

# CLIMATE CHANGE AND THE LAW BRIEFING PAPER

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# Climate Change and the Law Briefing Paper

## Executive Summary

We acknowledge the traditional owners and custodians of the land on which NSW Young Lawyers meet and pay our respects to Aboriginal Elders past, present and emerging. We acknowledge that Indigenous people have traditionally cared for the land and remain at the forefront of advocacy for climate justice.

### Background

This briefing paper has been prepared by the New South Wales Young Lawyers Human Rights Committee, Environment and Planning Law Committee, the International Law Committee and Animal Law Committee (Committees) to demonstrate the impacts of climate change and to support the recommendation to approve a Climate Change and the Law Policy Statement by NSW Young Lawyers Executive Council.

On 9 September 2019, the United Nations (UN) High Commissioner for Human Rights advised the UN Human Rights Council that “[c]limate change is a reality that now affects every region of the world...[t]he world has never seen a threat to human rights of this scope.”

### Climate Emergency

Declarations of a climate emergency are becoming increasingly frequent. As at 3 October 2019, 1,087 governments (including local governments) in 20 countries have declared a climate emergency. In Australia, more than 50 local governments and the Australian Capital have declared a climate emergency.<sup>1</sup>

Professional associations have also declared a climate emergency. Most notably, we refer to the declaration made by the Australian Medical Association (AMA) on 3 September 2019 that “climate change [is] a health emergency, with clear scientific evidence indicating severe impacts for our patients and communities now and into the future”.<sup>2</sup> We note the AMA’s comment that the “American Medical Association and the American College of Physicians recognised climate change as a health emergency in June this year, with the British Medical Association declaring a climate emergency in July.” Australian Engineers have declared a climate and biodiversity emergency, stating that “The impending climate breakdown and biodiversity loss are the two most serious issues of our time.”<sup>3</sup>

As of 23 September 2019, an open letter calling for the Law Council of Australia and its constituent bodies to declare a climate emergency has attracted a substantial number of signatures from lawyers and law students.<sup>4</sup> We recommend that NSW Young Lawyers declare a climate emergency as part of a new Climate Change and the Law Policy Statement.

### The role of lawyers, and especially young lawyers

A critical role for lawyers within society is to promote human rights and the rule of law. It is therefore within the role of lawyers to advocate for compliance with international and domestic human rights law and climate change law. As climate change poses a severe threat to human rights and the rule of law, it is also squarely within the role of lawyers to advocate for appropriate legal and policy responses. This role also extends into other areas likely to be significantly impacted upon by the manifestations of climate change, including biodiversity and animal welfare, and with respect to property rights, the viability of commercial enterprises (especially logistics businesses), planning and development, and natural resource management.

It is important for the law to evolve quickly to be able to respond appropriately to climate change, and lawyers are an important contributor to the process of law reform. Climate change issues are of increasing importance to members of NSW Young Lawyers as matters of professional competence, professional ethics and engaged participation in public life. It is important for young lawyers and law students to have an awareness and sound understanding of climate change issues and for NSW Young Lawyers to adequately prepare its members to be ‘climate ready’.

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1 Climate Emergency Declaration, “Climate emergency declarations in 1087 jurisdictions and local governments cover 266 million citizens” (3 October 2019) <<https://climateemergencydeclaration.org/climate-emergency-declarations-cover-15-million-citizens/>>.

2 Australian Medical Association, “Climate Change is a Health Emergency” (3 September 2019) <<https://ama.com.au/ausmed/climate-change-health-emergency>>.

3 Australian Engineers, “Australian Engineers Declare Climate and Biodiversity Emergency” <[https://engineersdeclare.org.au/?fbclid=IwAR0eb2qIN7Zo-3nOZD6t6vYJt\\_vhUuPiw\\_xl8cAKoDaf-kphG1DX0N694Aw](https://engineersdeclare.org.au/?fbclid=IwAR0eb2qIN7Zo-3nOZD6t6vYJt_vhUuPiw_xl8cAKoDaf-kphG1DX0N694Aw)>.

4 Open Letter to the Law Council of Australia and its Constituent Bodies (23 September 2019) <<https://docs.google.com/forms/d/e/1FAIpQLScqv3MnvS-RX9ZvLIRmVc4N0puCQtcUubM-BQx6lvkyi3MXA/viewform>>.

# 1. Climate Change

## What is climate change?

The United Nations Framework Convention on Climate Change (UNFCCC) states that climate change is the alteration of the composition of the global atmosphere which can be attributed to human activity, either directly or indirectly.<sup>5</sup> Climate change defined by the Intergovernmental Panel on Climate Change (IPCC) however refers to a change in the state of the climate ... whether due to natural variability or as a result of human activity.<sup>6</sup> The emissions of carbon dioxide (CO<sub>2</sub>) from the burning of fossil fuels has increased CO<sub>2</sub> concentration levels by 35%.<sup>7</sup> Further, the increase in CO<sub>2</sub> is increasing the warming effect on the earth by greenhouse gases.<sup>8</sup>

## What are the impacts of climate change?

“Dry regions of the earth are becoming drier causing droughts and wildfires threefold,<sup>9</sup> wet regions are becoming wetter as a result of floods and snow caused by the atmosphere retaining more water vapour at higher temperatures”.<sup>10</sup> The warming of the earth is dramatically affecting oceans, causing ice in the polar regions to melt, contributing to sea level rise, coral bleaching and associated fish deaths,<sup>11</sup> and higher water acidity as a result of CO<sub>2</sub> absorption.<sup>12</sup>

Simultaneously, the melting of polar ice releases previously stored greenhouse gases (methane) into the atmosphere to exacerbate the issue in a sort of ‘feedback loop’ of atmospheric and climate alteration.<sup>13</sup>

The IPCC has identified that climate change will impact biological, geophysical and socio-economic systems.<sup>14</sup> In 2018, the IPCC published its special report stating that the impacts of global warming of only 1.5°C above pre-industrial levels would incite more extreme and erratic weather events, heat waves, slower crop yields and sea level rise.<sup>15</sup> The World Health Organisation (WHO) in conjunction with the IPCC has concluded that climate change would cause an increase in heat-related mortality, the frequency of infectious disease epidemics and substantial health effects following population displacement due to sea level rise.<sup>16</sup> Developing nations are particularly vulnerable to these impacts, as many are inadequately equipped for climate change adaptation.<sup>17</sup>

It has been reported that the major economic impacts of climate change could spur economic losses of up to \$7 trillion (USD).<sup>18</sup> The Task Force on Climate-Related Financial Disclosures has reported that physical climate risks, being acute or chronic climate events, have the potential to greatly disrupt economic systems, leading to compounded transition climate risks.<sup>19</sup> The greatest transition risks will most likely be shifts in law and policy that mark a worldwide transition to renewable energy, jeopardising the current demand and value of non-renewable assets.<sup>20</sup>

Climate change also has detrimental impacts on biodiversity in particular animal life, as discussed below under the header ‘ethical obligations related to climate change’.

## How are communities responding?

Worldwide, growing awareness about the impacts of climate change has led to increasingly dynamic and nuanced activism. There is a strong impetus amongst school-aged people to address climate change, as represented by the “Fridays for Future” global school

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5 Pan, Zaitao, ‘Climate change and global warming, (2019) *Salem Press Encyclopedia of Science*, 1.

6 UNFCCC, ‘Fact sheet: *Climate change science – the status of climate change science today*’ (February 2011) <[https://unfccc.int/files/press/backgrounders/application/pdf/press\\_factsh\\_science.pdf](https://unfccc.int/files/press/backgrounders/application/pdf/press_factsh_science.pdf)> 1.

7 Paul, Carr, ‘What is climate change doing to us and for us?’ 53 (2018) 2 *The Wicked Problem of Climate Change*, 443.

8 Ibid 445.

9 Paul Carr, above n 7, 443.

10 Ibid 447.

11 Hon. Justice Brian J Preston SC, (speech delivered at the launch of (2016) 39(4) UNSW Law Journal Thematic Issue: Rethinking Climate Change and the Law, King & Wood Mallesons Sydney, 22 November 2016) 2.

12 Paul, Carr, above n 7, 447.

13 Christensen et al, ‘Tracing the climate signal: mitigation of anthropogenic methane emissions can outweigh a large Arctic natural emission increase’ (2019) 9 (<https://www.nature.com/articles/s41598-018-37719-9>).

14 ‘Summary for Policymakers of IPCC Special Report on Global Warming of 1.5°C approved by Governments’ (Intergovernmental Panel on Climate Change, 2018).

15 Ibid 4, 5, 9.

16 AJ McMichael et al, ‘International Consensus on the Science of Climate and Health: The IPCC Third Assessment Report’ *Climate Change and Human Health: Risks and Responses* (World Health Organisation, 1<sup>st</sup> edition, 2003).

17 ‘Climate Change Vulnerability and the Identification of Least Developed Countries’ (United Nations Committee for Development Policy, Background Paper No. 15, June 2012).

18 The Economist Intelligence Unit, *The Cost of Inaction: Recognising the Value at Risk from Climate Change* (2015) 2.

19 ‘Recommendations of the Task Force on Climate-Related Financial Disclosures’ (Task Force on Climate-Related Financial Disclosures, 2017) 6.

20 Ibid 5.

strike movement.<sup>21</sup> Escalating climate strikes have taken place since August 2018,<sup>22</sup> with climate strikes on 20 and 27 September 2019 seeing an estimated 6 million people attending climate strikes globally.<sup>23</sup> The Australian climate strike on 20 September 2019 was attended by more than 300,000 people in more than 110 Australian cities and towns.<sup>24</sup> It was endorsed by the Australian Council of Trade Unions, 2500 businesses organisations and several faith organisations.<sup>25</sup>

The Extinction Rebellion movement is encouraging non-violent civil disobedience as a tool to demand political response to ‘climate breakdown and ecological collapse’.<sup>26</sup> Within the financial sector, the Investor Group on Climate Change is pressuring financial companies and institutions to act to disclose their exposure to climate risks.<sup>27</sup>

Australian attitudes toward the impacts of climate change indicate mounting concern. In the Lowy Institute “Australian Attitudes to Climate Change” Poll released in May 2019, climate change was seen by 64% of Australians as ‘a critical threat’,<sup>28</sup> increasing by 18 points since 2014.<sup>29</sup> Community groups continue to work collectively to protest various large-scale mining developments that contribute to greenhouse gas emissions. The grassroots movement Stop Adani has been particularly instrumental in opposing the Adani Coal Mine development in Carmichael Queensland, with over 150 groups now mobilising across the country to participate in events, protests and rallies.<sup>30</sup> As will be discussed later, there has also been significant court action in New South Wales, Australia and globally which recognises the impacts of climate change.

## 2. Climate change and human rights

The overwhelming majority of States recognise the human right to a healthy environment.<sup>31</sup> The United Nations Human Rights Committee observes that climate change is one of “the most pressing and serious threats to the ability of present and future generations to enjoy the right to life”.<sup>32</sup> The Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment also recognises the impact of the “global climate emergency on the enjoyment of human rights”.<sup>33</sup>

In the case of the *Gabčíkovo-Nagymaros Project*, then Vice-President of the International Court of Justice Judge Christopher Weeramantry explained:

“The protection of the environment is a vital part of contemporary human rights doctrine, for it is a *sine qua non* [that is, a necessary condition] for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration [of Human Rights] and other human rights instruments.”

21 Fridays for Future <<https://www.fridaysforfuture.org/>>.

22 Fridays for Future, “About” <<https://www.fridaysforfuture.org/about>>.

23 Matthew Taylor, Jonathan Watts and John Bartlett, “Climate crisis: 6 million people join latest wave of global protests” (28 September 2019) <<https://www.theguardian.com/environment/2019/sep/27/climate-crisis-6-million-people-join-latest-wave-of-worldwide-protests>>.

24 Jenny Noyes and Natassia Chrysanthos, “Global climate strike LIVE: Australian school students march to protest climate change”, *Sydney Morning Herald* (20 September 2019) <<https://www.smh.com.au/national/global-climate-strike-live-australian-school-students-march-in-protest-of-climate-change-20190920-p52t70.html>>; Nick Baker and Abbie O’Brien, “Hundreds of thousands of Australians strike to protest climate inaction”, *SBS News* (20 September 2019) <<https://www.sbs.com.au/news/hundreds-of-thousands-of-australians-strike-to-protest-climate-inaction>>.

25 School Strike 4 Climate, “Biggest Climate Mobilisation in Australia’s History as 350,000 Students + Workers #ClimateStrike” <<https://www.schoolstrike4climate.com/post/biggest-climate-mobilisation-in-australia-s-history-as-300-000-students-workers-climatestrike>>.

26 Extinction Rebellion, ‘About Us’ (Accessed 1 August 2019) <<https://rebellion.earth/the-truth/about-us/>>.

27 ‘From Risk to Return: Investing in a Time of Climate Change Adaptation’ (Investor Group on Climate Change, 2017).

28 Lowy Institute, ‘Media Release: 2019 Lowy Institute Poll – Australian Attitudes to Climate Change’ (8 May 2019) <<https://www.loyyinstitute.org/publications/media-release-2019-lowy-institute-poll-australian-attitudes-climate-change>>.

29 Ibid.

30 Stop Adani, ‘Why We Will #StopAdani’ (Accessed 1 August 2019) <[https://www.stopadani.com/why\\_stop\\_adani](https://www.stopadani.com/why_stop_adani)>.

31 Meg Good, “Should Australia recognise the human right to a healthy environment?”, *The Conversation* (22 February 2018) <<https://theconversation.com/should-australia-recognise-the-human-right-to-a-healthy-environment-92104>>.

32 United Nations Human Rights Committee, General Comment No. 36 (30 October 2018) <<https://tbinternet.ohchr.org/Treaties/>>.

33 David R. Boyd, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN Doc A/74/161 (15 July 2019).

The United Nations Human Rights Council (**UNHRC**) has passed at least 11 resolutions since 2008 in which it has expressed concerns as to the human rights impacts of climate change.<sup>34</sup> On 2 July 2018, the UNHRC recognised “that climate change poses an existential threat for some countries”.<sup>35</sup> It emphasised that a broad range of human rights are impacted by climate change, including:

“the right to life, the right to adequate food, the right to the enjoyment of the highest attainable standard of physical and mental health, the right to adequate housing, the right to self-determination, the rights to safe drinking water and sanitation, the right to work and the right to development”<sup>36</sup>

Australia is bound to protect the above human rights by the *International Covenant on Civil and Political Rights (ICCPR)* and the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*.

The United Nations Special Rapporteur on extreme poverty and human rights illustrates how climate changes threatens some of the above human rights:

“According to the World Bank, at 2°C degrees of warming, 100-400 million more people could be at risk of hunger and 1-2 billion more people may no longer have adequate water ... Between 2030 and 2050, it is expected to cause approximately 250,000 additional deaths per year from malnutrition, malaria, diarrhoea and heat stress.”

Climate change raises further concerns regarding the right to equality in article 2(1) of the ICCPR and article 2(2) ICESCR. The UNHRC recognises that climate change impacts disproportionately on vulnerable people:

“... while these [climate change] implications affect individuals and communities around the world, the adverse effects of climate change are felt most acutely by those segments of the population that are already in vulnerable situations owing to factors such as geography, poverty, gender, age, indigenous or minority status, national or social origin or other status and disability”<sup>37</sup>

Climate change not only impacts more severely on people presently in poverty, but also pushes mounting numbers of people in poverty. The United Nations Special Rapporteur on extreme poverty and human rights explains:

“Climate change threatens to undo the last fifty years of progress in development, global health and poverty reduction. Middle-class families, in developed countries, are also being rendered poor. The World Bank estimates that without immediate climate action, climate change could push 120 million more people into poverty by 2030 – likely an underestimate, and rising in subsequent years.”<sup>38</sup>

As of 23 September 2019, at least two complaints have been made to United Nations human rights monitors, alleging that governmental inaction on climate change breaches international human rights law:

- In May 2019, a group of Torres Strait Islander people brought a complaint to the United Nations Human Rights Committee, alleging that the Australian Government’s inaction on climate change violates the right to life, the right to culture and the right to be free from arbitrary interference with privacy, family and home.<sup>39</sup>
- On 23 September 2019, 16 child complainants from 12 countries brought a complaint to the United Nations Committee on the Rights of the Child. The complaint alleges that the actions of five governments in causing and perpetuating the climate crisis breaches the rights of children to life, health and culture, and breaches the obligation to make the best interests of children a primary consideration in all actions concerning children.<sup>40</sup>

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34 Resolution 7/23 (March 2008); Resolution 10/4 (March 2009); Resolution 18/22 (September 2011); Resolution 26/27 (July 2014); Resolution 29/15 (July 2015); Resolution 16/11 (April 2011); Resolution 19/10 (April 2012); Resolution 25/21 (April 2014); Resolution 28/11 (April 2015); Resolution 32/33 (July 2016); Resolution 38/L.5 (July 2018).

35 Resolution 38/L.5 (July 2018) <<https://undocs.org/A/HRC/38/L.5>>.

36 Ibid.

37 Resolution 38/L.5 (July 2018) <<https://undocs.org/A/HRC/38/L.5>>

38 United Nations Special Rapporteur on extreme poverty and human rights, *Climate Change and Poverty* (25 June 2019) [11]-[13].

39 Katherine Murphy, “Torres Strait Islanders take climate change complaint to the United Nations”, *The Guardian* (13 May 2019) <<https://www.theguardian.com/australia-news/2019/may/13/torres-strait-islanders-take-climate-change-complaint-to-the-united-nations>>.

40 *Sacchi et al v Argentina, Brazil, France, Germany and Turkey*, Communication to the Committee on the Rights of the Child (23 September 2019) <<https://childrensvclimatecrisis.org/wp-content/uploads/2019/09/2019.09.23-CRC-communication-Sacchi-et-al-v.-Argentina-et-al-Redacted.pdf>>.

The Law Council of Australia recognises that the rule of law requires Australia to comply with its international obligations.<sup>41</sup> Australia's non-compliance with international human rights law and international climate change law therefore has rule of law implications.

Justice Kunc of the NSW Supreme Court has also explained the domestic rule of law implications of climate change:

“At its worst, inadequately mitigated climate change could undo our social order and the rule of law itself ... It is no longer either difficult or alarmist to imagine a day when, in extremis, the defence, external affairs and immigration powers of the Commonwealth are invoked to support measures not seen since World War II to deal with the social, political, economic and physical effects of climate change.”<sup>42</sup>

By way of example, the impacts of climate change on human rights are particularly evident in the context of forced migration. We have set out some considerations below.

### Climate change and forced migration

At the end of 2018, the United Nations High Commissioner for Refugees reported that 70.8 million people were “forcibly displaced worldwide as a result of persecution, conflict, violence or human rights violations”,<sup>43</sup> marking an increase of 2.3 million people since 2017.<sup>44</sup> Referring to the 2017 figure, John Podesta, Founder and Director of The Center for American Progress, stated that:

“While it is difficult to estimate, approximately one-third of these (22.5 million to 24 million people) were forced to move by “sudden onset” weather events—flooding, forest fires after droughts, and intensified storms.”<sup>45</sup>

This figure only accounts partially for forced displacement, as “it is becoming increasingly difficult to categorise displaced people because of the combined impacts of conflict, the environment, and economic pressures”.<sup>46</sup>

Despite these difficulties, the 2019 World Bank Report: Groundswell (**Groundswell Report**) presents findings of climate-change-induced migration as a result of slow onset impacts. Kristalina Georgieva, CEO of World Bank, summarises the Groundswell Report as follows:

“This report brings a much-needed focus to the nexus between climate change, migration and development in three regions: Sub-Saharan Africa, South Asia and Latin America. Its startling conclusion is that they may have to cope with more than 143 million internal climate migrants by 2050 unless concerted action is taken at the national and global levels.”<sup>47</sup>

Climate change directly impacts Australia and its neighbouring countries and islands. In 2011, the Pacific Climate Change Science Programme predicted that:

“... the Pacific will experience an increase in the average temperature, the number of extremely hot days, the number of extreme rainfall events, ocean acidification and sea-level rise.”<sup>48</sup>

41 Law Council of Australia, *Rule of Law Principles* (March 2011) Key Principle 8.

42 Francois Kunc, “Climate change may pose threat to rule of law, says Supreme Court judge Francois Kunc, *Australian Financial Review* (11 October 2018) <<https://www.afr.com/business/legal/climate-change-poses-threat-to-rule-of-law-says-supreme-court-judge-francois-kunc-20181011-h16iov>>.

43 UNHCR, *Global Trends: Forced Displacement in 2018* (Report) 2 <<https://www.unhcr.org/5d08d7ee7.pdf>>.

44 UNHCR, *Global Trends: Forced Displacement in 2017* (Report) 2.

45 John Podesta, *The Climate Crisis, Migration, and Refugees* (Policy Brief, 25 July 2019) 2 (citations omitted) <<https://www.brookings.edu/research/the-climate-crisis-migration-and-refugees/>>.

46 Jane McAdam, *Climate Change, Forced Migration, and International Law* (Oxford Scholarship Online, 2012) Ch I, citing Julian Borger, “Conflicts Fuelled by Climate Change Causing New Refugee Crisis, Warns UN”, *The Guardian* (online, 17 June 2008) <<http://www.guardian.co.uk/environment/2008/jun/17/climate-change.food>>.

47 Kumari Rigaud et al, World Bank Group, *Groundswell: Preparing for Internal Climate Migration* (Report, 2018) xvii <<https://www.worldbank.org/en/news/infographic/2018/03/19/groundswell---preparing-for-internal-climate-migration>>.

48 Australian Bureau of Meteorology and Commonwealth Scientific and Industrial Research Organisation, *Climate Change in the Pacific: Scientific Assessment and New Research: Volume 1-Country Reports* (2011), cited in John Campbell and Olivia Warrick, United Nations Economic and Social Commission for Asia and the Pacific, *Climate Change and Migration Issues in the Pacific* (Report, 2014) 6.



Sea-level rise, in particular, has severely impacted Pacific islands. Fiji and Nauru have established frameworks to adapt to climate change, fearing rising sea-levels.<sup>49</sup> Australia experienced this issue first-hand in 2009, when a person from the island of Kiribati sought refuge in Australia after rising sea-levels had threatened their village's drinking-well water, crops and papaya trees and, as a result, their livelihood.<sup>50</sup> Both the Minister for Immigration and Refugee Review Tribunal refused the application for a Protection Visa.

The Tribunal found that the person did not meet the definition of a refugee under Section 65 of the *Migration Act 1958* (Cth) despite there being "no doubt that the circumstances the applicant, and others living in Kiribati, face are serious and deserving of significant Governmental consideration and attention".<sup>51</sup>

Australian islands are also impacted by climate change. The livelihoods of Torres Strait Island communities are being threatened by "...water shortages (due to El Niño), and severe coral bleaching on our Great Barrier Reef, which travels right up through the Torres Strait."<sup>52</sup>

Professor Kristen Lyons explains:

"Some Torres Strait Islands are less than one metre above sea level and are already affected by climate change. Rising tides have delivered devastating effects for local communities, including flooding homes, land and cultural sites, with dire flooding in 2018 breaking a sea wall built to protect local communities."<sup>53</sup>

If action is not taken to address climate change, the conditions in countries currently experiencing its impact will worsen and many populations, including people living in the Pacific Islands and Australia's Torres Strait Islands, may be forcibly displaced from their homes.

### 3. Ethical obligations related to climate change

#### Intergenerational and interspecies equity

Intergenerational equity

Intergenerational equity is the principle that the present generation has a duty to ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations.<sup>54</sup> Essentially, each generation needs to minimise any harmful effects on the environment so that it can ensure natural resources are available for the next generation in at least the same condition as they were received.<sup>55</sup> To achieve intergenerational equity the next generation needs to enjoy an equal quality of and access to the environment to that enjoyed by the current generation.<sup>56</sup>

Interspecies equity

Interspecies equity is the principle that the non-human (animals and plants) world must also be considered in this issue. It recognises that nature has its own intrinsic value and that adopting an eco-centric approach is fundamental if we are going to get our response to climate change right.<sup>57</sup>

The recent Colombian Supreme Court decision regarding deforestation in the Amazon encapsulates these two concepts. The Colombian Supreme Court found that deforestation in the Amazon posed an "imminent and serious threat" to present and future generations due to its deleterious effects on climate change.<sup>58</sup> The Colombian Supreme Court considered both the human impact on the plaintiffs' and future generations' fundamental rights to life, water, clean air and a healthy environment as well as the fact

49 Ministry of Economy, Republic of Fiji, *Planned Relocation Guidelines* (2018); Government of the Republic of Nauru, *Republic of Nauru Framework for Climate Change Adaptation and Disaster Risk Reduction* (2015).

50 0907346 [2009] RRTA 1168 (10 December 2009) [17].

51 0907346 [2009] RRTA 1168 (10 December 2009) [54].

52 Torres Strait Island Regional Council, "Climate Change Adaptation" (Web Page, 2016) <<http://www.tsirc.qld.gov.au/changing-region/projects/climate-change-adaptation>>.

53 Kirsten Lyons, "Torres Strait Islanders ask UN to hold Australia to account on 'human rights abuses'", *The Conversation* (27 May 2019) <<https://theconversation.com/torres-strait-islanders-ask-un-to-hold-australia-to-account-on-climate-human-rights-abuses-117262>>.

54 *Protection of the Environment Administration Act 1991* (NSW) s 6(2)(b).

55 Edith Brown Weiss, 'Climate Change, Intergenerational Equity, and International Law' (2008) 9 *Vermont Journal of Environmental Law*, 616.

56 *Ibid.*

57 Klaus Bosselmann, *The Principle of Sustainability: Transforming Law and Governance* (Ashgate, 2008) 100-101.

58 Dejusticia, "In historic ruling, Colombian Court protects youth suing the national government for failing to curb deforestation" (5 April 2018) <<https://www.dejusticia.org/en/en-fallo-historico-corte-suprema-concede-tutela-de-cambio-climatico-y-generaciones-futuras/>>.

that the Amazon is an “entity subject of rights” and that the Colombian government has a duty to “protect, conserve, maintain and restore” the Amazon.<sup>59</sup> The Colombian Supreme Court ordered the Colombian government to establish an “intergenerational pact for the life of the Colombian Amazon” with the goal of reaching zero deforestation.<sup>60</sup>

As suggested in the notion of interspecies equity, a sensible and full discussion on the ethics of sustainability must take into consideration the impacts of climate change on biodiversity with respect to animals and the food practices of humans with respect to the impact of the animal agriculture sector on climate change.

#### Impacts of Climate Change on Animal Biodiversity

A United Nations report from the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services and others have warned that climate change is likely to pose a fundamental threat to species distribution and abundance, and is a major driver of species endangerments and extinctions in the 21st century.<sup>61</sup> Approximately 1 million species of animal (and plant) are threatened with extinction as a result of climate change.<sup>62</sup> Due to their ecological, behavioural, physiological and genetic traits, some species are more susceptible to climate change impacts, especially where their natural habitats are at risk of large climatic changes.<sup>63</sup> Extreme weather events caused by climate change — including severe droughts, heatwaves, floods and bushfire — are likely to adversely impact on animal (and plant) species.<sup>64</sup> By 2070, the scientific community has warned that the environment and ecosystem will be ‘more ecologically different than it is the same’.<sup>65</sup>

Rising sea levels as a result of climate change have detrimental impacts on marine biodiversity.<sup>66</sup> By way of example, a small 50cm sea level rise of is likely to cause sea turtles to lose their nesting beaches whereby sea turtles – in particular turtles using over 30% of Caribbean beaches – would be affected during the nesting season.<sup>67</sup> Furthermore, rising sea levels are likely to damage shallow coastal areas used annually by several species to raise their young, such as the (already) endangered Mediterranean Monk Seals which require beaches to raise their pups, and whales and dolphins which require shallow, calm waters to raise their calves.<sup>68</sup>

The Arctic has been reported to be ‘warming faster than any other region on Earth’.<sup>69</sup> Ice dependent Arctic wildlife (including narwhals, polar bears, and walruses) are at increasing risk of being impacted by climate change due to the shrinking sea ice cover which is occurring at a faster pace than Arctic wildlife can adapt to.<sup>70</sup> In particular, reports indicate that by 2100, polar bears may ‘face starvation and reproductive failure’.<sup>71</sup>

Lastly, temperature increase in Australia – in an already hot and dry region – beyond 2 degree Celsius is likely to cause ‘catastrophic destruction of the Great Barrier Reef’.<sup>72</sup> This has correlative impact on the reef’s unique Australian animal biodiversity, including coral life which is affected by warming of waters and pollution (caused by human activity) as evident in the presence of coral bleaching, especially in the southern reefs.<sup>73</sup>

59 Ibid.

60 Ibid.

61 United Nations, Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services, *Global Assessment Report on Biodiversity and Ecosystem Services* (2019), as cited in United Nations, ‘UN Report: Nature’s Dangerous Decline ‘Unprecedented’; Species Extinction Rates ‘Accelerating’ (Web Page, 6 May 2019) <<https://www.un.org/sustainabledevelopment/blog/2019/05/nature-decline-unprecedented-report/>>; C Parmesan and G Yohe ‘A Globally Coherent Fingerprint of Climate Change Impacts Across Natural Systems’ (2003) 421(6918) *Nature* 37; E H Allison et al, “Vulnerability of National Economies to Potential Impacts of Climate Change on Fisheries” (2010) 10(2) *Fish and Fisheries* 173.

62 United Nations, Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services, *Global Assessment Report on Biodiversity and Ecosystem Services* (2019), as cited in United Nations, ‘UN Report: Nature’s Dangerous Decline ‘Unprecedented’; Species Extinction Rates ‘Accelerating’ (Web Page, 6 May 2019) <<https://www.un.org/sustainabledevelopment/blog/2019/05/nature-decline-unprecedented-report/>>.

63 International Union for Conservation of Nature, ‘Species Susceptibility to Climate Change Impacts’ (Web Page, 2008) <[https://www.iucn.org/sites/dev/files/import/downloads/climate\\_change\\_and\\_species.pdf](https://www.iucn.org/sites/dev/files/import/downloads/climate_change_and_species.pdf)>.

64 Jeff Smith and NSW EDO Defending the Environment Advancing the Law, ‘What Will Australia’s Nature Look Like In 50 Years’ Time? (Web Page, 8 September 2014) <<https://www.edonsw.org.au/what-will-australia-s-nature-look-like-in-50-years-time>>.

65 Ibid.

66 Ibid.

67 Climate & Weather, ‘Climate Change - Effects on Animals, Birdlife and Plants’ (Web Page, 2019) <<https://www.climateandweather.net/global-warming/climate-change-and-animals.html>>.

68 Ibid.

69 World Wide Fund for Nature, ‘Arctic Climate Change’ (Web Page, 2019) <<https://arcticwwf.org/work/climate/>>.

70 Ibid.

71 Ibid.

72 Michael Kirby AC CMG, ‘Environmental and Planning Law in the Age of Human Rights and Climate Change’ (2019) 36 *Environmental and Planning Law Journal* 181.

73 Emma Kennedy, Alexandra Ordoñez and Guillermo Diaz-Pulido, ‘Coral Bleaching in the Southern Inshore Great Barrier Reef: a Case Study from the Keppel Islands’ (2017) 69(1) *Marine and Freshwater Research (Commonwealth Scientific and Industrial Research Organisation)* 191-197.



### Impact of Animal Agriculture on Climate Change

One of the key contributors to climate change and area for action is animal agriculture.<sup>74</sup> Animal agriculture is a highly carbon intensive industry and recognised as being ‘the second largest contributor to human-made greenhouse gas emissions after fossil fuels’.<sup>75</sup>

Animal agriculture is also a major cause of deforestation, water pollution, air pollution and biodiversity loss.<sup>76</sup> By way of example, the livestock sector is one of the major causes of global deforestation, and has recently been linked to 75 percent of the deforestation in the Amazon rainforest in Brazil.<sup>77</sup> Deforestation also causes loss of wildlife habitat for animals living in the Amazon rainforest.<sup>78</sup> Additionally, the global livestock sector’s contribution to global water and air pollution has been reported to produce nine times more sewage than humans, and release ‘pesticides, antibiotics, and heavy metals into water systems’.<sup>79</sup>

A 2019 report by the World Resources Institute and a report by the United Nations’ Intergovernmental Panel on Climate Change recognise that plant-based diets provide “major opportunities” to address climate change and reduce carbon emissions, associated deforestation and waste by-products.<sup>80</sup> Accordingly, the intermittent or permanent adoption of plant-based diets offer a sustainable and scientific-based pathway to implementing interspecies ethics to climate change action.

### Common but differentiated responsibility

The principle of common but differentiated responsibility is enshrined in the United Nations Framework Convention on Climate Change (UNFCCC).<sup>81</sup> The approach of common but differentiated responsibility acknowledges that while climate change is a global issue in that it has and will have impacts on all countries, the responsibility of individual countries to take steps to reduce emissions should be specific to a country’s current and historical contribution to global emissions, and capacity to take steps to reduce emissions. Countries such as Australia that have the technological and financial resources to take steps to reduce emissions have a greater responsibility than countries who do not. As a logical extension of the polluter pays principle, a country should be accountable to take steps within their capabilities, proportionate to their contribution to global emissions. This approach also seeks to distribute responsibility equitably in ensuring no one state bears an unreasonably high cost in combating climate change, whether financially or socially.

Australia is a developed country with very high per capita emissions. In 2013, this equated to nearly twice the average per capita CO<sub>2</sub> emission rate of countries in the Organisation for Economic Co-operation and Development (OECD).<sup>82</sup> This has been attributed to Australia’s reliance on fossil fuels, primarily coal, as a primary energy source. This is in addition to its substantial export of non-renewable energy resources.<sup>83</sup>

As a state with both a very high rate of contribution to global emissions and high capacity to reduce emissions, Australia has a moral, ethical and legal responsibility to take action. When viewed through the lens of consequentialism, the impacts of Australia’s high rate of emission as a contribution to climate change is the responsibility of Australia to remedy by acting to reduce these emissions. Further, some of the greatest impacts of climate change are likely to be social and humanitarian impacts on developing countries, while the greatest per capita global emissions have historically and currently result from the actions of developed countries, including Australia.

74 Rebecca Hersher and Allison Aubrey, *To Slow Global Warming, U.N. Warns Agriculture Must Change* (Web Page, 8 August 2019) <<https://www.npr.org/sections/thesalt/2019/08/08/748416223/to-slow-global-warming-u-n-warns-agriculture-must-change>>.

75 Climate Nexus, *Animal Agriculture’s Impact on Climate Change* (Web Page, 2019) <<https://climatenexus.org/climate-issues/food/animal-agricultures-impact-on-climate-change/>>.

76 Ibid.

77 Ibid.

78 Ibid.

79 Ibid.

80 Intergovernmental Panel on Climate Change, *Climate Change and Land: An IPCC Special Report On Climate Change, Desertification, Land Degradation, Sustainable Land Management, Food Security, And Greenhouse Gas Fluxes In Terrestrial Ecosystems* (IPCC Report, August 2019), available at <<https://www.ipcc.ch/report/srcc1/>>; M Jalava, M Kumm, M Porkka, S Siebert and O Varis, ‘Diet Change – a Solution to Reduce Water Use?’ (2014) 9(7) *Environmental Research Letters* 1-14. Tim Searchinger et al, World Resources Institute, *Creating A Sustainable Food Future A Menu Of Solutions To Feed Nearly 10 Billion People By 2050* (Synthesis Report, December 2018), available at <[https://www.wri.org/sites/default/files/2019-07/creating-sustainable-food-future\\_2\\_5.pdf](https://www.wri.org/sites/default/files/2019-07/creating-sustainable-food-future_2_5.pdf)>.

81 UNFCCC Article 3 Paragraph 1; Article 4 Paragraph 1.

82 Keyword MD, Hibberd MF & Emmerson KM (2017). *Australia state of the environment 2016: atmosphere*, independent report to the Australian Government Minister for the Environment and Energy, Australian Government Department of the Environment and Energy, Canberra.

83 Tom Swann, ‘High Carbon from a Land Down Under: Qualifying CO<sub>2</sub> from Australia’s fossil fuel mining and exports’ (The Australia Institute, July 2019) <<https://www.tai.org.au/content/new-analysis-australia-ranks-third-fossil-fuel-export>>.

## 4. Climate change and the law

### International legal framework for climate change

- The UNFCCC came into force on 21 March 1994 with the intention of encouraging States to take actions to stabilise greenhouse gas concentrations. It has been ratified by 197 countries.
- The 1997 Kyoto Protocol of the parties to the UNFCCC commits developed country parties to binding emission reduction targets for 2008-2012, and subsequent accords make more detailed rules for implementation.<sup>84</sup>
- In December 2015, parties to the UNFCCC entered into the Paris Agreement to strengthen the global response to climate change. Under the Paris Agreement, signatory States agreed to keep global temperature rise to below two degrees Celsius above pre-industrial levels through state-specific targets. Australia committed to reducing its greenhouse gas emissions by 26-28% below 2005 levels by 2030. Despite this, Australia's greenhouse gas emissions have risen every year since signing the Paris Agreement.<sup>85</sup>
- The *Oslo Principles on Global Obligations to Reduce Climate Change (Oslo Principles)* also form part of the international framework for addressing climate change. The Oslo Principles were also adopted in 2015 by a group of 13 experts in international environment and human rights law. The Oslo Principles call on States and enterprises to take measures to ensure global average surface temperature increase never exceeds pre-industrial temperatures by more than 2 degrees Celsius. The Oslo Principles also set out obligations on States to refrain from starting activities which may cause excessive greenhouse gas emissions and on businesses to assess their vulnerability to climate change.

### Climate change and the law overseas

Litigation seeking to address the causes or likely impacts of climate change is becoming increasingly commonplace.

Climate change litigation had been brought under a number of legal heads including tort claims alleging a breach of a duty of care, merits appeals and judicial review of decisions which may cause environmental harm, or as human rights or constitutional challenges. The scope of climate change legal challenges demonstrates the wide-reaching nature of the rights which climate change has the potential to impact and liabilities it is likely to create.

Below is a brief summary of significant climate change decisions in foreign domestic jurisdictions to date:

#### *Leghari* (Pakistan)

In *Leghari v Federation of Pakistan*,<sup>86</sup> a farmer sued the Pakistani Government for failing to carry out the National Climate Change Policy 2012 and Framework for Implementation of Climate Change Policy. In 2015, the Lahore High Court held that the Pakistani Government's delay in implementing the policies breached fundamental human rights. The Court ordered that a climate change commission be created and that various government ministries nominate a climate change focal person.

#### *Juliana* (United States of America)

In 2015, Our Children's Trust filed a lawsuit for declaratory and injunctive relief against the United States Government for failing to adequately regulate carbon dioxide pollution causing climate change, asserting that this violated young people's constitutional rights to "life, liberty, property and public trust resources..." The United States Government has attempted to stay the proceedings on a number of occasions. The trial is yet to commence.

#### *Urgenda* (Netherlands)

The *Urgenda* litigation was brought by a Dutch Non-Governmental Organisation, alleging that the Dutch Government had breached a duty of care owed to its citizens to prevent the foreseeable harm of climate change by adequately reducing greenhouse gas emissions and breaching human rights under the *Dutch Constitution* and *European Convention on Human Rights (ECHR)*. At first instance, the Hague District Court ordered the Dutch Government to reduce its greenhouse gas emissions by at least 25% relative to the 1990 emissions level.<sup>87</sup> On Appeal, the District Court's finding that the State owed a duty of care under the ECHR was upheld.<sup>88</sup>

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84 UNFCCC, *What is the Kyoto Protocol* <[https://unfccc.int/kyoto\\_protocol](https://unfccc.int/kyoto_protocol)>.

85 *Quarterly Update of Australia's National Greenhouse Gas Inventory: December 2018* (Commonwealth of Australia, 2019, <https://www.environment.gov.au/system/files/resources/408fcc37-dcfd-4ab8-a4f9-facc6bd98ea6/files/nggi-quarterly-update-dec-2018.pdf>).

86 W.P. No. 25501/2015.

87 *Urgenda Foundation v The State of the Netherlands, Rechtbank Den Haag* [District Court of The Hague, Chamber for Commercial Affairs] 24 June 2015.

88 *The State of the Netherlands v Urgenda Foundation, The Hague Court of Appeal* (9 October 2018).

## Climate change and the law in Australia

In Australia, there is no overarching piece of legislation dealing with climate change, including mitigation for all its potential impacts. Commonwealth legislation to deal with climate change largely centres around reduction, sequestration and disclosure of emissions:

- The Renewable Energy Target (RET) scheme prescribes a percentage of Australia's electricity to come from renewable sources, pursuant to the *Renewable Energy (Electricity) Act 2000* (Cth);<sup>89</sup>
- The Emissions Reduction Fund (ERF) (recently renamed as the Climate Solutions Fund (CSF)) funds measures for Australian businesses, farmers, land managers and Indigenous communities to take practical actions to reduce emissions using the project methodologies established under the *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth).<sup>90</sup> The Safeguard Mechanism, established under Part 3H of the *National Greenhouse and Energy Reporting Act 2007* (Cth) (NGER Act), aims to ensure that emission reductions purchased by the Government under the ERF/CSF are not offset by increases in emissions in other areas of the economy.
- Imposing disclosure obligations regarding greenhouse gas emissions, energy production and energy consumption on certain large organisations and buildings pursuant to the NGER Act and *Building Energy Efficiency Disclosure Act 2010* (Cth);
- Establishing the Clean Energy Regulator, an independent statutory authority responsible for administering legislation to reduce carbon emissions, pursuant to the *Clean Energy Regulator Act 2011* (Cth);
- Establishing the Climate Change Authority to provide independent, expert advice on climate change policy, pursuant to the *Climate Change Authority Act 2011* (Cth).
- Establishing the Australian Renewable Energy Agency, a statutory authority mandated under the *Australian Renewable Energy Agency Act 2012* (Cth) to accelerate the shift to affordable and reliable renewable energy.
- Establishing the Clean Energy Finance Corporation, a statutory authority mandated under the *Clean Energy Finance Corporation Act 2012* (Cth) to invest in the clean energy sector.

In NSW there is likewise no overarching legislation dealing with climate change. NSW legislation and mechanisms to deal with climate change include;

- The *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* (Mining SEPP) requires a consent authority for development for the purposes of mining, petroleum production or extractive industry to consider greenhouse gas emissions; and
- The *Coastal Management Act 2016* (NSW) and *State Environmental Planning Policy (Coastal Management) 2018* (NSW) deal with management of coastal environments. This legislation and planning policy impose obligations on Councils to formulate management plans for coastal environments (which are modelled to be vulnerable to climate change related weather events), restricting development in areas vulnerable to climate change related weather events, and protecting areas which provide carbon sinks (such as mangroves).
- Ecologically sustainable development (which captures intergenerational equity, as addressed above) is entrenched in a range of NSW Acts and Regulations including, with specific applicability to environmental management and development, as an object in s 1.3 of the *Environmental Planning and Assessment Act 1979*.

## Climate change litigation in Australia

Australia has a significant body of climate change litigation,<sup>91</sup> having one of the highest rates of climate change litigation in the world second only to the United States.<sup>92</sup> Below is a brief, and by no means exhaustive, summary of significant climate change decisions in New South Wales to date:

- **Gray v Minister for Planning** (2006) 152 LGERA 258; [2006] NSWLEC 720: Gray sought judicial review of a decision to place an environmental assessment for a coal mine on exhibition, on the basis that the environmental assessment did not consider scope 3 greenhouse gas emissions and therefore the consent authority had failed to consider the principles of ecologically sustainable development (ESD). The Court held that the principles of ESD required downstream emissions to be taken into account.<sup>93</sup>

89 Department of Environment and Energy, Commonwealth of Australia, *The Renewable Energy Target (RET) scheme* < <https://www.environment.gov.au/climate-change/government/renewable-energy-target-scheme>>

90 Department of Environment and Energy, Commonwealth of Australia, *About the Climate Solutions Fund - Emissions Reduction Fund* < <https://www.environment.gov.au/climate-change/government/emissions-reduction-fund/about>>

91 See, for instance, *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure* (2013) 194 LGERA 347; *Warkworth Mining Ltd v Bulga Milbrodale Progress Association Inc* (2014) 86 NSWLR 527; [2014] NSWCA 105; *Walker v Minister for Planning* (2007) 157 LGERA 124; [2007] NSWLEC 741; *Wollar Progress Association Incorporated v Wilpinjong Coal Pty Ltd* [2018] NSWLEC 92.

92 United Nations Environment, "The Status of Climate Change Litigation: A global review" (May 2017) 12.

93 *Gray v Minister for Planning* (2006) 152 LGERA 258; [2006] NSWLEC 720 [122], [125] and [131].

- **Minister for Planning v Walker** (2008) 161 LGERA 423; [2008] NSWCA 224: concerned an appeal of a Land and Environment Court decision to refuse development consent for a retirement village on the basis that the Minister had failed to take into account the public interest and principles of ESD by failing to consider climate change flood risk. Although the Minister was successful on appeal, the Court of Appeal found that climate change flood risk should have been considered by the Minister in assessing the precautionary principle<sup>94</sup> and that [61]-[62] and that principles of ESD were likely to be considered as a prima facie element of the public interest.<sup>95</sup>
- **Wollar Progress Association Incorporated v Wilpinjong Coal Pty Ltd** [2018] NSWLEC 92: *Wollar* involved judicial review of a decision to grant development consent to continue and extend an open cut coal mine on the basis that the consent authority failed to consider clause 14(2) of the Mining SEPP. Clause 14(2) required consent authorities to consider greenhouse gas emissions (including downstream emission) in determining development applications. The Applicant submitted that the consent authority should have regard to state or national policies such as the *NSW Climate Change Policy Framework*. The Court held these documents were not “policies” within the meaning of cl 14(2) and therefore did not have to be considered.<sup>96</sup>
- **Gloucester Resources Limited v Minister for Planning** [2019] NSWLEC 7: the *Rocky Hill* decision<sup>97</sup> was a merits appeal challenging a decision of the Minister for Planning to refuse development consent for a coal mine in the Hunter Valley in New South Wales. The Land and Environment Court upheld the Minister’s refusal on a several bases, including, significantly, because of the potential climate change impacts of the mine. The decision was significant because it held that all greenhouse gas emissions contribute to climate change and that “downstream” or indirect emissions from developments must be considered by consent authorities. On 8 May 2019, the mining company announced that it would not be appealing the decision.
- **Australian Coal Alliance Incorporated v Wyong Coal Pty Ltd** [2019] NSWLEC 31: was a judicial review challenge to the validity of a development consent for a coal mine. One of the bases for the challenge was an alleged failure by the consent authority to consider downstream emissions under cl 14(2) of the Mining SEPP. The Court found that although the consent authority had not specifically named the relevant clause of the Mining SEPP, the substance of the clause had been considered. ACA also alleged that the consent authority had deferred consideration of the downstream emissions to the point of creation of these emissions. The Court rejected this argument, finding that the consent authority had considered downstream emissions to be more appropriately dealt with at the location they were emitted.<sup>98</sup>

## Climate Change and Business Regulation

Noel Hutley SC and Sebastian Hartford-Davis’ memorandum of opinion, “Climate Change and Director’s Duties”, established the changing risk disclosure and management requirements for directors in 2016.<sup>99</sup> Their 2019 updated memorandum reinforced earlier findings and exemplified the “profound and accelerating shift in the way that Australian regulators, firms and the public perceive climate risk.”<sup>100</sup> Since 2016, recommendations made by the Taskforce on Climate-related Financial Disclosures have been endorsed by the Reserve Bank of Australia and the Australian Prudential Regulation Authority, and supported by the Australian Securities and Investment Commission.<sup>101</sup> Moreover, the Australian Accounting Standards Board and the Auditing and Assurance Standards Board established that climate-related risks should be considered for financial statement accounting estimates.<sup>102</sup> These changes have gained “acute interest” from investors and, in the opinion of Hutley SC and Hartford-Davis, “...these matters elevate the standard of care that will be expected of a reasonable director.”<sup>103</sup> Climate-related physical, transitional, and litigation risks now “represent foreseeable risks of harm to Australian businesses”,<sup>104</sup> and regulatory changes represent a “rapidly developing benchmark” for directors’ conduct.<sup>105</sup>

94 *Minister for Planning v Walker* (2008) 161 LGERA 423; [2008] NSWLEC 224 [60]-[62].

95 *Ibid* [56].

96 *Wollar Progress Association Incorporated v Wilpinjong Coal Pty Ltd* [2018] NSWLEC 92 [146].

97 *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7.

98 *Australian Coal Alliance Incorporated v Wyong Coal Pty Ltd* [2019] NSWLEC 31 [91]-[95].

99 Noel Hutley SC and Sebastian Hartford-Davis, *Climate Change and Directors Duties* (Memorandum of Opinion, Centre for Policy Development and the Future Business Council, 7 October 2016) [37] – [38].

100 Noel Hutley SC and Sebastian Hartford-Davis, *Climate Change and Directors Duties* (Supplementary Memorandum of Opinion, Centre for Policy Development and the Future Business Council, 26 March 2019) 2.

101 *Ibid* 4.

102 *Ibid*.

103 Hutley SC and Hartford-Davis (n 24) [34]; Hutley SC and Hartford-Davis (n 25) 2.

104 Hutley SC and Hartford-Davis (n 25) 2.

105 *Ibid* 3.

Increasing public awareness of and concern for these risks has been exhibited through prominent shareholder resolutions and court proceedings. These actions have aimed to set or improve climate-related targets,<sup>106</sup> or to increase climate related information disclosures.<sup>107</sup> Public climate change awareness is also evident through changing patterns of consumer behaviour leading to new reputational risks for businesses that fail to adopt some element of sustainable practice.<sup>108</sup> A sound understanding of climate change and its repercussions is now necessary for legal practitioners working within a rapidly changing regulatory and business risk environment.

## 5. 'Climate ready' legal profession

### Education

There is a need for enhanced climate awareness at all levels of the legal profession. Universities have a competitive opportunity to instil in students an appreciation and understanding of the human role in the ecosystem. NSW Young Lawyers can provide educational material and seminars to assist new and young lawyers to be environmentally literate. Understanding climate change also has implications for businesses' corporate social responsibility,<sup>109</sup> including in their supply chains. It should be the role of the legal profession to maintain the integrity of the rule of law by upholding and advancing human rights including in relation to climate change.<sup>110</sup> This inherently requires practitioners to have a sound understanding of climate change and its implications.

### Should there be a legal ethical obligation to have an environmentally sustainable law practice?

The Honourable Justice Brian J Preston, Chief Judge of the Land and Environmental Court of New South Wales stated that "the climate change problem will be solved not in one fell swoop, but by a series of small, incremental responses across all levels of governance."<sup>111</sup> The legal profession holds a significant position in society and it is imperative that it leads by example in respect to combating climate change.

It is also relevant that climate change will have justice implications for current and future generations.<sup>112</sup> There should be further discussion on expanding the legal ethical obligations that solicitors have to the administration of justice.<sup>113</sup>

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106 Ibid 4.

107 *Guy Abrahams v Commonwealth Bank of Australia* [2017] VID879 [11] – [15]; *Mark McVeigh v Retail Employees Superannuation Pty Ltd* CAN 001 987 739 [2018] NSD1333 [21].

108 Brian Preston, 'Implementing a Climate Conscious Approach in Daily Legal Practise' (Conference Paper, Australian & New Zealand Legal Ethics Colloquium on Sustainable Legal Ethics, 4 December 2015) 3.

109 International Bar Association, *Achieving Justice and Human Rights in an Era of Climate Disruption* (Report, July 2014) 45.

110 Ibid.

111 Honorary Justice Brian J Preston, 'Implementing a climate conscious approach in daily legal practice' (Paper presented at Australian & New Zealand Legal Ethics Colloquium Fifth Bi-Annual Meeting: Sustainable Legal Ethics as part of the public symposium 'Should Lawyers Challenge Emitters?' Monash University Law Chambers, Melbourne, 4 December 2015) 1.

112 Ibid 6.

113 *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW) r 3.