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# Indigenous-led Rights-based Approaches to Climate Litigation

## Discussion Paper

Francis Nona (*Dhoeybaw Clan*), Associate Professor Veronica Matthews (*Quandamooka*), Associate Professor Nina Lansbury, Kristina Vine, and Lillian Ireland (*Melukerdee*)

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**LOWITJA INSTITUTE**

PO Box 1524, Collingwood
Victoria 3066 Australia
E: admin@lowitja.org.au
W: www.lowitja.org.au

Authors: Francis Nona (*Dhoeybaw Clan*), Associate Professor Veronica Matthews (*Quandamooka*), Associate Professor Nina Lansbury, Kristina Vine, and Lillian Ireland (*Melukerdee*)

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## Dedication

This work is dedicated to the late Dr Lowitja O'Donoghue AC CBE DSG in memory of her passing. We thank her for her leadership of our people for so many decades.

## Acknowledgement of Country

We acknowledge the Traditional Custodians of the lands in which the planning, writing, communicating, analysing, and writing of this paper was undertaken by the project team and contributors. The authors pay respects to their Elders past, present, and future.


## Acknowledgements of contributors

The authors would like to acknowledge the contributors to this work – including the generations of Aboriginal and Torres Strait Islander Peoples whose Knowledges have been passed down with care and respect to today's generations, who will in turn pass it on. The authors would also like to thank the valuable input to the design and drafts of this paper by Professor Sandra Creamer (Waanyi Kalkadoon), Professor Rowena Maguire, Dr Sakshi Sakshi, Dr Britta Wigginton, and Mina Kinghorn.




## About the authors and their roles

Our project team was led by Aboriginal and Torres Strait Islander researchers working in the climate change and health field. Collaborating through the Healthy Environments and Lives Network (HEAL) network, this team represents relevant expertise and research experiences, as well as a variety of skills in First Nations health, climate change impacts, and human rights contexts. The team also allows for capacity strengthening of two PhD students (Nona and Vine) and an early career Aboriginal researcher (Ireland).

Francis Nona (*Dhoeybaw Clan*), Queensland University of Technology: Project coordination and lead writer of scoping review and discussion paper.

Associate Professor Veronica Matthews (*Quandamooka*), University Centre for Rural Health, University of Sydney: Senior Aboriginal researcher providing expert advice on climate change impacts and initiatives on Aboriginal and Torres Strait Islander communities. Assisted with drafting and reviewing scoping review and discussion paper.

Associate Professor Nina Lansbury, School of Public Health, University of Queensland: Project coordination support and senior researcher, assisted with drafting and reviewing scoping review and discussion paper.

Kris Vine, University Centre for Rural Health, University of Sydney: Lead of the scoping review, assisted with drafting and reviewing scoping review and discussion paper.

Lillian Ireland (*Melukerdee*), ACT Supreme Court: Research Assistant supporting literature searches and writing synthesis of scoping review.

## Purpose of this discussion paper

Lowitja Institute commissioned this discussion paper to examine the intersection between Indigenous rights, human rights, environmental rights, and climate action. The Institute sought to investigate how international human rights frameworks, rights-based approaches, and Indigenous nation building can support climate change efforts while also respecting Indigenous rights and climate justice.

The goals for this paper were twofold:

1. To empower Aboriginal and Torres Strait Islander leadership on climate action, including a solid foundation for national and international advocacy on climate and health.
2. To provide thought leadership in the broader Australian and international context.

Mark Thomas Warusam (Elder and Cultural Knowledge Holder) speaking with university students about drawing on Indigenous knowledge to develop adaptation strategies for climate change (photo: Francis Nona).

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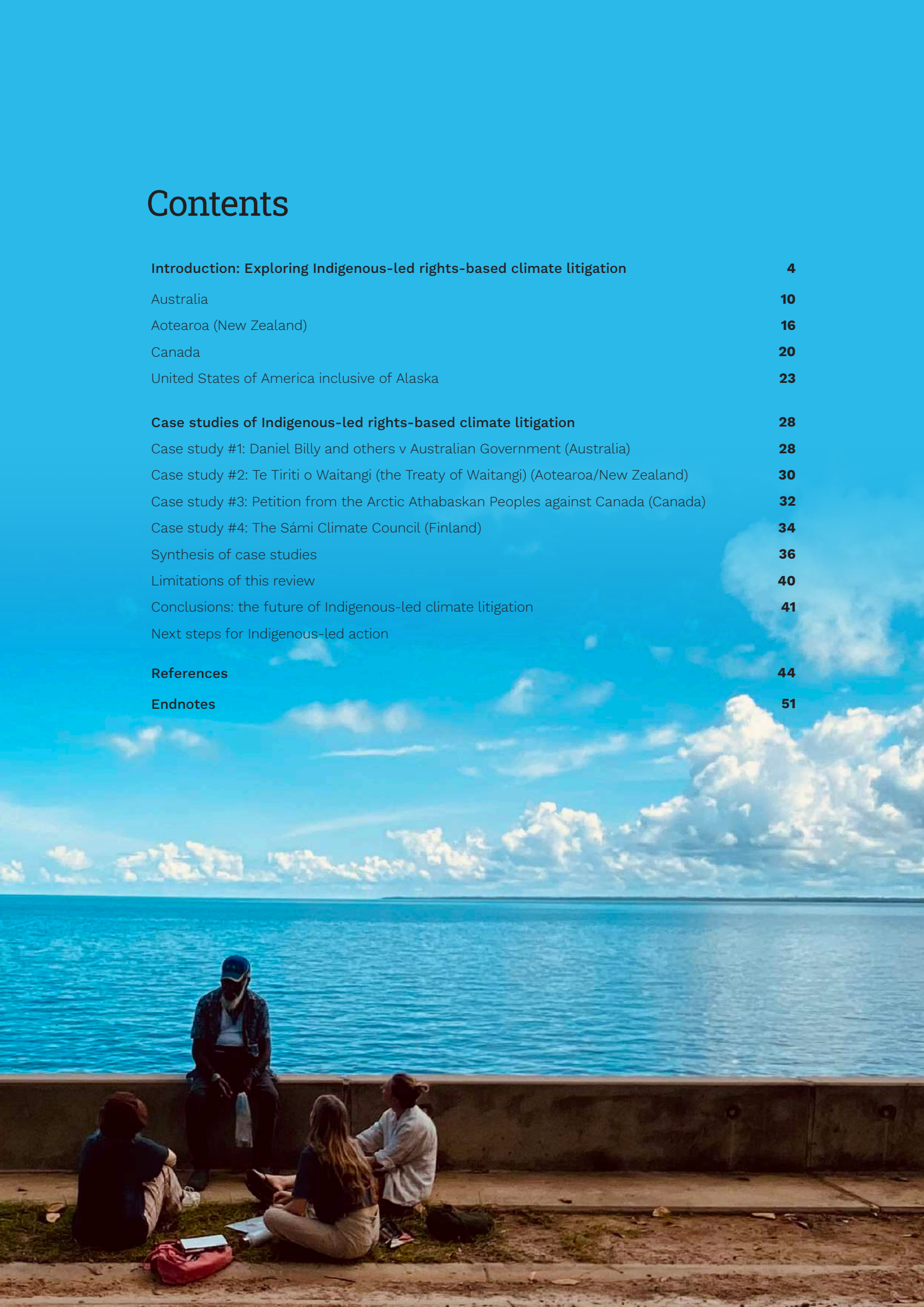


INTRODUCTION

# Exploring Indigenous-led rights-based climate litigation

It is widely accepted that climate change threatens the wellbeing of all people globally (IPCC 2022). In Australia, evidence is mounting that Aboriginal and Torres Strait Islander Peoples are and will continue to be disproportionately affected by direct and indirect health impacts of climate change (Bowles 2015; Hall and Crosby 2020; HEAL Network and CRE-STRIDE 2021; Lawrence et al. 2022). This pattern is mirrored across the world, with evidence now from the Intergovernmental Panel on Climate Change (IPCC) that Indigenous peoples[1] are more vulnerable to climate change (IPCC 2022). This latter finding is noteworthy. In particular, with three decades of research into climate change, the IPCC scientists have only recently acknowledged the ongoing role of colonialism as a driver of climate change. This explicit recognition allows acknowledgment of the historical injustices that shape the present day, including the unequal impacts of climate change.

In light of scientific consensus on the human-driven sources of climate change, globally there has been a steady movement of individuals and organisations seeking concrete actions from governments and the private sector, especially through adopting urgent mitigation and adaptation measures (UNEP 2020). These cases are increasingly categorised under 'climate change litigation' in mainstream media. Climate litigation tends to include a range of approaches, including rights-based litigation, environmental planning and impact assessment litigation, and enforcement of corporate responsibilities of various hues. Globally, climate litigation in its many forms is gaining traction as a movement for recognising and achieving climate justice (UNEP 2023). According to the recent United Nations Environment Programme (UNEP) report, the total number of climate-related litigation cases has more than doubled since the first report on the issue, with 884 cases in 2017 growing to 2,180 cases in 2022 (UNEP 2023). In addition, the report shows that Indigenous peoples, among others, are taking a leading role in climate litigation and using it as a strategic platform to drive policy and governance reform.

Climate litigation is a complex category of litigation that is constantly changing as new forms of evidence and claims are accommodated in the juridical spaces. One of the more visible categories is rights-based litigation, which refers to cases emerging from:

> *'the ways in which national constitution, human rights law and other laws in general, imbue individuals and communities with rights to climate mitigation and adaptation action. It refers to both international and domestic commitments made to ensure that people will enjoy a safe and stable climate as well as other rights that do not explicitly focus*

*on climate but have an impact in addressing climate change. These rights are variously known as human rights, environmental rights and human rights obligations related to the environment.'* (UNEP 2023: 26-27).

In domestic litigation worldwide, this category of cases has drawn on existing constitutional and fundamental rights under national laws to make the case for climate justice, while often framing it within international obligations under the Paris Agreement (resolved at the UN Climate Change Conference (COP21) in Paris, France, in 2015) and the broader human rights obligations and climate treaty regimes. Recent analyses of climate litigation have found climate rights cases documented across Austria, Australia, Brazil, Canada, Colombia, India, Netherlands, Norway, Pakistan, Peru, Philippines, the Republic of Korea, Switzerland, and the United States of America (Sabin Center 2023). However, many of these cases do not see a positive outcome due to, among other factors, financial resources, intimidation, and lack of procedural and strategic 'know-how'. The *UNEP Climate Litigation 2023 Report* also acknowledges that, for vulnerable groups, including Indigenous peoples, these barriers also tend to have adverse impacts in the aftermath of the litigation (UNEP 2023).

In this paper, we argue that a more in-depth analysis of rights-based climate litigation is required. Especially given the inequitable impacts of climate change on Indigenous peoples globally, and the potential structural barriers such as ongoing colonisation that tend to affect government responsiveness and responsibility, there is a compelling need to understand how climate litigations may be used strategically. In the scoping review, we seek to synthesise existing literature on how Indigenous peoples globally are drawing on national and international law to take a human rights-based approach to climate change litigation[2]. More broadly, the report aims to analyse Indigenous-led climate litigation and to consider implications, particularly for Aboriginal and Torres Strait Islander peoples and the Australian legal context.

## Background

> *'It is widely recognised that climate change "raises profoundly important questions about social justice, equity and human rights across countries and generations" given the stark inequalities between those with the greatest responsibility for contributing to the problem and those with the greatest vulnerabilities to its effects. Relations between and within countries, and between citizens of the world are characterised by "extreme carbon inequality" with vast differentials in emissions levels globally.*
>
> *The justice implications of these discrepancies in global emissions are starker still when these inequalities in carbon consumption are mapped against differentiated vulnerability to the effects of climate change. A key environmental justice challenge has been to make visible the impacts of climate change as a form of injustice and violence, and to call for responses that hold historical polluters to account, and provide compensative and reparative justice to those most vulnerable to the impacts of climate change.'* (Dehm 2020).

As the above quote describes, a result of more than 230 years of colonial legacy and the complex, intergenerational burden of European-led racist systems is that Aboriginal and Torres Strait Islander peoples will be disproportionately affected by increasing climate extremes that exacerbate heatwaves, bushfires, floods, storms, cyclones, and drought (Bowles 2015; Hall and Crosby 2020). There are already disparities in access to safe water supplies and food security, and climate change will increase these indirect impacts, along with air quality issues and a rise in infectious and vector-borne diseases (Bowles 2015; Hall et al. 2021; HEAL Network and CRE-STRIDE 2021).

Australia's history of stolen lands began with the lie of 'terra nullius' where it was purported by British colonisers to be an 'empty land' with no inhabitants, despite many records of interactions with the Indigenous peoples (Dudgeon et al. 2010). The theft of land was followed by frontier wars and massacres. Subsequently, government policies of assimilation, 'protectionism', and integration replaced state-led massacres. Now known as the 'Stolen Generations', children were taken from Aboriginal and Torres Strait Islander families to assimilate them into the non-Indigenous community. Aboriginal and Torres Strait Islander children remain over-represented in out-of-home care today. Wages for Aboriginal and Torres Strait Islander people were less than those paid to non-Indigenous Australians or non-existent, and were taken by the governments of the time. Stolen lands, children, and wages have exacerbated the impacts of institutionalised and systemic racism in Australia, impacting negatively on the health status of Aboriginal and Torres Strait Islander peoples (Paradies 2016; Parliament of Queensland 1897). This disadvantage puts Aboriginal and Torres Strait Islander people at a higher risk from the effects of climate change.

However, even in the face of ongoing colonial violence, there are many examples of community-led climate change adaptions from across Australia (HEAL Network and CRE-STRIDE 2021; Lansbury et al. 2022; McIntyre-Tamwoy et al. 2013; McNamara and Westoby 2011; McNamara et al. 2017; Redvers et al. 2022).

Aboriginal and Torres Strait Islander people have many cultural complexities and nuances across their different nations or groups – too many to summarise here. Despite this, they share a similar holistic concept of health and wellbeing, linked not only to an individual person's health status (as per Western cultural constructs), but to the wellbeing of the community and homelands known as Country (Bowles 2015). Therefore, the impacts of climate

change – both direct and indirect – include the myriad of social and emotional impacts related to the change or loss in cultural and spiritual connection to respective homelands or Country (Bowles 2015; Kingsley and Arabena 2015). For example, there is growing documentation of the spiritual, social, and emotional impacts of climate change on Torres Strait Islander peoples from the inundation and encroachment from the sea of sacred places and cemeteries (Green et al. 2010; Green 2008; McNamara and Westoby 2011).

Turning to the legal landscape for human rights within Australia, it is important to note some of the key international frameworks that the Australian Government has signed or joined, as further context for litigation led by Aboriginal and Torres Strait Islander peoples. Australia is a party to the *United Nations Declaration on Human Rights (UDHR)* and has signed and ratified: the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the Convention on the Rights of the Child (CRC); the Convention against Torture and Other Cruel Inhuman or Degrading Treatment of Punishment (CAT); the Convention on the Elimination of All Forms of Racial Discrimination (CERD); the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of Persons with Disabilities (CRPD). Australia is also a party to the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).*

The UDHR, IICPR, and ICESCR are considered to form the International Bill of Human Rights[3]. Despite ICESCR and ICCPR being developed at the same time, the ICCPR arguably has stronger accountability and reporting measures, meaning the ICESCR has weaker provisions for countries to uphold their citizens' economic, social, and cultural rights. An optional protocol to the ICESCR was developed in 2008 to provide mechanisms for individuals and groups to complain to the UN; however, this has not been ratified by the Australian Government.

In relation to the *UNDRIP*, settler-colonial countries with Indigenous populations ('CANZUS' countries: Canada, Australia, Aotearoa (New Zealand), and the United States of America) – the geopolitical focus for this scoping review – initially opposed the resolution in 2007. Over time, these nations have provided qualified support or endorsement and committed to 'take steps' towards implementation in varying degrees. Even though *UNDRIP* is not revolutionary, it is considered an instrument of international law, from which rights to culture and self-determination arise (Le Teno and Frison 2021). It also challenges the dominant Western individualistic approach to human rights, raising the importance of collective rights of Indigenous communities, which is particularly important in the climate change context where Indigenous community-level involvement is required (Le Teno and Frison 2021).

At a global level, the Expert Mechanism on the Rights of Indigenous Peoples, created in 2016, gives Indigenous peoples an avenue to advocate to the UN Human Rights Council. The Expert Mechanism also provides advice to countries about how to improve their laws to better achieve the goals of the *UNDRIP*. Other venues where Indigenous peoples have filed complaints include the UN Permanent Forum on Indigenous Issues, the International Indigenous Peoples Forum on Climate Change, and the World Conservation Congress (Jodoin et al. 2018).

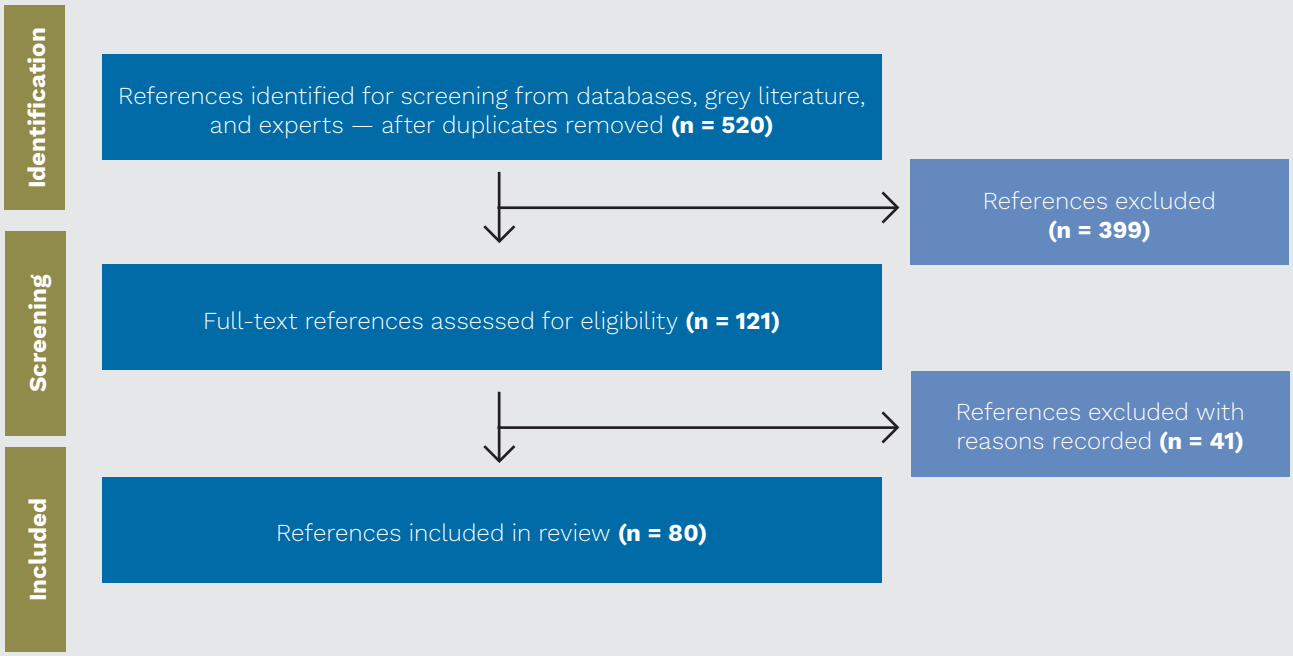
Given rights-based climate litigation is an evolving field, with debates ongoing and evidence of pending and decided cases mounting, we seek to review rights-based litigation led by Indigenous peoples in settler-colonial states. We define rights-based litigation as encompassing human rights arguments related to climate change (Wewerinke-Singe 2023). While not intending to be exhaustive or systematic, our review contributes to the growing documentation of pending and decided climate litigation that incorporates rights-based arguments. We provide in-depth analysis of four particular case studies and offer broader recommendations and implications for Indigenous Traditional Owners/Custodians, communities and allies, both in Australia and globally.

## Method

Our scoping review sought to identify and synthesise what has been reported in existing literature on how Indigenous peoples have used national and international human rights-based approaches to support climate change litigation. Following the Preferred Reporting Items for Systematic Review and Meta-Analysis extension for scoping review (PRISMA-ScR) methodology, the review looked at academic (peer-reviewed) literature, legal reports, and case studies, as well as publicly available online information (grey literature). All study types and website documents were included, with the review limited to English references from 2003-2023 that featured Indigenous peoples of Canada, Australia, Aotearoa (New Zealand), and the United States of America (US), given their similar colonial historical contexts, as well as the Arctic region and the Sápmi of Sámi communities across Norway, Sweden, Finland, and Russia. Database searches were undertaken in Scopus, Informit, Medline, and CINAHL with online documents and websites searched using Google. The search strategy used a combination of three concepts: First Nations peoples; human rights-based or environmental justice; and climate change.

A total of 520 references were identified from all sources. Using criteria to assess relevancy, a two-step screening process resulted in a final 80 records included in the review, as outlined in Figure 1. Four team members, two of whom are Indigenous, were involved in reviewing the records. A minimum of two reviewers were involved to finalise the included records. Additional references beyond those included in this scoping review have been used to inform this discussion paper where relevant, to provide a full overview of the topic and contexts.

**Figure 1:** Summary of the process for identifying references included in this scoping review



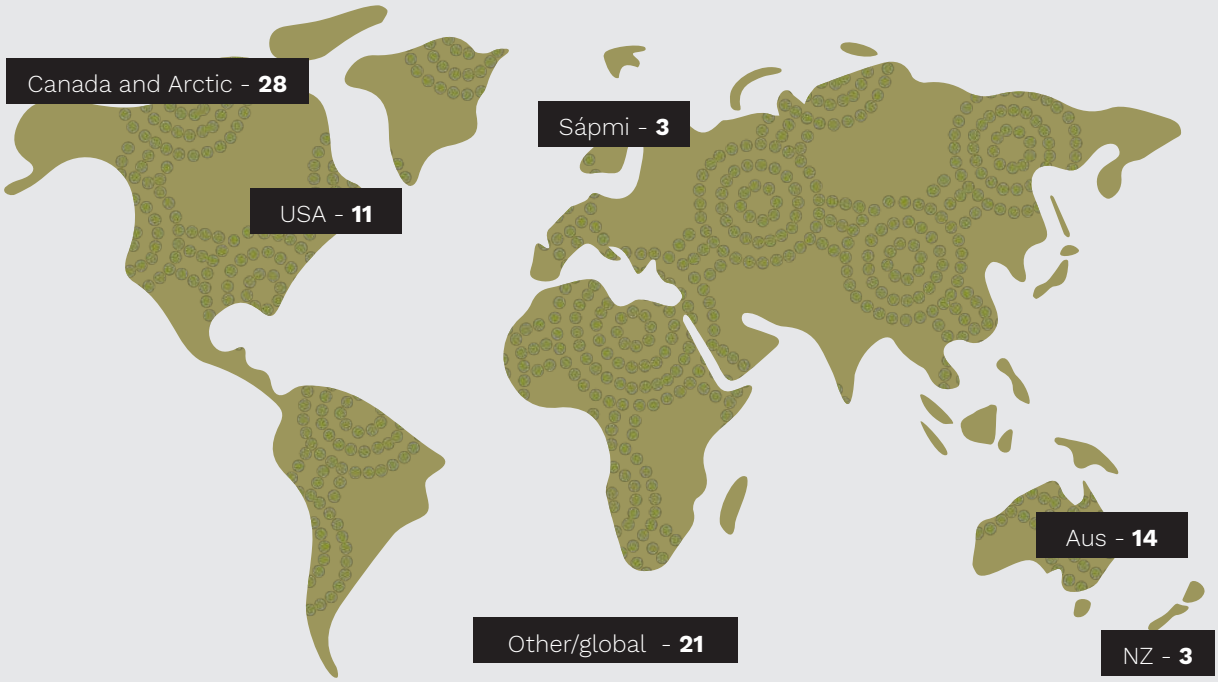
## Results

This scoping review identified how rights-based approaches are already being applied to support Indigenous peoples' action on climate change. The findings of the review are summarised here, categorised geographically, to give sociopolitical understanding of how rights-based approaches have been utilised and applied for and by Indigenous peoples in different regional historical contexts.

As represented in Figure 2, 28 references discuss the Canadian and Arctic regions, 14 cover Australia, 11 are from the US, including Alaska, 3 from Aotearoa (New Zealand) and 3 are focused on Sámi communities. The remaining 21 references were from a combination of locations or looked at the topics from a global perspective.

The authors categorised these results using national borders for ease of analysis and readability. We note, however, that these map-drawn boundaries do not give true recognition to Indigenous history and ways of being. We recognise and pay respect to the intricate Indigenous governance and legal systems that exist within and across many of these national borders as organised by the Indigenous communities of these lands.

**Figure 2:** Geographical distribution of references included in this review



# Australia

## Political and historical context

Aboriginal and Torres Strait Islander peoples maintain the Knowledges from thousands of generations about their Country – including how to adapt to changing climatic conditions (Lyons et al. 2019). Yet this knowledge is not often privileged in climate change policies; one critique observes that Indigenous voices can be 'compartmentalised' by decision-makers as only pertaining to 'traditional' or 'cultural' issues, and can be excluded from contributing to the 'practical' and/or 'material' aspects of political economy (Parsons 2014). Furthermore, the potential resilience provided by Knowledge of the Country and of the supportive environment – which may potentially offer some buffer or protection from climate change – can be undermined by low financial resources and relatively low political standing (Lyons et al. 2019).

Such exclusion from political decision-making on climate change prevent the priorities and concerns of affected Aboriginal and Torres Strait Islander peoples from being heard and priority initiatives implemented (Lowitja Institute 2023). This unequal access to power and decision-making has resulted in settler-colonial powers overriding Indigenous-centred determinations. For example, the Queensland Government extinguished native title over the Wangan and Jagalingou Country when seeking to approve a significant coal mine in the Galilee Basin (Stünzner 2022).

## Climate change issues and human rights violations

An example of climate change-induced impacts on Indigenous peoples and Country in Australia can be seen in the Torres Strait. Traditional Knowledge Holders and community members who continue to live on Country and support their family and culture

Ormiston Pound, Northern Territory (iStock).

have noted a range of climate-related changes. These include higher-than-average tides with associated sand erosion, changing lengths of seasons that affect planting and harvesting of traditional crops, and changes in bird migration patterns and timing (Calma 2008). Amid this, the land and sea rights and associated human rights held by Torres Strait Islander peoples are place-based and cannot be transported nor adequately compensated (Bedford et al. 2021).

## Effectiveness of human right mechanisms and initiatives for the climate crisis

There are opportunities for human rights governance mechanisms to be invoked at a range of levels from sub-state, state/territory, national and international levels, although all of these potential human rights legal actions are noted as being 'long and difficult' under current Australian laws (Rimmer 2022:259).

### Sub-state mechanisms

One example of human rights mechanisms that potentially provide climate change protection that was enacted at a sub-state level is the Torres Strait Regional Authority (TSRA). Its establishment of in 1994 was intended to provide a regional governance structure, conducted according to island customers (*ailan kastom*), for increased autonomy to develop a regional economic base for the Torres Strait Islands and their peoples (Calma 2008).

### State and territory mechanisms

Three state and territory jurisdictions in Australia – Queensland, Victoria, and the Australian Capital Territory – have enabled human rights legislation, although none has explicitly implemented the UN Declaration of the Rights of Indigenous Peoples (UNDRIP) (Bedford et al. 2021).

Queensland's *Human Rights Act 2019* contains a key feature of relevance to protect Indigenous rights affected by climate change. Section 28 under the Act requires consideration of the effect of decisions on the cultural rights of Aboriginal and Torres Strait Islander peoples, including their connection to land, sea, and other natural resources (Queensland Government 2019). The interpretation of this section is anticipated to be broad (Bedford et al. 2021). In 2022, Wangan and Jagalingou community spokesperson Adrian Burragubba was considered to be the first person to invoke and test Section 28 when resisting the development approval for the Adani coal mine on the Galilee Basin (Stünzner 2022).

### National mechanisms

There is an absence of Australian legislation on human rights — and while *UNDRIP* is recognised in Australia, it has not been legislated (Young 2020). This raises challenges for legal cases to protect Aboriginal and Torres Strait Islander peoples from climate change risks through invoking international human rights such as free, prior, and informed consent ('FPIC') and self-determination (Young 2020).

**Native Title legislation:** One national legal mechanism is native title legislation that has already been granted to the Traditional Owners of specific Country. A 2024 legal decision for the Gomeroi people regarding a gas project on their Country ruled that the 'public interest test' must include climate change risks when considering a development approval on Native Title land (O'Neill and Markey-Towler 2024). In the court case, one of the presiding judges stated that any development decision 'requires an arbitral body to address and evaluate any public benefits and detriments in the act being done'; this included considering the impact of greenhouse gas emissions from the proposed Narrabri gas project (FCA 2024:s228). This decision by the Federal Court

of Australia was considered by analysts to be the first to consider climate change in a public interest test for projects on Native Title land in Australia (O'Neill and Markey-Towler 2024).

**Australian Human Rights Commission (AHRC):** The AHRC is an independent statutory body of the Australian Government with a focus on the application of anti-discrimination legislation by federal departments and agencies. The AHRC provides a platform for the consideration of human rights, including regarding climate change and its impacts on Aboriginal and Torres Strait Islander peoples. Although climate change or similar was not specifically mentioned, a 2013 AHRC paper to explore Australian implementation of UNDRIP included aspects relevant to climate change, invoking the principles of non-discrimination and equality to 'increase the quality of life experienced by Aboriginal and Torres Strait Islander peoples' (Gooda et al. 2013:13). An earlier speech in 2008 by then AHRC President John von Doussa QC did explicitly address climate change, with special mention of the impact on Aboriginal and Torres Strait Islander peoples and their traditional Country (Doussa 2008). He noted that Australia is a signatory to a range of human rights instruments and thus agrees to respect, protect, and fulfil those rights, and has made this commitment to the international community. However, he also noted that international laws on human rights are not binding until ratified into Australian law (Doussa 2008). This situation remains current (Bedford et al. 2021).

**Emerging precedent cases:** Rimmer (2022) described a range of recent cases that may provide useful precedent decisions for future climate change-related legal challenges with human rights associations. These may also be relevant for Aboriginal and Torres Strait Islander peoples. Rimmer cited the Rocky Hill climate litigation that considered the impact of mining on the cultural heritage of Indigenous communities *(Gloucester Resources Limited v. Minister for Planning [2019] NSWLEC 7)*, with New South Wales bushfire survivors alleging that the bushfires were made likely or more intense by climate change (*Bushfire Survivors for Climate Action Incorporated v Environment Protection Authority [2021] NSWLEC 92*), and youth who argued to protect the duty of care for children and the future under a changed climate (*Minister for the Environment (Commonwealth) v Anjali Sharma & Ors (by their litigation representative Sister Marie Brigid Arthur [2021] VID389*; Rimmer 2022).

## International-level mechanisms

A number of international human rights mechanisms may be relevant to climate change protection for Indigenous peoples. These include relevant UN declarations and covenants, implementation mechanisms for such covenants, and UN rapporteurs with specific portfolios.

In considering these options (and as noted above), international human rights legislation with relevance to climate change and Indigenous peoples is limited to representing international norms and bringing a 'moral force to political debate' (Cordes-Holland 2008:13) unless imported into Australian legislation (Bedford et al. 2021).

A further consideration is that, in invoking human rights-related mechanisms, Aboriginal and Torres Strait Islander peoples must identify themselves legally as Indigenous peoples (Young 2020). This may be intrinsic to one's identity and also increase one's agency for the case. However, this decision to 'objectify' oneself in order to engage in the legal discourse may also be difficult; it may not be how the litigants want to assert their identity (Young 2020).

**UN Declaration and covenants:** Australia has committed to a range of UN declarations on human rights. In doing so, the Australian Government is committing to respect the enjoyment of human rights and to protect individuals and groups against

human rights abuses (Calma 2008). This includes adherence to the *UN Declaration of Human Rights* (1948). Three leading Indigenous Australian legal scholars have noted that climate change is likely to affect many human rights included in this Declaration, including 'the right to life, the right to water, the right to health, the right to human security, and the rights of First Nations peoples' (Bedford et al. 2021:377).

The *Declaration on the Rights of Indigenous Peoples* (UNDRIP 2007), which Australia belatedly adopted in 2009 (AHRC 2009), reaffirms that 'Indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind' (UN 2007). Of particular relevance to climate change is *UNDRIP* Article 29 that states, 'Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources' (UN 2007). A review of the application of *UNDRIP* in Australia was conducted in 2023 by the Australian Government and chaired by Senator Patrick Dodson, a Yawuru man and then Special Envoy for Reconciliation and Implementation of the Uluru Statement (Parliament of Australia 2023). Many of the 50 submissions received emphasised 'the importance of ensuring Aboriginal and Torres Strait Islander people are involved in determining the approach to implementing *UNDRIP*' (Parliament of Australia 2023:73). Options for implementing *UNDRIP* in Australia identified in the report included 'responding to the Uluru Statement from the Heart, processes to consider human rights through the Parliament, and the development of a National Action Plan' (Parliament of Australia 2023:73). Specifically on climate change, the report cited that '*UNDRIP* principles, particularly self-determination, participation in decision-making, and maintaining and strengthening cultural and spiritual relationships with traditional lands, territories, waters and resources, are significant in the context of changing climate conditions' (Parliament of Australia 2023:39).

The International Covenant on Civil and Political Rights (ICCPR 1966) is also of relevance to climate change and Indigenous Peoples – with particular potential from invoking Article 6 (right to life), Article 17 (freedom from interference to one's home) and Article 27 (right to culture) (Bedford et al. 2021; UN GA 1966). The UN Human Rights Committee (HRC) was established to monitor the implementation of the ICCPR by member states; communications can be made to the HRC by using the ICCPR Optional Protocol (UN OHCHR 2024a), however only when domestic options for a legal resolution have been exhausted (Cordes-Holland 2008). This opportunity is significant, as Cordes-Holland noted, stating that, 'of the international human rights treaties to which Australia is a party – and which contain rights relevantly implicated by climate change – only the ICCPR affords Australians the right to make an individual "communication" to a UN human rights body; in this case the HRC'. He noted that 'the HRC cannot enforce its "views"; thus the value of a positive determination by the HRC is more in its political rather than legal effect' (Cordes-Holland 2008:13).

A climate-related communication to the ICCPR was initiated by the 'Torres Strait 8' – a group of eight Torres Strait Islander adults and six children who claimed that the Australian Government had not undertaken timely nor sufficient climate change mitigation and adaptation efforts. Thus, they asserted, the climate-related harms on their Country, including saltwater intrusion on the outer islands, were a breach of their human rights (Rimmer 2022; Thornton 2022). The claimants cited particular violations of ICCPR Article 6 (right to life), Article 17 (freedom from interference to one's home) and Article 27 (right to culture) (Bedford et al. 2021; UN GA 1966). The Australian Government responded in 2020 by requesting that the HRC dismiss the action on the basis that a national government could not be held responsible for climate change,

that the Australian Government's climate change policies were consistent with international human rights commitments, and that the claimants had not adequately exhausted domestic legal processes (Rimmer 2022).

In 2022, the HRC determined in favour of the Torres Strait 8, stating that the Australian Government had failed to 'implement adequate mitigation and adaptation measures to prevent negative climate change impacts on the authors and the islands where they live' (UN CCPR 2022:s8.2). The HRC stated that environmental harm can be a violation of human rights where environment and culture are interlinked, noting 'the strong cultural and spiritual link between Indigenous peoples and their traditional lands' (UN CCPR 2022:s5.7) and that 'the health of their land and the surrounding seas are closely linked to their cultural integrity' (UN CCPR 2022:s8.14). The implication of this decision beyond the Torres Strait Islands is for nation states to ensure continued habitation of traditional Country through timely climate adaptation measures (Thornton 2022).

**UN bodies on Indigenous peoples' issues:**
There are three UN bodies mandated to address issues of relevance to Indigenous Peoples' issues and which, by association, have relevance to climate change impacts. This includes the UN Permanent Forum on Indigenous Issues that advises the UN Economic and Social Council on human rights, culture and environmental issues of relevance to Indigenous Peoples (UN DESA 2024). In 2008, the Permanent Forum commented specifically on climate change, stating that 'Indigenous peoples, who have the smallest ecological footprints, should not be asked to carry the heavier burden of adjusting to climate change' (UN ESC 2008:2). The other dedicated UN bodies are the Expert Mechanism on the Rights of Indigenous Peoples and the Special Rapporteur on the Rights of Indigenous Peoples. Special rapporteurs are appointed by the HRC as 'Special Procedures mandate holders' with thematic mandates to explore alleged human rights violations or abuses (UN HRC 2024). While UN rapporteurs cannot legally intervene in an issue, their input and reporting can initiate the UN to investigate further (Young 2020).

In 2017, the then UN Special Rapporteur on the Rights of Indigenous Peoples Victoria Tauli-Corpuz criticised the Australian Government's support for the proposed Galilee Basin coal mines as violating the human rights of FPIC and self-determination for the Wangan and Jagalingou peoples (Young 2020 #5159; UN GA 2017 #2389). The Wangan and Jagalingou peoples also engaged with the UN Special Rapporteur in the field of cultural rights, which exist to 'give greater visibility to cultural rights in the human rights system; and to foster a better understanding of the severity of their violations, and of the opportunity of their realisation for all' (UN OHCHR 2024b). Other special rapporteurs of relevance to climate change and Indigenous Peoples in Australia include the UN Special Rapporteur on Human Rights and the Environment, who filed a joint 'amicus' (expert) brief to the UN Human Rights Committee regarding the Torres Strait 8 action (Rimmer 2022).

## Advocacy tools promoting human rights approaches to climate issues

Beyond legal human rights mechanisms, there are additional advocacy tools being used in Australia to seek swifter climate action to prevent harm. These range from formal consultation and intentional collaborations to campaign actions and local implementation, as detailed below.

**Government-related formal consultation:**
One example was the establishment in 2023 of the First Nations Clean Energy and Emissions Reduction Advisory Committee to provide advice on the Australian Government's climate change priorities and policies and, in doing so, ensure Aboriginal and Torres Strait Islander cultural considerations and

benefits for local communities (DCCEEW 2023). Two examples of intentional collaborations include the Traditional Owner and science collaboration on climate change adaptation and mitigation strategies, convened by the Australian Government's National Environmental Science Program (CSIRO 2021), and the Lowitja Institute-led proposal for an Aboriginal and Torres Strait Islander Coalition on Climate and Health to advise on policy and decisions (Lowitja Institute 2023).

**Direct lobbying:** This 'on-ground' advocacy for effective and protective climate change action with a specific focus on Aboriginal and Torres Strait Islander peoples has included non-government reports, such as the *Close the Gap Campaign Annual Report;* in 2022 this called for Indigenous-led climate justice initiatives (Lowitja Institute 2022).

**Non-violent direct action:** Community lobbying actions have included the Seed Mob campaign to prevent new fossil fuel extraction activities by encouraging Origin Energy customers to change providers if fracking activities continue in the Northern Territory (Seed Mob NT 2024) and the Wangan and Jagalingou's petition to prevent Adani-owned mines being developed on their Country (W&JFC 2024). Non-violent direct actions through the Wangan and Jagalingou-led campaign include an occupation of land under an Adani mining lease, drawing justification from the *Queensland Human Rights Act* (Stünzner 2022).

**Local implementation of climate mitigation:** Initiatives include the installation of rooftop solar on remote community public housing led by community members in Tennant Creek in Central Australia (Lowitja Institute 2022).

# Aotearoa (New Zealand)

## Political and historical context

In Aotearoa (New Zealand), the Māori are the *tangata whenua* ('the people of the land'). As at the 2023 Census, the Māori population made up just under 18 per cent of the total Aotearoa population of almost 5 million (IWGIA 2024). It is likely that Māori migrated from East Polynesia between 1250 and 1300 (Te Ara 2024). They established villages, agriculture and horticulture, fisheries, trading, and associated social, political, and spiritual structures (Winter 2021). Their traditional practices to manage their lands and waterways are encapsulated in concepts such as *kaitiakitanga* (the responsibility to take care of natural resources) and *Te Mana o te Wai* (restoring and protecting the integrity of water) (Te Aho 2019).

The colonial history of Aotearoa involved migrants from England, Scotland, and Ireland arriving to settle in 1840, under the British monarchy (Winter 2021). That same year, *Te Tiriti o Waitangi* (the Treaty of Waitangi) was signed, thus 'allowing' settlement of Aotearoa by the British. The Treaty granted the British a right of governance over their subjects, promising that Māori would retain *tino rangatiratanga* (self-determination or full authority) over their lands and resources, and full conferral of British citizenship to the Māori (IWGIA 2024). The Treaty consisted of two versions: an English-language version and a Māori language version (*Te Tiriti;* which most Māori signatories signed) (IWGIA 2024). They are noted by Winter (2021) as not being exact translations but rather could be considered as 'two … competing social contracts' (Winter 2021).

The Treaty has been critiqued as having limited legal status to protect Māori rights as it is 'largely dependent upon political will and ad hoc recognition' (IWGIA 2024). Indeed, Winter (2021:74) notes that both versions of the Treaty were 'repeatedly breached by the settler government from shortly after signing'. Over the past 40 years, the national government has been in negotiation with Māori representatives for reparations of the breaches and on embedding consultation with Māori within legislation, while Māori have been 'reclaiming rights as agreed within *Te Tiriti*' (Winter 2021:74). This included the *Public Health and Disability Act 2000* recognising *Te Tiriti* and thus providing mechanisms for Māori participation in decision-making about health services (Jones et al. 2014).

Auckland's sky tower and central cityscape from Mount Eden (iStock).

It is noted that, at the time of writing (November 2024), the Aotearoa Government had introduced the Principles of the Treaty of Waitangi Bill. Of note is the proposed Principle 2, that

(1) The Crown recognises, and will respect and protect, the rights that hapū and iwi Māori had under the Treaty of Waitangi/*te Tiriti o Waitangi* at the time they signed it;

(2) However, if those rights differ from the rights of everyone, subclause (1) applies only if those rights are agreed in the settlement of a historical treaty claim under the Treaty of Waitangi Act 1975' (NZ Legislation 2024).

Legal scholars from the University of Waikato state that the proposed legislation risks negating recognised rights within the *te Tiriti o Waitangi* and limits its continuing application to contemporary settings. Although the Bill was likely to be defeated in Parliament, the commentators noted that a referendum on the Bill could be a possibility (Gillespie and Breen 2024).

Beyond *Te Tiriti*, there are international rights-based standards that recognise the rights of Māori as Indigenous peoples. This includes support (but not ratification) of the *UN Declaration of Rights of Indigenous Peoples (UNDRIP)* and the ratification into domestic law of the UN Convention on the Rights of the Child (that recognises and supports the practice of culture, religion, and language), and the International Covenant on Economic, Social and Cultural Rights (Jones et al. 2014).

## Climate change issues and human rights violations

Māori have experienced a range of climate change-related impacts on their human rights. These include water rights not being recognised, overriding traditional protocol and decision-making on oil drilling development proposals, and a rejection of refugee applications for climate-displaced people. These examples are described below.

**Water rights unrecognised in a changing climate:** For Māori, rivers form a central part of identity as they are considered ancestors (Prickett and Joy 2024). Māori therefore have a history of seeking to protect their rivers through resistance to government-facilitated environmental damage (Prickett and Joy 2024). Such damage includes pollution from agricultural and livestock grazing, as well as horticulture and forestry (Prickett and Joy 2024). Under a changing climate, hydrology and temperature changes are anticipated, thus amplifying the deterioration of the water quality (Prickett and Joy 2024). Yet Māori proprietary rights to water have not always been recognised by the Aotearoa Government, according to Te Aho (2019). Such rights would incorporate stewardship and sustainability of resources, and could prevent or better manage the documented impacts of climate change on Aotearoa waterways (Te Aho 2019). In 2017 the Whanganui R iver in Aotearoa was awarded legal 'personhood'. An example of progress in this space, it is discussed later in this paper.

**Efforts to prevent fossil fuel extraction (oil drilling):** The oil company Petrobas was granted a licence to explore and drill for oil on traditional Māori territory by the Aotearoa Government (Winter 2021). This permission was challenged in 2011 by Te Runanga o Te Whānau-ā-Apanui who claimed that the Minster of Energy had violated their peoples' commitment and duties to future generations (including the future climate), to the environment and to their ancestors, as required by Apanui philosophy and laws (Winter 2021). The High Court ruled in favour of the Minister, stating that the Western procedures required by parliament and by law had been fulfilled (Winter 2021). Winter (2021) references this case as a demonstration of how two philosophies cannot co-exist if one dominant political systems subordinates the other.

**Climate change displacement and migration:** A Kiribati resident filed for refugee status in Aotearoa in 2015 due to their climate change-induced displacement from their country. Their application was rejected. On appeal, the Court of Appeal in Aotearoa recognised the human right of affected people to seek asylum in another country. This has more recently been reinforced by the UN Human Rights Commission, which ruled that individuals who face climate change-induced conditions that violate the right to life cannot be deported from the country in which they are seeking asylum (Zaman and Das 2020).

## Effectiveness of human rights mechanisms and initiatives on climate change

Scholars have proposed that Indigenous peoples can better protect the natural resources, culture, and ecosystems on which they have depended through a rights-based approach. Gray et al. (2022) envision that such an approach should be amenable to domestic legal systems while linked to international human rights mechanisms (Gray et al. 2022). Below are examples where such mechanisms have been attempted through the assertion of Māori rights, use of the Treaty, and the granting of 'legal personhood' to natural resources.

**Assertion of rights:** Te Aho (2018) documented how Māori have asserted their rights and responsibilities to managing traditional waterways and lands as a response to climate change and environmental threats to these resources. This has seen some incorporation of Māori worldviews in Aotearoa laws. However, the author also notes that water rights have not been assumed nor granted to the Māori traditional owners. Another scholar critiqued the Aotearoa Government and associated state institutions for not providing 'a legitimating space or significant standing' to Māori concepts of 'philosophy … protocols and … environmental and intergenerational justice' (Winter 2021:5). This creates an environment where progressing rights towards a more practical reconciliation can require compromises for Māori (Te Aho 2018).

**Using the Treaty:** *Te Tiriti* principles are intended to inform the Waitangi Tribunal process, where grievances of claimant groups are intended to be acknowledged then settled with an outcome that is comprehensive and durable in order to provide both past healing and future building (Te Aho 2019). For example, the *Resource Management Act 1991* was reviewed by the Waitangi Tribunal and found that it had not recognised nor provided for *tikanga* (Indigenous laws and values). The tribunal directed that a Treaty-compliant environmental management plan should be instituted in the Act, however its recommendations are not legally binding on the Aotearoa Government (Te Aho 2019).

**Granting of personhood to natural resources:** There have been increasing efforts between the Aotearoa Governments and Māori traditional owners to incorporate both *tikanga* and Western systems of law in order to protect natural assets (Te Aho 2019). Such efforts seek to ensure Māori governance of resource management and to incorporate both ways of seeing into decision-making processes (Te Aho 2019). One prominent example is the *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* that extends legal personhood (and associated rights) to the Whanganui River (NZ PCO 2017) (Te Aho 2019). As such, s14 states that *Te Awa Tupua* (Whanganui River) is 'a legal person and has all the rights, powers, duties, and liabilities of a legal person' (NZ PCO 2017). The Act sets out four values to inform the water management of the river: *ko te Awa te mātāpuna o te ora* (the River is the source of spiritual and physical sustenance), *e rere kau mai i te Awa nui mai i te Kahui Maunga ki Tangaroa* (the great River flows from the mountains to the sea), *ko au te Awa, ko te Awa ko au* (I am the River and the River is me), and *ngā manga iti, ngā manga nui e honohono kau ana, ka tupu hei Awa Tupua* (the small and large streams that flow into one another form one River) (NZ PCO 2017:s.13).

## Advocacy and other tools promoting human rights approaches to climate issues

In additional to the human rights mechanisms described above, Māori can assert their human rights in response to climate change and other issues through the additional tools described below. This includes reserved seats in parliament for Māori, the Māori Council, and the right to health.

### Māori seats in parliament

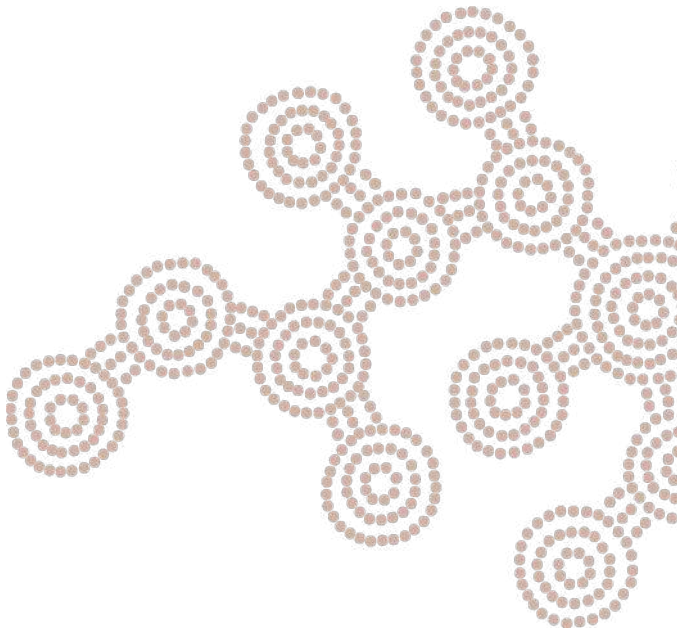
In 1867, the Māori Representation Act was introduced to reserve four seats for Māori representatives (NZ Parliament 2009). Based then on 'blood quantum', those documented with less than half Māori descent could vote in European electorates, while those with more than half Māori descent could vote in a Māori electorate. This ruling was revised in 1975 to enable voters with Māori descent to choose which electorate in which to vote (NZ Parliament 2009). However, the intention of the Act to ensure Māori representation can at the same time be seen as historical and structural disparity for Māori candidates and voters. Indeed, the more recent *1993 Electoral Act* established regulations for general electorate seats yet none for those seats with Māori representation (NZ Parliament 2009).

### Māori Council for Māori wellbeing

In 1962, the Māori Community Development Act established the New Zealand Māori Council with the role to be a 'a natural policy-making body for Māori with regard to the cultural, economic, social and political wellbeing of Māori' (Māori Council 2024). It is intended that the Māori Council contributes to policy and community initiatives that reflect *te mana motuhake o te iwi Māori*, the Māori concept of self-reliance and self-determination. The council has seven Executive Committee members, and 48 members nominated from 16 District Māori Councils that in turn are informed by 120 Māori Committees that represent communities at a marae, papakāinga, and hapū level (Māori Council 2024).

### Māori voices in a Right to Health Framework

The 'Right to Health Framework', as interpreted by Jones et al. (2014:2), seeks to ensure that rights-based commitments by government are considered in delivering the 'highest attainable standard of health, including the determinants of health'. In this case, it is applied with a focus on Māori and the current health disparities they experience in Aotearoa, noting that climate change provides both a threat and an opportunity to improve health (Jones et al. 2014). The authors assert that rights to health include identifying relevant national and international human rights laws and standards, that all health services and facilities should be 'available, accessible, acceptable and of good quality ('AAAQ')', that 'special attention is provided to non-discrimination, equality and vulnerability', and that individuals and communities can participate in decision-making that affects their health (Jones et al. 2014:5). At the time of publication (April 2025), the authors concluded that the Aotearoa Government was not currently meeting its rights to health obligations and that, 'unless explicit attention is paid to mitigation policies with health co-benefits that reduce inequities, New Zealand climate change policies risk worsening the state of Māori health' (Jones et al. 2014:12).



# Canada

## Political and historical context

Canada is home to three distinct groups of Indigenous Peoples: described by the national statistics body as 'Indians' (First Nations), Inuit and Métis who comprise five per cent of the national population (Statistics Canada 2022). Section 35 of the Canadian constitution recognises and affirms Aboriginal and treaty rights (1982). There are more than 600 First Nations, many different groups of Métis and 50 Inuit communities within four regions (Inuvialuit, Nunavut, Nunavik, and Nunatsiavut). The Inuit people have lived in the Arctic region for millennia with their traditional lands spanning Canada, Greenland, the Russian Federation and the US (Crowley 2011). Within the Canadian Arctic region, around half of the population is Inuit (Le Teno and Frison 2021).

Canada has a similar federated system to Australia with different levels of government: federal, provincial and municipal. There are ten provinces in Canada that have their own constitutional powers and three territories (Northwest Territories, the Yukon and Nunavut) that exercise delegated powers under the authority of the federal parliament (Government of Canada 2024). Historic treaties were signed between Canadian governments and Indigenous Peoples over the period 1701-1923 and, since 1975, modern treaties have been entered into with various Indigenous Nations. Treaties aside, there are many parallels to Australia's colonial history as revealed by the Canadian Truth and Reconciliation Commission that ran from 2007 to 2015. Canada also pursued policies of assimilation, removing Indigenous children into the Residential School system. The Commission has been credited with a shift in public understanding about the impacts of colonisation that subsequently led to the development of federal legislation, titled the *UN Declaration Act* (2021) (Department of Justice 2021a), to implement the *UNDRIP*.

## Climate change issues and human rights violations

An Arctic Climate Impact Assessment in 2005 concluded that the Arctic region is rapidly warming, three times faster than the global average, causing major transformations and reductions in sea ice, loss of flora and fauna habitat, loss of biodiversity, sea-level rises, saltwater intrusion, and infrastructure damage (Crowley 2011; Van der Zwaag et al. 2023). Consequently, climate change is directly threatening Inuit homelands, forcing rapid adaptation and violating their human rights, property, means of subsistence, economic livelihoods and cultural heritage (Crowley 2011). Communities can no longer rely on Traditional Knowledge built up over generations due to the rapid warming. There are serious safety issues when traversing the country due to thinning ice sheets which restricts harvest patterns (Crowley 2011). The loss of ability to practise culture is impacting wellbeing with disproportionate suicide rates of young Inuit men (Crowley 2011).

## Effectiveness of Canadian human right mechanisms and initiatives for the climate crisis

In 2005, Inuit communities were the first to frame climate change as a human rights issue when the Inuit Circumpolar Council submitted a petition to the Inter-American Commission on Human Rights (IAHCR). The petition combined legal arguments, scientific research and oral testimonies from Inuit communities regarding climate change impacts on their rights and traditional practices, specifically targeting the US for its level of global emissions, inaction to reduce emissions and engagement in climate denialism (Crowley 2011; Jodoin et al. 2020). Although ultimately unsuccessful, the petition has been described as 'a turning point' which led to the expansion of climate justice movements (Jodoin 2020). As such, it has been the catalyst for other legal petitions, declarations and human rights studies demonstrating the human rights

consequences of climate change around the world, particularly those of Indigenous Peoples (Crowley 2011; Osofsky, 2013 see Case study #3).

The US and Canadian governments were not persuaded to change their approach to global warming despite the human rights argument established in the petition. In addition, Inuit governments at the time, while interested in climate change, had other priorities such as education, health care access, housing and food security, limiting the traction of the petition at a local community level (Jodoin et al. 2020). An analysis of the case (Jodoin 2018) highlights the importance of bringing differing framings or perspectives together delicately, preferably involving a trustworthy source and reference to existing ideals within parts of society or institutions that are subject to the change process. The need to establish arguments and effect transformational change within existing Western systems and norms has created scepticism about the effectiveness of the petition and other legal strategies (Jodoin et al. 2020).

The election of the Trudeau Government in 2015 saw more commitment to address climate change, albeit amid continued fossil fuel industry influence. This included the development of a Pan-Canadian Framework on Clean Growth and Climate Change in 2016 which, contrary to its title, featured natural gas developments that disproportionately impact Indigenous communities (Reed et al. 2021). Despite the document mentioning 'Indigenous' people 83 times, there was very little input from Indigenous communities (Reed et al. 2021). Claiming to be acting 'in the national interest', Trudeau also reversed a campaign commitment by reapproving an oil pipeline development (TMX) through Indigenous territories, thus demonstrating continued strong influence of the fossil fuel industry (Spiegel 2021). In a court room ethnography, Spiegel documented how settler-colonial power overrode Indigenous rights and jurisdiction to protect fossil fuel interests. Indigenous Elders and youth peacefully protesting the development were characterised as 'troublemakers', charged and given prison sentences under laws that interfered with Indigenous Peoples' rights and obligations as caretakers of their land. This contrasted an 'Indigenous ontology of care' with colonial-settler drive for relentless extractivism (Spiegel 2021). Similar trends are happening elsewhere, including Australia where several jurisdictions have criminalised peaceful climate protest (Gulliver et al. 2023). The Nunavut Government is the only sub-national government in Canada to arise from a land claim agreement within which Indigenous negotiators considered self-determination an essential part. As the majority of the Nunavut population is Inuit (85 per cent), its local legislative assembly reflects a modern form of Indigenous governance (Le Teno and Frison 2021). The *Nunavut Agreement* (1993) and *Nunavut Act* (1999) underpin the governance system with the Agreement conforming to *UNDRIP* principles of self-determination (Le Teno and Frison 2021). The Nunavut governance model is multi-level and complex, involving the Federal Government, Nunavut Government and an overarching Inuit organisation called the Nunavut Tunngavik Incorporated (NTI), representing a wide range of Inuit interests. The NTI ensures that Inuit knowledge forms part of all decision-making processes. The complexity in the governance model reflects the tensions between Indigenous self-determination and the Federal Government's desire to retain control over the region's natural resources for economic development. In the last few years, there has been slow progress to devolve the control over Nunavut's resources and public lands to the Nunavut Government (Le Teno and Frison 2021).

Comparison of the *Nunavut Agreement* to *UNDRIP* standards highlights the need for international law to specifically recognise the unique collective rights of Indigenous groups. Le Teno and Frison (2021) argue that *UNDRIP's* self-determination principle is narrowly focused on a form of internal self-determination

based on preservation of culture and relationship to land, which are rights afforded to everyone. In promoting equality before the law, *UNDRIP* deprives Indigenous Peoples of their right to external self-determination, that is, to take part in global climate governance and become international lawmakers (Khan 2019; Le Teno and Frison 2021).

One of the end recommendations of the Truth and Reconciliation Commission in 2015 was a call for the implementation of *UNDRIP*. With public support attributed to the educational process of the Commission, Canada passed the *UNDRIP Act* in 2021 (Department of Justice 2021a). The Act requires the Federal Government to ensure existing laws are consistent with the Declaration and to work with Indigenous Peoples to implement UNDRIP through an action plan, monitored through annual progress reports. The plan was released in 2023 and comes with substantial funding over $60 million for five years from 2022-23 and $11 million ongoing (Department of Justice 2021b).

The plan includes rights over healthy environments (Article 29) whose goals are:

- 'Indigenous peoples enjoy the right to a healthy natural environment with Indigenous ways of knowing incorporated into the protection and stewardship of lands, waters, plants, and animals.
- Indigenous peoples play a central role on biodiversity conservation, water and environmental conservation, and climate change action planning, policy development, and decision-making.
- Self-determined climate action is supported as critical to advancing Canada's reconciliation with Indigenous peoples' (Department of Justice 2021b).

This is promising in its intent. However the challenge for implementation of the *UNDRIP* legislation is how it interacts with provincial and municipal laws (Van der Zwaag et al. 2023). British Colombia (BC) was the first jurisdiction in Canada to pass an implementation bill (BC Declaration Act 2019) (BC Legislature 2019). The *BC Declaration Act* was based on drafted national legislation that had been circulating since 2008 and includes stronger consent-seeking provisions than appeared in the national Act. An associated action plan was developed with BC Indigenous Peoples and released in 2022 with four priority areas: self-determination and inherent right of self-government; title and rights of Indigenous peoples; ending racism and discrimination; and social, cultural, and economic wellbeing (BC Legislature 2019).

Other possible solutions to align provincial and federal jurisdictions is to legislate climate change responsibilities into different sectors that have policy jurisdiction for areas sensitive to climate change impact, for example ocean management (Van der Zwaag et al. 2023). Another is for Federal Government collaborations with provincial governments, such as the Pan Canadian Framework on Clean Growth and Climate Change, to have genuine Indigenous community input, including the incorporation of traditional knowledges into climate action initiatives (Marion Suiseeya et al. 2022).

## Advocacy and other tools promoting human rights approaches to climate issues

The Assembly of First Nations (AFN) advocates for and supports communities in Canada in territorial claims and negotiations over rights to lands, waters. and resources. It has a council of Indigenous law experts and works to promote and maintain 'recognition of First Nation legal orders, languages, customs, and cultures in all their diversity. This commitment extends to policies, processes, and legislation that directly impact First Nations'. AFN also works to 'ensure that policies, processes, and legislation uphold Articles 27 and 40 of the *UNDRIP*' (AFN 2025).

# United States of America inclusive of Alaska

## Political and historical context

Through the 1800s and early 1900s, Federal United States (US) Native American policies followed a similar trajectory to Australia's colonisation – coexistence, removal to reservations, and assimilation. This history continues to impact on Tribes' access and control of land and natural resources today. Legislations such as the *Indian Removal Act* of 1830 and the *Dawes General Allotment Act* of 1887 saw the removal of Native American Tribes from traditional lands and legal control given to colonisers. In many cases, Native American Tribes were removed to reservations in less desirable locations and, in an attempt to break up and assimilate Tribes, individuals were given their own land allotments for farming. In return, these individuals became wards of the state, breaking their links to Tribal authority (McLaughlin 1996). With smaller individual parcels of land allotted to Native American Peoples, the *Dawes Act* was a veiled strategy to increase availability of Tribal land for colonial settlers. The allotment policy and individual land interests across Tribes continue to impact court cases today across a range of topics, including resource management and environmental protection (McLaughlin 1996).

Following Native American participation in World War 1, the US Congress authorised a survey of living conditions on Indian Reservations. The subsequent *'Meriam Report'* detailed grossly inadequate conditions relating to basic preventive health and education service provision (Johnson 2018). It recommended a number of actions that were legislated in the *Indian Reorganization Act* of 1934, affirming Native American Tribal sovereignty, restoring portions of Tribal land to Tribal ownership and effectively stopping the allotment practice (Hemmers 2024; McLaughlin 1996). The return of Tribal lands to Native American ownership required Tribes to adopt governance models and constitutions similar to the federal Western system.

Over 500 treaties were entered into with Native American Tribes between 1776 (United States independence) and 1871 (when Congress ceased a Presidential right to treat Tribes as independent nations). Post 1871, agreements with Tribes were ratified by Congress, giving state-level politicians a role in decision-making. Analysis of treaty and agreement documents show progressively worse outcomes for Native American Tribes as the US became more economically and militarily powerful (Spirling 2012). Even the earlier treaties that promised protection over Tribal lands and their resources were often failed by the Federal Government (Hemmers 2024). However, these treaties remain enforceable today with Tribal governments utilising the Indian Reorganization Act framework to formalise Tribal positions in efforts to protect homelands from resource extraction. For example, the Sioux Tribal Council passed a resolution to oppose all pipelines within its treaty boundaries as direct action against the Dakota Access Pipeline (Hemmers 2024). There were no treaties with Alaskan Inuit communities as Alaska was purchased by the US shortly before 1871.

These various historical treaty rights have created an assortment of unique land ownership models that have limited Native American rights and control over Tribal reservations, including the authority to manage resources (McNeeley 2017). These reservation lands and resources are commonly owned and/or controlled by non-Indigenous landowners or state and federal agencies – held in 'trust' for Tribes (McNeeley 2017). The fragmentation of authority and control over land, boundaries and natural resources continues to have direct impacts on how Native Americans are able to manage and protect their local natural resources; including air, food, water, and minerals from extractive industries.

## Climate change issues and human rights violations

As with other First Nations, Indigenous peoples in North America and Alaska lived sustainably and in harmony with the landscape, responding to seasonal weather changes and movement of food sources (Bronen et al. 2020; Whyte et al. 2019). Across the US, climate change is affecting the rights of Indigenous communities through the loss of culturally relevant species and the loss and degeneration of viable and sustainable lands.

Communities in Alaska and across the rest of the Arctic region have been some of the first Indigenous peoples to experience and recognise the impacts of climate change (Marchand 2022). Warming sea and air temperatures are adversely affecting culture and livelihoods from melting glaciers, thawing sea ice and permafrost, which underlies much of Alaska, compromising infrastructure and safe travel (Bronen et al. 2020). The significance of this can be shown by the creation of an Alaskan native term that references this process, *usteq* – referring to the catastrophic destruction of permafrost and the associated land collapse.

The climate change story of the Native Village of Kivalina is a case in point. Loss of sea ice and melting permafrost have eroded the land on which Kivalina is located, severely limiting the Iñupiat community's ability to adapt (Knodel 2014). Resettlement is the only adaptation option for such communities. A growing body of research looking at traditional migratory and seasonal travelling patterns understands climate relocation policies as a form of ongoing settler-colonial removal and injustice (Whyte et al. 2019). Decisions about adaptive relocation must be developed with community knowledges and leadership to ensure relevance and cultural appropriateness to all impacted Indigenous communities (Knodel 2014). Yet, in most cases, there is a lack of proactive support to work with Tribes to plan for the climate-induced community relocations (Bronen and Cochran 2021). There have been many community-led legal claims responding to the profound impacts of the changing climate and challenging further industrial development, including extraction of oil and gas resources. The continued defeat of these lawsuits likely demonstrates the lack of a fair Indigenous human rights or environmental justice lens to both legal review and opposition of these claims (Krakoff and Rosser 2012; Zentner et al. 2019).

In 1998, in Albuquerque, New Mexico, almost 200 US Native Americans, with non-Indigenous scientists and policy-makers, attended the Native Peoples/ Native Homelands Climate Change Workshop, part of regional and national dialogues to inform a national assessment on the consequences of climate variability (Maynard 1998). Prefacing the discussion were shared principles to highlight Indigenous perspectives, including that humans are part of nature; that Mother Earth and its climate are a single complex interconnected system; and that relationships between Native Nations and the US must be honoured as per federal treaty obligations and trust responsibility. Common environment and climate concerns were air pollution, contamination of water sources from agriculture and extractive industries, extreme weather, increased temperatures, and drought (Maynard 1998). Wide-ranging cultural, ecosystem, economic, and health impacts were also discussed. The workshop led to the development of the *Albuquerque Declaration* that was presented at the 1998 United Nations Climate Change Conference (COP4) in Buenos Aires in an effort to help governmental agencies and the public understand Indigenous insights and perspectives on climate change (Whyte et al. 2019). By 2001, the first US *National Climate Assessment* included a chapter on Indigenous climate change issues which was informed by the Albuquerque discussions and hence of significance for Native Peoples (Houser et al. 2001). These documents highlight the impacts of fossil fuel extractive industries whose practices have repeatedly

violated Indigenous peoples' human rights by failing to ensure their full and effective participation including free, prior, and informed consent as stipulated in *UNDRIP*.

## Effectiveness of human right mechanisms and initiatives for the climate crisis

The US has the highest number of climate change lawsuits globally. Litigation against major greenhouse gas emitters by various communities including Kivalina and the victims of Hurricane Katrina in 2005 have been unsuccessful, primarily due to difficulties establishing a cause-effect link between claimed damages and the emitters' conduct (McCormick et al. 2018). The difficulty in taking action against fossil fuel corporations relates to a 2007 Supreme Court judgement that ruled greenhouse gases as pollutants under the *Clean Air Act*, and therefore, the responsibility of the federal Environmental Protection Agency to regulate. Federal governance over greenhouse gas pollution 'displaces' any legal claims made against corporations under state nuisance (interference with individual property or rights) laws (McCormick et al. 2018).

The issue of water rights on Native Amercian reservation lands across the US is an ongoing political challenge going back to the policies of the 1800s. Early federal US legal rulings aimed to address orders of seniority between the reservation treaties and the national water rights system, based on what was established first, 'First in time, first in right'. However, this went on to cause ongoing legal conflicts between reservations and the states, who argued that water was owned and should be controlled by states themselves. By 1952, Congress passed legislation moving Tribal water rights from federal to state control, providing them the interpretation and application of water laws, often adversely against Tribes' rights (McNeeley 2017). Many long legal battles have since taken place due to the vague definitions of these rights, setting legal precedents (Cosens and Chaffin 2016). Of significance was the 1978 Supreme Court case *United States V. New Mexico* and the Big Horn general stream adjudication on Wyoming's Wind River Reservation, which commenced in 1977. These rulings declared tribal reservation water as having the sole purpose of supporting agriculture, tying Tribal water rights exclusively to irrigation for agriculture (McNeeley 2017). In response, two Tribes of the Wind River Reservation came together and created their own Tribal water values and uses code. This expressed that the cultural, spiritual, and traditional uses of the water resource are of equal value to its agricultural or industrial uses (Wind River Indian Reservation 1991). The *United States V New Mexico* ruling awarded State regulatory authority over Tribal reservation water rights and management, dismissing the spiritual and cultural interconnections of the land's natural resources, and limiting the Tribes' adaptive capacity in the face of decreasing water supply from climate change and water contamination (Mitchell 2019).

The open road in Kimberly, Western Australia (Shutterstock).

The complexity of jurisdictional governance and tensions between federal and state relationships were also demonstrated through the highly publicised case of the Standing Rock protests of 2016-17. With strong support of state authorities, energy company Energy Transfer Partners built the Dakota Access Pipeline (DAPL), spanning over 1,000 miles, now pumping some 470,000 barrels of oil daily, under two major river systems including the Missouri River at Lake Oahe, less than a mile from the reservation boundary of the Standing Rock Indian Reservation. The Standing Rock Sioux Tribal Council, the governing body for the Tribe and homeland, utilised its federal treaty to pass a resolution in 2012 opposing all pipelines within treaty boundaries, and vigorously protested the building of the DAPL, both in the public arena and the courts (Hemmers 2024). The Sioux filed a legal case arguing the DAPL threatened their environmental and economic wellbeing and would damage significant cultural and spiritual sites (Nosek 2020). The campaign took on global interest through social media (#NoDAPL), which provided the ability for tribal members to broadcast their own experiences and threats to their water supply and land. #NoDAPL became a global focal point for Indigenous rights and climate activists. During the campaign, more than 200 Indigenous communities from the US, Canada, and other parts of the world joined the Sioux tribe to support the protection of their land and calling for the US to honour their treaty (Hemmers 2024). Energy Transfer Partners hired private security and engaged state authorities to protect construction equipment and monitor and remove protesters. Local media was described as misrepresenting the peaceful protests as violent, justifying the use of brutal force by security officers and police, including rubber bullets, water cannons, pepper spray, tear gas, tasers, and dog attacks {Bacon 2020 #5839}. Protesters were arrested under false accusations and some were severely injured (Hemmers 2024). These attacks were often streamed live on social media platforms, causing greater global attention and outrage. In response to the campaign, then President Barack Obama halted the construction of the pipeline; however, this decision was soon reversed by President Donald Trump in 2017, on his second day in office, allowing the pipeline to go ahead. Despite their success, Energy Transfer Partners retaliated with million-dollar lawsuits against the NoDAPL environmental agencies and protest groups, claiming they were rogue eco-terrorists who engaged in criminal activity and misinformation to fabricate environmental issues (Nosek 2020). While the lawsuits were dismissed, their strategic intent is to intimidate, stifle, and criminalise environmental protests (Nosek 2020). A detailed cost analysis of the pipeline highlighted a high level of reputational and material risk due to the lack of consideration of human rights and of the social, environmental, and cultural impacts of projects (Fredericks et al. 2020). The stock price of Energy Transfer Partners has not fully recovered since the Standing Rock protests, signalling an imperative for investors to ensure due diligence in relation to a company's human rights policies and practices (Fredericks et al. 2020) and whether companies implement *UNDRIP* provisions.

Over time, there has been a gradual expansion of relevant international laws, including those relating to human rights, replacing centric state-based control over all areas of the law, with a slow cultural and ideological diversification of representation, including by non-Western countries (Krakoff and Rosser 2012). Significantly for the US, in December 2010 President Obama announced the country's endorsement of *UNDRIP* (Krakoff and Rosser 2012). While not binding, it clearly articulate the rights of Indigenous nations in relation to their connection to land and the right to self-determination, among many others, as well as stating the responsibility that Nation States, in this case the US, have to protect the land and resources of Indigenous communities (Krakoff and Rosser 2012). This endorsement provides additional legal consideration to be granted in climate change-

related claims bought by First Nations peoples. Young people, including First Nations children around the world, are appealing for intergenerational justice in climate litigation cases, for example in the Nelson Kanuk vs State of Alaska case in 2012. This complaint was bought against the State by six Alaskan children, alleging the State was violating the Alaskan Constitution and its public trust duty by not reducing greenhouse gas emissions and failing to protect the atmosphere. As two of the children, including lead claimant Kanuk, were Alaskan Native, this case extended the arguments across climate change, intergenerational justice, and Indigenous rights. They claimed that this breach was affecting their present and future rights to a stable climate and was damaging biodiversity and nature (Rimmer 2018). The case was dismissed by the Superior Court and, on appeal, by the Supreme Court of Alaska on the basis that there were no specific damages claimed by the children and that harms from climate change are shared by all, thereby making it a policy issue rather than a judicial one. The case laid out broad consideration of international legal debates over Indigenous rights and climate change as a useful precursor for climate litigation arising from government inactions (Rimmer 2018).

## Advocacy and other tools promoting human rights approaches to climate issues

Indigenous communities and Elders are uniquely positioned as Knowledge Holders to better our understanding of climate change impacts and to inform government policy of future mitigation and adaptation planning to help ensure decision-making supports climate justice for everyone (Marchand 2022; Zentner et al. 2019).

An example of Traditional Knowledge being applied to the challenges of climate impacts can be found in the case of the Iñupiaq people (Iñupiat) of Arctic Alaska, or the 'People of the Whales', (Sakakibara 2011). The Iñupiaq community was engaged during the 1970s in negotiations with the International Whaling Commission (IWC) through the Alaska Eskimo Whaling Commission (AEWC) against the banning of bowhead whaling. Through the support of intertribal Indigenous organisations such as the AEWC, Iñupiat participated in international debate and successfully defended their whaling rights, empowering their traditional ways and revitalising their cultural identity. Through the development and use of 'muktuk' politics – a term that describes the bowhead whale skin and highly valuable underlying blubber – focus shifted from whaling rights to broader human rights, to advocate for engagement in cultural practices and traditional ways of life for communities throughout the circumpolar region (Sakakibara 2011). The development and application of 'muktuk' politics shows traditional ways being applied in current global contexts of Indigenous-led climate action, linking climate change advocacy to Indigenous human and cultural rights. The representation of 'muktuk' grew to become a cultural symbol and since has been used to defend and advocate for circumpolar Indigenous cultural rights internationally (Sakakibara 2011).

More recently, communities continue to establish representative organisations for collective Indigenous action and advocacy in the context of climate change. The Center for Climate and Health was established in 2009 by the Alaska Native Tribal Health Consortium, to better understand the correlations of climate change and community health and assist communities to respond to climate-driven health impacts (Marchand 2022). In 2012, the Local Environmental Observer Network (LEO Network) was created, as a communication and awareness raising tool, to share information from specialists and observed citizen data about environmental events with Tribal health systems. This program has since expanded to include partnerships with climate observers worldwide (LEO Network 2024; Marchand 2022).

CASE STUDIES

# Case studies of Indigenous-led rights-based climate litigation

**This section presents four case studies from the focus regions that detail climate litigation led and informed by Indigenous peoples**

## CASE STUDY #1:

## Daniel Billy and others v Australian Government[4] (Australia)

### What was the issue?

Zenadth Kes (the Torres Strait Islands and surrounding seas) is home to Traditional Owners who have lived with a deep connection to land, sea, sky, and culture for over 60,000 years (Our Islands 2025 #5840. However, the increasing effects of climate change threaten the habitability of the region within a few generations (Rimmer 2022; Thornton 2022), with significant impact on human rights (Cordes-Holland 2008).

### What happened?

In 2019, the Torres Strait 8 lodged a complaint against the Australian Government to the United Nations (UN) on the premise that the Government's inadequate climate change mitigation or adaptation strategies breached their fundamental right to culture, life, and freedom from arbitrary interference (Rimmer 2022; Thornton 2022). Australia's then-Coalition Government had stated the case was inadmissible as it was for speculative future disruptions which could not be attributed only to the Australian Government (Thornton 2022).

The Torres Strait 8's action was supported by the Torres Strait Land and Sea Council, Gur A Baradharaw Kod (GBK), with the support of ClientEarth and 350.org (Thornton 2022). The complaint asserted that the Australian Government's lack of climate action breached the human rights of the people of the Torres Strait under the International Covenant on Civil and Political Rights (ICCPR) under Article 6 (the right to life), Article 17 (the right to be free from arbitrary interference and Article 27 (the right to culture) (Rimmer 2022; Thornton 2022).

### What were the successful aspects?

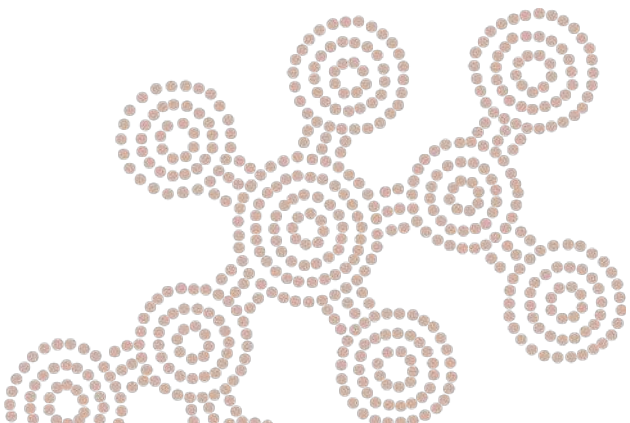
The UN Human Rights Committee (HRC) released its determination in September 2022, finding there were violations of articles 17 and 27, giving the Australian Government 180 days to outline how it intended to action these breaches (Thornton 2022). The committee found that the timeliness and sufficiency of the adaptation measures were lacking (Thornton

2022). This action was a precedent supporting other domestic and international petitions to support the rights of the people of Torres Strait (Rimmer 2022). The decision boosted awareness of the state's obligations to address climate displacement as a human rights issue and the impacts of climate change on the ecology and people of the Torres Strait (Rimmer 2022; Thornton 2022).

The case was viewed by multiple audiences, including the Torres Strait 8 claimants and their communities, Indigenous peoples in and beyond Australia, Australian Government representatives and policy-makers, international audiences scrutinising Australia's position and responses, and civil society organisations, including non-government organisations, as well as academics, students, and the media.

## What were the limitations?

The limitation of this action is that it is a non-binding decision, as the Australian Government – as a UN member nation – is only obliged to consider, not implement, the recommendations of UN committees (Rimmer 2022). More recently, the new Labor Government has reported on the possibility of *UNDRIP* implementation, with recommendations on how governments can ensure their approach to policy and legislation affecting Aboriginal and Torres Strait Islander Peoples is consistent with *UNDRIP* (JSC ATSIA 2023).



## What does this case study contribute to the rights of First Nations Peoples against climate change impacts?

The appeal by the Torres Strait 8 highlighted the inadequacy of the Australian Government's response to climate change as a human rights issue for the people from Torres Strait (Rimmer 2022). Like the landmark Mabo case that provided a pathway for Aboriginal and Torres Strait Islander peoples to claim Native Title over their traditional lands and seas, the UN action seeks to ensure that traditional cultures can be sustained despite the impacts of climate change (Rimmer 2022). The finding could also support future domestic action against the Australian Government (Rimmer 2022), and also against the Queensland Government, in the wake of introduction of the *Human Rights Act Queensland 2019* (Queensland Government 2019). Since this Act was introduced, a coal lease application from Waratah Coal was rejected in 2022 on the grounds, in part, of human rights (HRLC 2023).

## What aspects are transferable to an Australian context?

Given that this case occurred in Australia and was led by Australians, it is relevant for other Traditional Owners in Australia considering approaching the UN with evidence on how climate change is affecting their culture and livelihoods, and that the Government's insufficient mitigation or adaptation strategies represent a breach of fundamental rights.

**CASE STUDY #2:**

# Te Tiriti o Waitangi (the Treaty of Waitangi)[5] (Aotearoa/New Zealand)

## What was the issue?

Aotearoa (New Zealand) law does not recognise ownership of water or the space above the water as being subject to ownership rights of common law. Yet *Te Tiriti o Waitangi* (the 1840 Treaty of Waitangi between the Māori people and British) expresses the concept of *tino rangatiratanga*, a Māori worldview that encompasses responsibilities, sovereignty, autonomy, and self-determination (Jones et al. 2014). Māori people have a worldview that does not see the environment as a commodity or resource to be exploited, but rather as a spiritual being. It regards humans as another part of the environment, not the apex creature able to use resources without responsibility. Māori people believe in the importance of caring for the environment for current and future generations as part of their responsibilities as caretaker for land, air, and water (Te Aho 2018).

## What happened?

Under the framework of *Te Tiriti o Waitangi*, the *iwi* (Māori peoples or nations) were able to negotiate with the pakeha (non-Māori peoples) system of government to have a more Māori-inclusive approach to the governance of the Waikato River, a collaborative approach that melded British legal concepts and Māori ways of doing, to address the degradation of the river (Te Aho 2018). The co-management of the river includes the requirement for the local council to ensure it provides two seats for Māori people as a rights-based approach to decision-making (Te Aho 2018). This recognises the connection between iwi and the entity of the river, including caring for the river and access to economic benefits for Māori peoples (Te Aho 2018).

## What were the successful aspects?

The successful aspects of this approach were increased participation by Māori people in the management of natural resources, access to self-determination in cultural and economic benefits from natural resources, and integrating Māori concepts of caring for the environment into pakeha processes (Te Aho 2018). This approach is supported by the concept of *tino rangatiratango* in the Te *Tiriti o Waitangi*, as well as international rights standards ratified by Aotearoa such as the *UN Convention of the Child, the International Covenant on Economic, Social and Cultural Rights (ICESCR)* and *UNDRIP* (Jones et al. 2014).

## What were the limitations?

The limitations of the case study were that the concepts of *tino rangatiratango* in the *Te Tiriti o Waitangi* are not legally binding on the Crown (and therefore on the Aotearoa Government) and legal disputes can take years to be resolved (Te Aho 2018). The process requires compromise that potentially can weaken Indigenous advocacy on issues of self-determination, economic independence, and structural racial discrimination (Te Aho 2018).

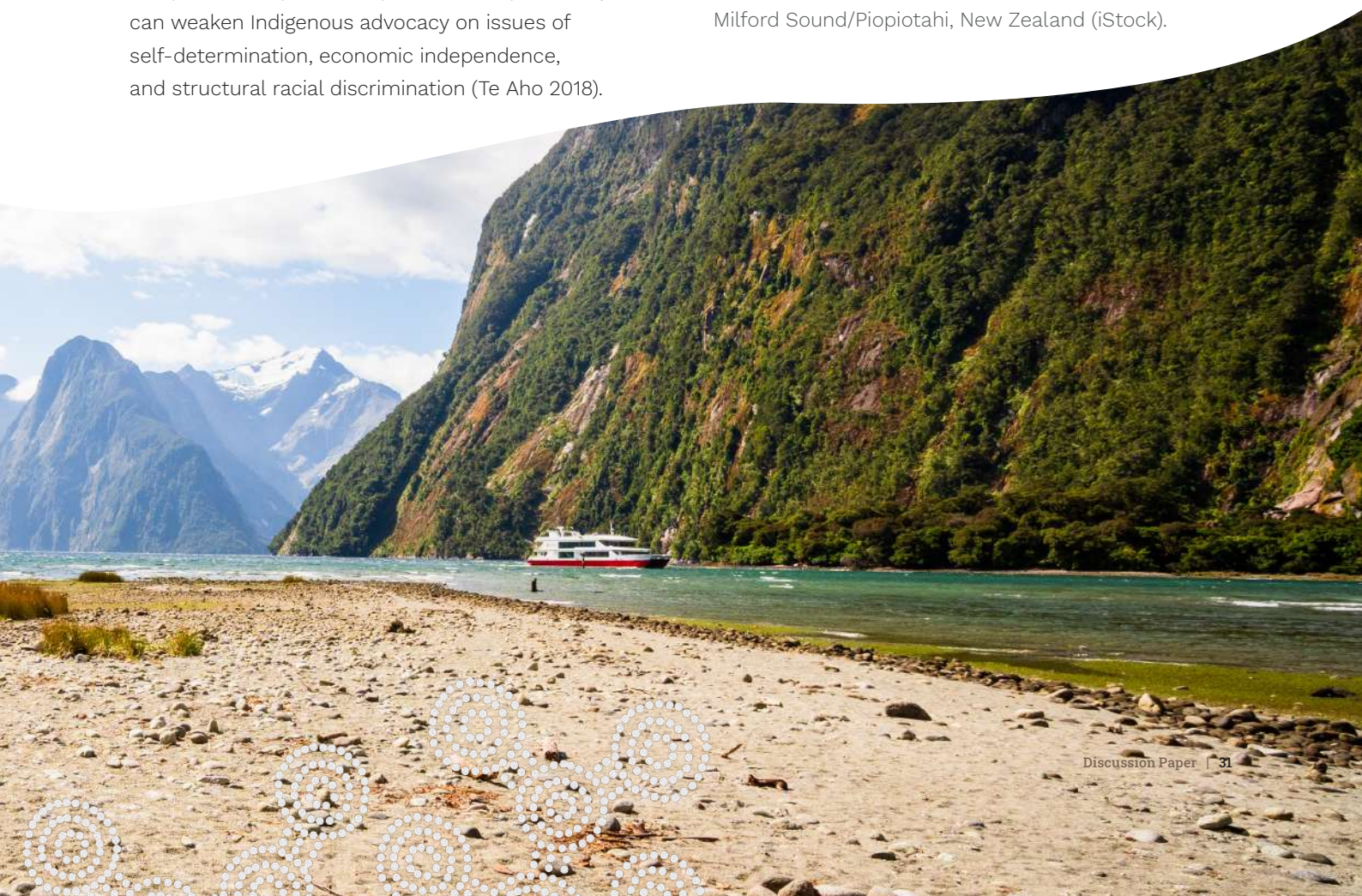
## What does this case study contribute to the rights of First Nations Peoples against climate change impacts?

The *Te Tiriti o Waitangi* underpins processes that support of *tino rangatiratango* for Māori people of Aotearoa to care for the natural resources, such as water. This Treaty concept could also contribute to addressing stressors that threaten the health and security of those natural resources, such as climate change (Te Aho 2018).

## What aspects are transferable to an Australian context?

There are many natural resources in Australia that are being or will be affected by climate change, including rivers, that could benefit from management that combines both Western legal aspects with Aboriginal and Torres Strait Islander management informed through Indigenous Knowledges and practices.

Milford Sound/Piopiotahi, New Zealand (iStock).



**CASE STUDY #3:**

# Petition from the Arctic Athabaskan Peoples against Canada[6] (Canada)

## What was the issue?

The Arctic and sub-Arctic regions of Alaska (US) and the Yukon Territory and Northwest Territories (Canada) are the traditional lands of the Arctic Athabaskan peoples. They have lived in this region for at least 10,000 years and their traditional land expanse is approximately three million square kilometers (Jaimes 2015). Their traditional practices and Knowledges are closely linked to the use and stewardship of natural resources for hunting, fire management, and maintenance of culture (Jaimes 2015). The Athabaskan Peoples have 23 languages and their population in 2000 was approximately 32,000 people (AAC 2024; Jaimes 2015).

The Arctic Athabaskan peoples have been affected by climate change through increased temperatures that have caused melting of permafrost, increased rainfall and associated flash floods, reduced sea ice, and acidification of the ocean (Mardikian and Galani 2023; McCrimmon 2016). A contribution to these impacts were black carbon emissions from Canada's use of diesel, stoves, forest, and agricultural fires, and some industrial facilities (Jaimes 2015).

In turn, these impacts have caused changes to animal and plant habitats, land, and building stability (through melted permafrost), food availability issues, and disrupted Athabaskan cultural practices (Mardikian and Galani 2023). Therefore, the Arctic Athabaskan peoples considered that their human rights had been violated by the Canadian Government's black carbon emissions (Szpak 2020).

## What happened?

In 2013, the Arctic Athabaskan peoples filed a petition to the Inter-American Commission on Human Rights (IACHR) based on the principal laws of the *American Declaration of the Rights and Duties of Man*, entitled 'Seeking relief from violations of the rights of Arctic Athabaskan Peoples resulting from rapid Arctic warming and melting caused by emissions of black carbon by Canada' (AAC 2024; Sabin Center 2024). The claim was that black carbon emitted near the Arctic latitudes has a higher warming potential (up to twice as fast as other parts of the world) and that, if the Canadian Government introduced mandatory emissions reductions, this could slow the resulting warming and melting (Jaimes 2015).

Their petition further claimed that, as a result of the black carbon-stimulated warming, the Arctic Athabaskan peoples' right to culture, property, and means of subsistence and health were violated due to their connection to their natural environment (Szpak 2020). This occurred through rapid warming and melting in their traditional lands, and was, in part, caused by the Canadian Government's lack of action to reduce emissions of 98,000 tons per year of black carbon (AAC 2013; Jaimes 2015; McCrimmon 2016). Their petition to the IACHR asked for 'relief from these violations resulting from the acts and omissions of Canada' (AAC 2013). They were legally represented by Earthjustice (US) and Ecojustice Canada (AAC 2013).

## What were the successful aspects?

There are three potentially successful aspects of this petition.

Firstly, the IACHR is the appropriate target as it has previously issued decisions on the violation of Indigenous peoples' human rights from environmental impacts (Jaimes 2015).

Furthermore, while the recommendations by the IACHR are non-binding on national governments, previous recommendations have influenced policies and been implemented (Jaimes 2015; McCrimmon 2016).

Secondly, the Arctic Athabaskan petition was developed by Earthjustice as a 2005 petition to the IACHR by the Inuit Peoples of the Arctic regions of Canada and US. It claimed that the US Government had failed to limit climate-disrupting greenhouse gas emissions and that the resulting climate change impacts violated the Inuit peoples' human rights (McCrimmon 2016). While the 2005 petition was rejected by the IACHR, the 2013 petition was able to build on the lessons, with a more persuasive argument regarding the state's violation of human rights, while also benefitting from changes in the IACHR's more recent law interpretations (McCrimmon 2016).

Thirdly, and in contrast to the 2005 petition, the 2013 petition's strength is in taking a specific climate change contributor – that of black carbon emissions – rather than a wider range of emissions (McCrimmon 2016). Black carbon has a more regional (rather than global) dispersal and a shorter period in the atmosphere (one week) as a greenhouse gas before landing on the snow and causing melting. Therefore, the petition is strengthened by the evidence of emissions contribution from Canada and the potential short-term gains from emissions reduction (McCrimmon 2016).

## What were the limitations?

There are four identified limitations with the use of a petition to secure action on climate change. Firstly, it is a slow process. The Arctic Athabaskan peoples lodged their petition in 2013. At the time of writing in 2024, a recommendation has not yet been made (Sabin Center 2024).

Secondly, the Inter-American Commission of Human Rights is not as powerful as the Inter-American Court of Human Rights. However, as the US and Canada have not ratified the American Convention on Human Rights, these nations do not recognise the Court (Krakoff and Rosser 2012). This leaves the Commission as the only target for petition-based climate action (Mardikian and Galani 2023).

The other two limitations are the merits of the case. One merit to be proven is that domestic actions have been tried and exhausted (Jaimes 2015). The other is to prove the causality between a specific nation's greenhouse gas emissions and the resulting impacts of climate change on the human rights of the petitioners (Szpak 2020).

## What does this case study contribute to the rights of First Nations Peoples against climate change impacts?

Human rights-based climate litigation is relatively new aspect of litigation (Szpak 2020). The Athabaskan peoples' petition provides a case study for other legal approaches to protection from climate-related risks to Indigenous peoples.

This can be viewed in three ways. Firstly, it makes explicit the role of Indigenous peoples as stewards of their traditional lands, and the cultural value of maintaining their lands – or, conversely, of the human rights impacts when this stewardship is not supported (Szpak 2020). Having this proven through legal arguments further embeds this recognition.

Secondly, this petition will develop the IACHR's position on the link between human rights and climate change impacts, that will in turn influence later IACHR decisions on similar claims (Jaimes 2015).

Finally, the lengthy process toward a decision from the IACHR (currently pending after 11 years) may have prompted alternative pathways that can be achieved faster and potentially with a more committed outcome, such as cooperative efforts between neighbouring states (McCrimmon 2016).

### What aspects are transferable to an Australian context?

The Arctic Athabaskan peoples' petition to a human rights authority has two highly relevant aspects for the Australian context. Firstly, it sets out the risks to Indigenous peoples' cultural maintenance from environmental impacts caused by climate change, and then invokes protections against these risks through human rights legislation. This link from environmental damage to human rights violations is well described by the petition. Secondly, the petition seeks to identify a specific nation state's contribution to climate change and to describe this impact on its peoples, as well as the state's ability to contribute to protection.

## CASE STUDY #4:

# The Sámi Climate Council[7] (Finland)

### What was the issue?

The Sámi Peoples (also written as Saami) are the only recognised Indigenous peoples in Europe; they are recognised in the constitutions of Norway, Finland, and Sweden (Mardikian and Galani 2023). The Sámi population of approximately 100,000 people covers national boundaries of Russia, Norway, Sweden, and Finland, particularly in the Arctic regions; they refer to their traditional lands as Sápmi (Mardikian and Galani2023; Pearl 2018).

Sámi Peoples maintain traditional land, sea, and animal management in the Northern European Arctic region, yet many of their practices are being negatively impacted by climate change (Mardikian and Galani 2023). Natural resources are being affected by changes to air temperatures and seasonal onset and to the length and size of tides (Pearl 2018). This includes impacts to the health of reindeer, which are traditionally herded by Sámi Peoples as a source of food and fur. Reindeer are affected by heat stress, by limited water and food access during droughts, and by wildfires destroying habitat (Hossain 2012).

### What happened?

In 2023, the Finnish Government adopted a decree under the existing *Climate Act 2022* to establish the Sámi Climate Council (Ministry of the Environment 2023). The Government's stated purpose was to 'bring the knowledge base and perspectives of the Sámi people into the climate policy processes' in recognition of the unique impacts of climate change on Sámi culture and traditional livelihoods in the Arctic (Ministry of the Environment 2023).

The council consists of 12 members, with at least half being traditional Sámi knowledge holders (including the vice-chair) as well as members qualified in environmental and other climate-relevant sciences (Ministry of the Environment 2023). Since November 2023, the Council has acted as an independent expert body on Finnish climate change policy, specifically tasked with assessing and monitoring the impacts of the Climate Act from a rights-based perspective of Sámi culture and Peoples (Ministry of the Environment 2023).

### What were the successful aspects?

There are three clear aspects where the Sámi Climate Council provides a successful example of an Indigenous rights-based approach on climate change. Firstly, it formally acknowledges the existence and value of Sámi rights and perspectives. The Sámi Parliament in Finland has existed since 1973 to provide this voice more broadly and the Finnish Arctic Strategy (2021) has recognised the value of these voices specifically on climate change; the Sámi Climate Council provides a mechanism for these two initiatives to be implemented into decision-making (Jauhiainen 2023).

Secondly, the Sámi Climate Council positions Sámi peoples in Finland as rights holders, rather than one of many stakeholder or interest groups. Where climate change threatens Sámi languages, knowledges, and culture, the Sámi Climate Council provides a mechanism for Sámi Peoples to uphold their rights and be centrally involved in decision-making (Jauhiainen 2023).

Finally, the Sámi Climate Council of Finland can contribute to climate-related policies and decisions beyond national borders through the multi-country Sámiráđđi ('Sámi Council'). The Sámiráđđi represents the civil society voices, rights and interests of Sámi Peoples from the four nations that constitute Sápmi traditional lands, including Finland, in a range of international fora including UN environmental conventions (Saami Council 2024). This includes the Sámiráđđi being one of only six Indigenous peoples' organisations granted Permanent Participant status in the Arctic Council, which makes policies on Arctic issues including climate change (Arctic Council 2024; Jauhiainen 2023). The Sámiráđđi has a particular interest in Arctic environmental protection and sustainable development, both of which are relevant to and affected by climate change (Arctic Council 2024).

## What were the limitations?

The limitations to the Sámi Climate Council are that it is a relatively new body and, as such, has not yet realised the leadership and potential for this Indigenous rights-based approach to climate change for Finland (Ministry of the Environment 2023). It also has a predominantly domestic purview as a body established under Finnish law, and thus can only contribute beyond national borders through coordination with multi-country bodies such as the Sámiráđđi and, through that, the Arctic Council (Arctic Council 2024).

Finally, while this new body does privilege Sámi rights and knowledges, the Sámi population in Finland is only ten per cent of the total Sámi population globally, with the majority living in Norway (40 to 60 per cent) followed by Sweden (30 to 40 per cent) and a small population in Russia (four per cent) (Pearl 2018).

## What does this case study contribute to the rights of Indigenous Peoples against climate change impacts?

This case study contributes three aspects to enhancing the rights of Indigenous peoples in responding to climate change (Ministry of the Environment 2023). It is a formal recognition of an Indigenous peoples' voice and importance on climate change and is easily locatable for domestic (and indirectly international) policy-making and decision-making on climate change. The Sámi Climate Council was established under Finland's *Climate Act 2022* (Ministry of the Environment 2023), so is difficult to dismantle. It is positioned as a representative body through which the constitutionally-recognised Sámi peoples can exercise their rights as related to climate change decisions on their traditional lands (Jauhiainen 2023).

## What aspects are transferable to an Australian context?

The above strengths and potential of the Sámi Climate Council have relevance in an Australian context as it is a current and functioning form of legislated representation of Indigenous voices and knowledges on climate change, a representation which does not yet exist in Australia for Aboriginal and Torres Strait Islander peoples (Lowitja Institute 2023).

# Synthesis of case studies

Strategic litigation for environmental and climate justice tends to have different categories of litigants, approaches, objectives, and outcomes. Hence, adopting a rigid analytical framework to either understand them or draw lessons from them is not desirable. A similar caveat ought to be extended to understanding 'rights' or 'rights-based' approaches to achieving climate justice. Scholars have recognised and contextualised the neoliberal origins of human rights and other fundamental rights within liberal democracies (Whyte et al. 2019). In a way similar to extractive industries extolling their so-called 'environmental' credentials, a 'good' human rights record and accountability mechanisms earn much-desired legitimacy for modern democracies. Hence, using the language of 'rights' can limit how broader issues, such as Indigenous self-determination, are articulated and contested. Similarly, 'litigation' comes with its own limitations, such as financial, procedural, and resource impediments. Engagement with courts may itself be a constraint, including where legal institutions are situated within the structures that perpetuate colonial and environmental harms, as well as through unfamiliarity of juridical space that wields immense power.

However, these case studies provide an indication of the diversity in approaches and compromises made while pursuing litigation as an avenue for materialising and enforcing rights-based approaches to climate justice. Climate litigation is neither complete nor an ultimate expression of climate justice. Instead, it is both an opportunistic and strategic device in the hands of Indigenous peoples for engaging, transforming, and advancing the principles of common law. The use of litigation, as illustrated by the case studies, does not preclude recourse to other courses of action or continuing the movements for legislative action and improved governance. Further, the sheer use of diverse forums, such as courts, domestic human rights commissions, UN HRC, and ICJ, among others, indicates a willingness to utilise different platforms with different legal powers and consequences in order to maximise the chances of achieving climate justice.

However, the use of strategic litigation has immense legal and moral heft and is likely to result in a speedier resolution of issues, which may include the mobilisation of social movements and public opinions that propel necessary governmental action. The acknowledgement of issues and adjudication in juridical spaces with the force of law enlivens the understanding of rights for all, but especially for Indigenous peoples. Instances may be found in decisions such as Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6)[8], where the Land Court of Queensland held that allowing the coal mine would adversely affect a range of human rights including right to life, right to health, cultural, and spiritual rights of Indigenous peoples, and right to property. While not all cases will be successful nor, even if successful, trigger the necessary government actions, the recognition extended by juridical spaces, especially domestic courts, is important.

The long-standing dispute surrounding mining giant Glencore's McArthur River mine is a case in point. In 2023, the Northern Territory dismissed claims brought by the Traditional Owners, who argued that the Minister's decision to lower the security bond set for Glencore's operation in one of the state's most toxic industrial sites and the expansion of Glencore's operation without a planned closure violated the environmental and cultural rights of Indigenous peoples. Gudanji woman and native title holder Josephine Davey, the Environment Centre NT, and Garawa man Jack Green have now appealed the decision. Jack Green was able to produce his paintings as submissions before the Joint Standing Committee on Northern Australia inquiry into the destruction of Indigenous Heritage Sites at Juukan Gorge, which was taking place at the same time.

His unconventional testimony exists in the quasi-legal space, and as an exhibition in the old Parliament House (now, the Museum of Australian Democracy), where it is more potent than the robust but clinical submissions made in the McArthur River mine case.

It has also helped to transform legal spaces, which have now grown to accept Indigenous voices through stories, songs, visual media, and other forms of knowledges to substantiate their claims. Similar evidence has been offered in the recent International Court of Justice advisory opinion on Obligations of States in respect of Climate Change.[9] The wider nature of legal submissions and seats of hearing (such as the on-Country evidence in the case of *Tipakalippa National Offshore Petroleum Safety and Environmental Management Authority (No 2)*[10] and *Pabai Pabai v Commonwealth*, more recently) also contribute to making legal institutions more inclusive and less colonial. The new evidentiary processes, court procedures, and knowledge filtered through the legal processes become available to the public with a fresh validation and as a fresh stimulus for similar rights-based legal action in the future.

In the case of *Daniel Billy*, as discussed earlier (see Case study #1), the UN HRC lacked the powers of a domestic court, as its jurisdiction and effectiveness of enforcement limited it. However, the issues raised find continuity in *Pabai Pabai*, awaiting a decision. *Daniel Billy* argued that the governmental inaction threatened the right to life with dignity, human rights, the right to private, family, and home life, and the right of minorities to enjoy their own culture. In the decision, UN HCR stated:

> *'the authors – as members of peoples who are the longstanding inhabitants of traditional lands consisting of small, low-lying islands that presumably offer scant opportunities for safe internal relocation – are highly exposed to adverse climate change impacts. It is uncontested that the authors' lives and cultures are highly dependent on the availability of the limited natural resources to which they have access, and on the predictability of the natural phenomena that surround them.'*

In awarding such recognition, claims are more readily recognised as legal issues that merit juridical attention and, in some instances, constructive redress. Should governments ignore the principles of international law and human rights, it comes at a great political cost, if not a certain legal cost.[11] The UN HRC decision stayed clear of instructing the Australian Government to adopt adaptation measures. Further, it also stated that there are no 'reasonable and foreseeable risks' under Article 6[12] in response to the claimant's argument that the right to life with dignity was threatened. However, the recognition of a substantial number of claims within the UN HRC decision, including cultural rights, helped propel the case forward in domestic litigation, such as *Pabai Pabai v Commonwealth*.

In Nordic jurisdictions, cases have been infrequent because of the existence of political representative mechanisms such as the Sámi council, which may have limited impact beyond the symbolic embodiment of justice. However, cases such as the *Girija Sámeby*[13] illustrate the importance of judicial pronouncement on some of the fundamental rights of Indigenous peoples. In the *Girija Sámeby*, the Girja reindeer herding community sued the Swedish state, claiming exclusive rights to hunt and fish within their herding district was denied to them. The challenge was partly against the existing *Reindeer Husbandry Act 1971*, which vested the ownership of the land, hunting, and fishing rights in the state, thus enabling the state to grant such rights to others, including non-Indigenous people within the Girija territory. There were three key arguments advanced in the case. First, the claimants argued that the hunting and fishing were exclusive rights that belonged to the Sámi people and must be held to the exclusion of the

state as well. Second, denying Sámi property rights violates the prohibition of discrimination articulated in Article 14 of the European Convention of Human Rights (ECHR) and the protection of property in Article 1 of the First Additional Protocol to the ECHR. Third, and more importantly, the claimants argued that the existing laws were a product of colonisation and not fit for contemporary values and articulated Indigenous rights in international law.

The Swedish Supreme Court took a cautiously conservative approach and endorsed the exclusivity argument made by the Sámi claimants. The court adopted the doctrine of 'immemorial prescription', which means that for the ownership to consolidate – leasing of hunting and fishing rights in this instance – it must have endured for a 'long period, continuously and without competition'.[14] Such a right must also have been exercised in good faith and without protest from others. The court made a factual determination that the Sámi had always practised the hunting and fishing, alongside herding, exclusively, and should not be deprived of their rights, especially since there are no corresponding historic or contemporary rights held by the state/crown. It is of interest to this case that the court remains silent on the question of colonisation and irrelevance of the colonial laws (Sakshi 2021). The court also remains silent on the state obligations under *UNDRIP* to uphold cultural rights and economic self-determination of Indigenous peoples. Despite the limitations of litigation, Sámi rights received a significant backing from the adjudication and its express recognition and statement of what constitutes as exclusive rights. The principle of 'immemorial prescription' also acknowledged the long connection between the Sámi peoples and the Sápmi.

Should one methodically make their way through any number of past Indigenous rights cases or more contemporary environmental and climate cases, adjudication has produced a common thread of knowledge. Such knowledge is not limited to the outcome or aftermath of cases but everything that occurs or is treated as evidence or relevant in the course of adjudication. From *Mabo* to *Youth Verdict* to *Sharma v Minister for Environment*, common law has coursed its way through different challenges into a more open space. Meanwhile, law has also picked up other knowledge forms, ways of living and procedures that meet the contemporary demands of fairness, equity and justice. While radical transformations in law (overturning of a settler state, for instance) are hardly possible, changes in what is deemed legally relevant and can influence the judges is now decidedly radical. Hence support for strategic or climate litigation that challenges the abilities and remit of modern courts. It is even more important now for Indigenous peoples to organise and participate in moments that can harness the possibility of revolutionary transformations in law through frequent and vigorous engagement with the legal system.

To offer some overarching reflections from this review, we provide Table 1 to summarise the benefits, elements for success and unintended consequences of both domestic and international law for climate litigation.

**Table 1:** Climate litigation benefits and unintended consequences

| Legal frameworks | Benefits of framework | Key elements for success | Unintended consequences |
|---|---|---|---|
| Domestic law | Clarity of principles.<br><br>Durable incorporation of such principles in governance. | Provisions within existing laws.<br><br>Willingness of the courts to read obligations into existing domestic law.<br><br>Willingness of courts to import obligations from international law. | Limitations of legal language to adopt extra-legal claims, such as critique of and resistance to colonialism – continues despite expansion of rights. |
| International law | Broader legal frameworks, obligations and greater progress in Indigenous rights outside of state sovereignties.<br><br>Self-determination in abstract is a stronger principle and finds ready support mechanism within international law instruments (such as expansive reading of right to life, right to property and cultural and spiritual rights). | The broader mandate of international courts and the absence of domestic political constraints.<br><br>No rigidity in the language or formal processes of the courts. | The absence of enforcement mechanisms or binding obligations on states makes the whole process repetitive.<br><br>States may also retaliate against the idea that international courts, irrespective of advisory or adversarial jurisdictions, are no substitute for political negotiation. |

## Limitations of this review

The limitations of this review overlap with the limitations of litigation in settler-colonial spaces.

First, it is understandably difficult to demand people invest faith in processes and institutions that have actively participated and continue to participate in impeding and destroying Indigenous sovereignties, knowledge forms, and ways of living. However, when it comes to the prospect of strategic litigation, there is reason, for cautious optimism. We do not argue here that courts can be 'friends' to Indigenous peoples, but that flexibilities and ambiguities in law can be used to create an ally that Indigenous peoples can work with. This report understands the difficulties in making this leap.

Second, the widespread nature of climate and rights-based litigation and the sheer diversity of jurisdictions can be daunting in terms of finding the right pathways to follow, the potential enormity of the task ahead and/or a lack of clarity about strategies for the way forward. It is a risk associated with the rigidity of law and litigation *per se*, requiring present litigants to find opportunities within the complexities of a legal system that makes it easier for future generations.

The pace at which the climate litigation space is moving is difficult to demonstrate in a static review such as this paper. For example, more-recent cases led by Traditional Owners and Indigenous communities in Australia were not identified in our search because of timing. We acknowledge that this review therefore is limited because of our need to put a finite timeframe on the search, and therefore our attempts to synthesise these findings are bound to these timeframes. There continue to be impactful and historic wins by Indigenous Elders and communities that showcase the dynamic nature of this litigation space.

Finally, this review excluded the Americas. This was largely due to our focus on 'CAANZUS' nations (Canada, Australia, Aotearoa (New Zealand), and the US) with their shared European colonial legacy and impacts on/for Indigenous peoples. However, the authors acknowledge the wide-ranging nature of rights litigation in Brazil, Chile, Argentina, Peru, Ecuador, and Colombia. For example, following a request from Colombia, the Inter-America Court of Human Rights is compiling an advisory opinion on climate change impacts on human rights (Lewis 2024). This opinion will provide much-needed clarity and direction. We acknowledge that most litigation and scholarship relating to environmental justice and rights of nature are based on developments in these countries, so we urge future research or reviews to explore the Americas.

## Conclusions: the future of Indigenous-led climate litigation

This review has looked at human rights climate litigation, which entails a focus on the harms to people rather than harms to the environment (consistent with environmental cases). A focus on humans arguably brings the issues related to climate change closer to home, making explicit the moral and ethical obligations to act to protect people.

The purpose of this scoping review has been to analyse Indigenous-led climate rights litigation and to consider implications particularly for Aboriginal and Torres Strait Islander Peoples. A total of 80 papers were analysed in terms of how rights-based approaches are being applied to support Indigenous peoples' action on climate change. We focused on four case studies to provide an in-depth perspective of the context surrounding the case.

This review contributes to a growing body of research that is documenting the rapid growing area of rights-based climate litigation and specifically the

role of Indigenous communities. In closing, we offer reflections from engaging in this review process and learning from the Indigenous communities leading strategic climate litigation.

While this review focused more explicitly on cases asserting human rights in the context of climate change, it is important for us to consider who else's rights are being litigated across the globe. This consideration is connected to cultural worldviews and who is granted personhood within the law. It also begs the question about the fundamental rights of nature and the relative authority of nature in climate litigation. For example, we found that in Aotearoa (Case study #2) a national framework has supported a more Māori-inclusive approach to the governance of the Waikato River. This case is not alone. Perhaps the interconnectedness of human and environmental harms is part of the future of strategic climate litigation.

There is an emerging body of cases asserting the fundamental rights of nature, as opposed to humans. These cases have been litigated in jurisdictions around the globe and share similar features to cases arguing for human rights. For example, like the Aotearoa case, rivers are frequently the subject of these cases, and notably not all these cases relate explicitly to climate change. This may be a new way in for climate litigation – if nature possesses rights, then those rights could be the basis of new actions arguing that climate change implicates those rights.

Finally, from our reading and learning, we argue that community-led advocacy and knowledge sharing is crucial. Therefore, celebrating communities' labour-intensive efforts is key, as is enabling them to distil and disseminate key lessons and recommendations from their litigation efforts. Indigenous communities whose homelands are also on the front line of climate change impacts would benefit from learning firsthand from those Elders, Traditional Owners, and community members leading ground-breaking cases in the climate-rights litigation movement. Allies can be included in such knowledge translation for the benefit of communities directly impacted by climate change. In addition, targeted and supported funding (and crowd funding) is necessary to ensure community-led and strategic advocacy continues to drive this movement.

# Next steps for Indigenous-led action

## Recommendations for litigation

Learning from the Indigenous-led cases analysed here, we offer case-level and broader litigation recommendations. Based on the current analysis, as well as Peel and Markey-Towler's (2022) analysis of strategic climate litigation, the following appear to be key ingredients to impactful cases:

1. Carefully selecting plaintiffs to communicate a strategic message with the case.
2. Engaging an experienced legal team with a track record of bringing other strategic climate legal interventions.
3. Targeting defendants who are widely seen to be lagging in their climate action.
4. Tying legal arguments closely to the latest climate science.
5. Making innovative legal arguments, including those emphasising duties of protection.
6. Seeking remedies that extend beyond the situation of individual litigants and contribute to intended policy and regulatory impacts.
7. Upholding the Australian Government's obligations to protect the rights of Aboriginal and Torres Strait Islander peoples under the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*, as this specifies that Indigenous peoples have a right to participate in decision-making over affairs that directly impact them and their lands, waters, and resources; this right is increasingly important in a changing climate.

Widening the lens to Indigenous-led climate litigation more broadly, our analysis has led us to consider further ingredients for impactful cases:

- Some of the promising and successful climate cases of recent times indicate that the courts have begun to appreciate the labour invested by the Indigenous claimants into bringing claims that have been traditionally sidelined as a matter of legislation or policy. This is an immense opportunity and a legal moment that must not be ignored.
- The range of cases and claims introduce new worldviews and forms of knowledge into the common law system, which is constantly evolving and accommodating. This advantage is particularly amplified by the role of more receptive and perceptive judges who are willing to learn from plural legal sources. Another example is shown in recent cases that have enabled more inclusive and less colonial evidentiary processes and court procedures (for example, for hearing evidence on Country) which benefits future cases.
- Even partial success in any court consolidates certain issues and claims as something that is potentially explored in future cases. For instance, the Duty of Care principle upheld by Bromberg J in the Federal Court decision of *Minister for the Environment (Commonwealth) v Anjali Sharma & Ors (by their litigation representative Sister Marie Brigid Arthur [2021] VID389* has become a starting point for arguments in *Pabai Pabai v Commonwealth*.
- A strong community-led campaign behind rights-based litigation indicates the necessary democratic legitimacy and critical mass behind the relevant issues. The demonstration of widespread concern may indicate that the law must keep up, thereby initiating both legislative and adjudicative action.
- While state accountability is the hallmark of most liberal democracies, it needs a clear legal articulation to further the cause of individuals to whom such as accountability is owed. While *UNDRIP* is understood to embody better articulation of Indigenous rights, and settler states like Canada have enacted it as legislation, there are more factors at play that determine the effectiveness and enforcement of such laws. The *UNDRIP* also limits itself by admitting that the state sovereignties are not to be displaced, thereby closing the avenues for plural and Indigenous sovereignties. For instance, states that are deeply embedded in extractive and fossil capitalism will have no institutional capacity or willingness to enforce UNDRIP principles. A legal system that upholds those principles is an urgent requirement, alongside concrete social action to demand such accountability.
- The legal fight for Indigenous rights and climate justice is not separate from the political fight against conditions of inequality and factors that sustain such structures of inequality and injustice. Reasserting Indigenous land and environmental relationships, emphasising Indigenous economic and cultural sovereignty that is incompatible with extractive and racial capitalism, and continuing to work towards planetary justice is an integral part of rights-based litigation and must be made clear with every opportunity.
- Indigenous peoples are utilising multiple international dispute resolution bodies to make these claims. This suggests the importance of raising awareness across different sectors and groups of people, and to approach rights-based climate litigation strategically in ways that are relevant for the socio-political context in which the case is situated.

All these lessons contribute to an argument for strategic climate litigation. Within a strategic climate litigation framework, litigation is not merely for the sake of winning. Rather, getting to court and enabling communities to advocate for their rights is a constructive and impactful step forward within a larger process of social change. Winning

a case is not necessarily the objective, rather it is about growing pressure for change (Batros and Khan 2020). In particular, a complex and wicked problem with deep structural roots, such as climate change, requires a much larger and longer process. Therefore, strategic climate litigation is about seeing litigation as a strategic tool within a larger theory of change. Nonetheless, support for strategic climate litigation will depend on reducing barriers to bringing cases forward to court. As the findings of the Climate Litigation 2023 Reports (UNEP 2023) show, these barriers may include financial challenges, intimidation, and lack of 'know-how'.

## Next steps and recommendations

As we know, climate changes is already having a disproportionate effect on the health and wellbeing of Aboriginal and Torres Strait Islander peoples, and Indigenous peoples around the world. We are seeking climate justice through strategic climate litigation. Climate mitigation and adaptation are not enough – we need climate justice. To support strategic climate litigation and reduce barriers to bringing cases forward to court, we recommend:

- **For legal services:** Legal and financial support for communities bringing cases forward to the courts. This might include pro bono legal services provided to communities, including promoting free legal information for people, such as peaceful protests (for example, https://www.actionreadyqld.com/).
- **For communities:** Advocacy training and education around strategic climate litigation that is community-led and driven. This is a highly contextual knowledge translation and dissemination process that is best held by communities for communities.
- **For policy-makers:** Sharing the stories of communities who have sought legal action and celebrating their strengths and successes (no matter how big or small) as part of raising awareness and supporting future litigation efforts.

While governments cannot avoid climate litigation, there are a range of steps governments can take to progress climate justice. **For governments** we recommend:

- **To fully implement and monitor the United Declaration on the Rights of Indigenous Peoples *(UNDRIP).***

  This would serve as a significant step forward by the Australian government to protect the rights to culture and self-determination for Aboriginal and Torres Strait Islander peoples.

  In supporting the implementation of the UNDRIP, national infrastructure should be developed and delivered to ensure Aboriginal and Torres Strait Islander people are involved in determining the approach to implementing the UNDRIP and to ensure the specific needs of Aboriginal and Torres Strait Islander peoples and communities are identified and addressed.
- **Embed mechanisms for sovereignty to be asserted.**

  Embed Aboriginal and Torres Strait Islander leadership into any future land agreements related to our peoples' land or water interests. This should reassert our sovereignty and relationship with the land and sea and go beyond the recognition and protection of our peoples' water interests.

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# Endnotes

1 Throughout we have used the language Indigenous to refer inclusively to all First Peoples, globally. Where we are referring exclusively to Indigenous Australians, we use the term *Aboriginal and Torres Strait Islander*.

2 We use the terms climate litigation and climate change litigation interchangeably.

3 https://www.ohchr.org/en/what-are-human-rights/international-bill-human-rights

4 https://climatecasechart.com/non-us-case/petition-of-torres-strait-islanders-to-the-united-nations-human-rights-committee-alleging-violations-stemming-from-australias-inaction-on-climate-change/

5 https://www.waitangitribunal.govt.nz/en/about/the-treaty/about-the-treaty

6 https://climatecasechart.com/non-us-case/petition-inter-american-commission-human-rights-seeking-relief-violations-rights-arctic-athabaskan-peoples-resulting-rapid-arctic-warming-melting-caused-emissions/

7 https://www.saamicouncil.net/en/climate-change-in-sapmi

8 [2022] QLC 21.

9 https://www.icj-cij.org/case/187

10 [2022] FCA 1121.

11 R v Secretary of State for the Home Department, ex parte Simms [1999] UKHL 33.

12 Article 6 of the International Covenant on Civil and Political Rights (ICCPR).

13 Högsta Domstolen [Swedish Supreme Court] (23 January 2020) Case No. T 853-18.

14 Högsta Domstolen, n (4), at 6, 45.

The Boranup Karee Forest,
near Margaret River,
Western Australia (Shutterstock).

LOWITJA INSTITUTE

Australia's National Institute for Aboriginal and Torres Strait Islander Health Research

## CONTACT

PO Box 1524, Collingwood Victoria 3066 Australia
T: +61 3 8341 5555 | F: +61 3 8341 5599 | E: admin@lowitja.org.au | www.lowitja.org.au
@LowitjaInstitut @lowitja_institute @lowitjainstitute

## ABOUT LOWITJA INSTITUTE

Lowitja Institute is Australia's only national Aboriginal and Torres Strait Islander community controlled health research institute named in honour of its co-patron, the late Dr Lowitja O'Donoghue AC CBE DSG. It is an Aboriginal and Torres Strait Islander organisation working for the health and welling of Australia's First Peoples through high-impact quality research, knowledge exchange and by supporting a new generation of Aboriginal and Torres Strait Islander health researchers. Established in January 2010, Lowitja Institute operates on key principles of Aboriginal and Torres Strait Islander leadership, a broader understanding of health that incorporates wellbeing and the need for the work to have a clear and positive impact.

The history of Lowitja Institute dates back to 1997 when the first Cooperative Research Centre for Aboriginal and Tropical Health was established. Since then, Lowitja Institute and the CRC organisations have led a substantial reform agenda in Aboriginal and Torres Strait Islander health research by working with communities, researchers and policymakers, with Aboriginal and Torres Strait Islander people setting the agenda and driving the outcomes.