

8 June 2019

Professor David Boyd

UN Special Rapporteur on human rights and the environment

Thematic Engagement, Special Procedures and Right to Development Division

By email: srenvironment@ohchr.org

Dear Professor Boyd,

The Climate Justice Programme welcomes the opportunity to provide a submission to the UN Special Rapporteur on human rights and the environment on the topic **Climate Change and Human Rights: a Safe Climate**. Our submission is based upon providing answers to the **Questionnaire** circulated by the Special Rapporteur.

The Climate Justice Programme is a non-profit organization that is entirely dedicated to using the law to combat climate change.[[1]](#endnote-1) We are lawyers, community members and activists who believe in the pursuit of climate justice, through the development of climate law. The Climate Justice Programme previously made a submission to **OHCHR’s 2008 study on the relationship between climate change and human rights**.[[2]](#endnote-2) We have provided responses to Questions 1, 2, 6 and 7 of the Questionnaire.

If you have any questions please do not hesitate to contact me.

Yours sincerely,

Dr Keely Boom

Executive Officer

Climate Justice Programme

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**Question 1. Please provide examples of ways in which climate change is already having adverse impacts on the human rights of people within your State.**

As our organization is registered in Australia, we have focused our answer upon Australia. Climate change is already causing adverse impacts upon the human right of people within Australia, particularly Indigenous peoples, and people who are living in rural and regional areas. Some examples follow:

1. **Torres Strait Islanders**

The Torres Strait is a group of more than 100 islands in the northern part of Australia, between the Cape York Peninsula of Queensland to the coast of Papua New Guinea. There are 19 communities within the Torres Strait residing on 16 of the islands. The communities are diverse with unique traditions, law and customs.[[3]](#endnote-3) The Mer people of the Torres Strait were the people who won the first native title case, which found that Australia was not *terra nullius* (land belonging to no one) when the British settled. The threats to the human rights of Torres Strait Islanders cannot be overstated. The islands are low-lying coral cays with little elevation. Thus, sea level rise and other related impacts including storm surges threaten to make the islands uninhabitable, and with it the possibility of cultural destruction.

The right to life is already being impacted, with a young girl’s life at risk in 2006 king tides, and through diminishing access to safe drinking water.[[4]](#endnote-4) Salt water intrusion and changes to precipitation also violate the right to water. Torres Strait Islanders have reported a change in fish stocks, dugongs and turtles, consistent with a violation of the right to food through climate change impacts.[[5]](#endnote-5)

It has already been documented that the right to health is being impacted in the Torres Strait, including in relation to mental health through the loss of ability to predict seasonal change in the region.[[6]](#endnote-6) In relation to the right to a healthy environment, Torres Strait Islanders have reported turtle nesting failures and other significant impacts on biodiversity. The right to culture is already being severely impacted, particularly as graveyard sites have been damaged by recent king tides, and the nesting behavior of turtles have become unpredictable. *Ailan Kastom* refers to distinctive Torres Strait Islander culture and way of life, blending traditional customs with Christianity. *Ailan Kastom* is dependent upon the marine environment of the Torres Strait. Eight Torres Strait Islanders have brought a complaint to the UN Human Rights Committee, arguing that rising seas cause by climate change are threatening their homelands and culture.[[7]](#endnote-7) The case is the first of its kind.

1. **Elderly people, children and others**

Climate change is already causing an increasing incidence of heatwaves in Australia,[[8]](#endnote-8) constituting violations of the rights to health, life, non-discrimination and a healthy and sustainable environment. Increasing incidences of heatwaves have caused more deaths within Australia than any other climate impact to date.[[9]](#endnote-9) The people most at risk are the elderly, children, outdoor workers, Indigenous Australians and those already suffering from chronic disease.

For example, during the 2014 heatwave in Victoria the maximum temperatures were 12°C or more above average for much of the state, with some areas recording temperatures of 45°C or more on three consecutive days.[[10]](#endnote-10) There was a 25% increase in Ambulance Victoria’s emergency caseload in the metropolitan region; a fivefold increase in heatwave presentations to public hospital emergency departments; and a three-fold increase in heat-related calls to a 24-hour medical support service.[[11]](#endnote-11) The heatwave caused 167 more death than that normally expected at that time of year in Victoria.[[12]](#endnote-12)

1. **The Murray-Darling Basin**

The Murray-Darling Basin is the most important river system in Australia, and is already being impacted by climate change. The Murray-Darling Basin rivers are used by 3 million Australians for drinking water, including in the capital city Canberra.[[13]](#endnote-13) There are more than 40 Aboriginal Nations with deep cultural, social, environmental, spiritual and economic connect to the lands of the Murray-Darling Basin.[[14]](#endnote-14) The Basin provides $22 billion worth of food and fibre every year.[[15]](#endnote-15)

The Murray-Darling Basin Authority (MDBA) released a discussion paper in February 2019 explaining the impacts of climate change upon the Basin.[[16]](#endnote-16) Annual mean temperatures in the Basin have increased by 1°C relative to 1910, with the greatest increase occurring in the previous 20 years.[[17]](#endnote-17) The Southern Basin has had changing rainfall patterns, with an overall decrease in annual rainfall due to climate change.[[18]](#endnote-18) The Northern Basin has had a shift in rainfall patterns, with declines in winter and spring, and increases in summer and autumn.[[19]](#endnote-19)

The human rights implications of these impacts are both direct (e.g. violation of the right to water for communities dependent upon the Basin) and indirect (e.g. violation of the right to food undermined through decreasing food security). The indirect violations are relevant to all Australians, not just people living within the Basin.

**2. Given that “**[**urgent, effective and ambitious action**](https://www.ohchr.org/EN/NewsEvents/Pages/BurningDowntheHouse.aspx)**” to ensure a safe climate is essential to protecting a wide range of human rights, what are the specific obligations of States and businesses in terms of addressing the main drivers of climate change (e.g. greenhouse gas emissions, deforestation, industrial agriculture)?**

Research commissioned by our organization quantified and traced ‘for the first time the lion’s share of cumulative global CO2 and methane emissions since the industrial revolution began to the largest multinational and state-owned *producers* of crude oil, natural gas, coal and cement.’[[20]](#endnote-20) These producers are collectively known as the Carbon Majors.

The Carbon Majors should be held accountable for the violations and threats to human rights to people within Australia and in the world.[[21]](#endnote-21) One option for determining the level of responsibility for an individual Carbon Major entity would be by identifying the entity’s share in the estimated global industrial carbon emissions, and when the entity is supposed to have allegedly gained knowledge of the dangers of its product to the climate, the world’s ecology and human rights.

The United Nations Guiding Principles on Business and Human Rights affirm that businesses have a responsibility to respect human right and not cause harm, while States have an obligation to ensure that businesses do not harm human rights. States and businesses must mobilise all resources available to prevent human rights violations being caused by climate change. States are obliged to cooperate internationally (including in relation to finances, technology and capacity-building) to realise a low-carbon, climate resilient, and sustainable future. States must empower people to participate in policy formulation. To prevent the further violations of human rights, States and businesses must immediately mitigate greenhouse gas emissions, reduce deforestation and the harmful effects of industrial agriculture. The time for urgent, effective and ambitious action on climate change is now.

In addition, it is a generally recognized principle of international law that states must carry out their treaty obligations in good faith (1969 Vienna Convention on the Law of Treaties, Art.26). This implicit rule applies to all human rights treaties and includes an obligation not to defeat the object and purpose of the treaty (VCLT, Art.19). As a result, parties to a treaty should refrain from acts that would prevent other parties to comply with the terms of the treaty and undermine its overall objective.

This is of particular importance in the human rights and climate change context, as most human rights instruments explicitly provide that parties shall only respect and ensure the rights of individuals under their jurisdiction or effective control (e.g. 1989 Convention on the Rights of the Child, Art.2 para.1). Climate change induced human rights violations, however, predominately occur in the Global South while - at least for the time being – the majority of causal emissions originated in Northern industrialized countries. So while these states may not be responsible in relation to climate affected people in other jurisdictions the territorial limitation does not apply vis-a-vis other states that may take legal action (to protect their citizens) at the international level.

States have the right to exploit their own resources but at the same time the responsibility to ensure that activities within their jurisdiction or control do not cause serious harm to the environment of other states or of areas beyond the limits of national jurisdiction (1996 ICJ Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons). If people’s human rights are affected this appears to be a clear indication that the threshold of serious (significant or substantial) harm has been reached.

As a result, states have an obligation to regulate and control greenhouse gas emissions with due diligence. While in many countries of the Global South this must still be balanced with the right to development, the need for poverty alleviation and other interests, industrialized nations may have to refrain from large-scale activities that further alter the composition of the global atmosphere. At least, they must inform and consult with other states and undertake a transboundary impact assessment (2001 International Law Commission’s Articles on Prevention of Transboundary Harm from Hazardous Activities) with a view to finding an internationally accepted solution (2014 International Law Association’s Principles relating to Climate Change, Article 7B para.6).

Finally, international law also increasingly recognizes that states have to take the necessary measures to ensure that prompt and adequate compensation is available for victims of transboundary damage (2006 ILC’s Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities). While in the climate change context this may not result in a substantive right to compensation for individual claimants, states may at least be obligated to gradually develop the necessary legal frameworks on liability and compensation for environmental damage to areas outside their jurisdiction. States have an obligation to seek redress on behalf of their citizens from the Carbon Majors, based upon the historical and ongoing contributions made by these businesses to the climate crisis.

Past state practice, in this connection, includes the international oil pollution compensation funds (the 1971 Fund, the 1992 Fund and the Supplementary Fund) as well as the liability regime for nuclear accidents under the Convention on Third Party Liability in the Field of Nuclear Energy (Paris), the Supplementary Convention (Brussels) and the IAEA Vienna Convention on Civil Liability for Nuclear Damage. A compensation scheme for loss and damage from the adverse effects of climate change that can be accessed by affected groups and individuals directly would be an important step towards global environmental justice.

**6. What are ways in which high-income States should assist low-income States in responding to climate change, while simultaneously contributing to sustainable development in those low-income States?**

All States, and especially high-income States, should agree to and introduce a global carbon levy upon the Carbon Majors to finance loss and damage within low-income States. The Carbon Majors are just 90 fossil fuel producers, yet they are responsible for around two-thirds of industrial carbon dioxide. The fossil fuel industry is responsible not only for the majority of carbon emissions but also for the delay in dealing with the climate crisis. The fossil fuel industry has known about the human rights threats from climate change for decades, yet they have funded climate denialists and subverted political processes aimed at fighting the problem.

The fossil fuel industry still receives massive government subsidies. In 2017, the value of global fossil fuel consumption subsidies was estimated to be more than USD300 billion, higher that the estimate for 2016 (USD 270 billion).[[22]](#endnote-22) Within Australia, the fossil fuel industry receives around AUD 12billion in tax-based subsidies each yet, and also receive further subsidies beyond this amount.[[23]](#endnote-23) High-income countries like Australia need to remove these subsidies as a matter of priority.

In addition, international law, and basic fairness, require that the fossil fuel industry should pay for the loss and damage that their products are causing. We propose that the international community introduce a Carbon Levy at the point of extraction for fossil fuels. Such a levy is consistent with international law, including the ‘polluter pays’ principle and provide a new and predictable source of finance – amounting to billions of dollars – for the communities that need it most, without removing the responsibility of governments to provide public sources of finance. In addition, by raising the cost of extracting fossil fuels, it would contribute to the eventual phase-out of a sector that has no place in a climate-safe world. Removal of fossil fuel subsidies coupled with a Carbon Levy would ensure that government recuperate the true and complete costs of climate change from the fossil fuel industry.

**7. What are the main challenges or barriers that your government, business, or organization has faced in attempting to address the impacts of climate change on human rights?**

Governments around the world have deep ties with the fossil fuel industry and have colluded with the Carbon Majors in support of their industry. The fossil fuel industry exerts great pressure upon national governments and the UNFCCC processes.[[24]](#endnote-24) In 2014, the fossil fuel industry spent USD141 million lobbying in Washington, DC.[[25]](#endnote-25) ExxonMobil, Royal Dutch Shell and three other oil industry trade groups spend approximately $115 million annually to obstruct laws on climate change.[[26]](#endnote-26) ExxonMobil spent USD30.9 million from 1998 to 2014 on the support of think tanks running climate denial campaigns.[[27]](#endnote-27)

The fossil fuel industry holds and promotes their own events alongside the climate negotiations. For example, Solutions COP21, which was held in Paris and officially endorsed by COP21, provided a huge greenwashing opportunity.[[28]](#endnote-28) As further problem is found in what is termed the ‘revolving door’ between fossil fuel corporations and government institutions, whereby senior bureaucratic staff, political staffers, members of parliament and ministers move on to work for the fossil fuel industry, and vice versa.[[29]](#endnote-29)

The tobacco industry was banned from lobbying on the framework convention on tobacco control and international law calls upon governments to pursue civil and criminal liability of the corporations that created the tobacco crisis. After years of undue influence by the tobacco industry, the World Health Assembly recognized in 2001 that ‘the tobacco industry has operated for years with the express intention of subverting the role of governments and of WHO in implementing public health policies to combat the tobacco epidemic.’[[30]](#endnote-30) The Preamble of the WHO Framework Convention on Tobacco Control recognized the Parties ‘need to be alert to any efforts by the tobacco industry to undermine or subvert tobacco control efforts and the need to be informed of activities of the tobacco industry to have a negative impact on tobacco control efforts.’

Article 5.3 bans the tobacco industry from having a role or voice in setting health policy, which applies to the international, regional and national levels of policymaking. This prohibition on lobbying by the tobacco industry has had a major role in ensuring the development of effective tobacco control policies. The Conference of the Parties, in decision FCTC/COP2(14) established a working group to elaborate guidelines for the implementation of Article 5.3. The Guidelines[[31]](#endnote-31) are based upon the elaboration of a number of principles, including that ‘there is a fundamental and irreconcilable conflict between the tobacco industry’s interest and public health policy interests’. The international community international community has clearly recognized that there is a need to protect the formulation and implementation of public health policies for tobacco control from the tobacco industry to the fullest extent possible.

In contrast, the UNFCCC process and national governments such as Australia have treated the fossil fuel industry as stakeholders, rather than the source of the problem. The Paris Agreement does not even mention fossil fuels and their role. Given the conflict of interest faced by the fossil fuel industry in relation to climate change policy, it is evident that the development and implementation of international, regional and national climate policy would benefit from a similar course of action. The fossil fuel industry’s potentially subversive role should be recognized as a threat to human rights by the international community and responded to through restrictions on its ability to lobby governments at all levels of policymaking.

1. See [www.climatejustice.org.au](http://www.climatejustice.org.au). [↑](#endnote-ref-1)
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3. See [www.tsra.gov.au](http://www.tsra.gov.au). [↑](#endnote-ref-3)
4. Australian Human Rights and Equal Opportunity Commission, *Case study 1: Climate change and the human rights of Torres Strait Islanders* (2008), 236. [↑](#endnote-ref-4)
5. Australian Human Rights and Equal Opportunity Commission, *Case study 1: Climate change and the human rights of Torres Strait Islanders* (2008), 239. [↑](#endnote-ref-5)
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7. Aljazeera, ‘Australia faces ‘world-first’ climate change human rights case’ (13 May 2019) <https://www.aljazeera.com/news/2019/05/australia-faces-world-climate-change-human-rights-case-190513050431042.html>. Also see Our Islands, Our Home, available at <http://ourislandsourhome.com.au/>. [↑](#endnote-ref-7)
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14. Government of South Australia, Department for Environment and Water, *Why the Murray-Darling is so important,* <https://www.environment.sa.gov.au/topics/river-murray/basin-plan/importance-of-murray-darling-basin>. [↑](#endnote-ref-14)
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16. Murray-Darling Basin Authority, *Climate change and the Murray-Darling Basin Plan: MDBA Discussion Paper* (February 2019) available at <https://www.mdba.gov.au/publications/mdba-reports/climate-change-murray-darling-basin-plan-discussion-paper>. [↑](#endnote-ref-16)
17. Murray-Darling Basin Authority, *Climate change and the Murray-Darling Basin Plan: MDBA Discussion Paper* (February 2019) available at <https://www.mdba.gov.au/publications/mdba-reports/climate-change-murray-darling-basin-plan-discussion-paper>, 4. [↑](#endnote-ref-17)
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19. Murray-Darling Basin Authority, *Climate change and the Murray-Darling Basin Plan: MDBA Discussion Paper* (February 2019) available at <https://www.mdba.gov.au/publications/mdba-reports/climate-change-murray-darling-basin-plan-discussion-paper>, 7. [↑](#endnote-ref-19)
20. See [www.carbonmajors.org](http://www.carbonmajors.org). [↑](#endnote-ref-20)
21. See P Frumhoff, R Heede and N Oreskes, ‘The climate responsibilities of industrial carbon producers’ 132 Climatic Change 157 (2015). [↑](#endnote-ref-21)
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23. <https://www.marketforces.org.au/campaigns/ffs/>. [↑](#endnote-ref-23)
24. See Naomi Oreskes and Erik Conway, *Merchants of Doubt: How a Handful of Scientists Obscured the Truth on Issues from Tobacco Smoke to Global Warming* (Bloomsbury Press, 2011). [↑](#endnote-ref-24)
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31. See Guidelines for implementation of Article 5.3 of the WHO Framework Convention on Tobacco Control on the protection of public health policies with respect to tobacco control from commercial and other vested interests of the tobacco industry, available at <http://www.who.int/fctc/guidelines/article_5_3.pdf>. [↑](#endnote-ref-31)