



MONASH University
Castan Centre for Human Rights Law

Special Rapporteur on Human Rights and the Environment

Submission in response to call for input of 7 October 2015

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Introduction

The Castan Centre for Human Rights Law (Castan Centre) thanks the Special Rapporteur for the opportunity to comment on the implementation of human rights obligations relating to the environment. Given our familiarity with the Australian context, we have elected to provide some examples of how such obligations could be better implemented by the Australian Government, but similar challenges are doubtless being faced by other States as well.

In your *Mapping Report* of 2013, you list a number of human rights obligations relating to the environment which are particularly relevant to Australia, including:

- The right to non-discrimination;¹
- Rights affected by disasters, including floods and bushfires;²
- Rights associated with environmental activism, particularly freedom of expression,³ and
- Rights affected by trans-boundary effects of both Governmental and corporate policy.⁴

You also discuss the adequacy of environmental impact assessment regimes from a human rights perspective and a State's duty to facilitate public participation in assessment processes.⁵

Human Rights and the Environment in Australia Generally

In 2008, the Australian Government commissioned a National Human Rights Consultation by an independent committee, in part to lay the groundwork for a national Charter of Rights.⁶ Although the Charter never eventuated, the Consultation did provide an opportunity for (amongst thousands of others) the country's largest Environment Defenders' Offices (EDOs) to make a submission entitled *Protection of Human Rights and Environmental Rights in Australia*.⁷ The submission's two most important recommendations were the legal protection of the right to a clean and healthy environment and appropriate action on climate change.⁸ The EDOs pointed out that, apart from indirect obligations to protect rights

¹ *Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox* (Mapping Report), UN Doc A/HRC/25/53; para 25.

² *Ibid*, para 23.

³ *Ibid*, para 30.

⁴ *Ibid*, paras 62-68.

⁵ *Ibid*, para 30-35.

⁶ See eg Australian Parliament, *Parliaments and Rights Protection*:

<http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BriefingBook43p/humanrightsprotection>.

⁷ NSW/Vic EDOs, *Protection of Human Rights and Environmental Rights in Australia*, 22 May 2009, available at: <https://envirojustice.org.au/downloads/files/law_reform/edo_vicnsw_humanrights_environment.pdf>.

⁸ *Ibid*, 5.

such as the rights to life and health through environmental conservation, Australia has a specific obligation under the Convention on the Rights of the Child (CRC)...

...[t]o combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution.⁹

In addition, Australia co-sponsored a Human Rights Council resolution on Human Rights and the Environment in March 2011, as well as the 2012 resolution which created your mandate.¹⁰

However, Australia has so far failed to implement its international human rights obligations comprehensively, and environmental rights such as the rights to health, water, food and adequate housing are not specifically legally protected.¹¹

As far as environmental protection law is concerned, the EDOs identified a 'plethora' of relevant legislation. However, they noted that '...as the law in Australia currently stands, there is no requirement for any government bodies to consider the human rights implications of the decisions it makes (sic) in the context of the environment.'¹² The EDOs went on to provide several case studies of how the law in Australia has failed to ensure that human rights are not breached in environmental protection contexts.¹³

The EDOs' submission concludes by recommending the adoption of a Charter of Rights, incorporating environmental rights. This is a recommendation which the Castan Centre endorses. The revision of government environmental policies and guidelines to incorporate a human rights framework would also be beneficial.¹⁴

The following sections set out some specific examples of other steps Australia could take to improve protection for the rights identified in your reports.

⁹ CRC, article 24(c).

¹⁰ See UNEP and OHCHR, *Human Rights and the Environment*, 19 June 2012: <http://www.unep.org/environmentalgovernance/Portals/8/publications/JointReport_OHCHR_HRE.pdf>, 14 (co-sponsorship details in endnotes).

¹¹ See eg *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2004* (ACT); federal anti-discrimination legislation.

¹² See NSW/Vic EDOs, *Protection of Human Rights and Environmental Rights in Australia*, above n 7, 13.

¹³ *Ibid*, 14-19.

¹⁴ *Ibid*, 20-22.

Non-discrimination (Climate Change and Hazardous Waste Disposal Policy)

In Australia, there are Indigenous-majority populations in a number of fragile environments, including low-lying islands, isolated coastal areas and arid zones. These environments have been identified as particularly vulnerable to climate change.¹⁵

You have already identified the National Indigenous Climate Change Project, which was established seven years ago to work with corporate Australia and the Government on the implications for land tenure, native title, cultural and moral rights of climate change.¹⁶ In 2008 when this project was initiated, the Australian Government was developing an Emissions Trading Scheme, which could have provided important opportunities for Indigenous peoples in global carbon markets.¹⁷ The Carbon Pollution Reduction Scheme¹⁸ was presented to the Australian Parliament in 2008, but did not attract enough votes to pass into law. Eventually, a trading scheme was implemented in late 2011,¹⁹ but it was dismantled two years later after a change in Government.

Australia now has a greenhouse gas reduction scheme known as 'direct action', which involves paying polluters to achieve a 5% reduction on 2000 levels by 2020, and has been criticised by the US, China and Brazil²⁰ (as well as the UN²¹). This despite being the biggest per capita emitter of such gases in the OECD and one of the world's largest coal producers.²² Australia's failure to take responsibility for mitigating the risks of climate change threatens a number of human rights, and its effect is likely to be felt disproportionately by those living in vulnerable environments – especially those who do not have the resources to relocate or otherwise avoid the consequences. Australia has been criticised for this negligence by those facing the earliest consequences of climate change, including leaders of Pacific islands nations.²³ The Intergovernmental Panel on Climate Change has also confirmed that

¹⁵ See eg Altman and Jordan, *Impact of Climate Change on Indigenous Australians: Submission to the Garnaut Climate Change Review*, April 2008:

<http://caepn.anu.edu.au/sites/default/files/Publications/topical/Altman_Jordan_Garnaut%20Review.pdf>.

¹⁶ See *Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, John H. Knox (Compilation of good practices), UN Doc A/HRC/28/61, para 91.

¹⁷ See Altman and Jordan, above n 15, 1.

¹⁸ See Department of Climate Change, *Carbon Pollution Reduction Scheme: Australia's Low Pollution Future* (White Paper), 15 December 2008: <<http://pandora.nla.gov.au/pan/102841/20090728-0000/www.climatechange.gov.au/whitepaper/report/index.html>>.

¹⁹ See *Clean Energy Act 2011* (Cth)

²⁰ See eg Medhora and Milman, 'Australia's Direct Action climate policy challenged by US, China and Brazil at the UN,' *The Guardian*, 20 April 2015: <<http://www.theguardian.com/environment/2015/apr/20/australia-direct-action-climate-policy-challenged-us-china-brazil>>.

²¹ See eg Alexander, 'UN Climate Chief: other countries are 'further ahead than Australia',' *The Conversation*, 6 May 2015: <<https://theconversation.com/un-climate-chief-other-countries-are-further-ahead-than-australia-41133>>.

²² See Phillips, 'A global history of emissions reduction schemes,' *ABC Radio National*, 30 June 2015: <<http://www.abc.net.au/radionational/programs/rearvision/a-global-history-of-carbon-reduction-schemes/6583580>>.

²³ See Office of the President of the Republic of Kiribati, *President Tong questions moral values of Australian leaders*, 13 September 2015: <<http://www.climate.gov.ki/2015/09/13/president-tong-questions-moral-values-of-australian-leaders>> (also features comment by Marshall Islands Foreign Minister).

Indigenous Australians living in vulnerable (especially coastal) areas will also be amongst the first to feel the effects of a lack of action.²⁴

For a broad range of reasons, including respect for human rights obligations, Australia must do more to reduce its contribution to, and show leadership on, climate change.

In 2009 the *Environment Protection and Biodiversity Conservation Act 1999* was independently reviewed by former senior official Allan Hawke. Australia's most senior official for Indigenous rights, the Aboriginal and Torres Strait Islander Social Justice Commissioner, made a submission to the 2009 review.²⁵ The Commissioner reported that the Government was failing to recognise the important role of Indigenous people in the conservation and ecologically sustainable use of Australia's biodiversity, and also to use relevant Indigenous knowledge (gained over millennia on the continent) effectively. The Commissioner also called on the Government to incorporate the principles of free, prior and informed consent to consultation under the federal legislative regime.²⁶ Finally, the Commissioner noted that the law would only be triggered when a matter of "National Environmental Significance" was being considered, and these matters did not include concerns crucial to Indigenous wellbeing, including climate change, land clearing/reforestation or (fresh)water management.²⁷ These matters are still missing from the list several years later, although protection of certain water resources from coal seam gas exploitation has since been added.²⁸

The National Radioactive Waste Management Project was established in 2012²⁹ to govern the storage and disposal within Australia of nuclear waste generated by reactors both in Australia and overseas (in countries using Australian-sourced fuel). The Project requires consultation with the land owners of any putative waste storage site, but the six objectives to be considered (Community Well Being, Stable Environment, Environmental Protection, Health, Safety and Security, Economic Viability) are not couched in human rights terms, even though they clearly engage Australia's international obligations.

A Spanish corporation (Enresa) engaged to devise a concept design for an Australian nuclear waste storage facility in 2013 produced a report which advised a site 'should not be located in an area that has been or is of special cultural or historical significance,' but omitted to

²⁴ See Milman, 'Climate Change: Indigenous Australians 'face disproportionate harm'', *The Guardian*, 14 October 2013: <<http://www.theguardian.com/environment/2013/oct/14/indigenous-face-disproportionate-harm-climate-change>>.

²⁵ AHRC, *Submission by the Aboriginal and Torres Strait Islander Social Justice Commissioner to Mr Allan Hawke in response to the Independent review of the Environment Protection and Biodiversity Conservation Act 1999*, January 2009: <https://www.humanrights.gov.au/sites/default/files/content/legal/submissions/sj_submissions/2009_Review_EPBC.pdf>.

²⁶ *Ibid*, 4-6.

²⁷ See also 'The Limitations of Indigenous Water Rights in the Proposed Murray-Darling Basin Plan,' *Right Now*, 8 September 2012: <<http://rightnow.org.au/topics/indigenous-people/another-missed-opportunity-indigenous-water-rights-in-the-proposed-murray-darling-basin-plan>>.

²⁸ See *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss 24D and 24E.

²⁹ See *National Radioactive Waste Management Act 2012* (Cth); also <<http://www.radioactivewaste.gov.au/project>>.

mention human rights,³⁰ despite ‘respect for human rights of all individuals’ being part of the company’s Code of Conduct.³¹

In 2007, a proposal to establish a waste facility in the Northern Territory began to be contested by Indigenous people in the area on the basis that they were not properly consulted. Although the relevant legislation allowed it to override land rights, the Government eventually relented, but only after years of costly disputation.³² It is now searching for an alternative site, which may also be on (or affect) Indigenous-owned land given the kind of sites being explored.³³ The *Declaration on the Rights of Indigenous Peoples*, which Australia endorsed in 2009, does not seem to have had any impact on policy in this area, despite a specific provision on hazardous waste disposal and consultation.³⁴

These examples are just a very brief selection of the ways in which Australia’s environmental law and policy fails to take into account adequately international human rights obligations; in particular those owed to Indigenous peoples. The Australian Government should be urged to revise its environmental policies not only in accordance with the recommendations of the majority of the world’s scientists, but also in accordance with international human rights law.

Disaster Responses

Australia regularly experiences extensive bushfires in and around the Summer months, and the season for them appears to be lengthening.

In the Australian Capital Territory in 2003 and in Victoria in 2009 bushfires ran out of control and killed many people. Coronial investigations made no mention of the Government’s obligation to protect the right to life, despite both jurisdictions having Charters of Rights.³⁵

³⁰ See Enresa, *GENERIC CONCEPTUAL DESIGN (NATIONAL RADIOACTIVE WASTE MANAGEMENT FACILITY)*, December 2013: <<http://www.radioactivewaste.gov.au/sites/prod.radioactivewaste.gov.au/files/files//Enresa-report.pdf>>.

³¹ Enresa, *Code of Conduct (Business) (ESP)*: <<http://www.enresa.es/files/codigoconductamaster.pdf>>.

³² See eg Ludlam, ‘This Land is not Nowhere, These People are not No-one,’ *Right Now*, 13 August 2012: <<http://rightnow.org.au/writing-cat/article/this-land-is-not-nowhere-these-people-are-not-no-one>>.

³³ See Donnelly, ‘Victory for traditional owners over Muckaty Station nuclear waste dump,’ *Sydney Morning Herald*, 19 June 2014: <<http://www.smh.com.au/federal-politics/political-news/victory-for-traditional-owners-over-muckaty-station-nuclear-waste-dump-20140619-zsedf.html>>.

³⁴ *Declaration on the Rights of Indigenous Peoples* (adopted by UNGA 13 September 2007, endorsed by Australia 3 April 2009), article 29(2).

³⁵ See Doogan, *The Canberra Firestorm: Inquests and Inquiry into Four Deaths and Four Fires between 8 and 18 January 2003*, December 2006:

<[http://www.courts.act.gov.au/resources/attachments/Canberra_Firestorm_\(VOL_I\).pdf](http://www.courts.act.gov.au/resources/attachments/Canberra_Firestorm_(VOL_I).pdf)> (Volume II available at: ([http://www.courts.act.gov.au/resources/attachments/The_Canberra_Firestorm_\(VOL_II\).pdf](http://www.courts.act.gov.au/resources/attachments/The_Canberra_Firestorm_(VOL_II).pdf)); also 2009 *Victorian Bushfires Royal Commission: Final Report*, July 2010: <<http://www.royalcommission.vic.gov.au/Commission-Reports/Final-Report.html>>.

Questions have also been raised about the legality of forced fire evacuations in NSW³⁶ and the level of participation permitted to victims in the Victorian Royal Commission inquiry.³⁷ However, a taxation review aimed at alleviating the burden on families after the 2009 bushfires in Victoria (which destroyed thousands of homes) was specifically developed within a human rights framework, which is encouraging.³⁸

Freedom of Expression for Environmental Defenders

There was recently controversy in Australia over a provision of the federal *Environment Protection and Biodiversity Conservation Act* allowing parties who would otherwise not have standing to launch litigation in respect of planned developments.³⁹ The controversy arose in the context of a major coal mine planned to be built by Indian multinational Adani. Successful court intervention by a group of conservationists on behalf of two vulnerable species threatened by the mine was condemned by the Government as ‘economic sabotage.’⁴⁰ Despite the fact that only six objections (out of 5,500 project approvals) over 15 years had been successful under the Act, the Government claimed it needed to act swiftly to stamp out this ‘lawfare’ and introduced a Bill to revoke the right of anyone not directly affected to complain. The Bill remains before the Parliament at the time of writing.⁴¹

In addition, the Australian Government severely cut funding for EDOs in 2014, once again in the context of ‘economic sabotage’ claims.⁴² Even when other cuts to legal aid were reversed due to public pressure in 2015, EDOs were excluded due to their ‘advocacy of causes,’ and the smaller offices in four states and territories are facing imminent closure.⁴³

³⁶ See Eburn, ‘Legality of forced evacuations during NSW bushfires,’ *Australian Emergency Law*, 10 January 2014: <<https://emergencylaw.wordpress.com/2014/01/10/legality-of-forced-evacuations-during-nsw-bushfires>>.

³⁷ See VEOHRC, *The 2009 report on the operation of the Charter of Human Rights and Responsibilities*; April 2010: <<http://www.humanrightscommission.vic.gov.au/index.php/our-resources-and-publications/charter-reports/item/167-2009-report-on-the-operation-of-the-charter-of-human-rights-and-responsibilities-apr-2010>>, 7.

³⁸ *Ibid*, 42.

³⁹ See *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 487.

⁴⁰ See eg ‘Abbott fights environmental ‘lawfare’ in Australia,’ *Deutsche Welle*, 11 September 2015: <<http://www.dw.com/en/abbott-fights-environmental-lawfare-in-australia/a-18708514>>.

⁴¹ See Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015, Senate Environment and Communications Committee: <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/E_PBC_Standing_Bill>.

⁴² See ‘Funding cut to Environmental Defender’s Offices described as ‘barbaric’,’ *ABC News Online*, 19 December 2013: <<http://www.abc.net.au/news/2013-12-18/funding-cut-to-environmental-defenders-offices/5164934>>.

⁴³ See Davidson, ‘Environmental Defenders Office lashes out at George Brandis over funding cuts,’ *The Guardian*, 31 March 2015: <<http://www.theguardian.com/australia-news/2015/mar/31/environmental-defenders-office-lashes-out-at-george-brandis-over-funding-cuts>>. The larger offices in NSW and Victoria receive more state government funding – see eg Merritt, ‘State to continue to fund NSW Environmental Defender’s Office,’ *The Australian*, 2 October 2015: <<http://www.theaustralian.com.au/business/legal-affairs/state-to-continue-funding-nsw-environmental-defenders-office/story-e6f9g97x-1227552913614>>.

A former judge of South Australia's Environment, Resources and Development Court linked this decision to mining industry lobbying and pointed out that there will no longer be an 'affordable legal option for communities and landholders who find themselves confronted with major development projects like mines, natural gas processing plants, coal seam gas fields and shale gas wells, or with new government planning policies that threaten citizen rights, local biodiversity, indigenous culture, farmland, clean waterways and other public interests.'⁴⁴ The closure of the EDO in the Northern Territory in particular may also have a disproportionate effect on Indigenous people who have limited options in challenging mining companies.⁴⁵

Burdening freedom of speech in environmental matters has some precedent in Australia. For example, in 2004, prominent logging company Gunns sued 20 environmental activists and organisations, including the Greens political party, for disrupting logging operations in Tasmania. This action was compared with the so-called 'SLAPP' writs issues in the US by companies wishing to silence legitimate protest, and it highlighted Australia's inadequate protection for freedom of speech, as well as the rights to peaceful assembly and public participation.⁴⁶ There was also a litigation ban on federal funding for EDOs from 1999 to 2007.⁴⁷

Environmental defenders and conservationists in Australia are forced to work without appropriate protection for freedom of expression, despite the threats they (and their clients) face from well-resourced and connected corporations.

Trans-boundary Harm

Australia is a major exporter of coal and uranium, both of which present serious environmental and health hazards. Apart from a clear moral obligation not to harm others and jeopardise future generations, Australia is also obliged to respect, protect and fulfil rights, such as the right to health, both within its jurisdiction and extraterritorially according to the *Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights*.⁴⁸

However, when it comes to coal exports, the Australian Government claims to see only advantages. For example, in the context of the impending approval of the Adani mine mentioned above, the relevant Minister has claimed that it is morally sound because

⁴⁴ See Trenorden, 'Environmental legal aid slashed when Australia needs it most,' *The Conversation*, 12 March 2014: <<https://theconversation.com/environmental-legal-aid-slashed-when-australia-needs-it-most-23988>>.

⁴⁵ See Davidson, above n 43.

⁴⁶ See NSW/Vic EDOs, *Protection of Human Rights and Environmental Rights in Australia*, above n 7, 18-19.

⁴⁷ See Trenorden, above n 44.

⁴⁸ *Maastricht Principles*, ETO Consortium 2012: <<http://www.etoconsortium.org/en/library/maastricht-principles>>, Principle 9.

burning coal will be better for the Indian citizens concerned than burning wood or dung.⁴⁹ This argument not only ignores the fact that most of these people are not connected to a grid which would allow them to benefit from coal-fired power stations, but also neglects to address alternatives (renewables) which would be more consistent with both sustainability and human rights principles.

In 2014, the Australian Government overturned a long-standing tenet of its foreign policy platform by provisionally agreeing to export uranium to India, which has not ratified the *Nuclear Non-proliferation Treaty*. A recent parliamentary report indicated that safeguards in the proposed agreement with India, intended to ensure the fuel was restricted to civilian use, are inadequate and the agreement may conflict with other obligations (although human rights obligations were not mentioned).⁵⁰ The report also points out that Australian uranium would be supplying a nuclear power sector less well-regulated than that of Japan, where even relatively strong regulation did not prevent a meltdown with grave human rights consequences.⁵¹

Australia's Department of Foreign Affairs and Trade, which is responsible for administering the country's aid program, has an official *Environment Protection Policy for the Aid Program*.⁵² However, although it refers to certain principles which align with a human rights framework,⁵³ it does not actually refer to human rights obligations at all. Given the interconnectedness of environmental and rights protection in the aid context, this is a notable omission. By contrast, the Swedish Government's Aid Policy Framework treats human rights and environmental protection (including climate policy) as mutually reinforcing aims.⁵⁴

Australia's Government claims to be 'seeking human rights for all,'⁵⁵ but its advocacy is not matched by exemplary leadership in trade or aid policy. There is a movement advocating greater attention to environmental justice in Australian law,⁵⁶ but so far it appears to have had little impact on federal Government policy.

⁴⁹ See eg "Moral' imperative in Australia's biggest coal mine, says Resources Minister Josh Frydenberg,' Sydney Morning Herald, 18 October 2015: <<http://www.smh.com.au/federal-politics/political-news/moral-imperative-in-australias-biggest-coal-mine-says-resources-minister-josh-frydenberg-20151017-gkbu0s.html>>.

⁵⁰ See Joint Standing Committee on Treaties, Report 151, 8 September 2015:

<http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/28_October_2014/Report_151>

⁵¹ Ibid, 81.

⁵² *Environment Protection Policy for the Aid Program*, Department of Foreign Affairs and Trade, 2014, <<http://dfat.gov.au/about-us/publications/Pages/environment-protection-policy-aid-program.aspx>>.

⁵³ Rights-related principles include 'protect the health, welfare, and livelihoods of people including women and vulnerable groups, including children and people with a disability' (at p 6).

⁵⁴ See Government Offices of Sweden, *Aid Policy Framework: the Direction of Swedish Aid* (2013):

<<http://www.regeringen.se/contentassets/6eef64a9a36e48ff9a95e4d6ad97ce84/aid-policy-framework>>.

⁵⁵ See *Australia: seeking human rights for all*, DFAT: <<http://dfat.gov.au/international-relations/themes/human-rights/Pages/australia-seeking-human-rights-for-all.aspx>>

⁵⁶ See Environmental Justice Australia: <<https://envirojustice.org.au/what-we-do>>.

Conclusion

The Australian Government, in both domestic and foreign environmental policy, rarely refers to human rights. Even policies concerning matters such as radioactive waste storage on Indigenous land, which raise many obvious human rights issues, neglect to address Australia's relevant international obligations. Australia has either ratified or endorsed a range of relevant instruments, including the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, the CRC, the *Declaration on the Rights of Indigenous Peoples* and the *Guiding Principles on Business and Human Rights*. It also promotes human rights in its foreign policy statements, and is currently running a campaign on its record to be elected to the Human Rights Council.⁵⁷

Unlike developing countries, Australia does not need technical assistance in this area. Rather, it needs to be called on by peers at the UN (for example in the context of the Universal Periodic Review and Human Rights Council elections, as well as in environmental fora) to consider the human rights implications of its potentially damaging environmental policies, and to address them comprehensively and transparently.

⁵⁷ See *Australia's Candidacy to the Human Rights Council*, Minister for Foreign Affairs & Attorney-General, 19 October 2015: <http://foreignminister.gov.au/releases/Pages/2015/jb_mr_151019.aspx>.