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Sea water is washing under their homes, killing crops and dislodging grave sites. Inspired by successful litigation in the Netherlands, two Torres Strait Islander elders are taking the Australian government to court in a bid to force urgent climate action.

By Miki Perkins
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When a baby is born on the tiny islands of Saibai and Boigu in the Torres Strait, its parents wait until the umbilical cord has dried and fallen off, then they bury the cord under a young tree such as a *woerakar*, a native hibiscus, or a broad-leaved sea almond.

This cord tree is a living symbol of the child's place in their clan and their connection to *ailan kastom*, or island custom. *Ailan kastom* tethers the child to the ancestral beliefs that connect Torres Strait Islanders to the land, sea and skies, and are passed from one generation to the next. Community elder Uncle Paul Kabai, 54, is explaining all this to me as we walk through the front garden of his weatherboard Queenslander on the remote island of Saibai. The carefully tended patch is full of bushes covered in red flowers. "It's a special thing, it gives you identification," says Kabai.

His home has sweeping views across a milky-blue stretch of sea to the thickly forested shores of Australia's nearest neighbour, Papua New Guinea. PNG can be reached via a 10-minute trip in a fast-moving tinnie from Saibai, our second-most northerly island. Residents in this region of the Torres Strait have the right to travel passport-free between the two nations, in recognition of their long history of familial and trade connections.

Kabai's own family tree grows next door at his brother's house, a giant sea almond with a small hollow in the roots, where the cords of generations have been buried for as long as anyone can remember. A father of eight as well as a grandfather, Kabai had thought the tree would remain where it is for generations to come. Now he's less certain.

As sunlight shines on the ocean, the wind sighs through coconut palms and a passing crocodile sends idle ripples across the bay (more on this adventurous guy later), it's easy to assume Saibai's residents live in a peaceful idyll. But in the monsoon season between December and February, it's a different story. At this time, more frequent storms are adding torque to the waves that beat against the low-lying coastline, particularly when they coincide with high tides, that come in about monthly, or the twice-yearly king tides.

During these storms, sea water flows under homes, erodes graves in the cemetery, ruins soil in food gardens with salt, and floods the sewerage networks, increasing the risk of disease. Saibai's \$24 million, federally funded sea wall, made of boulders and concrete, was breached less than six months after its 2017 completion, causing significant damage. A \$15 million, one-kilometre sea wall on Boigu, Australia's northernmost point, was finished this year. Many wonder how long it will take for it to be breached, too.

Torres Strait – also known as "Zenadth Kes", an amalgamation of local language names for the four winds that pass through the region –encompasses at least 274 islands in the shallow, tidal waters between the Cape York Peninsula and PNG. Its population of about 4500 live on 17 islands, some as little as about a metre above sea level.

The climate crisis is a stark reality here, where residents face an urgent, existential threat to their way of life. It's one thing to understand this theoretically, quite another to feel it on the ground, in homes that have seawater sluicing underneath them.

Such rising seas are caused by rapid global warming, which is melting vast chunks of ice sheets at the poles. Nobody recalls when the changes became noticeable on these islands, nor is it possible to predict exactly when they will be inundated if the current trajectory continues. But the implications are clear.

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“Becoming climate refugees means losing everything: our homes, our culture, our stories and our identity,” says Kabai, shaking his head. “If you take away our homelands, we don’t know who we are.” A stocky man, who often gestures with a pointing finger as he talks – at the blue sky, at the sparkling sea, at his island – Kabai has an endearing habit of slipping his glasses up onto his cap and peering intently at me when he wants to make a point, as if to say *this is urgent, listen up*. “If we have to relocate, it will be very sad for us. Very sad.”

Kabai and his brother-in-law, the 52-year-old elder Uncle Pabai Pabai, who lives on Boigu, are suing the Australian government. They are seeking orders that require the Commonwealth “take reasonable care” to protect Torres Strait Islanders and their *ailan kastom* from the harm caused by climate change – in this case by setting emissions reduction targets consistent with the best available science. They’re also seeking damages for the changes they say are already undermining their way of life.

“I left school in 1989 and moved to Cairns. When I came back to Boigu a few years later, everything was the same as when I’d left,” says Pabai. “But by the mid-2000s, I could see that things were starting to change. Our culture is built on knowledge of how everything should be. So if something happens to the seas, or the winds, or the fish, we notice.”

Launched in the Federal Court in October last year, theirs is the first climate class action to be brought on behalf of Australian First Nations people, and the first to claim that the government’s failure to significantly reduce emissions will force them to become refugees. “We have a cultural responsibility to make sure that it doesn’t happen, and to protect our country and our communities,” says Pabai.

Their court action, or *Pabai Pabai v Commonwealth of Australia* as it’s officially known – the Pabai case, informally – is modelled on watershed action in which the Netherlands-based Urgenda Foundation backed 886 people to successfully sue the Dutch government in 2015. Upheld on appeal, the ruling ordered that by the end of 2020, the government cut greenhouse gas emissions by at least 25 per cent of 1990 levels, which led to the rapid closure of one coal-fired power station and billions of euros in renewable-energy subsidies and investment. The outcome forged a path for other climate cases around the world, and Urgenda is advising the Australian lawyers on the Pabai case.

In a trial due to begin next June, the two men will tell the Federal Court that as the ocean rises, it will flood irreplaceable cultural heritage and burial sites, including places that contain human remains or have a spiritual significance akin to the Christian heaven. In an interim court hearing in mid-July, Justice Debra Mortimer said there was “no denying the unremitting march of the sea onto the islands of the Torres Strait”, the reality being that its people “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”.

She went on to note, however, that “whether the Commonwealth has legal responsibility for that reality, as the applicants allege in this proceeding, is a different question”, one that nevertheless gave the case “some considerable urgency”.

After the case was launched, the Coalition lost power in May’s so-called “climate election”. But the litigants are pressing ahead, saying the Albanese government’s target to reduce emissions to 43 per cent below 2005 levels by 2030 – against the Coalition’s 26-28 per cent cut – isn’t enough. “We are saying to the government, ‘Stop burning coal and gas,’” says Pabai. “We need to stop that. If this goes on forever this water will go up. The only way to stop it is to stop burning.”

As the eight-seater plane makes the 20-minute trip between Boigu and Saibai, the low-lying islands look like fishing nets cast across the blue Arafura Sea; a filigree of green vegetation and mangroves, and the silver flash of pools and rivers spread across a landscape that looks more water than land. The cluster of roofs and roads in the small townships on the higher, inhabited land only take up a sliver of space, hemmed in between sea and swampy hinterland. Formed by the silt that washed down nearby PNG rivers, they lie anywhere from 1 metre to 1.7 metres above sea level.

Kabai meets us at the tiny airport, an open-air room adorned with a large white sculpture of the *dhari*, or headdress, that features on the Torres Strait flag. Pabai has flown in, too. Kabai beams in welcome – most visitors from the

mainland need three flights to travel here – and takes us to his four-wheel drive parked outside. On the dashboard sits a small plastic crocodile and toy dog that symbolise his two totems, inherited from his parents.

We rumble out of the airport and down the dusty main road. As we crawl through the small township, the men call out in greeting to people walking or sitting on verandahs, pausing to exchange news. In this small community everyone is a friend, often a relative, and they're all talking about the drama of the previous evening, when a crocodile (apparently the same one) crawled over the sea wall and waddled down the main road, until someone scooped it up in the bucket of a digger and plopped it back into the sea. Videos of the hapless croc have spread like wildfire on social media, and Kabai stops the car to show us its claw marks in the mud.

One of the most pressing reasons to stop the rising sea lies in a sunny glade, a five-minute drive from the township on a dirt track that winds through thick tropical scrub. In the cemetery, a willie wagtail perches on a tombstone and flips its tail from side to side as it tilts its head, a beady eye studying us. Kabai's brother is buried here. A low seawall separates the cemetery from the coarse sand beach and a dense forest of twisted mangroves, their wrist-thick roots plunged deep into black mud at the fringe of the island.

During king tides, the sea rises up against this wall and floods into the cemetery. The wooden frames of graves have been shifted and dislodged, leaving distraught families to hazard a guess at where their ancestor's remains lie under the soil, so they can build a new, concrete grave above. One gravestone, at least 100 years old, has toppled forward onto the beach because the sea has eaten away at the sandy bank where it stood.

Kabai and Pabai tell *Good Weekend* what it was like to grow up on Saibai and Boigu. "We had a really good life. We were taught by our grandparents and parents how to become a man, and get a strong hold of culture," says Pabai. "They would give you an idea of how to live with your families, your responsibilities. We sat with them, and they talked to us."

Each day, children would follow their parents to the family garden, inland from the village, and learn how to grow plants like cassava, taro, sugar cane and bananas. The boys would be taken to sea on outrigger canoes to learn how to hunt *waru* (turtle) and dugong. They would build a tall platform called a *nath* from mango wood and wait there, spears poised, until a grazing dugong swam underneath, ploughing a slow path through the seagrass beds.

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When children reached high school they had to move to Thursday Island, the administrative centre of the Torres Strait, or the mainland, where many stayed for work or other opportunities. There was always a sense they could return, that their island home would be waiting. That's gone. But while younger generations are less likely to return, those already here are not inclined to move. "The elders won't move away from the island. Their church is here and our cemetery is here. They can't leave their ancestors," says Kabai. "If the island sinks, the elders will stay with it."

In Australia, access to justice is often limited to those who can afford it: it's prohibitively expensive to bring a case to court and if you lose, in most jurisdictions you're faced with paying the other side's costs. In the Pabai case, that's where the Grata Fund comes in. Unless you move in legal circles, you're unlikely to have heard of Grata, named after Grata Flos Matilda Greig, the first woman to practise law in Australia, in 1905.

Australian lawyer Isabelle Reinecke founded the not-for-profit Grata in 2015 to develop, fund and build campaigns around high-impact public-interest litigation. So far, there hasn't been much need for it to cover costs: 14 of the 15 cases backed by Grata have been won, including one brought by First Nations plaintiffs from Santa Teresa, south-east of Alice Springs, in a case against the Northern Territory government over dilapidated public housing.

After the Urgenda Foundation's success in the Netherlands, Reinecke and her team wondered if something similar could work here. They talked to several communities in different parts of Australia to see if any were interested in bringing a climate change case. At the same time, Pabai and Kabai had been looking for a way to protect their communities from climate change.

"When we first met Uncle Pabai and Uncle Paul [in 2021], it was obvious how compelling their case was," says Grata's acting executive director, Maria Nawaz. "They spoke so powerfully about the harm that climate change was already

doing, and about what they'd lose if things got much worse. We knew immediately we had to support them to have their day in court."

Respected elders in their community, both men have given their time to local councils and representative groups, but neither had previously been an activist or involved with legal action. The duo sought advice from their elders, as well as the island councils and native title groups, on whether they should lead the case. Everyone encouraged them to get involved. "People have been very supportive, they keep asking what's happening next," Pabai says.

The Torres Strait has a proud history of activism: in 1936, hundreds of its maritime workers and pearl-shell divers waged a months-long strike to protest harsh treatment and unfair labour conditions, forcing the Queensland government to make changes including granting them more autonomy. In 1992, the High Court overturned the colonial doctrine of terra nullius, or "land belonging to no one", in the famous case brought by Mer Island's Eddie Mabo. And more recently, in 2020, the child-rearing practices of Torres Strait Islanders were recognised with [Queensland legislation that enshrined its longstanding cultural adoption practices](#).

The Pabai case is part of a global wave of climate litigation that gained ground in the wake of the 2015 Paris Agreement, which committed signatories to limiting warming. A 2022 snapshot of litigation found that the cumulative number of climate-change-related cases has [more than doubled since 2015](#) to more than 2000 in total, with about one-quarter filed in 2020-22. Australia is a climate-litigation hotspot, second only to the United States. Last year, there were 46 climate-change judgments or new proceedings filed in Australia, up from 31 filed in 2020 and 27 in 2019, according to an analysis by Melbourne Climate Futures.

Early climate cases often involved challenging proposed projects, like a controversial coal mine or power station. But there's an increasing focus on strategic litigation that seeks greater corporate or government accountability. The most high-profile recent example was that of the eight Australian teenagers who were part of the School Strike for Climate movement, who [filed a class action against then-environment minister Sussan Ley](#), seeking to halt approval of the expansion of a coal mine in regional NSW.

Initially, a Federal Court judge rejected their claim for an injunction but found the minister had a "duty of care" to Australian children to protect them from harm when assessing fossil-fuel projects. The full bench of the Federal Court later unanimously overturned this decision on appeal, deciding it was not the place of the court to set policies on climate change but rather, the job of elected representatives.

In court, Pabai and Kabai will be represented pro bono by law firm Phi Finney McDonald (PFM).

I meet senior associate Grahame Best in the firm's airy office on Flinders Lane in the heart of Melbourne's CBD. We sit at a large conference table as the 36-year-old solicitor, dressed in a suit jacket and jeans, explains that a team of four lawyers had to initially examine whether they could win the case by "working to ground" different legal theories.

"It's very strategic. You have to figure out all the different pathways and goals and there's no playbook," he says. PFM has a strong social-justice practice, including representing First Nations, refugee and low-income people. It has acted for a Djab Wurrung elder contesting the destruction of sacred birthing trees in country Victoria, and for asylum seekers detained on Manus Island and Nauru.

Best and his team will try to convince the Federal Court to establish a novel duty of care that doesn't yet exist in the law. To be successful, they will need to prove that a special relationship exists. "The Commonwealth has a heightened relationship with Torres Strait Islanders," argues Best. "This is because there is a treaty in place, the Torres Strait Treaty, which sets out a series of obligations for the Commonwealth to protect and preserve the land and culture of the Torres Strait."

In April, the Morrison government acknowledged that Torres Strait Islanders are vulnerable to some effects of climate change, such as rising sea levels, and that the region has already been impacted. It denied that the Commonwealth owes the two men the duty of care alleged, however, and noted that Australia contributes only a very small proportion of global emissions. New Attorney-General Mark Dreyfus has said he is unable to comment while the matter is before the courts.

The world has heated by 1.1 degrees since 1850, and Australia by an average 1.2-1.68 degrees since 1910. Most climate scientists say that Australia should set an emissions cut of about 75 per cent by 2030 if the country is to have any chance of doing its part in the global – and likely unsuccessful – push to limit warming to 1.5 degrees.

According to the Intergovernmental Panel on Climate Change, even if warming is limited to well below two degrees, global sea levels could rise by 2100 by 30 to 60 centimetres, but by as much as 1.1 metres if emissions continue to strongly increase. With some Torres Strait islands only a metre or so above sea level, this would make them uninhabitable during storm surges.

Sea-level rise is complex to model. The Torres Strait is particularly dynamic because the powerful Pacific and Indian oceans move through a narrow channel, and the waters mix together in “baffling” tides in the Timor and Arafura seas, says David Kennedy, a professor in coastal geomorphology at the University of Melbourne. While small and low-lying islands are sensitive to myriad impacts of climate change, it’s unclear what kind of increase would be produced by warming of 1.5 to two degrees.

What we do know, however, is that the Australian Bureau of Meteorology has measured the rise in the Torres Strait as at least six millimetres a year between 1993 and 2019, or almost 16 centimetres in total. A tide-gauge station at Thursday Island, which began operating in April 2015, suggests a trend of 16 millimetres a year, although this may be due to natural variability over a short observation period.

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Since the Commonwealth’s initial response to the Pabai case, there has been a change of federal government. One of the first things Chris Bowen did after becoming Minister for Climate Change and Energy was travel to the Torres Strait. In June, he met with community and council leaders to hear how they were dealing with what he calls a “real and substantial threat”. He says, “The trip was about listening to the people of the Torres Strait, to hear from them first-hand about their experiences,” noting he’s unable to talk about the specific case. “We don’t have a second to waste.”

Grahame Best and his team have been comparing notes with Urgenda’s legal counsel in the Netherlands, Dennis Van Berkel. The foundation was established to stimulate an environmentally sustainable economy, and introduced the first collective purchasing agreement for solar panels in Europe. Its landmark 2015 win shifted debate in the Dutch parliament, Van Berkel tells me. “It has really changed the political landscape with regards to how politicians are dealing with climate change,” he says. “They just know we have to deal with it. We can’t get away with it anymore. We can’t ignore it anymore.”

The Dutch parliament [voted in 2019 to close all coal-fired power stations](#) by 2030, although it abandoned a cap on production last month until 2024 to address possible Russian natural-gas shortages. Its government has also pledged at least €35 billion (\$52 billion) for renewable energy and energy-efficiency measures, though it has been criticised by environment groups who say the emissions cuts ordered by the court were not delivered in time. Urgenda supports lawyers and activists around the world in similar litigation, and the London School of Economics has counted more than 73 related “framework” cases challenging governmental responses.

When I ask Best how it feels to be involved in all this, and leading the Pabai case, he smiles: “This sort of case is the reason I studied law.”

The Pabai matter is not the only climate-linked action afoot in the Torres Strait. In the quiet beer garden in a hotel on Thursday Island, I meet Yessie Mosby, a member of the Kulkagal nation and traditional owner from Masig Island. Mosby and his 11-year-old son Genia are on their way home from Sydney, where he opened the First Nations show at Australian Fashion Week, blowing a conch shell – a call to attention or action in many Pacific cultures – while dressed in a *dhari* warrior headdress made from cassowary feathers.

The 39-year-old is one of eight traditional owners, known as the Torres Strait Eight, who in [2019 took the federal government to the UN Human Rights Committee](#) for failing to protect the islands from climate damage. A decision on the complaint may be announced this year.

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There have been many changes to tiny Masig and the surrounding ocean since Mosby was a child. The land and sky have long told Kulkagal what to do: when a certain bird flies to Papua, it’s time to backburn and prepare the gardens; when a particular insect shrills, the rain will arrive within days. But now the mating season for *waru* (turtle) has shifted, the water is warmer, and the annual rhythms of animals and plants are disturbed. And, as on Saibai, when the wind combines with a high tide, the sea washes into the cemetery. “I was walking

with my children and picking up our ancestors’ remains off the beach, like shells, when I knew something had to be done as soon as possible,” he says.

On the drive back to Saibai township from the cemetery, Pabai and Kabai say how much they appreciate the support they’ve received since launching their case, from both their community and the Australian public. “Whenever I get stressed out I talk to the elders, and they say, ‘We’re going to do this together,’” says Kabai. “I don’t keep everything to myself. It’s better to share your thoughts, your views, with others and they can direct you.”

Pabai takes a big-picture view. “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.”