First Nations Peoples, Climate Change, Human Rights and Legal Rights

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This article provides a First Nations standpoint on climate change, informed by human rights law and legal education. It is co-authored by a Yuin woman who is a law academic, a Wirdi man who is a Queens Counsel, and a human rights law academic. The article argues that for any responses to climate change to be effective, they must be grounded in the perspectives, knowledge, and rights of First Nations peoples. The utility of human rights instruments to protect First Nation interests in a climate change milieu is explored at the international and domestic levels. Concomitantly, structural change must begin with the Indigenisation of legal education and the embedding of legal responses to climate change into the law curriculum. A holistic approach is necessary.

I Introduction

We acknowledge the First Nations peoples whose sovereignty over the lands now collectively known as Australia has never been ceded. We recognise the Ancestors who fought and died, protecting their people and their lands. We pay our respects to all the Elders and honour their role in preserving culture and communicating their knowledge and wisdom. We acknowledge the Traditional Owners of Country throughout Australia and their continuing connection to land, culture, and Ancestors.

'First Nations' is a term that has emanated from the Indigenous peoples of Canada.[1] It is intended to signify the pre-existing 'nation' status of Indigenous people in colonised territories. It is a term that has recently gained broader acceptance in Australia with the adoption of the Uluru Statement from the Heart

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1 Michael A Peters and Carl T Mika, 'Aborigine, Indian, Indigenous or First Nations?' (2017) 49(13) *Educational Philosophy and Theory* 1229.

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at a convention held at Yulara in the Northern Territory in 2017.[2] It is a term the authors favour over Indigenous people, or Aboriginal and Torres Strait Islander peoples, because it provides a much more positive assertion of political status by reference to territory. Simultaneously, we accept the criticism that any collective nouns can have the unintended effect of homogenisation and deny heterogeneity, self-identification, and self-selected terms.[3] However, it is not practical or feasible to refer to every individual group in an article of this nature; therefore, the authors have determined to use the preferable collective noun, First Nations.

Globally, First Nations have been in a state of transition since the 1960s, when a process often referred to as decolonisation first took shape and demanded action. The principle that the First Nations are entitled to self-determination has been recognised internationally, if not implemented domestically in Australia.[4]

This article argues that First Nations peoples must be centred as a priority in any examination of climate change, recognising their long-standing practices and cultural connection to the land. International and domestic human rights laws are potential avenues to protect both First Nations interests and the environment. To ensure lawyers are trained in skills that enable them to formulate such arguments, the nature of legal education in Australia must be reformed to embed Indigenous cultural awareness and climate change consciousness.

This article is structured into three parts. Part I is the introduction and setting of context. Part II considers the intersections between international human rights law and First Nations peoples with climate change, focussing on Australia, including a practitioner's perspective. Part III situates the analysis in the milieu of legal education from an educator's perspective. Finally, conclusions are offered, which include recommendations for future actions.

We commence this analysis by drawing on a personal experience of one of the authors, who in 2009, as a junior barrister, had the pleasure of acting for the Quandamooka People of the Moreton Bay Region of South East Queensland. The Quandamooka People are the bayside and island dialect groups of what is now called Moreton Bay. The matter involved the preparation of a native title claim by the Quandamooka People for what was, eventually, a legal recognition granted by the Federal Court of Australia of their native title over Minjerribah (or North Stradbroke Island as it is also known). That recognition occurred with the consent of the State of Queensland. Importantly, Dowsett J approached the matter with respect:

> I have not come here today to give anything to the Quandamooka People. These orders give them nothing. Rather, I come on behalf of all Australian people to recognize their existing rights and interests, which rights and interests have their roots in times

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2 *Uluru Statement from the Heart* (National Constitutional Convention, 26 May 2017).

3 Peters and Mika (n 1) 1230.

4 *United Nations Declaration on the Rights of Indigenous Peoples,* GA Res 61/296, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) ('*Declaration*').

> before 1788, only some of which have survived European settlement. Those surviving rights and interests I now acknowledge.[5]

The process of preparing the native title claim centred on interviews with many witnesses. One of those witnesses was a Quandamooka Elder who told of how, when he was young, before sand mining closed access to large parts of the island, he would travel to the south of Minjerribah on foot or by horse. It was estimated that this might have been a distance of approximately 30 kilometres. He said that along the way, they would hunt and burn the grasslands. He said that the track they would travel was through the middle of the island, and they would often see the kangaroos off in the distance, not how it was now being mostly densely overgrown with scrub. When asked whether there was a certain time of the year that they would head to the south of the island, he replied that it was always in the summer. At this point, there was a little confusion as general knowledge of traditional burning regimes in the area was limited. The current understanding of the rural fire service considered that fire management should be done in late winter.

The Elder explained, rather patiently, that summer was the proper time to burn as the snakes and goannas were their totems, and if they burned in summer, those reptiles would be alert and able to get out of the way of the fire. He stated that because they burnt every summer, the fires were only ever grass fires.

During the summer, this burning practice was common along the length of the east coast, with early historical records from British observers noting extensive burning in December and January. And so it was, with a short series of questions and answers, the Elder disclosed practices which were no doubt of great antiquity and in respect of which of there is perhaps no greater act of possession of territory. The practices he spoke of were in keeping with spiritual belief and the notions of interconnectedness between all things. He had also turned on its head the former and current practices of the fire management authorities.

We retell this story because it is topical, given the wildfires that scorched the Australian continent from November 2019 through to February of 2020, and because it provides a relatable backdrop to the topic of climate change. It underscores the importance of the benefits to all concerned about climate change that can be harnessed from being open and receptive to First Nation wisdom and knowledge. It highlights the need for the rights of First Nations peoples to be at the centre of any legal response to climate change. It requires the embedding of First Nations' perspectives into the law curriculum to equip emerging lawyers with the necessary skills to tackle the complex problems implicit in climate change.

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[5] *Delaney on behalf of Quandamooka People v Queensland* [2011] FCA 741, [21] (Dowsett J).

II Human Rights, Climate Change and First Nations Peoples: Reflections on the International and Australian Context

Having laid the foundation for this analysis, the next step is to critically analyse the human rights frameworks that could be drawn upon to promote First Nations peoples' rights and respond to the grave implications of climate change. While providing an academic synopsis of the relevant history of international human rights law, the first section also provides a unique standpoint in that it offers a First Nations practitioner's perspective on how this law has developed in Australia. The following sections focus specifically on how the international human rights framework has developed with respect to First Nations peoples, how human rights are structured domestically in Australia and, finally, how the rights considered go beyond conventional 'human' rights to include the necessary protection of our mother earth.

A *International Human Rights Frameworks Generally*

The *Universal Declaration on Human Rights* ('*UDHR*') proclaims, in Article 1:

> All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.[6]

The *UDHR* was passed at the General Assembly of the United Nations in 1948.[7] Since that time, there have been nine core United Nations conventions that have the effect of binding the signatory nations.[8] Australia is a party to seven of the core human rights instruments, and this provides the platform for domestic

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[6] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) art 1 ('*UDHR*').

[7] Ibid.

[8] *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) ('*ICERD*'); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*'); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('*ICESCR*'); *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('*CRC*'); *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, opened for signature 18 December 1990, 2220 UNTS 3 (entered into force 1 July 2003); *International Convention for the Protection of All Persons from Enforced Disappearance*, opened for signature 6 February 2007, 2716 UNTS 3 (entered into force 23 December 2010); *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 30 March 2008).

implementation.[9] The United Nations has Expert Committees in respect of these human rights instruments to monitor and guide implementation.[10] From time to time, the Committees will issue 'Comments' concerning the relevant convention to deal with issues arising from it.[11]

In many countries, those Comments are used as aids by the court to interpret the domestic legislation enacted to implement the conventions. In Australia, the High Court has had differing views. A starting point to illustrate those differing views is the landmark 1992 decision of *Mabo v Queensland [No 2]* ('*Mabo No 2*'), where the doctrine of *terra nullius*, which held that Australia was the land of no people, was rejected.[12] Brennan J, in the lead judgment, had regard to international norms in reaching his decision that the racially discriminatory doctrine of *terra nullius* could no longer stand as good law in Australia:

> Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.[13]

However, in a later case, *Maloney v The Queen* ('*Maloney*'), the High Court took a different approach.[14] *Maloney* concerned a challenge to liquor licencing laws that restricted alcohol sale in the discrete Aboriginal community of Bwgcolman (also known as Palm Island) in Queensland. In that case, even though the High Court held that the restrictions were racially discriminatory, it found that the Queensland government had acted to impose a special measure for the benefit of the Aboriginal and Torres Strait Islander people resident on Bwgcolman/Palm

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[9] See Attorney-General's Department, 'International Human Rights System', *Rights and Protections* (Web Page) <https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/international-human-rights-system>.

[10] See, eg, the Committee on the Elimination of All Forms of Racial Discrimination, Human Rights Committee, Committee on Economic, Social and Cultural Rights, Committee on the Elimination of All Forms of Discrimination, Committee Against Torture, Committee on the Rights of the Child, Committee on Migrant Workers, Committee on Enforced Disappearances, Committee on the Rights of Persons with Disabilities and other United Nations Committees, United Nations Human Rights Office of the High Commissioner, 'Human Rights Treaty Bodies: Individual Communications', *Human Rights Bodies* (Web Page) <https://www.ohchr.org/en/hrbodies/tbpetitions/Pages/IndividualCommunications.aspx>.

[11] See, eg, Committee on the Elimination of Racial Discrimination, *General Recommendation No. 36 (2020) on Preventing and Combating Racial Profiling by Law Enforcement Officials*, 102nd sess, UN Doc CERD/C/GC/36 (17 December 2020).

[12] *Mabo v Queensland [No 2]* (1992) 175 CLR 1 ('*Mabo No 2*').

[13] Ibid 42 (Brennan J) (citations omitted).

[14] *Maloney v The Queen* (2013) 252 CLR 168 ('*Maloney*').

Island.[15] Of central importance to the contentions, in that case, was the *International Convention on the Elimination of All Forms of Racial Discrimination*.[16] The Convention contains an article that enables States to take special measures that are racially discriminatory if such measures are for the benefit of the people who are the subjects of such measures.[17] That article was incorporated by reference in section 8 of the *Racial Discrimination Act 1975* (Cth) ('*RDA*').[18]

Again, an earlier decision of Brennan J's was the central focus of much of the argument. In 1985, Brennan J delivered the lead judgment in the case of *Gerhardy v Brown*.[19] In that case, it was held that there were four indicia to which the court ought to have regard in determining whether a purported special measure was, in fact, for the benefit of the subject community.[20] One of those indicia was whether the subjects of the purported benefit had consented to the action. Brennan J astutely noted that a purported benefit imposed upon a community against its will has the likelihood of being so disempowering as to outweigh any benefit said to be delivered.[21] Mrs Maloney relied upon those observations from Brennan J and a more recent 'Comment' from the Committee on the Elimination of all Forms of Racial Discrimination regarding the nature of free, prior and informed consent and how it should be understood in dealing with claims by States that discriminatory legislation were special measures.[22] However, the High Court ruled that it could not take into account the development of international norms when interpreting domestic legislative instruments.[23] It determined that the Court was bound to interpret the law as it was enacted, and s 8 of the Australian legislation had no requirement for the consent of the recipients.[24]

Former High Court Justice Michael Kirby has been critical of the High Court's approach to international norms.[25] He has done a great deal of work concerning the *Bangalore Principles on the Domestic Application of International Human Rights Norms*, in particular Principle 4, which recognises that regard may be had to international norms 'where domestic law — whether constitutional, statute or

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15 Ibid 193–4 [46].
16 *ICERD* (n 9).
17 Ibid art 1(4). See also ibid art 2(2).
18 *Racial Discrimination Act 1975* (Cth) s 8 ('*RDA*'). This section states that special measures are those referred to in paragraph 4 of Article 1 of the Convention, however, it does provide an exception to this under section 10(3) of the *RDA*.
19 *Gerhardy v Brown* (1985) 159 CLR 70.
20 Ibid.
21 *Maloney* (n 15) 221–3 [133]–[139] (Crennan J) citing *Gerhardy v Brown* (1985) 159 CLR 70, 135, 139 (Brennan J).
22 Ibid 180–1 [12]–[14] (French CJ), 185 [22]–[24] (French CJ), 255 [234] (Bell J).
23 Ibid 235 [175]–[176] (Kiefel J).
24 Ibid 185–6 [24] (French CJ), 208 [91] (Hayne J), 220–1 [132] (Crennan J), 238 [186] (Kiefel J), 257 [240] (Bell J), 300–1 [356]–[357] (Gageler J).
25 See Justice Michael Kirby, 'The Growing Impact of International Law on the Common Law' (2012) 33(1) *Adelaide Law Review* 7, 23.

common law — is uncertain or incomplete'.[26] Nevertheless, the High Court has not shifted.

The relevance of this for Australia is that, currently, Commonwealth human rights legislation remains in the form that it was enacted without the ability to interpret it in light of the recent developments in the international committees designed to provide assistance in implementation and interpretation, on which Australia has from time to time been represented.[27] The impact of that position is that much of what has occurred internationally in recent years, which might be regarded as expressions of international norms relating to climate change, will be unavailable to the Australian courts unless it is imported into domestic legislation.

With that in mind, the President of the then Human Rights and Equal Opportunity Commission identified that climate change would likely affect many human rights, including the right to life, the right to water, the right to health, the right to human security, and the rights of First Nations peoples. The President noted in relation to the rights of First Nations peoples in Australia that:

> [I]t has been predicted that northern Aboriginal communities will bear the brunt of climate change … facing serious health risks from malaria, dengue fever and heat stress, as well as loss of food sources from floods, drought and more intense bushfires.[28]

The effects of climate change will be felt most acutely by the poor, marginalised, and disadvantaged people worldwide. In Australia, there are no peoples who will be more affected than First Nations peoples.[29]

A mainstream example of the disproportionate effects of climate change can be found in an article on the Sydney Morning Herald's front page, which claimed that Australia could not meet its Paris Agreement commitments.[30] Australia is a party to the Paris Agreement, which builds on previous international efforts to respond to climate change. The Paris Agreement came into force in 2016.[31] Each

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[26] Leigh A H Johns, 'Justice Kirby, Human Rights and the Exercise of Judicial Choice' (2001) 27(2) *Monash University Law Review* 290, 300.

[27] Australia is a member of the United Nations Human Rights Council. Australia also remains engaged in international developments at the United Nations. See, eg, Australian Government, *Australian Statement to the Clustered Interactive Dialogue with the Special Rapporteur (SR) on Indigenous Issues and Expert Mechanism on the Rights of Indigenous Peoples* (National Statement, 18 September 2019).

[28] John von Doussa, 'Human Rights and Climate Change: A Tragedy in the Making' (Speech, HREOC Seminar Series for the 60th Anniversary of the *Universal Declaration of Human Rights*, 20 August 2008).

[29] James Ford, 'Indigenous Health and Climate Change' (2012) 102(7) *American Journal of Public Health* 1260. See also Donna Green, Garnaut Climate Change Review, *Climate Impacts on the Health of Remote Northern Australian Indigenous Communities* (Report, February 2008).

[30] Christiana Figueres, 'Be Honest Australia, You're Not "Meeting and Beating" Your Emissions Targets', *Sydney Morning Herald* (online at 9 March 2020) <https://www.smh.com.au/environment/climate-change/be-honest-australia-you-re-not-meeting-and-beating-your-emissions-targets-20200307-p547u1.html>.

[31] *Paris Agreement*, opened for signature 22 April 2016, [2016] ATS 24 (entered into force 4 November 2016)).

party to the Paris Agreement must submit emissions reductions commitments, known as Nationally Determined Contributions. In Australia, there was a mooted USD75 per barrel tax on oil. Of course, the people who will feel such an increase in fuel prices most acutely are those Aboriginal people who live in the remote communities in the Northern Territory. Their expenditure is controlled under income management laws that limit the range of places and purposes for which welfare might be spent.[32] It has been reported numerous times over many years that Aboriginal people in remote communities are already suffering significant disadvantage flowing from the inability to have sufficient cash to buy food at local stores and not having enough money to travel to regional centres to buy fresh food on a regular basis.[33]

It is also interesting to note that the Australian Human Rights Commission ('AHRC') recorded the impact of human rights upon policy responses to climate change.[34] It noted that people may possess individual rights that need to be taken into account, and that there will be differing impacts in different localities and local knowledge, including Indigenous knowledge, which should be considered, as well as the principles of non-discrimination and substantive equality so that minimum human rights standards are observed.[35]

The AHRC is silent on whether human rights may be used positively to protect those upon whom measurable impacts from climate change are likely to be added to or further exacerbated by government action. For instance, Torres Strait Islanders' right to own and inherit property, as recognised in art 5 of the *International Convention on the Elimination of All Forms of Racial Discrimination*, could potentially be used to argue that laws would be unlawful if they interfered with those rights in a way that other people's rights are not interfered with.

If that proposition is broken down, it can be anticipated that the government would first argue that the impact of climate change affects all people, and the result of rising sea levels will cause loss of property rights around Australia. The response to that argument might be that the rights to property that the Torres Strait Islanders and other First Nations peoples possess are rights to particular areas of the land and sea, which are not transportable and cannot be adequately remedied by compensation. First Nations peoples have different relationships with lands. Their identity is defined by their lands and the stories attached to the lands. Compensation is not adequate for the loss of the right to inherit those particular lands.

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[32] Luke Buckmaster, Carol Ey and Michael Klapdor, *Income Management: An Overview* (Research Paper, Parliamentary Library, Parliament of Australia, 21 June 2012).

[33] J Rob Bray et al, *Evaluating New Income Management in the Northern Territory: Final Evaluation Report* (Social Policy Research Centre UNSW Report, September 2014). See also Deloitte Access Economics, *Place Based Income Management: Medium Term Outcomes Evaluation Report* (Report, 9 April 2015) 4.3.1–4.3.6.

[34] Australian Human Rights Commission, *Declaration Dialogue Series: Equality and Non-discrimination* (Declaration Dialogue Series Paper No 5, July 2013).

[35] Ibid.

Second, it can be anticipated that the Australian government would argue that it has complied with, and is complying with, its international obligations and cannot be expected to do any more given the response to climate change requires a coordinated global effort. While this argument does have some merit, there may be some room to argue that legislative and regulatory regimes that allow for the continued extraction of thermal coal, or the continued clearing of native vegetation, directly contribute to increased carbon dioxide in the atmosphere.[36] A question may be asked whether the extraction of coal itself, as opposed to the burning of coal, ought to be counted against Australia in determining its contribution to global warming. The present international agreements on climate change calculate those emissions against the country which does the act of releasing the CO_2. However, in law, a person may be held liable for the reasonably foreseeable consequences of their actions. The question in human rights terms is whether the action or the law being challenged can be shown to have a discriminatory effect.

The government would no doubt argue that it has an obligation to act in the interests of all Australians by protecting the economy while observing its international obligations and that in doing so, no one sector of society is treated differently from any other. The parameters of this form of positive use of human rights instruments to protect First Nations peoples against government decisions or action, which increases CO_2 emissions, is worthy of further consideration and research. And it may be that a litigation option based on foreseeable consequences with a discriminatory effect is available.[37]

Overall, the capacity for human rights to be used to stop action contributing to the increase in CO_2 is limited because there are numerous competing forces at play. The investment in power generation through burning thermal coal is megalithic compared to First Nations people's rights and interests. Governments have underwritten it and in coal-producing countries, such as Australia, revenue from coal exports to a certain extent underpins the economy.[38] Indeed, the development of the western world to unprecedented levels of wealth and comfort has been achieved on the back of cheap electrical power and petroleum products, where the environmental cost has never been factored into the price.[39] Our houses are made of, and then filled with products and food from around the world,

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

[37] The recent case of *Waratah Coal Pty Ltd v Youth Verdict Ltd* [2020] QLC 33 illustrated the use of *Human Rights Act 2019* (Qld) s 28 to construct an argument that a mining licence should not be granted as it was incompatible with the right to culture for First Nations people. As a result of the disproportionate impact on First Nations people, there may be a justiciable human-rights based argument that there is a positive obligation to protect First Nations people.

[38] The Office of the Chief Economist has said that the Energy and Resources sector is forecast to produce $349 billion in exports in 2021–2022, making up more than half of total exports. See Office of the Chief Economist, *Resources and Energy Quarterly* (Forecast Report, September 2021, 4, 6).

[39] Hans A Baer, 'The Nexus of the Coal Industry and the State in Australia: Historical Dimensions and Contemporary Challenges' (2016) 99 *Energy Policy* 194.

powered by electricity from burnt coal. We drive our two-tonne cars to the store to top up on groceries and catch planes to go on holidays. We live in times of gross excess, and our political system does not have a track record of taking voluntary decisions that may reduce the perceived standard of living.

This existence, and our acceptance of it, must be contrasted with the spiritual, cultural, and legal frameworks of First Nations peoples the world over. First Nations peoples are raised to understand and have an emotional response that forms part of their relationship with their country and mother earth.[40] An appreciation of the strength of that relationship can cause turmoil. There is nothing about the First Nations peoples' existence in Australia that is sustainable in the current approaches. First Nation peoples' understanding of country, which holds for First Nations peoples everywhere, is that the earth is finely balanced, and one cannot simply take from somewhere else without affecting that place. Nor can one take too much of their own resources for trade without causing damage to country and its own sustainability. The fact that in modern society, water is trapped in dams and then sent to entirely different valleys to drink from, wash under, use for agriculture and to remove effluent from, has an effect on the ecosystems in both the valley the water was taken from and the valley in which it is ultimately used.

Turning to the consideration of broader human rights impacted by and potentially capable of protection in a climate change context, there can be no doubt that the best-managed landscapes in any developed settler states are those managed by First Nations peoples. This phenomenon has been studied and was even the subject of Pope Francis's comment in 2016 that when First Nation peoples' land rights are protected, those communities are the best guardians of the world's forests and biodiversity.[41]

While the effects of human-induced greenhouse gas emissions on the climate have been acknowledged and reported upon in detail for more than 30 years, it is only in recent years that individuals and groups have turned to the human rights regime with the hope that it may be the impetus to drive the government into taking action.

There is now ongoing climate change litigation in both Australia (*Sharma by Her Litigation Representative Sister Marie Brigid Arthur v Minister for the Environment*

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[40] Irene Watson, 'Sovereign Space, Caring for Country, and the Homeless Position of Aboriginal Peoples' (2009) 180(1) *South Atlantic Quarterly* 27, 37.

[41] National Aboriginal and Torres Strait Islander Catholic Council, *Pope Francis Statement to National Aboriginal and Torres Strait Islander Catholic Church* (Statement, 27 November 2016) <https://www.natsicc.org.au/pope-francis-message-to-indigenous-australians.html>. See generally Julia E Fa et al, 'Importance of Indigenous Peoples' Lands for the Conservation of Intact Forest Landscapes' (2020) 18(3) *Frontiers in Ecology and the Environment* 135. See also Kaiwen Su et al, 'Efforts of Indigenous Knowledge in Forest and Wildlife Conservation: A Case Study on Bulang People in Mangba Village in Yunnan Province, China' (2020) 11(11) *Forests* 1178. See also Graeme Reed et al, 'Indigenous Guardians as an Emerging Approach to Indigenous Environmental Governance' (2020) 35(1) *Conservation Biology* 179, 181.

(Commonwealth))[42] and New Zealand (*Smith v Fonterra Co-operative Group Ltd)*.[43] Likewise litigation has been undertaken around the globe, relying on the human right to life, to seek declarations and mandatory action by governments for inadequate responses to climate change. In many of these cases, the proceedings have been brought by young people whose lives will be impacted by global climate change.[44] In Canada, Belgium, Columbia, South Korea, France, Germany, Switzerland, the USA, Pakistan, Nepal and Aotearoa/New Zealand, there has been, or is currently, litigation on foot concerning government inaction on climate change.[45] There is even supra-national litigation in the European Court of

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42 (2021) 391 ALR 1.

43 [2020] 2 NZLR 394. For further analysis of the litigation in both cases, see Wendy Bonython, 'Tort law and Climate Change' (2021) 40(3) *University of Queensland Law Journal* 421.

44 See generally Jade S Sasser, 'The Wave of the Future? Youth Advocacy at the Nexus of Population and Climate Change' (2014) 180(2) *Geographical Journal* 102.

45 In Canada, the Federal Court in *La Rose v The Queen* (2020) FC 1008 dismissed a youth-led climate case on the ground of justiciability, at [26]. However, a provincial court, the Superior Court of Justice in Ontario, found in *Mathur v Ontario* (2020) ONSC 6918 that greenhouse gas emission targets were justiciable and that the *Canada Act 1982* (UK) c 11, sch B pt I ('*Canadian Charter of Rights and Freedoms*') applied to greenhouse gas emissions targets and policies, at [62]. In Belgium, litigation is currently ongoing to demand the government reduce its carbon omissions, see generally Klimaatzaak, 'Follow the Trial Closely' (Web Page, 2020) <https://www.klimaatzaak.eu/nl>. In Colombia, Colombia's Supreme Court decided in favour of 25 youth plaintiffs ('Future Generations') that the failure of the Colombian government's failure to reduce deforestation and comply with the Paris Agreement and National Development Plan 2014–2018 threatened constitutional rights, see *Demanda Generaciones Futuras v Minambiente* STC4360-2018, 5 April 2018. In South Korea, litigation is ongoing in South Korea's Constitutional Court. Nineteen youth members of 'Youth4ClimateAction' are arguing that the national climate change laws violate constitutional rights, see *Do-Hyun Kim et al v South Korea,* complaint lodged 13 March 2020 (Constitutional Court of South Korea). In France, four non-profits (Frondation pour la Nature et l'Homme, Greenpeace France, Notre à Tous, and Oxfam France) were successful in convincing the Administrative Court of Paris to recognise ecological damage from climate change and held the government was responsible for failing to meet its own climate targets in Tribunal Administratif de Paris [Paris Administrative Court], n°1904967, 1904968, 1904972, 1904976/4-1, 3 February 2021. In Germany, the German Administrative Court held that the government's climate policy may be reviewed by the court in *Family Farmers and Greenpeace v Germany*, Administrative Court of Berlin, VG 10 K 412.18, 31 October 2019. In Switzerland, the Union of Swiss Senior Women for Climate Protection filed litigation to the Supreme Court of Switzerland noting that due to the disproportionate effects of climate change on senior citizens, the Swiss Government failed to protect their human rights. The Supreme Court denied the appeal in *Verein KlimaSeniorinnen et al v Federal Department of the Environment, Transport, Energy and Communications* 1C_37/2019 (Federal Supreme Court, Public Law Division I, 5 May 2020), noting that the rights had not been suitably impacted and the remedy was not justiciable. In the United States of America, the high-profile litigation of *Juliana v United States*, 947 F 3d 1159 (9th Cir, 2020) was dismissed by the US Court of Appeals for the Ninth Circuit and reversed interlocutory orders for relief on the basis of harm due to climate change. In Pakistan, the Lahore High Court ruled that the Pakistani Government had failed to implement policies to prevent deforestation in *Sheikh Asim Farooq v Federation of Pakistan,* (Writ Petition No. 192069 of 2018, 30 August 2019). In Nepal, the Supreme Court of Nepal ordered that the Government of Nepal must enact climate change legislation in *Advocate Padam Bahadur Shrestha v The Office of the Prime Minister and the Council of Ministers, Singhadurbar, Kathmandu and others* (Decision no 10210, NKP, Part 61, Vol 3, 10th Day of Month of Poush of the Year 2075 BS). In Aotearoa/New Zealand, the High Court of New Zealand in *Thomson v Minister for Climate Change Issues* [2018] 2 NZLR 160 held that it had authority to review domestic climate change policy that discretion to enact policies and that the Minister had not made a reviewable error for the Court to intervene.

Justice.[46] In the main, this litigation relies on the constitutional or legislative protection of human rights as the foundation for these actions.

In Australia, the Constitution and statute law provide little protection of the human rights articulated in the *Universal Declaration of Human Rights*, the *International Convention on the Civil and Political Rights*, the *International Convention on the Economic Social and Cultural Rights*, and the *Convention on the Rights of the Child*.[47]

In Australian legislation, there is protection against discrimination on the basis of gender, disability, and race. The *Racial Discrimination Act 1975* (Cth) includes, as a schedule to the legislation, the *International Convention on the Elimination of All Forms of Racial Discrimination*.[48] This binds the parties to ensure that everyone is guaranteed the right to equality before the law noting specific rights including the right to security of the person and the right to equal participation in cultural activities. To gain access to those protections, it is necessary to establish not only that there is a denial of the right to security of the person, but also that the denial is discriminatory on the basis of race, colour, or national or ethnic origin.

The only other potential option, it appears, is to assert that the right to life is a *jus cogens* international law norm that is enforceable under domestic law. While this contention is presently untested in Australia, there is the potential for a case to be brought similar to *State of the Netherlands v Urgenda Foundation*, which the Netherlands Supreme Court determined in 2019.[49] In that matter, an environmental group (Urgenda) commenced litigation to oblige the government to improve upon its targets for emissions reductions. The Court agreed and ruled that the existing target was insufficient to meet its international obligations. Although that case was decided on the basis of obligations under the *European Convention on the Protection of Human Rights and Fundamental Freedoms*, there is an argument that the right to life, as an international norm, could form part of the Australian domestic law.

For First Nations peoples, the absence of a federal law protecting the right to life has meant that proceedings have been taken by certain Torres Strait Islanders via a complaint to the United Nations Human Rights Committee under the first

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[46] On 25 March 2021, the European Court of Justice dismissed the appeal, arguing that the plaintiffs were not affected by the European Union's climate policies. See *Carvalho v Parliament and Council (Judgment)* (General Court (Sixth Chamber) Court of Justice of the European Union, Case C-565/19, 25 March 2021).

[47] *UDHR* (n 7); *ICCPR* (n 9); *ICESCR* (n 9); *CRC* (n 9). Note that some of the rights in the *UDHR* and *ICCPR* overlap with the *ICERD*.

[48] Note there is also equal opportunity or anti-discrimination legislation in all Australian States and Territories.

[49] *State of the Netherlands v Urgenda Foundation*, Hoge Raad der Nederlanden [Supreme Court of the Netherlands], case 19/00135, ECLI:NL:HR:2019:2007 (20 December 2019). See also the earlier decisions in *Urgenda Foundation v The State of the Netherlands (Ministry of Infrastructure and the Environment)*, Rechtbank Den Haag [Hague District Court], case C/09/456689/HA ZA 13-1396 (24 June 2015) and *The State of the Netherlands v Urgenda Foundation*, Gerechtshof Den Hague [The Hague Court of Appeal], case 200.178.245/01 (9 October 2018).

optional protocol to the *International Covenant on Civil and Political Rights* ('*ICCPR*').[50] That complaint has been brought against Australia on the basis that its failure to adopt adequate measures to reduce greenhouse gas emissions or to build proper adaptation measures, such as sea walls on the islands, is a breach of the *ICCPR*. Most pressing is the seawater inundation of low-lying islands of the Torres Strait. The complainants have relied on impacts upon the right to life (protected by art 6), and specifically, the right to be free of arbitrary interference with privacy, family, and home (protected by art 17), and the right to culture (protected by art 27).

The Oslo Principles on Global Climate Change Obligations (the 'Oslo Principles') are of great importance to the initiatives taken by the various individuals and non-government organisations seeking legal sanctions against nation states for inaction on global climate change.[51] The Oslo Principles were prepared and endorsed by an eminent group of jurists, legal practitioners, and academics under the banner of the 'Expert Group on Global Climate Change Obligations', which included the Hon Michael Kirby. In 2015, the Oslo Principles were adopted by the Expert Group with the stated intention of seeking to overcome the generally abstract nature of previous efforts to define the scope of legal obligations relevant to climate change. It encompasses both:

1. the current obligations that all States and enterprises have to defend and protect the Earth's climate and, thus, its biosphere; and
2. the basic means of meeting those obligations.

The Oslo Principles function on the basis that a maximum of two degrees increase in global temperature over pre-industrial levels will have a 'profound, adverse and irreversible impact on human and other life and on the Earth'.[52] The Principles are detailed and operate on the precautionary principle — that is to say decisions and policies should be predicated on the basis of anticipating, avoiding, and mitigating threats to the environment. They allow for the transfer of effort between Nation States and relief for excessive hardship. Interestingly, the Oslo Principles provide that the State shall submit to the jurisdiction of courts and tribunals in which its compliance with the Principles can be challenged. There is also an obligation under the Oslo Principles to participate in the proceedings in

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[50] See generally Ebony Back and Rebecca Lucas, 'Climate Change and Human Rights to Collide Before the United Nations Human Rights Committee' *Australian Public Law* (Web Page, 17 July 2019) <https://auspublaw.org/2019/07/climate-change-and-human-rights-to-collide-before-the-united-nations-human-rights-committee/>; Donna Green and Kirsty Ruddock, 'Could Litigation Help Torres Strait Islanders Deal with Climate Impacts?' (2009) 9(2) *Sustainable Development Law & Policy* 23; Owen Cordes-Holland, 'The Sinking of the Strait: The Implications of Climate Change for Torres Strait Islanders' Human Rights Protected by the ICCPR' (2008) 9(2) *Melbourne Journal of International Law* 405.

[51] Global Justice Program Yale University, 'Oslo Principles on Global Climate Change Obligations' (Web Page, 30 March 2015) <https://globaljustice.yale.edu/sites/default/files/files/OsloPrinciples.pdf> ('Oslo Principles').

[52] Ibid.

good faith. It has been reported that the Australian government has challenged the complaint to the UN Human Rights Committee by the Torres Strait Islanders on the basis that the complaint concerns future risks and not present risks or damage, and also that because Australia is not the main or only contributor to global warming, and that climate change action is not its responsibility.[53] The first argument is in direct conflict with the precautionary principle and the second argument denies the global responsibility of all States to act on climate change. Interestingly, both of these counterarguments were warned against in the Oslo Principles.[54]

It is concerning that, in potential legal proceedings, Australia might seek to argue contrary to the Oslo Principles. Further, the Australian government's conduct in the Torres Straits peoples' complaint raises serious apprehensions about its willingness to engage with First Nation peoples at all in relation to climate change. Where then do the Quandamooka people or other First Nation peoples go to seek protection of their lands from the effects of poor decision-making, non-compliance with the *Declaration on the Rights of Indigenous Peoples* ('*Declaration*'), or breaches of their right to life and culture? There has been limited interest by successive Australian governments to empower First Nation peoples to be the decision-makers in respect of their territories, and there does not seem to be any ambition to implement domestically many other international instruments and norms. Likewise, there does not appear to be any public interest to countenance the development of a new land ethic that might result in a different approach to the conceptualisation of existence on this continent.

Nevertheless, international developments regarding respect for the human right to life and overseas courts' willingness to hear actions against governments on this issue give hope for a greater role for First Nations peoples and greater accountability over the government's inaction.

In this regard, the second limb of the Uluru Statement from the Heart offers some hope. The second limb of the Uluru Statement calls for the establishment of a *Makarrata* Commission. The term *Makarrata* is a Yolngu word meaning 'settlement after a battle'.[55] It is intended to provide the space for entry into treaties between First Nations and the Australian governments. In Victoria, work has already commenced on establishing a treaty framework. A First Nations Peoples' Assembly has been confirmed and calls for a truth and justice

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[53] Back and Lucas (n 49).

[54] 'Oslo Principles' (n 50).

[55] According to Dani Larkin and Kate Galloway, 'Uluru Statement from the Heart: Australian Public Law Pluralism' (2018) 30(2) *Bond Law Review* 335, 344:

> The Makarrata Commission proposal, however, represents a concrete means of institutional implementation, finally, of a collective right to self-determination. By enacting the proposed Makarrata Commission, Australia would afford Indigenous Australians the means of attaining political equality, civic equality, and ultimately the protection of their cultural identity. The legally protected, constitutionally enshrined mechanism affords self-determination through consultation resulting in expression of a prior, informed voice in State governance processes.

commission to inform the treaty process.[56] In the Northern Territory and Queensland, treaty processes are also underway.[57] The hope exists that, within the context of settlement negotiations over the next decade, progress can be made on starting to reach fair and just accommodation which fixes that which could not be fixed in *Mabo No 2* and which respects the rights set out in the *Declaration*, and perhaps even leads the country towards some higher land ethic. And perhaps, just perhaps, the knowledge and practices of the First Nations Elders can be respected and given due deference.

The international human rights framework, in particular the *Declaration on the Rights of Indigenous Peoples*, provides a positive starting point for nations to acknowledge the rights of First Nations peoples and to increase accountability. The next section, accordingly, examines aspects of the *Declaration* and reflects on how common law nations, including Australia, have been hesitant to adopt it.

B *The Human Rights Framework for First Nations peoples*

The rights of First Nations peoples were formally recognised by the United Nations General Assembly's adoption of the *Declaration* in 2007.[58] Notably, Australia, Aotearoa/New Zealand, Canada, and the United States of America opposed the *Declaration* in the UN General Assembly.[59] They have all since ratified the *Declaration*, with Australia giving its endorsement in 2009.[60]

The principle collective right articulated in the *Declaration* is the right to self-determination. That right underpins the call in the Uluru Statement from the Heart for a constitutional amendment to insert a role for a body representative of

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[56] See Daniel Andrews, 'Delivering Truth and Justice for Aboriginal Victorians' (Media Release, 11 July 2020). See generally Harry Hobbs, 'Victoria's Truth-Telling Commission: To Move Forward, We Need to Answer for the Legacies of Colonisation' *The Conservation* (online at 9 March 2021) <https://theconversation.com/victorias-truth-telling-commission-to-move-forward-we-need-to-answer-for-the-legacies-of-colonisation-156746>.

[57] In Queensland, Premier Annastacia Palaszczuk and Craig Crawford announced on 13 August 2020 that the Queensland Government had established a Treaty Advancement Committee after three months of consultation. See Anastacia Palaszczuk and Craig Crawford, 'Queensland Government's Historic Commitment to Treaty-making Process' *Queensland Government* (Joint Statement, 13 August 2020) < https://statements.qld.gov.au/statements/90413>. In the Northern Territory, the Barunga Memorandum of Understanding was signed at the Barunga Festival on 8 June 2018 to develop a framework of a treaty. In 2020, the *Treaty Commissioner Bill 2020* ('NT') established the Northern Territory Treaty Commissioner. See Northern Territory Treaty Commission, *Interim Report of the Northern Territory Treaty Commissioner* (Interim Report, March 2020).

[58] *Declaration* (n 4).

[59] The four states that voted against the *Declaration* cited concerns with self-determination, land rights, and rights to redress. See 'Australia Opposes UN Rights Declaration', *ABC News* (online at 14 September 2007) <https://www.abc.net.au/news/2007-09-14/australia-opposes-un-rights-declaration/669612>.

[60] Indigenous Affairs Minister Jenny Macklin at the time stated, 'Today Australia joins the international community to affirm the aspirations of all Indigenous peoples.' See Jenny Macklin, 'Statement on the United Nations Declaration on the Rights of Indigenous Peoples' (Speech, Canberra, 3 April 2009) <https://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/418T6/upload_binary/418t60.pdf;fileType=application%2Fpdf#search=%22media/pressrel/418T6%22>.

First Nations.[61] Although the proposal does not call for a decision-making power, the capacity to be heard is a critical aspect of self-determination.

First Nations peoples often understand self-determination to mean the same as sovereignty, even though the First Nations perspective of sovereignty might not be precisely the same as it is understood in international law.[62] The Uluru Statement refers to First Nations sovereignty being a *spiritual notion*. This is an expression borrowed from the 1975 International Court of Justice ('ICJ') Advisory Opinion on Western Sahara and later in Brennan J's judgment in the High Court of Australia decision in *Mabo No 2*.[63]

In the ICJ decision, it was recorded by the member of the court representing Zaire that the doctrine of *terra nullius* should be substituted by a spiritual notion. The ICJ stated:

> [T]he ancestral tie between the land, or 'mother nature', and the man who was born therefrom, remains attached thereto, and must one day return thither to be united with his ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty. This amounts to a denial of the very concept of terra nullius in the sense of a land which is capable of being appropriated by someone who is not born therefrom.[64]

This articulation of the relationship between people and their lands resonates very strongly with First Nations peoples in Australia, and by extension, with all First Nations peoples worldwide.

However, as the High Court held in *Mabo No 2*, domestic courts in Australia do not have the power to deal with challenges to Australian sovereignty.[65] Brennan J's judgment in *Mabo No 2* might be interpreted as the court acknowledging that the basis for the assertion of the acquisition of sovereignty is not supportable at international law but confirming that no Australian court can fix it and that all that can be done is to recognise the rights that are permissible to be recognised under the existing system.

In countries such as Australia, Aotearoa/New Zealand, Canada, and the United States of America, the failure of the imported British system to even contemplate flawed sovereignty in any political or legal sense makes the exercise of a right to self-determination within that system a poor, but nevertheless important, second-order outcome. Under the imported British system, the colonies determine the manner and extent to which self-determination is

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[61] The Guiding Principles that preceded the National Constitutional Convention cited the need for the Uluru Statement from the Heart to advance 'self-determination and the standards established under the *United Nations Declaration on the Rights of Indigenous Peoples*'. See Reform Council, *Final Report of the Reform Council* (Report, 30 June 2017), 22–4.

[62] Jane Robbins, 'A Nation Within? Indigenous Peoples, Representation and Sovereignty in Australia' (2010) 10(2) *Ethnicities* 257, 259.

[63] *Western Sahara (Advisory Opinion)* [1975] ICJ Rep 12, 85 (Vice President Ammoun) ('*Western Sahara Advisory Opinion*'); *Mabo No 2* (n 13).

[64] *Western Sahara Advisory Opinion* (n 62) 85–6 (Vice President Ammoun) (emphasis in original).

[65] *Mabo No 2* (n 13) 31.

exercised, and that judgement cannot be challenged in any court. While something might be better than nothing, self-determination under those conditions remains a very poor second.

Returning to the *Declaration*, it should be observed that it can be implemented domestically in two ways. First, it can be enshrined in domestic legislation. This has occurred in numerous countries worldwide, including Bolivia, under Indigenous President Evo Morales' guidance.[66] However, this has not happened in three of the four objector countries to date.

In Canada, it is significant that the first initiative to do so was a private member's Bill introduced by Romeo Saganash, a Cree lawyer and parliamentarian. That Bill was presented to the Canadian Parliament in 2016 and almost achieved passage in 2019.[67] It would have required all existing legislation to be audited against the *Declaration* and all legislation to be interpreted harmoniously with the *Declaration*.

On 21 June 2021, the *United Nations Declaration on the Rights of Indigenous Peoples Act* SC 2021, c14 was passed by the Canadian Parliament. The Acts' Summary states:

> This enactment provides that the Government of Canada must take all measures necessary to ensure that the laws of Canada are consistent with the United Nations Declaration on the Rights of Indigenous Peoples and must prepare and implement an action plan to achieve the objectives of the Declaration.

The Act contains a provision mandating that the government of Canada 'must, in consultation and cooperation with Indigenous peoples, take all measures necessary to ensure that the laws of Canada are consistent with the Declaration'.[68] Importantly, the Act also entrenches an obligatory reporting cycle, requiring a report be prepared, again 'in consultation and cooperation with Indigenous peoples', within 90 days after the end of the fiscal year.[69] The Report must then be tabled in each house of parliament, and is permanently referred to the parliamentary committees, which review matters relating to Indigenous peoples, and also made public.[70]

Previously in Canada, the Parliament of British Columbia successfully passed legislation on the same topic.[71] To date, the Canadian example remains the only domestic legislative implementation of the Declaration by any of the four objector

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66 The Plurinational State of Bolivia implemented the *Declaration* into its legislation and Constitution. See Centre for International Governance Innovation, *UNDRP and the 2009 Bolivian Constitution: The Internationalization of Indigenous Rights* (Report, 2014).

67 Bill C-262 provided an opportunity for 'reconciliation' and 'that our minimum standards with [I]ndigenous peoples of this country to be set out in the UN Declaration on the Rights of Indigenous Peoples'. See Romeo Saganash, 'Moved that Bill C-262: An Act to Ensure that the Laws of Canada Are in Harmony with the United Nations Declaration on the Rights of Indigenous Peoples' (Speech, 5 December 2017).

68 s 5.

69 s 7(1).

70 s 7(2), (3) & (4).

71 *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c C-44.

countries. In 2019 the Aotearoa/New Zealand government commenced the development of a 'Declaration implementation plan' to set out how the aspirations in the Declaration would be achieved.[72]

The second way the Declaration might achieve domestic effect is from the courts taking into account the Declaration as an expression of international law. One example of the common law's evolution occurred in Brennan J's lead judgment in Mabo No 2, which was referred to earlier. Although the Declaration had not been adopted at the time of the Mabo No 2 decision in 1992, its contents were identifiable as international norms.[73] This is entirely consistent with the Vienna Convention on the Law of Treaties, an international instrument governing international treaties' interpretation and application.[74] It provides, in art 31, that subsequent agreements and subsequent practice shall be taken into account in the interpretation of treaties.

We reiterate our dissatisfaction that in 2012 the High Court did not take the Declaration into account in interpreting the Racial Discrimination Act 1975 (Cth) in the case of Maloney.[75] As discussed above, in Maloney the High Court accepted that alcohol restrictions were a special measure for the Bwgcolman/Palm Island community's benefit, notwithstanding the community's consent was neither adequately sought nor obtained.

Returning to the consideration of First Nations and the articulation of rights in the Declaration, it can be shown that Australia has failed to provide any domestic mechanism for collective self-determination (a matter which the Uluru Statement from the Heart seeks to redress in part). Additionally, there has been a failure to provide adequate protection for cultural heritage (of which Australians were sadly reminded with the destruction of Juukan Gorge in Western Australia).[76] Finally, Australia has failed to provide adequate mechanisms to give effect to the right of First Nations peoples to exercise their free, prior, and informed consent. Consider the example of the Barngarla peoples' opposition to the nuclear waste dump proposed for their country in Kimba, South Australia.[77] The National Indigenous Television network reported that the Australian Electoral Commission ballot conducted in the Kimba Council district returned a 61.58% 'yes' vote to the question 'Do you support the proposed National Radioactive

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[72] Aotearoa/New Zealand's government has appointed a working group to provide advice on implementation of the framework. See Nanaia Mahuta, 'Government Moves on UN Rights Declaration' (Speech, 31 March 2019) <https://www.beehive.govt.nz/release/government-moves-un-rights-declaration>.

[73] *Mabo No 2* (n 13) 42–3.

[74] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTA 331 (entered into force 27 January 1980).

[75] *Maloney v The Queen* (n 15).

[76] John Southalan, 'Sorry, Not Sorry: The Operation of WA's Aboriginal Heritage Act' *Australian Public Law Blog* (Blog Post, 11 September 2020) <https://auspublaw.org/2020/09/sorry-not-sorry-the-operation-of-was-aboriginal-heritage-act/>.

[77] Sarah Martin, 'South Australia Nuclear Waste Dump Could Face Roadblock in Senate', *The Guardian* (online at 26 February 2020) <https://www.theguardian.com/australia-news/2020/feb/26/south-australia-nuclear-waste-dump-could-face-roadblock-in-senate>.

Waste Management Facility being located at one of the nominated sites in the community of Kimba?' By contrast, an independent poll of 209 Barngarla Native Title holders showed that 100 per cent of those who participated voted 'no' to the proposed facility located 20 kilometres from the township.[78] The Barngarla peoples continue to oppose revised plans for a nuclear waste dump on their country.[79]

C *The Domestic Human Rights Framework*

Domestically, there are three jurisdictions in Australia (Victoria, the Australian Capital Territory and Queensland) that have enacted human rights legislation.[80] Each of these jurisdictions had the opportunity to formally implement the *Declaration of the Rights of Indigenous Peoples* in their respective human rights instruments, but none directly or explicitly did so.

A matter for consideration is the potential utility of the *Human Rights Act 2019* (Qld), as it requires decision-makers to take into account, among other matters, the effect of their decisions on the cultural rights of Aboriginal and Torres Strait Islander peoples.[81] To date, this provision has not been tested in the courts, but its potential applications are quite broad.

The constraint on the access to the Queensland *Human Rights Act,* as a mechanism for intervention by the courts into government decision-making, is the requirement that complaints under this Act may only be initiated through a 'piggy-back' on other causes of action.[82] By this, it is meant that a complainant would have to claim another statutory breach, or an administrative law ground of judicial review, in order to make the complaint of a breach of human rights contrary to the *Human Rights Act*.[83] It would nonetheless remain possible to make a human rights complaint to the Queensland Human Rights Commission, rather than commence proceedings in the Queensland Supreme Court.[84]

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[78] See Douglas Smith, 'A Unanimous "No" Vote From Traditional Owners on SA's Proposed Nuclear Waste Dump', *SBS* (online at 21 November 2019) <https://www.sbs.com.au/nitv/article/2019/11/21/unanimous-no-vote-traditional-owners-sas-proposed-nuclear-waste-dump>.

[79] See Royce Kurmelovs, 'Barngarla Continue Fight Against Plan to Dump Nuclear Waste on Country', *SBS* (online at 29 July 2020) <https://www.sbs.com.au/nitv/article/2020/07/29/barngarla-continue-fight-against-plan-dump-nuclear-waste-country>.

[80] *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2004* (ACT); *Human Rights Act 2019* (Qld).

[81] *Human Rights Act 2019* (Qld) s 28.

[82] Ibid ss 58, 59.

[83] Explanatory Memorandum, Human Rights Bill 2018 (Qld) 7-8.

[84] *Human Rights Act 2019* (Qld) ss 64, 65.

D *Observations on the Human Rights Frameworks*

While existing human rights law and policy may be called upon to aid those most affected by climate change, the broader answers might not lie in human rights. After all, human rights were designed to protect the weak and the marginalised and promote human wellbeing. The climate change problem faced is not so much human wellbeing, but the wellbeing of the organism that is planet earth. In spiritual terms, many First Nations peoples conceive of this planet as our mother, having an identity, and to whom obligations are owed.

The question, then, is how this conception can be given form in the western legal sense. A precedent for recognising a legal personality in the natural forms has been achieved with the Whanganui River in Aotearoa/New Zealand.[85] When interviewed about the recognition, the lead negotiator for the Whanganui Iwi,[86] Gerrard Albert, stated:

> The reason we have taken this approach is because we consider the river an ancestor and always have. … We have fought to find an approximation in law so that all others can understand that from our perspective treating the river as a living entity is the correct way to approach it, as in indivisible whole, instead of the traditional model for the last 100 years of treating it from a perspective of ownership and management. … We can trace our genealogy to the origins of the universe. And therefore rather than us being masters of the natural world, we are part of it. We want to live like that as our starting point. And that is not an anti-development, or anti-economic use of the river but to begin with the view that it is a living being, and then consider its future from that central belief.[87]

As a result of legislation passed in the Aotearoa/New Zealand parliament, *Te Awa Tupua* (also known as the Whanganui River) has two guardians appointed to act for the river.[88] One guardian is from the government, and the other from the Whanganui Iwi. It is also important to note that the legislation recognising the *Te Awa Tupua* as a legal personality arose in the context of *Treaty of Waitangi* settlement negotiations.[89]

In terms of the proposition that mother earth might be recognised as a legal personality, jurisdictional issues need to be considered. But that is entirely within the domain of those State governments in Australia which are presently embarking on treaty discussions. It would be possible to recognise, at the request of the relevant First Nations, that our mother earth has a legal personality, and is

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85 *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) s 12 ('*Te Awa Tupua Act*').

86 Please note that 'Iwi' translates as clan or tribe.

87 See Eleanor Ainge Roy, 'New Zealand River Granted Same Legal Rights As Human Being' *The Guardian* (online at 16 March 2017) <https://www.theguardian.com/world/2017/mar/16/new-zealand-river-granted-same-legal-rights-as-human-being>.

88 *Te Awa Tupua Act* (n 84).

89 Toni Collins and Shea Esterling, 'Fluid Personality: Indigenous Rights and the *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* in Aotearoa New Zealand' (2019) 20(1) *Melbourne Journal of International Law* 1, 3–4.

entitled have people tasked with the role of guardian who can take steps to protect her from actions occurring within legal reach of that jurisdiction.

Ideally, at a macro-level, it would be desirable to have formal recognition that a legal personality can be accepted for the natural world. This could be achieved, for example, through the development of a United Nations convention on such a topic, which could require all signatory countries to take steps to progress the protection of the natural world and its key features.[90]

The connection between the land and First Nations peoples, this spiritual notion of sovereignty, is something the eminent Pawnee attorney Walter Echo-Hawk develops at length in his book.[91] He casts that connection into the construct of ethics and speaks of the need for an 'American land ethic'.[92] This term, he reminds us, was first used in 1948, and, while embraced by many, never blossomed.[93] According to Echo-Hawk, the absence of a land ethic permits the exploitation of the environment in a wholly unsustainable manner.[94] However, he makes clear that, in his opinion, if the US were to follow the leadership offered by Native Americans, it would instil in that nation some of the ethics that underpin the spiritual notion of belongingness to, and respect for, country.[95] The authors agree with his opinion and say that the same principle could apply in Australia. Without the development of such an ethic globally, our survival as a species is in great peril.

According to Echo-Hawk, colonists conquered the landscape and exercised a form of dominion over the land, people and environment. He argues that the colonial approach to land is one of the primary obstacles to the development of a land ethic that is based in sustainability and respect.[96] He claims the colonist in America only sees the landscape as something to be tamed and exploited for economic return.[97]

Turning to Australia, the *Native Title Act 1993* (Cth) and the determinations of native title made under it, now totalling more than 400 nationally, although only limited to recognition of rights and interests, is perhaps the best representation of State action consistent with the *Declaration* in Australia.[98]

The only other area in which it might be said that Australia has recognised Indigenous rights in a fuller sense is that of citizenry. The High Court of Australia's decision last year in the migration cases *Love v Commonwealth*; *Thoms*

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90 See, eg, the complexity of legal rights for the natural world in the New Zealand context: Abigail Hutchinson, 'The Whanganui River as a Legal Person' (2014) 39(3) *Alternative Law Journal* 179.

91 Walter Echo-Hawk and Anaya James, *In Light of Justice: The Rise of Human Rights in Native America and the UN Declaration on the Rights of Indigenous Peoples* (Fulcrum Publishing, 2018).

92 Ibid 133.

93 Ibid.

94 Ibid.

95 Ibid 138.

96 Ibid 134.

97 Ibid 135.

98 Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)* (Report No 126, 2015) 82.

v Commonwealth (‘*Love*; *Thoms*’) confirmed that only First Nations are able to determine the question of who are members of a First Nation; the determination of citizenry in this context was outside the remit of the Court.[99]

This article is not intended to be a treatise on native title. However, the decision in *Mabo No 2* in 1992 and the enactment of the Commonwealth *Native Title Act* in 1993 must be acknowledged as a recognition of rights of Indigenous peoples consistent with the *Declaration*, as mechanisms for the prevention or redress from the loss of territories. And even though native title is not, in fact, a form of title to land, but merely the recognition of rights and interests in relation to the land, the native title system in Australia represents the high-point in terms of domestic implementation of the rights later recognised in the *Declaration*.

There is a current example in the same vein, which may be a future exemplar. The Federal Attorney-General has released draft Bills to amend existing human rights legislation in Australia to provide for protection of religious beliefs.[100] In its current form, it seems the Bills, if enacted, could be interpreted to extend protection to First Nations religious beliefs — including those going to the identity and personality of mother earth and the beliefs as to her protection, and health and wellbeing. Notably, though, there is no record of the Attorney-General or the government giving sufficient thought to all the ramifications of such legislation, and the next iteration of the Bills may seek in some way to try to limit the access of First Nations, and perhaps other non-Christian beliefs, to those protections.[101]

This article has not considered the other forms of litigation that may be available or that have been used to challenge decisions by the government to approve projects that contribute to the present process of climate change (which could include but is not limited to environmental law, tort law, administrative law, and consumer protection law). However, any discussion of this topic would not be complete without reference to the decision of the Chief Justice of the New South Wales Land and Environment Court in the Rocky Hill coal mine case, formally known as *Gloucester Resources Limited v Minister for Planning*.[102] In this decision, Preston CJ found on environmental law grounds that the Minister for Planning’s decision to refuse the proposed mine because the approval of new coal mines was inconsistent with the State of New South Wales meeting its own self-imposed target of net-zero emission of greenhouse gases by 2050.[103] Preston CJ conducted a comprehensive (if not exhaustive) analysis of the international and domestic climate policy legislative frameworks and climate litigation. It is proper to acknowledge Preston CJ as a thought-leader in environmental and planning

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99 *Love v Commonwealth*; *Thoms v Commonwealth* (2020) 375 ALR 597 (‘*Love*; *Thoms*’).

100 Religious Discrimination Bill 2019 (Cth); Religious Discrimination (Consequential Amendments) Bill 2019 (Cth); Human Rights Legislation Amendment (Freedom of Religion) Bill 2019 (Cth).

101 Darwin Community Legal Service, Submission to Australian Government Attorney-General’s Department, *Religious Freedom Bills – Second Exposure Drafts Consultation* (3 March 2020) 3.

102 *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7 (‘*Gloucester Resources*’).

103 Ibid [526].

law in response to the climate change crisis. His judgment should be read and cited by all people interested in climate law and policy.

Importantly, after finding that the emissions from the proposed mine would be at least 37.8 megatonnes of CO_2, Preston CJ held:

> It matters not that this aggregate of the Project's GHG [(greenhouse gas)] emissions may represent a small fraction of the global total of GHG emissions. The global problem of climate change needs to be addressed by multiple local actions to mitigate emissions by sources and remove GHGs by sinks.[104]

Further, Preston CJ cited, with approval of Professor Steffen, an expert witness in the proceedings:

> All emissions are important because cumulatively they constitute the global total of greenhouse gas emissions, which are destabilising the global climate system at a rapid rate. Just as many emitters are contributing to the problem, so many emission reduction activities are required to solve the problem.[105]

Finally, concerning the Rocky Hill decision, it is also important to note that Preston CJ further held that the mine should not be approved because there was distributive inequality.[106] In other words, the burden to be borne by the residents in the nearby town of Gloucester was significantly greater than the benefit, and the environmental impact assessment carried out by the proponents did not adequately address nor mitigate those impacts.

The notion of distributive equity operates across society as a whole and requires examination of equity temporally, geographically, and socially. Dr Rebecca Lawrence gave evidence that Aboriginal people particularly suffer distributive inequity because they are 'a historically marginalised group who have experienced considerable impacts and harms from developments, but generally seen few net benefits'.[107] One might ask where the distributive equity is for First Nations, such as the Torres Strait Islander peoples, who will experience profound damage from the development of projects which contribute to increased greenhouse gases.

Turning to Australia's economic context, the Centre for International Development in the Kennedy School at Harvard University issued what it termed 'the Atlas of Economic Complexity'. It explores and analyses 133 national economies worldwide.[108] The Atlas shows that Australia fell from 57th to 93rd between 1995 and 2017. Australia is now in the company of Bangladesh, Cuba, Iran, and Mali on this scale. What this means in layman's terms is that Australia has increasingly relied on mining and exporting minerals and has very little else

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104 Ibid [515].

105 Ibid [450], [515].

106 Ibid [669].

107 Ibid [400].

108 ATLAS of Economic Complexity, 'Atlas of Economic Complexity' (Web Page, 2021) <https://atlas.cid.harvard.edu/>.

in terms of economic diversity to rely upon as a buffer against prolonged commodities downturns.

One question which can and should legitimately be asked is how successive governments allowed themselves to become so captured by the mining sector that Australia's economic security is almost entirely dependent upon one industry. The second question which might be asked is how that could have been allowed to happen given what has been known since well before 1995 — that greenhouse gases were eventually going to require the phasing out of coal. Rather than diversifying Australia's economic base, it has been left with far fewer alternatives. It can be speculated that acting in purely self-interest, the Australian coal sector might have calculated that having the Australian economy so beholden to coal was and is an important strategy in prolonging the government's commitment to coal mining.

In the meantime, Australians all, and particularly First Nations peoples, must insist that every government policy relating to climate change affecting human rights is developed and monitored in collaboration and in a spirit of genuine partnership. Ideally, all policy should be developed in a manner that takes into account the impact upon the rights of First Nations peoples and, with their consent, and makes use of their considerable knowledge. A current example of this occurred with the initiative taken by the Australian Commonwealth Scientific and Industrial Research Organisation ('CSIRO') in March 2021, which hosted 120 Traditional Owners at a five-day meeting in a regional city.[109] Those Elders represented more than 40 different First Nations groups.[110] This work needs to commence immediately with all speed to preserve the ancient wisdom for the preservation of First Nations culture and perhaps for the preservation of the country and all peoples of Australia.

III Legal Education

Many of the actions that can be initiated to address climate change that centre First Nations rights will occur in the political sphere and through the pressure that community engagement can generate. The Uluru Statement from the Heart stands as an open invitation to all Australians to work together on a journey of true reconciliation.

At an institutional level, the legal sector will undoubtedly play a crucial role in the development and recognition of First Nations rights and the inter-relationship between human rights and climate change. Inevitably, disputes

[109] Commonwealth Scientific and Industrial Research Organisation, 'Traditional Owners and Scientists Working To Tackle Common Climate Challenge' (Media Release, 25 March 2021) <https://www.csiro.au/en/news/news-releases/2021/traditional-owners-and-scientists-working-to-tackle-common-climate-challenge>.

[110] Ibid.

about climate impacts and government decision-making will be initiated in the court system for resolution. Therefore, a holistic approach is needed to ensure that today's law students can in the future become effective climate advocates, acknowledging and aware of the differential impact of climate change on First Nations peoples. As a matter of priority, attention must be focused on how emerging legal professionals can be equipped with the skills to assume a leading place in future legal climate challenges and human rights developments informed by an appreciation of First Nations perspectives.

There is a substantial body of scholarship and official recognition in Australia that there needs to be greater engagement within the higher education sector generally, and legal education specifically, to embrace and include Indigenous knowledge and lived experiences.[111] In 2008 the Bradley Review of Australian Higher Education concluded First Nations knowledge needed to be recognised as an 'important, unique element of higher education'.[112]

Those conclusions were then reflected in the official policies developed by the peak body for the sector, Universities Australia, who formulated a broad definition of Indigenous cultural competency as:

> Student and staff knowledge and understanding of Indigenous Australian cultures, histories and contemporary realities and awareness of Indigenous protocols, combined with the proficiency to engage and work effectively in Indigenous contexts congruent to the expectations of Indigenous Australian peoples. Cultural competence includes the ability to critically reflect on one's own culture and professional paradigms to understand its cultural limitations and effect positive change.[113]

This was followed in 2012 by the Behrendt Review of Higher Education Access and Outcomes for Aboriginal and Torres Strait Islander people, which made 35 recommendations directed to universities and the Australian government

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111 Jack Frawley, Gabrielle Russell and Juanita Sherwood (eds), *Cultural Competence and Higher Education Sector: Australian Perspectives, Policies and Practice* (Springer, 2020). For the legal education context, see Marcelle Burns and Jennifer Nielsen, 'Dealing with the "Wicked" Problem of Race and the Law: A Critical Journey for Students (and Academics)' (2018) 28(2) *Legal Education Review* 375, 403, and related scholarship by Irene Watson and Marcelle Burns, 'Indigenous Knowledges: A Strategy for First Nations Peoples Engagement in Higher Education' in Sally Varnham, Patty Kamvounias and Joan Squelch (eds), *Higher Education and the Law* (Federation Press, 2015) 41. See also Heather Douglas, 'Indigenous Legal Education: Towards Indigenisation' (2005) 6(8) *Indigenous Law Bulletin* 12. More recently, see Ambelin Kwaymullina, 'Teaching for the 21st Century: Indigenising the Law Curriculum at UWA' (2019) 29 *Legal Education Review* 155 ('Teaching for the 21st Century').

112 Denise Bradley et al, *Review of Australian Higher Education* (Final Report, December 2008) 33.

113 Universities Australia, *National Best Practice Framework for Indigenous Cultural Competency in Australian Universities* (Framework, October 2011) 48. See also Universities Australia, 'Universities Australia's Indigenous Strategy 2017–2020' (Web Page) <https://www.universitiesaustralia.edu.au/policy-submissions/diversity-equity/universities-australias-indigenous-strategy-2017-2020/> and related annual reports issued on the implementation of the Indigenous Strategy.

designed to form a comprehensive package of reforms to improve the cultural understanding and awareness of staff and students.[114]

Acting to support these accumulated insights, the Indigenous Cultural Competency for Legal Academics Program ('ICCLAP') was established to engender action in legal education specifically. In 2019, ICCLAP issued a Final Report which set down a pathway for action in legal education. In that report, ICCLAP advocated that cultural competence should be an attribute of all law graduates, and it defined cultural competency as being primarily about 'fostering meaningful cross-cultural dialogue'.[115]

ICCLAP articulated one of the guiding principles for embedding Indigenous cultural competency in legal education, was to enable:

> [W]ork-integrated learning with Indigenous communities and organisations, providing transformative learning experiences that are effective in changing attitudes. Such programs must be done ethically, ensure cultural safety and be adequately supported so as not to create a burden on communities or organisations. Indigenous and non-Indigenous 'peer-to-peer relationships' are effective at building cultural understanding and promoting two-way learning.[116]

Most recently, the peak body for Australian law schools, the Council of Australian Law Deans ('CALD'), recognised the importance of First Nations perspectives and experiences of the law. It released a Statement on Australian Law's Systemic Discrimination and Structural Bias Against First Nations Peoples on 3 December 2020:

> CALD urges all Australian law schools to work in partnership with First Nations peoples to give priority to the creation of culturally competent and culturally safe courses and programs. In so doing, CALD acknowledges the part that Australian legal education has played in supporting, either tacitly or openly, the law's systemic discrimination and structural bias against First Nations peoples. At the same time, CALD affirms the positive contribution Australian law schools can, should and will make, in full partnership with First Nations peoples, in exposing, critiquing and remedying all forms of institutionalised injustice.[117]

Furthermore, the Australian Law School Standards, developed by the CALD, have been updated to include new areas of knowledge required for law degrees. In 2020

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[114] *Review of Higher Education Access and Outcomes for Aboriginal and Torres Strait Islander People* (Final Report, July 2012) xvii. The Review of Higher Education Access and Outcomes for Aboriginal and Torres Strait Islander People highlighted the need for Indigenous Cultural Competency in university education. For analysis of the challenge of including Indigenous contexts in the law curriculum, see Kate Galloway, 'Indigenous Contexts in the Law Curriculum: Process and Structure' (2018) 28(2) *Legal Education Review* 1.

[115] Marcelle Burns, Anita L Hong and Asmi Wood, *Indigenous Cultural Competency for Legal Academics Program* (Final Report, 2019) 16.

[116] Burns, Hong and Wood (n 108) 20.

[117] Council of Australian Law Deans, 'CALD Statement on Australian Law's Systemic Discrimination and Structural Bias Against First Nations Peoples (Statement, 3 December 2020) <https://cald.asn.au/blog/2020/12/03/cald-statement-on-australian-laws-systemic-discrimination-and-structural-bias-against-first-nations-peoples/>.

these standards included a statement that the law curriculum will 'develop knowledge and understanding of Aboriginal and Torres Strait Islander perspectives on and the intersections with the law'.[118] Whilst CALD had previously taken the initiative to facilitate the internationalisation of the law curriculum, it is notable that climate change is yet to be embedded into the Australian Law Schools Standards. Therefore, it is recommended that CALD continue to update and revise its standards to reflect current legal challenges likely to confront and be actioned by future legal practitioners, such as climate change.

There has been action and widespread, worldwide recognition of the impending need for changes in legal education to address the rights and interests of First Nations peoples.[119] Two specific and practical examples illustrate this shared understanding. Firstly, in Canada, the Final Report of the Truth and Reconciliation Commission ('TRC') stated, 'there has to be awareness of the past, acknowledgement of the harm that has been inflicted, atonement for the causes, and action to change behaviour.'[120] The TRC issued Calls For Action (rather than the more traditional term recommendations) with Calls 27 and 28 directed at Law Societies and Law Schools, respectively. The Federation of Law Societies of Canada is called upon to ensure lawyers receive appropriate skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism. Law schools are similarly called upon to provide training in all the same areas for law students, and to require all law students to 'take a course in Aboriginal people and the law', with an express reference to the *Declaration.*[121]

Secondly, a positive and impactful development of interest has occurred in Aotearoa/New Zealand. The *Te Kaupeka Tăti Ture* (Faculty of Law) at Te Whare Wănanga o Otăgo (Otago University) has released research that highlights the need to restructure its curriculum on the basis that Aotearoa/New Zealand has a bijural, bicultural and bilingual legal system.[122] Thus, there is evidence of the necessity to recognise Măori Law as a foundational component of the legal system there, and consequently in legal education. The research was supported and co-branded with every one of the six law schools in Aotearoa/New Zealand. The research report concluded '[t]here can be no systemic change to how we

[118] Council of Australian Law Deans, 'Australian Law School Standards with Guidance Notes', *Resources* (Web Page, 30 June 2020) <https://cald.asn.au/wp-content/uploads/2020/07/Australian-Law-School-Standards-v1.3-30-Jul-2020.pdf>.

[119] Pooja Parmar, 'Reconciliation and Ethical Lawyering: Some Thoughts on Cultural Competence' (2019) 97(3) *Canadian Bar Review* 526; Kwaymullina, 'Teaching for the 21st Century' (n 104).

[120] Government of Canada/The Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Report, 2015) 6–7.

[121] Ibid 215.

[122] Michael and Suzanne Borrin Foundation, *Inspiring National Indigenous Legal Education for Aotearoa New Zealand's Bachelor of Laws Degree* (Report, 2020) <https://www.borrinfoundation.nz/wp-content/uploads/2020/08/Inspiring-National-Indigenous-Legal-Education-Phase-1-Report.pdf>.

understand law in a contemporary Aotearoa New Zealand if we do not teach it differently in our law schools'.[123]

In terms of Australian developments in moves to Indigenise the law curriculum, the 2019 article by Ambelin Kwaymullina is comprehensive in its guidance and wisdom explaining the process of Indigenisation at the University of Western Australia (UWA) Law School.[124] Kwaymullina explained the three key understandings needed in developing cultural competency as:

> First, … it is a journey not a destination; …Second, … an understanding of Indigenous peoples and contexts, … Third, … an ability to articulate and critically engage with one's own cultural and professional contexts.[125]

Kwaymullina emphasises the importance of equitable partnerships between Indigenous and non-Indigenous people as being 'vital to the success of any Indigenisation project',[126] and outlines 15 principles which justify and guide the UWA Indigenisation project.[127] She advises that it is critical that Indigenisation be relational and collaborative.[128] In recommending that Indigenisation must be integrated into the whole of the law degree and not contained within a specialist, elective subject, Kwaymullina acknowledges a main potential source of academic resistance —there is not enough space in the curriculum to absorb any additional content.[129]

The authors fully support and amplify all points made by Kwaymullina and, noting her advice, therefore offer a suggestion to counter any potential academic resistance or hesitancy. The Indigenisation of any law curriculum need not require the insertion of additional new content, but rather the cases analysed, and case studies explored, in any course can be switched to emphasise those that simultaneous allow engagement with First Nations knowledges and perspectives.

For example, in respect of the Australian Priestley 11 compulsory subjects, the authors offer the following indicative examples of potential content. In Criminal Law subjects, there could be focus on the Royal Commission into Aboriginal Deaths in Custody and its recommendations.[130] Tort Law could include a case study or tutorial/seminar examination of the concept of 'duty of care' through examination of the Stolen Generation compensation cases (*Cubillo v Commonwealth*, *Kruger v Commonwealth* and *Trevorrow v South Australia [No 5]*).[131] In Contract Law, two possible options are a focus on one of the leading substantive

[123] Ibid 46.
[124] Kwaymullina, 'Teaching for the 21st Century' (n 104).
[125] Ibid 172–3.
[126] Ibid 160.
[127] Ibid171–2.
[128] Ibid 176.
[129] Ibid 181.
[130] *Royal Commission into Aboriginal Deaths in Custody* (Final Report, 1991).
[131] *Cubillo v Commonwealth* (1999) 89 FCR 528 (strike out application); *Cubillo v Commonwealth [No 2]* (2000) 103 FCR 1 (trial); *Cubillo v Commonwealth* (2001) 112 FCR 455 (appeal); *Kruger v Commonwealth* (1997) 190 CLR 1; *Trevorrow v South Australia [No 5]* (2007) 98 SASR 136.

cases which features an Aboriginal party (*Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd*),[132] or a case study on misleading and deceptive conduct in respect of First Nations cultural designs as determined in the recent case of *Australian Competition and Consumer Commission v Birubi Art Pty Ltd*.[133] In Land Law or Property Law subjects, a critical examination could be undertaken of the native title, land rights systems in Australia and modern developments such as Indigenous Land Use Agreements. For Equity/Trusts, a case study on the settlement reached in the stolen wages class action case launched by First Nations peoples would be instructive.[134] Constitutional Law is rich with potential content, such as the invitation for Constitutional enshrinement of Voice made in the Uluru Statement from the Heart, or the recent cases of *Love*; *Thoms.*[135] In Administrative Law, there are several cases which could be featured such as *Onus v Alcoa of Australia Ltd* and *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd*,[136] both of which determined public interest standing for First Nations peoples or organisations. There is also the excellent article by Alexander Reilly which contains many other ideas for incorporating Indigenous perspectives into Administrative Law.[137] In Civil Dispute Resolution and Civil Procedure subjects, a case study could feature an interrogation of the impact of time limits on historical claims (such as Stolen Generations or Stolen Wages) or the use of class actions to redress past injustices. Evidence Law courses could refer to the Australian Law Reform Commission Report on Customary Law.[138] Corporations or Company Law could focus on the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) or the national Indigenous Procurement Policy.[139] There is also the excellent article by Heron Loban which contains many other ideas for incorporating Indigenous perspectives into corporate law subjects.[140] Last but by no means least, Legal Ethics courses could highlight the

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[132] (2007) 233 CLR 115.

[133] [2018] FCA 1595.

[134] Further information can be located at Stolen Wages Settlement, 'Update on Finalisation of Stolen Wages Administration' (Web Page, 2021) <https://www.stolenwages.com.au/>.

[135] *Love*; *Thoms* (n 92).

[136] *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27; *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247.

[137] Alexander Reilly, 'Finding an Indigenous Perspective in Administrative Law' (2009) 19(2) *Legal Education Review* 271.

[138] Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws (*Report No 31, June 1986).

[139] Further information can be located at National Indigenous Australians Agency, 'Indigenous Procurement Policy' (Web Page, 2021) <https://www.niaa.gov.au/indigenous-affairs/economic-development/indigenous-procurement-policy-ipp>.

[140] Heron Loban, 'Embedding Indigenous Perspectives in Business Law' (2011) 5(2) *e-Journal of Business Education and Scholarship of Teaching* 11.

various Australian law society protocols/guides for working with First Nations clients.[141]

The authors agree with Young, who argues that 'lawyers dealing with climate change require proficiency across different areas of law, not just the law that seeks to limit greenhouse gases'.[142] Therefore, as other articles in this special edition have argued, climate change needs to be embedded into the law curriculum in both compulsory subjects and stand-alone electives. Equally, Australian legal education also needs to be reformed to ensure that emerging lawyers are exposed throughout their law studies to Indigenous perspectives on the law. If these two initiatives were simultaneously incorporated into the law curriculum, new law graduates would then be able to make the connection between First Nations perspectives on the law and how the law can be a site of reform and redress for climate change.

The actions of Australian law schools to embrace and embed First Nations knowledges and lived experiences throughout the law curriculum will ensure that future law graduates are equipped with awareness about the differential impact the law and justice system can have on Frist Nations peoples. These insights can in turn provide the foundational understanding of the importance of and disparity in impact climate change has in First Nations communities. Without a broader awareness of First Nations issues, the capacity of Australian law graduates to advocate on climate change and contribute to the design of culturally informed and sensitive responses to climate change will be lessened.

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[141] For example, the Northern Territory Law Society has issued Indigenous protocols for lawyers: see Law Society Northern Territory, 'Indigenous Protocols For Lawyers' (Web Page, 2015) < https://www.lawsociety.com.au/sites/default/files/2018-03/indigenous_protocols_for_lawyers_0.pdf>. The Law Society of NSW has issued a resource document on Working with Indigenous Clients: see Law Society of New South Wales, 'Working With Indigenous Clients' (Web Page) <https://www.lawsociety.com.au/about-us/Law-Society-Initiatives/indigenous-issues/working-with-indigenous-clients>. The Law Society of Western Australia has issued protocols: see Law Society of Western Australia, 'Protocols for Lawyers with Aboriginal or Torres Strait Islander Clients in Western Australia' (Web Page) <https://www.lawsocietywa.asn.au/wp-content/uploads/2015/10/Protocols-for-Lawyers-with-Aboriginal-or-Torres-Strait-Islander-Clients-in-Western-Australia.pdf>. The Law Society of South Australia has similarly issued protocols, see Law Society of South Australia, 'Law Society of South Australia, Lawyers' Protocols for Dealing with Aboriginal Clients in South Australia' (Web Page, 2020) <https://www.lawsocietysa.asn.au/Public/Publications/Guidelines/Lawyers_Protocols_for_Dealing_with_Aboriginal_Clients.aspx>. The Law Society of Queensland has numerous resources developed by its First Nations Consulting Committee available on its website: see Queensland Law Society, 'First Nations Links' (Web Page) <https://www.qls.com.au/For_the_profession/First_Nations_Links>. Legal Aid Queensland has also issued best practice guidelines: see Legal Aid Queensland, 'Lawyers Working with Aboriginal and Torres Strait Islander Clients', *Best Practice Guidelines* (Web Page, 2016) <https://www.legalaid.qld.gov.au/About-us/Policies-and-procedures/Best-practice-guidelines/Lawyers-working-with-Aboriginal-and-Torres-Strait-Islander-clients>.

[142] Margaret A Young, 'Climate Change and Law: A Global Challenge for Legal Education' (2021) 40(3) *The University of Queensland Law Journal* 351.

IV CONCLUSION

A holistic approach is necessary to tackle the conundrum of First Nations peoples and climate change. For any responses to climate change to be effective, actions must be grounded in the perspectives, knowledge, and rights of First Nations peoples. Recognition of the vital contribution of First Nations peoples to the protection of our environment is manifest in the *Declaration of the Rights of Indigenous Peoples*. It is hoped that Australia will move to enshrined in domestic legislation in the near future, mirroring the evolutionary trajectory of Canada.

As established in this article, recent developments around the globe demonstrate that human rights instruments have the potential to protect First Nations' interests in a climate change context. In the Australian legal system, where human rights protection is most effective when enshrined in domestic legislation, there needs to be a commitment to legal reform. Options for reform should be informed by advances from other nations that recognize and respect the connection between First Nations peoples and the land. In the interim, human rights arguments in Australia rely predominately on anti-discrimination legislation and/or the articulation and acceptance of novel interpretations of international instruments and the evolution of international human rights norms through common law.

Concomitantly, the legal sector can be a force for positive change. Structural change must begin with both the Indigenisation of legal education and simultaneously embedding legal responses to climate change into the Australian law curriculum. Understanding and promoting human rights at a domestic level will provide a first step in addressing the inordinate impact of climate change on First Nations peoples. Understanding the compelling need for embedding First Nations knowledges and lived experience into the law curriculum will have a multitude of positive consequences. One of the most important will be the ability to accept, recognise and prioritise the perspectives, knowledge, and rights of First Nations peoples and draw on this to advocate and assist in responding to the challenges of climate change.