JOINT OPINION

A. INTRODUCTION

1. In our capacities as legal experts, we are requested to provide our joint opinion on whether effective remedies are available domestically to the anticipated clients of our instructors, namely, numerous Australians affected by the impacts of climate change (**the complainants**).[1]

2. The complainants wish to challenge the Australian Government's failure to regulate its fossil fuel exports in a manner that is consistent with 1.5°C temperature pathways. They wish to challenge this failure on the basis that such conduct has exacerbated the climate crisis, and has thus interfered with the enjoyment of their rights under Articles 6 (the right to life), 17 (the privacy, family and home right), and 27 (minority right to culture, religion and language) of the International Covenant on Civil and Political Rights (**ICCPR**).

3. The complainants seek relief for climate-related human rights violations. In that context, the kind of discrete and ad hoc remedy that might be available upon successful challenge of an individual project would not be sufficient. Rather, the complainants seek systemic relief — that would compel the Australian Government to regulate fossil fuel exports consistently with 1.5°C pathways. Accordingly, our opinion focuses on that kind of remedy.

4. There are no such remedies available to the complainants under Australian law.

   i. Foremost, no domestic court has the power to compel the Australian Government to align its fossil fuel export policy with 1.5°C pathways: such an order would require either legislative action, or the exercise of executive discretion in a particular manner, neither of which is amenable to judicial compulsion.

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[1] The complainants include individuals across the States and Territories of Australia who have suffered harm due to climate impacts (including bushfires, floods and extreme heat), comprising First Nations people, culturally and linguistically diverse people, people with disability and women.

ii. The absence of any constitutional or federal statutory bill of rights forecloses any national-scale human rights-based avenue by which the complaints could bring a legal action (let alone to obtain adequate relief).

iii. The common law does not presently supply a duty of care in respect of the conduct complained of, by reason of the core policy considerations that such a duty would engage, following the High Court authority ***Graham Barclay Oysters** Pty Ltd v Ryan* [2002] HCA 54; 211 CLR 540. *Graham Barclay Oysters* was referred to by the United Nations Human Rights Committee (the **Committee**) in *Daniel **Billy** et al v Australia*[2] and, since that time, has been applied in the climate context, specifically in *Minister for the Environment v **Sharma** & Ors* [2022] FCAFC 35, and ***Pabai** & Anor v Commonwealth of Australia **(No 2)*** [2025] FCA 796).

iv. The statutory frameworks relating to human rights law, climate and environmental law, and export regulation do not afford a pathway to an effective remedy. Whether at the federal or the state and territory level, these frameworks are typically confined to judicial or administrative review at the level of discrete projects or decisions. Accordingly, they cannot be relied upon to compel the Australian Government to regulate fossil fuel exports consistently with 1.5°C pathways.

5. Below we set out the relevant principles applicable to determining whether domestic remedies have been exhausted (Part B). We then answer the question: in our opinion, no domestic remedies are presently available to the complainants under Australian law which could provide adequate relief in the manner sought (Part C). We finally make brief comment on specific sources of law that we were requested to consider in forming our conclusion (Part D).

B. RELEVANT PRINCIPLES

6. Our instructors expect to receive instructions to submit a communication against Australia on behalf of the complainants to the Committee. A key requirement for admissibility is whether domestic remedies have been exhausted pursuant to article 5(2)(b) of the *Optional Protocol to the International Covenant on Civil and Political Rights*.[3] Admissibility is a question for the Committee to determine. The question we have been asked is whether effective remedies are available domestically. That

[2] Views of 22 September 2022 (CCPR/C/135/D/3624/2019) at [7.3].

[3] Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

question requires consideration of what is meant by an "effective remedy." Seven key principles emerge from the body of decisions on individual communications made by the Committee under the Optional Protocol (Views).

7. *First*, domestic remedies must not only be available, but also be effective.[4]

8. *Second*, "available" remedies are those that are *de facto* available to the person or people submitting the communication (that is, the complainant or complainants).[5]

9. *Third*, a complainant need only make use of those avenues that offer them a reasonable prospect of redress.[6] Remedies need not be exhausted in respect of domestic claims which are objectively without prospects of success;[7] accordingly, domestic remedies do not need to be exhausted if the highest domestic court has decided the matter.[8]

10. *Fourth*, a complainant need only make use of those avenues that relate to the violation being alleged.[9] They must invoke the relevant rights contained in the ICCPR as part of their domestic case (but need not refer to specific provisions).[10] If it is not possible to do so, it follows that the cause of action could not supply an effective remedy for a human rights violation.

11. *Fifth*, complainants need only pursue domestic remedies if the available redress would be proportionate to the harm suffered.[11]

12. *Sixth*, any decision that would only have recommendatory rather than binding effect cannot be described as a remedy which would be effective.[12]

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4 Human Rights Committee (**HRC**), *Vicente et al. v. Colombia*, Views of 29 July 1997 (CCPR/C/60/D/612/1995) at [5.2].

5 HRC, ***D.G***. *et al. v. the Philippines*, adopted on 26 May 2020 (CCPR/C/128/D/2568/2015) at [6.3].

6 *Billy* at [7.3]; HRC, ***Portillo Cáceres*** *et al. v. Paraguay*, Views of 20 September 2019 (CCPR/C/126/D/2751/2016) at [6.5].

7 HRC, *Earl Pratt and Ivan Morgan v. Jamaica*, Views of 6 April 1989, (Communication No. 210/1986 and 225/1987; A/44/40) at 222 [12.3], [12.5]; HRC, *Hew Raymond Griffiths v. Australia*, Views of 26 January 2015 (CCPR/C/112/D/1973/2010) at [6.3]. See *Chiara* ***Sacchi*** *et al. v. Argentina, Brazil, France, and Germany*, Views of 11 November 2021 (CRC/C/88/D/104/2019, CRC/C/88/D/105/2019, CRC/C/88/D/106/2019, CRC/C/88/D/107/2019) at [10.17].

8 HRC, *Ilmari Lansman et al v Finland*, Views of 26 October 1994 (CCPR/C/52/D/511/1992) at [6.2].

9 *Billy* at [7.3]; *Portillo Cáceres* at [6.5].

10 See HRC, *B. d. B et al v The Netherlands*, Views of 30 March 1989 (CCPR/C/35/D/273/1988) at [4.4], [6.3].

11 *Billy* at [7.3]; *Portillo Cáceres* at [6.5].

12 HRC, *Madafferi v Australia*, Views of 26 July 2004 (CCPR/C/81/D/1011/2001) at [8.4]. See HRC, *C v Australia*, Views of 28 October 2002 (CCPR/C/76/D/900/1999) at [7.3].

13. *Seventh*, mere doubts about the effectiveness of remedies are insufficient;[13] specific information is needed to show that domestic remedies are ineffective or unavailable.[14]

14. These principles were applied by the Committee in *Billy*. In that case, a complaint was brought by Australian First Peoples of the Torres Strait Islands, who "are among the most vulnerable populations to the impact of climate change".[15] The conduct complained of was that Australia had failed to implement an adaptation programme to ensure the long-term habitability of the Islands, and failed to mitigate the impacts of climate change, in breach of articles 2, 6, 17, 24 and 27 of the ICCPR.[16] In relation to the exhaustion of domestic remedies, the Committee recalled that a complainant need only make use of those avenues that offer a reasonable prospect of redress, which relate to the alleged violation, and which afford redress proportionate to the relevant harm.[17] The Committee found that the complaint was admissible, including because no relevant domestic remedy was available to the complainants in Australia at that time.[18]

C. DOMESTIC REMEDIES

15. Any judicial order requiring Australia to align its export policy to 1.5°C pathways would, in practice, require subsequent legislative action (enacting, repealing, or amending laws), the exercise of executive powers, functions or duties in a particular way, or both, in order to be implemented in Australian law.

16. No statutory or other existing power, function or duty has been identified under which the Australian Government could be compelled to align export policy with 1.5°C pathways. Accordingly, there is no basis on which the complainants could seek mandamus,[19] that is, an order to compel the performance of an unperformed public duty.[20]

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13 *D.G.* at [6.3]; HRC, *S.S. v Norway*, Communication No 79/1980, Views of 2 April 1982, (CCPR/C/OP/1) at [6.2]. See HRC, *J.R.C. v Costa Rica*, Views of 30 March 1989 (CCPR/C/35/D/296/1988) at [8.3]. See by analogy *Sacchi* at [10.17]-[10.18].

14 See by analogy *Sacchi* at [10.20].

15 *Billy* at [2.1].

16 *Billy* at [2.7]-[2.9].

17 *Billy* at [7.3].

18 See *Billy* at [7.3], [7.11].

19 Constitution of Australia, s 75(v); *Judiciary Act 1903* (Cth), s 39B(1).

20 *AZC20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 26; 278 CLR 512 at [56] (Kiefel CJ, Gordon and Steward JJ). See ***Randall*** *v Northcote Corporation* (1910) 11 CLR 100 at 114 (Griffith CJ); ***Cuming Campbell Investments*** *Pty Ltd v Collector of Imposts (Vict)* (1938) 60 CLR 741 at 749 (Latham CJ).

17. To the extent that there are relevant powers, functions or duties arising under the existing statutory framework, they involve discretionary action. Consistent with the separation of powers under Australia's Constitution, it is a longstanding principle that "[i]f the act sought to be compelled to be done is a discretionary act, mandamus does not go further than to command the exercise of the discretion, and can never go to command its exercise in a particular manner".[21]

18. Injunctive relief effectively compelling a reduction in fossil fuel exports or an alignment of fossil fuel export policy with 1.5°C pathways is unlikely to be granted. Among other reasons, any such injunction would be cast in subjective and imprecise terms, giving rise to practical difficulties in identifying the steps required for compliance and supervising adherence. The fundamental difficulty of an injunction of this kind is that would leave the Australian government "in the difficult position of not knowing precisely what it was required to do, or not do, to comply with the order."[22]

19. The International Court of Justice, in its Advisory Opinion on the *Obligations of States in respect of Climate Change* (General List No 187, 23 July 2025) (**Advisory Opinion**), has clarified the relevance and content of Australia's international obligations in respect of all conduct resulting in the climate system and other parts of the environment being adversely affected by anthropogenic GHG emissions, including fossil fuel production, consumption, and exports.[23] For the purposes of effective remedies at the domestic level, the complainant cannot rely on the Advisory Opinion directly to seek an order compelling Australia to align its export policy to 1.5°C pathways. While the Advisory Opinion can be expected to inspire new and novel arguments for future climate litigation in Australia and may even improve prospects of success in cases, we maintain that the complainants could not obtain that kind of relief at the domestic level for the reasons given above.

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21 *R v Arndel* [1906] HCA 7; 3 CLR 557 at 567 (Griffith CJ). See *Randall* at 105 (Griffith CJ), 111 (O'Connor J); *Water Conservation and Irrigation Commission (NSW) v Browning* [1947] HCA 21; 74 CLR 492 at 504 (Dixon J); *Cuming Campbell Investments* at 749 (Latham CJ).

22 *Pabai (No 2)* at [1243] (Wigney J), referring to *Naoumi v Dannawi* (2009) 75 NSWLR 216 at [36] (McColl JA, with whom Beazley and Macfarlan JJA agreed). See *Optus Networks Pty Ltd. v City of Boroondara* [1997] 2 VR 318 at 336-337 (Charles JA).

23 ICJ Advisory Opinion, para. 94.

D. PARTICULAR SOURCES OF LAW

20. In furnishing our joint opinion, we were asked to specifically consider certain sources of law.

D-1 *Administrative Law and Judicial Review*

21. Much of the existing body of Australian climate change litigation seeking mitigation outcomes concerns the review of specific projects or activities approved under environmental and planning legislation.[24]

22. Judicial review of administrative decisions is available at the federal level under the Constitution, the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**ADJR Act**), and judicial or merits review is sometimes available under specific legislation (see further below). The remedies available under judicial review relevantly include the prerogative writs of mandamus,[25] certiorari,[26] and prohibition,[27] as well as the equitable remedies of injunction and declaration.[28] These remedies apply at the discrete level of discrete exercises of power. None of those remedies supply an effective remedy to meet the needs of the complainants. In addition to the reasons given in Section C above in respect of mandamus and injunctive relief, we further observe that it would be time-intensive, impractical, and ineffective to challenge every environmental assessment and approval decision relating to fossil fuel projects with an export component through such proceedings.[29] Accordingly, we consider this is not the kind of redress sought by the complainants in this matter.

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[24] Jacqueline Peel & Hari M. Osofsky, Climate Change Litigation: Regulatory Pathways to Cleaner Energy (Cambridge Press, 2015), 87-90. The University of Melbourne maintains a comprehensive database of Australian climate litigation cases decided since 2000 (https://law.app.unimelb.edu.au/climate-change/index.php) with project-related mitigation cases making up more than a quarter of the overall climate litigation cases brought.

[25] Mandamus is an order compelling or directing a lower court or administrative decision maker to perform mandatory duties according to law.

[26] A writ of certiorari sets aside a decision made contrary to the law.

[27] A writ of prohibition forbids a decision maker from commencing or continuing to perform an unlawful act.

[28] In addition to the common law, see Constitution s 75(v); *Judiciary Act 1903* (Cth), s 39B, see Pts IV and VI generally; ADJR Act, especially ss 5-7, 10, 16.

[29] There is a listing of approved fossil fuel projects at https://www.climatecouncil.org.au/resources/albanese-governments-fossil-fuel-approvals/. Also see Grant & Hare, Australia's Global Fossil Fuel Carbon Footprint, Climate Analytics, 11 Aug 2024 at https://climateanalytics.org/publications/australias-global-fossil-fuel-carbon-footprint. See Supplementary Observations [12].

D-2 *Human Rights Law*

23. Australia does not have a constitutional or statutory bill of rights or equivalent comprehensive federal instrument of rights protection. There is accordingly no national-level constitutional or statutory basis on which the complainants could seek a remedy — including an order compelling the Australian Government to align its regulation of fossil fuel exports with 1.5°C pathways — for an alleged violation of their rights arising from Australia's acts or omissions in respect of climate change.

24. The Australian Human Rights Commission (**AHRC**) is a statutory body established under the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**). Under s 11(1)(f) of the AHRC Act, the AHRC may inquire into any act or practice inconsistent with a human right, and endeavour by conciliation to achieve settlement.[30] The AHRC is not a judicial organ and does not issue binding decisions. It cannot order the Commonwealth or State governments to take any specific measures. The processes of the AHRC do not supply an effective remedy.

25. Victoria, Queensland, and the Australian Capital Territory have human rights legislation.[31] Each of the Acts recognises the same or cognate rights as those relied upon by the complainants under the ICCPR.[32] The Acts also contain a provision that permits recourse to international and comparative legal sources for the purposes of interpreting the scope and content of the relevant rights.[33] Each Act takes a broadly consistent approach, incorporating an interpretive obligation requiring legislation to be read compatibly with the protected rights, so far as is possible consistent with its purpose,[34] and obligations on public authorities to give proper consideration to human rights when making decisions and to act compatibly with human rights.[35]

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[30] "Human right" in that context expressly includes the rights recognised in the ICCPR (and other relevant international instruments): s 3(1) (definition of 'human rights').

[31] See *Human Rights Act 2004* (ACT), *Charter of Human Rights and Responsibilities Act 2006* (Vic), and *Human Rights Act 2019* (Qld).

[32] *Human Rights Act 2004* (ACT), ss 9 (right to life), 12 (privacy), 27 (cultural and other rights of Aboriginal and Torres Strait Islander peoples and other minorities), see also s 27C (right to a healthy environment); *Charter of Human Rights and Responsibilities Act 2006* (Vic), ss 9 (right to life), 13 (privacy), 19 (cultural rights); *Human Rights Act 2019* (Qld), ss 16 (right to life), 25 (privacy), 27 (cultural rights, generally), 28 (cultural rights re Aboriginal and Torres Strait Islander peoples).

[33] See *Human Rights Act 2004* (ACT), s 31; *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 32(2); *Human Rights Act 2019* (Qld), s 48(3).

[34] *Human Rights Act 2004* (ACT), s 30; *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 32(1); *Human Rights Act 2019* (Qld), s 48(1)-(2).

[35] *Human Rights Act 2004* (ACT), s 40B; *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 38; *Human Rights Act 2019* (Qld), s 58.

26. Despite these features, the Acts do not supply a pathway available to the complainants to obtain an order compelling the Australian Government to regulate fossil fuel exports consistently with 1.5°C pathways, for the following reasons.

i. Some complainants are in jurisdictions where there is no such law.

ii. The interpretive obligation in each Act applies only to legislation of the relevant state or territory. It cannot be used to require federal legislation — including the statutes governing environmental approvals, greenhouse gas emissions, and fossil fuel exports discussed elsewhere in this opinion — to be construed compatibly with human rights, and therefore cannot ground any challenge to the conduct of the Australian Government in regulating fossil fuel exports.

iii. The obligations to give proper consideration to and to act compatibly with rights apply to governmental actors in the relevant states and territories, not to the decisions or other conduct of actors within the federal government.[36]

iv. The relief available under these Acts is limited. In respect of the interpretive obligations, the Acts offer declaratory relief where laws are not consistent with human rights.[37] Declarations do not affect the validity, operation, or enforcement of the law in question, nor the rights or obligations of any person.[38] In respect of the obligation to act compatibly with human rights, a person may seek relief (other than damages) subject to the precise procedural requirements required by each Act.[39] In Victoria and the Australian Capital Territory, the legislation does not independently supply a right to proceed in an action seeking a remedy, and requires the identification of a separate cause of action.[40] The complainants' have limited options for separate causes of action in that regard.

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[36] See *Human Rights Act 2004* (ACT), s 40; *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 4. Note the *Human Rights Act 2019* (Qld) purports to bind the Commonwealth to the extent legislative power of the Parliament permits, the meaning of "public entity" in s 9 and "functions … of a public nature" in s 10 in combination with constitutional limitations on the ability for states to regulate the essential capacities of the executive government of the Commonwealth forecloses any reasonable argument that the Qld Act can regulate the conduct of federal government actors in carrying out functions in respect of exports.

[37] *Human Rights Act 2004* (ACT), s 32(2); *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 36(2); *Human Rights Act 2019* (Qld), s 53.

[38] *Human Rights Act 2004* (ACT), s 32(3), *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 36(5); *Human Rights Act 2019* (Qld), s 54.

[39] *Human Rights Act 2004* (ACT), ss 40B, 40C; *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 38-39; *Human Rights Act 2019* (Qld), s 58-59.

[40] *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 39(1); cf *Human Rights Act 2004* (ACT), s 40C.

27. Further, the states and territories of Australia do not have the capacity or the authority to regulate Australia's export conduct beyond providing financial assistance to the production and export of goods within the narrow scope of the exception recognised in s 91 of the Australian Constitution.[41]

D-3 *Common Law*

28. As the law currently stands, Australian courts have found that no duty of care is owed by the Australian Government to its citizens in respect of failing to regulate environmental harm, nor, more specifically, in respect of failing to prevent greenhouse gas emissions, or failing to set an emissions reduction target consistent with the best available science.

29. In *Graham Barclay Oysters*, the High Court of Australia considered whether a duty of care was owed to regulate harm from environmental pollution and thus prevent harm to the plaintiffs. The High Court held that "[w]hen courts are invited to pass judgment on the reasonableness of governmental action or inaction, they may be confronted by issues that are inappropriate for judicial resolution."[42] The same concern has been raised in recent climate change cases, namely *Sharma* and *Pabai (No 2)*.

30. *Sharma* concerned a ministerial decision to approve a coal mine extension under the *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**), and an alleged duty of care to avoid causing climate change induced harm to Australian children within that statutory context. At first instance, Bromberg J found that such a duty was owed to the plaintiffs, but that finding was overturned on appeal by the Full Federal Court. The Full Federal Court found that the posited duty of care would raise for consideration "core policy questions unsuitable in their nature and character for judicial determination",[43] involving political considerations and value judgments whose resolution was "uniquely suited to elected representatives and executive government responsible for law-making and policy-making" and "inappropriate for judicial resolution."[44]

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[41] See *Seamen's Union of Australia v Utah Development Co* (1978) 144 CLR 120.

[42] *Graham Barclay Oysters* at [6] (Gleeson CJ).

[43] *Sharma* at [7], see also [15], [227]-[228], [246]-[248] (Allsop CJ).

[44] *Sharma* at [868] (Wheelahan J).

31. In *Pabai (No 2)*, the Federal Court (Wigney J) held that the Australian government did not owe a duty of care to Torres Strait Islander complainants to set emissions reduction targets having regard to the best available science, nor to set targets which prevent or minimise impacts of climate change in the region.[45] Wigney J accepted the merit in many of the factual claims, acknowledged the severe impacts of climate change on the applicants, and noted that the Australian government had not to date paid sufficient regard to the best available science.[46] Nonetheless, his Honour found that the claim faced "effectively insurmountable legal hurdles"[47] and that "the law in Australia as it currently stands provides no real or effective avenue through which the applicants were able to pursue their claims"[48] — a position that will persist absent legislative change or incremental development of the common law.[49] An appeal is currently before the Full Federal Court.

32. The reasoning in both *Pabai (No 2)* and *Sharma* was that the posited duty of care would require courts to resolve questions of core government policy — including how to balance Australia's international obligations against budgetary, economic, social, and political considerations — that are inherently unsuitable for judicial resolution.[50] Those same considerations would arise for the complainants here.

33. The courts in *Pabai (No 2)* and *Sharma* cited and relied upon *Graham Barclay Oysters* in reaching their conclusions. *Pabai (No 2)* and *Sharma* confirm, consistently with the Committee's approach in *Billy*, that *Graham Barclay Oysters* forecloses any duty of care in respect of the conduct in question — and with it, any effective domestic remedy.[51]

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45 *Pabai (No 2)* at [820], [852] (Wigney J). Referred to as the "targets duty".

46 *Pabai (No 2)* at [11] (Wigney J).

47 *Pabai (No 2)* at [12], see [13] (Wigney J).

48 *Pabai (No 2)* at [1275] (Wigney J).

49 *Pabai (No 2)* at [98], [950], [1275] (Wigney J), see also [854]-[855], [861].

50 See *Sharma* at [868] (Wheelahan J); *Pabai (No 2)* at [862] (Wigney J).

51 The courts in *Pabai (No 2)* and *Sharma* extensively cited *Graham Barclay Oysters*: see *Pabai (No 2)* at [102]-[103], [108]-[109], [119]-[120], [123], [133]-[134], [848], [928], [930], [1161], [1164], [1208], [1241] (Wigney J); *Sharma* at [4], [16], [206], [236], [240], [249], [252], [264], [294], [336] (Allsop CJ); [348]-[351], [414], [564], [611]-[612], [623], [632], [663], [672]-[673], [684]-[689] (Beach J); [778], [783]-[785], [837]-[838], [842], [851]-[852], [858], [864]-[866], [868] (Wheelahan J).

D-4 *Climate and Environmental Law*

34. We are not aware of any provision in the Australian statutory frameworks governing greenhouse gas emissions, fossil fuel exports, or environmental approvals that would enable the complainants to obtain the remedy they seek.[52]

35. The *Climate Change Act 2022* (Cth) (**Climate Change Act**) requires Australia to set national targets to reduce its greenhouse gas emissions. To date, the Australian Government has set three national targets: (1) reduce emissions by 43% below 2005 levels by 2030;[53] (2) reduce emissions by 62-70% below 2005 levels by 2035;[54] and (3) reduce emissions to net-zero by 2050.[55] The Climate Change Act does not define greenhouse gas emissions, and nothing in the Act expressly limits that term to territorial emissions within Australia's borders. That said, the Act provides no effective remedy for the complainants: it affords no avenue for judicial review capable of yielding a mandatory order, does not enact in law the 1.5°C target of the Paris Agreement,[56] does not expressly contemplate human rights grounds, does not expressly regulate Scope 3 emissions, and contains no mechanism by which fossil fuel projects inconsistent with the 1.5°C target could be challenged or refused.

36. The EPBC Act is Australia's national-level environmental impact assessment statute. It requires Australia's federal environment minister to consider the impacts of "actions"[57] prior to their approval, if those impacts are likely to be significant, and to impact upon one or more certain prescribed "matters of national environmental significance."[58] Most of these matters of national environmental significance relate to Australia's international treaty obligations. The EPBC Act has recently been amended,[59] however, the amended legislation does not add any further matters of national environmental significance relevant to climate change. It remains the case that the EPBC Act does not explicitly require decision-makers to consider either climate

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52 There may be avenues for litigation in reliance on these Acts as a general proposition, but none can produce an order compelling the Australian Government to regulate fossil fuel exports consistently with 1.5°C pathways.

53 Section 10(1).

54 Australia has not legislated its 2035 national target, but has communicated its 2035 NDC to the UNFCCC: *Australia's Second NDC*, available via <https://unfccc.int/NDCREG>.

55 Section 10(1)(b).

56 See International Court of Justice, *Obligations of States in respect of Climate Change* (Advisory Opinion) (General List No 187, 23 July 2025) at [224].

57 Action is defined in s 523; impact in s 527E.

58 EPBC Act Pt 3.

59 See the *Environment Protection Reform Act 2025*.

change or human rights impacts when approving new fossil fuel projects or project expansions, nor to have regard to Australia's greenhouse gas emissions reduction targets. The Full Federal Court has hence noted the "ill-suitedness" of the EPBC Act to assessing climate change and its impacts on matters of national environmental significance in Australia.[60] That observation remains accurate even in light of the amendments, although we note the undoubted relevance of climate change to protected matters.

37. Importantly, in any event, any successful challenge to an approval or other decision made under the EPBC Act would result in declaratory relief, a quashing of the validity of the challenged decision, orders for the decision-maker to remake the decision according to law, or some combination. Such remedies would be incremental in terms of climate change mitigation rather than comprehensive. As stated above, no remedy in mandamus would be available to compel Australia's environment minister (or any other decision-maker) to exercise any power, function or duty in a particular manner to achieve an alignment of Australia's export policy with 1.5°C temperature goal. We do not consider that the EPBC Act offers an effective remedy.

38. The *National Greenhouse and Energy Reporting Act 2007* (Cth) (together with associated regulations) sets out the legal framework for company-level reporting on greenhouse gas emissions. It addresses only Scope 1 and Scope 2 emissions and is purely a reporting framework. There is no remedy available of the kind that would meet the needs of the complainants. The Safeguard Mechanism, under section 13,[61] applies declining emissions baselines to covered facilities (known as "designated large facilities") and expressly covers only Scope 1 (direct) emissions at facilities emitting more than 100,000 tonnes of CO2-equivalent per year. It does not regulate Scope 3 emissions from the downstream use of exported coal, oil or gas, nor does it limit export volumes. While compliance is supervised by the Clean Energy Regulator, there is no further mechanism of review or challenge nor any associated remedy that would meet the needs of the complainants.

39. State and territory environmental and planning laws govern approval processes for plans, licences, permits, authorities and other authorisations required for fossil fuel

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60 *Environment Council of Central Queensland Inc v Minister for the Environment and Water* [2024] FCAFC 56; 304 FCR 91 at [140], [143] (Mortimer CJ and Colvin J), see also [141]-[142], referring to *Verein KlimaSeniorinnen Schweiz v Switzerland* (European Court of Human Rights, Grand Chamber, App No 53600/20, 9 April 2024) at [415]-[417], [422].

61 See *National Greenhouse and Energy Reporting (Safeguard Mechanism) Rule 2015* (Cth).

projects (including projects that would lead to fossil fuel exports).[62] There has been success in challenging applications for mining leases and environmental authorities for fossil fuel projects on climate change grounds, including in respect of Scope 3 emissions and human rights impacts.[63] However, such avenues do not offer any prospect of enabling the complainants to achieve an effective remedy. That is because any case brought under such legislation would be dealt with at the project-level alone; the remedies available are confined to judicial and administrative review – or, where the relevant body exercises only a recommendatory function, to non-binding recommendations, as exemplified by the decision of the Land Court of Queensland in *Waratah Coal*[64] — and would likely invite statutory and constitutional difficulties if utilised to interfere with Commonwealth export policy. In any event, no such proceeding could produce an order capable of compelling the federal government to align fossil fuel exports with 1.5°C pathways.

D-5 *Export Controls*

40. We have not been briefed with particulars as to Australia's fossil fuel exports. Having reviewed legislation governing export financing and fossil fuel subsidies,[65] we make three observations.

41. *First*, there are provisions in the *Customs Act 1901* (Cth) and the *Export Control Act 2020* (Cth) that confer discretionary powers on Australia's Commonwealth government to make rules or regulations prohibiting (or otherwise regulating) prescribed goods for export.[66] Such powers are available regulatory tools by which the Australian government could align fossil fuel exports with 1.5°C pathways in a manner that would protect the complainants' rights.[67] However, these powers do not offer an

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[62] See e.g., *Environmental Planning and Assessment Act 1979* (NSW), *Environmental Protection Act 1994* (Qld); *Mineral Resources Act 1989* (Qld).

[63] *Gloucester Resources Ltd v Minister for Planning* [2019] NSWLEC 7; 234 LGERA 257 at [699]-[700] (Preston CJ), see [486]-[528] on scope 3 emissions; *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6)* [2022] QLC 21 at [1805]-[1809], [1935]-[1941] (Kingham P), see [571]-[1029] (on climate change ground); [24]-[26], [66], [663]-[718] (exported coal and scope 3 emissions specifically) and [1288]-[1658] (human rights considerations).

[64] *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6)* [2022] QLC 21 at [55] (Kingham P).

[65] Namely the *Fuel Tax Act 2006* (Cth), the *Petroleum Resource Rent Tax Assessment Act 1987* (Cth), the *Export Finance and Insurance Corporation Act 1991* (Cth), the *Customs Act 1901* (Cth), the *Export Control Act 2020* (Cth), and the *Future Made in Australia Act 2024* (Cth).

[66] See *Customs Act 1901* (Cth), s 112; *Export Control Act 2020* (Cth), ss 24, 28-29.

[67] Of particular significance is s 28 of the *Export Control Act 2020* (Cth), by which the departmental secretary may decide to prescribe goods for the purpose of prohibiting or otherwise regulating it under the Act and, in so deciding, can relevantly have regard to Australia's rights and obligations relating to those goods under international agreements, international standards and other matters they consider

effective remedy for the complainants. That is because the relevant legislation does not create an administrative process for the complainants to seek an exercise of those powers in a way that would be protective of their rights, and there is no legal pathway by which the complainants could bring proceedings against the Australian government for failure to exercise discretionary powers in such a way, since mandamus does not lie to compel the exercise of discretion in a particular manner.

42. *Second*, we have identified two provisions concerned with the financing of fossil fuel production specifically, but neither supply an effective remedy.

    i. Section 23C of the *Export Finance and Insurance Corporation Act 1991* (Cth) prohibits Export Finance Australia from directly financing fossil fuel extraction, infrastructure or investments unless it refers the application to the Minister under s 25. Where referred, the Minister must determine the application, but cannot be compelled to refuse it; nor can the Minister be compelled to exercise the s 26 direction power in any particular way. Accordingly, s 23C does not supply an effective remedy.

    ii. Section 10A of the *Future Made in Australia Act 2024* (Cth) operates to prohibit financial support under the Act (called "FMIA supports") for: "(a) the extraction of coal, crude oil or natural gas; (b) the construction of infrastructure for the primary purpose of extracting coal, crude oil or natural gas; (c) directly financing investments for the sole purpose of the use of coal, crude oil or natural gas". Any relief that would arise would be discrete and confined to the validity of a particular instance of funding support, not comprehensive.

43. *Third*, to the extent that the statutory framework governing Australia's exports could be relevant to a common law claim against the Australian government regarding its conduct in respect of fossil fuel exports, any such claim would face the same core policy considerations that have precluded a duty of care in other cases (see Section C), and any relief obtained could not compel the Australian Government to align its fossil fuel export policy with 1.5°C pathways (see Section D-3).

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relevant. In considering how to regulate fossil fuel exports by s 28, the secretary could take into account relevant international law and standards, including the obligations of States in connection with "production activities" and that failure to take appropriate action to protect the climate system from GHG emissions "including through fossil fuel production, fossil fuel consumption, the granting of fossil fuel exploration licences or the provision of fossil fuel subsidies" may constitute an "internationally wrongful act", as clarified by the International Court of Justice in its *Advisory Opinion on the Obligations of States in respect of Climate Change*: at [427], see [94].

44. That does not mean no relief could be obtained by relying on Australia's legislation concerning exports as a general proposition. However, there is no effective remedy for the complainants: no provision of these Acts could ground a claim by the complainants, nor could any challenge to a decision made under these Acts produce a reasonable prospect of obtaining an effective remedy.

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