# australian network of environmental defender's offices

**Submission to the National Human Rights Consultation** **15 June 2009**

The Australian Network of Environmental Defender's Offices (ANEDO) consists of nine independently constituted and managed community environmental law centres located in each State and Territory of Australia.

Each EDO is dedicated to protecting the environment in the public interest. EDOs provide legal representation and advice, take an active role in environmental law reform and policy formulation, and offer a significant education program designed to facilitate public participation in environmental decision making.


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## Introduction

ANEDO is a network of nine community legal centres in each State and Territory, specialising in public interest environmental law and policy. We provide comment to the National Human Rights Consultation ('Consultation') from the perspective of community legal centres ('CLCs') who are undertaking legal proceedings to protect the environment or to enforce breaches of environment protection legislation. In particular, EDOs focus on facilitating community participation in decision-making processes, to empower those communities to protect the environment.

EDOs witness, and are confronted with, the human rights implications of many environmental issues on a day to day basis. These range from the exclusion of communities from participating in decision-making processes, to the detrimental environmental, health and cultural impacts from development and industry felt by disadvantaged and disempowered communities. EDOs are therefore well placed and have a unique position, providing them with a depth of understanding about how human rights and the environment interact.

In addition, EDOs have previously commented on the interaction between human rights and the environment, considering the interdependence and indivisibility of all human rights, and the need to better protect environmental rights, when their respective governments considered human rights legislation.[1]

## Scope of Submission

This Submission considers the relevance of environmental issues in the context of human rights protection in Australia. Specifically, it considers the scope for inclusion of rights in a 'Human Rights Act' that would directly or indirectly protect and promote environmental rights.

The Submission addresses the Committee's Terms of Reference ('TORs'), namely:

1. Which human rights (including corresponding responsibilities) should be protected and promoted?

2. Are these human rights currently sufficiently protected and promoted?

3. How could Australia better protect and promote human rights?

ANEDO's central recommendation is that it supports the enactment of a 'Human Rights Act' protecting fundamental human rights. The legislation should include

[1] See submission by the ACT, 'The Case for Environment Related Human Rights', available at http://www.edo.org.au/edoact/

civil and political rights and economic, social and cultural rights, reflecting Australia's international obligations.

In this context, ANEDO also strongly recommends the inclusion of the specific right to a clean and healthy environment. The various options for the inclusion of such a right are discussed below.

While a Human Rights Act would go a long way to protecting and promoting fundamental human rights, ANEDO believes that such rights must be underpinned by non-legislative measures including education, monitoring, a stronger role for human rights bodies including the Australian Human Rights Centre and greater access to justice, including funding of NGOs (including environmental NGOs). We adopt the submission of the Human Rights Law Resource Centre – *Educate, Engage and Empower* – on this issue.

## Summary of Recommendations

### *TOR 1: Which human rights should be protected and promoted?*

All of Australia's international human rights obligations should be formally and consistently protected at domestic law. In particular, the civil and political rights contained in the International Covenant on Civil and Political Rights ('ICCPR') and the economic, social and cultural rights contained in the International Covenant on Economic, Social and Cultural Rights ('ICESCR') should be adopted and enshrined in a national instrument.

While a distinction is commonly made between the two classes of rights, with economic, social and cultural often having less force, ANEDO supports the equal recognition and protection of both kinds of rights. This is because rights do not exist in isolation and are often indivisible and interdependent.

For the purposes of this submission, ANEDO considers and supports the adoption of a narrower band of rights specifically relating to the human rights dimensions of the environment, and more particularly, of climate change. ANEDO submits that, although Australia is not explicitly bound at international law to protect environmental human rights, the treaties to which it is legally bound provide a framework within which environmental rights should be protected and promoted.

The 'first generation', civil and political rights that ANEDO endorses are:

- the right to life; and
- the right to public participation (encompassing the right to access to information, public participation in decision making, and access to justice).

The 'second generation', economic, social and cultural rights that ANEDO endorses include:

- the right to an adequate standard of living;
- the right to the highest attainable standard of health;
- the right to water;
- the right to food; and
- indigenous/cultural rights.

The imperative for the inclusion of these rights is particularly strong following the recent Concluding Observations and Recommendations of the United Nations Committee on Economic, Social and Cultural Rights ('CESCR'), which urged Australia to take urgent action on the human rights implications of climate change – especially in the context of the right to an adequate standard of living (encompassing the right to food, water and sanitation) for indigenous communities.

In line with current trends in international and comparative domestic law, ANEDO recommends that these first and second generation rights be drafted to facilitate a broad interpretation that acknowledges the interdependence of the rights. For example, the right to life should be interpreted to extend to the 'bare necessities of life', including the highest attainable standard of living, health and the right to a clean and healthy environment.

Further, and perhaps most importantly, ANEDO supports the inclusion of a 'third generation' right, namely, the right to a clean and healthy environment. This may be subsumed under other basic rights (such as the right to life or the right to health), however ANEDO would favour the inclusion of this right as a stand-alone right/responsibility, on the basis of growing support at international law, and in numerous domestic jurisdictions, for such a model.

Finally, ANEDO supports some reference in a Human Rights Act, perhaps in the preamble, to the responsibility of intergenerational equity.

*TOR 2: Are these human rights sufficiently protected and promoted?*

ANEDO believes that a healthy environment is necessary for the enjoyment of many human rights, and conversely human rights violations can lead to the degradation of the environment. However, human rights are not sufficiently protected in Australia in the context of the environment. Moreover, Australia does not adequately protect environmental rights, in particular the right to public participation in decision making. This is established by a number of case studies, which demonstrate how human rights issues frequently arise in the context of decision-making about proposed development, in relation to climate change, and in the context of environmental campaigners.

In essence, ANEDO submits that a human rights based approach is likely to lead to better environmental and human rights outcomes.

*TOR 3: How could Australia better protect human rights?*

ANEDO calls for the introduction of a Human Rights Act to ensure better outcomes in matters involving human rights and the environment. ANEDO recommends that a Human Rights Act should:

- require Parliament to prepare a 'statement of compatibility' when tabling new bills, and that a specialist Committee should report on the compatibility of bills with protected human rights;

- require courts to interpret legislation consistently with human rights (including permitting the use of international and comparative human rights jurisprudence), and, where necessary, issue a 'declaration of incompatibility' if legislation cannot be interpreted consistently with human rights;

- be binding on public authorities, including State and Territory authorities, and require that those authorities give proper consideration to human rights when making decisions and developing policy; and are prohibited from acting inconsistently with protected human rights;

- in the absence of the legislation binding State and Territory public authorities, include an 'opt-in' clause for States and Territories;

- include a separate cause of action, and provide a full range of remedies including damages;

- in the absence of a separate cause of action, include a complaint resolution mechanism to an independent body such as the Australian Human Rights Commission;

- specifically contain language in a preamble or objects clause that recognises the interdependence and indivisibility of human rights. It could also refer to the principle of intergenerational equity;

- include a provision requiring regular review of the legislation.

In addition to the above legislative measures, ANEDO also:

- calls for the implementation of additional non-legislative measures including education, monitoring, a stronger role for human rights bodies including the Australian Human Rights Commission and greater support for access to justice, including funding of NGOs;

- calls for the Australian government to ratify the *Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* 1998;

- recommends that the Australian Government implement comprehensive 'anti-SLAPP' legislation to strengthen protection of public participation;

- calls for the Australian Government to take a range of steps to better secure access to justice in environmental matters, and particularly to extend Commonwealth legal aid for public interest environmental matters, to provide enhanced funding of community legal centres including EDOs, and to introduce public interest costs orders in all jurisdictions, to avoid the risks of adverse costs orders in litigation brought in the public interest.

## Overview of environmental rights in the human rights context

There is considerable, and growing, recognition at the international level and in numerous countries around the world of the importance of protecting and promoting environmental rights within the human rights context.

The 2008 Earthjustice *Environmental Rights Report on Human Rights and the Environment* noted that a review of international court decisions, treaties, resolutions, and reports from commissions and committees shows:

> 'increasing recognition that environmental harms adversely affect various individual and community rights such as the rights to life, health, water, food, work, culture, development, and information and participation, and that a human rights-based approach to environmental protection (*e.g.*, right to a clean and healthy environment, right to water, right to nature protection, and other basic procedural and democratic rights) can provide an effective framework for addressing these issues.'[2]

This part of the Submission will outline the international basis for environmental rights protections in Australia and provide examples of how other countries around the world are providing legal protection of environmental rights.

### *Binding international law*

None of the international human rights instruments to which Australia is a party specifically protect environmental rights. However some environmental rights are considered to be indirectly or implicitly protected through other rights. These include the right to life, the right to health, the right to adequate housing, the right to water, the right to culture, the right to participate in public life, and the right to freedom of speech.

For example, the Universal Declaration on Human Rights ('UDHR') at article 25 states:

> 'Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services...'

Although there is no specific reference to the environment, the term 'including' indicates a non-exhaustive list of factors essential to an adequate standard of living.

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[2] Earthjustice, '*Environmental Rights Report on Human Rights and the Environment'* (2008), (Viewed online on 11 May 2009 at <http://www.earthjustice.org/our_work/issues/international/human_rights/ >).

The ICCPR states at article 6(1):

> 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.'

The right to a clean and healthy environment and the right to water are often considered to be precursors to the right to life.[3] The 2008 Earthjustice report[4] explains:

> 'The right to life, perhaps the most basic human right, has extensive environmental links. The most obvious connections manifest themselves in situations such as the Chernobyl nuclear disaster and the Bhopal gas leak, each of which fouled the environment in ways that directly contributed to the loss of many lives. Less obvious but equally devastating, extractive industries such as mining, logging and oil development deprive indigenous peoples of the physical basis for their cultures and subsistence, and thereby threaten their lives.'

The links between the right to health and environmental rights are obvious. Many health problems stem from or are impacted by environmental pollution. The right to health in the ICESCR at article 12 calls on States Parties to take steps for:

> 'the improvement of all aspects of environmental and industrial hygiene' and 'the prevention, treatment and control of epidemic, endemic, occupational, and other diseases.'

These rights will also be relevant in the context of climate change which is likely to lead to sea level rise and an increase in the number and severity of extreme weather events. These impacts will threaten the right to life and health among others, and therefore protection of these human rights, even though not directly related to environmental protection, can provide additional impetus for the need to act to prevent climate change.

Of all the treaties that Australia is a party to, the most direct protection of environmental rights is found within the *Convention on the Rights of the Child*. It refers to aspects of environmental protection in relation to the child's right to health. Artide 24 provides that parties shall take appropriate measures:

> 'to 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'.

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[3] Justice Brian Preston, '*The Environment and its Influence on the Law'* (2008) 82 Australian Law Journal 180.

[4] Earthjustice, '*Environmental Rights Report on Human Rights and the Environment'* (2008), (Viewed online on 11 May 2009 at <http://www.earthjustice.org/our_work/issues/international/human_rights/ >).

Therefore, although Australia is not specifically bound at international law to protect environmental rights, it can be argued that the treaties which Australia is legally bound do provide a framework within which environmental rights should be protected and promoted.

*Non-binding international law*

There are a number of other international instruments that specifically refer to environmental human rights but are not legally binding on Australia because they are draft texts, or they are not intended to be legally binding on Parties, or they are conventions to which Australia is not a party. Although they are not binding on Australia they are relevant to global developments in environmental rights protection, and show a possible future path for Australia to follow.

The 1972 Declaration of the United Nations Conference on the Human Environment[5], or 'Stockholm Declaration,' was the first international instrument that specifically recognised the indivisible link between the environment and human rights. It is a non-binding instrument. It states at Principle 1:

> 'Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.'

Similarly the 1992 Declaration on Environment and Development,[6] or 'Rio Declaration,' recognises the right of humans to a healthy and productive life in harmony with nature.

The most comprehensive of all the international texts on environmental rights is the 1994 Draft Principles on Human Rights and the Environment.[7] It contains a number of artides which outline the importance of environmental rights in the human rights context. The document was drafted by a group of international experts on human rights and environment protection on behalf of the UN Special Rapporteur for Human Rights and the Environment. It was never formalised as an international instrument and is not binding. Some of the key artides in the Draft Principles state:

> 'Human rights, an ecologically sound environment, sustainable development and peace are interdependent and indivisible" (Article 1)
>
> 'All persons have the right to a secure, healthy and ecologically sound environment. This right and other human rights, including civil, cultural,

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[5] The 1972 Declaration of the United Nations Conference on the Human Environment can be viewed at <http://www.unep.org/Documents.multilingual/Default.asp?DocumentID=97&ArticleID=1503>.
[6] The 1992 Declaration on Environment and Development can be viewed at <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=78&ArticleID=1163>.
[7] The 1994 Draft Principles on Human Rights and the Environment can be viewed at <http://www1.umn.edu/humanrts/instree/1994-dec.htm>.

> economic, political and social rights, are universal, interdependent and indivisible.' (Article 2)
>
> 'All persons have the right to an environment adequate to meet equitably the needs of present generations and that does not impair the rights of future generations to meet equitably their needs.' (Article 4)

The Draft Principles highlight the indivisibility of human rights and environmental rights. That is, a clean healthy environment is integral to the enjoyment of many other human rights such as the right to life, the right to health and food, the right to adequate housing. This document is often quoted by human rights experts and international human rights bodies as a model text of environmental rights protection.

Clearly, there is considerable recognition at the international level of the importance and indivisibility of environmental rights and human rights. It is not a new concept and not a radical concept. ANEDO believes that there is a strong foundation for the recognition and inclusion of environmental rights within a human rights framework.

*Comparative domestic jurisprudence*

The protection of environmental rights within a domestic human rights framework is not a new concept. Earthjustice summarised the constitutional recognition of environmental rights in a submission to the UN Commission on Human Rights in March 2005:

> 'Numerous constitutions of the nations of the world guarantee a right to a clean and healthy environment or a related right. Of the approximately 193 countries of the world, there are now 117 whose national constitutions mention the protection of the environment or natural resources. One hundred and nine of them recognise the right to a clean and healthy environment and/or the state's obligation to prevent environmental harm. Of these, 56 constitutions explicitly recognize the right to a clean and healthy environment, and 97 constitutions make it the duty of the national government to prevent harm to the environment. Fifty-six constitutions recognise a responsibility of citizens or residents to protect the environment, while 14 prohibit the use of property in a manner that harms the environment or encourage land use planning to prevent such harm. Twenty constitutions explicitly make those who harm the environment liable for compensation and/or remediation of the harm, or establish a right to compensation for those suffering environmental injury. Sixteen constitutions provide an explicit right to information concerning the

> health of the environment or activities that may affect the environment.'[8]

For example South Africa has specifically protected environmental rights in its Constitution:

> 'Everyone has the right (a) to an environment that is not harmful to their health or well being; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable and other legislative measures that (i) prevent pollution and degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.'[9]

In 2005 France amended its constitution to include environmental provisions, known as the Environment Charter. The Charter contains 10 articles covering rights and responsibilities of its citizens in relation to the environment. As it is incorporated into the Constitution it is legally binding and gives environmental rights and responsibilities the same status as other rights such as the right to life and universal suffrage. Article 1 of the Charter states:

> 'Everyone has the right to live in a balanced environment which shows due respect for health.'[10]

Even small developing countries such as East Timor have provided protection of environmental rights in their constitutions. Section 61 of the East Timor Constitution states:

> '1. Everyone has the right to a humane, healthy, and ecologically balanced environment and the duty to protect it and improve it for the benefit of the future generations.
>
> 2. The State shall recognise the need to preserve and rationalise natural resources.
>
> 3. The State should promote actions aimed at protecting the environment and safeguarding the sustainable development of the economy."[11]

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[8] Earthjustice, '*Environmental Rights Report on Human Rights and the Environment'* (2008), (Viewed online on 11 May 2009 at <http://www.earthjustice.org/our_work/issues/international/human_rights/>).

[9] *South African Constitution* s 24.

[10] The French Charter of the Environment 2004, Article 1 (available at http://www.cidce.org/pdf/Charte_ANGLAIS.pdf).

[11] Constitution of the Democratic Republic of Timor-Leste August 2001 can be viewed at <http://www.timor-leste.gov.tl/constitution/constitution.htm>.

There is significant precedent in other countries for the protection of the environment within a human rights framework. ANEDO believes that it would be appropriate for Australia to follow this approach.

*The role of responsibilities as well as rights*

In an environmental context, environmental responsibilities are as important as environmental rights. Numerous international and domestic human rights instruments set out the responsibilities of government and/or citizens to protect the environment, and sometimes to remedy environmental harm. For example, the French Environment Charter places specific responsibilities on its citizens to protect the environment and remedy any damage caused:

> 'Art 2 - Everyone is under a duty to participate in preserving and enhancing the environment.
>
> Art 3 - Everyone shall, in the conditions provided for by law, foresee and avoid the occurrence of any damage which he or she may cause to the environment or, failing that, limit the consequences of such damage.
>
> Art 4 - Everyone shall be required, in the conditions provided for by law, to contribute to the making good of any damage he or she may have caused to the environment.'

This overview establishes that at both an international law and comparative domestic law, environmental rights are consistently recognised as an indivisible part of broader human rights protections. It is not a radical or complex notion. On this basis ANEDO now addresses the TORs.

## TOR 1: Which human rights should be protected and promoted?

Australia should better protect both civil and political rights and also economic, social and cultural rights, reflecting Australia's international obligations.[12] ANEDO therefore supports the adoption of all the rights contained in the ICCPR and ICESCR. In this respect the ANEDO endorses the submission of the Human Rights Law Resource Centre ('HRLRC'): *A Human Rights Act for All Australians*.

However, for the purposes of this submission, given ANEDO's role and expertise, ANEDO considers and supports the adoption of those rights specifically relating to the human rights dimensions of the environment, and more particularly, of climate change.

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[12] The *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976 and ratified by Australia in 1980) and the *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 999 U.N.T.S. 3 (entered into force 1 March 1976 and ratified by Australia in 1975).

The 'first generation', civil and political rights that ANEDO endorses are the right to life, and the right to public participation (encompassing the right to access to information, public participation in decision making, and access to justice).

The 'second generation', economic, social and cultural rights that ANEDO endorses include the right to an adequate standard of living, the right to adequate food, water and sanitation, and the right to the highest attainable standard of health.

While a distinction is commonly made between the two classes of rights, with economic, social and cultural often having less force, ANEDO supports the equal recognition and protection of both kinds of rights. This is because rights do not exist in isolation and are often indivisible. This is particularly so in the context of environmental rights.

In addition to these rights, ANEDO supports the explicit inclusion of a 'third generation' right, namely, an independent right to a clean and healthy environment. It also supports some reference to the responsibility of intergenerational equity.

### *Civil and political rights*

### The right to life

The right to life is protected in article 3 of the UDHR and article 6 of the ICCPR. The right to life is broad, and extends to the 'bare necessities of life' including clean water, food, and basic health care.[13] Further, the right imposes positive obligations on States to protect the right.[14]

In recent times, international tribunals have made explicit links between the right to life and the environment.[15] The 1972 United Nations Conference on the Human Environment declared that 'man's environment, the natural and the man-

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[13] *Francis Corali v Union Territory of Delhi* (AIR 1981 SC 746) per Bhagwati J. See also *Olga Tellis & Ors v Bombay Municipal Corporation* (AIR 1986 SC 180).

[14] See General Comment No. 6 (1994) UN Human Rights Committee: The Right to Life, U.N. Doc. HR/GEN/1/Rev1 6 at [1] and [5].

[15] See for example *Morka and the Social and Economic Action Rights Centre v Nigeria* Comm. 155/96 (Nigeria 2002) where oil production by the military government of Nigeria was found to be a threat to the rights to life, health and the environment contained in the African Charter on Human and People's Rights (viewed online on 5 June 2009 at http://www.elaw.org/system/files/ng.afr.commission.hrights.pdf); see also M Doelle, 'Climate Change and Human Rights: The Role of International Human Rights in Motivating States to Take Climate Change Seriously' (2004) 179 *Macquarie Journal of International & Comparative Environmental Law* 186, pp 200-205, which discusses cases that have previously recognised the link between environmental health and the right to life (viewed online at <http://www.law.mq.edu.au/html/MqJICEL/vol1/vol1-2_2.pdf> on 5 June 2009).

made, are essential to his well-being and to the enjoyment of basic human rights – even the right to life itself.' [16]

International jurisprudence has found the right to life to have been breached in numerous instances of environmental neglect. For example, in *Öneryildiz v Turkey*, a Turkish national and his extended family were living in a slum on the edge of a rubbish dump. The methane created by decomposing refuse caused an explosion that killed a large number of people, including the applicant's relatives. The Court found that the Turkish government was in breach of its duty to protect the right to life – 'which can be envisaged in relation to environmental issues'.[17]

In *Gbemre v Shell Petroleum Development Co Nigeria*[18] the Federal High Court of Nigeria found that uncontrolled gas flaring was a breach of the right to life, which included a right to a healthy environment.[19]

The UN HRC has noted that nuclear weapons not only threaten the right to life because they may be used during hostilities; they threaten the right to life by potentially contaminating the environment with radiation. On this construction, pollutants contaminating the environment with a comparable effect may also be seen as a threat to the right to life.[20]

In the Asia Pacific region more innovative interpretations of right to life have been explored. In India, the constitutionally protected right to life has been interpreted by the courts as implicitly including the right to a clean environment. For example, in *Charan Lal Sahu v Union of India*, the Supreme Court interpreted the provision to include the right to a wholesome environment.[21] In *Subhash Kumar v State of Bihar*,[22] the Supreme Court went further, holding that the right to life encompassed the enjoyment of pollution-free water and air for full enjoyment of life. This case is significant because it not only confirms the link between a healthy environment and the realisation of the right to life, but it also recognises a positive obligation on the State to address environmental harms, including through the effective implementation of extant laws and policies.[23]

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[16] Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration). Available at <http://www.unep.org/Documents.multilingual/Default.asp?DocumentID=97&ArticleID=1503>.
[17] Application no. 48939/99, ECHR, see [64].
[18] No. FHC/B/DS/53/05 (Nigeria 2005), (viewed online on 30 January 2009 at <http://www.climatelaw.org/cases/case-documents/nigeria/ni-shell-nov05-judgment.pdf>).
[19] *Ibid*, p.3 para c
[20] *Human Rights and the Environment: Final Report and Recommendations*, (2007), Asia Pacific Forum 12, Australia at 17-19.
[21] *Charan Lal Sahu v Union of India* (1990) AIR SC 1480.
[22] (1991) AIR SC 420; (1991) (1) SCC 598.
[23] *Human Rights and the Environment: Final Report and Recommendations*, (2007), Asia Pacific Forum 12, Australia at 10-11.

The Malaysian Court of Appeal has also interpreted the right to life broadly.[24] So far, these approaches are relatively novel and unique to a small number of jurisdictions.[25]

Climate change, both in Australia and around the world, will impact upon the right to life. In Australia, rising sea levels, changing weather patterns and increases in extreme weather events will affect food and water supplies, and pose risks to basic infrastructure, in some instances requiring the relocation of entire communities.[26] Further, rising temperatures will cause the spread of mosquito-borne diseases which impact on the health of whole communities. Indigenous communities are likely to be particularly affected by environmental degradation, including climate change.[27] Coastal and island communities will be threatened by the degradation of reefs and oceans and rising sea levels, most of all subsistence communities who rely on these sources for food.[28]

By compromising other basic human rights such as the right to food, water, health and a proper standard of living – not to mention the very real prospect of loss of life in certain circumstances – the absolute right to life is being, and will continue to be, breached by the failure of Australia to address, and redress, environmental problems, and particularly climate change, through a human rights framework.

**Participatory rights**

In addition to rights that directly and indirectly protect people's right to a clean and healthy environment, recognition of 'procedural rights' is important to ensure environmental rights are fully realised:

> 'No matter how strong a substantive right to a clean environment might be on paper, it would be meaningless without the procedural (and related) rights necessary to pursue respect, protection and promotion of that right.'[29]

A number of international instruments enshrine the right to public participation in governance and legal systems,[30] including through the right to access to

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[24] *Human Rights and the Environment: Final Report and Recommendations*, (2007), Asia Pacific Forum 12, Australia at 19 – 'extending beyond mere existence to the quality of life, and '[including] the right to live in a reasonably healthy and pollution free environment'.

[25] *Ibid* 58–9, 65–6

[26] 'King tides in 2005 and 2006 in the Torres Strait have highlighted the need to revisit short-term coastal protection and long-term relocation plans for up to two thousand Australians living on the central coral cays and north-west islands.' K Hennessy et al '*Contribution of Working Group II to the Fourth Assessment Report to the Intergovernmental Panel on Climate Change* 523 (M. Parry et al. eds., Cambridge University Press 2007), (viewed online on 6 February 2009 at http://www.ipcc-wg2.org).

[27] D Green, *Climate Change and Health: Impacts on Remote Indigenous Communities in Northern Australia* (2006) 8 CSIRO pp 7-9 (viewed online on 6 February 2009 <http://www.cmar.csiro.au/e-print/open/greendl_2006.pdf >)

[28] T.P. Hughes et al**, '**Climate Change, Human Impacts, and the Resilience of Coral Reefs' (August 2003) 301 *Science* at 929.

[29] Marie Soveroski, '*Environment Rights versus Environmental Wrongs: Forum over Substance?*' (2007) 16(3) Review of European Community and International Environmental Law at 261.

information, public participation in public decision-making, access to justice and the right to peaceful assembly.[31]

The *Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters* ('Aarhus Convention') is the most comprehensive international instrument on procedural environmental rights. It entered into force in 2001, is legally binding and has over 40 parties largely in the European Union (although not Australia). It creates rights to protect the 'three pillars' of public participation: access to information, public participation in decision making and access to justice in environmental matters. The objective of the Convention contained in Article 1 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.'

The Aarhus Convention also recognises that citizens may need assistance in order to exercise these rights, and that governments should provide that assistance.

The Aarhus Convention is widely acknowledged to represent international best practice in respect of public participation in government decision making on matters that affect the environment. As the United Nations Economic Commission for Europe ('ECE'), acknowledges:

> 'The Aarhus Convention is a new kind of environmental agreement. It links environmental rights and human rights. It acknowledges that we owe an obligation to future generations.
> .....
> The subject of the Aarhus Convention goes to the heart of the relationship between people and governments. The Convention is not only an

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[30] A number of these treaties are discussed in the Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment 14-16 January 2002 *Background Paper 1: Human Rights and Environment Issues in Multilateral Treaties Adopted between 1991 and 2001* (available at http://www.unhchr.ch/environment/bp1.html) Treaties include the *Protocol on Environmental Protection on the Conservation of Antarctic Fauna and Flora; Convention on Biological Diversity; Convention on Persistent Organic Pollutants*.

[31] For example the 'Rio Declaration' states: "Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided." Principle 10 of *The 1992 Declaration on Environment and Development*. See also Principle 20 and 22.

environmental agreement, it is also a Convention about government accountability, transparency and responsiveness.'[32]

A number of international environmental treaties that are binding on Australia also specifically protect participatory rights. For example the *UN Framework Convention on Climate Change* (1994) requires parties to:

> '(a) Promote and facilitate at the national and, as appropriate, subregional and regional levels, and in accordance with national laws and regulations, and within their respective capacities:
>
> (i) the development and implementation of educational and public awareness programmes on climate change and its effects;
>
> (ii) public access to information on climate change and its effects;
>
> (iii) public participation in addressing climate change and its effects and developing adequate responses.'[33] (Article 6)

Other basic rights contained in international instruments such as the right to health and the right to water[34] are intended to be interpreted and applied so that national strategies are developed through public participation.

International jurisprudence also recognises the link between public participation, basic human rights such as the right to life, and the environment. For example, in *Guerra and others v Italy*, the European Court of Human Rights ('ECHR') found that the failure to provide the local population with adequate access to information about the risks in relation to a nearby chemical factory in the case of an accident was a breach of their right to life and their right to family life.[35]

An example at a national level of how public participation in environmental issues can be protected is the Constitution of Finland. It provides that public authorities must 'endeavour to guarantee ... the right to a healthy environment and for everyone the possibility to influence the decisions that concern their own living environment' (section 20).

As the above discussion shows, international and comparative domestic law has recognised that procedural rights are fundamental to the ability of people to protect themselves from environmental harms. ANEDO submits that Australia is

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[32] See http://www.unece.org/env/pp/welcome.html (4/6/09)
[33] United Nations Framework Convention on Climate Change 1994 (available at <http://www.austlii.edu.au/au/other/dfat/treaties/1994/2.html>).
[34] See for example General Comment No 15 (2002), UN Committee on Economic Social and Cultural Rights at [48] (national water strategies require public participation).
[35] *Guerra and Others v Italy* (116/1996/735/932) (1998) European Court of Human Rights (Accessed online on 5 June 2009 at http://www.eel.nl/cases/ECHR/guerra.htm).

currently lacking in this area. A human rights framework would provide better recognition and protection of these rights in Australia.

Ideally, ANEDO would endorse a provision, similar to the Constitution of Finland above, that goes further to specifically protect procedural rights within the context of environmental rights.

### *Economic, social and cultural rights*

#### The right to an adequate standard of living

The right to an adequate standard of living is contained in article 11 of the ICESCR and article 25 of the UDHR. It is one of the most fundamental human rights, and includes the right to food, water, sanitation, clothing, housing and a healthy environment. The right is not prescriptive, and is intended to be interpreted broadly.[36]

It has been recognised at international law that poverty and the potential infringement of human rights are intrinsically linked. Poverty and environmental degradation are also linked. In this sense, it is clear that 'human rights abuses related to poverty can be both cause and effect of environmental problems'.[37]

The right to an adequate standard of living is not expressly protected in Australian law. However, in what appears to have been an historic first for a UN treaty body, the CESCR recently urged Australia to take urgent action on the human rights implications of climate change. It stated (at para 27):

> 'The Committee is concerned at the negative impact of climate change on the right to an adequate standard of living, including on the right to food and the right to water, affecting in particular indigenous peoples, in spite of the State party's recognition of the challenges imposed by climate change.'

The Committee recommended that Australia:

> 'take all the necessary and adequate measures to ensure the enjoyment of the right to food and of the right to affordable drinking water and sanitation in particular by indigenous peoples, using a human-rights based approach, in line with the Committee's general comments No. 15 on the right to water (2002), No.14 on the right to health (2000) and No. 12 on the right to food (1999).'[38]

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[36] General Comment No 15 (2002), UN Committee on Economic Social and Cultural Rights at [3]. See also CESCR General Comment No 12 which affirms that the right, which is "indivisibly linked to the inherent dignity of the human person and is indispensable for the fulfilment of other human rights", requires the adoption of appropriate environmental and social policies, at both the national and international levels.

[37] Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment (2002) Background Paper No. 3, 'The Intersection of Human Rights and Environmental Issues: A review of institutional developments at the international level' (viewed online on 5 June 2009 at http://www.unhchr.ch/environment/bp3.html).

[38] Concluding Observations of the Committee on Economic, Social and Cultural Rights on Australia, advance unedited version released 22 May 2009. Available at <http://www2.ohchr.org/english/bodies/cescr/docs/AdvanceVersions/E-C12-AUS-CO-4.doc>

These recommendations make clear the recognition by international treaty bodies of the links between human rights and environmental rights and responsibilities. They also suggest that Australia may be lacking in this area, and create an imperative for the Australian Government to address various pressing environmental problems – most particularly from the impacts of climate change, through a human rights framework.

## The right to health

The right to the highest attainable standard of health is contained in both article 25 of the UDHR and article 12 of the ICESCR. The latter explicitly requires States Parties to improve all aspects of environmental and industrial hygiene (art 11 (2)(b)). The right to health is a fundamental human right and a pre-condition for the enjoyment of many other rights including the right to life.[39]

The link between the individual right to health and the State's responsibility to maintain a clean and healthy environment is well recognised at international law.[40] In 2001 the World Health Organisation stated that:

> '[h]uman rights and sustainable development are intimately linked, especially as concerns the health aspects. The right to health and indeed to life cannot be achieved without basic rights to a safe and healthy environment, including water, air and land; and to the life-supporting systems that sustain life on earth for future generations.'[41]

International jurisprudence has made a link between the right to health and the right to a clean environment. In *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, the state-owned Nigerian National Company and the Shell Petroleum Development Corporation (in which the former had a majority of shares) had been exploiting oil reserves with no regard for the environment or health of the local communities in Ogoniland, Nigeria. Toxic wastes were deposited into the local environment and waterways but no facilities were put in place to prevent the wastes from spilling into villages. As a result, water, soil and air contamination brought about serious short-term and long-term health problems such as skin infections, gastrointestinal and respiratory ailments, increased cancer rates, and neurological and reproductive complications.

The African Commission found the military government of Nigeria in breach of, among other things, violations of the right to health and the right to a clean

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[39] "The protection of health and physical integrity is, in my view, … closely associated with the right to life". Per Judge Jambrek in *Guerra and Others v Italy* (116/1996/735/932) (1998) European Court of Human Rights (Accessed online on 5 June 2009 at http://www.eel.nl/cases/ECHR/guerra.htm.

[40] See for example General Comment No14 (2000) UN CESCR, on the right to the highest attainable standard of health (2000).

[41] Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment (2002) Background Paper No. 3, 'The Intersection of Human Rights and Environmental Issues: A review of institutional developments at the international level' (viewed online 5 June 2009 at < http://www.unhchr.ch/environment/bp3.html>), quoting WHO.

environment by contaminating water, soil and air, which harmed the health of the Ogoni people, and by failing to protect the community from the harm caused by the oil companies.[42]

This case is significant for its recognition and enforcement of second and third generation rights, which have commonly been dismissed as vague and unenforceable.[43]

The right to health is not explicitly protected in Australia. Yet, the population is particularly exposed to health risks arising from climate change and other environmental degradation.[44] A human rights framework could address these significant threats.

## The right to water

The right to water is indirectly contained in articles 11 and 12 of the ICESCR. It is recognised at international law to be 'fundamental for life', and so a 'prerequisite for the realisation of other human rights'.[45] The right is inextricably related to the right to the highest attainable standard of health,[46] the right to adequate housing and adequate food,[47] and the right to life.

The right to water has been recognised in a wide range of international documents, including treaties, declarations, and other standards.[48] Further, it is commonly

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[42] See in particular [52] – [54].

[43] The Commission stated that "these rights recognise the importance of a clean and healthy environment that is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual".

[44] For example, decreased crop yields will lead to food shortages, rising temperatures will lead to the spread of tropical diseases such as malaria, heat waves will threaten the life and health of large parts of the population, especially the young, the sick and the elderly. For further specific details on IPCC and Stern Review projections on the effects of climate change on human health, see the International Council on Human Rights' 'Climate Change and Human Rights: A Rough Guide' (2008), pp 99-100. Viewed at < http://www2.ohchr.org/english/issues/climatechange/docs/submissions/136_report.pdf> on 5 June 2009.

[45] See CESCR General Comment No 15 (2002) on the right to water at [1].

[46] See CESCR General Comment No. 14 (2000) on the right to the highest attainable standard of health, at [11], [12], [15], [34], [36], [40], [43] and [51].

[47] See CESCR General Comment No. 4 (1991) on the right to adequate housing at [8(b)] and [8(d)]. In relation to the right to adequate food, see the report by the Special Rapporteur of the Commission on the right to food, Mr. Jean Ziegler (E/CN.4/2002/58), submitted in accordance with Commission resolution 2001/25 of 20 April 2001.

[48] In the environmental context, see Agenda 21, Report of the United Nations Conference on Environment and Development (Earth Summit), Rio de Janeiro, 1992 (para 18.47: Protection of the quality and supply of freshwater resources); The Dublin Statement on Water and Sustainable Development, International Conference on Water and the Environment (UN, 1992); Resolution 2002/6 of the United Nations Sub-Commission on the Promotion and Protection of Human Rights on the promotion of the realisation of the right to drinking water. See also the report on the relationship between the enjoyment of economic, social and cultural rights and the promotion of the realisation of the right to drinking water supply and sanitation (E/CN.4/Sub.2/2002/10) submitted by the Special Rapporteur of the Sub-Commission on the right to drinking water supply and sanitation, Mr. El Hadji Guissé.

accepted that the right to potable water will be violated where water is polluted, unsafe, or toxic, including through omission by the State.[49]

In Australia, current environmental practices, as well as climate change, are affecting the right to water: water shortages in much of the south of the country are affecting the ability to grow food for the population,[50] as well as compromising the quality and quantity of drinking water. In the north, extreme weather events and sea level rises are already intruding into fresh water supplies.

Aside from the critical health and environmental impacts on water as a result of climate change in Australia, it is important also to recognise the cultural value that can be ascribed to water, particularly by Indigenous Australians. Article 25 of the *UN Declaration on the Rights of Indigenous Peoples*, to which Australia has very recently indicated its support,[51] specifically recognises the spiritual relationship that Indigenous peoples can maintain with waters and coastal seas.

The effects on water supply and distribution as a result of climate change are likely to be particularly dire in Australia. By protecting the right to water within a human rights framework, decisions by public authorities will be required to turn on not just economic imperatives but also social and environmental imperatives.

**The right to food**

The right to adequate food is subsumed under the right to an adequate standard of living (article 11 ICESCR). The right has been defined as 'inherent', extending to 'regular, permanent and unrestricted access, either directly or by means of financial purposes ... to adequate and sufficient food corresponding to the cultural traditions of the person'.[52]

International commentary has recognised the intrinsic link between the human right to food and the right to a healthy environment. In General Comment 12, the CESCR has acknowledged that the right requires the adoption of appropriate environmental policies and hygienic practices, to be fully realised at a national level.[53]

Soaring food prices, desertification and drought triggered by climate change, the expansion of mining into food producing regions, and growing populations are all

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[49] See CESCR General Comment No 15 (2002) on the right to water at [8], [16], [43] and [44].
[50] For example, the Lower Murray River now experiences drought every second year instead of every twentieth, and the Murray River currently has the lowest inflow in recorded history. The Garnaut Review has indicated that a one percent increase in maximum temperature will result in a 15% decrease in streamflow in the Murray-Darling Basin. See R Garnaut, *The Garnaut Climate Change Review, Draft report*, 4 July 2008, p 147.
[51] See information provided by the Australian Human Rights Commission at: <http://www.hreoc.gov.au/social_justice/declaration/index.html>
[52] Jean Xiegler, *The Right to Food*, UN Special Rapporteur on the right to food to the Commission on Human Rights, 57th session, 2001 (UN Doc E/CN.4/2001/53 at p 2).
[53] CESCR General Comment 12 (1999) on the right to adequate food at [4] and [10].

putting pressure on the right to food in Australia. To ensure that economic and other imperatives do not overwhelm other, equally legitimate human rights and environmental imperatives, the right to food should be included in a human rights framework.

## Indigenous and cultural rights

Article 27 of the ICCPR protects the right of minority groups, including indigenous groups, to enjoy their own culture, to profess and practise their own religion, and to use their own language. The UN *Declaration on the Rights of Indigenous Peoples* similarly enshrines the right of indigenous people to practice and revitalise their cultural practices, customs and institutions.[54] Indeed, it contains specific protections against environmental harms that would threaten the traditional way of life of indigenous people. The Draft Principles on Human Rights and the Environment state (art 14):

> '... Indigenous peoples have the right to protection against any action or course of conduct that may result in the destruction or degradation of their territories, including land, air, water, sea-ice, wildlife or other resources.'

The UN HRC has stated that the enjoyment of these rights may require positive legal measures of protection and means to ensure the effective participation of minority communities in decisions which affect them.[55]

International jurisprudence made the link between indigenous rights and climate change in 2005 in what has since become known as the Inuit case. In this case an alliance of Inuit from Canada and the United States filed a petition with the Inter-American Commission on Human Rights. The petition alleged that the human rights of the plaintiffs had been infringed and were being further violated due in large part to the failure of the United States to curb its greenhouse gas emissions. The petition alleged that 'the effects of global warming constitute violations of Inuit human rights for which the United States is responsible'.[56] Although the petition was not ultimately successful, it was innovative in several respects, not least in its recognition of the link between indigenous rights and climate change.[57]

It is clear that climate change and other environmental degradation can affect minority groups' culture and livelihoods. In Australia, this is likely to be particularly applicable to Aboriginal and Torres Strait Islander communities. For example, the Torres Strait are already feeling the effects of sea level rise which is

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[54] See arts 5, 9 and 11.
[55] HRC General Comment 23 (1994) on the rights of minorities at [7].
[56] *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.* Submitted by Sheila Watt-Cloutier, with the support of the Inuit Circumpolar Conference, on Behalf of All Inuit in the Arctic Regions of the United States and Canada (7 December 2005) p 70.
[57] For more detail on this case see the International Council of Human Rights' 2009 report: *Climate Change and Human Rights: A Rough Guide* at 41.

impacting on water supply, and will have serious cultural consequences for communities forced to relocate from their traditional lands.

A human rights framework for the protection of indigenous and cultural rights would go far in protecting traditional practices as well as livelihoods, for Australian indigenous groups. This approach has been recently and forcefully supported by the CESCR in its Concluding Observations on Australia, where it urged the Australian Government:

> 'to reduce its greenhouse gas emissions and to take all the necessary and adequate measures to mitigate the adverse consequences of climate change, impacting the right to food and the right to water for indigenous peoples, and put in place effective mechanisms to guarantee consultation of affected Aboriginal and Torres Strait-Islander peoples, so to enable them to exercise their rights to an informed decision as well as to harness the potential of their traditional knowledge and culture (in land management and conservation).'[58]

Clearly there is strong international support for the recognition of indigenous rights within a human rights framework. Links have regularly been made between such a right and the right to a clean and healthy environment, and Australia has been called upon to address these issues in terms. On this basis, the arguments in favour of the inclusion of a right to culture in a national human rights instrument in Australia are compelling.

### *Third Generation Rights*

### The right to a clean and healthy environment

As discussed above, there is growing support for the idea that the protection of the environment is 'a vital part of contemporary human rights doctrine and a *sine qua non* for numerous human rights, such as the right to health and the right to life'.[59] The Office of the High Commissioner for Human Rights, together with the United Nations Environment Programme, have commented that:

> 'Nearly all global and regional human rights bodies have considered the link between environmental degradation and internationally-guaranteed human rights. In most instances, the complaints brought have not been based upon a specific right to a safe and environmentally-sound environment, but rather upon rights to life, property, health, information, family and home life.

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[58] Concluding Observations of the Committee on Economic, Social and Cultural Rights on Australia, advance unedited version released 22 May 2009, at [27]. Available at <http://www2.ohchr.org/english/bodies/cescr/docs/AdvanceVersions/E-C12-AUS-CO-4.doc>

[59] C G Weeramantry J, in his separate opinion in the ICJs decision in *Gabcikovo-Nagymaros Project (Hungary v Slovakia)* 1997 ICJ 1997 at 110; 37 ILM 162 at 206 (1998), viewed at < http://www2.ohchr.org/english/issues/climatechange/docs/submissions/Australia_HR_Equal_Opportunity_Commission_HR_ClimateChange_4.pdf> at 3.

> Underlying the complaints, however, are instances of pollution, deforestation ... and other types of environmental harm. It may be asked whether or not a recognised and explicit right to a safe and environmentally-sound environment would add to the existing protections and further the international values represented by environmental law and human rights.'[60]

In 2007, the Advisory Council of Jurists for the Asia-Pacific Forum on National Human Rights Institutions recommended that the right to a healthy environment should be explicitly protected by human rights law, and not just as an 'add-on' to other existing rights.[61]

Arguably, it is the many nations worldwide who explicitly recognise the right to a clean and healthy environment in their constitutions who lead the way on this issue.[62] For example, article 24 of the *African Charter on Human and Peoples' Rights* reads: 'All peoples shall have the right to a general satisfactory environment favourable to their development.'[63] The Protocol of San Salvador to the American Convention on Human Rights (1988) provides (at article 11) that:

1. Everyone shall have the right to live in a healthy environment and to have access to basic public services.

2. The States Parties shall promote the protection, preservation, and improvement of the environment.

Article 21 of the Netherlands Constitution (1983) provides that 'it shall be the concern of the authorities to keep the country habitable and to protect and improve the environment'.

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[60] Joint report of the Office of the High Commissioner for Human Rights and United Nations Environment Program, 'Human Rights and the Environment: Jurisprudence of Human Rights Bodies (Background Paper No. 2), January 2002, available at <http://www.unhchr.ch/environment/bp2.html>.

[61] "The indivisibility and interdependence of human rights has long been recognised. In addition, … many human rights rely on environmental quality for their full realisation… The ACJ's primary recommendation therefore is that [national human rights institutions] advocate the adoption and implementation of a specific right to an environment conducive to the realisation of fundamental human rights". See Asia Pacific Forum, *Human Rights and the Environment: Final Report and Recommendations*, (2007), AFP 12 at p 33.

[62] Asia-Pacific Forum, *Human Rights and the Environment: Final Report and Recommendations*, (2007), AFP 12 at p 30.

[63] This right has been interpreted to include an obligation on the part of the State to secure ecologically sustainable development and use of natural resources; an obligation to permit independent scientific monitoring of threatened environments, and the publication of those studies for the benefit of the public; a duty to monitor and provide appropriate information to those communities exposed to hazardous materials and activities; and the provision of meaningful opportunities for individuals to be heard and to participate in the development of decisions affecting their communities. See S. T. Ebobrah, 'Towards Effective Realisation of the Right to a Satisfactory Environment on Human and Peoples' Rights (2006) (viewed online on 9 June 2009 at < http://www.up.ac.za/dspace/bitstream/2263/1210/1/ebobrah_st_1.pdf>), extrapolating from the decision in *The Social and Economic Rights Action Centre and Centre for Economic and Social Rights v Nigeria* (2001) AHRLR 51 (ACHPR 2001).

ANEDO believes that the incorporation of the right to a clean and healthy environment in a national human rights instrument would serve to underpin other fundamental rights such as the right to life and the right to health. It would also:

> 'add weight to the operative provisions for the implementation of the procedural rights of access to information, participation in decision-making and access to justice by strengthening the legal and philosophical underpinning of these rights. It would indicate that these procedural rights are not ends in themselves, but are meaningful as means towards the end of protecting the individual's substantive right to live in a healthy environment.'[64]

In light of the strong consensus among nations of the importance of enshrining environmental rights in human rights instruments, and the growing support at international law for a unifying right or principle, ANEDO supports the explicit recognition by Australia of the right to a clean and healthy environment in a Human Rights Act.

**The responsibility of intergenerational equity**

The concept of intergenerational equity says that humans 'hold the natural and cultural environment of the Earth in common both with other members of the present generation and with other generations, past and future'.[65] It contends that the earth is inherited from previous generations and an obligation exists to pass it on in reasonable condition to future generations. Intergenerational equity is central to the idea of sustainable development.[66]

This concept has been explored and litigated in various contexts internationally. For example, in the case of *Oposa v Factoran*,[67] children from all over the Philippines filed a case to compel the Secretary of the Department of Environment and Natural Resources to cancel all existing Timber License Agreements and to prevent him from renewing or processing any new applications, on the basis on the relatively novel theory of 'intergenerational justice'. The children claimed that they represented not only their generation, but also 'generations yet unborn.'[68]

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[64] Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment (2002), quoting the Economic Commission of for, Background Paper No. 3, 'The Intersection of Human Rights and Environmental Issues: A review of institutional developments at the international level' (viewed online on 5 June 2009 at < http://www.unhchr.ch/environment/bp3.html>).

[65] E B Weiss, *In fairness to future generations: international law, common patrimony and intergenerational equity*, 1989.

[66] An oft-quoted definition of sustainable development is "development that meets the needs of the present without compromising the ability of future generations to meet their own needs." First coined in *Our Common Future*, a report from the UN World Commission on Environment and Development, 1987.

[67] 224 SCRA 792 (1993); reprinted in 33 I.L.M. 173 (1994).

[68] *Ibid* at 802.

It is evident that environmental degradation, particularly in the context of climate change, raises significant issues on matters of equity between developed and developing nations (the former being largely responsible for climate change to date; the latter bearing the greatest burden), the rich and poor (the latter being far less equipped to adapt to, and pay for, the effects of climate change) and Indigenous and non-Indigenous Australians (the former bearing a disproportionate impact of climate change, given their relationship to the land, their cultural practices, and their relative disadvantage within the community). Further, the negative implications for future generations of a 'business as usual' approach to environmental practices are significant.

In essence, climate change and other environmental degradation in Australia and beyond undermines the human rights of those most vulnerable to its impacts – economically, geographically, and physically. Further, an irresponsible approach to addressing these issues has had, and will continue to have, significant effects on future generations of Australians. By incorporating the notion of intergenerational equity into a human rights framework in Australia, such problems may be addressed and redressed.

**Summary and Recommendations:**

- ANEDO recommends that all of Australia's international human rights obligations should be formally and consistently protected at domestic law. In particular, those contained in the ICCPR and the ICESCR;
- In particular, ANEDO recommends that the following rights be included in a Human Rights Act:
  - the right to life;
  - the right to public participation, including the right to freedom of expression, access to information, access to justice, and peaceful assembly;
  - the right to an adequate standard of living;
  - the right to an adequate standard of health;
  - the right to water;
  - the right to food;
  - the right of indigenous peoples to enjoy their culture; and
  - the right to a clean and healthy environment
- ANEDO recommends that the above rights be drafted to facilitate a broad interpretation, that recognises the interdependence of these rights. For example, the right to life necessitates the right to health, and adequate standard of living, and a clean and healthy environment;
- ANEDO recommends that, in line with the recently released Concluding Observations of the UN CESCR, the human rights implications of climate change be specifically addressed within a Human Rights Act;

- ANEDO recommends the inclusion in a Human Rights Act of a statement, perhaps in the Preamble, that recognises the importance of intergenerational equity, particularly in the context of climate change. For example:
    - *'This Charter is founded on the principle that all persons, communities and peoples have the right to a safe, secure, healthy and ecologically sound environment that is protected, preserved and improved both for the benefit of present and future generations, and in recognition of the inherent value of ecosystems, biodiversity and existing climate systems'.*

## TOR 2: Are these human rights sufficiently protected and promoted?

### *How are human rights currently protected in Australia?*

Human rights are currently protected through the Australian legal system in a number of limited ways. These include some constitutional protections (such as the implied right to vote and a limited implied right to freedom of political communication); specific legislation implementing international treaties to which Australia is a party (such as the *Racial Discrimination Act 1975* (Cth)[69] and the *Sex Discrimination Act 1984* (Cth));[70] and the common law (which together with evidence law, for example, has established a right to fair trial).[71]

Nevertheless, it is important to note that States have legislation protecting some human rights (such as discrimination laws), and the ACT and Victoria have specific human rights legislation (although notably these are limited to civil and political rights). [72]

However, there are no direct legal protections for civil and political, nor economic, social and cultural rights at the federal level, despite the fact that Australia is a signatory to both international conventions establishing these human rights.[73] Further, Australian law does not protect any specific environmental rights, such as the right to a clean and healthy environment.

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[69] Which implements Australia's obligations under the *International Convention on the Elimination of All Forms of Racial Discrimination 1965* opened for signature 21 December 1965, 660 U.N.T.S. 195 (entered into force 4 January 1969).

[70] Which implements Australia's obligations under the *Convention on the Elimination of All Forms of Discrimination Against Women 1979* opened for signature 18 December 1979, 1249 U.N.T.S. 13 (entered into force 3 September 1981).

[71] See Justice Brian Preston, 'The Environment and its Influence on the Law' (2008) 82 *Australian Law Journal* 180, and also 'Lets Talk About Rights' toolkit prepared by the Australian Human Rights Commission <http://www.hreoc.gov.au/letstalkaboutrights/info.html> at 19 May 2009.

[72] See the *Human Rights Act 2004* (ACT) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

[73] The *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976) and the *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 999 U.N.T.S. 3 (entered into force 1 March 1976).

*Are human rights sufficiently protected by environmental legislation?*

*Existing legislation*

A plethora of legislation in Australia's States and Territories, and some at the federal level, aims to protect the environment, regulate the use and development of land, and manage natural resources. These include planning laws, pollution laws, threatened species laws and laws regulating forestry and water resources. None of these laws include human rights concerns as being applicable in their implementation.

In accordance with these laws, government bodies are continually making decisions about land use and development that impact not only on the natural environment, but on the lives of people affected by those actions. For example, decisions made by Government to permit extractive industries to be developed that may lead to water pollution have the potential to impact on the health and access to water for communities living in the vicinity of that industry. Decisions made often deliberately exclude members of the public from participating in that process. As such, those communities most affected by a decision, and the accompanying environmental impacts, are excluded from the decision making process. As noted in TOR 1 above, such circumstances may give rise to a breach of a number of human rights, including the right to life, the right to an adequate standard of living, the right to health, the right to culture and the right to participate in public life.

*Recognition and application of human rights*

ANEDO submits that the current laws that regulate and protect the environment are often inadequate in ensuring that broader social and human rights concerns are given the same consideration as economic imperatives. As the law in Australia currently stands, there is no requirement for any public authorities to consider the human rights implications of the decisions it makes in the context of the environment.

ANEDO submits that there are many examples of situations where human rights are either violated or ignored in the environmental context. We explore some case studies by way of example below. The case studies have been grouped into three broad areas:

- The human rights implications in decision-making about development;
- The human rights implications of climate change; and
- The human rights of environmental campaigners.

These areas are not exhaustive in terms of where human rights issues may arise in the context of the environment. Nevertheless, they are a good representation of the contexts within which human rights implications can arise through the public

interest environmental law work undertaken by the nine EDO offices that constitute ANEDO.

*State vs Federal responsibility for environmental matters*

The primary responsibility for environmental regulation in Australia lies with the States and Territories. For this reason the case studies for the most part involve issues associated with State and Territory laws and public authorities and may have more limited application in the federal context. However, they nevertheless serve to illustrate the application of human rights to environmental policy and regulation.

The primary piece of environmental legislation at the federal level is the *Environment Protection and Biodiversity Conservation Act* (1999) ('EPBC Act'). This Act gives the Federal Environment Minister powers for assessing and determining matters of national environmental significance. In light of these powers, together with the federal government's role in developing policy around climate change, ANEDO submits that there remains significant relevance for a human rights framework for environmental decision-making at the federal level.

It is possible that a Human Rights Act could be applicable to State and Territory public authorities through, for example, an 'opt-in' provision. This could capture the vast majority of public authorities that make decisions on environmental matters. Such an option is discussed further in response to TOR 3, below.

***Human rights implications in decision-making about development***

Environmental controversies frequently arise in the context of proposed development, particularly in respect of extractive industries such as mining, where there is frequently tension between the economic, environmental and social impacts of these projects. Government decision-makers are charged with the responsibility of balancing a number of competing factors, and economic considerations frequently prevail. Sometimes, this can be in spite of, and at the expense of, valid and serious concerns about environmental and social impacts of a project. The result can be that the environmental and health impacts on communities are overlooked.

ANEDO submits that such practices can amount to violations of human rights including, in the most extreme circumstances, the right to life and an adequate standard of living. In Australia, repercussions that are likely to occur more frequently include violations of the right to water, the right to food, the right to a clean and healthy environment, and in cases involving Indigenous communities, the right to culture.

In addition, environmental laws across the States and Territories often permit citizens, through open standing provisions,[74] as well as at the federal level in the EPBC Act[75], to take court action to challenge the legality of government decisions. Such a process provides one avenue for citizens to increase both public participation and government accountability. However, governments have, particularly in controversial cases,[76] resorted to using 'special legislation' enacted deliberately to avoid the application of their own environmental protection laws or to render litigation challenging the validity of a decision futile. ANEDO submits that the use by governments of special legislation that circumvents public participation provisions is contrary to the right to participate in public life.

The following case study illustrates circumstances where all of these human rights issues were raised.

*Case Study: The MacArthur River Mine expansion, Northern Territory*[77]

In 2003, owners of the MacArthur River Mine (MRM) proposed to expand the operation of their zinc, lead and silver mine in a remote area of the Northern Territory (NT), which would involve the rerouting of the MacArthur River. Serious environmental damage and public health concerns, as well as cultural concerns, were raised by both environmentalists and Traditional Owners in the area. Despite being initially rejected by the NT EPA with serious concerns raised by the NT Environment Minister, after pressure from the Federal Government, the NT Minister for Mines approved the mine expansion. Traditional Owners challenged the legality of this decision, and succeeded in the Supreme Court of NT, only to have legislation introduced into the NT Parliament just two days later, designed to enable the mine expansion to go ahead despite the Court decision. The legislation passed quickly. A further challenge in the Federal Court against the Minister for Environment, who approved the expansion under the EPBC Act was successful, but a fresh approval was then issued. The mine expansion was then able to proceed.

A number of human rights issues are raised by this case. The mine expansion had the potential to cause serious environmental harm, affecting the health and well-being of those Aboriginal communities living near the mine. Human rights that had the potential to be breached as a result included the rights to health, life and to culture, as well as the right to a clean and healthy environment. There was also a failure to respect participatory rights, such as the right to participate in public

[74] For example, see s123 *Environmental Planning and Assessment Act 1979* (NSW); s114 *Planning and Environment Act 1987* (Vic); s4.1.21 *Integrated Planning Act 1997* (Qld).
[75] EPBC Act, s487
[76] See the examples give in Jeff Smith 'Abiding by the Umpire's Decision: Special Legislation and the Planning System in NSW and Australia' (2008) 85 IMPACT! 15
[77] Based on the article Kirsty Ruddock, 'Justice in the Northern Territory?' 7(2) *Indigenous Law Bulletin* 21, 21 – 24.

affairs, in the way that the government ensured the ongoing operation of the mine by passing special legislation to defeat the successful challenge to the Government's decision-making processes.

Taking a human rights based approach in this situation may have led to a different outcome. For example, if the Federal Environment Minister who made the decision in this case was required to consider human rights, it is possible that more weight may have been given to the public health and environmental impacts of the MRM expansion as well as the cultural impacts for the Traditional Owners. Ultimately, the legislation operated specifically to defeat public participation and facilitate the project despite its serious health, environmental and cultural implications. Had there been a requirement to scrutinise bills on the part of the Territory to ensure that they were consistent with human rights, perhaps the 'special legislation' may not have passed so rapidly and without comment in the NT Parliament.

*The human rights implications of climate change*

To date, the debate about climate change has largely been focused on the environmental and economic challenges that it presents. However, ANEDO submits that the human rights implications of climate change are becoming increasingly recognised. On a global scale, international climate change negotiations have involved a longstanding debate on matters of equity between developed and developing nations, in determining the allocation of responsibility for mitigating climate change. This also extends to the consideration of the equity issues raised in relation to the capacity of developing nations to adapt to climate change, which has been for the most part caused by industrialised nations. Further, the rights of those individuals and communities that may be forced to migrate due to the impacts of climate change is an issue that is also growing rapidly in recognition and concern.

On a more local scale, issues of justice and inequality in the climate change context are also becoming more prevalent in the public debate. Those individuals and communities who are already socially and economically disadvantaged and marginalised are likely to have a more limited capacity to adapt to the impacts of climate change (for example, if forced to relocate) and will be most affected by extreme climate events[78] (as Hurricane Katrina recently demonstrated). For example, the introduction by the Federal Government of its proposed Climate Pollution Reduction Scheme has raised alarms that it will hit low-income households the hardest, as it is likely to create increased household bills.[79]

Further, ANEDO submits that climate change will also have a disproportionate impact on Indigenous people in Australia, given the threats it poses, as a result of their fundamental relationship to the land, on their health and well being.

[78] See for example: http://www.abc.net.au/news/stories/2009/04/21/2548027.htm (21/4/09)

[79] See, for example PIAC's submission on Climate Policy: http://www.piac.asn.au/publications/pubs/09.04.09-EWCAP-Submission%20to%20Climate%20Policy%20Senate%20Select%20Committee.pdf

Indigenous communities are also much more vulnerable to climate change due to existing social and economic disadvantage.[80] Indigenous Australians also risk being disengaged from participating in, and being consulted on, Australia's responses to climate change.

The negative impact of climate change on the right to an adequate standard of living, including on the right to food and the right to water, and its particular effect on Indigenous Australians, has been recently acknowledged by the UN CESCR, in its review of Australia's compliance with the ICESCR, noted earlier in this Submission.[81]

ANEDO submits that climate change is perhaps the most pressing example of where a human rights based approach to environmental matters may provide the most equitable way to resolve the complex issues that arise, particularly for those most vulnerable to its impacts.

The examples set out below consider some circumstances where climate change impacts raise issues that might best be resolved through a human rights framework.

*Example: Climate Change, Coal Mining and the Right to Food*

There is currently a dispute in the Caroona region in NSW, one of the most fertile food growing regions in Australia, between farmers and coal miners about the use of land in the region.[82] Mining uses significant amounts of water, inevitably damages the structure of soil and the landscape, and results in pollution of both air and water. The soils in this region are particularly fertile. An already arid nation, Australia is predicted to become even drier as a result of climate change, which will further impact on this situation.[83] With the continued expansion of coal mining in this area, the use by mining of the ever dwindling water supply may mean that the agriculture industry in the region is no longer viable. This may have a severe impact on food security for NSW, and for Australia.

Exploration for further mining is ongoing, to the concern of local farmers. A number of human rights, including the right to water, the right to food and the

[80] Australian Human Rights Commission, *Native Title Report 2008*. See particularly Chapter 5, 'Indigenous peoples and climate change' and 'case study 1- climate change and the human rights of Torres Strait Islanders' <http://www.humanrights.gov.au/social_justice/nt_report/ntreport08/> on 19 May 2009.

[81] UN Committee on Economic, Social and Cultural Rights, Concluding Observations, 22 May 2009 (E/C.12/AUS/CO/4) <http://www2.ohchr.org/english/bodies/cescr/docs/AdvanceVersions/E-C12-AUS-CO-4.doc>

[82] Marian Wilkinson, 'Small farmers take fight to mighty miner' *Sydney Morning Herald* (Sydney) 13 April 2009 <http://www.smh.com.au/national/small-farmers-take-fight-to-mighty-miner-20090412-a3zf.html?page=-1> on 19 May 2009. See also Kirsty Ruddock and Felicity Millner, 'Can we eat coal? Human rights and coal mining' (2008) 86 IMPACT! 7

[83] Intergovernmental Panel on Climate Change, Fourth Assessment Report, Summary for Policymakers, 11 <http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr_spm.pdf >

right to a clean and healthy environment, are raised in this situation. However, the current planning system in NSW has meant that, to date, the NSW Government has failed to consider the broader social and environmental impacts of coal mining in this region, and whether mining is even appropriate.

If required to take a human rights based approach in these circumstances, ANEDO submits that the NSW Government would be required to more broadly consider whether coal mining should continue to proceed in this region given the potential repercussions for human rights that it raises. These include the impacts on farmers and communities on their rights to water, to an adequate standard of health, the right to food through the need for food security, and the right to a clean and healthy environment.

*Example: Climate Change and Sea Level Rise*

It is widely acknowledged that among developed nations, Australia will be one that is severely affected by climate change. Given the proportion of our population residing in coastal areas (estimated at being over 80% within 50kms of the coast), the consequences of sea level rise are a serious concern. Changes to weather patterns, ocean currents, ocean temperature and storm surges will all influence sea level rise, contributing to coastal erosion, flooding and inundation, as well as causing the loss of wetlands and salt-water intrusion into freshwater sources.[84]

There are many potential human rights issues raised in the context of sea level rise. The 'sea change' phenomenon has resulted in coastal communities changing dramatically in socio-economic makeup, and as social disadvantage is already endemic in Australian coastal communities, existing disadvantages become exacerbated. There will be varying levels of capacity for individuals and communities to relocate, or take measures to protect their properties, in response to rising sea levels, further exacerbating existing inequalities. Governments are unlikely to willingly compensate land owners for any damage associated with climate change related coastal hazards such as sea level rise.[85]

Further, rising sea levels and flooding pose other risks including the salinisation of freshwater sources impacting on the availability of drinking water, the destruction

[84] See the IPCC Fourth Assessment Report, Chapter 11: Australia and New Zealand, at 520 < http://www.ipcc.ch/pdf/assessment-report/ar4/wg2/ar4-wg2-chapter11.pdf>

[85] For example, the NSW Government's recent Draft Sea Level Rise Policy Statement indicates that the government has no intention of compensating owners of land affected by coastal hazards or flood risks: see http://www.environment.nsw.gov.au/resources/climatechange/09125DraftSLRpolicy.pdf

of infrastructure, enhanced exposure to disease and the potential toxic contamination of water if contaminated sites are inundated.[86]

In the context of the Torres Strait Islands, the problem is already a real one as sea level rise and extreme climatic events are already occurring.[87] For them, the implications are particularly far-reaching in terms of the impacts on their culture and way of life if they eventually are forced to relocate and relinquish their connection with their traditional lands, as well as the impacts on infrastructure, health, water resources, biodiversity and their capacity to traditionally manage their natural resources.[88] The Torres Strait is also the birthplace of native title in Australia, with many islands having native title determinations over them. These native title rights, and the associated cultural rights, could be lost.[89]

Governments are currently grappling with how to address the risks posed by sea level rise from a policy perspective. Taking a human rights based approach, government would be required to consider the implications that such policy choices have on the human rights of those individuals that are likely to be affected: the right to life, the right to housing, the right to water, the right to food, the right to health, the right to culture, and the right to a clean and healthy environment. In the context of sea level rise, active public participation in decision-making processes to determine the best local options for adapting will also be critical. These issues are particularly critical for Australia's Indigenous populations, where consultation must be guaranteed to 'enable them to exercise their rights to an informed decision as well as to harness the potential of their traditional knowledge and culture in land management and culture'.[90]

ANEDO submits that a conceptual human rights framework that could guide government responses to climate change from a human rights perspective may lead

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[86] See Intergovernmental Panel on Climate Change, *Climate Change 2007: Synthesis Report (Summary for Policymakers)* (2007) 13 <http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr_spm.pdf> at 20 May 2009. See also EDO NSW's submission on the NSW Draft Sea Level Rise Policy Statement, available at: http://www.edo.org.au/edonsw/site/policy.php#1

[87] For example, see 'Sinking without trace: Australia's climate change victims', *The Independent* (London) 5 May 2008 <http://www.independent.co.uk/environment/climate-change/sinking-without-trace-australias-climate-change-victims-821136.html> on 20 May 2009.

[88] See discussions in Donna Green and Kirsty Ruddock, 'Could litigation help Torres Strait Islanders Deal with Climate Impacts?' (2009) 9 *Sustainable Development Law and Policy* 23 <http://www.wcl.american.edu/org/sustainabledevelopment/documents/09winter.pdf?rd=1> at 20 May 2009; Owen Cordes-Holland, 'The Sinking of the Strait: The Implications of Climate Change for Torres Strait Islanders' Human Rights' (2008) 9 *Melbourne Journal of International Law* 405 <http://www.austlii.edu.au/au/journals/MelbJIL/2008/16.html> on 20 May 2009. The AHRC's *Native Title Report 2008* also considers in depth the human rights implications of climate change on Torres Strait Islanders <http://www.humanrights.gov.au/social_justice/nt_report/ntreport08/pdf/casestudy1.pdf> on 20 May 2009.

[89] *Mabo v Queensland* (No 2) (1992) 175 CLR 1

[90] UN Committee on Economic, Social and Cultural Rights, Concluding Observations, 22 May 2009 (E/C.12/AUS/CO/4) at [27] <http://www2.ohchr.org/english/bodies/cescr/docs/AdvanceVersions/E-C12-AUS-CO-4.doc>

to the improved development and application of policy in this area - moving the focus of adapting to sea level rise from science and economics, to include these human rights implications.[91]

*The human rights of environmental campaigners*

Another area of human rights arises in the context of whether the law in Australia adequately protects the rights of environmental activists and protestors. In Australia, we often assume that we are guaranteed the freedom to speak our mind without the threat of adverse legal consequences, with the only limitations provided by defamation laws that seek to balance freedom of speech with the need to protect the reputation or privacy of individuals. However, as we noted earlier, the law in Australia has limited protection of human rights.

ANEDO submits that recent developments in Australia suggest that the rights and freedoms associated with peaceful protest actions are being targeted in the context of environmental campaigning. Unfortunately, there are examples of the treatment of activists who peacefully protest against logging operations (such as charges of 'intimidation' brought by police) that potentially amount to an infringement of their rights to freedom of speech and to peacefully protest. Stronger human rights protections might ensure that there is greater respect for the rights of protestors, in the context of the criminal justice system.

There has also been a rise in court actions filed by corporations that aim to intimidate or discourage environmental campaigners or activists from voicing their concerns, called 'strategic litigation against public participation' ('SLAPP suits'). A SLAPP suit achieves its purpose because of the great expense, anxiety and stress placed on the defendant(s) by the litigation, which amounts to intimidation. It also has a 'chilling' effect on wider public debate, by discouraging debate, silencing criticism and protest and curtailing public participation in the political process.

In response to SLAPP suits, there have been few attempts in States and Territories across Australia to introduce legislation to protect human rights, particularly the right of public participation, from this kind of litigation.[92] However, the ACT recently passed the *Protection of Public Participation Act 2008* (ACT)[93] which applies to any case seeking damages[94] and allows a court to order the plaintiff to pay a

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[91] HREOC (now the Australian Human Rights Commission) prepared a paper arguing for a 'human rights approach' to effectively address the threats to human rights resulting from climate change and providing remedies. See Human Rights and Equal Opportunity Commission, 'Human Rights and Climate Change' (2008) <http://www.humanrights.gov.au/about/media/papers/index.html> on 20 May 2009.

[92] See discussion in Michael Bozic 'Slip, Slop, SLAPP: It's Time for Action' (2008) 85 *IMPACT!* 8, 8-9; and in Greg Ogle, 'Gunning For Change: The Need for Public Participation Law Reform' (2005) <http://www.wilderness.org.au/articles/pdf/Gunning_for_Change_web.pdf> on 20 May 2009

[93] Available at <http://www.legislation.act.gov.au/a/2008-48/current/pdf/2008-48.pdf>

[94] Subject to certain exceptions. Section 8(2)(a) specifically permits defamation claims.

financial penalty if the case was commenced for an improper purpose, in relation to conduct constituting public participation. This provides a limited deterrent for SLAPP suits, as it is not framed as a positive right to public participation and has the difficult requirement of proving that the motivation for the litigation is improper.[95]

ANEDO therefore submits that constraints placed on environmental protestors by threats of criminal prosecution, the rise of SLAPP suits, highlights the need for stronger protection of civil and political rights in Australia, particularly the right to freedom of speech and the right to public participation.

The case study of the 'Gunns 20' litigation, discussed below, highlights the current inadequate protection of these rights.

*Case Study: The 'Gunns 20' Litigation*[96]

By far the largest and most controversial SLAPP suit to date in Australia is the case referred to as the 'Gunns 20'. In 2004, logging and wood chipping company Gunns Limited sued 20 environmental activists, green organisations (as well as their individual staff members), and members of the Greens party for $6.4 million in damages. The claim, which was 216 pages long (although subsequently amended on a number of occasions after being struck out by the Court), sought damages for disruption of its logging operations in Tasmania (by protests and blockades), and in respect of allegations made that its woodchip piles could be harmful to health. It was issued just days before Gunns announced its plans to build a major pulp mill.

The proceedings are ongoing against some, but not all, of the original defendants. Gunns has recently agreed to pay the Wilderness Society $350,000 to settle its case against them. However, Gunns has also recently filed a new case against 13 activists seeking damages for disruptions to the operation of a woodchip plant.[97] This suggests the company intends to continue to use litigation to respond to the actions of forest campaigners seeking to protect Tasmania's native forests.

Of concern here is that there is inadequate protection of freedom of speech, the right to peaceful assembly, and the right to public participation. The huge expense, time and stress subjected to the defendants by the litigation has clear implications not only on the rights of the defendants themselves to exercise their rights to participate in public life through protesting and encouraging debate on these issues, it also has the potential impact on freedom of speech more broadly in the community, as forest campaigners may be deterred from speaking out for fear of future litigation.

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[95] See Greg Ogle, 'Gunning For Change: The Need for Public Participation Law Reform' (2005).
[96] See the website: http://www.gunns20.org for further detail about the case.
[97] See Matthew Denholm, 'Gunns lodges writ against 13' *The Australian* (Sydney), 8 January 2009 <http://www.theaustralian.news.com.au/story/0,,24885908-5006788,00.html> on 20 May 2009.

ANEDO submits that if Australia had stronger protections for these human rights, there may be more protection available for the campaigners being subject to such litigation. For example, if the defendants were able to raise human rights arguments in the Court proceedings, the case may have been resolved more quickly, and the commercial torts (wrongs) pleaded in the case (such as the tort of interference with trade and business by unlawful means) would have to be considered in the context of the protection of human rights (not simply the 'economic rights' of the company making the claim).

Indeed, the explicit protection of human rights in Australian legislation could assist in deterring SLAPP suits of this nature from being commenced. Alternatively, a 'culture of human rights' that may be created by stronger human rights protections could lead to greater impetus for the introduction of specific 'anti-SLAPP' legislation.

ANEDO submits that this selection of examples and case studies demonstrates the interconnectedness and indivisibility of human rights and environmental protection. In this context, ANEDO submits that greater protection of human rights in Australia, providing scope for the use of a human rights based approach by Government bodies, has the potential in many circumstances to lead to better environmental policies, regulations and outcomes.

**Summary and Recommendations:**

- Australia does not adequately protect a range of human rights;
- Existing environmental laws in Australia do not adequately protect environmental rights, in particular the right to public participation;
- In ANEDO's experience, human rights issues frequently arise in the context of environmental matters, particularly in relation to decision-making about environment and planning matters, climate change and environmental campaigners;
- A human rights based approach in the environmental context is likely to lead to better human rights and environmental outcomes.

## TOR 3: How could Australia better protect and promote human rights?

ANEDO supports the introduction of a Human Rights Act, as it will offer the strongest protections of human rights, in the absence of government willingness to

consider a constitutionally enshrined 'bill of rights'. ANEDO believes that such an instrument would lead to better laws and policies, greater government accountability and transparency in decision making, and generally improved environmental and social outcomes.

Broadly, ANEDO supports the legislative models similar to that proposed by the HRLRC, which take aspects from the ACT *Human Rights Act*, the Victorian *Charter*, the UK *Human Rights Act* and the Canadian Bill of Rights.

However ANEDO also recognises that legislation must be supported by other, 'informal' measures, such as the development of government policy on human rights, the preparation of government programs addressing specific areas of human rights, and education programs, including in schools, to better enhance public awareness and understanding about human rights.[98]

Options for formal and informal human rights frameworks are discussed below.

***A legislative framework for better protecting human rights in relation to the environment***

ANEDO proposes that a Human Rights Act:

- require Parliament to scrutinise how all new bills are likely to impact on human rights;
- require Courts to interpret legislation in accordance with human rights;
- apply to public authorities, who must consider human rights when making decisions, delivering services and developing policies;
- binds State and Territory public authorities through the inclusion of a provision that it is intended to bind the Crown in the right of the Commonwealth and the States and Territories, or, alternatively, provide an 'opt-in' clause for State and Territory public authorities; and
- provide a separate cause of action, with broad options for remedies, or, in the absence of such a mechanism, provide for a complaint resolution mechanism;
- include in a preamble to the Act a recognition of the notion of intergenerational equity (which might refer to a right to a clean and healthy environment);

[98] See the Australian Human Rights Commission Toolkit, available at: <http://www.hreoc.gov.au/letstalkaboutrights/downloads/toolkit.pdf>

- be subject to review on a regular basis (eg, every 4 years).

The details of such measures are considered below.

*Obligations of the legislature*

The scrutiny of new and existing legislation for compatibility with protected rights is an important preventative measure that can reduce the risk of legislation infringing human rights. In the environmental context, this is particularly important in cases where 'special legislation' is proposed in order to facilitate the approval of a development or project that is the subject of court proceedings, and often bypasses community participation and consultation, as was highlighted by the MacArthur River Mine case in TOR 2 above.

Requiring Parliament to scrutinise the human rights implications of special legislation is likely to provide greater protection of the public interest and ensure greater debate and participation by the public in the issues.

Therefore, ANEDO supports provisions in a Human Rights Act that will require all new bills tabled in Parliament to include a 'statement of compatibility' which must specify whether the bill is consistent with protected rights, and if not, how it is inconsistent. These statements must be published.[99] While a law should not be invalidated if it breaches human rights, such a mechanism would encourage and sometimes require law makers to protect those rights and would increase transparency and accountability in the law making process.

ANEDO also supports the establishment of a specialist Joint Parliamentary Committee to report to Parliament about whether new bills are compatible with protected human rights. Such a Committee may also conduct thematic inquiries into human rights issues and respond to declarations of incompatibility, noted below.

*Obligations of the courts*

Courts would play an important role in the operation of a Human Rights Act. ANEDO supports a separate cause of action to be taken against public authorities in breach of protected rights to be brought in courts. In addition, courts would be required to interpret laws consistently with human rights, refer to international and comparative domestic jurisprudence in that interpretation process, and, where necessary, declare that the laws are incompatible with human rights (ie, make 'declarations of incompatibility'). None of these powers would enable courts to invalidate federal legislation.[100]

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[99] ANEDO would also support the publication of any legal advice it receives regarding the compatibility of new legislation with human rights, to ensure transparency, which is reportedly done in New Zealand according to convention. See '*Engaging in the Debate*' HRLRC p 74.

[100] For further discussion on this issue, see the HRLRC's Submission '*A Human Rights Act for all Australians*' at p 102 – 108.

The courts would interact with a Human Rights Act through the interpretation of protected rights in cases involving breach, or other matters involving the interpretation of legislation that may have a bearing on human rights. How a Human Rights Act would interact with other legislation is of interest to ANEDO given that the vast majority of environmental law is found in legislation, rather than the common law. For example, the *Environmental Planning and Assessment Act 1979* (NSW) governs the assessment of development applications in NSW. In accordance with the legislation, decision-makers are required to consider a raft of matters when assessing the application, including environmental impacts, the 'public interest' and 'the social and economic impacts in the locality'. If courts were called on to interpret such concepts consistently with protected human rights, this would potentially provide better outcomes for individuals and public interest groups, and an improved framework for interpreting the meaning of 'public interest'.

The interpretation of human rights in accordance with international and comparative jurisprudence is also particularly important in the environmental context. As established in response to TOR 1 above, there is a large body of jurisprudence in many other parts of the world which afford far greater recognition of environmental rights, including human rights frameworks. For example, a number of countries have interpreted the right to life, the right to health and the right to an adequate standard of living to extend to the right to a clean and healthy environment. Such an approach is currently lacking in Australia.

*Obligations of public authorities*

ANEDO believes that a Human Rights Act should bind all public authorities, which include all aspects of the executive arm of government and government service delivery. Specifically, all public authorities should be required to act compatibly with human rights and give proper consideration to human rights in decision making processes.[101] A broad interpretation should be given to the meaning of public authority – including bodies whose functions are of a public nature. Public authorities should not be able to 'contract out' of their human rights obligations through the engagement of third parties or contractors.

ANEDO's position is that the most positive influence of a Human Rights Act is where it can ensure that the potential human rights consequences of decisions that impact on the environment (such as applications for development approval) are given consideration. As noted above in TOR 2, most environmental decision making at the federal level occurs in the context of the EPBC Act. The existence of a Human Rights Act would require, for example, the Minister to consider an application for approval of a development in a human rights framework. This would lend itself to a more equitable and inclusive assessment process, where

[101] This is consistent with s 38(1) of the Victorian *Charter* and s 40B(1) of the ACT *Human Rights Act.*

consideration is given to such matters as the right to public participation, an adequate standard of living, human health, and a clean and healthy environment.

ANEDO also believes that a Human Rights Act would also be likely to influence the operations of companies who require environmental approvals. This is because they would recognise that government decision-makers will be obligated to assess their applications with the human rights implications in mind.[102] In this respect, a Human Rights Act would have the effect of creating a 'dialogue' and 'culture' of rights that goes beyond public authorities.

*Application to States and Territories*

ANEDO submits a Human Rights Act should bind State and Territory public authorities. This could be achieved by the inclusion of a provision that it is intended to bind the Crown in the right of the Commonwealth and the States and Territories.[103] This would not apply to state courts, Parliaments or Ministerial offices for constitutional reasons, but these make up a small proportion of State and Territory public authorities. Such an approach would be in accordance with Australia's international obligations under the ICCPR (Article 50) and the ICESCR (Article 28)[104]. This is discussed further below.

Because the majority of environmental legislation is State and Territory based, ANEDO considers it particularly important that such a provision is included. Specifically, decision-making about development and land use, environmental protection and natural resource management for the most part take place at the State and Territory level. ANEDO submits that it is critical to ensure that State and Territory government decision-makers consider the human rights implications of their decisions on environmental matters to ensure the greatest protection is provided for environmental rights. Such a requirement would lead to better environmental and human rights outcomes.

In the event that such a provision is not included in a Human Rights Act, ANEDO would support an 'opt-in' clause for State and Territories to enable them to elect to be bound.[105] This could at least engender a 'culture of rights' at the State and Territory level, and could also provide a lobbying tool for advocates engaged in consultation and participation in environmentally relevant issues.

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[102] For example, see comments made in relation to ramifications for the private sector in respect of the *Victorian Charter of Human Rights and Responsibilities Act 2006* by Allens Arthur Robinson, 'Focus: Victorian Charter of Human Rights' 28 April 2009,

http://www.aar.com.au/pubs/ldr/focsrapr09.htm?min=true

[103] See HRLRC submission, 'A Human Rights Act for All Australians'.

[104] See HRLRC submission, 'A Human Rights Act for All Australians' at page 118 These Convention obligations require federal states to implement their obligations under those treaties to all parts of federal States without any limitations or exceptions.

[105] The ACT *Human Rights Act* has a provision allowing entities who are not public authorities to opt-in to the obligations of public authorities. This provision entered into force on 1 January 2009.

*Remedies*

ANEDO supports the inclusion of separate cause of action for individuals to bring a claim against a public authority for a breach of its obligations under the Human Rights Act. It further supports the grant of any remedy, including damages. This would be consistent with the international law requirement that people whose rights are violated have an 'effective remedy'.[106] It would also accord with the approach of the United Kingdom under its *Human Rights Act*, and be similar to the recently amended ACT legislation which provides for any remedy with the exception of damages.

In the absence of the inclusion of a separate cause of action, ANEDO would support a complaint resolution mechanism. For example, the Australian Human Rights Commission ('AHRC'), or another body, could be empowered to receive individual complaints. These could be brought to the attention of the relevant public authority the subject of the complaint, with the AHRC or alternative body empowered to make recommendations to the public authority, among other things. This could include recommending conciliation or a change in policy or procedure, for example. Complaints and recommendations should be made publicly available. Such an approach would fill a gap in current human rights protections in Australia where there is no domestic, broad-reaching body that can adjudicate on complaints about violations of human rights.

Administrative law remedies that are commonly available in the environmental context may restrain decision-makers from acting if they have made *procedural* errors, however, this does not extend to appealing the merits of a decision. This can severely limit the capacity of interested third parties to participate in environmental decision making.

Therefore, while ANEDO supports the full spectrum of remedies, the most relevant remedies for challenging violations of human rights by public authorities would involve remedies that restrain the decision-maker from acting in a particular way.

The availability of this and other remedies for breaches of human rights would ensure that decision-makers are more accountable for the broader impacts of their decisions, particularly as they relate to vulnerable communities whose human and environmental rights are frequently ignored (such as in the MacArthur case discussed in TOR 2 above).

*Preamble*

As stated throughout this submission, ANEDO supports the inclusion of a broad range of human rights. It also supports the inclusion of a stand-alone right to a clean and healthy environment.

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[106] See, for example, ICCPR art 2(3).

However, whether or not a stand-alone environmental right is included in a Human Rights Act, ANEDO would call for a statement to be inserted into the Preamble or Objects clause that asserts that protected rights be interpreted broadly and in recognition of the interdependence and indivisibility of human rights.

It should also include a reference to the principle of intergenerational equity.[107] For example, it could state that:

> 'This Charter is founded on the principle that all persons, communities and peoples have the right to a safe, secure, healthy and ecologically sound environment that is protected, preserved and improved both for the benefit of present and future generations, and in recognition of the inherent value of ecosystems, biodiversity and existing climate systems.'

Such an approach could still ensure that the environmental aspects of many civil and political, as well as social, cultural and economic rights are implicitly recognised. This recognition accords with the growing international human rights jurisprudence on the interaction of human rights and the environment, and the need to recognise the need to protect the interests of both present and future generations.

*Review*

ANEDO would advocate for a provision requiring that the Human Rights Act is reviewed on a regular basis, to ensure that the Act is operating in accordance with its objectives, and to enable additional rights to be included for protection, as confidence grows in regards to its operation. This would enable the Human Rights Act to evolve with a strengthening 'culture of rights'. This is particularly important if a Human Rights Act excludes certain rights when it first enters into force.

***Other measures for protecting human rights in the context of the environment***

ANEDO supports a number of other measures to better protect and promote human rights in Australia. While a Human Rights Act would go a long way to protecting and promoting fundamental human rights, ANEDO believes that such rights must be underpinned by non-legislative measures including education, monitoring, a stronger role for human rights bodies including the Australian Human Rights Commission and greater support for access to justice, including funding of NGOs (including environmental NGOs). We endorse the submission of the Human Rights Law Resource Centre – *Educate, Engage and Empower* – on

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[107] As discussed above in response to TOR 1, intergenerational equity "holds the natural and cultural environment of the Earth in common both with other members of the present generation and with other generations, past and future". See E B Weiss, *In fairness to future generations: international law, common patrimony and intergenerational equity*, 1989.

this issue. However, as that submission is not directed specifically to environmental issues, we also add the following additional comments and recommendations.

As a network of community legal centres specialising in environmental public interest law, ANEDO is particularly focused on promoting public participation in environmental decision making. Public participation is critical to fulfilment of human rights in relation to environmental decisions, so that individuals and communities are involved in the decisions that will affect their environment. The case studies highlighted in TOR 2 have emphasised the critical importance of public participation in environmental decision making. They demonstrate how human rights can be violated when communities are excluded from participating in such processes, such as through the use of special legislation, or intimated for doing so, in the case of SLAPP suits. Therefore, ANEDO recommends that additional measures be taken in respect of environmental 'participatory rights,' as follows.

*Ratification of the Aarhus Convention*

As stated above in TOR 1, the *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters 1998* ('Aarhus Convention')[108] is widely acknowledged to represent international best practice is respect of public participation in government decision making on matters that affect the environment. It also makes the link between environmental rights and human rights, and acknowledges that we owe an obligation to future generations.

The Aarhus Convention is open to accession by any country non-member country, subject to the approval of the Meeting of the Parties. ANEDO therefore submits that Australia ratify this convention to confirm its commitment to the importance of participatory rights in environmental decision making, and the direct impact of these specific participatory rights on other human rights.

*Anti-SLAPP legislation*

ANEDO submits that an important step to protect participation in the political process, which is particularly relevant for environmental matters would be to enact legislation to protect public participation. This would particularly focus on preventing SLAPP suits such as the 'Gunns 20' case that was described in TOR 2 above.

While the ACT has introduced 'anti-SLAPP' legislation,[109] it is the only State to have done so. Further, it appears that the utility of this legislation will be limited as it only applies to permit a court to order a plaintiff to pay a financial penalty if a

[108] See <http://www.unece.org/env/pp/> for more information about this Convention.

[109] *Protection of Public Participation Act 2008 (ACT)*

case for damages has been commenced for an improper purpose, in relation to conduct constituting public participation.[110]

The South Australian EDO has prepared a proposal setting out a draft bill to protect and encourage public participation. It considers examples of 'anti-SLAPP' legislation that has been introduced in the USA.[111] It proposes legislation framed around creating a positive right to public participation, and enabling the summary dismissal of claims relating to public participation.

ANEDO submits that there is a critical need to ensure that the right to participate in public life (including freedom of expression) is given adequate protection. This requires the implementation of 'anti-SLAPP' legislation in Australia. The Federal Government should take a leading role to promote the introduction of such legislation.

*Enhanced access to justice in relation to environmental matters*

ANEDO exists because its member EDOs were created to fill an unmet community need for legal advice on environmental law. In every State and Territory, EDOs occupy a unique position in providing access to justice to the community on public interest environmental law issues. As noted above in relation to the Aarhus Convention, access to justice is a critical aspect of ensuring that the right to public participation in environmental decision making is fulfilled. Providing access to justice in environmental matters is therefore a key component in promoting and protecting environmental rights.

There are a number of ways that access to justice requires improvement in Australia. These matters have been explored in depth in the recent ANEDO submission to the *Senate Legal and Constitutional Affairs Committee Inquiry into Access to Justice* (4 May 2009), which is adopted for the purposes of the present submission.[112] We recommend, among other things:

- legal aid funding for environmental public interest matters be provided on a national scale. Currently, only NSW provides legal aid for public interest environmental matters, which means that in other jurisdictions, many groups are effectively prevented from accessing justice and enforcing breaches of environmental legislation;

- enhanced funding for community legal centres, including all EDOs, to enable those offices to better meet the need for assistance in environmental

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[110] *Protection of Public Participation Act 2008 (ACT)* s9

[111] See SA EDO website at <http://www.edo.org.au/edosa/research/public%20participation.htm>. Law reform to protect environmental protestors from SLAPP suits has also been discussed by Dr Greg Ogle, Legal Coordinator, The Wilderness Society, 'Gunning for Change: The Need for Public Participation Law Reform' (2005)

[112] See <http://www.edo.org.au/policy/090504access_justice.pdf >

public interest matters, which, as this submission has highlighted, frequently have a human rights dimension;

- the introduction of public interest costs order provisions in all jurisdictions, to alleviate the risks of adverse costs orders against litigants bringing environmental cases in the public interest. This will also improve the ability of Indigenous people to access the justice system in order to protect their rights.

**Summary and Recommendations:**

- ANEDO calls for the introduction of a Human Rights Act to ensure better outcomes in matters involving human rights and the environment;
- A Human Rights Act should protect a broad range of human rights including civil, political, economic, social, cultural as well as specific environmental rights;
- A Human Rights Act should require Parliament to prepare a 'statement of compatibility' when tabling new bills, and a specialist Committee should report on the compatibility of bills with protected human rights;
- A Human Rights Act should require courts to interpret legislation consistently with human rights (including permitting the use of international and comparative human rights jurisprudence), and, where necessary, issue a 'declaration of incompatibility' if legislation cannot be interpreted consistently with human rights;
- A Human Rights Act should be binding on public authorities, including State and Territory authorities, and require that those authorities give proper consideration to human rights when making decisions and developing policy; and are prohibited from acting inconsistently with protected human rights;
- In the absence of a Human Rights Act being binding on State and Territory public authorities, ANEDO would support an 'opt-in' clause;
- A Human Rights Act should include a separate cause of action, and provide a full range of remedies including damages;
- In the absence of a separate cause of action, ANEDO would support the inclusion of a complaint resolution mechanism to an independent body such as the Australian Human Rights Commission;

- A Human Rights Act should specifically contain language in a preamble or objects clause that recognises the interdependence and indivisibility of human rights. It could also refer to the principle of intergenerational equity;

- A Human Rights Act should include a provision requiring regular review of the legislation;

- ANEDO calls for the implementation of additional non-legislative measures including education, monitoring, a stronger role for human rights bodies including the Australian Human Rights Commission and greater support for access to justice, including funding of NGOs;

- ANEDO calls for the Australian government to ratify the *Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters 1998;*

- ANEDO recommends that the Australian government implement comprehensive 'anti-SLAPP' legislation to strengthen protection of public participation in environmental matters;

- ANEDO calls for the Australian government to take a range of steps to better secure access to justice in environmental matters, particularly to extend Commonwealth legal aid for public interest environmental matters, to provide enhanced funding of community legal centres including EDOs, and to introduce public interest costs orders in all jurisdictions, to avoid the risks of adverse costs orders in litigation brought in the public interest.