

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 25/02/2022 6:01:15 PM AEDT and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged: Defence - Form 33 - Rule 16.32
File Number: VID622/2021
File Title: PABAI PABAI & ANOR v COMMONWEALTH OF AUSTRALIA
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 25/02/2022 6:07:59 PM AEDT

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.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



Form 33
Rule 16.32

FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: VICTORIA
DIVISION:

NO VID622/2021

PABAI PABAI
First Applicant

GUY PAUL KABAI
Second Applicant

COMMONWEALTH OF AUSTRALIA
Respondent

DEFENCE

In this pleading, save as expressly dealt with below, the Respondent adopts defined terms used in the Statement of Claim (**SOC**) for convenience only and without conveying any admission of their content.

In a letter dated 17 December 2021, the Applicants stated that the phrase “at all material times” when used in the SOC (except paragraph 50) references “the period from at least approximately 2014 onwards”. The Respondent pleads to the SOC on that basis.

1. In response to paragraph 1 of the SOC, the Respondent:
 - a. admits that the Applicants purport to bring the proceeding on behalf of the persons described in the paragraph;
 - b. says that, to the extent that the Applicants and Group Members assert claims in respect of damage suffered more than six years before the commencement of the proceedings, those claims are time-barred;
 - c. says further that, to the extent that the Applicants and Group Members assert claims in respect of damage suffered prior to 4 March 1992, those claims are not able to be brought under Pt IVA of the *Federal Court of Australia Act 1976* (Cth);
 - d. otherwise denies the allegations in the paragraph.
2. In response to paragraph 2 of the SOC, the Respondent:
 - a. admits the Applicants are of Torres Strait Islander descent;

Filed on behalf of the Respondent, Commonwealth of Australia
Prepared by: Emily Nance
AGS lawyer within the meaning of s 55I of the *Judiciary Act 1903*

File ref: 21008585

Address for Service:
The Australian Government Solicitor
Level 34, 600 Bourke Street, MELBOURNE VIC 3000
emily.nance@ags.gov.au

Telephone: 03 9242 1316
Lawyer's Email:
emily.nance@ags.gov.au
Facsimile: 03 9242 1333

- b. otherwise does not know and therefore cannot admit the allegations in paragraph 2 of the SOC.
3. In response to paragraph 3 of the SOC, the Respondent:
- a. says that by native title determination QUD6199/1998 (*Gibuma on behalf of the Boigu People v State of Queensland* [2004] FCA 1575) (the **Boigu People Determination**), pursuant to the applicable provisions of the *Native Title Act 1993* (Cth) (**NTA**), the Boigu People, including the members of the Pabai family, were recognised as native title holders in respect of the determination area described in Schedule 1 and shown on the plan in Schedule 2 of the Boigu People Determination, which includes most of the land and waters on the landward side of the high water mark of the land of the island referred to as Boigu Island (save for those parcels of land specifically identified in Schedule 1);
 - b. says the Boigu People, including the members of the Pabai family, are recorded in Schedule 3 of the Boigu People Determination as the native title holders for the native title rights and interests as set out in that Determination and as otherwise specified pursuant to the terms of that Determination;
 - c. says the First Applicant is also a member of the Malu Ki'ai (Torres Strait Islanders) Corporation, which, pursuant to the Boigu People Determination, holds and has held the native title in respect of the determination area identified in that Determination on trust on and from 24 May 2005;
 - d. otherwise does not know and therefore cannot admit the allegations in the paragraph.
4. In response to paragraph 4 of the SOC, the Respondent:
- a. says that by native title determination QUD6017/1998 (*Saibai People v State of Queensland* [1999] FCA 158) (the **Saibai People Determination**), pursuant to the applicable provisions of the NTA, the Saibai People were recognised as native title holders in respect of the land and inland waters on the landward side of the high water mark of the determination area, including most of Saibai Island, except those areas excluded in paragraph 1 of the Saibai People Determination;
 - b. says the Saibai People are recorded in paragraph 2 of the Saibai People Determination as the persons that hold the communal and group rights comprising the native title rights and interests as set out in that Determination and as otherwise specified pursuant to the terms of that Determination;
 - c. says the Second Applicant is a member of the Saibai Mura Buway (Torres Strait Islanders) Corporation which, pursuant to the Saibai People Determination, holds and has held the native title in respect of the determination area identified in the Saibai People Determination on trust on and from 12 February 1999;

- d. otherwise does not know and therefore cannot admit the allegations in the paragraph.
5. In response to paragraph 5 of the SOC, the Respondent:
 - a. repeats paragraph 1 above;
 - b. admits that, as at the commencement of the proceeding, there were more than 7 persons who were of Torres Strait Islander descent;
 - c. otherwise denies the allegations in the paragraph.
 6. The Respondent admits the allegations in paragraph 6 of the SOC.
 7. The Respondent admits the allegations in paragraph 7 of the SOC.
 8. In response to paragraph 8 of the SOC, the Respondent:
 - a. says that the IPCC's most recent report found that global mean surface temperature was 1.08°C [with the assessed 90% interval 0.95 to 1.20°C] higher in 2011-2020 than 1850-1900, with larger increases over land than over the ocean;

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IPCC, *AR6 Climate Change 2021: The Physical Science Basis*, published on or around 9 August 2021 (**AR6 WGI**), Summary for Policymakers (**SPM**) at [A.1.3].

- b. says that the World Meteorological Organisation's (**WMO**) most recent report found that the global mean temperature for 2021 (based on data from January to September) was 1.08 +/- 0.13°C above the 1850-1900 average;

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WMO, *State of Global Climate 2021: WMO Provisional report*, published on or around 1 November 2021 (**WMO 2021 Report**), p. 6.

- c. says that the IPCC's most recent report found that the likely range of total human-caused global surface temperature increase from 1850-1900 to 2010-2019 was in the range of 0.8°C to 1.3°C, with a best estimate of 1.07°C;

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AR6 WGI SPM at [A.1.3].

- d. otherwise denies the allegations in the paragraph.
9. In response to paragraph 9 of the SOC, the Respondent:
 - a. says that the IPCC Special Report on 1.5°C found that, based on the data and models then available to it, Global Temperature Increase is likely to reach

1.5°C between 2030 and 2052 if GHG emissions continue to increase at the 2017 rate;

- b. says that AR6 WGI found that, based on the data and models then available to it, it is more likely than not that Global Temperature Increase of 1.5°C will be exceeded in the near term (2021-2040) and may exceed 3.0°C during the 21st century, depending on the future rate of GHG emissions;
- c. says that the UNEP Emissions Gap Report 2020 found that, based on the data and models then available to it, current NDCs are consistent with limiting warming to 3.2°C by the end of the century (66% probability) and 3.0°C if both conditional and unconditional NDCs are fully implemented, and that countries must collectively increase their NDC ambitions threefold to get on track to a 2°C goal and more than fivefold to get on track to the 1.5°C goal;
- d. says that the IPCC Special Report on 1.5°C and AR6 WGI found that many of the impacts of climate change are likely to be less severe at 1.5°C global warming level compared to higher levels of global warming;
- e. otherwise does not know and therefore cannot admit the allegations in the paragraph.

10. The Respondent admits the allegations in paragraph 10 of the SOC.

11. In response to paragraph 11 of the SOC, the Respondent:

- a. as to sub-paragraph 11(a)(i), admits that there is a near-linear relationship between cumulative anthropogenic carbon dioxide (**CO₂**) emissions and the increase in global surface temperature and that every tonne of CO₂ emissions adds to global warming, but says further that:
 - i. it is the cumulative total of GHG emissions that determines the quantum of Global Temperature Increase;
 - ii. AR6 WG1 estimates that each 1000 Gt CO₂ is likely to result in Global Temperature Increase of 0.27°C – 0.63°C with a best estimate of 0.45°C, and there is no statement in the IPCC AR6 WGI report as to the quantum of Global Temperature Increase likely to be caused by emission of smaller quantities of CO₂;
- b. as to sub-paragraph 11(a)(ii), admits that the frequency and severity of many impacts of climate change is projected to increase with Global Temperature Increase though there are varying levels of confidence as to the relationship between particular levels of Global Temperature Increase and the frequency and severity of different risks and impacts;
- c. as to sub-paragraph 11(a)(iii), says that the existence of tipping points, which are critical thresholds beyond which a system reorganises, including abruptly and/or irreversibly (**Tipping Points**), cannot be excluded, though they are not well understood;

- d. as to sub-paragraph 11(a)(iv), admits that, generally, the risk of triggering Tipping Points increases with Global Temperature Increase but says that there is considerable uncertainty regarding the risk of triggering particular Tipping Points at different temperature thresholds;
- e. as to sub-paragraph 11(a)(v), admits that, 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 (including sea level rise) are projected to manifest and increase in years to come;
- f. as to sub-paragraph 11(b), says that AR6 WGI expressed different degrees of confidence as to whether particular changes due to past and future GHG emissions are irreversible for centuries to millennia;
- g. otherwise admits the allegations in sub-paragraph (b)(i);
- h. as to sub-paragraph 11(b)(ii), says achieving global net zero CO₂ emissions, with anthropogenic CO₂ emissions balanced by anthropogenic removals of CO₂, is a requirement for stabilizing global surface temperature increase but says this is different from achieving net zero of all GHG emissions, and not all GHG emissions need to reduce to net zero to achieve global temperature stabilization;
- i. admits the allegations in sub-paragraphs 11(b)(iii), but says that does not take into account the possibility of future actions to remove GHG emissions from the atmosphere or otherwise lower global temperatures;
- j. as to sub-paragraph 11(b)(iv), repeats sub-paragraphs (b) to (e) above;
- k. as to sub-paragraph 11(c), says that climate science is able to model or project (amongst other things):
 - i. the probability of future Global Temperature Increase reaching specified temperatures based on current and projected GHG emissions;
 - ii. the impacts and risks of climate change for different ranges of Global Temperature Increase, with varying levels of confidence for different risks and impacts;
 - iii. the cumulative amount of global CO₂ emissions remaining to give a specified probability of limiting Global Temperature Increase to a specified level (**global CO₂ emissions budgets**);
 - iv. the level of global GHG emissions reductions that are projected to give a specified probability of limiting Global Temperature Increase to a specified level;

16. The Respondent admits the allegations in paragraph 16 of the SOC.
17. In response to paragraph 17 of the SOC, the Respondent:
 - a. admits the first two sentences of the paragraph;
 - b. says that since 2010, UNEP has published an annual “Emissions Gap” report on the difference between where GHG emissions are predicted to be in 2030 and where they should be to avoid the worst impacts of climate change;
 - c. otherwise denies the allegations in the paragraph.
18. In response to paragraph 18 of the SOC, the Respondent:
 - a. says that the CSIRO is a body corporate established pursuant to the *Science and Industry Research Act 1949* (Cth) whose functions include but are not limited to scientific research;
 - b. says that since 1 July 2014, the CSIRO has been a corporate Commonwealth entity within the meaning of s 11(a) of the *Public Governance, Performance and Accountability Act 2013* (Cth);
 - c. otherwise denies the allegations in the paragraph.
19. In response to paragraph 19 of the SOC, the Respondent:
 - a. admits that the BOM is Australia's national weather, climate and water agency;
 - b. says that the BOM is a body established pursuant to the *Meteorology Act 1955* (Cth) with certain functions under that Act and additional functions under the *Water Act 2007* (Cth);
 - c. says that since 1 July 2014, the BOM has been a non-corporate Commonwealth entity within the meaning of s 11(b) of the *Public Governance, Performance and Accountability Act 2013* (Cth);
 - d. otherwise denies the allegations in the paragraph.
20. The Respondent admits the allegations in paragraph 20 of the SOC.
21. In response to paragraph 21 of the SOC, the Respondent:
 - a. admits that the CCA is an independent statutory body established under the *Climate Change Authority Act 2011* (Cth);
 - b. says that the CCA provides (and since 2015 has continued to provide) independent, expert advice to the Respondent on climate change policy and mitigation initiatives, including through conducting regular and specifically commissioned reviews;

- c. otherwise denies the allegations in the paragraph.

22. In response to paragraph 22 of the SOC, the Respondent:

- a. says that in a letter dated 30 November 2021, the Respondent requested that the Applicants identify which reports of the IPCC, WMO, UNEP, CSIRO, BOM, CCA and which particular other “peer-reviewed scientific literature” were said to constitute the “Best Available Science” and at what point/s in time;
- b. says that in a letter dated 17 December 2021, the Applicants responded that “[s]pecific reports and timeframes are not included in the definition of Best Available Science because the Best Available Science evolves over time”;
- c. says that from at least around 2014 reports of the IPCC, WMO and CSIRO are leading sources of science on climate change;
- d. says that the UNEP and CCA are not scientific bodies but provide reliable and credible public information informed by scientific information for policy makers;
- e. says that the IPCC, UNEP and CCA do not conduct their own research, modelling or make measurements of climate or weather phenomena;
- f. says that peer-reviewed scientific literature in relation to the causes and impacts of climate change describes a body of information that evolves with time, in relation to which there is not necessarily consistency in the opinions of individual authors. Through its assessments, the IPCC determines the state of knowledge on climate change, including identifying where there is agreement in the scientific community on topics related to climate change, and where further research is needed;
- g. otherwise, in light of the absence of particulars of the relevant reports and literature said to constitute the Best Available Science, and the relevant dates, does not know and therefore cannot admit the allegations in the paragraph.

23. In response to paragraph 23 of the SOC, the Respondent:

- a. repeats paragraph 22 above;
- b. admits since at least around 2014 there have been reports from one or more of the IPCC, WMO, UNEP, CSIRO, BOM, CCA and/or other peer-reviewed literature that have addressed:
 - i. the current and projected impacts of climate change;
 - ii. the current and projected impacts of climate change for the Torres Strait Islands and/or low-lying islands generally;
 - iii. actions which can be taken to mitigate or avoid the impacts of climate change, including GHG emissions reductions at the global level and for Australia;

- c. otherwise, for the reasons pleaded in paragraph 22 above, does not know and therefore cannot admit the allegations in paragraph.
24. In response to paragraph 24 of the SOC, the Respondent:
- a. admits the allegations in sub-paragraphs (a) and (e);
 - b. as to sub-paragraph (b), repeats paragraph 8 above;
 - c. as to sub-paragraph (c), admits that the Last Interglacial, around 125,000 years ago, is the next most recent candidate for a period of higher mean surface temperature than the decadal average as at 2020;
 - d. as to sub-paragraph (d), admits that the concentration of total GHGs in the atmosphere has increased year on year since at least 2014 (though the concentrations of some GHGs such as CFCs and halons has decreased) and will continue to do so until a balance is reached between the GHGs emitted and removed from the atmosphere;
 - e. otherwise denies the allegations in the paragraph.
25. In response to the allegations in paragraph 25 of the SOC, the Respondent:
- a. repeats paragraph 24b. above;
 - b. otherwise admits the allegations in the paragraph.
26. In response to paragraph 26 of the SOC, the Respondent:
- a. repeats paragraph 11.b, 11.c and 11.d above;
 - b. otherwise denies the allegations in the paragraph.
27. In response to paragraph 27 of the SOC, the Respondent:
- a. repeats paragraphs 11 and 26 above;
 - b. admits that there is scientific consensus (with at least medium confidence) that some risks and impacts of climate change will be avoided and other risks and impacts reduced at a Global Temperature Increase of 1.5°C compared with an increase of 2°C;
 - c. otherwise denies the allegations in the paragraph.
28. In response to paragraph 28 of the SOC, the Respondent:
- a. admits that small and low-lying islands are vulnerable to several impacts of climate change, such as sea level rise, storm surges, tropical and extratropical cyclones, increasing air and surface temperatures and changing rainfall patterns;

- b. otherwise denies the allegations in the paragraph.
29. In response to paragraph 29 of the SOC, the Respondent:
- a. repeats paragraph 28 above;
 - b. admits that some Indigenous peoples, including some Indigenous peoples in Australia, are more vulnerable to the impacts of climate change than other peoples, by reason of (inter alia) their place of residence, occupation, connection to the land and environment and/or social and economic disadvantage;
 - c. otherwise does not know and therefore cannot admit the allegations in the paragraph.
30. In response to paragraph 30 of the SOC, the Respondent:
- a. repeats paragraphs 11, 26 and 27 above;
 - b. otherwise says the allegation is ambiguous and therefore does not know and cannot admit the paragraph.
31. In response to paragraph 31 of the SOC, the Respondent:
- a. repeats paragraph 27.b above;
 - b. says that the allegation is ambiguous in that it does not specify what the “most severe Projected Impacts of Climate Change” are alleged to be;
 - c. otherwise denies the allegations in the paragraph.
32. In response to paragraph 32 of the SOC, the Respondent:
- a. says the UNFCCC was adopted on 9 May 1992, opened for signature on 4 June 1992 and entered into force generally and in Australia on 21 March 1994;
 - b. otherwise admits the allegations in the paragraph.
33. The Respondent admits the allegations in paragraph 33 of the SOC.
34. The Respondent admits the allegations in paragraph 34 of the SOC.
35. In response to paragraph 35 of the SOC, the Respondent:
- a. says the Paris Agreement was adopted on 12 December 2015, opened for signature on 22 April 2016, entered into force generally on 4 November 2016 and entered into force in Australia on 9 December 2016;
 - b. otherwise admits the allegations in the paragraph.

36. The Respondent admits the allegations in paragraph 36 of the SOC and says further that the aim of the Paris Agreement as stated in Article 2 is to “strengthen the global response to the threat of climate change”, in enhancing the implementation of the UNFCCC, including its objective.
37. In response to paragraph 37 of the SOC, the Respondent:
- a. says there are currently 193 parties to the Paris Agreement;
 - b. otherwise admits the allegations in the paragraph.
38. In response to paragraph 38 of the SOC, the Respondent:
- a. says that each party to the Paris Agreement is required to pursue domestic mitigation measures with the aim of achieving the objectives of their NDCs;
 - b. otherwise admits the allegations in the paragraph.
39. In response to paragraph 39 of the SOC, the Respondent:
- a. repeats sub-paragraphs 11.k to 11.m above;
 - b. says some bodies, including the IPCC, have calculated approximate global CO₂ emissions budgets in order to give a specified probability of limiting Global Temperature Increase to a specified level;
 - c. otherwise denies the allegations in the paragraph.
40. In response to paragraph 40 of the SOC, the Respondent:
- a. repeats sub-paragraphs 11.k to 11.m above;
 - b. admits that global CO₂ emissions budgets can inform the level of global CO₂ emissions reductions that will, based on the assumptions modelled, give a specific probability of maintaining Global Temperature Increase below a specified level;
 - c. admits that the earlier and larger the global CO₂ emissions reductions, the slower the depletion of any global CO₂ emissions budget;
 - d. admits that slower reduction of global CO₂ emissions will result in a faster depletion of any global CO₂ emissions budget;
 - e. otherwise denies the allegations in the paragraph.
41. In response to paragraph 41 of the SOC, the Respondent:
- a. says the IPCC in the AR6 WGI published in August 2021 has determined an approximate remaining CO₂ budget for a 50% likelihood of limiting Global Temperature Increase to 1.5°C (**IPCC Global CO₂ Budget**);

- b. otherwise denies the allegations in the paragraph.
42. In response to paragraph 42 of the SOC, the Respondent:
- a. repeats paragraphs 9 and 41 above;
 - b. admits that, based on the rate of global CO₂ emissions in 2019 found by the IPCC in AR6 WGI published in August 2021, the IPCC Global CO₂ Budget would be depleted within the next two decades;
 - c. otherwise denies the allegations in the paragraph.
43. In response to paragraph 43 of the SOC, the Respondent:
- a. repeats paragraphs 9, 27 and 41 above;
 - b. admits that, in the AR6 WGI published in August 2021, the IPCC has determined that even if CO₂ emissions stay within the IPCC Global CO₂ Budget, there remains a 50% chance that Global Temperature Increase will exceed 1.5°C;
 - c. otherwise denies the allegations in the paragraph.
44. In response to paragraph 44 of the SOC, the Respondent:
- a. in response to sub-paragraph (a), says:
 - i. global action is required in order to have a meaningful impact on climate change;
 - ii. the Paris Agreement aims to strengthen the global response to the threat of climate change, including by holding Global Temperature Increase to well below 2°C and pursuing efforts to limit the Global Temperature Increase to 1.5°C, recognising that this would significantly reduce the risks and impacts of climate change (Article 2.1(a));
 - iii. in order to achieve that long-term temperature goal, the Parties to the Paris Agreement aim to reach global peaking of greenhouse gas emissions as soon as possible, recognising that peaking will take longer for developing country Parties, and to undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of GHGs in the second half of this century, on the basis of equity and in the context of sustainable development and efforts to eradicate poverty (Article 4.1);
 - iv. the parties to the Paris Agreement including the Respondent are required to communicate NDCs, and pursue domestic mitigation

measures with the aim of achieving the objectives of such NDCs (Article 4.2);

- v. further, each Party's successive NDC is to represent a progression beyond the Party's then current NDC and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances (Article 4.3);
- vi. otherwise, the allegation that "all countries do their part" is ambiguous, and the Respondent therefore does not know and cannot admit the allegations in the sub-paragraph;

b. in response to sub-paragraph (b), says:

- i. in model pathways with no or limited overshoot of 1.5°C, global net anthropogenic CO₂ emissions reach net zero around 2050, accompanied by deep reductions in non-CO₂ emissions; and
- ii. for limiting global warming to below 2°C, global net anthropogenic CO₂ emissions reach net zero around 2070, also accompanied by deep reductions in non-CO₂ emissions;

c. repeats paragraphs 9, 27, 36, 38, 41-43 above;

d. otherwise denies the allegations in the paragraph.

45. In response to paragraph 45 of the SOC, the Respondent:

a. repeats paragraphs 11, 22, 41 and 44 above;

b. says that, as the "Global 1.5°C Budget" is apparently drawn from the AR6 WGI published in August 2021:

- i. the allegations in this paragraph must logically be limited to after that date;
- ii. it is a CO₂ only emissions budget not a total GHG emissions budget;

c. says that there is no scientific consensus as to the appropriate method to determine each country's GHG emissions budgets and targets, and they can be determined in a number of different ways;

d. otherwise, says that the phrase "for each country to do its part" is ambiguous, and the Respondent therefore does not know and cannot admit the allegations in the paragraph.

46. In response to paragraph 46 of the SOC, the Respondent:

a. repeats paragraphs 11.k-11.m, 39-40, 44 and 45 above;

- b. says that global CO₂ budgets may, along with other considerations, be relevant to determining a national CO₂ emissions budget, however different outcomes will be reached depending on the approach adopted to determining how the burden of reducing global GHG emissions is to be distributed between countries;
 - c. otherwise denies the allegations in the paragraph.
47. In response to paragraph 47 of the SOC, the Respondent:
- a. repeats paragraph 21 above;
 - b. says that on 27 February 2014, the CCA provided a report to the Respondent which reviewed Australia's GHG targets and reported on Australia's progress towards them (**CCA Report**);
 - c. says the CCA Report recommended a national GHG budget for the period 2013-2050 of 10.1 Gt CO₂-e derived from a global GHG emissions budget which was said to provide a 67% probability of limiting warming to 2 degrees or less;
 - d. says that the CCA Report drew on climate science available at the time, but the CCA did not carry out independent scientific research and does not have an independent scientific research function;
 - e. otherwise denies the allegations in the paragraph.
48. In response to paragraph 48, the Respondent:
- a. admits that since 2014, GHGs have continued to be emitted from activities conducted in Australia;
 - b. says that there are no agreed country specific GHG or CO₂ emissions budgets to hold Global Temperature Increase to 1.5°C or any other figure;
 - c. says there is no agreed emissions budget for Australia, though various papers and reports have attempted to formulate such a budget, with different results;
 - d. otherwise denies the allegations in the paragraph.
49. In response to paragraph 49 of the SOC, the Respondent:
- a. repeats paragraphs 22-22.g and 39-48;
 - b. says there is no GHG emissions budget for Australia that would, of itself, be capable of holding Global Temperature Increase to 1.5°C or any other figure;
 - c. says that different GHG emissions budgets may be determined depending on (amongst other things):

- i. the degree of probability of limiting Global Temperature Increases to 1.5°C;
 - ii. the baseline year selected;
 - iii. the share of the relevant global emissions budget determined to be appropriate for Australia, which is a contestable policy decision; and
 - iv. whether the budget is to apply to all GHGs or only CO₂; and
- d. otherwise denies the allegations in the paragraph.

50. In response to paragraph 50 of the SOC, the Respondent:

- a. says that in a letter dated 17 December 2021, the Applicants stated that the phrase “at all material times” when used in this paragraph references “the period from 2015 onwards” and the Respondent pleads to the paragraph on that basis;
- b. repeats paragraphs 22 and 39-49 above;
- c. says that on 11 August 2015, in advance of the December 2015 UNFCCC Conference of the Parties in Paris, the Respondent submitted its intended nationally determined contributions to reduce GHG emissions by 26-28% below 2005 levels by 2030 (**2030 Target**) which became Australia’s first NDC for the purpose of the Paris Agreement on 9 November 2016 upon Australia’s ratification of the Paris Agreement;
- d. says that on 31 December 2020, the Respondent communicated an updated NDC which affirmed its 2030 Target;
- e. says further that on 28 October 2021, the Respondent communicated an updated and enhanced NDC adopting a target of net zero emissions by 2050 (**2050 Target**), committing to seven low emissions technology stretch goals and reaffirming its economy-wide target to reduce emissions by 26-28% below 2005 levels by 2030;

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Copies of the communications described in sub-paragraphs (c)-(e) above are publicly available at:

[https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Australia First/Australias Intended Nationally Determined Contribution to a new Climate Change Agreement - August 2015.pdf](https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Australia%20First/Australias%20Intended%20Nationally%20Determined%20Contribution%20to%20a%20new%20Climate%20Change%20Agreement%20-%20August%202015.pdf)

<https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Australia%20First/Australia%20NDC%20recommunication%20FINAL.PDF>

<https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Australia%20First/Australia%20Nationally%20Determined%20Contribution%20Update%200October%202021%20WEB.pdf>

- f. says that determination of each of the 2030 Target and the 2050 Target was a decision of high level government policy, involving economic, social and political factors, including the Respondent's relationships with foreign governments;
- g. says the Respondent's annual GHG emissions as at June 2021 were 20.4% lower than the levels as at June 2005 and current modelling shows the Respondent is on track to overachieve on the 2030 Target by up to 9 percentage points, achieving reduction in emissions of up to 35% below 2005 levels by 2030;

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Australia's emissions projections released on 26 October 2021, publicly available at:
https://www.industry.gov.au/sites/default/files/October%202021/document/australias_emissions_projections_2021_0.pdf

Quarterly Update of Australia's National Greenhouse Gas Inventory: June 2021, publicly available at:
<https://www.industry.gov.au/sites/default/files/November%202021/document/nggi-quarterly-update-june-2021-data-sources.pdf>

- h. says that on 26 October 2021, the Respondent released Australia's Long Term Emissions Reduction Plan, a whole-of-economy plan to achieve net zero emissions by 2050, which recognises that it is necessary to continuously refine and adapt the plan to meet the 2050 Target; and

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A copy of Australia's Long Term Emissions Reduction Plan is publicly available at: [https://www.industry.gov.au/sites/default/files/October 2021/document/australias-long-term-emissions-reduction-plan.pdf](https://www.industry.gov.au/sites/default/files/October%2021/document/australias-long-term-emissions-reduction-plan.pdf)

- i. otherwise denies the allegations in the paragraph.
51. In response to paragraph 51 of the SOC, the Respondent:
- a. repeats paragraphs 11.a-11.d, 26 and 27 above;
 - b. otherwise denies the allegations in the paragraph.
52. In response to paragraph 52 of the SOC, the Respondent:
- a. says that the area of the Torres Strait, as defined in the International Hydrographic Organisation's draft 4th Edition of the Limits of Oceans and Seas (the **Torres Strait Islands**), endorsed by the Interdepartmental Committee of Surveying and Mapping under ICSM Resolution R00/11/06 - Limits of Oceans and Seas and Offshore Undersea Features (April 2001), is approximately 48,105km²;

- b. says that the area of the Torres Strait comprises 17 inhabited islands and hundreds of uninhabited islands, although the total number of islands varies depending on the definition of “island” that is applied;
- c. says that some but not all islands in the Torres Strait area are surrounded by coral reefs and some islands have no or limited coral reefs associated with them;
- d. says that as at 2016, 81.3% of the population of the Torres Strait Islands identified as Torres Strait Islander people;
- e. otherwise admits the allegations in sub-paragraphs (a)-(d) and (f);
- f. says that as at 2016, the population of the Torres Strait Islands was approximately 4,500 persons but the Respondent otherwise does not know and cannot admit what the population was during the period 2014 to present.

53. In response to paragraph 53 of the SOC, the Respondent:

- a. says that some structures and significant sites on some Torres Strait Islands are located on low lying areas and subject to a risk of inundation events;
- b. admits that some of the Torres Strait Islands have been subject to inundation events prior to and since 2014;
- c. otherwise does not know and therefore cannot admit the allegations in the paragraph.

54. In response to paragraph 54 of the SOC, the Respondent:

- a. admits that some, but not all, Torres Strait Islanders occupy and reside in areas which include the Torres Strait Islands and/or other parts of Australia;
- b. says that the island of Daru (sometimes known as Darau) is within the geographical area of the Torres Strait Islands but is part of the territory of Papua New Guinea, not Australia;
- c. admits the allegations in sub-paragraph (b);
- d. as to sub-paragraph (c):
 - i. says that in a letter dated 30 November 2021, the Respondent sought further and better particulars of the “Native Title Rights” asserted by the Applicants, which the Applicants declined to provide, except to confirm that the particulars in paragraph 54(c) of the SOC are not intended to apply to each individual Torres Strait Islander;
 - ii. says there have been a number of court proceedings that have determined, pursuant to the NTA or common law, that certain groups

of Torres Strait Islanders hold specified native title rights and interests in relation to specified parts of the Torres Strait Islands;

- iii. repeats paragraphs 3 and 4 above;
 - iv. otherwise does not know and therefore cannot admit the allegations in the sub-paragraph;
 - e. as to sub-paragraph (d), admits that *Ailan Kastom* is the body of customs, traditions, observances and beliefs of some or all of the Torres Strait Islanders living in the Torres Strait area, and includes any such customs, traditions, observances and beliefs relating to particular persons, areas, objects or relationships;
 - f. admits that the Applicants are of Torres Strait Islander descent;
 - g. in light of the definition of “Group Members” in paragraph 1 of the SOC, admits that the Group Members are of Torres Strait Islander descent;
 - h. otherwise denies the allegations in the paragraph.
55. The Respondent admits the allegations in paragraph 55 of the SOC.
56. The Respondent admits the allegations in paragraph 56 of the SOC.
57. In response to paragraph 57 of the SOC, the Respondent:
- a. repeats paragraphs 8 and 53 above;
 - b. admits that the Torres Strait Islands have been affected by some impacts of climate change, including warmer days, ocean acidification, increase in ocean temperature and sea level rise but does not know and cannot admit whether, and if so the extent to which, existing global sea level rise has contributed to an increase in the extent or frequency of inundation events and/or coastal erosion in the Torres Strait Islands;
 - c. says that Torres Strait Islanders in the Torres Strait Islands are at risk of harm to human health from the potential impacts of climate change and that the Torres Strait Islands have been affected by some impacts of climate change, including warmer days which can affect human health, but the Respondent does not know and cannot admit whether, and if so the extent to which, current warming has affected human health of Torres Strait Islanders;
 - d. says that the impacts of climate change are not uniform across all parts of the Torres Strait Islands due to differences in the ocean and land environments, including differences in the elevation of islands;
 - e. says that some parts of the Torres Strait Islands have been affected by inundation during high tides and surge events from time to time for many years, including prior to 2014;

- f. otherwise does not know and therefore cannot admit the allegations in the paragraph.
58. In response to paragraph 58 of the SOC, the Respondent:
- a. repeats paragraphs 26, 27, 28, 29, 30, 31 and 51 above; and
 - b. otherwise denies the allegations.
59. In response to paragraph 59 of the SOC, the Respondent:
- a. repeats paragraphs 26, 27, 28, 29, 30, 31, 51 and 57 above;
 - b. says that there is high confidence that small islands are projected to be at risk and very sensitive to coastal climate change and other stressors such as oceanic warming, sea level rise, cyclones and mass coral bleaching and mortality although there is a lack of precise quantitative studies of projected impacts of sea level rise at Global Temperature Increase of 1.5°C and 2°C;
 - c. otherwise does not know and therefore cannot admit the allegations in the paragraph.
60. In response to paragraph 60 of the SOC, the Respondent:
- a. repeats paragraphs 11.b to 11.d above;
 - b. otherwise does not know and therefore cannot admit the allegations in the paragraph.
61. In response to paragraph 61 of the SOC, the Respondent:
- a. repeats paragraphs 28, 29, 53 and 57-60 above;
 - b. admits the Torres Strait Islands are vulnerable to some impacts of climate change, including sea level rise, storm surges, tropical and extratropical cyclones, increasing air and surface temperatures and changing rainfall patterns;
 - c. otherwise does not know and therefore cannot admit the allegations in the paragraph.
62. In response to paragraph 62 of the SOC, the Respondent:
- a. says that climate change poses significant risks for all people;
 - b. repeats paragraphs 28.a and 29.b above, and says Torres Strait Islanders may be vulnerable to the impacts of climate change for the reasons pleaded therein;
 - c. otherwise denies the allegations in the paragraph.

63. In response to paragraph 63 of the SOC, the Respondent:
- a. says that there are adaptation options that may be available to some Torres Strait Islanders inhabiting some Torres Strait Islands to protect themselves from the projected impacts of climate change, including the construction or retrofitting of buildings to withstand increased air temperatures, heatwaves and natural hazard events, construction of seawalls and infrastructure to protect against inundation and erosion and restoring seagrasses, mangroves and tidal wetlands to protect coastal infrastructure from storm surges and maintain the productivity of fisheries and marine industries;
 - b. otherwise does not know and therefore cannot admit the allegations in the paragraph.
64. In response to paragraph 64 of the SOC, the Respondent:
- a. admits the allegations in the paragraph;
 - b. says further that the Torres Strait Treaty entered into force for Australia on 15 February 1985.
65. In response to paragraph 65 of the SOC, the Respondent:
- a. admits that, pursuant to the Torres Strait Treaty, a Protected Zone in the Torres Strait was established comprising all the land, sea, airspace, seabed and subsoil within the area bounded by the line described in Annex 9 to the Treaty;
 - b. repeats paragraph 52 above, and says the Torres Strait Islands includes islands outside the Protected Zone, such as the Inner Island Group;
 - c. otherwise denies the allegations in the paragraph.
66. In response to 66 of the SOC, the Respondent:
- a. admits that the principal purpose of the Parties in establishing the Protected Zone, and in determining its northern, southern, eastern and western boundaries, is to acknowledge and protect the traditional way of life and livelihood of the traditional inhabitants including their traditional fishing and free movement (Torres Strait Treaty, Article 10.3);
 - b. admits that a further purpose of the Parties in establishing the Protected Zone is to protect and preserve the marine environment and indigenous fauna and flora in and in the vicinity of the Protected Zone (Torres Strait Treaty, Article 10.4);
 - c. otherwise denies the allegations in the paragraph.
67. The Respondent admits the allegations in paragraph 67 of the SOC and says further that:

- a. Article 13(1) provides that each Party shall take legislative and other measures necessary to protect and preserve the marine environment in and in the vicinity of the Protected Zone and that, in formulating those measures, each Party shall take into account internationally agreed rules, standards and recommended practices which have been adopted by diplomatic conferences or by relevant international organisations;
- b. Article 13(2) provides that the measures that each Party shall take in accordance with Article 13(1) shall include 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 and shall include, in particular, measures to minimise to the fullest practicable extent (inter alia) the release of toxic, harmful or noxious substances from land-based sources, from rivers, from or through the atmosphere, or by dumping at sea, and pollution or other damage from vessels.

68. In response to paragraph 68, the Respondent:

- a. says that the UNFCCC entered into force in Australia on 21 March 1994 and the Paris Agreement entered into force in Australia on 9 December 2016;
- b. otherwise admits the allegations in the paragraph.

69. In response to paragraph 69, the Respondent:

- a. repeats paragraph 50.c above;
- b. otherwise denies the allegations in the paragraph.

70. In response to paragraph 70 of the SOC, the Respondent:

- a. repeats paragraphs 22, 45, 49, and 50.f above;
- b. otherwise denies the allegations in the paragraph.

71. In response to paragraph 71 of the SOC, the Respondent:

- a. says that:
 - i. in 2014, 2015, 2017 and 2018 Australia ranked eighth globally in GHG emissions per capita and ninth globally in 2016;
 - ii. Australia's share of total annual global GHG emissions for 2014-2018 was approximately 1.2-1.3%;

PARTICULARS

Australia	2018	2017	2016	2015	2014
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Share of global GHG emissions	1.27%	1.30%	1.22%	1.21%	1.21%
Emissions per capita	24.79	25.33	23.87	23.79	24.12
Global ranking - emissions per capita	8 th	8 th	9 th	8 th	8 th

CAIT data: Climate Watch. 2020. GHG Emissions. Washington DC: World Resources Institute.

Data for 2019-2021 is not yet available.

- b. otherwise admits the allegations in the paragraph.
72. The Respondent denies the allegations in paragraph 72 of the SOC.
73. In response to paragraph 73 of the SOC, the Respondent:
- a. admits the Respondent has taken and/or funded a number of actions in order to mitigate the impacts and projected impacts of climate change in Australia and the Torres Strait Islands;
 - b. otherwise denies the allegations in the paragraph.
74. In response to paragraph 74 of the SOC, the Respondent:
- a. admits the allegations in the paragraph, but says that the funding has been provided since 2014;
 - b. says further that, pursuant to that funding:
 - i. seawalls were to be constructed in Saibai, Boigu, Poruma, Warraber, lama and Masig between 2014 and 2017 (**Seawalls Stage 1**) however in in 2016 the scope was reduced to major works on Saibai and minor works on Boigu and Poruma due to cost and technical difficulties;
 - ii. further seawalls are being constructed in Boigu, Poruma, Warraber and Masig (**Seawalls Stage 2**).
75. In response to paragraph 75 of the SOC, the Respondent:
- a. repeats paragraph 53 above;
 - b. says that the Saibai Island seawall was intended to protect the island of Saibai and not other islands within the Torres Strait;
 - c. otherwise does not know and therefore cannot admit the allegations in the paragraph.

76. In response to paragraph 76 of the SOC, the Respondent:
- a. repeats paragraphs 22, 22.g, 45, 46, 49 and 71 above;
 - b. admits that the Respondent has the power or ability to set national GHG emissions targets or budgets and says further that such determinations are decisions of high level government policy, involving economic, social and political factors, including the Respondent's relationships with foreign governments;
 - c. admits that the Respondent has the power or ability to take steps to reduce or minimise its own GHG emissions within operational and budgetary constraints;
 - d. admits that a number of statutes and regulations confer powers on Commonwealth agencies or Ministers which, depending on the circumstances of a particular case, may be lawfully exercised so as to reduce or minimise GHG emissions from activities undertaken by other entities in Australia;
 - e. otherwise denies the allegations in the paragraph.
77. In response to paragraph 77 of the SOC, the Respondent:
- a. says that in a letter dated 30 November 2021, the Respondent requested that the Applicants provide particulars of the allegations of knowledge and constructive knowledge pleaded in this paragraph, including particulars of the documents of which it is alleged the Respondent knew or ought to have known and the precise dates from which it is alleged the Respondent knew or ought to have known the pleaded matters, which the Applicants declined to provide;
 - b. admits that the Respondent knew of the content of the following reports or documents referred to in the SOC from at least on or around the date of their publication:
 - i. UNFCCC (adopted 9 May 1992, noting that it was later ratified by Australia on 30 December 1992 and entered into force for Australia on 21 March 1994);
 - ii. CCA, Reducing Australia's Greenhouse Gas Emissions – Targets and Progress Review: Final Report (February 2014);
 - iii. IPCC Fifth Assessment Report, which comprises four separate reports released on September 2013, March 2014, April 2014 and October 2014 (respectively);

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AR5 Climate Change 2013: The Physical Science Basis (September 2013)

AR5 Climate Change 2014: Impacts, Adaptation, and Vulnerability (March 2014)

AR5 Climate Change 2014: Mitigation of Climate Change (April 2014)

AR5 Synthesis Report: Climate Change 2014 (October 2014)

- iv. United Nations Framework Convention on Climate Change's Report on the Structured Expert Dialogue on the 2013-2015 Review (May] 2015);
 - v. Paris Agreement (adopted 12 December 2015, noting that it was later ratified by Australia on 9 November 2016 and entered into force for Australia on 9 December 2016);
 - vi. IPCC Special Report on 1.5°C (October 2018);
 - vii. IPCC Special Report on the Ocean (September 2019);
 - viii. UNEP Emissions Gap Report 2020 (December 2020);
 - ix. WMO State of the Global Climate in 2020 Report (April 2021);
 - x. Joint Report of the IPCC and the IPBES, Scientific outcome of the IPBES-IPCC co-sponsored workshop on biodiversity and climate change (June 2021);
 - xi. AR6 WGI (August 2021);
- c. says that the Respondent knew of the assessment of the extent of scientific consensus in relation to the risks and projected impacts of climate change, including the risks and impacts of climate change for small and low-lying islands, and the assessments of the various emissions pathways published in the reports in sub-paragraph (b) above;
 - d. to the extent that sub-paragraphs (a) and (b) include allegations as to the Respondent's knowledge of "Tipping Points" as defined in the particulars to sub-paragraph 11(a)(iii), repeats paragraphs 11.c-11.d above;
 - e. as to sub-paragraph (e), repeats paragraphs 22-22.g, 39-49 and sub-paragraph (b) above and says that as the Respondent does not know the content of the Best Available Science, it otherwise does not know and cannot admit the allegations in sub-paragraph (e);
 - f. otherwise, due to the absence of adequate particulars, does not know and cannot admit the allegations in the paragraph.

78. In response to paragraph 78 of the SOC, the Respondent:

- a. repeats paragraphs 28-31, 49-51, 57-61 and 76 above;
- b. otherwise denies the allegations in the paragraph.

79. In response to paragraph 79 of the SOC, the Respondent:

- a. refers to and repeats paragraphs 61 – 63 and 77.c above;
 - b. otherwise denies paragraph 79.
80. In response to paragraph 80 of the SOC, the Respondent:
- a. refers to and repeats paragraph 44 above;
 - b. says that by reason of climate change being the result of global emissions of GHG, of which Australia contributes only a very small proportion, it was not reasonably foreseeable that conduct by the Respondent in determining its GHG emissions targets would cause Global Temperature Increase of a degree that would cause any person, or alternatively, a class of persons including the Applicants and Group Members, to suffer loss and damage;
 - c. otherwise denies the allegations in paragraph 80 of the SOC.
81. The Respondent denies the allegations in paragraph 81 of the SOC.
82. In response to paragraph 82 of the SOC, the Respondent:
- a. says that in a letter dated 17 December 2021, the Applicants stated that the Applicants allege that both duty and breach existed from at least approximately 2014 and are ongoing;
 - b. repeats paragraphs 22-23 and 44-46 above;
 - c. says that, as the Best Available Science Target is defined in paragraph 45 of the SOC by reference to the “Global 1.5°C Budget” which in turn is apparently drawn from the AR6 WGI published in August 2021, any obligations in the nature of those pleaded in sub-paragraphs (d) and (f) could only logically arise after August 2021;
 - d. says that determination of any national GHG emissions target is a decision of high level government policy, involving economic, social and political factors, including the Respondent’s relationships with foreign governments, and in respect of which the Court should not impose a duty of care;
 - e. otherwise denies the allegations in the paragraph.
83. In response to paragraph 83 of the SOC, the Respondent:
- a. repeats paragraphs 50, 73-74 and 81-82 above;
 - b. otherwise denies the allegations in the paragraph.
84. In response to paragraph 84 of the SOC, the Respondent:
- a. repeats paragraphs 3, 4 and 54.d above; and

- b. admits that any native title rights held by the Applicants and any Group Members are recognised and protected in accordance with the NTA and unable to be extinguished contrary to the NTA.

85. In response to paragraph 85 of the SOC, the Respondent:

- a. repeats paragraphs 82 and 84 above;
- b. denies that a failure to act can constitute a “future act” within the meaning of the NTA;
- c. otherwise denies the allegations in the paragraph;
- d. says further that the Applicants do not plead or claim any remedial consequence flowing from the allegations in paragraphs 84-85 of the SOC and therefore the allegations fail to disclose a reasonable cause of action and should be struck out.

85A. In answer to the whole of the SOC, the Respondent says that the allegations made by the Applicants impermissibly invite the Court to apply the standard of negligence to decisions of high level government policy, which involve or are dictated by economic, social and political factors, including the Respondent’s relationships with foreign governments, and in respect of which the Court should not impose a duty of care.

86. In response to paragraph 86 of the SOC, the Respondent:

- a. says that, to the extent that any claim is made in respect of loss or damage suffered more than six years before the commencement of the proceedings, those claims are time-barred;
- b. otherwise denies the allegations in the paragraph.

87. The Respondent denies the allegations in paragraph 87 of the SOC.

88. The Respondent denies the allegations in paragraph 88 of the SOC.

89. The Respondent denies the allegations in paragraph 89 of the SOC.

Date: 25 February 2022



Emily Nance
AGS lawyer
for and on behalf of the Australian Government Solicitor
Lawyer for the Respondent

This pleading was prepared by Anna Mitchelmore SC, Zoe Maud and Alicia Lyons of counsel.

CERTIFICATE OF LAWYER

I, Emily Nance, certify to the Court that, in relation to the defence filed on behalf of the Respondent, the factual and legal material available to me at present provides a proper basis for:

1. each allegation in the pleading; and
2. each denial in the pleading; and
3. each non-admission in the pleading.

Date: 25 February 2022



Signed by Emily Nance
AGS lawyer
for and on behalf of the Australian Government Solicitor
Lawyer for the Respondent