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

Registrar

Important Information

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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 TO SECOND FURTHER AMENDED STATEMENT OF CLAIM

In this pleading, save as expressly dealt with below, the Respondent adopts defined terms used in the Second Further Amended Statement of Claim filed 11 April 2023 (**SFASOC**) for convenience only and without conveying any admission of their content.

1. In response to paragraph 1 of the SFASOC, 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 personal injury suffered more than three years before the commencement of the proceedings, those claims are time-barred by reason of s 11 of the *Limitation of Actions Act 1974* (Qld) and/or s 16B of the *Limitation Act 1985* (ACT) (and/or cognate legislation in other States and Territories, to the extent relevant and applicable);
 - c. says that, to the extent that the Applicants and Group Members assert claims in respect of other loss or damage suffered more than six years before the commencement of the proceedings, those claims are time-barred by reason of s 10 of the *Limitation of Actions Act 1974* (Qld) and/or s 11 of the *Limitation Act 1985* (ACT) (and/or cognate legislation in other States and Territories, to the extent relevant and applicable);
 - d. 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);
 - e. otherwise denies the allegations in the paragraph.

Filed on behalf of the Respondent, Commonwealth of Australia
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2. In response to paragraph 2 of the SFASOC, the Respondent:
 - a. admits the Applicants are Torres Strait Islanders;
 - b. otherwise does not know and therefore cannot admit the allegations in the paragraph.

3. In response to paragraph 3 of the SFASOC, 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 SFASOC, 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 SFASOC, 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 Torres Strait Islanders;
 - c. otherwise denies the allegations in the paragraph.
6. The Respondent admits the allegations in paragraph 6 of the SFASOC.
7. The Respondent admits the allegations in paragraph 7 of the SFASOC.
8. In response to paragraph 8 of the SFASOC, the Respondent:
- a. says that the IPCC's report *AR6 Climate Change 2021: The Physical Science Basis*, published on or around 9 August 2021 (**AR6 WGI**) found that global mean surface temperature was 1.09°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;

PARTICULARS

IPCC, AR6 WGI Summary for Policymakers (**SPM**) at [A.1.2].

- b. says that the World Meteorological Organisation's (**WMO**) most recent report found that the global mean temperature for 2021 was 1.11 ±0.13 °C above the 1850-1900 average;

PARTICULARS

WMO, *State of the Global Climate 2021 (WMO-No. 1290) (WMO 2021 Report)*, p. 2.

- c. says that the IPCC's AR6 WGI report found that the likely range of total human-caused global surface temperature increase from 1850-1900 to 2010-2019 is 0.8°C to 1.3°C, with a best estimate of 1.07°C;

PARTICULARS

AR6 WGI SPM at [A.1.3].

- d. otherwise denies the allegations in the paragraph.

9. In response to paragraph 9 of the SFASOC, 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 2021 found that, based on the data and models then available to it, unconditional Nationally Determined Contributions (**NDCs**) are consistent with limiting warming to 2.7°C by the end of the century (66% probability), 2.6°C if both conditional and unconditional NDCs are fully implemented and 2.2°C if net-zero emissions pledges are also fully implemented;
 - d. otherwise does not know and therefore cannot admit the allegations in the paragraph.
10. The Respondent admits the allegations in paragraph 10 of the SFASOC.
11. In response to paragraph 11 of the SFASOC, 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 CO₂ emissions that largely determines the quantum of Global Temperature Increase together with the warming and cooling effects from other anthropogenic emissions over time;
 - ii. AR6 WGI 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/or 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 uncertainty regarding particular Tipping Points and the temperature threshold at which particular Tipping Points are triggered;
- 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 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;
 - l. says that the models or projections referred to in the previous sub-paragraph are estimates or approximations based on, amongst other things:
 - i. the available information and scientific understanding at the time; and
 - ii. the assumptions as to future GHG emissions and removal rates, with attendant uncertainty as to which (if any) of the modelled rates and outcomes are most likely to occur;
 - m. otherwise denies the allegations in the paragraph.
- 12. The Respondent does not plead to paragraph 12 of the SFASOC, which does not contain any allegations against it.
- 13. In response to paragraph 13 of the SFASOC, the Respondent:
 - a. admits that multiple international and domestic organisations model the current and projected impacts of climate change and actions to mitigate or avoid those impacts;
 - b. otherwise denies the allegations in the paragraph.
- 14. In response to paragraph 14 of the SFASOC, the Respondent:
 - a. admits that the IPCC was established in 1988 by the UNEP and WMO;
 - b. says it is an international body made up of member countries of the United Nations and WMO;
 - c. admits that the IPCC currently has 195 member countries, including the Respondent;
 - d. otherwise denies the allegations in the paragraph.
- 15. In response to paragraph 15 of the SFASOC, the Respondent:
 - a. says the IPCC reporting process also involves member government reviews;
 - b. says the IPCC does not conduct its own research, run models or make measurements of climate or weather phenomena;
 - c. otherwise, admits that the description in paragraph 15 of the SFASOC is a general description of the IPCC reporting process.
- 16. The Respondent admits the allegations in paragraph 16 of the SFASOC.

17. In response to paragraph 17 of the SFASOC, 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 SFASOC, 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 SFASOC, 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 SFASOC.
21. In response to paragraph 21 of the SFASOC, 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 SFASOC, 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 and findings contained in different articles. 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. says that the reports or parts of the reports of some of the bodies listed in paragraph 22 of the SFASOC address policy matters that are not matters of science;
 - h. otherwise, in light of the absence of particulars of the relevant reports said to constitute the Best Available Science, and the relevant dates, does not know and therefore cannot admit the allegations in the paragraph.

- 22A. In response to paragraph 22A of the SFASOC, the Respondent:

- a. admits that the science on climate change is not static and evolves over time;
- b. repeats paragraph 22 above;
- c. otherwise, for the reasons set out in paragraphs 22(a), (b), (f), (g) and 22A(a), does not know and therefore cannot admit the allegations in the paragraph.

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

- a. repeats paragraphs 22 and 22A above;

- b. admits since at least around 2014 there have been reports from one or more of the IPCC, WMO, UNEP, CSIRO, BOM and CCA 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 paragraphs 22 and 22A above, does not know and therefore cannot admit the allegations in the paragraph.

24. In response to paragraph 24 of the SFASOC, 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 CO₂ 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 CO₂ 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 SFASOC, the Respondent:

- a. repeats paragraph 8 above;
- b. otherwise admits the allegations in the paragraph.

26. In response to paragraph 26 of the SFASOC, the Respondent:

- a. repeats paragraph 11.b, 11.c and 11.d above;
- b. otherwise denies the allegations in the paragraph.

26A. In response to paragraph 26A of the SFASOC, the Respondent:

- a. admits that the current scientific consensus is that there will be impacts of climate change at a Global Temperature Increase of 1.5°C, including sea level rise by 2100 relative to 1995-2014 of 0.28-0.55m and 0.37-0.86m by

2150 (medium confidence), coral reef decline by a further 70-90% at 1.5°C (high confidence) and in terrestrial ecosystems, 3 to 14% of species assessed will likely face very high risk of extinction;

- b. otherwise says the allegation is vague and ambiguous and therefore does not know and cannot admit the allegations in the paragraph.

27. In response to paragraph 27 of the SFASOC, 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.

27A. In response to paragraph 27A of the SFASOC, 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 projected impacts of climate change will be avoided and other risks and projected impacts reduced at a Global Temperature Increase of 2.0°C or greater compared with an increase of 3.0°C;
- c. otherwise says the allegation is vague and ambiguous and therefore does not know and cannot admit the allegations in the paragraph.

28. In response to paragraph 28 of the SFASOC, 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 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 SFASOC, 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. [not used]
31. In response to paragraph 31 of the SFASOC, the Respondent:
 - a. repeats paragraph 27.b above;
 - b. says that the allegation is ambiguous in that it does not specify what the “most dangerous Projected Impacts of Climate Change to small and low lying islands such as the Torres Strait Islands” are alleged to be;
 - c. otherwise denies the allegations in the paragraph.
32. In response to paragraph 32 of the SFASOC, 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 SFASOC.
34. The Respondent admits the allegations in paragraph 34 of the SFASOC.
35. In response to paragraph 35 of the SFASOC, 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 SFASOC 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 194 parties to the Paris Agreement;
 - b. otherwise admits the allegations in the paragraph.
38. In response to paragraph 38 of the SFASOC, 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 SFASOC, the Respondent:
- a. repeats sub-paragraphs 11.k to 11.l 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. [not used]
41. In response to paragraph 41 of the SFASOC, the Respondent:
- a. says that in the AR6 WGI report published in August 2021, the IPCC has identified an estimated remaining carbon budget from the beginning of 2020 for a 50% likelihood of limiting global warming to 1.5°C (**IPCC 50% Global CO₂ Budget**), as well as estimated remaining carbon budgets for a 17%, 33%, 67% and 83% likelihood of limiting global warming to 1.5°C;
 - b. says the estimated remaining carbon budgets identified by the IPCC in AR6 WGI consider the warming from non-CO₂ drivers as implied by the scenarios assessed in IPCC Special Report on 1.5°C. Remaining carbon budgets depend on the amounts and timing of non-CO₂ mitigation which can increase or decrease the estimated remaining carbon budgets referred to in a. by 220GtCO₂ or more;
 - c. 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 50% 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 SFASOC, the Respondent:
- a. repeats paragraphs 9, 27 to 28, 31 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 50% 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.

43A. In response to paragraph 43A of the SFASOC, the Respondent:

- a. repeats sub-paragraphs 11.k to 11.l and 41 above;
- b. says that there is a lower degree of confidence in assessing the peak warming expected from a particular global GHG emissions budget, compared to a global CO₂ emissions budget, because the amount of warming depends on the timing of emissions of short-lived gasses;
- c. otherwise denies the allegations in the paragraph.

43B. In response to paragraph 43B of the SFASOC, the Respondent:

- a. repeats sub-paragraphs 11.k to 11.l, 41 and 43A above;
- b. admits that global CO₂ or GHG emissions budgets can inform the level of global CO₂ or GHG 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 or GHG emissions reductions, the slower the depletion of any global CO₂ or GHG emissions budget;
- d. admits that slower reduction of global CO₂ or GHG emissions will result in a faster depletion of any global CO₂ or GHG emissions budget;
- e. otherwise denies the allegations in the paragraph.

44. In response to paragraph 44 of the SFASOC, 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 in the early 2050s, 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, 31, 36, 38, 41-43B above;
- d. otherwise denies the allegations in the paragraph.

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

- a. repeats paragraphs 11, 22, 41, 43A, 43B and 44 above;
- b. says that the determination of each country's GHG or CO₂ emissions budgets and targets is a matter of policy, informed by scientific knowledge;
- c. says a country's GHG or CO₂ emissions budgets and targets will depend, amongst other things, on a judgement about how the burden of reducing global emissions should be distributed between countries, which is a contestable policy decision involving socioeconomic, equity and capability considerations as well as the national circumstances of the country;
- d. says that none of the bodies referred to in paragraph 22c. above have determined the necessary GHG or CO₂ emissions reductions for each country to do its part consistent with staying within a global GHG emissions budget;
- e. otherwise denies the allegations in the paragraph.

46. [not used]
47. In response to paragraph 47 of the SFASOC, 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 there is no agreed GHG or CO₂ emissions budget for Australia, though various papers and reports have attempted to formulate such a budget, with different results;
 - c. otherwise denies the allegations in the paragraph.
49. In response to paragraph 49 of the SFASOC, the Respondent:
- a. repeats paragraphs 22-23 and 39-48;
 - b. says that global CO₂ emissions budgets may, along with other considerations, be relevant to setting a national CO₂ emissions budget;
 - c. says that different national CO₂ or GHG emissions budgets (including for Australia) may be set 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 the country, which is a contestable policy decision

involving socioeconomic, equity and capability considerations as well as the national circumstances of the country;

- iv. whether the budget is to apply to all GHGs or only CO₂;
 - d. says there is no GHG or CO₂ emissions budget for Australia that could, if met, be capable of holding Global Temperature Increase to 1.5°C or any other figure;
 - e. otherwise denies the allegations in the paragraph.
50. In response to paragraph 50 of the SFASOC, the Respondent:
- a. repeats paragraphs 22-23, 31 and 39-49 above;
 - b. says that on 11 August 2015, in advance of the December 2015 UNFCCC Conference of the Parties in Paris, the Respondent submitted its intended NDC 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;
 - c. says that on 31 December 2020, the Respondent communicated an updated NDC which affirmed its 2030 Target;
 - d. 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;

PARTICULARS

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

[https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Australia%20First/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>

- e. says further that on 16 June 2022, the Respondent communicated an updated NDC to reduce GHG emissions by 43% below 2005 levels by 2030 (**Updated 2030 Target**);
- f. says further that s 10(1) of the *Climate Change Act 2022* (Cth) provides that Australia's GHG emissions reduction targets are:

- i. reducing Australia's net GHG emissions to 43% below 2005 levels by 2030 implemented as a point target and implemented as an emissions budget covering the period 2021 – 2030; and
 - ii. reducing Australia's net greenhouse gas emissions to zero by 2050;
- g. says that each of the determinations of the NDCs pleaded in sub-paragraphs (b)-(e) above was a decision of high level government policy, involving economic, social and political factors, including the Respondent's relationships with foreign governments;
- 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;

PARTICULARS

A copy of Australia's Long Term Emissions Reduction Plan is publicly available at: <https://www.industry.gov.au/sites/default/files/October2021/document/australias-long-term-emissions-reduction-plan.pdf>

- i. says that, because the relevant decision-making processes of the Commonwealth are subject to public interest immunity, any further response to this paragraph of the SFASOC would involve disclosing information that, in the public interest, should not be disclosed;
- j. refers to paragraph 22 above and says that by reason of the ambiguity regarding what is meant by Best Available Science, the Respondent does not know and therefore cannot admit the allegations in the paragraph.

50A. In response to paragraph 50A of the SFASOC, the Respondent:

- a. repeats paragraphs 48 and 49;
- b. otherwise denies the allegations in the paragraph.

50B. In response to paragraph 50B of the SFASOC, the Respondent:

- a. repeats paragraphs 22-23 and 39-50A;
- b. otherwise denies the allegations in the paragraph.

51. In response to paragraph 51 of the SFASOC, the Respondent:

- a. repeats paragraphs 11.a-11.d, 26-28 and 31 above;
- b. otherwise denies the allegations in the paragraph.

52. In response to paragraph 52 of the SFASOC, 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% and as at 2021, 90% of the population of the Torres Strait Islands identified as Torres Strait Islander or Aboriginal and Torres Strait Islander;
- e. otherwise admits the allegations in sub-paragraphs (a)-(d) and (f);
- f. says that the population of the Torres Strait Islands was 4,500 persons in 2016 and 4,125 in 2021 but the Respondent otherwise does not know and cannot admit what the population was at other points during the period 2014 to present.

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

- a. as to sub-paragraph (a):
 - i. admits that "Torres Strait Islander" is defined in s 4(1) of the *Aboriginal and Torres Strait Islander Act 2005* (Cth) to mean a descendant of an indigenous inhabitant of the Torres Strait Islands;
 - ii. admits that "Torres Strait Islander" for the purposes of the SFASOC also includes persons who are Torres Strait Islanders by customary or traditional adoption; and
 - iii. says that is the sense in which the term is used in this Defence;

- b. says 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;
- c. 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;
- d. admits the allegations in sub-paragraph (b);
- e. 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 admits the allegations in the sub-paragraph;
- f. 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;
- g. admits that the Applicants are Torres Strait Islanders;
- h. in light of the definition of “Group Members” in paragraph 1 of the SFASOC, admits that the Group Members are Torres Strait Islanders;
- i. otherwise denies the allegations in the paragraph.

55. The Respondent admits the allegations in paragraph 55 of the SFASOC.

56. In response to paragraph 56 of the SFASOC, the Respondent:

- a. admits the allegations in sub-paragraph (a);
- b. admits that marine hunting and fishing, and sourcing other food, in the Torres Strait Islands is an important food source for some Torres Strait Islanders;

- c. otherwise denies the allegations in the paragraph (including because the definition of Torres Strait Islanders is not limited to persons then residing in the Torres Strait Islands).

57. In response to paragraph 57 of the SFASOC, 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 SFASOC, the Respondent:

- a. repeats paragraphs 26-31, 51 and 57 above;
- b. says that the allegation is ambiguous and/or inconsistent with the allegation in paragraph 24(b) insofar as it is alleged that at all material times since at least 2014, failure to prevent Global Temperature Increase from exceeding the Global Temperature Limit has had severe impacts on Torres Strait Islanders; and
- c. otherwise denies the allegations in the paragraph.

59. In response to paragraph 59 of the SFASOC, the Respondent:

- a. repeats paragraphs 26-31, 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, tropical 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 SFASOC, 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 SFASOC, 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 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 SFASOC, 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.
- 62A. In response to paragraph 62A of the SFASOC, the Respondent:
- a. says it does not know and cannot admit whether *all* individual Torres Strait Islanders have rights and interests possessed under traditional laws and customs, recognised by the common law of Australia;
 - b. says it does not know and cannot admit that Torres Strait Islanders have rights and interests in *all* of the lands and waters of the Torres Strait Islands;
 - c. says that any rights and interests to any parts of the land and waters of the Torres Strait Islands possessed under traditional laws and customs, once

recognised by the common law of Australia, may have been extinguished in some parts of the Torres Strait Islands;

- d. repeats paragraph 54.e above;
- e. otherwise admits the allegations in the paragraph.

62B. In response to paragraph 62B of the SFASOC, the Respondent:

- a. admits that some instances of exercise by Torres Strait Islanders of rights and interests possessed under traditional laws and customs is vulnerable to the current and projected impacts of climate change;
- b. does not know and cannot admit that Torres Strait Islanders' unique connection to the land and waters of the Torres Strait Islands is vulnerable to the current and projected impacts of climate change.

63. In response to paragraph 63 of the SFASOC, 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 SFASOC, 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 SFASOC, 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 SFASOC, 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 SFASOC 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.
- 67A. In response to paragraph 67A, the Respondent:
- a. admits that the NTA was enacted by the Respondent and that ss 3-200 and 202-253 entered into force on 1 January 1994;
 - b. admits that the NTA is intended to be a special measure for the advancement and protection of Aboriginal peoples and Torres Strait Islanders for the purposes of paragraph 4 of Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination and the *Racial Discrimination Act 1975* (Cth);
 - c. admits that the main objects of the NTA are to provide for the recognition and protection of native title, to establish ways in which future dealings affecting native title may proceed and to set standards for those dealings, to establish a mechanism for determining claims to native title, and to

provide for, or permit, the validation of past acts, and intermediate period acts, invalidated because of the existence of native title.

- d. given the lack of clarity in what is intended in the expression 'for ... protection of Torres Strait Islanders', if something beyond what is admitted above is to be asserted, otherwise relies upon the terms of the NTA to identify the purposes for which it was enacted.

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.b above;
- b. otherwise admits the allegations in the paragraph.

69A. In response to paragraph 69A, the Respondent:

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

69B. In response to paragraph 69B, the Respondent:

- a. repeats paragraph 50.d and 50.h above;
- b. otherwise denies the allegations in the paragraph.

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

- a. repeats paragraphs 50.e-50.f above;
- b. otherwise admits the allegations in the paragraph.

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

- a. says that:
 - i. in 2015, 2017 and 2019 Australia ranked eighth globally in GHG emissions per capita, ninth globally in 2014, sixth globally in 2018, and tenth globally in 2016;
 - ii. Australia's share of total annual global GHG emissions for 2014-2019 was approximately 1.2-1.3%;

PARTICULARS

Australia	2019	2018	2017	2016	2015	2014
Share of global GHG emissions	1.22%	1.26%	1.30%	1.22%	1.21%	1.22%
Emissions per capita (t CO₂-e)	23.99	24.87	25.47	23.91	23.89	24.28
Global ranking - emissions per capita	8 th	6 th	8 th	10 th	8 th	9 th

CAIT data: Climate Watch. 2022. GHG Emissions. Washington DC: World Resources Institute.

Data for 2020-2021 is not yet available.

- b. otherwise admits the allegations in the paragraph.
72. The Respondent denies the allegations in paragraph 72 of the SFASOC.
73. In response to paragraph 73 of the SFASOC, 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 SFASOC, 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, however 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. a seawall has been constructed on Boigu Island, with practical completion achieved on 25 March 2022;
 - iii. a seawall has been constructed on Poruma Island, with practical completion achieved in November 2022;
 - iv. processes are underway to procure services to construct coastal protection structures on Masig, lama and Warraber.

75. In response to paragraph 75 of the SFASOC, 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 SFASOC, the Respondent:
- a. repeats paragraphs 22, 22.h, 31, 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 SFASOC, 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 SFASOC 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);

PARTICULARS

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), AR6 WGII (February 2022) and AR6 WGIII (April 2022);
- 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.h, 31, 39-49 and sub-paragraph (b) above;
 - f. otherwise, due to the absence of adequate particulars, does not know and cannot admit the allegations in sub-paragraphs (a) and (b);

- g. otherwise denies the allegations in the paragraph.
78. In response to paragraph 78 of the SFASOC, the Respondent:
- a. repeats paragraphs 28-31, 49-51, 53, 57-62, 62B and 76 above;
 - b. otherwise denies the allegations in the paragraph.
79. In response to paragraph 79 of the SFASOC, the Respondent:
- a. refers to and repeats paragraphs 61-63 and 77.c above;
 - b. otherwise denies the allegations in the paragraph.
80. In response to paragraph 80 of the SFASOC, the Respondent:
- a. refers to and repeats paragraphs 31 and 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 and/or implementing adaptation measures 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 the paragraph.
81. The Respondent denies the allegations in paragraph 81 of the SFASOC, and says further that:
- a. the Duty of Care pleaded is not in a form that could be recognised by a Court because it does not identify the risk of recognised harm in respect of which the Respondent is alleged to be required to take reasonable precautions;
 - b. it relies upon paragraph 82(b) and (d) below.
- 81A. The Respondent denies the allegations in paragraph 81A of the SFASOC and says further that the determination of what (if any) adaptation measures should be taken in any particular location within Australia to prevent or minimise the risk of harm from climate change is a decision of high level government policy, involving economic, social and political factors, in respect of which the Court should not impose a duty of care.
82. In response to paragraph 82 of the SFASOC, the Respondent:
- a. repeats paragraphs 22-23, 31, 44-50 and 80 above;
 - b. 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;

- c. says that the determination of what measures should be and/or need to be implemented to reduce Australia's GHG emissions consistent with any national GHG emissions target is a decision of high level government policy, involving economic, social and political factors, in respect of which the Court should not impose a duty of care;
- d. otherwise denies the allegations in the paragraph.

82A. In response to paragraph 82A of the SFASOC, the Respondent:

- a. repeats paragraphs 80 and 81A above;
- b. says that the allegation fails to identify the standard of care with sufficient precision and is vague and embarrassing;
- c. repeats paragraph 73 above and says that it is not able to control whether or not the measures alleged are implemented in the Torres Strait Islands; and
- d. otherwise denies the allegations in the paragraph.

83. In response to paragraph 83 of the SFASOC, the Respondent:

- a. repeats paragraphs 50, 73-74, 80 and 81-82 above;
- b. otherwise denies the allegations in the paragraph.

83A. In response to paragraph 83A of the SFASOC, the Respondent:

- a. repeats paragraphs 73-74, 80, 81 and 82A above;
- b. otherwise denies the allegations in the paragraph.

84. [not used]

85. [not used]

85A. In answer to the whole of the SFASOC, 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 SFASOC, the Respondent:

- a. says that any breach by the Respondent of a duty of care in relation to the matters pleaded in paragraphs 82(a)-(d) of the SFASOC cannot of itself be

causally connected to any loss or damage suffered by the Applicants and/or Group Members as a result of the impacts of climate change;

- 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, any breach of the alleged duty of care by the Respondent in determining its GHG emissions targets and/or implementing adaptation measures is not, for the purposes of the law of negligence, causally connected to any loss or damage suffered by the Applicants and Group Members as a result of the impacts of climate change;
- c. says that the loss and damage pleaded in paragraph 86(b) and (c) of the SFASOC is not harm recognised as compensable under the law of negligence;
- d. repeats paragraphs 1.b and 1.c above;
- e. says that any claim for damages for personal injury and/or mental harm (including as referred to in paragraph 86(d) of the SFASOC) is subject to Parts 3.2 and 7.1 of the *Civil Law (Wrongs) Act 2002* (ACT) and/or Parts 2 and 3 of the *Civil Liability Act 2002* (Qld) (and/or cognate provisions in other States and Territories, to the extent relevant and applicable);
- f. otherwise denies the allegations in the paragraph.

87. In response to paragraph 87 of the SFASOC, the Respondent:

- a. repeats paragraph 86 above;
- b. otherwise denies the allegations in the paragraph.

87A. [not used]

88. [not used]

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

Date: 9 May 2023



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

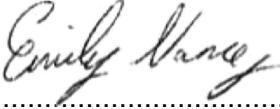
This pleading was prepared by Stephen Lloyd SC, Zoe Maud, Alicia Lyons, Matthew Sherman and Madeleine Salinger of counsel.

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: 9 May 2023



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