

First Nations leaders sue Commonwealth over climate change in groundbreaking pro bono case

By Elena McNiece
and Courtney Law

Pabai's garden – Photo credit: Pabai Pabai



"If we don't have support from the organisations and the people out there, we lose everything. It's not only for us, it's for everyone..."

— Uncle Pabai

Uncle Pabai and Uncle Paul, two First Nations leaders from remote islands in the Torres Strait are taking the Australian government to court for failing to prevent the impacts of climate change.

Uncle Paul's house in Saibai has panoramic views of the blue ocean and the coast of our northerly neighbour Papua New Guinea, but in the summer monsoon seasons, frequent and intense storms sweep the shore out to sea and flood the island. In these storms, ocean water floods homes and inundates garden soil, making it difficult for families to grow traditional foods. The sea water floods sacred cemeteries and drags ancestors' remains out to sea. Locals have had to pull their ancestors' bones from the water and attempt to rebury them. Year round, traditional food sources like dugong and turtle are changing their patterns and locals are at increased risk of dangerous mosquito-borne diseases.

Uncle Paul is a Traditional Owner of Saibai Island in the Guda Maluyligal Nation. His ancestors have lived in the Torres Strait for more than 65,000 years and he now fears that climate change will wash away his history, culture and Country.

The climate change impacts that Uncle Paul is seeing are happening all over the Torres Strait, where sea level rise is twice the global average. Many islands are extremely low-lying and some towns are as low as 1 metre above sea level. On numerous islands including Boigu and Saibai, the

small island town is wedged between the ocean shore and the swamp as it's the only suitable land remaining.

Uncle Pabai, Traditional Owner of Boigu Island, also in the Guda Maluyligal Nation, shares the same fears. When he sits down at his kitchen table with his kids he shows them photos of the village on Boigu to show how much it's changed and how the land has fallen into the sea. He says the gap between the sea and village is getting closer with every storm surge and king tide.

As a Boigu man, Uncle Pabai has specific cultural responsibility to protect sacred sites which have enormous spiritual significance to the entire Guda Maluyligal Nation and people in the western islands. He says it's his cultural responsibility to protect these places.

Left with no other choice, Uncle Pabai and Uncle Paul have turned to the courts to prevent losing 65,000 years of identity, custom and Country under the water. Uncle Pabai said *"If we're looking at 10 or 20 years from now [without action], we'll be losing our islands. We'll be climate change refugees. How will you be able to identify yourself if your island is under the water? You won't be able to say 'I'm from Boigu' because Boigu is under the water."*

In order to protect their island homes, Uncle Pabai and Uncle Paul are bringing a landmark case, the first of its kind in Australian courts. In their case, they are asking the Federal Court of Australia to establish a novel duty of care that doesn't yet

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exist in the law. They are arguing that, in light of the Australian government’s special relationship with Torres Strait Islander peoples (enshrined, for example, in the Torres Strait Treaty), the Commonwealth owes a duty to take reasonable steps to protect Torres Strait Islander peoples from

the impacts of climate change. Uncle Pabai and Uncle Paul argue that the Australian government has been negligent by failing to implement adaptation and mitigation measures in line with the best available science to protect them from climate harms.

By starting this case, Uncle Pabai and Uncle Paul are joining the global wave of climate litigation that has gained traction since the 2015 Paris Agreement. Uncle Pabai and Uncle Paul have been working with the Urgenda Foundation, which helped 886 people in the Netherlands to take the Dutch government to court in 2015 for not doing enough to prevent the impacts

of climate change. As a result of the case, the Netherlands now has some of the strongest climate policies in the world. Urgenda’s case has become an inspiration for people around the world fighting for climate action through the courts.

Uncle Pabai and Uncle Paul’s case was filed in the Federal Court in October 2021 and the first stage of hearings will start in June 2023, including a week of hearings on Country in the Torres Strait. This is an extraordinary step for the Court to take and an important opportunity for the Torres Strait community to participate in the justice process. Expert evidence will be heard in the second hearing stage towards the end of 2023. After the hearings, the Court hopes to hand down its decision in the first half of 2024.

Justice Mortimer, the Federal Court judge assigned to the case, has already acknowledged that there is “no denying the unremitting march of the sea onto the islands of the Torres Strait”, and Torres Strait Islanders “risk losing their way of life, their homes, their gardens, the resources of the sea on which they have always depended and the graves of their ancestors”.

Uncle Pabai and Uncle Paul are represented pro bono by Melbourne-based class action firm Phi Finney McDonald, and barrister Fiona McLeod AO SC. They are also partnering with international climate law experts at the Dutch Urgenda Foundation.

“Many marginalised groups are blocked from using the courts to defend their rights because of soaring financial barriers. We use our litigation skills to help ensure everyone has access to justice. Uncle Pabai and Uncle Paul’s case is very compelling and it’s a privilege to be able to represent them in this historic case,” said Brett Spiegel, Principal Lawyer at Phi Finney McDonald.

Paul Kabai and Pabai Pabai — On the boardwalk, Boigu — Photo credit: Talei Elu





Paul Kabai — Photo credit: Connor Kerlin

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The groundbreaking case is supported by Grata Fund, a public interest organisation that supports marginalised people to advocate for their legal rights. Grata Fund removes the financial barriers that prevent test cases in the public interest from going ahead. Relativity has also lent its support to the case by providing pro bono use of their technology, RelativityOne, which will be critical for e-discovery and will save the legal team time in prioritising and categorising document reviews.

Torres Strait Islanders have a long history of fighting for their rights, including through the courts, and some of those battles have changed the face of modern Australia. Thirty years ago, Torres Strait Islander man Eddie Mabo took on the government through the

courts and established that terra nullius was a lie. This landmark pro bono case paved the way for land rights for all First Nations people in Australia. Australia has some of the highest financial barriers to public interest litigation in common law countries so the importance of pro bono work cannot be understated in ensuring everyone can defend their rights in court.

“If we don’t have support from the organisations and the people out there, we lose everything. If we don’t win in this case, that means our islands will be underwater, and no one will be listening to what is here in the Torres Strait. It’s not only for us, it’s for everyone,” said Uncle Pabai, Plaintiff in the Australian Climate Case. ■



Pabai Pabai — Photo credit: Connor Kerlin



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