



# **Human Rights and Climate Change Litigation – a local perspective**

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## >> ***Human Rights Act 2019 (Qld)***

- > Acts, decisions and legislation must be compatible with human rights: r 8.
- > Possible human rights raised in climate change litigation:
  - a) right to life: s 16
  - b) right to own property: s 24
  - c) rights of a child: s 26
  - d) cultural rights for ATSI peoples: s 28
- > Human rights are protected; no one can limit or destroy a human right to a greater extent than provided under HRA: s 14.
- > Reasonable and justifiable limits on rights: s 13

# >> Interpretation

Some principles:

- 1) *Rights are to be interpreted purposively, “in the broadest possible way,” and “in a non-technical sense”.*
  - s 3 (object of the HRA is to promote and protect rights) and s 48(1) (interpretation of statutory provisions in a way compatible with rights).
- 2) *Reasonable and demonstrable limitations on the human right under ss 8 and 13 are not taken into account when identifying its scope.*

This reflects *PJB v Melbourne Health* (2011) 39 VR 373 at 384 [36] (Bell J).

# >> Interpretation

Some principles:

- 3) *International decisions may be considered in interpreting rights: s 49(3).*

This “**veritable smorgasbord of jurisprudence and commentary**” ... “**is a good thing**”: *Castles v Secretary of the Department of Justice* (2010) 28 VR 141 at 161 [70] (Emerton J).

These materials should be “**should be consulted with discrimination and care**”. They must have “**logical or analogical relevance**” to the law the Court is interpreting. The international law does not become the local law: *Momcilovic v The Queen* (2011) 245 CLR 1 at [18]-[19] (French CJ), [155]-[161] (Gummow J).

## >> Areas of application

Declaration of incompatibility: ss 48(2), 53-54

> Supreme Court: s 49

> Legislation

- Test: “*a statutory provision can not be interpreted in a way compatible with human rights*”: s 53(2) but compare s 48(1)
  - A high bar

> Limited practical utility:

- No effect on validity of statute: s 54(a)
- Does not create legal rights or give rise to any cause of action: s 54(b)
- Subject to Parliamentary overrides: ss 53(3), 43-47

# >> Areas of application

## 58 Conduct of public entities

- (1) It is unlawful for a public entity—
  - (a) to act or make a decision in a way that is not compatible with human rights; or
  - (b) in making a decision, to fail to give proper consideration to a human right relevant to the decision.

### > Two limbs:

- (1) ‘proper’ consideration (s 58(5)); and
- (2) substance of act/decision (ss 8, 13).

For a decision to be lawful, both limbs must be satisfied.

### > ‘Piggyback’ claims only and no damages: s 59.

## >> Proper consideration limb

“...proper consideration of human rights should not be a sophisticated legal exercise. Proper consideration need not involve formally identifying the ‘correct’ rights or explaining their content by reference to legal principles or jurisprudence. Rather, proper consideration will involve understanding in general terms which of the rights of the person affected by the decision may be relevant and whether, and if so how, those rights will be interfered with by the decision that is made. As part of the exercise of justification, proper consideration will involve balancing competing private and public interests. There is no formula for such an exercise, and it should not be scrutinised over-zealously by the courts.

...the requirement ... to give proper consideration to a relevant human right requires a decision-maker to do more than merely invoke the Charter like a mantra, it will be sufficient in most circumstances that there is some evidence that shows the decision-maker seriously turned his or her mind to the possible impact of the decision on a person’s human rights and the implications thereof for the affected person, and that the countervailing interests or obligations were identified.”

*Castles v Secretary of the Department of Justice* (2010) 28 VR 141 at 184 [185]-[186] (Emerton J).

## >> Substance limb: what needs to be shown?

1. The Queensland government has approved an emissions-intensive project;
2. That project will result in increased greenhouse gas emissions;
3. These greenhouse gas emissions will contribute to climate change;
4. Climate change will have impacts on human life in Queensland; and
5. These impacts are not compatible with the human right to life.

Justine Bell-James & Brianna Collins, *Queensland Human Rights Act: New Frontier for Australian Climate Change Litigation?* (2020) 43(1) UNSW Law Journal 1, 34-35.

## >> Challenges

- > Future generations (do they have rights?)
- > Identifying individual victims
- > Imminence of threat
- > Causation – is the right limited by the specific act or decision?
  - Market Substitution Defence
  - Carbon Budget
- > Judicial willingness to engage with climate change arguments

# >> Limitations

## 13 Human rights may be limited

- (1) A human right may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.
- (2) In deciding whether a limit on a human right is reasonable and justifiable as mentioned in subsection (1), the following factors may be relevant—
  - (a) the nature of the human right;
  - (b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom;
  - (c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose;
  - (d) whether there are any less restrictive and reasonably available ways to achieve the purpose;
  - (e) the importance of the purpose of the limitation;
  - (f) the importance of preserving the human right, taking into account the nature and extent of the limitation on the human right;
  - (g) the balance between the matters mentioned in paragraphs (e) and (f).

## > Examples of limitations?

- Economic development
- Energy security
- Other social benefits

# >> Proportionality

## Onus and proof

“When the court so applies [s 13(2)], the onus of establishing that the limitation is demonstrably justified lies on the party seeking to uphold the justification. The standard of justification is stringent. Where matters of fact are involved, cogent evidence may be necessary. While the civil standard of proof applies, a high degree of probability is required, because limiting human rights is involved. The function of the court is to make an independent and objective judgment for itself about whether the limitation is justified under [s 13(2)] and therefore whether the act or decision is unlawful as incompatible with human rights or compatible and therefore lawful.”

*PJB v Melbourne Health* (2011) 39 VR 373 at 441 [310] (Bell J).

## >> Proportionality

> This is not merits review but is a more intensive standard than judicial review on *Wednesbury* unreasonableness grounds.

*PJB v Melbourne Health* (2011) 39 VR 373 at 443-444 [314]-[317] (Bell J).

> Two differences:

“First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision-maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relevant weight accorded to interests and considerations.”

*R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 at 547 [27]  
(Lord Steyn)

## >> Proportionality

Deference?

“...[s 58(1)] requires the court to approach [s 13(2)] with a limited degree of deference to the decision-maker, either in terms of fact-finding, discretionary considerations or the exercise of the balancing judgments. To do otherwise would constrain the court’s analysis of the lawfulness of the act or decision and constitute a failure to properly exercise the review jurisdiction. Proportionality, however, must be judged objectively, by the court. No greater degree of ‘weight and latitude’ can be given to a public authority’s acts and decisions for to do so would be for the court to defer in its review to the balance struck by the public authority.”

*Certain Children v Minister for Families and Children (No 2)*  
(2017) 52 VR 441 at 508 [218] (Dixon J).

## >> Key takeaway

While there are challenges, there is a real possibility that an Australian court may find that the right to life is engaged by inaction on climate change.

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