QUEENSLAND'S *HUMAN RIGHTS ACT*: A NEW FRONTIER FOR AUSTRALIAN CLIMATE CHANGE LITIGATION?

JUSTINE BELL-JAMES* AND BRIANA COLLINS**

In 2019, the Queensland Parliament enacted a Human Rights Act, enshrining, inter alia, the human right to life. The Human Rights Act 2019 (Qld) presents a timely opportunity to open the next chapter in Australia's climate change litigation history – a human rights-based climate change case. This article will consider the possible characterisation of such a case, drawing on international experience. Ultimately, it will conclude that a rights-based climate change case is feasible in Queensland, and a successful case would have national and international ramifications, due to the potential for Queensland coal deposits to contribute to global climate change. Further, a successful rights-based climate change case in Queensland has the capability to set powerful precedent in the growing body of climate litigation both domestically and internationally, where international climate litigation has been observed as taking a 'rights turn'.

I INTRODUCTION

Climate change is an urgent global problem, yet one which governments around the world have struggled to solve. In the absence of strong policy action to address the causes and impacts of climate change, citizens have taken to the courts to seek redress. The result is a rich body of climate change case law, in Australia and internationally.

As there is generally no explicit climate change-related cause of action available, litigants have framed their arguments within recognised causes of action, such as judicial or merits review of government decisions, or negligence. To date, the majority of climate change litigation in Australia has centred around decisions made during the environmental impact assessment ('EIA') process for

* LLB(Hons), GradDipLegalPrac, PhD (QUT), Associate Professor, TC Beirne School of Law, University of Queensland.

** LLB(Hons)/BA Candidate, University of Queensland.

large-scale, emissions-intensive coal mines.[1] These so-called 'first generation'[2] cases have certainly made significant progress in embedding climate change within both EIA frameworks and judicial discourse,[3] but it has been argued that Australian climate change litigation has not yet had the 'transformative' impact that it has had in other jurisdictions.[4] This moment may be approaching in light of the New South Wales Land and Environment Court's 2019 decision in *Gloucester Resources Ltd v Minister for Planning*, in which Preston CJ upheld a government's decision to reject an application for a coal mine development.[5] The influence of this judgment on other courts remains to be seen though, and cases in other jurisdictions may continue to be stymied by the legislative regimes courts are required to operate within, as well as the narrow scope of review available in some instances.[6] Unless EIA laws are specifically amended to become more 'climate-friendly', and the 'market substitution defence'[7] can be overcome, a dramatic shift in jurisprudence is ultimately at the discretion of the court making the decision.

The slow progress of climate change arguments through EIA cases has led scholars to consider the legal basis for the 'next generation' of Australian climate litigation.[8] Peel, Osofsky and Foerster posit that while 'first generation' cases have focused on discrete projects and statutes, 'next generation' cases 'are founded on an accountability model whereby legal interventions are designed to hold governments and corporations directly to account for the climate change implications of their activities'.[9] The Dutch *Urgenda Foundation v Netherlands*

1 See, eg, *Greenpeace Australia Ltd v Redbank Power Co Pty Ltd* (1994) 86 LGERA 143; *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment and Heritage* (2006) 232 ALR 510; *Australian Conservation Foundation Inc v Minister for the Environment* (2016) 251 FCR 308; *Australian Conservation Foundation Inc v Minister for the Environment and Energy* (2017) 251 FCR 359; *Xstrata Coal Queensland Pty Ltd v Friends of the Earth – Brisbane Co-Op Ltd* [2012] QLC 13, [576] (*'Wandoan Mine Case'*)*; Hancock Coal Pty Ltd v Kelly [No 4]* [2014] QLC 12; *Adani Mining Pty Ltd v Land Services of Coast and Country Inc* [2015] QLC 48; *Coast and Country Association of Queensland Inc v Smith* [2015] QSC 260; *Coast and Country Association of Queensland Inc v Smith* [2016] QCA 242; *Land Services of Coast and Country Inc v Chief Executive*, *Department of Environment and Heritage Protection* (2016) 222 LGERA 122; *Gloucester Resources Ltd v Minister for Planning* (2019) 234 LGERA 257.

2 Jacqueline Peel, Hari Osofsky and Anita Foerster, 'Shaping the "Next Generation" of Climate Change Litigation in Australia' (2017) 41(2) *Melbourne University Law Review* 793, 795.

3 See, eg, Justine Bell-James and Sean Ryan, 'Climate Change Litigation in Queensland: A Case Study in Incrementalism' (2016) 33(6) *Environmental and Planning Law Journal* 515.

4 Peel, Osofsky and Foerster (n 2) 796.

5 (2019) 234 LGERA 257.

6 For example, judicial review is the only available avenue to challenge decisions made under parts 7 to 9 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), as there is no explicit right to merits review granted. Note however that there is limited scope for internal review of referral decisions per ss 74C(3)(c), 78–79.

7 See, eg, Bell-James and Ryan (n 3) 524. This so-called 'defence' is evidence led by a proponent that, if their mine were to be refused, coal would be sourced elsewhere and burned regardless. Therefore, refusing the mine would not lead to a net reduction in greenhouse gas emissions. This will be discussed in detail below at Part V(A).

8 Peel, Osofsky and Foerster (n 2).

9 Ibid 803 (emphasis omitted).

('*Urgenda*')[10] case is a prime example of 'next generation' climate change litigation, and represented a historic moment in global climate change jurisprudence. In 2015 the District Court of the Hague found the Dutch government liable in negligence for failing to adequately address the threat of climate change,[11] with this decision upheld by the Hague Court of Appeal in 2018, and the Dutch Supreme Court in 2019.[12] Since 2015, there has been much discussion as to whether an *Urgenda*-style tort law case could be successful before Australian courts,[13] as the next step in 'next generation' climate litigation.

An alternative line of 'next generation' climate litigation builds upon human rights law. Peel and Osofsky observe that, internationally, climate change litigation has taken a 'rights turn', with a trend of human rights cases being brought before courts, accompanied by increasing judicial receptivity to these arguments.[14] In 2015, Pakistan's Lahore High Court ruled that a failure to implement extant climate change policy was a breach of the applicant's human rights, including the right to life.[15] A number of other cases are on foot in jurisdictions across the globe,[16] as well as a complaint lodged with the United Nations ('UN') Human Rights Committee in May 2019 by a group of Torres Strait Islanders against the Australian government. This claim alleged that the government's failure to take action on climate change has contravened, amongst other rights, the human right to life.[17] As observed in a recent report by the UN Special Rapporteur on Extreme Poverty and Human Rights, '[c]limate change threatens truly catastrophic consequences across much of the globe and the human rights of vast numbers of people will be among the casualties'.[18] For this reason, the 'rights turn' is hardly surprising.

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10 Rechtbank Den Haag [Hague District Court], C/09/456689/HA ZA 13–1396 (24 June 2015) <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:7196> ('*Urgenda*').

11 Ibid. Note that human rights arguments were made in this case, but were unsuccessful.

12 *Netherlands v Urgenda Foundation*, Gerechtshof Den Haag [Hague Court of Appeal], 200.178.245/01 (9 October 2018) <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI%3ANL%3AGHDHA%3A2018%3A2610&fbclid=IwAR2LdCLjZFm4T2e3byjDP8dYNzDi8lAOOKVa05DwcVXpnnUq3_ks9pfN_cQ>; *The Netherlands v Urgenda Foundation*, Hoge Raad der Nederlanden [Supreme Court of the Netherlands], ECLI:NL:HR:2019:2007 (20 December 2019) <https://www.urgenda.nl/wp-content/uploads/ENG-Dutch-Supreme-Court-Urgenda-v-Netherlands-20-12-2019.pdf>.

13 See, eg, Tim Baxter, 'Urgenda-Style Climate Litigation Has Promise in Australia' (2017) 32(3) *Australian Environment Review* 70; 'Urgenda's Big Climate Win: What Does It Mean for Australia?', *Environmental Defender's Office (Qld)* (Web Page, 16 October 2018) <https://www.edoqld.org.au/urgendas_big_climate_win>; Chris McGrath, 'Urgenda Appeal Is Groundbreaking for Ambitious Climate Litigation Globally' (2019) 36(1) *Environmental and Planning Law Journal* 90.

14 Jacqueline Peel and Hari M Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7(1) *Transnational Environmental Law* 37, 40.

15 *Ashgar Leghari v Pakistan*, Lahore High Court Green Bench (Pakistan), WP No 25501/2015, Orders of 4 September 2015 and 14 September 2015 <https://elaw.org/PK_AshgarLeghari_v_Pakistan_2015>.

16 See discussion in Part IV(C).

17 ClientEarth, 'Climate Threatened Torres Strait Islanders Bring Human Rights Claim against Australia' (Press Release, 12 May 2019) <https://www.clientearth.org/press/climate-threatened-torres-strait-islanders-bring-human-rights-claim-against-australia/>.

18 Special Rapporteur on Extreme Poverty and Human Rights, *Climate Change and Poverty*, UN Doc A/HRC/41/39 (17 July 2019) [1].

To date, there have been no Australian cases whereby human rights violations have been argued on the basis of climate change. This is likely due to the lack of legislative human rights protections in most Australian jurisdictions, with the exception of the Australian Capital Territory ('ACT'),[19] Victoria,[20] and very recently, Queensland, which enacted the *Human Rights Act 2019* (Qld) ('*HR Act*') in February 2019. Queensland has been a 'flash point for the conflict between coal and the climate in the courts';[21] it is home to the World Heritage listed Great Barrier Reef, numerous low-lying coastal settlements, prime agricultural land, and areas of great significance to indigenous peoples. Queensland's Galilee Basin is also ground zero for proposed mining projects of a scale never seen before in Australia, and significant on a global scale.[22] For these reasons, Queensland may be a natural choice of jurisdiction for a human rights and climate change claim to be pursued, building on previous coal mine litigation, and a critical question is raised as to whether human rights legislation could be a vehicle for climate change arguments in Australia, utilising the Queensland *HR Act*.

This article aims to consider the possibility of climate change litigation taking a 'rights turn' in Australia, through Queensland's new *HR Act*, and the right to life in particular. Whilst other human rights may be relevant in the climate change context, consideration of all of these rights is beyond the scope of an article of this length. The right to life has been chosen as it is likely to be one of the strongest arguments in this context, due to significant international progress in establishing a link between climate change and the right to life, combined with the large body of scientific literature outlining the risks to human life and wellbeing in Queensland as a result of unabated climate change.[23]

This article will commence with an explanation of 'unabated' climate change as defined in international norms, and consider how this issue has evolved through law, policy and public discourse to become a human rights issue. It will then provide an overview of the relevant provisions of the Queensland *HR Act* and identify the mechanisms available that are prima facie useful in the context of potential climate litigation. As the *HR Act* is explicitly intended to reflect protections at international law,[24] it will analyse the interpretation of the right to life at international law and in other jurisdictions, with particular attention to its relationship to climate change.

This article will then provide a detailed analysis as to why unabated climate change may be at odds with Queensland's legislative right to life, as scientists predict dire consequences for the human wellbeing of Queenslanders as climate change impacts manifest. It will make some observations as to how a case may

19 *Human Rights Act 2004* (ACT).

20 *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Victorian Charter*').

21 Bell-James and Ryan (n 3) 517.

22 See, eg, 'Overview', *The Galilee Basin* (Web Page, 26 November 2015) <http://galileebasin.org/overview/>.

23 The specific emphasis on health impacts in Queensland is critical as the Act is not expressed to be extraterritorial in nature. Specifically, the Act states that '[a]ll individuals in Queensland have human rights': *Human Rights Act 2019* (Qld) s 11(1) ('*HR Act*').

24 Explanatory Notes, Human Rights Bill 2018 (Qld) 1–2.

be framed in Queensland, building on existing challenges to coal mine developments, with reference to potential limitations and caveats. Ultimately, it will conclude that the Queensland *HR Act* provides a fertile ground for climate change arguments – perhaps providing a roadmap for the next frontier of climate change litigation in Australia.

II UNABATED CLIMATE CHANGE AND HUMAN RIGHTS

It is crucial to commence this article by defining 'unabated' climate change and demonstrating why it is a human rights issue. To reduce or limit the impacts of climate change, scientific debate has often centred around what is a 'safe' level of climate change. This stems from the language of the *UN Framework Convention on Climate Change*, of which the primary objective is to '[stabilise] … greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system'.[25]

In the early 21st century, 2°C average global warming was viewed as safe, or as the guardrail for safe climate change.[26] This 2°C target was adopted in the 2009 *Copenhagen Accord* as an objective for states to pursue.[27] Scientists have utilised this 2°C target to formulate a 'carbon budget'; that is, an amount of carbon dioxide which can be emitted globally while keeping climate change under the agreed 'safe' limit. A 2009 paper indicated that, to keep warming under 2°C, cumulative global greenhouse gas emissions for the period 2000–50 could not exceed 1,000 Gt.[28] In 2015, it was suggested that over 80% of global current coal reserves should remain unused in order to meet this target.[29] This 'carbon budget' has been utilised in climate change litigation as a basis for arguing that the greenhouse gas emissions derived from coal burned from a single mine can be 'significant' in a global context, as they will represent a discernible proportion of the global carbon budget.[30]

More recently, 1.5°C has emerged as the target which should be adhered to in order to keep climate change impacts to a 'safe' level.[31] To this end, the central

25 *United Nations Framework Convention on Climate Change*, opened for signature 4 June 1992, 1771 UNTS 107 (entered into force 21 March 1994) art 2.

26 See, eg, Christopher B Field et al, 'Summary for Policymakers' in Christopher B Field et al (eds), *Climate Change 2014: Impacts*, *Adaptation*, *and Vulnerability* (Cambridge University Press, 2014) 1, 4–8.

27 Conference of the Parties, United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on Its Fifteenth Session, Held in Copenhagen from 7 to 19 December* 2009, UN Doc FCCC/CP/2009/11/Add.1 (30 March 2010) 4, 5 [1] ('*Copenhagen Accord*').

28 Malte Meinshausen et al, 'Greenhouse-Gas Emission Targets for Limiting Global Warming to 2°C' (2009) 458(7242) *Nature* 1158.

29 Christophe McGlade and Paul Ekins, 'The Geographical Distribution of Fossil Fuels Unused When Limiting Global Warming to 2°C' (2015) 517(7533) *Nature* 187, 187.

30 See, eg, Malte Meinshausen, *Contribution of the Wandoan Coal Mine to Climate Change and Ocean Acidification* (Expert Report, 3 August 2011) 18 [44].

31 *Report on the Structured Expert Dialogue on the 2013–2015 Review*, UN Doc FCCC/SB/2015/INF.1 (4 May 2015) 32 [113], 33.

goal of the *Paris Agreement* is to reduce warming to well below 2°C, with an aspirational goal of 1.5°C.[32] However, if warming continues at its current rate, it is likely that the 1.5°C threshold will be crossed sometime between 2030 and 2052.[33] Although 1.5°C and 2°C do not seem like vastly different targets, the recent 2018 Intergovernmental Panel on Climate Change ('IPCC') Special Report has highlighted the substantially worsened impacts that would occur under an average of 2°C warming.[34] In the Australian context, heatwaves would be much more commonplace in a 2°C average warmer world than in a 1.5°C average warmer world.[35] Risks of drought and extreme precipitation are lower under 1.5°C of warming, and global mean sea level rise will be of a lesser magnitude.[36] Species loss and extinction will be lower under 1.5°C, as will impacts on oceans and marine biodiversity.[37] Leaders of Pacific Island nations are strong advocates for a 1.5°C target, as anything higher will devastate their communities.[38]

Even at 1.5°C average warming, there are likely to be significant impacts on human life and wellbeing. Risks to health, food and water security, livelihoods and economic growth increase with 1.5°C average warming, and increase even further with 2°C average warming.[39] However, limiting global warming to 1.5°C (compared with 2°C) could reduce the number of people exposed to climate risks and poverty by as much as several hundred million by 2050.[40] Globally, the impacts of unabated climate change will be many and varied, including melting of glaciers and ice sheets, increased frequency and intensity of extreme weather events such as heatwaves, droughts, floods, cyclones and fires, changes in distribution of terrestrial and marine species, impacts on crops and food security, human health impacts from extreme heat and cold, and increased poverty.[41]

As climate change is projected to have devastating impacts on human systems as well as the natural environment, unabated climate change has, in the past two decades, been positioned as a human rights issue. This has been achieved, in part, via the propagation of the term 'climate justice', which

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32 Conference of the Parties, *Report of the Conference of the Parties on Its Twenty-First Session, Held in Paris from 30 November to 13 December* 2015, UN Doc FCCC/CP/2015/10/Add.1 (29 January 2016) art 2 ('*Paris Agreement*'). Note that these temperature goals are based on pre-industrial levels.

33 Myles Allen et al, 'Summary for Policymakers' in Valérie Masson-Delmotte et al (eds), *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* (Intergovernmental Panel on Climate Change, 2018) 3, 4.

34 Ibid 9–10.

35 Andrew D King, David J Karoly and Benjamin J Henley, 'Australian Climate Extremes at 1.5°C and 2°C of Global Warming' (2017) 7(6) *Nature Climate Change* 412, 415.

36 Allen et al (n 33) 7.

37 Ibid 8, 10.

38 See, eg, Kosi Latu, '1.5 to Stay Alive: Reflecting on the IPCC Special Report on Global Warming of 1.5 Degrees Celsius', *SPREP* (Column, 8 October 2018) <https://www.sprep.org/news/15-to-stay-alive-reflecting-on-the-ipcc-special-report-on-global-warming-of-15-degrees-celsius>.

39 Allen et al (n 33) 9.

40 Ibid.

41 See, eg, QK Ahmad et al, 'Summary for Policymakers' in James J McCarthy et al (eds), *Climate Change 2001: Impacts*, *Adaptation*, *and Vulnerability* (Cambridge University Press, 2001) 1.

encapsulates the message that those who contribute the least to fuelling climate change will be disproportionately affected by its impacts. It aims to frame the issue as a human problem with human ramifications, shifting the focus from pure environmental degradation to issues such as threats to human life, exacerbation of poverty, the plight of climate refugees, and generally adopting an intersectional lens in observing the different manner in which communities experience climate impacts.[42] The first climate justice summit was held at the Hague in 2000, during the sixth session of the *United Nations Framework Convention on Climate Change Conference* ('*UNFCCC*'),[43] and the relationship between human rights and climate change has since become part of the fabric of international human rights policy. A Human Rights Council Resolution made in 2008 explicitly recognised that climate change 'poses an immediate and far-reaching threat to people and communities around the world and has implications for the full enjoyment of human rights'.[44] These sentiments were reiterated in a 2009 Resolution, which noted that 'climate change-related impacts have a range of implications, both direct and indirect, for the effective enjoyment of human rights including, inter alia, the right to life'.[45] These resolutions were followed by a study undertaken by the Office of the United Nations High Commissioner for Human Rights ('OHCHR') on the relationship between climate change and human rights. This culminated in a report released in 2009, which is often referenced as a 'landmark' report recognising the interconnectedness of climate change harms and fundamental human rights ('*OHCHR Report*').[46] The *Cancun Agreements* under the *UNFCCC* noted the 2009 resolution of the Human Rights Council, recognising that climate change will have direct and indirect implications for the effective enjoyment of human rights.[47] Between 2009 and 2015, a long stream of similar resolutions and workshops came out of the international law community,[48] culminating in human rights themes appearing in

42 See, eg, Paul Chatterton, David Featherstone and Paul Routledge, 'Articulating Climate Justice in Copenhagen: Antagonism, the Commons, and Solidarity' (2012) 45(3) *Antipode* 602; Marcelo Wilson Furlan Matos Alves and Enzo Barberio Mariano, 'Climate Justice and Human Development: A Systematic Literature Review' (2018) 202 *Journal of Cleaner Production* 360.

43 Frederika Whitehead, 'The First Climate Justice Summit: A Pie in the Face for the Global North', *The Guardian* (online, 17 April 2014) <https://www.theguardian.com/global-development-professionals-network/2014/apr/16/climate-change-justice-summit>.

44 *Report of the Human Rights Council*, UN GAOR, 63rd sess, Supp No 53, UN Doc A/63/53 (2008, adopted 28 March 2008) 136.

45 *Human Rights and Climate Change*, HRC Res 10/4, UN Doc A/HRC/RES/10/4 (25 March 2009).

46 Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights*, 10th sess, Agenda Item 2, UN Doc A/HRC/10/61 (15 January 2009) ('*OHCHR Report*'). See, eg, Felix Kirchmeier and Yves Lador, 'From Copenhagen to Paris at the UN Human Rights Council: When Climate Change Became a Human Rights Issue' in Sébastien Duyck, Sébastien Jodoin and Alyssa Johl (eds), *The Routledge Handbook of Human Rights and Climate Governance* (Routledge, 2018) 145, 147.

47 Conference of the Parties, United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on Its Sixteenth Session*, *Held in Cancun from 29 November to 10 December 2010*, UN Doc FCCC/CP/2010/7/Add.1 (15 March 2011) Preamble para 7 ('*Cancun Agreements*').

48 See, eg, Kirchmeier and Lador (n 46).

the Preamble to the *Paris Agreement*, described as a 'crescendo' on the relationship between human rights and climate change.[49]

This international backdrop demonstrates that climate change has become a mainstream human rights issue, creating an important role for Queensland's new *HR Act* as a vehicle for climate change litigation.

III THE QUEENSLAND *HUMAN RIGHTS ACT*

A Legislative Enshrinement of Human Rights

The Human Rights Bill 2018 (Qld) was introduced to Queensland's Parliament on 31 October 2018, fulfilling a 2017 election commitment[50] which followed an inquiry into the appropriateness and desirability of a human rights Act for Queensland.[51] The Bill was eventually passed into law on 27 February 2019, and is anticipated to commence in early 2020. The *HR Act* is expressly stated to be derived from relevant international laws, including the *International Covenant on Civil and Political Rights* ('*ICCPR*'), the *Universal Declaration of Human Rights* ('*UDHR*'), and the *International Covenant on Economic*, *Social and Cultural Rights* ('*ICESCR*').[52] The *HR Act* also explicitly states that '[i]nternational law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision'.[53]

The *HR Act* introduces legislative protection for 23 human rights. Several of these rights have potential application to climate change, including:

- The right to life – '[e]very person has the right to life and has the right not to be arbitrarily deprived of life';[54]
- Property rights – '[a]ll persons have the right to own property', and '[a] person must not be arbitrarily deprived of the person's property';[55]
- Cultural rights generally – '[a]ll persons with a particular cultural, religious, racial or linguistic background must not be denied the right, in community with other persons of that background, to enjoy their culture, to declare and practise their religion and to use their language';[56]

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49 John Knox, *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, UN Doc A/HRC/31/52 (1 February 2016) 6 [17].

50 Yvette D'Ath, 'Human Rights Bill Honours Another Palaszczuk Government Election Commitment' (Media Statement, 31 October 2018) <http://statements.qld.gov.au/Statement/2018/10/31/human-rights-bill-honours-another-palaszczuk-government-election-commitment>.

51 Legal Affairs and Community Safety Committee, Parliament of Queensland, *Inquiry into a Possible Human Rights Act for Queensland* (Report No 30, June 2016).

52 Explanatory Notes, Human Rights Bill 2018 (Qld) 1–2.

53 *HR Act* s 48(3).

54 Ibid s 16.

55 Ibid s 24.

56 Ibid s 27.

- Cultural rights for Aboriginal peoples and Torres Strait Islander peoples – the *HR Act* recognises that 'Aboriginal peoples and Torres Strait Islander peoples hold distinct cultural rights', and sets out a series of protections for these rights;[57] and
- The right to all persons to be equal before the law.[58]

As noted above, this article will focus on the right to life.

B Creation of Obligations

The *HR Act* provides protection for these legislatively enshrined human rights through the so-called 'dialogue model', which originated in the United Kingdom ('UK') and is now adopted in Victoria and the ACT, described as a model which features 'parliament retaining its legislative supremacy, the courts playing a subsidiary but important interpretive and declaratory role, and the executive facilitating the creation of a human rights culture across government'.[59]

That is, it is intended that human rights discourse permeates all facets of public decision-making, with legal challenge available as a supplementary mechanism where this has not occurred.[60] The dialogue model is given effect in the *HR Act* through the imposition of a number of obligations on the three arms of government, and corresponding, although limited, enforcement mechanisms available to eligible seekers of redress. The *HR Act* establishes different obligations for Parliament, courts and tribunals, and the executive.

The *HR Act* governs Parliament by requiring a member of Parliament who proposes a new Bill to prepare a statement of compatibility for the Bill.[61] The Bill is then scrutinised by the committee responsible for the portfolio.[62] This does not necessarily mean that legislation must always be compatible with human rights, as it is expressly stated that a failure to comply with these requirements in relation to a Bill will not affect the validity of a resulting Act.[63] Additionally, Parliament can make an 'override declaration'. This is an express declaration in an Act that the Act or provision, or another Act or provision, has effect despite

57 Ibid s 28.

58 Ibid s 15(3). There has been some discussion of the right to equal treatment before the law and its relevance to the principle of intergenerational equity, particularly regarding the disproportionate impacts of climate change that will be felt by young people: see, eg, John von Doussa, Allison Corkery and Renée Chartres, 'Human Rights and Climate Change' (Background Paper, Human Rights and Equal Opportunity Commission, 2008). A recent case targeting climate change inaction filed against the European Parliament has run a human rights argument including the right to equal treatment before the law in their application to court: see *Armando Carvalho v European Parliament* (General Court (Second Chamber), T-330/18 ECLI:EU:T:2019:324, 8 May 2019) [30]. Note that this case is currently on appeal before the Court of Justice of the European Union (C-565/19 P).

59 George Williams and Daniel Reynolds, 'A Human Rights Act for Queensland? Lessons from Recent Australian Experience' (2016) 41(2) *Alternative Law Journal* 81, 81.

60 This is supported by the objects of the Act, which are '(a) to protect and promote human rights; and (b) to help build a culture in the Queensland public sector that respects and promotes human rights; and (c) to help promote a dialogue about the nature, meaning and scope of human rights': *HR Act* s 3.

61 *HR Act* s 38(1).

62 Ibid s 39.

63 Ibid s 42.

being incompatible with one or more human rights.[64] It is the intention of Parliament that such a declaration only be made in exceptional circumstances,[65] and that a member introducing the Bill containing an override provision must make a statement explaining the exceptional circumstances that justify its inclusion.[66]

There is also some scope for the Supreme Court to make a declaration of incompatibility, which is a declaration to the effect that the Court is of the opinion that a statutory provision cannot be interpreted in a way compatible with human rights.[67] These declarations cannot be made in relation to override declarations.[68] A declaration of incompatibility does not affect the validity of the statutory provision, nor does it create in any person a legal right or give rise to any civil cause of action.[69] However it does create an obligation upon the relevant Minister to table a copy of the declaration before the legislative assembly,[70] and prepare a written response to the declaration.[71] The legislative assembly in turn must refer the declaration to the relevant portfolio committee.[72]

Section 48 of the *HR Act* outlines the obligations of courts and tribunals. It provides that '[a]ll statutory provisions must, to the extent possible that is consistent with their purpose, be interpreted in a way that is compatible with human rights'[73] and, if it cannot be, 'the provision must, to the extent possible that is consistent with its purpose, be interpreted in a way that is most compatible with human rights'.[74] The provision also explicitly empowers courts and tribunals to consider international law and the judgments of domestic, foreign and international courts relevant to a human right in interpreting a statutory provision.[75] Furthermore, it clearly intends to nurture a dialogue of human rights discourse in the judiciary and between the three branches of government with regard to interpretation of existing laws.

Finally, the *HR Act* also regulates the decision-making functions of government. Under section 58(1), it is unlawful for a public entity to act or make

64 Ibid s 43(1)–(2).

65 Ibid s 43(4). Examples given in the legislative notes are 'war, a state of emergency, an exceptional crisis situation constituting a threat to public safety, health or order'.

66 Ibid s 44(1).

67 Ibid s 53(2). This applies 'if (a) in a proceeding in the Supreme Court a question of law arises that relates to the application of this Act or a question arises in relation to the interpretation of a statutory provision in accordance with this Act; or (b) a question is referred to the Supreme Court under s 49; or (c) an appeal before the Court of Appeal relates to a question mentioned in paragraph (a)': at s 53(1). Section 49 provides that 'if, in a proceeding before a court or tribunal a question of law arises that relates to the application of this Act; or a question arises in relation to the interpretation of a statutory provision in accordance with this Act', the question may be referred to the Supreme Court: at ss 49(1)–(2).

68 Ibid s 53(3).

69 Ibid s 54.

70 Ibid s 56(1)(a). This must be done within 6 sitting days after receiving the declaration.

71 Ibid s 56(1)(b). This must be done within 6 months of receiving the declaration. The Minister must also consider the portfolio committee's report under s 57: at s 56(2).

72 Ibid s 57(1). The portfolio committee must consider the declaration, and 'report on the declaration to the Legislative Assembly within three months after it is referred': at s 57(2).

73 Ibid s 48(1).

74 Ibid s 48(2).

75 Ibid s 48(3).

a decision in a way that is not compatible with human rights, or to fail to give proper consideration to human rights in making a decision. A decision is considered to be compatible with human rights where it does not limit a human right, or limits it only to an extent that is 'reasonable and demonstrably justifiable'[76] in a 'free and democratic society based on human dignity, equality and freedom'.[77] The *HR Act* outlines several factors which may be taken into account when deciding whether a limitation on a human right is reasonable and justifiable, such as the nature of the human right, the nature of the limitation and the balance between the matters, and whether there are any less restrictive and reasonably available ways to achieve the purpose.[78] The second limb of section 58(1) makes it unlawful to fail to give 'proper consideration' to human rights in making a decision. This includes, but is not limited to, identifying the human rights that may be affected by the decision, and considering them.[79] The dialogue model approach to human rights legislation is clearly seen in the design of this provision which intends for public entities – defined to include government bodies, employees, law enforcement officers and ministers[80] – to integrate contemplation of human rights throughout all decision-making processes. Despite this, the *HR Act* also states that a contravention of this section does not invalidate the decision, nor does it mean that the person responsible has committed an offence.[81]

C Availability of Enforcement Mechanisms

The dialogue model prioritises the integration of human rights discourse into the public sphere over recourse to litigation. For this reason, while some of the obligations under the *HR Act* are enforceable by the subject of an alleged breach, these mechanisms are limited. For example, whilst Parliament must make statements of compatibility with human rights when proposing new laws, these statements are not binding on any court or tribunal,[82] can be expressly overridden by declaration,[83] and laws incompatible with human rights are not invalid.[84] The result of the combination of these provisions is that there is no avenue under the *HR Act* to enforce a Bill's compatibility with human rights.

If a question arises regarding whether or not a court or tribunal has interpreted a law as 'compatible' or 'most compatible' with human rights as required by section 48, section 49 allows for that question to be referred to the Supreme Court for judgment under certain conditions. Importantly, the mechanism requires that the court or tribunal in question consent to the referral, by considering 'the question … appropriate to be decided by the Supreme

76 Ibid s 8(b).
77 Ibid s 13(1).
78 Ibid s 13(2).
79 Ibid s 58(5).
80 Ibid s 9.
81 Ibid s 58(6).
82 Ibid s 38(4).
83 Ibid s 43.
84 Ibid s 42.

Court'.[85] This caveat has the potential to limit the usefulness of this enforcement mechanism for parties to a proceeding who feel their human rights have not been properly considered in the application of laws.

The *HR Act* responds to contraventions of section 58(1) by public entities with two possible avenues for recourse. First, an individual the subject of a public entity's alleged contravention may make a complaint through the human rights complaint process under part 4 of the *HR Act*. The individual, their agent, or a person given written authorisation may make a complaint to the Queensland Human Rights Commissioner.[86] The Commissioner's powers only extend to resolving the matter through conciliation as an out-of-court dispute resolution mechanism.[87]

Second, and most notably in the context of this article, there is scope for the judiciary to consider breaches of human rights obligations by public entities in certain cases. While section 58(1) makes it unlawful for a public entity to act or make a decision in a way that is not compatible with human rights, or in making a decision, to fail to give proper consideration to relevant human rights,[88] the *HR Act* does not provide for a specific cause of action or offence in circumstances where human rights have been violated in this manner. Rather, it contains a 'piggyback' clause,[89] whereby a human rights claim can be 'piggybacked' onto another legal claim (the 'primary' claim).[90] If a decision is actionable under another law on the grounds of being unlawful (the primary claim), then the person may also seek relief on the grounds of its unlawfulness under section 58.[91] From the drafting of the *HR Act*, it does not appear that the person making the claim needs to demonstrate that they are personally affected by the human rights breach – rather, they only need prove that a decision is unlawful under section 58. A person may be entitled to relief on the basis of a breach of the *HR Act* even where the primary claim is unsuccessful.[92] Damages are not available as a remedy for such a breach,[93] but a person will be entitled to any other relief or remedy they could have obtained in relation to an independent cause of action[94] (eg, having the decision set aside).

85 Ibid s 49(2)(b).
86 Ibid s 64(1).
87 Ibid ss 79–87.
88 Ibid s 58(1).
89 See, eg, Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (Report, 1 September 2015) 119.
90 This 'piggyback' claim model reflects the *Victorian Charter* approach. It is relevant to note that, in Victoria, this approach has been criticised on several grounds: it can prevent a person from raising a valid human rights claim in circumstances where there is no available primary action, it can lead to complex preliminary jurisdictional issues, and it can be a drain on resources where the primary concern is the human rights violation: see, eg, ibid. Valid as these criticisms may be, the 'piggyback' approach has ultimately been adopted by the Queensland Parliament, and a human rights claim will need to be attached to a primary claim.
91 *HR Act* s 59(1)–(2).
92 Ibid s 59(2).
93 Ibid s 59(3).
94 Ibid s 59(4); Explanatory Notes, Human Rights Bill 2018 (Qld) 8.

D The Potential of the *Human Rights Act* Framework to Contribute to the Abatement of Climate Change

Idealistically, if the relationship between climate change and human rights permeates public discourse and public sector decision-making in Queensland, the *HR Act* may, through its emphasis on dialogue, influence legislative and administrative decision-making into a more climate-friendly form without having to resort to more direct enforcement mechanisms. The mere existence of obligations on government decision-makers to contemplate human rights, regardless of the availability of enforcement mechanisms, would at the very least be expected to inform key debates during important decision-making processes.

The potential and incalculable benefits of increased human rights discourse aside, particular enforcement avenues under the *HR Act* present themselves as specifically employable in a climate change context. In the context of this article, our key interest lies in the mechanism for challenging a decision of a public entity as unlawful on the basis of its incompatibility with human rights (specifically the right to life) under section 58(1). The appeal of such a mechanism, in the context of climate change litigation, lies in its potential to render unlawful a government decision which contributes to the exacerbation of climate change, should the link be drawn between human rights and climate change impacts. Such decisions could include, for example, the decision of a minister to approve a new coal mine, or the decision of a government department to commit public funding to the opening of new large-scale fossil fuel projects, or to subsidise construction of new coal power stations, despite international agreements which mandate rapid decarbonisation in order to maintain a 'safe' level of global warming.

In order to pursue such a claim under the *HR Act* with climate mitigation in mind, the following factors would have to be addressed:

1. The link between an established human right and climate change must be established, such as the human right to life;
2. A decision of a public entity which impacts upon climate change must be argued as incompatible with the human right to life;
3. The 'piggyback' nature of the recourse available for a contravention will require the existence of a separate cause of action onto which the human rights claim may attach.

Decisions from other jurisdictions may be instructive in the framing of such a claim, and these decisions will be discussed in the next section.

IV THE INTERPRETATION OF THE HUMAN RIGHT TO LIFE AND CLIMATE CHANGE

The Queensland *HR Act* was not created in a vacuum, and the rights therein have long been recognised by international and foreign domestic bodies. The right to life in the Queensland *HR Act* is expressly drawn from article 6(1) of the

ICCPR,[95] and the *HR Act* also states that international law and judgments of domestic, foreign and international courts may be considered in interpreting it.[96] As a result, interpretation of the right to life by the interpretative body of the *ICCPR*, the Human Rights Committee, is essential to understanding how the right may be interpreted in Queensland, to inform the prospects of a climate-based human rights challenge on the basis of the right to life. While general comments released by the Committee do not have binding force, they are intended to be influential upon states which are party to the *ICCPR*. This is especially so where there is limited jurisprudence in other Australian jurisdictions, as will be demonstrated at Part IV(D).

This section will also analyse how the link between climate change and the right to life has been considered internationally to determine how the right may be read in a Queensland court. This will in turn inform the likelihood of it being interpreted in a way that can contemplate the impacts of climate change as a threat to the right to life, leaving room to employ the mechanism given by section 58(1) for successful climate litigation.

A The *ICCPR* and the International Policy Context

The *ICCPR* was the outcome of a lengthy drafting process spanning two decades and was finally adopted by the UN General Assembly on 16 December 1966.[97] Article 6(1) states that '[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life'.[98]

This is underpinned by the more general article 2(1), which requires state parties to 'respect and … ensure' the rights granted in the *ICCPR* to individuals within its territory. It has been argued that this gives rise to both positive and negative obligations: while 'respect' for rights means that a state must not violate rights in a negative sense, 'ensure' connotes a positive obligation to 'see to it that everything is done to enable the individuals to enjoy and exercise these rights'.[99] The positive nature of the obligation has also been accepted by the UN Human Rights Committee.[100]

Initially, the right to life under the *ICCPR* was concerned with the most overt threats to human life, such as the unlawful use of force, genocide and the death penalty. However, calls for the right to be interpreted more broadly can be traced back to the 1980s.[101] In 1982, the UN Human Rights Committee observed that

95 Explanatory Notes, Human Rights Bill 2018 (Qld) 3.

96 *HR Act* s 48(3).

97 Elizabeth Wicks, *The Right to Life and Conflicting Interests* (Oxford University Press, 2010) 41.

98 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 6(1) ('*ICCPR*').

99 Halûk A Kabaalioğlu, 'The Obligations to "Respect" and to "Ensure" the Right to Life' in BG Ramcharan (ed), *The Right to Life in International Law* (Martinus Nijhoff Publishers, 1985) 160, 165.

100 See, eg, 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*, 124th sess, UN Doc CCPR/C/GC/36 (30 October 2018) 5 [21].

101 See, eg, BG Ramcharan, 'The Concept and Dimension of the Right to Life' in BG Ramcharan (ed), *The Right to Life in International Law* (Martinus Nijhoff Publishers, 1985) 1, 6.

'the right to life has been too often narrowly interpreted. The expression "inherent right to life" cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures'.[102]

In light of international environmental law developments like the *Stockholm Declaration*, which stated that there is a human right to 'adequate conditions of life, in an environment of a quality that permits a life of dignity and wellbeing',[103] calls for the concept of the right to life at the international human rights level to extend to a right to a safe environment intensified.[104] Ramcharan, writing in 1985, argued that a right to a safe environment would include 'a strict duty upon States … to take effective measures to prevent and to safeguard against the occurrence of environmental hazards which threaten the lives of human beings'.[105] He further argued that the right to life should always be afforded priority over economic considerations.[106]

It appears that this call for broader conception of the right to life has been heeded. Knox and Pejan, writing in 2018, observed that, in the prior two decades, the interdependence between human rights and environmental protection has become increasingly clear.[107] Over time, the conception of the right to life evolved further, extending to encompass specific rights related to climate change. Limon[108] identifies the Inuit Petition to the Inter-American Commission on Human Rights in 2005 as one of the earliest acknowledgements of this link.[109] This link between the human right to life and climate change has also been recognised by a number of scholars.[110] Caney noted that, fundamentally, climate change will result in deaths due to increases in extreme weather events like hurricanes and storm surges, and due to increased heat stress.[111] Thus, climate

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102 *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.1 (29 July 1994) 7 [5].

103 Principle 1: *Report of the United Nations Conference on the Human Environment*, UN Doc A/CONF.48/14/Rev.1 (5–16 June 1972) 4 ('*Stockholm Declaration*').

104 Ramcharan (n 101) 13.

105 Ibid.

106 Ibid 14.

107 John H Knox and Ramin Pejan, 'Introduction' in John H Knox and Ramin Pejan (eds), *The Human Right to a Healthy Environment* (Cambridge University Press, 2018) 1, 1.

108 Marc Limon, 'Human Rights and Climate Change: Constructing a Case for Political Action' (2009) 33(2) *Harvard Environmental Law Review* 439, 441.

109 'Petition to the Inter American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States' (Petition, 7 December 2005) <http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2005/20051208_na_petition.pdf>.

110 See, eg, Stephen Humphreys (ed), *Human Rights and Climate Change* (Cambridge University Press, 2009); Limon (n 108); Svitlana Kravchenko, 'Right to Carbon or Right to Life: Human Rights Approaches to Climate Change' (2008) 9(3) *Vermont Journal of Environmental Law* 513; Daniel Bodansky, 'Climate Change and Human Rights: Unpacking the Issues' (2010) 38(3) *Georgia Journal of International and Comparative Law* 511; Derek Bell, 'Does Anthropogenic Climate Change Violate Human Rights?' (2011) 14(2) *Critical Review of International Social and Political Philosophy* 99; John H Knox, 'Human Rights Principles and Climate Change' in Kevin R Gray, Richard Tarasofsky and Cinnamon Carlarne (eds), *The Oxford Handbook of International Climate Change Law* (Oxford University Press, 2016) 214.

111 Simon Caney, 'Climate Change, Human Rights and Moral Thresholds' in Stephen Humphreys (ed), *Human Rights and Climate Change* (Cambridge University Press, 2009) 69, 77.

change will have an overt and direct impact on human life. More indirectly, climate change will affect food and water security, which will also impact significantly on human life.[112]

The most recent word on the international interpretation of the human right to life is from the Human Rights Committee's[113] General Comment[114] released in October 2018.[115] This Comment emphasises the importance of the right to life, once again reiterating that it should not be interpreted narrowly.[116] Fundamentally, the right to life 'concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death'[117] and importantly, 'includes an obligation for States parties to adopt any appropriate laws or other measures in order to protect life from all reasonably foreseeable threats, *including from threats emanating from private persons and entities*'.[118] It is not a stretch to conclude that the exacerbation of climate change impacts by decision-makers could fall within the ambit of the positive obligation within the right to life to protect citizens from reasonably foreseeable threats even where those threats are orchestrated by private entities, such as proponents of fossil fuel projects. The Human Rights Committee made this starkly clear when it specifically earmarked climate change as one of the biggest threats to the right to life in the same document. At paragraph 62, it is stated 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*'.[119] To this end, '[i]mplementation of the obligation to respect and ensure the right to life, and in particular life with dignity, depends, inter alia, *on measures taken by States parties to preserve the environment and protect it against harm, pollution and climate change* caused by public and private actors'.[120] In other words, the Human Rights Committee's statement asserts that the fulfilment of the *ICCPR*'s right to life requires signatories to adopt measures to protect their citizens from climate change. The connection between the right to life and climate change, at least at the international level, is therefore abundantly clear.

In terms of how far this right extends, the General Comment takes an extremely far-reaching approach to jurisdiction. Under article 2(1) of the *ICCPR*, each state party 'undertakes to respect and to ensure [human rights] to all

112 See, eg, Bridget Lewis, *Environmental Human Rights and Climate Change: Current Status and Future Prospects* (Springer, 2018) 158–9.

113 The Human Rights Committee is established pursuant to art 28(1) of the *ICCPR*.

114 The Human Rights Committee shall make such general comments as it may consider appropriate, and transmit these to state parties: *ICCPR* art 40(4). General Comments are not legally binding, but are considered as important as expert pronouncements on Covenant issues: Helen Keller and Leena Grover, 'General Comments of the Human Rights Committee and Their Legitimacy' in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press, 2012) 116, 129.

115 Human Rights Committee (n 100).

116 Ibid [3].

117 Ibid.

118 Ibid [18] (emphasis added).

119 Ibid [62] (emphasis added).

120 Ibid (emphasis added).

individuals *within its territory and subject to its jurisdiction*'.[121] The General Comment construes this article very broadly, interpreting it to mean persons over whose enjoyment of the right to life the state party exercises power or effective control, and this '*includes persons located outside any territory effectively controlled by the State*, whose right to life is nonetheless impacted by its military or other activities in a direct and reasonably foreseeable manner'.[122] While this conception of jurisdiction would be of great utility to potential climate change litigants, it is not clear that this broader definition will be accepted by state parties. In fact, some have already criticised it in submissions to the draft General Comment. For example, Canada argued that the 'interpretation would impinge on well-established principles of sovereignty',[123] with Austria agreeing that the 'wording goes far beyond the established interpretation of the extraterritorial application of the Covenant'.[124] Indeed, the extraterritorial application of human rights law has long been a topic of intense debate,[125] so it is difficult to predict the influence of this particular aspect of the General Comment. Regardless, even if it is ultimately construed broadly at the international level, the jurisdictional reach of the *HR Act* appears to be limited specifically to persons in Queensland. Therefore, this part of the General Comment may not be of relevance to Queensland at this point in time.

In summary, the right to life under the *ICCPR* has evolved over time, and the relationship between human rights and climate change has become a key part of the discourse of both human rights and climate change bodies. The most recent General Comment by the Human Rights Committee has strongly emphasised that recognition of the right to life by a state would include measures to prevent or restrict anthropogenic climate change, cementing the clear conceptual link between climate change and the right to life and laying the groundwork for the link to be made in the context of Australian litigation.

B Cases Concerning the *European Convention on Human Rights*

Human rights instruments have been used as vehicles for environmental arguments internationally. Many of these cases have arisen before the European Court of Human Rights ('ECHR'), in the context of the European *Convention for the Protection of Human Rights and Fundamental Freedoms*,[126] which also

121 *ICCPR* art 2 (emphasis added).

122 Human Rights Committee (n 100) [63] (emphasis added).

123 Government of Canada, 'Human Rights Committee, Draft General Comment No 36 on Article 6 of the International Covenant on Civil and Political Rights – Right to Life: Comments by the Government of Canada' (Comments, 23 October 2017) [7] <https://www.ohchr.org/en/hrbodies/ccpr/pages/gc36-article6righttolife.aspx>.

124 Government of Austria, 'Austrian Comments on the Draft General Comment on Article 6 of the International Covenant on Civil and Political Rights (ICCPR), on the Right to Life' (Comments, 2017) 2 <https://www.ohchr.org/en/hrbodies/ccpr/pages/gc36-article6righttolife.aspx>.

125 See, eg, Markus Vordermayer, 'The Extraterritorial Application of Multilateral Environmental Agreements' (2018) 59(1) *Harvard International Law Journal* 59, 72.

126 Opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 2. This Convention is commonly known as the *European Convention on Human Rights*. We note that there have also been important developments in other jurisdictions – for example, the Advisory Opinion of the Inter-

guarantees the right to life. While these cases are not strictly binding on Australian courts, the Queensland *HR Act* states that '[i]nternational law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision'.[127] It is therefore relevant to consider decisions of the ECHR, which provide important insights on possible interpretations of the right to life beyond Human Rights Committee general comments and in the context of adversarial litigation.

The right to life has been interpreted by the ECHR to entail a positive obligation to safeguard life in accordance with *ICCPR* interpretations,[128] but this positive obligation initially received a fairly strict interpretation. In the case of *Osman v United Kingdom* ('*Osman*'),[129] the Court stated that the obligation:

> must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising … In the opinion of the Court where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person … it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.[130]

Thus, there are effectively two limbs to the *Osman* test: knowledge of a risk to the life of an individual, and immediacy of that risk. This is in contrast to a broader test configured by the Human Rights Committee in the context of the *ICCPR*, which appears to require mere 'reasonable foreseeability' of the threat in order to hold states parties accountable to limitations on their citizens' human rights.[131]

Wewerinke-Singh suggests that the knowledge limb of the *Osman* test can be satisfied in the case of climate change, due to the prevalence of material like the IPCC reports, and the *UNFCCC* agreements.[132] The 'immediacy of the risk' criterion, however, could prove to be problematic in the context of climate change due to its nature as an incremental, collective harm with no single or sudden trigger.

However, the immediacy test does not appear to have been adhered to strictly in subsequent cases. Ebert and Sijniensky undertook a review of cases from the UK and European Union ('EU'), and suggested that the case law

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American Court of Human Rights released in 2017. However, a full consideration of all overseas jurisdictions is beyond the scope of an article of this length.

127 *HR Act* s 48(3).

128 *LCB v United Kingdom* (1999) 27 EHRR 212, 228 [36].

129 (2000) 29 EHRR 245.

130 Ibid 305–6 [116]–[117].

131 Human Rights Committee (n 100) [7].

132 Margaretha Wewerinke-Singh, 'State Responsibility for Human Rights Violations Associated with Climate Change' in Sébastien Duyck, Sébastien Jodoin and Alyssa Johl (eds), *The Routledge Handbook of Human Rights and Climate Governance* (Routledge, 2018) 75, 79.

> illustrates that both Courts have been prepared to construe the 'immediacy' criterion in a rather flexible manner depending on the specific context of the case. In general, it would appear that the threshold for the 'immediacy' element is lower than that of the original *Osman* Test where there is a context of overall violence or where the existence of a risk in itself depends on State action.[133]

That is, the 'immediacy' of the risk may be of less importance where the existence of the risk depends on state action. This certainly seems to be the approach of the court in cases such as *Budayeva v Russia*,[134] where eight people were killed by a preventable mudslide caused by incremental environmental degradation. The Court held that the right to life 'does not solely concern deaths resulting from the use of force' but also imposes on states a positive obligation to 'safeguard the lives of those within their jurisdiction'.[135] More analogous to the context of climate change as a slow and incremental threat to life are the facts of *Taşkin v Turkey*,[136] wherein the Court found human rights violations with respect to harms that had not yet occurred. The case regarded a community's concerns over the use of cyanide in a prospective gold mine and its potential effects on human health in future years. The government authority argued that there was no violation of human rights, as it was a 'probable and hypothetical risk', and 'not at all imminent'.[137] The Court rejected this assertion, and found that the fact that the 'hypothetical risk' had been referenced as a possibility in the project's environmental assessment was enough to form a 'sufficiently close link'[138] to infringement of the applicants' rights, irrespective of whether such infringements had yet occurred. This interpretation was deemed necessary as a result of the positive obligations on states to take active measures to 'secure' human rights.[139] Further, the Court said that '[i]f this were not the case, the positive obligation on the State to take reasonable and appropriate measures to secure the applicant's rights … would be set at naught'.[140] This suggests that the Court favours a more expansive interpretation which accounts for risks which are not definitionally 'immediate', including prospective environmental hazards. Peel and Osofsky suggest that climate change cases could build on this jurisprudence, applying it to 'the situation of foreseeable climate disaster risks and harm'.[141]

Another interesting viewpoint on the strict *Osman* configuration of the right to life comes from Ebert and Sijniensky, who suggest that the immediacy element should be removed in the case of 'structural risks',[142] which they define as 'any risk to the life of an individual that is fostered by prevalent social

133 Franz Christian Ebert and Romina I Sijniensky, 'Preventing Violations of the Right to Life in the European and the Inter-American Human Rights Systems: From the *Osman* Test to a Coherent Doctrine on Risk Protection?' (2015) 15(2) *Human Rights Law Review* 343, 360.
134 [2008] II Eur Court HR 267.
135 Ibid 288–9. See also *Öneryildiz v Turkey* [2004] XII Eur Court HR 79.
136 [2004] X Eur Court HR 179.
137 Ibid 208.
138 Ibid 182.
139 Ibid 205 [113].
140 Ibid.
141 Peel and Osofsky (n 14) 64.
142 Ebert and Sijniensky (n 133) 366.

structures, such as racism or sexism'.[143] Arguably, climate change could similarly be characterised as a structural risk. On this basis, a court could be asked to reject the *Osman* test in a climate change case. Furthermore, it is possible that the test would be ignored entirely by Australian courts in a climate change context because of the fact that ultimately, *Osman* involved vastly different circumstances (a murder), presenting a valid argument that the test espoused therein is not applicable to a wholly different type of risk, such as environmental degradation or climate change.

In summary, despite potential issues arising from an *Osman* interpretation of the right to life in the context of climate change, more recent ECHR cases have interpreted the right to life and right to private and family life as extending to situations of threatened environmental harm from hazardous activities and natural disasters, suggesting a shift away from the criteria of immediacy of risk. Jurisprudence from this court has historically been persuasive in landmark Australian judgments[144] and has contributed to shaping Australia's implied rights framework. European Court reasoning has been relied upon in the High Court of Australia to help define a prisoner's right to vote,[145] freedom of political communication,[146] the right to a fair trial[147] and the proportionality test, with regard to freedom of speech.[148] The broad interpretation of the positive obligation to safeguard the right to life may well be considered favourably in Australia in any litigation under human rights legislation, especially in light of the clear link that the Human Rights Committee has drawn between climate change and violations of the right to life within the *ICCPR*.

C Cases from International Domestic Courts

There have also been several high-profile human rights and climate change specific cases in different regions around the world. In the Pakistan case of *Ashgar Leghari v Pakistan*,[149] a citizen brought a suit against the government alleging that their failure to implement climate policy (the National Climate Change Policy 2012 and the Framework for Implementation of Climate Change Policy 2014–30) offended his fundamental rights; in particular, the right to life and liberty and inviolability of dignity of man. In an extremely progressive judgment, the Court noted that climate change is a 'defining challenge of our time' which has led to serious climate variations in Pakistan, and remarked that '[o]n a legal and constitutional plane this is [a] clarion call for the protection of

143 Ibid 362–3.

144 For a comprehensive account of the influence of the European Court of Human Rights jurisprudence on Australian courts: see Michael Kirby, 'Australia and the European Court of Human Rights' (Conference Paper, Conference on Re-Appraising the Judicial Role: European and Australian Comparative Perspectives, 14 February 2011) 22–42.

145 *Roach v Electoral Commissioner* (2007) 233 CLR 162, 178 [16] (Gleeson CJ), 203 [100] (Gummow, Kirby and Crennan JJ).

146 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 140 (Mason CJ).

147 *Dietrich v The Queen* (1992) 177 CLR 292, 307 (Mason CJ and McHugh J).

148 *Leask v Commonwealth* (1996) 187 CLR 579, 594–5 (Brennan CJ).

149 Lahore High Court Green Bench (Pakistan), WP No 25501/2015, Orders of 4 September 2015 and 14 September 205 <https://elaw.org/PK_Ashgar Leghari_v_Pakistan_2015>.

fundamental rights of the citizens of Pakistan, in particular, the vulnerable and weak segments of the society who are unable to approach this Court'.[150] The Court held that the delay in implementing policy 'offends the fundamental rights of the citizens which need to be safeguarded'.[151] To address this deficiency, the Court made several orders relevant to ensuring implementation occurs.

In the Colombian case of *Future Generations v Minister for the Environment*,[152] a group of youth plaintiffs alleged that the government's failure to reduce deforestation and ensure compliance with a target for zero-net deforestation in the Amazon by 2020 threatened their fundamental rights, including a right to life and health. The Court held that the fundamental rights to life and health are substantially linked. In the absence of a healthy environment, subjects of law and sentient beings in general will not be able to survive, much less protect those rights, for future generations. The increasing deterioration of the environment is a serious attack on current and future life and on other fundamental rights; it gradually depletes life and all its related rights. To this end, the Court ordered the government to formulate various action plans within four months.[153]

In addition to these landmark cases, momentum continues to build globally, with cases currently pending before courts in Europe,[154] Switzerland,[155] and the US,[156] and recently decided in Canada.[157] Internationally, to use the language of Peel and Osofsky, courts certainly seem to be taking a 'rights turn', and section 48(3) of the Queensland *HR Act* expressly states that judgments of foreign courts may be considered in interpreting it.

D Victoria and the ACT

As Queensland is not the first Australian jurisdiction to enact human rights protections, it is relevant to consider the experience of Victoria and the ACT.

The *Victorian Charter* legislatively enshrines the right to life.[158] To date, there is very little jurisprudence concerning this section, and the Charter Guide

150 Ibid [6].

151 Ibid [8].

152 *Demanda Generaciones Futuras v Minambiente* (Unreported, Supreme Court of Colombia, Villabona J, 5 April 2018). An unofficial English translation is available at <http://climatecasechart.com/non-us-case/future-generation-v-ministry-environment-others/>.

153 Ibid.

154 *Armando Carvalho v European Parliament* (General Court, Second Chamber, T-330/18 ECLI:EU:1:2019:324, 8 May 2019).

155 *Verein KlimaSeniorinnen Schweiz v Federal Department of the Environment*, *Transport*, *Energy and Communications (DETEC)* (Unreported, Federal Administrative Court of Switzerland, Bandli, Péquignot and Candrian JJ, 27 November 2018). An unofficial English translation is available at <http://climatecasechart.com/non-us-case/union-of-swiss-senior-women-for-climate-protection-v-swiss-federal-parliament/>.

156 *Juliana v United States* (D Or, No 6:15-CV-01517-AA, 21 November 2018). The authors note that since the time of writing, this case has been overturned: see *Juliana v United States* (9th Cir, No 18-36082, January 17 2020).

157 *ENvironnement JEUnesse v A-G (Canada)* (Superior Court of Quebec, Morrison J, 11 July 2019). An unofficial English translation is available at <http://climatecasechart.com/non-us-case/environnement-jeunesse-v-canadian-government/>.

158 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 9.

published by the Victorian Government is the most useful source of commentary. The Charter Guide notes that the positive duty to ensure the right to life in Victoria extends to: (a) safeguarding the lives of persons in Victoria through the administration of the criminal law system, (b) undertaking effective official investigations into the circumstances of some deaths, and (c) protecting the lives of persons in the government's care.[159] Thus, the positive duty has been interpreted in a relatively narrow sense, aimed mainly at criminal justice. The Guide does note, however, the UN Human Rights Committee's view that the right should not be interpreted narrowly,[160] and indicates that the scope of duties may change over time.[161] At this point in time though, there is no precedent from Victoria relevant to a climate change case.

It should be noted though that the Charter Guide (under a heading titled '[e]ffective criminal law provisions and law enforcement') refers to the *Osman* test,[162] discussed above at Part IV(B). The Charter Guide is not explicit as to whether this test should be applied by Victorian courts. It is also unclear whether it suggests the application of the test only in cases regarding criminal law and law enforcement, or whether it would be of broader application. It is difficult to predict to what extent this test would influence Victorian courts, and possibly also Queensland courts, given the similarities in their human rights legislation. However, the requirement for a 'real and immediate risk' may present some challenges if adopted, as discussed above.

The *Human Rights Act 2004* (ACT) also legislatively enshrines the right to life.[163] The ACT Act has one major advantage over the Queensland *HR Act* and *Victorian Charter*, in that it provides for a direct cause of action. This cause of action arises in circumstances where a person claims that a public authority has acted in a way that is incompatible with their human rights, or, in making a decision, failed to give proper consideration to a relevant human right.[164] Despite this broader cause of action, there is limited jurisprudence on this provision.

In short, there is little to glean from the Victorian and ACT experience in terms of the likely success of a climate change and right to life argument. A case brought in Queensland on this ground would be an Australian first.

159 Victorian Government Solicitor's Office, *Section 9: Right to Life* (Charter Guide, 16 August 2017) 62 <http://humanrights.vgso.vic.gov.au/charter-guide/charter-rights-by-section/section-9-right-life>.

160 Ibid 58.

161 Ibid 62.

162 Ibid 59.

163 *Human Rights Act 2004* (ACT) s 9(1).

164 Ibid ss 40B, 40C.

V DOES THE *HUMAN RIGHTS ACT 2019* (QLD) MAKE IT UNLAWFUL FOR A PUBLIC ENTITY TO MAKE A DECISION THAT WILL CONTRIBUTE TO UNABATED CLIMATE CHANGE?

The enactment of Queensland's *HR Act* presents an emerging opportunity to shift the course of climate change litigation in Australia. Under section 58(1), it is unlawful for a public entity to act or make a decision in a way that is incompatible with human rights, or, in making a decision, to fail to give proper consideration to a human right relevant to the decision. International and foreign domestic bodies and courts have recognised that unabated climate change may infringe the human right to life. There is a similar argument that if a decision-maker in Queensland made a decision that will contribute to unabated climate change, they also made a decision that is incompatible with the right to life, rendering it unlawful.

This section will consider a scenario in which a challenge may be made under section 58(1) of the *HR Act* to decisions which have the potential to exacerbate climate change. It will first identify a potential primary cause of action to fulfil the 'piggyback' requirement of the mechanism, and will then draw a link between climate change impacts specifically in Queensland and threats to human life. This will demonstrate that decisions which exacerbate climate change in Queensland are consequently incompatible with the right to life, and are therefore unlawful. The result is that a section 58(1) challenge on the basis of climate change in Queensland is viable, and has the potential to cause a tipping point in Australian climate litigation.

A Identifying a Primary Cause of Action

As discussed above in Part III of this article, the Queensland *HR Act* does not provide a standalone cause of action for a violation of human rights. If a decision is actionable under another law on the grounds of it being unlawful, then the person may also seek relief on the grounds of its unlawfulness under the *HR Act.*[165] Although this aspect of the regime has been criticised, it is unlikely to present a significant problem in the case of climate change litigation, as a primary claim will be available. There is an existing body of jurisprudence in Queensland concerning the relevance of climate change under the planning approval process for coal mines, and further litigation building on this jurisprudence would be a logical primary cause of action.

To date, climate change litigation in Queensland has generally arisen through the objections processes under the *Mineral Resources Act 1989* (Qld) ('*Mineral Resources Act*') and the *Environmental Protection Act 1994* (Qld) ('*Environmental Protection Act*'), which regulate the granting of a mining lease and an environmental authority respectively.[166] These regimes allow a person who has made a submission during the assessment process under the

165 *HR Act* ss 58, 59(1)–(2).

166 Both of these approvals are required for large-scale mining operations.

Environmental Protection Act, or any person under the *Mineral Resources Act*, to object to the granting of an approval, and have that objection heard by Queensland's Land Court.[167]

The current legislative framework in Queensland does not explicitly require climate change to be taken into account in making decisions about mining leases and associated environmental authorities. Regardless, Queensland courts have found that Scope 3 emissions from coal mines are a relevant consideration for decision-makers under both pieces of legislation;[168] Scope 3 emissions in this context being the emissions resulting from third party burning of coal, which may occur overseas. Further, Queensland courts have also accepted climate change science; acknowledged cause and effect between a project's Scope 3 emissions and climate change; found that single projects are significant in a global context; and assessed emissions on a cumulative (rather than annual) basis.[169]

In essence, Queensland courts are edging closer to upholding an objection to a mine on the basis of climate change arguments. The main barrier to a successful objection to date has been the so-called 'market substitution' or 'perfect substitution' defence, which has been applied as a 'trump card' in climate litigation in Queensland.[170] This so-called defence essentially posits that if that proponent does not mine and sell coal, someone else will.[171] For this reason, the projected Scope 3 emissions from a particular mine are considered to be not likely to make a measurable contribution to global climate change. The market substitution defence has been criticised: for example, Bell-James and Ryan note that '[i]t effectively treats the theoretical alternative project (which may or may not proceed) as a carbon credit which offsets all the impacts of the emissions of the mine in question'.[172] That is, the emissions of the mine under consideration are negated by the cessation of a hypothetical future project. The high degree of uncertainty associated with this line of reasoning is problematic, and will likely be continually challenged before Queensland courts – Bell-James and Ryan draw an analogy to biodiversity offsets, which are often criticised for exchanging certain environmental harm with uncertain future gains.[173]

Furthermore, the future application of this principle is of course dependent on international demand for coal remaining high, accompanied by the likelihood of other mines continuing to open offshore. In light of the global push to limit climate change to 1.5°C,[174] the future of coal is uncertain. Indeed, major players

167 *Environmental Protection Act 1994* (Qld) s 182(2); *Mineral Resources Act 1989* (Qld) s 260.

168 *Hancock Coal Pty Ltd v Kelly [No 4]* [2014] QLC 12, [218] (Member Smith); *Coast and Country Association of Queensland Inc v Smith* [2015] QSC 260, [34], [36], [39] (Douglas J); *Adani Mining Pty Ltd v Land Services of Coast and Country Inc* [2015] QLC 48, [446]–[447], [455] (MacDonald P). See also Bell-James and Ryan (n 3) 532.

169 See summary in Bell-James and Ryan (n 3) 531–3.

170 Ibid 535.

171 *Adani Mining Pty Ltd v Land Services of Coast and Country Inc* [2015] QLC 48, [456] (MacDonald P).

172 Bell-James and Ryan (n 3) 535.

173 Ibid.

174 See, eg, *Paris Agreement* (n 32) art 2; Valérie Masson-Delmotte et al (eds), *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*

like the US and China are reducing their exploitation and use of coal.[175] A downturn in the market for coal will provide grounds to argue that the market substitution defence is not applicable. The NSW Land and Environment Court has also recently rejected the market substitution defence, noting the 'logical flaw' in the defence: '[i]f a development will cause an environmental impact that is found to be unacceptable, the environmental impact does not become acceptable because a hypothetical and uncertain alternative development might also cause the same unacceptable environmental impact. The environmental impact remains unacceptable regardless of where it is caused'.[176]

In summary, although climate change cases in Queensland have been largely unsuccessful to date, it is by no means clear that future cases will not gain traction before the courts. Continuing to challenge decisions to approve mining operations therefore presents a viable option for a primary claim, upon which a human rights claim could be 'piggybacked'. It should also be noted that success under the primary action is not a prerequisite to relief or a remedy for the human rights violation claim,[177] so a potential applicant should not necessarily be deterred by the fact that climate change cases have not yet enjoyed success before Queensland courts.

B The Right to Life as Incompatible with Climate Change-Exacerbating Decisions in Queensland

If a human rights claim is 'piggybacked' onto a challenge to an approval for an emissions-intensive coal mine, the logical argument would be that the Queensland government has contributed to climate change by approving and/or failing to impose adequate conditions on an emissions-intensive development (ie, a large-scale coal mine). The corresponding human rights argument would then hypothetically turn on whether climate change can be shown to impact on the right to life enjoyed by persons in Queensland. As a result, a litigant would have to demonstrate that a public entity has made a decision in a way that is not compatible with the human right to life, deeming it unlawful under section 58(1)(a) of the *HR Act.* This argument would complement a more traditional challenge to a mining approval, as both arguments would rely on similar evidence.

The analysis above in Part IV of this article could provide the foundations of a right to life claim in Queensland. The right to life has been broadly interpreted at the international level, and the interconnectedness of this right and climate change is now well-recognised. In particular, the interpretation of the *ICCPR* right to life indicates that climate change impacts are well within the

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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* (IPCC, 2018) ('*IPCC Special Report*').

175 See, eg, United States Energy Information Administration, *Short-Term Energy Outlook (STEO)* (Outlook, September 2018) <https://www.eia.gov/outlooks/steo/archives/Sep18.pdf>; Will Steffen, Climate Council, *Galilee Basin: Unburnable Coal* (Report, 2015) 9 ('*Galilee Basin Report*').

176 *Gloucester Resources Ltd v Minister for Planning* (2019) 234 LGERA 257, 378 [545] (Preston CJ).

177 *HR Act* s 59(2).

contemplation of the right's positive obligations on authorities, and will require that, where climate impacts can be characterised as reasonably foreseeable, governments take measures to mitigate climate change threats emanating from private entities, such as proponents of fossil fuel projects. Given that the right to life in Queensland is drawn expressly from the *ICCPR*, there is a compelling argument that this should be persuasive in interpreting the *HR Act*. Therefore, where climate change impacts can be identified as impacting human lives in Queensland, decisions which contribute to climate change may be considered to be 'limiting' the right to life and therefore, incompatible with the right to life.

Challenging these decisions will be contingent on the availability of a primary claim and specifically, the ability of the evidence to demonstrate the link between a proponent's projected carbon emissions from a prospective coal mine, and climate change impacts in Queensland. A detailed analysis of the extent of this evidence required and its availability is beyond the scope of this article. However, in brief, Queensland contributes significantly to the climate change problem globally, particularly through its coal exports. Australia is one of the world's largest coal exporters,[178] with Queensland a major contributor to the export market.[179] Queensland has just reported a record yearly high for coal exports,[180] and volume is set to increase significantly if the Galilee Basin is opened for the mining of thermal coal.[181] Current applications for mining in the Galilee Basin include Adani's Carmichael Mine, as well as a number of other proposed large-scale projects.[182] Exploitation of the Galilee Basin is wholly inconsistent with remaining within the carbon budget, with the Climate Council deeming the Galilee Basin's coal as 'unburnable'.[183] If the Galilee Basin is exploited to its full potential, resulting emissions would be in the magnitude of 700 million tonnes of CO^2 per annum.[184] This would result in a single region in a single country using a significant and measurable proportion of the global carbon budget; in effect, deep cuts in emissions would be needed elsewhere to offset this impact. As a result, Queensland coal exports are a significant contributor to the exacerbation of global climate change and therefore may allow for the acceptance of the argument that a decision to approve a mine intended for the mining and combustion of large amounts of coal overseas has a significant contribution to climate change and resulting impacts in Queensland.

In addition, the link between human life and climate change impacts in Queensland generally can clearly be made out. There is a wealth of scientific

178 See, eg, 'Coal Exports: Country Rankings', *TheGlobalEconomy.com* (Web Page, 2016) <https://www.theglobaleconomy.com/rankings/coal_exports/>.

179 See, eg, Australian Resources and Energy Group AMMA, *Coal Drives Record 2018 Export Figures* (Media Release, 12 February 2019). It was noted that '[m]ore than half of the nation's $66 billion in Australian coal export revenue recorded in 2018 came from Queensland's $35.7 billion worth of exports'.

180 Tim Swanston and Talissa Siganto, 'Queensland Coal Exports Hit Record High, Greens Claim Job Numbers Don't Stack Up', *ABC News* (online, 15 January 2019) <https://www.abc.net.au/news/2019-01-15/queensland-record-coal-exports/10715628>.

181 'Overview', *The Galilee Basin* (Web Page, 26 November 2015) <http://galileebasin.org/overview/>.

182 Ibid.

183 *Galilee Basin Report* (n 175).

184 Ibid 12.

data available outlining the potential risks to human life and health in Australia broadly, and Queensland more specifically, if climate change continues unabated. These risks include the physical and mental impacts of heatwave stress, increased incidence of diseases, and impacts from natural disasters. In a recent study published in the *Medical Journal of Australia*, a team of researchers found: 'Australia is vulnerable to the impacts of climate change on health, and policy inaction in this regard threatens Australian lives. In a number of respects, Australia has gone backwards and now lags behind other high-income countries'.[185]

One of the major threats to human life is heatwaves.[186] Studies have shown that anthropogenic climate change has likely already played a role in recent heatwaves,[187] and heatwaves are also projected to increase in frequency, duration and intensity in Australia with climate change.[188] The *Medical Journal of Australia* study mentioned above looked at the historical impact of heatwaves in Australia's biggest cities, including Brisbane, and found 'significant linear associations between exposure to higher temperatures and greater mortality'.[189] This supported an earlier study of the same cities, which found that Brisbane is one of the capital cities with the highest mortality risk rate during heatwave events.[190] Studies have also found a statistically significant increase in Brisbane emergency hospital admissions during heatwaves,[191] as well as a correlation between heatwaves and preterm birth in Brisbane.[192] Therefore, any increased severity and intensity of heatwaves is likely to have a commensurate impact on human mortality. While roughly 2 in 100,000 deaths in Australia at present are associated with heat, this is projected to rise to 8 in 100,000 by 2080.[193] The

185 Ying Zhang et al, 'The *MJA-Lancet* Countdown on Health and Climate Change: Australian Policy Inaction Threatens Lives' (2018) 209(11) *Medical Journal of Australia* 474.e1, 474.e1.

186 Australian Academy of Science, Climate Change Challenges to Health: Risks and Opportunities (Report, 2015).

187 Mitchell T Black, David J Karoly and Andrew D King, 'The Contribution of Anthropogenic Forcing to the Adelaide and Melbourne, Australia, Heat Waves of January 2014' (2015) 96(12) *Special Supplement to the Bulletin of the American Meteorological Society* 145; Andrew King et al, 'Increased Likelihood of Brisbane, Australia, G20 Heat Event Due to Anthropogenic Climate Change' (2015) 96(12) *Special Supplement to the Bulletin of the American Meteorological Society* 141; Daniel Mitchell et al, 'Attributing Human Mortality During Extreme Heat Waves to Anthropogenic Climate Change' (2016) 11(7) *Environmental Research Letters* 1.

188 See, eg, N Herold et al, 'Australian Climate Extremes in the 21st Century According to a Regional Climate Model Ensemble: Implications for Health and Agriculture' (2018) 20 *Weather and Climate Extremes* 54; Will Steffen, Lesley Hughes and Sarah Perkins, Climate Council, *Heatwaves: Hotter, Longer, More Often* (Report, 2014) ('*Heatwaves Report*').

189 Zhang et al (n 185) 474.e2.

190 Shilu Tong et al, 'The Impact of Heatwaves on Mortality in Australia: A Multicity Study' (2014) 4(2) *BMJ Open* 1.

191 Shilu Tong, Xiao Yu Wang and Adrian Gerard Barnett, 'Assessment of Heat-Related Health Impacts in Brisbane, Australia: Comparison of Different Heatwave Definitions' (2010) 5(8) *PLoS ONE* e12155.1, e12155.4.

192 J Wang et al, 'Maternal Exposure to Heatwave and Preterm Birth in Brisbane, Australia' (2013) 120(13) *BJOG: An International Journal of Obstetrics and Gynaecology* 1631.

193 Sotiris Vardoulakis et al, 'Comparative Assessment of the Effects of Climate Change on Heat- and Cold-Related Mortality in the United Kingdom and Australia' (2014) 122(12) *Environmental Health Perspectives* 1285, 1285.

Climate Council has also recognised that increased heatwaves will continue to increase the burden on Australia's health services,[194] potentially also exacerbating health outcomes for individuals.

Natural disasters other than heatwaves also pose a serious threat to human life. A 2018 study of 67 countries found that, of developed countries studied, Australia is the second most vulnerable to climate risk.[195] One of these natural disaster risks is bushfire, with climate change making weather conditions drier and more conducive to bushfires.[196] November 2018 saw devastating bushfires engulf large parts of Queensland, including in areas which had never had a 'catastrophic' fire weather condition rating recorded before.[197] Climate change will likely also cause changes to the frequency, intensity and distribution of cyclones,[198] posing a possible threat to human life.

Other possible health impacts of a warming climate include illness and deaths due to increased incidences of infectious, vector-borne, foodborne and waterborne diseases.[199] A recent paper found that a higher emissions scenario would result in larger communities of mosquitos, with Australia disproportionately affected.[200] Mosquitos carry diseases such as dengue, and previous studies have found a correlation between climate change and increased dengue risk.[201] Another study suggested that climate change will directly increase habitat suitability for mosquitos throughout much of Australia, and this will also be compounded by the indirect impact of changed water storage practices by humans in response to drought.[202] That is, artificially flooded water storage containers can increase the population of mosquitos.[203]

Queensland has been experiencing severe drought conditions, with more than half the State still drought declared.[204] Climate change will exacerbate drought conditions, through increased frequency and intensity of hot days, impacting on

194 *Heatwaves Report* (n 188) 21.

195 Ashim Paun, Lucy Acton and Wai-Shin Chan, 'Fragile Planet: Scoring Climate Risks Around the World' (Research Report, March 2018) 1.

196 See, eg, Will Steffen, Annika Dean and Martin Rice, Climate Council, *Weather Gone Wild: Climate Change-Fuelled Extreme Weather in 2018* (Report, 2019) 9.

197 Lesley Hughes et al, 'Escalating Queensland Bushfire Threat: Interim Conclusions' (Interim Report, November 2018).

198 Climate Council, 'Tropical Cyclones and Climate Change: Factsheet' (Factsheet, 2017).

199 Australian Academy of Science (n 186) 10.

200 Andrew J Monaghan et al, 'The Potential Impacts of 21st Century Climatic and Population Changes on Human Exposure to the Virus Vector Mosquito *Aedes Aegypti*' (2018) 146(3–4) *Climatic Change* 487, 488.

201 Maha Bouzid et al, 'Climate Change and the Emergence of Vector-Borne Diseases in Europe: Case Study of Dengue Fever' (2014) 14 *BMC Public Health* 781, 781.

202 Nigel W Beebe et al, 'Australia's Dengue Risk Driven by Human Adaptation to Climate Change' (2009) 3(5) *PLoS Neglected Tropical Diseases* e429.1.

203 Michael Kearney et al, 'Integrating Biophysical Models and Evolutionary Theory to Predict Climatic Impacts on Species' Ranges: The Dengue Mosquito *Aedes Aegypti* in Australia' (2009) 23 *Functional Ecology* 528, 536.

204 'Drought Declarations', *Queensland Government* (Web Page, 20 August 2019) <https://www.longpaddock.qld.gov.au/drought/drought-declarations/>.

health, livelihoods and the economy.[205] Climate change will impact on economically valuable crops like wheat and cotton,[206] and impact on species extent and distribution,[207] which can in turn have ramifications for human life.

The impacts on human life and health will not be restricted to physical health impacts, and it has been recognised that climate change will have impacts on mental health.[208] This includes direct impacts (for example, through trauma related to climate-related disasters) and indirect impacts (for example, as a product of physical stress, and through disruption to community wellbeing).[209] Extreme heat can have a harmful impact on mental health, with the impact thought to be as detrimental to mental health as periods of unemployment.[210] In warmer states, including Queensland, there is a positive correlation between mean annual maximum temperature and suicide rates.[211]

In summary, the lives of Queensland citizens will be affected by unabated climate change in serious and measurable ways, because climate change will increase heat-related illness and affects, increased incidences of disease, impacts on food and water security, impacts on mental health, and threats to their livelihoods and homes. There is also clear action that can be taken in Queensland to reduce the potential impacts of climate change; specifically, rejecting applications for large-scale, emissions-intensive mining activities. Therefore, it could be argued that inaction on climate change – or, action that will exacerbate climate change (for example, approving major coal mines) – is incompatible with the legislatively enshrined human right to life under section 58(1) of the *HR Act*.

C The Limit to the Right to Life Is Not Reasonable or Demonstrably Justifiable

Importantly, section 58(1) provides that a decision is unlawful if it is made in a way that is not compatible with human rights. A decision will not be incompatible with the right to life, and therefore unlawful, unless it cannot be '[reasonably] and demonstrably justifiable',[212] 'in a free and democratic society based on human dignity, equality and freedom'.[213] Factors for courts to take into account when determining this include the nature of the right, the nature of the limitation, and whether there are less restrictive and reasonably available ways to achieve the purpose of the limitation.[214] In the case of a decision of a public entity

205 Will Steffen, Climate Council, *Thirsty Country: Climate Change and Drought in Australia* (Report, 2015).

206 F Shabani and B Kotey, 'Future Distribution of Cotton and Wheat in Australia under Potential Climate Change' (2016) 154(2) *Journal of Agricultural Science* 175.

207 See, eg, Kristen J Williams et al, *Queensland's Biodiversity under Climate Change: Impacts and Adaptation* (Synthesis Report, August 2012) vii.

208 Zhang et al (n 185) 474.e6.

209 Helen Louise Berry, Kathryn Bowen and Tord Kjellstrom, 'Climate Change and Mental Health: A Causal Pathways Framework' (2010) 55(2) *International Journal of Public Health* 123, 123.

210 N Ding, H Berry and L O'Brien, 'The Effect of Extreme Heat on Mental Health: Evidence from Australia' (2015) 44(Supp 1) *International Journal of Epidemiology* i64, i64.

211 Zhang et al (n 185) 474.e8.

212 *HR Act* s 8(b).

213 Ibid s 13(1).

214 Ibid s 13.

to approve a coal mine, or make any other action or decision which contributes to the exacerbation of the impacts of climate change, it is arguable that the limit is not reasonably and demonstrably justifiable under the *HR Act*.

Peel and Osofsky note that it may be more difficult to mount human rights arguments in a case concerning emissions-intensive projects, because there will be competing arguments, including economic development and energy security.[215] In the *HR Act* context, these arguments could go to the 'nature of the limitation' factor. Economic arguments have certainly been a feature of past Land Court cases in Queensland; in the *Wandoan Mine Case*, MacDonald P was willing to accept that climate change was a relevant consideration, but concluded that it was only one of the factors that the court needed to weigh up, with other factors including economic and social benefits that would derive from the project.[216] On balance, her Honour determined that these benefits would outweigh the 'comparatively minor' environmental impacts.[217] Similarly, the risk here is that a court would determine that economic interests override human rights. There could also potentially be arguments made that any risk to human life could be mitigated in the future through climate change adaptation measures, which is a less restrictive measure to achieve the same goal.

While authorities may argue that such decisions are important to the Australian economy, employment opportunities for rural Queenslanders, and international trade, it is important to note that the nature of the right to life, as defined by the Human Rights Committee, is that it is 'the supreme right from which no derogation is permitted even in … public emergencies which [threaten] the life of the nation'.[218] Ramcharan argued that the right to life should always be afforded priority over economic considerations.[219] This strong wording provides the basis for an argument that the right to life cannot be compromised in favour of competing economic interests in government decision-making. Further, the argument can also be made that there are less restrictive and reasonably available ways to achieve the purpose of, for example, furthering economic development in Queensland and Australia by approving a coal mine. For instance, it can be argued that Australia's economic interests and employment opportunities would be better served by fostering the clean energy industry and supporting just transitions for mine workers. As a result, it is viable to argue that a decision by a government authority which can be proven to contribute to climate change impacts is incompatible with the human right to life under section 58(1) of the *HR Act* because it limits the right to life, and the limit is not justifiable under the *HR Act.*

D Limitations and Possible Barriers to Success

Although there are certainly the foundations to 'piggyback' a human rights claim onto a mining approval challenge in Queensland, there are some additional

215 Peel and Osofsky (n 14) 63.
216 *Wandoan Mine Case* [2012] QLC 13, [576] (MacDonald P).
217 Ibid [581].
218 Human Rights Committee (n 100) [2].
219 Ramcharan (n 101) 14.

limitations and caveats to bear in mind. Stephens argues that there are two prerequisites to a court accepting a violation of the right to life on climate change grounds: first, a broad definition of a right to life must be accepted, and second, 'the longer term threat to human existence must be accepted as grounds for asserting the right'.[220] There are possibly also several other considerations of relevance here – causation and jurisdictional reach. These will be discussed in turn.

1 Interpretation of the Right to Life

As there is no right to a healthy environment and/or climate in the *HR Act*, other rights will have to be used as a vehicle for a climate change argument. This may be the right to life, as discussed in this article, and/or the other rights identified above in Part III as well. A detailed analysis of whether a specific right to a healthy environment is required is beyond the scope of this article, but Lewis has recently argued that a specific right of this type is not essential to success, and indeed the difficulties involved with implementing such a specific right may outweigh its effectiveness.[221] Some key international cases like *Ashgar Leghari v Pakistan*[222] and the ongoing *Juliana*[223] litigation in the US specifically concern the right to life, and Peel and Osofsky observe that these cases 'illustrate the ways in which non-environmentally focused rights protection … may be extended to encompass claims based on impacts brought about by climate change'.[224] It is unlikely that the lack of a specific right to a healthy environment will present a significant hurdle in Queensland. There is a wealth of scientific evidence delineating the significant human life and health impacts which will flow from unabated climate change. For this reason, the right to life should provide a robust vehicle for a human rights claim.

However, this will be dependent on a court adopting a broad interpretation of the right to life, sufficient to encompass human health impacts caused by climate change. The extent to which a judiciary is willing to adopt these broad arguments will be key.

2 Judicial Willingness to Accept Climate Change Arguments

As Stephens argues, there must be willingness on the part of a court to accept that climate change poses a long-term threat to human existence.[225] Peel and Osofsky make a similar observation in relation to successful human rights cases, noting that these cases have arisen in jurisdictions which have a rich history of judicial activism and strong constitutions, such as Pakistan and India.[226] On the

220 Pamela Stephens, 'Applying Human Rights Norms to Climate Change: The Elusive Remedy' (2010) 21(1) *Colorado Journal of International Environmental Law and Policy* 49, 52.

221 Lewis (n 112) 230–1.

222 *Ashgar Leghari v Pakistan*, Lahore High Court Green Bench (Pakistan), WP No 25501/2015, Orders of 4 September 2015 and 14 September 2015 <https://elaw.org/PK_AshgarLeghari_v_Pakistan_2015>.

223 *Juliana v United States*, No 6:15-CV-01517-AA, 2018 WL 6303774 (D Or 21 November 2018).

224 Peel and Osofsky (n 14) 62.

225 Stephens (n 220) 52.

226 Peel and Osofsky (n 14) 62.

other hand, more conservative courts have in some cases dismissed climate litigation on the basis of non-justiciability, deeming questions of action on climate change to be reserved for the political arena.[227] Australia's traditionally conservative courts may be more amenable to this type of argument.

That said, progress has already been made before Queensland courts. While climate change science was disputed by a member of the Land Court's predecessor as recently as 2007,[228] there is now unequivocal acceptance by the Land Court of a causal link between greenhouse gas emissions and climate change.[229] Bell-James and Ryan observe that there have already been significant incremental developments in climate change jurisprudence in Queensland in a relatively short timeframe, but also acknowledge that there are some remaining hurdles to overcome.[230] While the Queensland judiciary cannot be described as 'activist', there is certainly some demonstrated willingness to engage with climate change arguments, and develop the law in an incremental fashion.

3 Causation

The landmark 2009 *OHCHR Report* suggested that establishing causal linkages between climate change and human rights would be difficult for several reasons. First, because it is difficult to connect a country's emissions with a specific climate change related effect, and then to a human rights violation. Second, because climate change is often one of a number of causes of weather-related events. Finally, because climate change impacts are generally a projection of future impacts, whereas human rights violations generally arise from events which have already occurred.[231]

The first two of these factors are not new to Queensland Courts, and have already been addressed in cases related to the assessment and approval of mines. Causation has, to date, been a major hurdle for courts in climate change litigation. However, through the progress of multiple climate change cases before Queensland courts, some of these hurdles have been overcome. For example, Queensland's Land Court has accepted that the greenhouse gas emissions resulting from a single project will contribute to climate change impacts[232] in a physical cause and effect sense.[233] The Land Court has also found that these emissions from a single project can make a significant contribution to climate change[234] – in litigation concerning the proposed Alpha mine, the Land Court found that the projected emissions from the proposed mine, including Scope 3

227 *California v General Motors Corp* (ND Cal, No C06-05755 MJJ, 17 September 2007); *Connecticut v American Electric Power Co Inc,* 406 F Supp 2d 265, 272 (SDNY, 2005); *Kivalina v ExxonMobil Corp,* 663 F Supp 2d 863 (ND Cal, 2009).

228 *Re Xstrata Coal Queensland Pty Ltd* [2007] QLRT 33, [21] (Koppenol P).

229 See Bell-James and Ryan (n 3) 532.

230 Ibid 536–7.

231 *OHCHR Report* (n 46) [70].

232 *Wandoan Mine Case* [2012] QLC 13, [567] (MacDonald P).

233 *Adani Mining Pty Ltd v Land Services of Coast and Country Inc* [2015] QLC 48, [429] (MacDonald P).

234 See Bell-James and Ryan (n 3) 532–3.

emissions, were 'real and of concern', and could not be dismissed as negligible.[235]

There is consequently some important jurisprudence on causation which can be built upon in a climate change and human rights case. However, it is also acknowledged that the broad approach to causation under Queensland's *Environmental Protection Act 1994* (Qld) is helpful here. This Act states that environmental harm may be caused by an activity 'whether the harm results from the activity alone or from the combined effects of the activity and other activities'.[236] This means that a court is not required to draw a correlation between a particular project and a corresponding specific climate change impact.

The push towards 1.5°C as the target level of climate change may also assist with proving causation. The carbon budget literature has been used in Queensland litigation to frame the likely impact of the proposed mine in question. For example, in a joint expert report to the Land Court of Queensland in litigation concerning Adani's Carmichael Mine, it was estimated that the cumulative emissions from the coal proposed to be extracted would represent around 0.5% of the global carbon budget.[237] In essence, the greenhouse gas emissions from coal mined in the proposed Carmichael Mine will represent a tangible and significant portion of the total allowance for staying under 2°C of global warming. This figure has not been recalculated with a carbon budget for 1.5°C of global warming, but it would mean that this project (and projects of similar magnitude) would represent an even larger contribution to the depletion of the carbon budget. The *IPCC Special Report* does suggest that, to stay within the 1.5°C range, by 2050 coal will only be able to comprise 1–7% of the global energy supply.[238] That is, coal will need to become a very small proportion of the energy mix in order to limit climate change impacts. It may now be easier to establish the causal link between a particular mining project and climate change in light of the 2018 *IPCC Special Report*.

Demonstrating a link between a particular mine and climate change is, however, only one of the required causal steps. Establishing causation in a climate change case often requires satisfying the court of a number of cumulative steps. For example, in the context of challenges to coal mines under Australia's federal environmental law,[239] it has been suggested that establishing causation requires the applicant to prove no less than six causal steps.[240]

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235 *Hancock Coal Pty Ltd v Kelly [No 4]* [2014] QLC 12, [209] (Member Smith). The project emissions were framed in the context of the global carbon budget, and would represent 0.16% of this carbon budget.

236 *Environmental Protection Act 1994* (Qld) s 14(2)(b).

237 See, eg, Chris Taylor and Malte Meinshausen, *Joint Report to the Land Court of Queensland on* '*Climate Change – Emissions*'*: Adani Mining Pty Ltd (Adani) v Land Services of Coast and Country Inc & Ors* (Expert Report, 22 December 2014) [18].

238 Joeri Rogelj et al, 'Mitigation Pathways Compatible with 1.5°C in the Context of Sustainable Development' in Masson-Delmotte et al (n 174) 93, 96.

239 *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

240 These six causal steps are that (1) coal is extracted from a mine by the proponent; (2) coal is sold by the proponent to a third party; (3) that third party burns coal; (4) this burning of coal produces emissions (Scope 3 emissions); (5) these emissions increase global temperature/exacerbate climate change; and (6) this climate change causes impacts on a prescribed matter of national environmental significance, which in this case, would be the Great Barrier Reef World Heritage Area or the Great Barrier Reef Marine Park:

In a human rights and climate change case in Queensland, the following cumulative steps would be required to demonstrate that the Queensland government has made a decision in a way that is not compatible with the human right to life:

1. The Queensland government has approved an emissions-intensive project;
2. That project will result in increased greenhouse gas emissions;
3. These greenhouse gas emissions will contribute to climate change;
4. Climate change will have impacts on human life in Queensland; and
5. These impacts are not compatible with the human right to life.

The first three steps should be straightforward, as this progress has already been made in earlier cases. Demonstrating the second step will be assisted by the 2018 *IPCC Special Report*, and the tightening of the carbon budget. The fourth step is certainly arguable, due to the wealth of scientific literature outlining the impacts on human health in Queensland under climate change. Convincing a court of the fifth step may be more challenging, particularly in the absence of any human rights jurisprudence in Queensland. However, Vollmer suggests this is actually one of the less troublesome aspects of the causal chain; if earlier causal steps are made out and climate change impacts are sufficiently severe, a corresponding infringement on human rights can be found.[241]

Although each individual causal step can arguably be proven, the likelihood of success would also depend upon whether a court takes a narrow or a broad approach to causation; for example, whether a court would insist on an applicant being able to prove a causal link between this particular decision of the Queensland government and this particular mine, and a corresponding specific impact on human life. A broad approach to causation is a precursor to success.

The other hurdle is the so-called 'market substitution' defence, discussed above at Part V(A). Overcoming the market substitution defence remains a challenge in Queensland, and may also present some difficulties in a human rights case.

Finally, the remaining causation issue raised in the *OHCHR Report* was that climate change impacts are generally a projection of future impacts, whereas human rights violations tend to arise from events which have already occurred.[242] As noted above in Part IV(D), the Victorian Charter Guide refers to the test from *Osman*, which states that there must be knowledge of a 'real and *immediate* risk to the life of an identified individual or individuals'.[243] While the narrow construction of the right to life adopted in *Osman* could be a concern if Queensland courts choose to adopt this reasoning, there are numerous reasons for

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Justine Bell-James and Craig Forrest, 'Ecologically Sustainable Development and the Great Barrier Reef: A Delicate Balance of Interests' (2019) 36(2) *Environmental and Planning Law Journal* 97, 110.

241 Abby Rubinson Vollmer, 'Mobilising Human Rights to Combat Climate Change through Litigation' in Sébastien Duyck, Sébastien Jodoin and Alyssa Johl (eds), *The Routledge Handbook of Human Rights and Climate Governance* (Routledge, 2018) 359, 367.

242 *OHCHR Report* (n 46) [70].

243 *Osman* (2000) 29 EHRR 245, 305 [116] (emphasis added).

the court to adopt a broader interpretation. As outlined in Part IV(B), the ECHR has since moved away from the *Osman* construction, as evidenced in *Taşkin v Turkey*,[244] and Queensland courts may also be more inclined to rely upon *ICCPR* interpretations due to the express link between the *ICCPR* and the *HR Act*.[245]

4 Jurisdictional Reach

Despite the push for extraterritorial human rights recognition at the international level, the wording of the *HR Act* suggests a far narrower approach to causation. That is, it is likely to be necessary to show that a decision is incompatible with the human rights of persons in Queensland. Although this will limit the scope of arguments, this article has demonstrated that there is a wealth of evidence demonstrating the link between unabated climate change, and severe life and health impacts which will directly affect persons in Queensland. The narrow jurisdictional reach is therefore unlikely to be a significant problem, and a case can be framed around impacts on persons in Queensland.

VI CONCLUSION

Internationally, climate change litigation has taken a 'rights turn',[246] with cases either decided or pending before a number of courts across the globe. Human rights and climate change arguments have not yet been tested before Australian courts, but the *HR Act* presents an exciting opportunity. The combination of Queensland's unique environment, significant coal resources, and high exposure to climate change impacts arguably makes it the ideal jurisdiction for a human rights and climate change case.

This article has demonstrated that the key elements for a successful legal challenge are present, although there are some hurdles to success. None of these hurdles are insurmountable though, and the continually strengthening scientific evidence and impetus to act at the international level may help to lead Queensland courts towards a positive outcome.

Furthermore, this article has only considered climate change arguments in the context of the right to life, and there are at least several other possible bases for a climate change action. A case could potentially be strengthened by arguing that multiple human rights are violated, and this is a rich area for future research.

The recent decision in *Gloucester Resources Ltd v Minister for Planning*[247] is also perhaps an indication that the tide may be turning in domestic climate change litigation. Preston CJ referred to developments like the *Paris Agreement* and the IPCC 2018 Special Report in reaching his decision – all developments which have occurred since the last climate change case was argued before Queensland's Land Court. His Honour concluded his judgment by stating:

244 [2004] X Eur Court HR 179.
245 Explanatory Notes, Human Rights Bill 2018 (Qld) 1.
246 Peel and Osofsky (n 14) 40.
247 (2019) 234 LGERA 257.

> [A]n open cut coal mine in this part of the Gloucester valley would be in the wrong place at the wrong time … Wrong time because the GHG emissions of the coal mine and its coal product will increase global total concentrations of GHGs at a time when what is now urgently needed, in order to meet generally agreed climate targets, is a rapid and deep decrease in GHG emissions. These dire consequences should be avoided.[248]

The timing in Queensland is no different – although perhaps the passage of the *HR Act* means that the time is right for a new chapter in climate change litigation.

248 Ibid 403 [699] (Preston CJ).