Seminar transcript 25 June 2020: "**Queensland's Human Rights Act: Turning Up the Heat for Australian Climate Change Litigation and Development Approvals?**"
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Damian Clothier QC (DC): Good afternoon, everyone. Welcome to the Level Twenty Seven Chambers webinar on human rights and climate change litigation. My name is Damian Clothier and I'm your Chair this evening.

The two immediate prompts for tonight's webinar were first, the recent enactment in Queensland of the *Human Rights Act* 2019 which came into force on the 1 January. Secondly, the news that the *Act* is already been invoked by Youth Advocacy Group as a basis of objection to Clive Palmer's Galilee coal project on several grounds but grounds that include that its contribution to climate change will violate their human rights.

Now, for those of us who are lawyers, it's not often that we have the occasion to train in an area that we are completely unfamiliar with. For most of us the *Human Rights Act* presents a very interesting opportunity to do just that. While the issue of core human rights pervading legislative and administrative processes is something that practitioners and other jurisdictions are probably quite familiar with, particularly in other countries, it is not something which many of us practicing in Queensland are likely to have much grounding in. So we're fortunate to have our three presenters tonight give us that grounding. I'll introduce them collectively at the outset so as not to interrupt the flow of the presentations.

Hopefully, at the end, there will be time for some questions to draw upon their knowledge and expertise. During the webinar, or at the end of it, you can ask questions via the chat function on the website.

Now, one of the few advantages of COVID-19 is that we've all had to quickly adapt and rely upon technology more and more. And one of the advantages of that is that we are able through events like this to invite presenters from far afield. And tonight, we're very very pleased to welcome James Strachan QC as our first presenter. James joins us from London where normally he would practice from 39 Essex Chambers. He practices extensively in administrative and public law, planning & environment, and human rights just to name a few of his many areas and talent. James is praised by both UK *Legal 500* and *Chambers & Partners*, and was announced as 'Environmental & Planning Silk of the Year' in 2016. James will give us some valuable insights into the UK experience, shaped as it is by the *European Convention on Human Rights*, and how rights subject of that convention have been related to environmental issues.

We will then turn to Bianca Kabel from Level Twenty Seven Chambers. Having worked as a solicitor and Associate to Justice David Jackson of the Supreme Court of Queensland and having obtained her BCL with Distinction from Oxford, in just a few short years Bianca has quickly established herself as a sought after Junior in many areas, including commercial,

public and environmental law. Bianca will present on other international experiences in which human rights have affected environmental issues, particularly in connection with climate change impacts.

We will then hear from Joshua Sproule also from Level Twenty Seven Chambers. Joshua is one of our Readers. He has worked for the Australian Government Solicitor and was Associate to Justice Dowsett in the Federal Court. He is very, very well versed in public law and administrative law issues. Joshua will survey our act from Queensland and relevant decisions, and he'll provide some insights into how the topics addressed by our first two speakers might relate to the new legal paradigm which we find ourselves in in Queensland.

With those introductory remarks, I'd now like to hand it over to James for the first part of the presentation.

James Strachan QC (JS): Thank you very much. I'm delighted to join this event from the United Kingdom, where the current strange world we live in means that distance is no longer any real obstacle.

SOURCE OF UK HUMAN RIGHTS – EUROPEAN CONVENTION ON HUMAN RIGHTS

I'm going to try and provide you with some brief reflections on how human rights have affected environmental law in the UK over the past decades. The starting points is, of course, at the source of the rights themselves. For the UK that is the *European Convention on Human Rights* which was an international treaty made by signatory states made in the 1950s in light of the *Universal Declaration of Human Rights* made by the General Assembly of the UN, which is a different Treaty, which doesn't have direct effect in the UK. As everyone will no doubt know, the European Convention was made in the shadow of World War II. So unsurprisingly at that time, the need for a convention to respect human rights in respect of many rights which had been flouted so egregiously was obvious. But equally, unsurprisingly, it's not an international treaty that was made specifically with the environment in mind. Indeed, it's far more obviously concerned with rights such as the right to life, freedom against torture and slavery, protection of freedom of expression, and religion. The UK became a signatory in 1953. In consequence of that, you could go to the European Court of Human Rights if you had a complaint. But that all changed in 1998 with the *US Human Rights Act* of that year which came into force in 2000. And that incorporated those convention rights into UK law, so they could be relied upon in the UK courts, and that included the duty not to act incompatibly with those *Convention* rights unless otherwise required by primary legislation. And there's also an interpretive duty to interpret legislation compatibly with those rights as far as possible, and there's still access to the European Court of Human Rights in Strasburg in Europe but you now need to exhaust your domestic remedies in the UK in courts before applying there.

This may be obvious to most of you, if not all of you, but there isn't a Brexit from the *European Convention on Human Rights*. Brexit, of course, is only from the European Union, which is a different organisation. Despite that being obvious, you may not be surprised to know that, in my own view, many millions of those who voted for Brexit didn't appreciate the difference, and that we are not exiting from the *European Convention on Human Rights* at the end of this year.

The *European Convention* is not a natural source of environmental human rights for the reasons I've just given. It's also relevant to note that many of the rights are qualified rather than absolute rights. But the *Convention* is a living instrument, as it's been described, and it has evolved through interpretation as there have been cultural shifts and changes in Europe. A classic example of that would have been the right to sexuality or rights to gender, transgender rights, none of which would have been necessarily contemplated by the signatory states in 1950, but which are now given expression through interpretive arrangements of the rights themselves. And part of that expansion has occurred through a recognition of both what I regard as substantive and also procedural rights in the articles. An example would be the right to life, which obviously protects individuals through the criminal or indeed from police protection to preservation of life. But that has been interpreted now to include a duty on the state to investigate where life is taken, for example, in custody. And that is important for environmental law because those procedural interpretations of the article rights have given rise to a significant right to access to environmental information which comes with the main rights themselves. The main rights that are involved in environmental law, which I suspect will be similar for your jurisdiction, or the equivalents are indeed article to the right to life, Article 6 right to a fair trial, Article 8 the right to respect for private and family life, and Article 1 of the first protocol to the *Convention* which has to do with the protection of property.

I just wanted to give you a brief flavour of how the courts have approached those rights in the context of environmental law. There are an awful lot of cases and so I've just sort to highlight some of the key ones. But the overall message so far has been that the human rights in question have had a broadly speaking limited effect in terms of environmental law.

Article 2 is of course the right to life. Right to life is an absolute right, but it has been interpreted to apply only to the most serious cases in environmental cases such as *Taskin v Turkey* and *Oneryilditz v Turkey*, both of which involve environmental incidents with very significant loss of life or threat to life. Therefore, one needs quite a serious breach of the environmental arrangements for there to be any breach of Article 2.

Article 6 is to do with the right to fair trial of civil rights and it has been applied to things such as compulsory acquisition of land for development. But it's had a limited impact because the courts, and the House of Lords in the case of *Alconbury*, construed the right to be satisfied

where there was a right of access to the courts by way of judicial review, not a right to a new hearing and such.

Article 8, the right to private life, has been given the widest scope in environmental law and is most often cited or invoked. It's important to recognise it's a qualified right and that means that an interference with private life can be justified by the state where the interference is for a legitimate reason, and it's considered to be proportionate. Examples where Article 8 has been gauged, but not necessarily breached, include Heathrow, London Heathrow, noise in terms of impact on residents in two cases, *Powell and Rayner v UK* and *Hatton v UK*. But in the end the Grand Chamber the European Court regarded the government's approach to allowing such noise subject to certain controls to be a proportionate interference with the right to peaceful enjoyment of one's home. It's been applied in relation to large industrial pollution cases *Lopez Ostra v Spain* and *Giacomelli v Italy*, *Fadeyeva v Russia* and *Cordella v Italy* are all examples. And the picture at the top of your screen is the very large steel works at Ilva in Southern Italy which has been the subject of repeated litigation in the European Court for failure to deal with highly toxic admissions. And in those cases Article 8 was found to be breached, but again, only as a result of a somewhat antiquated plant operating with clear scientific evidence of adverse health effects being demonstrated. And then as I mentioned, procedural rights arising from Article 8 where in *Guerra v Italy* and *McGinley* and *Egan v UK* are examples where individuals have been entitled to access environmental information about the threat to the environment, or to themselves, or to their own health, which is an important protection.

Lastly, Article 1 of the first protocol, recognised for example in the UK by the case of *Lough v SSCLG*, that interfered with adjoining development but treated as a qualifying right where again the development was justified as being proportionate.

RECENT UK ENVIRONMENTAL CASES CONCERNING HUMAN RIGHTS

Turning to some more recent UK examples just to illustrate the point that human rights have really recently played a relatively minor role in the main environmental litigation. I've just given you a few examples.

Hardy and Maille v UK was about a liquefied natural gas terminal in Milford Haven which was granted permission and a challenge was rejected on Article 8 grounds to that permission.

R(Clientearth) v DEFRA relates to a whole series of cases that went up to the Supreme Court about challenges based on the European Union Air Quality Directive. Although those were successful challenges it's important to know they weren't based on human rights but rather on different environmental directives.

R(Spurrier/Plan B) v SST is a rather odd name for what others may know is the Heathrow third runway case, which is very topical over here at the moment. That was a challenge, which ultimately succeeded to the government's national policy statement for a new runway at Heathrow. It was upheld recently this year in the Court of Appeal based on a failure to take account of climate change agreements in the Paris Agreement to achieve a net zero greenhouse gas emissions. It's again important to note that that wasn't a challenge that succeeded on human rights grounds. In fact, those human rights grounds were rejected. There is a Supreme Court hearing for those who are interested in relation to Heathrow, the third runway case later this year, so watch this space.

R(Granger-Taylor) v HS2 Ltd is an example of human rights being invoked to challenge High Speed 2, a new National Rail provision in the UK, and those grounds were rejected.

And finally, *R(Clientearth) v Sec of State*, a very recent case I have just done concerns grants of permission for a gas fired power generating station, one of the largest in Europe. Again, no human rights grounds were pursued.

WHY THE LIMITED EFFECTS OF HUMAN RIGHTS ON ENVRONMENTAL LAW IN THE UK?

What is the reason for the limited effects of human rights environmental law over here? First of all, there's the obvious point that they're not direct environmental human rights, so it's harder to invoke them.

A second point to note is that much of the environmental law in the UK is governed by a whole wealth of other legislation, including European law, as I've already indicated, such as environmental impact assessments and habitats directives or environmental permitting. That means of course challenges often fall on those grounds. And there is extensive consideration of environmental impacts under those regulations which means that human rights often take a bit of a backseat in that sort of litigation.

The other point to notice, that absent a sort of direct Article 2 threat to life, I've already pointed out that other human rights are qualified and interferences with them can be therefore be justified by the public interest and proportionate interference. So the grants of planning permission for large scale development, be it a power station, a runway, or a railway can often be justified as being a proportionate interference with property or home rights for the wider public interest.

Lastly, as illustrated by the *Clientearth* case, global environmental effects such as climate change often result in national targets and national requirements, whereas individual projects may not actually directly breach those targets. For example, net zero greenhouse gas emissions of being a national target and achieving those targets, ironically, may not preclude

sometimes a development which emits greenhouse gas emissions. *Clientearth* is a good example, where the move to an electric type environment with electric cars etc, actually requires the ability to generate more electricity and to fill the gap where wind and other sustainable modes can't always provide the power source, and consequently, ironically, more power stations are in order to move to a more sustainable system.

PREDICTIONS FOR THE FUTURE OF CLIMATE CHANGE LITIGATION

What are my predictions for the future? Well, I've given you three ideas, by references to three images at the top.

You won't recognise, I suspect, the person on the left. That there is Professor Boyd who is the Special Rapporteur on human rights in the environment. And for those who are interested, that's a European appointment. He has produced a thematic report on safe climate and the role of human rights as to catalyse action on climate change. That may indicate at least a cultural shift in Europe which may result in changes.

The second image, you will probably recognise, is indicating the potential for political pressure to create climate change driven environmental human rights such as a right to decarbonisation. I don't think that exists over there, but who knows that might come from such political pressure.

Lastly, and perhaps most significantly for you, the possibility of a proactive judicial system, which interprets those rights that I've just discussed, and actually to include a right to protection against climate change. That really requires a judiciary that's willing to interpret those rights in a broad way.

That really concludes my brief reflections on where we are over here. I will hand over to the next speakers.

Bianca Kabel (BK): Thank you very much, James. Can I add my thanks to you all for joining us this evening.

As Damian mentioned, my part of this evening's presentation is to focus upon international trends and developments in this space, but looking particularly outside the UK and the European Court of Human Rights. What I'm particularly interested in for this afternoon's purposes is the experience of domestic courts around the world and how what's been found there and how courts have dealt with human rights challenges in other jurisdictions might give us some idea about what to expect in Queensland.

To pick up on the last point that James mentioned, I think we might see a bit of a contrast perhaps between what's been seen in the UK and what's being experienced elsewhere in the world.

Of course, in undertaking this kind of review, we must be cognisant of some of the jurisdictional peculiarities. Nonetheless, given that it's such a novel and developing area in Queensland, it seems instructive to look across our borders to what's happening elsewhere.

THE RISING TIDE OF CLIMATE CHANGE LITIGATION GLOBALLY

I really just extracted a neat quote on the slide there [see slide 2 BK slide deck] from Michelle Bachelet, the United Nations High Commissioner for Human Rights, speaking really, as you'll see, to the importance of climate change, and the impacts upon humanity.

The first point really that I want to look at is, overall what are the global trends that we're seeing at a particularly high level? In May of 2019, a group of researchers at the London School of Economics did a comprehensive overview of the world's climate litigation, speaking out about climate litigation generally not specific to human rights. They made a few interesting observations and findings, which I'd like to share with you.

The first is that climate change cases at that time had been brought in at least 28 countries around the world. And since May of last year, on my account, that number has increased at least to 33 countries. In many of those jurisdictions it's true to say that at least some of the cases have had a human rights element. The breakdown is also quite interesting. By far the most cases have been brought in the United States, and that comprised in May of last year 1,023 of the total 1,328 cases. Interestingly, however, Australia came in with the second highest number of cases, and that was at 94. It was then followed by the EU at 55, and UK at 53.

And when one undertakes then a comparison of the findings of the London School of Economics research against other reports, what we see is a marked increase in the total number of cases worldwide. In May of 2017, two years prior to their report, the UN reported that there were 884 climate change climate change cases worldwide. And so comparing that to what the London School of Economics found that's a 50% increase in only two years. Then by January of this year, that number had reached 1,444. And so on my account a roughly 9% increase in those six months.

From those statistics, if you like, it's fair to say that there's been a global and relatively rapid increase in climate litigation, at least over the past three years or so. What has also been observed by a number of academic commentators and climate activists is that globally there's been a change in the winds, if you like, of cases take on a much greater human rights dimension, and signalling that what has been described by a number of Australian academics

as a 'rights turn'. And this rights turn has been spurred on by a number of key cases that we've seen around the world and domestic courts in particular. And I'll mention a few of those highlights.

BACKGROUND TO CLIMATE LITIGATION AROUND THE WORLD

Many of the commentators will attribute the beginning of the wave to the well-known decision now in *Urgenda*, and I hope you'll forgive me for my poor pronunciation of things. By way of some background to that case, the United Nations Intergovernmental Panel on Climate Change issued various assessment reports on climate change in the 2000s. Amongst other things, the IPCC emphasised the need for a significant reduction in carbon dioxide emissions by 2030, and a target of two degrees Celsius. Now, the applicant, the Urgenda Foundation is a climate activist group. And the state of the Netherlands and Urgenda were both in agreement if you like that it was necessary to limit the concentration of greenhouse gases in the atmosphere. But their views essentially differed, and the arguments differed at the speed at which the Netherlands should be obliged to do that.

Now, particularly, for our purposes, the Court made a number of interesting observations, which I'd like to draw your attention to. In the first instance, in The Hague District Court, it was held that it was widely accepted that the emission of greenhouse gases makes it highly probable that dangerous climate change will occur within several decades. The Court then went on to refer to the impact this will have upon humans, including the deterioration of food production, increased mortality and a decrease in availability of fresh water. What's interesting, at least in the English translation that I've been able to find, is a quote from the Court saying that it is a fact that there will be dangerous climate change. So quite a certain finding, if you like.

The Court then proceeded to find that the severity of the danger gave rise to a positive legal duty owed by the state to its citizens. And with the existence of this positive legal duty, that gave the judge a mandate if you like to intervene in what we might see typically in our jurisdiction as being in the political domain or a matter of policy for the government. In determining then what steps are required to fulfill that duty, the Court relied on a number of things, but most interestingly for our purposes, two principles of which you might already be aware. First is the equity principle, which provides, among other things, that extra effort is asked of countries that have up until now been responsible for most emissions and have profited first. And the precautionary principle which is broadly that where there are threats of serious or irreversible damage, the lack of scientific certainty should not be seen as an impediment to the requirement to take active steps.

Ultimately, the Hague District Court ordered that the Netherlands achieve a particular result, which for the civil lawyers amongst us will find perhaps somewhat unusual, rather than a legal

duty to take certain steps. It was a duty in fact to accomplish an outcome. And it was ordered then to reduce the collective volume of the annual Dutch greenhouse emissions, or have them reduced in such a way that by the end of 2020 that volume would have been reduced by at least 25% compared to the 1990 levels. That was consistent with what the applicants Urgenda had contended for.

As I said, and perhaps unsurprisingly from the result, the case has been widely recognised as being a leading development in this area, really kicking off some of the human rights new generation cases if you like. For example, the UN High Commissioner for Human Rights, Michelle Bachelet, who we saw before, was quoted as saying "…it provides a clear path forward for concerned individuals in Europe and around the world to undertake climate litigation in order to protect human rights." I think it's probably fair to say she wasn't quite wrong about that. Not long after *Urgenda* was followed by a decision in *Leghari v Federation of Pakistan*. In that case, a farmer who was also studying law from Pakistan brought an action against the government and alleged that their failure to implement climate policy at home defended his fundamental rights, and he specifically relied upon the right to life and liberty, and the inviolability of the dignity of man. Now, he was successful there as well. The court sided for those rights as well as the precautionary principle again, and found the delay and lethargy of the state at implementing its climate change policy offended the fundamental rights of its citizens.

CONSIDERATION FOR LACK OF SCIENTIFIC CERTAINTY IN JUDGMENTS

If I can turn back there briefly to the *Urgenda* case, because the story doesn't quite end where we left it earlier.

In September of 2015, the Dutch government appealed the decision of the Hague District Court. That was unsuccessful. It then appealed on to the Dutch Supreme Court. Again, it was unsuccessful. The Supreme Court handed down its decision in late December of last year, and it affirmed the judgment of the Court of Appeal.

I just want to draw your attention to a few comments that are made in the course of the Supreme Court's judgment, particularly which might signal some pathways for our future case law here and give us a better idea about some of the trends that we're seeing.

In particular, the Netherlands argued that it had taken a number of measures, including adaptation and mitigation measures, to limit the risks of climate change which hadn't been adequately considered by the courts below. That argument wasn't found to be persuasive by the Supreme Court which found that it had not been made clear or plausible that the potentially disastrous consequences of excessive global warming can be adequately prevented with the measures adopted by the state. However, perhaps on the flip side, the

court was also a bit adaptable when it came to a lack of complete scientific certainty of the impact of the reduction of carbon emissions upon the effects of climate change. In doing so, in adopting the precautionary principle again, and adopting the standard of a high degree of possibility that reduction of carbon emissions would have an impact.

I think what's interesting about that is it shows that the lack of scientific certainty can cut both ways and cut against those seeking to establish the impacts of climate change and against those who are seeking to demonstrate that the steps that they're taking are sufficient. Now, in perhaps in our jurisdiction, at least, you might expect that much might depend upon the who gets the onus in a particular case. But the way that the precautionary principle was applied by the Dutch Supreme Court might indicate that there is more flexibility there than we might otherwise see in our more usual jurisprudence. Certainly in that case the Supreme Court was quite willing to use the precautionary principle to analyse the lack of certainty of the science in a way that was against the interests of this day.

It's fair to say many of you would agree that the outcome is perhaps quite extraordinary. In fact, the court itself recognised that on at least one occasion. It also does stand in stark contrast to what we've seen in some other jurisdictions, highlighting perhaps again the obvious point that I mentioned earlier that the relevance of these cases and trends must also be considered through the prism of their particular jurisdictional context.

One example is that the last example on the slide, *Juliana v US* [see slide 4]. In that case twenty-one youth plaintiffs filed a suit alleging that the US government had violated their rights under the US Constitution. They argued that the Fifth Amendment, which protects against deprivation of life, liberty, or property without due process of law, encompasses the right to a climate system capable of sustaining human life. That might perhaps be an attempt to overcome a lack of direct environmental rights that James mentioned before. They argued that by encouraging and allowing activities relating to greenhouse gas emissions the state had offended those rights.

In fact, they were successful at first instance. Ultimately, however, on appeal before the Ninth Circuit Court of Appeals, it was found that despite there being compelling evidence that we're headed for an environmental apocalypse, and even assuming, so notably not finding that there wasn't such a right, but assuming a constitutional right to a safe climate system exists, that impressive case for redress, it was found must be presented to the political branches of government rather than the courts. Notably, however, it's worth being aware that there was in fact a powerful dissent delivered as well.

Now, we might expect perhaps just from hearing that even brief overview that the Australian courts here would be more inclined to take the route of the Ninth Circuit Court of Appeals.

Although with our new human rights legislation here in Queensland we might wonder how precisely that plays out, but that is a topic I will leave for Josh to speak to.

In any event, it might not be as farfetched to see a case like *Urgenda* play out in Australia as you might think. In May of last year, a group of eight citizens from the Torres Strait Islands filed a claim before UN Human Rights Committee. The Islanders are requesting that the Australian Government reduces greenhouse gas emissions and adopt adequate coastal defence measures in full consultation with island communities. They are relying upon rights, specifically under the *International Covenant on Civil and Political Rights*. In particular, Article 27 being the right to culture; Article 17 the right to be free from arbitrary interference with privacy, family and home; and Article 6 the right to life. So in particular, they are seeking, amongst other things, that Australia reduce its emissions by at least 65% below the 2005 levels by 2030, and to phase out thermal coal both for domestic electricity generation and export markets.

Notably, when it was first filed it was the first climate change litigation originating from Australia with a human rights element. So that's May of last year. The results remain to be seen, and of course, whether or not it will in fact result in any political pressure or adoption of the findings of the Human Rights Committee by the Australian Government. But we might think as well that any findings made by Human Rights Committee might themselves provide a stronger basis for our domestic courts to deal with climate change challenges. For example, it might provide, for instance, a new gusto or arguments for our domestic plaintiffs took to run with.

The examples which I have referred to so far concerning climate change litigation generally with human rights based arguments. But there are at least a few current examples from around the world where we see those sorts of arguments being particularly run in relation to planned or approved developments or projects. I wanted to just briefly touch on those.

The first, which has not yet proceeded to judgment, is the decision in *Ali v Federation of Pakistan*. In that case the petitioner is a seven-year-old girl. She has brought a petition seeking an injunction against the development of a coal field which has been approved by Pakistan's government. She says the development is likely to increase Pakistani coal production from 4.5 to 16 million metric tonnes per year with obvious consequential impact on greenhouse gas emissions. She also says that it will displace residents in the region and lead to environmental degradation both directly through water quality impacts and indirectly through air quality impacts from coal combustion. Watch that space very carefully.

The next example is a decision with a perhaps somewhat unique human rights take. It was a decision of the French Minister of the Supreme Court in 2019, again in December, in which it upheld a decision to include an expiration date in a fossil fuel mining permit. *IBC Petroleum France SA v France* was where the applicant had applied for an extension of its existing fossil

fuel extraction permit. There was a law passed in France in 2017 which prevented, essentially existing amongst other things, existing hydrocarbon mining permits to be extended beyond the first of January 2014. The decision was made to approve the extension but only until that date. IBC Petroleum sued and alleged itself that placing an expiration date interfered with the company's right to the peaceful enjoyment of property implied by Article 1 of the *Charter of Fundamental Rights* of the European Union. Ultimately, the court dismissed the application and concluded that it was an appropriate balance between the right to enjoy property and France's commitment to limit climate change under the *Paris Agreement*.

The final example that I've noted on the slide [see slide 5] for you is a decision in Norway, in which Greenpeace brought litigation seeking to prevent the Norwegian government from granting permission for oil drilling exploration in the Arctic Sea. The Court of Appeal in that unanimously decided that the decision to permit new exploration licenses did not violate the Norwegian constitution or the *Paris Agreement*. And a critical finding, certainly interesting for our purposes, is that it was found that it's uncertain whether viable discoveries will be made and whether the decision will lead to emissions. And that was because, in part, the permission was for exploration rather than for drilling itself. So similarly here, we might see distinctions drawn of that kind between licenses granted for prospecting or exploration as opposed to petroleum leases in law.

Greenpeace I should note has since appealed, as we see on the on the slide, to the Supreme Court of Norway, which has been listed to be heard by 19 justices.

WHAT CAN WE AUSTRALIA LEARN FROM INTERNATIONAL CLIMATE CHANGE LITIGATION?

To finish up, what are our key takeaways? First, I think, we can see at least a significant increase globally in climate change litigation. As part of that we are seeing, particularly in the more recent years, an increased human rights focus, that's the 'rights term' as it is being called by some Australian commentators.

In some of the cases that we've seen, certainly the most notable ones, we're seeing a greater willingness by domestic courts around the world to recognise the link between climate change and fundamental rights and to recognise consequential duties and obligations upon states to give effect to those rights in a meaningful way. They've been willing to adopt different or novel arguments to overcome some of our perhaps foreseeable difficulties in proof of causality and impact. One of those, which is often used, is the precautionary principle in dealing with particularly scientific uncertainty. The last point there that they are showing a great willingness to hold governments to their international commitments to climate change as part of domestic law, by linking it through to those fundamental rights.

The question to leave for Australia, and one that remains to be seen as I said, is the claim by the Torres Strait Islanders in May of 2019 was really recognised as one of our first most significant human rights based climate change claims, even though brought abroad. Nonetheless, given that Australia presently is only number two in terms of the world leading statistics of climate change litigation generally, we might see that as we continue to have more of a rights turn in this litigation that it will be brought on and Australia will be brought more to the forefront in this new generation of claims.

On that note, I'll hand it over to Josh to continue.

QLD HUMAN RIGHTS ACT – INTERPRETING THE RIGHT TO LIFE

Joshua Sproule (JS): Thanks Bianca, and thanks also to James for joining us this afternoon.

My part of the discussion is about the new *Human Rights Act* in Queensland. The *Human Rights Act* introduces twenty-three rights, all acts and decisions and public entities and legislation must be compatible with those rights. That involves two questions. First, is the right limited? and second is limit reasonable and demonstrably justifiable? which involves proportionality test.

Only some of the rights in the *Human Rights Act* will have relevance to climate change litigation, my focus will be on the right to life.

There are two kinds of risks or threats to life for climate change. First, direct threats to life such as from extreme weather events. Second, indirect changes to the environment which make it less able to support life. The question is whether those impacts and limitations on the right to life within the meaning of s16 as a matter of statutory construction.

It is important to note that there are no interstate decisions in Victoria or the ACT that have looked at climate change through a human rights lens. So there's no one judicial authority either way. So how might the right to life be interpreted? Well, there are arguments for AND against.

On the for side, in Victoria the courts have held the right should be read broadly and without regard to reasonable limitations. The explanatory memorandum to the right to life in s16 of the *Human Rights Act* also says it is intended that the state take positive measures to address threats to life, such as from malnutrition, which suggests that the determinants of life are included in the scope of the right to life. On the other hand, there is no express right in the *Human Rights Act* to a healthy environment or to a healthy climate. So one should not be implied.
In the explanatory memorandum to the right to access health services in s37 of the *Human Rights Act* also says the right does not include the underlying determinants of health. And so

given that clear statement of intention it would be rather odd if the underlying determinants of health or otherwise were protected under the right to life in s16. There's a possibility that direct impacts may be protected under s16, but indirect impacts are not, and that depends whether the right to life includes the right to access to the resources required for life.

THE SCOPE OF THE QLD HUMAN RIGHTS ACT

International jurisprudence on human rights to climate change is also relevant to the consideration of the scope of the rights of the *Human Rights Act*. There are two views about this. One is that it's great. But on the other hand, the High Court is cautioned against adopting and applying international jurisprudence indiscriminately. The ordinary techniques of statutory construction apply. It is always permitted in regard to international issue decisions. And so s49(3) doesn't change that. It's not a foregone conclusion that international climate change human rights cases can be translated uncritically to the Australian context, in the context here in Queensland. But s16 of the *Human Rights Act* here in Queensland was based on Article 6(1) of the ICCPR, and the language is relevantly indistinguishable. So at the very least, the jurisprudence on the scope and content on the right to life under the ICCPR will be influential in Australia.

There are two areas where climate change litigation will likely have a focus. First is declarations of incompatibility. Cases like this will be rare because depending on how a particular statutory provision is framed, it may be harder to show that legislation is incompatible with rights rather than a particular decision. Secondly, other than using litigation to make a political statement, there is limited practical effect to a declaration of incompatibilities.

QLD HUMAN RIGHTS ACT S58 – COMPATABILITY WITH HUMAN RIGHTS

I think the more fruitful area of application is review of acts and decisions of public entities under s58 in the *Human Rights Act*.

The term public entity has a complex definition but for present purposes simply think government acts and decisions. There are two limbs to s58. For acts, which include values and proposals to act, they must as a matter of substance be compatible with human rights. For decisions, there are two things. First, the decision maker must give proper consideration to human rights. And secondly, the actual decision has to be compatible with human rights as a matter of substance. So both of those limbs have to be satisfied and it's not sufficient if proper consideration is given to rights in making a decision that the actual decision isn't compatible with human rights, for obvious reasons.

In relation to relief, it can only be absolved for unlawfulness under s58 through a piggyback claimant. That means in conjunction with non-*Human Rights Act* relief if and where it is available. The non-*Human Rights Act* relief though doesn't need to be successful. Relief under

the *Human Rights* Act is most likely to be a combined with judicial review proceedings or in cases about development projects. Questions of standing arise and will depend on whether the person can actually seek the non-*Human Rights Act* relief.

What does it mean to give proper consideration to a right under s58? Well, it's more onerous than the relevant considerations around in judicial review because the word 'proper' in s58 has some work to do. As s58(5) says, it includes but is not limited to identifying the relevant human rights in considering if the decision will be compatible with them. Jurisprudence in Victoria, as I've put on the slide [see slide 7 of JS deck], is that the decision maker must have seriously turned his or her mind to the human rights issues and not simply looked at the charter in a formulistic way. It's arguable then that decision makers need to seriously consider whether or not climate change impacts of a proposed decision will limit the right to life and where the balance between those rights and the reasonable limitations lie.

What is needed to show that a particular act or decision is, as a matter of substance, incompatible with the right to life because of climate change? Well, the authors of this paper, Justine Bell-James and Brianna Collins, identify five steps [see slide 8]. Steps two and three can be a little difficult, because they involve showing first a net increase in emissions, and secondly, that the net increase will contribute to climate change. Claimants will of course need to produce evidence about this. As to set form, claimants will need to show that the impacts will be suffered by persons in Queensland, rather than simply at a global level. And that's because the *Human Rights Act* only jurisdictionally applies to Queensland. Step five could be jurisprudentially challenging, but if the earlier court steps are made out, and the impacts are relatively immediate and severe, and being an infringement is reasonably likely to be found. What I mean by that is that if the threat to human life is quite serious, then it's more likely that the right to life has been infringed.

CHALLENGES FACED BY RIGHT TO LIFE CLIMATE CHANGE ACTIONS

There are quite a number of challenges that right to life climate change actions will need to overcome.

First, it's uncertain if future generations have rights under the *Human Rights Act*. The *Human Rights Act* does not expressly provide so. The *Human Rights Act* is also framed in a way that suggests existing humans only have rights under it. So successful climate based claims may need to show the impacts from climate change on the present generation or the present population.

Second, the dispersed way in which the impacts of climate change mean that it is difficult to identify individual victims. For example, while we know that more individuals perish for more intense heat waves for example, we don't know who they will be. By referring to individuals

and every person in the relative sections of *Human Rights Act*, it may be that the rights under the *Human Rights Act* are held individually rather than collectively. If so, to succeed, it will be necessary to show that there are individual victims impacted by climate change and for claimants to identify them, rather than simply taking a statistical approach.

On the other hand, there's a Victorian authority that suggests that it's not necessary for an identifiable individual to be affected, and that a potential effect on the rights of a class of persons is sufficient. Instead, whether or not there is an identifiable victim is relevant to issues of standing.

Third, climate change impacts are generally a projection of future impacts. But human rights violations generally arise from events that have already occurred. The court will need to make choices about what constitutes a threat to a human right imminent enough so as to require protection. For example, does it require knowledge by the state for real and immediate risk to life? Or does the threat simply need to be reasonably foreseeable? Are slow, incremental and pervasive risks enough? And there are differences in the jurisprudence internationally. A broad approach, however, to go to causation and the identification of victims is needed for claimants to succeed.

Fourth, the relationship between the act or decision and the impact on the human right is unsettled. The question is, does the decision or act need to be the operative cause of the limit of rights? There are views in both ways in Victoria.

The causation issue also raises other problems. For example, the market substitution defence, where emitters argue that if one project doesn't go ahead the market will simply substitute, and emissions will occur anyway. So, if the proponent doesn't sell coal, for example, someone else will. There are some answers to this. First, proponents will need to prove it up. And second, the environmental impact remains unacceptable regardless where it is caused, which is what Chief Justice Preston held in a case from New South Wales in the Environmental Planning Court.

The causation problem can also be reframed, like the Dutch Supreme Court did in *Urgenda*. The argument is that the climate science tells us with certain confidence that only a particular amount of greenhouse gases can be spent or emitted for a given level of global warming. If that carbon budget is exceeded global temperatures become higher. So each reduction of greenhouse gas emissions has a positive effect on combating climate change. Hence, no reduction is negligible and conversely every failure to reduce emissions contributes to the problem.

What will the courts in Queensland decide? Well, that last point needs explanation.

WHAT LIMITS ON RIGHTS ARE THERE UNDER THE QLD HUMAN RIGHTS ACT?

What limits are there on rights under the *Human Rights Act*? S13 entails a proportionality test. The relevant factors which are put up on the slides [see slide 10] are not restricted to those in s13(2). Respondents will likely run arguments that the court will need to weigh up factors like those on the right hand side of the slide against the need to mitigate against climate change. But s13(2) requires the court to ask if there are any less restrictive and reasonably available ways to achieve the purpose of a limitation. For example, in the context of the limitations I have put on the slide, more energy efficient means, more renewable energy sources, and achievement of economic prosperity, and development in new renewable industries. The upshot of this is that arguments based on economic development, energy security and other social benefits might actually hold less weight than they once did.

Once the limit on rights is shown, the onus also switches to the decision maker to show the limitation is reasonable and justifiable.

Proponents of decisions might need to be take a more active role and do more heavy lifting to show that impacts from climate change on the right to life.

More stringent standards may mean climate change claims on the *Human Rights Act* are more likely to succeed. The court also takes a more active role, it must make an independent and objective judgment for itself about where the limitation is justified. The court is thus more likely to be more involved in assessing what is the right balance to be struck, and the proper weight to be accorded in competing considerations. That's quite a different approach from what has traditionally been understood to be the role of the courts in traditional review.

On the one view, that has a tendency to enrol the courts in policy debate and politics. The Victorian courts have been cognisant of that and while there's no doctrinal difference to decision makers per se, the court courts have given some latitude to decision makers in terms of their fact finding, the discretionary considerations, and the exercise in balancing up a competing consideration.

The court also cannot just discern a decision simply because it takes a different view of the *Act* or decision on the merits. In the context of climate change, complex whole society, policy considerations are involved and the courts may in fact give a degree of latitude to the government to decide how the balance should be struck. For example, in *Urgenda* while the Dutch Supreme Court found that Holland had to do more to reduce emissions, it left the state free to choose the measures to be taken to achieve this. While a particular project might be emissions intensive, it might be one small part of the government's overall positive climate change policy.

WHAT LESSONS FROM INTERNATIONAL JURISPRUDENCE?

What are the key takeaways? Well, there's a growing international trend to consider climate change issues through a human rights framework. But as we've heard this afternoon, success has been mixed. While international jurisprudence is not directly translatable into the Australian context it would likely be influential. While there are significant challenges to successful human rights climate change claimants need to overcome, those challenges are not insurmountable, but it remains to be seen.

I will now leave it to Damian to wrap up.

DC: Thank you very much to our speakers.

We did have a couple of questions, which I'll take a few minutes with.

Our first question is "Is it more likely that environmental rights would be regarded as related to rights to an adequate standard of living or health?" I'm not sure, I might pull in the first instance volunteers to respond to that question. If not, I might ask Josh to respond to any specific reference to the Queensland act. No volunteers? So it's over to Josh.

JS: In the *Human Rights Act* in Queensland the right to life doesn't say that there needs to be an adequate standard of living, but that's certainly something the court could imply when in it construes the section but these things are quite open ended, because there simply just hasn't been any decisions in Australia on the question.

The right to health services expressly excludes the determinants for good health in the explanatory memorandum. So when the court is looking at how to construe the *Act* it will have to refer to the explanatory memorandum in terms of what Parliament intended the right to encompass.

DC: It just falls to me to thank our speakers very much for a very interesting series of discussions in relation to a topic which I think we will find will be of increasing relevance to Queensland lawyers, and probably a minefield for decision makers in the future. I shouldn't single anyone out but thank you very much to James in particular for making his time available, and from beaming in from London. Otherwise, have a good evening. Thank you very much.