coastal erosion.

Sandy shorelines in Australia have retreated between 0.5–1m a year in many locations around Australia between 1984-2015.

Further particulars to be provided.

- d. increase in the frequency, size and/or intensity of extreme weather events such as terrestrial and marine heatwaves, severe storms, and flooding;

#### **Particulars**

The Applicants refer to and repeat paragraph 25(e) and the particulars thereto.

Northern Australia has had significant increases in the intensity and frequency of hot extremes and significant decreases in the intensity and frequency of cold extremes since the 1950s.

Increased Ocean Temperatures have caused longer and more frequent marine heatwaves around Australia.

Further particulars to be provided.

- e. harm and destruction of ecosystems and non-human species; and

#### **Particulars**

The Applicants refer to and repeat paragraph 25(f) and the particulars thereto.

The Applicants refer to and repeat the particulars to paragraph 57(b).

Climate Change has caused more frequent and more severe bleaching of coral reefs in northern Australia, particularly in recent decades. In 2020, a mass coral bleaching event marked the first time in which bleaching occurred on individual reefs along the entire 2,300km of the Great Barrier Reef.

Climate Change has broadly impacted the marine ecosystems in the Torres Strait Islands causing changes in reproduction, organism growth, physiology and species composition and distribution.

Further particulars to be provided.

- f. harm to human health.

#### **Particulars**

Indigenous communities are at particular risk to the health consequences of Climate Change due to poor health, inadequate infrastructure, and poverty.

Heatwaves and prolonged periods of high temperatures increase the incidence of sudden onset heat stress, heart attacks, strokes, respiratory issues, cognitive performance and other health issues, particularly in people with poor health.

Global Temperature Increase increases the favourable conditions for infectious diseases such as malaria and dengue fever.

Communities vulnerable to the Impacts of Climate Change are particularly at risk of increased mental health issues.

Further particulars to be provided.

**(Current Impacts of Climate Change in the Torres Strait Islands).**

*Projected Impacts of Climate Change in the Torres Strait Islands*

58. Failure to prevent Global Temperature Increase from exceeding the Global Temperature Limit will have severe impacts on Torres Strait Islanders, including, injury, disease, and death, rendering some of the islands uninhabitable and displacing Torres Strait Islanders, causing them to become climate refugees, and causing substantial loss of *Ailan Kastom*.
59. At all material times, the following Impacts of Climate Change and Current Impacts of Climate Change, among others, are projected to occur in the Torres Strait Islands if Global Temperature Increase exceeds the Global Temperature Limit:
- a. further increase in average surface temperature, above the projected Global Temperature Increases;

**Particulars**

Based on the observed ratio of Australian to Global Temperature Increase, a Global Temperature Increase of 1.5°C would equate to a temperature increase of 2.1°C in Australia.

There is high confidence there will be continued substantial increases in mean, maximum and minimum temperatures in all seasons in the Australian wet tropics region in which the Torres Strait Islands are located.

Further particulars to be provided.

- b. further ocean acidification and increases in Ocean Temperature;

**Particulars**

The Applicants refer to and repeat paragraph 26 and the particulars thereto.

Further particulars to be provided.

- c. further sea level rise and associated impacts, including inundation, erosion, and contamination of freshwater sources, which could render islands in the Torres Strait uninhabitable by the end of the century and displace Torres Strait Islanders, causing them to become climate refugees;

**Particulars**

The Applicants refer to and repeat paragraphs 26 and 28 and the particulars thereto.

There is very high confidence in future sea level rise in the Torres Strait Islands.

It is reasonable to expect that sea level rise for the Torres Strait Islands will be similar or higher than the global mean sea level rise.

Sea level rise will cause further inundation, erosion and contamination of freshwater sources in Torres Strait Islands already regularly impacted and will cause inundation, erosion and contamination of freshwater sources in islands that are not currently regularly impacted. Projected sea level rise could render islands in the Torres Strait Islands uninhabitable by the end of the century.

The Applicants refer to the particulars to paragraph 59(d) below. It is projected that higher sea levels combined with storm surges will increase the severity and frequency of inundation, erosion and contamination of freshwater in the Torres Strait Islands.

Agriculture in the Torres Strait Islands is very likely to be adversely impacted by sea level rise, and associated extreme weather events, and by inundation, soil salinization and decline in water supply caused by seawater intruding into freshwater reservoirs.

Increased frequency of flooding in the Torres Strait Islands will increase recovery times for access to potable water. Two consecutive years of annual flooding would prevent freshwater aquifers from recovering from saltwater contamination.

Further particulars to be provided.

- d. further increase in the number of intense tropical cyclones, and incidence, intensity and duration of other extreme weather events, such as heatwaves, severe storms, and flooding, and associated impacts;

### **Particulars**

The Applicants refer to and repeat paragraphs 26 and 28 and the particulars thereto.

The Applicants refer to and repeat the particulars to paragraph 59(c).

Under a Global Temperature Increase of 2°C, the increase in intensity and frequency of hot extremes in Northern Australia is very likely compared with the recent past (1995-2014), and extremely likely compared with pre-industrial times.

The largest increases in marine heatwave frequency due to Climate Change are projected for the Arctic and tropical oceans.

In the future, heavy precipitation and pluvial flooding are very likely to increase over northern Australia.

Wind speed in northern Australia will likely increase during summer and winter by approximately 50% and 80%, respectively. The combination of increased wind speed and sea level rise increases the frequency of inundation and flooding, which damages infrastructure and contaminates freshwater sources.

The number of intense tropical cyclones (Category 4 to 5) is likely to increase with additional Global Temperature Increase. Warmer Ocean Temperature will increase the probability of stronger cyclones, and the

shift in tropical cyclones for the South Pacific region. Cyclones in the Torres Strait are projected to become stronger and longer lasting and are likely to impact infrastructure, emergency services facilities and roads.

Further particulars to be provided.

- e. further harm and destruction of ecosystems and non-human species, including:
  - i. coral reefs;
  - ii. marine ecosystems and species; and
  - iii. mangroves and coastal wetlands.

### **Particulars**

The Applicants refer to and repeat paragraph 26 and the particulars thereto, and the particulars to sub-paragraph 59(b) above.

Warming of the wet tropics coastal waters poses a significant threat to the marine environment through biological changes in marine species, including local abundance, community structure, and enhanced coral bleaching risk.

As a result of the inability of coral reefs to recover from bleaching events as described in the particulars to paragraph 57(b) above, increased acidification will further damage reef ecosystems in the Torres Strait Islands.

Seagrass meadows are the primary food source for dugongs and green turtles in the Torres Strait. There is likely a critical temperature limit for seagrasses above which it is expected there would be a decrease in productivity and distribution of species that rely on this environment.

Further particulars to be provided.

- f. greater likelihood of injury, disease, and death due to extreme weather events; increased likelihood of undernutrition resulting from diminished food production; and increased risks from food- and water-borne diseases and vector-borne diseases.

### **Particulars**

The Applicants refer to and repeat the particulars to paragraphs 25(f) and 57(f) above.

Further Global Temperature Increase will exacerbate food insecurity and potential malnutrition as availability of traditional plants for food, medicine and cultural business decreases. Torres Strait Islanders are particularly vulnerable to malnutrition with 22% of indigenous Australians in remote areas experiencing food insecurity compared with the 4% national average.

Projected Impacts of Climate Change including warmer temperature, increased rainfall, and flooding will increase the prevalence of mosquito-borne diseases including malaria, dengue fever and Zika virus. These impacts will also increase foodborne diseases with salmonella disease rates projected to rise by 15% for every 1°C increase in Global Temperature Increase.

Further particulars to be provided.

**(Projected Impacts of Climate Change in the Torres Strait Islands).**

60. Exceeding the Global Temperature Limit runs a greater risk of triggering Tipping Points, beyond which certain Projected Impacts of Climate Change in the Torres Strait Islands could no longer be avoided, including rendering many of the islands uninhabitable and displacing Torres Strait Islanders, even if global temperatures are subsequently reduced.

**Particulars**

The Applicants refer to and repeat the particulars to paragraph 26.

**IV. DUTY OF CARE**

***Torres Strait Islanders' vulnerability and degree of hazard***

61. As set out in paragraphs 28, 29, 53, and 57 to 59 above, the Torres Strait Islands are vulnerable to the Current and Projected Impacts of Climate Change in the Torres Strait Islands.
62. The degree of harm to the Torres Strait Islands from Climate Change is extremely significant.
63. Torres Strait Islanders, including the Applicants and the Group Members, cannot protect themselves from, or sufficiently mitigate, the harms associated with the Current and Projected Impacts of Climate Change in the Torres Strait Islands.

***The Commonwealth's control and Torres Strait Islanders' reliance***

64. On or about 18 December 1978, the Commonwealth entered into a treaty with Papua New Guinea in respect of the Torres Strait Islands (**Torres Strait Treaty**).

**Particulars**

The Applicants refer to the *Treaty between Australia and the Independent State of Papua New Guinea Concerning Sovereignty and Maritime Boundaries in the Area Between Two Countries, Including the Area Known as Torres Strait, and Related Matters* entered on 18 December 1978, in force from 15 February 1985.

65. Pursuant to the Torres Strait Treaty, a Protected Zone was established comprising all the land, sea, airspace, seabed and subsoil within the Torres Strait Islands (**Protected Zone**).
66. The Protected Zone was established for the following purposes:

- a. principally, to acknowledge and protect the traditional way of life and livelihood of the traditional inhabitants (including Torres Strait Islanders) including their traditional fishing and free movement; and
- b. further, to protect and preserve the marine environment and indigenous fauna and flora in, and in the vicinity of, the Protected Zone.

#### **Particulars**

The Applicants refer to Article 10 of the Torres Strait Treaty.

67. Pursuant to the Torres Strait Treaty, the Commonwealth is required to:

- a. take legislative and other measures necessary to protect and preserve the marine environment in, and in the vicinity of, the Protected Zone, including taking into account internationally agreed rules, standards and recommended practices which have been adopted by diplomatic conferences or by relevant international organisations; and/or
- b. take measures for the prevention and control of pollution or other damage to the marine environment from all sources and activities under its jurisdiction or control, including, in particular, measures to minimise to the fullest practicable extent the release of toxic, harmful or noxious substances from land-based sources, from rivers, from or through the atmosphere, or by dumping at sea.

#### **Particulars**

The Applicants refer to Article 13 of the Torres Strait Treaty.

68. The Commonwealth has been a party to the UNFCCC since 1992, and to the Paris Agreement since 2016.

#### **Particulars**

The Applicants refer to and repeat the particulars to paragraphs 33 and 37.

69. From about August 2015, and pursuant to its obligation under Article 4(2) of the Paris Agreement, the Commonwealth set its first NDC, namely Australia's 2030 Target, as defined in paragraph 50(a) above.

#### **Particulars**

The Commonwealth committed to reduce Australia's GHG emissions by 26-28% below 2005 levels by 2030.

70. The Commonwealth has set and maintained Australia's 2030 Target without regard to Best Available Science on the GHG emissions reductions required of Australia to hold Global Temperature Increase below the Global Temperature Limit.

#### **Particulars**

The Applicants refer to and repeat paragraph 50 and the particulars thereto.

71. Australia is one of the largest global emitters of GHGs on a per capita basis.

### Particulars

In 2018, Australia contributed approximately 1.3% of global GHG emissions, while constituting approximately 0.33% of the global population.

The Applicants refer to the Climate Watch Data Explorer tool, available at [www.climatewatchdata.org](http://www.climatewatchdata.org).

72. Further, the Commonwealth is one of the largest emitters of GHGs in Australia.

### Particulars

Energy usage each year from Commonwealth sources generates over two million tonnes of CO<sub>2</sub>-e, not including fuel used in military vehicles and equipment (**Commonwealth's Own Emissions**). See <https://energy.gov.au/government-priorities/energy-productivity-and-energy-efficiency/government-buildings>.

73. The Commonwealth assumed responsibility for the protection of Torres Strait Islanders, including the Applicants and the Group Members, from the Current and Projected Impacts of Climate Change in the Torres Strait Islands through a number of programs.

### Particulars

- a. The Torres Strait Climate Change Strategy 2014-2018;
- b. The Torres Strait Regional Adaption and Resilience Plan 2016-2021;
- c. The Torres Strait Coastal Management Committee;
- d. The Climate and Coastal Working Group;
- e. The Environmental Management Programme;
- f. The TSRA Land and Sea Management Unit;
- g. The Torres Strait Major Infrastructure Programme; and
- h. The Commonwealth's Indigenous Land and Sea Corporation.

74. Since at least 2012, the Commonwealth has funded the construction of seawalls in the Torres Strait Islands.

### Particulars

On 4 June 2012, the Commonwealth announced the provision of \$12 million in funding for coastal protection works in the more vulnerable islands of Saibai, Boigu, Iama, Poruma, Masig and Warraber.

On 26 February 2014, the Commonwealth announced the provision of a further \$12 million to support improvements to seawall infrastructure in the Torres Strait Islands across the "six most vulnerable" of the inhabited Torres Strait Islands.

In 2017, a \$24.5 million seawall was completed on Saibai, using both Commonwealth and State funds, in an effort to protect gravesites from sea level rise (**Saibai Seawall**).

Further particulars to be provided.

75. The construction of the Saibai Island Seawall has not protected Saibai or the Torres Strait Islands from the impacts of sea level rise, storm surges and flooding.

#### **Particulars**

In about January 2018, less than 6 months after its construction was completed, the Saibai Seawall was breached, which resulted in property and other damage.

The Applicants otherwise refer to and repeat the matters set out at paragraph 53(b) above.

Further particulars to be provided.

76. Further, at all material times, the Commonwealth had control over, and/or the power or ability to:

- a. set and meet a Best Available Science Target to hold Global Temperature Increase to the Global Temperature Limit;
- b. otherwise prevent or minimise further Global Temperature Increase by reducing the Commonwealth's Own Emissions, so as to minimise or reduce the likely Current and Projected Impacts of Climate Change in the Torres Strait Islands; and
- c. control GHG emissions through existing statutes and regulations.

#### **Particulars to sub-paragraph (c)**

- i. The *Environment Protection and Biodiversity Conservation Act 1999* (Cth);
- ii. The *Great Barrier Reef Marine Park Act 1975* (Cth) (ss 37AA, 61ABA, 61ABB);
- iii. The Emissions Reduction Fund and the Safeguard Mechanism, established in 2015 by an amendment to the *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth);
- iv. The Carbon Farming Initiative established by the *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) (s 3);
- v. The National Energy Productivity Plan;
- vi. The *Fuel Quality Standards Act 2000* (Cth) (s 3);

- vii. The Clean Energy Finance Corporation established under the *Clean Energy Finance Corporation Act 2012* (Cth);
- viii. The Renewable Energy Target, established by the *Renewable Energy (Electricity) Act 2000* (Cth);
- ix. The Carbon Neutral Program;
- x. The Australian Energy Regulator;
- xi. The Australian Renewable Energy Agency, established under the *Australian Renewable Energy Agency Act 2011* (Cth);
- xii. The Carbon Capture and Storage Research Development Demonstration Fund;
- xiii. The Clean Energy Regulator established by the *Clean Energy Regulator Act 2011* (Cth);
- xiv. The National Greenhouse and Energy Reporting Scheme;
- xv. The Emissions Reduction Fund;
- xvi. The Renewable Energy Target;
- xvii. The Australian National Registry of Emissions Units; and
- xviii. The National Greenhouse and Energy Reporting Scheme under the *National Greenhouse and Energy Reporting Act 2007* (Cth).

***The Commonwealth's knowledge and foreseeability***

77. At all material times, the Commonwealth knew, or ought reasonably to have known:

- a. of the Current and Projected Impacts of Climate Change;

**Particulars**

The Commonwealth's knowledge is to be inferred from the following matters and documents:

- i. the Applicants refer to and repeat paragraphs 24 to 29 and 32 to 38;
- ii. the Commonwealth's adoption and ratification of the UNFCCC and the Paris Agreement;
- iii. the Commonwealth's NDC;
- iv. the Commonwealth's membership of the IPCC and the WMO, and publications and data released by both; and
- v. reports of Commonwealth government departments, agencies and statutory bodies, or reports prepared by third parties for same, including:

1. Australian Government, Department of Industry, Science, Energy and Resources (and previous incarnations, including the Australian Government, Department of Climate Change and Energy Efficiency);
  2. The CCA;
  3. The CSIRO;
  4. The BOM;
  5. The Great Barrier Reef Marine Park Authority;
  6. The Australian Fisheries Management Authority; and
  7. The Torres Strait Regional Authority.
- b. of the Current and Projected Impacts of Climate Change in the Torres Strait Islands;

#### **Particulars**

The Commonwealth's knowledge is to be inferred from the following matters and documents:

- i. the Applicants refer to and repeat paragraphs 57 to 60;
  - ii. the Applicants refer to and repeat the matters listed in sub-paragraph (a); and
  - iii. reports of, or prepared for, State and/or local government agencies, including:
    1. Fisheries Queensland, Department of Employment, Economic Development and Innovation;
    2. The Torres Strait Island Regional Council; and
    3. the Commonwealth's funding of seawalls in the Torres Strait Islands, as referred to in paragraph 74 above.
- c. of the Global Temperature Limit;

#### **Particulars**

The Commonwealth's knowledge is to be inferred from the following matters and documents:

- i. the Commonwealth's adoption and ratification of the Paris Agreement;
- ii. the Applicants refer to and repeat paragraphs 26 to 31, and 39 to 49; and

- iii. The Applicants refer to and repeat the matters listed in subparagraph (a)(iv) – (vi).
- d. of the need to prevent further Global Temperature Increase and, in particular, to limit Global Temperature Increase to the Global Temperature Limit, in order to minimise the Current and Projected Impacts of Climate Change in the Torres Strait Islands;

#### **Particulars**

The Applicants refer to and repeat the particulars to paragraph 77(c).

- e. of the Best Available Science regarding the measures, including GHG emissions reductions, required to prevent further Global Temperature Increase and to limit Global Temperature Increase to the Global Temperature Limit, as outlined in paragraphs 39 to 49.

#### **Particulars**

The Commonwealth's knowledge is to be inferred from the following matters and documents:

- i. the Applicants refer to and repeat paragraphs 29 to 31, and 39 to 49; and
  - ii. the Applicants refer to and repeat the matters listed in subparagraph (a)(iv) – (v).
78. At all material times, Torres Strait Islanders, including the Applicants and the Group Members, were vulnerable to the consequences of the failure of the Commonwealth to take reasonable measures to:
- a. prevent or minimise further Global Temperature Increase;
  - b. limit Global Temperature Increase to the Global Temperature Limit, including by setting and meeting a Best Available Science Target.

#### **Particulars**

The Commonwealth set, and has maintained, Australia's 2030 Target without regard to Best Available Science on the GHG emissions reductions required of Australia to hold Global Temperature Increase below the Global Temperature Limit, as outlined in paragraph 50.

79. At all material times, the Commonwealth knew, or ought to have known, of the vulnerability of Torres Strait Islanders, including the Applicants and the Group Members.
80. Further, it was reasonably foreseeable that if the Commonwealth failed to take the steps outlined in paragraph 82 then persons, such as Torres Strait Islanders, including the Applicants and the Group Members, would suffer loss and damage.

81. Accordingly, by reason of the above matters, the Commonwealth owes a duty to Torres Strait Islanders, including the Applicants and the Group Members, to take reasonable steps to:

- a. protect Torres Strait Islanders; and/or
- b. protect Torres Strait Islanders' traditional way of life, including taking steps to preserve *Ailan Kastom*; and/or
- c. protect the marine environment in and around the Protected Zone, including the Torres Strait Islands;

from the Current and Projected Impacts of Climate Change in the Torres Strait Islands (**Duty of Care**).

## **V. STANDARD OF CARE AND BREACH OF DUTY OF CARE**

82. At all material times, the Commonwealth owed a Duty of Care to Torres Strait Islanders, including the Applicants and the Group Members, to take reasonable steps to ensure that, having regard to the Best Available Science, it:

- a. identified the Current and Projected Impacts of Climate Change in the Torres Strait Islands;
- b. identified the risk, scope and severity of Current and Projected Impacts of Climate Change in the Torres Strait Islands;
- c. identified the Global Temperature Increase at which Current and Projected Impacts of Climate Change in the Torres Strait Islands would occur;
- d. identified a Best Available Science Target to prevent or minimise Current and Projected Impacts of Climate Change in the Torres Strait Islands;
- e. avoid injury and harm to Torres Strait Islanders, including the Applicants and the Group Members, from GHG emissions into the Earth's atmosphere;
- f. implement such measures as are necessary to reduce Australia's GHG emissions consistent with the Best Available Science Target identified at subparagraph (d) above; and
- g. implement such measures as are necessary to protect the land and marine environment of the Torres Strait Islands and the cultural and customary rights of Torres Strait Islanders, including the Applicants and the Group Members, from GHG emissions into the Earth's atmosphere.

83. Negligently, and in breach of the Duty of Care owed to Torres Strait Islanders, including the Applicants and the Group Members, the Commonwealth has failed to take any, or any reasonable, steps identified at paragraph 82.

84. Further, pursuant to the NTA, the Native Title Rights are:

- a. recognised and protected by the NTA; and
- b. unable to be extinguished contrary to the provisions of the NTA.

### **Particulars**

The Applicants refer to sections 3, 4, 10, 11 of the NTA.

85. At all material times, the Commonwealth's failure to take any, or any reasonable, steps identified at paragraph 82, so as to prevent or minimise the Current and Projected Impacts of Climate Change in the Torres Strait Islands:

- a. constitutes future acts which affects the Native Title Rights of Torres Strait Islanders within the meaning of the NTA;

### **Particulars**

The Applicants refer to sections 226, 227 and 233 of the NTA. Sea level rises, inundation and coastal erosion will extinguish certain rights and interests over the Torres Strait Islands, because they will disappear.

and/or

- b. are otherwise invalid, insofar as those acts affect or extinguish the Native Title Rights.

## **VI. LOSS AND DAMAGE**

86. As a result of the Commonwealth's breaches of the Duty of Care as alleged, Torres Strait Islanders, including the Applicants and the Group Members, have suffered, and will continue to suffer, loss and damage:

- a. degradation of the land and marine environment including life and coral reef systems;
- b. loss of *Ailan Kastom*; and
- c. loss of Native Title Rights.

87. Further, the Commonwealth's ongoing breach of the Duty of Care will continue to cause:

- a. an increase in GHG emissions; and/or
- b. a material contribution to the Impacts of Climate Change and therefore the Projected Impacts of Climate Change in the Torres Strait Islands.

88. Still further, the Commonwealth's ongoing breach of the Duty of Care will cause Torres Strait Islanders, including the Applicants and the Group Members, to suffer physical and psychological injury.

### **Particulars**

The Applicants refer to and repeat paragraphs 58 and 59(f) and the particulars thereto.

89. Unless otherwise restrained, the Commonwealth will continue to breach the Duty of Care, causing loss and damage to Torres Strait Islanders, including the Applicants and the Group Members.

Date: 26 October 2021



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Signed by Brett Spiegel  
Lawyer for the Applicants

This pleading was prepared by Fiona McLeod SC and Lindy Barrett of Counsel.

**Certificate of lawyer**

I, Brett Spiegel, certify to the Court that, in relation to the statement of claim 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 pleading.

Date: 26 October 2021



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Signed by Brett Spiegel  
Lawyer for the Applicants