UNITED NATIONS HUMAN RIGHTS COMMITTEE

REPLY TO STATE PARTY'S SUBMISSIONS ON ADMISSIBILITY AND MERITS DATED 29 MAY 2020 FROM AUTHORS OF COMMUNICATION NO. 3624/2019 (BILLY ET AL V AUSTRALIA) SUBMITTED UNDER THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

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I. INTRODUCTION

(1) Overview

1. This Reply[1] responds to the *Australian Government Submission on Admissibility and Merits* dated 29 May 2020 (the State party's '**Submission**').

2. The Authors of Communication No. 3624/2019 ('the **Communication**'), Mr Daniel Billy, Mr Ted Billy, Ms Nazareth Fauid, Mr Stanley Marama, Mr Yessie Mosby, Mr Keith Pabai, Mr Kabay Tamu and Ms Nazareth Warria (the '**Authors**') and their children, Genia Mosby, Ikasa Mosby, Awara Mosby, Santoi Mosby, Baimop Mosby and Tyrique Tamu, are members of the Torres Strait Islander First Nation People who have inhabited the Torres Strait for thousands of years, making it one of the oldest continuing cultures in the world. They are deeply disappointed by Australia's response and its unwillingness to recognise its obligations towards them under the International Covenant on Civil and Political Rights (the '**ICCPR**' or the '**Covenant**').

3. Despite the State party's failure to acknowledge its legal obligations under the Covenant, Australia has **not** challenged the fundamental facts relied on by the Authors, specifically concerning:

   (1) the science of climate change and its (current and predicted severe future) impacts on the Authors' homes and islands, particularly Boigu, Poruma, Warraber and Masig ('the **Islands**');

   (2) the Authors' witness statement evidence of the already existing impacts on their human rights caused by climate-related environmental degradation;

   (3) the Authors' unique and vulnerable culture, and its interdependence with the unique geography, climate and ecosystems of each of their Islands and with culturally important land and sea species of flora and fauna of the Torres Strait region;

   (4) Australia's disproportionate contribution to global climate change, and the inadequacy of its national policies to address the already catastrophic threat of climate change; and

   (5) the nature and scale of the adaptation needs in the Torres Strait, and the Authors' Islands specifically, and the delay and inadequacies of Australia's response to date.

4. A list of the key facts that are uncontested by Australia is included in Section III(1) below.

5. The Authors' witness evidence is based on the deep knowledge they have about their land and sea territories as Torres Strait Islander indigenous people ('**Islanders**'). This knowledge includes effects on their land and sea – from the current erosion caused by sea level rise, to coral bleaching and the disappearance of flora and fauna species that are central to their

[1] Which is submitted pursuant to Rule 92.6 of the *Human Rights Committee's Rules of Procedure* (2019) (CCPR/C/3/Rev.11) and the direction given to the Authors by an email dated 29 May 2020 from the Petitions and Urgent Actions Section, Office of the United Nations High Commissioner for Human Rights.

subsistence and traditional culture. The State party's Submission is regrettably dismissive of the traditional ecological knowledge held by the Authors.

6. On admissibility, Australia has raised a number of objections which mis-state the legal tests and misconceive the Authors' arguments. The Authors' claims do not rely on proving breaches of treaties other than the Covenant, such as the Paris Agreement. The Authors' argument that the Paris Agrement is relevant to the interpretation of State parties' obligations under the ICCPR to prevent the human rights impacts of climate change, is consistent with the Human Rights Committee's ('the **Committee's**') own jurisprudence. Australia's Submissions that the Authors' claims are manifestly unsubstantiated and insufficient to establish victim status regrettably fail to engage with the factual evidence presented in the Communication and are not valid as matters of fact or law. (See further in Section II below.)

7. On the merits, addressed in Sections III and IV below, Australia has also avoided engaging with the Authors' submissions as they truly are – again, both on the facts and the law. Importantly, Australia wrongly asserts that, according to the Communication, "*the allegedly adverse effects of climate change on the enjoyment of the Authors' human rights* ***are yet to be suffered, if at all****"* (Emphasis added) (Submission §41). This objection is without foundation. The Authors have provided substantial evidence of **already existing** adverse effects that amount to violations of the Covenant (Communication §§46–73). These current impacts have been substantiated by witness statements, photographs, videos and expert scientific evidence, none of which is contested by Australia. One reason why this evidence is uncontested by Australia may be because it is consistent with the State's own sources, including from its agency, the Torres Strait Regional Authority ('**TSRA**') (Communication §§42(2) and 49 and Annexes 1-2).

8. Moreover, the Authors' case is that there is an existing duty on Australia under the Covenant, which Australia has already violated, to take sufficient action to avert devastating and irreversible future impacts on rights protected by the Covenant – such as those concerning future sea level rise caused by **existing and current** greenhouse gas emissions ('**GHGs**') and the need for protective measures to be initiated **today** (Communication §§74–85 and Annex 14). Australia's Submission is wrong in law to assert that a communication can only be admissible if the most extreme impacts of the violation complained of have already occurred (Submission §25). Clearly, the nature of climate change as a slow-onset process with outcomes dependent on the degree of action taken in the present means that a State party may violate its human rights obligations before the worst effects are realised.

9. Australia also seeks to dismiss the Communication with the assertion that "*[i]t is not possible, as a matter of international human rights law, to attribute climate change to Australia.*" (Submission §36). Such assertions, to the effect that the Covenant does not offer protection for the human rights impacts of climate change, cannot be correct. Among other things, if they were, there would be a lacuna of protection without any basis in the Covenant. They also disregard the nature of the Authors' claims. The Authors have not invoked the responsibility of the State in an abstract, unspecified manner. The Authors have identified specific acts and omissions by Australia in the context of its response to climate change – in terms of both adaptation and mitigation – that amount to human rights violations under the

Covenant and for which Australia incurs international responsibility (see further in Section IV below).

10. In summary, in its submissions concerning the law, Australia has made a number of assertions that ignore or disregard established international human rights jurisprudence:

    (1) Australia argues that international climate change treaties,[2] are irrelevant to interpreting the rights under the Covenant (Submission §18). This position is inconsistent with the jurisprudence of the Committee, and that of leading international human rights courts, which holds that States parties' obligations under international environmental law are relevant to interpreting the scope of their duties under the Covenant;

    (2) Australia attempts to deny any value to General Comment No. 36 ('**GC 36**').[3] In doing so, it seeks, unilaterally, to reduce the scope of obligations of a State under Article 6. Australia's position is however inconsistent with its obligations under the Covenant as reflected in the Committee's authoritative analysis in GC 36 and in its current jurisprudence (Submission §§62, 72 and 74);

    (3) Australia seeks to use the Committee's recent decision in **Teitiota v New Zealand**[4] to dispute its obligations to the Authors. However, in contrast to the present case, that case was a deportation case, with fundamentally different obligations owed by the State party (New Zealand) under the Covenant accordingly. In fact, **Teitiota v New Zealand** supports the Authors' case;

    (4) Australia claims that the Authors' Article 27 case relates to "*future hypothetical violations*" and claims that States have discretion as to how they protect their minorities. The first claim is factually incorrect, but also disregards the Committee's jurisprudence on State parties' obligations to take positive steps to prevent foreseeable impacts on rights, including the recent case of **Portillo Cáceres and others v Paraguay.**[5] The second claim does not reflect the Committee's case law, which recognises the duty of States not to take measures that, when taken together, amount to a denial of an indigenous minority to enjoy their culture.

11. Australia also argues that the Authors "*are not entitled to any of the broad range of remedies they seek*" (Submission §9). Again, this is a brusque assertion which fails to engage with Australia's obligations under international law. If, as the Authors contend, Australia has violated the Covenant, then Australia's international responsibility is engaged. Australia is

[2] Which must include the universally adopted international treaty relating to the prevention of climate change, the United Nations Framework Convention on Climate Change, under which the Paris Agreement is made. There are no other international treaties relating to climate change.
[3] UN Human Rights Committee, *General Comment No. 36* (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the right to life, 30 October 2018. CCPR/C/GC/36.
[4] UN Human Rights Committee, **Ioane Teitiota v New Zealand**, CCPR/C/127/D/2728/2016, Views of 7 January 2020.
[5] UN Human Rights Committee, **Portillo Cáceres et al. v. Paraguay**, Communication No. 2751/2016, Doc. No. CCPR/C/126/D/2751/2016, Views of 25 July 2019.

obliged to cease the violation and to make appropriate reparations to the victims.[6] The Authors have not sought an inappropriate range of remedies. They have sought only the elementary legal consequences appropriate to redressing an international wrong, being: reasonable and proportionate measures to ensure that current violations of their Covenant rights cease and that otherwise inevitable future violations are averted, including dispossession from their ancestral homelands.

(2) Structure of the Authors' Reply

12. These submissions are divided into four sections. Section II addresses Australia's admissibility objections. Section III deals with the factual aspects of the merits. Section IV addresses the legal aspects of the merits.

13. For the reasons set out in the Communication and in this Reply, the Authors submit that Australia is in violation of the Covenant, and that for Australia to cease being in violation it needs to take the steps set out in the Communication at §214 (on adaptation) and §216 (on mitigation).

II. ADMISSIBILITY

14. Australia has advanced four objections to admissibility, although all but the first of these are based on assertions about the merits of the Authors' case. The objections are addressed in turn under (2) below, following a brief discussion of matters that Australia has **not** contested.

(1) Matters not in issue

15. Australia has not challenged admissibility on the basis that the Authors have failed to exhaust domestic remedies (Optional Protocol, Article 2).

16. Australia accepts therefore that there are no domestic remedies available to the Authors for the ICCPR violations contained in the Communication. The non-availability of domestic remedies for these wrongs *per se* amounts to a breach of Article 2(3) of the ICCPR, which provides that:

> "*[e]ach 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***." (Emphasis added)

(2) Australia's objections to admissibility

17. Australia's four objections to admissibility are that: (1) the Communication is "*inadmissible ratione materiae*"; (2) international climate change treaties are irrelevant to the proper interpretation of the Covenant; (3) the Authors' claims are "*manifestly unsubstantiated*"; and

[6] See Articles 30-31 of the International Law Commission's *Articles on the Responsibility of States for Internationally Wrongful Acts.*

(4) the Authors are not "*victims*" under Article 1 of the Optional Protocol. These objections are addressed in turn.

A. The Authors' claims are admissible *ratione materiae*

18. Australia argues that the Communication is inadmissible *ratione materiae* "*to the extent the Authors' claims rely on obligations under international climate change treaties*" or allege breaches of "*international human rights treaties other than the Covenant*" (Submission §§14-15). Australia mischaracterises the Authors' case. The Communication is based squarely on "*the rights set forth in the Covenant*" and is admissible *ratione materiae*. In this regard, the Authors submitted that the content of Australia's duties under the Covenant may be informed by Australia's wider obligations and commitments under international law, including the Paris Agreement and under other international human rights treaties (Communication §§131-135).

19. Australia seeks to rely on **K.L. v Denmark**.[7] However, in that case the author had asked the Committee to consider violations of both (a) the Covenant, and (b) various other international instruments, **in their own right** (rather than for the purpose of interpreting the Covenant); accordingly, the claim was admissible to the extent of (a) but not (b). In this case, the Communication is based only on violations of the Covenant and does not rely on violations of other treaties in their own right.

20. The Authors' case on the relevance of other international treaties is addressed further below in Section II(2)(B).

B. International climate change treaties are relevant to the interpretation of human rights obligations of State parties to the Covenant

21. Australia argues that international climate change treaties are irrelevant to the interpretation of the human rights obligations of State parties to the Covenant (Submission Section II(2)). However, this objection really goes to the merits, not to admissibility: if Australia were correct, then (at most) the Authors' contention that other international law instruments are relevant to the interpretation of the Covenant would be unavailable. This objection is not a ground for finding the Communication inadmissible.

22. In any event, Australia's argument is incorrect. It is well established that the content of a State party's human rights obligations can be informed by the State's other relevant international obligations, including under international environmental law. Thus, the Committee stated in GC 36 (in the context of the right to life) that:

> "*[e]nvironmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life.* ***The obligations of States parties under international environmental law should thus inform the contents of article 6 of***

[7] UN Human Rights Committee, **K. L. v Denmark**, Communication 59/1979, UN Doc. CCPR/C/OP/1.

> ***the Covenant**, and the obligation of States parties to respect and ensure the right to life should also inform their relevant obligations under international environmental law.*"[8] (Emphasis added)

23. The Committee adopted this approach in **Portillo Cáceres v Paraguay**, where the Committee considered it relevant to the content of Paraguay's obligations under the Covenant that Paraguay was bound by the Stockholm Convention on Persistent Organic Pollutants (one of the pollutants concerned was one where the Review Committee of the Stockholm Convention had requested a global ban in 2008).[9]

24. International courts take the same approach. For example, the European Court of Human Rights ('**ECtHR**') has held that international environmental law instruments provide a basis for defining States' human rights duties in a number of cases (see, e.g., **Tatar v Romania**, **Taskin v Turkey**, and **Grimokovskaya v Ukraine**).[10] In its *Advisory Opinion No. 23*, the Inter-American Court of Human Rights referred extensively to international environmental law on transboundary harms in defining the scope of 'jurisdiction' over such harms under Article 1.1 of the American Convention.[11]

25. We further note that the Committee drew attention to the close connection between climate change risks and Article 6 in its recent Concluding Observations on the initial report of the Republic of Cabo Verde,[12] making detailed recommendations on sustainable development and resilience to climate change and linking these to the right to life under Article 6.[13]

26. Thus, where the type of environmental harm which gives rise to the human rights impact in question is climate change, and the State party has undertaken international treaty obligations to reduce its contribution to such harms, such obligations are relevant to the interpretation of the State party's duties under the Covenant in the context of climate change. This includes Australia's obligations under the Paris Agreement, including its commitments made in its Nationally Determined Contribution ('**NDC**') on the reduction of GHGs, known as mitigation.

27. This approach is consistent with Article 31(3)(c) of the Vienna Convention on the Law of Treaties 1969 ('**VCLT**'), which reflects customary international law and which requires that the interpretation of a treaty, such as the Covenant, take into account other relevant rules of international law binding on the State concerned. In this regard, Australia argues that "*Article 31(3)(c) . . . is restricted to relevant rules of international law as applicable 'between the parties'*," and that "*the State Parties vary widely with respect to the climate change treaties themselves and also with respect to State Parties to the Covenant*".

28. First, that argument is empirically incorrect:

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[8] GC 36, §62.
[9] **Portillo Cáceres v Paraguay**, §7.3 and footnote 7 at §2.11.
[10] Communication, §161(4).
[11] Ibid., §156.
[12] CCPR/C/CPV/CO/1/Add.1, §§17-18.
[13] Ibid.

1) There are 173 State parties to the ICCPR;

2) There are 197 State parties to the UNFCCC (equaling universal adoption), of which 189 have ratified the Paris Agreement;

3) Australia has not identified any State parties to the ICCPR which are not State Parties to the Paris Agreement (in fact, at the time of writing, there are only six State parties to the ICCPR that have signed but not yet ratified the Paris Agreement).[14]

29. Australia's case erroneously treats the Covenant as if it were a synallagmatic treaty whose primary beneficiaries are other States. However, as a human rights treaty, the primary beneficiaries of the obligations under the Covenant are not other State parties, but individuals under the jurisdiction of the State in question.[15]

30. Moreover, Australia simply assumes that "between the parties" means "State parties". The International Law Commission ('**ILC**') has observed to the contrary that "*the sub-paragraph does not specify whether, in determining relevance and applicability one must have regard to all parties to the treaty in question, or merely to those in dispute.*"[16] Australia's point however misses the true significance of Article 31(3)(c) which as the ILC observed is to reflect the principle of "*systemic integration*", that treaties should be interpreted in the context of their normative environment.[17]

31. As the ILC pointed out, "*the systemic nature of international law has received clearest formal expression in that article.*"[18] This means that the Convenant cannot be interpreted in a vacuum. There is a "*normative environment*" (rules binding rules on Australia) that is relevant to the interpretation of Australia's obligations under the Covenant. As the ILC Special Rapporteur on Fragmentation of International Law, Martti Koskenniemi, observed:

> "*[i]t is sometimes suggested that international tribunals or law-applying (treaty) bodies are not entitled to apply the law that goes "beyond" the four corners of the constituting instrument […]. But if, as discussed … above, all international law exists in systemic relationship with other law, no such application can take place without situating the relevant jurisdiction-endowing instrument in its normative environment. This means that although a tribunal may only have jurisdiction in regard to a particular instrument, it must always interpret and apply that instrument in its relationship to its normative environment – that is to say "other" international law.*"[19]

[14] Only Turkey, Iran, Iraq, Eritrea, Libya and Yemen have not ratified the Paris Agreement. The United States has submitted a notice of withdrawal that does not take effect until 4 November 2020, per the terms of the Agreement.
[15] See Special Rapporteur on *State Responsibility*, James Crawford, A/CN.4/507 and Add. 1-4, §17.
[16] ILC Study Group on Fragmentation of International Law, A/CN.4/L.682, §426(c).
[17] *Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law*, Martti Koskenniemi, A/CN.4/L.682, §430.
[18] Ibid., §420.
[19] Ibid., §423 (footnotes omitted).

32. In the **Namibia Advisory Opinion**,[20] the International Court of Justice ('**ICJ**') confirmed that "… *an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.*"[21] It added that "*interpretation cannot remain unaffected by the subsequent development of law.*"[22] Such an approach to interpretation is consistent with previous comments from the Committee finding that the Covenant should be interpreted as a "*living instrument*".[23]

33. Further, the universal adoption of the UNFCCC argues **for** the integration of principles of international climate change law into interpretations of the Covenant. Under Article 3(1) of the UNFCCC, all States have committed to be guided by the principle that:

> "*[t]he Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.*"

C. <u>The Authors' claims are sufficiently substantiated under Rule 99(b)</u>

34. Australia argues that the Authors' claim to be "*victims of a violation*" of the Convention is "*manifestly unsubstantiated*" because they have failed to show "*either that an act or omission of a State party has already adversely affected [their] enjoyment of [Convention] rights or that such an effect is imminent*" (Submission Section II(3)). Australia makes various distinct points under this heading.

Treaties other than the Covenant

35. Australia argues that "*[a]ll of the Authors' claims rely on alleged breaches of obligations other than those set out in the Covenant*" (Submission §24). That argument is misconceived, for the reasons set out above in Sections II(2)(A)-(B).

Current violation / imminent threat of violation

36. Australia argues that "*[t]o the extent that the Authors' claims do relate to a violation of a right under the Covenant, there is no evidence that there is any current or imminent threat of a violation of such rights*" (Submission §24). Australia's objection is misconceived. The Authors' claim is based both on **current** violations (which in itself is sufficient for the purposes of establishing admissibility) and also on the **imminent threat** of violations.

[20] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), *Advisory Opinion,* I.C.J. Reports 1971, p. 16.
[21] Ibid., p. 19.
[22] Ibid.
[23] UN Human Rights Committee, **Judge v Canada**, Communication No. 829/1998, UN Doc. No. CCPR/C/78/D/829/1998, Views of 5 August 2002; UN Human Rights Committee, **Yoon and Choi v Republic of Korea**, Communications Nos. 1321/2004 and 1322/2004, U.N. Doc. CCPR/C/88/D/1321-1322/2004, Views of 3 November 2006; UN Human Rights Committee, **Atasoy and Sarkut v Turkey**, Communications Nos. 1853/2008 and 1854/2008, U.N. Doc. CCPR/C/104/D/1853-1854/2008, Views of 29 March 2012.

Furthermore, as explained below, there is no requirement for the Authors to show that the threats will have effect on the Authors' rights over a short timescale.

37. First, the Authors are already suffering the impacts of current (and continuing) violations of their rights under the Covenant. The premise of Australia's case is that the Authors will become 'victims' only when their Islands have become uninhabitable and they are forced to become displaced persons in their own country. Australia fails to acknowledge that **at present** the Authors are suffering severe effects of environmental degradation that are affecting their fundamental rights substantially. The erosion of their ancestral burial grounds and culturally important land is happening **now**; the interference with their food security and cultural practices is happening **now**. The evidence submitted with the Communication showed that:

    (1) the Authors are members of an indigenous community with a distinct culture and way of life that is inextricably linked to the Islands on which they live and the surrounding seas (Communication, Sections VI(3)-(4));

    (2) as a result of climate change the Authors are already suffering substantial negative effects to their culture and way of life, caused by flooding, erosion, coral bleaching, saltwater intrusion into traditional gardens and the decline of nutritionally and culturally important marine and terrestrial species (Communication, Sections VI(4)(B)-(C) and §155);

    (3) climate change is already causing a substantive negative impact to the traditional culture and way of life of the Authors' communities and their ability to pass their culture to the next generation (Communication, Sections VI(4)(B)-(C) and §183); and

    (4) climate change is already impacting the private, family and home life of the Authors, for example erosion is already approaching close to the homes of some community members causing them distress and anxiety (Communication, Sections VI(4)(B)-(C) and §196).

38. In these circumstances, the Authors are already suffering from current violations of their rights under the Covenant, in particular Article 2; Article 6 (the right to life, including a right to life with dignity); Article 17 (the right to privacy, family and home); Article 27 (the right to culture); and Article 24 (the right of children to protection). The evidence in relation to current impacts being suffered by the Authors is addressed further in Section (III)(2) below.

39. Second, Australia is already in current (and continuing) violation of its obligations under the Covenant, leading to the impacts described above. The Authors' case is that Australia is **already** in violation of its obligations under the Covenant both in relation to adaptation and mitigation. (Communication, Sections IX(2)-(6)), which Australia fails to acknowledge. In short, by reason of Article 2 of the Covenant (read together with Articles 6, 17 , 27 and 24) and by reason of Australia's long-standing knowledge of the risks of climate change, both generally and in relation to the Authors, Australia has been under positive obligations of conduct (described as obligations of "*due diligence*"*)* to protect against the "*reasonably forseeable*" risks of climate change (Communication, Sections IX(2)-(6)). There is therefore

no exclusion of treaty protection for effects that eventuate over long timescales, provided that they are foreseeable. These points are addressed further in Sections IV(2)(A)-(C) below.

40. The risks that the Authors face extend beyond the existing impacts of climate change, as outlined above. Climate change foreseeably threatens to cause the **permanent displacement** of the Authors from the Islands, which would cause the destruction of their culture and way of life and egregious and **irreparable** harm to the Authors' ability to enjoy their rights under the Covenant (Communication Sections VI(4)(D)-(E) and §§155, 183 and 196 and see further in Section III(2) below).

41. The threat of permanent displacement can be prevented by reasonable and proportionate measures. However, the current climate change impacts and likely future impacts on the Torres Strait predicted by the best available science are such that unless urgent action is taken, they will become **inevitable and irreversible**. Australia **has failed and is failing** to take any adequate measures to address the current impacts or the expected future impacts and is thereby consigning the Authors and their communities to a slow-onset catastrophe, in which their ability to enjoy life with dignity, to enjoy their rights to privacy, family and home and to practise their culture and pass it on to their next generation will be destroyed (Communication §199 and see further in Section IV(2)(B) below). Australia's failure to take adequate steps applies equally to mitigation as it does adaptation (Communication, *inter alia* §§169-172 and see further in Section IV(2)(C) below).

42. Under international human rights law, for a positive obligation by the State to arise it must be established that the authorities **knew or ought to have known at the time** of the existence of a real and immediate risk to the rights of individuals subject to its jurisdiction and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.[24] In Section IV(2)(B), we address the point that the climate change (and human rights) threats in the Torres Strait have been known to Australia for over a decade. This was also described in §§91-95 of the Communication.

43. The question of whether there is an 'immediate' (or 'imminent') risk in this context does not depend upon whether the threat will materialise in a short period of time. In **Urgenda v The State of the Netherlands**, the Dutch Supreme Court stated as follows in the specific context of climate change:

> "*[t]he ECtHR has on multiple occasions found that Article 2 ECHR was violated with regard to a state's acts or omissions in relation to a natural or environmental disaster. It is obliged to take appropriate steps if there is a real and immediate risk to persons and the state in question is aware of that risk.* ***In this context, the term 'real and immediate risk' must be understood to refer to a risk that is both genuine and imminent. The term 'immediate' does not refer to imminence in the sense that the risk must materialise within a short period of time, but rather that the risk in question is directly threatening the persons involved. The protection of Article 2 ECHR also***

[24] See for example ECtHR, **Mastromatteo v Italy**, (Application no. 37703/97), Judgment 24 October 2002 §68; and **Paul and Audrey Edwards v the United Kingdom** (Application no. 46477/99), Judgment 14 March 2002 §55.

> ***regards risks that may only materialise in the longer term***" (at §5.2.2).[25] (Emphasis added)

44. Thus the question of 'immediacy' (or 'imminence') depends upon whether the risk directly threatens the persons involved. In this case, the risks from climate change, including the threat of permanent displacement, are clearly risks that 'directly threaten' the Authors (and their children as victims). In summary, the Authors and their children face further and severe 'imminent' threats from climate change and further continuing and 'imminent' violations of their rights under the Covenant.

45. Australia relies on the various cases in which citizens of the Netherlands and France who opposed nuclear weapons sought to invoke Article 6 in order to change their governments' policies on nuclear weapons.[26] In those cases, the authors were clearly attempting to use the ICCPR to bring an *actio popularis*. They relied on the risk that a nuclear war would interfere with their Article 6 rights, but (clearly) that risk was remote at that time and the authors were not specifically affected by it. It was in that context that the Committee found that the authors had not demonstrated any current or imminent threat of a violation of their ICCPR rights.

46. The situation of the Authors is very different. The prospect of worsening climate change impacts, especially sea-level rise, erosion and flooding leading to the Authors' Islands becoming unviable for habitation is not a remote or speculative one. It is already happening. It does not depend on contingencies.[27] The irreversibility of the situation is what scientists – and Australia itself – predicts will happen, within the lifetimes of the Authors and their children, unless Australia takes rapid and substantial action. The Authors are therefore (unlike the authors in **E.W. Bordes & Temeharo v France** and **Aalbersberg v The State of the Netherlands**) directly and specially affected. It is their life with dignity and their unique culture that will be lost. The present case can be distinguished from the facts of **E.W. Bordes & Temeharo v France**, and **Aalbersberg v The State of the Netherlands**; indeed, its facts are much closer to the tragic case of **Portillo Cáceres v Paraguay** (and that of **Oneryildiz v Turkey** before the ECtHR)[28], where an environmental problem created specific risks to life and where the State knew of those risks, over a period of years, and yet failed to take action to address them, resulting in eventual loss of life and other serious human rights impacts.

47. In effect, Australia is submitting that now – while there is still a little time remaining in which the Australian government can take action to address the situation and enable the Authors' Islands to remain habitable and their culture to survive – the Covenant provides no protection. According to Australia, the Authors must simply wait, suffer the increasingly severe climate impacts that will eventually bring forced displacement, dispersal and the loss of their culture and then have the consolation of an ineffectual, meaningless ruling from the Committee that mourns the fate of their culture and dignity, without being able to change it. That

[25] Dutch Supreme Court, **The State of The Netherlands v Stichting Urgenda**, No. 19/00135, Judgment of 20 December 2019. Footnotes omitted.
[26] **E.W. et al. v The Netherlands** (No. 429/1990); **E.W. Bordes & Temeharo et. al. v France** (No. 645/1995); **Aalbersberg v The State of the Netherlands** (No. 1440/2005).
[27] Unlike the possibility of nuclear war breaking out, in the cases referred to in the previous footnote.
[28] **Oneryildiz v Turkey**, Merits and just satisfaction (App No. 48939/99).

interpretation would render the Covenant a dead letter. The States parties to the Covenant intended it to create rights which are real and effective. This entails that where (as here) the Authors' rights are being impaired and they face a real, foreseeable risk that severe violations (and associated suffering) will occur unless the State party takes prompt and effective measures to avert them, a communication which evidences that situation is sufficiently 'substantiated' to be admissible under the Optional Protocol.

Causation

48. Australia contends that "*the Authors' claims fail to 'sufficiently substantiate' any meaningful connection or causation under international law between Australia's measures (or alleged failure to take measures) and the alleged violations of the Covenant*…" and that the Authors have failed to show that "*an act or omission **by Australia** has adversely affected the enjoyment of their rights under the Covenant*", because climate change is "*by definition a global issue and not the sole responsibility of the Australian Government or any other single State*" (Submission §26, emphasis in the original). This is incorrect.

49. The Authors refer to Section IV(1) below, where these points are addressed in detail. In summary, Australia's reliance on *sine qua non* causation is misconceived. In relation to adaptation, Australia's violations of the Covenant arise from its breach of its obligations of conduct, regardless of whether Australia has caused or contributed to the climate change impacts in question. In relation to mitigation, the relevant concept is not causation, but attribution, and in this regard Australia cannot escape its State responsibility under international law for its GHGs by saying that other States also contribute to the threat of climate change.

50. The Authors submit therefore that their claims, based on current and imminent violations, are sufficiently substantiated under Rule 99(b).

D. <u>The Authors are victims under Article 1 of the Optional Protocol</u>

51. Australia says that "*[i]n light of the above*" (which appears to mean Australia's arguments which have already been addressed above in Sections II(2)(A)-(C)), the Authors fail to show that they are 'victims' within the meaning of Article 1 of the Optional Protocol (Submission II §4). As to that assertion, the Authors repeat the responses given in Sections II(2)(A)-(C) above. In particular: (1) the Authors' case and evidence is based on existing and foreseeable future impacts (over both the near and longer term) and on existing violations of the Covenant, something which Australia entirely overlooks; and (2) the Authors and their children are specifically implicated by these impacts, which are therefore 'imminent' for the purposes of Article 1.

52. Furthermore, the catastrophic consequences for the Authors which would occur if and when the Authors' Islands become unviable for habitation are not a "*future hypothetical*" matter, but the culmination of a process – a 'slow-onset process' as described in **Teitiota v New**

Zealand[29] (and in the Communication) – which has **already begun**. Australia notes in its Submission §29, that in **Teitiota v New Zealand**:

> "*[t]here was sufficient time for intervening acts to take place, by the Republic of Kiribati and the international community, to take affirmative measures to protect the population.*"

53. The context in **Teitiota v New Zealand** was entirely different to the present case, as considered in detail below. However, even in **Teitiota v New Zealand**, the Committee did not consider this a ground for finding Mr Teitiota's communication inadmissible. It was admissible and was considered on the merits.

54. As regards the Authors' claim that Australia is violating the Covenant by its failure adequately to mitigate its contribution to global climate change, individuals (such as the Authors) who are under the jurisdiction of the State party in question, and who are especially vulnerable to rights violations caused by worsening climate change, are the very persons whom the State party's duties are intended to protect. Such persons are 'victims' for the purposes of the Optional Protocol, even though Australia's conduct will also contribute to harms suffered all around the world. Indeed, if the Authors are not 'victims' of Australia's failure to mitigate GHGs, it is difficult to conceive of anyone who could qualify as a victim, and accordingly the Covenant would be effectively silenced in relation to climate change mitigation for those trying to seek specific redress.

III. THE FACTS

(1) Facts uncontested by Australia

55. The following facts are not contested (and are therefore accepted by Australia) in its Submission:

Climate change and its impacts on the Authors' homes and Islands

(1) the reality of climate change and its current and expected impacts – including the summary of the scientific consensus set out in the Communication at §4, §§96-104;

(2) that the Authors and their communities are **already** experiencing severe impacts from climate change, especially: flooding and inundation of villages (Stanley Marama WS §29, §32; Keith Pabai WS §38; Yessie Mosby WS, §86) and graveyards (Yessie Mosby WS §65, §67; Ted Billy WS §20; Stanley Marama WS §33), loss by erosion of their traditional lands including plantations and gardens (Yessie Mosby WS §85; Nazareth Warria WS §28), destruction/withering of traditional gardens through salinification caused by flooding / seawater ingress (Stanley Marama WS §15, §17; Keith Pabai WS §40; Yessie Mosby WS §61, §68; Nazareth Warria WS § 28), and decline of nutritionally and culturally important marine species caused by climate change and

[29] UN Human Rights Committee, **Ioane Teitiota v New Zealand**, CCPR/C/127/D/2728/2016, Views of 7 January 2020.

associated coral bleaching (reef death) and ocean acidification (Keith Pabai WS §§42-45; Yessie Mosby §§70-71; Nazareth Fauid WS §20);

(3) that sea level rise in the Torres Strait is occurring at about twice the global average, as the State party's own agency, the TSRA, concede (Communication §47);

(4) the predicted impacts of climate change on the Torres Strait and in particular on the Authors' Islands of Boigu, Masig, Warraber and Poruma as set out in the scientific experts' report attached to the Communication (Communication Annex 14), and the current impacts set out in Communication §§47-49;

(5) that the TSRA, being the responsible agency of the Australian federal government, has assessed that if strong action is not taken, "*there is the potential for climate change impacts in Torres Strait to create a human rights crisis*", and that "[e]*ven small increases in sea level due to climate change will have an immense impact*", "*threatening their viability [of Torres Strait communities]*" (Communication §44);

(6) that those Authors who live on Boigu and Masig face the real likelihood of displacement from their Islands within the next decades unless **immediate** and significant action is taken to enable the Islands to withstand expected sea level rise (Communication Annex 14, p. 24), while those Authors who live on Warraber and Poruma face the real likelihood of displacement from their Islands within their lifetimes unless such action is taken within 10-15 years (Communication Annex 14, p. 24);

(7) that displacement from their Islands would irreparably destroy the Authors' ability to practice their culture, including by passing it on to their children and grandchildren and that at present the Authors' and their children's ability to practice their culture (including their ceremonies) is being affected by climate change (Keith Pabai WS §§23-27, §29, §§30-32; Yessie Mosby WS §58, §§88-91; Stanley Marama WS §§31-35; Nazareth Fauid WS §32; Kabay Tamu WS §§26-32);

The Authors' culture

(8) the deep and intrinsic connection between the indigenous culture of the Torres Strait Islanders with their particular Islands and surrounding reefs and seas, and with traditional ways of harvesting living resources (Communication §§41-43);

(9) that each Island in the Torres Strait has its own particular culture (within an overarching commonality of cultures), intimately linked to the geography, meteorology and biology of the individual Island – and the culture of each Island exists only on that Island, each Island being the only place where the culture as a whole, interacting with the natural environment on which it is based, can be practiced (Communication §82);

(10) that the culture and practices of upkeeping ancestral graveyards, visiting and feeling communion with deceased relatives is at the heart of the Authors' cultures, and that the most important ceremonies (such as coming-of-age and initiation ceremonies) are only culturally meaningful if performed on the native lands of the community whose

ceremony it is (Stanley Marama WS §§25-27; Yessie Mosby WS §59, 90; Keith Pabai WS §§22-29; Nazareth Warria WS §23, 27; Daniel Billy WS §24; Ted Billy WS §§33-34);

(11) the background of recent cultural suppression under colonialism and after (Communication §§86-87);

Australia's disproportionate contribution to global climate change

(12) that Australia has the highest per capita GHGs of any developed country (Communication §106);

(13) that over a period when, pursuant to the UNFCCC (and in part pursuant to the Kyoto Protocol) many major developed countries **reduced significantly** their GHGs, Australia's GHGs (without LULUCF[30]) **increased significantly** between 1990 and 2016 (Communication §107);

(14) that Australia's performance in reducing emissions was ranked 43rd out of 45 developed countries (Communication §108 and footnote 86);

(15) that Australia's NDC does not reflect its *"highest possible ambition"*, as is required by the Paris Agreement. Australia has only claimed that its NDC is a "*significant contribution to global efforts*" (Submission §6), it has not alleged that the NDC represents Australia's highest possible ambition;

(16) that Australia is on course to miss its own NDC target for GHG reductions by a large margin (Communication §118);

(17) that Australia is also **the only State** proposing to use credits carried over from the Kyoto Protocol to meet its Paris Agreement NDC, a highly controversial policy that has been found to be inconsistent with the terms of the Paris Agreement by international law experts (Communication §119);[31]

(18) that the Australian government continues to subsidise the fossil fuel industry, thereby promoting increased GHGs in other countries (Communication §126), and continues to promote the use of coal in domestic electricity generation (Communication §§122-124);

Adaptation needs in the Torres Strait

(19) that it is possible, with the right resourcing, to put in place infrastructure that would slow down the erosion of the Islands and will enable the Authors' Islands to remain habitable over the long term; and that in the cases of Boigu and Masig this work needs

[30] As noted in the Communication, §§106-107.

[31] https://www.climatechangenews.com/2020/03/04/australias-carbon-accounting-plan-paris-goals-criticised-legally-baseless/.

to start urgently, while in the case of Warraber and Poruma it would need to be done promptly (Communication Annex 14 Sections 7-8 at pp. 23-25); and

(20) that the Australian government has not put in place the funding for any such long-term (or even medium-term) solution.

(2) Evidence of current and imminent violations that are not "*future hypothetical*"

56. Australia relies heavily on the argument that the Authors' case is based only on violations which are "*future hypothetical*" or not "*imminent*". That is incorrect, as explained above in Section II(2). Furthermore, Australia has not challenged the Authors' factual case as to the existing and imminent violations of their rights, as explained in Section III(1) above. Examples of the uncontested evidence that underpins the Authors' factual case, include the following:

Changes to seasonal patterns, erosion of ancestral land, saltwater intrusion affecting traditional knowledge

(1) "*Our 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. But things have changed and seasons have changed. You cannot predict anymore. How we predict weather and the reason is a big part of our way of life*." (Kabay Tamu WS §25)

(2) "*We pass this culture down to our young ones…I show the younger ones where to go and look for food, to go fishing and diving. I teach gardening as well. This is becoming harder with changes in the weather and not enough rain*." (Nazareth Fauid WS §18)

(See also e.g. Yessie Mosby WS §85; Kabay Tamu WS §23.)

Damage to graves and to related cultural practices

(3) "*Three years ago, we had a big tidal surge…this revealed the remains of* athe *Genia's two wives. Some of these remains are still visible. Some have sadly been wrecked by crashing waves and driftwood*." (Yessie Mosby WS §65)

(4) "*It was upsetting to see the old cemetery moved – people were very sad and upset … It really has a big effect culturally because these things are very important to us*." (Ted Billy WS §22)

(See also e.g. Ted Billy WS §20; Yessie Mosby WS §67; Stanley Marama WS §33.)

Marine species and subsistence fruits/vegetables in decline as a result of climate change affecting quality of life, and culture

(5) "*The seasons and the winds tell us how we hunt what fish species are breeding and where to catch them. I have noticed that these things have changed, you can't predict the seasons…you could pull up lots and lots of fish…That doesn't happen any more*." (Keith Pabai, WS 10, §42)

(6) "*My grandparents used to have gardens here (sweet potato, cassava, sugarcane, corn, watermelon). You cannot plant anything here now*." (Yessie Mosby WS 9, §61)

(See also e.g. Nazareth Warria WS §28, §§36-37; Kabay Tamu WS §21; Yessie Mosby WS §68, §§70-71; Keith Pabai WS §40, §43, §45; Stanley Marama WS §15, §17; Nazareth Fauid WS §20.)

Damage / imminent risk to homes

(7) [After the tidal surge of March 2019] "*We also felt physically in danger from the surge. Next to our house is a big almond tree, the house where my wide and I live was shaking and we could hear the tree cracking. We came outside to see and as we watch a big branch … came down onto my wife's old car. This has all made us worried about our kid's safety*." (Yessie Mosby WS §86)

(8) "*At the highest tides, if there is any wind blows, the water comes right up over the wall and floods the village. In 2010, it came right through the school and was about 30cm deep, which is in the centre of the village*." (Keith Pabai WS §38)

(See also e.g. Stanley Marama WS §§29 and 32.)

Saltwater intrusion as a consequence of climate change, affecting water resources and subsistence

(9) "*The well is not useable any more because the water is brackish, contaminated by saltwater. We cannot drink from it any more*." (Yessie Mosby WS §69)

(10) "*[Erosion damaged] an old well that used to be for families to get fresh water. The well used to be inland and under ground. We used to sit and picnic there, when the shoreline used to be another 5 metres or so out from where the well is*." (Nazareth Warria WS §30)

57. Furthermore, Australia does not challenge the established science of climate change as presented in the Communication or in the reports of its agency, the TSRA. The TSRA's *Climate Change Strategy 2014-2018* notes that sea levels are rising in the Torres Strait at a rate that is **twice** the global average, and that these changes are already being "*observed with significant flooding and erosion events in 2005, 2006, 2009 and 2010 and 2014*" (Communication Annex 1 p. 10).

58. Given that Australia accepts the science of climate change, and that sea levels are rising in the Torres Strait at this rapid rate, it must also accept that the continued sea level rise and risk from storm surge will eventually make continued habitation of the Authors' Islands impossible without urgent action, as described in the expert report from Climate Planning at Annex 14 of the Communication. It is therefore impossible for the State party to claim that these impacts are "*hypothetical*". In truth, if these impacts are not addressed they will be the **inevitable** conclusion of a slow-onset process that has already begun.

59. Finally, as regards the Authors' claim in relation to mitigation, given the latent effect of GHGs on the climatic system (also called climate inertia), it is the State's present actions to

reduce emissions – or not – that will determine the ultimate outcome for the Authors and their communities. Therefore the present-day acts and omissions of the State have already and will continue to impair the rights of the Authors (in ways which will increasingly worsen over time) because of the latent and / or irreversible nature of the scientific process of climate change. Each of these concepts is briefly explained below:

(1) **Long-term effects of GHGs emitted today:** Global warming (and ocean acidification) occur due to the cumulative build-up of GHGs in the atmosphere. At the most basic level, carbon dioxide emissions released into the atmosphere **today** will continue to exert warming effects for thousands of years and will therefore contribute to sea level rise over the coming decades as life on the Authors' Islands becomes increasingly threatened. (Communication §100). Even for methane – a less long-lived but more potent greenhouse gas – the severe warming effects of these emissions will last for over a decade.[32]

(2) **Likely irreversibility of warming and impacts:** The science is also clear that reducing the world's average temperature once it has warmed is extremely difficult and would depend on unproven negative emissions technologies such as bioenergy with carbon capture and storage on an unprecedented scale, or vast reforestation of huge parts of the Earth's surface, with significant risks to food supply.[33] The irreversibility of harm is also highlighted by the risk of passing tipping points, such as the melting of the Greenland ice sheet, which could cause rapid sea level rise of up to 7 metres.[34] Accordingly, sea level rise and related climate impacts will irreversibly affect the habitability of the Authors' Islands, unless long-term adaptation plans and measures are initiated now **and** the sufficient mitigation of GHGs occurs now.

(3) **Climate inertia / lag:** In addition to the fact that warming reflects the cumulative 'stock' of GHGs build up over time, there is also a lag period (called climate lag or inertia) between the release of GHGs and the resultant increase in surface temperature. This phenomenon is even more extreme in the case of ocean temperature and sea level rise due to the ocean's much greater capacity for absorbing heat compared with the average land surface.[35] This only reinforces the need for the State to take adequate

[32] See, e.g., IPCC, (2014), *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*, p. 87.
[33] IPCC, 2018: Summary for Policymakers. In: 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 [Masson-Delmotte, V., P. Zhai, H.-O. Pörtner, D. Roberts, J. Skea, P.R. Shukla, A. Pirani, W. Moufouma-Okia, C. Péan, R. Pidcock, S. Connors, J.B.R. Matthews, Y. Chen, X. Zhou, M.I. Gomis, E. Lonnoy, T. Maycock, M. Tignor, and T. Waterfield (eds.)]. World Meteorological Organization, Geneva, Switzerland, p. 17.
[33] Heron et al. 2017. *Impacts of Climate Change on World Heritage Coral Reefs: A First Global Scientific Assessment.* Paris, UNESCO World Heritage Centre.
[34] IPCC, AR5, p. 16.
[35] The Intergovernmental Panel on Climate Change 5th Assessment Report summarised the science as follows: "*[t]he ocean's huge heat capacity and slow circulation lend it significant thermal inertia. It takes about a decade for near-surface ocean temperatures to adjust in response to climate forcing (Section 12.5), such as changes in greenhouse gas concentrations. Thus, if greenhouse gas concentrations could be held at present levels into the future, increases*

mitigation actions to reduce emissions **in the present** in order to protect the Authors' rights. Accordingly, the Intergovenmental Panel on Climate Change's ('**the IPCC's**') report on 1.5°C found that in order to meet the 1.5°C temperature threshold, deep and rapid reductions of emissions must commence immediately.[36] It should also be noted that the IPCC predicts the loss of the majority of the world's tropical coral reefs at around 1.5°C of warming.[37]

60. In addition, there are other fundamental practical reasons why adequate mitigation and adaptation measures need to be initiated **now** for them to be effective:

(1) On mitigation, it is not possible to phase out high carbon energy systems overnight. Transitions of that scale take decades – to build the necessary infrastructure, re-train the workforce and re-design economies generally. This was emphasised by the IPCC in its SR15.[38]

(2) Equally, in terms of adaptation, new infrastructure needs take time to scope and to implement, particularly if they are to be informed by adequate community consultation and taking into account all possible solutions and risks, as acknowledged by the TSRA's *Torres Strait Regional Adaptation and Resilience Plan 2016 – 2021*.[39]

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in the Earth's surface temperature would begin to slow within about a decade. However, deep ocean temperature would continue to warm for centuries to millennia (Section 12.5), and thus sea levels would continue to rise for centuries to millennia as well (Section 13.5)." IPCC, (2013), *Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* [Stocker, T.F., D. Qin, G.-K. Plattner, M. Tignor, S.K. Allen, J. Boschung, A. Nauels, Y. Xia, V. Bex and P.M. Midgley (eds.)] p. 266.

[36] IPCC, (2018), *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* [Masson-Delmotte, V., P. Zhai, H.-O. Pörtner, D. Roberts, J. Skea, P.R. Shukla, A. Pirani, W. Moufouma-Okia, C. Péan, R. Pidcock, S. Connors, J.B.R. Matthews, Y. Chen, X. Zhou, M.I. Gomis, E. Lonnoy, T. Maycock, M. Tignor, and T. Waterfield (eds.)] p. 32.

[37] Heron et al. 2017. *Impacts of Climate Change on World Heritage Coral Reefs: A First Global Scientific Assessment.* Paris, UNESCO World Heritage Centre.

[38] IPCC, (2018), SR15, p. 392 ("*Because these different actions are connected, a 'whole systems' approach would be needed for the type of transformations that could limit warming to 1.5°C. This means that all relevant companies, industries and stakeholders would need to be involved to increase the support and chance of successful implementation. As an illustration, the deployment of low-emission technology (e.g., renewable energy projects or a bio-based chemical plants) would depend upon economic conditions (e.g., employment generation or capacity to mobilize investment), but also on social/cultural conditions (e.g., awareness and acceptability) and institutional conditions (e.g., political support and understanding). To limit warming to1.5°C, mitigation would have to be large-scale and rapid. Transitions can be transformative or incremental, and they often, but not always, go hand in hand … While the pace of change that would be required to limit warming to 1.5°C can be found in the past, there is no historical precedent for the scale of the necessary transitions, in particular in a socially and economically sustainable way. Resolving such speed and scale issues would require people's support, public-sector interventions and private-sector cooperation.*").

[39] TSRA, (2016), *Torres Strait Regional Adaptation and Resilience Plan 2016-2021*, Foreword ("*While this Plan sets out a course of action for the future, it highlights that there are some actions that need to occur immediately. The decisions and investments we make today will determine to a large degree how well our region will be able to respond to climate change.*"), p. 25 ("*Successful adaptation in the region is going to require*

(3) Australia's observations regarding its response to climate change and adequacy of current measures

A. Inadequacy of adaptation action in the Torres Strait

61. In the Communication, the Authors described the decade-long recent history of Australia's failure to implement an adaptation programme capable of ensuring the long-term habitability of the Authors' Islands (Communication VI(5)(A) and particularly §§91-95). The Communication describes the numerous attempts to secure funding for emergency sea walls, as well as the failure to fund any medium- or long-term adaptation strategy for the region, requiring local government to take a 'triage' approach. Most of the priority actions identified in the *Torres Strait Regional Adaptation and Resilience Plan 2016-2021* remain unfunded. These failures constitute concrete acts and omissions by Australia that are actual, existing violations of the human rights of the Authors.

62. In its Submission, Australia refers to only one physical measure implemented (through its federal agency the TSRA) to provide *"significant protection for the community from erosion and storm surge impacts"* – a seawall on the island of Saibai (Submission §53). To recall, none of the Authors lives on Saibai, and it is of course only one of the 18 inhabited islands in the Torres Strait. Otherwise, Australia asserts (with ominous vagueness) that the "*TSRA is working with local councils to progress more detailed assessment of coastal hazards to inform coastal adaptation responses*" (Submission §53). As matters stand, Australia has not taken the measures which are **urgently** required to protect the long-term habitability of the Authors' Islands, nor committed itself to take such measures, nor committed itself to fund such measures.

63. Australia does not refer to the A$25m of emergency infrastructure funding promised by Minister for Indigenous Australians Ken Wyatt MP in December 2019, citing "*an ever-present risk of inundation*" and "*critical needs for the people of the Torres Strait*".[40] The Authors can only conclude that Australia has failed to do so because it knows that this funding (which has still not led to any infrastructure being built) does not come close to providing the measures needed to ensure long-term habitability, and yet shows that Australia accepts that the lives of Torres Strait people are already critically affected by **current** levels of inundation.

64. In Section V of its Submission, Australia lists various policies and initiatives related to climate adaptation at the federal and state level. However, Australia fails entirely to explain how any of these measures address the Authors' specific complaints set out in the Communication. In their second report **annexed** to this Reply, respected think tank The Australia Institute ('**TAI Report**') explain the limited extent of the adaptation measures

early consideration of what type of infrastructure is best suited to meet current and future conditions and where it should be located to ensure future generations are benefiting rather than being compromised by decisions made now."), and p. 42 ("*What is required is a well-considered, community led strategy to assess risks, identify thresholds, options and priorities. This will enable the development of a clear pathway for communities and governments to respond to risks from sea-level rise as they unfold. This requires significant discussion and planning to ensure community aspirations and priorities are adequately considered.*").

[40] https://ministers.pmc.gov.au/wyatt/2019/torres-strait-infrastructure-package.

referred to by Australia, which are insufficient to address climate adaptation needs generally in Australia and in the Torres Strait particularly (Annex 1 §§16-20, 71, 73).

65. Australia's cynical attitude and inadequate response to the Communication and the scale of the problem is demonstrated by the reference to 70kW of solar panels that have been installed on TSRA staff housing on Thursday Island. These panels power less than 15 homes, most of which are occupied by government staff from mainland Australia, and they do not directly benefit the indigenous communities of the Torres Strait in any way, let alone in the context of their adaptation needs.

B. Inadequacy of mitigation action at national level

66. The Communication alleges that Australia's wrongful acts and omissions are constituted by (1) its failure to set an adequate national emissions target (being its NDC made under the Paris Agreement); (2) Australia's failure to pursue domestic measures to achieve its NDC target; and (3) its active pursuit of policies which will foreseeably make matters worse including the subsidisation and promotion of the continued use of fossil fuels (Communication §169). In its Submission, Australia fails to engage with, let alone refute, any of the detailed evidence presented by the Authors in the Communication regarding (i) Australia's failure to take adequate mitigation measures (Communication VI(5)(B)) and (ii) its positive steps taken to **increase** GHGs (Communication VI(5)(C)).

67. Instead Australia has simply listed various policies related to climate and energy and baldly asserted that these are "*comprehensive*" (Submission V 'Further Observations' §127). Australia must therefore be taken to accept the factual accuracy of points made by the Authors in the Communication with respect to its mitigation policies. Accordingly, the Authors maintain their position that Australia's action to reduce GHGs is clearly inadequate in view of the applicable and well-established principles and minimum standards, including those of "*highest possible ambition*" and "*common but differentiated responsibility*".

68. Irrespective of this failure by Australia to meet the case made by the Authors, the annexed TAI Report updates the previous assessment,[41] describing relevant policy developments following the submission of the Communication. The report also provides further background on Australia's engagement with climate change at the international level from 1989 onwards in response to Australia's claim that it is "*committed to playing its part in the coordinated global action necessary to deliver a healthy environment for future generations* …" and that it has "*a strong record of meeting [international] emissions targets*" (Submission §§125-26).

69. In the context of current policy, The Australia Institute have also provided details of important aspects omitted from Australia's Submission, as well as correcting false claims. For example, The Australia Institute note that:

    (1) in terms of support for renewable energy, Australia has cancelled the Renewable Energy Target (RET) – cited by Australia at §122 of its Submission – without putting in place

[41] Communication, Annex 4.

a replacement scheme, with the consequence that Australia no longer has a target for decarbonising the electricity sector, the country's largest source of GHG emissions (Annex 1 §§52-54);

(2) Australia's core mitigation policy, the Emissions Reduction Fund (ERF) – also cited by Australia at §122 of its Submission – has failed to deliver sufficient emissions reductions to date and yet has now been allocated dramatically *reduced* yearly funding (Annex 1 §§46-51); and

(3) while Australia appears to rely on its NDC under the Paris Agreement as an indication of the sufficiency of the action that it is taking to reduce emissions (§125), it fails to mention that to make up for the significant shortfall in progress towards meeting its NDC, Australia is now planning to use credits obtained under the entirely separate Kyoto Protocol regime, in a move that has no basis in the terms of the Paris Agreement and that only reduces further Australia's already weak level of ambition and effort (Annex 1 §§38-44).

70. In summary, The Australia Institute explain in their second report not only the inadequacy of Australia's commitments at the international level (i.e. its NDC under the Paris Agreement) including the paucity of its efforts compared to comparable States (Annex 1 §§24-37), but also that Australia remains off track to meet such (already inadequate) commitments (Annex 1 §§38-66).

IV. THE LAW

71. This section deals with three main issues. Section A assesses the consistency of Australia's allegations on causality with principles of State attribution under the Law of State Responsibility. It concludes that Australia's statement of the law has no support in the Law of State Responsibility. Section B deals with three cross-cutting issues relevant to the analysis of the Covenant rights engaged in this case. Sections C addresses the submissions of Australia in relation to each Article of the Covenant.

(1) Australia's causation arguments on State Responsibility for climate change are flawed and contrary to the law of State Responsibility

72. Australia claims that "*establishing factual causation as a matter of international law presents 'near insurmountable' barriers*" (Submission §68), because, it argues, that climate change is "*by definition a global issue and not the sole responsibility of the Australian Government or any other single State*" (Submission §26) and that climate change cannot be attributed to Australia under international law.

73. Australia suggests therefore that, as a matter of international law, a State party to the ICCPR can be under no obligation to reduce its contribution to a global harmful phenomenon, so long as other States are also continuing to contribute to it. This is simply incorrect.

74. This approach to causation, which would require victims to demonstrate that a single State is "*responsible for **the majority** of climate change at a global level or exclusively responsible for climate change harms*" (Emphasis added) (Submission §26) is wrong under international law. Australia's rationale would lead to the absurd conclusion that no State could ever be held liable for the effects of its wrongful GHGs due to the character of climate change as a cumulative problem to which all States contribute.

75. The Authors submit that *sine qua non* causation is not the applicable test to assess the responsibility of Australia in the present case. Under the Law of State Responsibility if two or more States contribute to the same harm, each of them is internationally responsible for its contribution.[42]

76. First, causation is irrelevant to assess Australia's obligations concerning adaptation. As discussed at §§98-101 below (in relation to adaptation measures to address actual and foreseeable climate change impacts on the human rights of those under its jurisdiction), this obligation is not dependent upon the causal relationship between Australia as a country and global climate change. Even if the climate change threat were wholly extraneous to Australia (which it is not), Australia would still be under the same duty to take positive measures. These positive measures are essential to protect the Authors' Islands and to ensure the Authors' rights under the Covenant.

77. Second, the key notion to establish Australia's responsibility in relation to mitigation, does not rest on any element of causation (i.e. on the mere recognition of a link of factual causality), but on principles of attribution. *The Commentary of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts*, for example, observes that:

> "*[t]he different rules of attribution … have a cumulative effect, such that a State may be responsible for the effects of the conduct of private parties, if it failed to take necessary measures to prevent those effects.*"[43]

78. Failure on the part of the State to take action, such as to adequately regulate those polluting the environment is an omission giving rise to State responsibility.

79. Equally, when multiple States are responsible for the same wrongful act (i.e. high GHGs), the general principle is that:

> "*[e]ach State is separately responsible for the conduct attributable to it, and that responsibility is not diminished or reduced by the fact that one or more States are also responsible for the same act.*"[44]

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[42] International Law Commission's *Articles on Responsibility of States for Internationally Wrongful Acts*, Article 47.
[43] International Law Commission, (2001), *Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries*, p. 39.
[44] Ibid. p. 124.

80. For example, when multiple States pollute the same river by separate discharges of pollutants, the responsibility of each participating State is determined individually, on the basis of its own conduct and by reference to its own international obligations.[45] Following a similar approach, in the **Potash Mines** case (**Handelskwekerij Bier v Mines de Potasse d'Alsace** [1976] NJ 1989), the Dutch Supreme Court considered a claim against multiple polluters each of which had unlawfully discharged wastes into the Rhine, holding that each defendant was responsible, *pro rata*, for its own contribution.

81. Further, the State has misunderstood the statements on attribution cited in §38 of its Submission from the Office of the United Nations High Commissioner for Human Rights ('**OHCHR's**') 2009 report. These comments relate to the ability of science to 'attribute' specific extreme weather events (such as droughts or hurricanes) that are influenced by climate change to the GHGs of any single State. They do not imply that it is impossible to attribute territorial (or extra-territorial) GHGs and their effects to the emitting State, which is well documented in State emissions inventories under the UNFCCC and various other sources. Furthermore, the science of extreme weather event attribution **can** now identify the ways in which anthropogenic climate change has altered the severity or frequency of specific extreme weather events.[46] Given the above, it is indeed possible to attribute the impacts of climate change to all States in proportion to their historic and ongoing emissions of GHGs, without going to the (absurd) lengths of tracing the influence of specific greenhouse gas molecules on a particular weather event as Australia suggests.[47]

82. This principle of attribution was applied to GHGs in the recent **Urgenda** decision, where the Dutch Supreme Court held (in finding that the Netherlands' policies on fossil fuel emissions had breached Articles 2 and 8 of the ECHR) that, while global climate change is caused by the emissions of all countries, the duty on the Netherlands was "*to do [its] part*".[48] The Court stated *inter alia*:

> "*[t]he defence that a state does not have to take responsibility because other countries do not comply with their partial responsibility, cannot be accepted. Nor can the assertion that a country's own share in global greenhouse gas emissions is very small and that reducing emissions from one's own territory makes little difference on a global scale, be accepted as a defence. Indeed, acceptance of these defences would mean that a country could easily evade its partial responsibility by pointing out other countries or its own small share. If, on the other hand, this defence is ruled out, each country can be effectively called to account for its share of emissions and the chance of all countries actually making their contribution will be greatest…*"[49]

83. In a statement published on 20 December 2019 in the wake of the Dutch Supreme Court's ruling, the UN OHCHR, Michelle Bachelet, welcomed the **Urgenda** ruling. The UN OHCHR stated:

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[45] Ibid., p. 125.
[46] https://www.worldweatherattribution.org/bushfires-in-australia-2019-2020/.
[47] See for example the Climate Data Explorer run by the World Resources Institute: http://cait.wri.org/.
[48] Dutch Supreme Court, **The State of The Netherlands v Stichting Urgenda**, No. 19/00135, Judgment of 20 December 2019, §§5.8, 5.6.1-5.7.9.
[49] Ibid., §5.7.9.

> "*[t]he decision confirms that the Government of the Netherlands and, by implication, other governments have binding legal obligations, based on international human rights law, to undertake strong reductions in emissions of greenhouse gases*."

84. The UN OHCHR further stated:

> "*[t]his landmark ruling provides a clear path forward for concerned individuals in Europe – and around the world – to undertake climate litigation in order to protect human rights, and I pay tribute to the civil society groups which initiated this action."*
>
> *"I cannot underline too much the importance of today's decision, and the even greater importance of it being swiftly replicated in other countries.*"[50]

85. In short, Australia is responsible for its own contribution, for its own lack of due diligence and for its own failure to ensure adaptation measures are in place to protect the rights of the Authors and that its own obligations in relation to GHGs reduction are fulfilled.

(2) Cross-cutting issues concerning the violations of the ICCPR

86. Some of Australia's arguments are cross-cutting and apply generally, rather than to just one of the Covenant rights relied on. These issues concern Australia's positive duties under the Covenant and are relevant in particular to Australia's case on 'adaptation' and 'mitigation' (Submission §§33-54). The three cross-cutting issues are:

A. Australia's general duty to take positive measures to protect the Authors: obligations of conduct (due diligence);

B. Australia's positive duties to protect the Authors against the known or foreseeable threat of climate change impacts in relation to adaptation; and

C. Australia's positive duties to protect the Authors against the known or foreseeable threat of climate change impacts in relation to mitigation.

A. <u>Australia's general duty to take positive measures to protect the Authors: obligations of conduct (due diligence)</u>

87. The starting point is to address the nature of Australia's positive obligations of conduct.

88. Under the Covenant (reading Article 2 together with Articles 6, 17, 27 and 24) State parties have a positive obligation of conduct to protect against reasonably foreseeable threats (Communication, §§141-143, §149). For example, under Article 6 itself and under Article 6 in combination with Article 2, there is a positive obligation to ensure the right to life and to exercise due diligence to protect the lives of individuals against reasonably foreseeable

[50] https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25450&LangID=E.

threats, even if those threats are not attributable to the State itself.[51] States parties may be in violation of Article 6 even if such threats and situations do not result in the loss of life.[52]

89. The required standard of conduct has been expressed as a "*best efforts*" standard, or "*due diligence*".[53] That is, a standard of conduct that corresponds with what a responsible State ought to do under normal conditions in a situation with its best practicable and available means, with a view to fulfilling its international obligation (Communication §149(2), §§158-172).

90. The due diligence standard also varies in the context of climate change on the basis of common but differentiated responsibilities and respective capabilities ('**CBDR-RC**'). It is also well-established in other contexts that States differ significantly in capacity, and that the challenges they may face to control the activities in their territory will affect the evaluation of whether they have breached their due diligence obligations.[54]

91. In the context of climate change the Authors suggested in the Communication that this standard could be equated with the concepts of "*highest possible ambition*" in light of CBDR-RC in Article 4(3) of the Paris Agreement. As publicist, Christina Voigt, noted in the article included as Annex 3 to the Communication, the concept of "*dynamic differentiation*", expressed in the core principles of in the Paris Agreement is itself a due diligence standard that "*requires each government to act in proportion to the risk at stake and to take all appropriate and adequate climate measures according to its responsibility and its best capabilities.*"[55]

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[51] **Teitiota v New Zealand**, §9.4; **Portillo Cáceres v Paraguay**, §7.5. See also **Y. Sh. v Russian Federation**, Application No. 2815/2016, UN Doc. No. CCPR/C/128/D/2815/2016, Decision of 13 March 2020, §8.5; **Martinez v Colombia**, Application No. 3076/2017, UN Doc. No. CCPR/C/128/D/3076/2017, Views of 11 March 2020 (§9.2: "*State parties are thus under a due diligence obligation to take reasonable, positive measures that do not impose disproportionate burdens on them in response to reasonably foreseeable threats to life originating from private persons and entities whose conduct is not attributable to the State*").

[52] **Teitiota v New Zealand**, §9.4; **Portillo Cáceres v Paraguay**, §7.3. In **Portillo Cáceres v Paraguay**, the victims of the violation were not only Mr Portillo Cáceres, who was himself killed, but also the authors, because despite the "*threats to the life of the authors that were reasonably foreseeable by the State party*", "*the fumigations continued*", causing "*the serious intoxication suffered by the authors*". Based on these facts, "*the Committee concludes that the facts before it disclose a violation of article 6 of the Covenant, to the detriment of Mr Portillo Cáceres and the authors of the communication.*"

[53] In the context of the ICCPR, the Committee stated in GC 36, §7: "*State parties must respect the right to life and have the duty to refrain from engaging in conduct resulting in arbitrary deprivation of life. State parties **must also ensure** the right to life and **exercise due diligence to protect the lives of individuals** against deprivations caused by persons or entities, whose conduct is not attributable to the State. The obligation of State parties to respect and ensure the right to life extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life. State parties may be in violation of article 6 even if such threats and situations do not result in loss of life.*" In application of this rule, Australia would be responsible for example, for exercising due diligence to address foreseeable threats and life-threatening situations not attributable directly to the State but to private actors.

[54] *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities* (n 11) 154-155, commentary to Article 3, §12, referring to Principle 11 of the Rio Declaration.

[55] 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 to the Communication.

92. The notion of due diligence is relevant as a standard for assessing the adequacy of government action in this case in order to ensure the protection of the human rights of the Authors under the ICCPR. It does not depend on the source of the threat. For example, in relation to the right to life, GC 36 §21 reads:

> "*[t]he duty to take positive measures to protect the right to life derives from the general duty to ensure the rights recognized in the Covenant, which is articulated in article 2, paragraph 1, when read in conjunction with article 6, as well as from the specific duty to protect the right to life by law which is articulated in the second sentence of article 6.* ***States parties are thus under a due diligence obligation to undertake reasonable positive measures*** *which do not impose on them disproportionate burdens.*" (Emphasis added)

93. In **Urgenda**, the Dutch Supreme Court held the following in relation to the positive obligations and due diligence obligations of the State under the European Convention on Human Rights ('**ECHR**'), a parallel relevant to this case:

> "*5.3.2 The obligation to take appropriate steps pursuant to Articles 2 [right to life] and 8 [right to respect for private and family life and home] ECHR also encompasses the duty of the state to take preventive measures to counter the danger, even if the materialisation of that danger is uncertain … The obligation pursuant to Articles 2 and 8 ECHR* ***to take appropriate steps to counter an imminent threat may encompass both mitigation measures (measures to prevent the threat from materialising) or adaptation measures (measures to lessen or soften the impact of that materialisation****)…*
>
> *5.3.3. The court may determine whether the measures taken by a state are reasonable and suitable. The policy a state implements when taking measures must be consistent* ***and the state must take measures in good time. A state must take due diligence into account in its policy.*** *The court can determine whether the policy implemented satisfies these requirements. In many instances found in ECtHR case law, a state's policy has been found to be inadequate, or a state has failed to provide sufficient substantiation that its policy is not inadequate …*
>
> *6.5. In addition, the courts can assess whether the State, with regard to the threat of a dangerous climate change, is complying with its duty mentioned above in 5.5.3 under Articles 2 and 8 ECHR* ***to observe due diligence and pursue good governance****.*" (Emphasis added)

94. Two elements of the due diligence standard of care are particularly relevant in the present case: (i) opportunity to act or prevent and (ii) the foreseeability of harm.[56] In brief, this means that a claim against the State will be successful if the claimant shows that the State's agents knew or ought to have known at the time of the existence of a real and immediate risk to the rights of the individuals subject of the jurisdiction of the State in question and then failed to take apprioriate action. This is precisely the case here, given that Australia **knew** of the

[56] See above at §42 referring to ECtHR, **Mastromatteo v Italy**, (Application no. 37703/97), Judgment 24 October 2002, §68; **Paul and Audrey Edwards v. the United Kingdom** (Application no. 46477/99), Judgment 14 March 2002, §55.

foreseeability of harm by climate change in Torres Strait and yet did nothing to avert that harm, as already set out in the Communication at §§91-97.

95. This is further demonstrated by the existence of a 2008 report[57] by the Australian Human Rights Commission ('**AHRC**'), an organ of the Commonwealth government,[58] entitled 'Human Rights and Climate Change' noted that climate change would cause widespread and serious human rights impacts in Australia and the wider world. The AHRC cited the UN Deputy Commissioner for Human Rights as stating that countries:

> "*[h]ave an obligation to prevent and address some of the direst consequences that climate change may reap on human rights*" and that "*states have a positive obligation to protect individuals against the threat posed to human rights by climate change, regardless of the causes*."

96. The AHRC's report noted that the Committee's General Comment No. 6[59] in 1982 had warned against a narrow or restrictive interpretation of the right to life.

97. While the AHRC address the issues at a general level, in relation to the Torres Strait the AHRC specifically noted that "*[I]t is also anticipated that in the Torres Strait Islands, at least 8000 people could lose their homes if sea levels rise by one metre*." The AHRC here cited and referred to a 2006 paper[60] by the Commonwealth Scientific and Industrial Research Organisation ('**CSIRO**'), entitled 'How Might Climate Change Affect Island Culture in the Torres Strait?'. This paper refers to many of the climate change impacts currently felt by the Authors and shows that the Australian government knew, at least as far back as 2006, of the grave threats to Torres Strait Islanders' communities, wellbeing and culture. The research paper's summary notes that:

> "*[s]ome of these islands are only a metre or two above local mean sea level; and in the last two years several have suffered major inundation incidents due to a combination of king tides and strong winds. Most of these islands have inadequate infrastructure, health services and employment opportunities. This social context is highly significant in terms of these communities' resilience to climate hazards because social and economic disadvantage reduces their ability to cope and their capacity to adapt to rapid environmental change.* ***This concern is compounded by a cultural issue not normally considered by natural scientists working on identifying climate impacts in human settlements. Many Islanders connect the health of their land and sea country to their mental and physical wellbeing and, more broadly, their cultural integrity. Therefore, direct biophysical impacts such as rising temperatures, extreme weather events or secondary impacts resulting from these biophysical changes are likely to have significant indirect impacts on the social and cultural cohesion of these communities****. In the near term, projected changes could affect subsistence hunting as well as commercial fishery operations with significant nutritional, economic and cultural*

[57] https://humanrights.gov.au/our-work/commission-general/publications/human-rights-climate-change-2008.
[58] As it then was: it has since been renamed the Australian Human Rights and Equal Opportunities Commission.
[59] Human Rights Committee, *General Comment No. 6* (1982) on Article 6 of the International Covenant on Civil and Political Rights, on the right to life, 30 April 1982. CCPR/C/GC/6.
[60] http://www.cmar.csiro.au/e-print/open/greendl_2006a.pdf.

> *ramifications. Similarly, change in rainfall could exacerbate existing pressures on potable water supplies unless significant anticipatory planning is initiated to reduce this climate related risk.* ***In the longer term, the very existence of Ailan Kastom (Island Custom) may be threatened if projected sea level rise in combination with extreme weather events increases the frequency and/or severity of inundation incidents and necessitates relocation from the islands.*** *In conclusion, highly participatory adaptation planning is vital to reduce climate risks and their subsequent impacts on Islanders' cultural integrity in the mid to long term.*" (Emphasis added)

B. Australia's positive duties to protect the Authors against the known and foreseeable threats of climate change impacts in relation to adaptation

98. Australia argues in relation to adaptation that "*there has been no breach*" because "*the allegedly adverse effects of climate change on the enjoyment of the Authors' human rights are yet to be suffered, if at all*" (Submission §41) and that "*in any event, the Australian Government… is taking specific action in relation to adaptation measures*" (Submission §42 and §§43-54). Several points may be made in response.

99. It is noted that Australia has acknowledged that its agency, the TSRA, has the responsibility of "*co-ordinating climate change programs and policies for the benefit of the region and its communities*" (Submission §42). Thus Australia cannot dispute that the Authors are within its jurisidiction and within its territory. It follows from what is set out in the Communicaton and in Section IV(2)(A) above that Australia has been under continuing obligations under the Covenant to protect the Authors from the severe effects of climate change for many years. That is because for many years Australia has known of the real and immediate risks posed by climate change both generally and specifically for the vulnerable population of the Torres Strait.

100. The point about Australia's long standing knowledge has not been disputed by Australia. The Communication at §§91-95 includes details of attempts by local politicians and representatives from the Torres Strait to raise the issue of flooding and erosion in the region, unsuccessfully, since 2009. The States' own Torres Strait Climate Change Strategy 2014-2018 (published in 2014), acknowledges that "*the probable worst-case scenario is the relocation of several communities, incurring considerable cultural, spiritual and economic costs.*" Indeed, as set out above at §§94-97, Australia has known about the climate change threat to the Islands since at least 2006.

101. Australia is responsible for the impacts being suffered by the Authors, having already violated its obligations of conduct and due diligence under the Covenant by failing to put in place adequate adaptation meaures. This issue has been addressed above, in Section III(3). The Authors submit that the adaptation measures identified by Australia (in particular in its Submission at §§43-54) are so inadequate that they fail to meet the requisite standard of conduct required of Australia. Australia's delayed response, and lack of proportionate or effective action, constitute a violation of the Authors' rights.

C. Australia's positive duties to protect the Authors against the known and foreseeable threats of climate change impacts in relation to mitigation

102. In relation to mitigation, Australia argues that:

> "*[t]here is no obligation in the Covenant to 'set a sufficiently ambitious national emissions reduction target under the 2015 Paris Agreement', to pursue 'adequate domestic remedies to meet that target' or to 'cease promoting the extraction and use of fossil fuels, particularly coal for electricity generation'*" (Submission §35).

103. Having regard to the Communication at §§158-165, and to Section IV(2)(A) above, Australia has been under continuing obligations of conduct to protect the Authors from the known and forseen threat of climate change impacts, by cutting its GHGs, that is 'mitigation'. The existence of this positive duty in relation to mitigation is supported by a wide range of sources in addition to those already cited in the Communication.

104. In the Committee's decision in **Teitiota v New Zealand** (published after the Communication was filed) the Committee recalled that: "…*climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life*." [61] The magnitude of the threat to core human rights on such a scale has consequences for the scope of positive measures States parties are required by the ICCPR (as well as other international human rights treaties) to take in response.

105. Since the Communication was filed, some five United Nations treaty bodies issued a joint statement on *Human Rights and Climate Change*, setting out that existing human rights obligations under various universal human rights treaties embraced obligations on all States to strive to reduce GHGs:

> "*[i]n order for States to comply with their human rights obligations, and to realize the objectives of the Paris Agreement, they must adopt and implement policies aimed at reducing emissions, which reflect the highest possible ambition, foster climate resilience and ensure that public and private investments are consistent with a pathway towards low carbon emissions and climate resilient development.*
>
> *In relation to efforts to reduce emissions, States parties should effectively contribute to phasing out fossils fuels, promoting renewable energy and addressing emissions from the land sector, including by combating deforestation. Additionally, States must regulate private actors, including by holding them accountable for harm they generate both domestically and extraterritorially. States should also discontinue financial incentives or investments in activities and infrastructure which are not consistent with low greenhouse gas emissions pathways, whether undertaken by public or private actors as a mitigation measure to prevent further damage and risk.*"[62]

[61] **Teitiota v New Zealand**, §9.4.
[62] CESCR, CEDAW, CPRAMWMF, CRPD, CRC, *Joint statement on "Human Rights and Climate Change"*, published 16 September 2019, available at: https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24998.

106. The Committee has raised climate change concerns in the process of consideration of reports of States parties to the ICCPR. We have mentioned the case of Cabo Verde (see above at §25). The Committee has also recently asked the government of Guyana to respond to concerns that large scale oil extraction significantly increased GHGs, causes ocean acidification and rising sea-levels.[63] In other words, under the ICCPR, the protection of the right to life requires States to review their energy policies and prevent the dangerous emission of GHGs.

107. In his 2019 *Annual Report to the United Nations General Assembly*, the UN Special Rapporteur on Human Rights and the Environment noted *inter alia* that:

> "*…[t]o comply with their human rights obligations, developed States … must reduce their emissions at a rate consistent with their international commitments.… States must submit ambitious nationally determined contributions by 2020…. All States should prepare rights-based deep decarbonization plans intended to achieve net zero carbon emissions by 2050.… Four main categories of actions must be taken: addressing society's addiction to fossil fuels; accelerating other mitigation actions; protecting vulnerable people from climate impacts; and providing unprecedented levels of financial support to least developed countries and small island developing States.*"[64]

108. As discussed in relation to admissibility, in order to assess the content of Australia's obligation under the Covenant, it is relevant to take account of Australia's obligations under the Paris Agreement, including submitting an NDC representing its "*highest possible ambition*". This point has been addressed in the Communication at §§158-162 and above in Section II(2)(B).

109. It must be emphasised that Australia is an outlier in terms of climate change policies and measures. Compared to other countries with similar levels of development and wealth, Australia's performance in relation to its mitigation obligations has been and remains extraordinarily weak. This is important, because Australia would seek to persuade the Committee that it should not (so to speak) single out Australia for criticism by finding a violation, and that if the Committee were to find Australia in violation by reason of its inadequate GHG mitigation measures, then this would 'open the floodgates' of

[63] Human Rights Committee, *List of issues prior to submission of the third report of Guyana*, 6 August 2020, available at: https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/GUY/CCPR_C_GUY_QPR_3_32992_E.pdf, §14 ("*Please provide information on the steps taken to prevent and mitigate the negative effects of climate change and environmental degradation, particularly as a consequence of gold mining and offshore oil production. Please respond to concerns that large scale oil extraction significantly increases greenhouse gas emissions, causes ocean acidification and rising sea-levels, and adversely affects the most vulnerable groups in the State party, including the Amerindian and fishery-dependent communities and individuals living in poverty. Please report on the steps taken to: (a) develop mechanisms and systems to ensure the sustainable use of natural resources, including oil and gas; (b) develop and fully implement environmental standards, including the Environmental Protection Act; (c) conduct environmental impact assessments; and (d) provide appropriate access to information on environmental hazards.*")

[64] UN Special Rapporteur for Human Rights and the Environment, Annual Report (2019) *Safe Climate: A Report of the UN Special Rapporteur for Human Rights and the Environment*, p. 34, §75, available at https://www.ohchr.org/Documents/Issues/Environment/SREnvironment/Report.pdf.

mitigation-related complaints to the Committee. So Australia seeks to portray itself as in step in with the rest of the developed world. But that is not the reality.

110. Australia is an extreme case, both as to: (1) the level of per capita GHGs; and (2) the absence of policies and measures to reduce GHGs. Multiple independent expert bodies have confirmed that Australia's progress on GHG mitigation is woefully inadequate.[65] In 2019, the United Nations Environment Programme ('**UNEP**') noted that for Australia to meet its 2030 target "*further action*" is required because Australia has "*no major policy tool to encourage emissions reductions from the electricity sector*". The Organisation for Economic Cooperation and Development ('**OECD**') reported in 2019 that "*Australia is among the top ten largest greenhouse gas emitters in the OECD …* [and] *needs to intensify mitigation efforts to reach its Paris Agreement goal*".[66] Two leading NGOs monitoring countries' mitigation performance, Climate Analytics and Climate Action Tracker, publicly warned that Australia is not on track to meet its 2030 NDC commitment under the Paris Agreement. Climate Action Tracker, notes that:

> "*[a]fter factoring out the highly uncertain LULUCF sector to focus on energy and industry emissions Australia's Paris Agreement target translates to a 14-16% decrease from 2005 levels by 2030. Under current policies, Australian emissions are headed for an increase of 8% above 2005 levels by 2030 (excluding LULUCF), and if rated would be "highly insufficient" … While the federal government continues to repeatedly state that Australia is on track to meet its 2030 target 'in a canter', [CAT] is not aware of any scientific basis, published by any analyst or government agency, that would support this*."[67]

111. This is explained in detail in the TAI Report in **Annex 1**.

(3) Matters specific to individual Articles of the ICCPR

A. Article 2

112. The Authors note that Australia has not addressed the arguments raised in the Communication under Article 2. In particular, the submission by the Authors that 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 actions of the State itself. The Authors therefore stand by their arguments (Communication §141-144) which Australia has not rebutted.

[65] The non-governmental Climate Change Performance Index (CCPI), an independent monitoring tool published since 2005 by a consortium of NGOs graded Australia's climate policies **57th out of the 57 countries** (and the EU) which account for 90% of global GHG emissions, available at https://www.climate-change-performance-index.org/.
[66] OECD, Environmental Performance Reviews: Australia 2019, available at https://read.oecd-ilibrary.org/environment/oecd-environmental-performance-reviews-australia-2019_9789264310452-en#page5.
[67] https://climateactiontracker.org/.

B. Article 6

113. Australia argues for a narrow concept of the right to life (Submission §§58-86). It says that *"the right to life under Article 6(1) requires States to protect against arbitrary deprivation of life"* and that Article 6(1) does not require States to protect against the effects of climate change (Submission §59). This position has no support in the workings of the Committee and indeed in any case law on the right to life under international human rights law.

114. In GC 36 §62 the Committee stated that that climate change constitutes one of the most pressing and serious threats to the right to life as follows:

> "*[e]nvironmental 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 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**.*" (Emphasis added)

115. Australia denies the authority of GC 36, arguing that it does not "*necessarily reflect an interpretation of the Covenant that is consistent with the established rules of treaty interpretation as agreed upon by State parties*". However, the Committee is the authoritative organ to interpret the ICCPR and not State parties. The interpretation of Article 6(1) of the Committee is rooted in case law that evolves through time, and is further consistent with developments in all fora on the right to life.

116. It is also pertinent to point out that jurisprudential developments are a subsidiary source of international law.[68] Thus the jurisprudence of organs in the Inter-American system are valid references in this case. It is wrong to say that the right to a healthy environment does not fall within the scope of the right to life. The *Advisory Opinion* Australia quotes from focused on construing the scope of the right to life, and it is within that scope that the Court pronounced the right to a healthy environment (Submission §84). In **Portillo Cáceres v Paraguay**, the Committee implied that the right to life in its positive connotation entails the right to a healthy environment:

> "*…the right to life also concerns the entitlement of individuals … to be free from acts or omissions that would cause their unnatural or premature death. State parties should take all appropriate measures to address the general conditions in society that may give rise to threats to the right to life **or prevent individuals from enjoying their right to life with dignity, and these conditions include environmental pollution.***" (§7.3) (Emphasis added)

[68] Article 38 *ICJ Statute*, reflecting the sources of international law, available at https://www.icj-cij.org/en/statute.

117. **Portillo Cáceres v Paraguay** therefore demonstrates that harms caused by environmental degradation, including climate change impacts, are not *"beyond the scope of Article 6(1)"* under the ICCPR as claimed by Australia.

The right to life with dignity

118. Australia denies that the right to life with dignity is protected under the ICCPR. In other words, it argues that Article 6(1) only protects life devoid of dignity. However, the principle that the right to life with dignity is an entitlement under the ICCPR Article 6(1) is well established in the case law of the Committee.

119. The Committee has confirmed that the right to life under Article 6 ICCPR is not to be interpreted narrowly[69] 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[70] (**Teitiota v New Zealand**, §9.4; **Portillo Cáceres v Paraguay**, §7.3 GC 36).

Duty to protect

120. This fundamental approach to the right to life has been applied in a recent case raising environmental issues, the **Portillo Cáceres v Paraguay** case. The authors of that communication alleged that the State Party had violated the right to life because it had:

> "***failed to discharge its duty to protect their lives*** *and physical integrity because it was not* ***diligent in enforcing environmental standards and laws****. The authors also claim that their* ***right to a life with dignity has been violated owing to the circumstances in which they live****, as they are surrounded by uncontrolled crop dusting that has* ***a detrimental impact on their daily lives*** *and has resulted in their being poisoned, since it pollutes the waterways in which they fish and the well water that they drink, has ruined the crops that they use for food and has caused the death of their farm animals.*"[71] (Emphasis added)

121. As in **Portillo Cáceres v Paraguay**, the authors in this case have argued that the State has failed to discharge its duty to protect their lives because the State has not been diligent in enforcing its duties. As in the case of **Portillo Cáceres v Paraguay**, the Authors are made to live with the daily consequences of that failure.

Article 6(1) can be violated even if there is no loss of life

122. A second, important aspect of **Portillo Cáceres v Paraguay**, was that in finding a violation of the right to life in respect to individuals that were alive, the Committee reaffirmed the principle that "*States parties may be in violation of article 6 of the Covenant even if such threats and situations do not result in loss of life.*"[72] It is wrong to assert therefore that the

[69] GC 36, §3.
[70] Ibid., §65.
[71] **Portillo Cáceres v Paraguay**, §3.5. Footnotes omitted.
[72] Ibid., § 7.3.

right to life "*could only be breached in circumstances where a State's actions or inaction directly caused the death of an individual*" (Submission §80).

The Authors' case is to be distinguished from Teitiota

123. Australia also relies on **Teitiota v New Zealand**, arguing that in finding no breach of the right to life, the Committee "*took into account that the timeframe for climate related impacts to take place in the Republic of Kiribarti permitted sufficient time for intervening acts to...protect the population*" and that "*the Committee took into account the adapative measures the Republic of Kiribarti was taking*" (Submission §69). However **Teitiota v New Zealand** was fundamentally distinct from this case on the facts. When read properly, **Teitiota v New Zealand** supports the Authors' position.

124. First, **Teitiota v New Zealand** arose in the particular context of a deportation, where the State party's obligation under the ICCPR is to provide a fair and individualised assessment of the risk which the author would face after being deported. As the Committee emphasised in **Teitiota v New Zealand** the test to be applied was whether there was "*clear arbitrariness, error or injustice*" in the evaluation by the State party's authorities of the author's claim that he faced a real risk of a threat to his Article 6 rights.[73] The Committee's decision was based on a finding that the New Zealand immigration tribunal had provided the author with a fair and individualised assessment. Indeed, far from being arbitrary, the approach of the New Zealand tribunal seems to have been conscientious and in some ways a model of the kind of assessment which both international refugee law and the ICCPR call for. By contrast, this case is not about whether Australia has been "*arbitrary*", but whether it has complied with its positive obligations of conduct and due diligence, as described in the Communication and above.

125. Secondly, Mr Teitiota did not allege an actual violation had occurred, but that his (future) deportation would be a violation because it would expose him to threats to his life. In **Teitiota v New Zealand**, the Committee held that the requirement (under the Optional Protocol) that a risk of a violation must be 'imminent' "*means that the risk to life must be, at least, likely to occur*".[74] The New Zealand tribunal found that the risks to Mr Teitiota's Article 6 rights were remote, not rising above conjecture. The Committee noted that based on the information made available to it, it was:

> "*[n]ot in a position to conclude that the assessment of the domestic authorities that the measures by taken by the Republic of Kiribati would suffice to protect the author's right to life under article 6 of the Covenant was clearly arbitrary or erroneous in this regard, or amounted to a denial of justice.*" (§9.12)

126. Indeed, the State party in that case had noted that the author had presented only two letters relating to the domestic proceedings.

[73] **Teitiota v New Zealand,** §§9.3, 9.6, 9.7.
[74] Ibid., §2.9.

127. By contrast, the Authors' Communication: (1) is based on existing impacts of existing violations; (2) refers to likely impacts over the coming decades that clearly pass the threshold of being "*at least likely to occur*" – they are what scientific experts predict will occur, unless urgent action is taken; and (3) is supported by strong evidence from authoritative sources as well as the State's own sources.

128. Third, the Authors (unlike Mr Teitiota) are **not** in the same position as Australians generally, but are exposed to an impairment of their lives, dignity and culture that is acutely specific to them as members of their small Island communities.

129. Fourth, the author's complaint in **Teitiota v New Zealand** was based on actual danger to life, not the right to life with dignity nor on the right of persons belonging to a minority to practise their culture.[75] **Even so**, the author was able to demonstrate for admissibility purposes a sufficient risk of impairment to his life arising from climate change impacts.[76] In this case, the position is *a fortiori* because:

    (1) the ICCPR rights relied on by the Authors are wider in scope (not limited to the risk of arbitrary deprivation of life);

    (2) the Authors allege **actual violations** by the State party of obligations under Articles 2, 6, 27, 17 and 24, not only an anticipated violation; and

    (3) the threatened future harms from the Authors' Islands becoming unviable for habitation are **not** in the realm of conjecture and surmise but are what reputable scientific experts, and the State party itself, predict will happen unless urgent action is taken.

130. Fifth, a further key distinction is that in **Teitiota v New Zealand**, the Committee analysed the acts and omissions of the receiving State (Kiribati), which is a Least Developed Country that unlike Australia is not a major contributor to global GHGs nor does it subsidise the fossil fuel industry, thereby promoting increased GHGs globally. While the Committee noted that the New Zealand Tribunal had observed that the New Zealand authorities had assessed that Kiribati (a country with small resources and low GHGs) was acting to protect those under its jurisdiction from climate change degradation, the information before the Committee in that case was more limited (Kiribati not being party to the proceeding), while the position of Australia in relation to the Authors is also very different, as already explained.

131. Finally, **Teitiota v New Zealand** supports the Authors' case because: (1) it shows that, contrary to what Australia asserts, climate change is relevant to the obligations of States under the ICCPR;[77] (2) it held that States parties may be in violation of Article 6 of the Covenant even if such threats and situations do not result in the loss of life;[78] and (3) the right to life also includes the right of individuals to enjoy a life with dignity.[79]

[75] Ibid., §3.
[76] Ibid., §§8.5-8.6.
[77] Ibid., §§9.4-9.5.
[78] Ibid., §9.4.
[79] Ibid.

C. Article 27

132. Australia's Submission in relation to Article 27 (Submission §§94-107) consists partly of generalised commentary that does not address the issues raised by the Communication. Insofar as Australia does engage with the Communication, it has not answered the Authors' complaint that a violation exists.

133. Australia says that it has put in place laws to protect the Torres Strait Islanders cultural identity, citing one piece of legislation only, the *Native Title Act 1993* (Submission §93). However, the *Native Title Act 1993* is not designed to respond to the threats in question; it does not do so, and Australia does not even suggest that it does. The *Native Title Act 1993* allows local communities to assert land rights over traditional land and sea territories, but it does not in any way protect the Authors' culture against destruction by climate change impacts.

134. Australia says that State parties have "*discretion as to how they protect minority cultures, provided that the measures they take are effective*" (Submission §90). However, Australia has not so far taken any measures that are adequate to prevent the Authors' Islands becoming unviable for habitation. Australia has not shown that it is implementing or will implement any **concrete** measure that is effective to prevent that outcome. The alleged existence of "*discretion*" cannot negate a violation where the State party is faced with the real, foreseeable threat of the Authors' cultures being extinguished and is taking no steps to prevent that outcome. As described above, the track record of Australia (at Commonwealth level and by the state of Queensland) is one of inaction, of very limited and delayed measures and of a failure to listen to what the people of the Torres Strait know is happening to their traditional lands and sea.

135. Australia's second assertion is that the Authors are only alleging "*future hypothetical violations*"[80] of Article 27. That is incorrect. The Authors' case is based on the existing and foreseeable future impacts of current (and imminent) violations of their right to enjoy their culture, which depends on the ability to live on and from the natural resources of their Islands. These impacts are described in detail in Section III(2) above. Dispossession from sea level rise is a slow-onset process that has already begun, is inevitable and irreversible unless urgent action is taken, and cannot be said to be hypothetical, as explained above at §§55, 58-60. The Authors' cultural, social and spiritual welfare depends on a healthy environment, which has been and is being degraded by climate change. Accordingly, the violations are not future hypothetical but have already commenced. For the Authors' Islands (and especially Boigu and Masig), the window of time in which adequate adaptation measures can still be planned and implemented is rapidly closing. It is the failure to take action now, when it is actually possible to avoid the harms which will otherwise occur, that constitutes the violation of Articles 2 and 27. The Communication therefore concerns existing violations, in common with other cases where a violation has been found.[81]

[80] Submission, §§88, 94.
[81] Such as those referred to in Submission, §§95-96.

136. Australia claims that Article 27 was never intended to protect from the impacts of climate change. Yet, it is the Committee's jurisprudence on Article 27 that provides the strongest support for the proposition that environmental harm can lead to violations of fundamental human rights, given the dependence of indigenous minority cultures on a healthy environment, and the strong cultural and spiritual link between indigenous peoples and their traditional lands. This was the basis of the Committee's views in **Poma Poma v Peru**[82], a case which strongly supports the Authors' case, as well as **Jouni Länsman v Finland**, cited in the Communication at §185, in which the Committee said that:

> "*[t]he scope of [the State's] freedom to [permit activity that affects minority culture] … 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.*"[83]

137. Further, the case of **Mavlonov and Sa'di v Uzbekistan**[84] cited by Australia[85] supports the Authors' case because the fact that the publication of a minority language newspaper was deemed crucial for the maintenance of cultural rights shows that acts which affect minority culture, but fall short of causing its total destruction, can also amount to violations of Article 27.

138. Facing the loss of the sea, reefs and Island environments that sustain their cultural and spiritual lives is heartbreaking for the Authors. As Kabay Tamu said of the link between the Authors and their Islands:

> "*[w]e have a right to practise our culture and to practise it here, in our traditional homeland, where we belong. Our culture has a value to us that no money could ever compensate for. Our culture starts here on the land. It is how we are connected with the land and the sea. You wash away the land and it is like a piece of us you are taking away from us. The impact of climate change on our culture – sea levels rising, coastal erosion, the effect of climate change and coral bleaching on our practices connected with the sea – it is beyond one's understanding*" (Kabay Tamu, WS §11).

D. <u>Article 17</u>

139. Australia argues that "*the Authors have failed to demonstrate any past or present violation of Article 17*" (Submission §§99-107, §100). Again, this overlooks that the Authors' case is based on the existing impacts of existing violations, as well as on Australia's contining duty to prevent further violations.

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[82] UN Human Rights Committee, **Poma Poma v Peru**, Communication No. 1457/2006, UN Doc. CCPR/C/95/D/1457/2006, Views of 27 March 2009.
[83] UN Human Rights Committee, **Jouni Länsman v Finland**, Communication No. 671/1995, UN Doc. CCPR/C/58/D/671/1995, Views of 30 October 1996.
[84] UN Human Rights Committee, **Mavlonov and Sa'di v Uzbekistan**, Communication No. 1334/2004, UN Doc. CCPR/C/95/D/1334/2004, Views of 19 March 2004.
[85] Submission, §96.

140. The Authors' case does not "*focus entirely on the future disruption to family life which may be caused by climate change*" (Submission §104). The homes of the Authors are being flooded now, their land affected, their family remains washed away due to the sea level rise (see in Sections III(1) and (2) above). Indeed, the Authors have provided witness statements, photographic evidence and videos showing the impacts on their right to enjoy their home under Article 17.

141. Furthermore, as regards the future, the Authors' case is not based on "*future disruption to family life which may be caused by climate change*" (Submission §104). It is based on the future disruption to family which **will** be caused by Australia's violation of its obligations to protect the Authors from the effects of climate change (see Sections III(1)-(2) above).

142. Finally, Australia argues tht Article 17 does not apply because:

> "*[a]ny alleged interference that might arise in the future as a consequence of climate change would not emanate from State authorities nor from natural or legal persons that were authorized by the State*" (Submission §105).

143. Again, Australia overlooks that the Authors' case is based on existing impacts and violations. The interference with Article 17 is the result of a specific conduct attributable to Australia's state organs/agents, that is, Australia's lack of action.

144. The State has not addressed at all the Authors' arguments that Article 17 can apply to situations of environmental harm (Communication §§194-195, 196). Therefore, Australia has not challenged the legal principles relied on by the Authors under Article 17.

145. In light of the extensive evidence of degradation of the Authors' homes, the Authors respectfully invite the Committee to make a finding of a violation of their rights under Article 17 due to the lack of action on the part of Australia to protect their rights.

E. <u>Article 24</u>

146. Australia states that it has "*a broad discretion*" to comply with Article 24 of the ICCPR (Submission §114). It has not mentioned one single measure to ensure the protection of the Authors' children's right to life with dignity.

147. At present, their world is being eroded. Their parents are struggling to teach them their rituals and customs because the environment upon which they rely to do so, has changed (Communication §69).

148. The duties of Australia to child victims under the ICCPR must be interpreted in harmony with Article 3(1) of the UN Convention on the Rights of the Child, which provides: "*in all actions concerning children … the best interests of the child shall be a primary consideration*". Nowhere in the submissions has Australia referred to this consideration and its specific application to the Authors' children.

149. The principle of intergenerational equity, which "*places a duty on current generations to act as responsible stewards of the planet and ensure the rights of future generations to meet their developmental and environmental needs*" (see e.g. Principle 3 of the Rio Declaration on Environment and Development, 1992; UNFCCC Article 3(1); Preamble to the Paris Agreement) are likewise completely ignored by Australia to the detriment of the children of the Torres Strait, including the Authors' children.

V. REMEDIES

150. Australia accepts that in principle:

> "*[a]ppropriate remedies for breaches of the Covenant would ordinarily include restitution; compensation and rehabilitation for the victim; law reform and changes in policies and practices that are in violation of the Covenant; and steps to prevent the repetition of the violation (guarantee of non-repetition).*" (Submission §119)

151. However, Australia argues that "*none of the mitigation measures sought by the Authors fall within the remit of the Covenant*" (Submission §118). This is misplaced. The Authors repeat the arguments set out in their Communication and above, including Section IV(2).

152. Australia further argues that the adaptation measures requested by the Authors are "*unprecedented*" and "*fall outside the scope of the Covenant*" (Submission §119). Again, the Authors repeat the arguments set out in their Communication and above, including Section IV(2) above. Furthermore, adaptation measures are consistent with the practice of the Committee and with fundamental principles of international law, including that an ongoing violation should cease (Communication §214). Both the mitigation and adaptation measures sought in the Communication are needed urgently to stop the ongoing violations of the Authors' rights.

153. The Authors emphasise that they have requested, *inter alia*, that their communities should be consulted as to the best way to implement adaptation measures.

VI. CONCLUSION

154. It would be both extraordinary and lamentable if Australia's conduct is held to be in compliance with its ICCPR obligations. Climate change is one of the world's greatest threats to human rights. The Authors are among the most climate-vulnerable people in the world and are suffering real world impacts arising from Australia's violations that will worsen dramatically and irreversibly within years. These are impacts that they have not contributed to, yet which threaten their very cultural identity and being. Australia's track record and current climate and energy policies make it an outlier, at the bottom of the league of developed countries for GHG mitigation, on any measure. It has also shamefully neglected the adaptation needs of the Torres Strait indigenous minority for at least the past 15 years.

155. Australia has had 11 months to reply to the original Communication. Given that time matters in this case, the Authors invite the Committee to treat their communication with the necessary urgency it deserves and proceed to adjudicate their rights. The Authors respectfully invite the Committee to find that their case is admissible and that their rights under the ICCPR have been violated by the failure to act on the part of Australia.

156. Fundamentally, time is of the essence. The IPCC has stated that mankind has only a 12-year window in which to limit the global increase in temperature to 1.5˚C. That was two years ago.[86] In relation to the Authors' Islands, the uncontested evidence is that they cannot wait any longer.

157. If not this case and now, then which case and when?

VII. ANNEXES

(1) Report from The Australia Institute regarding Australia's climate change policies dated 29 September 2020

[86] IPCC, (2018), SR15.

Annex 1

29 September 2020

ClientEarth London
Fieldworks, 274 Richmond Rd
London E8 3QW

To Sophie Marjanac,

Please find the following letter in response to your request for an updated review of the sufficiency of Australia's current climate and energy policy, including comments on the Australian Government's position regarding your clients' complaint.

I have outlined the history of Australia's climate policy including Australia's commitments under the United Nations Framework Convention on Climate Change and successive treaties, the Kyoto Protocol and the Paris Agreement. I have also provided an overview of Australia's current domestic climate policy framework, including recent updates until the 28 September 2020.

I hope this information assists in the present case.

Regards,

Richie Merzian
Climate and Energy Program Director
The Australia Institute

Contents

Summary response to the Australian Government Submission on Admissibility and Merits to the United Nations Human Rights Committee

Mitigation policy and investment

1. The Australian Government's Submission notes that "Australia has a comprehensive suite of policies to meet our emissions reduction commitments" (paragraph 127). On analysis, Australia's climate change mitigation policies are insufficient to meet Australia's international obligations for reducing greenhouse gas emissions. Moreover, the current Australian Government has failed to provide adequate funding to carry forward many of these insufficient policies. These policies will be detailed briefly below and expanded in later sections.

2. Australia has no national target, policy or legislation to decarbonise the electricity sector, Australia's largest emitting sector.

3. Funding for the Australian Renewable Energy Agency (ARENA), the peak body to manage public investment in early-stage renewable energy projects, has been reduced under successive Governments from its initial budget allocation and will be further reduced under the current Government.

4. The Australian Government recently introduced a bill to amend the governing legislation of its public green bank, the Clean Energy Finance Corporation (CEFC) to allow investment in loss-making fossil fuel projects like new gas power plants. The Government intends to also amend the governing legislation of ARENA to dilute its efforts and become 'technology-neutral'.

5. The Government's successful Renewable Energy Target (RET) hit its target of 33,000GWh of electricity generated from renewables this year. It will not be renewed beyond its 2020 end date.

6. The Climate Solutions Package announced in 2019 is identified in the Australian Government Submission as the policy suite that outlines how Australia will achieve its 2030 Paris Agreement Nationally Determined Contribution (NDC) target. The Climate Solutions Package includes additional funding for the Emissions Reduction Fund (ERF), the intention to develop a National Electric Vehicle Strategy, measures to improve energy efficiency and additional funding for Snowy 2.0, the Battery of the Nation Project in Tasmania and the MarinusLink transmission line.

7. The Emissions Reduction Fund (ERF) is a reverse auction to purchase carbon credit units from the market and it is the only component of the Government's policies designed to

directly reduce emissions. The ERF has struggled to meet emission reduction expectations. In 2019, the Government allocated the ERF less funding and stretched it over a longer period of time.

8. The ERF is complemented by the Safeguard Mechanism, intended to ensure large emitters (with facilities that emit over 100,000 tonnes of carbon dioxide equivalent of pollution) maintain their emissions below an established baseline. Yet the baselines have been set too high, allowing emissions from many of Australia's largest polluters to increase, not decrease.

9. The Technology Investment Roadmap launched on 22 September 2020 to accelerate the development of new and emerging technologies prioritises two technologies that are polluting and expensive, while ignoring renewable energy and EVs. These include carbon capture and storage (CCS), an expensive technology that has failed to commercialise for coal despite $1.3 billion in government support and clean hydrogen that includes hydrogen made from fossil fuels with CCS. Remarkably, the Government has not detailed any emissions reductions from the Technology Investment Roadmap between now and 2030, only claiming it will have some impact on domestic and exported emissions in 2040. This leaves Australia without additional policies necessary to meet its 2030 NDC.

10. The National Electric Vehicle Strategy has been delayed multiple times since its announcement and is still not published, despite Australia falling behind the rapid global uptake of electric vehicles (EVs) and transport emissions making up around 20% of national emissions. EVs make up just 0.6% of total car sales in Australia,[1] compared to 3% of new car sales globally.[2] The Technology Investment Roadmap did include additional funding of 74.5 AUD million over four years for EV infrastructure and fleets, administered by ARENA.

11. Australia still lacks a long-term climate strategy, despite domestic and international commitments to deliver one this year. Australia has no 2050 emissions reduction target, despite more than 70 countries around the world having committed to a target of net zero by 2050.[3]

12. Contrary to the Government's claims (paragraphs 128-129 of the Submission), the Australian Government has a poor record on supporting clean energy and climate change research. In 2014, funding for the CSIRO was reduced by 111.4 AUD million and in 2020, the CSIRO cut 40 jobs from the energy team, including scientists, engineers and researchers.[4]

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[1] Parkinson (2020) *Tesla takes 70 per cent of market, as Australia electric car sales reach 5,000 in 2019,* https://thedriven.io/2020/01/20/tesla-takes-70-per-cent-of-market-as-australia-electric-car-sales-reach-5000-in-2019/
[2] Doyle (2020) *Norway sets electric car record as battery autos least dented by Covid-19 crisis*, https://www.climatechangenews.com/2020/07/02/norway-sets-electric-car-record-battery-autos-least-dented-covid-19-crisis/
[3] Dalzell (2020) *Scott Morrison refuses to commit to net zero carbon emissions by 2050*, https://www.abc.net.au/news/2020-09-20/scott-morrison-refuses-to-commit-net-zero-carbon-emissions-2050/12682714
[4] (2020) *I just asked @ABCNews a question about #coronavirus #COVID-19 ... Do you have a question too?* https://modules.wearehearken.com/abc-national/embed/5075/share
Hart (2020) *CSIRO to pull plug on energy jobs*, https://www.cpsu.org.au/content/csiro-pull-plug-energy-jobs

13. In 2013, the Climate Commission, an independent public advisory group established to report on climate science, was abolished. The Climate Change Authority, a further independent public agency charged with advising the Government on emission reduction targets, has been largely ignored (and reduced to a fraction of its original staffing profile).

14. The Australian Government's Submission identifies its support for clean energy innovation by highlighting its participation in Mission Innovation (MI). MI requires countries to double their public R&D over 5 years from 2015-2020 and report annually on progress. ARENA is the lead agency responsible for delivering on Australia's commitments to MI. ARENA will require substantial funding if it is to drive innovation in renewable electricity generation, transport and other sectors necessary to achieve emissions reductions. It is hard to see how ARENA will do this with the cut in funding to 140 AUD million per annum and the expectation to fund additional research areas beyond its original remit.

15. In 2019, Australia ceased contributions to the Green Climate Fund (GCF), the largest fund dedicated to helping developing countries reduce emissions and adapt to climate change.

Adaptation policy and investment

16. The Australian Government's policies do not prioritise climate change adaptation. The National Climate Resilience and Adaptation Strategy does not address the fact that climate impacts are already occurring or the pace and extent of forecast climate change impacts. The National Climate Change Adaptation Research Facility (NCCARF) and the CSIRO's Climate Adaptation Flagship have both been defunded and closed down.[5]

17. Climate Compass, a bureaucratic risk management document, is not a climate policy, and is not intended to assist with mitigating or adapting to climate change.

18. The Australian Government's Submission also details a range of small policies, including several Queensland policies, to support their claimed comprehensive policy suite to address climate change. However, these policies, detailed below, are minor and are inherently unable to compensate for the inadequacy of Australia's broader climate change policy suite. Federal and state policies in aggregate will not significantly decrease Australia's greenhouse gas emissions.

19. In the Submission, the Australian Government attempts to highlight its active role in addressing climate change impacts in the Torres Strait by detailing small climate change policies in Queensland, including QCoasts2100 and the Queensland Climate Transition Strategy (paragraphs 136-139).

[5] Rickards & Howden (2020) *Climate adaptation is not a far-off idea - it's here and it affects us all*, https://www.smh.com.au/environment/climate-change/climate-adaptation-is-not-a-far-off-idea-it-s-here-and-it-affects-us-all-20200109-p53q7r.html

20. The Queensland Climate Transition Strategy and QCoasts2100 do not adequately address climate change mitigation and adaptation, particularly with relation to the Torres Strait. The Queensland Climate Transition Strategy makes no mention of the Torres Strait. A lack of funding for QCoasts2100 in the 2019-20 budget means many councils will not be able to commence or complete their strategies, particularly indigenous councils.[6]

Support for fossil fuels

21. The Australian Government continues to support policies that will detract from emissions reduction, taking Australia further away from meeting its weak NDC under the Paris Agreement and contributing to greater climate change impacts.

22. The Australian Government has announced plans for a gas-fired economic recovery from the COVID-19 pandemic. This includes setting new fossil gas supply targets, unlocking five major gas resource basins for extraction and building new gas infrastructure.[7] The Government also committed to financing 1,000 megawatts of new dispatchable energy from gas generation if the private sector does not immediately invest to build it in 2021.[8]

23. The International Institute for Sustainable Development's Energy Policy Tracker has recorded Australian Government spending of 483 million USD supporting fossil fuel energy since the beginning of the COVID-19 pandemic.[9]

[6] Local Government Association of Queensland (2018) *What does the State Budget mean for Qld councils?*, http://qcrc.lgaq.asn.au/web/guest/notice-board/-/asset_publisher/AHDhMHIxBm3z/content/what-does-the-state-budget-mean-for-qld-councils-/pop_up?_101_INSTANCE_AHDhMHIxBm3z_viewMode=print

[7] Commonwealth of Australia (2020) *Gas-Fired Recovery – Media Release*, https://www.pm.gov.au/media/gas-fired-recovery

[8] Commonwealth of Australia (2020) *Ensuring Affordable, Reliable and Secure Electricity Supply – Media Release*, https://www.pm.gov.au/media/ensuring-affordable-reliable-and-secure-electricity-supply

[9] https://www.energypolicytracker.org/country/australia/

Australia's inadequate action on climate change

24. The Australian Government's Submission claims that: "Australia has a strong record of meeting [its international] emissions targets" (paragraph 126). However, this claim is clearly misplaced when viewed against the history of Australia's actions.

25. In 1997, Australia successfully lobbied for a weak emissions reduction target for the first commitment period (2008-2012) of the Kyoto Protocol, committing to emissions growth of 8% above its 1990 baseline. Under the protocol, just three of 39 industrialised countries were permitted to increase emissions; Australia, Iceland and Norway. Other industrialised countries negotiated more ambitious emissions targets based on the 1990 baseline: Netherlands - 8% reduction; Japan - 6% reduction; UK - 12.5% reduction; Germany - 21% reduction; Denmark - 21% reduction.[10]

26. Australia also successfully lobbied to include land use, land use change and forestry (LULUCF) emissions figures in the emissions base year, allowing fossil fuel emissions to increase throughout the Kyoto commitment period, offset by a reduction in land clearing, mainly in Queensland. Australia was the main proponent and main beneficiary for this lenient approach and as a result the provision is informally known as "the Australia clause".[11]

27. Under the second commitment period of the Kyoto Protocol (2013-2020), Australia committed to cut greenhouse gas emissions by just half a percent from the 1990 baseline.

28. In 2014, Australia became the first Government to repeal a national carbon price, the Emissions Trading Scheme (ETS). If the ETS were still in place, Australia's emissions would have been 72 million tonnes lower from 2015 to 2020, and would be 25 million tonnes per year lower in 2020.[12] Australia's emissions fell significantly while the carbon price was in place from 2012 to 2014, and increased again for the next five years after it was repealed.

29. The Australian Government often points out that Australia's domestic emissions represents only 1.3% of global emissions. However, this still places Australia in the top 20 global polluters. This figure also obscures domestic per capita emissions, or emissions per person, and emissions associated with Australia's exported fossil fuels. Australia's emissions per capita are the highest in the OECD and among the highest in the world. The only countries

[10] UNFCCC (1998) *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, https://unfccc.int/resource/docs/convkp/kpeng.pdf
Official Journal of the European Communities (n.d.) *ANNEX II*, https://ec.europa.eu/clima/sites/clima/files/strategies/progress/docs/table_emm_limitation_en.pdf
[11] Australian Government (2009) *The Kyoto Protocol accounting rules*, https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/~/link.aspx?_id=C5066CCDFBF2437BAFEB744911ADEA67&_z=z
[12] Grudnoff (2020) *The Carbon Pricing Mechanism under the Gillard Government*, https://www.tai.org.au/sites/default/files/Carbon%20price%2010%20years%20on%20%5Bweb%5D.pdf

with higher per capita emissions are petro-states like Kuwait, Qatar and the UAE.[13]

30. Australian coal exports have doubled in the last two decades. Liquified Natural Gas (LNG) exports also doubled in the decade to 2015 and again to 2018. The carbon footprint of Australia's fossil fuel exports make it the fifth biggest miner of fossil fuels in the world, only smaller than China, the United States, Russia and Saudi Arabia. Australia is the third biggest fossil fuel exporter by CO_2 potential and is the largest coal exporter in the world, representing 29% of global coal trade.[14]

31. Despite being a large producer of fossil fuels, Australia's economy is far less dependent on fossil fuels as a source of income and employment than other major fossil fuel producers, meaning Australia does have the capacity to reduce fossil fuel production and consumption.[15]

Paris Agreement climate commitments and policies

32. In 2015, United Nations Framework Convention on Climate Change (UNFCCC) parties agreed on the landmark Paris Agreement that aims to limit global temperature rise to well below 2.0°C above pre-industrial levels, and pursue efforts to limit temperature rise to 1.5°C.[16] The Paris Agreement requires party nations to declare emissions reductions targets via Nationally Determined Contributions (NDCs). Australia signed the Paris Agreement on 22 April 2016, ratifying the treaty on 9 November 2016.[17]

33. Ahead of the Paris Agreement in 2015, Australia proposed an "economy-wide target to reduce greenhouse gas emissions by 26 to 28 per cent below 2005 levels by 2030".[18] This became its NDC. Current projections by the Australian Government indicate it is not on track to meet this target.[19]

34. Australia's NDC is incompatible with both Paris Agreement goals of limiting warming to 1.5°C or "well below" 2°C, and would lead to warming of at least 3°C if other countries were to follow similar policies.[20] To be compatible with the Paris Agreement, Australia would need to

[13] Swann (2019) *High Carbon from a Land Down Under*, https://www.tai.org.au/sites/default/files/P667%20High%20Carbon%20from%20a%20Land%20Down%20Under%20%5BWEB%5D_0.pdf
[14] Ibid.
[15] Ibid.
[16] UNFCCC (2015) *The Paris Agreement*, https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement
[17] *United Nations Treaty Collection*, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en
[18] Commonwealth of Australia, *Australia's Intended Nationally Determined Contribution to a new Climate Change Agreement*, https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Australia%20First/Australias%20Intended%20Nationally%20Determined%20Contribution%20to%20a%20new%20Climate%20Change%20Agreement%20-%20August%202015.pdf
[19] Climate Analytics Australia (2019) *Australia's proposed 'Kyoto carryover' - nature, scale implications, legal issues and environmental integrity of the Paris Agreement*, https://climateanalytics.org/media/report_australia_kyoto_carryover_dec2019.pdf
[20] Climate Action Tracker (n.d.) *Australia | Climate Action Tracker*, https://climateactiontracker.org/countries/australia/

reduce emissions by 45-65% by 2030 on 2005 levels.[21] Recent analysis suggests that Australia's fair share of emissions reduction efforts would be even greater, including larger domestic emissions reduction and assistance for poorer countries to reduce emissions.[22] These recent studies find that to meet its 'fair share' of reduced emissions, Australia would need to reduce emissions by 55-87% by 2030 based on 2005 levels.[23] Such an approach to allocating emissions reductions between countries acknowledges the fact that Australia is a wealthy country with higher per capita emissions relative to other countries, therefore having a greater capacity to reduce emissions than others.[24]

35. The UNFCCC's climate science body, the Intergovernmental Panel on Climate Change (IPCC), states that approximately 1.0°C of global warming has been caused to date by human activities and is likely to reach 1.5°C between 2030 and 2052 at current rates.[25] To keep warming under 1.5°C, global net greenhouse gas emissions must decline by 45% from 2010 levels by 2030 and reach net zero by 2050. Coal must be phased out globally by 2050 and by 2030 in OECD countries to meet this target.

36. Australia's emissions have increased significantly since 1990. However, Australian Government accounting, which includes reduced emissions from LULUCF, distorts Australia's overall emissions profile. Total emissions in 2019 have increased by 7% since 1990 including LULUCF, and increased by 33% since 1990 excluding LULUCF.[26] Emissions (with LULUCF) have only recently started to fall, down 0.9% in the year to December 2019.[27]

37. By comparison, UK emissions in 2019 were down 45% on 1990 levels.[28] In Sweden, emissions in 2013 were down 22% on 1990 levels.[29] France's emissions in 2016, excluding LULUCF, have decreased by 15% since 1990.[30]

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[21] Climate Change Authority (2015) *Final Report on Australia's Future Emissions Reduction Targets*, https://www.climatechangeauthority.gov.au/news/final-report-australias-future-emissions-reduction-targets
[22] Climate Analytics (2019) *Australian political party positions and the Paris Agreement: an overview,* https://climateanalytics.org/media/ca_-_australian_political_party_positions_and_the_paris_agreement_-_2019.05.10_1.pdf
[23] Climate Analytics (2019) *Australian political party positions and the Paris Agreement: an overview,* https://climateanalytics.org/media/ca_-_australian_political_party_positions_and_the_paris_agreement_-_2019.05.10_1.pdf
[24] Climate Change Authority (2014) *Australia's Emissions Budget to 2050*, https://www.climatechangeauthority.gov.au/sites/default/files/2020-06/Target-Progress-Review/Targets%20and%20Progress%20Review%20Final%20Report_Chapter%208.pdf
[25] Intergovernmental Panel on Climate Change (2019) *Summary for Policymakers. In: Global Warming of 1.5°C*, https://www.ipcc.ch/site/assets/uploads/sites/2/2019/05/SR15_SPM_version_report_LR.pdf
[26] Climate Transparency (2019) B*rown to Green - The G20 Transition Towards A Net-Zero Emissions Economy: Australia*, https://www.climate-transparency.org/wp-content/uploads/2019/11/B2G_2019_Australia.pdf
[27] Commonwealth of Australia (2020) *Quarterly Update of Australia's National Greenhouse Gas Inventory: December 2019*, https://www.industry.gov.au/sites/default/files/2020-05/nggi-quarterly-update-dec-2019.pdf
[28] UK Provisional Greenhouse Gas Emissions (2019) *2019 UK Provisional Greenhouse Gas Emissions*, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/875482/2019_UK_greenhouse_gas_emissions_provisional_figures_statistical_summary.pdf
[29] Government Offices of Sweden/Swedish Environmental Protection Agency (2014) *Sweden's Second Biennial Report under the UNFCCC*, https://unfccc.int/sites/default/files/sweden_br2.pdf
[30] Climate Transparency (2019) *Brown to Green - The G20 Transition Towards A Net-Zero Emissions Economy: France*, https://www.climate-transparency.org/wp-content/uploads/2019/11/B2G_2019_France.pdf

Illegitimate use of Kyoto credits to meet NDC under Paris Agreement

38. Australia is not on track to meet its NDC target of reducing emissions by 26-28% on 2005 levels. Australia intends to illegitimately use (or "carryover") Assigned Amount Units (AAUs) from the Kyoto Protocol to meet its NDC under the Paris Agreement. These credits do not represent genuine efforts to reduce fossil fuel consumption or curb emissions and represent an attempt by the Australian Government to water down its already weak NDC under the Paris Agreement.[31]

39. Australia's emissions forecasts in 2019 estimate that it will reach 16% emissions reduction in 2030 below 2005 levels, instead of a 26-28% emissions reduction.[32] The Australian Government plans on using credits under the Kyoto regime to make up for this shortfall in effort to reduce emissions to meet its NDC. Using these credits to meet Australia's NDC is contradictory to the Paris Agreement, under which parties are required to strive for the "highest possible ambition" in emissions reduction policies.

40. Australia is the only country that intends to use these Kyoto credits to meet its NDC under the Paris Agreement.[33] In 2015, Denmark, Germany, the Netherlands, Sweden and the United Kingdom all announced that they will cancel their credits from the first period of the Kyoto Protocol. In 2018, New Zealand announced it will not use its Kyoto credits.[34]

41. The use of Kyoto credits within the Paris Agreement has no legal or moral legitimacy. The Paris Agreement and the Kyoto Protocol are separate treaties under the UNFCCC. The Paris Agreement contains no provisions allowing countries to use Kyoto credits towards NDCs.

42. Several groups oppose Australia's use of Kyoto credits. Pacific leaders have called on Australia to abandon its plans to use the credits and it has been condemned by the Alliance of Small Island States and Least Developed Countries. A letter from nine legal experts to the Australian Government warned that their intention to "carry over" Kyoto credits is "legally baseless" in international law.[35] The letter stated that "any expression of an intention or potential reliance on invalid Kyoto allowances or credits for meeting Paris Agreement targets conveys a message to the world that Australia wishes to reserve the right to avoid a

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[31] Climate Analytics Australia (2019) *Australia's proposed "Kyoto carryover" - nature, scale implications, legal issues and environmental integrity of the Paris Agreement*, https://climateanalytics.org/media/report_australia_kyoto_carryover_dec2019.pdf

[32] Climate Analytics Australia (2019) *Australia's proposed "Kyoto carryover" - nature, scale implications, legal issues and environmental integrity of the Paris Agreement*, https://climateanalytics.org/media/report_australia_kyoto_carryover_dec2019.pdf

[33] Readfern & Morton (2019) *Australia is the only country using carryover climate credits, officials admit* https://www.theguardian.com/environment/2019/oct/22/australia-is-the-only-country-using-carryover-climate-credits-officials-admit

[34] Merzian (2019) *Taking way too much credit*, https://www.tai.org.au/sites/default/files/P645%20Taking%20way%20too%20much%20credit%20%5BWEB%5D.pdf

[35] Mazengarb (2020) *Kyoto carryover is "legally baseless", international law experts warn Morrison government*, https://reneweconomy.com.au/kyoto-carryover-is-legally-baseless-international-law-experts-warn-morrison-government-72062/

significant proportion of mitigation effort needed to meet its 2030 target under the Paris Agreement".[36] Executive Secretary of the UNFCCC from 2010 to 2016, Christiana Figueres, described Australia's intended use of Kyoto credits: "It is not legal, it is not correct, it is not moral. It is cheating".[37]

43. Australia's intended use of Kyoto credits has been condemned internationally. In Madrid in 2019, the United Kingdom and New Zealand both spoke out against the use of Kyoto credits.[38]

44. Following criticism received from at the Madrid climate conference in 2019, the responsible Government Minister stated that Australia will only use the Kyoto carryover credits 'if we have to'.[39] In the absence of any credible climate policy it is difficult to foresee a situation where Australia won't seek to reply on them.

Australia's climate policies

45. Australia will only meet its 2030 emissions reduction target using legally baseless Kyoto credits due to the inadequacy of existing emissions reduction policies. The existing policy measures on climate and emissions reduction are described below.

Emissions Reduction Fund (ERF)

46. The ERF is an auctioning mechanism through which the Government purchases lowest cost abatement in the form of greenhouse gas abatement credits. The ERF is the Government's central climate policy and the only component of the Governments climate change strategy designed to directly reduce emissions. It is a voluntary scheme that provides carbon credits to individuals and businesses that undertake emissions reduction projects using a certified methodology. A reverse auction mechanism is used to select projects that will achieve emissions reduction at the lowest price.

47. The ERF is a 2.55 billion AUD scheme and has contracted 193 million tonnes of carbon abatement. However, only 52.7 million tonnes of this abatement has been delivered to

[36] Stephens et al. (2020) *Letter to The Hon Scot Morrison MP, Prime Minister*, https://twitter.com/ProfTimStephens/status/1235466623898640384/photo/1
[37] Fernyhough (2020) *Australia "cheating" on Paris, says former UN climate chief,* https://www.afr.com/policy/energy-and-climate/australia-cheating-on-paris-says-former-un-climate-chief-20200308-p547yf
[38] Mazengarb (2019) *COP25 talks labelled "lost opportunity", as Australia burns its international reputation*, https://reneweconomy.com.au/cop25-talks-labelled-lost-opportunity-as-australia-burns-its-international-reputation-46894/

[39] Skynews (2020) *Coalition will 'only use Kyoto credits' if emissions targets are not being met,* https://www.skynews.com.au/details/_6125086905001

date.[40] The majority of ERF projects are in the land-use sector. The scheme does not provide incentives to reduce emissions in the energy (electricity and stationary energy) or transport sectors, which make up 52.1% and 18.8% respectively of Australia's total domestic greenhouse gas emissions.[41]

48. The ERF commenced in 2014 with 2.5 billion AUD over 5 years. It received additional funding in 2019 under the Government's Climate Solutions Package. The additional funding was less than the initial amount (only 2 billion AUD) and is stretched out over a longer period (15 years).[42] In short, the already ineffective policy for reducing emissions was getting less money over a longer timeframe.

49. As the Government's flagship climate policy, the ERF has been ineffective at reducing Australia's emissions, which have continued to increase throughout the implementation of the ERF. Therefore, there is no indication that the ERF is capable of reducing emissions to the extent necessary for Australia to meet its NDC.

50. The Government has also flagged the possibility of using the ERF to fund new fossil fuel projects and update existing fossil fuel projects on the clearly inadequate basis that they are incrementally cleaner than the projects they replace. The fund has also been criticised for providing funding to projects that were already commercially viable and would have been built anyway.[43]

51. The Safeguard Mechanism is a component of the ERF, and requires Australia's largest emitters to measure, report and manage their emissions in line with an established baseline. Under the mechanism, large emitters should maintain emissions below their baseline level or purchase carbon offsets for emissions over their designated baseline. Baselines are often calculated at generously high levels and, because the mechanism allows for baseline adjustments, many baselines have been raised by the Government to accommodate for a variety of circumstances.[44] As a result, the Safeguard Mechanism has had little to no impact on reducing Australia's emissions.

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[40] Clean Energy Regulator (2020) *Auction March 2020,* http://www.cleanenergyregulator.gov.au/ERF/Auctions-results/march-2020

[41] Commonwealth of Australia (2020) *Quarterly Update of Australia's National Greenhouse Gas Inventory: December 2019*, https://www.industry.gov.au/sites/default/files/2020-05/nggi-quarterly-update-dec-2019.pdf

[42] Karp (2019) *Budget 2019: Coalition cuts climate solutions fund by $70m a year,* https://www.theguardian.com/environment/2019/apr/02/coalition-climate-solutions-fund-must-last-further-five-years#:~:text=But%20in%20the%20budget%20papers,%24189m%20over%20four%20years.

[43] Climate Council (2019) *Climate Solutions Package: Decoded*, https://www.climatecouncil.org.au/climate-solutions-package-decoded/

Morton (2019) *Emissions reduction fund to pay for fossil fuel plant that would be built anyway*, https://www.theguardian.com/environment/2019/feb/25/emissions-reduction-fund-to-pay-for-fossil-fuel-plant-that-would-be-built-anyway

Ogge & Merzian (2019) *ERF Rort Risk*, https://www.tai.org.au/sites/default/files/P768%20ERF%20Facilities%20Review%20-%20Australia%20Institute%20Submission%20%255bWEB%255d_0.pdf

[44] MacKenzie (2019) *Australia's Emissions Reduction Fund is almost empty. It shouldn't be refilled*, http://theconversation.com/australias-emissions-reduction-fund-is-almost-empty-it-shouldnt-be-refilled-92283

Wood (2015) *Why the ERF safeguard mechanism fails to balance environment and economic priorities*, https://grattan.edu.au/wp-content/uploads/2015/06/239_wood_submission__DoESafeguardMechanism.pdf

Renewable Energy Target

52. The Renewable Energy Target (RET) was introduced in 2001, with the aim of achieving a 2% renewable energy penetration of the nation's electricity generation. In 2009, the target was extended to 20% renewable energy by 2020. In 2011, the RET was split into two parts; a Large-scale Renewable Energy Target of 33,000 GWh by 2020, and a Small-scale Renewable Energy Scheme to help home-owners and small businesses install renewable energy systems.

53. Despite its success, the Coalition Government has confirmed they will not be replacing the RET beyond 2020.[45]

54. Sub-national policies will be responsible for continued growth in renewable energy investment, although the lack of a national RET increases investment uncertainty. Investment in large-scale renewable energy projects fell by 56% in 2019, out of step with global trends that saw investments up 1% from the previous year.[46]

National Energy Productivity Plan

55. In 2015, Federal and state level governments adopted the National Energy Productivity Plan (NEPP). The NEPP sets a target of 40% energy efficiency improvement between 2015 and 2030.

56. Energy efficiency to 2018 had improved by only 1.1%.[47] Australia is forecast to meet only half of its energy efficiency target, while the lack of progress is blamed on Australia's continuing high dependency on fossil fuels.[48]

ARENA

57. The Australian Renewable Energy Agency (ARENA) was established in 2012 to unlock investment in renewable energy projects. It is the main funder of renewable energy innovation in Australia.

Swann (2018) *Gorgon-tuan Problem*, https://www.tai.org.au/sites/default/files/P635%20Gorgon-tuan%20Problem%20%5BWeb%5D.pdf

[45] McConnell (2019) *Australia has met its renewable energy target. But don't pop the champagne*, http://theconversation.com/australia-has-met-its-renewable-energy-target-but-dont-pop-the-champagne-122939

[46] Hannam (2020) *Spending on large-scale renewable energy in Australia plunges*, https://www.smh.com.au/business/markets/spending-on-large-scale-renewable-energy-in-australia-plunges-20200116-p53s4g.html

[47] Saddler (2020) *Australia has failed miserably on energy efficiency – and government figures hide the truth*, http://theconversation.com/australia-has-failed-miserably-on-energy-efficiency-and-government-figures-hide-the-truth-123176

[48] Matich (2020) *Monash University research exposes national energy productivity shortfall*, https://www.pv-magazine-australia.com/2020/05/07/monash-university-research-exposes-national-energy-productivity-shortfall/

58. ARENA's original legislation budgeted an average 315 million AUD per year 2012-20.[49] ARENA's funding was subsequently decreased under the current Government to 240 million AUD in 2014 and even further to 194 million AUD in 2016 for the period 2012-22.[50]

59. In its first five years of operation ARENA and its sister organisation the Clean Energy Finance Corporation (CEFC), which operates like a public green bank, catalysed over $23 billion in renewable energy investments.[51]

60. ARENA will require substantial funding if it is to drive innovation in renewable electricity generation, transport and other sectors necessary to achieve emissions reduction.

61. On 17 September 2020, the Government announced additional funding for ARENA at a base level of 140 million AUD per annum until 2022, another significant reduction in funding levels.

62. The Government is also attempting to broaden the mandate of ARENA and the CEFC to encourage support for non-renewable energy generation, storage and transmission, by allowing them to fund new fossil gas generation, carbon capture and storage (CCS) and invest in potentially loss-making projects where this was not previously allowed.[52]

Technology Investment Roadmap

63. The Government's Technology Investment Roadmap outlines the continued growth of fossil fuels in Australia's future technology mix: carbon capture and storage (CCS), hydrogen produced with fossil fuels, and gas. It does not quantify or provide for any emissions reductions over the next decade to 2030.

64. CCS is prioritised in the Technology Investment Roadmap to support power generation from oil and gas extraction, natural gas processing, industry and hydrogen production.[53] Despite years of research and trials, CCS (which is used to capture and store greenhouse gases emitted from fossil fuel power stations and energy intensive industries) remains a highly costly technology and is yet to be established at scale. According to Australia Institute

[49] Australian Renewable Energy Agency Act 2011, section 64 (1).
[50] Clean Energy Legislation (Carbon Tax Repeal) Act 2014, schedule 5.
Budget Savings (Omnibus) Act 2016, schedule 5.
[51] Browne et al. (2019) *Saved by the Bench,* https://www.tai.org.au/content/saved-bench
[52] Foley (2020) *Taylor expands clean energy fund's remit to fire up gas-led recovery,* https://www.smh.com.au/politics/federal/taylor-expands-clean-energy-fund-s-remit-to-fire-up-gas-led-recovery-20200827-p55pvu.html
Clean Energy Finance Corporation Amendment (Grid Reliability Fund) Bill 2020, https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=CHAMBER;id=chamber%2Fhansardr%2F3b94a6bd-87fb-43ab-85ed-81ebdcb4940b%2F0048;query=Id%3A%22chamber%2Fhansardr%2F3b94a6bd-87fb-43ab-85ed-81ebdcb4940b%2F0048%22
[53] Commonwealth of Australia (2020) *Technology Investment Roadmap 2020*, https://www.industry.gov.au/sites/default/files/September%202020/document/first-low-emissions-technology-statement-2020.pdf

research, 1.3 billion AUD in Government support has been provided for CCS to date but there are still no working examples of CCS for coal and only one for gas which was three years delayed and is still not fully operational in Australia.[54]

65. The roadmap defines clean hydrogen as including hydrogen made from fossil fuels and uses CCS to make it a low emissions technology, instead of aiming to build a hydrogen industry using renewable energy.[55]

66. Gas generation is highlighted by the Roadmap as a crucial technology that will support renewable energy and emissions reduction efforts in Australia and the Pacific region. This is inconsistent with research that shows gas is not a low emissions technology, being mostly composed of methane, which has 85 times the warming impact of carbon dioxide.[56] Gas also displaces cheaper and cleaner sources of energy when used for heating houses, hot water and industrial uses instead of displacing coal.[57] The Roadmap identifies that where the private sector does not lead investment, the Government will publicly finance dispatchable gas generation.[58]

Adaptation policies

67. In addition to inadequate policies to mitigate climate change, the Australian Government has been reticent to act on climate change adaptation.

68. Climate change is already impacting on human and natural systems, with observable changes to many land and ocean ecosystems. Some impacts may be long-lasting or irreversible. Future climate-related risks can be reduced by implementing adaptation efforts. Mitigation to slow sea level rise can enable greater adaptation opportunities for human and ecological systems in small low-lying islands. Adaptation requirements are expected to be significantly lower with 1.5°C of warming in comparison with 2°C of warming, however there are still limits to the adaptive capacity of human and ecological systems at 1.5°C, particularly in vulnerable regions such as small, low-lying island, therefore requiring extensive adaptation efforts.[59]

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[54] Browne & Swann (2017) *Money for Nothing* https://www.tai.org.au/content/money-nothing
[55] Commonwealth of Australia (2020) *Technology Investment Roadmap 2020*, https://www.industry.gov.au/sites/default/files/September%202020/document/first-low-emissions-technology-statement-2020.pdf
[56] Baxter (2020) *Scott Morrison's gas transition plan is a dangerous road to nowhere*, http://theconversation.com/scott-morrisons-gas-transition-plan-is-a-dangerous-road-to-nowhere-130951
[57] Ogge & Swann (2020) *Gas Fired Backfire*, https://www.tai.org.au/sites/default/files/P908%20Gas-fired%20backfire%20%5Bweb%5D_0.pdf
[58] Commonwealth of Australia (2020) *Technology Investment Roadmap 2020*, https://www.industry.gov.au/sites/default/files/September%202020/document/first-low-emissions-technology-statement-2020.pdf
[59] Intergovernmental Panel on Climate Change (2019) *Summary for Policymakers. In: Global Warming of 1.5°C*, https://www.ipcc.ch/site/assets/uploads/sites/2/2019/05/SR15_SPM_version_report_LR.pdf

69. Climate change was a significant driver of the devastating 2019-20 summer bushfires across Australia, making the conditions that enabled the fires at least 30% more likely.[60] Climate change plays a role in making fires larger and more frequent due to dryness and dangerous weather. Australia has warmed by approximately 1°C since 1990 and 2019 was the warmest year on record, 1.52°C above the 1961-90 average. A fire year like 2019 would be at least four times more likely in a 2°C world and normal in a world that is 2.5-3°C warmer than average. More than three-quarters of the Australian continent experienced the worst bushfire conditions on record.[61]

70. The bushfires emitted approximately two-thirds of Australia's annual emissions, which could take forests more than 100 years to reabsorb.[62] Emissions from bushfires are excluded from Australia's national emissions accounting under the Paris Agreement NDC.

71. The Australian Government has taken limited action to enable or encourage adaptation to the impacts and risks of climate change. In 2015, it updated the National Climate Resilience and Adaptation Strategy, yet the strategy does not grapple with the pace and extent of climate change, such as impacts that are already occurring. Despite the strategy calling for policy and planning to account for climate change risks, this is not occurring.

72. The National Climate Change Adaptation Research Facility (NCCARF) and the Climate Adaptation Flagship of the CSIRO both served as world leading providers of adaptation information, yet both have been closed.[63]

73. Australia remains reticent to link the increasing incidence and severity of extreme weather events to climate change. Government responses, including to recent droughts, forest fires, flooding, extreme heat and cyclones – fail to integrate long-term adaptation.

74. For example, the Government has been criticised by the CSIRO for a lack of coordination or mandate to assess the broad, systemic risks associated with climate change. CSIRO urged the Government to embed climate and disaster resilience as a national priority and invest in research to bridge knowledge gaps.[64]

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[60] van Oldenborgh et al. (2020) *Attribution of the Australian bushfire risk to anthropogenic climate change*, https://nhess.copernicus.org/preprints/nhess-2020-69/

[61] Dunne, Gabbatiss & McSweeney (2020) *Media reaction: Australia's bushfires and climate change*, https://www.carbonbrief.org/media-reaction-australias-bushfires-and-climate-change
Dunne (2020) *Explainer: How climate change is affecting wildfires around the world*, https://www.carbonbrief.org/explainer-how-climate-change-is-affecting-wildfires-around-the-world

[62] Foley (2020) *Bushfires spew two-thirds of national carbon emissions in one season,* https://www.smh.com.au/politics/federal/bushfires-spew-two-thirds-of-national-carbon-emissions-in-one-season-20200102-p53oez.html

[63] Rickards & Howden (2020) *Climate adaptation is not a far-off idea - it's here and it affects us all*, https://www.smh.com.au/environment/climate-change/climate-adaptation-is-not-a-far-off-idea-it-s-here-and-it-affects-us-all-20200109-p53q7r.html

[64] Burgess (2020) CSIRO calls for leadership on climate change amid "low levels of public understanding", https://www.canberratimes.com.au/story/6861114/csiro-calls-for-leadership-on-climate-change-amid-low-levels-of-public-understanding/

75. Although the Government has established a Disaster and Climate Resilience Reference Group, little to no information is available to show the discussions and outcomes delivered by this group.