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Enhancing Climate Change Legislation, Support for Climate Change Litigation and Advancement of the Principle of Intergenerational Justice

*Submission to the United Nations Special Rapporteur on
the promotion and protection of human rights in the context
of climate change*

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Part 1: Background

The [Castan Centre for Human Rights Law](#) (**Castan Centre**), based in the Faculty of Law at Monash University in Australia is a research, education and policy centre which aims to create a more just world where human rights are respected, protected and fulfilled, allowing all people to flourish in freedom and dignity.

The Castan Centre was founded in 2000 by Monash academics and human rights advocates and was named in honour of the world-renowned human rights advocate, [Ron Castan AM QC](#). The Castan Centre has a long history of defending and promoting the realisation of human rights in Australia, and has a strong commitment to research and advocacy concerning human rights and climate change. Climate change is both a research priority area for the Castan Centre and for Monash University more broadly.

1.2 Submission structure

This submission begins with a survey of the Australian experience of climate litigation in **Part 2**, highlighting three recent domestic examples of climate litigation in Australia, two of which explicitly draw upon human rights principles. We also consider the recent case brought by Torres Strait Islander peoples before the United Nations Human Rights Committee and what this reflects about the current state of legal protections in Australia for those facing the impacts of climate change. In **Part 3**, we outline the need for a new approach to climate change and explore what an intersectional and human rights-based approach might look like. We also highlight how the right to a healthy environment may be recognised in Australian law, through federal and provincial human rights instruments. In **Part 4**, we provide our conclusions and recommendations.

Part 2: The Australian Experience of Climate Litigation

2.1 Domestic climate litigation

There have been a number of recent developments in civil litigation in domestic courts across Australia concerning the duty of governments to adequately consider the impacts of climate change in decision-making and to take reasonable care to avoid the negative impacts of climate change. We here highlight three examples.

2.1.1 The *Sharma* Case

In May 2021, the Federal Court of Australia held that the federal Minister for the Environment owed Australian children a duty of care to prevent harm caused by climate change in deciding whether to exercise ministerial powers to allow the extension of a coal mine.¹

¹ *Sharma v Minister for the Environment (Cth)* (2021) 291 ALR 1, 113 [491].

The Minister subsequently appealed this decision and in March 2022, the Full Federal Court unanimously overturned the decision, holding instead that such a duty of care was not established.² Each of the judges of the Full Court gave different reasons, although the impacts of climate change were not disputed. Chief Justice Allsop decided, in part, to allow the Minister's appeal because 'the positive duty throws up for consideration ... matters that are core policy questions unsustainable in their nature and character for judicial determination'.³ Wheelahan J held, inter alia, that the concept of causation employed in the law of negligence was not capable of rendering the extension of a coal mine 'a cause of personal injury'.⁴ In April 2022, the plaintiffs confirmed that they would not seek special leave to the High Court.⁵

2.1.2 Waratah Coal Case

In November 2022, the Land Court of Queensland issued an advisory opinion, recommending against the grant of a mining lease and environmental authority to allow Waratah Coal to mine thermal coal in Queensland's Gallilee Basin.⁶ As a public authority, the Land Court was required by the *Human Rights Act 2019* (Qld) to both act compatibly with and give proper consideration to relevant human rights in making its decision. The Court identified a number of human rights as being engaged by the application, including the right to life and the rights of First Nations peoples.⁷

On the right to life, while the Court recognised that there was some financial benefit flowing from approval to the surrounding area, such benefit must be weighed against the threat to life posed by climate change to people in Queensland. The Court held that the project's 'material contribution to the life-threatening conditions of climate change (and associated economic and social costs) is not proportionate to the economic benefit and the supply of thermal coal to Southeast Asia ... the limit is unreasonable in the sense of being disproportionate because it extends beyond what is reasonably necessary to achieve the purposes' of the project.⁸

On the rights of First Nations peoples, the Court noted that 'First Nations peoples will be disproportionately affected by climate change impacts', including through heatwaves and extreme temperatures and sea level rise resulting in frequent severe and damaging coastal flooding and storm surges.⁹ Evidence before the Court demonstrated that 'climate change impacts will have a profound impact on cultural rights and, for some peoples who will be displaced from their [C]ountry, it risks the

² *Minister for the Environment v Sharma* (2022) 291 FCR 311.

³ *Ibid* 318 [7] (Allsop CJ).

⁴ *Ibid* 486 [757] (Wheelahan J).

⁵ Equity Generation Lawyers, "'They Will Not Forget Our Names': No Appeal, but a Vow to Keep Pushing for Climate Action" (Media Release, 12 April 2022) <<https://equitygenerationlawyers.com/wp/wp-content/uploads/2022/04/220412-Statement-from-Sharma-litigants-on-High-Court-appeal.pdf>>.

⁶ *Waratah Coal Pty Ltd v Youth Verdict (No 6)* [2022] QLC 21.

⁷ *Ibid* [77]-[91].

⁸ *Ibid* [1486].

⁹ *Ibid* [1542]-[1565].

survival of their culture'.¹⁰ In the Court's view, the scale of the potential destruction posed by the effects of climate change meant that the limitation to the rights of First Nations peoples counted against approval of the project, especially 'set against the history of dispossession of First Nations people in this country'.¹¹

2.2.3 The Australian Climate Case

On 26 October 2021, First Nations leaders from remote islands in Guda Malugligal in the Torres Strait issued proceedings against the Australian Government in the Federal Court of Australia.¹² The applicants argue that by failing to prevent climate change, the Australian Government has breached its duty of care to ensure that Torres Strait Islander peoples are not harmed by climate change.¹³ They seek orders requiring the government to prevent this harm by cutting greenhouse gas emissions.¹⁴ The matter is listed for hearing in June 2023.¹⁵

2.2 International climate litigation: *Billy et al v Australia*

The United Nations Human Rights Committee found that Australia's failure to adequately adapt to climate change violates the human rights of Torres Strait Islander peoples, in September 2022.¹⁶ The Committee found that Australia violated Torres Strait Islander peoples rights to private life, home and family and their enjoyment of culture. In doing so the Committee noted Australia's efforts to construct a seawall, but found it to be an inadequate response to the serious threats from climate change raised by Torres Strait Islander peoples since the 1990s.¹⁷ This decision underscores the critical need for states to act to address the human rights impacts arising from climate change.¹⁸ That this case needed to be brought before the Committee, and that adequate remedies could not therefore be obtained domestically, is an indictment on Australia's legal protections for those at the frontline of the climate crisis.

¹⁰ Ibid [1565].

¹¹ Ibid [1568].

¹² 'First Nations Leaders Sue Commonwealth Over Climate Change' (Media Release, 16 November 2021) <https://www.gratafund.org.au/climate_case_summary>.

¹³ 'The Case', *The Australian Climate Case* (Web Page) <<https://australianclimatecase.org.au/the-case/>>.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Human Rights Committee, *Views: Communication No 3624/2019*, 135th sess, UN DOC CCPR/C/135/D/3624/2019 (22 September 2022) ('*Billy et al v Australia*').

¹⁷ Ibid [8.12] and [8.14].

¹⁸ Karin M Frod , Andrea Olivares Jones and Joanna Kyriakakis, 'Torres Strait Islanders Successful in Landmark Human Rights Complaint against Australia', Castan Centre for Human Rights Law Blog (online, 3 October 2022) <<https://castancentre.com/2022/10/03/torres-strait-islanders-successful-in-landmark-human-rights-complaint-against-australia/>>.

Part 3: An Intersectional and Human Rights-Based Approach

3.1 The need for a new approach

The lives, health, and dignity of all persons is inextricably linked to the conditions of their physical environment.¹⁹ Climate change is already affecting our physical environment, including ‘temperatures and the weather, the quality of air, food and water’ and our interactions with animals and pathogens, all of which are ‘fundamental factors for human flourishing’.²⁰ Australia is already experiencing the impacts of climate change, and it is estimated that Australia’s future climate will be typified by more intense and heavy rainfall, longer fire seasons and more dangerous fire weather, and warmer average temperatures with more heatwaves and fewer cool days.²¹

We therefore seek to incorporate a climate change-sensitive approach in our work at the Castan Centre and in this submission are mindful of the need to consider the interrelated and intersected challenges faced in addressing climate change.

3.2 An intersectional approach

While climate change affects all people, there are some groups disproportionately affected by the effects of climate change. Among other groups, climate change has a unique and acute impact on First Nations peoples in Australia, who have long-held and deep connections to the land and waters.²² Indigenous land is under considerable pressure arising from effects of climate change, climate policies and bids to acquire Indigenous interests in land. Of particular concern is the environmental damage and rapid erosion of land in the Torres Strait, which threatens homes, food and water supplies; has damaged sacred sites, burial places, and spaces for hunting and gathering; increases the spread of infectious disease; and, in turn, affects Indigenous life, health, cultural heritage, identity, and livelihood.

As we discuss further below, it is critical that meaningful engagement which empowers First Nations peoples to be actively involved in decision-making around climate change be a priority. It is also vital that the Australian Government, and provincial governments in Australia, recognise the traditional knowledge and experience of First Nations peoples and appropriately integrate these practices into climate mitigation and adaptation strategies, including climate legislation.

3.3 A human rights-based approach

As Australia does not have any stand-alone federal human rights protections or any protections of Australia’s existing human rights instruments (although, as discussed below, this may soon change),

¹⁹ Andrea L Phelan, ‘The Environment, a Change Climate and Planetary Health’ in Lawrence O Gostin and Benjamin Mason Meier (eds), *Foundations of Global Health & Human Rights* (Oxford University Press, 2020) 417, 417.

²⁰ *Ibid.*

²¹ CSIRO and Australian Bureau of Meteorology, *State of Climate Change 2020* (report, 2020) 2, 22.

²² Warwick Baird, ‘Climate Change and Indigenous Peoples’ (Speech, Native Title Conference 2008, 4 June 2009) <<https://humanrights.gov.au/about/news/speeches/climate-change-and-indigenous-peoples>>.

human rights-based approaches are not likely to deliver climate action through traditional legal mechanisms, such as litigation in domestic courts.²³ Rather, within the current domestic legal framework, the potential of a human rights-based approach to climate change lies in its ability to garner political pressure on governments through civil society movements and the actions of international and domestic human rights actors which can translate into stronger climate action.²⁴ As has been expressed elsewhere:

In this way, the potential of a human rights-based approach to climate change in Australia is its capacity to be utilised as a tool of advocacy and activism. So understood, a human rights-based approach to climate change can drive the prioritisation of environmental protection and climate action by highlighting the ways in which climate harms impede the realisation of our human rights and ensuring that climate responses are driven by, and focus on, the groups and peoples most affected by climate change.²⁵

There is no universal definition of a human rights-based approach. Nevertheless, such approaches have their origin in sustainable development discourse and tend to have a number of common elements, namely: the participation of rights-holders in decision-making processes; clear links to human rights; accountability for duty-bearers with respect to human rights; respect for principles of equality and non-discrimination of rights holders; the empowerment of rights-holders to understand and enjoy their human rights, and participate in decision-making and the formulation of laws, policies, and practices that impact upon them; and transparency for all stakeholders involved.²⁶ A key element of a human rights-based approach to climate change is that it 'moves beyond seeing individuals on the frontline of climate change as victims of a hostile world, but as dignified and autonomous rights-bearers demanding the protection and realisation of their human right to a healthy environment'.²⁷

Yet, the full force of a human rights-based approach to climate change in Australia requires both a federal stand-alone human rights instrument and recognition in provincial human rights instruments of the right to a healthy environment.

3.4 The right to a healthy environment recognised in domestic law

Although Australia does not have a stand-alone federal human rights instrument, three of the eight provincial jurisdictions in Australia have stand-alone legislated human rights instruments,²⁸ however none of these instruments yet recognise the right to a healthy environment. Nevertheless, the *Waratah Coal Case* discussed at Section 2.1.2 above demonstrates the potential of human rights recognised in domestic law to achieve climate justice. It also shows how an intersectional approach is necessary to

²³ Scott Walker, 'The Meaning and Potential of a Human Rights-Based Approach to Climate Change Post-Sharma' (2022) 47(3) *Alternative Law Journal* 194, 197.

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ 'Human Rights Based Approach', *Swedish International Development Cooperation Agency* (Web Page) <<https://www.sida.se/en/for-partners/methods-materials/human-rights-based-approach>>.

²⁷ Walker (n 23) 198.

²⁸ *Human Rights Act 2004* (ACT), *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2019* (Qld).

understanding, and addressing through law, the impacts of climate change – which touches upon every aspect of human life and dignity.

The Australian Capital Territory (**ACT**) is the first Australian jurisdiction committed to introducing a right to a healthy environment in that jurisdiction's *Human Rights Act*, the first such legislation introduced in Australia, this year, following community consultations.²⁹ If passed by the legislature, this would mean that public authorities in the Australian Capital Territory (including, the government and government agencies) would have to act compatible with the right to a healthy environment and, in decision-making, give proper consideration to the right to a healthy environment where it is relevant.³⁰ This would embed an explicit human rights-based approach at all levels of decision-making, policy-making, and law-making within public authorities and has the potential to give legal force to the political potential of a human rights-based approach to climate change. The real impact of any such laws is likely not to be seen in the ACT, given that it is not a jurisdiction in which mining and other large-scale climate change-related projects are being developed. Yet, we hope that such a change in law provides a basis for other jurisdictions to consider similar amendments.

Part 4: Conclusion and Recommendations

Australia continues to lag behind in its legal protections for those at the forefront of the climate crisis, with insufficient federal and provincial regimes for the protection of human rights. To establish an intersectional, human rights-based approach to climate change which provides avenues for remedy when human rights have not been adequately considered in climate change-related decisions, we urge the Special Rapporteur to **recommend that Australia enacts a federal Human Rights Act** which recognises the right to a healthy environment, among other rights, and that provincial jurisdictions with existing human rights instruments amend those laws to recognise the right to a healthy environment.

²⁹ 'Right to a Healthy Environment', *ACT Justice and Community Safety Directorate* (Web Page) <

³⁰ *Human Rights Act 2004* (ACT) s 40B(1).