

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 31/03/2022 1:14:27 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: Concise Statement
File Number: VID622/2021
File Title: PABAI PABAI & ANOR v COMMONWEALTH OF AUSTRALIA
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 31/03/2022 1:22:00 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.



Concise Statement

No. 622 of 2021

Federal Court of Australia
District Registry: Victoria
Division: General

PABAI PABAI

First Applicant

GUY PAUL KABAI

Second Applicant

COMMONWEALTH OF AUSTRALIA

Respondent

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

A. THE PARTIES

4. Pabai Pabai and Guy Paul Kabai have commenced this proceeding as a class action on behalf of all persons of Torres Strait Islander descent who have suffered and/or may suffer loss and damage as a result of the conduct of the Commonwealth.
5. Pabai Pabai and Guy Paul Kabai are Torres Strait Islanders from the Gudamalulgal Nation.
6. Pabai Pabai is 52 years of age. He resides on Boigu Island. He holds native title rights and interests in respect of Boigu Island.

7. Guy Paul Kabai is 54 years of age. He resides on Saibai Island. He holds native title rights and interests in respect of Saibai Island.

B. THE CLAIM

B1. The Torres Strait Islands and Torres Strait Islanders

8. The Torres Strait Islands, or *Zenadth Kes*, are the approximately 274 islands in an area of shallow open seas of approximately 48,000km² between the Cape York Peninsula and Papua New Guinea. The population is approximately 4,500 persons.
9. Torres Strait Islanders include the Gudang, Kaiwalagal, Maluiligal, Gudamalulgal, Kulkalgal, and Kemerker Meriam Nations. Torres Strait Islanders hold native title and/or native title rights and interests in relation to various parts of the Torres Strait Islands.
10. Torres Strait Islanders have a distinctive culture, known as *Ailan Kastom*, which includes a unique spiritual and physical connection with the Torres Strait Islands and surrounding waters.

B2. Vulnerability of Torres Strait Islanders to Climate Change

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

B3. Harm Caused by Climate Change to Torres Strait Islanders

13. Climate change causes a wide range of impacts on the environment, which have direct consequences for human life, health, livelihoods and cultural practices.
14. Australian and international scientific bodies, including agencies of the Commonwealth, have documented the current and projected harm caused by climate change to Torres Strait Islanders.
15. The current impacts of climate change in the Torres Strait Islands include higher average temperatures; sea level rise (which have increased the impacts of storm surges, resulting in greater coastal erosion and inundation of freshwater with saltwater); ocean warming and ocean acidification (leading to, among other impacts, coral bleaching and impacts on marine ecosystems); and more frequent and severe heatwaves, with impacts on human health.
16. Climate change in the Torres Strait is already harming *Ailan Kastom*.
17. The projected impacts of climate change on Torres Strait Islanders are even more severe. These include further sea level rise and associated impacts, including inundation of parts of islands, and contamination of freshwater sources; increased injury, disease, and death due to extreme weather events; increased undernutrition resulting from diminished food production; and increased health harms from food- and water-borne diseases and vector-borne diseases.

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

B4. Commonwealth Duty of Care to Torres Strait Islanders

19. The Commonwealth owes a duty of care to Torres Strait Islanders to take reasonable steps to protect them from the harms caused by climate change. In fulfilling its duty, the Commonwealth must have regard to the best available science in relation to climate change.
20. The Commonwealth's duty arises from, amongst other things, the Torres Strait Treaty; the *Native Title Act 1993* (Cth); the unique vulnerability and degree of hazard posed to Torres Strait Islanders from climate change, including personal injury, death and loss of *Ailan Kastom*, from which they cannot protect themselves; the Commonwealth's control and knowledge of the current and projected harm to Torres Strait Islanders; the foreseeability of the harm to Torres Strait Islanders from climate change; the Commonwealth's assumption of the climate risk to Torres Strait Islanders and Torres Strait Islanders' reliance upon the Commonwealth for protection from climate change.

B5. Commonwealth's Breach of Duty of Care

21. Since at least 2014, the Commonwealth has breached its duty of care by acting without regard to the best available science in assessing and addressing the current and projected harm to Torres Strait Islanders from climate change.
22. Mitigation of climate change requires having regard to the best available science including the reduction of greenhouse gas emissions so as to halt further climate change and minimise harms to Torres Strait Islanders.
23. Adaptation measures undertaken by the Commonwealth have been inadequate. For example, the construction of a sea wall on Sabai Island has failed to protect the Island. Rising seas breached the sea wall less than 6 months after its construction was completed in 2018, causing significant damage.
24. Global temperature has increased approximately 1.2°C from pre-industrial levels. It is projected to surpass 1.5°C in the next two decades and could rise by 3°C or more by the end of the century unless there are rapid and significant emissions reductions by 2030.
25. The survival of *Ailan Kastom* and Torres Strait Islanders in the Torres Strait depends on limiting global temperature increase:
 - (a) Holding the long-term global temperature increase to 1.5°C would prevent many of the most significant projected harms to Torres Strait Islanders from climate change.
 - (b) A global temperature increase of 2 to 3°C (and above) would have catastrophic implications for the life, health, livelihoods and *Ailan Kastom* of Torres Strait Islanders.
 - (c) Further, exceeding 1.5°C temperature increase carries a significant risk of triggering tipping points, beyond which the most severe projected impacts of climate change to Torres Strait Islanders could no longer be avoided.
26. Australia is one of the largest global emitters of greenhouse gases on a per capita basis.

27. In the determination of its greenhouse gas emission reduction targets, the Commonwealth has failed to take into account and engage with the best available science on emissions, breaching its duty to protect Torres Strait Islanders. More specifically, the Commonwealth has failed to have proper regard to advice from the Australian Climate Change Authority, the independent statutory body tasked with providing the Commonwealth with independent expert advice on the basis of the best available science on emissions.
28. Australia's 2030 emissions reduction target, set in 2015 and re-affirmed in 2020, is *below* the lower end of the emissions range which the Climate Change Authority advised was appropriate for limiting global temperature increase to 3°C. This means that Australia's 2030 emissions reduction target corresponds with a global temperature increase of *more* than 3°C.

B6. Loss and damage

29. As a result of the Commonwealth's breaches of the duty of care as alleged, the Applicants and all Torres Strait Islanders have suffered loss and damage.
30. Further, unless restrained, the Commonwealth's ongoing breach of duty will cause further loss and damage to the Applicants and all Torres Strait Islanders.

C. THE RELIEF SOUGHT FROM THE COURT

31. The Applicants seek declarations recognising the Commonwealth's duty of care to Torres Strait Islanders and injunctive relief including requiring the Commonwealth to take reasonable care to protect Torres Strait Islanders and *Ailan Kastom* from harm caused by climate change.
32. The Applicants also seek damages and costs.

Date: 31 March 2022

Fiona McLeod SC

Lindy Barrett

Shanta Martin

Certificate of lawyer

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

Date: 31 March 2022

A handwritten signature in black ink, appearing to read 'Brett Spiegel', written in a cursive style.

Signed by Brett Spiegel

Lawyer for the Applicants