

NOTICE OF FILING

Details of Filing

Document Lodged:	Concise Statement
Court of Filing	FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment:	29/05/2023 10:19:19 AM AEST
Date Accepted for Filing:	29/05/2023 10:19:23 AM AEST
File Number:	VID622/2021
File Title:	PABAI PABAI & ANOR v COMMONWEALTH OF AUSTRALIA
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



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

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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AMENDED CONCISE STATEMENT IN RESPONSE

FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: VICTORIA
DIVISION: GENERAL

NO VID622/2021

PABAI PABAI
First Applicant

GUY PAUL KABAI
Second Applicant

COMMONWEALTH OF AUSTRALIA
Respondent

1. Climate change presents serious threats and challenges to the environment, the Australian community and the world at large. The impacts of climate change will affect all parts of the globe, with some regions being particularly vulnerable to certain impacts. The Respondent acknowledges that the Torres Strait Islands are vulnerable to some impacts of climate change, such as rising sea levels, and that some of the impacts of climate change have already been felt in that region.
2. Anthropogenic climate change is the result of greenhouse gas (**GHG**) emissions from human activity around the world. Global action is required to meaningfully limit future climate change. The Respondent is a signatory to the two international treaties established to address climate change, the United Nations Framework Convention on Climate Change and the Paris Agreement. In accordance with the Paris Agreement, the Respondent has communicated its nationally determined contribution (**NDC**) to reduce GHG emissions by 26-28% below 2005 levels by 2030 (**2030 Target**). On 28 October 2021, the Respondent communicated an updated and enhanced NDC adopting a target of net zero emissions by 2050 (**2050 Target**). Australia was on track to overachieve on the 2030 Target by up to 9 percentage points and, in 2022, the Respondent communicated an updated NDC to reduce GHG emissions by 43% below 2005 levels by 2030 (**Updated 2030 Target**).
3. The appropriate response by the Respondent to the risks of climate change is a matter of public policy of the highest importance, involving scientific, economic, social and political matters which must also be considered within the framework of international agreements and the Respondent's relationships with foreign governments. The imposition of the duty of care, or the alternative duty of care, alleged by the Applicants would require the Court to assess at the point of breach questions of policy-making unsuited to judicial determination. The alleged duty of care and alternative duty of care must be rejected for that reason.
4. Further, because the Respondent contributes a very small proportion of global GHG emissions, it is not reasonably foreseeable that the Respondent's conduct in

Filed on behalf of the Respondent, Commonwealth of Australia

File ref: 21008585

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determining its GHG emissions reductions targets would cause the Applicants and Group Members harm and the Respondent lacks the necessary control to prevent or materially mitigate climate change or its impacts. The alleged duty and alternative duty are also incoherent and/or inconsistent with administrative law principles and would lead to disproportionate and indeterminate liability.

5. Thus, the application of established principle requires rejection of the alleged duty of care and alternative duty of care. The Respondent's position is supported by the recent decision of the Full Federal Court in *Minister for the Environment v Sharma* [2022] FCAFC 35.

A. PARTIES

6. There is no dispute that each of the Applicants is a Torres Strait Islander and that the Boigu People and Saibai People have been recognised as native title holders in respect of certain parts of Boigu Island and Saibai Island respectively.
7. The Respondent acknowledges that the Applicants have commenced a class action on behalf of the persons described in paragraph 4 of the Applicants' Amended Concise Statement, but denies that the Respondent has engaged in any wrongful conduct and says also that any claims in respect of damage suffered more than 6 years ago are out of time.

B. THE CLAIM

Factual Background

8. There is no material dispute as to the nature of the Torres Strait Islands or the existence of *Ailan Kastom*.
9. A number of court proceedings have determined, pursuant to the *Native Title Act 1993* (Cth) (**NTA**) or the 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. The Respondent does not know whether all Group Members hold native title rights and interests in parts of the Torres Strait Islands. The nature of any native title rights and interests will vary from group to group and person to person and will concern different parts of the land and waters of the Torres Strait Islands.
10. 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. It is not disputed that some structures and significant sites on some Torres Strait Islands are located on low lying areas, or that some Torres Strait Islands have been subject to inundation events prior to and since 2014.
11. 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. It is not known 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. Climate change poses a risk of harm to the health of people living in the Torres Strait Islands, such as from warmer days which can affect human health, although the extent to which current

warming may have affected the health of people living in the Torres Strait Islands is not known. 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. The Respondent does not know whether climate change has already harmed *Ailan Kastom*.

12. It is accepted that small and low-lying islands are projected to be at risk and very sensitive to impacts of climate change, in particular oceanic warming, sea level rise, cyclones and mass coral bleaching and coral mortality, however there is a lack of precise quantitative studies of projected impacts of sea level rise at a global temperature increase of 1.5°C and 2°C.

No Duty of Care

13. The Respondent does not owe the novel duty of care or alternative duty of care alleged. The duty and alternative duty as pleaded are framed at too high a level of abstraction and, as noted, would involve the Court in assessing at the point of breach questions of policy-making unsuited to judicial determination. The duty and alternative duty must be rejected for those reasons. Further, consideration of the relevant salient features point overwhelmingly against recognition of the duty and alternative duty.

Lack of foreseeability and/or knowledge

14. By reason of climate change being the result of global GHG emissions, of which Australia contributes only a very small proportion, it was not reasonably foreseeable that the conduct of the Respondent in determining its GHG emissions targets, or any other alleged conduct of the Respondent, would cause global temperature increase of such a degree that it would cause any person, or alternatively a class of persons including the Applicants and Group Members, to suffer loss and damage.

Incoherence and inconsistency with other legal principles

15. The imposition of a duty of care in relation to policy decisions, such as the setting by Cabinet of Australia's GHG emissions targets, or decisions about whether and how to allocate government resources to fund adaptation measures, is incoherent and/or inconsistent with administrative law principles. It would provide a vehicle for collateral attack on governmental and policy decisions which are non-justiciable under public and administrative law doctrines.
16. The Torres Strait Treaty cannot provide the basis for the alleged duty or alternative duty, because it is not concerned with climate change and does not create a relationship of proximity for the purpose of the alleged duty of care or alternative duty of care.

Lack of control and lack of actions to avoid harm

17. Climate change is a global problem and global action is required in order to have a meaningful impact on climate change. It is not possible for the Respondent, by itself, to prevent or materially mitigate climate change or its impacts. The impacts of climate change generally and in relation to the Torres Strait Islands will depend significantly on the decisions and conduct of other nations and significant GHG emitters. The relationship between the Respondent and the Applicants and Group Members in

relation to the current and future impacts of climate change is indirect and mediated by intervening conduct of countless others around the world.¹

Disproportionate and indeterminate liability

18. The Applicants claim that the duty or alternative duty is owed to them and all persons who at any time during the period from about 1985 and continuing, are Torres Strait Islanders (whether by descent or customary adoption) and suffered loss or damage as a result of the conduct of the Respondent described in the Second Further Amended Statement of Claim (**2FASOC**). Recognition of this duty or alternative duty would expose the Respondent to potential liability of a vast scope which is out of proportion to the Respondent's small contribution to global GHG emissions.
19. The duty or alternative duty would also impose on the Respondent liability which is indeterminate, in that it is impossible to ascertain prospectively who will suffer loss or damage as a result of the Respondent's alleged conduct. Further, the duty or alternative duty would potentially lead to liability for indeterminate damages, if harm eventuates for decades to come.
20. Further and relatedly, recognition of the alleged duty of care would lead, by analogy, to the imposition of an equivalent duty of care on every person who carries out an activity that contributes to overall emissions and every person who performs an act that facilitates or authorises such an activity to occur. If the Applicants' contentions as to duty were to be accepted, every time a person suffered harm attributable to climate change, a cause of action would arise against every person who has in the past materially contributed to overall emissions. Further, all such people would be joint tortfeasors, liable to contribute to any damages.

No assumption of risk

21. The fact that 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/or the Torres Strait Islands, does not mean it has thereby assumed responsibility for climate risk.

No Breach of Duty

22. The Respondent denies that it has breached the alleged duty of care.
23. Determination of a country's GHG emissions budgets and targets is a matter of high-level government policy, involving scientific, economic, social and political factors, including the relationships between foreign governments. The Respondent's 2030 Target, 2050 Target and Updated 2030 Target are reasonable in the circumstances.
24. Further, the Respondent's annual GHG emissions as at June 2021 were 20.4% lower than levels as at June 2005. The Respondent was on track to overachieve on the 2030 Target by up to 9 percentage points, achieving a reduction in emissions of up to 35% below 2005 levels by 2030. The Respondent has now committed via its Updated 2030 Target to reduce GHG emissions by 43% below 2005 levels by 2030.

¹ *Minister for the Environment v Sharma* [2022] FCAFC 35 at [336] (Allsop CJ).

25. The Respondent also denies that it has breached the alleged alternative duty of care. 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, which actions have been reasonable in the circumstances.

No Causation of Loss or Damage

26. The Respondent moreover denies that any loss or damage has been suffered, or will be suffered, as a result of any alleged breach of duty by the Respondent.
27. There is scientific consensus 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, however there is a lack of scientific studies as to the precise impact of a global temperature increase of 1.5°C compared to 2°C or 3°C on the Torres Strait Islands in particular. There is also considerable uncertainty regarding the risk of triggering particular tipping points at different temperature thresholds.
28. The Respondent only contributes a small share of total global GHG emissions (1.2-1.3% for 2014-2018).
29. The GHG emissions reduction target determined by a country sets the minimum reduction that the country has committed to achieving. The Respondent was on track to over-achieve on the 2030 Target and has now increased its ambition via the Updated 2030 Target. There is no causal nexus between the determination of the 2030 Target, the 2050 Target or the Updated 2030 Target and any impacts of climate change in the Torres Strait Islands.
30. Further, to the extent that it can be established that any alleged conduct of the Respondent has caused, or will cause, an incremental increase in GHG emissions, that does not provide a sufficient factual foundation for a conclusion that the Respondent's actions were a necessary condition of that harm or alternatively it is not appropriate for the Respondent to be held liable for such harm. The Applicants' case in relation to the alleged breach of the alternative duty is unclear. Subject to clarification of the alleged breach, the Respondent does not accept that any failure on its part has caused compensable harm to the Applicants or Group Members.
31. Finally, to the extent that it can be established that the Respondent owed the alleged duty of care or alternative duty of care to the Applicants which was breached, causing them loss of the kind alleged, that will not determine the question of loss or damage for the balance of the Group Members, which will depend on their individual circumstances. In particular, the impact on Torres Strait Islanders who do not inhabit the Torres Strait Islands (but are included in the class definition) will raise particular questions as to proximity, foreseeability, loss and damage.

C. THE RELIEF SOUGHT FROM THE COURT

32. The Respondent denies the Applicants are entitled to the relief sought. Further, the form of the injunction sought is not capable of enforcement by a Court.
33. The Respondent otherwise relies on its Defence to the 2FASOC dated 9 May 2023. To the extent that this document is inconsistent with that Defence, the Defence prevails.

CERTIFICATE OF LAWYER

SIGNATURE OF LAWYER

I, Emily Nance, certify to the Court that, in relation to the Concise Statement in Response filed on behalf of the Respondent, the factual and legal material available to me at present provides a proper basis for each of the matters in the Response.

Date: 29 May 2023



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