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Donna Green

Kirsty Ruddock

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COULD LITIGATION HELP TORRES STRAIT ISLANDERS DEAL WITH CLIMATE IMPACTS?

by Dr. Donna Green* & Kirsty Ruddock**

INTRODUCTION

Over the last fifteen years, Torres Strait Islanders have successfully fought to obtain native title rights over their land. Some Islanders are now concerned that these rights may disappear due to the impacts of climate change. The very existence of *Ailan Kastom* (island custom) may be threatened if projected sea level rise in combination with extreme weather events increases the frequency or severity of inundation and necessitates relocation from the islands.

This paper explores the legal remedies that may assist Torres Strait Islanders in dealing with adaptation to climate change. We use the Torres Strait Islands as a case study to examine the question of whether it is possible to hold a party responsible for physical damage to Torres Strait Islands, and cultural damage to Islander society. The paper outlines several areas of law that could assist Torres Strait Islanders including native title law, human rights laws, tort laws, and environmental protection laws.

The paper begins by briefly identifying what is known about the biophysical impacts of climate change for the Torres Strait. These direct biophysical impacts and indirect effects from climate change are discussed in the context of pre-existing social and economic disadvantages found in these communities. We also address a variety of philosophical and legal questions regarding the fact that some Torres Strait communities suffer a disproportionate share of the consequences of climate change. As we discuss these issues we must keep in mind that environmental protection laws in many countries seek to ensure that people are held accountable for damage they cause to the environment. Should this be the case with greenhouse gas (“GHG”) emissions as it is with other pollutants? Is the rest of Australia obligated to assist communities in the Torres Strait to ensure their culture and way of life is preserved? What legal actions and alternatives are available to enable the Islanders to preserve their way of life and ensure adequate compensation for any harm from climate change effects? By considering a combination of legal strategies, as well as adaptative lifestyle responses including the possibility of relocation, we assess the ability of the Torres Strait community to react to impending climate change.

INTERNATIONAL CONTEXT

The Intergovernmental Panel on Climate Change (“IPCC”) has long acknowledged that Small Island States are disproportionately impacted by climate change due to their susceptibility to rising sea levels, storm surges, and their limited resources and infrastructure.¹ As a response to these challenges, and with international support, several small Pacific Island nations are currently engaging in anticipatory adaptation—from hard engineering strategies, e.g. building sea walls, to radical social upheaval planning, e.g. international emigration.² Questions of equity surrounding who should pay for these costs remain due to the recognition of Pacific Island Nations’ minimal current, and virtually non-existent past, GHG emissions. The polluter pays principle suggests that costs of adaptation should not exclusively be borne by these countries.³

Similar concerns are now being raised about how climate change will affect the lives of people living on remote, low-lying Australian islands in the Torres Strait. As part of the wealthy, industrialized nation Australia, the situation of these islands is different than

most Small Island States. There are, however, many parallels between the widely reported concerns of Pacific Islanders about loss of land and sovereignty due to climate impacts combined with natural variability and changing land use, and those of the Torres Strait. For the first time, in 2007, the impacts of climate change on Islanders were specifically noted in the IPCC’s Fourth Assessment Report.⁴

CASE STUDY: THE TORRES STRAIT REGION

The Torres Strait region encompasses about forty-eight thousand square kilometers of open sea, comprised of a shallow

Small Island States are disproportionately impacted by climate change due to their susceptibility to rising sea levels.

*Dr. Donna Green is a researcher at the Climate Change Research Centre, University of New South Wales, Australia. Her research focuses on human-environment interactions, specifically on social and economic vulnerability, adaptation, and risk. She leads the *Sharingknowledge.net.au* program that uses Indigenous and non-Indigenous knowledge to understand climate impacts on remote communities in northern Australia. **Kirsty Ruddock is the Principal Solicitor of the Environmental Defender’s Office, New South Wales. The Environmental Defender’s Office is a community legal center that specializes in public interest environmental law.

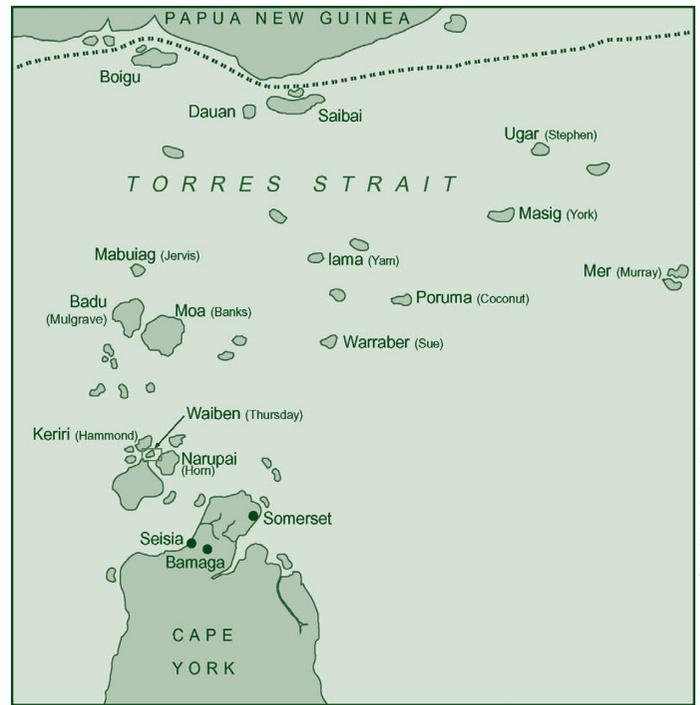
continental shelf between Papua New Guinea and mainland Australia. Torres Strait Islanders are the lesser known of the two Indigenous Australian people. The majority of Islanders live on mainland Australia, however, approximately eight thousand people still live on seventeen of the over 150 islands in the Torres Strait region.⁵ There is significant inter-island cultural difference, demonstrated by language and cultural practices varying across the islands. Islander culture, or *Ailan Kastom*, refers to a distinctive Torres Strait Islander culture and way of life, incorporating together traditional elements of Islander beliefs with Christianity. This unique culture permeates all aspects of island life and is recognized by State and Commonwealth agencies through enshrinement in the *Torres Strait Islander Land Act 1991 (Queensl.)*.⁶

Although the impacts of climate change are already being felt across Australia, the legal responsibilities for climate change are not as clear. At present, there are no Australian laws that specifically deal with protecting communities from climate change impacts.⁷ The policy response in Australia to climate change has not yet addressed issues of responsibility and protection, instead mostly focusing on designing an emissions trading system.⁸

Australia's policy response has also ignored the need for climate justice. Principles of climate justice redefine climate change from a scientific issue to one of human rights and environmental justice. The principles include the concept of "ecological debt" which focuses on redressing inequalities of wealth, power, and access to the earth's resources.⁹ In Australia, climate justice initiatives aim to ensure that Indigenous Australians, who are traditionally more vulnerable members of society, are protected from the impacts of climate change.¹⁰

Public interest litigation has always played a key role in ensuring that citizens are heard and their rights are protected. The Torres Strait has a proud tradition of public interest litigation, being the home of Eddie Mabo, whose case in the High Court brought about the recognition of native title and the *Native Title Act 1993 (Cth)*.¹¹

One way of ensuring that policymakers become aware of the need to protect the rights and interests of Torres Strait Islanders is to use the law to highlight these issues and to seek to hold both governments and corporations responsible for their contribution to climate impacts felt there. Litigation can focus public attention on a particular issue through media exposure, and encourage society to debate public values and the need to protect our environment.¹² Even unsuccessful cases can expose weaknesses in the law and highlight the need for law reform and the development of the law, allowing subsequent cases to build on the legal arguments and scientific evidence presented.¹³



Map of Torres Strait Islands.

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Although to date there have been no Australian cases that have sought to address climate change by holding governments

Principles of climate justice redefine climate change from a scientific issue to one of human rights and environmental justice.

and corporations responsible for their climate impacts, there are a number of different laws explored below that could assist if Torres Strait Islanders wished to pursue the matter.¹⁴ The types of laws that could be used fall into two broad categories: laws that are aimed at protecting human rights like the *Native Title Act 1993 (Cth)* and laws that are directed at finding persons liable for damage to the environment, such as tort laws and specific environmental statutes. Before these options are

discussed in more detail, we briefly outline the projected climate impacts for the region.

BIOPHYSICAL IMPACTS IN THE TORRES STRAIT

No published research has yet specifically focused on biophysical climate impacts in the Torres Strait.¹⁵ Some climate change projections have, however, been calculated for a wider area encompassing the region.¹⁶ These reports project increases in average temperature, relative to the climate of 1990 for the Cape York region of Queensland, of 0.5–1.2°C by 2030 and 1.0–4.2°C by 2070. The average dry-season rainfall for this region is projected to decrease by 1–6% by 2030 and by 2–23% by 2070. The average wet-season rainfall is projected to increase by 0–4% by 2030 and by 1–13% by 2070.¹⁷ However, it is

possible that these ranges may underestimate the magnitudes of likely changes.

Increasing sea surface temperature threatens corals, with regular coral bleaching anticipated just south of the Torres Strait, in the Great Barrier Marine Park, within one to two decades.¹⁸ The average global sea level rise indicates increases of up to seventy-nine centimeters by 2100, with regional variation adding five centimeters to this global average.¹⁹

Changes in the intensity and frequency of weather and climate extremes (rather than average changes) are likely to be a major concern for the Torres Strait. However, there are limited climate extremes data available for the region for validating climate models. Future projections for Australia as a whole show that changes in temperature and precipitation extremes, such as heat waves and rainfall intensity, will increase.²⁰ In the north-east of Australia, tropical cyclones tend to center south of the Torres Strait Islands (around latitudes of 14°–15°C south), in the Gulf of Carpentaria and off the northern Queensland mainland coast. However, even low intensity, relatively distant cyclones or tropical lows in the Gulf of Carpentaria can cause problems when they occur in conjunction with the season of prevailing northwest winds, during January and February, and at high tide.

INDIRECT IMPACTS AND CULTURAL DAMAGE

Climate impacts, such as more extreme weather or an increase in the intensity of storm tides, are likely to result in the need for more maintenance of basic infrastructure, including roads, culverts, jetties, airstrips, water piping, fencing, and sea walls.²¹ Such maintenance is more difficult and expensive for island communities than for less remote communities on the Australian mainland, particularly due to extra transportation costs and time involved with bringing all hardware into the Torres Strait by barge or air. Finding these additional resources is extremely difficult with numerous reports detailing the existing extreme socio-economic disadvantage in the region.²²

Climate change will also likely impact surface and ground water resources, making resource management in the dry season difficult. In the past, many islands depended on fresh water lenses to provide drinking water, but high demand for water (particularly since the introduction of reticulated sewage systems) has caused supply problems for many islands.²³ Rainwater tanks and large lined dams are used to trap and store water for use in the dry season on all islands with many islands already reaching the limits of their drinking water supply and relying on mobile or permanent desalination plants to meet demand.²⁴

Climate change also affects plant and animal biodiversity. Beach and mangrove areas are important habitats and nurseries for several significant species of marine animals. With increasing sea surface temperatures and ocean acidification, the viability of sea grass beds, which are important feeding grounds for turtles and dugongs and a nursery area for prawns and tropical rock lobster, is an area of significant concern.²⁵ Many animals including turtles, dugongs, crocodiles, stingrays, and sharks have a significant cultural role for many Islanders. However, any major impacts on the lifecycles of these animals would reduce

the availability of a nutritious source of fresh food for many coastal communities that traditionally hunt these animals.²⁶

It is likely that changes in natural systems will cause economic, social, and psychological damage, especially if these impacts affect totemic fauna, e.g. turtle and dugong, other important seafood, e.g. crayfish and turtle, or culturally important flora, e.g. Wongai and almond trees. Such problems are likely to add to difficulties of Islanders attempting to revive traditional gardening practices.²⁷

For many Torres Strait Islanders, a connection with their island—a place of ancestry, identity, language, livelihood, and community connection—is the largest determinant of their individual and community “health.” Therefore, biophysical changes affecting the “health” of natural ecosystems are likely to also impact human systems: both individuals’ physical and psychological well-being, as well as the “health” of a community’s cultural cohesion. The impacts of more extreme weather events on sacred sites have not been researched to date, despite the expressed concern of several Torres Strait Islander elders and leaders that such impacts would have serious negative psychological effects.²⁸

WHO IS LIABLE FOR CLIMATE CHANGE?

There are a number of legal responses that Islanders could use to protect their rights and interests from the impacts of climate change using the common law of torts, or by bringing claims under specific statutes that protect the environment, native title, and human rights. As climate change litigation is a new phenomenon, only time will tell whether any of these areas of law could be successfully used to address their concerns.

HUMAN RIGHTS LAWS

As the scientific evidence indicates, climate change threatens the lives, health, culture, and livelihood of many Small Island States and low-lying coastal communities. It is therefore necessary to consider how human rights laws may provide protection to these communities. There are three types of laws that could be of assistance: native title, discrimination, or international human rights laws.

Native Title

Native title is recognized as an important form of customary land law for Indigenous Australians. The *Native Title Act 1993 (Cth)* (“NT Act”) provides for the protection and recognition of native title.²⁹ Native title rights are particularly important to the Torres Strait Islanders. Not only did the Mabo decision establish those rights, but *all* communities in the Torres Strait have their native title rights and interests legally recognized.³⁰ Of the thirty-nine native title determinations made in Queensland as of July 2007, twenty-six are related to Torres Strait communities.³¹ This is the opposite situation to most mainland Indigenous communities which are still fighting in the Courts to have their native title rights recognized.³² Such claims can take ten to fifteen years to finalize.³³ Those who hold exclusive determinations of native title, such as the Traditional Owners of the Mer Island group, obtain the right to control and manage land, similar to freehold

landowners. The High Court recently extended exclusive native title rights to the inter-tidal zone in the Northern Territory.³⁴

One of the real risks posed by climate change is that sea level rise or other storm events may impact and damage land held by Torres Strait Islanders under the NT Act, as well as the rights over the sea and inter-tidal zones. Native title cannot be extinguished except in accordance with the NT Act so the question is whether the NT Act effectively protects Torres Strait Islander's land rights from the impacts of climate change. There is an argument that sea level rise is an "act" in the sense contemplated by and protected under the legislation. Relevantly, section 226 of the NT Act defines "acts that affect native title" to include not only positive acts such as the making of legislation or granting of a license, but the "creation, variation, extension, renewal, or extinguishment of any interest in relation to land or waters." Sea level rise will extinguish certain rights and interests over land because it will be inundated.

The question will be whether the flooding of land will be interpreted as an "act." The act is not one undertaken by the Australian Government, but rather by those producing GHG emissions. Yet, insufficient action by the Australian Government to mitigate the impacts of those gases on Torres Strait Islanders native title rights could arguably be an "act."

One other option available to native title holders is to bring a compensation claim for the impacts of climate change on extinguishing or impairing their native title rights. The NT Act provides for a regime to award compensation to traditional owners for the impairment of their native title rights over an area of land or water.³⁵ It could be argued that the failure to take steps to mitigate climate change means that the Commonwealth and Queensland Governments, in particular, have contributed to the extinguishment or impairment of native title rights.

To date, there have been no successful compensation claims under the NT Act. This is partly because native title must be proved before an application for compensation can be determined under the NT Act, and native title is difficult to prove.³⁶ Compensation can be no more than what would result from a compulsory acquisition and enshrines the concept of "just terms."³⁷ Compensation would be based on market value plus any amount to reflect the cultural value of the land. In the case of the Torres Strait, the market values could be considerable. Therefore, Torres Strait Islanders could lodge claims for compensation on the basis of the extinguishment of their rights as a result of climate change, which could result in significant compensation payments.

Discrimination Laws

Traditionally climate change has been viewed as an environmental, rather than a human rights issue. However there is an increasing recognition that climate change has severe human rights implications and is worsening poverty and vulnerability in communities least responsible for the problem.³⁸ In the absence of a bill or charter of rights in Australia, Australia's current human rights laws do not provide adequate protection to Torres Strait Islanders faced with damage to their culture and possible relocation as a result of climate change.³⁹

In 2005, the Inuit, who are the Indigenous inhabitants of the Arctic region of North America and Greenland, brought a petition to the Inter American Commission of Human Rights ("IACHR").⁴⁰ The petition requested IACHR's assistance in obtaining relief from human rights violations resulting from the impacts of climate change caused by the acts and omissions of the United States. In particular, the petition argued that the United States had violated a number of rights set out in the American Declaration of the Rights and Duties of Man,⁴¹ International Convention on Civil and Political Rights ("ICCPR"),⁴² and International Covenant on Economic, Social and Cultural

Rights ("ICESCR").⁴³ Climate change is impacting and will continue to impact the Inuit people's right to enjoy their traditional lands, to maintain their cultural property, as well as their rights to health and life, residence, the inviolability of their home, and right to means of subsistence.⁴⁴ The petition has yet to be determined but it shows that international human rights are being violated by climate change and litigation is serving to highlight these issues.⁴⁵

It is possible that Torres Strait Islanders could similarly bring their complaints to United Nations bodies. In particular,

the UN Human Rights Committee ("UNHRC") can receive individual complaints and actively investigate and rule upon those complaints.⁴⁶ Some commentators have argued that this system is the oldest, most utilized, and most authoritative within the UN regime.⁴⁷ While the UN Human Rights Committee cannot make binding decisions, its recommendations can highlight the problem and place moral and political pressure on Governments to act.⁴⁸

Torres Strait Islanders may be able to utilize the power of the UNHRC and argue before the Committee that the right to life (article 6), freedom of movement and choice of residence (article 12), and prohibition of interference with privacy, family, and home (article 17) of the International Convention on Civil and Political Rights have been breached. International tribunals have previously recognized the link between environmental health and the right to life.⁴⁹ Similarly, international tribunals have recognized that harm to the environment from pollution can impact the right to home and family life.⁵⁰ In particular, Torres Islanders, parallel to the Inuits, could argue that climate

There are a number of legal responses that Islanders could use to protect their rights and interests from the impacts of climate change.

change threatens the life and health of Torres Strait Islanders. The potential impacts are more than mosquito-borne illnesses and water quality issues in the islands; they also pose risks to basic island infrastructure such as roads, wharves, airstrips, and buildings.⁵¹

Furthermore, the right to freedom of movement in article 12 of the ICCPR also covers the situation of internally displaced persons who are forced to move or are restricted by environmental issues.⁵² This may be an argument that could be used under Australian law to protect Torres Strait Islanders from being forcibly relocated. In *Kruger v. Commonwealth*, Justice Gaudron gave some support to the concept of the right to freedom of movement under Australian law. The Justice found that freedom of movement was part of the implied political communications under the that could restrict state powers, and on this basis laws restricting the freedom of movement of Aboriginal people, with no lawful purpose of protecting Aboriginal persons, were invalid.⁵³ Any laws or policies that are developed to relocate Torres Strait Islanders affected by climate change will need to be carefully considered to ensure they do not infringe on such protections.

Before lodging a communication with the UN Human Rights Committee, an individual must have exhausted all of the domestic remedies available to deal with the breach of the ICCPR.⁵⁴ Although violation of the ICCPR may be used as evidence of violation of domestic law, in this case, there are no domestic remedies within Australia to address these breaches of the ICCPR. Consequently, it would be possible for Torres Strait Islanders to lodge such a complaint directly with the UNHRC at any time.

However, domestic law may be used as a tool to address the fact that climate change will have a disproportionate impact on Torres Strait communities and other Indigenous communities in Northern Australia. Obviously climate change is not directly targeting these communities but is indirectly doing so. It is arguable that the Government's failure to act to prevent the impact of climate change on these communities is indirectly discriminatory. In particular, Australia's failure to date to commit to strict emission targets is impacting disproportionately on these communities.

Australia has in place laws to protect persons against indirect discrimination on the basis of their race.⁵⁵ These laws prohibit policies or rules that put at a disadvantage people of a particular race, color, descent, or national or ethnic origin more than people of another race, color, descent, or national or ethnic origin. Cases have often highlighted provisions that are "fair in form and intention but discriminatory in impact and outcome,"⁵⁶ for example, provisions that are race neutral but affect a particular group disproportionately. Again, the issue here is that the problem relates to inaction rather than, in many cases, direct actions. Arguably the failure of Governments to introduce strong laws to reduce GHG emissions is indirectly discriminatory, but proving this at law may be more difficult.

TORT LAWS

Traditionally, tort laws are aimed at redressing harms to individuals and their property caused by the actions of others. These laws could be used by individuals to bring actions against large GHG emitters or Governments. Indigenous communities in the United States have commenced bringing cases for physical damage to their homes and culture as a result of climate change.⁵⁷

Public Nuisance

To date most of the climate change litigation in the United States has used the tort of public nuisance. No such cases have been commenced in Australia. Nuisance focuses on interference with the right to use and enjoy land.⁵⁸ Public nuisance is defined as an unlawful act, the effect of which is to endanger the life, health, property, or comfort of the public at large.⁵⁹ It is a defense to an action of public nuisance that the actions are an inevitable consequence of the conduct of work that is authorized by a statute and therefore reasonable, and reasonable steps have been taken to prevent the nuisance. It is no defense to a nuisance action based on pollution for the polluter to prove that the environment was already polluted from another source or that the polluter's individual actions were not the sole cause of the nuisance.⁶⁰ Public nuisance is better suited to climate change actions than negligence because causation issues are likely to be less complex.

Two relevant nuisance actions have recently been considered in the United States. In *Connecticut v. American Electric Power Co.*⁶¹ the plaintiffs sought broad forms of judicial relief from the court to abate the "public nuisance" of "global warming" including holding the defendants liable for creating and contributing to a public nuisance and requiring the defendants to abate its contribution to the nuisance through a cap on its carbon dioxide emissions and then reduce them by a specified percentage each year for at least a decade. The plaintiffs argued that U.S. residents faced injuries to public health (heat deaths and respiratory illnesses), increased smog levels, damage to coastal resources from rising sea levels, increases in droughts and flooding, and widespread loss of species and biodiversity as a result of the defendants' actions.⁶² The state of California also sued a number of automobile manufacturers for public nuisance, seeking monetary damages in connection with global warming.⁶³

Both cases were dismissed by the District Court and are currently on appeal.⁶⁴ The Courts viewed the climate change argument as based on non-justiciable political questions with implications for the U.S. economy, foreign relations, and national security, partly due to the extensive nature of the remedies sought in this case. In *Kivalina v. Exxon Mobil*, the Native Inuit village of Kivalina has commenced a public nuisance action as well as a conspiracy case against nine oil companies, fourteen power companies, and a coal company for damages it is suffering from the melting Arctic ice.⁶⁵ At the time of writing, the case has yet to be heard.

Negligence

The most common tort is that of negligence. The essence of negligence is that there has been a failure to take reasonable care to prevent injury to others.⁶⁶ To establish a case of negligence, a litigant has to prove that the defendant owed them a duty of care; that the duty of care was breached; and the breach was the cause of their loss or damage.⁶⁷

The scientific evidence suggests that some damage is already occurring to parts of the Torres Strait, and despite adequate observational records in this region, it is reasonable to consider that slow onset sea level rise will play an ever increasing role in raising the frequency of inundations on low-lying islands in the future. As noted *supra*, more frequent inundations from storm tides may also result if there is an increase in the incidence or frequency of tropical cyclones. Some scientists are suggesting that they may soon be able to judge the role climate change is playing in these extreme weather events.⁶⁸

There is an argument that Governments at all levels owe a duty of care to protect the land and culture of Torres Strait Islanders, by acting to prevent harm to communities from climate change, and are therefore liable for the damage to those communities.⁶⁹ The High Court in Australia has suggested that the degree of vulnerability of those who depend on the proper exercise by the authority of its power may be owed a duty of care.⁷⁰ If a duty of care could be established, it may also be possible to apply such an argument to large emitters of greenhouse gases.

The consensus among practitioners and academics seems to be that local Councils will owe a duty of care to landowners with regard to their consideration of individual development applications in coastal areas that are most at risk of climate change.⁷¹ The amalgamated Island Council will owe a duty of care to residents when considering development applications in the coastal zone, as they have extensive powers to control planning, knowledge of the impacts of climate change, and the community in which they work is extremely vulnerable to such events. There are provisions introduced in recent years to limit the scope of public authorities in negligence to circumstances where they are acting so unreasonably.⁷² Over time, as the impacts of climate change become more severe in some communities and areas, failure to prevent damage caused by climate change may come to be considered sufficiently unreasonable to overcome such a restriction.

The greatest obstacle to people seeking to establish negligence is the issue of causation. Even large GHG emitters can argue that they have not substantially or significantly contributed to the harm suffered by a plaintiff, and their emissions are just a very insignificant amount in comparison to current global and historical emissions. The decision of the U.S. Supreme Court in *Massachusetts v. EPA* accepted that incremental small steps from GHG emitters should still be regulated despite not being the only cause of these emissions in the global context.⁷³ In delivering the opinion of the Court, Justice Stevens stated: “[The EPA’s] argument rests on the erroneous assumption that

a small incremental step, because it is incremental, can never be attacked in a federal judicial forum. Yet accepting that premise would doom most challenges to regulatory action.”⁷⁴

However, the tests of causation will need to evolve to determine who is liable for climate change and will depend on developments in science enabling such predictions to occur, as well as the courts accepting that they should determine the issues, as opposed to Governments.⁷⁵ Some commentators have suggested a more suitable test for determining liability in negligence will be a test that asks “does climate change lead to a material increase in risk to persons?” instead of proving that it is a substantial factor in causing the damage.⁷⁶ Public interest cases about climate change impacts could be fundamental in bringing about developments in the law of negligence to provide remedies for the impacts of climate change. A comparison has been made to asbestos or tobacco litigation, suggesting that over time the law will provide remedies as the effects of climate change become more severe.⁷⁷

STATUTORY OFFENSES UNDER QUEENSLAND ENVIRONMENTAL PROTECTION LEGISLATION

In Queensland, the principal law dealing with environment protection is the *Environment Protection Act 1994* (“EP Act”).⁷⁸ In a recent paper, Dr. Chris McGrath discussed the potential for this legislation to be used by third parties to challenge major greenhouse polluters.⁷⁹ One of the advantages of the EP Act is that it has wide standing provisions that provide significant opportunities for people to bring proceedings in the Queensland Planning and Environment Court.⁸⁰ Usually parties can do so without facing the risks of an adverse costs order.⁸¹ The EP Act creates the offense of causing serious or material environmental harm. The notion of “environmental harm” is widely defined⁸² under the legislation and, although it has not been judicially tested, could foreseeably encompass the emission of greenhouse gases and consequential climate change.⁸³

The EP Act clarifies some of the complexities of causation by stating that environmental harm may be caused by an activity whether the harm “is a direct or indirect result of the activity,” or “results from the activity alone or from the combined effects of the activity and other activities or factors.”⁸⁴ Public interest litigation could be brought on behalf of Torres Strait communities against a corporation operating a number of coal-fired power stations in Queensland for contributing to greater storm tides in the Torres Strait. One of the main barriers to such a case would be that power stations operate under particular environmental authorities. If the court interpreted those authorities broadly they may find they cover all harms that result from power stations operations. It is also a defense to take all reasonable and practical measures to prevent or minimize environmental harm arising from any activity that causes or is likely to cause environmental harm.⁸⁵

CONCLUSION

Alongside the direct biophysical impacts, such as storm surge inundation, it is the myriad of multiple and concomitant

non-climate stresses—limited availability of drinking water, constraints on land available to build on, and the high costs of living—that will be exacerbated by climate impacts on many of the Torres Strait Islands over the next generations.

It is likely that the confluence of existing economic and social constraints with these additional climate impacts, in particular extreme weather events, will create the most vulnerability for low-lying island communities in the medium to long term. The lack of adaptive capacity and resources in these communities is likely to be one of the key factors in reducing their resilience to future climate impacts. In developing resilience-building activities, it is crucial that the socio-economic factors that have caused existing disadvantages in these communities be addressed. In the short term, built infrastructure such as roads, houses, water and electricity services, airstrips, and public buildings will need to be planned with “climate-proofing” in mind. In the longer term, new sources of money to pay for larger projects will need to be found.

Other Pacific islands are already dealing with the vexing issue of relocation by advancing long-term relocation strategies.⁸⁶ Some Islanders may want institutional support to understand the ramifications of different alternative options including

how to provide longer term “climate proofing” as well as planning for relocation off low-lying islands. Due to the expense of relocation and the impacts on culture in the entire Torres Strait region that would result even if only a couple of communities were to decide to relocate, significant forewarning is imperative to reduce associated cultural, social, and economic damage.

There are a number of ways that Torres Strait Islanders could exercise their legal rights to seek to address the impacts of climate change. Although they are unlikely to be able to mitigate projected impacts, they may serve as a potential source of additional funds either directly or indirectly. While any legal actions will be long and difficult under current laws, it is imperative that Governments at all levels begin to address and understand the issues they are facing and urgently develop strategies to protect Torres Strait Islanders’ rights and culture. 

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Endnotes: Could Litigation Help Torres Strait Islanders Deal with Climate Impacts?

¹ See generally N. MIMURA ET AL., CONTRIBUTION OF WORKING GROUP II TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (M.L. Parry et al. eds., Cambridge University Press 2007).

² See Samir Patel, *Climate Science: A Sinking Feeling*, 440 NATURE 734, 736 (2006); see also ABC NEWS, *Endangered Pacific Islet Facing Mass Relocation* (Jun. 5, 2008), available at <http://www.abc.net.au/news/stories/2008/06/05/2265671.htm> (last visited Feb. 6, 2009).

³ PAUL BAER ET AL., HEINRICH BÖLL FOUND., GREENHOUSE DEVELOPMENT RIGHTS FRAMEWORK: THE RIGHT TO DEVELOPMENT IN A CLIMATE CONSTRAINED WORLD (2008), available at <http://www.ecoequity.org/docs/TheGDRsFramework.pdf> (last visited Feb. 6, 2009).

⁴ 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. Kevin Hennessy et al., *Australia and New Zealand, in* CONTRIBUTION OF WORKING GROUP II TO THE FOURTH ASSESSMENT: REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 523 (2007), available at <http://www.ipcc-wg2.org/> (last visited Feb. 6, 2009).

⁵ AUSTRALIAN BUREAU OF STATISTICS, THE HEALTH AND WELFARE OF AUSTRALIA’S ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES 244 (2005), available at <http://www.abs.gov.au/ausstats/abs@.nsf/mf/4704.0/> (last visited Feb. 6, 2009).

⁶ “Generally the body of customs, traditions, observances and beliefs of Torres Strait Islanders or of a particular group of Torres Strait Islanders, and includes any such customs, traditions, observances and beliefs relating to particular persons, areas, objects or relationships.” Torres Strait Islander Land Act, 1991, § 2.02 1991 (Austl.).

⁷ Kate McCrossin, *A Critical Analysis Of The Extent To Which International Environmental Law Has Influenced Commonwealth Legislation And Policies And NSW Legislation With Respect To Climate Change*, 12 LOCAL GOVERNMENT L.J. 230, 233-234 (2007) (explaining that the Commonwealth has directly regulated GHG issues only in the Renewable Energy (Electricity) Act, 2000 (Austl), Energy Grants (Cleaner Fuels) Scheme Act, 2004 (Austl), Ozone Protection and Synthetic Greenhouse Gas Management Act, 1989 (Austl) and Energy Efficiency Opportunities Act, 2006 (Austl)).

⁸ See Chris McGrath, *Legal Liability For Climate Change In Queensland*, 13 QUEENSL. ENVTL. L. REP. 6, 9 (2007). See also DEPARTMENT OF CLIMATE CHANGE, CARBON POLLUTION REDUCTION SCHEME – AUSTRALIA’S LOW POLLUTION FUTURE (2008), available at <http://www.climatechange.gov.au/whitepaper/report/pubs/pdf/CPRSReportvol1.zip> (last visited Feb. 6, 2009).

⁹ FRIENDS OF THE EARTH, CLIMATE JUSTICE: A FAIR SHARE OF THE ATMOSPHERE 4 (2006), available at <http://www.foe.org.au/resources/publications/climate-justice/A%20fair%20share%20of%20the%20Atmosphere.pdf> (last visited Feb. 6, 2009).

¹⁰ See, e.g., Australian Climate Justice Program, <http://www.cana.net.au/ACJP/> (last visited Feb. 10, 2009).

¹¹ See generally *Mabo v. Queensl. II* (1992) 175 C.L.R. 1 (Austl.).

¹² C.J. Preston, *The Role Of Public Interest Environmental Litigation*, 23 ENVIRONMENTAL AND PLANNING L. J. 337, 347 (2006).

¹³ J. SMITH & D. SHEARMAN, CLIMATE CHANGE LITIGATION 12 (Presidian 2006).

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¹⁴ Most Australian cases to date have focused on reviewing Government decisions to approve coal mines or coal-fired electricity generators. The first case to raise such issues was *Greenpeace Austl. Ltd. v. Redbank Power Co. Pty. Ltd.* (1994) 84 L.G.E.R.A. 143 (imposing conditions upon a coal-fired power station in NSW requiring it to mitigate the effects of greenhouse gas emissions by the planting of sinks, the limitation of fuel sources for the station to tailings from particular mines, and the monitoring of and reporting on stack emissions). See also *Austl. Conservation Found. v. La Trobe City Council* (2006) [2006] A.L.M.D. 6142; *Wildlife Pres. Soc’y of Queensl. Proserpine/Whitsunday Branch Inc. v. Minister for the Env’t & Heritage* (2006) 232 A.L.R. 510; *Gray v. Minister for Planning* (2006) 152 L.G.E.R.A. 258; *Anvil Hill Project Watch Ass’n Inc. v. Minister for the Env’t and Water Res.* [2007] F.C.A. 1480; and *Re: Xstrata Coal Queensl. Pty. Ltd. & Ors* [2007] Q.L.R.T. 33 (using merits review to object to a mining lease before the Land and Resources Tribunal).

¹⁵ See generally Donna Green et al., *Will climate change force some Torres Strait Islanders to be amongst the first ‘internally displaced’ Australians?* (forthcoming 2009).

¹⁶ See MICHAEL DUNLOP & PETER R. BROWN, AUSTRALIA DEPARTMENT OF CLIMATE CHANGE, IMPLICATIONS OF CLIMATE CHANGE FOR AUSTRALIA’S NATIONAL RESERVE SYSTEM 68 (2008) [hereinafter SHARING KNOWLEDGE – TORRES STRAIT ISLANDS], available at <http://www.climatechange.gov.au/impacts/publications/pubs/nrs-report.pdf> (last visited Feb. 6, 2009); see also Torres Strait Islands [map], Sharingknowledge Project, <http://sharingknowledge.net.au/> (last visited Feb. 20, 2009).

¹⁷ SHARING KNOWLEDGE – TORRES STRAIT ISLANDS, *supra* note 16.

¹⁸ T.P. Hughes et al., *Climate Change, Human Impacts, and the Resilience of Coral Reefs*, SCIENCE, Aug. 15, 2003, at 929.

¹⁹ Nathaniel L. Bindoff et al., *Observations: Oceanic Climate Change and Sea Level*, in CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS (S. Solomon et al. eds., 2007), available at <http://www.ipcc.ch/pdf/assessment-report/ar4/wg1/ar4-wg1-chapter5.pdf> (last visited Jan. 28, 2009).

²⁰ Lisa Alexander & Julie Arblaster, *Assessing Trends in Observed and Modelled Climate Extremes Over Australia in Relation to Future Projections*, 28 INT’L J. CLIMATOLOGY (2008), abstract available at <http://www3.interscience.wiley.com/journal/120835621/abstract?CRETRY=1&SRETRY=0> (last visited Feb. 6, 2009).

²¹ SHARING KNOWLEDGE – TORRES STRAIT ISLANDS, *supra* note 16.

²² PUBLIC HEALTH SERVICES AND HEALTH INFORMATION CENTRE, HEALTH DETERMINATIONS: TORRES STRAIT AND NORTHERN PENINSULA AREA HEALTH SERVICE DISTRICT 11 fig. TO 6.7 (2004), available at http://www.health.qld.gov.au/hdq/documents/22418_6_nz_tore.pdf (last visited Jan. 30, 2009); Bill Arthur, *Location and Socioeconomic Status: Torres Strait Islanders* (Ctr. for Aboriginal Econ. Policy Research, The Austl. Nat’l Univ., Discussion Paper No. 199/2000, 1996), available at http://www.anu.edu.au/caepr/Publications/DP/2000_DP199.pdf (last visited Feb. 6, 2009).

²³ SHARING KNOWLEDGE – TORRES STRAIT ISLANDS, *supra* note 16.

²⁴ *Id.*

²⁵ See generally DUNLOP & BROWN, *supra* note 16, at 52-56.

²⁶ *Id.*

²⁷ DONNA GREEN, COMMONWEALTH SCIENTIFIC AND INDUSTRIAL RESEARCH ORGANIZATION, HOW MIGHT CLIMATE CHANGE AFFECT CULTURE IN THE TORRES STRAIT? 13 (2006), available at www.cmar.csiro.au/e-print/open/greendl_2006a.pdf (last visited Feb. 15, 2009).

²⁸ *Id.*

²⁹ Native Title Act, 1993, § 3(a) (Austl.).

³⁰ Mabo, *supra* note 11, at 100.

³¹ Determinations include Badu & Moa People #2, Badu Islanders #1, Buru & Warul Kawa, Dauan People, Erubam Le (Darnley Islanders) #1, Garboi, Gebara Islanders #1, Kaurareg People (Murulag #1), Kaurareg People (Mipa, Tarilag, Yeta, Damaralag), Kaurareg People (Murulag #2), Kaurareg People (Ngurupai), Kaurareg People (Zuna), Kulkalgal People, Mabo, Mabuiag People, Masig People and Damuth People, Meriam People, Moa Island, Mualgal People #2,

People of Boigu Island #2, Porumalgal Poruma People, Saibai Island, Ugar (Stephens Islanders) #1, Warraber People, Warraberalgal, Porumalgal and Iama Peoples, Yam Islanders/Tudulaig People. See National Native Title Tribunal website, <http://www.nntt.gov.au/Pages/default.aspx> (last visited Feb. 6, 2009).

³² *Id.*

³³ See North Australian Indigenous Land and Sea Management Alliance, *Kuku Yalanji Agreements: Signed and Sealed*, KANTRI LAIF, 2007, available at http://www.nailsma.org.au/publications/kantri_laif_issue_3_2007.html?tid=427709 (last visited Feb. 12, 2008).

³⁴ Northern Territory of Australia v. Arnhem Land Aboriginal Land Trust (2008) 82 A.L.J.R. 1099 (Austl.).

³⁵ See Native Title Act, 1993, §§ 17, 20, 22G, 22L, 23J, 50, 51, 51A (Austl.).

³⁶ *Id.* at § 13(1).

³⁷ Bryan Keon-Cohen, *Compensation and Compulsory Acquisition Under the Native Title Act 1993*, 28(1) MONASH UNIVERSITY L. REV. 17, 24 (2002).

³⁸ See IPCC, *Human Settlements, Energy, and Industry: State of Knowledge Regarding Climate Change Impacts on Human Populations*, in CLIMATE CHANGE 2001: IMPACTS, ADAPTATION AND VULNERABILITY 388 (2001), available at http://www.grida.no/climate/ipcc_tar/wg2/index.htm. See also Mark Byrne & Marta Iljadica, *There Goes the Neighbourhood!: Human Rights and Climate Law*, 12 UNIYA OCCASIONAL PAPER (2007), available at http://www.uniya.org/talks/byrne_may07-op1.html (last visited Jan. 29, 2009).

³⁹ See Byrne & Iljadica, *supra* note 38.

⁴⁰ SHEILA WATT-CLOUTIER, INUIT CIRCUMPOLAR CONFERENCE, 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 (2005) [hereinafter INUIT PETITION], available at http://www.earthjustice.org/library/legal_docs/petition-to-the-inter-american-commission-on-human-rights-on-behalf-of-the-inuit-circumpolar-conference.pdf (last visited Jan. 29, 2009).

⁴¹ See generally American Declaration of the Rights and Duties of Man, April 1948, OAS Res. XXX, reprinted in SECRETARIAT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS, BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM 5 (2003), available at <http://www.corteidh.or.cr/docs/libros/Basingl01.pdf> (last visited Jan. 29, 2009).

⁴² See generally International Covenant on Civil and Political Rights, December 16, 1966, 999 U.N.T.S 171 [hereinafter ICCPR].

⁴³ See International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S 3 [hereinafter ICESCR].

⁴⁴ INUIT PETITION, *supra* note 40, at 5-6.

⁴⁵ Michael Gerrard, *Survey of Climate Change Litigation*, 238(63) N.Y. L. J. 1 (2007), available at http://www.nycbar.org/mp3/ClimateChangeLitigationNew_Y.pdf (last visited Jan. 30, 2009).

⁴⁶ Australia acceded to the Optional Protocol to the ICCPR on September 25, 1991 and the Protocol came into force for Australia on December 25, 1991, ICCPR, *supra* note 42.

⁴⁷ Meinhard Doelle, *Climate Change and Human Rights: The Role of International Human Rights in Motivating States to Take Climate Change Seriously*, 1 MACQUARIE J. INT’L & COMP. ENVTL. L. 179, 186 (2004), available at http://www.law.mq.edu.au/html/MqJICEL/vol1/vol1-2_2.pdf (last visited Jan. 29, 2009).

⁴⁸ See generally Elizabeth Evatt, *Reflecting on the Role of International Communications in Implementing Human Rights*, 5 AUSTR. J. HUM. RTS. 20 (1999), available at <http://www.austlii.edu.au/au/journals/AJHR/1999/20.html> (last visited Feb. 20 2009).

⁴⁹ Doelle, *supra* note 47, at 200-205 (discussing cases that have previously recognized the link between environmental health and the right to life). See also *Gbemre v. Shell Petroleum Development Co. Nigeria*, No. FHC/B/DS/53/05 (Nigeria 2005), available at <http://www.climatelaw.org/cases/case-documents/nigeria/ni-shell-nov05-judgment.pdf> (last visited Jan. 30, 2009).

⁵⁰ See *Lopez Ostra v. Spain*, 46 Eur. Ct. H.R. (1994).

- ⁵¹ DONNA GREEN, COMMONWEALTH SCIENTIFIC AND INDUSTRIAL RESEARCH ORGANIZATION, CLIMATE CHANGE AND HEALTH: IMPACTS ON REMOTE INDIGENOUS COMMUNITIES IN NORTHERN AUSTRALIA 5, 8 (2006), available at http://www.cmar.csiro.au/e-print/open/greendl_2006.pdf (last visited Feb. 6, 2009).
- ⁵² The Secretary-General, *Internally Displaced Persons: Report of the Representative of the Secretary-General*, section D(1)(31) delivered to the Commission of Human Rights, UN Doc E/CN.4/1996/52/Add.2 (Dec. 5, 1995), available at <http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/75550ee91a4fb1f802566cc005c2c63?Opendocument> (last visited Feb 6, 2009).
- ⁵³ *Kruger v. Commonwealth* (1997) 190 C.L.R. 1, 4 (Austl.).
- ⁵⁴ SARAH PRITCHARD & NAOMI SHARP, AUSTRALIAN HUMAN RIGHTS INFORMATION CENTRE, COMMUNICATING WITH THE HUMAN RIGHTS COMMITTEE: A GUIDE TO THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 5.5.2.7 (1996).
- ⁵⁵ Racial Discrimination Act, 1975, § 9(1A) (Austl.).
- ⁵⁶ See *Department of Foreign Affairs and Trade v. Styles* (1989) 88 A.L.R 621, 627 (Austl.).
- ⁵⁷ See *Complaint for Damages at 1, Kivalina v. ExxonMobil Corp.*, No. 08-1138 (N.D. Cal. Feb. 26, 2008), available at <http://www.climatelaw.org/cases/country/us/kivalina/Kivalina%20Complaint.pdf> (last visited Jan. 30, 2009).
- ⁵⁸ RESTATEMENT (SECOND) OF TORTS 10, 40 GM (1989 App.).
- ⁵⁹ See *R. v. Clifford* (1980) 1 N.S.W.L.R 314, 318 (Austl.).
- ⁶⁰ See *Footscray Corp. v. Maize Products Pty. Ltd.* (1943) 67 C.L.R 301, 312 (Austl.).
- ⁶¹ See *Connecticut v. American Elec. Power Co.*, 406 F. Supp. 2d 265, 267 (S.D.N.Y. 2005).
- ⁶² *Id.* at 268.
- ⁶³ See *California v. General Motors Corp.*, No. C06-05755 MJJ, 2007 WL 272687, at 1 (N.D. Cal. Sept. 17, 2007).
- ⁶⁴ See Office of Attorney General, California Department of Justice, Public Nuisance Litigation, <http://ag.ca.gov/globalwarming/litigation.php> (last visited Jan. 30, 2009).
- ⁶⁵ See *Complaint for Damages*, *supra* note 57, at 1-2.
- ⁶⁶ RESTATEMENT (SECOND) OF TORTS §291 (1965).
- ⁶⁷ RESTATEMENT (THIRD) OF TORTS §6 cmt. b (2005).
- ⁶⁸ See Press Release, Lawrence Livermore National Laboratory, Researchers Link Human Activities to Rising Ocean Temperatures in Hurricane Formation Regions (Sept. 11, 2006), available at https://publicaffairs.llnl.gov/news/news_releases/2006/NR-06-09-02.html (last visited Feb. 6, 2009); see also AAP, *Companies Could Be Sued Over Climate Change*, THE DAILY TELEGRAPH, Dec. 9, 2008, <http://www.news.com.au/dailytelegraph/story/0,22049,24777682-5001028,00.html> (last visited Jan. 30, 2009).
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- ⁷⁰ See *Graham Barclay Oysters Pty. Ltd. v. Ryan* (2003) 211 C.L.R. 540, 576 (Austl.).
- ⁷¹ Zada Lipman & Robert Stokes, *Shifting Sands: The Implications of Climate Change and a Changing Coastline for Private Interests and Public Authorities in Relation to Waterfront Land*, 20 ENVTL. & PLANNING L.J. 406, 420 (2003). See also Jan McDonald, *The Adaptation Imperative: Managing the Legal Risks of Climate Change in Climate Law in Australia*, in CLIMATE LAW IN AUSTRALIA 124, 135 (Tim Bonyhady & Peter Christoff eds., Melbourne University Press 2007); Chris McGrath, *Legal Liability for Climate Change in Queensland*, 13 QUEENSL. ENVTL. PRACTICE REP. 17 (2007); Jan McDonald & Philippa England, *A Risky Climate for Decision-Making: The Legal Liability of Development Authorities for Climate Change Impacts*, 24 ENVTL. & PLANNING L.J. 405 (2007).
- ⁷² See Civil Liability Act, 2003, §36(2) (Queensl.).
- ⁷³ See *Massachusetts v. EPA*, 549 U.S. 497, 525 (2007).
- ⁷⁴ *Id.* at 524.
- ⁷⁵ See decision of *Comer v. Murphy Oil*, No 1:05-CV-436 (S.D Miss, 18 April 2006) (dismissed on Aug. 30 2007).
- ⁷⁶ See *Mabo*, *supra* note 11, at 109-113.
- ⁷⁷ Richard Fletcher, *Climate Change and the Pacific – Science, Conference Papers and the Odd Bit of Real Action?* 61 INT'L. BAR NEWS 25, 26 (2007).
- ⁷⁸ See generally Environmental Protection Act, 1994 (Queensl.).
- ⁷⁹ See generally Chris McGrath, *Legal Liability for Climate Change in Queensland*, 13 QUEENSL. ENVTL. PRACT. REP. 17 (2007).
- ⁸⁰ See Environmental Protection Act, *supra* note 78, at § 505 (Queensl.).
- ⁸¹ See Integrated Planning Act, 1997, § 4.1.23 (Queensl.).
- ⁸² See *Maroochy Shire Council v. Barnes* (2001) 273 Q.C.A., 475.
- ⁸³ See Environmental Protection Act, *supra* note 78, at §§ 8, 9, 14 (Queensl.).
- ⁸⁴ Environmental Protection Act, *supra* note 78, at § 14(2).
- ⁸⁵ Environmental Protection Act, *supra* note 78, at § 319(1). See also *Maroochy Shire Council [2001] Q.P.E.L.R* (where Dodds DCJ considered the duty is to not cause more damage than necessary rather than a protective duty).
- ⁸⁶ BENJAMIN L. PRESTON ET AL., COMMONWEALTH SCIENTIFIC AND INDUSTRIAL RESEARCH ORGANIZATION, CLIMATE CHANGE IN THE ASIA/PACIFIC REGION 49-50 (2006).