

18 September 2008



**Friends of
the Earth**



By email: registry@ohchr.org

Office of the United Nations High Commissioner for Human Rights
Attention: Mr. Ulrik Halsteen
United Nations Office
Geneva
CH 1211 Geneva 10

Dear Mr. Halsteen,

We commend the Office of the United Nations High Commissioner for Human Rights' detailed study into the relationship between climate change and human rights. We note that this study is in response to resolution 7/23 adopted by the Human Rights Council on 28 March entitled "Human Rights and Climate Change."

We note that the OHCHR would be grateful to receive any relevant information for the preparation of this study, including on:

- a) Assessments at national or regional level of the impact of climate change (experienced or anticipated) on human lives, the populations most affected and vulnerable, and the enjoyment of human rights;
- b) Projects and measures at national or regional level to mitigate or adapt to climate change, including information on assessments of their impact on affected populations and their human rights;
- c) Views on the relationship between obligations arising out of international climate conventions and international human rights treaties, including on international assistance and cooperation; and
- d) Examples of support to mitigate and adapt to climate change through international assistance and cooperation, including assessments of their human rights impact.

We are a group of Australian non-government organisations who are deeply concerned about the impacts of climate change upon human rights. This submission has been prepared by Friends of the Earth Australia¹ and the Australian Climate Justice Program (ACJP²).

Friends of the Earth Australia is a national environment and social justice organisation. FOE Australia is a member of Friends of the Earth International the world's largest grassroots environmental network, uniting 70 diverse national member groups and some 5,000 local activist groups on every continent. With over 2 million members and supporters around the world, we campaign on today's most urgent environmental and social issues.

The ACJP was launched in 2003 and is based at Climate Action Network Australia (CANA³). It has a strong relationship with the London-based international Climate Justice Programme.⁴ The ACJP is based on the fundamental premise that the law can be a powerful and effective tool in the campaign for climate protection. Since 2003, the ACJP has executed and supported a range of successful legal actions. At the same time, the climate crisis is worsening; and political and corporate leaders are failing to deliver sufficient cuts in greenhouse pollution.

CANA is an alliance of over 50 regional, state and national environmental, health, community development, and research groups from throughout Australia.⁵ CANA was formed in 1998 to be the Australian branch of the global CAN network, with representative groups in over 70 nations.

Our submission outlines some of the impacts of climate change (experienced and anticipated) on human lives and human rights in Australia and the Pacific, providing case studies of those most affected and vulnerable. It considers both the need for and lack of a human rights framework in Australian climate policy. Our submission provides an outline of climate litigation in Australia and elsewhere, demonstrating the growing momentum around enforcing legal responsibilities and obligations to prevent and minimise the impacts of climate change upon human lives and human rights. Finally, our submission calls for a human rights approach by the international community, particularly in the "second commitment period." We call for the development of an agreed and accepted formulation of a right to a safe climate: one which recognises the inter-connectedness of such a right with other rights and the importance of inter-generational equity to the essence of such a right.

We have also attached the following appendix to support our submission:

1. voices from communities affected by climate change, friends of the earth international november 2007

We look forward to the conclusions of the Office of the High Commissioner for Human Rights. The information provided in this submission and the appendix may be made available upon the OHCHR website.

¹ Find out more about Friends of the Australia at www.foe.org.au

² Find out more about the ACJP at www.cana.net.au/ACJP

³ CANA is a non-profit alliance of environmental, public health, social justice and research organisations throughout Australia that are concerned about climate change (global warming). Formed in 1998, CANA is also the Australian branch of the global Climate Action Network, which has members in over 70 nations. To find out more about CANA, visit www.cana.net.au

⁴ www.climatelaw.org

⁵ See full list of members here: http://www.cana.net.au/index.php?site_var=11

Sincerely,

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Submission to the OHCHR regarding human rights and climate change by Friends of the Earth Australia, the Australian Climate Justice Program and Climate Action Network Australia

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Introduction

The following outlines some of the impacts of climate change (experienced and anticipated) on human lives and human rights in Australia and the Pacific, providing case studies of those most affected and vulnerable. It considers both the need for and lack of a human rights framework in Australian climate policy. The submission provides an outline of climate litigation in Australia and elsewhere, demonstrating the growing momentum around enforcing legal responsibilities and obligations to prevent and minimise the impacts of climate change upon human lives and human rights. Finally, we call for a human rights approach by the international community, particularly in the “second commitment period” (beyond 2012).

PART 1 The need for integrating a human rights framework in Australian climate policy

While there is no recognition of a right to a safe climate at international law there has been some recognition of a right to an adequate environment. For example Article 1 of the Aarhus Convention states:

“In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public

participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.”

A number of existing human rights rely on a safe climate for their complete realisation. These include many civil, political, economic, social and cultural rights. For example rights to life, health, adequate standard of living, property, self-determination and just and favourable conditions of work all may rely on conditions of a safe climate.

The recognition of the importance of a safe climate to the realisation of human rights, while understood in many countries, unfortunately does not have strong foothold in Australia's climate policy development.

Government climate policy explanation and justification while touching on many of the areas that would give rise to human rights concerns is usually framed by economic or security considerations.

The recently released government Green paper outlining options for a Carbon Pollution Reduction Scheme (emissions trading scheme) delineates a “safe society” as one of its aims but does not mention human rights.

The government commissioned Garnaut Review, while covering many climate impacts that would contribute to the violation of human rights, does not mention human rights either. This is despite a detailed elaboration, on for example, the impacts of sea level rise on deltaic regions or the creation of climate change refugees in the Pacific.

A partial explanation of the failure to explain climate mitigation and adaptation in terms of human rights is perhaps the dominance of economic criteria in the public debate and formulation of Australian climate policy.

Human rights are too often equated with “moral” questions and a common theme of government bureaucrats in consultations with non-government organisations has been the urging of NGOs to frame climate policy in economic not moral concerns.

Never-the-less it is our view that a human rights framework is essential for understanding the urgency of acting on climate change and is necessary to communicate fully the impact climate change will have on people in Australia and around the world.

In addition it is important that work be done to develop an agreed and accepted formulation of a right to a safe climate one which recognises the inter-connectedness of such a right with other rights and the importance of inter-generational equity to the essence of such a right.

Case studies: climate change in Australia and the Pacific

Climate change will have an enormous impact on every person and species on the planet. Already many communities around the globe and in Australia are feeling the effects of global warming. As climate change continues and emergency action is not taken to urgently shift global emissions rapidly downward the local and regional disasters already experienced will develop into global catastrophe.

The current and future impacts already experienced are many and varied, below are a number of case studies that illustrate the manner in which human rights are being and will be continue to be affected by climate change.

The Carteret Islanders

The Carteret Islands (also known as Carteret Atoll, Tulun or Kilinailau Islands/Atoll), are part of Papua New Guinea (PNG) and located 120 kilometres northeast of Bougainville in the Pacific Ocean.

The islands are a scattering of low lying islands in a horseshoe shape stretching roughly 30 kilometres in a north-south direction, with a total land area of 0.6 square kilometres and a maximum elevation of 1.2 metres above sea level. All of the islands are on the edge of the lagoon and the population of the Carterets is about 2,500 people. Han is the largest island, with a population of about 1,000. All of the islands have tree cover, except where small clearings have been made for crop gardens.

The Carteret Islanders are amongst the world's first 'environmental refugees'. An entire cultural group is facing relocation due to the impacts of climate change. The islanders have fought for more than twenty years against the rising ocean, building sea walls and planting mangroves. However, storm surges and high tides continue to wash away homes, destroy vegetable gardens, and contaminate fresh water supplies. On November 24, 2005, the Papua New Guinean government authorised the evacuation of the islands, 10 families at a time, to Bougainville. The evacuation started in early 2007 and this could continue up until 2020, depending on how inhabited the islands remain. However, it has also been estimated that by 2015, the Carteret Islands could be largely submerged and entirely uninhabitable.

These changes have violated the economic, social and cultural rights of the Carteret Islanders.

Climate Change and the Pacific

The experience of the Carteret Islanders is likely to be repeated all over the Pacific as low lying islands and atolls feel the brunt of sea level rise - which may be as much as four metres this century⁶ - storm surges and king tides. Other climate changes such as the loss of coral reefs - which directly support the livelihood of over 100 million people across the world - and changes in rainfall patterns all threaten the sustainability of many communities in the Pacific.

For the small island countries of Tuvalu and Kirabati the important civil and political rights, including the right to self determination are at risk as their whole nations may lose almost all their land mass this century.⁷

Human rights frameworks and international refugee law will need evolve and supplemented to address the growing displacement caused by climate change.

⁶ Tara Ravens, Thousands of waterfront homes in danger: scientists, AAP, August 20, 2008

⁷ Richard Baker, PM 'rejects' Tuvalu on sea level, The Age, February 20, 2007

Sea-level rise and Australia

In Australia, indigenous communities in the north of Australia and in the Torres Strait are particularly at risk as they have important social, economic and cultural connections and reliance on land and the sea.

The Torres Strait Islands, scattered across 22,000 square kilometres between Australia and Papua New Guinea, are home to more than eight thousand people.

*The Torres Strait Islands, scattered across 22,000 square kilometres between Australia and Papua New Guinea, are home to more than eight thousand people. Many live only metres from the beach, sometimes less than one metre above sea level. In early 2006, high tides, strong winds and heavy rain caused severe damage to half the region's inhabited islands. Homes were damaged, sewage systems flooded and belongings lost. Islanders report such events as increasingly common. The Yorke Island chairperson, Mr Donald Mosby, is in no doubt that global warming is to blame. "You don't have to be a scientist," he said, "not when you see metres of beach disappearing every week."*⁸

Over 80 % of the Australian population lives within 3 kilometres of the coast line and sea level rises will have a substantial impact on infrastructure and the economic and social rights of many people. The Commonwealth Department of Climate Change estimates that in NSW alone as many as 269,505 homes may be affected by sea level rise.⁹

The right to family life and the right to property are just some of the social, economic and cultural rights that will be violated by such sea level rise.

Drought and the Murray-Darling Basin

The Murray-Darling river system covers one-seventh of the continent and is ranked fifteenth in the world in terms of length and twenty first in terms of area¹⁰. It includes the three largest rivers in Australia; the Murray River, the Darling River and the Murrumbidgee River.

The Murray-Darling underpins many rural communities and significant sections of Australia's economy. Three million Australians inside and outside the Murray-Darling Basin are directly dependent its water¹¹.

About 85 per cent of all irrigation in Australia takes place in the Murray-Darling Basin, which supports an agricultural industry worth more than \$9 billion per annum¹².

The river system is in crisis under the combined pressure of over-allocated water allocations, increased salinity, land clearing and climate change enhanced drought. In December 2006, less water flowed into the Murray River than at any time in the past century¹³

⁸ voices from communities affected by climate change, friends of the earth international november 2007

⁹ Tara Ravens, Thousands of waterfront homes in danger: scientists, AAP, August 20, 2008

¹⁰ http://www.mdbc.gov.au/about/basin_statistics (accessed, Sept 7)

¹¹ ibid

¹² voices from communities affected by climate change, friends of the earth international november 2007

¹³ voices from communities affected by climate change, friends of the earth international november 2007

The social, economic and cultural rights of many communities that rely on the Murry-Darling are under threat because of global warming.

PART 2 Climate Change Litigation

Introduction to Climate Litigation

Climate change is already impacting upon the lives and rights of people in Australia and the Pacific. The science shows that these impacts are anticipated to become far, far worse. The worst impacts are and will be upon the lives and livelihoods of the poor and developing countries, especially small island states. The most significant perpetrators of climate change are the rich and the developed countries.

Climate change litigation has been building over the last few years to enforce the law to combat climate change. Aside from human rights law, other legal theories invoked have been constitutional law, emission control regulation, endangered species protection, freedom of information and international legal obligations. Judgements and administrative decisions have begun to emerge.

There is a growing momentum around enforcing legal responsibilities and obligations to prevent and minimise the impacts of climate change upon human lives and human rights.

Climate Litigation in Australia

In Australia, there have not yet been any cases linking human rights and climate change. However, climate change litigation has been building up around three areas: environmental planning, World Heritage and misleading advertising. This litigation demonstrates a growing momentum around legal responsibilities for climate change (which are closely related to rights to a safe climate).

Environmental Impact Assessment Litigation in Australia has had considerable success in establishing judicial acceptance of climate change and the responsibility of human contributions. The following cases provide examples of this successful litigation:

1. *Australian Conservation Foundation v Minister for Planning*¹⁴ This case was filed in August 2004 and was one of the first climate change litigation cases. The case involved a judicial review of a planning decision to extend a coal mine. The court held that greenhouse gas emissions from burning coal must be taken into account in the planning decision. The court also held that energy sources producing greenhouse gas emissions have the potential to give rise to “significant” environmental effects. Of

particular note was the court's discussion of balancing current and future generation interests.

2. *Gray v Minister for Planning* (“Anvil Hill Mine Case”)¹⁵ The Anvil Hill Mine Case involved judicial review of a decision to approve a new coal mine. The court held that the greenhouse gas emissions from burning coal must be taken into account in determining the environmental effects of the proposal. The court held that there was a proximate link between mining of substantial local reserve, the only purpose of which is fuel in power stations and emissions of greenhouse gases which contribute to global warming. The court also stated that the fact that there are many contributors globally does not mean that contributions from a single large source such as Anvil Hill should be ignored.
3. *Gippsland Coastal Board v South Gippsland*¹⁶ This landmark decision was made in July 2008. Plans to build six seaside homes in Gippsland were overturned by the Victorian Civil and Administrative Tribunal, partly due to climate change considerations. The court accepted that some level of climate change will result in extreme weather conditions beyond the historical record that planners and others rely on in assessing future potential impact. The court applied the precautionary principle, holding that increases in the severity of storm events coupled with rising sea levels create an unacceptable and reasonably foreseeable risk of inundation of the subject land and the proposed dwelling.

Advertising Litigation has recently been developing in Australia. The following provide important examples:

1. In 2007, the Australian Climate Justice Program and Greenpeace lodged a complaint with the Australian Competition and Consumer Commission (ACCC) over HRL Limited's use of the term ‘clean coal’ in relation to its proposed new brown coal-fired power plant in Victoria. This advertising was despite the fact that the proposed plant would increase Victoria's greenhouse gas pollution by between 2.4 and 2.7 mt each year according to data released by Victorian Energy Minister Peter Batchelor.¹⁷ Similar litigation has been successful in European jurisdictions such as Germany and the Netherlands.¹⁸
2. On 29 April 2008, De Longhi Australia Pty Ltd admitted to making representations that its portable air-conditioning products are “environmentally friendly” and contain “non-harmful gases” when this was not the case.¹⁹ De Longhi sells a range of portable cooling products that use “harmful greenhouse gases (R407C, R410A). It also sells “ECO” model coolers that use R290, a low impact global warming gas.”²⁰ De Longhi provided court enforceable undertakings to the ACCC that it will refrain from making false or misleading representations and implement a trade practices compliance program.²¹
3. In December 2007, the ACCC reached agreement with Origin Energy over some of its advertising. Origin had aired a television advertisement representing that switching to Origin GreenPower would be the same as “not driving your car for two years.” The ACCC raised concerns that this advertisement did not clearly explain to consumers

¹⁵ [2006] NSWLEC 720

¹⁶ *Gippsland Coastal Board v South Gippsland SC & Ors* (No 2) [2008] VCAT 1545 (29 July 2008)

¹⁷ www.cana.net.au/ACJP

¹⁸ www.climatelaw.org

¹⁹ Trim document number D08/36802 (<http://www.accc.gov.au/content/index.phtml/itemId/826196>)

²⁰ ACCC Press Release, “De Longhi alters “environmentally friendly” claims” (30 April 2008).

²¹ Trim document number D08/36802 (<http://www.accc.gov.au/content/index.phtml/itemId/826196>)

the underlying averaging basis for the claimed environmental benefits of switching to Origin 100 per cent GreenPower. Origin agreed to not air such advertisements in the future without making explicit the basis upon which the representations are made. Origin also agreed to send a clarification letter to GreenPower customers who signed up during the period of the advertisement's broadcast.²²

World Heritage In Danger Petitions have been filed over the last couple of years to request the World Heritage Committee to add sites to the List of World Heritage in Danger on the basis of serious potential dangers arising from the impacts of climate change. The Great Barrier Reef and the Greater Blue Mountains are two Australian World Heritage sites that have been the subject of in danger petitions.²³ Such listing would require the World Heritage Committee to develop and adopt, in consultation with the State concerned, a program for corrective measures. In July 2008, the World Heritage Committee responded to these dangers by adopting new criteria for assessing properties which are most threatened by climate change for inclusion on the List of World Heritage in Danger.²⁴

Climate litigation in Australia has been building up around environmental planning, World Heritage and misleading advertising. This litigation demonstrates a growing momentum around legal responsibilities for climate change.

Climate Litigation Outside Australia

We would also like to note that litigation has been developing elsewhere linking human rights and responsibilities in legal forum. In particular the following cases demonstrate the importance of litigation in enforcing human rights in response to climate change.

1. *Gbemre v Shell Petroleum Development Company of Nigeria*²⁵ In this case an individual and community in the Niger Delta filed a case in the Federal High Court of Nigeria against Shell and other major oil companies to stop gas flaring. Gas flaring in Nigeria has contributed more greenhouse gas emissions than all other sources in sub-Saharan Africa combined, as well as poisoning local communities. The court held that the gas flaring was a gross violation of constitutionally guaranteed rights to life and dignity. This is the first time that a Nigerian court has applied the rights to life and dignity in an environmental case.
2. *Petition to the Inter American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States*²⁶ The Arctic Inuit filed a petition arguing that the impacts of climate change in the Arctic infringe upon the environmental, subsistence, and other human rights of Inuit. The Inuit sought a ruling from the Commission that the US must adopt mandatory limits on greenhouse gases and "...help the Inuit adapt to unavoidable impacts of climate change." The Inuit relied on the breach of the following rights set

²² ACCC Press Release, "ACCC scrutinises Origin green power television advertisement" (21 December 2007).

²³ http://www.cana.net.au/ACJP/cases.php?case_table=cases_acjp

²⁴ World Heritage Committee Decision 32 COM 7A.32 (July 2008)

²⁵ <http://www.climatelaw.org/cases/country/nigeria/gasflares/>

²⁶ <http://www.climatelaw.org/cases/country/intl/inuit/>

out in the American Declaration of Rights and Duties of Man: the right to life (Art. 1), the right to residence and movement (Art. VIII), the right to inviolability of the home (Art. IX), the right to preservation of health and to well-being (Art. XI), the rights to benefits of culture (Art. XIII) and the right to work and to fair remuneration (Art. XIV). The Commission technically dismissed the Petition in December 2006. A hearing was however held in March 2007. No hearing report appears to have been published.

3. *Native Village of Kivalina v ExxonMobil, BP and others*²⁷ In this case, the Village of Kivalina has made a civil claim for damages against some of the biggest oil, coal and power companies on the basis that global warming is a public nuisance. Kivalina has also alleged that some of the defendants conspired to create a false debate about global warming to deceive the public. The village is being destroyed by melting sea ice that formerly protected the village from winter storms, as well as massive erosion that has damaged and destroyed infrastructure. The village must be relocated, costing up to US\$400 million. The case is pending.

Climate litigation in Nigeria and North America has been developing linking human rights and responsibilities.

International Climate Litigation

The human rights instruments provide monitoring and enforcement mechanisms that State Parties are subject to. Through ratification, States have agreed to respect, protect and fulfil the rights contained within international human rights instruments. Should a State Party fail to meet its obligations within the context of climate change negotiations and responses, this could lead to complaints being lodged against that State with the UN treaty monitoring bodies.²⁸

It is possible that legal action may be taken in other international fora. While human rights are generally not enforceable by individuals of one State against another State, international environmental law does provide some resource. International law prohibits one State from injuring persons and properties in another State. This principle derives from the famous Trail Smelter case²⁹ in which Canada was held responsible for transboundary air pollution in the U.S. In this case, the tribunal stated that under “principles of international law ... no state has the right to use or permit the use of territory in such a manner as to cause injury by fumes in or to the territory of another of the properties or persons therein...”. While no international climate change cases have yet arisen in the International Court of Justice, Tuvalu has threatened to take legal action against Australia and the United States.³⁰

Climate litigation in international bodies such as the International Court of Justice and the UN treaty monitoring bodies may emerge in coming years.

²⁷ N.D. Cal., No. cv-08-1138

²⁸ *Background Paper: Human Rights and Climate Change*, p. 9.

²⁹ (1938/1941) 3 R.I.A.A. 1905

³⁰ <http://news.bbc.co.uk/1/hi/world/asia-pacific/1854118.stm>

PART 3 Call for a human rights approach

While certain rights are implicit within the United Nations Framework Convention on Climate Change (UNFCCC), such as a right to development, there is yet to be a clear framework that defines the relationship between human rights and climate change.

Australia and other nations have existing obligations under national and international law to prevent the human rights impacts of climate change. The position of nations in the second commitment period should be to ensure that these human rights will be protected.

The modern formulation of the Trail Smelter case can be seen in the preamble of the UNFCCC. This case was decided before the development of the main international human rights instruments. However the international community should ensure that the international agreement for the second commitment period will meet existing obligations under international law. The maxim, *sic utere tuo ut alienum non laedas*, use your own property so as not to injure that of another, should find expression in the new international agreement.

In response to climate change, human rights requires a triple task to be performed by governments, namely to (1) avoid harmful emissions nationally in order to respect the right to live in freedom from human-induced climate perturbations; (2) protect human rights against third-party emissions of countries or corporations through international cooperation; and (3) fulfil human rights obligations by upgrading people's capability to cope with climate change through adaptation measures, such as dam building, resettlement, or land redistribution.³¹

It is often difficult to establish the causal connection between the causes and impacts of climate change.³² However, regardless of the cause of threat to human rights, states have a positive obligation to act because state inaction would exacerbate the situation.³³

The international community needs to adopt a human rights approach to climate change, particularly in the “second commitment period” (beyond 2012).

It is important that work be done to develop an agreed and accepted formulation of a right to a safe climate: one which recognises the inter-connectedness of such a right with other rights and the importance of inter-generational equity to the essence of such a right.

³¹ Sachs, W., *Climate Change and Human Rights*, WDEV Special Report 1/2007, p.9.

³² *Background Paper: Human Rights and Climate Change*, p. 10.

³³ *Background Paper: Human Rights and Climate Change*, p. 10.