



Environmental
Defenders Office



Environmental
Justice Australia

31 July 2020

Human Rights Unit
Attorney-General's Department
Sent via email only: upr@ag.gov.au

Dear Madam/Sir,

**Consultation on the draft National Report for Australia's third Universal Periodic Review –
Joint Submission by Environmental Defenders Office and Environmental Justice Australia**

Environmental Defenders Office (**EDO**) and Environmental Justice Australia (**EJA**) welcome the opportunity to comment on Australia's Draft National Report in respect of its third Universal Periodic Review (**Draft National Report**).

We note the Draft National Report was released for public comment on 1 July 2020, with submissions closing on 29 July 2020. We are grateful for an extension we were granted until 31 July 2020 by an email from the Human Rights Unit dated 27 July 2020.

EDO and EJA, with US based Earthjustice, made a joint stakeholder submission to the Universal Periodic Review of Australia (**Joint Submission**), which we have **enclosed** for your information.

Our comments in this letter and our Joint Submission comprise our present submission on the Draft National Report.

In summary, our submission addresses the following key points:

1. The Draft National Report must be updated to provide a summary of Australia's actions on the following two essential issues impacting human rights in Australia which have not yet been addressed:
 - (a) Climate change is internationally recognised as impacting human rights yet the Draft National Report makes no mention of this significant issue and Australia's actions to reduce the risks to human rights associated with it.
 - (b) Protection of the cultural heritage of First Nations peoples is a human rights issue for Aboriginal and Torres Strait Islanders yet it is also not addressed. This is a particularly significant omission given the high-profile destruction of the 46,000 year old Juukan Gorge caves of significant cultural importance to the Puutu Kunti Kurrama and Pinikura peoples in Western Australia and other recent failures to protect significant sacred sites and cultural heritage of First Nations peoples.

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2. We urge the Commonwealth Government to take action, detailed in our recommendations below, to address threats to human rights and failures under Australia’s international law obligations being caused by:
 - a. Australia’s failure to take sufficient action to reduce its greenhouse gas emissions to reduce the risk of dangerous climate change, which is an internationally recognised human right threat; and
 - b. Australia’s failure to adequately protect the cultural heritage of Aboriginal and Torres Strait Islander peoples and to empower First Nations peoples through full implementation of Free, Prior and Informed Consent obligations.
3. We urge the Commonwealth Government to implement a national Human Rights Act. In the absence of constitutionally protected rights which protect First Nations cultural heritage and the rights impacted by climate change, a legislative human rights framework is a necessary step to ensure Australia’s compliance with its international human rights obligations.

Addressing the threat to human rights posed by climate change and Australia’s inadequate action

1. The Draft National Report does not mention climate change, which is a concerning omission given that United Nations human rights treaty bodies and experts have recognised that the impacts of climate change harm human rights .
 - (a) The United Nations Office of the High Commissioner of Human Rights (**OHCHR**) confirmed that “climate change directly and indirectly threatens the full and effective enjoyment of a range of human rights, including the rights to life, water and sanitation, food, health, housing, self-determination, culture and development”.¹
 - (b) The United Nations Human Rights Committee stated that climate change is one “of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life”.²
 - (c) The United Nations Committee on Economic, Social and Cultural Rights has acknowledged that the right to health includes “the right to highest attainable standard

¹ United Nations Office of the High Commissioner of Human Rights (“OHCHR”), *Analytical study on the relationship between climate change and the human right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, A/HRC/32/23 (May 6, 2016) [4] <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/092/02/pdf/G1609202.pdf?OpenElement>>.

² Human Rights Committee, General Comment No. 36 – Article 6: right to life, CCPR/C/GC/36 (Sep. 3, 2019) [62] <<https://undocs.org/CCPR/C/GC/36>>.

of health”³ which “extends to the underlying determinants of health”, including a healthy environment.⁴

- (d) The human rights of First Nations peoples in Australia are disproportionately affected by climate change impacts “because of their close connection to nature and dependence on wildlife, plants and healthy ecosystems for food, medicine and cultural needs”.⁵ This includes the rights to life, health, housing, and culture. Moreover, Torres Strait Islanders are facing inundation of their island homes and an unfolding human rights disaster. The climate change threats to First Nations peoples are exacerbated by the continued support in Australia for new and expanding fossil fuel projects which also contribute to First Nations peoples’ ongoing dispossession of land and sacred sites, contrary to the right of First Nations peoples to cultural survival and heritage.⁶ These are important concerns that should be addressed in the Draft National Report, particularly as they relate to strengthening other human rights protections for First Nations peoples under Part IV(B).

International critique on Australia’s inadequate climate action and its impact on human rights

2. At Australia's second Universal Periodic Review in 2015 (**UPR**), Australia’s response to climate change was raised by the governments of Fiji and Maldives, whose peoples are already being impacted by the reality of sea level rise and increased extreme weather events:

“15. Fiji noted with concern that the commitment of Australia to reducing greenhouse gas emissions would not be sufficient

...

40. Maldives inquired about efforts made to address climate change and reduce greenhouse gas emissions to safe levels.”⁷

3. Fiji further recommended that Australia “revise its Intended Nationally Determined Contribution to be in line with a fair approach taken by other industrialised countries, so as to be consistent with the full enjoyment of human rights by its people and those in neighbouring countries”.⁸

³ United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)*, 22nd sess, UN Doc E/C.12/2000/4 (11 August 2000) [4] <<https://undocs.org/E/C.12/2000/4>>.

⁴ Ibid.

⁵ Special Rapporteur D. Boyd, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN Doc A/74/161 (15 July 2019) <<https://undocs.org/en/A/74/161>>.

⁶ *United Nations Declaration on the Rights of Indigenous Peoples*, UN GAOR, 61st sess, Agenda Item 68, UN Doc A/61/L.67, Annex I, art 32 <https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf>. See also, Article 27, International Covenant on Civil and Political Rights and Article 15, International Covenant on Economic, Social and Cultural Rights.

⁷ United Nations General Assembly Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Australia*, UN GAOR, 35th sess, Agenda Item 6, UN Doc A/HRC/31/14 (13 January 2016) [15], [40] <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/004/89/PDF/G1600489.pdf?OpenElement>>.

⁸ Ibid, [136.219].

4. Australia responded to Fiji’s further recommendation with the assertion that “Australia’s Intended Nationally Determined Contribution is a strong and fair contribution and comparable to those of other developed countries on a range of indicators”.⁹ Australia noted the recommendation and declined to consider it further at the time.¹⁰ We do not consider that Australia’s position is consistent with Australia’s human rights obligations at home or abroad. We strongly request that Australia update its Draft National Report to address its obligations in relation to the protection of human rights from the impacts of climate change.

5. As set out in section D of the Joint Submission, in addition to the concerns raised by Maldives and Fiji at Australia’s second UPR, United Nations human rights treaty bodies have also raised concerns about Australia’s failure to reduce its contributions to climate change:
 - (a) In July 2017, the Committee on Economic, Social and Cultural Rights expressed concern about Australia’s “continued increase of carbon dioxide emissions ... which run the risk of worsening in the coming years, despite [Australia’s] commitments as a developed country under the United Nations Framework Convention on Climate Change and the Kyoto Protocol, as well as its nationally determined contribution under the Paris Agreement.”¹¹ The Committee recommended that Australia “take immediate measures aimed at reversing the current trend of increasing absolute emissions of greenhouse gases, ... pursue alternative and renewable energy production ... [and] review its position in support of coal mines and coal exports.”¹²

 - (b) In July 2018, the Committee on the Elimination of Discrimination Against Women expressed concern about Australia’s “greenhouse gas emissions of 1.4 per cent of global emissions,” “the high level of those emissions in relation to the State party’s population of 0.3 per cent of the world population,” and Australia’s “continued dependency on coal for domestic use and exports.”¹³ The Committee recommended that Australia “further reduce greenhouse gas emissions, notably those resulting from coal consumption and exports.”¹⁴

 - (c) In November 2019, the Committee on the Rights of the Child expressed concern that Australia had “made insufficient progress on the goals and targets set out in the Paris Agreement and about its continuing investment in extractive industries” and urged Australia to “promptly take measures to reduce its emissions of greenhouse gases by establishing targets and deadlines to phase out the domestic use and export of coal and

⁹ United Nations General Assembly Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Australia, Addendum*, UN GAOR, 35th sess, Agenda Item 6, UN Doc A/HR/31/14/Add.1 (29 February 2016) [12] <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/039/53/PDF/G1603953.pdf?OpenElement>>.

¹⁰ *Ibid* [13].

¹¹ CESCR, *Concluding observations on the fifth periodic report of Australia*, E/C.12/AUS/CO/5 (Jul. 11, 2017), para. 11, <https://undocs.org/en/E/C.12/AUS/CO/5>.

¹² *Id.*, para. 12.

¹³ Committee on the Elimination of Discrimination against Women, *Concluding observations on the eighth periodic report of Australia*, CEDAW/C/AUS/CO/8 (Jul. 25, 2018), para. 29(c), <https://undocs.org/en/CEDAW/C/AUS/CO/8>.

¹⁴ Committee on the Rights of the Child, *Concluding observations on the combined fifth and sixth periodic reports of Australia*, above n. 4, paras. 40, 41(b), <https://undocs.org/CRC/C/AUS/CO/5-6>.

to accelerate the transition to renewable energy.”¹⁵ The Committee also expressed “concern and disappointment that a protest led by children calling on government to protect the environment received a strongly worded negative response from those in authority, which demonstrates disrespect for the right of children to express their views on this important issue.”¹⁶

Australia’s inadequate climate action is exacerbating the threat that climate change poses to human rights

6. Despite the impact that climate change is already having on human rights, and will continue to have at an intensifying pace in the future, as well as the ongoing concerns raised by United Nations human rights experts, Australia’s policies continue to exacerbate climate change and the threats it poses to human rights:¹⁷
 - (a) Australia’s economy remains carbon-intensive and its greenhouse gas emissions, excluding land use, land-use change and forestry emissions, increased every year from 2014-2018.¹⁸ With no significant decline projected before 2030, Australia is not on track to fulfil its 2020 or 2030 emissions reduction targets under the United Nations Framework Convention on Climate Change (UNFCCC).¹⁹
 - (b) Australia’s reliance on carryover credits to meet emissions reduction targets under the Paris Agreement artificially inflates Australia’s total reported reductions, undermining global emissions-reduction efforts and the goals of the Paris Agreement. Even with the controversial use of carryover credits Australia will not meet its higher 2030 target.²⁰
 - (c) Australia has not set a sufficiently ambitious emissions-reduction target for 2030, which under current policies will see Australia’s per-capita emissions remain among the highest globally until at least 2030.²¹

¹⁵ *Id.*, para. 30(c).

¹⁶ *Id.*, para. 40.

¹⁷ These points are provided in detail in the enclosed Joint Submission at paragraph 19.

¹⁸ 7 See Commonwealth of Australia, Quarterly Update of Australia’s National Greenhouse Gas Inventory: December 2019 (2020), Data Table 1A (pp. 31-34), <https://www.industry.gov.au/sites/default/files/2020-05/nggi-quarterlyupdate-dec-2019.pdf>. Emissions in 2018 (excluding LULUCF) were 557.4 Mt, and emissions in 2019 (excluding LULUCF) were 550.9 Mt. *Id.*, pp. 33-34

¹⁹ United Nations Environment Programme (“UNEP”), Emissions Gap Report 2019 (“2019 UNEP Emissions Gap Report”), pp. xvi, 7, <https://wedocs.unep.org/bitstream/handle/20.500.11822/30797/EGR2019.pdf?sequence=1&isAllowed=y>; Commonwealth of Australia, Australia’s emissions projections 2019 (Dec. 2019), p. 6, <https://publications.industry.gov.au/publications/climate-change/system/files/resources/4aa/australiasemissions-projections-2019-report.pdf>.

²⁰ *Id.*, Table 2 “Cumulative emissions reduction task 2021 to 2030” (p. 6).

²¹ United Nations Environment Programme (“UNEP”), Emissions Gap Report 2019 (“2019 UNEP Emissions Gap Report”), p. 11, Table 2.2. <https://wedocs.unep.org/bitstream/handle/20.500.11822/30797/EGR2019.pdf?sequence=1&isAllowed=y>.

- (d) Climate Action Tracker and Paris Equity Check, which rate countries' targets against multiple effort-sharing approaches,²² conclude that Australia's 2030 target does not represent its fair share of global emissions reductions to limit warming to 2°C, let alone 1.5°C. ²³ Climate Action Tracker concludes that if all governments were to propose targets at a similar level of effort to Australia relative to their national circumstances, this would lead to warming of up to 3°C.²⁴
7. The Draft National Report fails to address these issues and, indeed, there is no reference to the term "climate change" in the entire report. Even the reference to Australia's catastrophic bushfires, which were exacerbated by climate change and directly resulted in loss of life, amongst other human rights impacts and environmental losses, is discussed with no reference to climate change, let alone Australia's human rights obligations to mitigate climate change.
8. In addition, despite the disproportional impacts of climate change and fossil fuel exploitation on First Nations peoples, there is no mention of what Australia is doing, or needs to do, to address these issues. Australia has obligations to protect the culture of First Nations peoples under the International Covenant on Civil and Political Rights (**ICCPR**) and International Covenant on Economic, Social and Cultural Rights (**ICESCR**), and the lands of First Nations peoples under the International Convention on the Elimination of Racial Discrimination (**ICERD**).
9. Australia's failure to responsibly reduce its contributions to climate change and further address these issues in the Draft National Report is in substantial derogation of its human rights obligations, including under the:
- (a) ICCPR;
 - (b) ICESCR;
 - (c) ICERD;
 - (d) Convention on the Rights of the Child;
 - (e) Convention on the Elimination of All Forms of Discrimination Against Women; and
 - (f) United Nations Declaration on the Rights of Indigenous Peoples.

²² Climate Action Tracker is an independent scientific analysis produced by Climate Analytics and New Climate Institute which measures countries' emissions targets against over 40 effort-sharing studies used by the IPCC: Climate Action Tracker, Comparability of effort, <https://climateactiontracker.org/methodology/comparability-ofeffort/>. Paris Equity Check uses peer-reviewed methodology to assess the equity of countries' emissions targets against five types of equity assessment based on effort-sharing approaches identified by the IPCC: Paris Equity Check, The science – about the Paris Equity Check assessment, <http://paris-equity-check.org/the-science.html>.

²³ Climate Action Tracker, Australia – fair share (as at Dec. 2, 2019), <https://climateactiontracker.org/countries/australia/fair-share/>; Paris Equity Check, Equity Map, <http://parisequity-check.org/multi-equity-map.html#open-graph>.

²⁴ Id. Climate Action Tracker, Australia – fair share.

Australia has failed to protect the culture of First Nations peoples, resulting in specific human rights violations and derogation from its human rights obligations to First Nations peoples

10. It is surprising that the Draft National Report does not address the recent destruction of the 46,000 year old caves of significant cultural heritage significance to the Puutu Kunti Kurrama and Pinikura peoples at Juukan Gorge in the Pilbara region of Western Australia and the failure of the Commonwealth and its courts to protect acknowledged significant sites of the Gomeri people.²⁵ These events amount to violations of human rights including the right to culture protected in the ICESCR and other instruments. Commonwealth and subnational cultural heritage laws do not adequately implement Australia's international obligations and are in need of a total overhaul. States cannot intentionally destroy, or allow private entities to intentionally destroy, the culture of First Nations peoples, including sacred sites, where to do so would threaten the integrity of First Nations people's culture or put at risk cultural survival and cultural identity.²⁶ In practice, this would cover most, if not all, significant sites, but Australia's laws permit the destruction of such sites.
11. Standards relating to the cultural heritage of First Nations peoples are found in several international human rights instruments. The starting point is the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).²⁷ Australia gave its support to UNDRIP in 2009. In a technical sense, UNDRIP is not legally binding, but the rights (and consequential obligations on States) contained within it are derived from pre-existing human rights and international law developed under treaties that are binding on Australia. This includes, the ICESCR, the ICERD and the ICCPR. UNDRIP does not "create new rights for First Nations peoples, but rather provide[s] a contextualised elaboration of general human rights principles and rights as they relate to the specific historical, cultural and social circumstances of First Nations peoples".²⁸ As UNDRIP articulates the content of pre-existing human rights obligations, the former UN Special Rapporteur on Human Rights, James Anaya, explained that the implementation "of the Declaration should be regarded as political, moral and, yes, legal imperative without qualification".²⁹

²⁵ *Talbott v Minister for the Environment* [2020] FCA 1042.

²⁶ See, Human Rights Committee, *Angela Poma Poma v Peru*, CCPR/C/95/D/1457/2006, Apr.24, 2009, para 7.4: [A] State may legitimately take steps to promote its economic development. Nevertheless,..economic development may not undermine the rights [to culture] protected by article 27 [of the International Covenant on Civil and Political Rights]. Thus, the leeway the State has in this area should be commensurate with the obligations it must assume under article 27....[M]easures whose impact amounts to a denial of the right of a community to enjoy its own culture are incompatible with article 27, whereas measures with only a limited impact on the way of life and livelihood of persons belonging to that community would not necessarily amount to a denial of the rights under article 27.

²⁷ *United Nations Declaration on the Rights of Indigenous Peoples*, UN GAOR, 61st sess, Agenda Item 68, UN Doc A/61/L.67, Annex I, art 32 <https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf>.

²⁸ United Nations Human Rights Council (UNHRC), Expert Mechanism on the Rights of Indigenous Peoples (EMRIP), Study of the Expert Mechanism on the Rights of Indigenous Peoples - Free, Prior and Informed Consent: a human rights based approach, A/HRC/39/62, 10 August 2018, para. 3.

²⁹ Special Rapporteur James Anaya, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights including the Right to Development: Report of the Special Rapporteur

12. Moreover, although States (like Australia) tend to refer to UNDRIP as aspirational, the rights (and consequential obligations on States) contained in UNDRIP “constitute the minimum standards for the survival, dignity and well-being of the Indigenous peoples of the world” (Article 43). They are not the ceiling, they are the floor.
13. UNDRIP upholds the rights of First Nations peoples to develop their own cultures and customs, to the use and control of their ceremonial objects, not to be subjected to destruction of their cultures or to discrimination on cultural grounds, and to redress mechanisms for action that deprives them of their cultural values.³⁰ Various Articles in UNDRIP require States to provide protection and empowerment of First Nations peoples to protect cultural heritage.³¹
14. The right to culture (framed as the right to enjoy culture and practise their own religion) is protected at Article 27 of the ICCPR and Article 15 of the ICESCR (framed as the right to take part in cultural life). While States, like Australia, have the sovereign right to develop, that right is burdened where it puts at risk the cultural survival³² or cultural identity of First Nations peoples, which the destruction of sacred sites does. Australia’s economic development must be balanced against the right to culture and only measures that will have limited impact on First Nations culture is permitted.
15. Australia is failing in meeting these international law obligations. The recent legal destruction of the Juukan Gorge is a key example of this failure but just one of innumerable failures to protect First Nations cultural heritage since colonisation of Australia.

Australia must legislate a national Human Rights Act

16. Most modern democracies have considered human rights too important to be left as moral norms and have thus enshrined human rights in their constitutions, such that Australia is now the only democratic western country that does not have explicit human rights in our constitution. Australia also does not currently have a Human Rights Act nationally. Without a national Human Rights Act which is justiciable and reflects the obligations that Australia has accepted and committed to in the treaties and declaration that we have set out above, Australia’s implementation of its human rights obligations is piecemeal, incomplete and subject to political whim.

on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, A/HRC/12/34, 15 July 2009, para.38.

³⁰ See, UNHRC, EMRIP, Study by the Expert Mechanism on the Rights of Indigenous Peoples on the Promotion and protection of the rights of Indigenous peoples with respect to their cultural heritage, A/HRC/30/53, 19 August 2015, para.11.

³¹ See Articles 8, 11, 12, 25, 31

³² The Inter-American Human Rights Commission has interpreted survival as entailing more than physical survival. It must “be understood as the ability of the [people] to ‘preserve, protect, and guarantee the special relationship that [they] have with their territory’, so that ‘they may continue living their traditional way of life, and that their distinct cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected...’ That is, the term ‘survival’ in this context signifies much more than physical survival”

17. Various subnational jurisdictions in Australia have introduced human rights instruments, including the Australian Capital Territory, Victoria and most recently Queensland. While this is laudable, it does not absolve the need for federal leadership in implementing a national Human Rights Act to guarantee protection of human rights to all peoples in Australia.
18. The human rights issues that we have addressed in this letter are significant. A National Human Rights Act would go a long way to meeting Australia's human rights obligations and enable citizens to participate in the protection of their important rights. Any human rights framework introduced in Australia must include Australia's endorsement of UNDRIP and a specific enshrining of those rights.

Recommendations to improve Australia's actions on human rights to fulfill our international law obligations

19. We urge the Commonwealth Government to fulfil its human rights obligations by implementing measures to reduce its greenhouse gas emissions to reflect the highest possible ambition and use the maximum available resources to do so, to ensure consistency with the full enjoyment of human rights by its people and those around the world. Specifically, consistent with our recommendations to the UN Human Rights Council, we recommend that Australia:
 - (a) Take immediate measures to reverse its current trend of increasing greenhouse gas emissions, setting enforceable deadlines to do so;
 - (b) Intensify its efforts to meet its 2030 emissions reductions target under the Paris Agreement, including by refraining from the use of carryover credits from the Kyoto Protocol;
 - (c) Strengthen its 2030 emission reduction target under the Paris Agreement so that the target reflects Australia's highest possible ambition, and mobilise the maximum available resources to achieve this target;
 - (d) Promptly take steps and set enforceable deadlines to phase out its domestic reliance on fossil fuels and dedicate the maximum available financial and material resources to shift to renewable energy by, for example, making long-term commitments to procure energy from low-carbon renewable sources or reforming national regulation to facilitate the deployment of renewable energy;
 - (e) Reconsider the development of new and expanded fossil fuel development projects, and promptly take steps and set enforceable deadlines to phase out its production and export of fossil fuels, including by refusing to approve new or expanded fossil fuel development projects;
 - (f) Discontinue subsidies, financial incentives, or investments that promote or enable activities and infrastructure that are inconsistent with low greenhouse gas emissions pathways;
 - (g) Ensure that:
 - i. All those who are affected by climate change in Australia, especially those most vulnerable to its impacts – such as young people and First Nations peoples – have access to information on the causes and impacts of climate change, and are adequately consulted on the development of climate policies;
 - ii. The right of children to express their views on climate change is duly recognised and respected; and

- iii. The rights and interests of people outside Australia who are impacted by Australia's contributions to climate change, especially those of Australia's Pacific neighbours, are considered when Australia formulates and implements climate policies; and
 - (h) Protect the essential rights of non-government organisations to undertake policy advocacy on environmental issues and the freedom of the public to undertake peaceful protest.
20. We urge the Commonwealth Government to protect the right of First Nations peoples to their cultural survival and heritage in line with its international law obligations. A key element of this is the review and reform of the suite of national and subnational laws that are intended to protect, or which interact with, First Nations cultural heritage in Australia, led by First Nations peoples.
21. We urge the Commonwealth Government to introduce a National Human Rights Act to ensure the strengthened recognition and protection of human rights across Australia. Any human rights framework introduced in Australia must include Australia's endorsement of UNDRIP and a specific enshrining of those rights.

Yours sincerely,



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Environmental Defenders Office



Ariane Wilkinson, Senior Lawyer
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