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STATE OF DENIAL

Australia's legal obligations for human rights harms within Australia from its fossil fuel exports

Australian Climate Accountability Project

September 2025

ABOUT THIS REPORT

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As an Australia-based Institute, we have focused in this analysis on human rights harms to people in Australia. We take this Australia-focused approach knowing that many people and communities in our Asia-Pacific neighbouring countries are facing even more destructive climate change impacts and even greater loss. Our aim is to demonstrate to those within Australia that the consequences of our actions in exporting large quantities of fossil fuels include serious and permanent harms to ourselves. We hope that the Institute's efforts to build domestic understanding of this, and of the resulting need for a rapid, managed phase-out of these exports, will also benefit those outside Australia facing climate-driven harms made yet more intense by Australia's contributions to ongoing global warming.

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About the Australian Climate Accountability Project

This is a publication of the Australian Climate Accountability Project at the Australian Human Rights Institute (UNSW). The Australian Human Rights Institute produces world-leading research and advances debate on critical human rights issues. Our strategic and rigorous research transforms practices to mainstream human rights.

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The Australian Climate Accountability Project is located on the unceded territory of the traditional owners, the Bidjigal people.

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Glossary of acronyms

AAS	Australian Academy of Science
CMA	Conference of the Parties serving as the meeting of the parties to the Paris Agreement
CO_{2e}	Carbon dioxide equivalent
COP	Conference of the Parties (to the UNFCCC)
CSIRO	Commonwealth Scientific and Industrial Research Organisation
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
GHG	Greenhouse gas
HRC	UN Human Rights Committee
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IPCC	UN Intergovernmental Panel on Climate Change
ITLOS	International Tribunal on the Law of the Sea
NDC	Nationally Determined Contribution
OECD	Organisation for Economic Cooperation and Development
TCRE	Transient climate response to cumulative CO_2 emissions
UDHR	Universal Declaration of Human Rights
UNFCCC	UN Framework Convention on Climate Change
UNGPs	UN Guiding Principles on Business and Human Rights

Foreword

From the ferocious ‘Black Summer’ bushfires that ravaged my beloved south coast of NSW, to the devastating flooding in the Northern Rivers, to the droughts in Victoria, to the rising sea levels threatening the Torres Strait and the continuation of First Nations lives and cultures, to the mass bleaching of the Great Barrier Reef, the Ningaloo Reef and beyond – Australia is experiencing devastating consequences as a result of climate change.

Weather patterns are shifting and changing, thousands of Australians are dying due to unprecedented heat, species are becoming extinct, entire suburbs and communities are losing their homes or risk going under water, and taxpayers are funding billions in climate change related disaster relief.

Climate change is not a future problem. We have already caused irreparable damage to the climate system. We are living in the age of consequences.

And if we don’t act quickly, it is only going to get worse.

Far worse.

In short, the Australia I love – my home and yours – faces an existential danger. Our children and their grandchildren will never know the Australia we have known. Their future is uncertain because of our inaction. If we don’t act now, they won’t have a liveable future.

The Australian government has publicly acknowledged the risk of human-induced climate change since the 1980s. But, in truth, governments have known for far longer about climate change and that it would cause ‘famine and starvation’, ‘unrest’ and ‘mass movement’ of peoples across borders.[1]

For more than half a century, our governments have known what causes climate change and have known how to stop it. But, instead, successive Australian governments have continued to subsidise fossil fuels and approve and extend licences for massive fossil fuel projects. These negligent actions, and ongoing climate inaction, threaten the future of Australia and the planet. As long predicted, rising temperatures, sea level rise and catastrophic weather events are decimating parts of our country, our Pacific neighbours, and our economies, displacing indigenous communities from their ancestral homes and cultural practices, and violating everyone’s human rights. As the research presented in State of Denial makes clear, climate change is having a disastrous effect on Australians and our human rights to health and to life.

[1] See, for eg, CIA, ‘A Study of Climatological Research as it Pertains to Intelligence Problems’, Aug 1974.

All human rights are under threat. The climate crisis is a global human rights crisis. Governments knew but have failed to do what is required to protect our rights – and are continuing to fail to do what is needed.

That is why, as a human rights lawyer, I dedicated part of my practice to addressing climate change. Frustrated with the inaction of governments like ours, and the failure of international climate negotiations to deliver the action we need, I worked with the government of Vanuatu to take the world's biggest problem – climate change – to the world's highest court: the International Court of Justice.

State of Denial sets out how Australia has continued policies which encourage emissions, denied responsibility for our exported emissions, and has sought to avoid responsibility for climate harms by pointing to purported diffuse causes of climate change and by claiming Australia's emissions are merely a 'drop in the ocean' and that the harm caused by climate change cannot be attributed to Australia – or any other state. This was reflected in Australia's submissions before the International Court of Justice.

On 23 July 2025, the International Court of Justice handed down its historic opinion, rejecting all of Australia's arguments – along with those of the big emitting states like the US, China, Russia, and Saudi Arabia – to conclude that all states, including Australia, have binding international obligations to protect the climate system, which requires ambitious emission reduction targets to keep to 1.5°C. It also found that all states, including Australia, are responsible under international law for the harm caused by our emissions – including emissions we export – and this gives rise to obligations to provide reparation and remedies to the states and peoples harmed as a result. The Court made clear that protecting the climate system is necessary for the protection of all human rights and that the Australian government has obligations to all of us, as Australians, to prevent and protect against harm to the climate system and to provide us remedy for the human rights violations caused by climate change.

In short, the recommendations you read here in State of Denial are not just best practice policy recommendations – it is what is required of Australia under our binding international legal obligations.

We have done our bit as international lawyers, but as the International Court said:

> *… International law, whose authority has been invoked by the General Assembly, has an important but ultimately limited role in resolving this problem. A complete solution to this daunting, and self-inflicted, problem requires the contribution of all fields of human knowledge, whether law, science, economics or any other. Above all, a lasting and satisfactory solution requires human will and wisdom — at the individual, social and*

> *political levels — to change our habits, comforts and current way of life in order to secure a future for ourselves and those who are yet to come.*[2]

What we now need is implementation and accountability at home in Australia.

State of Denial is a roadmap to accountability, starkly depicting the gulf between what international law requires of the Australian government and the reality of its conduct. This analysis can be used by individuals, organisations, communities, activists, and lawyers to support their demands for our government to comply with its international obligations by making deep and rapid cuts to emissions. It also provides a glimpse into a shared future where international law, human rights and the best available science are at the forefront of decision-making – and where we do what is needed to protect our beautiful country and the ability of future generations to live and thrive in it.

I want our children, and their children, to have a liveable future. I want to protect Australia's incredible natural beauty and the ecological diversity that makes our country so unique.

For that, we need urgent climate action. State of Denial is an important resource to help shape what that can look like.

Jennifer Robinson

[2] International Court of Justice (ICJ), Obligations of States in Respect of Climate Change, Advisory Opinion, 23 July 2025. General List. No. 187, [456].

Introduction

This report examines, for the first time, the factual and legal relationships between:

- Australia's fossil fuel exports and associated policies,
- their adverse impacts on people in Australia, and,
- Australia's compliance with its human rights and related international law obligations.

Our report describes the ways in which Australia's fossil fuel export-related actions and policies are contributing to worsening climate change and adverse effects on people in Australia. We provide a detailed examination of Australia's binding human rights and related international law obligations regarding this contribution, and we conclude with National Guidance for Australia, setting out the essential elements of regulatory and policy reform for Australia if it is to comply with these legal obligations.

The report serves particularly as a resource for lawyers and policymakers, and engages with key evidentiary and procedural challenges for those in Australia seeking remedies for adverse impacts, including human rights harms, from climate extremes made worse by the fossil fuel exports and policies. It comes at a pivotal moment, with courts worldwide increasingly recognizing the incompatibility between States' ongoing fossil fuel-producing actions and policies, and compliance with their binding human rights and related international law obligations. Our rigorous legal analysis, grounded both in relevant Australian law and international law frameworks, offers legal practitioners and policymakers the tools to advance the required reforms for Australia's compliance with these binding obligations.

This analysis focuses solely on Australia's obligations to prevent climate-driven human rights harms *within its own territory*. We do not explore Australia's extraterritorial human rights or international law obligations—that is, its obligations to people in other States whose human or other rights may be adversely affected as a consequence of Australia's fossil fuel exports and associated policies. Nor do we examine the international law obligations of States towards other States regarding harm which their fossil fuel activities are causing to the climate system.

The report is organized into six substantive Parts, each building upon the previous one. The **Executive Summary** provides a concise overview of the report's key findings and recommendations. **Part 1** establishes the factual foundation, by setting out the evidence that Australia's fossil fuel exports and associated policies are contributing measurably to worsening climate extremes. **Parts 2-5** describe the human rights affected, the evidence of harmful impacts in Australia, and the sources and content of Australia's binding legal obligations to protect the rights and prevent significant harm to Earth's climate system. **Part 6** presents National Guidance for Australia, offering essential reforms for Australia - as a large fossil fuel exporter – to adopt if it is to comply with its human rights and related international law obligations in the climate change context.

Executive summary

‘States should be accountable to rights-holders for their contributions to climate change, including for failure to adequately regulate the emissions of businesses under their jurisdiction regardless of where such emissions … actually occur.’

> United Nations High Commissioner for Human Rights,
> ‘Understanding Human Rights and Climate Change’, 2015 [3].

Key Findings

Australia is one of the largest fossil fuel exporters in the world, in second place globally for lifecycle carbon emissions from exported fossil fuels – behind only Russia and ahead of every Organization of the Petroleum Exporting Countries (‘OPEC’) country. The emissions from Australia’s fossil fuel exports represent a significant and measurable contribution to global warming that materially threatens the climate system and human rights, including in Australia. Australia’s total fossil fuel carbon dioxide (‘CO_2’) footprint in 2022, including overseas emissions from the fossil fuels it produced for export, was 4.5% of global fossil fuel CO_2 emissions for that year. Of that 4.5%, only around 1% was emitted within Australia, while around 3.5% emanated solely from the production, processing, transportation and combustion or other use of Australia’s exported fossil fuels.

Cumulative, emissions associated with Australia's fossil fuel exports (from 1961-2023) have contributed approximately 0.013°C to global warming, with projected fossil fuel exports between 2023 and 2035 expected to add another 0.007°C. While these numbers appear small, they demonstrate a measurable contribution to climate system harm and intensifying climate extremes in Australia. The Intergovernmental Panel on Climate Change (‘the IPCC’) has made very clear that *every* fraction of a degree of warming worsens climate change, amplifying the likelihood and severity of extreme weather—heatwaves, floods, fires—that threatens lives, property and ecosystems on which human life depends.

Australia denies responsibility for the climate and resulting human harms within its territory which correspond with the contribution of its fossil fuel exports to global warming and a worsening climate, relying on the argument that no single country's emissions alone can ‘cause’ climate change. This argument is directly contradicted by climate science, including by the IPCC.

Even though Australia is aware of its substantial contribution to climate harm and adverse human rights impacts, it has taken no direct steps to minimise them, even though measures are available to it which have a real prospect of doing so. Its actions place it in a position of failing to comply with binding international human rights law and related international law. Its continuing

approvals for new fossil fuel projects and granting of subsidies and other supports are potentially internationally wrongful acts. In failing to address the harms from its fossil fuel exports, Australia is choosing to stand outside the law.

Australia's Current Policy Framework

Instead of taking steps to minimise its contribution to climate change and its harmful consequences, Australia continues to take a defiant, 'business as usual' stance, in 'denial' of its human rights and international law responsibilities relating to the fossil fuel exports.

- **No Regulatory Framework**: Australia has no cap or limit on its fossil fuel export volumes, no associated reduction policies, no plan to restrict or reduce the exports, nor any national targets or framework to limit them in the future.
- **Continued Expansion**: Australia continues to issue new exploration licences and project approvals. Most of the production is for export, often approved to operate for decades.
- **Government Subsidies**: Federal and state governments continue to provide billions of dollars annually in fossil fuel production and consumption subsidies and other supports.
- **Regulatory Gaps**: Australia's domestic emissions mitigation framework for its fossil fuel production and use excludes these exported emissions, even though they typically constitute at least 90% of the fossil fuel exporters' lifecycle emissions.
- **Active Promotion**: Government representatives continue to actively promote Australian coal and gas to overseas buyers.

Human rights harms in Australia

While climate change significantly harms many human rights, this analysis explores the harms from worsening climate change in Australia for two rights in particular.

The right to life: Climate-driven heat extremes are increasing mortality rates across Australia, with vulnerable populations including the elderly, children, First Nations communities, and people with medical conditions facing increasing risk and death. Heat-related deaths in Australia have so far been substantially under-recorded, with tens of thousands of deaths here between 2006-2017 being in fact attributable to heat.

The right to family and home life: Climate change is increasingly interfering with people's family and home life, including by forcing many to make significant personal changes to stay safe – changes which themselves impair family and home life, and are effectively permanently required. For example, people with asthma will increasingly be forced by extreme weather to remain indoors, disrupting quality of life, work attendance, outdoor activities and social connections.

Australia's Human Rights and International Law Obligations

Australia is a party to all the major international human rights treaties, which require it to be especially vigilant and to take the measures necessary to protect human rights of people in its territory against real and foreseeable threats or harms – including those arising from business activities like fossil fuel production, regardless of where the GHG emissions occur.

Australia has known for a considerable time of these very real climate-driven threats and harms to human rights in its territory. It has both the capability to minimise these and reasonable measures available to it that have a real prospect of doing so. Australia's failure to take action to minimise the harms from its fossil fuel exports places it in breach of its binding human rights law obligations.

Australia is also, by its actions, failing to comply with its human rights-related international law obligations. The International Court of Justice ('ICJ') recently concluded that all States are subject to the international law obligation to prevent significant harm to the climate system. The Court specifically identified failure by a State 'to take appropriate action to protect the climate system from GHG emissions — including through fossil fuel production, fossil fuel consumption, the granting of fossil fuel exploration licences or the provision of fossil fuel subsidies' - as a potentially wrongful act under international law. It also concluded that realisation of human rights cannot be ensured by States without such protection of the climate system.

National Guidance for Australia

To comply with its human rights and related international law obligations, Australia must undertake a four-step reform process.

1 **Establish an Immediate Moratorium:** Halt all approvals of new or expanded fossil fuel projects and related infrastructure, and of new financial support and subsidy programs for fossil fuel production for export, pending decisions made in the course of the actions outlined below.

- **Conduct Human Rights Due Diligence:** (i) Undertake a comprehensive assessment of the contribution of the fossil fuel exports to climate-related human rights harms within Australia, including historical, current, and projected total emissions and their temperature effects. (ii) Conduct a review of its current fossil fuel exports-related national and sub-national policies and regulation (or their absence) and assess their role in worsening human rights harms. (iii) Identify the steps it could reasonably and effectively take to minimize the human rights harms, including in relation to the actions of private entities.
- **Develop a regulatory and policy reform package:** In accordance with Australia's due diligence outcomes, develop a reform package, incorporating: (i) the necessary, adequate and appropriate measures and policies to protect the climate system and human rights in Australia, including in particular stopping its actions potentially constituting internationally wrongful acts; (ii) the implementation of an orderly but ambitious fossil fuel exports phase-out plan, in bona fide cooperation with stakeholders; and (iii) a process of consequential legislative reform, particularly in relation to protection of the climate and of human rights.

Australia should reference the reform package in its Nationally Determined Contribution ('NDC').

- **Rights-Based Implementation:** Ensure reform processes incorporate principles of accountability, transparency, participation, and non-discrimination, with effective remedies (through the introduction of a federal Human Rights Act) for human rights violations.

Conclusion

The required reforms reflect Australia's binding legal obligation, but they also offer Australia an opportunity to demonstrate leadership in addressing the climate crisis while protecting the human rights of people within its territory, particularly of vulnerable communities already experiencing climate-related harms. Delay in implementing these measures will only increase the severity of climate damage, escalating both harms to human rights and the magnitude of Australia's breach of its human rights and international law obligations.

1 Australia's fossil fuel exports and their role in worsening climate change

1.0 Key points

- Australia's contribution to global warming - and to the worsening of climate change in its own territory - includes not only its domestic emissions but also its fossil fuel exports.
- Australia's total fossil fuel carbon footprint in 2022, including the emissions from its exported fossil fuels, was 4.5% of global CO_2 emissions for that year.
- Multiple forms of measurement demonstrate that the worsening of harm to Australia's own climate associated with these export volumes is both quantifiable and significant.
- Climate risks and harms become significantly greater with every fractional rise in average global temperatures.
- Australia's full contribution to global warming also includes its failure to develop any plan for future exports reduction and its active promotion and enabling of the exports well into the future.
- Australia's commitment to continuing fossil fuel exports signals to the world that inaction on climate is acceptable, undermining global efforts and delaying progress.
- Australia's argument, that it is not possible to attribute worsened climate change to the emissions of any one country, is patently incorrect in science.

Australia tends to see itself as a responsible and diligent State in international efforts to combat climate change and as a small contributor to the global climate problem. It is a Party to both the UN Framework Convention on Climate Change ('the UNFCCC') and the Paris Agreement,[3] and it actively participates in the processes established under those treaties. It pursues policies, laws and programs which are directed at reducing its domestic emissions against both interim and 2050 targets.[4] It duly complies with the Paris Agreement's emissions reporting and other procedural requirements. It has introduced legislation aimed at stimulating investment in large-scale clean energy projects, including for export.[5]

In 2023, Australia's domestic emissions were 1.1% of global emissions.[6] Yet its contribution to global warming and, consequently, to the worsening of climate change in its own territory, is very much greater when the effects of its fossil fuel exports are factored in. This Part presents key facts about Australia's contribution to global warming

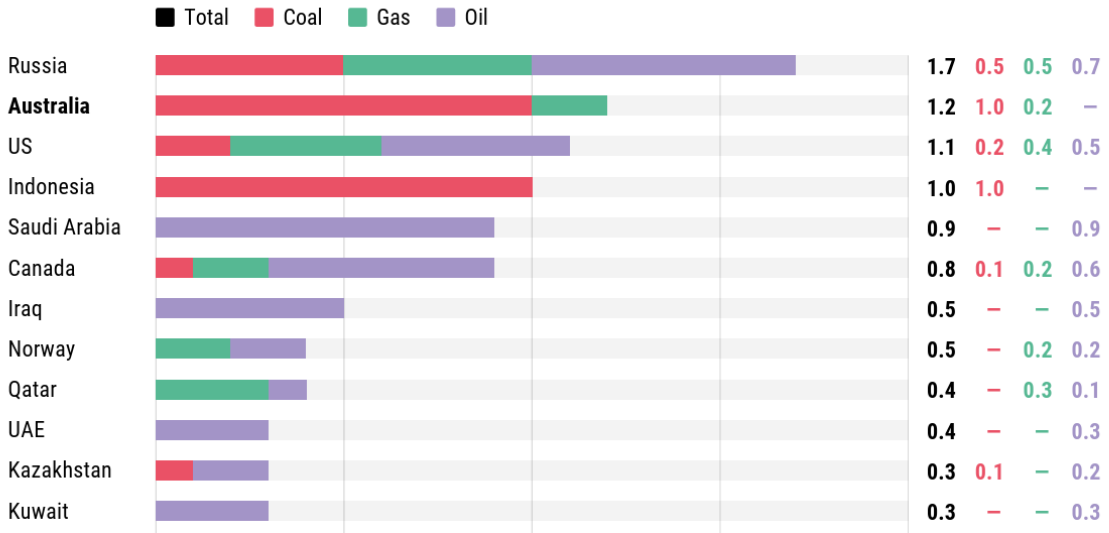
[3] United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc. No. 102-38, 1771 U.N.T.S. 107 ('UNFCCC Framework Convention'); Paris Agreement ('Paris Agreement'), opened for signature 22 April 2016, ATS 24 (entered into force 4 November 2016).
[4] *Climate Change Act* 2022 (No. 37, 2022) (Cth).
[5] See, for e.g., the *Clean Energy Finance Corporation Act 2012* (Cth). Despite these domestic actions, Climate Action Tracker has rated Australia's actions as 'insufficient', on the basis that its 'climate policies and action in 2030 need substantial improvements to be consistent with limiting warming to 1.5°C. If all countries were to follow Australia's approach, warming would reach over 2°C and up to 3°C': Climate Action Tracker, November 2024.
[6] Climate Analytics, 'Australia's Global Fossil Fuel Carbon Footprint' ('Footprint report'), August 2024, at 1.

through its fossil fuel exports. Those facts underlie the human rights harms which flow from the contribution of the exports to a worsening climate in Australia (see Part 4), as well as informing the scope and content of Australia's human rights law obligations in the climate context (see Part 5).

1.1 Australia's fossil fuel exports contribute measurably to worsening climate change

Even though Australia itself has already warmed by even more than the world's average,[7] it is continuing its activities as one of the world's largest fossil fuel exporting countries. The bulk of Australia's existing and new fossil fuel production is sold overseas. In 2022-2023, 89% of Australia's black coal energy production was exported, as was 73% of its domestic natural gas production.[8] Australia's total fossil fuel carbon dioxide ('CO_2') footprint in 2022, including overseas emissions from the fossil fuels it produced for export, was 4.5% of global fossil fuel CO_2 emissions for that year. Of that 4.5%, only around 1% was emitted within Australia, while around 3.5% emanated solely from the production, processing, transportation and combustion or other use of Australia's exported fossil fuels.[9] Based on total lifecycle carbon dioxide equivalent ('CO_2e') emissions associated with its fossil fuel production alone, in 2021 Australia ranked 5th largest in the world.[10] When the CO2e lifecycle emissions are measured only for Australia's exported fossil fuels, as the graph below shows, it ranks 2nd largest in the world - ahead of the United States and each of the OPEC states, and behind only Russia.

2021 exports extraction and end-use GHG emissions ($GtCO_2e$)



Climate Analytics, 'Australia's global fossil fuel carbon footprint', August 2024, Figure 10, at 22.

[7] Australia has already warmed on average by 1.51 degrees above pre-industrial levels: CSIRO, State of the Climate 2024.
[8] DCCEEW, Australian Energy Update, August 2024, at 39.
[9] Climate Analytics, Footprint report, at 1.
[10] SEI et al., Production Gap Report 2023, at 36; Climate Analytics, Footprint Report, at 56.

'will remain high', with Australia projected to still be exporting around 200 Mt per annum by 2027 (from 209 Mt in 2024).[11] Australia's metallurgical coal exports are projected to increase, growing to at 171 Mt in 2027 (compared to 153 Mt in 2024).[12] Gas exports are expected to hold largely steady to 2027, with new supply offsetting gradual declines from older projects. While export volumes are expected to decline after that, due to ongoing depletion of existing gas reserves, some large new projects are expected to come online shortly (namely, Santos' Barossa and Narrabri gas projects).[13]

There are several ways to demonstrate that Australia's fossil fuel exports are measurably contributing to worsening climate change. Expressed in terms of sheer emissions volumes, Climate Analytics has calculated that 'cumulatively, from 1961 to 2023 Australia's fossil fuel exports have been responsible for emitting 30Gt of carbon dioxide to the atmosphere' and that, by 2035, 'Australia's fossil fuel exports will add another 15Gt to that cumulative total, bringing it to 45 Gt.'[14]

The relationship between cumulative CO_2 emissions and global warming has been studied extensively by climate scientists. In its latest assessment report (AR6), the IPCC reaffirmed, with 'high confidence', that there is a near-linear relationship between cumulative anthropogenic CO_2 emissions and the increase in global average temperature caused by CO_2 over the course of this century relative to 1850-1900.[15] This near-linear relationship (the Transient Climate Response to cumulative carbon Emissions, or 'TCRE') between cumulative CO_2 and global warming implies that reaching net zero anthropogenic CO_2 is a requirement to stop human-induced global temperature rise from continuing to increase.

It also implies that limiting global temperature increase to a specific level requires limiting cumulative CO_2 emissions to within a carbon budget, providing a second way to express Australia's contribution: as its proportion of the 'global carbon budget' consistent with a 50% chance of limiting global mean warming to 1.5°C.[16] At 2024 emission levels, the remaining carbon budget for a 50 percent chance to limit warming to 1.5°C will likely be exceeded by 2030.[17] The emissions from Australia's projected fossil fuel exports from 2024 to 2035 would consume around 7.5% of that budget.[18]

While noting the global responsibility for anthropogenic CO_2 emissions and the complexity and uncertainty in climate models, it is possible to translate Australia's cumulative CO_2 exported emissions into corresponding degrees of global warming based on the TCRE relationship.[19] This means that Australia's contribution may also be quantified in terms of fractions of a degree of warming caused. The IPCC assesses that the best estimate of the TCRE relationship is that every 1,000 Gt of CO_2

[11] DCCEEW, Resources & Energy Quarterly: June 2025, at 45-47.
[12] DCCEEW, Resources & Energy Quarterly: June 2025, at 39.
[13] DCCEEW, Resources & Energy Quarterly: June 2025, at 55.
[14] Climate Analytics, 'Footprint report', at 19 and Executive Summary.
[15] IPCC, 'Climate Change 2021: The Physical Science Basis', AR6, WG1, Summary for Policymakers, at 28.
[16] IPCC, 'Climate Change 2023: Synthesis Report', AR6, at 82.
[17] CSIRO, Global carbon budget, 2024.
[18] Climate Analytics, 'Footprint report', at 35.
[19] Note that the TCRE relationship is specific to cumulative CO_2, not all greenhouse gases.

emissions causes 0.45°C of warming, with a 66–100% likelihood of warming between 0.27°C to 0.63°C.[20]

This provides a third way to express the contribution of Australia's fossil fuel exports: to apply the TCRE to Australia's decades of fossil fuel production from 1960 (when its large-scale coal exports began) to 2023, and to the period 2023 to 2035, based on government and industry projections and plans for that period. The table below includes corresponding median TCRE global warming contribution[21] for the period 1961-2023 for three scopes of cumulative CO_2 emissions related to Australia's direct actions: its domestic emissions, the emissions from its fossil fuel exports, and its total emissions footprint.[22] Global warming from Australia's total carbon footprint over the period 1961-2023 is estimated at about .021°C or about 3.1% of the total contribution from fossil fuel emissions.[23]

Australia has already measurably contributed to global warming, and this will increase with ongoing fossil fuel production and export

	Historical | 1961 to 2023		Projected to 2035	
	Cumulative CO_2	Warming °C	Cumulative CO_2	Warming °C
Domestic excl. LULUCF	18 Gt	0.008°C	22 Gt	0.010°C
Fossil fuel export	30 Gt	0.013°C	45 Gt	0.020°C
Total footprint (Domestic + exported)	47 Gt	0.021°C	66 Gt	0.029°C
Global fossil fuel CO2 emissions[3]	1504 Gt	.669°C		

Table 1: Global warming corresponding to Australia's domestic and exported CO_2 footprint based on the transient climate response to cumulative CO_2 emissions.

The temperature increases attributable to Australia's fossil fuel exports to 2023 and over the coming decade are small figures but their significance is large because, as climate scientists have repeatedly stated, '[w]ith every additional increment of global warming, regional changes in

[20] IPCC, 'Climate Change 2021: Summary for Policymakers', AR6, at 28.
[21] The ratio between globally averaged surface temperature increase and cumulative CO_2 emissions is described as the transient climate response to cumulative CO_2 emissions ('TCRE').
[22] Methodological notes to accompany the table: Australia's domestic CO_2 emissions occur within Australia's territorial borders, as reported to the UNFCCC. The emissions from Australia's fossil fuel exports are the CO_2 emissions that occur when Australia's exported fossil fuels are combusted overseas, together with the share of domestic CO_2 emissions that arise in the extraction, processing and distribution of these fossil fuels for export. Australia's total emissions footprint is its total domestic CO_2 emissions, plus its exported fossil CO_2 emissions. The table also shows the estimated median TCRE warming contribution from global fossil fuel related CO_2 emissions for the period 1961-2023 of about 0.67°C. Total observed global from 1961 to 2023 according to the Hadley HadCRUT5 temperature data set (Morice, C. P. et al. An Updated Assessment of Near-Surface Temperature Change From 1850: The HadCRUT5 Data Set. J. Geophys. Res. Atmospheres 126, e2019JD032361, 2021) is about 1.1°C, with other sources of warming and/or temperature change including deforestation, methane, nitrous oxide, halocarbon emissions, air pollution contributing to the difference between the fossil fuel caused warming and the total warming observed over this period.
[23] Climate Analytics' calculations, based on the results in 'Footprint report' and applying the median IPCC AR6 estimate for transient climate response to cumulative CO_2 emissions to the report's timeseries.

mean climate and extremes become more widespread and pronounced.'[24] In measurably raising Earth's global mean temperature, even by small fractions of a degree, Australia is contributing to raise the threat (including in its own territory) of more frequent, intense, longer lasting and often compounding heat extremes, fires, droughts, rainfall, flooding and storms.[25] The 'likelihood of abrupt and irreversible changes … [also] … increases with higher global warming levels.'[26]

Moreover, for many climate hazards, a further increase in the temperature rise so far will result in an even greater proportional rise in the probability of the hazards occurring and in their intensity. In its 2018 report[27] on the differences between the climate hazards at 1.5°C and those at 2° - that is, the differences from a further temperature rise of half a degree (one-third of the rise so far) - the IPCC demonstrated that the increase in climate risks and harms will be significantly greater than one third at the warmer level. For example, compared to 1.5°C warmer world, at 2°C warmer (a one-third temperature rise) [28] We explore human harms caused by climate change in more detail in Part 4, below.

The graph below illustrates the escalating worsening of climate changes and impacts at fractionally different temperature levels.

Increasing likelihood of extreme events with higher warming

Event	Associated Impacts	Natural	Current	1.5°C	2°C
Angry summer 2012-2013	Severe heatwaves, power blackouts, bushfires, illnesses and deaths up	3% (1-5%)	44% (36-52%)	57% (50-65%)	77% (70-84%)
Coral Sea heat JFM 2016	Worst coral bleaching event on record	0% (0%)	31% (22-40%)	54% (53-76%)	87% (79-93%)
SE Australia drought 2006 – Low rainfall	Water restrictions, less food grown	1% (1-2%)	2% (1-3%)	3% (1-4%)	3% (1-4%)
SE Australia drought 2006 – High temperatures	Water restrictions, less food grown	1% (0-1%)	35% (28-42%)	52% (45-59%)	74% (67-81%)

Source: Climate Council, 'Aim High, Go Fast', 2023, at 37.

[24] IPCC, 'Climate Change 2023: Synthesis Report', 'Summary for Policymakers', at 12. Such warnings are repeated many times in various forms in the IPCC's 2023 Synthesis Report and other recent IPCC reports.
[25] IPCC, 'Climate Change 2022: Impacts, Adaptation, Vulnerability', AR6, WGII, 'Chapter 11: Australasia', at 1635-1638, Table 11.14. 'Compounding' refers to when two or more extreme weather events happen at the same time, or one happens immediately after the other and they more or less combine. When this happens, the individual impacts of the extreme weather events are often much larger than if the events had occurred separately from one another: N Ridder et al, 'A new global picture of compounding weather and climate hazards', 2020. For example, in Queensland in late 2023, fires, storms, a cyclone and flooding struck in quick succession: L Poncet, A King, 'What we know about last year's top 10 wild Australian climatic events – from fire and flood combos to cyclone-driven extreme rain', University of Melbourne, 29 February 2024. See also M Speer and L Leslie, 'Flash droughts are becoming more common in Australia' The Conversation, 9 April 2024.
[26] IPCC, 'Climate Change 2023: Synthesis Report', at 77.
[27] IPCC, 2018, *Special Report on Global Warming of 1.5°C,* 'Summary for Policymakers', at B.5
[28] IPCC, 2018, 'Summary for Policymakers', at B.5.

A fourth way to measure the significance of the emissions from Australia's fossil fuel exports for worsening climate change is to consider the levels to be released from their combustion over the decade to 2035 (around 15 Bt) and assess these against emissions over that decade from existing and planned projects globally. This approach opens up, in effect, an understanding of the role to be played by those exports in pushing the Paris Agreement's temperature goal out of reach. It is akin to the approach adopted in the UK, which very recently introduced a new 'Supplementary guidance for assessing the effects of downstream scope 3 emissions on climate from offshore oil and gas projects'.[29] The Supplementary Guidance follows the 2024 decision in *Finch v Surrey County Council*, where the UK Supreme Court found that a decision to grant planning permission for an onshore oil development project was unlawful because greenhouse gas ('GHG') emissions from combustion of the oil to be produced had not been assessed in the Environmental Impact Assessment ('EIA') as part of the planning decision.[30]

The value of viewing Australia's exported fossil fuel emissions in this context is evident from the findings of a 2022 study, which calculated the upstream and downstream emissions from the world's already 'committed emissions' (its existing or under construction oil or gas fields and coal mines). The study found that 'staying within a 1.5°C carbon budget (50% probability) implies leaving almost 40% of developed reserves of fossil fuels unextracted'.[31] In other words, measuring in this fourth way will reveal that, rather than Australia's exported fossil fuel emissions over the coming decade merely adding 'drops in a bucket', the bucket is already very much overflowing.[32]

1.2 Australia's permissive policies and actions facilitate the fossil fuel exports

As set out above, Australia's contribution to global warming - and to the worsening of climate change in its own territory – relates only to the GHG emissions, both within its territory and overseas from the burning of its fossil fuels. However, Australia's *full* fossil fuel contribution to global warming is not limited to the emissions for which it is directly or indirectly responsible – its contribution extends to all its policies and actions *facilitating and promoting* damage to the climate system through its fossil fuels, regardless of where the emissions resulting from or

[29] UK Department for Energy Security and Net Zero (UK DESNZ), 'Environmental Impact Assessment (EIA) – Assessing effects of downstream scope 3 emissions on climate', June 2025.
30 R (Finch on behalf of the Weald Action Group & Others) v. Surrey County Council (& Others), [2024] UKSC 20. The Supplementary Guidance provides direction in the assessment of effects of downstream GHG emissions on climate from an offshore oil and gas project seeking approval, and is primarily focused on projects requiring a mandatory Environment Statement (ES). The Guidelines explain that the baseline current state of the environment, against which the effects of a project can be assessed in the ES, should be the global GHGs and must include 'a reasonable future estimate of global GHGs affecting climate over the lifetime of a project': UK DESNZ Supplementary Guidelines, at 9.
[31] K Trout et al., 'Existing fossil fuel extraction would warm the world beyond 1.5°C', *Environmental Research Letters*, 17 (2022).
[32] F Green, 'Britain's tough new test for fossil fuel projects', *Inside Story*, 3 July 2025.

encouraged by those policies and actions occur. In Advisory Opinion No. 187, the International Court of Justice ('ICJ') explained that,

> '[f]ailure of a State to take appropriate action to protect the climate system from GHG emissions — including through fossil fuel production, fossil fuel consumption, the granting of fossil fuel exploration licences or the provision of fossil fuel subsidies — may constitute an internationally wrongful act which is attributable to that State. The … internationally wrongful act in question is not the emission of GHGs per se, but the breach of conventional and customary [international law] obligations … pertaining to the protection of the climate system from significant harm resulting from anthropogenic emissions of such gases.'[33]

An analysis of Australia's **laws, regulations and programs** reveals that:[34]

- Australia has no policy in place to cap, restrict or reduce its fossil fuel export production, nor any targets or plans for doing so in the future. For example, Australia's current Long-Term Emissions Reduction Plan does not include any plans to curb fossil fuel exports or reach net zero exported emissions by 2050.[35] As the 2023 Production Gap Report observed with concern, Australia has in fact 'no national policy framework aiming to restrict fossil fuel exploration, production or infrastructure development.'[36]
- Australia is continuing to issue new exploration licences and approvals for expanded and new coal, gas and oil projects, with many more planned.[37] The approvals often permit operation for decades and almost all new projects are producing for export.
- Substantial subsidies and tax concessions continue to be granted to fossil fuel exporters and to developers of the infrastructure on which those export operations depend.[38] In 2023–24, Australian Federal and state governments provided AU$14.5bn worth of

[33] International Court of Justice (ICJ), OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE, Advisory Opinion, 23 July 2025. General List. No. 187 ('ICJ, Advisory Opinion No. 187'), [427]. Australia's full contribution to climate change also includes the embedded emissions in the goods and services it imports. To an extent, these emissions are tracked and reported by the Australian government: see, for e.g., DCCEEW, 'Quarterly Update of Australia's National Greenhouse Gas Inventory: March 2022', at 23-24.
[34] Australian Climate Accountability Project, 'Escalation', August 2024.
[35] DCCEEW, 'Australia's Long-Term Emissions Reduction Plan' (2021). Note that the Federal Government's net zero plan is still under preparation as of May 2025: DCCEEW, Net Zero Plan. The 2021 is still in place but was developed by the previous Coalition Government and was heavily criticised by the (now) Prime Minister in 2021: The Guardian, 'Australia commits to 2050 net zero emissions plan but with no detail and no modelling', 26 October 2021. And see Climate Analytics, 'Footprint report', at 6.
[36] SEI et al., Production Gap Report 2023, at 55.
[37] Department of Industry, Science and Resources, Commonwealth of Australia Resources and Energy Major Projects 2023, at 23. In the 2023 discussions over reform of the Safeguard Mechanism, the government is reported to have positively declined to commit to a policy of no new fossil fuel project approvals: Climate Action Tracker, Australia.
[38] SEI et al., Production Gap Report 2023, at 54-55.

supports and tax concessions to subsidize its fossil fuel production generally and major users, a 31% increase on the subsidies provided in the previous year.[39]

- The binding (and declining) net emissions baselines for operators of large industrial facilities[40] under Australia's Safeguard Mechanism do not extend to emissions occurring overseas. For Australia's large fossil fuel exporters, the vast bulk of their emissions are 'scope 3', meaning that they occur downstream and offshore. Coal export giant Glencore disclosed in 2023 that its 'Scope 3 emissions represent more than 90% of our emissions, the majority of which relate to our current coal portfolio.'[41]
- There are few restrictions imposed under Australian law on producers of fossil fuels for export in relation to the climate or human rights impacts of the emissions resulting from the use of those fossil fuels outside Australia's territory.[42]
- While Australia's new climate-related disclosure regime for corporations[43] is a step forward generally towards decarbonisation, Australia has eschewed a crucial opportunity to follow Europe in requiring fossil fuel corporations to disclose external climate-driven impacts from their business activities[44] and to conduct mandatory human rights and environmental due diligence.[45] This failure greatly reduces the effectiveness of disclosure in advancing decarbonisation.
- Australia has pursued diplomatic policies which are export-facilitating and promoting. For example, government representatives are reported to be actively promoting Australia's coal and gas to overseas buyers.[46] A 2025 report by the Jubilee Australia Research Centre documents multiple recent instances of Commonwealth Ministers in the trade, resources and climate change portfolios officially promoting expanding demand for Australian gas by countries in our region.[47]

In so far as any aspect of Australia's current policy might be said to aim at reducing its fossil fuel exports, a raft of national policies and programs now include incentives to develop alternative industries which could potentially displace some fossil fuel exports to some extent. For example,

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[39] Australia Institute, Fossil Fuel Subsidies in Australia 2024. Although Australia has committed to the G20 Leaders agreement 'to rationalise and phase-out inefficient fossil fuel subsidies that encourage wasteful consumption', it submitted its response to the G20 in June 2024, 'concluding that we had no measures within scope of the Commitment': Australian Treasury, 'G 20 Commitment on Fossil Fuel Subsidies: SOP and Australia's Response', 2009.
[40] Clean Energy Regulator, Safeguard Mechanism.
[41] Glencore, 'Climate Action Transition Plan: 2024-2026', at 9.
[42] A missed opportunity is the failure to provide, specifically or explicitly, in Part 3 of the Federal *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) (*EPBC Act*) for the impacts of total project emissions on climate change to be taken into account in the granting of approvals.
[43] Commonwealth of Australia, *Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Act 2024.*
[44] Australia's new regime is a 'single materiality' one, requiring disclosure of material climate-related risks to the company but not of material climate-related impacts of the company's business activities. The disclosure regime introduced under the EU Corporate Sustainability Reporting Directive (CSRD) is a 'double materiality' disclosure regime – covering not only traditional 'risk materiality' but also 'impact materiality' (the actual or potential external impacts of the operations of the company, its subsidiaries or its value chain): European Commission, 'Corporate Sustainability Reporting'.
[45] European Commission, 'Corporate sustainability due diligence'.
[46] R Denniss and A Behm, 'Double Game: how Australian diplomacy protects fossil fuels', Australian Foreign Affairs, July 2021.
[47] S Ali and J Sherley, 'How to Build a Gas Empire: Part 1', July 2025, at 20-22.

the initiatives under the Federal Government's *Future Made in Australia Act* ('*FMIA Act*') form the core of Australia's future industrial policy, as well as its national transition policy.[48] The *FMIA Act* is, in part, an exports-oriented package and offers substantial incentives and supports for the development and establishment of clean industries and energy with an exports focus. Yet it is highly unlikely that the *FMIA Act* will result in any significant displacement of Australia's current fossil fuel exports in the near-term.[49] Rather than decarbonization through *displacement* of the fossil fuel exports, Australia's aim appears to be to develop thriving clean export industries while also maintaining its thriving fossil fuel export industries.

Nor can adaptation action, critically important though it is, replace the need for action to reduce emissions Australia is currently finalizing its new National Adaptation Plan.[50] Done well, adaptation saves lives, livelihoods and property, and helps to protect from climate-driven harm those least able to protect themselves, but the potential to adapt to climate change has hard or biophysical limits. Moreover, once warming has occurred, it is effectively permanent and irreversible; similarly, once triggered, tipping points produce effects that cannot be undone by mitigation or adaptation. For these and other reasons (for example, existing loss and damage), adaptation cannot substitute for effective mitigation action by Australia.

With its fossil fuel export volumes staying steady (or rising), Australia's total contribution to global warming must be understood to include the ambition-depleting signals that its 'business as usual' approach sends to other countries and fossil fuel markets. Its laws, regulations, programs and policies associated with the exports signal that there will be no supply-side led reductions in coal and gas for export from Australia for the foreseeable future. In a world still hesitating to embrace the necessary global transition at scale, Australia's policies and actions encourage inaction and delayed action to limit climate change, and they weaken global ambition. They act to increase 'carbon lock-in', making the energy transition more difficult[51] by creating an inertia that favours the ongoing development and use of fossil fuels.

In summary, both Australia's fossil fuel exported emissions and its associated, permissive laws and policies are contributing to rising global average temperatures. Quantifiable increases in the probability of climate hazards, and of their heightened frequency, intensity and duration, can be attributed to fractional temperature rises;[52] in turn, these increases correspond with raised probability and severity of many human harms - and of harms to human rights, as the balance of this analysis explains. Australia's argument that individual sets of emissions, as mere drops in

[48] Prime Minister of Australia, 'A future made in Australia', speech given 11 April 2024, And see Climate Council, https://www.climatecouncil.org.au/resources/what-does-a-future-made-in-australia-mean-for-climate/

[49] Even the United States' *Inflation Reduction Act* has not prevented subsequent rapid expansion of US gas and oil exports: B Cahill, Centre for Strategic and International Studies, 'US Energy Exports Boom: Defining National Interests', January 2024.

[50] DCCEEW, Climate Adaptation in Australia.

[51] See K C Seto et al, 2021. 'Carbon Lock-In: Types, Causes, and Policy Implications', *Annual Review of Environment and Resources*, Vol. 41, at 427.

[52] See IPCC, 2018 Special Report on Global Warming of 1.5^{0}C.

the ocean, do not lead to climatic changes with adverse human impacts is not supported by current climate science.

2 Applicable law: Human rights law, the Paris Agreement and customary international law

2.0 Key points

- Australia is a signatory to all the main international human rights treaties and has assumed the obligation to respect and protect the human rights they contain.
- While there is no Federal Human Rights Act and incorporation of human rights law in Australia (with its dualist legal system) has been piecemeal, international law is often brought in through judicial incorporation, and there is a legal presumption under Australian law that Federal Parliament intends to give effect to Australia's international law obligations.
- Australia's repeated claim that it is not required under the Paris Agreement to take any responsibility for the emissions from its fossil fuel exports is not correct in law.
- Australia's associated claim that its international law obligations to protect in relation to climate change are limited to those in the Paris Agreement is also not correct in law, as multiple international courts have now made clear.
- Having endorsed the UNGPs and established a Contact Point under the OECD Guidelines, Australia has confirmed its duty to protect against adverse human rights impacts (including from a worsening climate) by fossil fuel exporters operating in its territory.

In this Part, we explore and describe the legal framework governing Australia's human rights obligations in relation to its fossil fuel exports and climate change. The applicable law is to be found in a variety of international and domestic legal sources; we set out these sources, as well as the nature and content of the rights involved and the various State obligations. We also examine how Australia's legal system incorporates international human rights law, including through state-level human rights statutes and judicial incorporation. We critically analyse Australia's argument that the Paris Agreement absolves it of responsibility for the impacts of the emissions from its fossil fuel exports, demonstrating that this interpretation contradicts not only the Agreement's objectives but also international law and human rights jurisprudence.

2.1 Applicable international law – an overview

The focus of this paper is on Australia's legal obligations to protect human rights in the climate change context. Much of this law is to be found in relevant international law - in treaties and conventions dealing with human rights, in customary international law and in the Vienna Convention guiding interpretation of treaties. Related law is to be found in the collection of treaties, conventions and agreements dealing with environmental law generally and, more specifically, with climate change and States' obligations. These sources of human rights and

related obligations for Australia are set out in this Part. In addition, where appropriate, reference is made to Australia's domestic law and to its relationship with international law.

International human rights law

Australia is a Party to all the major international human rights treaties, including the foundational 1948 Universal Declaration on Human Rights ('UDHR'), the International Covenant on Civil and Political Rights ('ICCPR') and the International Covenant on Economic, Social and Cultural Rights ('ICESCR'),[53] thereby assuming international human rights law obligations to respect and protect the human rights of individuals within its territory or under its jurisdiction. Under Australia's dualist legal system, international law and its norms are not considered to form part of domestic law unless and until enacted into law by Parliament or incorporated into the common law by the courts.[54]

The relevant provisions of the UDHR have been taken up in the later conventions, particularly in the ICCPR and ICESCR. The human rights which have so far proved most justiciable in the climate change context are the Article 3 right 'to life, liberty and the security of person', and the Article 12 guarantee that '[n]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence'. Both rights have become important in their later emanations, especially in the European Convention on Human Rights ('ECHR') in recent human rights and climate cases discussed below.

A survey of human rights-related litigation reveals that ICESCR is of limited significance in cases seeking to enforce States' protection obligations in the context of climate change. However, two aspects of people's social and economic lives have been identified in the jurisprudence as particularly exposed to impairment by climate change: access to adequate food, water and housing (within the Article 11 right to an adequate standard of living), and enjoyment of the highest standard of physical and mental health (Article 12). While both are set out as human rights in ICECSR and are the subject of State obligations of progressive realisation, they are not easily enforced.

Importantly, however, some of their elements appear within two human rights in the ICCPR which have been more available for enforcement. The first of those in the ICCPR is Article 6(1) which provides:

> 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.'

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[53] International Covenant on Civil and Political Rights, adopted 16 December 1966, entered into force 23 March 1976, 999 UNTS 171; International Covenant on Economic, Social, and Cultural Rights, adopted ,16 December 1966, entered into force 3 January 1976, 999 UNTS 171.
[54] See Brennan J in *Mabo v Queensland (No 2)* (1992) 175 CLR 1; [1992] HCA 23 at [41]-[42].

The second is Article 17, which includes both a prohibition and a guarantee of protection:

> '1 No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
> 2 Everyone has the right to the protection of the law against such interference or attacks.'

The importance of these provisions in relation to climate-driven human harms is discussed in depth in Part 4.

The ICESCR and the ICCPR prescribe how they are to be construed and the scope of their operation, each providing that its provisions 'shall extend to all parts of federal States without any limitations or exceptions'.[55] Other general provisions in the two Conventions indicate particular rules of interpretation.[56] However, general provisions governing the interpretation of treaties and other international instruments are found in the Vienna Convention on the Law of Treaties[57] and reflect customary international law principles. Importantly, Article 27 of the Vienna Convention provides that a State Party 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.

International instruments dealing with climate change

The historical development of international concern with respect to climate change followed and focused one aspect of concerns about the environment and the need to ensure sustainable development. The first climate change international instrument of importance was the 1992 UN Framework Convention on Climate Change ('UNFCCC'), referred to in Section 1 above. It was followed by a series of Conferences of the Parties ('COPs'), the resolutions of which may be important in establishing subsequent state practice, but the most consequential agreement following the UNFCCC was the Paris Agreement of 2015, which identified goals for the upper limits of global warming and set reporting obligations for all Parties. Most recently, the ICJ Advisory Opinion identified many aspects of climate change law which are now customary international law and, as such, not limited to, or by, the terms of individual treaties.

Domestic Australian law, human rights and climate change

Australia has no federal human rights Act. Some human rights are protected in other legislation, such as anti-discrimination laws.[58] Various international instruments, including the ICCPR and

[55] ICESCR, Art 28; ICCPR, Art 50.
[56] See, eg, ICCPR, Arts 13(4), 24, 25.
[57] Vienna Convention on the Law of Treaties, 1155 UNTS 331.
[58] For example, Australia has four main statutes protecting against discrimination on the basis of race, sex, disability or age.

ICESCR, are included as Schedules to the *Australian Human Rights Commission Act 1986* (Cth) (‘*the AHRC Act*’).[59] However, their principles are not thereby incorporated into domestic law. Under the *AHRC Act*, complaints of impairment of rights in scheduled instruments can be made to the Australian Human Rights Commission but with limited or no remedy if the Government does not agree to address the impairment. The *AHRC Act* also confers on the Commission the function, on its own initiative, of inquiring into any act or practice that may be inconsistent with or contrary to any human right in a scheduled instrument and to report to the Minister on any action which, in its view, needs to be taken by Australia in order to comply with the provisions of the Covenant.[60] *The Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) provides for a Parliamentary Joint Committee on Human Rights to scrutinise Bills, but without consequence if a Bill is considered to limit or impair human rights.[61]

More comprehensive human rights protections have been introduced at the state and territory level. Human rights statutes exist in Victoria,[62] the Australian Capital Territory[63] (‘ACT’) and Queensland.[64] These statutes bind particular state and territory public authorities, including government departments, statutory authorities and public servants. Given the lack of any sizeable fossil fuel projects in the ACT, Victoria and Queensland are more relevant for decision making by public authorities for new or expanded fossil fuel projects. However, the ACT Human Rights Act is alone in containing a ‘right to a clean, healthy and sustainable environment’,[65] a right or ‘precondition’ which has now been recognized by the International Court of Justice (ICJ) as ‘essential for the enjoyment of other human rights’.[66]

Under both the Victorian and Queensland statutes:

- it is unlawful for a public authority to act in a way incompatible with human rights or, in making a decision, to fail to give proper consideration to human rights;[67] and
- all statutory provisions must be interpreted in a human rights compatible way to the extent possible that is consistent with the statutory provisions’ purpose.[68]

In Australia, international law may become part of its domestic law through judicial adoption or incorporation, absent inconsistent legislation. Courts have interpreted and applied international

[59] *Australian Human Rights Commission Act 1986* (Cth). The ICCPR is Schedule 2 to the *Act*.
[60] *Australian Human Rights Commission Act* 1986 (Cth), ss.11(1)(f), (j) and (k).
[61] *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). That *Act* also requires that Bills must be accompanied by a ‘statement of compatibility’ with human rights when introduced to Parliament. There is no consequence should the statement indicate the Bill is not compatible, nor any guarantee that the statement itself has properly engaged with international human rights law.
[62] *Charter of Human Rights and Responsibilities Act 2006* (Vic).
[63] *Human Rights Act 2004* (ACT).
[64] *Human Rights Act 2019* (Qld).
[65] *Human Rights Act 2004* (ACT), s 27C.
[66] ICJ, Advisory Opinion No. 187, [393].
[67] *Human Rights Act 2019* (Qld), s 58; *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 38.
[68] *Human Rights Act 2019* (Qld), s 48(1); *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 32(1); *Human Rights Act 2004* (ACT), s 31.

legal principles when deciding cases, effectively weaving international legal standards into the fabric of Australian jurisprudence even without explicit legislative enactment.[69]

Under the Victorian, Queensland and ACT statutes, international law and the judgments of domestic, foreign and international courts and tribunals relating to a human right may, where relevant, be considered in interpreting a statutory provision.[70] For this reason, the human rights jurisprudence discussed in this analysis will be relevant in any claims involving the interpretation of similar provisions in those jurisdictions. However, the Queensland and Victorian statutes are unique among internationally comparable legislation in not allowing a human rights claim to stand alone; a claim must be attached to another legal claim or review process.[71] Most commonly, human rights claims in those jurisdictions are made in addition to administrative law arguments.

Article 50 of the ICCPR and Article 28 of the ICESCR provide that the rights in the Covenant 'shall extend to all parts of federal states without any limitations or exceptions'. The Australian federal Government is accordingly obliged to ensure protection of the rights in the ICCPR, and to take steps towards progressive realisation of the rights in the ICESCR, throughout the country. The UN Human Rights Committee ('HRC') has also made it clear that, although States are allowed to give effect to human rights in accordance with domestic constitutional processes, 'the same principle operates so as to prevent States Parties from invoking provisions of the constitutional law or other aspects of domestic law to justify a failure to perform or give effect to obligations under the treaty.'[72]

The Australian Constitution confers legislative power on the federal Parliament 'with respect to … external affairs'.[73] This empowers, but does not require, it to give effect in domestic law to a treaty or international instrument to which Australia is a party.[74] Within their own jurisdictions, state and territory laws may reflect international human rights laws. State planning approvals, subject to controls imposed by states – such as, through climate change legislation[75] - control the grant of mining tenements and have on occasion resulted in the rejection of coal mining applications, in part because of the harm anticipated from exported emissions.

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[69] The Canadian Supreme Court has recently taken a strong position favouring this approach: *Nevsun Resources Ltd v Araya*, 2020 SCC 5.
[70] *Human Rights Act 2019* (Qld), s 48(3); *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 32(2).
[71] *Human Rights Act 2019* (Qld), s 59(1); *Charter of Human Rights and Responsibilities Act 2006* (Vic), s39(1).
[72] United Nations Human Rights Committee, 'General Comment 31 on The Nature of the General Legal Obligation Imposed on States Parties to the Covenant', CCPR/C/21/Rev.1/Add. 13 (26 May 2004), [4].
[73] Constitution of Australia, s 51(xxix).
[74] *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416; [1996] HCA 56.
[75] See, for e.g., ACT *Climate Change and Greenhouse Gas Reduction Act 2010;* the Victorian *Climate Change Act 2017*; and the NSW 'Climate Change Policy Framework' and *Climate Change (Net Zero Future) Act 2023*.

Importantly, there is a legal presumption under Australian law that the Federal Parliament, *prima facie*, intends to give effect to Australia's obligations under international law,[76] including international human rights law. While such legal presumptions do not provide comprehensive human rights protections for people in Australia, as a party to the ICCPR and the ICESCR, Australia agrees to act in good faith in relation to its Covenant obligations, including to 'respect and protect' the rights they contain.[77]

The recent ICJ Advisory Opinion is particularly relevant to determining Australia's international human rights law obligations. The Court considered that, in the climate change context, States have obligations of an *erga omnes* character to protect the climate system against significant harm, including from anthropogenic GHG emissions.[78] *Erga omnes* obligations in international law are binding on Australia even in the absence of domestic enforceability, with the result that Australia may be held accountable for non-compliance through international procedures. This understanding is in accordance with the fundamental principle (mentioned above) expressed in Article 27 of the Vienna Convention in relation to treaties. Additionally, the ICJ observed that 'the full enjoyment of human rights cannot be ensured without the protection of the climate system' and that 'States are required to take necessary measures [to protect the climate system] in this regard.'[79] Taken all together, as will be seen in the further discussion in Part 5 of this analysis, even under its dualist system and with the absence of comprehensive federal human rights protection, Australia has broad and binding international law obligations to take necessary measures to protect human rights in Australia, in so far as they are at risk from or impaired as a result of significant harms to the climate system.

Regulation of business conduct

The UN Guiding Principles on Business and Human Rights ('UNGPs'),[80] endorsed by the Human Rights Council in 2011, are a 'soft law' human rights instrument. While the UNGPs were not specifically designed to address climate change, their relevance to fossil fuel companies and climate-related human rights harms is evident. Australia has endorsed the UNGPs, having co-sponsored the resolution that adopted them, supported them since their inception in 2011,[81]

[76] D Rothwell et al., *International Law in Australia* (2016, 3rd ed, Thompson Reuters), at 39, citing *Polites v Commonwealth* (1945) 70 CLR 60, 68–9 (Latham CJ); [1945] HCA 3. However, there is no longer a 'legitimate expectation' that Australia's international treaty obligations will be considered in executive decision-making: *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 236; [2015] HCA 40. And cf *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273; [1995] HCA 20.
[77] UN Office of the High Commissioner for Human Rights, *What are Human Rights?*, 27 August 2008.
[78] ICJ, Advisory Opinion No. 187, [440].
[79] ICJ, Advisory Opinion No. 187, [403].
[80] UN High Commissioner for Human Rights, 'Guiding Principles for Business and Human Rights', 2011.
[81] See Australian Human Rights Commission (AHRC) and Australian Human Rights Institute, 'At the Crossroads: 10 years of implementing the UN Guiding Principles on Business and Human Rights in Australia' ('Crossroads report'), 2021.

and actively implementing them through various initiatives, including the 2018 *Modern Slavery Act*.[82]

The UNGPs set out a framework for addressing business-related human rights impacts through three foundational pillars: the State duty to protect, the corporate responsibility to respect, and access to remedy. The first pillar of the UNGPs confirms that States have a duty to protect against adverse human rights impacts by third parties (private entities), including business enterprises, within their territory or jurisdiction. This obligation encompasses both direct protection, through appropriate regulation and enforcement, and indirect protection, through policy coherence and enabling access to remedy. In the climate context, this duty extends to protecting individuals and communities from climate-related human rights harms attributable to fossil fuel companies operating within the State's territory.

In the climate change context, States' obligations as set out in the UNGPs require the development of comprehensive regulatory frameworks that address the climate-related human rights impacts of fossil fuel companies. This includes environmental impact assessment requirements that specifically consider human rights implications, mandatory due diligence obligations for companies to identify and mitigate climate-related human rights risks, and robust enforcement mechanisms with meaningful penalties for non-compliance.

Australia has also committed to promoting and implementing the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct,[83] including the Due Diligence Guidance for Responsible Business Conduct, through its Australian National Contact Point ('AusNCP'). The AusNCP provides a mechanism for handling complaints regarding the implementation of the Guidelines and encourages dialogue between parties to resolve issues according to the AusNCP.

While neither the UNGPs nor the OECD Guidelines are not binding international law, they are internationally agreed standards that the Australian government should require its multinational fossil fuel exporters to observe. In November 2024, the Hague Court of Appeal in *Milieudefensie v Dutch Royal Shell* stated that, while 'protection from dangerous climate change is a human right', private companies like Shell 'may also have a responsibility to take measures to counter dangerous climate change'.[84]

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[82] Note, too, that under s.11(1)(k) of the *Australian Human Rights Commission Act*, a function of the Commission is, 'on its own initiative or when requested by the Minister, to report to the Minister as to the action (if any) that, in the opinion of the Commission, needs to be taken by Australia in order to comply with the provisions of … *any relevant international instrument*' (emphasis added). The phrase is defined in s.3 as including 'a declaration made by an international organisation', which would incorporate the UNGPs. The Commission has identified gaps in the implementation of the UNGPs in Australia in six areas, including 'addressing the adverse human rights impacts of climate change': AHRC, Crossroads report, at 26-31.

[83] OECD, 'Due Diligence Guidance for Responsible Business Conduct', 2018.'

[84] *Milieudefensie et al. v. Royal Dutch Shell ('Milieudefensie v Shell')*, Judgement 12 November 2024, [7.17]. And see, H van Asselt and A Savaresi, 'Corporate climate (un)accountability? Landmark Shell ruling overturned on appeal', November 2024. The decision has now been appealed to the Supreme Court of the Netherlands: *Milieudefensie v Shell*, Appeal, February 2025.

2.2 The Paris Agreement and States' human rights law obligations in relation to climate change

Australia has repeatedly treated the emissions from its fossil fuel exports as the sole responsibility of the countries that buy them, arguing they do not fall under its own obligations under the Paris Agreement. Australia's Prime Minister, Anthony Albanese, explained in 2022 that 'the UN … measure[s] emissions based upon where they occur, not where the product comes from. Japan doesn't have to account for its emissions if a Japanese car in Australia is emitting carbon dioxide'.[85] Australia declined the opportunity to discuss its fossil fuel exports in its Observations in the UN Human Rights Committee complaint, *Daniel Billy*, although the adverse effects of those exported emissions had been raised by the complainants, Australia asserting that '[n]one of the alleged failures to take mitigation measures fall within the scope of the Covenant.'[86] Similarly, in its Written Statement to the ICJ in March, 2024, Australia eschewed the opportunity to explain its position in relation to the exported emissions and its human rights law obligations.[87]

In denying any responsibility for the exported emissions, Australia relies upon Article 13 of the Paris Agreement, which establishes an enhanced transparency framework that builds on the transparency arrangements under the UNFCCC. Each Party is required to provide and maintain a national inventory report of its anthropogenic greenhouse gas emissions, prepared using the methodologies approved by the IPCC and agreed upon by the Parties, as well as information necessary to track progress made in implementing and achieving its nationally determined contribution. The IPCC 'good practice' guidance relates to national reporting of emissions.[88]

However, Australia's argument is not supported by the Paris Agreement. First, it is incorrect to infer from Article 13 that countries which export large volumes of the very products causing most of the global warming are absolved by a provision aimed at enhancing transparency from taking any responsibility for their actions, especially when those actions work powerfully against that Agreement's central aims.[89] It is also incorrect to infer from Article 13 that, should fossil fuel exporting countries take exports-focused mitigation action, they will be acting in a way that is contrary to aspects of the Paris Agreement, rather than supportive of it.

Far from discouraging Parties from taking action to reduce their fossil fuel production for export, the Agreement encourages each Party to take actions which reflect 'its highest possible ambition' (Art. 4.3) and 'to undertake … ambitious efforts … with the view to achieving' (Art. 3)

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[85] ABC, '7.30 Report', 26 July 2022.
[86] *Daniel Billy et al. v. Australia* ('*Daniel Billy*'), Communication No. 3624/2019, CCPR/C/135/D/3624/2019, 18 September 2023, [4.3].
[87] Written Statement of Australia, Submission to the International Court of Justice, March, 2024.
[88] Conference of the Parties serving as the meeting of the Parties to the Paris Agreement, 'Modalities, procedures and guidelines for the transparency framework for action and support referred to in Article 13 of the Paris Agreement', Decision -/CMA.1.
[89] Nor can it be inferred from the text of UNFCCC Decision 18/CMA.1 'Modalities, procedures and guidelines for the transparency framework for action and support referred to in Article 13 of the Paris Agreement'.

the temperature goal of holding the increase in global average temperature to well below 2°C and pursuing efforts to limit the increase to 1.5°C (Art. 2.1). While these efforts 'shall' include 'domestic mitigation measures' (Art. 4.2), they are not limited to those by the Agreement. The Agreement adds that the temperature goal is to be achieved through Parties aiming for 'global peaking of greenhouse gas emissions as soon as possible', with 'rapid reductions thereafter' (Art. 4.1), and in a manner which 'reflect[s] equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances' (Art. 2.2) ('CBDR-RC').

Importantly, the recent ICJ Advisory Opinion clarified that recourse must also be had to subsequent sources of law when interpreting States' obligations under the climate change treaties: 'the relevant decisions of the governing bodies of these treaties, which are the COP of the UNFCCC, the COP serving as the meeting of the Parties (hereinafter the "CMA") to the Kyoto Protocol and the CMA to the Paris Agreement.'[90] In the Court's view, the decisions of COPs create legally binding obligations for the Parties in relation to Article 4(8), that,

> '[i]n communicating their nationally determined contributions, all Parties shall provide the information necessary for clarity, transparency and understanding in accordance with decision 1/CP.21 and any relevant decisions of the Conference of the Parties serving as the meeting of the Parties to this Agreement.'[91]

Such decisions,

> 'may constitute subsequent agreements under Article 31, paragraph 3 (a), of the Vienna Convention on the Law of Treaties, in so far as such decisions express agreement in substance between the parties regarding the interpretation of the relevant treaty, and thus are to be taken into account as means of interpreting the climate change treaties.'[92]

This means that subsequent agreements made at the COP level are likely to establish binding subsequent rules applying to the Parties. Thus, based on sources including CMA and COP decisions, the ICJ concluded that,

> 'rather than being entirely discretionary as some participants argued, NDCs must satisfy certain standards under the Paris Agreement. All NDCs prepared, communicated and maintained by parties under the Paris Agreement must, when taken together, be capable of realizing the objectives of the Agreement which are set out in Article 2.'[93]

In a further example, at COP 28 where the first Global Stocktake Report was tabled, the COP called on the Parties to contribute to the global efforts to 'transition away from fossil fuels in

[90] ICJ, Advisory Opinion No. 187, [184].
[91] ICJ, Advisory Opinion No. 187, [184].
[92] ICJ, Advisory Opinion No. 187, [184].
[93] ICJ, Advisory Opinion No. 187, [249].

energy systems, in a just, orderly and equitable manner, accelerating action in this critical decade, so as to achieve net zero by 2050', and to 'accelerate' efforts towards net-zero energy systems.[94]

Far from 'reading down' States' obligations under Article 4 and the Paris Agreement generally in relation to Nationally Determined Contributions ('NDCs'), the Court explained that the NDC-related requirements are not only obligations of result (to prepare, communicate, register and maintain successive NDCs) but obligations of conduct, defined by the international standard of due diligence: '[t]he content of the NDCs is equally relevant to determine compliance.'[95] The customary international law duty to prevent significant harm to the environment 'requires States to exercise due diligence, including with respect to activities such as setting NDCs'.[96] While the standard of due diligence varies according to different laws and situations, the Court considered that,

> 'in the current context, because of the seriousness of the threat posed by climate change, the standard of due diligence to be applied in preparing the NDCs is stringent. This means that each party has to do its utmost to ensure that the NDCs it puts forward represent its highest possible ambition in order to realize the objectives of the Agreement.'[97]

Relevantly for Australia's arguments relating to its obligations under the Paris Agreement and its status as a highly developed country, the Court also concluded that,

> 'consistent with the varying character of due diligence and the principle of common but differentiated responsibilities and respective capabilities, the standard to be applied when assessing the NDCs of different parties will vary depending, inter alia, on historical contributions to cumulative GHG emissions, and the level of development and national circumstances of the party in question.'[98]

While not binding on Australia, human rights jurisprudence from Europe, including from the European Court of Human Rights ('ECtHR'), indicates that Parties to both the Paris Agreement and the UNFCCC are obliged under the European Convention on Human Rights to do their 'part' or 'fair share' to mitigate climate change and achieve the Paris Agreement's temperature goal, 'even if it is a global problem'.[99] Principles guiding Parties to the UNFCCC help to define the scope of their part:

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[94] UNFCCC, First Global Stocktake 2023, [28].
[95] ICJ, Advisory Opinion No. 187, [236].
[96] ICJ, Advisory Opinion No. 187, [241].
[97] ICJ, Advisory Opinion No. 187, [246].
[98] ICJ, Advisory Opinion No. 187, [247].
[99] *State of the Netherlands v. Stichting Urgenda* (20 December 2019, NL:HR:2019:2007) ('*Urgenda'*), [5.7.1]. And see: *VZW Klimaatzaak v Kingdom of Belgium and Others ('Klimaatzaak'),* Brussells Court of Appeal, 2022/AR/891 (30 November 2023), [158]; *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* ('*KlimaSeniorinnen'*) App no 53600/20 (ECtHR, 9 April 2024), [442]; *Neubauer v Germany* (24 March 2021) 1 BvR 2656/18.

- developed countries should 'take the lead in combating climate change and the adverse effects thereof';
- 'Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities'; and
- 'Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects'.[100]

Following such reasoning, as a wealthy country which is comfortably within the category of 'developed countries' identified in the UNFCCC and Paris Agreement, Australia should take the lead in global decarbonisation efforts.[101] Nor can Australia legitimately claim that its exports are needed to support the energy needs of developing countries, since almost two-thirds went to Japan, Korea and Taiwan in 2022-2023,[102] countries which are also in the top echelons of income and development globally.

In addition, as explained in the next section, it is now clear as a matter of law that the international climate law regime (of which the Paris Agreement is one part) is not *lex specialis*. This has significance for the relationship between human rights law and the Paris Agreement, and for Australia's human rights and related international law protection obligations.

2.3 International law directly applicable in the context of climate change

In its recent Advisory Opinion,[103] the International Tribunal on the Law of the Sea ('ITLOS') stated that the UN Convention on the Law of the Sea ('UNCLOS') and the Paris Agreement complement each other, and that States' merely satisfying their obligations under the Paris Agreement is unlikely to be sufficient to comply also with their UNCLOS obligations:

[100] UNFCCC Framework Convention, Art 3.

[101] UNDP, 'Human Development Report 2023-2024', Table 1, at 274. Focus Taiwan, 'Taiwan the 14th richest country in the world', December 2023 (Taiwan is not included in the UNDP's human development classifications).

[102] Australian Department of Industry, Science and Resources, Resources and Energy Quarterly ('REQ') March 2024, 'Historical data March 2024'. Australia also exported fossil fuels to the upper-middle-income country China; together with a large quantity of metallurgical coal, much smaller quantities of thermal coal and a little gas to the lower-middle-income India: The Coal Trader, 'Australian Thermal Coal Exports Rise 13% YoY in 2023'; Statista, 'Leading markets for LNG exports from Australia 2023'. Australia sells much smaller quantities, mostly thermal coal, to a small handful of developing countries, including Vietnam.

[103] *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law (Advisory Opinion)* ('Advisory Opinion of 21 May 2024'), (International Tribunal for the Law of the Sea, Case no. 31, 21 May 2024), at [223]-[224]. *Lex specialis derogat legi generali* is the principle that special law has priority over general law; that whenever two or more norms deal with the same subject matter, priority should be given to the norm that is more specific. For *lex specialis* to apply, however, there must be some inconsistency between provisions or a discernible intention that one is to exclude the other: see Rep. of the Study Grp. of the Int'l L. Comm'n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* U.N, Doc. A/CN.4/L.702 (13 July 2006), at para.14 (2) (5)-(10); International Law Commission (ILC), *Draft Articles on Responsibility of States for Internationally Wrongful Acts,* U.N. Doc A/56/10 (2001), at art. 55 cmt. para 4.

> ‘UNCLOS and the Paris Agreement are separate agreements, with separate sets of obligations. [T]he former does not supersede the latter …. [T]he Paris Agreement is not *lex specialis*.’[104]

The Inter-American Court of Human Rights (‘IACtHR’) in its Advisory Opinion 32 reasoned similarly in relation to the human rights protection obligations of States Parties to the Inter-American System in the context of climate change.[105] In similar vein, the ICJ in its recent Advisory Opinion stated decisively that ‘the argument according to which the climate change treaties constitute the only relevant applicable law cannot be upheld’,[106] concluding instead,

> ‘that the principle of *lex specialis* does not lead to a general exclusion by the climate change treaties of other rules of international law…. [Rather,] international human rights law, the climate change treaties and other relevant environmental treaties, as well as the relevant obligations under customary international law, inform each other. States must therefore take their obligations under international human rights law into account when implementing their obligations under the climate change treaties and other relevant environmental treaties and under customary international law, just as they must take their obligations under the climate change treaties and other relevant environmental treaties and under customary international law into account when implementing their human rights obligations.’[107]

A concordant approach has been adopted by the ECtHR, the Court noting in the case of *KlimaSeniorinnen*, that it has, in its jurisprudence, ‘consistently held that the [ECHR] should be interpreted, as far as possible, in harmony with other rules of international law’, including particularly (in this context) the Paris Agreement.’[108] The ICJ and regional human rights courts have now explored the large canvas of international and regional laws relating to the protection of human rights in the context of climate change, and the jurisprudence which has emerged forms a notably consistent, harmonious and mutually supporting whole. This broader interpretation strengthens the legal basis for holding States accountable for climate action and potentially opens new avenues for climate litigation.

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[104] ITLOS, Advisory Opinion of 21 May 2024, [223]-[224].

105 Inter-American Court of Human Rights (‘IACtHR’), Advisory Opinion OC-32/25 (3 July 2025) (‘IACtHR, Advisory Opinion 32’): see Court’s discussion at [219]-[237].

[106] ICJ, Advisory Opinion No. 187, [171].

[107] ICJ, Advisory Opinion No 187, [404].

[108] ECtHR, *KlimaSeniorinnen*, [456].

3 Challenges in enforcement of human rights in the climate change context

3.0 Key points

- Australia is the only Western liberal democracy without a national human rights Act and has been frequently criticised for failing to provide legal remedies at the national level for human rights harms.
- This failure to comply with its human rights obligations creates challenges for those facing harms and seeking protection or remedies, forcing some individuals to seek protection through other legal means, including sub-national human rights law and tort law (with limited success).
- Scientists can now establish general causal links between given quantities of emissions and given increases in certain harms from worsening climate impacts, dispatching Australia's responsibility-denying 'drop in the ocean' argument.
- However, proving specific individual human (rights) harms remains challenging in court proceedings, and the relationship is complicated between intensifying climate extremes and the harms which will predictably occur in the future as a result of actions taken now.
- Courts have been reluctant to intervene, seeing climate-related grievances as a matter for the legislature, not the courts.
- Even though human rights are universal, human rights law frameworks focus on protection of the rights of the individual and may be ill-suited to situations where large segments of a population face real threats to their human rights.
- While developments in attribution science and interdisciplinary research are steadily reducing some of the evidentiary challenges for individuals seeking protection, reform is necessary to ensure courts have the required powers to provide human rights protection in the unique context of climate change.
- The fact that there are substantial challenges in the climate change context to individual enforcement of States' duties to protect human rights does not (as is clear from Part 5 of this analysis) detract from the – now uncontested - fact that the harms are occurring and will worsen will every fractional temperature rise, nor from the legal fact that States have binding international law obligations to prevent the harms.

In Part 3, we examine the legal and evidentiary obstacles hindering effective enforcement of human rights in climate-related cases. As has been recognised, human rights issues have been

largely absent from climate change litigation in Australia.[109] Australia's domestic legal framework lacks comprehensive human rights protections and remedies. Added to this, there are complex causation challenges in establishing harm attributable to actions which worsen climate extremes, and Australia has advanced arguments which employ this complexity to deny responsibility for harms connected to its exported fossil fuel emissions. There are also procedural barriers facing those seeking relief from climate-related human rights harms, particularly relating to courts' standing requirements and justiciability concerns. These increase the difficulties for individuals seeking to bring successful human rights claims in the climate change context, although scientific advances in attribution research and emerging human health data are beginning to overcome some traditional causation obstacles.

The fact that these obstacles, challenges and barriers exist does not detract from the fact, which is now uncontested, that the harms are occurring and will intensify will every fractional rise in global mean temperatures. As explained in Part 5, below, Australia's binding protection obligations under international and human rights law exist independently of difficulties with enforcement of rights domestically. The challenges do, however, inform the actions Australia must take to comply with those obligations. The ICJ in its Advisory Opinion has clarified that States have a binding customary international law obligation to prevent significant harm to the climate system and that, in the absence of a clean, healthy and sustainable environment – which includes the climate system - States cannot meet their human rights protection obligations.[110]

3.1 Barriers to human rights remedies in Australia

Australia is known for being the only Western liberal democracy without a federal Human Rights Act or charter[111] and it has been frequently criticized by international human rights bodies for failing to provide legal remedies at the national level for human rights harms within its territory.[112] ICCPR Article 2(3) requires States Parties to ensure that any person whose rights or freedoms in the Covenant are violated shall have an effective remedy, access to a judicial remedy, and enforcement of such remedies when granted. This failure to legislate effectively prevents direct enforcement of ICCPR rights in Australia, including in relation to the harms from its worsening climate.

Some individuals have sought to protect their human rights against climate-driven harms through other legal avenues, particularly through sub-national human rights law, local planning laws and tort law. For example, in *Waratah Coal Pty Ltd v Youth Verdict*, President Kingham of

[109] B Preston and N Silbert, 'Trends In Human Rights-Based Climate Litigation: Pathways for Litigation in Australia' (2023) 49(1) *Monash University Law Review*, 39.
[110] ICJ, Advisory Opinion No. 187, [393].
[111] Australian Human Rights Commission, 'A Human Rights Act for Australia', 2023, at 1.
[112] See, for e.g., Australian Human Rights Commission, 'Review of Australia's Fourth Periodic Report on the Implementation of the International Covenant on Economic Social and Cultural Rights', 2009; Refugee Council of Australia, 'UN member states challenge Australia's refugee and asylum policies', 31 March 2023.

the Queensland Land Court recommended against approval for a new coal project. Kingham found that the project in question would limit several human rights under the sub-national *Queensland Human Rights Act*, namely the right to property, privacy and home, the cultural rights of First Nations peoples, the rights of children, the right to enjoy human rights equally and the right to life.[113] Other cases in Australia have challenged fossil fuel companies' plans to expand or start new projects by raising concerns about potential human rights impacts but without identifying these impacts as human rights harms. These challenges have focused on the obligation for decision-makers to take account, under local planning laws, of the resulting human harms from the emissions from the use of exported fossil fuel. The NSW Land and Environment Court, for example, in 2019 confirmed a refusal by the NSW Environmental Protection Authority of an application known as the Rocky Hill coal project.[114] In declining to disturb the Authority's refusal of the application, the Chief Judge noted that 'downstream emissions' (from exported coal) had been identified as a relevant consideration in cases in Victoria, Queensland and NSW,[115] and concluded 'that the negative impacts of the Project, including … climate change impacts, outweigh the economic and other public benefits of the Project.'[116] However, in the absence of access to arguments directly raising violations of human rights, that consideration alone has not been decisive in challenges to new or expanded project approvals.

In recent years, there have also been attempts to establish a common law duty of care in relation to the impacts of climate change on especially vulnerable population groups. In *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment*,[117] a group of young claimants argued that the Commonwealth owed them a duty of care when government officers or ministers exercised statutory authority in relation to applications for new or expanded fossil fuel projects (in this case, an extension of the operation of a coal mine). The claimants succeeded at trial but lost on appeal. In arguing that a duty of care was owed, the claimants relied heavily on expert evidence of the potentially harmful effects on humans of increasing emissions of greenhouse gases. However, neither the arguments nor the reasoning referred to Australia's obligations under human rights treaties, and the same was true in the appeal. Indeed, even though at trial Bromberg J found that a duty of care did exist at common law, no actual breach of that duty was found to have been established.

In this context, on appeal in *Minister for the Environment v Sharma* the Chief Justice made some pointed observations as to the scope and operation of the statute under which the Minister was required to make the coal mine extension decision in question, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('*EPBC Act'*):

[113] *Waratah Coal Pty Ltd v Youth Verdict Ltd* [2020] QLC 33 ('*Youth Verdict*'), [44].
[114] *Gloucester Resources Ltd v Minister for Planning* [2019] NSWLEC 7 (Preston CJ).
[115] *Gloucester Resources Ltd v Minister for Planning*, [500]-[503].
[116] *Gloucester Resources Ltd v Minister for Planning*, [688].
[117] *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment* [2021] FCA 560 (Bromberg J); *Minister for the Environment v Sharma* [2022] FCAFC 35 (Allsop CJ, Beach and Wheelahan JJ) ('*Sharma*').

> 'As earlier discussed, the *Act* is not concerned generally with the protection of the environment nor with any response to global warming and climate change. The Commonwealth [Act?] has its particular concerns and focus, and the decision in question also has its particular concerns and focus. Nor … is the protection of the interests and safety of human beings in the environment a primary object of the Act, nor is human safety an implied mandatory consideration in the exercise of the Minister's statutory function ….'[118]

The claim by Torres Strait Islanders in the Federal Court in *Pabai and Kabai v Commonwealth of Australia* (*'Pabai*'), which has been unsuccessful at first instance, was also framed in terms of a tortious duty of care owed by the Commonwealth to an especially vulnerable population group, Torres Strait Islanders.[119] However, the primary basis of the pleaded duty differed from that in *Sharma* in that, rather than being engaged in relation to an exercise of Ministerial discretion under the *EPBC Act*, it relied primarily on the status of the claimants as the inhabitants of a Protected Zone under a treaty with Papua New Guinea.[120] The pleading also referred to Australia's accession to the UNFCCC and the Paris Agreement, claiming that the lack of ambition in Australia's 2030 emissions reduction target was not in accordance with that Agreement nor with best available science.[121]

The claim in *Pabai* did not raise Australia's international human rights obligations, nor expressly address mitigation by requiring Australia to control its fossil fuel exports. It is apparent that, even for those facing climate-driven harms for which the scientific evidence is uncontested, there are formidable challenges in Australia as a result of lack of legal remedies for those experiencing climate-related human (rights) harms. As the Judgment Summary in *Pabai* stated,

> 'The reality is that the law in Australia as it currently stands provides no real or effective legal avenue through which individuals and communities, like those in the Torres Strait Islands, can claim damages or other relief in respect of harm that they claim to have suffered as a result of governmental decisions and conduct which involve matters of high or core government policy, including in respect of the responses to climate change and its impacts. That will remain the case unless and until the law in Australia changes, either by the incremental development or expansion of the common law by appellate courts, or by the enactment of legislation. Until then, the only real avenue available to those in the position of the applicants and other Torres Strait Islanders involves public advocacy and protest, and ultimately recourse via the ballot box.'[122]

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[118] *'Sharma',* [2022] FCAFC 35, per Allsop CJ, [101].
[119] *Pabai v Commonwealth of Australia* (No. 2) (*'Pabai'*) [2025] FCA 796.
[120] Treaty between Australia and the Independent State of Papua New Guinea Concerning Sovereignty and Maritime Boundaries in the Area Between Two Countries, Including the Area Known as Torres Strait, and Related Matters, entered on 18 December 1978, in force from 15 February 1985.
[121] *Pabai*, Petition, 26 October 2021, [50].
[122] *Pabai*, Judgment Summary.

However, as the next Section explains, even in jurisdictions where remedies for such harms have been provided, formidable challenges have confronted those seeking to enforce human rights protections against climate-related harms.

3.2 Demonstrating human rights responsibility: 'causing' climate change

There is a powerful and increasingly alarmed consensus among human rights bodies and institutions that worsening climate change presents a grave threat to human rights everywhere. In his submission to the 2015 Conference of the Parties to the UNFCCC, the then High Commissioner for Human Rights described threats and actual harms from Earth's worsening climate as negative impacts on human rights:

> 'It is now beyond dispute that climate change caused by human activity has negative impacts on the full enjoyment of human rights. Climate change has profound impacts on a wide variety of human rights, including the rights to life, self-determination, development, food, health, water and sanitation and housing.'[123]

That climate change has negative impacts generally on the enjoyment of human rights has been recognised in multiple resolutions, decisions and reports adopted by international, regional and some domestic human rights bodies. The UN Human Rights Council has repeatedly warned of the urgency of international co-operation in protecting human rights against the impacts of climate change. It has passed a number of resolutions referencing human rights and the environment, and has recognised that environmental damage has negative implications for the effective enjoyment of all human rights.[124] The 2015 Paris Agreement includes a preambular paragraph in which, without creating binding legal obligations, the Parties are exhorted to respect, promote and consider their human rights obligations when taking action to address climate change.

By contrast, establishing in a court or tribunal that a particular State or large emitter bears responsibility for human rights harms experienced by an individual or demographic group has required drawing a causal connection between the specific act of emitting and the individual human rights harm. Drawing this chain of causation in the context of climate change and human rights law is complex. The complexity arises, in large part, from the fact that climate change as a phenomenon is the result of a multiplicity of GHG emitting individual actions. Further, the exacerbated harms attributable to temperature rises tend to occur some time after the emissions to which the rises are attributable, and exactly to whom, when, where and how those exacerbated harms will occur may not be knowable in advance. This has led to political

[123] UNHCHR, 'Understanding Human Rights and Climate Change', 2015.
[124] See 'Human Rights Council resolutions on human rights and climate change'.

opportunism, offering large fossil fuel producing States (and corporations) a justification for denying any specific responsibility for the harms which the consumption of their fossil fuels is exacerbating.

Australia has frequently relied defensively upon such a line of argument: that no single set of emissions by an individual entity can be said to cause climate change and, hence, to cause the threats or harms from climate change to people and their human rights to arise. In the HRC matter of *Daniel Billy*, for example, Australia argued that,

> '[t]he alleged threat to the authors' rights is a global phenomenon arising from myriad acts committed by innumerable private and State entities over decades…. [T]he authors acknowledge the multiplicity of global causes of climate change…. [125] Academic scholars have noted that "causal pathways involving anthropogenic climate change, and especially its impacts, are intricate and diffuse".'[126]

***Daniel Billy et al. v. Australia*, UN Human Rights Committee (2022)**

The *Daniel Billy* complaint was brought to the UN Human Rights Committee by eight Torres Strait Islanders who argued that Australia's inadequate action on climate change violated their human rights to life, to practice culture, and to be free from arbitrary interference with family and home life, as rising sea levels and climate impacts threatened their ancestral islands and traditional way of life. In 2022, the Committee ruled in favour of the complainants in finding that Australia had indeed violated their right to culture and right to family and home life, by failing to take timely and adequate measures to protect the complainants from climate change impacts. The majority of the Committee did not find a violation of the right to life, due to adaptation and mitigation measures already in place.

The Committee asked Australia to provide adequate compensation to the complainants for harm suffered; to engage in meaningful consultation with the complainants' communities; and to continue implementation of measures necessary to secure Torres Strait Islanders continued safe existence on their islands.

Australia argued similarly before the ICJ that the emissions of no one country can be said to *cause* climate change, because,

[125] *Daniel Billy,* [6.7].
[126] *Daniel Billy*, [6.9]. This argument by Australia was not addressed in the Committee's Observations in *Daniel Billy*, where it restricted its views to Australia's failures to put in place adequate adaptation measures.

> 'the diffuse geographic sources of anthropogenic greenhouse gas emissions, and the time periods over which they accumulate in such a way that they could cause significant harm, set these emissions apart from the more conventional forms of pollution. It is the combined effect of all greenhouse gas emissions, over time, which leads to changed climate patterns and, ultimately, to the consequences of climate change for individual States.' [127]

In discussing liability for reparations (that is, for established harm), the ICJ found that this conclusion is not necessarily correct in the context of the duty to prevent significant harm to the climate system; while the causal link between the omissions of a State and the harm arising from climate change is more tenuous than in the case of local sources of pollution, this does not make establishing causation impossible.[128] Recognising that causal standards may vary between areas of law, the standard which has been developed in the Court's case law is nonetheless 'capable of being applied' in the context of climate change obligations. While requiring the existence of 'a sufficiently direct and certain causal nexus between the wrongful act . . . and the injury suffered by the Applicant', the standard is 'flexible enough' to address the causation challenges in the climate change context.[129] While attribution of damage caused by climate change to a particular State's emissions must be established '*in concreto*', recourse to science will frequently allow attribution of a particular climatic events or trends to anthropogenic climate change.[130]

The ICJ's view is, indeed, in accordance with advances in attribution science and with increasing research tracking human harms as Earth's climate deteriorates. Such advances make it possible to establish a causal chain in which releasing a set quantity of GHG emissions (CO_2e) will raise global mean temperatures by a known fraction of a degree; this temperature rise will generate particular climatic changes; and these changes will raise the probability of quantified increases in the incidence of climate extremes. In this analysis, we refer to this chain as the 'general causal case'. This may be sufficient to obtain relief against future harm.

The general causal case

In this general sense, climate scientists have now established the factual chain of causation between individual sets of emissions and increased probability and severity of climate extremes.[131] Two climate scientists, Callahan and Mankin, recently maintained that the scientific case for climate liability – that is, for connecting given quantities or sets of emissions with given

[127] Written Statement of Australia, March 2024, at 85-86.
[128] ICJ Advisory Opinion No. 187, [435].
[129] ICJ Advisory Opinion No. 187, [436].
[130] ICJ Advisory Opinion No. 187, [437].
[131] Climate scientists are also increasingly able to 'downscale' projections of increases in climate extremes to regional and even smaller areas. See, for e.g., the 'Publications' of Professor Jason Evans, UNSW Climate Change Research Centre; Australian Government, 'Climate Change in Australia'.

increases in climate extremes, is now 'closed'.[132] To reach this conclusion, the authors applied reduced-complexity climate models ('RCMs') and pattern scaling, in the context of recent advances in 'source attribution' research, to 'link the contributions of individual emitters to local temperature changes in an efficient, transparent and reproducible manner.'[133] The authors also linked the projected increases in climatic extremes to increases in the probability and severity of a substantial list of climate-related socioeconomic threats, referring in doing so to,

> 'recent peer-reviewed work [which] has used econometrics to infer causal relationships between climate hazards and outcomes such as income loss, reduced agricultural yields, increased human mortality and depressed economic growth. In the attribution context, these causal relationships have been applied to quantify the historical costs of flooding, crop losses and reduced economic output from increases in average and extreme temperatures.'[134]

Using these methods and available data, Callahan and Mankin demonstrated,

> 'that emissions traceable to carbon majors have increased heatwave intensity globally, causing quantifiable income losses for people in subnational regions around the world. Our analysis uses reductions in gross domestic product per capita ('GDPpc') growth to represent particularized injuries.'[135]

They emphasized that

> 'the power of the ['end to end'] attribution framework we present is that it is flexible, transparent and modular, meaning that other damages ..., other hazards … and other time periods … can be included to support particular attribution questions as the scientific, legal and climatic landscapes develop.'[136]

The authors constructed a 'counterfactual' world in which a particular, large emitter's contribution to local extreme heat could be isolated and removed, and then 'compared heat-driven economic damages between the historical and the counterfactual worlds, with their difference being the company's contribution to damages.'[137] While losses in this study were calculated in the context of the global economy, they are also capable of being,

> 'assessed at finer, more legally relevant regional scales, revealing inequities in the causes and consequences of global warming. Together, extreme heat from the top five emitting companies (Fig. 2a) has driven annual GDPpc reductions exceeding 1% across

[132] C Callahan and J Mankin, 'Carbon majors and the scientific case for climate liability', 2025, *Nature*, Vol 640, 893; and see N Abrams et al., 'Quantifying the consequences of continued fossil fuel extraction and use', 2025 (in publication).
[133] Callahan and Mankin, at 894.
[134] Callahan and Mankin, at 895.
[135] Callahan and Mankin, at 895.
[136] Callahan and Mankin, at 895.
[137] Callahan and Mankin, at 895. Importantly, too, the framework developed by Callahan and Mankin is described by the authors as operating as a 'but for' test.

> South America, Africa and Southeast Asia. By contrast, the USA and Europe—where Gazprom, Chevron, ExxonMobil and BP are headquartered—have experienced milder costs from extreme heat.'[138]

Callahan and Mankin refer to peer-reviewed studies which 'use econometrics to infer causal relationships between climate hazards and outcomes', including increased human mortality.[139] The existing volume of robust evidence of human harms from worsening climate extremes is steadily expanding, including studies in Australia (see Part 4, below). The establishment with high confidence by climate scientists, in collaboration with, for example, economists or public health specialists, of the probability of such harms confirms the concern of human rights bodies, and of the ICJ, that climate change presents a grave threat to the realisation and enjoyment of human rights. This is a live matter for Australia, given its projected fossil fuel exports over the coming decade and the fractional rise in global temperature which will be attributable to their emissions,[140] as well as the corresponding, predictable worsening of many human (rights) harms.

In sum, Australia's argument before the ICJ and the HRC in *Daniel Billy* - that individual sets of emissions, as mere drops in the ocean, do not lead to climatic changes with adverse human impacts - is simply not supported by current climate science, nor by the IPCC's conclusion that every fraction of a degree matters.[141]

The individual causal case

However, more challenging to establish for those seeking a remedy for existing climate-driven human rights harms has been the 'individual causal case'. That is, there are challenges in seeking to extend the factual chain of causation from individual sets of emissions to specific human rights harms experienced by particular individuals. The ECtHR in *KlimaSeniorinnen* noted that, in individual claims of human rights impairment under the ECHR, the causation issues raised are particularly complex in the context of climate change, and include: the connection between the range of adverse effects from climate change and the threats from those effects to the enjoyment of human rights; the connection, at the individual level, between the claimed harm or risk of harm to the claimant/s and the impugned acts or omissions of State; and the responsibility attributed to the State for the claimed adverse effects, given the multiple sources of aggregate GHG emissions.[142] The Federal Court decision in *Pabai* demonstrates the

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[138] Callahan and Mankin, at 896.
[139] The studies the authors refer to specifically are T Carleton et al., 'Valuing the global mortality consequences of climate change accounting for adaptation costs and benefits', *Q. J. Econ.* 137, 2037–2105 (2022); A Barreca et al., 'Adapting to climate change: the remarkable decline in the US temperature-mortality relationship over the twentieth century', *J. Political Econ*. 124, 105–159 (2016).
[140] Climate Analytics, 'Footprint report', at 30-31. Calculations based on the results in 'Footprint report'.
[141] IPCC, AR6, *Climate Change 2023: Synthesis Report*, at 12.
[142] For a more detailed discussion, see *Kilmaseniorinnen*, [424] – [425]; and see V Stoyanova, '*Klimaseniorinnen* and the question/s of causation' 7 May, 2024.

inherent difficulty in the law of negligence in establishing a direct causal link between, in this case, a single government's emissions policies and specific climate impacts, particularly given the global and cumulative nature of climate change.

> ***KlimaSeniorinnen*, European Court of Human Rights (2024)**
>
> The *KlimaSeniorinnen* case was brought by four individuals and an association of 2000 older women, whose average age was 73. They claimed that Switzerland had violated the human right to private and family life under Article 8 of the European Convention on Human Rights by failing to implement adequate climate protection policies. The European Court found that Switzerland had violated the right to private and family life, which encompasses a right to effective protection by State authorities from the serious adverse effects of climate change on lives, health, wellbeing and quality of life. The Court found that there were critical gaps in Switzerland's regulatory framework – in particular, Switzerland's lack of an individual carbon budget or national greenhouse gas (GHG) emissions limits. The Court found that Switzerland had failed to act in an appropriate and timely way to meet its obligations to protect the affected human right. The Court also found that Switzerland was required to include the GHG emissions embedded in its imports when developing its individual carbon budget.
>
> The Court noted that Switzerland had a legal obligation to assess the specific measures to be taken to ensure the Swiss authorities comply with Convention requirements as clarified in the judgment.

In other cases, courts in Europe have found 'the general causal case' to be sufficient to conclude that worsening climate change is inherently a threat to particular human rights. For example, in *Urgenda*, the Netherlands Supreme Court found that there was 'a real threat of dangerous climate change, resulting in the serious risk that the current generation of citizens will be confronted with loss of life'.[143] The case was based on an alleged violation of the duty of care in the Dutch Civil Code. In *Youth Verdict*, the Queensland Land Court also found the general causal case sufficient to conclude that emissions from the thermal coal mine seeking approval would limit the right to life in the state of Queensland. Kingham P explained that,

> 'climate change at any level will limit the right to life to some extent and is already doing so. Approving the project would contribute to foreseeable and preventable life-terminating harm. The combustion of the Project coal would make a material contribution to the risk of climate scenario 2 being materialised and narrows the options

[143] *Urgenda*, [4.7].

> available to achieve climate scenario 1, which is consistent with the Paris Agreement goals.'[144]

The strengthening of the general causal case as attribution science develops may also assist individual claimants, to the extent that it opens access to a legal approach in climate and human rights cases similar to that adopted in tort law by many courts when dealing with multiple exposures to a harm (such as asbestos) and establishing causation for resulting injury. The 'material contribution' approach allows plaintiffs to establish causation if they can prove that a defendant's action materially contributed to their injury, even where that contribution was not the sole cause of the injury.[145] In *Allianz Australia Ltd v Sim*, the NSW Court of Appeal noted that no authority had been presented to support,

> 'the proposition that substantial successive and cumulative tortious conduct, independently engaged in by several defendants, did not render each liable for the consequential and individual harm, in circumstances where individually, the tortious conduct was neither necessary nor sufficient to cause the harm.'[146]

In 2010, the High Court of Australia in *Amaca Pty Ltd v Ellis* set out the 'material contribution' approach in circumstances where a person suffers an injury following exposure to a substance and science can only go so far as to say that the exposure increased the risk of the disease.[147] In such cases, the law requires proof, on the balance of probabilities, that the defendant's negligence was a cause of the plaintiff's disease, in the sense that it materially contributed to the plaintiff contracting the disease. It is sufficient that the defendant's negligence made a material contribution to the plaintiff's injury; it need not have been a necessary condition of its occurrence.[148]

A similar approach might be taken in a claim that the emissions from Australia's exported fossil fuels, as a discrete set of emissions, have measurably raised global mean temperatures fractionally and, in doing so, predictably worsened climate extremes, thereby raising the probability of adverse human impacts of the kind in the complaint. In other words, Australia's actions will have 'materially contributed' to the harm to the claimant, even though they cannot be said to have caused climate change nor to be solely responsible for the resulting harm to the claimant. However, in the context of liability in tort, the Federal Court in *Pabai* concluded that it 'would be difficult to accept' that any failings on the part of the Commonwealth in respect of its

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[144] *Youth Verdict*, [1512].
[145] *Amaca Pty Ltd v Booth* (2011) 246 CLR 36, [70], and citing Lord Watson in *Wakelin v London and South Western Railway Co (1886)* 12 App Cas 41.
[146] *Allianz Australia Ltd v Sim*, [2012] NSWCA 68, [145], per Basten JA. The Court of Appeal referred (at [32]-[33], per Allsop P, and [139] and [143], per Basten JA) to the work of Jane Stapleton, who provides a number of hypothetical factual scenarios of non-necessary, non-sufficient factors that contribute to an outcome: J Stapleton, "Factual Causation" (2010) Federal Law Review, 467. Stapleton explains that a non-necessary, non-sufficient factor may contribute to the existence of a phenomenon by forming part of an undifferentiated whole. She states that a factor is a 'factual cause' 'if it contributes *in any way* to the existence of the phenomenon in issue': at 476.
[147] *Amaca Pty Ltd v Ellis* (2010) 240 CLR 111.
[148] *Amaca Pty Ltd v Ellis*, [68]-[71].

responses to climate change and its protection of Torres Strait Islanders from the impacts of climate change 'materially contributed to the loss or damage suffered by Torres Strait Islanders as a result of the impacts of climate change during the period relevant to the cause of action.'[149]

Aspects of causation are not the only enforcement challenges arising from or associated with the relationship between human rights and climate change, as the next section explains.

3.3 Enforcing individual human rights in the context of broad climate harms

Judicial bodies (courts and tribunals) adopt mechanisms to control who may institute proceedings before them. In common law countries, the control mechanisms are known as 'standing' (involving the characteristics of the complainant) and 'justiciability' (involving the nature of the claim for relief). Under the ECHR, the ECtHR 'may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the … Parties'.[150] For this reason, the jurisprudence of the ECtHR refers to 'victim status' when discussing who may institute proceedings in that Court. In *KlimaSeniorinnen*, the Court used the alternative term 'standing' to refer to the status of the association seeking to represent the victims, as an association cannot itself be a victim.[151]

Standing

In climate litigation in every country, standing is a significant challenge for those seeking remedies for individualised harms from climate extremes. For the most part, these challenges arise from aspects of the relationship between human rights harms and climate change, including the difficulties described above with establishing the chain of causation between particular emissions (and related government action or inaction) and individual adverse impacts. However, another aspect of the relationship is that courts and tribunals generally will require an individual bringing a human rights claim to have a real and personal, as opposed to a hypothetical, interest in the matter before they will allocate their valuable and limited resources. For example, the HRC in *Daniel Billy* explained that the right to protection does not extend to 'hypothetical' threats to life; to gain standing (and to demonstrate an actual impairment of the right), applicants must face a real and reasonably foreseeable risk of being exposed to 'physical endangerment or extreme precarity that could threaten their right to life'.[152]

The Australian cases mentioned above have also faced standing challenges. In Australia, statutes conferring jurisdiction will commonly require that the complainant be a 'person

[149] *Pabai*, [13].
[150] ECHR, Article 34.
[151] *KlimaSeniorinnen*, [475] – [477].
[152] *Daniel Billy,* [8.6].

aggrieved'.[153] This term invokes the general law principles of standing, which require a person to have an 'interest' in the resolution of the matter in dispute. In public law matters, such as much environmental litigation, the Australian courts require a 'special' or 'sufficient' interest. What constitutes a special or sufficient interest will turn on a variety of factors, including the nature of the asserted right, the nature of the complainant's connection with the enforcement of the right, the nature of the relief sought and the functions of the particular court or tribunal. A complainant seeking to present a case must have a 'concrete adverseness which sharpens presentation of the issues'.[154]

One consequence of applying high standing requirements is that an association with objectives focused on the issue to be raised, evidence of past commitment to pursing those objectives, and the financial resources to pursue proceedings may well have standing where its individual members or supporters will not. The issue of standing arose in the Queensland case *Youth Verdict,* which considered an application for approval of a coal mine expansion and its potential impacts on human rights.[155] The Queensland Land Court held that the objector association, Youth Verdict, was entitled to maintain its objection to the grant of the mining tenement under the *Human Rights Act 2019* (Qld) on the ground that the approval would 'limit' the human rights of people in Queensland, as determined by the Court in its final decision.[156]

The ECtHR in *KlimaSeniorinnen* reflected on the different relationship between the applicant association and the human rights harms to its members flowing from a worsening climate. In reaching its decision on the association's standing, the Court noted that,

> 'the applicant association … has demonstrated that it pursues a dedicated purpose in accordance with its statutory objectives in the defense of the human rights of its members and other affected individuals against the threats arising from climate change in the respondent State and that it is genuinely qualified and representative to act on behalf of those individuals who may arguably claim to be subject to specific threats or adverse effects of climate change on their life, health, well-being and quality of life as protected under the Convention.'[157]

A further consequence of the 'real' or 'special' interest requirement is that, in considering standing at the outset, courts will typically also take account of the nature of the alleged breach of a legal obligation, the nature of the legal obligation itself and the precise relief sought. This analytical process has often led to courts more or less merging the evaluative judgments required in identifying the 'special interest' for standing with addressing the merits of the claim, as was effectively the case in *KlimaSeniorinnen*.[158] This has meant that several climate litigation

[153] See, for example, *Australian Human Rights Commission Act 1986* (Cth), s 20(1)(b).
[154] *Kuczborski v Queensland* (2014) 254 CLR 51; [2014] HCA 46, [186] (Crennan, Kiefel, Gageler and Keane JJ).
[155] *Youth Verdict Ltd* [2020] QLC 33.
[156] *Waratah Coal Pty Ltd v Youth Verdict Ltd* (No 6) [2022] QLC 21, [1505] and [1512].
[157] *KlimaSeniorinnen*, [524].
[158] *KlimaSeniorinnen*, [458].

has been unable to reach the hearing stage, being prevented at the outset by not satisfying standing requirements applied in this 'merged' way.

The victim status criteria referred to by the Court in *KlimaSeniorinnen* 'in the context of complaints concerning harm or risk of harm resulting from alleged failure by the State to combat climate change' also require an applicant to demonstrate a personal and direct effect from the State's action and/or inaction or insufficient action.[159] This effect must include a high intensity of exposure to the adverse effects of climate change (significant level and severity), as well as revealing a 'pressing need to ensure the applicant's individual protection, owing to the absence or inadequacy of any reasonable measures to reduce harm.' The Court acknowledged in this case that 'the threshold for fulfilling these criteria is especially high'[160] and that, in climate change cases, it will require a 'close link between victim status and the applicability of the relevant Convention provisions'.[161] This approach reflects that applied in Australian courts. However, the requirement can be problematic, where current actions will likely lock in further human rights harms from climate change but those harms will occur in the future and may not represent sufficiently direct or current harms for the purposes of standing.

The challenges particularly arise where the persons affected are the 'population at large'; if the group is so large that no-one has a 'special' interest for the purposes of standing, the matter is likely to be considered by courts as a matter for the legislature.[162] Traditional human rights frameworks are designed around individual rights and remedies. In the climate change context, this can diminish their capacity to provide remedies for harms, where the harms affect the population at large or significant segments of it. In fact, in *KlimaSeniorinnen*, the ECtHR noted the deliberate absence of an *actio popularis* (open standing) provision in the ECHR and the importance of not introducing one through judicial dictat, in circumstances where 'virtually anybody' could be a potential victim.[163] The Court concluded that the multiple individual applicants, as members of the population group older women in Switzerland, did not have 'victim status' to bring a complaint relating to infringement of the right to life under ECHR Article 2.[164]

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[159] *KlimaSeniorinnen,* [487].

[160] *KlimaSeniorinnen,* [488].

[161] *KlimaSeniorinnen,* [459]. In its jurisprudence relating to the admissibility of Article 8 claims (right to family and home life) involving adverse effects arising from environmental harm, the ECtHR has often merged its assessment of the separate questions of victim status and applicability of the right to a particular fact situation: *KlimaSeniorinnen,* [437]. On this approach, whether a person has victim status may be examined as a separate issue, or in the context of an assessment of the applicability of a right to a given fact situation, or as so bound up with the issues as to be joined to the examination of the complaint on the merits: *KlimaSeniorinnen,* [458].

[162] The overlap with standing is important in Australia because there are strong suggestions that standing controls in Australia do not operate in dealing with claims against the Commonwealth, a Commonwealth agency or officers of the Commonwealth: see, eg, *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247; [1998] HCA 49, [39]-[43] (Gaudron, Gummow and Kirby JJ); *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1; [2009] HCA 23, [152] (Gummow, Crennan and Bell JJ).

[163] *KlimaSeniorinnen,* [483], [485].

[164] *KlimaSeniorinnen,* [536]. The Court also found it 'unnecessary' to analyse any further the issues relating to the claims of infringement of the right to life in this case, given its decision to in relation to the right to family and home life claim: [536].

By contrast, in the Belgian case *Klimaatzaak*, the Brussels Court of Appeal accepted that standing requirements were satisfied by the 58,000 citizen co-plaintiffs. The Court was satisfied with the general causal case that climate change brings with it life-threatening harms, observing:

> '… the extent of the consequences of global warming and the scale of the risks it entails mean that it can be considered, with sufficient judicial certainty, that each of the natural persons who are [sic] validly involved in the case has an interest of their own in obtaining the convictions that are sought against the public authorities.'[165]

Justiciability

A further control mechanism utilised by courts and presenting challenges for many seeking to enforce human rights in the climate change context is 'justiciability', which is concerned not with characteristics of a claimant but with the nature of the claim. One justiciability consideration, which raises challenges for claimants related to the relationship between human rights and climate change, is whether the criteria for resolving the dispute operate at the level of policy, which is a matter for the executive arm of government rather than for the courts.[166] The Federal Court in *Pabai* declined to intervene in the 'Commonwealth's actions concerning the setting of emissions reduction targets', given that they 'involve issues of high or core government policy and political judgment which properly fall within the province of the elected representatives and executive government of the day, not the judicial arm of government.'[167]

Reflections

The challenges for those seeking to enforce their human rights, arising from or connected with aspects of the relationship between human rights and climate change, are likely to ease somewhat with the emergence of research from multiple disciplines demonstrating more definable relationships between fractional temperature increases, intensifying climate extremes and increases in climate-related harms or threats of harm to particular or vulnerable population groups.[168] Some of this research is mentioned in Part 4, next, in the context of harms to the rights to life and to family and home life. The scientific and expert capability is developing, too, to identify individuals with geographical, demographic or personal characteristics which place their human rights to life, family and home life, health, culture or other entitlements under additional threat from incremental worsening of climate extremes.

Certainly, there is much that cannot be known in advance about the incidence and severity of future harm to individuals and their human rights from the increasing hazards which climate

[165] *Klimaatzaak*, [133].
[166] See *Sharma*, at 35.
[167] *Pabai*, [977].
[168] See N Abram et al., 'Quantifying project-level consequences of continued fossil fuel production and use' (2025) (in publication).

change brings. Uncertainties include the in/effectiveness of adaptation efforts, future emissions reductions globally, and the triggering of tipping points. However, as a general and pressing concern, courts need to be able to accommodate the fact that the threats to life and to family and home life created by worsening climate change do confront very large segments of states' populations. While harm on this scale does not sit easily with a human rights law regime oriented to the protection of the individual, those individuals ought not be denied protection because the threatened harm is 'proximate' to so many.

4 Worsening harms to human rights in Australia from climate change

4.0 Key points

- Changes already taking place in the Earth system are eroding foundational conditions for, and are fundamentally threatening, human health.
- The right to life is a right to be positively protected from acts or omissions that may be expected to cause a person's death or create a life-threatening situation.
- Climate change brings with it more frequent and intense weather extremes and hazards which threaten human lives and raise premature human deaths.
- Heat-related deaths in Australia are significantly under-recorded, with over 36,000 deaths between 2006-2017 actually attributable to heat, and vulnerable populations facing increasing threats.
- Elderly people, children, First Nations communities, people with medical conditions like asthma and diabetes, and those in disadvantaged areas face disproportionate climate-related threats to life, and parts of Australia will be pushed outside the 'human climate niche' at 2.7°C - 3°C warming.
- The right to family and home life is a right to positive protection from arbitrary interference in a person's private, family or home.
- Climate-driven lifestyle restrictions (like asthma sufferers staying indoors during extreme weather) constitute interference with the right to family and home life, not just protective measures.
- As illustration, Australia's 2.8 million asthma sufferers face increasing interference in their home lives from climate-driven extreme weather events, including heat, thunderstorms, bushfire smoke and the aftermath of floods.
- People with multiple risk factors (such as low income, disability, age, First Nations status) face particularly severe and compounded climate-related interference with their right to family and home life.
- Climate change also threatens or harms other human rights, including children's rights, First Nations' rights, health rights and the right to a healthy environment.

In this Part, we describe the grave nature of the threat climate change poses to people, including in Australia. We do this through a primary focus on human health, given the multiple risks which our changing climate and increasing climate extremes are escalating, particularly for sectors of our population which are both exposed to climate-related harms and vulnerable to

them. From studying the jurisprudence, two human rights are emerging as being both particularly under threat from adverse climate impacts and capable, in some circumstances, of being successfully litigated by those affected. These are the right to life and the right to privacy, family and the home ('the right to family and home life').[169] The two are also rights of general import, their enjoyment being threatened to some degree by climate change for most sectors of Australia's population. In Part 4, we set out some of the ways in which these two rights are already being affected in Australia and how the impacts are expected to intensify, especially for the groups most at risk, as our climate worsens. For example, we present extensive data showing increasing heat-related mortality among vulnerable populations. We also demonstrate how climate impacts can force individuals to make personal adaptations that constitute interference with their home and family life. We then briefly discuss other human rights which are emerging as also readily exposed to climate-related impairment.

4.1 Climate-related harms to human health

A recent *Lancet* publication brought together information from the planetary boundaries framework of Earth system scientists and the planetary health framework of health scientists to illustrate the importance of the relationship between the two, particularly the fact that human health – and 'all life on Earth' - cannot avoid impacts from changes to the stability and resilience of the Earth system.[170] The planetary boundaries framework identifies nine critical Earth system processes that regulate the stability and resilience of our planet, setting quantitative thresholds that humanity should not cross to avoid triggering abrupt or irreversible environmental changes.[171] However, six of the nine 'are now transgressed and most trend towards further transgression'.[172]

The authors start from the premise that 'destabilising the Earth system is fundamentally threatening human health', pointing to the 'ample evidence that each change in the Earth system as tracked by the planetary boundaries framework affects human health in a variety of ways'. While the total burden of disease associated with transgressing planetary boundaries has not yet been comprehensively assessed,

> 'the scale of many known impacts suggests a large global burden over the coming decades. These health impacts can occur well before planetary boundaries are transgressed. But crossing these safe boundaries—which might include crossing irreversible tipping points and subsequent loss of the Earth's resilience—will further

[169] *Urgenda*; *Daniel Billy*; *Klimaatzaak*; and *KlimaSeniorinnen.*
[170] S Myers et al., 'Connecting planetary boundaries and planetary health: a resilient and stable Earth system is crucial for human health', *The Lancet* (Comment), 15 July 2025, at 1.
[171] These boundaries include climate change, biodiversity loss, biogeochemical cycles, ocean acidification, land use change, freshwater use, ozone depletion, atmospheric aerosols, and chemical pollution: see K Richardson et al., 'Earth beyond six of nine planetary boundaries', *Sciences Advances*, Vol 9, No 37, September 2023.
[172] S Myers et al., at 1.

accelerate environmental changes and amplify their health risks. Large-scale shifts in the Earth system can also destabilise human societies, with potentially severe and unforeseeable effects on a range of additional determinants of health.'[173]

They presented examples of human health impacts from transgressing the various planetary boundaries, including the following in relation to the climate change boundary.

Planetary Boundary	Examples of human health impacts				
Climate Change	**Non-communicable diseases (NCDs)**	**Food and nutrition**	**Infectious diseases**	**Reproductive, maternal and child health**	**Mental Health**
	Heat exposure increases mortality from cardiovascular and respiratory diseases,[1-4] and heat-related mortality is projected to further increase with climate change.[5-8] Climate change can alter pollen seasons, distribution, production and allergenicity, and increase the burden of allergic diseases.[9-13]	Climate change has already reduced food security.[14] Resulting from impacts on food quality and quantity, socioeconomic and other factors, food insecurity and adverse nutritional outcomes are expected to worsen in the future.[15-23] In addition, the severe environmental impacts of agriculture itself will likely be amplified.[24]	Climate hazards such as temperature and precipitation changes, floods, droughts or storms can aggravate more than half of known human pathogenic infectious diseases.[25] For instance, they have been shown to expand or alter the range, transmission and occurrence of vector-borne diseases.[26-33]	Heat exposure is associated with higher risks of preterm birth, stillbirths, congenital anomalies, hypertensive disorders in pregnancy and gestational diabetes.[34] Heat also has a number of adverse effects on children's health, especially in marginalized communities.[35-37]	Chronic, slow-onset climate change, extreme events, and climate-related disasters and displacement lead to negative mental health impacts for affected populations, particularly for already disadvantaged groups such as Indigenous communities or gender-diverse people.[38-45]

S Myers et al., 'Connecting planetary boundaries and planetary health: a resilient and stable Earth system is crucial for human health', *The Lancet* (Comment), 15 July 2025, Appendix.[174]

These adverse human health impacts will often present real and serious threats to human rights, including the right to life and the rights to family and home life.

4.2 Climate-related harms to the right to life in Australia

4.2.1 The right to life

The right to life is contained in Article 6(1) of the ICCPR: 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life'.

[173] S Myers et al., at 1.
[174] The authors note that future health risk assessments of the planetary boundaries will need to address conceptual and methodological challenges.

The corresponding sections in the Queensland, Victorian and ACT Human Rights statutes are in effectively identical terms.[175] Article 4 of the American Convention on Human Rights[176] is also largely similar. Article 2 of the ECHR, having been drafted prior to the ICCPR and for the purpose of securing the rights declared in the UDHR,[177] is worded differently,[178] but the differences are not significant in the climate change context. Importantly, all provisions require that the right to life must be protected by law.

In opening its General Comment No. 36 on the right to life, adopted in 2019,[179] the HRC noted that the right to life 'is a right that should not be interpreted narrowly.' This provides important guidance for the correct approach to interpreting the treaty provision. Significantly, it means that the scope of the right to life is not limited to the right not to be arbitrarily deprived of life by the State; it gives broader protection of a preventative and anticipatory character. Crucially, it includes the right 'to be free from acts and omissions that are intended or may be expected to cause [a person's] unnatural or premature death.'[180]

The General Comment has also clarified that the entitlement of individuals under this provision extends to freedom from acts and omissions which may give rise to direct threats to life arising from 'the general conditions in society' and explained that such threats 'may include ... threats arising from degradation of the environment.'[181] Indeed, the General Comment goes on to explain that 'environmental degradation [and] climate change … constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life.'[182]

The right extends to protection from 'reasonably foreseeable *threats* and life-threatening situations that can result in loss of life' (emphasis added), whether or not loss of life actually occurs;[183] an impairment of the right to life can occur even when no-one has died.[184] The HRC has confirmed this interpretation of the right to life in the context of climate change.[185] The interpretation was also affirmed by the ECtHR in *KlimaSeniorinnen* and applied in the context of

[175] Section 16, Queensland *Human Rights Act 2019*; s.9, Victorian *Charter of Human Rights and Responsibilities 2006*; and s.16, ACT *Human Rights Act 2004*.
[176] Organization of American States (OAS), American Convention on Human Rights, 'Pact of San Jose', Costa Rica, -, 22 November 1969.
[177] Article 3 of the UDHR simply states: 'Everyone has the right to life, liberty and the security of person.'
[178] ECHR, Article 2: 'Right to life. 1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.'
[179] HRC, General comment No. 36, Article 6: right to life, CCPR/C/GC/36, 3 September 2019.
[180] HRC, General comment No. 36, [3].
[181] HRC, General comment No. 36, [26].
[182] HRC, General comment No. 36, [62].
[183] HRC, General comment No. 36, [7].
[184] HRC, General comment No. 36, [7]. And see Jo M. Pasqualucci, "The right to a dignified life (*vida digna*): the integration of economic and social rights with civil and political rights in the inter-American human rights system", *Hastings International and Comparative Law Review*, vol. 31, No. 1 (2008), at 1–32.
[185] *Daniel Billy,* [8.3].

climate change. If an activity is 'dangerous' by its very nature, the right may still apply even in the absence of injuries, provided the person's life is 'at real and imminent risk'.[186] The Court found that failures by States to combat climate change fall most appropriately into the category of an activity which is, by its very nature, capable of putting a person's life at risk.[187] Importantly, this may extend to risks to life arising from State action *or* inaction in the context of climate change.[188] The Court also held that it would be 'possible to assume that a serious risk of a significant decline in a person's life expectancy owing to climate change ought also to trigger the applicability of Article 2', where the victim status of the person was able to be established based on the criteria set out in the judgment.[189] The Court also noted here the 'compelling scientific evidence showing a link between climate change and increased risk of mortality, particularly in vulnerable groups.'[190] Finally, the right also encompasses protection of a person against deprivations caused by 'entities whose conduct is not attributable to the state',[191] which would include entities exporting fossil fuels from Australia, all of which are privately owned.

To establish actual impairment of the right by an identified individual, however, the Court in *KlimaSeniorinnen* held that the risk in question must be 'real and imminent', meaning that it must pose 'a serious, genuine and sufficiently ascertainable threat to life, containing an element of material and temporal proximity of the threat to the harm complained of'.[192] As discussed in B.2, above, there remain challenges for claimants seeking to establish impairment of their human rights resulting from the effects of climate change. Nevertheless, as explained earlier and as the following illustration shows, the general case that Australia's worsening climate poses increasing threats to the right to life in its own territory is now incontrovertible.

It is clear from a wealth of data and modelling that climate change brings with it more frequent and intense weather extremes and hazards which raise premature human deaths. In 2022, the IPCC reported that, already and 'in all regions, extreme heat events have resulted in human mortality (very high confidence)',[193] and predicted that 'climate change and related extreme events will significantly increase … premature deaths from the near- to long-term (high confidence).'[194] A 2021 study used empirical data from 732 locations in 43 countries to estimate the mortality burdens associated with the additional heat exposure that has resulted from recent human-induced warming, during the period 1991–2018. Across all study countries, it found 'that

[186] See: *Nicolae Virgiliu Tănase v. Romania* ([GC], no. 41720/13, §§ 140-41, 25 June 2019); *KlimaSeniorinnen,* [509].
[187] *KlimaSeniorinnen,* [509].
[188] *KlimaSeniorinnen,* [511].
[189] *KlimaSeniorinnen,* [513].
[190] *KlimaSeniorinnen,* [509].
[191] HRC, General comment No. 36, [7].
[192] *KlimaSeniorinnen,* [511-513].
[193] IPCC, AR6, WGII, 'Summary for Policymakers', [B.1.4].
[194] IPCC, AR6, WGII, 'Summary for Policymakers', [B.4.4].

37.0% of warm-season heat-related deaths can be attributed to anthropogenic climate change and that increased mortality is evident on every continent.'[195]

4.2.2 Illustration: Increasing heat and the right to life in Australia

Increasing heat, specifically in combination with rising humidity, is arguably the most pervasive and serious climate hazard threatening human life in Australia. The magnitude of future heat-related threats to life or of unnatural or premature heat-related deaths by 2100 will depend on the ambition of mitigation efforts, but also on population growth and ageing, urbanisation trends and adaptation efforts.[196] All of these are factors which have the capacity to affect risk and vary mortality outcomes from global temperature rise. However, the world itself is currently on a path to at least 2.7°C additional warming by the end of the century, with a 50% chance of exceeding that.[197] This takes the world into a temperature range which will push climate extremes beyond the geophysical boundaries of many adaptative responses and involve increasingly cascading and compounding extreme weather events. The year 2024 was the warmest year in the 175-year observational record, with each of the past ten years individually being the warmest ten years on record.[198] Added to this, there is a voice of concern among climate scientists that climatic changes, extremes and impacts from global temperature rises might be more severe than earlier projections indicated.[199] In AR6, the IPCC expanded its focus from what is most likely to occur, to now include low likelihood but very high impact ('HILL') climate hazards,[200] such as the level of global warming exceeding the expected range, the development of record-shattering extremes, compounding of extreme events and rapid shifts occurring between opposite extremes.[201]

As mentioned in A.1, above, the IPCC has demonstrated that fractional increases in global mean temperatures trigger disproportionately larger rises in the incidence and likelihood of certain climate-related hazards and threats.[202] In 2022, the IPCC reported that, already and 'in all regions, extreme heat events have resulted in human mortality (very high confidence)',[203] and predicted that 'climate change and related extreme events will significantly increase … premature deaths from the near- to long-term (high confidence).'[204] A 2021 study used empirical

[195] Vicedo-Cabrera et al., 'The burden of heat-related mortality attributable to recent human-induced climate change', *Nature Climate Change*, 11 (2021).
[196] Ebi et al., 'Hot weather and heat extremes: health risks', (2021) *The Lancet*, 398(10301), at 704.
[197] IPCC, Climate Change 2023: Synthesis Report, 'Summary for Policymakers', at B.1.1; and see Climate Action Tracker, 'CAT warming projections' (Nov. 2024 update).
[198] World Meteorological Association, 'State of the Global Climate, 2024', at 3
[199] See, for e.g., K Anderson, 'IPCC's conservative nature masks true scale of action needed to avert catastrophic climate change', The Conversation, 25 March 2023. Other prominent climate scientists who have taken a similar view include James Hansen, Michael Mann and Johann Rockstrom.
[200] IPCC, AR6, WG1, 'Technical Summary', Box TS.1: 'Core Concepts Central to This Report', at 40.
[201] R Wood et al., 'A Climate Science Toolkit for High Impact-Low Likelihood Climate Risks', AGU, *Earth's Future*, Vol. 11, Issue 4, Apr 2023.
[202] IPCC, 2018, *Special Report,* 'Summary for Policymakers', at 9, B.5.
[203] IPCC, AR6, WGII, 'Summary for Policymakers', [B.1.4].
[204] IPCC, AR6, WGII, 'Summary for Policymakers', [B.4.4].

data from 732 locations in 43 countries to estimate the mortality burdens associated with the additional heat exposure that has resulted from recent human-induced warming, during the period 1991–2018. Across all study countries, it found 'that 37.0% of warm-season heat-related deaths can be attributed to anthropogenic climate change and that increased mortality is evident on every continent.'[205]

In relation to Australia, the IPCC observed in 2022 that global warming is already causing hot days and heatwaves to increase in frequency, intensity and duration.[206] The Australian Academy of Science noted that,

> 'Most Australians live in towns and cities and will experience climate change from an urban environment perspective. The greatest risks to urban populations are likely to come from increasing temperatures: we expect more frequent, longer and more intense heatwaves in the future. Increasing periods of extreme heat will likely increase human mortality and morbidity, especially among vulnerable members of the population.'[207]

Below, we set out some of the substantial evidence and scientific consensus that many identifiable population groups in Australia are being placed at real and imminent risk to their lives by rising temperatures and increasing hot days.

- An earlier study of mortality in Brisbane, Sydney and Melbourne found a consistent and significant increase in mortality during heatwaves,[208] but in 2022 the IPCC projected that heat-related excess deaths in those cities will increase by about 300/year (low emission pathway) to 600/year (high emission pathway) during the period 2031–2080.[209]
- At present, deaths in Australia caused by heat, including in combination with humidity, are under-recorded, often being attributed instead to the medical emergency which the heat triggered (eg heart attack or stroke).[210] A 2019 study found heat-related deaths in Australia have been grossly underestimated and that more than 36,000 deaths between 2006 and 2017 were, in fact, attributable to heat.[211]
- Geographical factors may place people in Australia at greater risk of unnatural or premature death from heat. For example, at 2.7°C to 3°C additional warming, some areas of northern Australia, including the capital city Darwin, will be pushed outside the 'human climate niche'.[212] The Australian Academy of Science ('AAS') has predicted that

[205] Vicedo-Cabrera et al., 'The burden of heat-related mortality attributable to recent human-induced climate change', *Nature Climate Change*, 11 (2021).
[206] IPCC, AR6, WGII, Chapter 11: 'Australasia', at 1583.
[207] Australian Academy of Science (AAS), 'The risks to Australia of a 3^{0}C warmer world', 2021, at 53.
[208] Tong S, et al., 'The impact of heatwaves on mortality in Australia: a multicity study', *BMJ Open,* 2014.
[209] IPCC, AR6, WGII, Chapter 11: 'Australasia', at 1584.
[210] T Longden et al., 'Heat-related mortality: an urgent need to recognise and record', *The Lancet: Planetary Health*, 2020, Vol. 4, Issue 5.
[211] T Longden, 'The impact of temperature on mortality across different climate zones'*, Climate Change, 2019.*
[212] B Workman and K Bowen, 'Study finds 2 billion people will struggle to survive in a warming world – and these parts of Australia are most vulnerable', May 23, 2023.

Darwin will have become virtually uninhabitable, with high humidity and as many as 265 days each year on average above 35 degrees.[213]

Table 4. Average number of days per year with maximum temperature above 35°C

	1981–2010	2090 RCP2.6 (~1.5°C)	2090 RCP8.5 (~3°C)
Sydney	3.1	4.5 (3.9 to 5.8)	11 (8.2 to 15)
Melbourne	11	14 (12 to 17)	24 (19 to 32)
Perth	28	37 (33 to 42)	63 (50 to 72)
Brisbane	12	27 (21 to 42)	55 (37 to 80)
Darwin	11	111 (54 to 211)	265 (180 to 322)

RCP2.6 corresponds to around 1.5°C warming over Australia and RCP8.5 corresponds to 3°C warming over Australia (Watterson et al. 2015). Figures in brackets are the 10th and 90th percentiles.

AAS, 'The risks to Australia of a 30C warmer world', 2021, at 53.

- First Nations communities living in Northern Australia's Kimberley, Top End, Cape York Peninsula, Torres Strait and Gulf Country face increasing climate displacement challenges due to rising temperatures, with heat extremes now more frequent and intense, and some regions recording over 43°C for extended periods during summer months.[214] At projected levels of warming, First Nations communities in Northern Australia will face rising threats to life while they remain on traditional country.[215]
- Personal characteristics may place the lives of people in Australia at greater risk from additional heat. Studies are indicating that the mortality impacts of heatwaves vary with certain factors, particularly age, gender, education level, income level, and diabetes prevalence.[216] This accords with the reporting by the IPCC of increased climate vulnerability of certain exposed population groups. In further evidence,
    - A 2025 meta study has confirmed that there is a significant association between exposure during pregnancy to excessive heat, particularly in the first and third trimesters, and increased preterm birth, low birthweight, stillbirth, preeclampsia, miscarriage and/or gestational diabetes.[217]
    - A 2024 study showed the number of young people in NSW who presented to hospitals for suicidal thoughts and behaviours increasing with the daily mean temperature.[218] These increases occurred across a full range of temperatures and on single hot days, not only during heatwaves. The effect

[213] AAS, 'The risks to Australia of a 3^0C warmer world', at 53.
[214] Green, D., et al, 'Heat, health and Indigenous communities in northern Australia', *Medical Journal of Australia*, (2021) 214(11).
[215] Bamblett, L., et al., 'Climate displacement and Indigenous Australians: Community perspectives from the North', *Indigenous Studies Review*, (2022) 17(3).
[216] Tong et al., above; and see P Amoatey et al., above; AAS, 'The risks to Australia of a 3^0C warmer world', at 53.
[217] Masters, C., et al., 'Scoping review of climate drivers on maternal health: current evidence and clinical implications', *AJOG Global Reports*, Vol 5, Issue 1, February 2025.
[218] C Dey et al, 'Youth suicidality risk relative to ambient temperature and heatwaves across climate zones: A time series analysis of emergency department presentations in New South Wales, Australia', *Australian and New Zealand Journal of Psychiatry*, Volume 59, Issue 1, October 2024.

was found to start at a moderate temperature; for example, on days with a 24-hour mean temperature of 21.9°C, there was a 4.7% higher rate of presentations at Emergency Departments than there would have been at a cooler mean of 18.3 °C, the NSW average for spring.

- Of increasing concern is Australia's ageing population, with 23–25% of Australians by 2056 projected to be older than 65. This age group is vulnerable to heat stress, and the increasing frequency of extreme heat events places this group at greater risk of temperature-related mortality.[219]

- Medical conditions may place the lives of people in Australia at greater risk. Heat-vulnerable groups include those living with asthma, diabetes, heart disease or lung, mental health and other relevant conditions.[220] In the pending case of *Mullner v Austria* before the ECtHR, an Austrian citizen with a temperature-dependent form of multiple sclerosis ('MS') has filed a case against the Austrian government for violations of his human rights for failing to set effective climate measures to reduce GHG emissions and mitigate the severity of climate change.[221] In his claim, Mullner explains that most MS patients suffer from an accompanying syndrome which is a temperature-dependent sensitivity, causing patients like himself to lose muscular control more as temperatures rise.

- Cultural factors may place the lives of people in Australia at greater risk. A 2021 Discussion Paper by the Lowitja Institute presents the results of a scoping review of academic and 'grey' literature relating to the direct and indirect impacts of climate change on Aboriginal and Torres Strait Islander health and wellbeing. The Paper concluded that,

> 'there are many, varied direct and indirect climate change impacts on the morbidity and mortality of Aboriginal and Torres Strait Islander people. The "cascading consequences" of climate change will touch every aspect of Aboriginal and Torres Strait Islander livelihoods. It will compound historical injustices, extending colonial processes that disrupted cultural and spiritual connections to Country that are central to health and wellbeing. It will further threaten social and cultural determinants of health including access to Country, traditional foods and other food sources, safe water, appropriate housing, infrastructure, and health services. Health services will struggle operating in extreme weather with increasing demands and a reduced

[219] AAS, 'The risks to Australia of a 3^0C warmer world', at 63.
[220] K Ebi et al., 'Burning embers: synthesis of the health risks of climate change', (2021) *Environmental Research Letters*, 16. And see, for e.g., S Cuschieri et al., 'The interaction between diabetes and climate change – A review on the dual global phenomena', *Early Human Development*, Volume 155, April 2021.
[221] *Mullner v Austria* ('*Mullner*'), App. No. 18859/21 (ECtHR, March 2021).

workforce. All these forces will combine to exacerbate already unacceptable levels of ill health within Aboriginal and Torres Strait Islander populations.'[222]

- Situational characteristics may place the lives of people in Australia at greater risk. Many have factors in their lives which make it difficult for them to avoid heat exposure, for example, heat-vulnerable people for whom outdoor physical work dominates available employment. Another example is heat-vulnerable people who live in urban areas which are increasingly acting as 'heat islands' - areas where the physical environment (typically closely clustered housing with dark roofs and surfaces, expansive concrete and few trees) attracts and traps heat, often aided by the geography.[223] At higher degrees of warming, heat related deaths have been observed to rise in urban areas in Australia.[224]

- Foundational human systems under pressure from weather extremes may place the lives of people, including those in Australia, at greater risk.[225] Examples of life-endangering threats from climate-driven heat on foundational human systems include essential services being overloaded beyond a point which can be managed, energy systems being disrupted; some urban areas becoming persistent heat islands, and health systems becoming overwhelmed. In its most recent report on Australasia, the IPCC described strains on human systems from many climate-driven harms as *already occurring* in Australia, with 'extreme heat [having] caused excess deaths and increased rates of many illnesses', and 'major costs' being borne by governments from 'extreme weather'.[226]

- A particularly important aspect of climate impacts is that 'risks are connected across sectors'.[227] The lives of people with complex intersectionalities of the above risk factors are particularly threatened. They may not have access to adaptation strategies, where there are factors of cost, geography, mobility or cultural difference involved. Numerous studies have linked lower incomes with higher risk of death during hot weather from such common conditions as diabetes or cardiovascular disease, particularly in areas of high population density.[228] As Stein illustrates,

[222] Lowitja Institute, 'Climate Change and Aboriginal and Torres Strait Islander Health', November 2021, at 39.
[223] Heat island effects in cities are known to create severe, heat-related health hazards, and the phenomenon is the reason extreme heat is the leading cause of weather-related deaths in urban environments: S Chapman et al, 'The impact of climate change and urban growth on urban climate and heat stress in a subtropical city', (2019) *International Journal of Climatology*, at 3013.
[224] The authors found increased mortality rates during heatwaves corresponded strongly with living in capital cities in Australia: P Amoatey et al., 'Evaluating the association between heatwave vulnerability index and related deaths in Australia', *Environmental Impact Assessment Review*, 112 (2025).
[225] See generally IPCC, 2018 'Special Report', Chapter 3.
[226] IPCC, AR6, WG II, 'Chapter 11: Australasia', at 1583.
[227] H Bambrick, National Centre for Epidemiology and Population Health, ANU, The Lighthouse (Macquarie University), 8 April 2025.
[228] UQ News, 'Heatwave mortality studies reveal climate change impacts and risk for cities', 18 February 2025. And see, for e.g., QCOSS, '2024 Heat Survey: Surging power prices put Queenslanders' health at risk', 21 March 2024.

> ‘Worldwide over a billion persons with disabilities are disproportionately affected by climate change which threatens their rights to life, health, food, personal mobility, and cultural life. The mortality rate of persons with disabilities in natural disasters is up to four times higher than persons without disabilities. Australians with disabilities are disproportionately at risk from climate change… A 2022 analysis of Australian heatwave fatalities from 2001 to 2018 found that 89 per cent of fatalities had a disability or multiple disabilities. Intersectionally, persons facing multiple discrimination such as First Nations people are disparately impacted.’[229]

The evidence above illustrates some of the ways rising heat-related mortality in Australia is significant and rising yet under-recognised. Vulnerable populations, in particular, are increasingly exposed to real and foreseeable climate-driven threats to their right to life. It is evident that even small increments in temperature rise measurably raise the frequency and severity of extreme heat events and increasingly raise threats to human life.

4.3 Climate-related harms to the right to ‘family and home life’ in Australia

4.3.1 The right to family and home life

The right to respect for privacy, family and home (the ‘right to family and home life’) is contained in Article 17 of the ICCPR. This right is expressed first as a prohibition: ‘1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.’ It is also expressed as a guarantee of protection against arbitrary or unlawful interferences to privacy, family, home and correspondence: ‘2. Everyone has the right to the protection of the law against such interference or attacks.’ The right is understood as an entitlement to positive ‘protection of the law’,[230] through a ‘legislative framework prohibiting such acts by natural or legal persons.’[231] In the context of the present analysis, that will include a prohibition on such acts by fossil fuel companies in Australia.

In relation to the nature and content of the right to family and home life in the context of climate change, the ECtHR in *KlimaSeniorinnen* turned to earlier case law on environmental nuisance

[229] ‘People with disability more vulnerable to climate change’, Law Society of NSW Journal Online, quoting Professor Michael Ashley Stein, Harvard Law School, 16 November 2023.
[230] ICCPR, Article 17(2); and see *Benito Oliveira et al. v. Paraguay* (CCPR/C/132/D/2552/2015) at 8.3; Human Rights Committee, *Portillo Cáceres et al. v. Paraguay* (‘*Portillo Cáceres’)* (CCPR/C/126/D/2751/2016), para. 7.8.
[231] UN Human Rights Committee (HRC), CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, 8 April 1988, at [1] and [9].

and Article 8, describing these decisions as providing 'some inspiration' for developing the law in this regard.[232] The Court concluded that,

> '… having regard to the causal relationship between State actions and/or omissions relating to climate change and the harm, or risk of harm, affecting individuals, Article 8 must be seen as encompassing a right for individuals to effective protection by the State authorities from serious adverse effects of climate change on their life, health, well-being and quality of life.'[233]

The sub-national human rights statutes in Australia include the right to family and home life, in essentially identical terms to Article 17.[234] Each requires public entities to act and make decisions in ways which are compatible with the human rights protected in the *Acts*. In *Director of Housing v Sudi*, the Victorian *Charter* right identical to that in ICCPR Article 17 was interpreted as one which 'ensure[s] everybody can develop individually, socially and spiritually in that sphere, which provides the civil foundation for their effective participation in democratic society.'[235] In *Youth Verdict*, the Queensland Land Court concluded that approval for the coal mine in question would unjustifiably limit the right to family and home life in Queensland (among other rights), particularly referring to its contribution to 'sea level rise and plans to relocate up to 2,000 people from the Torres Strait.' [236]

There are numerous elements to be established in an individual claim under ICCPR Article 17, each of which has been defined or clarified in the jurisprudence under the ICCPR or under regional or national human rights law. 'Interference' must be actual and a certain level of severity must be attained,[237] with a 'direct and immediate' link between the harm complained of and the individual's private or family life or home; a general deterioration of the environment will not be enough.[238] The jurisprudence has generally included actual or severe risk of damage to a person's physical or mental health or quality of life that interferes with the enjoyment of their private or family life or home.[239] A finding by the ECtHR of actual interference or of a sufficiently serious risk of such will depend on an assessment applying criteria similar to the victim status

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[232] *KlimaSeniorinnen,* [422].
[233] *KlimaSeniorinnen,* {519].
[234] Section 25, Queensland *Human Rights Act 2019*; s.13, Victorian *Charter of Human Rights and Responsibilities Act 2006*; s.12, ACT *Human Rights Act 2004*.
[235] *Director of Housing v Sudi* [2010] VCAT 328, [29] per Justice Bell.
[236] *Youth Verdict,* [1626]. The right in s.25 of Queensland *Act* is identical in its terms to ICCPR Article 17.
[237] *KlimaSeniorinnen,* [514]; *Çiçek and Others v. Turkey* (dec.), no. 44837/07, [22], 4 February 2020; *Pavlov and Others v. Russia*, no. 31612/09, [59], 11 October 2022.
[238] *KlimaSeniorinnen,* [515]; *Ivan Atanasov v. Bulgaria*, no. 12853/03, [66], 2 December 2010; *Hardy and Maile v. the United Kingdom*, no. 31965/07, [187], 14 February 2012; *Kyrtatos v. Greece*, no. 41666/98, [52], ECHR 2003-VI.
[239] *Dubetska and Others v. Ukraine*, judgment of 10 February 2011, application No. 30499/03, [105]; and see *KlimaSeniorinnen*, [435] and [515]-[516] and *Daniel Billy,* [8.10]-[8.12]; and see, for e.g., the risks posed by the possibility of explosion due to escaped LNG in *Hardy and Maile v United Kingdom* [2012] ECHR 261 (14 February 2012); the risk of being made more vulnerable to illness because of pollution in *Jugheli and Others v. Georgia*, no. 38342/05, 13 July 2017; the health risks posed by a cemetery located too close to a residence and water supply in *Dzemyuk v. Ukraine* no. 42488/02, 4 September 2014.

requirements,[240] which that Court held were 'determinative for establishing whether Article 8 rights are at stake and whether this provision applies.'[241]

Unlike ECHR Article 8, ICCPR Article 17 and Australian sub-national human rights laws expressly protect not only against unlawful but also 'arbitrary' interference. In the UN HRC's view, 'the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.' [242] For 'family' and 'home', the objectives of the ICCPR require that the term 'family' is given a broad interpretation,[243] while 'home' has been understood as a place where a person resides or carries out their usual occupation.[244]

In the climate change context, the harm involved will generally be the effectively irreversible worsening of climate extremes. The interference caused by the harm will be the collection of impacts on the individuals resulting from the worsening climate extremes. These include both general impacts, such as a permanently raised levels of threat, and specific impacts, such as more frequent and intense inundation or hot days.

For human rights harms claims brought by associations in the ECtHR, the question of actual interference is slightly different as there is no requirement for the association to show that the members would have met the individual victim status requirements.[245] Inherent in the Court's finding in *KlimaSeniorinnen* that the association had standing, however, was the ample general evidence that older women experience specific threats or adverse effects from climate change to their lives, health or well-being.[246] More broadly the Court acknowledged that the scientific evidence demonstrated the contribution of climate change to increased morbidity and mortality among more vulnerable groups.[247] Its reasoning behind allowing claims by associations included 'climate change as a common concern of humankind and the necessity of promoting intergenerational burden-sharing in this context.'[248] The Court also recognised the risk of irreversibility and severity of the effects of climate change, which included risks to individuals'

[240] *KlimaSeniorinnen,* [520].
[241] *KlimaSeniorinnen,* [520].
[242] UN Human Rights Committee (HRC), CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, 8 April 1988, at [4]. And see Kingham P, that 'arbitrariness' in the context of this right refers to a limit that is 'capricious, or has resulted from conduct which is unpredictable, unjust or unreasonable in the sense of not being proportionate to the legitimate aim sought': *Youth Verdict,* [1629].
[243] *Francis Hopu and Tepoaitu Bessert v. France*, Communication No. 549/1993, U.N. Doc. CCPR/C/60/D/549/1993/Rev.1. (1997), [10.3]
[244] Human Rights Committee, *Portillo Cáceres,* [7.8]. And see *Daniel Billy* [8.12] and *KlimaSeniorinnen* [514]-[517].
[245] *KlimaSeniorinnen,* [502].
[246] *KlimaSeniorinnen,* [66]-[67].
[247] *KlimaSeniorinnen,* [478].
[248] *KlimaSeniorinnen,* [499].

rights in the future if action were not taken now.[249] Any complaints to the Court, however, could not be in the abstract.[250]

4.3.2 Illustration: Asthma and personal adaptation imperatives as 'arbitrary interference' in the right to family and home life

A concern which has arisen in some of the jurisprudence relating to climate change and people's home lives, such as in *Daniel Billy*, is the extent to which personal adaptation actions, made imperative by rising temperatures for protecting one's own life, health, livelihood, property, cultural practices or personal security from climate-related threats, themselves constitute 'interference' in the right to family and home life. The concern is well illustrated by the example of climate change and asthma.

In 2022, around 2.8 million (11%) people in Australia were estimated to be living with asthma.[251] This is a significantly higher rate than the incidence in the global population.[252] Asthma is also highly prevalent in children in Australia, affecting 8.5% of all children aged between 0 and 14 years old; it also remains the leading cause of disease burden in this age group.[253] Asthma is a potentially life-threatening condition. Multiple studies have revealed that extreme weather events elevate asthma risks across various climates, particularly during summer and winter months.[254] Asthma is susceptible to triggering by events such as drought, flooding, high humidity, wildfires, sand or dust storms, and thunderstorms, where they lead 'to increases in air pollution, pollen season length, pollen and mould concentration, and allergenicity of pollen.'[255]

Incremental increases in global mean temperatures are changing Australia's climate, increasing the likelihood of extreme weather and indirect events like bushfires and floods occurring more frequently and with greater intensity. For asthmatics, particularly those with a high level of exposure to the threats and who are within vulnerable population groups, this creates the possibility of a personal, direct and severe interference with their right to family and home life. For example, it is likely that thunderstorms will increase in frequency and intensity in Australia as global mean temperatures rise.[256] In 2016, what has been described as 'the world's largest,

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[249] *KlimaSeniorinnen,* [499].
[250] *KlimaSeniorinnen,* [487].
[251] ABS, National Health Survey,
[252] In 2019, the estimated number of people with asthma globally was 262 million, just over 3% of the global population: https://www.who.int/news-room/fact-sheets/detail/asthma. However, a recent New York Times report states that 'nearly half of Americans, or roughly 156 million people, are living with unsafe levels of air pollution, the American Lung Association found in April. And about a quarter, or 81 million, have seasonal allergic reactions to pollen from trees, grasses and weeds, according to the Asthma and Allergy Foundation of America': 'Do I really need an air purifier?', 2 July 2025.
[253] Australian Institute of Health Welfare. 'Asthma', 2023.
[254] Goshua A. et al., 'The Role of Climate Change in Asthma', *Advances in Experimental Medicine and Biology*, Jan 2023, 1426; Wang J. et al., 'Effects of climate and environmental factors on childhood and adolescent asthma: A systematic review based on spatial and temporal analysis evidence', *Science of the Total Environment*, 951; Rorie, A et al., 'The Role of Extreme Weather and Climate-Related Events on Asthma Outcomes', *Immunol Allergy Clin North Am.,* 2021, 73.
[255] Goshua A. et al., 'The Role of Climate Change in Asthma', *Advances in Experimental Medicine and Biology*, Jan 2023, 1426.
[256] See e.g., CSIRO, 'Australia's changing climate', but note that '[p]rojections for rainfall, thunderstorms, hail, lightning and tornadoes have large uncertainties': IPCC, AR6, WGII, Chapter 11, 'Australasia', at 1590.

most catastrophic epidemic thunderstorm asthma event'[257] occurred in Melbourne, due to high pollen counts coinciding with thunderstorms. This resulted in 3,365 people presenting to hospital emergency departments over a period of just 30 hours, and in 10 deaths.[258] These data compare with an average rate of asthma-related deaths in Australia as a whole in 2023 of 1.3 per day,[259] and of 265.8 emergency department presentations per day at public hospitals for asthma in the 2022-23 financial year.[260] The potential role of climate change in this event has been referred to in one analysis.[261]

Fire weather, too, is projected to increase in frequency, severity and duration in southern and eastern Australia.[262] The 2019-20 bushfires in Australia were of a magnitude and ferocity that would have been 'virtually impossible' without the increase in temperatures due to climate change.[263] The fires led to increased hospitalisation rates for asthma.[264] Large increases at a state and territory level included a 25% increase in the weeks beginning 8 December 2019 and 5 January 2020 in NSW; a 95% increase in the week beginning 12 January 2020 in Victoria; and a 36% increase in the week beginning 10 November 2019 in Queensland.

The general direction of advice from government, expert and public health sources to asthmatics in the face of the rising risk to their lives and health from climate-driven weather extremes is to adopt self-protection. For example, the Asthma Council of Australia recommends that, during a bushfire, people with asthma reduce their exposure to smoke by staying indoors with their doors and windows closed.[265] Healthline advises asthmatics on poor air quality days to 'stay indoors as much as possible, avoid outdoor exercise and outdoor activities such as mowing the lawn'[266] The NSW Government exhorts people with asthma, on days of smoke or poor air quality, to 'STAY INDOORS as much as possible with windows and doors closed until outdoor air quality is better'.[267] The 2016 thunderstorm event in Melbourne caused the Victorian government to initiate an 'epidemic thunderstorm asthma risk forecast' system between October and December each year. Recommended advice for people with asthma during a thunderstorm event includes staying indoors with doors and windows closed and switching off air conditioning, including

[257] Thien F, Beggs PJ, Csutoros D, Darvall J, Hew M, Davies JM, Bardin PG, Bannister T, Barnes S, Bellomo R, Byrne T, Casamento A, Conron M, Cross A, Crosswell A, Douglass JA, Durie M, Dyett J, Ebert E, Erbas B and French C (2018) 'The Melbourne epidemic thunderstorm asthma event 2016: an investigation of environmental triggers, effect on health services, and patient risk factors', *Lancet Planet Health*, 2(6), at e255.
[258] F Thien et al., at e255.
[259] National Asthma Council, Oct 2024.
[260] Asthma Australia, 'Asthma Australia South Australia Pre-Budget Submission 2024-25', February 2023, at 3.
[261] F Thien et al, at e260.
[262] IPCC, AR6, WGII, 'Chapter 11: Australasia', at 1599.
[263] Australian Climate Accountability Project, 'Escalation', at 22.
[264] See generally: Australian Institute of Health and Welfare 2020. Australian bushfires 2019–20: Exploring the short-term health impacts. Cat. no. PHE 276. Canberra: AIHW; Australian Institute of Health and Welfare, Data update: Short-term health impacts of the 2019–20 Australian bushfires, 12 November 2021.
[265] Asthma Council of Australia, 'Bushfires and Asthma'.
[266] Healthline, 'How you can manage asthma on poor air quality days'.
[267] NSW Government, 'Air quality: health advice'.

evaporative air conditioning.[268] Outdoor workers with asthma are advised to minimize their exposure to conditions which place their health in danger, including not working.[269]

While these self-protective steps are eminently sensible and necessary, they are also actions which have been made necessary by a set of climate change-driven interferences (in the form of increased incidence of threats) in the home lives of people with asthma. The weather extremes now occurring more frequently and more intensely as a result of Australia's deteriorating climate are capable of creating a very substantial level of intrusion in the lives of many people in Australia, one which is predicted to escalate with every fraction of a degree of warming. As explained previously, courts are now recognizing that certain climate-related impacts can constitute interference with the right to family and home life, particularly when they reach sufficient intensity and duration. The impacts which have been recognised include both actual damage and a sufficiently severe threat or risk of damage, including through health impacts, forced displacement and relocations, lifestyle restrictions and adaptations, cultural and traditional impacts, environmental degradation (where relied upon for wellbeing), resources security impacts (food, water), economic and emotional stress, and key services/infrastructure degradation. For people with asthma, adverse impacts on their home lives may include more frequent periods of illness, which may be severe and require hospitalization.

Moreover, the self-protective actions necessary in response to the intensifying climate threats can constitute a second form of interference. Adopting the recommended personal adaptation measures, which are necessary for health, wellbeing and even survival, may simply change the elements of the interference in family and home life, without reducing or removing it. There is some recognition of this in the jurisprudence, particularly when the need to adopt self-protective measures reaches considerable intensity and duration. For example, the 2019-20 bushfires in Australia lasted between five and six months.[270] Broadly, the responses made imperative for personal safety have included health responses, forced displacement and relocations, lifestyle restrictions and adaptations, curtailed cultural and traditional practice, adjustments driven by economic and emotional stress, and alterations to protect personal security (such as moving closer to essential resources and services).

This form of interference has been identified as particularly harming those in vulnerable population groups. An important aspect of climate impacts generally is that 'risks are connected across sectors'.[271] Adopting the necessary self-protective measures or following the official health advice may be especially onerous for people with asthma who are also members of certain vulnerable population groups. In 2022, people living in areas of most disadvantage in

[268] Victorian Government, 'Thunderstorm Asthma'.
[269] See, in relation to heat and outdoor work, Fatima et al., 'Impacts of hot climatic conditions on work, health, and safety in Australia: A case study of policies in practice in the construction industry', (2023) *Safety Science*, Vol. 165, at Part 1.4.
[270] Australian Institute of Health & Welfare, 'Australia's bushfires 2019-20: Exploring the short-term health impacts', November 2021.
[271] Bambrick, The Lighthouse, 8 April 2025.

Australia were more likely to have asthma than those living in areas of least disadvantage; people living with disability were more likely than those with no disability to have asthma.[272] For many in these groups, air conditioning may be an unaffordable luxury. Other adverse health harms may be triggered on hot days when people with asthma follow health advice by turning their air conditioners off.[273] Self-protection for people with asthma may also mean taking time away from work, which may not be possible financially; missing days at school, jeopardising a child's education; or not engaging as much in exercise or sport, losing those health benefits. In these and other ways, a person's personal circumstances may determine not only the intensity of their direct exposure to the interference but also the severity of the effects of the interference from a worsening climate on their quality of family and home life.

In both *Daniel Billy* and *KlimaSeniorinnen*, these issues were raised by the facts and in the reasoning. In both cases, no violation or impairment of the right to life was found because reasonably available adaptation and self-protective actions could be taken by the claimants to obviate serious risk to their lives. In *Daniel Billy,* the authors had submitted that their islands would be uninhabitable in 10 to 15 years. The HRC considered this timeframe was sufficient for Australia to take measures to 'protect [through current and future adaptation measures] and, where necessary, relocate the alleged victims.'[274] Yet the extreme situation of individuals having to abandon their homes due to sea level rise was then held by the Committee to be physical interference with the home which crossed a line beyond the personal adaptation action which can reasonably be asked of individuals under threat. [275] Indeed, the degradation and loss of traditional land was the basis of the finding of interference with family and home life by Australia, due its failure to put in place adequate adaptation measures.

Rising heat is similarly capable of affecting certain populations in ways which constitute an interference in their homes self-protective responses which act as a different form of interference, such as abandonment of their homes. For example, First Nations communities living in Northern Australia's Kimberley, Top End, Cape York Peninsula, Torres Strait and Gulf Country face increasing climate displacement risk due to rising temperatures, with heat extremes now more frequent and intense, and some regions recording temperatures of over 43°C for extended periods during summer months. Heat is also affecting the environment, limiting access to traditional foods and resources, interfering with some cultural activities, and disrupting cultural and spiritual connections to Country that are central to health and wellbeing. Rising heat will increasingly threaten social and cultural determinants of health, including access to Country and to practise culture, traditional foods and other food sources, safe water,

[272] ABS, 'Health conditions and risks: Asthma'.
[273] The IPCC points to a 2012 study which found that air conditioning in Australian homes reduces mortality in heatwaves by up to 80%: IPCC, AR6, WGII, 'Chapter 11: Australasia', at 1624.
[274] *Daniel Billy,* [8.7].
[275] *Daniel Billy,* [8.9]-[8.12].

appropriate housing, infrastructure, and health services. Yet abandonment of their traditional Country would be a devastating adaptive step of the most severely interfering kind.

In *Klimaseniorinnen,* the Court 'accepted that heatwaves affected the applicants' quality of life' but reasoned that '[i]t cannot be said that the applicants suffered from any critical medical condition whose possible aggravation linked to heatwaves could not be alleviated by the adaptation measures available in Switzerland or by means of reasonable measures of personal adaptation given the extent of heatwaves affecting that country.'[276] The Court had recognised the risk of irreversibility and severity of the effects of climate change, which included risks to individuals' rights in the future if action were not taken now, but, in the meantime, personal adaptation measures were open to them to minimise their risk.[277] In their evidence, the women described needing, for reasons of personal safety, to adapt their lifestyles during hot weather by only going out during cooler periods of the day, staying indoors for most of the day, requiring the provision of special clothing to stay cool, and refraining from recreational activities. These personal adaptation measures had acted as restrictions on the women's interactions with family and friends and had led to isolation.[278]

For now, it remains unclear where the line is to be found at which an expectation by the State that individuals will take personal adaptation steps to mitigate the risks to them, such as asthma attacks, from climate extremes becomes an interference in its own right in the family and home life of the adapting individuals.[279] For vulnerable population groups in Australia, the line between personal adaptation expectations and impermissible interference in family and home life is of real significance. Population groups with underlying health conditions or other vulnerabilities exacerbated by the extremes represent significant segments of Australia's population. For example, 23–25% of Australians will be aged 65 or above by 2056, and people living with asthma, diabetes, heart or lung disease, mental health and other heat-relevant conditions already number in the millions in Australia. Moreover, climate-related impacts and threats will rise in frequency, intensity and duration in tandem with rising emissions and global mean temperatures over the coming period. Every rise in global mean temperature and in resulting increased risk means that the necessary personal adjustments to people's home lives are likely to be increasingly intrusive and to be permanently required.

The evidence above illustrates the way in which worsening climate extremes in Australia, particularly heatwaves, bushfires, and air pollution, can force certain population groups, such as people with asthma, to adjust their personal and domestic activities in ways that curtail their everyday lives. Being compelled to avoid dangers exacerbated by worsening climate change

[276] *KlimaSeniorinnen,* [532] – [533].
[277] *KlimaSeniorinnen,* [499].
[278] *KlimaSeniorinnen,* [15]-[21].
[279] Note that in *Pabai*, Wigney J dismissed as 'fanciful' the Commonwealth's submission that the applicants were not vulnerable to harm as they could protect themselves by building their own seawalls: *Pabai*, [1172].

can, itself, constitute a sustained interference with people's ability to enjoy their family, privacy, and home life.

4.4 Climate change-driven harms to other human rights

Climate change, of course, has the potential to impact many other human rights adversely. The ICJ began its human rights law analysis from the basis that 'anthropogenic GHG emissions have an adverse impact on the climate system and other parts of the environment.[280] It noted the ample factual evidence, including that 'the IPCC has underscored the interdependence between the vulnerability of human populations and that of ecosystems,' and concluded that

> 'degradation of the climate system and of other parts of the environment impairs the enjoyment of a range of rights protected by human rights law. The Court is thus of the view that the adverse effects of climate change, including, inter alia, the impact on the health and livelihoods of individuals through events such as sea level rise, drought, desertification and natural disasters, may significantly impair the enjoyment of certain human rights.'[281]

Climate change, human systems and vulnerability

The IPCC has warned that climate change poses threats to foundational 'human systems',[282] many of which 'stand between' individuals in climate-vulnerable groups and harms to them from extreme weather, as well as providing access to health services, food and water, education, safe housing, energy, transport and more. Climate-vulnerable individuals and population groups tend to depend particularly on such systems, and the threats from weather extremes create additional, foreseeable and serious risks to their health, wellbeing and even their lives.

Examples of climate-driven threats to human systems include essential services being overloaded beyond a point which can be managed; fresh food and safe water systems repeatedly being rendered insecure; energy systems being disrupted; some settlement areas becoming persistent heat islands; and health systems becoming overwhelmed, with cascading extreme weather, vector- and water-borne diseases, and psychological stress all straining capacity.

The IPCC has identified human systems in Australia which are exposed to climate hazards, to greater or lesser extents. They include governance systems and institutions; essential services; food and water systems; energy systems; economic systems; social systems; settlement

[280] ICJ, Advisory Opinion No. 187, [375].
[281] ICJ, Advisory Opinion No. 187, [376].
[282] The IPCC here defines a human system as, 'any system in which human organizations and institutions play a major role. Often, but not always, the term is synonymous with society or social systems. Systems such as agricultural systems, urban systems, political systems, technological systems and economic systems': IPCC, 2018, *Global warming of 1.5C*, 'Annex I: Glossary', at 551.

systems; health systems; human-related natural systems; and natural environments.[283] The IPCC described strains on human systems from many climate-driven harms as already occurring in Australia, with 'extreme heat [having] caused excess deaths and increased rates of many illnesses', and 'major costs' being borne by governments from 'extreme weather'.[284] The same report warns of *future* climate hazards for Australia,[285] including the risk of a future,

> 'inability of [Australian] institutions and governance systems to manage climate risks. For example, the scale and scope of projected climate impacts [might] overwhelm the capacity of institutions, organisations and systems to provide necessary policies, services, resources and coordination.'[286]

Australia, too, is concerned about the impacts of climate hazards - particularly extreme heat - on its significant human systems and is currently in the process of assessing its national climate risk from within a national systems framework.[287]

Economic and social rights

These human systems impacts further imperil, in particular, certain human rights set out on the ICESCR, including the right to an adequate standard of living, the right to health, the right to safe and healthy working conditions and the right to practice culture. States' obligations in relation to the 'economic and social rights' in ICESCR are, to an extent, less immediate than for those in the ICCPR, being obligations of progressive realisation to the maximum of the State's available resources. Moreover, there are limited avenues for claims, the vast majority of states (including Australia) not having adopted the Optional Protocol to the ICESCR, which provides for an individual communications process to the ESCR Committee.

The ICJ drew on an ample literature when concluding in its Advisory Opinion that climate change threatens the ability of individuals to enjoy the (ICESCR Article 12) right to the highest attainable standard of physical and mental health. However, there has been no jurisprudence directly relating to climate change-exacerbated harms to the right to health, and the right is not included in major human rights conventions such as the ECHR. While there is a right to health in the Queensland *Human Rights Act*, the right is framed essentially as a prohibition on discrimination in the provision of health services, as opposed to a guarantee of protection against threats to health. Yet it is notable that health-related climate impacts have tended to be at the heart of harms to the right to life and the right to family and home life which have been recognised in the jurisprudence. Indeed, health-related impacts are also a key mechanism for

[283] IPCC, 'Chapter 11: Australasia', AR6, WGII, at 1648-1649
[284] IPCC, 'Chapter 11: Australasia', AR6, WGII, at 1583.
[285] IPCC, 'Chapter 11: Australasia', AR6, WGII, particularly at 1584 and 1623.
[286] IPCC, 'Chapter 11: Australasia', AR6, WGII, at 1584.
[287] DCCEEW, 'National Climate Risk Assessment: First Pass Assessment Report', 2024, at 9.

climate-related harm in relation to the rights to 'safe and healthy working conditions' (ICESCR Article 7(b)) and to 'take part in cultural life' (ICESCR Article 15(1)(a)).

The ICJ noted that climate change may impair or hinder enjoyment of the (ICESCR Article 11) right to an adequate standard of living, which encompasses access to food, water and housing.[288] In *Daniel Billy*, the HRC concluded that factors weighing strongly in finding that Australia had violated the Torres Strait Islanders' right to privacy, family and home life (ICCPR Article 17) were the destructive effects of climate change on their housing, food sources and physical and mental health.[289] However, there is no recognition in the Australian sub-national human rights statutes of a right to an adequate standard of living.[290]

One strong concern in the link between economic and social rights, climate hazards and particular dependence on human systems relates to the identification of a dynamic relationship between climate vulnerability and social inequalities. The relationship has been described in a paper for the UN Department of Economic and Social Affairs ('DESA') as,

> 'characterized by a vicious cycle, whereby initial inequality causes the disadvantaged groups to suffer disproportionately from the adverse effects of climate change, resulting in greater subsequent inequality.'[291]

The IPCC's reports support this finding and predict that increased climate risks will also increase existing vulnerability in Australia, through 'exacerbat[ing] existing … social inequalities and inequities'. These include inequalities and inequities 'between Indigenous and non-Indigenous Peoples and between generations, rural and urban areas, incomes and health status.' The IPCC concluded in its 2020 report on 'Risk' that what places these groups at escalated climate risk is an insufficiency of resilience, equity and justice, adaptation and transformation, each of which it describes as 'entry points' for risk.[292] Confirming this, a 2022 study reviewed evidence of the health risks posed by climate change for Indigenous (First Nations) Australian populations in New South Wales compared to non-Indigenous populations. It concluded that reducing the inequality *now* between Indigenous and non-Indigenous populations will build climate resilience and help prevent climate impacts from driving even deeper inequality.

The IACtHR in its recent Opinion 'warn[ed] that climate change is a determining factor that aggravates inequality and multidimensional poverty as it directly affects the goods and services

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[288] ICJ, Advisory Opinion No. 187, [380].
[289] *Daniel Billy*, [8.12].
[290] Note that insufficient protections apply for residential tenancies as climate extremes intensify. For example, installing air conditioning is not a requirement for landlords in the sub-tropical capital city of Brisbane: 'Minimum housing standards fact sheet – general tenancies'.
[291] S Islam and J Winkel, 'Climate Change and Social Inequality', UN Department of Economic and Social Affairs ('DESA'), (2017) Working Paper No. 152, at 2.
[292] In similar vein, Islam and Winkel have identified three main channels through which the inequality-aggravating effect of climate change materializes: 'First, inequality increases the exposure of the disadvantaged social groups to the "adverse effects of climate change" ("climate hazards," for short). Second, given the exposure level, inequality increases the disadvantaged groups' susceptibility to damages caused by climate hazards. Third, inequality decreases these groups' relative ability to cope with and recover from the damages they suffer': Islam and Winkel (2017), at 2.

essential for a dignified life. This phenomenon will negatively impact all dimensions of poverty by increasing hunger, reducing access to safe drinking water and basic sanitation, reducing crop yields, increasing malnutrition and the incidence of diseases such as malaria, dengue fever and heat stress, as well as destroying housing and limiting access to education.[293] Judge Charlesworth in her Separate Opinion to the ICJ Advisory Opinion reiterated such concerns and concluded that 'States have a particular obligation to protect the human rights of vulnerable groups. This requires close attention to the potentially discriminatory effects of measures taken to respond to climate change.'[294]

The right to a healthy environment

Effectively inseparable from all human rights is the right to a healthy environment, which includes a healthy climate. The 2018 Advisory Opinion of the IACtHR recognized the right to a healthy environment as an autonomous right deriving from other rights in the American Convention on Human Rights (particularly Article 26) and the Charter of the Organisation of American States.[295] In 2020, the UN Special Rapporteur on Human Rights and the Environment noted that the right was explicitly included in regional treaties ratified by 126 States and that 80 percent of the member States of the UN legally recognised the right.[296] The South Korean Constitutional Court in 2024 ruled that the State had violated its constitutional obligation to protect the fundamental rights of the people, including the constitutional right to a healthy environment, in relation to its national greenhouse gas reduction target.[297] Also in 2024, the Montana Supreme Court found that an Act restricting consideration of greenhouse gas emissions and corresponding climate change impacts in environmental reviews violated the right to a clean and healthful environment provided for in the state's constitution.[298]

In 2022, the UN General Assembly passed a resolution recognizing the human right to 'a clean, healthy and sustainable environment' and identified climate change as one of the most serious threats to the right.[299] In 2025, the right was recognised in the *Human Rights Act* of the ACT. However, the right has not yet been incorporated expressly into the international human rights conventions, nor is it recognised in the ECHR. The ECtHR has noted that the recognition of the right by the UN General Assembly 'forms part of the international-law context in which the Court

[293] IACtHR, Advisory Opinion 32, [623].
[294] Separate Opinion of Judge Charlesworth, https://www.icj-cij.org/sites/default/files/case-related/187/187-20250723-adv-01-08-en.pdf, [29].
[295] Inter-American Court of Human Rights ('IACtHR'), Advisory Opinion OC-23/17 (15 Nov.2017). The IACtHR enforced the right in 2020: Case of the *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 420, ¶ 305 (Feb. 6, 2020).
[296] UN Special Rapporteur on Human Rights and the Environment, 'Right to a healthy environment: good practices', (A/HRC/43/53), [10] & [13].
[297] *Do-Hyun Kim et al. v. South Korea*.
[298] *Held v. State of Montana*.
[299] United Nations, Resolution adopted by the General Assembly on 28 July 2022: 'The human right to a clean, healthy and sustainable environment', A/RES/76.300.

assesses Convention issues before it …, notably as regards the recognition by the Contracting Parties of a close link between the protection of the environment and human rights'.[300]

In July 2025, the IACtHR issued a second Advisory Opinion in which it concluded, among other things, that the right to a healthy environment under the Inter-American Human Rights system contains a right to a 'healthy climate'.[301] Relatedly, the Court determined that States have clear obligations to regulate climate-damaging corporate activity,[302] adopt ambitious climate targets grounded in science and equity,[303] and avoid irreversible harms to human life and the environment.[304] It also affirmed that States are prohibited from causing irreversible environmental damage.[305]

This Opinion was closely followed by that of the ICJ. Citing multiple sources identifying a human right to a clean, healthy and sustainable environment (including UN General Assembly 76/300 of 28 July 2022),[306] the ICJ took the view,

> 'that a clean, healthy and sustainable environment is a precondition for the enjoyment of many human rights, such as the right to life, the right to health and the right to an adequate standard of living, including access to water, food and housing. The right to a clean, healthy and sustainable environment results from the interdependence between human rights and the protection of the environment. Consequently, in so far as States parties to human rights treaties are required to guarantee the effective enjoyment of such rights, it is difficult to see how these obligations can be fulfilled without at the same time ensuring the protection of the right to a clean, healthy and sustainable environment as a human right. The human right to a clean, healthy and sustainable environment is therefore inherent in the enjoyment of other human rights. The Court thus concludes that, under international law, the human right to a clean, healthy and sustainable environment is essential for the enjoyment of other human rights.'[307]

The rights of 'climate vulnerable' groups

The ICJ Advisory Opinion noted that certain population groups have been identified as especially vulnerable to harms from climate change.[308] In a Separate Opinion, Justice Charlesworth observed that '[i]t is widely observed that the adverse effects of climate change

[300] *KlimaSeniorinnen,* [448].
[301] IACtHR Advisory Opinion 32, [300].
[302] IACtHR Advisory Opinion 32, [347]-[350].
[303] IACtHR, Advisory Opinion 32, [216] and [236].
[304] IACtHR, Advisory Opinion 32, [269].
[305] IACtHR, Advisory Opinion 32, at B.1.3.
[306] ICJ, Advisory Opinion No. 187, [388] – [392].
[307] ICJ, Advisory Opinion No. 187, [393].
[308] ICJ, Advisory Opinion No. 187, [382]-[384].

are felt more intensely by people who are already marginalized because of their social, economic, political or cultural status, age or physical abilities.'[309]

Women and children. The ICJ Advisory Opinion further noted that 'climate change impairs the enjoyment of the rights of women, children and Indigenous peoples'[310] The climate crisis disproportionately affects women and girls, who make up the majority of the world's poor and are often responsible for securing natural resources like food, water, and firewood for their families.[311] The UN starkly illustrates the heightened climate exposure and vulnerability of women by citing the fact that, '[w]hen extreme weather disasters strike, women and children are 14 times more likely to die than men, mostly due to limited access to information, limited mobility, decision-making, and resources. An estimated 4 out of 5 people displaced by the impacts of climate change are women and girls. Acute disasters can also disrupt essential services'.[312]

First Nations people. Similarly, climate change poses extremely serious threats to the rights of First Nations peoples in Australia. The right for a member of any minority to enjoy their own culture is protected and guaranteed under ICCPR Article 27. Australia has been found by the UN HRC, acting in its role considering individual communications (complaints), to have breached its obligations in relation to this right in the context of climate change.[313] Much of the Committee's reasoning regarding the content of the right to enjoy culture in the context of climate change is similar to, if not the same as, that regarding the ICCPR Article 17 right to family and home life.[314] In 2019 in *Daniel Billy*, the HRC concluded that climate-driven harms to the way of life of the community on its traditional lands, whether by the destruction of crops and other food sources or by the washing away of land on which cultural ceremonies are held, constituted both an interference with the right to family and home life and an impairment of the right to enjoy culture.[315] In *Pabai*, while acknowledging the devastating impacts of climate change on the Torres Strait and the unique connection Torres Strait Islanders have with their land and culture, the Federal Court held that loss of culture (*Ailan Kastom*) due to climate change impacts is not currently recognized as a compensable form of damage under Australian law.[316]

Although *Pabai* was not argued as a human rights case, a vast amount of evidence setting out climate-related harms was not contested by the Respondent Commonwealth. The Federal Court concluded that,

> 'climate change has had, and is continuing to have, significant and deleterious impacts on the Torres Strait Islands…. [and the] impacts of climate change on the Torres Strait

[309] ICJ, Separate Opinion of Judge Charlesworth, [14].
[310] ICJ Advisory Opinion No. 187, [382].
[311] UN, Climate Action: Why women are key to climate action.
[312] UN, Climate Action: Why women are key to climate action.
[313] *Daniel Billy, [8.14].*
[314] *Daniel Billy,* [8.9]-[8.14].
[315] *Daniel Billy, [8.12].*
[316] *Pabai*, [1134].

> Islands are real and are worsening…. [C]hanges which have had perhaps a less direct but nonetheless significant impact on Torres Strait Islanders' way of life, include: changes in the timing or arrival of the seasons; changing migratory patterns of birds; changes in the breeding seasons or patterns of certain marine life; and changes in the timing of the flowering and fruiting of certain plants. Torres Strait Islanders traditionally conducted their gardening, hunting and gathering and cultural practices by reference to the patterns and timing of those types of natural phenomena. Torres Strait Islanders accordingly now perceive there to be a misalignment or discord between the natural phenomena and their traditional way of life. That has in turn made it difficult for the elders in the community to pass on their traditional knowledge and cultural practices to the younger generation.'[317]

Even while climate change presents serious, and essentially permanent and irreversible, threats to children's rights,[318] there has been no significant climate change-related jurisprudence focusing purely on the rights of the child.[319] Cases raising the position of children have mostly been framed, instead, in terms of recognising the rights of future generations and have tended to involve consideration of rights contained in a domestic constitution.[320] Importantly, some courts have recognised that States need to act now to mitigate climate change impacts in order to avoid an increased burden on future generations.[321] For example, this has informed the ECtHR's assessment of Switzerland's obligations with regard to the right to family and home life in the context of climate change.[322] However, in April 2025, nine young people in Australia made a formal complaint to the UN Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change, in which they alleged violations by Australia of the UN Convention on the Rights of the Child.[323] The claim stated 'that Australia is violating its responsibility to protect the human rights of the Complainants by failing to take sufficiently ambitious action to mitigate the effects of climate change on the Complainants, in relation to activities within Australia's jurisdiction or control resulting in anthropogenic GHG emissions that fuel climate change.'[324]

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[317] *Pabai*, [713]-[714].
[318] See, for e.g., Committee on the Rights of the Child, General Comment No. 26 (2023) on children's rights and the environment, with a special focus on climate change, RC/C/GC/26, 23 August 2023.
[319] The exception is the 2019 conclusion of the UN Committee on the Rights of the Child ('CRC') in *Sacchi, et al. v. Argentina, et al*, ('*Sacchi*') 8 October 2021, where the Committee rejected the claim as inadmissible but accepted that States can be responsible for the impacts of their emissions on the rights of children outside their borders.
[320] See, for e.g., *Juliana v. United States* 947 F.3d 1159 (9th Cir. 2020); *Held v. State of Montana*, 2024 MT 312, 560 P.3d 1235 (Mont. 2024).
[321] See for example: *Neubauer*; *Do-Hyun Kim et al. v. South Korea* (2024), Constitutional Court of Korea, 2020HunMa389 et al, rendered on August 29, 2024; *KlimaSeniorinnen*, [549].
[322] *KlimaSeniorinnen,* [549].
[323] Complaint to UN Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change, 1 April 2025, at 25.
[324] Complaint to UN Special Rapporteur, at 1.

5 Australia's human rights protection obligations in the climate change context

5.0 Key points

- Australia has obligations under international human rights law and related international law to take positive steps to protect the human rights of those in its territory or under its jurisdiction from climate-related harms. Australia's obligations have been engaged by its actual knowledge of climate threats to human rights, its capability to reduce the threats, and the reasonable measures available to it to mitigate harms, especially given the scale of its fossil fuel exports.
- Australia has a customary international law obligation to prevent significant harm to the climate system from GHG emissions. In fact, causing significant harm may well constitute an internationally wrongful act by Australia.
- A central component of the positive protection obligations of States under human rights and related international law is the obligation to conduct 'due diligence', to ensure a State is meeting the standard of human rights protection required. In the climate context, this requires a stringent standard of conduct.
- Australia is required under these legal obligations to establish an effective and enforceable national package of measures and policies adequate to prevent significant climate harm resulting from its fossil fuel exports. In doing so, it must use all means at its disposal, including adopting regulatory measures designed to achieve necessary deep, rapid and sustained emissions reductions. It must also regulate the conduct of private entities, including through measures such as establishing environmental impact assessment procedures capable of capturing the specific risks that its fossil fuel exporting entities create.
- In addition to measures to prevent significant harm to the climate system, the national package must also address Australia's obligations to protect climate-exposed human rights within its territory through measures and policies that prevent, mitigate and remedy those harms. They include taking all necessary measures to protect the climate system on which the realisation of human rights depends and regulating private entities, provided such actions are not unduly burdensome for Australia and are capable of being effective.
- International courts have concluded that a State's obligation to protect extends to indirect contributions to worsening climate harm, including actions or policies which result in emissions even where these occur outside its territory. Actions identified which may have this result include fossil fuel production, export licensing, and subsidising, making these actions potentially internationally wrongful acts by the State.

- As a wealthy State with high capability, Australia's obligations are particularly stringent under the principle of common but differentiated responsibilities and respective capabilities (CBDR-RC), and must be undertaken in cooperation with other States as part of continuous and sustained, good faith efforts to achieve the collective goal of limiting global temperature rise to 1.5°C above pre-industrial levels.
- Australia is not complying with its international law or human rights law obligations in that, despite the resulting aggravation of harms to the climate system and to human rights in its territory, it has no direct regulatory framework to limit its climate-damaging fossil fuel exports, it is continuing to approve new fossil fuel projects and to provide very substantial subsidies, and it is actively promoting the exports overseas while disclaiming responsibility for their associated harms.

In this Part, we set out Australia's legal obligations under international human rights law and related international law regarding its fossil fuel exports and corresponding climate and human impacts. We explain that Australia's positive obligations to protect are engaged (triggered) by its actual knowledge of real climate threats and its capability to mitigate them through, among other options, developing a plan for an orderly phase-out of its fossil fuel exports. We describe the core legal obligation of due diligence in the climate context, and recent European jurisprudence on concepts dealing with individual States' responsibilities. Finally, we set out States' general protective obligations and explain the legal significance of Australia's failure to effectively regulate or adopt a policy framework limiting the fossil fuel exports, now or in the future, and of its actions supporting and promoting the sector.

Throughout this Part, we confine our analysis to Australia's human rights law and related international law obligations, in which we include its obligations to people within its territory under international and domestic human rights law, and under human rights-related climate law and customary international law. We do not explore Australia's extraterritorial human rights obligations - that is, its obligations to people outside its territory or jurisdiction whose human rights may be adversely affected as a consequence of its fossil fuel exports and related policies. Nor do we examine its inter-State international law obligations regarding harm which its fossil fuel activities are causing to the climate system.

5.1 Scope and nature of States' human rights obligations in the climate change context

Despite Australia's stance of 'denial' of legal responsibility, its failure to take available steps which could mitigate human rights harms in Australia associated with its exported fossil fuel emissions is a failure to comply with its human rights-related international law obligations of positive protection.

5.1.1. Factors 'engaging' States' positive protection obligations in the climate change context

Australia has broad and binding international law obligations in relation to harm to Earth's climate system and for human harms relating to anthropogenic climate change. These obligations arise under both customary international law and the treaties to which Australia is a Party. The obligations arise under the international human rights law instruments and require States Parties to positively protect certain rights. The ICJ in its Advisory Opinion clarified that States have a customary international law duty to prevent significant harm to the climate system.[325]

States' obligations of positive protection or prevention arise when certain factors operate to 'engage' them.

Engaging the obligations

A State Party's positive obligations to protect human rights are engaged once the State knows, or ought reasonably to know, of a foreseeable and real threat to those rights, and where the State has the capacity to mitigate that threat. In determining whether a threat is 'real', treaty bodies and courts have tended to exclude theoretical or remote threats but have not demanded the high level of certainty and temporal imminence typically required to enforce claims of individual human rights harms.[326] This accords with the preventative purpose of States' protection obligations under human rights law and avoids the human rights regime operating, effectively, as an 'after the event' or compensatory one. The IACtHR has recently confirmed that a State's human rights positive protection obligations under the Inter-American System are engaged when human rights face risks which are real and immediate, and when the State is (or should be) aware of that fact and is reasonably able to avoid, prevent or reduce the risks.[327]

The ICJ in its Advisory Opinion concluded that actions which pose a risk of significant harm to the climate system will also constitute actions posing a risk of harm to human rights. This is due to the fact that a clean, healthy and sustainable environment is 'essential for the enjoyment of other human rights'.[328] Referring to the ITLOS Advisory Opinion, the ICJ found that whether a particular risk meets this threshold of 'significant harm' - and, therefore, engages the State obligation - will depend on both the probability or foreseeability of the occurrence of harm and its severity or magnitude.[329] The ICJ further explained that, when considering whether customary international law obligations have been engaged in a particular situation,

[325] ICJ, Advisory Opinion No. 187, [274].
[326] See, for e.g., HRC, General Comment no. 36; and see *Case of Osman v The United Kingdom*, ECtHR, 28 October 1998, [116].
[327] IACtHR, Advisory Opinion 32, [225]-[226].
[328] ICJ, Advisory Opinion No. 187, [393].
[329] CJ, Advisory Opinion No. 187, [274]-[275]; ITLOS, Advisory Opinion, [239] and [397].

- ‘it is necessary to take into account the risks which current activities might pose in the future, including in the long term’;[330]
- ‘a risk of significant harm may also be present in situations where significant harm to the [climate system] is caused by the cumulative effect of different acts undertaken by various States and by private actors’;[331] and,
- the ‘duty arises as a result of the general risk of significant harm to which States contribute, in markedly different ways, through the activities undertaken within their jurisdiction or control.’[332]

Regarding foreseeability, not only are the real threats from worsening climate change to human rights ‘foreseeable’ by Australia, it has actual knowledge of them. Multiple channels have long been available to Australia through which reliable information has been provided about the nature and gravity of the threats to many aspects of human lives and wellbeing from worsening climate extremes, including in Australia. As a Party to the Paris Agreement, Australia participates in the IPCC processes, including those for settling the Summaries for Policymakers. Observed and projected impacts of worsening climate change, including human impacts, were the subject of the chapter, ‘Australasia’, in the 2023 IPCC report. Australia has also had domestic sources of such information, such as the annual CSIRO State of the Climate reports[333] and Lancet Countdown reports,[334] research and publications of the Climate Change Authority,[335] and reports by the Australian Academy of Science.[336]

The Australian Human Rights Commission warned as early as 2007 that ‘the effects of climate change may threaten a broad range of internationally accepted human rights [in Australia], including the rights to life, to food and to a place to live and work.’[337] Multiple climate-related cases have now been adjudicated in Australia (and elsewhere) in which the evidence of climate-driven human harm has not been disputed. Human rights law experts in academic settings have raised the need for Australia to address climate change in the context of its impacts on human rights.[338] Several UN bodies and special rapporteurs have explicitly stated that climate change is a major threat to human rights globally. The 2019 UN Human Rights Council Resolution 41/21 explicitly recognizes the impact of climate change on various human rights, including the right to life, self-determination, development, health, food, water, and sanitation.[339] The report of the UN Special Rapporteur on Climate Change and Human Rights, in particular, emphasizes that climate change poses a serious threat to the ability of present and future generations to enjoy

[330] ICJ, Advisory Opinion No. 187, [274].
[331] ICJ, Advisory Opinion No. 187, [276].
[332] ICJ, Advisory Opinion No. 187, [279].
[333] See CSIRO, State of the Climate 2024.
[334] See 2024 Report of the MJA-Lancet Countdown on Health and Climate Change.
[335] See https://www.climatechangeauthority.gov.au/
[336] See, for example, Australian Academy of Science, The risks to Australia of a 3C warmer world.
[337] Australian Human Rights Commission, ‘Climate Change and Human Rights’, 2007.
[338] See, e.g., Australian Human Rights Institute (UNSW), ‘Climate Change and Human Rights’; and Castan Centre for Human Rights Law (Monash), ‘Human Rights and Climate Change: The Impacts on People in Vulnerable Situations’, 2021.
[339] Resolution adopted by the Human Rights Council on 12 July 2019, A/HRC/RES 41/21, at 2.

the right to life.[340] Five UN human rights treaty bodies have issued a joint statement emphasizing that climate change is a serious threat to human rights, leading to (among other things) forced migration and internal displacement.[341] In its Advisory Opinion, the ICJ characterized climate change as 'an existential problem of planetary proportions that imperils all forms of life and the very health of our planet,' with adverse effects threatening to significantly impair the enjoyment of human rights.[342]

In addition, Australia has been made aware that worsening climate extremes present real threats to human rights in specific areas of its *own* territory. For example, in *Daniel Billy* in 2021, the HRC found that Australia's failure to adequately protect Torres Strait Islanders against adverse impacts of climate change violated their rights to enjoy their culture and be free from arbitrary interferences with their private life, family and home.

In sum, Australia can be taken to be aware of the dynamics through which its fossil fuel exports:

- constitute a significant threat to the climate system by their contribution to GHG atmospheric concentration; and,

- raise real, climate-related threats to multiple aspects of human life and wellbeing in Australia, thereby threatening the realisation and enjoyment of human rights in its territory, particularly for those groups which are both exposed and vulnerable to worsening climate hazards.

Regarding capacity to mitigate the threat or risks, Australia has had the capacity to reduce its contribution to global warming, taking into consideration the volumes of fossil fuels it exports, the scale of the emissions from those exports and their contribution to atmospheric GHGs (relative to its domestic contribution), the TCRE and the fractional rise in global mean temperatures attributable to the emissions from those exports, the worsening effect of incremental temperature rise on climate extremes in Australia, and the increased threats of harm to people in Australia corresponding with that worsening.

Private entities' actions also engage State obligations

States' positive obligations are equally engaged when foreseeable and real threats to protected rights arise from the actions of private entities, including fossil fuel corporations. Such actions have frequently been described as 'attributable' under international law to the State which has jurisdiction.[343] Australia has pursued a course of State conduct in which it has actively supported private fossil fuel export producers, through providing government financial and logistical

[340] Report of the Special Rapporteur on the promotion and protection of human rights in the context of climate change, 28 July 2023, A/78/255.
[341] Joint Statement on Human Rights and Climate Change, 14 May 2020.
[342] ICJ, Advisory Opinion No. 187, [393] and [456].
[343] IACtHR, Advisory Opinion 32, [226]. For a more detailed discussion of attribution to States in international law, see M Werewinke-Singh, at 91-92.

supports to the exporting corporations, issuing project approvals (including through regional authorities), export permits and licences, and maintaining national laws which facilitate production.

The UN Human Rights Committee in its General Comment on the ICCPR right to life has confirmed that a State's obligation to protect also encompasses protection against harms to that right caused by private entities.[344] This is particularly relevant for States like Australia where fossil fuel producing corporations are active. Indeed, Australia conceded in its submissions to that Committee in *Daniel Billy* that '[a]ny positive obligation that arises under the [ICCPR] is principally limited to the threat posed by the acts of private persons or entities within a State party's jurisdiction and control.'[345]

Importantly, the ICJ clarified the nature of attribution in the climate change context, explaining that,

> 'attribution in this context involves attaching to a State its own actions or omissions that constitute a failure to exercise regulatory due diligence. In such circumstances, the question of attributing the conduct of private actors to a State does not arise…. Thus, a State may be responsible where, for example, it has failed to exercise due diligence by not taking the necessary regulatory and legislative measures to limit the quantity of emissions caused by private actors under its jurisdiction.'[346]

This statement by the ICJ is particularly significant for Australia as it makes clear that its international law obligations arise not from attribution of the overseas emissions to it but from its failure to regulate to mitigate the harms caused by the fossil fuel exporting entities operating within its territory and jurisdiction.

5.1.2 States' human rights and related international law obligations to conduct due diligence

A central component of the protection obligations of States Parties to the international human rights treaties and of States under related international law is the obligation to conduct 'due diligence'.[347] In this context, the term refers to an obligation not merely to identify and assess available steps to prevent, mitigate and remedy perceived harm but also to take such steps. It is a duty to meet a particular standard of 'conduct' in affording protection, rather than a requirement to produce a particular result.

The due diligence obligation under human rights law requires States to be constantly vigilant (diligent) in relation to foreseeable and real risks to the protected human rights, with human

[344] HRC, General comment No. 36, [7].
[345] *Daniel Billy,* [6.8].
[346] ICJ, Advisory Opinion No. 187, [428].
[347] See HRC, General comment No. 36, Article 6: right to life, CCPR/C/GC/36, 3 September 2019, [7].

rights treaties generally setting high, specific standards for due diligence.[348] The ICJ concluded in its Advisory Opinion that due diligence by States Parties under international human rights law is an obligation ' to respect and ensure the effective enjoyment of human rights by taking necessary measures to protect the climate system and other parts of the environment'.[349]

The IACtHR in its Advisory Opinion 32 concluded that, confronted as States are with the 'extraordinary' risks presented by climate change, they must act with 'enhanced' due diligence if they are to meet their human rights protective obligations.[350] The IACtHR concluded that a State's positive human rights law obligations under the Inter-American System to ensure the rights and prevent harm require it, in conducting due diligence, to take all effective measures necessary to reduce the human rights risk from degradation of climate systems.[351] The process of due diligence adopted by a State Party to that System in relation to a particular risk must, the Court said, be adapted to meet the character and urgency of that risk.[352]

That said, a State's human rights due diligence obligations are not unlimited, being obligations of conduct, rather than of result. Their scope and content even in the face of real and imminent threats to human rights are subject to such factors as the State's capacity to act in protection of the threatened human rights;[353] whether the State has already taken adequate steps and employed reasonable means to prevent harms to the rights;[354] and, whether requiring the State to do so will be to impose an undue or disproportionate burden on it.[355] States have discretion in determining what measures are necessary, although objective criteria, including scientific and technological information, relevant international rules and standards, the risk of harm and the urgency involved, limit arbitrary interpretation.

The obligation to conduct due diligence in relation to the risks presented by anthropogenic climate change also arises under customary international law. The ICJ in its Advisory Opinion observed that 'customary international law sets forth obligations for States to ensure the protection of the climate system … from anthropogenic greenhouse gas emissions'. The obligations include 'a duty to prevent significant harm to the environment by acting with due diligence and to use all means at their disposal to prevent activities carried out within their jurisdiction or control from causing significant harm to the climate system …, in accordance with their common but differentiated responsibilities and respective capabilities.'[356]

The ICJ observed that 'climate change … poses a quintessentially universal risk … of a general and urgent character, requiring the identification of a corresponding general standard of

[348] See, e.g., N Angelet, 'Due diligence in international law', 30 July 2024.
[349] ICJ Advisory Opinion No. 187, [457], 3.E.
[350] IACtHR, Advisory Opinion 32, [231] – [234].
[351] IACtHR Advisory Opinion 32, [227]-[229].
[352] IACtHR Advisory Opinion 32, [232]; agreeing with ITLOS, Advisory Opinion of 21 May 2024, [239].
[353] B Baade (2020), at 97; V Lanovoy, 2020.
[354] M Monnheimer, at 244-245; V Lanovoy, 2020.
[355] M Monnheimer, at 221-2.
[356] ICJ Advisory Opinion No. 187, [457], 3.B(a).

conduct, to be applied subject to the principle of common but differentiated responsibilities and respective capabilities…. Under these circumstances, the Court recognizes that the standard of due diligence for preventing significant harm to the climate system is *stringent*.'[357] (emphasis added) The Court noted that the content of due diligence required varies depending on the specific situation.[358] The obligation to conduct due diligence 'entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control' and, in the context of climate change, 'a heightened degree of vigilance and prevention is required.'[359]

The ICJ expressed agreement with ITLOS, that due diligence under customary international law in the climate change context requires a State to use all means at its disposal to avoid activities causing significant damage to the climate system.[360] This includes a national system to regulate the activities and 'adequate vigilance to make such a system function efficiently, with a view to achieving the intended objective'.[361] In these regards,

> 'appropriate rules and measures include, but are not limited to, regulatory mitigation mechanisms that are designed to achieve the deep, rapid, and sustained reductions of GHG emissions that are necessary for the prevention of significant harm to the climate system…. These rules and measures must regulate the conduct of public and private operators within the States' jurisdiction or control and be accompanied by effective enforcement and monitoring mechanisms to ensure their implementation.'[362]

The ICJ noted that, while elements of the due diligence obligation are variable or evolving,

> 'the relevant elements, individually and in combination, provide guidance for the identification of an appropriate standard of conduct for different situations. The Court is therefore of the view that the question … whether or how a relevant element of the obligation to exercise due diligence to protect the [climate system] applies in a particular situation should be determined objectively.'[363]

The ICJ also stated that, 'when determining the appropriate measures to be adopted by a State, the principle of common but differentiated responsibilities and respective capabilities must be taken into account'.[364] For a major fossil fuel exporting, highly developed State like Australia, what is required to meet the standard of due diligence will be of a higher and more demanding nature than would be the case for low emitting, lower income States.

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[357] ICJ, Advisory Opinion No. 187, [137]-[138]; [254] re domestic mitigation measures; see also [268] and [343].
[358] ICJ, Advisory Opinion No. 187, [280].
[359] ICJ, Advisory Opinion No. 187, [138].
[360] ICJ, Advisory Opinion No. 187, [137], [138], [229], [281], [290] and [345].
[361] Elements which are 'particularly relevant' in the context of climate change include 'appropriate measures': ICJ, Advisory Opinion No. 187, [281].
[362] ICJ, Advisory Opinion No. 187, [282].
[363] ICJ, Advisory Opinion No. 187, [300].
[364] ICJ, Advisory Opinion No. 187, [290].

The ICJ described the various elements of the due diligence duty in this context as 'includ[ing] States taking, to the best of their ability, appropriate and, if necessary, precautionary, measures which take account of scientific and technological information, as well as relevant rules and international standards, and which vary depending on each State's respective capabilities. Other elements of the required conduct include undertaking risk assessments and notifying and consulting other States, as appropriate.'[365]

Private actors and due diligence

In relation to the actions of private actors, both the ICJ and the IACtHR concluded that a State's due diligence obligation in relation to harm to the climate system also extends to protective action against the harmful activities of businesses or persons under the State's jurisdiction, even though that conduct is not itself attributable to the State.[366] This aspect of the obligation has particular relevance to Australia, as the fossil fuel exporting enterprises operating in Australia are mostly private entities, rather than (as in many countries) state-owned enterprises.[367]

The ICJ considered that States, in adopting as part of their due diligence the 'appropriate rules and measures' required pursuant to the customary international law obligation to prevent significant harm to the climate system, 'must regulate the conduct of public and private operators within the States' jurisdiction or control and be accompanied by effective enforcement and monitoring mechanisms to ensure their implementation.'[368] The Court considered it 'important' that States establish environmental impact assessment procedures which are capable of capturing the specific risks from 'particularly significant proposed individual activities contributing to GHG emissions', on the basis of best available science.[369]

The IACtHR had earlier, in Advisory Opinion 32, set out the specific obligations of States within the Inter-American System to ensure that private entities establish and implement effective human rights due diligence processes; these should aim to enable the corporations to identify, prevent, mitigate and, where appropriate, remedy adverse human rights impacts of business activity, in accordance with the UNGPs[370] and with the most recent developments in

[365] ICJ, Advisory Opinion No. 187, [136].
[366] HRC, General comment No. 36, citing: HRC, general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, para. 8. See also European Court of Human Rights, *Osman v. United Kingdom* (case No. 87/1997/871/1083), judgment of 28 October 1998, para. 116.
[367] Note that some fossil fuel exporters operating in Australia may be wholly or partly owned by other States. INPEX, for example, is partly owned by the Japanese government: INPEX Australia, 2022 Tax Transparency Report. Baade emphasizes that due diligence in the human rights law context is 'a pragmatic standard that strives to minimise risks to human rights no matter the source of the risks': B Baade, *Due Diligence and the Duty to Protect Human Rights In: Due Diligence in the International Legal Order*. Edited by: Heike Krieger, Anne Peters, and Leonhard Kreuzer, Oxford University Press (2020), at 107; although see J Ruggie and J Sherman III, 'The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale', *European Journal of International Law* 28 (2017), at 923–924
[368] ICJ, Advisory Opinion No. 187, [282].
[369] ICJ, Advisory Opinion No. 187, [298].
[370] IACtHR Advisory Opinion 32, [348].

international and comparative law.[371] States should, it continued, establish differentiated climate action obligations and impose stricter duties based on the current and historical contribution of individual companies to climate change.[372]

A State 'doing its part'

The obligation to conduct due diligence has sometimes been implicitly considered by courts when deciding human rights claims, in the context of a State's duty to assess what its part should or could be in addressing the risk of climate-related human rights harms. In the *Urgenda* case, the Supreme Court of the Netherlands concluded that the Articles in the ECHR guaranteeing the rights to life and to family and home life should, in the context of the risks from climate change, 'be interpreted in such a way that [they] oblige the contracting states to do their part to counter that danger.'[373] In *Klimaatzaak*, the Brussels Court of Appeal explained that, in assessing whether the State was meeting its positive obligations under the ECHR, 'it must be ascertained whether the Respondent parties have done and continue to do their part in the fight against global warming, in order to prevent a dangerous threshold from being crossed.'[374]

The ECtHR in *KlimaSeniorinnen* did not explicitly state that 'doing its part' is an element of a State's human rights positive protection obligations under the ECHR but it did conclude that: those positive obligations include protecting individuals from the adverse effects of climate change; failing to take sufficient action to address climate change can violate Article 8 of the ECHR; and the requirement to take sufficient action includes establishing an adequate regulatory framework for emissions mitigation measures. Noting the emphasis which the IPCC has placed on carbon budgets, the Court concluded that, 'in the absence of any domestic measure attempting to quantify the respondent State's remaining carbon budget, the Court has difficulty accepting that the State could be regarded as complying effectively with its regulatory obligation under Article 8 of the Convention.'[375] The Court did not precisely define what should be included in a State's individual carbon budget but it did emphasize that States must establish and implement clear national emissions reduction targets, with specified timelines and intermediate reduction targets, that it must act in good time and in an appropriate manner, and that the targets adopted must be aligned with the Paris Agreement's goal of limiting warming to 1.5°C or well below 2°C.[376] The Court deliberately left some flexibility for States to determine their individual approaches while meeting these general requirements.

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[371] The Court here cited: 'Advisory Opinion OC-23/17, supra, para. 124. See Human Rights Council. Human rights and transnational corporations and other business enterprises. A/HRC/RES/17/4, 6 July 2011, Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate due diligence for sustainability and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859; OECD, "Due Diligence Guidance for Responsible Business Conduct", 2018, available at: https://mneguidelines.oecd.org/Guia-de-laOCDE-de-debida-diligencia-for-responsible-business-conduct.pdf.'

[372] IACtHR Advisory Opinion 32, [350].

[373] *Urgenda*, [5.7.1].

[374] *Klimaatzaak*, [159].

[375] *KlimaSeniorinnen*, [571].

[376] *KlimaSeniorinnen,*, [550].

The ECtHR also provided valuable elucidation as to how, from the perspective of human rights protection, the exercise by an individual ECHR State of addressing its part might be approached.[377] It began from the premise that 'each State has its own share of responsibilities to take measures to tackle climate change and that the taking of those measures is determined by the State's own capabilities rather than by any specific action (or omission) of any other State.'[378] This is particularly significant in its implications for States relying on versions of the argument that individual action beyond collective commitments is not a legal obligation, since only collective action by States can (entirely) avoid significant damage to the climate system.

In setting out States' mitigation obligations under the Paris Agreement, the ICJ adopted the term 'adequate' in concluding that, to comply,

> 'all parties must take measures … that make an adequate contribution to achieving the collective temperature goal'.[379]

These measures, to be set out in parties' NDCs, 'must, when taken together, be capable of achieving the temperature goal and the purposes of the Agreement.' The ICJ continued that 'each party has a due diligence obligation to do its utmost to ensure that the NDCs it puts forward represent its highest possible ambition in order to realize the objectives of the Agreement.'[380] The Court recognised that there will be 'variations in the means available to parties and their capabilities', in its final conclusions explaining that the parties' obligation to take measures capable of making an adequate contribution to achieving the temperature goal set out in the Agreement is to be understood as an obligation 'in accordance with their common but differentiated responsibilities and respective capabilities'.[381]

Unlike the ECtHR, which has approached the task of identifying whether a State is complying with its ECHR obligations by whether it has (among other things) adopted a national carbon budget aligned with the Paris Agreement's temperature goal, the ICJ has approached the task from the perspective of the duty to prevent significant harm to the climate system, together with the conclusion that the duty is subject to the principle of CBDR-RC. Each approach embodies concepts of equity and 'the need to distribute equitably the burdens of the obligations in respect of climate change',[382] including particularly the obligation to align individual and collective efforts with the 1.5°C temperature goal. Clearly, in light of the principle of CBDR-RC and following the ICJ's approach, the expectation of what is 'adequate' will be particularly high for a State like Australia, which is highly developed economically and socially, is producing more than three times the fossil fuels it requires for its domestic needs, is exporting most of that to other highly developed parties, has (through these exports) already measurably raised Earth's mean

[377] *KlimaSeniorinnen,* [442].
[378] *KlimaSeniorinnen,* [442]
[379] ICJ, Advisory Opinion No. 187, [270].
[380] ICJ, Advisory Opinion No. 187, [270].
[381] ICJ, Advisory Opinion No. 187, [270] and [457].
[382] ICJ, Advisory Opinion No. 187, [148].

temperature, and has ample resources for developing alternative, transition-promoting export industries.

Even though the IPCC has concluded with high confidence that a climate which is 1.5°C above pre-industrial levels is not 'safe' for most people and poses significant, effectively permanent risks to them, it has become 'the scientifically based consensus target' which now frames States' international law obligations.[383] The ICJ in its Advisory Opinion noted that CMA decisions subsequent to the adoption of the Paris Agreement constitute agreement between the parties as to the meaning or content of Article 2 of that Agreement, as a result of which the 1.5°C threshold has become the parties' agreed temperature goal. The ICJ concluded that parties are therefore obliged to

> 'ensure that their NDCs fulfil their obligations under the Paris Agreement and thus, when taken together, are capable of achieving the temperature goal of limiting global warming to 1.5°C above pre-industrial levels, as well as the overall objective of the "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system".[384]

The role of cooperation

The ICJ in Advisory Opinion No. 187 emphasised the importance of cooperation and collective action in a State's meeting its individual mitigation obligations in the climate change context. It explained that 'the specific character of climate change requires States to take individual measures in co-operation with other States'[385] and affirmed that, 'in the context of climate change, States have a customary obligation to co-operate', a duty which is also 'a central obligation under the climate change treaties.'[386] Co-operation, the Court said, 'is not a matter of choice for States but a pressing need and a legal obligation.'[387]

Importantly,

> '[t]he duty to co-operate takes on a special importance in the context of the need to reach a collective temperature goal…. States must co-operate to achieve concrete emission reduction targets or a methodology for determining contributions of individual States, including with respect to the fulfilment of any collective temperature goal. The duty to co-operate is applicable to all States, although its level may vary depending on additional criteria, first and foremost the common but differentiated responsibilities and respective capabilities principle.'[388]

[383] ICJ, Advisory Opinion No. 187, [83] and [224].
[384] ICJ, Advisory Opinion No. 187, [83] and [225].
[385] ICJ, Advisory Opinion No. 187, [304].
[386] ICJ, Advisory Opinion No. 187, [140].
[387] ICJ, Advisory Opinion No. 187, [308].
[388] ICJ, Advisory Opinion No. 187, [305].

In saying this, the ICJ 'recognise[d] that that the duty to co-operate leaves States some discretion in determining the means for regulating their GHG emissions. However, this discretion cannot serve as an excuse for States to refrain from co-operating with the required level of due diligence or to present their effort as an entirely voluntary contribution which cannot be subjected to scrutiny.' The duty to co-operate requires 'efforts by States to continuously develop, maintain and implement a collective climate policy that is based on an equitable distribution of burdens and in accordance with the principle of common but differentiated responsibilities and respective capabilities.'[389]

The duty to cooperate as a binding legal obligation of States adds content to the 'binding obligations [set out in the climate treaties] for States parties to ensure the protection of the climate system … from anthropogenic greenhouse gas emissions', including particularly the 'obligation to prepare, communicate and maintain successive and progressive nationally determined contributions which, inter alia, when taken together, are capable of achieving the temperature goal of limiting global warming to 1.5°C above pre-industrial levels.'[390]

The IACtHR concluded that States' obligations under the Inter-American System require each State to consider the temperature goal as a 'minimum starting point, rather than the finishing line', when determining the mitigation target required of it.[391] Considerations for States in setting their mitigation targets are, the IACtHR explained, determined by human rights protection obligations and include considerations of justice, a State's capabilities, its population, its human development levels and climate vulnerability index rankings, and other such measures. In short, the Inter-American System requires cooperation towards 'the most ambitious possible mitigation targets' for the protection of human rights.[392]

5.1.3 Attribution of responsibility for 'indirect emissions'

As explained in Part 1.2, above, Australia's full contribution to global warming is not limited to its domestic emissions but also to significant harm to the climate system for which it is indirectly responsible. Its harmful policies and actions include both positive promotion of fossil fuel production for export (through, for example, issuing new project licences and approvals or granting subsidies) and negative failures to mitigate harms from that production (the absence of any controlling regulatory or policy framework in relation to the exports).

A State's customary international law obligation to protect is an obligation to regulate and arises regardless of where the emissions resulting indirectly from or encouraged by its policies and actions occur. The ICJ Advisory Opinion stated that 'fossil fuel production, fossil fuel consumption, the granting of fossil fuel exploration licences or the provision of fossil fuel

[389] ICJ, Advisory Opinion No. 187, [306].
[390] ICJ Advisory Opinion No. 187, [457], 3.A(f).
[391] IACtHR, Advisory Opinion 32, [326].
[392] IACtHR, Advisory Opinion 32, [324]-[332].

subsidies' constitute failures of a State to take appropriate action to protect the climate system from GHG emissions and are likely to be internationally wrongful acts attributable to that State.[393] The Court explained that the internationally wrongful act in question is not the emission of GHGs but 'the breach of conventional and customary [international law] obligations … pertaining to the protection of the climate system from significant harm resulting from anthropogenic emissions of such gases.'

For this reason, and following the jurisprudence referred to by the ICJ relating to international law of States' responsibility for harm and its application to harm to the climate system, a State's contribution to climate harm will include all its fossil fuel-related actions which constitute failure to protect the climate system from significantly damaging GHG emissions.

In Europe, a State's duty to protect the climate system from significant harm specifically includes harm through the emissions embedded in substantial volumes of imported goods and services.[394] The ECtHR in *KlimaSeniorinnen* concluded that Switzerland's human rights law obligations required it to account for both emissions occurring within its borders and consumption-based emissions – that is, emissions 'embedded' in Switzerland's imported goods (and possibly services). The relevant Swiss authority had already accepted in its reports 'that the GHG emissions attributable to Switzerland through the import of goods and their consumption form a significant part (an estimate of 70% for 2015) of the overall Swiss GHG footprint'.[395] The authority added that, '[i]n a globalised economy, both the GHG emitted in Switzerland and those emitted abroad as a result of Swiss final demand must be recorded'.[396] The Court observed that it would be,

> 'difficult, if not impossible, to discuss Switzerland's responsibility for the effects of its GHG emissions on the applicants' rights without taking into account the emissions generated through the import of goods and their consumption.'[397]

In a reference to the relationship between the climate and human rights law regimes, the ECtHR explained that the global aims in instruments like the Paris Agreement 'cannot of themselves suffice as a criterion for any assessment of [ECHR] compliance'.[398] The fact that, for the purpose of avoiding double accounting in the enhanced transparency framework, a State is not required under the Paris Agreement to include such embedded emissions in its reporting under that framework, was not considered relevant to questions of compliance with its human rights law obligations.

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[393] ICJ, Advisory Opinion No. 187, [427}.
[394] To an extent, these emissions are tracked and reported by the Australian government: see, for e.g., DCCEEW, 'Quarterly Update of Australia's National Greenhouse Gas Inventory: March 2022', at 23-24.
[395] *KlimaSeniorinnen,* [278].
[396] *KlimaSeniorinnen,* [279].
[397] *KlimaSeniorinnen*, [280].
[398] *KlimaSeniorinnen*, [547]..

The ECtHR's discussion of embedded emissions was brief, no doubt because responsibility had already been conceded by the Swiss authority, but the ruling confirms that a Member State's obligations under the ECHR extend beyond reducing the emissions occurring within its borders to those embedded in its imports where these may, through their own contribution to climate system harm, affect human rights.[399] Failing to address these emissions constituted a failure to comply with Switzerland's positive protection obligations under the ECHR. The Court explained that the proportionally substantial embedded emissions in Switzerland's imported goods (and perhaps services) must be subject to the requisite emissions reduction targets, with specified timelines, and aligned with the Paris Agreement and its temperature goal.

The reasoning and conclusions of the ICJ and (while not binding on Australia) of the ECtHR have implications for the interpretation of corresponding provisions and obligations of States Parties – including Australia - to the ICCPR in relation to protection of the right to life, the right to family and home life and, indeed, to all rights for which States Parties carry positive protection obligations.[400] An important element in the ECtHR's consideration was the scale of the potential for harm to the climate system and human rights from a State's indirect GHG emissions relative to its direct, territorial emissions. Both Australia and Switzerland have very much higher overall or lifecycle GHG 'footprints' as a result of the emissions embedded in their imports or exports. As shown in Part 1, the emissions from Australia's exported fossil fuels are currently more than three times its domestic fossil fuel carbon emissions.

It is anticipated that the ECtHR will further clarify the human rights law obligations of ECHR States' in these regards in its forthcoming decision in *Greenpeace Nordic and Others v Norway*.[401] The applicants in that case have argued that, in issuing new licences for oil and gas exploration in the Arctic that will allow new fossil fuels to market from 2035 and beyond, the Norwegian government has violated their ECHR rights to life and to respect for family life and home. In particular, the applicants argue, their government has failed to declare, describe and assess the climate effects of the exported (embedded) emissions from the oil which will ultimately be extracted, impairing the applicants' ECHR rights.[402]

The ICJ reached a number of further conclusions which also bear on the issue of States' obligations to prevent significant harm by private entities to the climate system and to human rights.

- It explained that the duty to cooperate is a binding legal obligation under which States 'must cooperate to achieve … a methodology for determining contributions of individual

[399] See G Verdigal, 'International trade and "embedded emissions" after KlimaSeniorinnen', 1 May 2024.
[400] The IACtHR in its Advisory Opinion reasoned similarly to the ICJ and the ECtHR, stating that, '[g]iven the urgency and severity of the climate emergency … States should also consider in their regulation the activities and sectors that emit GHGs both within and outside the State's territory:' IACtHR Advisory Opinion 32, [337].
[401] *Greenpeace Nordic and Others v Norway,* ECtHR, 34068/21.
[402] Application to the ECHR, 15 June 2021.

states, including with respect to the fulfilment' of the temperature goal agreed to in the Paris Agreement.[403]

- It concluded that the climate change treaties set 'binding obligations' for States Parties 'to … prepare … nationally determined contributions which, inter alia, when taken together, are capable of achieving the temperature goal of limiting global warming to 1.5°C above pre-industrial levels'.[404]

- It explained that, as part of States' customary international law obligation to prevent significant harm to the climate system, their regulation of private entities 'must be accompanied by effective enforcement and monitoring mechanisms to ensure their implementation.'[405] This includes regulating the conduct of entities 'within their jurisdiction or control', irrespective of where the actions take place which are causing the significant harm.[406]

- It considered it 'important' that States establish environmental impact assessment procedures which are capable of capturing the specific risks from 'particularly significant proposed individual activities contributing to GHG emissions', on the basis of best available science.[407]

5.2 General elements of States' positive obligations under the ICCPR

ICCPR Article 2 sets out the general obligations of States Parties under the Covenant.

> *ICCPR Article 2*
>
> 1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
>
> 2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

The Article 2 obligation to take necessary steps to give effect to the rights is unqualified and of immediate effect. Australia is required to give good faith effect to these obligations, which are binding on it.[408] A failure to comply with this obligation cannot be justified by reference to

[403] ICJ Advisory Opinion No. 187, [305].
[404] ICJ Advisory Opinion No. 187, [457], 3.A(f).
[405] ICJ, Advisory Opinion No. 187, [273] and [282].
[406] ICJ, Advisory Opinion No. 187, [282].
[407] ICJ, Advisory Opinion No. 187, [298].
[408] *Vienna Convention on the Law of Treaties*, Article 26.

political, social, cultural or economic considerations within the State.[409] The legal obligation in Article 2 is expressed both negatively and positively. Negatively, Australia must respect the rights and refrain from violating them, and any restrictions it imposes on those rights must be permissible under the relevant provisions of the Covenant. Positively, Australia is required to ensure the rights, particularly by adopting laws or other measures to fulfil its legal obligations. These obligations will only be properly discharged if individuals are protected not only against actions by the State but also against acts committed by private entities that impair the rights.

Both positive and negative obligations are also present in ICCPR Article 6 and Article 17:

- Australia is obliged under Article 6 to respect, and provide protection by law to, the right to life, and is prohibited by the provision from failing to protect those within its territory against arbitrary deprivation of life. Protection of the right to life is a customary rule and general principle of international law, while the prohibition on arbitrary deprivation of life is a peremptory norm of international law.

- Article 17 prohibits arbitrary or unlawful interference with a person's privacy, family, home or correspondence, and imposes a positive obligation on States to provide protection of the law against such interference.

- The right to life is set out in ECHR Article 2 in terms which are similar, in all relevant respects, to those in ICCPR Article 6, and the same is the case for the right to family and home life in ECHR Article 8 and ICCPR Article 17. All four provisions contain statements of positive State obligations to provide the right with protection of the law.

Drawing from the previous section 5.1, States' positive obligations to protect begin in practice with conducting due diligence (extending to threats from private entities) to determine whether the obligations are being met. Conducting due diligence should:

- reveal the status of climate-related threats and risks to human rights within a State's territory;
- detail the State's full contribution to the risks;
- set out the State's existing actions, laws and policies;
- assess whether these meet its human rights law obligations; and,
- inform any protective steps taken by the State in response.

This information is a prerequisite for the State to ensure it is in a position positively to respect, protect and ensure the ICCPR rights.

In relation to a State's full contribution to climate risks, the correct focus is not on whether the State's actions are 'causing' or have 'caused' climate change but on whether they are increasing the risk to human rights through contributing to worsen climate change. This is made clear by the ICJ, as well as in the reasoning in *KlimaSeniorinnen*. In the latter, the ECtHR explained that,

[409] HRC, General Comment No. 31, 2004, [14].

even though 'there is no single or specific source of [climate] harm', and even though 'GHG emissions arise from a multitude of sources', and even though '[t]he harm derives from aggregate levels of such emissions',[410] the action which engages a State's human rights responsibility is that there are reasonable, available measures which the State's authorities could take which could have a real prospect of mitigating the harm (and as opposed to worsening it).[411]

As explained in Section 5.1.1, a State Party's positive obligations under the ICCPR extend to protection from actions by private entities, where responsibility to protect lies with the State in which they are operating.[412] In describing the scope of States' obligation to 'guarantee' or 'ensure' the rights under the American Convention, the IACtHR concurred that the obligation 'extends … to prevent, in the private sphere, third parties from violating the protected interests.'[413] At issue is whether the private entities involved are, through their actions, increasing the risk to human rights through contributing to worsen climate change. Where that is the case, the IACtHR has explained that Inter-American System States are obliged to establish domestic regulatory frameworks to ensure that corporations under their jurisdiction meet their duties and responsibilities set out in the UNGPs. The Court's view was that each State must act to ensure high-emitting corporations within its jurisdiction take effective measures to combat climate change and related human rights impacts, conducting appropriate due diligence, adopting transition plans, and providing accurate information regarding the impacts of their operations on climate change and human rights.[414]

In assessing a State's current actions, laws and policies, and identifying further measures open to it, climate change has emerged as a relatively recent threat to human rights. The content of the obligations of States to protect the rights in this context has not yet been comprehensively articulated in international human rights law or jurisprudence. Even the 2019 General Comment No. 36 dedicates only one paragraph to the environment and climate change together, despite the gravity of the escalating and effectively permanent threats which the latter presents to lives and human rights.[415] The ICJ in its Advisory Opinion said little relating to States' obligations under the human rights treaties specifically, although its statements relating to States' customary international law preventative obligations in the climate system context substantially clarify their positive protection obligations overall. The ECtHR and the IACtHR have provided useful elucidation in relation to their regional human rights systems, including as to the actions of private entities.

In describing the scope of States' obligation to 'guarantee' or 'ensure' the rights under the Inter-American Convention, the IACtHR emphasized the preventative dimension of the positive

[410] *KlimaSeniorinnen,* [416].
[411] *KlimaSeniorinnen,* [444]
[412] See HRC, General comment No. 36, 2019, [21]. And see HRC, General comment No. 16, 1988, [1].
[413] IACtHR Advisory Opinion 32, [226].
[414] IACtHR, Advisory Opinion 32, [345]-[347].
[415] HRC, General comment No. 36, 2019, [62].

obligation to protect in the climate context, including 'the duty to prevent, in the private sphere, third parties from violating the protected legal interests.' The Court explained that the duty,

> 'is fulfilled when, in situations of real and immediate risk where the State is, or should be, aware of and has a reasonable possibility of preventing or avoiding said risk, the State adopts measures addressed at guaranteeing the rights of the individual or group of individuals who are at risk. This aspect of the obligation of guarantee is fundamental in the context of the climate emergency. Consequently, to comply with the obligation of guarantee, States must take all necessary measures to reduce, on the one hand, the risks derived, on the one hand, from the degradation of the global climate system and, on the other, from exposure and vulnerability to the effects of this degradation…..
>
> Even if the measures that should be adopted to comply with the obligation of prevention vary according to the right that is sought to protect and the circumstances of each State Party, the Court [in earlier jurisprudence] has established certain minimum obligations in relation to the prevention of human rights violations resulting from environmental damage. In this context, the State complies with the obligation of prevention when it: (i) regulates, (ii) supervises, and (iii) monitors the activities of private individuals that entail risks for the human rights recognized in the American Convention and other treaties for which it has jurisdiction. Bearing in mind the special nature of environmental damage, the State must also (iv) require and adopt environmental impact assessments (v); establish contingency plans, and (vi) mitigate situations in which environmental damage has occurred. In the context of the climate emergency, the last two obligations are complied with when the State plans and executes its response to the impacts of climate change on both the environment, and the individual.'[416]

The ECtHR in *KlimaSeniorinnen* held, in the context of climate change and the rights to life and to family and home life, that 'the essence of the relevant State [human rights] duties … relates to the reduction of the risks of harm for individuals. Conversely, failures in the performance of those duties entail an aggravation of the risks involved'.[417] Following this reasoning, a State's compliance with its ICCPR positive obligations in the context of climate change would be measured not only by what it *is* doing but also by what it is *not* doing to reduce the risk of climate-related harm to the rights of individuals in its territory. Emphasizing, as did the IACtHR, the preventative dimension of the positive obligation to protect, the ECtHR explained that the

[416] IACtHR Advisory Opinion 32, [226]-[227] and [230].
[417] *KlimaSeniorinnen,* [439].

steps a State is required to take should be directed at reducing the risks of harm, including harm emanating from any aggravation of those risks.[418]

Given this, a State's human rights law obligations in the climate context are not tied to what other States have done and are doing but what it, itself, can do to reduce the risk of harm to the rights, through taking protective and preventative steps and through addressing any aggravating actions. As the Court explained in *KlimaSeniorinnen*, '[t]he relevant test does not require it to be shown that "but for" the failing or omission of the authorities the harm would not have occurred.'[419] Similarly, the UN Committee on the Rights of the Child ('CRC') concluded in *Sacchi* 'that the collective nature of the causation of climate change does not absolve the State party of its individual responsibility that may derive from the harm that the emissions originating within its territory may cause to children'.[420]

That said, a State's positive obligations to protect in relation to the ICCPR rights are not unlimited. The required protective or preventative measures are those which are reasonable, positive, and do not impose a disproportionate burden on the State in response to the foreseeable threats.[421] However, Australia has interpreted these limits in a particular way, arguing that its positive obligations will be engaged only where it has the capability to put an end to the *entirety* of the threat to rights posed by climate change. In its submissions in *Daniel Billy*, Australia explained its position:

> 'Any positive obligation that arises under the [ICCPR] is principally limited to the threat posed by the acts of private persons or entities within a State party's jurisdiction and control. This could also extend to positive obligations in respect of environmental issues … where it is within the scope of a State's power to avoid that risk. However, it does not create an obligation to protect generally against the future effects of climate change, which, as a matter of international law, extends well beyond the scope of a single State party's jurisdiction and control.'[422]

In considered reasoning, the Court in *KlimaSeniorinnen* disagreed with the substance of this line of argument generally. It clarified that, to ensure the protection under the ECHR of the right to family and home life in the climate change context, a State's 'primary duty is to adopt, and to

[418] Note, too, the ECtHR in *KlimaSeniorinnen,* explaining that, under the ECHR, a State's positive obligations in the 'environmental context' 'largely overlap' when it comes to the right to life and the right to family and home life. The Court recognised that principles developed under each right in environmental cases provide, together, a basis for the approach to be applied for both when identifying these obligations in the novel but related context of climate change: *KlimaSeniorinnen,* [292] and [540].
[419] *KlimaSeniorinnen,* [441]-[444]. The Montana Supreme Court reasoned similarly in *Held v. State* in late 2024, in relation to that state's constitutional right to a clean and healthful environment, 'We reject the argument that the delegates—intending the strongest, all-encompassing environmental protections in the nation, both anticipatory and preventative, for present and future generations—would grant the State a free pass to pollute the Montana environment just because the rest of the world insisted on doing so': *Held v. State of Montana*, [30].
[420] CRC, *Sacchi*, [10.10].
[421] HRC, General comment No. 36, 2019, [21].
[422] *Daniel Billy,* [6.8].

effectively apply in practice, regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change.'[423] These measures must be 'aimed at preventing an increase in GHG concentrations in the Earth's atmosphere and a rise in global average temperature beyond levels capable of producing serious and irreversible adverse effects on human rights, notably the right to private and family life and home under Article 8 of the Convention'.[424] This approach accords with that of the ICJ in relation to the stringent due diligence obligations of States in the climate change context, whereby they are required to use all means at their disposal to avoid activities causing significant damage to the climate system, including a national system to regulate the activities,[425] with 'appropriate rules and measures [that] include, but are not limited to, regulatory mitigation mechanisms that are designed to achieve the deep, rapid, and sustained reductions of GHG emissions that are necessary for the prevention of significant harm to the climate system.'[426]

The ECtHR in *KlimaSeniorinnen* relied on the scientific evidence of the IPCC[427] in finding, as matters of fact, that States are capable of taking measures to effectively address the 'serious current and future threats' which anthropogenic climate change poses to the enjoyment of human rights, that 'the relevant risks are projected to be lower if the rise in temperature is limited to 1.5°C above pre-industrial levels and if action is taken urgently, and that current global mitigation efforts are not sufficient to meet the latter target.'[428] More specifically, the Court explained that effective protection of the right to family and home life requires each ECHR State to implement 'measures for the substantial and progressive reduction of their respective GHG emission levels, with a view to reaching net neutrality within, in principle, the next three decades.'[429]

The ECtHR then set out the criteria by which it would assess whether a State was approaching the task of putting measures in place with the requisite due diligence (within its 'margin of appreciation').[430] While leaving it to the State to choose for itself which specific measures it will adopt, that State must nevertheless have 'put in place the relevant legislative and administrative

[423] *KlimaSeniorinnen,* [545].
[424] *KlimaSeniorinnen,* [546]. Importantly, while part of a State's obligations in relation to non-interference in family and home life is likely to relate to implementing 'adequate adaptation measures' to protect family and home life (*Daniel Billy,* [8.12]), the Court in this case described adaptation measures as being 'supplementary' to mitigation measures: *KlimaSeniorinnen,* [552].
[425] ICJ, Advisory Opinion No. 187, [281].
[426] ICJ, Advisory Opinion No. 187, [282].
[427] *KlimaSeniorinnen,* [104]-[120].
[428] *KlimaSeniorinnen,* [436].
[429] *KlimaSeniorinnen,* [548].
[430] As a general principle, States Parties to the ECHR have a margin of appreciation as to what measures they decide to put in place. The Court explained that, nevertheless, it can assess whether a State is approaching the task with the requisite due diligence: B Baade (2020), at 101. And see *KlimaSeniorinnen,* [538 (e)]. Given the 'urgency' and the 'grave risk' of irreversibility in relation to climate change, the Court in *KlimaSeniorinnen* found that the scope of the margin of appreciation is reduced in this context and that 'climate protection should carry considerable weight in the weighing-up of any competing considerations': *KlimaSeniorinnen,* [542]. In relation to the choice of means, however, the States should be given a wide margin of appreciation: *KlimaSeniorinnen,* [543].

framework designed to provide effective protection' of the Art 8 right.[431] In putting in place that framework, the State's domestic authorities must have had due regard to the need to 'adopt general measures specifying … [their] method of quantification of future GHG emissions, [one which must be] in line with the overarching goal for national and/or global climate change mitigation commitments'.

In other words, each State must have put in place a mitigation framework which is aligned with preventing 'a rise in global average temperature beyond levels capable of producing serious and irreversible adverse effects on human rights.'[432] The ECtHR in this case assessed whether Switzerland's existing framework included concrete implementation of the general measures, through such practical steps as setting targets, identifying pathways to meet the national GHG reduction goals, accounting for progress and acting in good time and appropriately.[433] It found Switzerland had failed in its Article 8 obligations due to the 'absence of any domestic measure attempting to quantify [its] remaining carbon budget'[434] and to its failure to act in good time, and in an appropriate and consistent manner, in relation to the implementation of a framework of effective protection of the right.[435]

5.3 Summary of conclusions regarding States' obligations

As a Party to all the major human rights treaties, the climate treaties and under customary international law, Australia's binding legal obligations set out above may be understood as falling into three principal categories.

First, Australia is obliged to **ensure the protection of the climate system** from significant harm from anthropogenic GHG emissions, particularly through conducting stringent due diligence using all means at its disposal to prevent such harm. The 'means' include adopting an effective and enforceable national system of appropriate rules and measures to regulate significantly harmful activities. These include but are not limited to regulatory measures designed to achieve the necessary deep, rapid and sustained emissions reductions, and measures regulating the conduct of private entities (including by establishing EIA procedures capable of capturing the specific risks high-emitting private entities create). As a wealthy State with high capability, failure by Australia to take such appropriate actions is likely to constitute an internationally wrongful act.

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[431] *KlimaSeniorinnen,* [538 (a)].
[432] *KlimaSeniorinnen*, [546].
[433] *KlimaSeniorinnen,* [550]. In addition, the Court held that effective protection requires adaptation measures aimed at alleviating 'the most severe or imminent consequences of climate change': *see* [552]. This approach is similar to that of the HRC in *Daniel Billy,* where the Committee took into account any adaptive measures taken by Australia to reduce climate change-related harms in the Torres Strait Islands: *Daniel Billy,* [8.6]-[8.8]. In fact, the HRC considered that, in the circumstances of that case, there was still sufficient time for Australia to intervene by taking affirmative measures to protect and, where necessary, relocate the claimants. These adaptation obligations did not, however, indicate that there was still sufficient time for Australia to delay mitigation action.
[434] *KlimaSeniorinnen*, [572].
[435] *KlimaSeniorinnen,* [573].

Particularly relevant in determining an 'adequate'[436] national system for Australia are the principle of common but differentiated responsibilities and respective capabilities (CBDR-RC) and the international law obligation to cooperate.

Secondly, Australia has **human rights law obligations to protect the rights** of individuals within its territory from foreseeable and real threats, through both respecting the rights and meeting its positive protection obligations under the human rights treaties. 'Positive protection' obligations require Australia to conduct due diligence to prevent, mitigate and remedy threatened human rights harms. In the context of climate change, a particularly high standard of due diligence attaches, involving taking all necessary measures to protect the climate system (as fundamental to the enjoyment of human rights). Necessary measures include protection from threats resulting from actions of private entities. The positive obligations extend to protective actions which are not unduly burdensome and are capable of being effective.

Thirdly, Australia is under an international law obligation to take the above steps and measures **in cooperation with other States**, as part of the duty to prevent significant harm to the climate system. States are positively required to engage in continuous and sustained forms of cooperation, in good faith efforts to achieve the collective goal of limiting global temperature rise to 1.5°C above pre-industrial levels, including especially through cooperative, concrete emissions reductions capable of achieving the collective goal.

5.4 Evaluating Australia's laws, actions and policies against its human rights law obligations

Australia's laws, actions, and policies regarding its fossil fuel exports fall significantly short of its international law obligations and of its human rights law positive protection obligations. The lifecycle emissions from Australia's exported fossil fuels are measurably raising global mean temperatures by increments which may seem small but are sufficient to raise the incidence and severity of multiple climate hazards in Australia and globally, with every fractional or incremental temperature rise worsening climate extremes.[437] Australia's exports are tangibly contributing to worsening adverse impacts on human rights, now and in the future, including tthe right to life and the right to family and home life.

Yet Australia's current approach to its responsibilities for the adverse human rights impacts of its fossil fuel exports is well characterized as one of 'denial'. Australia has both declined to regulate

[436] ICJ, Advisory Opinion 187, [270].
[437] IPCC, AR6, *Climate Change 2023: Synthesis Report*, at 12. As mentioned in Part 1, such warnings are repeated many times in various forms in the IPCC's 2023 Synthesis Report, and in its accompanying Summary for Policymakers and other recent IPCC reports eg 'Risks are increasing with every increment of warming': at 17. And see IPCC, 2018, *Special Report on Global Warming of 1.5°C*, at B.5. The IPCC has also used 'Reasons For Concern' graphs (also referred to as 'burning ember' graphs) to illustrate aspects of heightening climate risk at fractionally higher temperatures.

the exports, despite their measurable and substantial contribution to harm to the Earth's climate system, and has continued actively to promote them. Key features of its current approach are:

1 **Absence of a regulatory framework to contain the sector:** Australia has no plan to cap, restrict, set targets for or reduce its fossil fuel export production, nor indeed any 'national policy framework aiming to restrict fossil fuel exploration, production or infrastructure development' generally.[438]

2 **Regulatory gaps, omitting the sector:** The Safeguard Mechanism's net emissions baselines do not extend to exported emissions, which typically constitute around 90% of fossil fuel exporters' emissions.[439]

3 **Continued expansion:** Australia continues to issue new exploration licences and approvals for expanded and new coal and gas export projects, many with decades-long operational permits; this builds in continued growth in its appropriated portion of the remaining global carbon budget.[440]

4 **Subsidization:** In 2023–24, Australian Federal and state governments provided AU$14.5bn worth of supports and tax concessions to subsidize its fossil fuel production generally and major users in Australia, a 31% increase on the subsidies provided in the previous year.[441]

5 **Diplomatic promotion**: Government representatives actively promote Australian coal and gas to overseas buyers, while disclaiming any responsibility for the emissions resulting from the exports.[442]

Many of these actions are the very kind identified by the ICJ as potentially internationally unlawful acts.[443]

Australia's human rights law and related international law obligations have been engaged, given the foreseeable and real risks to human rights in Australia which worsening climate change is presenting, and given the fact that there are measures reasonably available to it which it has failed to take but which could have had a real prospect of altering the outcome or mitigating the harms. Australia is in a position where, as a wealthy and world-ranking fossil fuel exporter, there are multiple actions which would not be unduly burdensome and which it is capable of taking to mitigate harms to human rights in its territory but which it is actively declining to take:

- It has not conducted, or has not disclosed that it has conducted, human rights due diligence regarding its total contribution and the harms.
- While it has set emissions reduction targets and emissions limits for large industrial facilities, it has not developed and adopted a national plan in which it sets a total

[438] SEI et al., Production Gap Report 2023, at 55.
[439] Clean Energy Regulator, Safeguard Mechanism.
[440] Climate Analytics, 'Footprint report', Executive Summary.
[441] Australia Institute, Fossil Fuel Subsidies in Australia 2024. Although Australia has committed to the G20 Leaders agreement 'to rationalise and phase-out inefficient fossil fuel subsidies that encourage wasteful consumption', it submitted its response to the G20 in June, 'concluding that we had no measures within scope of the Commitment': Australian Treasury, 'G 20 Commitment on Fossil Fuel Subsidies: SOP and Australia's Response', 2009.
[442] R Denniss and A Behm, 'Double Game', July 2021; S Ali and J Sherley, 'How to Build a Gas Empire: Part 1', July 2025.
[443] ICJ, Advisory Opinion 187, [427].

allowable amount of greenhouse gas emissions over time, in alignment with the Paris Agreement's temperature goal.

- It has not set targets for ending the expansion, subsidizing and promotion of its fossil fuel exports.
- In particular, it has not established any regulatory frameworks to address its exported emissions and their corresponding harms.

Australia and others have argued against the utility of fossil fuel exporting countries taking unilateral action, on the basis that it will merely lead to 'market substitution'. This reasoning predicts that other exporters will step in to fill the gap if one exporter stops, with the result that there will be no global decarbonization gain overall. The argument has no application in the present context, as what is required by Australia is not a sudden or overnight halt to the exports but a cooperative and just approach to stopping significant harm to the climate system from the exports. In any event, industry experts and economists have explained that the market substitution argument rests on a particularly weak economic assumption: that any decrease in Australia's exports would be fully 'substituted' by other sellers, with no effect on volumes of demand.[444] It is much more likely that Australia's actions would alter global fossil fuel markets by creating a looming shortage, pushing up world prices, dampening demand and, over time, stimulating a stronger and earlier move away from fossil fuels - supported by the fact that renewable energy sources would be cheaper and more available. What is least likely to occur, they point out, is that Australia's current buyer countries would simply keep buying the same quantities of coal or gas, at what would be higher prices, from new sellers over the full period during which Australia's coal or gas production would otherwise have continued.

Australia's failures to act on its legal obligations place it in clear non-compliance with its ICCPR positive obligations to protect the right to life and the right to family and home life, with its obligations under the ICESCR, and with its customary international law obligations to take necessary steps to prevent significant harm to the climate system.

Nor can adaptation action by Australia substitute for ambitious mitigation: '[d]eep and swift mitigation is critical to avoid widespread breaching of adaptation limits.'[445] At 1.5°C of warming already in Australia and with global emissions still rising, worsening climate extremes pose a persistent threat to human life and to family and home life, one which will continue to intensify alongside the ongoing rise in global mean temperatures.

In the next Part, we set out National Guidance for Australia to follow to bring itself into alignment with its human rights law and related international law obligations in the context of its fossil fuel exports and their aggravating contribution to worsening climate change in Australia.

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[444] For an excellent outline of the literature, see Redline, 'Market Substitution'. And see *WildEarth Guardians v. United States Bureau of Land Management*, (USCA 10th Cir, 870 F.3d 1222, 15 September, 2017).
[445] Future Earth, '10 New Insights in Climate Science 2022', The Earth League, WCRP (2022), Stockholm, at 13-15.

6 National Guidance for Australia's human rights law compliance

'States should be accountable to rights-holders for their contributions to climate change, including for failure to adequately regulate the emissions of businesses under their jurisdiction regardless of where such emissions … actually occur.'

UNHCHR, 'Understanding Human Rights and Climate Change', 2015, at 3.

This National Guidance for Australia outlines a four-step reform process which, based on the analysis and information in this report, Australia must undertake to address its obligations regarding its fossil fuel exports under international human rights law and related international law, particularly in light of their contribution to worsening harms to the human rights to life and to family and home life.

1 Establish a moratorium

To avoid perpetuating internationally wrongful acts and to meet its binding legal obligations, Australia must immediately halt all approvals of new or expanded fossil fuel projects and related infrastructure, and of new financial support and subsidy programs for fossil fuel production for export, pending decisions made in the course of the actions outlined below.

2 Conduct due diligence in relation to the human rights impacts and climate system harms of the fossil fuel exports

In the context of climate change, Australia is obliged under international human rights law to conduct a particularly 'high standard' of human rights due diligence to investigate the contribution of its fossil fuel exports and facilitating policies to worsening climate harms and related adverse impacts on human rights within its territory, and to identify actions available to it to mitigate these.

Given the body of information already available, this exercise need not be onerous or protracted. As demonstrated in this report, information is already available as to the contribution of Australia's fossil fuel exports - historically, currently and as projected – to increasing global mean temperatures and associated increases in climate extremes. While information and data about the adverse human and human rights impacts of climate change in Australia are rapidly growing, Australia will need to investigate those impacts comprehensively. It will also need to identify its national and sub-national policies and regulation (or their absence) relating to the fossil fuel exports, and assess their role in worsening these adverse impacts. Finally, it must

identify the steps it can reasonably and effectively take to minimize the adverse impacts, including in relation to the actions of private entities.

Australia is also obliged under international law to conduct 'stringent' due diligence in relation to significant harm to the climate system which is attributable to its fossil fuel exports or associated policies. Once again, this exercise by Australia need not be protracted, given the wealth of relevant information already available, including in the IPCC reports. Australia is required as part of due diligence to identify and mobilise 'all means at its disposal' to prevent such harm, including where harm is attributable to the actions of private entities.

3 Develop a package of reform measures and policies

There can be little doubt, based on the evidence in this report and other sources, including the IPCC reports and the 'Australasia' chapter, analyses undertaken by human rights bodies and uncontested expert evidence presented in domestic litigation, that due diligence conducted by Australia will reveal that it must institute a process of substantial reform in relation to the fossil fuel exports if it is to comply with its international law obligations. It is already evident that Australia's contribution to climate harm through its fossil fuel exports is substantial and that it has taken no direct steps to address or mitigate that contribution, even though measures are available – including stopping its harmful actions - which have a real prospect of mitigating the harms.[446]

In light of this evidence, as the law and jurisprudence set out in this analysis make clear, Australia's protective and preventative obligations have been engaged by both the real threats posed by climate change and its failure to take available actions in relation to its fossil fuel exports, given their measurable contribution to climate and human rights harm. To meet these obligations, Australia is required to protect the climate system and climate-exposed human rights **by adopting protective and preventative measures and policies** which are necessary, adequate and appropriate for these ends, and which are consistent with the individual and cooperative efforts necessary to meet the Paris Agreement's 1.5°C temperature goal. Australia must ensure that the measures and policies it adopts are also consistent with the core principle of Common but Differentiated Responsibilities and Respective Capabilities ('CBDR-RC'), by taking due account of its historical role and contribution to harming the climate system, as well as its high levels of human development, economic capacity and technological capability.

In particular, Australia must **reform its existing measures and policies which permit and facilitate potentially internationally wrongful acts** by Australian governments and governmental authorities. The ICJ has made clear that certain types of measure or policy - particularly sustained fossil fuel production, granting fossil fuel exploration licences, and subsidies for fossil fuel projects – are likely to constitute internationally wrongful acts under

[446] *KlimaSeniorinnen,* [444]

international law.[447] These are the very kind of measures and policies which federal and sub-national governments and their agencies in Australia are currently pursuing in relation to its fossil fuels - production which is almost entirely for export.

Reform of this production, so as to comply with international and human rights law, will require Australia to develop and implement **a fossil fuel exports phase-out plan**, and must involve ambitious reductions in those export volumes. Reduction targets might focus, for simplicity, on percentage reductions in earmarked production or in export volumes, rather than on more complicated systems for reductions in emissions which will occur overseas.[448]

To comply with international and human rights law, Australia must also implement a **process of legislative reform**. Its reforms must include consequential amendments to environmental protection and mining legislation, as well as to requirements for corporations in relation to harmful, climate-related impacts from their business activities.[449] Additionally, the reforms must include the introduction of an Australian Human Rights Act, incorporating enforceable human rights protections and State obligations into Australia's domestic law. Existing procedural challenges for those experiencing climate-related human (rights) harms or threats of harm and seeking to enforce their rights must also be addressed.

If implementation of Australia's fossil fuel exports phase-out plan is to be effective and orderly, and to meet the international law obligation of cooperation, a critical element will be **good faith consultations and partnerships with stakeholders**. Importantly, Australia should initiate concerted bilateral talks with its major fossil fuel buyer countries aimed at the cooperative development of pathways for an ambitious, managed and orderly transition away from reliance on our (or, indeed, any) fossil fuels. This action is particularly important for maximizing the overall, global mitigation gain from Australia's exports-related reforms and minimizing any potential for market substitution.

Finally, multiple international law obligations compel Australia to **secure its reforms by referencing them in its NDC**. The obligations include its duty to use all means at its disposal to prevent significant harm to the climate system and its customary international law and treaty law-based duty of cooperation. They also include its Paris Agreement obligations to make mitigation commitments which reflect 'its highest possible ambition' and to ensure its NDC is 'capable of making an adequate contribution to the achievement of the temperature goal' of

[447] ICJ, Advisory Opinion No. 187, [427].
[448] Climate Council, 'Submission to Climate Change Authority', 7 July 2023, at 43. The phase-out might be modelled on Australia's highly successful system of controls for implementing the *Montreal Protocol* in a stepwise, time-bound manner: see *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989* (Cth), particularly s.3 objectives. Controls might also include a tax on production by volume: see F Green and R Denniss, 'Thinking creatively about phasing out coal', *Inside Story*, 2018.
[449] Australia should apply Europe's climate-related 'external impacts' disclosure requirements for large fossil fuel corporations operating in Australia ('double materiality' and climate-related due diligence obligations).

1.5°C above pre-industrial levels, which 'has become the scientifically based consensus target under the Paris Agreement'.[450]

4 Apply human rights principles to the fossil fuel exports reform plan

Human rights law also offers guidance of a procedural rights nature.[451] The effective implementation of the processes and reforms necessary for Australia's compliance requires an institutional architecture which is aligned with the human rights law principles of accountability and transparency, and with the human rights to participation, effective remedies and non-discrimination. These will direct Australia to ensure that its fossil fuel exports reform plan:

- is well resourced, and has the engagement of state and territory governments;
- is accountable and has integrity, such as with annual reporting requirements to Parliament and independent oversight of compliance with climate and human rights commitments;
- is transparent, for example, is developed through a phased approach with clear benchmarks, beginning with the moratorium and followed by the comprehensive due diligence process;
- is participatory, involving consultation with affected communities;
- respects human rights during implementation, for example, with targeted assistance for economic diversification, and comprehensive transition planning for regional areas;
- is non-discriminatory, in that it does not perpetuate broader social inequalities and considers the needs of marginalized groups; and,
- offers effective and meaningful remedies for human rights impairments, including judicial and other redress mechanisms.

[450] ICJ, Advisory Opinion No. 187, [224] and [242]-[245].
[451] See, e.g., UNHCHR 'Good governance practices for the protection of human rights', 2007; in the climate change context, UNHCHR, 'Understanding human rights and climate change', 2015.