Trends in Human Rights-Based Climate Litigation: Pathways for Litigation in Australia

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Brian J Preston* and Nicola Silbert**

Abstract

There is growing recognition of the intersection between human rights and climate change. As linkages between climate change and human rights grow, so too has climate litigation overseas that seeks to use human rights arguments. While climate litigation overseas has been observed as taking a 'rights turn', this same trend has not been followed in Australia. This article examines how and why human rights-based climate litigation in Australia has differed from the overseas context. Through a survey of overseas human rights-based climate litigation based on three types of causes of action: international and regional treaties; constitutional rights; and human rights enshrined in statute, this article demonstrates that these causes of action are limited in availability and scope in the Australian context. To respond to these limitations, this article offers two possibilities for human rights-based climate litigation in Australia: using human rights as a tool for statutory interpretation; and using human rights to understand breaches of other laws, such as planning or environmental laws.

I Introduction

The ramifications of climate change are reverberating across the globe, along with increased pressure to mitigate the causes of climate change and adapt to its consequences. In this context, there is growing recognition of the intersection between human rights and climate change. As linkages between climate change and human rights grow, so too does climate litigation that is based on causes of action that have a human rights foundation.

* The Honourable Justice Brian J Preston, Chief Judge of the Land and Environment Court of New South Wales. This article is an amended version of a keynote address delivered by Justice Preston to the 2021 Castan Centre for Human Rights Law and King & Wood Mallesons Annual Lecture on 9 December 2021. A draft of the article that has been accepted for publication in Volume 49 of the *Monash University Law Review*. The fully-edited final and citable version of the article is forthcoming.

** Researcher/Tipstaff to the Hon Justice Brian Preston in 2021.

Overseas, there has been a rise in climate litigation that employs human rights arguments. These cases have been based on different causes of action, including international and regional treaty law, constitutional law, domestic statutes, and other sources of law. Yet, as this article will reveal, human rights litigation in Australia has not followed the same trends of human rights-based climate litigation overseas. Human rights-based climate litigation in Australia has been limited both in terms of the number of cases and the human rights content of these cases. This article examines the questions of how and why human rights-based climate litigation in Australia has differed from human rights-based climate litigation overseas. Through a survey of overseas human rights-based climate litigation, we demonstrate that the Australian legal landscape has limited causes of action for human rights arguments related to climate change. To respond to these limitations, this article offers some possibilities for human rights-based climate litigation in the Australian legal context.

Part II begins with a short introduction to the relationship between human rights and climate change, and the role of litigation in negotiating and developing this relationship. Part III offers an overview of human rights litigation focusing on three causes of action based on international and regional treaties, constitutional rights and human rights enshrined in statute. Part IV probes the possibilities for each of these causes of action in the Australian context. We argue that there are limited possibilities for human rights-based litigation in Australia based on causes of action under treaty law, constitutionally protected rights, and human rights enshrined in statute. These human rights-based litigation pathways in Australia are limited by Australia not being part of a binding regional human rights system; having few rights in the Constitution and no national bill of rights; and a lack of independent causes of action available in State human rights legislation. Outside of these causes of action, however, lie other possibilities for human rights-based climate litigation in Australia. Part V analyses two possibilities for human-rights based climate litigation in Australia, both concerned with the interpretation of laws. One involves using human rights as a tool for statutory interpretation, and the other involves using human rights to understand breaches of other laws, such as planning or environmental laws. Part VI offers concluding thoughts on the implications of these trends and directions.

II The relationship between climate change and human rights

Before human rights-based climate litigation can be examined, it is necessary to understand the relationship between climate change and human rights, and the role of climate litigation in this context. Climate change has widespread implications for a range of human rights. Human rights, in turn, have implications for mitigation of and adaptation to climate change. Climate

litigation is one forum through which the relationship between human rights and climate change has been developed and elaborated upon.

A Climate change and human rights

Climate change has implications for a broad spectrum of human rights. These include the rights to life, safe drinking water and sanitation, food, health, housing, self-determination, culture, work and development. The impacts of climate change on human rights are being increasingly recognised. On 5 October 2021, United Nations Human Rights Council resolution A/HRC/48/L.23/Rev.1 (Resolution 48/13) recognised the human right to a safe, clean, healthy and sustainable environment, and the implications of climate change for this right, and a cognate resolution (A/HRC/48/L.27) established a Special Rapporteur on the promotion and protection of human rights in the context of climate change. On 28 July 2022, the UN General Assembly adopted a similar resolution to that of the UN Human Rights Council (A/RES/76/300), recognising the human right to a clean, healthy and sustainable environment. Since the passing of Resolution 48/13, the Resolution has been mentioned by the Constitutional Court of Costa Rica in a decision ordering the government to stop the use of a bee-killing pesticide,[1] and by the Constitutional Court of Ecuador in a decision prohibiting mining in protected forests.[2]

States have procedural and substantive obligations to enable effective enjoyment of these rights.[3] At a national level, these substantive obligations include an obligation of every state to protect those within its jurisdiction from the harmful effects of climate change, with respect to both climate mitigation and adaptation.[4] Procedural obligations include duties to assess environmental impacts and allow access to environmental information; to facilitate public participation in environmental decision-making; and to provide access to remedies for harm.[5] Former Special Rapporteur John Knox elaborated on these obligations in framework principles on human rights and the environment,[6] which summarise the main human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. The

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[1] David Boyd, 'Newsletter 11', *United Nations Special Procedures of the Human Rights Council* (Web Page, April 2022) <https://us19.campaign-archive.com/?u=ba766e1bd004df444598dd9ff&id=f4ce565869>.
[2] Ibid.
[3] 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: Climate Change Report*, UN Doc A/HRC/31/52 (1 February 2016) [50]-[80].
[4] Ibid [68].
[5] Ibid [50].
[6] 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: Climate Change Report*, UN Doc A/HRC/37/59 (24 January 2018).

framework principles recognise that "environmental harm interferes with the enjoyment of human rights, and the exercise of human rights helps to protect the environment and to promote sustainable development".[7]

Importantly, there is increasing recognition that climate change disproportionately impacts people and communities in vulnerable situations[8] who have historically contributed the least to greenhouse gas emissions. In July 2021, Human Rights Council resolution (A/HRC/RES/47/24) requested the Secretary-General to prepare and submit a report to the Human Rights Council on the adverse impact of climate change on the full and effective enjoyment of human rights of people in vulnerable situations.

Human rights, in turn, have implications for mitigation and adaptation to climate change. International instruments mandate a human rights-based approach to climate change. Human rights were originally marginal to international climate change law. There is a lack of explicit human rights language in the United Nations Framework Convention on Climate Change (UNFCCC)[9] and Kyoto Protocol,[10] although these instruments can be seen to capture human rights concerns in the more general language of human welfare, human interests and equity.[11]

The preamble to the Paris Agreement acknowledges that all states "should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity".[12] While the insertion of human rights into the Paris Agreement is an important step, the content of the provision has been described as weak on the basis that it is limited to responses to climate change, rather than to impacts which are already occurring and will occur in the future.[13] Further, the language requires parties only to *consider* rather than to *fulfill*

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[7] Ibid 7.
[8] Human Rights Council, *Resolution adopted by the Human Rights Council on 14 July 2021,* UN Doc A/HRC/RES/47/24 (14 July 2021).
[9] *United Nations Framework Convention on Climate Change*, opened for signature 9 May 1992, 1771 UNTS 107 (entered into force 21 March 1994).
[10] *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 11 December 1997 (entered into force 16 February 2005).
[11] Ben Boer and Rosemary Mwanza, 'The Converging Regimes of Human Rights and Environmental Protection in International Law' in Tuula Honkonen and Seita Romppanen (eds) *International Environmental Law-making and Diplomacy Review* (University of Eastern Finland, 2018) 25.
[12] *Paris Agreement*, opened for signature 16 February 2016, UNTS I-54113 (entered into force 4 November 2016).
[13] Ben Boer, 'The Preamble' in Geert van Calster and Leonie Reins (eds) *The Paris Agreement on Climate Change: A Commentary* (Edward Elgar, 2021) 60.

human rights obligations.[14] The rights enumerated in the Paris Agreement are limited, and notably do not include the right to life or rights concerning food and safe water or cultural rights. However, the Paris Agreement undoubtedly "represents a breakthrough, in that it explicitly links human rights and climate change".[15]

A human rights-based approach to climate change involves identifying rights-holders and corresponding duty-bearers, and formulating policies and programs with the objective of fulfilling human rights.[16] Norms, principles and standards derived from human rights law should guide climate mitigation and adaptation.[17] In his Call to Action on the occasion of the 75th anniversary of the United Nations, United Nations Secretary-General António Guterres set out climate justice as a priority area for human rights.[18] The Call to Action notes that "climate change is the biggest threat to our survival as a species and is already threatening human rights around the world" and calls for climate justice, particularly for future generations.[19]

Cases discussed later in this article reveal that a human-rights based approach to climate change involves grappling with tensions between different human rights – for instance, tensions between cultural rights and rights to a healthy environment. Other examples of human rights issues in climate mitigation and adaptation are highlighted in the thematic study by the Special Rapporteur on the rights of indigenous peoples on the impacts of climate change and climate finance on indigenous peoples' rights.[20] The report notes situations where climate change mitigation projects have negatively affected the rights of indigenous peoples, notably renewable energy projects such as biofuel production and the construction of hydroelectric dams.[21] For example, test flooding of the Barro Blanco hydroelectric project in Panama prompted allegations of displacement and negative impacts on the traditional lands and cultural sites of the Ngäbe peoples. The project, which was eligible for carbon credits and registered under the Clean Development Mechanism (CDM) under the UNFCCC, was later

[14] Ibid.
[15] David Boyd, *Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN Doc A/74/161 (15 July 2019) ('Safe Climate Report') [54].
[16] Office of the High Commissioner for Human Rights, *A human rights-based approach to climate change* (Web Page, 2021) <https://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/AboutClimateChangeHR.aspx>.
[17] Ibid.
[18] António Guterres, *The Highest Aspiration: A Call to Action for Human Rights* (United Nations, 2020).
[19] Ibid 9.
[20] Victoria Tauli-Corpuz, *Report of the Special Rapporteur on the rights of indigenous peoples*, UN Doc A/HRC/36/46 (1 November 2017).
[21] Ibid [14].

withdrawn from the CDM registry under pressure from indigenous communities and international organizations.[22]

The very balancing between climate mitigation and adaptation is itself a human rights issue, as it involves navigating different benefits and burdens. This is because stronger mitigation measures now limit the need for adaptation in the future, while weaker mitigation measures now increase the need for future adaptation. [23] The balancing of benefits and burdens in choosing between mitigation and adaptation measures is a human rights issue.

B *Climate litigation and human rights*

The relationship between human rights and climate change has been developed through litigation. Climate litigation is litigation in which a question of climate change law, policy or science is a material issue of law or fact.[24] Over the past decade, there has been a noted rise in climate litigation which relies, in whole or in part, on human rights arguments. Saveresi and Setzer identify that, as May 2021, 112 cases worldwide relied on human rights law obligations.[25] The vast majority of these cases were commenced after 2015.[26] This has prompted academics to identify a 'rights-turn'[27] in climate litigation, that is to say, "an increasing trend for petitioners to employ rights claims in climate change lawsuits, as well as a growing receptivity of courts to this framing."[28]

While Australia is the country with the highest number of identified climate litigation cases outside of the United States of America,[29] there have been notably few climate litigation cases based on human rights arguments in Australia. Of the 194 climate litigation cases recorded by the University of Melbourne Climate Change Litigation Database, only three[30] have been

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[22] Ibid [109].
[23] See Brian Preston, 'The Adequacy of the Law in Achieving Climate Change Justice – Some Preliminary Comments (2016) 34(1) *Journal of Energy & Natural Resources Law* 45, 45.
[24] As adapted from David Markell and JB Ruhl, 'An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual' (2012) 64 *Florida Law Review* 15.
[25] Annalisa Saveresi and Joana Setzer, 'Mapping the Whole of the Moon: An Analysis of the Role of Human Rights in Climate Litigation' (Working Paper, May 2021) 2.
[26] César Rodríguez-Garavito, 'Litigating the Climate Emergency: The Global Rise of Human Rights-Based Litigation for Climate Action' (Working Paper, May 2021) 3 <papers.ssrn.com/sol3/papers.cfm?abstract_id=3860420>.
[27] Jacqueline Peel and Hari Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7(1) *Transnational Environmental Law* 37.
[28] Ibid 37.
[29] Joana Setzer and Catherine Higham, *Global trends in climate change litigation: 2022 snapshot* (Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, 2022) 9.
[30] *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors* [2020] QLC 33; *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors* (No 2) [2021] QLC 4 and *0907346* [2009] RRTA 1168. *0907346* was a review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the

classified as human rights litigation. Part IV of this article explores possible explanations for this low number. However, before undertaking this enquiry, we must first look to overseas jurisdictions to understand the bases for the "rights-turn" in climate litigation.

III Human rights-based litigation overseas

In order to examine how and why human rights-based climate litigation in Australia differs from human rights-based climate litigation overseas, it is necessary to first understand the bases and trends of overseas human rights-based climate litigation. This part provides an exploration of human rights-based climate litigation in overseas jurisdictions. It focuses on three causes of action prominent in overseas cases: international and regional treaties; human rights protected by constitutions; and human rights enshrined in statute.

The intention of this part is not to provide a conclusive or exhaustive survey, but rather to describe human rights-based climate litigation overseas sufficiently to explain the few convergences but more divergences in Australian climate litigation. This survey of overseas litigation enables us to identify trends overseas that may or may not be occurring in Australia, and to thereby assist in a better understanding of the limitations and possibilities for human-rights based climate litigation in the Australian legal context.

A *International or regional agreements*

The first type of human rights-based climate litigation are causes of action that are grounded in international or regional human rights instruments. Some cases draw on international or regional human rights instruments to make claims in domestic jurisdictions, such as in the *Urgenda* litigation. Other cases involve using complaints mechanisms in international and regional human rights instruments.

Urgenda v The Netherlands is perhaps the most high-profile climate litigation case and marks a historical linkage between human rights and climate litigation. The Urgenda Foundation and 900 Dutch citizens sued the Dutch government seeking orders to require it to take additional actions to mitigate climate change. The plaintiffs claimed that the Dutch government's

applicant a protection visa under the *Migration Act 1958* (Cth). The applicant, a citizen from Kiribati, argued that he fell within the definition of a "refugee" for the purposes of the *Migration Act* because he feared returning to his country of nationality due to sea level rise and other climate impacts. The Tribunal affirmed the Minister's decision not to grant the visa, and held at [51] that "In this case, the Tribunal does not believe that the element of an attitude or motivation can be identified, such that the conduct feared can be properly considered persecution for reasons of a Convention characteristic as required". The *Waratah Coal* cases will be discussed later in this article.

unambitious climate policy and mitigation action breached its duty of care under the Dutch Civil code and human rights law under the European Convention on Human Rights (ECHR).

On 24 June 2015, The Hague District Court found that the Dutch State's emissions reductions targets were insufficient and ordered the Dutch government to limit GHG emissions to 25% below 1990 levels by 2020. The District Court concluded that the State has a duty, under the law of hazardous negligence in the Dutch Civil Code, to take mitigation measures due to the severity of the consequences of climate change and the risk of climate change occurring.[31] The District Court did not, however, uphold the claim of breach of human rights law. The District Court held that "Urgenda itself cannot be designated as a direct or indirect victim, within the meaning of Article 34 ECHR, of a violation of Articles 2 and 8 ECHR".[32] Nevertheless, the District Court found that the ECHR could be taken into account when applying national law standards or concepts, and serve as a source of interpretation when implementing private law concepts such as the duty of care.[33]

The Dutch government appealed the decision. The Hague Court of Appeal upheld the District Court's ruling, but this time on the basis of a breach of human rights law. The Court held that the emissions targets contravened the right to life under Article 2 of the ECHR and the right to private life, family life, home, and correspondence under Article 8 of the ECHR. The Court noted that while the ECHR cannot result in imposing an impossible or disproportionate burden, the State must take appropriate measures to uphold these rights.[34] Dangerous climate change threatens the lives, wellbeing and environment of citizens in the Netherlands and worldwide, and threatens the enjoyment of citizens' rights under Articles 2 and 8 of the ECHR.[35] Articles 2 and 8 therefore create an obligation for the State to take positive measures to contribute to reducing emissions relative to its own circumstances.[36]

On the further appeal by the Dutch government, the Supreme Court of the Netherlands upheld the decision of The Hague Court of Appeal that the ECHR imposed a positive obligation to take appropriate measures to prevent climate change.[37] Given the findings that climate change constitutes a real and immediate risk, "the mere existence of a sufficiently genuine possibility that this risk will materialise means that suitable measures must be taken."[38] The

[31] *Urgenda Foundation v State of the Netherlands* (ECLI:NL:RBDHA: 2015:7145) ('*Urgenda I*').
[32] Ibid [4.45]
[33] Ibid [4.46], [4.52].
[34] *State of the Netherlands v Urgenda Foundation* (ECLI:NL:GHDHA:2018:2610) ('*Urgenda II*') [5.3.4].
[35] Ibid [5.2.2]-[5.3.2], [5.6.2].
[36] Ibid [5.9.1].
[37] *State of the Netherlands v Urgenda* (ECLI:NL:HR:2019:2007) ('*Urgenda III*').
[38] Ibid [5.6.2].

Supreme Court found that these measures require the Netherlands to achieve a greenhouse gas emissions reduction target of 25% compared to 1990 levels, by the end of 2020. The *Urgenda* litigation is a clear example of human rights litigation that utilised causes of action based on a regional human rights instrument.

While perhaps less strictly defined as 'litigation',[39] international treaty bodies offer another forum for human rights-based climate litigation. In *Sacchi et al v Argentina et al,* 16 young people filed a petition to the Committee on the Rights of the Child complaining that Argentina, Brazil, France, Germany and Turkey violated their rights under the *Convention on the Rights of the Child* (CRC).[40] The complainants argued that by failing to prevent and mitigate the consequences of climate change, the state parties have violated their right to life and right to survival and development of the child (Articles 6 CRC), right to health (Article 24 CRC) and cultural rights (Article 30 CRC), read in conjunction with the obligation to act in the best interests of the child (Article 3 CRC). The Committee on the Rights of the Child found that the communication was inadmissible because the complainants had not exhausted domestic remedies.[41] Nevertheless, the Committee did accept the complainants' arguments for the purpose of jurisdiction and standing, holding that the complainants "have sufficiently justified, for the purposes of establishing jurisdiction, that the impairment of their Convention rights as a result of the State party's acts or omissions regarding the carbon emissions originating within its territory was reasonably foreseeable. It also concludes that the authors have established prima facie that they have personally experienced a real and significant harm in order to justify their victim status."[42]

Climate litigation based on international and regional human rights instruments has also demonstrated tensions between different rights in the climate litigation context. For example, where measures to mitigate climate change are taken, the taking of those measures may itself interfere with human rights protected by international agreements. A recent illustration is *Statnett SF v Sør-Fosen sijte*,[43] where the Supreme Court of Norway unanimously held that

[39] For example, the Grantham Institute climate litigation database includes international complaints mechanisms as litigation: see Methodology – Litigation, *Climate Laws of the World* (Grantham Research Institute on Climate Change and the Environment, 2021) <www.climate-laws.org/methodology-litigation>.
[40] Committee on the Rights of the Child, *Decision adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure in respect of Communication No. 104/2019*, UN Doc CRC/C/88/D/104/2019 (8 October 2021) ('*Sacchi et al v Argentina et al*').
[41] Ibid [10.15].
[42] Ibid [10.14].
[43] HR-2021-1975-S (sak nr. 20-143891SIV-HRET), (sak nr. 20-143892SIV-HRET) og (sak nr. 20-143893SIV-HRET).

the construction of wind power plants on the Fosen peninsula interfered with the rights of reindeer herders to enjoy their own culture under Article 27 of the International Covenant on Civil and Political Rights (ICCPR). The right to a healthy environment needed to be balanced against the reindeer herders' cultural rights. The Supreme Court held that renewable energy production is an important factor in ensuring enjoyment of the right to a healthy environment. Nevertheless, there were other development alternatives that did not infringe the reindeer herders' right to cultural enjoyment. The Supreme Court unanimously concluded that the wind power licence and expropriation decision were invalid. In this example, human rights considerations can be seen to impact climate mitigation measures.

Regional and international instruments thereby offer one type of cause of action for human rights-based climate litigation in overseas and international jurisdictions. Part IVA discusses the potential for this type of cause of action in the Australian context.

B *Human rights enshrined in national constitutions*

Constitutional law has become an important source of law for overseas human rights-based climate litigation. While some of these cases involve a reinterpretation of constitutionally enshrined human rights, such as the right to life, other cases find new bases for constitutional rights specifically directed toward climate change.

One example of utilising constitutionally enshrined rights in the climate adaptation context is the 2015 case of *Leghari v Federation of Pakistan*.[44] The Lahore High Court held that the Pakistan government's inaction in implementing Pakistan's *National Climate Change Policy 2012* and *Framework for Implementation of Climate Change Policy* breached fundamental rights as read with constitutional principles and international environmental principles. The Court identified a breach of "fundamental rights, like the right to life (Article 9) which includes the right to a healthy and clean environment and right to human dignity (Article 14)" and constitutional principles of democracy, equality, social, economic and political justice that included "within their ambit and commitment" the international environmental principles of sustainable development, the precautionary principle, environmental impact assessment, inter- and intra- generational equity and the public trust doctrine. By way of remedy, the Court established a Climate Change Commission to monitor the implementation of the climate policies and detailed the expectations and responsibilities of the Climate Change

[44] *Asghar Leghari v Federation of Pakistan* (2015) WP No. 25501/2015, Order Sheet (4 September 2015); Judgement Sheet (25 January 2018).

Commission.[45] The Court monitored the activities of the Commission over 25 hearings between 2015-2018. In 2018, the Court dissolved the Commission, leaving open the possibility that the case may be revived in the event of future breaches.[46] Since the dissolution of the Commission there have, however, been gaps identified in Pakistan's climate legislation and policy framework, including the need for additional funding for implementation.[47]

Litigation based on constitutional rights has also been brought to challenge the inadequacy of law and policy to mitigate greenhouse gas emissions. *Neubauer et al v Germany*[48] involved a constitutional complaint regarding Germany's Federal Climate Protection Act (the *Bundesklimaschutzgesetz*).[49] The Climate Protection Act aimed to implement Germany's obligations under the Paris Agreement. Under the Act, greenhouse gas emissions were required to be reduced by at least 55% by 2030, relative to 1990 levels. The Act set out the annual allowable greenhouse gas emission amounts for various sectors in line with reduction quotas for the target year 2030. There were, however, no provisions for targets beyond the year 2030. The Act instead provided that in 2025 the Federal Government must set annually decreasing emission amounts for further periods after the year 2030 by means of ordinances. The youth complainants challenged the Climate Protection Act on the basis that the emission reduction targets were insufficient and violated their human rights as protected under the Constitution of Germany, the Basic Law (*Grundgesetz*), including the right to life and physical integrity (Article 2(2)), right to property (Article 14(1)) and right to the protection of "natural sources of life" (Article 20a).

The German Constitutional Court held that the failure of the Climate Protection Act to set greenhouse gas emission reduction targets beyond 2030 limits intertemporal guarantees of freedom.[50] Fundamental rights under the Basic Law protected the complainants against threats to freedom caused by the greenhouse gas reduction burdens being unilaterally offloaded onto the future. The provisions of the Climate Protection Act have an advance interference-like effect on the freedoms. The complainants' opportunity to exercise protected

[45] Ibid [108].
[46] Ibid [27].
[47] Umair Saleem, 'Strengthening the Legal Framework to address Climate Change in Pakistan' (2022) 12 *IUCN Academy of Environmental Law Environmental eJournal* 40.
[48] *Neubauer et al v Germany* (2021) 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20, 1 BvR 288/20 ('*Neubauer v Germany*').
[49] See Petra Minnerop, 'The "Advance Interference-Like Effect" of Climate Targets: Fundamental Rights, Intergenerational Equity and the German Federal Constitutional Court' (2022) 34(1) *Journal of Environmental Law* 135; Gerd Winter, 'The Intergenerational Effect of Fundamental Rights: A Contribution of the German Federal Constitutional Court to Climate Protection' (2022) 34(1) *Journal of Environmental Law* 209.
[50] *Neubauer v Germany* (n 48) [182]-[183]. Note, however that the complainants failed to show violation of art 2(2) and art 14(1) of the German Basic Law: see [144]-[153].

freedoms that involve emitting greenhouse gases in the future conflict with constitutional limits on the levels of greenhouse gases that can be safely emitted in the present. Any exercise of freedom involving greenhouse gas emissions will be subject to increasingly stringent, and constitutionally required, restrictions. In order to be constitutional, the advance interference-like effect of current emission provisions − an effect that arises not only de facto, but also de jure − must be compatible with the objective obligation to take climate action as enshrined in the Basic Law.[51] The procedural requirements of the Climate Protection Act were not stringent enough and did not set down all necessary aspects of developing the targets within the required timeframe. The legislature must, at a minimum, determine the size of the annual emission amounts to be set for periods after 2030 or impose more detailed requirements for their determination.[52]

While these climate litigation cases were reliant on more established constitutional rights,[53] more recent cases are based on an emerging stand-alone right to a safe climate arising from national constitutions.[54] The ongoing case of *Juliana et al v United States* seeks recognition of a right to a stable climate as an extension of existing rights under the United States Constitution, relying on the due process clause. The due process clause of the Fifth Amendment to the US Constitution bars the Federal Government from depriving a person of "life, liberty, or property" without "due process of law." The plaintiffs had argued that the Federal Government had violated their due process rights by approving fossil fuel production, consumption and combustion. The defendants and intervenors argued that, first, the plaintiffs had failed to identify infringement of a fundamental right or discrimination against a suspect class of persons, and second, the defendants have no affirmative duty to protect the plaintiffs from climate change.

The US government and industry interveners sought to summarily dismiss the action. US District Court Judge Ann Aiken issued an Opinion and Order denying the Federal Government and industry intervenors' motions to dismiss the case.[55] The Court determined that the political

[51] Ibid [184]-[187].
[52] Ibid [261].
[53] See also Camille Cameron and Riley Weyman, 'Recent Youth-led and Rights-Based Climate Change Litigation in Canada: Reconciling Justiciability, Charter Claims and Procedural Choices' (2022) 34(1) *Journal of Environmental Law* 195 for a discussion of three ongoing Canadian climate litigation cases which are grounded in the *Canadian Charter of Rights and Freedoms*.
[54] Right to a "safe" climate reflects the language of international human rights (see, for example, Safe Climate Report (n 15)) whereas *Juliana v United States* (cited in n 55) frames this as a right to a "stable" climate.
[55] *Juliana v United States* 217 F Supp 3d 1224 (D Or 2016) ('*Juliana v United States* (D Or 2016').

question doctrine does not apply to the case; the plaintiffs have standing; and the plaintiffs had properly asserted due process and public trust claims.

Importantly, the Court also articulated a new fundamental right. The Court noted that "fundamental liberty rights include both rights enumerated elsewhere in the Constitution and rights and liberties which are either (1) 'deeply rooted in this Nation's history and tradition' or (2) 'fundamental to our scheme of ordered liberty'".[56] The Court discussed the earlier Supreme Court decision of *Obergefell v Hodges,*[57] which held that same sex marriage is a fundamental right under the Constitution's due process clause. The Court noted that "just as marriage is the 'foundation of the family', a stable climate system is quite literally the foundation of society, without which there would be neither civilization nor progress." In determining whether a right is fundamental, courts must exercise "reasoned judgment," keeping in mind that "history and tradition guide and discipline this inquiry but do not set its outer boundaries." In exercising this "reasoned judgement", the Court concluded that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society.[58] As such, a complaint that "alleges governmental action is affirmatively and substantially damaging the climate system in a way that will cause human deaths, shorten human lifespans, result in widespread damage to property, threaten human food sources, and dramatically alter the planet's ecosystem, states a claim for a due process violation."[59] The plaintiffs had adequately alleged infringement of this fundamental right.[60]

The District Court decision was reversed on appeal by the Ninth Circuit Court.[61] The majority denied the standing of the plaintiffs, holding that the plaintiffs' injuries were not redressable by the judiciary. The majority stated that instead the plaintiffs' case "must be made to the political branches or to the electorate at large, the latter of which can change the composition of the political branches through the ballot box."[62] In her dissenting judgment, Judge Staton reasoned that "some rights serve as the necessary predicate for others; their fundamentality therefore derives, at least in part, from the necessity to preserve other fundamental constitutional protections."[63] Judge Staton held that the due process clause, taken together with the text and context of the Constitution, creates a "principle of perpetuity" which prevents

[56] Ibid 1249.
[57] 576 US 644 (2015).
[58] *Juliana v United States* (D Or 2016) 1250.
[59] Ibid.
[60] Ibid.
[61] *Juliana v United States* 947 F 3d 1159 (9th Cir 2020).
[62] Ibid 1175.
[63] Ibid 1177.

"the willful dissolution of the Republic."[64] While the perpetuity principle "is not an environmental right", it protects the perpetuity of the nation[65] and is engaged by the existential threat of climate change. The proceedings in *Juliana* are ongoing.

Litigation based on a stand-alone constitutional right to a safe climate has been initiated in other jurisdictions. On 8 October 2020, the Institute of Amazonian Studies filed a class action against the Federal Government of Brazil, seeking recognition of a fundamental right to a stable climate for present and future generations under the Brazilian Constitution, and seeking an order to compel the Federal Government to comply with national climate law.[66] The plaintiffs allege that the Federal Government has failed to comply with its own action plans to prevent deforestation and mitigate and adapt to climate change, violating national law and fundamental rights. On 5 June 2021, environmental justice non-governmental organisation A Sud, along with over 200 plaintiffs, filed a suit against the Italian government. The plaintiffs allege that, by failing to take necessary measures to meet the temperature targets under the Paris Agreement, the government is violating fundamental rights, including the right to a stable and safe climate.[67] The action seeks a declaration that the government's inaction is contributing to the climate emergency and an order to reduce greenhouse gas emissions by 92% by 2030 from 1990 levels. An independent right to a safe climate is thus one emerging area of climate litigation overseas.

There is also an increasing number of countries which have specifically incorporated environmental rights within their constitutions. This has been described as "environmental constitutionalism",[68] and has been a growing practice since the 1970s.[69] On 5 October 2021, Resolution 48/13 noted that "more than 155 States have recognized some form of a right to a healthy environment in, inter alia, international agreements or their national constitutions, legislation or policies". The constitutional recognition of environmental rights has been seen to create a number of benefits,[70] including allowing litigants to enforce environmental rights-

[64] Ibid 1179.
[65] Ibid.
[66] Sabin Centre for Climate Change Law, 'Institute of Amazonian Studies v. Brazil' *Climate Case Chart* (Web Page, 2021) <http://climatecasechart.com/climate-change-litigation/non-us-case/institute-of-amazonian-studies-v-brazil/>.
[67] Sabin Centre for Climate Change Law, 'A Sud et al. v. Italy' *Climate Case Chart* (Web Page, 2021) <http://climatecasechart.com/climate-change-litigation/non-us-case/a-sud-et-al-v-italy/>.
[68] Louis Kotzé, *Global Environmental Constitutionalism in the Anthropocene* (Bloomsbury Publishing, 2016) 145.
[69] Navraj Ghaleigh, Joana Setzer and Asanga Welikala, 'The Complexities of Comparative Climate Constitutionalism' (Working Paper No 2022/06, University of Edinburgh School of Law, 2022) 6.
[70] Joana Setzer and Délton de Carvalho, 'Climate litigation to protect the Brazilian Amazon: Establishing a constitutional right to a stable climate' (2021) 30 *Review of European, Comparative & International Environmental Law* 197, 200.

based claims against governments and corporations on a constitutional basis,[71] thereby enhancing access to justice and the ability to redress environmental harms.[72] Such provisions are, however, limited. For instance, Auz shows how political economy of extractivism, constitutional design that grants the president too much power, and elitist nature of litigation limits the reach of climate litigation.[73]

Dedicated climate provisions are also being incorporated in national constitutions, with the eleven countries having been identified as having these provisions to date: Algeria, Bolivia, Côte d'Ivoire, Cuba, Dominican Republic, Ecuador, Thailand, Tunisia, Venezuela, Vietnam and Zambia.[74] Other countries, such as France, Sri Lanka and Chile, are also considering including climate provisions in their constitutions.[75] However, this has been met with varying levels of success. On 6 July 2021, the French government abandoned its plans to introduce a new climate provision in the French Constitution that would "guarantee environmental protection and biological diversity, and combat climate change". The provision was opposed by members of the Senate who were concerned that the word "guarantee" would elevate environmental concerns over other constitutional principles.[76] The constitutional character of legal responses to climate change is a growing area of legal and academic exploration.[77]

Causes of action based on constitutional law have therefore been a fruitful area of human rights-based climate litigation overseas. Some of these cases centre around reinterpretation of existing human rights enshrined in constitutions, while others offer the possibility for new human rights specifically directed toward climate protection. Part IVB shows that the potential for human rights-based climate litigation based on Australian constitutional law does not offer these same pathways for litigation.

C *Human rights enshrined in statute*

Overseas human rights-based climate litigation is firstly grounded on human rights provisions in domestic statutes. For example, in the United Kingdom case of *R (on the application of Plan*

[71] Ibid. César Rodríguez-Garavito, 'Human Rights: The Global South's Route to Climate Litigation' (2020) 114 *AJIL Unbound* 40.
[72] Ghaleigh, Setzer and Welikala (n 69) 6.
[73] Juan Auz, 'Human Rights-Based Climate Litigation: A Latin American Cartography' (2022) 13(1) *Journal of Human Rights and Environment* 114.
[74] Ghaleigh, Setzer and Welikala (n 69) 9.
[75] Ibid 13-14; Setzer and de Carvalho (n 70) 201.
[76] Constant Méheut, 'France Drops Plans to Enshrine Climate Fight in Constitution', *The New York Times* (Web Page, 6 July 2021) <https://www.nytimes.com/2021/07/06/world/europe/france-climate--change-constitution.html>; Ghaleigh, Setzer and Welikala (n 69) 13.
[77] Ghaleigh, Setzer and Welikala (n 69) 5, 8, 15-16.

B Earth and others) v The Prime Minister and others,[78] the plaintiffs argued that the UK government had breached s 6 of the *Human Rights Act 1998* (UK), which makes it unlawful for a public authority to act in a way which is incompatible with the ECHR. The plaintiffs argued that the UK government's unambitious greenhouse gas emissions targets and climate policy had breached their rights to life (Article 2), private and family life (Article 8), and protection from discrimination (Article 14) in the ECHR as incorporated into domestic law by the *Human Rights Act 1998*. The plaintiffs argued that the UK government had a duty to, but had failed to, put in place an administrative framework designed to provide effective deterrence against threats to the right to life and to private and family life from climate change. The High Court refused permission to proceed on the papers. The "insuperable problem" with the plaintiffs' claims under Articles 2 and 8 was that there was an administrative framework to combat the threats posed by climate change in the form of the *Climate Change Act 2008* (UK) and all the policies and measures adopted under the Act.[79] That framework was constantly evolving.[80] It was not for the Court to evaluate the adequacy or effectiveness of the adopted framework.[81] The Court also held that the plaintiffs could not show that they were a 'victim' of a breach of ECHR rights so as to qualify to bring a claim under s 7(1) of the *Human Rights Act 1998*.[82] Although the plaintiffs were unsuccessful, the case demonstrates that human rights enshrined in domestic statutes may offer opportunities for litigation. This is discussed in the Australian context in Part IVC.

Overseas human rights-based climate litigation is also grounded on domestic laws other than specific human rights legislation. One example is the statutory responsibilities of private actors and corporations to uphold human rights obligations. When it comes to climate change, the responsibility of corporate actors looms large, with a total of 90 companies (referred to as 'carbon majors') having produced fuels that have led to 63% of the world's greenhouse gas emissions between 1854 and 2010.[83] While human rights law is not well-suited to pursuing corporate actors,[84] there is an increasing move to sue corporations and their directors for corporate actions and activities that cause or contribute to climate change-induced human rights violations. Human rights obligations of corporate actors are also being expanded at the

[78] [2021] EWHC 3469 (Admin).
[79] Ibid [48].
[80] Ibid [49].
[81] Ibid [50], [51], [54].
[82] Ibid [78].
[83] Richard Heede, 'Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers, 1854-2010' (2014) 122 *Climatic Change* 229.
[84] Annalisa Savaresi and Joana Setzer, 'Rights-based litigation in the climate emergency: mapping the landscape and new knowledge frontiers' (2022) 13(1) *Journal of Human Rights and the Environment* 7, 19, 28.

international level. For instance, human rights law is one of the legal bases for the United Nations Binding Principles of Business and Human Rights[85] and the Principles on Climate Obligations of Enterprises.[86]

In *Milieudefensie et al v Royal Dutch Shell plc*,[87] Milieudefensie and six other plaintiffs alleged that Royal Dutch Shell had violated its duty of care under Dutch civil law by emitting greenhouse gas emissions that contributed to climate change. The Hague District Court relied on human rights law to define the scope of the duty of care owed by Royal Dutch Shell under Dutch civil law. The Court found that climate change threatens the right to life and the right to respect for private and family life of Dutch residents and the inhabitants of the Wadden region.[88] In its interpretation of the standard of care, the Court considered the United Nations Guiding Principles on Business and Human Rights,[89] noting that "companies may be expected to identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships"[90] and must take "appropriate action" on the basis of this assessment.[91] The Court held that Shell had an obligation to reduce its greenhouse gas emissions by 45% by 2030 compared to 2010 levels, and to zero by 2050 in line with the Paris Climate Agreement.[92]

In 2019, the National Commission on Human Rights of the Philippines announced its preliminary findings and recommendations following a four-year inquiry into the human rights impacts of climate change in the Philippines and the contribution of 47 carbon majors to those impacts.[93] Greenpeace Southeast Asia and a number of other organisations had filed a petition requesting the Commission to investigate "the human rights implications of climate change and ocean acidification and the resulting rights violations in the Philippines" and "whether the investor-owned Carbon Majors have breached their responsibilities to respect

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[85] John Ruggie, *Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy Framework*, UN Doc A/HRC/17/31 (21 March 2011).
[86] Expert Group on Global Climate Change, *Principles on Climate Obligations of Enterprises* (Eleven International Publishing, 2nd ed, 2020) 72.
[87] ECLI:NL:RBDHA:2021:5337.
[88] Ibid [4.4.10].
[89] Ibid [4.4.11].
[90] Ibid [4.4.20].
[91] Ibid [4.4.21].
[92] Ibid [4.4.55].
[93] Commissioner Roberto Cadiz made this announcement during the 2019 United Nations Climate Change Conference (COP25): see Isabella Kaminski, 'Carbon Majors Can Be Held Liable for Human Rights Violations, Philippines Commission Rules', *Business & Human Rights Resource Centre* (Web Page, 9 December 2019) <https://www.business-humanrights.org/en/latest-news/carbon-majors-can-be-held-liable-for-human-rights-violations-philippines-commission-rules/>.

the rights of the Filipino people." In May 2022, the Commission published its final report finding that the carbon majors, which include ExxonMobil, Chevron, Shell, BP and Repsol, played a clear role in anthropogenic climate change and could be held legally liable for its impacts. The Commission found that the carbon majors engaged in "willful obfuscation and obstruction" to prevent meaningful climate action.[94] The Commission held that the carbon majors "directly by themselves or indirectly through others, singly and/or through concerted action, engaged in willful obfuscation of climate science, which has prejudiced the right of the public to make informed decisions about their products, concealing that their products posed significant harms to the environment and the climate system. All these have served to obfuscate scientific findings and delay meaningful environmental and climate action."[95] The Commission concluded that these acts may be bases for liability[96] and encouraged states, as part of their duty to human rights, to enact and/or enforce laws to hold companies accountable.[97]

Obligations of corporate and private actors are thus a growing area of human rights-based climate litigation. This may be based on domestic statutes which regulate corporations or domestic statutes with human rights provisions. Statutory pathways for human rights-based litigation are discussed in the Australian context in Part IVC.

IV Human rights-based climate litigation in Australia

Part III has outlined trends in human rights-based climate litigation overseas through an exploration of three different types of causes of action grounded in human rights law: international and regional human rights law, constitutional law and statute. This Part investigates pathways for litigation for each of these causes of action in Australia. It shows that the Australian legal landscape offers limited possibilities for litigation for these causes of action.[98]

[94] Commission on Human Rights of the Philippines, *National Inquiry on Climate Change* (Report, 2022) 104.
[95] Ibid 108-109.
[96] Ibid 115.
[97] Ibid 115.
[98] The Asia-Pacific regional human rights framework is fragmented, with limited enforcement mechanisms: see Ben Boer, 'Climate Change and Human Rights in the Asia-Pacific: A Fragmented Approach' in Ottavio Quirico and Mouloud Boumghar (eds), *Climate Change and Human Rights: An International and Comparative Law Perspective* (Routledge, 2016).

A *International or regional treaty*

Australia is a party to a plethora of international human rights treaties. In a dualist legal system like that of Australia, the signing and ratification of international instruments do not create binding domestic obligations or abrogate the power of Parliament to make laws that are inconsistent with international instruments.[99] In the absence of legislation incorporating international human rights treaties, they are not a source of law or rights.[100] While some treaties have been partially implemented through domestic legislation,[101] the majority have not been incorporated into Australian domestic law. The pathways for using international law as an interpretative principle are discussed in Part V of this article.

Consistent with trends in other countries, as discussed in Part IIIA, Australia has been the subject of complaints in the international arena,[102] including a recent complaint brought by eight Torres Strait Islander people against the Australian government to the United Nations Human Rights Committee.[103] The petition alleges that Australia is violating the plaintiffs' fundamental human rights under the ICCPR due to the government's failure to address climate change. The complaint alleges that Australia's insufficient action on climate change has violated the right to culture (Article 27 ICCPR), the right to be free from arbitrary interference with privacy, family and home (Article 17 ICCPR), and the right to life (Article 6 ICCPR). The complaint argues these violations stem from both insufficient targets and plans to mitigate greenhouse gas emissions and inadequate funding for coastal defence and resilience measures on the islands, such as seawalls. The complaint is still pending before the Committee.

On 25 October 2021, five young Australians lodged a joint complaint to the United Nations Special Rapporteur for human rights and environment, the Special Rapporteur for the rights of Indigenous people, and the Special Rapporteur for the rights of persons with disabilities with regard to the Australian government's lack of climate action.[104] The complainants argue

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[99] See, eg, *Dietrich v The Queen* (1992) 177 CLR 292, 305; [1992] HCA 57; *Minister for Immigration v B* (2004) 219 CLR 365; [2004] HCA 20 [171].
[100] *Chow Hung Ching v The King* (1949) 77 CLR 449.
[101] For example, the *Disability Discrimination Act 1992* (Cth) reflects many provisions contained in the Convention on the Rights of People with Disabilities.
[102] The Grantham Research Institute on Climate Change and the Environment and Sabin Centre databases identify complaints before UN mechanisms as climate litigation.
[103] Sophie Marjanac and Sam Hunter Jones, 'Are matters of national survival related to climate change really beyond a court's power?' *Open Global Rights* (Web Page, 28 June 2020) <https://www.openglobalrights.org/matters-of-national-survival-climate-change-beyond-courts/>.
[104] Environmental Justice Australia, 'Ahead of COP26, five young Australians lodge human rights complaint with UN over government inaction on climate crisis' (Media Release, 25 October 2021) <https://www.envirojustice.org.au/ahead-of-cop26-five-young-australians-lodge-human-rights-complaint-with-un-over-government-inaction-on-climate-crisis/>.

that the Australian government's emissions reduction targets fail to uphold the human rights of young people in Australia, particularly those at acute risk from climate harms, including young First Nations people and people with disabilities.

International mechanisms have also been used to hold business to account. In January 2020, Friends of the Earth Australia and three individuals submitted a complaint against ANZ Bank to the Australian National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises. The complaint alleged that ANZ failed to adhere to the OECD Guidelines through lack of climate-related disclosure and due diligence, inadequate environmental policies and management, and disregard for consumer interests. The NCP Initial Assessment accepted the complaint, offering its 'good offices' process with the aim of reaching an agreement between the parties.[105]

While international complaints against Australia may influence the development of domestic law, human rights enshrined in international human rights treaties are not a source of law in the absence of incorporating legislation. They therefore offer limited options for litigation pathways in Australian domestic litigation.

B *Human rights enshrined in the Australian constitution*

Unlike many other countries, including those discussed at Part IIIB, the Australian Constitution was not intended to be a mechanism of human rights protection. The Australian Constitution does not expressly include a bill of human rights. There are some limited human rights, such as the right to implied freedom of political communication, that courts have implied within the Australian Constitution. These rights are, however, extremely limited, leading to restricted pathways for human rights-based litigation. Part VA of this article explores possibilities for human rights enshrined in the Australian Constitution as a means of interpretation of other domestic law.

C *Human rights enshrined in statute*

As noted, at a national level, Australia does not have a bill of rights. The States of Victoria,[106] Queensland[107] and the Australian Capital Territory[108] have each adopted human rights legislation. These legislative frameworks for human rights are still relatively new in Australia,

[105] Australian National Contact Point, *Initial Assessment: Complaint was submitted by Friends of the Earth Australia and others, against Australia and New Zealand Banking Group Limited* (24 November 2020).
[106] *Charter of Human Rights and Responsibilities Act 2006* (Vic).
[107] *Human Rights Act 2019* (Qld).
[108] *Human Rights Act 2004* (ACT).

having been met with "excitement and exhilaration but also one of trepidation and reservation",[109] as the then Chief Justice Marilyn Warren noted at the time of the introduction of the Victorian Charter of Human Rights and Responsibilities.

Each of these three pieces of human rights legislation contains different human rights and different procedures for complaints and enforcement, and applies only within its respective state and territory. There are also limited options for stand-alone claims under these human rights laws. For example, under the *Victorian Charter of Human Rights and Responsibilities Act 2006*, a claim under the Charter must be attached to another cause of action.[110] Under the *Human Rights Act 2019* (Qld), a claim must similarly 'piggy-back' off a different cause of action.[111] By contrast, the *Human Rights Act 2004* (ACT) "has one major advantage over the Queensland *HR Act* and *Victorian Charter*, in that it provides for a direct cause of action… Despite this broader cause of action, there is limited jurisprudence on this provision"[112] to guide future human rights-based climate litigation.

That said, the human rights legislative frameworks in these jurisdictions do offer pathways for litigation. Bell-James and Collins show that human-rights based climate litigation is available under the Queensland Human Rights Act.[113] Indeed, such litigation is currently on foot. The Queensland case of *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors*[114] is exceptional in its position as the only Australian climate litigation based on a human rights statute. Youth Verdict and the Bimblebox Alliance objected to Waratah Coal's mining lease and environmental authority for a proposed coal mine development in the Galilee Basin on the basis that the decision to grant the mining lease and environmental authority was unlawful under s 58(1) of the *Human Rights Act 2019*. Waratah Coal applied to strike out the human rights objections to the extent that they relied on the *Human Rights Act* or, in the alternative, obtain a declaration that the Queensland Land Court does not have jurisdiction and was not obliged to consider those objections. The Land Court rejected Waratah Coal's application and held that human rights considerations apply to the Land Court in making its recommendations on applications for a mining lease and an environmental authority. The Land Court's recommendation on an application for a mining lease or environmental authority is both an "act" and a "decision" as

[109] Chief Justice Marilyn Warren, 'Opening Remarks to Judicial College of Victoria: Introduction to Human Rights' (Speech, State Library Theatrette, 19 February 2007).
[110] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 39(1).
[111] *Human Rights Act 2019* (Qld) s 59.
[112] Justine Bell-James and Briana Collins, 'Queensland's *Human Rights Act:* A New Frontier for Australian Climate Change Litigation?' (2020) 43(1) *UNSW Law Journal* 3, 24. See *Human Rights Act 2004* (ACT) ss 40B, 40C.
[113] Bell-James and Collins (n 112).
[114] [2020] QLC 33.

those terms are used in s 58(1) of the *Human Rights Act*. The Land Court's recommendation would have a practical benefit to the ultimate decision-makers, who themselves would be bound by s 58(1).[115] The Land Court has jurisdiction to consider objections based on the *Human Rights Act* in hearing objections to mining lease or environmental authority applications and also is compelled, as a public entity, to itself make a decision in a way that is compatible with human rights.[116] The Land Court held that the objectors could rely on s 58 of the *Human Rights Act*, without seeking a remedy or separate relief under s 59, and objectors would be entitled to seek relief in the event the Land Court failed to make a recommendation in a way that was compatible with human rights.[117]

The Land Court recently handed down a further decision in the case, dealing with the need to take evidence from First Nations witnesses on country in order to protect their human rights under the *Human Rights Act*.[118] The Land Court granted leave to Youth Verdict and the Bimblebox Alliance to take on country evidence of First Nations witnesses about the impact of climate change on their community and cultural rights in order to uphold the witnesses' human rights under s 28(2)(a) of the *Human Rights Act*. While the Land Court acknowledged that inconvenience and costs could be borne by the parties to hear the evidence on country,[119] it gave significant weight to the cultural rights of the First Nations witnesses to have the evidence heard on country and in the company of Elders as was required by the witnesses' cultural protocols.[120] The Land Court further noted that solely relying on the witnesses' written statements would not allow for a proper analysis of the evidence as "written evidence from a First Nations witness is a poor substitute for oral evidence given on country and in the company of those with cultural authority."[121]

These two human rights decisions of the Queensland Land Court based on the *Human Rights Act* are, however, the exception. The lack of effective human rights laws elsewhere in Australia, and hence the lack of precedent-setting judicial decisions, has led plaintiffs to search for alternative means by which human rights may be protected through climate litigation. One

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[115] Ibid [54], [64].
[116] Ibid [77].
[117] Ibid [87].
[118] *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 5)* [2022] QLC 4. An international example of climate litigation regarding the protection of cultural rights is *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy* (2022) 1 All SA 796 (ECG). The South Africa High Court relied on evidence of customary knowledge from Indigenous communities to hold that the grant of an exploration right to oil and gas companies, which was awarded without meaningful consultation with the communities, constituted a violation of the applicants' right to consultation that deserves to be protected by way of an interim interdict.
[119] [2022] QLC 4 [28], [44].
[120] Ibid [19], [33], [37].
[121] Ibid [38].

means is to raise the human rights implications in challenges to specific developments that might contribute to climate change. The endorsement of the concept of the carbon budget in *Gloucester Resources v Minister for Planning*[122] ('*Gloucester*') has been noted as an alternative way of linking the cumulative and indirect nature of greenhouse gas emissions to climate harms, including interference with human rights.[123] Project-based climate litigation is an example of one legal pathway toward protecting human rights through climate litigation in the absence of a dedicated human rights legislative framework. Further alternative pathways which may offer possibilities for future climate litigation are discussed later in this article.

Another means is to raise the procedural rights implications. Procedural rights are an important aspect of human rights-based climate litigation,[124] although comparatively few human rights-based climate cases concern alleged breaches of procedural obligations.[125] Climate litigation (and environmental litigation more generally) in Australia has included litigation seeking to uphold procedural rights – namely access to information, public participation in environmental decision-making and access to justice.[126] Litigation regarding access to information has included, in the climate context, information regarding funding of fossil fuel projects. For instance, in the recently initiated case of *Abrahams v Commonwealth Bank of Australia*,[127] shareholders of the Commonwealth Bank of Australia are seeking access to internal company documents under s 247A of the *Corporations Act 2001* (Cth). These documents include information regarding the Commonwealth Bank's investment in gas projects in Australia and overseas. On 4 November 2021, the Court made consent orders agreed to by the parties to allow the plaintiffs to inspect a limited scope of the documents sought.[128] The Court was satisfied that the plaintiffs were acting in good faith and that inspection was to be made for a proper purpose as required by law. The litigation is ongoing.

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[122] (2019) 234 LGERA 357; [2019] NSWLEC 7 ('*Gloucester*').
[123] Julia Dehm, 'Coal Mines, Carbon Budgets and Human Rights in Australian Climate Litigation: Reflections on Gloucester Resources Limited v Minister for Planning and Environment' (2020) 26(2) *Australian Journal of Human Rights* 244.
[124] Knox (n 3) [50].
[125] Annalisa Savaresi and Joana Setzer, 'Rights-based litigation in the climate emergency: mapping the landscape and new knowledge frontiers' (2022) 13(1) *Journal of Human Rights and the Environment* 7.
[126] *Rio Declaration on Environment and Development*, 31 ILM 874 (1992), Principle 10; *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (adopted 25 June 1998, entered into force 30 October 2001) ('Aarhus Convention'). *Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean* (adopted 4 March 2018, entered into force 22 April 2021) ('Escazú Convention'). Australia is not a party to the Aarhus Convention which enshrines procedural environmental rights in Europe, or the Escazú Convention which enshrines procedural environmental rights in Latin America and the Caribbean.
[127] (2021) FCA NSD864/2021.
[128] Order of Cheeseman J in *Abrahams v Commonwealth Bank of Australia* (Federal Court of Australia, NSD864/2021, 4 November 2021).

Public participation in environmental decision-making has long been an issue in Australian climate litigation. This includes mechanisms for community participation in decisions regarding fossil fuel projects. There are various levels of public participation, ranging from less involved to more involved and meaningful levels of engagement.[129] Typically, laws regulating land and its resources afford limited levels of public participation. For some strategic planning and policy decisions, the public may have no opportunity to participate and may merely be informed of decisions that have already been made.[130] For other project-specific decisions, a minimum opportunity for public participation may be provided, usually in the form of public notice and comment,[131] with the decision-maker taking into account any public comments received in making project specific decisions.[132]

There is also a problem of the timing of public participation. Public participation will be more effective when it occurs at a stage when it has the potential to influence the nature, extent and other features of the use of land and its resources. Communities could participate at the involve or collaborate levels of public participation to formulate alternatives, identify solutions, and select and design the preferred project for which a legal licence is to be sought.[133] The Court in *Gloucester* noted the social impacts of limiting the extent to which individuals and groups have input into the decisions that affect their lives and the extent to which they have access to complaints, remedy and grievance mechanisms.[134] The Court described "residents' sense of powerlessness and helplessness in the decision making process for approval of the Project and the acquisition of affected properties as evidence of this type of social impact."[135] The Court concluded that the mine would result in social impacts on residents and Aboriginal people due to the limitations on these people being able to meaningfully participate and control the decision making process. The Court concluded, however, that these limitations flow from the planning system and not from the particular project proposed.[136] The law thereby limits public participation in environmental decisions, including those involving fossil fuel extraction.[137]

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[129] Brian Preston, 'The Adequacy of the Law in Satisfying Society's Expectations for Major Projects' (2015) 32 *Environment and Planning Law Journal* 182, 191.
[130] For example, there are limited consultation requirements for the making of environmental planning instruments including a State environmental planning policy or a local environmental plan under the *Environmental Planning and Assessment Act 1979* (NSW) s 3.30(1).
[131] See, eg, *Environmental Planning and Assessment Act 1979* (NSW) Sch 1.
[132] See, eg, *Environmental Planning and Assessment Act 1979* (NSW) s 4.15(1)(d).
[133] Preston (n 129) 193.
[134] *Gloucester* (n 122) [389].
[135] *Gloucester* (n 122) [390].
[136] *Gloucester* (n 122) [392].
[137] Preston (n 129).

There is, therefore, potential for climate litigation in Australia regarding procedural rights. When it comes to substantive human rights, however, Australia's notable lack of a national bill of rights and limited human rights legislation leaves Australia without the same foundations for human rights-based climate litigation that have allowed such litigation in other jurisdictions. Bearing in mind these limitations, other legal pathways for human rights-based climate litigation in Australia need to be explored. This is the subject of Part V of the article.

V Future directions for human rights-based climate litigation in Australia

As discussed in the previous parts, the types of causes of action and complaints that have been pursued overseas are limited in availability and scope in Australia. The likelihood is that climate litigation in Australia will explore other legal pathways to protect human rights. What those alternative legal pathways might be is difficult to predict; it depends on the legal imagination and ingenuity of plaintiff lawyers. Inspiration may be drawn from overseas climate litigation. Climate litigation can be "contagious".[138] This may lead to climate litigation in Australia pursuing the three emerging areas of climate litigation overseas discussed in previous Part III, notwithstanding the difficulties in doing so. Overseas experience also suggests at least two other potential legal pathways for human rights-based climate litigation in Australia: using human rights as a tool for statutory interpretation and using human rights as a way of understanding breaches of other laws, such as planning and environmental laws. These will be explored below.

A *Human rights as an interpretative tool*

Human rights can inform the interpretation of legislation. A court's approach to interpretation of legislation involves a number of assumptions (sometimes known as 'rules') of interpretation. Examples of these approaches to interpretation include: the presumption not to alienate vested proprietary rights without compensation;[139] the presumption that legislation will not have extraterritorial effect;[140] and the assumption that the legislature would not have intended to remove the jurisdiction of the courts[141] or to alter established common law doctrines.[142] Many of the traditional rights, freedoms and privileges embedded in these interpretative rules

[138] Natasha Affolder, 'Contagious Environmental Lawmaking' (2019) 31 *Journal of Environmental Law* 187; Brian J Preston, 'The Influence of the Paris Agreement on Climate Change Litigation: Causation, Corporate Governance and Catalyst (Part II) (2021) 33 *Journal of Environmental Law* 227, 247-255.
[139] *Clissold v Perry* (1904) 1 CLR 363; [1904] HCA 12.
[140] *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309; [1908] HCA 95.
[141] *Magrath v Goldsbrough, Mort & Co Ltd* (1932) 47 CLR 121, 134; [1932] HCA 10.
[142] *Federal Commissioner of Taxation v Citibank Ltd* (1989) 20 FCR 403, 433.

are described in the language of human rights.[143] Approaches to statutory interpretation can therefore be seen as forming a "common law Bill of Rights".[144] What might be the implications for climate change of this "common law Bill of Rights"? This article contemplates two examples: the principle of legality and the presumption that laws are consistent with international law.

1 Principle of legality

Courts do not impute to the legislature an intention to interfere with fundamental rights unless there is clear expression of an unmistakable and unambiguous intention to interfere with these fundamental rights.[145] This was expressed by the High Court in *Coco v R* as an "insistence on express authorisation of an abrogation or curtailment of a fundamental right, freedom or immunity".[146] This approach has been described as the "principle of legality". The principle of legality has been the subject of much judicial and academic debate.[147] Whether or not the principle is "an unhelpful label"[148] that obscures proper legal analysis, the principle of legality is one that regularly guides courts in interpreting legislation.[149]

The principle of legality is of particular significance in Australian jurisdictions with a human rights legislative framework. Despite different approaches taken by the High Court in *Momcilovic v The Queen*,[150] the majority held that the Victorian Charter of Human Rights reflects the principle of legality and does not establish a new paradigm of statutory interpretation.[151]

One rationale for the principle of legality is that Parliament would not abrogate or curtail fundamental common law rights without express intention. Parliament must therefore "squarely confront what it is doing and accept the political cost" when these fundamental rights

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[143] Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (ALRC Report 129) [1.7]. For instance, Murphy J referred to 'the common law of human rights' in *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 346; [1983] HCA 9.
[144] James Spigelman, 'The Common Law Bill of Rights: First Lecture in the 2008 McPherson Lectures on Statutory Interpretation and Human Rights' (Speech delivered at the University of Queensland, Brisbane, 10 March 2008).
[145] *Coco v R* (1994) 179 CLR 427, 437-38; [1994] HCA 15 ('*Coco v R*'); *Lee v New South Wales Crime Commission* (2013) 251 CLR 196; [2013] HCA 39 [313] (*'Lee*'); *Kassam v Hazzard; Henry v Hazzard* (2021) 393 ALR 664; [2021] NSWSC 1320 [193] ('*Kassam* NSWSC'); *Kassam v Hazzard; Henry v Hazzard* (2021) 396 ALR 302; [2021] NSWCA 299 [80]-[94], [162]-[167] ('*Kassam* NSWCA').
[146] *Coco v R* (n 145).
[147] See commentary in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017).
[148] John Basten, 'The Principle of Legality – An Unhelpful Label' in Meagher and Groves (n 147) 74.
[149] See, recently, *Kassam* NSWSC (n 145) [193]; *Kassam* NSWCA (n 145) [80]-[94], [162]-[167].
[150] (2011) 245 CLR 1; [2011] HCA 34 ('*Momcilovic*').
[151] Ibid [43]-[46], [51] (French CJ), [684] (Bell J).

are curtailed.[152] The principle of legality thereby serves the related purposes of protecting rights and freedoms from unintended legislative interference and increasing the effectiveness of the democratic process when legislation impacting such rights is considered.[153] Gleeson CJ noted in *Al-Kateb v Godwin* that:

> "Courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment."[154]

The statutory intention to abrogate or curtail fundamental rights must be expressed in clear and unambiguous words.[155] As Kiefel J observed in *X7 v Australian Crime Commission*:

> "The requirement of the principle of legality is that a statutory intention to abrogate or restrict a fundamental freedom or principle or to depart from the general system of law must be expressed with irresistible clearness. That is not a low standard. It will usually require that it be manifest from the statute in question that the legislature has directed its attention to the question whether to so abrogate or restrict and has determined to do so."[156]

The principle of legality applies to fundamental rights, freedoms and immunities, as distinguished from other rights that have been recognised by law. In order to apply the principle of legality, it is necessary to identify with a degree of precision the fundamental right, freedom or immunity which is said to be curtailed or abrogated, or that specific element of the general system of law which is similarly affected.[157] In *Lee v New South Wales Crime Commission,*[158] Gageler and Keane JJ observed:

> "Application of the principle of construction is not confined to the protection of rights, freedoms or immunities that are hard-edged, of long standing or recognised and enforceable or otherwise protected at common law. The principle extends to the

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[152] See *R v Secretary of State for the Home Department; Ex Parte Simms* [2000] 2 AC 115, 131 (Lord Hoffman) ('*Simms*').
[153] *Director of Public Prosecutions v Kaba* (2014) 44 VR 526; [2014] VSC 52 [174] (Bell J).
[154] (2004) 219 CLR 562; [2004] HCA 37 [19]-[20], dissenting in result but not in principle.
[155] This test has also been expressed in different formulations, including "unambiguously clear" and "irresistible clearness"; "express words of plain intendment"; and 'clear words or necessary implication: for a list of these various formulations, see *Durham Holdings Pty Ltd v New South Wales* (1999) 47 NSWLR 340; [1999] NSWCA 324 [44].
[156] (2013) 248 CLR 92; [2013] HCA 29 [158]. See also Basten JA in *Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd (No 2)* (2016) 95 NSWLR 157; [2016] NSWCA 379 [45].
[157] *Secretary, Department of Family and Community Services v Hayward (a pseudonym)* (2018) 98 NSWLR 599; [2018] NSWCA 209 [39].
[158] *Lee* (n 145).

> protection of fundamental principles and systemic values. The principle ought not, however, to be extended beyond its rationale: it exists to protect from inadvertent and collateral alteration rights, freedoms, immunities, principles and values that are important within our system of representative and responsible government under the rule of law; it does not exist to shield those rights, freedoms, immunities, principles and values from being specifically affected in the pursuit of clearly identified legislative objects by means within the constitutional competence of the enacting legislature." [159]

There is no clear methodology for how and when a right or freedom becomes fundamental at common law, and "what rights and freedoms are recognised as fundamental at common law is ultimately a matter of judicial choice."[160] Certain rights have, however, been recognised by the courts as requiring clear legislative intention in order to be abrogated.[161] These include: personal rights, such as personal liberty,[162] freedom of movement,[163] and freedom of expression;[164] property rights, such as the right from alienation of property without compensation;[165] and procedural rights, such as the right to procedural fairness.[166] Importantly, the categories of rights that might be regarded as "fundamental" are not closed.

Fundamental rights change depending on time and place,[167] and what is necessary to displace the presumption may have a variable standard.[168] This raises the question of whether climate change and its consequences for human rights can inform both the identification of certain rights as fundamental and what is necessary to find abrogation of these rights. Climate change is undisputedly one of the greatest challenges in the current time and in the place of Australia. In the context of a public duty to develop environmental quality objectives, guidelines and policies to ensure environment protection, the Land and Environment Court of NSW found that the environmental quality objectives, guidelines and policies that need to be developed to ensure environment protection will need to change in response to the threats to the

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[159] Ibid [313].
[160] Dan Meagher, 'The Common Law Principle of Legality in the Age of Rights' (2011) 35(2) *Melbourne University Law Review* 449.
[161] See Dennis Pearce, *Statutory Interpretation in Australia* (LexisNexis, 9th ed, 2019) for a summarised list of examples where courts have required the need for a clear indication of an intention for the principles, rights and privileges specified to be abrogated. See also the list of examples given in *Momcilovic* (n 150) [444].
[162] *Williams v R* (1986) 161 CLR 278, 292; [1986] HCA 88.
[163] *Kruger v Commonwealth* (1997) 190 CLR 1; [1997] HCA 27.
[164] *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39, 52; [1980] HCA 44.
[165] *Clissold v Perry* (n 139).
[166] *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252; [2010] HCA 23 [58], [59].
[167] *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290; [2001] HCA 14 [28]. See also *Bropho v Western Australia* (1990) 171 CLR 1, 18; [1990] HCA 24.
[168] Pearce (n 161) [5.9]

environment that prevail and are pressing at the time.[169] The Court concluded that "at the current time and in the place of New South Wales, the threat to the environment of climate change is of sufficiently great magnitude and sufficiently great impact as to be one against which the environment needs to be protected."[170] By analogical reasoning, in the current time and place, in which climate change touches every aspect of our legal and social systems,[171] could climate change and its consequences for human rights inform a court's application of the principle of legality in cases where it arises?

There are three steps in answering this question: first, identifying a fundamental right, freedom or immunity that is recognised at common law or is of such a fundamental nature or character as to engage the principle of legality; secondly, ascertaining whether the relevant legislation interferes with this right; and thirdly, assessing whether the principle of legality in fact operates to constrain any interference with such rights.[172]

Starting with the first step, this article raises three possibilities of such a fundamental right: (1) a right that has already been recognised by the courts as fitting within the recognised class of fundamental rights; (2) a right already recognised within international human rights law, such as the right to life; (3) and a right specifically related to climate change, such as the right to a safe climate.

As to the first, courts have identified a number of rights which fit into a recognised category of fundamental rights, freedoms and immunities that require express legislative intention to be curtailed or abrogated. One instance where environmental concerns have intersected with recognised fundamental rights is the right to freedom of expression. The High Court has long recognised that a freedom of political communication is implied in the Constitution,[173] and the principle of legality provides an additional protection for freedom of expression.[174] When interpreting a statute, courts will presume that Parliament did not intend to interfere with freedom of expression unless this intention is unambiguously clear.[175] The implied freedom of

[169] *Bushfire Survivors for Climate Action Incorporated v Environment Protection Authority* [2021] NSWLEC 92 [66].
[170] Ibid [69].
[171] See Elizabeth Fisher, Eloise Scotford and Emily Barritt, 'The Legally Disruptive Nature of Climate Change' (2017) 80(2) *Modern Law Review* 173.
[172] *Kassam* NSWCA (n 145) [92].
[173] *Australian Capital Television v Commonwealth* (1992) 177 CLR 106; [1992] HCA 45; *Nationwide News v Wills* (1992) 177 CLR 1; [1992] HCA 46; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 570; [1997] HCA 25.
[174] Australian Law Reform Commission, Traditional Rights and Freedoms—Encroachments by Commonwealth Laws (ALRC Report 129) [4.30].
[175] *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1; [2013] HCA 3 [42]–[46]*; Evans v New South Wales* (2008) 168 FCR 576; [2008] FCAFC 130 [72]; *Simms* (n 152), 130.

political communication, and corresponding principle of legality was discussed in *Brown v Tasmania*.[176] The plaintiffs were arrested and charged with offences under the *Workplaces (Protection from Protesters) Act 2014* (Tas) (Protestors Act) while raising public and political awareness about logging in the Lapoinya Forest in Tasmania. Although the prosecution did not proceed with the charges, the plaintiffs instituted proceedings in the original jurisdiction of the High Court challenging the validity of sections of the Protesters Act. In finding that these sections[177] were invalid, the majority held that the measures adopted by the Protesters Act to deter protesters effected a significant burden on the freedom of political communication. This burden was not justified.[178] In particular, vague definitions and lack of clarity around the boundaries of "business premises" or a "business access area" in the Protestors Act[179] would likely result in errors such that some lawful protests would be prevented or discontinued, and protesters would be deterred from further protesting.[180] The balance of the impugned provisions were not reasonably necessary because the Protesters Act was likely to deter protests of all kinds, which was "too high a cost to the freedom given the limited purpose of the Act".[181]

While *Brown* is a judgment about constitutional and common law protection of forums for expression, it is a case situated within the history of environmental protest in Tasmania.[182] The judgments are framed within the context of Tasmanian forests,[183] such that "the subtext to this case was to pit the plaintiff's claim to a right to protest inside the forest against the State's claim to close the forest for the purposes of private logging".[184] The history of environmental protest in Tasmania and the importance of the forest as a site for the protests[185] is detailed in the judgments. For instance, the majority notes that "onsite protests have been a catalyst for granting protection to the environment in particular places and have contributed to governments in Tasmania and throughout Australia granting legislative and regulatory environmental protection to areas not previously protected".[186] The analysis of the implied

[176] (2017) 261 CLR 328; [2017] HCA 43 ('*Brown v Tasmania*').
[177] *Workplaces (Protection from Protesters) Act 2014* (Tas) s 6(1), 6(2), 6(3), 6(4), 8(1), s 11(1), 11(2), 11(6), 11(7), 11(8), 13 and Pt 4.
[178] *Brown v Tasmania* (n 176) [152].
[179] Ibid [67].
[180] Ibid [77], [84], [85].
[181] Ibid [145].
[182] Cristy Clark and John Page, 'Of Protest, the Commons, and Customary Public Rights: An Ancient Tale of the Lawful Forest' (2019) 42(1) *UNSW Law Journal* 26, 30.
[183] *Brown v Tasmania* (n 176) see [6], [23], [32] (Kiefel CJ, Bell and Keane JJ), [221] (Gageler J), [240] (Nettle J).
[184] Clark and Page (n 182) 30.
[185] *Brown v Tasmania* (n 176) [64].
[186] Ibid [33].

freedom of communication and related right to freedom of expression was thereby situated within the forest as a site of environmental protest.[187]

How might climate change and its consequences assist in the interpretation of the right to freedom of expression or implied freedom of political communication? Consider, for example, legislation which creates offences for protestors seeking to disrupt operations at a coal mine. It is necessary to consider the operation and effect of a statute in order to answer the question whether a statute impermissibly burdens the implied freedom of political communication.[188] In considering whether such legislation might be interpreted as placing an unjustified burden on freedom of expression or the implied freedom of political communication, a court might have regard to the importance of place. Here, a court might consider the relevance of the coal mine as a site for protest, compared with the coupes in the forest discussed in *Brown,* or may draw upon the history of climate protest in an analogous manner to forestry protests in *Brown.* Climate change might, therefore, feed into an analysis of the implied freedom of political communication and the corresponding fundamental right to freedom of expression.

The second possible fundamental right is a right already recognised in human rights law. It has been argued that it is legitimate and consistent with the common law to draw upon international human rights norms to update the set of values[189] protected through the principle of legality.[190] In this way, international human rights norms could be adopted as a "touchstone"[191] for the principle of legality. A former Chief Justice of Australia, the Hon Robert French, has stated extra-judicially that "[i]t does not take a great stretch of the imagination to visualise intersections between these fundamental rights and freedoms, long recognised by the common law, and the fundamental rights and freedoms which are the subject of the Universal Declaration of Human Rights and subsequent international Conventions to which Australia is a party."[192] In *Director of Public Prosecutions v Kaba,* the Supreme Court of Victoria held that the rights and freedoms in the International Convention on Civil and Political

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[187] Clark and Page (n 182).
[188] *Brown v Tasmania* (n 176) [61].
[189] Dan Meagher, 'The Common Law Principle of Legality in the Age of Rights' (2011) 35(2) *Melbourne University Law Review* 449.
[190] David Dyzenhaus, Murray Hunt and Michael Taggart, 'The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation' (2001) 1(1) *Oxford University Commonwealth Law Journal* 5, 6.
[191] Meagher (n 189) 449.
[192] Chief Justice Robert French, 'Oil and Water? International Law and Domestic Law in Australia' (Speech delivered at the Brennan Lecture, Bond University, 26 June 2009) 21 <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj26June09.pdf>. See application of this statement in *Director of Public Prosecutions v Kaba* (2014) 44 VR 526; [2014] VSC 52 [179].

Rights were fundamental rights and freedoms for the purpose of the principle of legality.[193] If this approach were to be taken in Australia, internationally recognised human rights might be identified as fundamental rights engaging the principle of legality.

One internationally recognised human right is the right to life. Overseas, there are numerous cases where the right to life has been understood as encompassing environmental rights. An example is the 30-year history of litigation brought by environmental public interest lawyer MC Mehta,[194] such as *M.C. Mehta v Union of India*,[195] which discussed the right to life and personal liberty in Article 21 of the Constitution of India.[196] The Supreme Court of India has held elsewhere that "the right to live is a fundamental right under Article 21 of the Constitution and it includes the right to enjoyment of pollution-free water and air for full enjoyment of life."[197] The right to life "encompasses within its ambit the protection and preservation of the environment, ecological balance, freedom from pollution of air and water, and sanitation, without which life cannot be enjoyed. Any contract or action which would cause environmental pollution… should be regarded as amounting to violation of Article 21".[198] The content of the right to life has therefore been held as including a right to live in a healthy and safe environment.

These cases are part of a broader trend of constitutional courts and texts recognising the environment as a subject for protection under human rights law.[199] A logical extension of these decisions might be that the right to live in a healthy and safe environment includes the right to live in an environment with a safe climate. The UN Human Rights Committee has noted that climate change and environmental degradation are some of the "most pressing and serious threats to the ability of present and future generations to enjoy the right to life." The Committee found that state obligations under international environmental law should inform the contents of the right to life (article 6 of the ICCPR), which should in turn inform the contents of state obligations under international environmental law.[200] Implementation of the right to life

[193] *Director of Public Prosecutions v Kaba* (n 192) [181].
[194] See MC Mehta, *In the Public Interest: Landmark Judgments and Orders of the Supreme Court of India on Environment and Human Rights* (Prakriti Publications, 2009).
[195] 1987 SCR (1) 819.
[196] *M.C. Mehta vs Union of India* (Writ Petition Nos 158128/2019 and 158129/2019) [2].
[197] *Subhash Kumar v State of Bihar* (1991) AIR SC 420.
[198] *Virender Gaur v State of Haryana* (1995) 2 SCC 577.
[199] Erin Daly and James May, *Global Environmental Constitutionalism* (Cambridge University Press, 2015).
[200] 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* (CCPR/C/GC/36, 30 October 2018) at [62].

therefore includes taking measures "to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors."[201]

A third possibility is to develop and recognise a new fundamental right related to climate change. As earlier discussed, the categories of rights that might be regarded as "fundamental" are not closed, but include rights that are important within our system of representative and responsible government under the rule of law.[202] Could it be argued that a safe climate is so important to the rule of law and Australian system of representative government that it should be recognised as a fundamental right protected by the principle of legality? In the previously discussed case of *Juliana*, the US District Court found that the right to due process in the US Constitution includes a fundamental right to a stable climate. The Court noted that the principles of substantive due process evolve to encompass different rights over time. A right to a stable climate fell within the concept of due process in the US Constitution because it was held to be fundamental to a free and ordered society.[203]

By analogical reasoning, could a climate that is compatible with a safe, clean and healthy environment be so "important within our system of representative and responsible government under the rule of law"[204] that a right to such a climate might fall within the category of fundamental rights that cannot be abrogated without clear legislative intention? As noted in *Juliana,* "a stable climate system is quite literally the foundation of society, without which there would be neither civilization nor progress."[205] Judge Staton's dissent in the Ninth Circuit Court of Appeal's decision similarly found that the existential threat posed by climate change engaged the perpetuity principle, which protected the plaintiffs from the "willfull destruction" of the Nation. The consequences of climate change are widespread, rapid and intensifying, and unprecedented.[206] In Australia, the impacts of climate change include more frequent and hotter heatwaves; increased extent and intensity of bushfires; and increased extent and intensity of extreme rainfall events. The Australian system of representative and responsible government, and the rule of law, are not separate from the natural environment but are constituted by and dependent on it. On this reasoning, it is arguable that a safe climate might be able to be seen as so important to the rule of law and governmental systems that it falls within the class of fundamental rights protected by the principle of legality.

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[201] Ibid.
[202] *Lee* (n 145) [313].
[203] *Juliana v United States* (D Or 2016) (n 55) 1250.
[204] *Lee* (n 145) [313].
[205] *Juliana v United States* (D Or 2016) (n 55) 1250.
[206] Intergovernmental Panel on Climate Change, *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Report, 2021) A.1.

If a fundamental right were to be identified, the second step would involve ascertaining whether the relevant legislation interferes with this right and if so, the extent of the interference. This interference must be material: the principle of legality will not necessarily be engaged if the interference with the fundamental right that is authorised by the legislation is slight or indirect or temporary.[207] As Gageler and Keane JJ observed in *Lee*,[208] "the notion that any subtraction, however anodyne it might be in its practical effect, from the forensic advantages enjoyed by an accused under the general law necessarily involves an interference with the administration of justice or prejudice to the fair trial of the accused is unsound in principle."

The third step involves an assessment of whether the principle of legality in fact operates to constrain any interference with the fundamental right. This includes examining whether the legislation that curtails or abrogates the fundamental right expresses a clear and unambiguous intention to do so. The language of such an express intention would need to correspond with, and be directed to, the fundamental right that is intended to be abrogated or curtailed. Where the objects or purpose of the legislation contemplates the abrogation or curtailment of particular rights, the principle of legality will have little if any role to play.[209] Thus in *Australian Securities and Investments Commission v DB Management Pty Limited*,[210] the High Court found that "the relevant provisions of the legislation in question have, as their primary concern, interference with vested proprietary rights."[211] The legislation enabled compulsory acquisition of property. In this circumstance, "it is of little assistance, in endeavouring to work out the meaning of parts of that scheme, to invoke a general presumption against the very thing which the legislation sets out to achieve."[212] A law that is directed toward authorising interference with a fundamental right will thus manifest an intention to abrogate or curtail this fundamental right. This might be particularly relevant to, for example, legislation which itself approves or otherwise fast-tracks the approval process for fossil fuel projects, that contribute to climate change.

The clarity with which the intention to curtail or abrogate the fundamental right needs to be expressed will be correlative to and vary with the strength or fundamental nature of the right involved,[213] "with the required clarity increasing the more that the rights are 'fundamental' or

[207] *Kassam* NSWCA (n 145) [87].
[208] *Lee* (n 145) [324] and see also [126] (Crennan J).
[209] *Kassam* NSWCA (n 145) [85].
[210] (2000) 199 CLR 321; [2000] HCA 7.
[211] Ibid [43].
[212] Ibid [43].
[213] *Mann v Paterson Constructions Pty Limited* (2019) 267 CLR 560; [2019] HCA 32 [159]; *Kassam* NSWCA (n 145).

'important'."[214] McHugh J similarly observed in *Gifford v Strang Patrick Stevedoring Pty Limited,*[215] "the presumption of non-interference is strong when the right is a fundamental right of our legal system; it is weak when the right is merely one to take or not take a particular course of action".[216]

In these ways, the principle of legality might be able to be invoked in human rights-based arguments in climate litigation.

2 Presumption of consistency with international human rights law

A different interpretative tool is to interpret legislation in a way that accords with international human rights law.[217] There has been much debate regarding the effect of international treaties that Australia has signed but not incorporated into Australian domestic law. In *Minister for Immigration and Ethnic Affairs v Teoh,*[218] an unincorporated convention to which Australia was a party, the CRC,[219] could not be relied on as a limitation on the exercise of an administrative discretion,[220] yet the High Court held that ratification of the CRC raised a legitimate expectation that the decision-maker would take account of the CRC.[221] In the later decision of *Re Minister for Immigration and Multicultural Affairs and Indigenous Affairs; ex parte Lam*,[222] four of the judges criticised aspects of the *Teoh* decision. While the extent to which an unincorporated treaty can be relied on as a limitation on the exercise of an administrative discretion is therefore contentious, *Teoh* is "too well established to be repealed now by judicial decision".[223] Hence, it can be taken that "where a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party."[224] A wider interpretative principle has

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[214] Ibid [159].
[215] (2003) 214 CLR 269; [2003] HCA 33.
[216] Ibid [36].
[217] For consideration of the relationship between the principle of legality and presumption of consistency with international law: see Wendy Lacey, 'Confluence or Divergence? The Principle of Legality and the Presumption of Consistency with International Law' in Meagher and Groves (n 147) 237.
[218] (1995) 183 CLR 273 ('*Teoh*').
[219] Opened for signature 20 November 1989, 1577 UNTS 3; 28 ILM 1456 (entered into force 2 September 1990).
[220] *Teoh* (n 218) 287.
[221] Ibid.
[222] (2003) 214 CLR 1; [2003] HCA 6.
[223] *Al-Kateb v Godwin* (2004) 219 CLR 562; [2004] HCA 37 (McHugh J) [65] ('*Al-Kateb*'). For a comprehensive list of applications of *Teoh,* see Pearce (n 161) annexure [3.12].
[224] *Teoh* (n 218) 287. See also *Momcilovic* (n 150) [18].

been suggested by Justice Kirby, that legislation should be interpreted so as to be consistent with the principles of the international law of human rights and fundamental freedoms.[225]

Either interpretative approach has implications for human rights-based climate litigation. As noted earlier, climate change impacts a range of human rights under international human rights law. Human rights recognised under human rights conventions such as the ECHR, including the right to life and the right to family and private life, have been found to have environmental content.[226] Government inaction on climate change has been held specifically to threaten the right to life and the right to private life, family life, home, and correspondence.[227] Climate change has also been held to violate rights under other treaties or international conventions, including the Convention on the Rights of the Child.[228]

Where legislation or executive action under legislation interferes with human rights, a court could interpret such legislation, where it is ambiguous or unclear, in a way that accords with Australia's obligations under a treaty or an international convention to which Australia is a party (the first interpretative principle) or is consistent with principles of international law of human rights and freedoms (Kirby J's interpretative principle). Either way, the result may be to uphold human rights that are being or will be affected by climate change.

B *Human rights informing other laws*

The second alternative pathway is using human rights to frame and describe breaches of other laws, such as planning or environmental laws. Threats from extreme weather events, such as bushfires or floods, can be described as a threat to the effective enjoyment of the right to life. Threats from climate change-induced drought can be described as a threat to the right to food or the right to water. Threats from sea-level rise can be described as a threat to the right to self-determination. Where these rights are not directly enforceable through human rights legislation, they can be used as a discourse and a way of understanding a breach of other substantive laws.

In the *Urgenda* litigation, the breach of the duty of care under the Dutch civil law was described in terms of impacts on the right to life under Article 2 of the ECHR and the right to private life,

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[225] *Al-Kateb* (n 223) [193]. See also Michael Kirby, 'Municipal Courts and the International Interpretive Principle: Al-Kateb v Godwin' (2020) 43(3) *UNSW Law Journal* 930.
[226] *Öneryıldız v Turkey* (Application No. 48939/99, 20 November 2004); *López Ostra v Spain* (Application No. 16798/90, 9 December 1994); *Fadeyeva v Russia* [2005] ECHR 376; (2007) 45 EHRR 10.
[227] *Urgenda II* (n 34); *Urgenda III* (n 37).
[228] *Sacchi v Argentina* (n 40).

family life, home, and correspondence under Article 8 of the ECHR.[229] Human rights law was used to describe the harms caused by the breach. While the Netherlands is a party to the ECHR, there is nothing to prevent the framing of climate change-related harms as human rights violations in the absence of such a convention.

Similarly, the recent Federal Court of Australia decision of *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment*[230] described the harms of future climate scenarios,[231] and direct impacts on the applications, including heatwaves[232] and bushfires,[233] in addition to indirect impacts.[234] The factual findings of *Sharma* were upheld on appeal,[235] although the legal conclusion that the relevant Minister owed but breached a duty of care in exercising statutory powers under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) was overturned. If there had been a duty of care, it might have assisted in describing the harms in terms of human rights, in order to understand the salient features relevant to determining the content of the duty of care and any breach of duty. In this way, human rights discourse might assist in the assessment and analysis of a duty of care and breach of duty.

Even in jurisdictions without dedicated human rights legislation, human rights discourse may be used to describe harms or frame arguments of a breach of other substantive laws. For example, the harms described in *Gloucester* to peoples' health and wellbeing[236] could have been described in the discourse of the right to health. The impacts on peoples' culture[237] could have been described in the discourse of cultural rights. Indeed, in considering the social impacts of the mine, the Court considered the *Social Impact Assessment Guideline* (Department of Planning and Environment, 2017), which stated that, "as a guide, social impacts can involve changes to people's personal and property rights, including whether their economic livelihoods are affected, and whether they experience personal disadvantage or have their civil liberties affected". In this context, the Court discussed personal and property rights, including issues related to economic livelihood and whether or not people experience

[229] *Urgenda I* (n 31).
[230] [2021] FCA 560 ('*Sharma*').
[231] Ibid [55]-[69]. See Jacqueline Peel and Rebekkah Markey-Towler, 'A Duty to Care: The Case of Sharma v Minister for the Environment [2021] FCA 560' (2021) 33(3) *Journal of Environmental Law* 272.
[232] *Sharma* (n 230) [205]-[225].
[233] Ibid [226]-[235].
[234] Ibid [237]-[246].
[235] *Minister for the Environment v Sharma* (2022) 400 ALR 203; [2022] FCAFC 35 [273]-[290], [330]-[331], [412], [834].
[236] *Gloucester* (n 122) [353]-[368].
[237] Ibid [340]-[352].

personal disadvantage or have their civil liberties affected.[238] These social impact harms could have been described and framed in terms of human rights obligations. Human rights discourse could thereby have aided the Court's appreciation of the extent of the harms caused in the case.

VI Conclusion

This article has explored how and why human rights-based climate litigation in Australia has differed from human rights-based climate litigation overseas. Through a survey of overseas human rights-based climate litigation, three types of causes of action in human rights-based climate litigation have been examined: international and regional treaties; constitutional rights; and human rights enshrined in statute. Each of these causes of action is limited in availability and scope in the Australian context, leading to a dearth of human rights-based climate litigation in Australia. Outside of these causes of action, however, lie other possibilities for human rights-based climate litigation in Australia. Two such possibilities are using human rights as a tool for statutory interpretation, and using human rights to understand breaches of other laws, such as planning or environmental laws.

[238] Ibid [380].