COMMUNICATION UNDER THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

13 May 2019

I. THE AUTHORS

1. The Authors are eight individuals (six male complainants and two female complainants) from the Torres Strait Islander indigenous minority group who live on the islands of Boigu, Masig (Yorke Island), Warraber (Sue Island) and Poruma (Coconut Island) in the Torres Strait region of the State of Queensland, Australia. They are:

   (1) Keith Pabai [redacted] and Stanley Marama [redacted] of Boigu;

   (2) Nazareth Warria [redacted] and Yessie Mosby [redacted] of Masig;

   (3) Kabay Tamu [redacted], Ted Billy [redacted] and Daniel Billy [redacted] of Warraber; and

   (4) Nazareth Fauid [redacted] of Poruma.

2. The Authors are submitting this communication as alleged victims. In addition, Yessie Mosby brings the complaint also on behalf of his children Genia Mosby [redacted], Ikasa Mosby [redacted], Awara Mosby [redacted] (pictured on the first page of his witness statement), Santoi Mosby [redacted] and Baimop Mosby [redacted] as victims; Kabay Tamu brings this complaint also on behalf of his son Tyrique Tamu [redacted]. Each of the Authors has provided a witness statement setting out the facts relevant to this Communication, attached as **Annexes 5-12**. A film containing interviews with the Authors and images filmed on their islands in March 2019 is available at the following link: https://vimeo.com/335680830 [redacted].

3. The Authors and their communities are among the most vulnerable in the world to the current and future impacts of climate change. The Authors have a deep concern that their culture and way of life, which is intimately linked with their land and sea territories in the Torres Strait, is gravely threatened by the effects of climate change and sea level rise in particular. Unless urgent action is taken, climate change is predicted to make their islands uninhabitable within their and their children's lifetimes.

4. By climate change the Authors mean changes in the Earth's natural climatic systems since pre-industrial times caused by the accumulation of anthropogenic greenhouse gases[1] in the atmosphere, and land use changes (such as deforestation).[2] The accumulation of greenhouse gases in the atmosphere traps heat from the sun causing an increase in global mean surface temperatures ('**GMST**') (among other measures of global temperature), a phenomenon called global warming.[3] To date, anthropogenic greenhouse gas emissions have caused the Earth's GMST to rise by approximately 1 degree above pre-industrial[4] levels,[5] causing significant changes to the Earth's climatic zones and weather patterns, increasing extreme weather, causing sea level rise and affecting all natural systems.[6] In addition to

[1] The six greenhouse gases that primarily cause global warming and climate change and that are regulated by the Kyoto Protocol include carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs) and sulphur hexafluoride (SF_6). See Kyoto Protocol (1998), Annex A.
[2] Climate change is defined in Art.1(2) of the 1992 United Nations Framework Convention on Climate Change (UNFCCC) to mean: "a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods."
[3] See Intergovernmental Panel on Climate Change (IPCC), *Global warming of 1.5 °C: an IPCC special report on the impacts of global warming of 1.5 °C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* ('**SR15**'), Summary for Policymakers, pp 6-8 and 26.
[4] The term "pre-industrial" is defined by the IPCC as *"[t]he multi-century period prior to the onset of large-scale industrial activity around 1750*", with "*[t]he reference period 1850–1900 … used to approximate pre-industrial GMST.*" See IPCC, SR15, Summary for Policymakers, p. 26.
[5] Id, §A.1.
[6] Id, §§B.1-B.5.

causing the ocean to warm,[7] increased carbon dioxide in the Earth's atmosphere is absorbed by the ocean, increasing ocean acidification.[8]

II. STATE CONCERNED

5. The State concerned is Australia, a party to the International Covenant on Civil and Political Rights ('**ICCPR**' or '**the Covenant**') and to the Optional Protocol to the ICCPR ('**Optional Protocol**'). Australia ratified the ICCPR on 13 August 1980 and acceded to the Optional Protocol on 25 September 1991. The Communication relates to the conduct of Australia after it ratified the ICCPR and after it acceded to the Optional Protocol. There is therefore no bar to the Committee's competence *ratione temporis*.

6. As stated above, the Authors are individuals who live in, and are citizens of, Australia. They are therefore individuals "*within [the State Party's] territory and subject to its jurisdiction*" within the meaning of Article 2(1) ICCPR.

III. ARTICLES VIOLATED

7. The Authors allege that their State, Australia, is violating its responsibility to protect their human rights by failing to:

   (1) take adequate measures to provide infrastructure to protect their lives and way of life, their homes and their culture against the threats posed by climate change, especially sea level rise ('**adaptation**'); and

   (2) take adequate measures to reduce Australia's national greenhouse gas emissions which contribute to climate change, including by failing to set a sufficiently ambitious national emissions reduction target under the 2015 Paris Agreement,[9] by failing to pursue adequate domestic measures to meet that target, and by failing to cease promoting the extraction and use of fossil fuels, particularly coal for electricity generation ('**mitigation**').

8. It is alleged that Australia's acts and omissions in relation to the above constitute a violation of the Authors' fundamental rights guaranteed by the ICCPR, in particular Articles 2(1), 2(2), 2(3), 6, 17, 27, and (in respect of the children identified in §2 as victims) Article 24(1).

IV. EXHAUSTION OF DOMESTIC REMEDIES

9. This communication complies with Article 5(2)(b) of the Optional Protocol and Rule 99(f) of the Rules of procedure of the Human Rights Committee ('**the Committee**').[10]

10. The remedies that must be pursued in this context are judicial or administrative avenues that offer an author a reasonable prospect of redress. The Committee has repeatedly stated that Article 5(2)(b) of the Optional Protocol, by referring to "*all available domestic remedies*", "*clearly refers in the first place to judicial remedies.*"[11] Such a remedy must have the capacity to deliver a binding decision and provide effective relief, rather than being merely recommendatory. Domestic avenues that do not meet those

[7] See Id, Chapter 3, p. 223 ("*ocean waters have increased in sea surface temperature (SST) by approximately 0.9°C … since 1870–1899*".).

[8] See Id, p. 178 ("*The ocean has absorbed about 30% of the anthropogenic carbon dioxide, resulting in ocean acidification and changes to carbonate chemistry that are unprecedented for at least the last 65 million years (high confidence). Risks have been identified for the survival, calcification, growth, development and abundance of a broad range of marine taxonomic groups, ranging from algae to fish, with substantial evidence of predictable trait-based sensitivities (high confidence). There are multiple lines of evidence that ocean warming and acidification corresponding to 1.5°C of global warming would impact a wide range of marine organisms and ecosystems, as well as sectors such as aquaculture and fisheries (high confidence).*").

[9] Australia acceded to the Paris Agreement on 9 November 2016. For the relevance of the Paris Agreement to Australia's obligations under the ICCPR, see the factual account and legal analysis in this communication.

[10] Rules of Procedure of the Human Rights Committee, CPPR/C/3/Rev.11, 9 January 2019.

[11] Human Rights Committee, **R.T. v France**, Communication No. 262/1987, Views of 30 March 1989, CCPR/C/35/D/262/1987, §7.4. See also Human Rights Committee, **P.S. v Denmark**, Communication No. 397/1990, Views of 22 July 1992, CCPR/C/45/D/397/1990, §5.4.

criteria need not be exhausted for a communication to be admissible. As this section sets out, there are no effective judicial remedies available to the authors in this case.

11. In determining whether any particular remedy meets the criteria of availability and effectiveness, regard must be had to the particular circumstances of the individual case. The Committee must take realistic account not only of formal remedies available in the domestic legal system, "*but also of the general legal and political context in which they operate.*"[12]

12. Further, there is no requirement to exhaust objectively futile remedies. There is no requirement under the Optional Protocol to exhaust domestic remedies that do not offer a reasonable prospect of success.[13] Thus in situations where the law in the relevant jurisdiction is settled, with the result that the domestic court or administrative body would inevitably dismiss the application, an author is not required to make the futile application and have it dismissed before his or her communication to the Committee will be admissible. In short, complainants under the Optional Protocol are required to exhaust remedies that are available, effective, sufficient and adequate.[14]

13. The Authors submit that there are no available or effective domestic remedies that would allow them to enforce their rights protected under Articles 2, 6, 17, 24 and 27 of the Covenant, in respect of the violation of those rights by the Australian Government's failure to mitigate its greenhouse gas emissions or to help the Authors to adapt adequately to the effects of climate change. As matters stand, the legal system in Australia provides no remedies for human rights affected by climate change.

14. The Authors sought a formal advice from Australian counsel as to whether any effective domestic remedies exist to challenge the Australian Government's climate change policies affecting their rights. The Australian counsel advised that no such domestic remedies exist. A copy of their advice is exhibited as **Annex 13**. In summary, the advice concludes that:

    (1) Australian Human Rights Commission ('**AHRC**') conciliation processes do not constitute an effective remedy;

    (2) there is no protection of the Authors' human rights guaranteed by the ICCPR in the Australian Constitution, or any other legislation applicable to the federal Government; and

    (3) remedies seeking to address the adaptation and mitigation policies of Australia would be plainly ineffective under Australia's current law and system of Parliamentary sovereignty.

15. The following sections explain those conclusions as to the absence of any effective judicial remedies in more detail.

(1) Australian Human Rights Commission conciliation processes do not constitute an effective remedy

16. The AHRC is a statutory body established under the *Australian Human Rights Commission Act 1986* (Cth) ('**AHRC Act**'). Its main functions and powers include the investigation and conciliation of complaints under federal discrimination law. The AHRC is not a judicial organ and does not therefore provide a judicial remedy within the meaning of Article 5(2)(b) of the Optional Protocol.

17. In **C v Australia**, the Human Rights Committee held that the AHRC (which was then known as the Human Rights and Equal Opportunity Commission or 'HREOC') was not an avenue required to be pursued in order to exhaust domestic remedies. In that case, the Committee found that:

[12] European Court of Human Rights, **Akdivar et al. v Turkey** [GC], 30 August 1996, §§68-69; **Khashiyev and Akayeva v Russia**, 24 February 2005, §§116-17.
[13] Human Rights Committee, **Griffiths v Australia**, Communication No. 1973/2010, Views of 21 October 2014, CCPR/C/112/D/1973/2010.
[14] See Human Rights Committee, **Vicente et al. v Colombia**, Communication No. 612/1995, Views of 29 July 1997, CCPR/C/60/D/612/1995, §5.2

any decision of these bodies [the then HREOC as well as the Commonwealth Ombudsman], even if they had decided the author's claims in his favour, would only have had recommendatory rather than binding effect, by which the Executive would, at its discretion, have been free to disregard. As such, these remedies cannot be described as ones which would, in terms of the Optional Protocol, be effective.[15]

18. The same conclusion as to the non-binding nature of AHRC remedies, and therefore there being no need to exhaust them, was reached in **Brough v Australia**[16] and **Madafferi v Australia**,[17] among other cases.

19. Accordingly, the Authors submit that the conciliation processes of the AHRC would be plainly ineffective in respect of this particular violation of their rights and that they are therefore not required to pursue them in this case.

(2) There is no protection of the Authors' rights under the ICCPR in the Australian Constitution or other legislation

20. Australia has not given effect in its Constitution to the rights recognised in the ICCPR. The Australian Constitution contains no bill of rights.[18] Unlike many nations around the world,[19] there are no environmental rights in the Australian Constitution, such as the right to a healthy environment. The rights of Australia's first peoples, or their connection to their lands, are not recognised in its Constitution. The Commonwealth of Australia has not passed any laws protecting the rights guaranteed by Articles 6, 17, 24 or 27 of the ICCPR.

21. The Torres Strait is part of the Australian State of Queensland. Queensland does not guarantee protection of human rights in its State Constitution. The Human Rights Act 2019 (Qld) ('**Qld HRA**') was passed on 27 February 2019 and is expected to become law on 1 January 2020. It provides that all individuals in Queensland have the rights guaranteed in the ICCPR protected by law. However, the Qld HRA will apply only to decisions or actions taken by a public authority of the State of Queensland and does not apply to the Commonwealth of Australia, which has primary responsibility for environmental policy in the context of compliance with international law. Furthermore, the Qld HRA affords no remedy for acts or omissions that take place before the Act comes into effect on 1 January 2020. The advice received by the Authors concluded that the Qld HRA will not provide any remedy for failing to take action to respond to climate change or to protect the Authors from its effects: **Annex 13**, §32.

22. More fundamentally, the powers of the Queensland Human Rights Commission under part 4 of the Qld HRA will be limited to conciliation and reporting. The Commission does not have coercive powers. For the reasons set out above in relation to the AHRC, invoking those powers would not provide effective remedies that the authors are required to exhaust under the Optional Protocol.

(3) Lawsuits seeking to challenge the adaptation and mitigation policies of Australia would be plainly ineffective under Australia's current law and system of Parliamentary sovereignty

23. In several countries, individuals have taken legal action challenging the sufficiency and effectiveness of their government's national law and policy on climate change. The Authors received advice stating that each of the legal theories that have had success internationally would be plainly ineffective in

[15] Human Rights Committee, **C v Australia**, Communication No. 900/1999, Views of 28 October 2002, CCPR/C/76/D/900/1999, §7.3.
[16] Human Rights Committee, **Brough v Australia**, Communication No. 1184/2003, Views of 17 March 2006, CCPR/C/86/D/1184/2003.
[17] Human Rights Committee, **Madafferi v Australia**, Communication No. 1011/2001, Views of 26 July 2004, CCPR/C/81/D/1011/2001.
[18] This position is criticised in Williams, G & Reynolds, D *A Charter of Rights for Australia*, UNSW Press, 2017.
[19] Such as India, South Africa, Kenya, Ecuador, Turkey, Mexico, Brazil, the EU, Costa Rica, Germany, Peru, Chile, Argentina, Columbia and the Philippines.

Australia, partly because of the deference shown to Parliamentary sovereignty by Australian courts,[20] a view shared by leading academic scholars of this topic.[21]

24. Specifically, in relation to the tort of negligence, the Authors were advised that a claim against the Commonwealth of Australia in the tort of negligence would be plainly ineffective and could not succeed. This is because of a unanimous decision of the High Court (the highest appellate court) finding that State organs do not owe duties of care for failures to regulate environmental harm.[22] This decision is binding precedent on Australian courts and is frequently applied in tort claims against government entities.

25. Under Australian law as it currently stands, a claim in negligence against the Australian Government would not offer a reasonable prospect of success. Further, the usual remedy in tort is damages, whereas the Authors of this communication seek a View from the Committee on the climate change policies of Australia to remedy their effect on the Authors' human rights. Such a remedy is not usually available in the civil law of tort.[23]

26. Most climate change litigation in Australia is administrative, involving merits or judicial review of the environmental impacts of specific projects or developments under statutes concerning land use planning and environmental regulation. Administrative proceedings would not provide a remedy relating to the compatibility of Australia's adaptation measures in the Torres Strait or its emissions reduction measures with its human rights obligations. It would be impracticable for the Authors to attempt to challenge each and every administrative act of the Australian Government affecting or implementing its regulation of greenhouse gas emissions, such as the grant of environmental permits for coal mines, or each and every act or omission in respect of adaptation. Further, there are no existing avenues of judicial review of the legislation regulating greenhouse gas emissions or adaptation measures open to the Authors that would offer any reasonable prospects of success.

27. For these reasons, and for the reasons fully explained in the advice at **Annex 13**, the Authors submit that there is no bar under Article 5(2)(b) of the Optional Protocol to a finding of admissibility.

V. OTHER INTERNATIONAL PROCEDURES

28. The same matter is not being examined under another procedure of international investigation or settlement.

VI. FACTS OF THE CLAIM

29. This section describes: (i) the threat of forced displacement of some of the world's most climate-vulnerable people; (ii) the Torres Strait region; (iii) Torres Strait culture and its inextricable link to land and sea; (iv) the impact of climate change on the Torres Strait; and (v) Australia's climate change policies.

(1) The threat of forced displacement of some of the world's most climate-vulnerable people

30. The Torres Strait Islander indigenous people, especially the Authors' low-lying island communities of Boigu, Masig, Warraber and Poruma, are among the most vulnerable populations in the world to climate change. They are now in the early stages of a slow-onset catastrophe. Unless their State, Australia, takes urgent action on mitigation of and adaptation to climate change, they face the devastating prospect of their islands becoming unviable for habitation over the coming decades. This would cause themselves,

[20] See **Annex 13**, §§73 onwards.
[21] Peel, J, Osofsky, H & Foerster, A 'Shaping the 'Next Generation' of Climate Change Litigation in Australia' 41 *Melbourne University Law Review* 793, available at https://law.unimelb.edu.au/__data/assets/pdf_file/0005/2771447/10-Peel,-Osofsky-and-Foerster.pdf accessed 29 April 2019.
[22] **Graham Barclay Oysters v Ryan** [2002] HCA 54.
[23] **Annex 13**, §82.

their families and their communities to be uprooted, and their ancient culture, deeply and inextricably linked to the islands and the local environment, to risk extinction.

31. The Authors have explained the impact that dispossession would have on the Islanders' lives. Ted Billy says:

> *If we have to move from this island, then as long as we live there will always be an empty space in us – that is how much we are connected to the island, to the place that we live.* (§31)
>
> *There are also several sacred sites on the island that are really important to us, where we still have a real connection to the history of the site. That connection would be lost and missed if we had to move away. We won't be able to pass down to the younger generations our stories and history, about their culture. The younger generations wouldn't have the privilege that we had of living in this place and living as an islander. Where we live is how we identify ourselves, by passing down information about what we know about this place that has been handed down by our forefathers and mothers.* (§35)

32. Stanley Marama expresses the loss as follows:

> *If I was asked to leave this island, I can't. I can't leave my community, because this is my home. This is where I get my blessing from. I can't leave my grandfathers, grandmothers, and other relatives behind in the cemetery. It will affect my family, my kids, my grandchildren, because we spend our whole lives in the community of Boigu.*
>
> *I think if we had to move down south, this is when we would question ourselves. We can't fit into life down there, because a lot of things are connected to white man. If we had to leave behind the culture and leave behind the community, we would leave behind our history – our grandmothers and grandfathers. That will affect us, make us question who we are.* (§§34 and 35)

33. Nazareth Fauid states:

> *If we had to move it would disconnect us from our culture and lifestyle in the Torres Strait. Our kids would lose their culture if they were forced to move. They are proud of their culture, the community where they are living and their loved ones next or us or in the cemetery. They are so proud of who they are – their identity, being Porumalgal.* (§32)

34. Kabay Tamu says:

> *You disconnect the people from their land and they don't practise their traditions anymore. They don't speak their language. Once we are disconnected from the land, we are disconnected from our culture, language and traditions. We will be climate change refugees in our own country. You take us away from our home and you stop us from practising our culture. I fear especially for my son's future.* (§26)

(2) The Torres Strait region

35. The Torres Strait is a belt of sea that lies between Papua New Guinea to the north and mainland Australia to the south. It joins the Arafura Sea to the west with the Coral Sea to the east. The region is part of Australia, and is described in the *Land and Sea Management Strategy for Torres Strait 2016-2036* produced by the Torres Strait Regional Authority ('**TSRA**'),[24] an organ of Australia's federal government.[25] Chapter 2 of the *Land and Sea Management Strategy*, attached at **Annex 2**, describes the

[24] TSRA (2016) *Land and Sea Management Strategy for Torres Strait 2016-2036*. Report prepared by the Land and Sea Management Unit, Torres Strait Regional Authority.

[25] The TSRA is established under Section 142 of the *Aboriginal and Torres Strait Islander Act 2005* (Cth) (**ATSI Act**) as an indigenous representative body as well as an agency of the Commonwealth government. The functions of the TSRA include the recognition and maintenance *"of the special and unique Ailan Kastom* of Torres Strait Islanders living in the Torres Strait area"* (per Section 142A(1)(a) of the ATSI Act). The TSRA does not have powers or functions directly related to the climate change

unique environment and geography of the region and the culture of the people who live in the Torres Strait, the Torres Strait Islanders, as well as the history and nature of their occupation of the Strait.

36. The islands on which the Authors live are described in their witness statements, which contain maps showing their locations and attach *Land and Sea Profiles* produced by the TSRA describing their respective geographies and natural features. See in particular: Boigu – Keith Pabai at §§5-10 and Stanley Marama at §§5-9; Masig – Yessie Mosby at §§5-9 and Nazareth Warria at §§5-9; Warraber – Kabay Tamu at §§5-9, Ted Billy at §§5-9 and Daniel Billy at §§5-9; Poruma – Nazareth Fauid at §§5-9.

37. Torres Strait Islanders are a small numerical minority within Australia, although they constitute almost the whole of the settled population of the Torres Strait region. Australian census figures from 2016 indicate that all Aboriginal and Torres Strait Islander people *together* accounted for 2.8% of Australia's population, with Torres Strait Islanders making up 5% of that figure, i.e. about 0.14% of the total population.[26]

(3) Torres Strait culture and its inextricable link to land and sea

38. Whilst there are overarching commonalities in culture across the Torres Strait region, each island has its own distinct culture. There are four main island groups, with increased linguistic and cultural similarities within each group, namely: North-Western (Boigu, Saibai, Dauan), Western (Badu, Moa, Mabuiag), Central (Masig, Poruma, Warraber, Iama) and Eastern (Erub, Mer, Ugar). Both the Torres Strait Islanders as an umbrella group and each island's community, each constitute distinct and identifiable cultural minorities within Australian society.

39. There are two main native languages spoken in the Torres Strait region, which are distinctive to the region: (i) Kalaw Lagaw Ya, Kala Kawa Ya or Kulkalgal Ya, dialects of the same language that is spoken in the North-Western, Western and Central islands, and (ii) Meriam Mir, spoken in the Eastern islands.

40. The Torres Strait Islanders' distinctive culture is recognized in Australia and internationally.[27] More detail about the culture can be found in the affidavit of Keith Pabai dated 12 September 2008 from proceedings establishing Torres Strait Islanders' native title rights and interests in the sea area of the Torres Strait, attached to his statement included as **Annex 10**.

41. The Torres Strait culture is intimately linked with the natural environment of the region, both land and sea. The connection to land and sea territories is described by Keith Pabai (§31):

> *We as a people are so connected to everything around us. The Island is what makes us, it gives us our identity. We know everything about the environment on this island, the land, the sea, the plants, the winds, the stars, the seasons.* ***The Island makes us who we are. Our whole life comes from the island and the nature here, the environment. It is a spiritual connection. We know how to hunt and fish from this island – to survive here. We get that from generations of knowledge that been passed down to us.*** *I know every species of plant, animal, wind on this island, the way the vegetation changes, what to harvest at different times of the year. That is the*

policies of the Australian Government. (*"*Ailan Kastom*" [island custom] is defined by the ATSI Act as: "*the body of customs, traditions, observances and beliefs of some or all of the Torres Strait Islanders living in the Torres Strait area, and includes any such customs, traditions, observances and beliefs relating to particular persons, areas, objects or relationships.*")

[26] Australian Bureau of Statistics, "2016 Census shows growing Aboriginal and Torres Strait Islander population", available at: http://www.abs.gov.au/ausstats/abs@.nsf/MediaRealesesByCatalogue/02D50FAA9987D6B7CA25814800087E03, accessed on 1 March 2019.

[27] Academic sources of information about the culture include Shnukal, A (2004) 'The post-contact created environment in the Torres Strait Central Islands' *Memoirs of the Queensland Museum, Cultural Heritage Series* 3(1): 317-346, Brisbane, available at hhttps://www.qm.qld.gov.au/~/media/Documents/QM/About+Us/Publications/Memoirs+-+Culture/C3-1/ch3-1-shnukl.pdf and Beckett, J (1987) *Torres Strait Islanders:Custom and Colonisalism*, Cambridge University Press, Sydney.

cultural inheritance we teach our children. It is so important to us, this strong spiritual connection to this island, our homeland. (Emphasis added)

42. The Authors provide detailed accounts of their culture and of the vital part that their island territories (lands and seas) play in that culture in their witness statements. In summary:

    (1) The culture that the Authors live and practise daily is intimately tied to traditional means of subsistence, especially fishing and gathering living marine resources. See, e.g., witness statements of Yessie Mosby at §§20-41; Stanley Marama at §§15-27; Keith Pabai at §§12 and 17-33; Nazareth Warria at §§16-27; Ted Billy at §§13-16; Daniel Billy at §§14-22; Nazareth Fauid at §§14-18.

    (2) Living from the natural resources is an important part of the community's *communal* and *spiritual* life. See, e.g., witness statements of Keith Pabai at §12(d)-(e) and §§30-31; Daniel Billy at §§15-19; Kabay Tamu at §§18-19; Yessie Mosby at §§28-59; Nazareth Fauid at §18; Nazareth Warria at §§20-24.

    (3) Essential and distinctive features of their culture are bound up with the land and sea territories of their particular islands and the seasonal rhythms and life-cycles in the Torres Strait. See, e.g., witness statements of Nazareth Warria at §§23-25; Stanley Marama at §§16, 18; Keith Pabai at §12(d)-(e) and §§30-31, 41-42; Kabay Tamu at §25.

    (4) The Authors and the other members of their communities have a deep attachment to the place where they were raised and where their ancestors are buried. It is also very important to them spiritually to be able to go on tending to the graves of their ancestors, who have a continuing presence as part of the community. It is important to them to know that they can visit graves of ancestors and in turn will be buried in their community cemeteries. See, e.g., witness statements of Keith Pabai at §§19 and 29; Stanley Marama at §§25 and 33-35; Ted Billy §§13-17; Kabay Tamu at §§17 and 27; Nazareth Fauid at §31; Nazareth Warria at §§26-27.

43. The evidence demonstrates that the Authors as indigenous peoples are intimately connected to their island homes. Their spiritual, emotional and physical wellbeing is linked to the health of the surrounding land and seas and their ability to inhabit their islands in safety and security.

(4) The impact of climate change on the Torres Strait

A. Australia's recognition of a "human rights crisis" in the Torres Strait

44. The Australian government has itself acknowledged the seriousness of the present situation, including that current trends threaten a "*human rights crisis*" in the Torres Strait.[28] In particular:

    (1) The TSRA has acknowledged in the *Torres Strait Climate Change Strategy 2014-2018* (**Annex 1**) that:

    > *[t]he extent of the predicted effects of climate change in the Torres Strait region, along with the geographic, ecological, social and cultural characteristics make Torres Strait communities amongst the most vulnerable in Australia.* ***The effects of climate change threaten the islands themselves as well as marine and coastal ecosystems and resources, and therefore the life, livelihoods and unique culture of Torres Strait Islanders****. Indigenous communities are more vulnerable to climate change because of the social and economic disadvantages they already face.*[29] (Emphasis added)

    (2) Given this, the Strategy recognizes that:

[28] TSRA (2014), *Torres Strait Climate Change Strategy 2014-18: Building Community Adaptive Capacity and Resilience* ('***Torres Strait Climate Change Strategy 2014-2018***'), **Annex 1**, p. iii.
[29] Ibid.

> ***If strong action is not taken to address these threats, there is the potential for climate change impacts in Torres Strait to create a human rights crisis.*** *The degree of vulnerability of Torres Strait communities to climate change, and sea level rise in particular, needs to be fully appreciated by governments and policy makers* ***Even small increases in sea level due to climate change will have an immense impact on Torres Strait communities, potentially threatening their viability. Large increases would result in several Torres Strait islands being completely inundated and uninhabitable.***[30] (Emphasis added)

(3) The Strategy further notes that:

> *Whilst it remains unclear what level of inundation will be tolerable for communities over the longer term, the probable worst-case scenario is the relocation of several communities, incurring considerable cultural, spiritual and economic costs …*
>
> *The interconnection between Ailan Kastom (Island custom) and healthy land and sea are integral to spiritual and cultural identity, making the potential threat of climate change to both the islands and the surrounding ecosystems all the more significant to the region's traditional inhabitants.*[31]

45. The following sections detail the existing impacts of climate change and scientists' assessment of future impacts. In summary:

(1) Even now, sea level rise is causing flooding and erosion on the Authors' low-lying islands, while higher temperatures and ocean acidification are causing coral bleaching, reef death, the decline of seagrass beds and of nutritionally and culturally important marine species (see Sections (B) and (C) below).

(2) These impacts are expected to worsen as global temperatures continue to rise (see Section (D) below). Scientific models indicate that in the coming decades rising sea levels will cause increasingly regular inundation of the Authors' low-lying islands, unless proper infrastructure is put in place to protect inhabited areas. At the heart of the impending human rights crisis is the looming prospect of the low-lying islands becoming unviable for habitation in the coming decades, unless urgent action is taken.

B. Existing impacts in the Torres Strait

46. Broadly in line with global trends, Australia's mean surface temperature has warmed by about 1°C since 1910.[32] The surrounding oceans show a similar temperature increase and have become more acidic.[33]

47. The TSRA's *Torres Strait Climate Change Strategy 2014-18* (**Annex 1**) notes that:

> *In the Torres Strait region, sea level has been rising at ~0.6 cm per year from 1993-2010 (compared to global average of 3.2 mm/yr). The rate of sea level rise since the mid-19th century has been larger than the mean rate during the previous two millennia ...*
>
> *Impacts [of climate change] are already being experienced, with coral bleaching observed on Torres Strait reefs in 2010, and the impacts of sea level rise on the frequency and extent of inundation observed with significant flooding and erosion events in 2005, 2006, 2009 and 2010 and 2014 ...*

[30] Ibid.
[31] Id, p. 16.
[32] See https://www.environment.gov.au/climate-change/climate-science-data/climate-science/impacts; https://www.climatechangeinaustralia.gov.au/en/climate-campus/australian-climate-change/australian-trends/.
[33] See https://www.environment.gov.au/climate-change/climate-science-data/climate-science/impacts.

Already islanders are noticing changes in the timing of seasons, rainfall, temperatures and in the behaviour of key species.[34]

48. The TSRA's assessment is that:

> *Studies of extreme seawater inundation in Torres Strait at present show that based on a 5-year return period five communities are particularly vulnerable to inundation – Saibai, Boigu, Masig, Warraber and Iamavii [Iama, also known as Yam]. Future sea level rise will exacerbate this existing issue, with inundation events likely to occur more frequently and the possibility that several Torres Strait islands are completely inundated.*[35]

49. The TSRA records that at present the following impacts have been observed in the Torres Strait region:

    (1) Impacts of inundation and erosion events on low-lying communities and sites of cultural significance;

    (2) Coral bleaching due to thermal stress;

    (3) Enhanced salt water intrusion into coastal ecosystems;

    (4) Impacts from sea level rise leading to increased frequency and extent of inundation;

    (5) Enhanced erosion and inundation of low-lying communities; and

    (6) Coastal erosion events threatening existing island infrastructure.[36]

50. It further notes that the impact of all these changes is expected to worsen as climate change progresses.[37]

C. Impacts currently felt by the Authors and their communities

51. Each of the Authors to this communication has observed significant and destructive impacts from climate change on their respective islands, and on their traditional ecological knowledge, as recorded in their witness statements. These include the following.

Flooding threatening habitability and homes

52. On Boigu, the village now gets flooded every year, when the highest tides occur between December and February. Stanley Marama testifies that "*In all my life I've never seen the high tides like we get in the community now*" (§29). In 2010, the worst flood yet damaged the foundations of his house and his family's graves (§§32-33). An average high tide comes level with the top of the existing sea wall: Keith Pabai, §37. If there is wind blowing, the water comes right over and floods the village: Keith Pabai, §38. The photographs in Keith Pabai's witness statement (under §38) show the annual high tide flooding on 1 January 2019.

53. On Masig, in addition to severe erosion (see further below), high tides with storm surges destroyed buildings by the shore in March 2019: see Nazareth Warria, §§30-35. She testifies that "*I was really shocked to see this – I've never seen such big waves or such bad erosion before. I felt physically in danger. I was watching with some TSI Rangers and TSIRC workers and I felt that the waves could actually sweep us away*." (§35). Yessie Mosby describes the same events, with photographs showing how buildings near the shore were destroyed (§§72-87).

54. On Warraber, every two to three years the highest tide combined with strong winds cause sea water to flood the centre of the village: see Ted Billy, §27.

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[34] TSRA, *Torres Strait Climate Change Strategy 2014-18*, **Annex 1**, pp 7, 10 and 20.
[35] Id, p. 14.
[36] Id, p. 12.
[37] Id, p. 14.

Erosion threatening homes, cultural sites and critical vegetation

55. On Boigu, "*[t]he erosion of the island from the high tides is really serious*" (Keith Pabai, §36). The shoreline has moved in, and one area is now a separate small island which used to be connected to the main island: Keith Pabai, §34.

56. On Masig, the erosion problem is severe. Masig has been losing about one metre of land per year: Yessie Mosby, §85. Then, in March 2019, a combination of high tides and strong winds from a cyclone passing 200km to the south caused the severe flooding and erosion referred to above, in which three metres of shoreline was lost in three days: Yessie Mosby, §§72-87.

57. Areas that used to be inland bush with coconut trees and other plantations are now tidal flats: Yessie Mosby, §61 (and photograph). The location of the seashore has moved a significant distance inland from where it used to be: Yessie Mosby, §63 (and photograph). A tidal surge in recent years destroyed some family graves, scattering human remains: Yessie Mosby, §§65-67.

58. In the lifetime of Nazareth Warria (b. 1973), she has seen areas that were coconut plantations and almond trees washed away on both the north and south sides of the island, with particularly severe erosion occurring recently in March 2019: Nazareth Warria, §§28, 30-35 and 40.

59. On Warraber, buildings, tree plantations, garden areas and graves have been washed away over the years: Ted Billy, §§18-20. One high tide event with strong winds can cause about one metre of erosion: Ted Billy, §23. The community does its best by building makeshift barriers with tyres, but this is only a partial fix, and now the tyres are starting to be washed away: Ted Billy, §§24 and 26. Ted Billy testifies that "*I think the erosion is getting worse every year. When the wet season comes and we have cyclones, the soil is … getting washed off … In some places, we have been losing about 1 metre or even 2 metres of land every year. When I was a teenager, the shoreline used to be about 40 metres further out than it is now*." (§25).

60. Kabay Tamu testifies that "*[o]n the eastern side where I live, the erosion has been very bad in the last couple of years. I know where the sand used to be. I remember there used to be a pig pen and a place for boiling trochus shells. That land has all gone and is now sea*." (§21). On the south side, an area that used to be coconut and wongai trees has been eroded away (§22 (and photograph)). He records that: "*[t]he high tide takes away areas that people used to go to to have family gatherings. They don't go there anymore because the areas are wiped out by rising sea levels; the trees are gone, the coconuts are gone. It is sad. When, after the monsoon season, we go and we see how far the land has eroded, it is like a piece of us is gone*." (§23).

61. On Poruma, a large amount of the island's sand has been washed away over the past few decades, with the worst erosion occurring on the south-west corner of the island: Nazareth Fauid, §§20-22 and 27.

Saltwater intrusion affecting water resources and critical vegetation

62. Rising sea levels have caused saltwater intrusion into the soil of the islands, such that areas previously used for traditional gardening can no longer be cultivated. On Boigu, the residents "*used to grow sweet potato, watermelon, sugar cane and banana*", but "*nowadays we don't do much traditional gardening because of the high tide*": Stanley Marama, §§15. Keith Pabai states that: "*We used to have* kaikai *(food) gardens over the other side of the island, but now we had to abandon them because of the high tide, the saltwater goes too far over those gardening places now*." (§40).

63. On Masig, Yessie Mosby states that "*Coconut trees are our life. We live off coconut trees*" (§38). He describes an area with a lot of coconut trees which used to be healthy, but "*[t]he rising sea level has turned all of them sick*" (§68). Their fruits do not contain coconut water, and others do not bear fruit at all. "*Here and all along this coast, you see dead trees*." (§68). A well associated with his ancestor Genia is now "*brackish, contaminated by saltwater. We cannot drink from it any more*." (§69).

64. These impacts mean that the Authors are reliant on expensive imported goods that are often beyond their means: see, e.g., Stanley Marama §17 ("*Now there are not many gardens on Boigu because of the high tide. These days if you look at the prices at the IBIS shop there is a big problem – it is too much for us. It is not fit to our living because there are only limited jobs on the islands.*"), and Nazareth Warria §37 ("*I feel that we're going to lose our vegetable gardens, and that's taking away our livelihood. It means we have to spend money to buy things from the shop, which is very expensive.*").

Seasons and weather changing affecting the Authors' lives

65. On Boigu, Keith Pabai testifies that seasons are "*very important for us*" – the patterns of seasons and winds "*tell us how we should live, what to catch, what to hunt, when certain species are ready for harvesting*" (§41). But now, "*these things have changed, you can't predict the seasons*" (§42). The *Kuki* (northwest monsoon) wind was still blowing in April 2019, whereas it would usually shift to the south-east by March (§42). He also notes that "*it's getting hotter and hotter all the time*" (§44). Stanley Marama too notes that the seasons are changing and that the weather is "*getting rougher*" (§36).

66. On Masig, Nazareth Warria records similar disruption to the old seasonal patterns: the *Kuki* (northwest monsoon) wind comes much later than before – it now lasts until April-May when the *Sagerr* (southerly trade wind) should be blowing, and the monsoon rains come in March instead of November-December as before (§36). Also, the temperature is "*getting hotter*", and drought "*ruins our garden*" (§37).

67. Kabay Tamu of Warraber states that while "*older ones used to be able to predict the seasons and could tell you what the wind is going to be like in a particular month, when the fish are going to come up … things have changed and seasons have changed. You cannot predict any more*." (§25).

68. Nazareth Fauid of Poruma also testifies to these changes:

> *The seasons are changing. There is less rain. The monsoon season is different. We did not get enough rain this year. … Hopefully we will get rain this year but we don't know what is going to happen. This is making it harder to garden.* (§25)

69. All these changes make it harder to pass on traditional ecological knowledge. Nazareth Fauid testifies that:

> *We pass this culture down to our young ones. I speak from my perspective as a woman. I love my diving, hunting and gathering. I show the younger ones where to go and look for food, to go fishing and diving. I teach them gardening as well. This is becoming harder with changes in the weather and not enough rain.* (§18)

Marine species in decline vital to the Authors' subsistence and culture

70. On Boigu, Keith Pabai records that "*[t]here are definitely less fish than there used to be*" (§43), that now saltwater fish can be caught in what had been freshwater swamps on the island (§43), and that when he was young "*there would be flocks of dugongs, so many of them. We eat the dugong for ceremonies. That is our culture. Now you see them, but it's nothing like before – it is much harder to find them*." (§45).

71. Yessie Mosby of Masig records that seagrass beds and dependent species have disappeared: "*Where you used to see whole patches of seagrass in an area, you go to the same area now and there is no seagrass. Where there is no seagrass, there is no spider shell or clamshell for us to eat.*" (§71).

72. Kabay Tamu of Warraber testifies that: "*We also see a lot of coral bleaching here, from heat waves in the ocean. The coral keeps bleaching and our reefs are dying. The fish are dying*." (§24).

73. Nazareth Fauid of Poruma records the same: where coral bleaching occurred two or three years ago, "*[y]ou do not see fish or crayfish in that area any more.*" (§24). Crayfish is a fundamental source of food and income for the Authors and their communities: see, e.g., Kabay Tamu (§19).

D. Future impacts: the threat of forced displacement

74. As set out in Section (A) above and in more detail in Section (E) below, the impact of projected future sea level rise on the Authors' low-lying islands will be severe.

75. An independent expert scientific report synthesising the state of the current science and the likely future impacts of climate change on Boigu, Masig, Warraber and Poruma is attached as **Annex 14**. The report was written by the following team of recognised experts: Donovan Burton, Professor John Church, Dr John Hunter, Adjunct Professor Dr Peter Best, Ian Edwards, Chloe Portanger. It concludes that:

> *By 2030 each of the locations will experience some increase in extreme events. By 2050 (which is only 30 years away) each island will have a considerable change to the likelihood of inundation events. By 2100, what is a 100-year risk today will become an almost daily challenge.*
>
> *There are a number of adaptation activities that can protect the islands from the current and emerging risks. As well as engineering solutions for raising the land, providing coastal defences and climate-proofing the critical infrastructure in each of the locations there is also a need to help residents manage the other effects of climate change (e.g. extreme temperatures and changes to rainfall). …*
>
> *The risks that climate change present each of the islands is immense and challenge the viability of human settlement. Overcoming the physical challenge from sea level rise is not unsurmountable, but requires ongoing attention, significant resourcing and some grand visioning in regards of large-scale adaptation actions.*[38]

76. Figure 1 in the report (at page 6) shows the interrelationship of erosion and flooding impacts on ecosystems, livelihoods and habitation for small islands such as those in the Torres Strait.

77. The report includes modelling of the specific erosion and inundation risks from sea level rise for each of the islands. In respect of Masig and Boigu, it finds that:

> *Without immediate adaptation planning and implementation [the island] is at serious risk of becoming unfit for human habitation. A confluence of events or compounding storm surge events over a short period of time may be the trigger for considerable challenges to the viability of the island community. Adaptation cannot occur here without considerable resource allocation.*[39]

78. In respect of Poruma, the report finds that:

> *Given the timeframe to implement a comprehensive suite of adaptation actions there is an urgency to implement meaningful adaptation planning and implementation in the next 10-15 years to ensure that the island is resilient to that level (and above) of projected sea level rise. Without this Poruma is at serious risk of becoming unfit for human habitation.*[40]

79. While for Warraber, the report notes that "*[b]y 2050, what is classed as a current one in 100-year event will shift to a return period of once every four years*", and that "*[b]y 2100, a 100-year event today will occur every few days*".[41]

E. The devastating effects of climate change on the Authors, their lives and culture

> *I will probably be alive to see my children not have anything. When they are adults they will not have anything for their children. We will be living on another man's land … That is when my identity, the Masigilgal identity, will die. I know a lot to teach my children, but I cannot teach my*

[38] Climate Planning, 'Torres Strait Expert Analysis: Scoping Climate Change Risk Assessment for Torres Strait Islands Masig, Warraber, Boigu and Poruma', 13 May 2019, **Annex 14**, p. 26 .
[39] Id, p. 23.
[40] Id, p. 24.
[41] Ibid.

children about their inheritance on another man's land. It won't have the sacredness and the power of our culture …

Our island is the string connecting us to our culture. It ties us to who we are. If we were to have to move we would be like helium balloons disconnected from our culture. Our culture would become extinct. We would be a dying race of people. (Yessie Mosby, §§90-91)

80. The preceding sections set out (i) how the way of life and culture of the Authors and their communities is inseparable to their land and sea territories and traditional ways of harvesting living resources, and (ii) that scientists predict that without urgent action to redress the situation, the communities on Boigu, Masig, Warraber and Poruma face a serious risk of their islands becoming unviable for habitation by 2050, if not earlier. It follows that the Authors, their communities and their children (including those identified as victims in this Communication) face the devastating loss of their homes, their way of life and the unique and rich indigenous culture of their islands.

81. The prospect of having to leave their islands due to climate change is an unbearable one for the Authors and their communities. The Authors each give their personal testimony about this: Keith Pabai, §§46-47 and 51; Stanley Marama, §§34-37; Nazareth Warrai, §38; Yessie Mosby, §§88-91; Ted Billy, §§28-35; Daniel Billy, §§23-24 and 28; Kabay Tamu, §§26-27 and 32-33; Nazareth Fauid, §§28-33.

82. The evidence shows that relocation of communities would prevent the Authors from enjoying their culture in community with the other members of their group, because:

(1) The distinctive island cultures of Boigu, Masig, Warraber and Poruma do not, and cannot, exist outside of the islands themselves. They are the only places where the culture exists as a living whole, interacting with the natural environment on which it is based. Some cultural practices can only be observed on the island, such as those related to sacred sites including cemeteries, initiation ceremonies and some dances. See, e.g., Keith Pabai, §§24-27 and 29; Stanley Marama, §§19-27; Yessie Mosby, §59; Ted Billy, §§31-35.

(2) The Authors' and their communities' indigenous knowledge about the natural environment and their traditional ways of subsistence could not be practised if the Islanders were relocated to the mainland. See, e.g., Nazareth Warria, §38; Yessie Mosby §§89-91; Keith Pabai, §§30-33 and 46-47; Ted Billy §§32-35; Daniel Billy §§23-24; Nazareth Fauid, §§28-33.

(3) Relocation of Islanders *to other Torres Strait islands* is not a viable solution to preserve the Authors' culture:

(a) first, it would not even be feasible to relocate the populations of Poruma, Masig, Boigu and Warraber *within the Torres Strait*. While some other islands (e.g. Mer, Erub, Badu) are less vulnerable to sea-level rise because they are elevated, those islands are already inhabited by their own communities who possess the native title to the islands and waters. Relocated Islanders would therefore be living on other people's land. See, e.g., Yessie Mosby, §90; Kabay Tamu, §26.

(b) second, relocation would not enable the preservation of the *locally specific* island cultures of Boigu, Masig, Warraber and Poruma. Between different islands there are significant differences of topography and biogeography that have deeply marked their respective cultures. Each island community's culture has grown up, over thousands of years, as a way of life adapted to those particular surroundings. There are also differences in language, dialect, values, traditions and culinary habits. The distinctive cultures of Poruma, Masig, Boigu and Warraber could not continue if their populations were resettled elsewhere. See the passages from the evidence cited in sub-paragraphs (1)-(2) above.

83. As noted above, the Australian government has itself acknowledged that current trends threaten a "*human rights crisis*" in the Torres Strait and "*the probable worst-case scenario is the relocation of several communities, incurring considerable cultural, spiritual and economic costs*."[42]

84. Moreover, *even if* the Authors and their communities do remain *in situ*, the projected effects of climate change will imminently cause a severe negative effect (at the very least) on their ability to enjoy their culture. The existence of their traditional ways of subsistence and cultural and spiritual life will be threatened by the cumulative impact of negative trends that have already begun (see the evidence cited in Section VI(4)(C) above), and that are set to worsen over time. In particular:

(1) worsening and more frequent inundation will threaten homes and cause property damage including to critical community infrastructure and gardens;

(2) cemeteries and sacred sites will likely be flooded and even washed away. The sense of communion with family and ancestors, central to islander identity, will be harmed;

(3) changes in weather patterns and seasons caused by climate change will affect traditional ecological knowledge and cultural identity as well as affecting traditional ways of subsistence;

(4) impacts on the marine environment will harm traditional ecological knowledge and important cultural practices as well as affecting traditional ways of subsistence, through the processes of:

(a) the bleaching and death of the coral reefs that are the foundation of the marine ecosystems on which their way of life depends;

(b) the collapse of turtle and dugong populations, which are important ceremonial foods and equally important as a source of cultural and spiritual identity; and

(c) the loss of fish and other marine species such as crayfish (tropical rock lobster) which are forecast to be negatively impacted by warming waters.[43]

85. Notably, the TSRA predicts that effects on traditional ways of life and subsistence and culturally important living resources are severe:

> *[C]limate change impacts on seagrasses have potentially devastating implications for dugong and turtle populations. Turtles are also threated by warmer temperatures and loss of nesting beaches from enhanced erosion and sea level rise. …*
>
> *Besides the direct impacts of climate change (e.g. extreme weather impacts on ecosystems, health and wellbeing), there are likely to be a multitude of indirect or flow on impacts (e.g. consequential impacts upon traditional hunting and cultural practices due to changes in ecosystems and marine species). …*
>
> *Combined, these impacts will present significant social, cultural and economic challenges, such as loss of access to traditional land and sea country and loss of, or changes to, cultural practices; impacts on infrastructure, housing, land-based food production systems and marine industries; and health issues such as increased disease and heat-related illness.*[44]

F. The wider context: recovery from colonialism

> *For us to be forced to move because of the impact of climate change will be colonisation all over again.* (Kabay Tamu, §26)

[42] TSRA, *Torres Strait Climate Change Strategy 2014-18*, **Annex 1**, pp iii and 14.
[43] Johnson, J and Welch, D 'Climate change implications for Torres Strait fisheries: assessing vulnerability to inform adaptation' in *Climatic Change* (2016) 135:611-624.
[44] *TSRA Climate Change Strategy*, **Annex 1**, pp 1-2.

The culture of Boigu was damaged by colonialism, because of white man – but we try to keep it on a level that our forefathers give us. They give us that knowledge of culture. We are keeping those traditions alive by practising them in the community to keep the culture alive. It is still strong, because of the knowledge that is passed down to kids. (Stanley Marama, §24)

86. The predicted devastating effects on the Authors' way of life and culture discussed above should also be seen in a wider context of colonialism. In the 19th and 20th centuries, the Islanders were systematically discriminated against by Australian State and Federal Governments. Throughout the 20th century, from 1897 to 1973, legislation in the State of Queensland directly controlled the lives of Torres Strait Islanders, under the various 'Protection Acts'. The *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld) and subsequent legislation put all Torres Strait Islanders under the control of the Protector of Aboriginals, requiring permission to be granted to marry, travel and work, with wages retained by the State and held 'on trust'.[45] What 'on trust' meant in reality can be gauged from the fact that in 2015 the Queensland Government established a 'Stolen Wages Reparations Taskforce' to make reparation for the past history of unjust control over the lives of Torres Strait Islander people of the State and the theft of their wages under the Protection Acts. The Protection Acts also permitted the removal of children from their families and the re-location of islanders to missions. Some Torres Strait Islanders were removed to Palm Island, off Townsville.[46] In 2008, the Australian government issued an official apology to the 'Stolen Generation' of Aboriginal and Torres Strait Islander people who were removed from their families from 1910-1970.[47] Many older Torres Strait Islanders alive today recall the restrictions that were placed on their daily lives.

87. As the Authors' statements cited above note, the impacts of climate change on the human rights of the Authors will compound the history of injustice perpetrated against the Torres Strait Islander minority.

(5) Australia's climate change policies

A. Australia's failure to implement an adaptation programme ensuring long-term habitability of the Authors' islands

Governance arrangements in the Torres Strait

88. The Torres Strait falls within the State of Queensland. The Torres Strait Island Regional Council ('**TSIRC**') is the Queensland local government established under the *Local Government Act 2009* (Qld). Its electorate covers the remote outer islands of the Torres Strait[48] and each of the Authors' islands of Boigu, Warraber, Masig and Poruma. The State of Queensland, through the TSIRC, has primary responsibility for local infrastructure including the maintenance of essential water and sewerage services on the islands.

89. Although the State of Queensland has constitutional power and responsibility for the Torres Strait, the Commonwealth has significant interests in the region, given its importance to various federal departments including border protection, biosecurity, management of the Torres Strait Treaty[49] and

[45] Frankland, K 'A Brief History of Government Administration of Aboriginal and Torres Strait Islander Peoples in Queensland', 1994, available at https://www.slq.qld.gov.au/sites/default/files/Admin_History_Aboriginal_and_Torres_Strait_Islanders%20%281%29_0.pdf. Queensland Government response to the Stolen Wages reparations Taskforce report, Reconciling Past Injustice, May 2016, available at https://cabinet.qld.gov.au/documents/2016/Apr/StlWages/Attachments/Response.PDF accessed 11 April 2019. Some Torres Strait Islanders have joined a class action to recover stolen wages from the Queensland government: https://www.shine.com.au/service/class-actions/stolen-wages-class-action; and https://www.stolenwages.com.au/.

[46] Aboriginal and Torres Strait Islander missions and reserves in Queensland, State Library of Queensland, available at https://www.slq.qld.gov.au/research-collections/aboriginal-and-torres-strait-islander-people/community-history, accessed 11 April 2019.

[47] See Australian Institute of Aboriginal and Torres Strait Islander Studies, 'Apology to Australia's Indigenous peoples', available at https://aiatsis.gov.au/explore/articles/apology-australias-indigenous-peoples, accessed 11 April 2019.

[48] The Torres Shire Council has jurisdiction over the inner islands of Horn (Ngurupai), Hammond (Karriri), Thursday (Waiben) and Prince of Wales (Muralug).

[49] Available at http://www.austlii.edu.au/au/other/dfat/treaties/1985/4.html.

indigenous affairs (a federal competence). As noted above, the TSRA is a Commonwealth Government instrumentality with the responsibility for formulating, co-ordinating and implementing programs for the Torres Strait and Aboriginal people living in the region. Its board consists of local community members who are elected[50] to represent each island community. However, the functions of the TSRA are limited, and it must perform all functions in accordance with directions from the responsible Minister.[51] The responsible Minister is currently the Minister for Indigenous Affairs.

90. Accordingly, governance in the Torres Strait is shared between the state and federal levels of government and reflects Australia's federal structure. Both the TSRA and TSIRC recognise that the islands are vulnerable to sea level rise and require additional resources to adequately manage this threat.

History of Australia's failing to put in place adequate adaptation measures in the Torres Strait

91. For decades Torres Strait Islanders and their representatives have been drawing attention to the impact of erosion on their island homes: Ted Billy, §§36-37. Over the last 10 years numerous requests for assistance and funding have been made to State and Federal Government by or on behalf of the Torres Strait Islanders. However the response has been both slow and inadequate.

92. In 2009, John Toshi Kris, then Chairperson of the TSRA, called for A$22 million to fund mitigation work, observing "*We've seen houses going under water. People are frustrated with sandbags. What they need to see is real projects on the ground to try and save these communities.*"[52] In 2011, Dr Kevin Parnell of James Cook University conducted a study of the adaptation needs of the islands that assessed risks associated with erosion and inundation on the six most vulnerable islands of the Torres Strait.[53] In 2012, political representatives from the TSRA and TSIRC sought A$22 million[54] in funding from the Federal Government to build sea walls for the islands of Saibai, Boigu, Waraber and Iama. In 2013, the Labor Government promised A$12 million,[55] but the subsequent Coalition Government reduced the sum to A$5 million.[56] Ultimately, in 2014, the Federal Government committed A$12 million, to match A$12 million promised by the State of Queensland.[57]

93. In 2017, a new seawall was finally completed on the island of Saibai, at a cost of A$24.5 million.[58] However, the cost of the seawall on Saibai left little or no funding for the Authors' islands of Boigu, Warraber, Masig and Poruma. A funding gap remains and at least a further A$20 million would be necessary to carry out emergency coastal defence works on the Authors' islands. Further sustained investment will be required to address the islands' long-term adaptation needs to ensure the continued habitability of the islands.

94. In May 2018, local councillor Getano Lui called on the State and Federal Government to provide A$10 million each in immediate funding for seawall works on Boigu and Poruma islands, and scoping works on Iama, Masig and Warraber islands.[59] In August 2018, Cynthia Lui, the State member for Cook, visited Boigu and reported: "*I met with community members on Boigu Island who are worried sick about the effects of climate change because it's a serious threat to their families and homes*." She noted that the State Government had promised A$20 million for sea wall works and infrastructure, conditional

[50] See Division 5 of the ATSI Act
[51] See Sections 142A and 142E of the ATSI Act
[52] https://www.abc.net.au/news/2009-12-07/pm-ignoring-plight-of-australias-sinking-islands/1172716
[53] Parnell KE, Smithers SG and Duce SJ. (2010) *Coastal erosion and inundation in the central island group (Masig, Poruma, Warraber and Iama), Torres Strait: Science supporting adaptation*, Marine and Tropical Sciences Research Facility, Cairns.
[54] https://www.abc.net.au/radionational/programs/backgroundbriefing/2012-03-04/3857272
[55] https://www.abc.net.au/radionational/programs/backgroundbriefing/2012-03-04/3857272; https://www.senatormacdonald.org/torres-strait-sea-walls-project-ebbs-away/
[56] http://www.abc.net.au/local/stories/2014/01/20/3928810.htm
[57] https://www.cairnspost.com.au/news/cairns/funds-to-rebuild-seawalls-in-torres-straits-14-inhabited-islands/news-story/37ed8fe5f41d608e9165d21e833cdaf3
[58] https://www.abc.net.au/news/2017-07-15/saibai-islanders-celebrate-new-seawall-rising-ocean-levels/8709912
[59] https://thewest.com.au/politics/policy/rising-sea-levels-threaten-torres-is-homes-ng-s-1863658

on funds being matched at the Federal level and called on the Federal Government to provide the matching funds.[60] In 2017-18, some work was completed on Boigu (Stage 1)[61] and emergency works were completed on Poruma.[62] Many of the priority actions identified in the *Torres Strait Regional Adaptation and Resilience Plan 2016-2021* remain unfunded, despite being identified as necessary through official science-based studies.[63] As at the date of this Communication, there is no further confirmed government funding for any of the islands.

95. In these circumstances, local government has had to adopt a 'triage' approach to critical works required to save homes and infrastructure. The residents of Warraber and Masig island have taken matters into their own hands, using local materials, green waste and debris to secure fragile coastal ecosystems from worsening erosion. See, e.g., Ted Billy, §§26 and 36, and Nazareth Warria, §§39-40.

B. Australia's failure to mitigate climate change

Australia's recognition of the threat posed by climate change

96. GMST has already risen by about 1°C above pre-industrial levels.[64] It is currently increasing at approximately 0.2°C per decade.[65] A study by the United States government concludes that 9 out of the 10 warmest years have occurred since 2005, with the last five years (2014–2018) ranking as the five warmest years on record.[66]

97. The Australian government has acknowledged that climate change is a reality and that Australia itself "*faces significant environmental and economic impacts from climate change across a number of sectors*".[67] The government itself has predicted significant climate change effects on coastal vulnerability, water resources, biodiversity and agriculture.[68] Australia also accepts that "*[d]ecisions made today will have lasting consequences for future generations*."[69]

98. The most comprehensive and internationally accepted assessments of the science of climate change are those of the Intergovernmental Panel on Climate Change ('**IPCC**'), an international organisation which has 195 member States.[70] The IPCC does not engage in scientific research itself, but instead carries of

[60] https://www.cynthialui.com.au/press-releases/100-member-for-cook-calls-on-the-federal-government-to-match-funding-for-torres-strait-islands-flood-mitigation-and-seawalls.
[61] TSIRC Annual Report 2017-2018, p. 29, available at http://www.tsirc.qld.gov.au/sites/default/files/Publications/Annual%20Report_2017_18_Web.pdf.
[62] http://www.tsra.gov.au/news-and-resources/news/tsra-to-provide-$650,000-in-funding-for-emergency-coastal-erosion-works-on-poruma.
[63] Torres Strait Regional Authority (2016). *Torres Strait Adaptation and Resilience Plan 2016-2021*. Report prepared by the Environmental Management Program, Torres Strait Regional Authority, June 2016.
[64] IPCC, SR15, Summary for Policymakers, §A.1 ("*Human activities are estimated to have caused approximately 1.0°C of global warming above pre-industrial levels, with a likely range of 0.8°C to 1.2°C*").
[65] Id, §A.1.1 ("*Estimated anthropogenic global warming is currently increasing at 0.2°C (likely between 0.1°C and 0.3°C) per decade due to past and ongoing emissions (high confidence)*.").
[66] United States National Oceanic and Atmospheric Administration (NOAA), National Centers for Environmental Information, *State of the Climate: Global Climate Report for 2018*, published online January 2019, retrieved on February 20, 2019 from https://www.ncdc.noaa.gov/sotc/global/201813.
[67] Australian Government, Department of the Environment and Energy, *Climate Change Impacts in Australia*, https://www.environment.gov.au/climate-change/climate-science-data/climate-science/impacts. The Australian government's own assessment is that climate change is already affecting Australia, with average temperatures about 0.9°C higher than 1910, declining rainfall in the southeast and southwest and increased rainfall in the northwest, and an overall increase in extreme fire weather. See also Australian Government, *Setting Australia's Post 2020 Target for reducing greenhouse gas emissions*, pp 6-7.
[68] Australian Government, *Setting Australia's Post 2020 Target for reducing greenhouse gas emissions*, p. 7.
[69] Australian Government, Department of the Environment and Energy, *Climate Change Impacts in Australia*, https://www.environment.gov.au/climate-change/climate-science-data/climate-science/impacts.
[70] The IPCC was established in 1988 through cooperation between the United Nations Environment Programme (UNEP) and the World Meteorological Organisation. The UN General Assembly endorsed the IPCC's establishment and mission "*to provide internationally coordinated scientific assessments of the magnitude, timing and potential environmental and socio-economic impact of climate change and realistic response strategies*". UNGA Resolution 43/53, 6 December 1988. See https://www.ipcc.ch/about/history/.

an open and transparent review of published scientific studies so as to produce a comprehensive and balanced assessment.[71]

99. The IPCC issues assessment reports on the state of knowledge on climate change. The most recent is its Fifth Assessment Report ('**AR5**') issued in 2014, which informed the negotiation of the Paris Agreement. The decision of the United Nations Framework Convention on Climate Change ('**UNFCCC**')[72] Conference of the Parties ('**COP**') that adopted the Paris Agreement also requested the IPCC to prepare a report on the consequences of global warming of 1.5°C. This report ('**SR1.5**') was published in November 2018.

100. According to the IPCC, the primary cause of global warming is human activity.[73] There is a clear and logarithmic relationship between atmospheric greenhouse gas ('**GHG**') concentrations and GMST.[74] CO_2 is long-lasting in the atmosphere so the cumulative total of today's emissions and past emissions determines the degree of warming. Any hope of averting a climate catastrophe therefore necessarily requires phasing out CO_2 emissions, at such a rate that cumulative emissions do not exceed the 'budget' that corresponds to a given temperature increase.[75]

101. Under the IPCC's methodology used in AR5, the global carbon budget to have a 50% chance of limiting global average temperature increase to 1.5°C is 580 gigatonnes (Gt) of CO_2 from January 2018. To have a 66% chance of limiting temperature increase to 1.5°C, the global carbon budget is just 420 Gt of CO_2.[76] As of late 2017, global emissions were running at about 42 Gt CO_2 per year, such that if emissions were to remain at those levels, the entire carbon budget for a 66% chance of limiting warming to 1.5°C would be used up in just 10 years.

102. The negative impacts of global warming on human societies are already being felt in numerous ways.[77] In 2014, the IPCC stated in its AR5 that "*[w]ithout additional mitigation efforts beyond those in place today, and even with adaptation, warming by the end of the 21st century will lead to high to very high risk of severe, widespread and irreversible impacts globally (high confidence)*".[78]

103. The IPCC's SR1.5 report on 1.5°C warming shows (i) that even if warming is limited to 1.5°C it will have massive impacts on ecosystems and human societies, and (ii) warming of more than 1.5°C is associated with significantly increased risks. The IPCC reported that model-based projections of global mean sea level rise suggest an indicative range of 0.26 metres to 0.77 metres (relative to the 1986–2005 average) by 2100 for 1.5°C of global warming.[79] Moreover, temperature increases over 1.5°C run the risk of catastrophic sea level rise: "*[m]arine ice sheet instability in Antarctica and / or irreversible loss of the Greenland ice sheet could result in multi-metre rise in sea level over hundreds to thousands of*

[71] https://www.ipcc.ch/about/preparingreports/
[72] The first global treaty for the management, mitigation of and adaptation to anthropogenic climate change, adopted in 1992. Australia ratified the UNFCCC on 30 December 1992, see https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=IND&mtdsg_no=XXVII-7&chapter=27&Temp=mtdsg3&clang=_en.
[73] See IPCC, SR15, Summary for Policymakers, §A1. See also the IPCC's Fifth Assessment Report (2014) ('**AR5**'), "*[t]he best estimate of the human-induced contribution to warming is similar to the observed warming over this period*", while it is "*extremely likely*" that human activity accounts for more than half of observed warming. IPCC, AR5, §SPM 1.2, "*Causes of climate change*".
[74] IPCC, AR5, Summary for Policymakers, p. 8 ("*Multiple lines of evidence indicate a strong, consistent, almost linear relationship between cumulative CO2 emissions and projected global temperature change to the year 2100 …*").
[75] Id, p. 14, §C.1.3.
[76] Ibid.
[77] IPCC, AR5, Summary for Policymakers, p. 8, §SPM 1 ("*Impacts from recent climate-related extremes, such as heat waves, droughts, floods, cyclones and wildfires, reveal significant vulnerability and exposure of some ecosystems and many human systems to current climate variability (very high confidence).*" Also, global average sea levels increased by about 0.19 metres between 1901 to 2010. See Id, p. 4.
[78] Id, p. 18.
[79] IPCC, SR15, Summary for Policymakers, p. 9, §B.2.1.

years. These instabilities could be triggered at around 1.5°C to 2°C of global warming (medium confidence)."[80]

104. It is therefore clear that urgent and rapid action is required. Model pathways for no or limited overshoot of 1.5°C involve global CO_2 emissions reductions of about 45% by 2030 from 2010 levels, falling to net zero around 2050.[81]

Australia's emissions record is amongst the worst in the world

105. Despite having acknowledged the reality of climate change, Australia's record for greenhouse gas emissions is amongst the worst in the world, whether measured in absolute terms or in relative terms.

106. In absolute terms, Australia has the second highest emissions of CO_2 in the world on a per capita basis. In 2017, Australia's CO_2 emissions[82] were 16.452 tonnes per capita. This figure is higher than the USA (15.741 tonnes per capita), Japan (10.360 tonnes per capita) and Germany (9.7 tonnes per capita). The only nation with higher CO_2 emissions per capita is Canada (at 16.855 tonnes per capita). This information is taken from a 2018 EU Report[83] and is understood to be the most recent available.

107. Between 1990 and 2016, Australia's greenhouse gas emissions (without LULUCF[84]) ***increased*** by 30.72%.[85] By contrast, over the same period the European Union's emissions ***decreased*** by 24%, whilst the United Kingdom and Germany achieved emissions ***reductions*** of 39.21% and 27.34% respectively.

108. Australia's performance in reducing its emissions over this period has been ranked ***43rd out of 45*** developed 'Annex I' Parties to the UNFCCC.[86] The phrase "*Annex I Parties*" refers to certain developed countries (including Australia) on which the UNFCCC imposed heightened responsibilities for mitigation of climate change (Article 4(2)(a)). There are currently 197 parties to the UNFCCC.[87]

Australia's obligations under the Paris Agreement

107. In 2015, the Parties to the UNFCCC met for the 21st COP ('**COP21**'). This meeting led to the 2015 Paris Agreement. So far 184 of the 197 State parties to the UNFCCC have ratified the Paris Agreement, which entered into force on 4 November 2016. Australia became a party on 9 November 2016.[88]

108. Two features of the Paris Agreement are of particular relevance. First, the Agreement defines its purpose with reference to specific temperature goals. Article 2(1) provides:

> *This Agreement . . .* ***aims to strengthen the global response to the threat of climate change****, in the context of sustainable development and efforts to eradicate poverty, including by:* ***Holding the increase in the global average temperature to well below 2 °C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5 °C above pre-industrial levels****,*

[80] Id, p. 9, §B.2.2.
[81] Id, p. 14, §C.1.
[82] This excludes Australia's emissions of GHGs other than CO_2 (such as methane).
[83] https://ec.europa.eu/jrc/en/publication/eur-scientific-and-technical-research-reports/fossil-co2-emissions-all-world-countries-2018-report.
[84] The phrase "*without LULUCF*" means that the figures given in the map exclude emissions and offsets from land-use, land-use change and forestry. An analysis on a "*without LULUCF*" basis provides the most meaningful way to compare the performance of different countries, given the large uncertainty around LULUCF emissions data, the need to compare like with like and the need to increase transparency about the adequacy of targets. See https://climateactiontracker.org/methodology/indc-ratings-and-lulucf/. The Australian government has estimated that, if LULUCF is included, then between 1990 and 2015 its emissions decreased, but only by 0.1%: see Commonwealth of Australia, *State of the Environment 2016*, accessed 26 January 2019. Available at https://soe.environment.gov.au/theme/climate/topic/2016/trends-emissions.
[85] United Nations, UNFCCC, Time Series, Annex I, accessed 26 January 2019. Available at http://di.unfccc.int/time_series.
[86] United Nations, 'Global Map – Annex I', accessed 29 January 2019. Available at http://di.unfccc.int/global_map.
[87] Australia ratified the UNFCCC on 30 December 1992. See https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=IND&mtdsg_no=XXVII-7&chapter=27&Temp=mtdsg3&clang=_en.
[88] https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en.

recognizing that this would significantly reduce the risks and impacts of climate change *. . ."* (emphasis added).

109. Second, the Agreement imposes obligations of conduct on each Party in relation to its national greenhouse gas emissions:

(1) Article 3 provides: "*As nationally determined contributions to the global response to climate change, all Parties are to* ***undertake and communicate ambitious efforts as defined in Articles 4, 7, 9, 10, 11 and 13 with the view to achieving the purpose of this Agreement as set out in Article 2****. The efforts of all Parties will represent a progression over time . . ."* (emphasis added).

(2) Article 4 provides:

> *2. Each Party shall prepare, communicate and maintain successive nationally determined contributions* ***that it intends to achieve****.* ***Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions****.*
>
> *3. Each Party's successive nationally determined contribution will* ***represent a progression*** *beyond the Party's then current nationally determined contribution and* ***reflect its highest possible ambition,*** *reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances. ...*
>
> *8. In communicating their nationally determined contributions, all Parties shall provide the information necessary for clarity, transparency and understanding in accordance with decision 1/CP.21 . . .*
>
> *9. Each Party shall communicate a nationally determined contribution* ***every five years*** *. . .*
>
> *11. A Party may at any time adjust its existing nationally determined contribution* ***with a view to enhancing its level of ambition*** *. . .* (Emphasis added)

110. Thus, Australia's obligations under the Paris Agreement may be summarised as follows:[89]

(1) It is required to communicate, prepare and maintain a "nationally determined contribution" ('**NDC**'). As regards the NDC:

(a) It must be "*ambitious*" and indeed must reflect Australia's "*highest possible ambition*", so that Australia must deploy its "*best efforts*" in setting its NDC.[90]

(b) It must reflect Australia's "*common but differentiated responsibilities and respective capabilities, in the light of [its own] national circumstances"* (Article 4(2) and see also Article 2(2)[91]).[92] Thus more is required from Australia than is required from less wealthy and developed countries.

(c) It must be prepared with a view to achieving the global temperature goals set out in Article 2 (Article 3).

(2) Australia must pursue domestic measures intended and / or designed to achieve its NDC. This follows from the text of Article 4(2) (the words "*that it intends to achieve*" in the first sentence and the words "*with the aim of achieving the objectives of such contributions*" in the second sentence), as well as the international law principle of good faith.

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[89] See further Voigt, C & Ferreira, F (2016) "'Dynamic Differentiation': The Principles of CBDR-RC, Progression and Highest Possible Ambition in the Paris Agreement", 5 *Transnational Environmental Law*, 285-303, **Annex 3**.
[90] Id, p. 295.
[91] Article 2(2) states: "*This Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances*."
[92] Voigt, C & Ferreira, F (2016) "'Dynamic Differentiation': The Principles of CBDR-RC, Progression and Highest Possible Ambition in the Paris Agreement", 5 *Transnational Environmental Law*, 285-303, **Annex 3**.

(3) Australia is required to communicate at least every five years a new NDC, which must be more ambitious than the existing one (Articles 4(2), (3) and (11)). Australia is entitled at any time to adjust its NDC, but again only to enhance its level of ambition (Article 4(11)).

(4) In general, Australia must act in accordance with the principle of equity (Article 2(2)).

Australia's emission reduction target under the Paris Agreement

111. Australia transmitted its intended NDC to the UNFCCC in August 2015.[93] This then became Australia's first NDC upon Australia ratifying the Paris Agreement on 9 November 2016.[94]

112. Australia's NDC is based on an "*economy-wide target to **reduce** greenhouse gas emissions **by 26 to 28 per cent below 2005 levels by 2030***".[95] Australia claims that this represents "*an ambitious, fair and responsible contribution to global efforts toward meeting the objective of the UNFCCC with the goal of limiting global average temperature rise to below two degrees Celsius*."[96]

113. However, Australia's NDC breaches its obligations under the Paris Agreement, in various respects. First, Australia's proposed reduction in greenhouse gas emissions of "*26 to 28 per cent below 2005 levels by 2030*" is incompatible with achieving the global temperature goal set out in Article 2 of the Paris Agreement (i.e. holding the global average temperature increase to "well below" 2°C and "pursuing efforts" to limit the increase to 1.5°C):

(1) Australia's NDC target for 2030 has been rated as "*insufficient*", indicating that "*Australia's climate commitment . . . is not consistent with holding warming to below 2°C, let alone limiting it to 1.5°C, and is instead consistent with warming between 2°C and 3°C*".[97] This analysis has been performed by experts at Climate Action Tracker, an "*independent scientific analysis produced by three research organisations[98] tracking climate action since 2009*."[99]

(2) Furthermore, according to the IPCC, having a 50% chance of limiting the global temperature increase to 1.5°C requires that global emissions are reduced ***by 45% by 2030 against 2010 levels*** and that CO_2 emissions reach net zero emissions by 2050.[100] Accordingly, Australia's proposal to reduce Australia's emissions by only ***26 to 28%*** by 2030 does not, on any view, represent an

[93] This was a few months before the Paris Agreement was concluded, pursuant to a decision made at the 2014 COP of the UNFCCC. Australia is required to communicate a new, more ambitious NDC in late 2019, in accordance with Articles 4(9) of the Paris Agreement and UNFCCC Decision 1/CP.21, §25: "*Parties shall submit to the secretariat their nationally determined contributions referred to in Article 4 of the Agreement at least 9 to 12 months in advance of the relevant session of the Conference of the Parties …*".

[94] UNFCCC Decision 1/CP.21, §22: "*The Conference of the Parties … [a]lso invites Parties to communicate their first nationally determined contribution no later than when the Party submits its respective instrument of ratification, acceptance, approval or accession of the Paris Agreement; **if a Party has communicated an intended nationally determined contribution prior to joining the Agreement, that Party shall be considered to have satisfied this provision unless that Party decides otherwise**;*"

[95] Australian Government, *Australia's Intended Nationally Determined Contribution to a new Climate Change Agreement*, August 2015, accessed 29 January 2019. Available at https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Australia%20First/Australias%20Intended%20Nationally%20Determined%20Contribution%20to%20a%20new%20Climate%20Change%20Agreement%20-%20August%202015.pdf.

[96] Id.

[97] https://climateactiontracker.org/countries/australia/fair-share/

[98] The three organisations are Climate Analytics, NewClimate Institute and Ecofys. See further https://climateactiontracker.org/about/the-consortium/.

[99] See further: https://climateactiontracker.org/about/. Climate Action Tracker summarises its methodology as follows: "*To assess the climatic impact of the targets put forward by countries, we first construct a global emissions pathway to 2100. This global pathway is then used as input to a carbon-cycle / climate model (MAGICC), which is run multiple times in order to obtain a probability distribution of outcomes such as global mean temperature, CO2 concentration, and total greenhouse gas concentration. The detailed methodology of the climate model is outlined in Meinshausen et al. 2009 & 2011*." (see further https://climateactiontracker.org/methodology/global-pathways/).

[100] IPCC, SR15, Summary for Policymakers, §C.1.

effort to limit the global temperature increase to 1.5°C, especially given Australia's heightened responsibility as one of the world's wealthiest and most developed States.[101]

114. Second, on Australia's own formulation, its NDC is not directed at achieving the temperature goal in Article 2 of the Paris Agreement. Australia says that its NDC is based on the less onerous pre-Paris Agreement goal of "*limiting global average temperature rise to* ***below two degrees Celsius***."[102]

115. Third, Australia's NDC runs contrary to the analysis of the government's own advisers, the Climate Change Authority ('**CCA**')[103]:

(1) In December 2014, the Australian government asked the CCA to advise on (among other things): "*what future emissions reduction targets Australia should commit to as part of an effective and equitable global effort to achieve the objective of the UNFCCC (Article 2) or subsequent agreement to which Australia is a party.*"[104]

(2) The CCA's assessment (contained in reports of April and July 2015 in advance of COP21 in Paris) pre-dated the Paris Agreement and accordingly was based on meeting the previous "less than 2 degrees" temperature goal. Even then, the CCA recommended much steeper reductions in greenhouse gas emissions than those ultimately adopted by Australia under the Paris Agreement, namely: (a) for 2025, a target of 36% below 2005 levels; and (b) for ***2030***, a target of ***45-65% below 2005 levels***.[105]

(3) The CCA's analysis was based on the following considerations. The CCA considered questions of feasibility,[106] capacity[107] and equity.[108] Furthermore, the CCA noted (i) a "*broad measure of agreement*" from stakeholders that weight should be given to "*what the scientific evidence is telling us we need to do*"; (ii) that the CCA's recommended targets were "*no more challenging that the targets many other developed countries have been pursuing*"; and (iii) that "*the costs of achieving particular targets . . . are best considered in the design of appropriate policy instruments, rather than through the acceptance of inadequate national targets.*"[109]

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[101] In 2018, Australia had the world's largest median wealth per adult. See https://www.credit-suisse.com/corporate/en/research/research-institute/global-wealth-report.html.

[102] Australian Government, *Australia's Intended Nationally Determined Contribution to a new Climate Change Agreement*, August 2015 (emphasis added).

[103] The CCA is a statutory agency established under the *Climate Change Authority Act 2011* (Cth), with the role of national reviewing climate change policy and advising the Australian government.

[104] CCA, 'Special Review Draft Report – Australia's Future Emissions Reduction Targets', April 2015, p. 27 (Appendix A – Terms of Reference), available at: http://climatechangeauthority.gov.au/sites/prod.climatechangeauthority.gov.au/files/Australia%27s%20future%20emissions%20reduction%20targets.pdf.

[105] See CCA, 'Final Report on Australia's Future Emissions Reductions Targets', 2 July 2015, p. 6 and Fig. 2, available at: http://climatechangeauthority.gov.au/sites/prod.climatechangeauthority.gov.au/files/Final-report-Australias-future-emissions-reduction-targets.pdf.

[106] CCA, 'Special Review Draft Report – Australia's Future Emissions Reduction Targets', April 2015, p. 25 ("*The Authority has consistently argued that Australia should build a comprehensive suite (or 'toolbox') of market and non-market policies to deliver necessary emissions reductions at least cost. Such a toolbox does not exist at present. While the Emissions Reduction Fund (ERF), the central plank of the government's Direct Action Plan, does operate across all sectors, there are low-cost emissions reduction opportunities that it is not able to access (CCA 2014a). The planned ERF Safeguard Mechanism, which will impose penalties for major emitters who exceed a baseline level, could also assist, but this will depend crucially on the baselines that are set.* ***The Authority's analysis, and experience from overseas, suggests that it is feasible to implement policies to meet the recommended 2025 target while still maintaining strong economic growth (CCA 2014d). A range of possible measures is available.*** *The European Union has introduced a region wide emissions trading scheme (ETS), while the Republic of Korea, China, the United States, Japan and some other countries have ETSs, either at the national or sub-national level. China, for example, has pilot ETSs in seven regions and cities; the coverage of these schemes is approaching one quarter of China's total emissions. Several other countries, including Chile and Mexico, have opted for an emissions tax. Targets and other incentives for renewable energy, and regulated energy efficiency standards for appliances, buildings and vehicles, have been adopted in many countries.*").

[107] See, e.g., CCA, 'Special Review Draft Report – Australia's Future Emissions Reduction Targets', April 2015, p. 14.

[108] See, e.g., CCA, 'Special Review Draft Report – Australia's Future Emissions Reduction Targets', April 2015, p. 20.

[109] See CCA, 'Final Report', 2 July 2015, pp 1 and 4.

116. Fourth, the approach taken by the Australian government in setting its NDC target (as explained in the government's report of August 2015[110]) is flawed and inconsistent with Australia's obligations under the Paris Agreement in several specific respects:

(1) Australia's approach is expressly based on the same incorrect global temperature goal that appears in its NDC communication (mentioned above). In other words, Australia bases its NDC target on limiting the global temperature rise to "*below two degrees Celsius*", rather than holding the global average temperature increase to "***well** below*" 2°C and pursuing efforts to limit the increase to 1.5°C. [111]

(2) Australia refers to its "*national circumstances*",[112] but fails to mention, let alone apply the correct principle under the Paris Agreement, i.e. Australia's "*highest possible ambition reflecting its common but differentiated responsibilities and respective capabilities, in the light of [its own] national circumstances.*" Thus Australia fails to account for its heightened responsibilities, not only as a developed country, but also as "*the world's 12th largest economy, and the 11th highest income per person.*"[113]

(3) Australia's chosen target is said to be based on various considerations, in particular: whether it is "*within the range of targets announced by other developed countries*"; the *"structure of Australia's economy*" and the "*economic impacts*."[114] However, Australia fails entirely to consider the overriding requirement of "*highest possible ambition*", let alone suggest that its chosen target actually represents its "*highest possible ambition*", as required under the Paris Agreement.

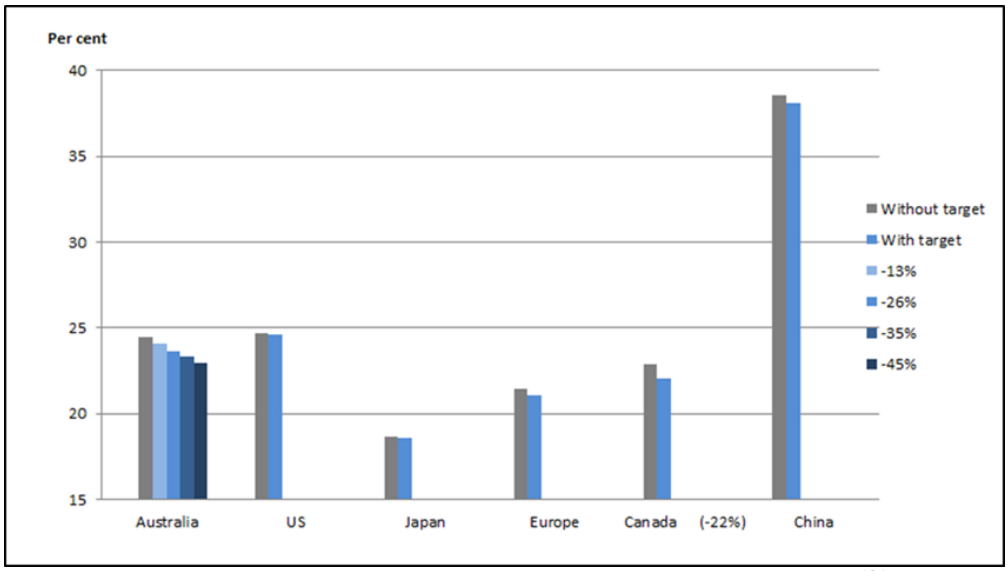
(4) Australia fails to take into account a fundamental aspect of its "*national circumstances*", namely that, as a starting point, its record for reducing GHG emissions is amongst the worst in the world. It should follow that Australia has heightened responsibilities to reduce its emissions, compared both to developed and developing countries.

(5) At the same time, Australia also fails to take into account "*the economic and social impacts of climate change and benefits of a global response*" as these were said to be "*difficult to quantify*".[115]

(6) Finally, in relation to the question of economic impact, Australia relies on the work of the economist Professor Warwick McKibbin. [116] However, it fails to take into account (or to take into account properly) Professor McKibbin's key finding that "*[a]ll the economies, including Australia, continue to grow and at similar rates to their growth in the absence of targets*"[117] and that this is the case even for a target of 45% reduction by 2030, as shown by Professor McKibbin's graph below. [118] In all of the reduction scenarios modelled, Australia's GDP grows by approximately 23-24% between 2020 and 2030. Furthermore, the government's economic

[110] Commonwealth of Australia, Department of the Prime Minister and Cabinet, 'Setting Australia's post-2020 target for reducing greenhouse gas emissions. Final report of the UNFCCC Taskforce', 1 August 2015, available at: https://www.pmc.gov.au/sites/default/files/publications/150821%20UNFCCC%20Report.pdf.
[111] 'Final report of the UNFCCC Taskforce', 1 August 2015, p. 5.
[112] 'Final report of the UNFCCC Taskforce', 1 August 2015, pp 23-34.
[113] Id, p. 28.
[114] Id, pp 35 and 41.
[115] Id, p. 35.
[116] Id, pp 40-43.
[117] Warwick McKibbin, 'Report 2: Economic Modelling of Australian Action Under a New Climate Change Agreement', 20 August 2015, p. 15, available at: https://dfat.gov.au/about-us/publications/Documents/economic-modelling-australian-action-under-new-global-cc-agreement.pdf.
[118] Ibid.

modelling is deliberately conservative in that it "*may over-estimate the cost of the Government's target*",[119] and has been criticised by other economists in this regard.[120]



GDP growth, Australia and key countries, 2020 to 2030 (per cent)[121]

117. In these circumstances, Australia has failed to adhere to its commitments under the Paris Agreement. Its NDC: (1) is not ambitious, let alone of "*the highest possible ambition*"; (2) does not represent Australia's "*best efforts*"; (3) is expressly directed at the wrong temperature goal and in substance is incompatible with the actual temperature goal required under the Paris Agreement; and (4) fails to reflect (or to reflect properly) Australia's "*common but differentiated responsibilities and respective capabilities, in the light of [its own] national circumstances*" or the principle of equity.

Australia does not have sufficient policies in place to meet its inadequate NDC

118. Furthermore, Australia is on course to miss its (inadequate) NDC target by a large margin. In December 2018, the Australian government released emissions projections to 2030, which included the below graph illustrating the vast gap between Australia's projected emissions on the basis of current policies and the reductions required to meet its NDC.[122]

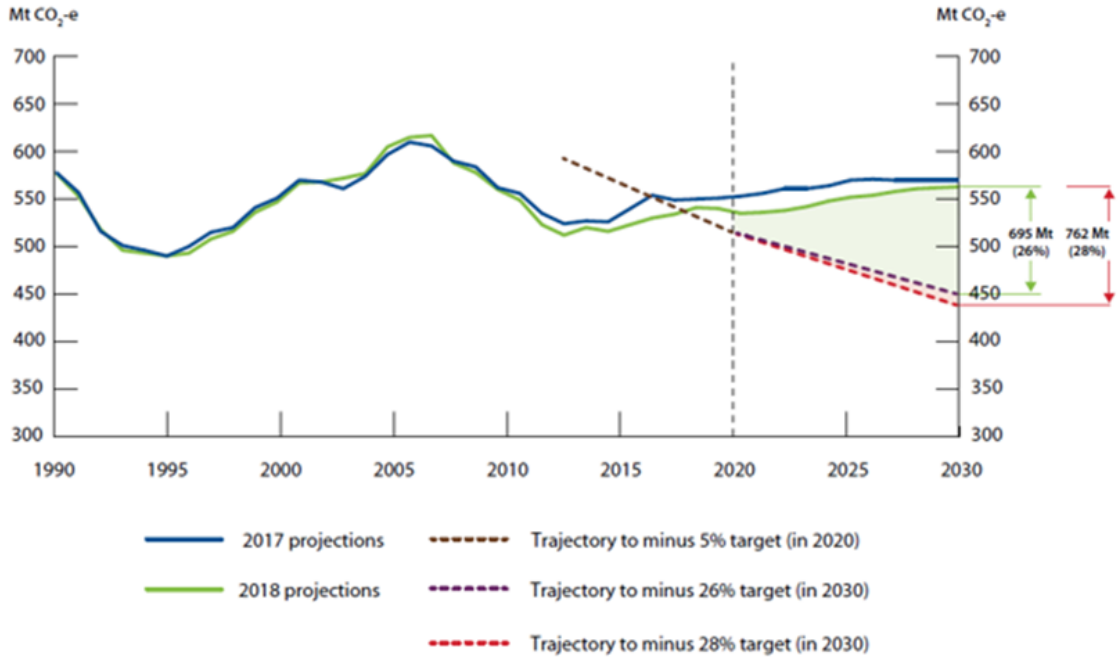
[119] Commonwealth of Australia, Department of the Prime Minister and Cabinet, 'Setting Australia's post-2020 target for reducing greenhouse gas emissions. Final report of the UNFCCC Taskforce', 1 August 2015, p. 41 ("***The McKibbin modelling concludes Australia and those economies depicted in figure 5.4 all continue to grow under climate action, but at a slightly slower rate than if they did not act. The modelling is conservative and may over-estimate the cost of the Government's target in two ways.*** *First, the McKibbin modelling states "(A)ssuming lower energy technology costs reduced these impacts by around one third." Second, specific policies were not modelled, in particular the low cost elements of the Government's policy (such as the Emissions Reduction Fund, the National Energy Productivity Plan among others) in what was a generic sensitivity analysis. Given cost and availability of abatement opportunities identified by RepuTex and ClimateWorks, it is reasonable to assume that for lower targets the economic impacts estimated by McKibbin are likely to be at the lower end of the range of costs for those targets.*").

[120] See, e.g., https://theconversation.com/economic-modelling-may-overplay-the-costs-of-australias-2030-climate-target-46975.

[121] Warwick McKibbin, 'Report 2: Economic Modelling of Australian Action Under a New Climate Change Agreement', 20 August 2015, p. 15.

[122] Australian Government, *Australia's emissions projections 2018*, pp 34-37.

Figure 4 Australia's emissions trends, 1990 to 2030



Source: Australian Government

119. As this graph shows, Australia has a policy gap of between 695 – 762 Mt CO_2-e[123] of emissions reductions that are required by 2030. In the 2018 emissions projections, it is implied that Australia may use its "carry over" credits under the Kyoto Protocol in order to meet its Paris Agreement commitments.[124] If this is Australia's intention, to do so would clearly be impermissible under the Paris Agreement, having no basis in the Agreement's "*highest possible ambition*" framework,[125] the science of what is required,[126] nor indeed in the process by which Australia set its NDC in 2015.[127]

120. A report prepared for the purposes of this Communication from respected Australian think tank The Australia Institute is contained at **Annex 4** and describes why Australia's current policies (the Emissions Reduction Fund, the Renewable Energy Target and the National Energy Productivity Plan) are insufficient to meet Australia's already inadequate NDC.

121. In these circumstances, Australia is in further breach of its obligations under the Paris Agreement in that it has failed to pursue domestic measures that are intended or designed to achieve its NDC. The lack of "intention" or "design" is clear from the substantial and admitted gap between Australia's projected emissions and its NDC as well as the absence of adequate policies, as shown above.

C. Australia is actively pursuing policies that are increasing emissions, foreseeably making matters worse

122. Since 1990, Australia has not only failed to reduce its greenhouse gas emissions. It has also actively pursued policies that have increased emissions by promoting the extraction and use of fossil fuels both in Australia and overseas, in particular thermal coal for electricity generation.

[123] CO_2 equivalent (CO_2-e) represents an amount of GHG standardised to the global warming potential of CO_2.
[124] Australian Government, *Australia's emissions projections 2018*, December 2018, p. 10 (Table 2), available at http://www.environment.gov.au/system/files/resources/128ae060-ac07-4874-857e-dced2ca22347/files/australias-emissions-projections-2018.pdf.
[125] See §§107ff above.
[126] See IPCC, SR15, Summary for Policymakers.
[127] See Commonwealth of Australia, Department of the Prime Minister and Cabinet, 'Setting Australia's post-2020 target for reducing greenhouse gas emissions. Final report of the UNFCCC Taskforce', 1 August 2015.

123. The continued use of thermal coal in electricity production at current levels is incompatible with achieving the goals of the Paris Agreement and with a world in which there is just a 50% chance of warming being kept to 1.5 degrees above pre-industrial levels.[128] As SR1.5 shows, total global coal use for energy needs to fall by between 59-78% against 2010 levels by 2030.[129] Australia's continued promotion of thermal coal – it is the world's second largest exporter of thermal coal[130] – severely undermines global efforts to combat climate change.

124. Australia's coal policy was criticised by the Committee on Economic, Social and Cultural Rights in its "Concluding observations on the fifth periodic report of Australia" issued in June 2017.[131] The Committee recommended that Australia "*review its position in support of coal mines and coal export*", as well as "*address the impact of climate change on indigenous peoples more effectively while fully engaging indigenous peoples in related policy and programme design and implementation*".[132]

125. The dramatic extent to which Australia supports thermal coal use in the specific context of: (1) exports, (2) fugitive emissions from mining, and (3) power sector combustion is as follows:

    (1) Coal exports. According to the Government, Australia produced 265 Mt of thermal coal between March 2017 and March 2018.[133] However, less than a quarter of this production was consumed in Australia, with 203 Mt being exported,[134] making Australia the world's second largest exporter after Indonesia.[135] The government projects that this figure will rise to 225 Mt per year in 2023/24.[136] That would equate to approximately 510 MtCO2e,[137] broadly equivalent to Australia's ***total*** territorial greenhouse gas emissions in 2018.[138] The growth of Australia's export volumes is said to reflect, among other things, "*the ramp up of several new projects, including the Mount Pleasant, Orion Downs, Byerwen and Carmichael mines*".[139] The proposed Carmichael mine has been described by the International Energy Agency as "*probably the most controversial coal project currently under development*" given the potential climate impact from opening up one of the world's largest coal basins.[140] However, the Australian government

[128] Climate Analytics, *Implications of the Paris Agreement for Coal Use in the Power Sector*, November 2016, available at https://climateanalytics.org/media/climateanalytics-coalreport_nov2016_1.pdf accessed 25 April 2019 ("*… for the Paris Agreement compatible pathway, global emissions from coal need to fall by around three quarters from close to 10 GtCO2 per year in 2020 to around 2.5 GtCO2 per year in 2030.*").
[129] IPCC, SR15, Summary for Policymakers, p. 16. See also IPCC, SR15, Chapter 2, Table 2.7, p. 133 (showing that coal needs to have an approx. 7% share of global electricity generation by 2030 in a Paris-compliant scenario).
[130] Australian Government, Department of Industry, Innovation and Science, *Energy Quarterly – March 2019*, p. 48, available at https://www.industry.gov.au/data-and-publications/resources-and-energy-quarterly-march-2019.
[131] "*11. The Committee is concerned about the continued increase of CO_2 emissions in the State party, at risk of worsening in the coming years, despite the State party's commitments as a developed country under the UN Framework Convention on Climate Change and the Kyoto Protocol, as well as its Nationally Determined Contribution under the Paris Agreement. The Committee is also concerned that environmental protection has decreased in recent years as shown by the repeal of the Emissions Trading Scheme in 2013, and the State party's ongoing support to new coal mines and coal-fired power stations.* ***The Committee is also concerned that climate change is disproportionately affecting the enjoyment of Covenant rights by indigenous peoples***."
12. The Committee recommends that the State party revise its climate change and energy policies, as indicated during the dialogue. ***It recommends that the State party take immediate measures aimed at reversing the current trend of increasing absolute emissions of greenhouse gases, and pursue alternative and renewable energy production. The Committee also encourages the State party to review its position in support of coal mines and coal export. The Committee further recommends that the State party address the impact of climate change on indigenous peoples more effectively while fully engaging indigenous peoples in related policy and programme design and implementation***." (Emphasis added.)
[132] Committee on Economic, Social and Cultural Rights, 'Concluding observations on the fifth periodic report of Australia', June 2017, §§11-12.
[133] Australian Government, Department of Industry, Innovation and Science, 'Resources and Energy Quarterly', March 2019, p. 59, available at https://publications.industry.gov.au/publications/resourcesandenergyquarterlymarch2019/documents/Resources-and-Energy-Quarterly-March-2019.pdf.
[134] Id.
[135] Id, pp 48 and 58.
[136] Id, p. 59.
[137] Using a conversion factor of 2.261.
[138] Australian Government, *Australia's emissions projections 2018*, December 2018, p. 12.
[139] Australian Government, Department of Industry, Innovation and Science, 'Resources and Energy Quarterly', March 2019, p. 57.
[140] https://www.bloomberg.com/news/articles/2018-12-18/the-world-s-most-controversial-coal-mine-is-set-to-break-ground.

continues to support the project despite the refusal of financial support from both Australian and overseas banks.[141]

(2) Fugitive emissions. The Australian government forecasts fugitive emissions from coal mining to increase from 24 to 27MtCO2e by 2020, as a number of "*gassy coal mines*" enter full production. From 2020 to 2030, annual fugitive emissions are projected to increase from 27 to 31 Mt CO2e.[142]

(3) Electricity Generation. In 2017, ***61%*** of Australia's electricity came from coal, with around a third of Australia's greenhouse gas emissions coming from the power sector.[143] By contrast, in the same year, the share of UK electricity generation from coal was ***6.7%***,[144] down from 67% in 1990.[145] As noted in the report of The Australia Institute at **Annex 4** following the collapse of the National Energy Guarantee (a policy designed to reduce emissions from the power sector) in 2018, the Australian government has been determined to pursue a policy of prolonging and *increasing* the use of thermal coal in Australia's energy mix, despite the climate impacts.

126. Moreover, the Australian government actively subsidises fossil fuel extraction and production[146] and promotes the use of coal overseas.[147]

127. In summary, the Australian State is not merely omitting to adopt sufficient measures to protect against climate change, but in fact also taking positive steps that significantly worsen the problem.

VII. STATE RESPONSIBILITY AND ATTRIBUTION OF CONDUCT TO AUSTRALIA

128. In accordance with the rules of State Responsibility under International Law, a State incurs international responsibility when conduct consisting of an action or omission (a) is attributable to the State and (b) constitutes a breach of an international obligation of the State.[148]

129. The acts and omissions on which the Authors rely are directly attributable to Australia. In this regard the Committee has confirmed:

> *The obligations of the Covenant . . . are binding on every State Party as a whole. All branches of government (executive, legislative and judicial), and other public or government authorities, at whatever level-national, regional or local-are in a position to engage the responsibility of the State Party. The executive branch that usually represents the State Part internationally . . . may not point to the fact that an action . . . was carried out by another branch of government as a means of seeking to relieve the State Party from responsibility.*" (General Comment 31, §4).

130. Furthermore, for countries with a federal structure, the ICCPR extends "*to all parts . . . without any limitation or exception*".[149]

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[141] https://www.theguardian.com/environment/2017/dec/06/adani-coalmine-wont-be-funded-by-chinese-banks-embassy-says; https://www.abc.net.au/news/2018-11-29/adani-carmichael-coal-mine-go-ahead-plans-to-self-fund/10567848.
[142] Australian Government, *Australia's emissions projections 2018*, December 2018, pp 23-24.
[143] https://www.carbonbrief.org/the-carbon-brief-profile-australia.
[144] UK Government, Department for Business, Energy and Industrial Strategy, 'UK Energy Statistics, 2017 & Q4 2017 – Press Notice', p. 9, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/695626/Press_Notice_March_2018.pdf.
[145] https://www.carbonbrief.org/analysis-why-the-uks-co2-emissions-have-fallen-38-since-1990.
[146] ODI, Oil Change International, 'G20 Subsidies to oil, gas and coal production: Australia' Country Study, November 2015, available at https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/9992.pdf.
[147] https://uk.reuters.com/article/uk-australia-coal-glencore/australia-says-coal-market-booming-as-it-dismisses-glencore-cuts-idUKKCN1QA0ZH.
[148] Article 2, The International Law Commission's Draft Articles on Responsibility of States for International Wrongful Acts, in J. Crawford, *The International Law's Commission's Articles on State Responsibility*, p. 62.
[149] General Comment 31, §4; Article 50 ICCPR.

VIII. AUSTRALIA'S BINDING OBLIGATIONS UNDER INTERNATIONAL CLIMATE CHANGE TREATIES AND OTHER INTERNATIONAL HUMAN RIGHTS TREATIES ARE RELEVANT TO ITS HUMAN RIGHTS OBLIGATIONS UNDER THE ICCPR

131. Article 31 of the Vienna Convention on the Law of Treaties ('**VCLT**') sets out a principle that when interpreting a treaty, not only the agreements and instruments formally related to it are to be taken into account (Article 31.2), but also "*any relevant rules of international law applicable in the relation between the parties*" (Article 31.3(c)).

132. The Authors respectfully submit that Australia's international obligations under international climate change treaties, referred to above, constitute part of the entire prevailing system relevant to the examination of Australia's human rights violations under the ICCPR. Indeed, the Preamble of the Paris Agreement acknowledges that climate change is a common concern of humankind and that "*Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights…*".[150]

133. Consistent with this interrelation between obligations under human rights law and climate change obligations by States, the Office of the United Nations High Commissioner for Human Rights ('**OHCHR**') has set out a number of considerations that should guide States in the action they take to address climate change (which are described below).

134. Australia is a party to the International Covenant on Economic, Social and Cultural Rights ('**ICESCR**'),[151] Convention on the Elimination of all Forms of Discrimination Against Women ('**CEDAW**'),[152] the Convention on the Rights of the Child ('**CRC**'),[153]and the International Convention on the Elimination of all Forms of Racial Discrimination ('**CERD**').[154] The Authors submit that these treaties are part of the prevailing system relevant to the examination of Australia's human rights violations under the ICCPR to the detriment of the Authors.

135. The authoritative interpretations that other human rights organs have made regarding climate change and human rights obligations under said treaties are relevant to construing State obligations under the ICCPR.

IX. ANALYSIS REGARDING BREACHES OF THE ICCPR

(1) Climate change as an issue of human rights

136. Numerous UN bodies and institutions, including the Committee itself, have emphasized that climate change is a matter of fundamental human rights, and some have specifically criticised Australia's record in this regard.

137. In October 2018, the Committee adopted its General Comment 36 ('**GC 36**') in relation to Article 6 (the right to life), stating that:

> *Environmental degradation, **climate change** and non-sustainable development constitute **some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life.** Obligations of States parties under international environmental law should thus inform the contents of Article 6 of the Covenant, and the obligation of State parties to respect*

[150] Alan Boyle, 'Climate Change, the Paris Agreement and Human Rights', *International Comparative Law Quarterly*, Vol. 67, Part 4, October 2018, p. 771.
[151] Australia ratified ICESCR on 10 December 1975, see https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=_en.
[152] Australia acceded to CEDAW on 28 July 1983, see https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en.
[153] Australia acceded to CRC on 17 December 1990, see https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en.
[154] Australia ratified CERD on 30 September 1975, see https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&clang=_en.

and ensure the right to life must reinforce their relevant obligations under international environmental law. ***The ability of individuals to enjoy the right to life, and in particular life with dignity, depends on measures taken by State parties to protect the environment against harm and pollution***.

138. Furthermore:

(1) The OHCHR has set out a number of considerations that should guide States in the action they take to address climate change. These include: (i) mitigating climate change and preventing negative effects on human rights; (ii) ensuring that all persons have the necessary capacity to adapt to climate change; (iii) ensuring accountability and effective remedies for human rights harms caused by climate change; (iv) mobilising maximum available resources for sustainable, human rights-based development; (v) ensuring equity in climate action; and (vi) guaranteeing equality, non-discrimination, and meaningful and informed participation in decision making.[155] The OHCHR stressed that "*States (duty-bearers) have* ***an affirmative obligation to take effective measures to prevent and redress these climate impacts,*** *and therefore, to mitigate climate change, and to ensure that all human beings (rights-holders) have the necessary capacity to adapt to the climate crisis*".[156]

(2) The Committee on Economic, Social and Cultural Rights, which monitors ICESCR, has acknowledged that climate change constitute "*a massive threat to economic, social and cultural rights*" and it warned that "*a failure to prevent foreseeable human rights harm caused by climate change, or a failure to mobilize the maximum available resources in an effort to do so, could constitute a breach of this obligation.*"[157] It also commented, in relation to States' NDCs that "*in order to act consistently with their human rights obligations, those contributions should be revised to better reflect the "highest possible ambition" referred to in the Paris Agreement (art. 4 (3)).*"[158]

(3) In 2018, the Committee on the Elimination of Discrimination Against Women issued General Recommendation No. 37 on "the gender-related dimensions of disaster risk reduction in the context of climate change." This identifies many of the key climate change issues that States should consider when implementing CEDAW, including "*[l]imiting fossil fuel use and greenhouse gas emissions and the harmful environmental effects of extractive industries such as mining ... and the allocation of climate financing*".[159]

(4) The United Nations Human Rights Council noted in 2018 that "*climate change has contributed and continues to contribute to the increased frequency and intensity of both sudden-onset natural disasters and slow-onset events, and that these events have adverse effects on the full enjoyment of all human rights*", and gave particular emphasis to the achievement of the Paris Agreement's temperature goals as a human rights concern: "*Stressing the importance of holding the increase in the global average temperature to well below 2°C above pre-industrial levels and of pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, while recognizing that this would significantly reduce the risks and impacts of climate change*". The Human Rights

[155] OHCHR, 'Understanding Human Rights and Climate Change', OHCR's submission to the 21st Conference of Parties to the UNFCCC (27 November 2015) and the 'Key Messages on Human Rights and Climate Change', available at https://www.ohchr.org/Documents/Issues/ClimateChange/COP21.pdf.
[156] Id (emphasis added).
[157] Committee on Economic, Social and Cultural Rights' Statement on "Climate Change and the International Covenant on Economic, Social and Cultural Rights", 31 October 2018, E/C.12/2018/1 ('**CESCR Statement**'), §6.
[158] Id, §§6-13.
[159] Committee on the Elimination of Discrimination against Women, General recommendation No. 37 (2018) on the gender-related dimensions of disaster risk reduction in the context of climate change, 13 March 2018, CEDAW/C/GC/37, §14.

Council accordingly called for "*full, effective and sustained implementation of the United Nations Framework Convention on Climate Change and the Paris Agreement*".[160]

(5) In October 2018, David Boyd, the UN Special Rapporteur on Human Rights and the Environment, issued a "Statement on human rights obligations related to climate change, with a particular focus on the right to life" (in the context of proceedings in the Irish Courts), in which he emphasised the obligation "*to take positive and effective measures to prevent the human rights harm caused by climate change*."[161]

139. Regional and domestic courts have also stressed the link between human rights, the environment and climate change:

(1) The Inter-American Court of Human Rights ('**IACtHR**') in its landmark Advisory Opinion No. 23 on "Human Rights and the Environment" (published February 2018) stated that "*... climate change has very diverse repercussions for the effective enjoyment of human rights, such as the rights to life, health, food, water, housing and self-determination*" (§54), and that the "*human right to a healthy environment*" has collective and individual connotations, being both a "*universal interest ... owed to present and future generations*" and having "*direct or indirect repercussions on people due to its connection with other [individual] rights, such as the right to health, personal integrity or life, among others*" (§59).

(2) The IACtHR has emphasised that there is "*a critical link between human beings' subsistence and the environment has been recognised in other international treaties and instruments ... including the International Covenant on Civil and Political Rights*."[162]

(3) In October 2018, the Hague Court of Appeal gave judgment in **Urgenda Foundation v The State of the Netherlands**, upholding a claim (based on the European Convention on Human Rights ('**ECHR**')) that the Dutch Government had failed to take adequate measures to mitigate climate change.[163]

140. Australia's record has also attracted specific criticism:

(1) As mentioned above, the CESCR has stated in relation to Australia:

> *The Committee is concerned about the continued increase of carbon dioxide emissions in the State party, which run the risk of worsening in the coming years, despite the State party's commitments as a developed country under the United Nations Framework Convention on Climate Change and the Kyoto Protocol, as well as its national determined contribution under the Paris Agreement. The Committee is also concerned that environmental protection has decreased in recent years as shown by the repeal of the emissions scheme trading scheme 2013, and the State party's ongoing support to new coal mines and coal-fired power stations. The Committee is also concerned that climate change is disproportionally affecting the enjoyment of the Covenant rights by indigenous peoples*.[164]

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[160] Human Rights Council, Resolution 38/4 ("*Human Rights and Climate Change*"), A/HRC/38/L.5, recitals and §2.
[161] UN Special Rapporteur on human rights and the environment, 'Statement on the human rights obligations related to climate change, with a particular focus on the right to life', 25 October 2018, §54.
[162] Inter-American Commission on Human Rights ('**IAComHR**'), *Indigenous and Tribal People's Rights over Their Ancestral Lands and Natural Resources, Norms and Jurisprudence of the Inter-American Human Rights System*, OEA/Ser.I/L/V/II. Doc 56/09 (30 December 2009), §192.
[163] **State of the Netherlands v Urgenda Foundation**, C/09/456689/ HA ZA 13-1396, Judgment of 9 October 2019. The Court upheld the decision of the Hague District Court made in **Urgenda Foundation v State of the Netherlands**, C/09/456689/HA ZA 13-1396, Judgement of 24 June 2015 and ordered the Dutch Government, by 2020, to reduce GHG emissions to 25% below 1990 levels, replacing the existing target of 17%. The case is referred to further below.
[164] CESCR, 'Concluding Observations on the fifth periodic report of Australia', E/C.12/AUS/CO/5, 11 July 2017, §11.

It recommended that Australia "*revise its climate change and energy policies*", "*take immediate measures aimed at reversing the current trend of increasing absolute emissions of greenhouse gases*", "*review its position support of coal mines and coal exports*", and "*address the impact of climate change on indigenous peoples more effectively*".[165]

(2) The CEDAW Committee has also recommended Australia to adopt "*a human rights-based approach in the development of climate change responses*", to further reduce greenhouse emissions, notably those resulting from coal consumption and exports, and to establish safeguards to protect all groups from the negative impacts of fossil fuels, both in the State party as well as abroad, including when those result from exports of fossil fuels.[166]

(2) Article 2

141. Article 2 of the ICCPR plays an essential and overarching role in the application of the Covenant. Article 2 states:

> *(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 ...*
>
> *(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.***
>
> *(3) Each State Party to the present Covenant undertakes:*
>
> *(a)* ***To ensure*** *that any person whose rights or freedoms as herein recognized are violated shall* ***have an effective remedy****, ...*

142. Article 2 requires States to take positive measures to *ensure* the enjoyment of the rights enshrined in the ICCPR (rather than merely to refrain from directly causing infringements thereof by the actions of the State itself).

143. In this case Australia is in violation of Article 2, read together with Articles 6 and / or 17 and / or 24 and / or 27. In particular, as set out further below, Australia is in violation of its obligation to "respect and ensure" the rights recognised in those Articles of the ICCPR.

144. In further violation of Article 2:

(1) Australia has *failed* to adopt such laws or other measures as are necessary to give effect to the rights recognised in the ICCPR, in particular under Articles 6, 17, 24 and 27, contrary to, inter alia, Article 2(2).

(2) Australia is *failing* to ensure accountability and effective remedy for human rights harms caused by climate change. As seen in the section dealing with exhaustion of domestic remedies, Australia has failed to guarantee effective remedies to the Authors, in order to redress the impact of climate change in their homes, such as sea level rise, extreme weather events and others.

(3) Australia has *failed* to ensure equity in climate action. The Authors (and the children and future generations in their communities) who have contributed the least to greenhouse gas emissions are those most affected by climate change.

[165] Id, §12.
[166] CEDAW, 'Concluding Observations on the eight periodic report of Australia', CEDAW/C/AUS/CO/8, 25 July 2018, §§29-30.

(4) Australia has *failed* to guarantee equality, non-discrimination, and meaningful and informed participation in decision making. The Authors and their communities are not being heard, and their needs in respect of the developing human crisis in their islands are not being addressed.

(3) Australia's violation of Article 6

145. Article 6(1) of the ICCPR 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.*

146. Australia is obliged to respect and ensure the "right to life", both in relation to "loss of life", and in relation to "life with dignity" (under Article 6 and / or Articles 2 and 6 read together). In this case Australia has violated its obligations by failing to take any (or any adequate) measures of adaptation and mitigation.

A. Australia's obligations to respect and ensure the right to life in relation to: (i) foreseeable loss of life; and (ii) the Authors' right to a life with dignity

147. In its General Comment No. 6 on the right to life, the Committee stated explicitly that the right to life "*is a right which should not be interpreted narrowly*".[167] More recently, the Committee's GC 36 described climate change as one of "*the most pressing and serious threats to the ability of present and future generations to enjoy the right to life*".[168]

148. The Authors are among the most endangered by the negative impacts of climate change, members of a community at risk of forced displacement.

Australia's duties not to cause and to prevent foreseeable loss of life

149. The following general principles relating to Article 6 are well established and were recently confirmed by the Committee in GC 36:

(1) Article 6 protects the right to life of all human beings. It is "*the supreme right from which no derogation is permitted . . .*". It has "*crucial importance both for individuals and for society as a whole*" and is "*a fundamental right whose effective protection is the prequisite for the enjoyment of all other human rights*" (GC 36, §2).

(2) Article 6(1) imposes both negative and positive duties. States must refrain from causing, by their own acts or omissions, foreseeable loss of life. Furthermore, States must take positive steps (sometimes described as a duty of "due diligence") to protect individuals against foreseeable loss of life caused by conduct which is not attributable to the state (GC 36, §§6 and 7).

(3) The obligation of States to respect and ensure the right to life extends to all threats that **can** result in loss of life. States may be in violation of article 6 even if such threats have not actually resulted in loss of life (GC 36, §7).

150. Australia's obligations in this regard include the obligation to prevent loss of life from the impacts of climate change. The existence of such a duty under Article 6(1) in the context of climate change harms is supported by judicial decisions of domestic courts, by publicists of the highest standing (expert human rights scholars) and by GC 36:

(1) On 9 October 2018 the Hague Court of Appeal gave judgment in **Urgenda Foundation v The State of the Netherlands**, a case where an NGO successfully sued the Dutch Government for failing to take adequate measures to mitigate climate change.[169] The claimants relied on (inter

[167] Human Rights Committee, General Comment No. 6: Article 6 (Right to life), §1.
[168] Human Rights Committee, General Comment No. 36 on the right to life, §62, adopted on 30 October 2018. See also Alan Boyle, 'Climate Change, the Paris Agreement and Human Rights', op cit., p. 759.
[169] **State of the Netherlands v Urgenda Foundation**, op cit.

alia) the right to life in Article 2 of the ECHR[170] (which is analogous to Article 6, ICCPR).[171] The Court stated that "*The interest protected by Article 2 ECHR is the right to life,* ***which includes environment-related situations that affect or threaten the right to life***" (§40); that under Article 2 the government has "***a positive obligation to take concrete action to prevent a future violation of [this] interest*** . . . " (§40); and that "*if the government knows that there is a real and imminent threat,* ***the State must take precautionary measures to prevent infringement as far as possible***" (§43). The Court noted that the Dutch Government did not "*contest Urgenda's assertion that an inadequate climate policy in the second half of this century will lead to hundreds of thousands of victims in Western Europe alone*." (§44) and concluded: "***it is appropriate to speak of 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 and / or a disruption of family life***. ***As has been considered above by the Court, it follows from Articles 2 and 8 ECHR that the State has a duty to protect against this real threat***." (§45, emphasis added).

(2) On 25 October 2018, Professor David R. Boyd, the UN Special Rapporteur on Human Rights and Environment, submitted an expert report to the Courts of the Republic of Ireland in **Friends of the Irish Environment CLG v The Government of Ireland, Ireland and the Attorney-General**.[172] The case involves a challenge to approval of Ireland's "National Mitigation Plan" for climate change, including on human rights grounds. Professor Boyd's report focused on the right to life and concluded that "***climate change clearly and adversely impacts the right to life, a right which the Government of Ireland is legally obligated to respect, protect and fulfil***" and that therefore "***the Government of Ireland has positive human rights obligations to mitigate climate change by rapidly reducing its greenhouse gas emissions***." (§5). Professor Boyd's conclusions were based on a rigorous analysis of existing jurisprudence and other material relating to climate change, including the "*dramatic*" and "*foreseeable*" consequences of additional deaths and injury.[173]

(3) On 30 October 2018, the Committee adopted GC 36, which supported the link between climate change and the right to life in a general sense (as well as in relation to right to a life with dignity, as discussed below).

(4) The grave threat to human life from climate change is well recognised and has for some time been "*foreseeable*". For example, the IPCC's 2007 assessment report ('**AR4**') projects, with high confidence, an increase in people suffering from death, disease and injury due to climate change related heatwaves, floods, storms, fires and droughts. The AR5 determined with high confidence that since the middle of the 20th century climate change has caused an increase in warm temperature extremes, leading to a "*greater likelihood of injury and death due to more intense heat waves and fires*" (at p. 69). A report by the World Bank has also drawn the link between climate change, extreme weather events and loss of human life. For example, it points to the death toll of 70,000 in the 2003 European heat wave[174] and the death toll of 55,000 in the 2010 Russian heatwave.[175] A 2016 report by the World Health Organization indicates that 250,000 additional deaths could occur every year between 2030 and 2050 as a result of climate change.[176]

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[170] Article 2(1) ECHR provides: "*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*."
[171] The claimants also relied on Article 8 ECHR, and the Hague Court's analysis on this aspect has been considered above in the Section on Article 17 ICCPR.
[172] The case has the reference number 2018/291 JR. The judicial review proceedings were heard in January 2019. See https://www.friendsoftheirishenvironment.org/climate-case.
[173] Id, §§22-26.
[174] World Bank (2010), *World Development Report 2010: Development and Cimate Change*, p. 62.
[175] https://www.who.int/globalchange/publications/heat-and-health/en/.
[176] https://www.who.int/news-room/fact-sheets/detail/climate-change-and-health.

151. Australia's positive duty to prevent loss of life from climate change is also supported by the evidence in this case:

(1) The Authors and the Torres Strait Islanders are particularly vulnerable.[177] The TSRA has stated that anticipated climate change impacts in the Torres Strait region include "*health issues such as increased disease and heat-related illness*".[178]

(2) Furthermore, the Authors have given specific evidence of being in physical danger: see Nazareth Warria at §35 ("*I felt physically in danger … I felt that the waves could actually sweep us away*"; see also Nazareth Fauid at §23 (increased risk of infection), §29 (fears for safety); see also Ted Billy at §23 (high waves and rough weather – "*that's what really scares us*").

Australia's duties to respect and ensure the Authors' right to a life with dignity

152. The Committee has confirmed that the right to life under Article 6 ICCPR is not to be interpreted narrowly (GC 36, §3); that it includes a right to "***life with dignity***"; and that the serious threat of climate change requires states to act to protect the ability of citizens to enjoy a life with dignity (see GC 36, §65, quoted in Section IX(1) above).

153. The proposition that, in international human rights law, the right to life includes a right to life with dignity has evolved from the jurisprudence of the IACtHR.[179]

(1) In **Yakye Axa Indigenous Community v Paraguay**,[180] the right to life in Article 4 of the 1969 American Convention on Human Rights[181] was regarded as containing basic economic, social and cultural rights which included being able to exercise traditional activities for subsistence (hunting, fishing) and access to natural resources deeply connected with the cultural identity of aboriginal communities. The Court stated that:

> *One of the obligations that the State must inescapably undertake as a guarantor, to protect and ensure the right to life, is that of generating minimum living conditions that are compatible with the dignity of the human person and of not creating conditions that hinder or impede it. In this regard the State has the duty to take positive, concrete measures geared towards fulfillment of the right to a decent life, especially in the case of persons who are vulnerable and at risk, …*[182]

The Court concluded that Paraguay had violated the right to life because it had failed to ensure the indigenous community's "*right to a life in dignity*".

(2) In **Sawhoyamaxa Indigenous Community v Paraguay**[183] the court also emphasized the duty of states to guarantee the creation of conditions that may be necessary in order to prevent violations of the right to life.

(3) The case of **Moiwana Community v Suriname**,[184] concerned the claim of an indigenous community that had been forcibly evicted from its land by State agents. As a result, the community was displaced and left to live without their land rights. The Court acknowledged:

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[177] See Climate Planning, 'Torres Strait Expert Analysis: Scoping Climate Change Risk Assessment for Torres Strait Islands Masig, Warraber, Boigu and Poruma', 13 May 2019, **Annex 14**, pp 10 and 12.
[178] *Torres Strait Climate Change Strategy 2014-2018*, **Annex 1**, p. 2.
[179] IACtHR, **Villagrán-Morales v Guatemala**, judgment of 19 November 1999.
[180] IACtHR, **Yakye Axa Indigenous Community v Paraguay**, judgment of 17 June 2005, §162.
[181] Article 4 of the ACHR is in similar terms to Article 6(1) of the ICCPR and provides: "*Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life*."
[182] Id, §162.
[183] IACtHR, **Sawhoyamaxa Indigenous Community v Paraguay**, judgment of 29 March 2006.
[184] IACtHR, **Moiwana Community v Suriname**, judgment of 15 June 2005.

The N'djuka community's relationship to its traditional land is of vital spiritual, cultural and material importance. In order for the culture to maintain its integrity and identity, its members must have access to their homeland. Land rights in N'djuka society exist on several levels, ranging from rights of the entire ethnic community to those of the individual.[185]

154. In a Separate Opinion in the case, Judge Cançado Trindade observed the existing links between the right to life and right to culture of individuals with a distinctive culture such as the indigenous/aboriginal petitioners: "*The tragedy of uprootedness, manifested in the present case, cannot passed unnoticed here, as uprootedness affects ultimately the right to cultural identity, which conforms* ***the material or substantive content of the right to life lato sensu itself.***"[186] Among other issues, the displacement of the N'djuka, for whom it was crucial to perform proper burial and rituals for the deceased in traditional lands, denied them of an essential cultural right that went directly to the notion of dignity. By not fulfilling the traditional obligations concerning the dead, the petitioners in that case declared that "*it is as if we do not exist on Earth.*"

155. In this case Australia must ensure, respect and fulfil the Authors' right to a life with dignity by protecting the Authors from climate change. In particular:

(1) The Authors are members of a community with a distinct culture and way of life that is inextricably linked to the islands on which they live and the surrounding oceans (see Sections VI(3) and (4) above).

(2) As a result of climate change: (a) the Authors are already suffering substantial negative effects to their culture and way of life, for example flooding, erosion, coral bleaching, saltwater intrusion into traditional gardens and the decline of nutritionally and culturally important marine life (see Sections VI(4)(B)-(C) above); (b) the Authors are facing the serious threat of permanent displacement from their land, which would result in the destruction of their culture and way of life (see Sections VI(4)(D)-(E) above). They are facing "*the tragedy of uprootedness*".

(3) The ability of the Authors to enjoy a life with dignity is already being affected and (foreseeably) will be substantially undermined, absent urgent steps by Australia, as described further below.

The right to life as a right to a healthy environment

156. More recently, the right to a healthy environment as "*a fundamental right for the existence of humanity*" was recognised as part of the right to life in the **Advisory Opinion 23 on Environment and Human Rights** by the IACtHR.[187] It was held that the right to a healthy environment is a right with individual and collective dimensions[188] and that environmental degradation and the adverse effects of climate change affect the effective enjoyment of human rights (including, fundamentally, the right to life).[189] It further acknowledges an interdependence and indivisibility between human rights and the protection of the environment, giving rise to state obligations.[190] In the same vein, it stressed that "*a critical link between human beings' subsistence and the environment has been recognised in other international treaties and instruments ... including the International Covenant on Civil and Political Rights.*"[191]

[185] Id, §86(6).
[186] IACtHR, **Moiwana Community v Suriname**, judgment of 15 June 2005, Separate Opinion of Judge Cançado Trindade, §13 (emphasis added).
[187] IACtHR, Advisory Opinion 23, February 2018, §59.
[188] Id. §47.
[189] Ibid.
[190] Id §55.
[191] IAComHR, *Indigenous and Tribal People's Rights over Their Ancestral Lands and Natural Resources, Norms and Jurisprudence of the Inter-American Human Rights System*, OEA/Ser.I/L/V/II. Doc 56/09 (30 December 2009), §192.

157. The facts set out above illustrate the fundamental connection between the right to life and a healthy environment for the Authors: for example, Keith Pabai states "*I have noticed that these things have changed, you can't predict the seasons*." (§42).

B. The nature of Australia's obligations

158. Australia is obliged to respect and positively to "*ensure*" the Authors' right to life. It must "*adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil [its] legal obligations*." (HRC, GC 31, §62).[192] In general, the measures should be "*effective . . . to prevent the human rights harm caused by climate change*."[193]

159. In the context of this case, Australia's obligations under Article 6 also require it to devote its "*maximum available resources*" to complying with its obligations. This follows from the conclusion of the UN Special Rapporteur on Human Rights and the Environment in his evidence to the Irish courts (mentioned above in Section IX(1)), based on a rigorous review of the existing jurisprudence:

> *The Government of Ireland has clear, positive, and enforceable obligations to protect against the infringement of human rights by climate change. It must reduce emissions as rapidly as possible,* ***applying the maximum available resources****. This conclusion follows from the nature of Ireland's obligations under international human rights law and international environmental law*.[194]

160. The above statement is also consistent with the position under ICESCR.[195]

161. Furthermore, Australia's Article 6 obligations also require it to comply with its international environmental obligations:

(1) This follows from Article 31.3(c) VCLT, as set out in Section VIII above.

(2) In its recent General Comment on Article 6, the Committee confirmed the need for states to comply with international environmental law obligations in order to comply with their Article 6 obligations: *"****Obligations of States parties under international environmental law should thus inform the contents of article 6 of the Covenant . . States parties should therefore … develop and implement substantive environmental standards …****"*[196]

(3) This approach is also supported by the UN's Framework Principles on Human Rights and the Environment, which emphasize (at §37) that "*once [States'] obligations [under international environmental law] have been defined … States must comply with them in good faith*", and *"[n]o State should ever seek to withdraw from any of its international obligations to protect against transboundary or global environmental harm. States should continually monitor whether their existing international obligations are sufficient. When those obligations and commitments prove to be inadequate, States should quickly take the necessary steps to strengthen them …*".[197]

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[192] Human Rights Committee, General Comment No. 31, §7. This follows from Australia's obligations under Article 2(1), as well as its obligations under Article 2(2).

[193] UN Special Rapporteur on human rights and the environment, 'Statement on the human rights obligations related to climate change, with a particular focus on the right to life', 25 October 2018, §54.

[194] Id, §59. See also §53: "*Since climate change directly contributes to human rights violations, the Government of Ireland has a positive obligation to take measures to mitigate climate change, to prevent its negative human rights impacts, and to ensure that all persons, particularly those in vulnerable situations, have adequate capacity to adapt to the growing climate crisis.* ***Failure to prevent foreseeable human rights harms caused by climate change, or at the very least to mobilize maximum available resources in an effort to do so, constitutes a breach of this obligation***." (Emphasis added.)

[195] CESCR Statement, op cit, §6.

[196] Human Rights Committee, General Comment on Article 6, op cit, §62. See also the HRC's Fact Sheet 15 noting that a State's obligation to ensure enjoyment of human rights "*may well require* ***positive action*** *by the State party, for example by establishing an appropriate legislative and policy framework and* ***devoting sufficient resources to their effective implementation***."[196]

[197] Human Rights Committee, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment', January 2018. The United Nations Human Rights Council took note with appreciation of these principles in its Resolution 37/8 in 2018.

(4) This is also in line with the jurisprudence of the European Court of Human Rights, with international environmental law instruments such as the Rio Declaration[198] and the Aarhus Convention[199] having provided a basis for defining States' duties under the ECHR.

162. In the context of climate change, the UNFCCC and the Paris Agreement contain the most directly relevant obligations for Australia. Both the Human Rights Council and (in the context of ICESCR) the Committee on Economic, Social and Cultural Rights have characterised compliance with the Paris Agreement as an essential aspect of the human rights obligation of states in relation to climate change (see Section IX(1) above). If Australia is in breach of the UNFCCC or the Paris Agreement, it follows that it is also in breach of its obligations under Article 6.

163. In addition, Australia's human rights obligations inform the content of its obligations under the Paris Agreement:

(1) Australia's obligations under the Paris Agreement are part of its obligation to use its "*maximum available resources*" and "*all appropriate means*".[200]

(2) As well as using maximum available resources, States must consider the rights of the most vulnerable when setting climate change mitigation targets. This has been emphasised by the UN Special Rapporteur and in the UN Framework Principles on Human Rights and the Environment.[201]

(3) It follows from the all of the above that in setting their NDC States must undertake a thorough "bottom up" assessment of all possible measures at their disposal to reduce emissions. This assessment should inform the level of a State's emissions reduction target, unless it considers that such action goes beyond its "*maximum available resources*", taking into account the overall impacts of climate change and a failure to take such mitigation measures on the most vulnerable (both in Australia and globally).

(4) Indeed, the Preamble of the Paris Agreement acknowledges that climate change is a common concern of humankind, and that:

> *Parties should, **when taking action to address climate change, respect, promote and consider their respective obligations on human rights**, the right to health, **the rights of indigenous peoples**, local communities, migrants, **children**, persons with disabilities and*

[198] See **Tătar v Romania**, no. 67021/01, 27 January 2009.
[199] See **Taskin v Turkey** (2006) 42 EHRR 50; **Grimkovskaya v Ukraine**, no. 38182/03, 31 July 2011.
[200] See Human Rights Council, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment', February 2016, §48 ("*This distinction is relevant to all of the human rights obligations of States in relation to climate change, including the duty of international cooperation. As in human rights law generally, some of these obligations are of immediate effect and require essentially the same conduct of every State. For example, every State must respect the rights of free expression and association in the development and implementation of climate-related actions. At the same time, the implementation of other responsibilities — e.g., efforts to reduce emissions of greenhouse gases — can be expected to vary based on differing capabilities and conditions. Even in such cases, however, each State should do what it can. More precisely, consistent with article 2(1) of the International Covenant on Economic, Social and Cultural Rights, each State should take actions "to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means"*.").
[201] UN Special Rapporteur on human rights and the environment, op cit, §21 ("*Therefore, from a human rights perspective, States must not only implement their current NDC, but also strengthen those contributions to meet the targets set out in article 2 of the Paris Agreement and the objectives of the UNFCCC to mitigate the adverse effects of climate change. States are aware of the gap between their current commitments and their collective goal, and they agreed in Paris to review the adequacy of their commitments through stocktaking exercises every five years, beginning in 2023. However, it is already clear that States must begin to move beyond their current commitments even before the first stocktaking, in order to close the gap between what is promised and what is necessary. In all of these actions, States must take care to protect the rights of the most vulnerable*."). See also UN HRC, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment', January 2018, Principles 3, 14 and 15.

people in vulnerable situations *and the right to development,* ***as well as gender equality, empowerment of women and intergenerational equity***. [202] (Emphasis added)

164. Finally, the OHCHR has underlined the importance of adaptation and mitigation measures as part of a State's human rights obligations in relation to climate change. In relation to adaptation, the OHCHR has emphasised:

> *States must ensure that appropriate adaptation measures are taken to protect and fulfil the rights of all persons, particularly those most endangered by the negative impacts of climate change such as those living in vulnerable areas (eg small islands . . .). States must build adaptive capacities in vulnerable communities . . .* [203]

165. In relation to mitigation, the OHCHR has emphasised that "*States must act to limit . . . emissions of greenhouse gases . . . including through regulatory measures, in order to prevent to the greatest extent possible the current and future negative human rights impacts of climate change*."[204]

C. Australia's violation of its obligations in relation to adaptation and mitigation

Adaptation

166. Australia has violated its obligations in relation to adaptation. It has so far failed to put in place any (or any adequate) adaptation measures to ensure that the Authors' rights will be protected. Australia has failed even to resource adequately the specific measures identified as necessary by the TSIRC and its own instrumentality the TSRA. Australia has failed to do what is necessary to avoid a human rights crisis.

167. The minimum adaptation steps that Australia is required to take are detailed below in the section on 'Remedies'. These steps include: (a) commissioning a comprehensive and fully-costed study of all coastal defence and resilience measures available in respect of each island out to at least 2100, so as to avoid the communities' forced displacement from their island and to minimise erosion and inundation as far as possible; and (b) implementing fully and expeditiously coastal defence and resilience measures based on that study in consultation with the island communities.

168. Australia is required to take these steps given:

(1) its obligations to respect and ensure the Authors' rights under Articles 6 and 2, to take effective measures and to deploy its "*maximum available resources*", as set out above;

(2) that the proposed measures are essential to prevent the forced displacement of the Authors from the Islands and therefore to safeguard the human rights and the culture of a vulnerable indigenous minority;

(3) that there can be no doubt that Australia as a country is wealthy enough to fund the necessary measures (for example, the cost of the requested emergency adaptation measures is A$20m, which amounts to only approximately 0.004% of the Australian government's anticipated spend in the single budget year 2019/20 of A$493.3bn[205]); and

(4) that, by contrast, the amount which the Queensland state government expects to receive from royalties on the mining of coal alone in budget years 2016-2020 is A$16.6bn (thus leaving aside

[202] Alan Boyle, 'Climate Change, the Paris Agreement and Human Rights', *International Comparative Law Quarterly*, Vol. 67, Part 4, October 2018, p. 771.
[203] OHCHR, 'Understanding Human Rights and Climate Change' OHCR's submission to the 21st Conference of Parties to the UNFCCC (27 November 2015) and the 'Key Messages on Human Rights and Climate Change' https://www.ohchr.org/Documents/Issues/ClimateChange/COP21.pdf, p. 2.
[204] Id.
[205] Australian Government, *Australian Government Budget 2019-20*, Appendix A: Budget aggregates ('payments'), available at https://www.budget.gov.au/2019-20/content/overview.htm.

coal mining land rents, corporation tax paid by coal mining companies and any other duties and taxes received by the state and federal governments).[206] The Australian government has thus failed to commit to funding a sum that represents 0.1% of a portion of what the Queensland state government alone will make over just a five-year period from its irresponsible promotion of coal mining in the face of the clear climate science, towards meeting some of the problems that its policies have caused.

Mitigation

169. Australia has violated its obligations under the ICCPR in respect of mitigation, having failed to meet its obligations under the Paris Agreement, in particular given: (1) the inadequacy of Australia's NDC target; (2) Australia's failure to pursue domestic measures to achieve its NDC target (let alone measures to achieve an adequate NDC target); and (3) its active pursuit of policies which will foreseeably make matters worse (see Section VI(5)(B) above).[207] Further or alternatively, Australia has violated its obligations under the ICCPR in relation to the inadequacy of its NDC and its domestic measures and policies, based on its general obligations under the ICCPR (regardless of the Paris Agreement) as set out in Section IX(3)(B) above, having regard to the matters set out in Section VI(5)(B) above.

170. Furthermore, Australia's acts and omissions set out above constitute violations of the ICCPR notwithstanding that global warming results from the cumulative GHG emissions of all countries. Where a State fails to fulfil its obligations, the State is in violation and incurs international responsibility, independently of whether there is proof of a causal link to any particular harm.[208] Australia is obliged vis-à-vis the Authors to take measures in accordance with the principles above, even though the acts and omissions of other States may also be contributing to the Authors' plight. Obligations of a protective and precautionary nature exist notwithstanding that States *may* be unable, by fully discharging their obligations, to ensure the full protection of the interests protected by human rights obligations.

171. In any event, Australia's wrongful conduct does make a causal contribution to the relevant harms. High-level domestic courts in a number of countries,[209] when deciding claims relating to climate change, have held that contributory causation (as opposed to the 'but-for' test) is sufficient for the climate concerns at stake to be actionable. As Justice Preston held in the important Australian case of **Gloucester Resources Limited v Minister for Planning** [2019] NSWLEC 7:

> *All anthropogenic GHG emissions contribute to climate change. … The direct and indirect GHG emissions of [the project in question] will contribute cumulatively to the global total GHG emissions. … It matters not that this aggregate of the Project's GHG emissions may represent a small fraction of the global total of GHG emissions. … All emissions are important because cumulatively they constitute the global total of greenhouse gas emissions, which are destabilising the global climate system at a rapid rate. Just as many emitters are contributing to the problem, so many emission reduction activities are required to solve the problem.*[210]

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[206] Queensland Government, *Queensland Budget 2018-19 – Budget Strategy and Outlook – Budget Paper No.2*', p. 62 (see also statement "*Royalties ensure some of the proceeds of the extraction of non-renewable resources are returned to the community*."), available at https://budget.qld.gov.au/files/BP2-2018-19.pdf.

[207] As noted above in Section IX(1), Australia's record on mitigation has already attached criticism from the CESCR and CEDAW Committees.

[208] See International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts, article 1 (providing for State responsibility in all cases of breach of an international obligation, with no consideration of causation of damage), and article 2 and the ILC's commentary thereto, especially para (4).

[209] E.g. the US Supreme Court in **Massachusetts v EPA** 549 U.S. 497, the Hague Court of Appeal in **Urgenda**, and the Colombian Supreme Court in the landmark environmental case no. STC4360-2018 (recognizing legal personality of and granting protections to the Colombian Amazon forest for the purpose of, inter alia, mitigating greenhouse gas emissions).

[210] **Gloucester Resources Limited v Minister for Planning** [2019] NSWLEC 7, §§514-515. This case was a merits review arising from an Environmental Impact Assessment conducted for the approval of a new metallurgical coal mine in New South Wales, Australia. Justice Preston's judgment discusses some of the preceding authorities.

172. It followed that: *"[t]here is a causal link between the Project's cumulative GHG emissions and climate change and its consequences. The Project's cumulative GHG emissions will contribute to the global total of GHG concentrations in the atmosphere. The global total of GHG concentrations will affect the climate system and cause climate change impacts*."[211]

(4) Australia's violation of Article 27

> *We as a people are so connected to everything around us. The Island is what makes us, it gives us our identity. We know everything about the environment on this island, the land, the sea, the plants, the winds, the stars, the seasons. The Island makes us who we are. Our whole life comes from the island and the nature here, the environment. It is a spiritual connection. We know how to hunt and fish from this island, to survive here, we get that from generations of knowledge that been passed down to us. I know every species of plant, animal, wind on this island, the way the vegetation changes, what to harvest at different times of the year. That is the cultural inheritance we teach our children. It is so important to us, this strong spiritual connection to this island, our homeland*. (Keith Pabai, §31)

173. Article 27 of the ICCPR provides:

> *In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.*

174. Australia is obliged to respect and ensure the Authors' "*right to enjoy their own culture*", (under Article 27 and / or Articles 2 and 27 read together), given in particular that the Authors are a member of a "minority" for the purposes of Article 27 and that climate change is causing and will increasingly cause a substantial negative effect on the Authors' ability to enjoy their culture unless urgent action is taken. Australia has violated its obligations by failing to take any (or any adequate) measures of adaptation and mitigation and by failing to ensure effective participation in decisions that affect the ability to continue to enjoy the right to culture.

A. Australia's obligations to respect and ensure the Authors' rights to enjoy their own culture

Article 27 requires States (i) not to deprive members of a minority of the ability to enjoy their culture in community with other members of the group and (ii) to take positive measures to protect against such deprivation

175. The purpose of Article 27 is to ensure the survival and continued development of the cultural, religious and social identity of the minorities concerned, enriching the fabric of society as a whole (CCPR General Comment No. 23 ('**GC 23**'), §9). This purpose must inform the interpretation and application of Article 27.

176. Article 27 imposes both negative and positive duties on States. A State is required (1) to refrain from taking measures which cause or contribute to depriving members of a minority of the ability to enjoy their culture in community with other members of the group; and (2) to take positive measures to ensure the protection of the minority culture against threats which, if left unaddressed, would result in such deprivation.

177. The positive aspect of the State's duty arises from the combined effect of Article 27 with Article 2 ICCPR (as to which, see Section IX(2) above). Furthermore, although the Article 27 right is held by individuals, the protection of an individual's Article 27 right may, and in many cases does, require that the minority *group* to which the individual belongs is able to maintain the minority's cultural life (GC 23, §6.2). This is a further reason why Article 27 may require positive measures to be taken by States

[211] Id, §525.

to protect the ability of the members of a minority group, in community with other members of the group, to maintain, enjoy, develop and pass on their culture.

The Authors are members of a minority for the purposes of Article 27

178. A minority in Article 27 refers to a group who share in common a culture, religion or language, and who are numerically inferior in the State as a whole. See GC 23, §5.1; **Ballantyne v Canada, 359/1989 & 385/1989** (holding that "*the minorities referred to in article 27 are minorities within such a State, and not minorities within any province. A group may constitute a majority in a province but still be a minority in a State and thus be entitled to the benefits of article 27*."). The existence of a minority is in no way dependent on whether the State adopts discriminatory policies in relation to the group: GC 23, §5.2.

179. The Torres Strait Islanders are a minority within the meaning of Article 27. This is established by the facts set out in Section VI(2) above. In addition, the Torres Strait Islanders are a recognized indigenous minority under Australian law, and also recognized as being an indigenous people. See Section 4 of *Aboriginal and Torres Strait Islander Act* 2005 (Cth), defining "*Torres Strait Islander*" as "*a descendant of an indigenous inhabitant of the Torres Strait Islands*".[212]

The Authors' indigenous minority culture is critically dependent on the continued existence and habitability of their islands as well as the ecological health of the surrounding seas

180. For many minority cultures, especially indigenous peoples, a central aspect of their culture is a particular way of life that is intimately associated with the use of territory and natural resources (GC 23, §7). See also **Ominayak v Canada**[213]; **Kitok v Sweden**[214]; **Ilmari Länsman v Finland**[215]; **Diergaardt v Namibia**[216]. The continued enjoyment of these territories and resources on which the culture depends may therefore require positive measures of protection by States, as well as measures to ensure effective participation of minority communities in decisions which affect them (GC 23, §7).

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[212] The Preamble to the said Act records that:

> "…*WHEREAS the people whose descendants are now known as Aboriginal persons and Torres Strait Islanders were the inhabitants of Australia before European settlement;*
> *AND WHEREAS they have been progressively dispossessed of their lands and this dispossession occurred largely without compensation, and successive governments have failed to reach a lasting and equitable agreement with Aboriginal persons and Torres Strait Islanders concerning the use of their lands*;…"

[213] Human Rights Committee, **Ominayak v Canada**, Communication No. 167/1984, Views of 22 July 1987, CCPR/C/38/D/167/1984: "[§32.2] *The Committee recognizes that the rights protected by article 27, include the right of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong . . . .* [§33] *. . . recent developments threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of article 27 so long as they continue*."

[214] Human Rights Committee, **Kitok v Sweden**, Communication No. 197/1985, Views of 27 July 1988, CCPR/C/33/D/197/1985: "[§9.2] *The regulation of an economic activity is normally a matter for the State alone. However, where that activity is an essential element in the culture of an ethnic community, its application to an individual may fall under article 27 of the Covenant . . .* [§9.6] *[Because it would prevent certain members of an indigenous minority from practising their traditional way of life,] [t]he Committee has none the less had grave doubts as to whether certain provisions of the Reindeer Husbandry Act , and their application to the author, are compatible with article 27 of the Covenant*."

[215] Human Rights Committee, **Ilmari Länsman v Finland**, Communication No. 511/1992, Views of 26 October 1994, CCPR/C/52/D/511/1992: "[§9.2] *It is undisputed that the authors are members of a minority within the meaning of article 27 and as such have the right to enjoy their own culture; it is further undisputed that reindeer husbandry is an essential element of their culture. In this context, the Committee recalls that economic activities may come within the ambit of article 27, if they are an essential element of the culture of an ethnic community*."

[216] Human Rights Committee, **Diergaardt v Namibia**, Communication No. 760/1997, Views of 25 July 2000, CCPR/C/69/D/760/1997: "[§10.6] *As the earlier case law by the Committee illustrates, the right of members of a minority to enjoy their culture under article 27 includes protection to a particular way of life associated with the use of land resources through economic activities, such as hunting and fishing, especially in the case of indigenous peoples*." See also the concurring opinion of Committee Members Evatt, Klein, Kretzmer and Medina Quiroga, who observed: "… *This claim raises some difficult issues as to how the culture of a minority which is protected by the Covenant is to be defined, and what role economic activities have in that culture. These issues are more readily resolved in regard to indigenous communities which can very often show that their particular way of life or culture is, and has for long been, closely bound up with particular lands in regard to both economic and other cultural and spiritual activities, to the extent that the deprivation of or denial of access to the land denies them the right to enjoy their own culture in all its aspects*."

181. In this case, the relevant facts are set out in Section VI(3) above. In brief summary, the Torres Strait culture is intimately and inextricably linked to the islands, to the Islanders' land and sea territories, the local environment and traditional livelihoods and the use – including cultural and ceremonial uses – of marine living resources. Climate change is causing and will cause a substantial negative effect on the Authors' ability to enjoy their culture.

182. Environmental harms may give rise to a violation of Article 27, particularly if they threaten the viability of the indigenous way of life on their traditional lands. See, e.g., **Poma Poma v Peru** (finding that the draining of wetlands inhabited by the indigenous Aymara people which degraded the lands on which they traditionally raised llamas had caused a violation of the author's Article 27 rights).[217] A violation occurs where the State has caused or permitted a "*substantive negative impact*" on the enjoyment of the right of a member of a minority group to enjoy the cultural life of the community: see **Poma Poma** (supra), §7.5.

183. On the facts: (1) climate change is *already* causing a substantive negative impact to the traditional way of life of the Authors' communities; and (2) climate change (foreseeably) threatens to cause the permanent displacement of the Authors from the Islands and thereby to cause egregious and irreparable harm to the Authors' ability to enjoy their culture (see Section VI(4) above).

B. The nature of Australia's obligations

184. The Authors repeat and rely on the analysis in Section IX(3)(B) above in relation to Article 6, which applies equally to Article 27 (read alone or together with Article 2).

185. Furthermore, in relation to Article 27, it is established that:

(1) A State's conduct has to be considered cumulatively and "in the round". Actions which, taken individually, might not amount to a violation of Article 27 may constitute a violation in the context of the State's conduct and treatment of the minority group concerned, taken as a whole. **Jouni Länsman v Finland**.[218]

(2) A State's freedom to pursue objectives such as economic development is limited by the rights recognized in Article 27. While States are permitted to pursue policies which have a limited impact on the enjoyment by minority groups including indigenous peoples of their traditional ways of life, such measures may not amount to a denial of the right to enjoy that culture: **Ilmari Länsman** (supra);[219] **Poma Poma** (supra).[220]

186. Where a State's actions affect the enjoyment by members of a minority group, especially an indigenous people, of their traditional ways of life and means of subsistence, Article 27 also requires that the State

[217] Human Rights Committee, **Poma Poma v Peru**, Communication No. 1457/2006, Views of 27 March 2009, CCPR/C/95/D/1457/2006.

[218] Human Rights Committee, **Jouni Länsman v Finland**, Communication No. 671/1995, Views of 30 October 1996, CCPR/C/58/D/671/1995: "[§10.7] *The Committee is aware, on the basis of earlier communications, that other large scale exploitations touching upon the natural environment, such as quarrying, are being planned and implemented in the area where the Sami people live. Even though in the present communication the Committee has reached the conclusion that the facts of the case do not reveal a violation of the rights of the authors, the Committee deems it important to point out that the State party must bear in mind when taking steps affecting the rights under article 27, that though different activities in themselves may not constitute a violation of this article, such activities, taken together, may erode the rights of Sami people to enjoy their own culture*."

[219] Supra "[§9.4] *A State may understandably wish to encourage development or allow economic activity by enterprises. The scope of its freedom to do so is not to be assessed by reference to a margin of appreciation, but by reference to the obligations it has undertaken in article 27. Article 27 requires that a member of a minority shall not be denied his right to enjoy his culture. Thus, measures whose impact amount to a denial of the right will not be compatible with the obligations under article 27*."

[220] Supra "[§7.4] *The Committee recognizes that a State may legitimately take steps to promote its economic development. Nevertheless, it recalls that economic development may not undermine the rights protected by article 27. Thus the leeway the State has in this area should be commensurate with the obligations it must assume under article 27. The Committee also points out that measures whose impact amounts to a denial of the right of a community to enjoy its own culture are incompatible with article 27, whereas measures with only a limited impact on the way of life and livelihood of persons belonging to that community would not necessarily amount to a denial of the rights under article 27*."

ensure the *effective participation* by the minority group in decisions affecting its way of life. **Poma Poma** (supra), §7.6**.**

187. Further in this regard:

(1) The Committee has noted that where a decision by a State has an impact on the ability of an indigenous people to enjoy its traditional way of life, including economic activities that are intimately connected with its traditional culture, Article 27 requires the effective participation of the minority group in the State's decision-making process. See **Poma Poma** (supra), §§7.6-7.7.[221]

(2) It is submitted that, in relation to States' duties to ensure effective participation in decision-making by indigenous peoples, the Committee may have regard to the internationally agreed standard of achievement in the United Nations Declaration on the Rights of Indigenous Peoples (A/RES/61/295). Under the Declaration, free, prior and informed consent is required for all decisions which "*affect*" the indigenous communities.[222]

(3) Article 2.3 of the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (A/RES/47/135) (1992) provides that "*[p]ersons belonging to minorities have the right to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live, in a manner not incompatible with national legislation*."

C. Australia's violation of its obligations in relation to adaptation, mitigation and participation

188. In respect of adaptation and mitigation, the Authors repeat and rely on the analysis in Section IX(3)(C) above in relation to Article 6, which applies equally to Article 27 (read alone or together with Article 2).

189. In this case, Australia has also failed to ensure effective participation by the Authors' communities in its decision-making, even though they bear the brunt of those decisions. As noted in Section VI(5)(A) above, the Torres Strait communities' attempts to engage the government on their adaptation needs have met with very little success.

(5) Australia's violation of Article 17

190. Article 17 of the ICCPR provides:

> *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.*
>
> *Everyone has the right to the protection of the law against such interference or attacks.*

191. Australia is obliged to respect and ensure the Authors' rights to privacy, family and home (under Article 17 and / or Articles 2 and 17 read together), especially as climate change is already affecting and will foreseeably devastate the Authors' rights in this regard. Australia has violated its obligations by failing to take any (or any adequate) measures of adaptation and mitigation.

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[221] See also the older case of **Jouni Länsman** (supra), §10.5.

[222] See especially Article 32, which provides: "*1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources. 2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project* ***affecting*** *their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.*" (Emphasis added). See also Articles 18 – 19: "*Article 18. Indigenous peoples have the right to participate in decision-making in* ***matters which would affect their rights,*** *through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions. Article 19. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative* ***measures that may affect them***." (Emphasis added).

A. Australia's obligations to respect and ensure the Authors' rights to privacy, family and home

Article 17 requires States not to interfere with a person's privacy, family or home and to prevent such interference arising from the conduct or other matters not attributable to the state

192. In Article 17 ICCPR, the term "*family*" has a broad meaning and includes all those comprising the family as understood in the society of the State party concerned (General Comment No. 16 on article 17, adopted on 8th April 1988 ('**GC 16**'), §5). The term "*home*" also has a broad meaning and includes both the place where a person resides and the place where a person carries out his usual occupation (GC 16, §5).

193. Article 17 imposes both negative and positive duties. States must not interfere with a person's privacy, family or home. Furthermore, they must prevent such interference arising from conduct or other matters not attributable to the state, at least where the risk of such interference is foreseeable and serious. The positive aspect of the duties arises from Article 17 taken on its own: see GC 16, §§1 and 9; they also arise when Article 2 and 17 are read together.

Where climate change threatens disruption to privacy, family and the home Article 17 requires states to prevent serious interference with private, home and family life of individuals under their jurisdiction

194. Article 17 can apply to situations of environmental harm. The existence of a positive duty in Article 17 in relation to environmental harms is also supported by analogy with Article 8 of the ECHR. See, e.g. **López Ostra v Spain**, application no. 16798/90, judgment of 9 December 1994; **Tatar v Romania**, application no. 67021/01, judgment of 27 January 2009 (holding that the Romanian State had been under a duty to prevent foreseeable toxic pollution from a gold mine from affecting the health and safety of nearby residents); **Taskin v Turkey**, application no. 46117/99, judgment of 10 November 2004 ("*Article 8 applies to severe environmental pollution which may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health*."); see also **Grimkovskaya v Ukraine**, application no. 38182/03, judgment of 21 July 2011.[223]

195. Furthermore, specifically in relation to climate change, the analysis of Article 8 ECHR by the Hague Court of Appeal in **Urgenda Foundation v The State of the Netherlands** (cited above in relation to Article 6), is relevant. The Dutch Court held that the "*interests*" protected by Article 8 are "*the right to private life, family life, home and correspondence*"; that Article 8 may "*apply in environment-related situations*" and that the foreseeable threat of "*disruption to family life*" posed by climate change was itself a basis for positive obligations on the Dutch Government to take steps of mitigation (see Section IX(3)(A) above).

The climate change harms affecting the Torres Strait region will foreseeably cause serious disruption to private, home and family life, including the Authors'

196. As set out above in Section VI(4) above: (1) Climate change is already impacting the private, family and home life of the Authors are already occurring. For example erosion is already approaching close to the homes of some community members and causing them distress and anxiety. (2) Moreover, as is now recognised and foreseeable, the Authors and their communities face the prospect of being forced to abandon their homes entirely, within the lifetimes of community members currently alive (including the Authors) (see Section VI(4) above). This would be a catastrophically serious infringement of the Authors' rights to enjoy their privacy, family[224] and home life (including for many of the Authors, their work and ability to carry out their usual occupation[225]).

[223] **Grimkovskaya v Ukraine**, application no. 38182/03, judgment of 21 July 2011, at §58.
[224] As set out in the witness statements, the Authors generally live in their homes with family and have other family members living on the islands.
[225] As set out in the witness statements, the Authors who work generally have their place of "usual occupation" on the Islands.

B. The nature of Australia's obligations

197. The Authors repeat and rely on the analysis in Section IX(3)(C) above in relation to Article 6, which applies equally to Article 17 (read alone or together with Article 2).

C. Australia's violation of its obligations in relation to adaptation and mitigation

198. The Authors repeat and rely on the analysis in Section IX(3)(C) above in relation to Article 6, which applies equally to Article 17 (read alone or together with Article 2).

(6) Australia's violation of Article 24

> *I always think about my children, especially when it comes to my home, Masig. My children come first. I am frightened for my children and grandchildren. What is going to happen to them? How will they survive? They will be Masigalgal in blood. But as a tribe and as a nation there will be nothing left of us. We will be an extinct culture. When my children are adults and have children, it will be like learning about the Romans or the Spartans. They will say that 50 years ago there was a nation called Masigalgal.* (Yessie Mosby, §89)

199. As noted above Yessie Mosby and Kabay Tamu bring this complaint also on behalf of their children as victims. In his witness statement, Yessie Mosby describes the risks to his children and future generations posed by Australia's failure to take adequate steps:

> *I will probably be alive to see my children not have anything. When they are adults they will not have anything for their children. We will be living on another man's land. I don't want to see that future. That is when my identity, the Masigalgal identity, will die. I know a lot to teach my children but I cannot teach my children about their inheritance on another man's land. It won't have the sacredness and the power of our culture. We are very cultural people. We need to be on the island to learn about who and what we are. We grew up here and our afterbirth is buried here. What of the remains of our ancestors*? (§90).

200. Article 24(1) of the ICCPR reads:

> *Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as minor, on the part of his family, society and the State.*

A. Australia's obligations to respect and ensure the rights of the Authors' children and future generations

201. Article 24(1) is relevant to this case in its interrelation with Articles 6, 17 and 27.

202. As it has been observed in landmark international human rights decisions concerning the protection of children of indigenous peoples, "*[f]or indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations*."[226]

203. In the **Yakye Axa** case, a case raising displacement issues of an indigenous community, it was stressed by Judges Cancado Trindade and Ventura Robles, that the cultural identity of the claimants was affected, and that the children of that community were born predestinated to a denial of fundamental rights.[227]

204. In the **Sawhoyamaxa** case the rights of the child were examined, in the context of the plight of an indigenous community from El Chaco, whose traditional ways of life were on the way of extinction, deprived of their soil and forests where their ancestors had planted guaba, oranges and grapefruit trees for the generations to come. It was held that the State in question had violated its obligations under the

[226] IACtHR, **Mayagna (Sumo) Awas Tingni Community v Nicaragua**, judgment of 31 August 2001, §149.
[227] **Yakye Axa Indigenous Community v Paraguay**, Dissenting Opinion of Judge Cancado Trindade and Judge Ventura Robles, 17 June 2005, §19.

right to life for failure to foster the life of the members of this community. It was held that the State was aware of the vulnerability of the members of the community. In that context, it was found that the right of the child had been violated for failure to adopt special measures of protection based on the best interests of the child.

205. In the same vein, Yessie Mosby and Kabay Tamu submit that by violating the rights above examined, Australia is failing to protect the most vulnerable and affected of all, the future generations of their community, and in particular their children, named above.

The fundamental right of future generations to a stable climate system capable of sustaining human life

206. Moreover, the Authors understand that the children of their community, including the victims in this case, have a fundamental right to a stable climate system on the basis of the right of the child to a healthy environment. In this context, the Authors rely on the case of **Juliana v United States**,[228] in which the Federal District Court of Oregon has found that "*the right to a climate system capable of sustaining human life is **fundamental** to a free and ordered society*".

207. The Authors submit that Australia is violating this right in respect of the children named as victims of this complaint.

B. The nature of Australia's obligations

208. The Authors repeat and rely on the analysis in Section VIII(3)(C) above in relation to Article 6, which applies equally to Article 24 (read alone or together with Article 2).

C. Australia's violation of its obligations in relation to adaptation and mitigation

209. The Authors repeat and rely on the analysis in Section VIII(3)(C) above in relation to Article 6, which applies equally to Article 24 (read alone or together with Article 2).

X. REMEDIES SOUGHT

210. The Authors respectfully ask the Committee to uphold their Communication and to declare that Australia is in violation of Articles 6, 17, 24 and 27 and of Article 2, read in conjunction with each of Articles 6, 17, 24 and 27. In particular, the Committee is asked to declare that Australia is in violation by reason of:

    (1) its failure to take any (or any adequate) measures of adaptation to protect the Authors from climate change; and

    (2) its failure to take any (or any adequate) measures of Mitigation, including in relation to: (a) the inadequacy of Australia's NDC; and / or (b) the inadequacy of its domestic laws, policies and practices.

211. Where the Committee finds that a communication reveals violations of Convention rights, it may set out measures to make full reparation to the victims (including restitution, compensation, rehabilitation and measures of satisfaction).[229]

212. Furthermore, under international law, a state responsible for an internationally wrongful act is obliged to cease that act, if is continuing, and to offer appropriate assurances and guarantees of non-repetition, if circumstances require.[230] The Committee may set out measures to guarantee non-repetition, "*which*

[228] **Juliana v United States**, US District Court of Oregon Case No 6:15-cv-01517-TC, 10 November 2016 (emphasis added).
[229] Human Rights Committee, "Guidelines on measures of reparation under the Optional Protocol to the International Covenant on Civil and Political Rights", 30 November 2016, §2. The legal basis for the Committee to set out measures of reparation in its Views is Article 2 of the ICCPR: Id, §3.
[230] "Responsibility of States for Internationally Wrongful Acts", 2001, Article 30.

are essential to prevent subsequent human rights violations".[231] The Committee should be specific as to the relevant measures in order to optimize the reparation afforded in each case.[232] The Committee has provided various examples of guarantees of non-repetition, which include:

> *When laws or regulations in the State Party are found to be at variance with Covenant obligations, the Committee should request their repeal or amendment to bring them into accordance with the Covenant. The Committee should specify which laws or regulations or which provisions of a law or regulation should be amended, while identifying the proper international standards applicable. If the violation stems from the absence of certain legal provisions, the measures of reparation should include the adoption of the necessary laws or regulations*.[233]

213. In this case, measures of adaptation and mitigation are both necessary in order to prevent a continuation of the violations set out above. Accordingly, the Committee is asked to set out the following measures.

(1) Adaptation

214. Australia must take all steps necessary to ensure the continued safe existence of the Authors and the communities on their islands, in accordance with Australia's obligations under the ICCPR, including at a minimum, the following:

(1) commission a comprehensive and fully-costed study of all coastal defence, resilience and other measures available in respect of each island with the primary objective being to avoid forced retreat of communities and the displacement of people. The study shall be based on the most up-to-date IPCC sea-level rise estimates and future 100-year storm tide levels, and be conducted with full consultation of the local communities, integrating traditional ecological knowledge into that process;

(2) implement fully and expeditiously the measures necessary to secure the communities' continued safe existence on their respective islands taking full account of the views of the communities concerned, and integrating traditional ecological knowledge into that process;

(3) monitor and review the effectiveness of the measures implemented and resolve any deficiencies as soon as practicable, at all times taking full account of the views of the communities concerned and integrating traditional ecological knowledge into that process; and

(4) <u>In any event</u>, provide all of the measures identified as 'Initiative One' in the most recent Torres Strait Island Regional Council Federal Election Initiatives 2019, including "*[r]ealisation of the previously promised bipartisan $20m Commonwealth contribution to rectification works*".[234]

215. Australia's adaptation measures in the Torres Strait should be designed to ensure the maximum possible protection for all internationally recognized human rights, including those protected by Articles 6, 17, 24 and 27. Australia's policymaking framework should enable a scientifically-informed, ambitious, transparent, locally empowering and gender-sensitive approach in which partnership between federal, state and local governments is nurtured inter alia by sufficient resources and continual monitoring and review of progress, shortfalls and updating of plans.

(2) Mitigation

216. Australia must amend its laws, policies and practices and adopt such other laws, policies, practices and take such other measures of mitigation as are necessary to comply with Australia's obligations under the ICCPR, including at a minimum the following:

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[231] Human Rights Committee, "Guidelines on measures of reparation under the Optional Protocol to the International Covenant on Civil and Political Rights", 30 November 2016, §12.
[232] Id, §12.
[233] Id, §13.
[234] http://www.tsirc.qld.gov.au/sites/default/files/TSIRC%20Federal%20Election%20Initiatives_0.pdf.

(1) Australia must remain a party to the UNFCCC and the Paris Agreement and participate in good faith in the processes and mechanisms established under those Agreements, co-operating with other countries in order to achieve the temperature goal in Article 2 of the Paris Agreement.

(2) Australia's second and subsequent NDCs must comply with the Paris Agreement and its obligations under the ICCPR:

(a) This includes: (i) reflecting Australia's highest possible ambition; (ii) representing a genuine effort to limit the global temperature increase to 1.5°C; (iii) reflecting Australia's "*common but differentiated responsibilities and respective capabilities, in the light of different national circumstances*"; and (iv) accounting for and reflecting Australia's position as one the world's wealthiest and most developed countries, having amongst the world's worst existing records for fossil fuel emissions (on a per capita basis).

(b) This also includes conducting a comprehensive and rigorous "bottom up assessment" of all appropriate means available to it applying its maximum available resources, taking into account: (i) the impacts on the most vulnerable (in Australia and globally); and (ii) the best available science.

(c) Further or alternatively, to be consistent with the IPCC's most recent assessment and the advice of the CCA, Australia's second and subsequent NDCs should commit it to reducing its emissions by at least 65% by 2030 below 2005 levels and to achieving net zero emissions as soon as possible and by no later than 2050 (without carrying over credits from the Kyoto Protocol regime).

(3) Australia must put in place and pursue measures (including laws, policies and practices) that are sufficient to achieve its NDC (without carrying over credits from the Kyoto Protocol regime) and do so forthwith.

(4) Australia must cease all policies that support and facilitate the use of thermal coal in electricity generation (both domestically and internationally), and phase out all coal mining as soon as possible (taking into account the need for a just transition for coal mining communities).

(3) General / cross-cutting obligations

217. Australia is obliged to under the ICCPR to consult with the Torres Strait people through their representatives on climate change impacts in the Torres Strait region and to enable the voices of the Torres Strait people to be heard on (a) major Government decisions which affect Australia's greenhouse gas emissions, and (b) all issues relating to adaptation in the Torres Strait.

218. In particular, Australia should ensure that all major decisions on policy and on the authorisation of private activities with a significant climate change impact (including fossil fuel extraction and any decision to make a subsidy available to fossil fuel sectors) should allow for the effective participation of climate-vulnerable and indigenous peoples.

London, 13 May 2019

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Signed by the Authors:

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30 April 2019