pandora's box

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Unsustainable Practices: Law and the Environment

Cover Image: Joseph Colbrook

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Unsustainable Practices: Law and the Environment

Editors

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FOREWORD: SHIFTING FROM UNSUSTAINABILITY TO SUSTAINABILITY

The Honourable Justice Brian Preston

The theme for this year's edition of *Pandora's Box* is "Unsustainable Practices: Law and the Environment". The articles and interviews explore different respects in which the law frames and facilitates unsustainability. Unsustainability in our use and exploitation of the land, air and water, and their biota, upon which both human and non-human life depend. Unsustainability in caring for Country, culture and community. Unsustainability in participatory democracy, in governance as if people mattered.

At the core of unsustainability lies a failure to listen and learn from the lands and the waters, from the roots of life. Laws are drafted and governance organised with a top-down, rather than a bottom-up approach. A top-down approach focuses on the users and exploiters of the environment and meeting their needs and desires to use and exploit the environment. It asks, "what can the environment do for us?" A bottom-up approach focuses on the environment that is sought to be used or exploited and meeting its capacities and needs to function and flourish even when its natural resources are used or exploited. It asks, "what can we do for the environment?"

In this foreword, I will sketch this problem of our laws and governance pursuing a top-down, rather than a bottom-up approach in regulating the use and exploitation of the environment.

The top-down approach can be seen in the way that laws primarily promote the use and exploitation of the planet's natural resources, whilst incidentally regulating the externalities of such use and exploitation. As to the primary goal of the laws, the environment is seen not as an integrated whole, but as a collection of disaggregated parts, which we term natural resources. The concept of "resources" is of a stock or supply of materials and assets that can be drawn upon by humans in order to function as needed or desired. Laws regulate the distribution of natural resources amongst people who wish to use or exploit them. Issues

of distributive justice are involved, but only for the persons who are to be or are not to be the beneficiaries of the distribution of the natural resources. No issue of distributive justice arises for the environment, including whether its natural resources should be distributed at all or in any particular manner.

As to the incidental goal of the laws, the concept of externalities is an economic one. It refers to situations where the production or consumption of goods or services imposes costs or benefits on others, which are not reflected in the prices charged for the goods and services being provided. In an environmental context, it refers to situations where the use of natural resources by one person causes adverse environmental impacts that impose costs on other persons or on the environment, which are not internalised by the user in the costs of production or reflected in the prices charged for the goods or services provided by the user of the natural resources.[1]

Laws regulate externalities by limiting the extent or degree of adverse environmental impacts caused by the use or exploitation of natural resources. Laws might limit the area of native vegetation or habitat of an endangered species or ecological community that is authorised to be cleared. Laws might limit the type, amount or volume of polluting substances that is authorised to be discharged into the environment. Laws might limit the volume of natural resources, such as surface and groundwater, that is authorised to be extracted. The purpose of imposing such limits on the use or exploitation of natural resources is to reduce the costs imposed on others, mainly humans. The environment might also be considered insofar as the adverse impacts on the environment indirectly impact on people's use of the environment. An example is the pollution of a river leading to fish kills, which reduces people's use of the river for agriculture, aquaculture or recreation. The purpose of imposing limits is rarely to prevent externalities occurring in the first place.

This top-down approach to law and governance of the environment is doomed to failure. Distributive decision-making focuses on the needs and desires of the persons to whom

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[1] Brian J Preston, 'Economic valuation of the environment' (2015) 32 *Environmental and Planning Law Journal* 301.

natural resources are to be distributed, not on the capacities and needs of the natural resources that are to be distributed. This almost inevitably leads to overuse and over-exploitation of the natural resources. People are rarely prepared to accept a distribution of less natural resources than they say they need or desire. Garrett Hardin warned of the tragedy of the commons. The commons is any ecosystem, river or lake, ocean or atmosphere. Hardin argued that a commons subject to communal and unregulated use is at risk of tragic ecological collapse because of self-interested human behaviour.[2]

Witness the escalating decline in all natural resources, from the plants and animals, ecological communities and ecosystems, collectively making up the biological diversity of life on Earth, to the terrestrial waters and their aquatic ecology, to the oceans and their fish and other marine resources, to an atmosphere unpolluted by greenhouse gases. On all these indices of environmental quality, we are going backwards. Our use of the environment is unsustainable. The Global Footprint Network calculates that currently, in 2021, humanity uses the equivalent of 1.7 Earths to provide the resources we use and absorb our waste. This means it now takes the Earth one year and eight months to regenerate what we use in a year.[3]

We can only break this ecologically destructive cycle by changing our thinking. Adapting what John F Kennedy said at his inauguration address, we need to ask not what the environment can do for us, but what can we do for the environment. This involves changing the way we view our relationship with the environment. Thomas Berry suggested that we need to develop a "mutually enhancing human-Earth relationship",[4] in which we realise that the Earth is "a communion of subjects, not a collection of objects".[5] This involves not merely consideration of, but considerateness towards, the environment.

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[2] Garrett Hardin, 'Tragedy of the Commons' (1968) 162 *Science* 1243.

[3] *Global Footprint Network* (Web Page) <https://www.footprintnetwork.org/>.

[4] Thomas Berry, *The Great Work: Our way into the Future* (Bell Tower, 1999) 61.

[5] Thomas Berry, *Evening Thoughts: Reflecting on Earth as Sacred Community* (Sierra Club Books and University of California Press, 2006) 17.

In the pithy phrase of Klaus Bosselmann, we need "Earth governance", to think about our governance of the Earth system from the perspective of the Earth. In doing so, "we see the whole first, not its parts. The needs of earth and all her inhabitants stand right before us. They define the ends of action for which we must find the means".[6]

Similarly, Cormac Cullinan argues that:

> Within the Earth system the wellbeing of the planet as a whole is paramount. None of the components of the Earth's biosphere can survive except within the Earth ecosystem. This means that the wellbeing of each member of the Earth Community is derived from, and cannot take precedence over, the wellbeing of Earth as a whole. Accordingly the first principle of Earth jurisprudence must be to give precedence to the survival, health and prospering of the whole Community over the interests of any individual or human society. Giving effect to this principle is actually also the best way of securing the long-term interests of humans. It is only our failure to appreciate that we are part of the Earth Community that has led us to believe and act as if the reverse were true.[7]

This is a bottom-up approach, in which the Earth's biosphere and biota, and their capacities and needs, inform and frame our laws and governance, and the governed speak to the governing.

Aldo Leopold was wise to this problem. He advocated adoption of a land ethic. He recognised that the case for a land ethic might appear hopeless while so ever we remain fixated on the economic exploitation of the environment. He said we must "quit thinking about decent land-use as solely an economic problem." Instead, we need to "examine each question in terms of what is ethically and aesthetically right, as well as what is economically expedient". Leopold proposed a simple heuristic for Earth governance: "A thing is right

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[6] Klaus Bosselmann, *Earth Governance* (Edward Elgar, 2015) 2.

[7] Cormac Cullinan, *Wild Law* (Siber Ink, 2011) 97. See also Corman Cullinan, 'Earth Jurisprudence' in Lavanya Rajamani and Jacqueline Peel (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2nd ed, 2021) 233-248.

when it tends to preserve the integrity, stability, and beauty of the biotic community. It is wrong when it tends otherwise".[8]

Edward Schumacher observed that in the simple question of how we treat the land is involved our entire way of life. Schumacher was an economist. His classic book, *Small is Beautiful*, was subtitled, "A study of economics as if people mattered".[9] Schumacher saw economics as a way of sustaining, restoring and maintaining the immense diversity and complexity of the biosphere in addition to nourishing, nurturing and fulfilling appropriate human needs. In short, economics is to serve both people and planet. For Schumacher, care for the land and the soil was fundamental to caring for the whole natural world, as well as a way of creating a just and equitable society.

Leopold's land ethic and Schumacher's integration principle encapsulate the concept of ecologically sustainable development (**ESD**). The World Commission on Environment and Development describes sustainable development in its report, *Our Common Future*, as development that meets the needs of the present without compromising the ability of future generations to meet their own needs.[10] The needs of present and future generations are not only economic and social, but also environmental. Economic and social needs cannot be met continuously in a deteriorating environment. Any further degradation of the Earth's natural capital must be prevented for the sake of future generations. Thus, at the core of ESD is ecological sustainability. This is the outcome that ESD demands. It requires living within the planet's ecological limits. It involves development that improves the total quality of life both now and in the future in a way that maintains the ecological process upon which life depends.[11]

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[8] Aldo Leopold, *A Sand County Almanac* (Ballentine Books, 1970) 262.

[9] E F Schumacher, *Small is Beautiful* (Blond & Briggs, 1973).

[10] World Commission on Environment and Development, *Our Common Future* (Oxford University Press, 1987).

[11] *Environmental Protection Act 1994* (Qld) s 3. See also Brian J Preston, 'The Judicial Development of Ecologically Sustainable Development' in Douglas Fisher (ed) *Research Handbook on Fundamental Concepts of Environmental Law* (Edward Elgar, 2016) 475, 480.

These ideas chart a course from the shoals of unsustainability to the sounds of sustainability. We need to reform our laws, legal institutions and governance systems to see the whole of the environment, not its parts; to consider and be considerate of the capacities and needs of the biosphere and its biota, and to live within the ecological limits of the Earth system.

A NOTE FROM THE EDITORS

This edition of *Pandora's Box* is named 'Unsustainable Practices: Law and the Environment'. This title was chosen to acknowledge the role that the law has in furthering and justifying environmentally harmful actions by governments and private entities. The law regulates the environment in numerous ways, not just through environmental legislation, but also cultural heritage law, native title law, human rights law, law of politics, corporations law, and more. The breadth of this title reflects the myriad ways that our legal system intersects with the environment, and accordingly this edition seeks to place the impact on the environment at the centre of our examination of the law.

We are grateful to receive such wonderful contributions for our edition this year, which we hope sheds some light on the ways that environmental issues intersect with the legal system. Climate change and its consequences are real, current, and above all, urgent. Collective action is essential not only in the political and corporate spheres, but also in the legal sphere. The contributions in this journal reveal some of the flashpoints in this space and concerns that must be addressed to ensure that the legal industry does its part in protecting and healing our planet and our people.

We express thanks to Joseph Colbrook for his photography, used for the cover of this edition. We are also thankful for the support of our team in the Justice and the Law Society, specifically Sian Hur, Melanie Karibasic, Betty Kim, Rachel Moss, Tooru Nishido, Rebecca Ren, and Mitree Vongphakdi. Their dedication to the publication and launch of *Pandora's Box* is greatly appreciated.

The Justice & The Law Society acknowledges that this journal was published on Turrbal and Jagera land and pays respects to their elders, past, present, and emerging. We acknowledge that Indigenous sovereignty has never been ceded or extinguished and pay tribute to its laws which sustain and survive.

Rachna Nagesh and Thomas Moore

2021 Editors, Pandora's Box

ABOUT PANDORA'S BOX

Pandora's Box is the annual academic journal published by the Justice and the Law Society of the University of Queensland. It has been published since 1994 and aims to bring academic discussion of legal, social justice and political issues to a wider audience.

The journal is not so named because of the classical interpretation of the story: of a woman's weakness and disobedience unleashing evils on the world. Rather, we regard Pandora as the heroine of the story – the inquiring mind – as that is what the legal mind should be.

Pandora's Box was previously launched each year at the Justice and the Law Society's Annual Professional Breakfast. This year, it was launched at a separate launch event including a panel discussion with some of the contributors to this edition of the journal.

Pandora's Box is registered with Ulrich's International Periodical Directory and can be accessed online through *Informit* and EBSCO.

Additional copies of the journal, including previous editions, are available. Please contact secretary@jatl.org for more information or go online at http://www.jatl.org/ to find the digitised versions.

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Associate Professor Justine Bell-James is an Associate Professor at the TC Beirne School of Law, teaching undergraduate and postgraduate courses in the areas of environmental law and property law. Associate Professor Bell-James completed a PhD at the Queensland University of Technology in 2010 and was a postdoctoral fellow at the Global Change Institute at the University of Queensland from 2011-2013. Her interdisciplinary postdoctoral research considered legal, policy and insurance responses to coastal hazards and sea-level rise. Associate Professor Bell-James' current research focuses on legal mechanisms for protection of the coast under climate change, incorporating both human settlements and coastal ecosystems. She currently leads an ARC Discovery Project (2019-2021) considering how wetland ecosystem services can be integrated into legal frameworks.

Dr Emma Carmody is an international environmental lawyer with particular expertise in water law and policy. She has extensive experience advising nation states, government ministries, First Nations peoples, farmers and peak conservation organisations in Australia and abroad. Dr Carmody is the Managing Lawyer of the Freshwater Program at the Environmental Defenders Office and sole Legal Advisor to the Secretariat of, and 171 Contracting Parties to, the Ramsar Convention on Wetlands. She also serves on the Strategic Advisory Council of the Alliance for Global Water Adaptation and is a former Trustee of the Alliance for Water Stewardship International. She is listed in Best Lawyers in Australia in two categories (Water Law and Environment and Planning Law) and was the 2018 recipient of the Dunphy Award for Most Outstanding Effort by an Individual at the NSW Environment Awards.

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Disaster Management in Australia: The 'Bushfire Summer' and critical energy networks', (2022, OUP)). With colleagues, she is revisioning property law to respond to biodiversity loss (M Davies, L Godden, N Graham, 'Situating Property within Habitat: Reintegrating Place, People, and Law' (2021) *JL Prop. & Soc'y*, 1).

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Harry Jonas is an international lawyer working on environmental and human rights issues. He co-founded Natural Justice, an organisation providing legal support to Indigenous Peoples and local communities across the African continent at the nexus of human rights and environmental issues. Mr Jonas was instrumental in catalysing work on nature stewardship beyond protected areas through the development of law and policy on 'other effective area-based conservation measures' (**OECMs**) and co-chairs the IUCN World Commission on Protected Areas Specialist Group on OECMs. He applies a 'legal and political ecology' frame to understand power, agency and change in social and environmental systems. His publications include The Right to Responsibility, The Living Convention and The Conservation Standards, as well as peer-reviewed papers on protected and conserved areas. He is an Ashoka 'changemaker' fellow and is affiliated with the Centre for International Sustainable Development Law and the UNEP World Conservation Monitoring Centre.

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Honour also served as a lecturer at the University of Queensland (1991-2000) and Director of the Master of Environmental Management Program (1992-1995). President Kingham was awarded the Queensland Law Society's Agnes McWhinney Award in 2010 for outstanding professional contribution by a female lawyer. Her Honour is a continuing member of the Griffith Law School Visiting Committee and was appointed as an Honorary Doctor of Griffith University in 2016.

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Dr Chris McGrath is a Brisbane-based barrister practising primarily in climate litigation. He holds bachelor degrees in Law and Science, a Master of Laws and a PhD. Dr McGrath is also an Adjunct Associate Professor at the School of Earth and Environmental Sciences, UQ. His website, Environmental Law Australia, www.envlaw.com.au, provides case studies of litigation in which he has acted and lectures on a range of environmental law topics.

Thomas Moore is a final year student studying a Bachelor of Laws (Honours) and Bachelor of Arts (majoring in Political Science and International Relations). He is currently an intern at Queensland South Native Title Services and will be an Associate to a Member of the Land Court of Queensland in 2022. Mr Moore was the co-editor of *Pandora's Box* for 2021.

Rachna Nagesh graduated from the University of Queensland in 2021 with a Bachelor of Laws (Honours) and a Bachelor of Arts (majoring in Political Science). She currently works

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The Honourable Justice Brian Preston is the Chief Judge of the Land and Environment Court of New South Wales and an additional Judge of the NSW Court of Appeal and NSW Court of Criminal Appeal. He has served as an Acting Judge of the District Court of Queensland and the Planning and Environment Court (2014) and has been appointed an Acting Member of the Land Court of Queensland (October 2021 – April 2022). Justice Preston is an Official Member of the Judicial Commission of NSW, Fellow of the Australian Academy of Law, Fellow of the Royal Society of NSW and Honorary Fellow of the Environment Institute of Australia and New Zealand. He was awarded an honorary Doctor of Letters by Macquarie University in 2018. Justice Preston is an Adjunct Professor at the University of Sydney, Western Sydney University and Southern Cross University. He has written Australia's first book on environmental litigation and 139 articles, book chapters and reviews on environmental law, administrative and criminal law.

Councillor Jonathan Sri is the elected representative of Brisbane City Council's Gabba Ward, representing the suburbs of West End, Highgate Hill, Dutton Park, South Brisbane, Kangaroo Point and Woolloongabba. Elected in 2016 and re-elected in 2020, Councillor Sri is the first Greens member in Brisbane, and has sought to redefine the role of city councillor while broadening the parameters of mainstream policy debate. Prior to becoming a councillor, he worked in a wide range of fields, most recently as a youth worker and musician. He holds a Bachelor of Laws (Hons)/Bachelor of Arts (majoring in Journalism and Indigenous Studies) as well as a Graduate Certificate in Writing from the University of Queensland.

MANY INTERESTS, ONE PLACE: THE UNSUSTAINABILITY OF A HIERARCHY OF RIGHTS TO LAND

Kate Galloway* and Melissa Castan+

Real property law enables the grant of multiple rights in the one parcel of land. However, there are other sources of rights in land, and obligations that burden property rights, that might subsist over or in relation to the same physical space. The full complement of rights and obligations over land are therefore in tension with each other. Although these tensions are often not exposed in an urban metropolitan context, they frequently arise beyond Australia's cities. That some rights prevail to the exclusion of others that exist over the same area of land, reveals the legislature's priorities and the privileges it bestows. The ordering of rights over land has implications for the sustainability of sites designated as Indigenous cultural heritage within the Australian legislative framework, and for First Nations' lands more generally. This article assesses the capacity of the existing framework of rights over land to uphold self-determination of First Nations in Australia as a measure of the sustainability of the current hierarchy of those rights.

I INTRODUCTION

In mid-2020, mining company Rio Tinto controversially, but lawfully, destroyed caves in the ancient Juukan Gorge.[1] Since then, the Western Australian government has released a draft of cultural heritage legislation to replace the 1974 Act that permitted the caves' destruction,[2] and the Parliamentary Committee on Northern Australia has inquired into the circumstances of the incident and what is required to protect such heritage in the future.[3] Amidst submissions to the Inquiry was evidence that Rio Tinto had permitted the dumping of hundreds of irreplaceable cultural artefacts it had taken from the Pilbara. The company

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[1] For background, see Joint Standing Committee on Northern Australia, 'Never Again' Interim Report of Inquiry into the Destruction of 46,000 Year Old Caves at the Juukan Gorge in the Pilbara region of Western Australia ('Inquiry'); Kate Galloway, 'A Legal Lacuna: Between Cultural Heritage and Native Title' (2020) 35(4) *Australian Environment Review* 110 ('Legal Lacuna').

[2] Aboriginal Cultural Heritage Bill 2020 (WA).

[3] Inquiry (n 1).

had failed, for decades, to notify the Eastern Guruma Elders of the disposal.[4] Both incidents have attracted considerable public attention in Australia and internationally. The destruction of the Juukan Gorge caves ultimately led to the resignation of Rio Tinto's CEO[5]—signifying the perception of the event as a breach of the company's social licence if not its legal obligations.

These two examples raise questions of principle relevant to the co-existence of different frameworks of rights and obligations affecting land, and the tension between various stakeholders in relation to that land. Of particular interest, is that the public's response indicates surprise at the inability of the Traditional Owners to protect the site, pointing to an assumption amongst the public that First Nations peoples have the right to protect Indigenous cultural heritage.

In response, this article first explains the legal ordering that resulted in the lawful destruction of the Juukan Gorge site, with reference to general principles of property law, native title, and cultural heritage. It then identifies the absence in this existing hierarchy of rights over land, of principles of self-determination—a silencing of the underlying interests of First Nations peoples despite their intrinsic interest in the land including as recognised by law. In doing so, it seeks to articulate the public's dismay about the lawful destruction of Indigenous cultural heritage in terms of the law's failure to uphold principles of self-determination.

Before commencing, we acknowledge our standpoint as white lawyers and academics. We do not speak for, or with the authority of, First Nations peoples in presenting our ideas here. Our aim is to analyse the approach of the settler-colonial legal system to First Nations' claims to land.

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[4] The assertions were made in documents seen by reporters though not appearing amidst the Inquiry submissions. Lorena Allam, 'Rio Tinto Accused of Allowing Irreplaceable Indigenous Artefacts to Be Dumped in Rubbish Tip' *Guardian Australia* (25 June 2021) <https://www.theguardian.com/business/2021/jun/25/rio-tinto-accused-australian-indigenous-artefacts-dumped-rubbish>.

[5] David Chau and Michael Janda, 'Rio Tinto Boss Jean-Sebastien Jacques Quits Over Juukan Gorge Blast' *ABC News* (11 September 2020) <https://www.abc.net.au/news/2020-09-11/rio-tinto-boss-jean-sebastien-jacques-quits-over-juukan-blast/12653950>.

II THE LEGAL ORDERING OF RIGHTS OVER LAND

The Anglo-Australian legal system regulates access to and rights in land via the State. The State's paramount interest is expressed both through real property as well as cultural heritage, albeit in different ways. And while native title law derives its content from 'traditional law and custom',[6] the reality is that this occurs only through the mechanisms of the settler-colonial State.[7]

This part summarises four different species of rights over land: the estate in fee simple, mineral rights, native title, and cultural heritage. In doing so, it explains which rights take precedence, notably where more than one type of right exists over the same land.

A Estates: Freehold and Leasehold

The estate in fee simple is 'the highest and largest estate that a subject is capable of enjoying'.[8] In common parlance, 'ownership' best fits the extensive nature of the fee simple estate. Although there is no precise or definitive description of rights comprised within the estate, either at law,[9] or theoretically,[10] it is accepted that the estate represents 'plenary' rights.

Inherent in the notion of an estate is the concept of seisin—a legal right to possession of the land.[11] Possession implies a right to exclude, subject to the grant of any lesser rights 'carved out' of the larger interest[12]—such as an easement—where a right to grant lesser

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[6] *Western Australia v Ward* (2002) 213 CLR 1, [20].

[7] Following the decision in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 ('Mabo'), and the introduction of the *Native Title Act 1993* (Cth).

[8] Blackstone (1765-1769), Book 2, Chapter 11. See also *Gumana v Northern Territory* (2007) 158 FCR 349, [83]; *Commonwealth v New South Wales* (1923) 33 CLR 1, 42.

[9] See, eg, *Yanner v Eaton* (1999) 201 CLR 351, [109].

[10] See, eg, Kate Galloway, 'One Tale of Property, In My Own Words' (2018) 27(1) *Griffith Law Review* 157; Kevin Gray and Susan Francis Gray, 'The Rhetoric of Realty' in Joshua Getzler (ed), *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (Butterworths, 2003) 204.

[11] Frederic William Maitland, 'The Mystery of Seisin' in *Select Essays in Anglo-American History* (Little Brown and Company, 1909) 591.

[12] Kevin Gray and Susan Francis Gray, 'The Rhetoric of Realty' in Joshua Getzler (ed), *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (Butterworths, 2003) 204, citing *Willies-*

interests, or to alienate in full,[13] are themselves a feature of 'ownership'. Although there is little further guidance on enumerated rights, title holders are generally able to deal with the physical land in ways that can only indicate the existence of rights.[14]

While plenary rights in the estate permit a freehold owner to carve out lesser rights, so too does the State have the power to create estates less than freehold. In Australia, these take a variety of forms including leasehold estates. In the Australian context the leasehold estate is granted pursuant to legislation and as observed in the *Wik case*,[15] these are sui generis interests dependent upon achieving a legislative purpose, rather than reflecting the common law hallmarks of a lease.[16]

As a consequence of the sui generis nature of a State leasehold, the High Court of Australia determined that a leasehold, depending on its particular incidents, might co-exist with native title. In an expression of the State's determination to afford paramountcy to its own interests, the notorious 'Ten-Point Plan' following the *Wik* decision gave primacy to the leasehold estate through amendment to the *Native Title Act 1993* (Cth).[17] The amendments aligned with the widely accepted understanding of leasehold land in jurisdictions such as Queensland, whereby a leasehold estate was considered 'as good as freehold'.[18] The implications of native title following the *Wik* decision—namely that a leasehold may as a

Williams v National Trust (1993) 65 P & CR 359, 361 per Hoffmann LJ and *Ingram v IRC* [2000] 1 AC 293, 303G per Lord Hoffmann, 310C-D per Lord Hutton.

[13] Such a right is 'traceable as far back as the statute *Quia Emptores 1290*': Brendan Edgeworth, *Butt's Land Law* (7th ed, Thomson, 2017) 109.

[14] Enumerated and discussed in: JE Penner 'The "Bundle of Rights" Picture of Property' (1996) 43 *UCLA Law Review* 711. For an application of Penner's theory in the Australian real property context, see Kristy Richardson and Kate Galloway, 'Severing a Joint Tenancy: A Queensland Analysis' (2009) 16 *Australian Property Law Journal* 245.

[15] *Wik Peoples v Queensland* (1996) 187 CLR 1.

[16] Ibid 115–17.

[17] *Native Title Amendment Act 1998* (Cth), sch 1, s 23B.

[18] This arose from past policies on the grant of State leasehold. See, eg, Productivity Commission, *Pastoral Leases and Non-Pastoral Land Use* Commission Research Paper (AusInfo, 2002) 7.

question of law be subject to other interests—therefore came as a shock to Queensland pastoralists.

Despite the extensive connotations of the estate, other sources of law might constrain the rights comprising the estate.[19] Relevantly, the extent to which the estate itself attaches to the physical land is limited by law.

B Minerals

Independent of the rights comprised in the estate is the question of what is physically owned. This is no academic question, as it is the source of other substantive rights over the very same physical space.

The estate is attached to an area geolocated on the earth's surface.[20] The geological features of the land are, however, cleaved from the object of ownership by various means. Water and other resources otherwise inherently connected with land are reserved to the State,[21] as are minerals. Historically, gold and silver were excluded from the fee simple estate in favour of the State.[22] More recently, the State has reserved all minerals from grants of freehold,[23] encroaching further into the plenary nature of the fee simple.

Because all minerals within a state vest in the State, it is not only the fee simple that is subject to mineral rights over the same area. Indeed, the nature of mining means that it is highly unlikely for mining interests to be exercised within metropolitan areas—where most freehold interests in Australia are located. Given this reality, the fee simple estate is effectively prioritised over mining rights.

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[19] See, eg, Brendan Edgeworth, *Butt's Land Law* (7th ed, Thomson, 2017) 108–9.

[20] What comprises 'land' as the object owned are established both by common law and by statute. See, eg, Kate Galloway, 'Landowners' vs Miners' Property Interests: The Unsustainability of Property as Dominion' (2012) 37 (2) *Alternative Law Journal* 77.

[21] *Water Act 2000* (Qld) s 26; *Land Act 1994* (Qld) ch 2 pt 2; *Greenhouse Gas Storage Act 2009* (Qld) s 28; *Geothermal Energy Act 2010* (Qld) s 29.

[22] *Case of Mines* (1567) 75 ER 472.

[23] See, eg, *Mineral Resources Act 1989* (Qld) s 8; *Petroleum Act 1923* (Qld) s 9.

This leaves mining rights to compete with other property rights beyond the metropolitan fringe as when the State grants any interest in land, it reserves mineral rights to the Crown.[24]

As the (self-declared) owner of all minerals, the State grants what might broadly be described as mineral rights[25] regardless of any other interest in that land.[26] Although mineral rights attach only to the minerals, they encompass an implicit right of access and the right, necessarily, to lay waste to the land itself. Destroying the land obviously materially affects the object of the landowner's interest despite the subsistence of ownership rights even in the face of remediation requirements.

In addition, and relevant to this analysis, although mineral rights are far more circumscribed than the broader fee simple estate, or those of most leasehold interests, they are implicitly given priority over the more extensive interests in land, because they operate in spite of landholder's rights. Although there may be compensation provisions for damage to land, money payment does not directly address the incursion into the loss of the land itself, and the rights attendant on ownership. It fails, in short, to engage with the underlying tension between competing property interests.[27]

The less extensive nature of mineral rights is evidenced by the requirement (generally speaking) for holders of mineral rights to notify, or negotiate with, landowners before entering private land.[28] In terms of entering into agreements with landowners, the *Land Access Code 2016* (Qld)[29] illustrates that their purpose is to facilitate mining—that is, a prioritisation of mining over landowners' interests.

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[24] See eg, *Mineral Resources Act 1989* (Qld) s 8; *Land Act 1994* (Qld) s 21.

[25] See, eg, discussion in John Southalan, *Mining Law & Policy: International Perspectives* (Federation Press, 2012) 43.

[26] *Mineral Resources Act 1989* (Qld) ss 9-10.

[27] See discussion in Lael K Weis, 'Resources and the Property Rights Curse' (2015) 28 *Canadian Journal of Law and Jurisprudence* 209, 222.

[28] Different regimes have different types of rights, and different requirements for each type of rights. See, eg, *Mineral Resources Act 1989* (Qld), sch 1.

[29] *Mineral and Energy Resources (Common Provisions) Regulation 2016* (Qld), sch 1.

Although ostensibly working through a process of agreement making, the pre-determined outcome is implementation of the State's reservation of minerals from grants of land.

C Native Title

The two principal forms of the Indigenous estate are statutory Indigenous tenures[30] and native title. Both depend upon the exercise of State authority to come into being. This part focuses on native title, a creation of the common law despite arising from the fact of Aboriginal and Torres Strait Islander peoples' prior possession of their lands[31] and otherwise depending on the relevant claimant group's laws and customs for its content.[32] To be clear: native title is not 'Indigenous law' but instead embodies the principles of property according to the common law.[33]

Unlike the fee simple estate, native title rights are not necessarily plenary[34] – although they may be co-extensive with the rights contemplated by a fee simple estate[35] – and they are certainly not ambiguous. It is a requirement of native title that each component interest be expressly cited,[36] along with proof of its source 'pre-sovereignty' and its ongoing expression even in the face of a concerted colonial dispossession.[37]

The inferiority of native title relative to common law interests is built into its very fabric. In the first place, the nature of native title was called into question, and its classification of as

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[30] In Queensland, for example, see *Aboriginal Land Act 1991* (Qld); *Torres Strait Islander Land Act 1991* (Qld).

[31] See Kent Macneil, *Common Law Aboriginal Title* (Claredon Press, 1989).

[32] *Western Australia v Ward* (2002) 213 CLR 1, [20].

[33] Kent McNeil, 'Aboriginal Title and Aboriginal Rights: What's the Connection?' (1997) *Alberta Law Review* 117, 142. See also, generally, McNeil, *Common Law Aboriginal Title* (n 31).

[34] As discussed in *Wik Peoples v Queensland* (1996) 187 CLR 1.

[35] *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 61.

[36] Sean Brennan, 'Statutory Interpretation and Indigenous Property Rights' (2010) 21 *Public Law Review* 239, 259; Paul Finn, 'Mabo into the Future: Native Title Jurisprudence' (2012) 8 Indigenous Law Bulletin 5.

[37] As illustrated by *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

proprietary was a question for the common law and a matter left open by Brennan J in the lead judgment.[38] Scholarly debate ensued for some years,[39] before native title came to be accepted within the family of 'property' rights.

In the second place, native title is necessarily inferior to the freehold estate by virtue of the High Court's navigation through the doctrines of tenure and estates that comprise the 'skeleton of principle which gives the body of our law its shape and internal consistency.'[40] Thus, native title will be extinguished by the grant of an estate in fee simple: the two cannot co-exist.[41] While it may have originally been possible for native title to exist alongside crown leasehold, that possibility was itself extinguished by amendments to the *Native Title Act*.[42]

The susceptibility of native title to extinguishment either through a loss of the requisite connection by claimants with their law and custom[43] or by way of a 'clear and plain intention' evinced by the State,[44] differentiates native title from property more broadly. By contrast, Blackstone asserted that the only way to dispose of property was by an express disavowal of title.[45]

Given ongoing assertions of sovereignty by First Nations peoples in Australia,[46] that has not occurred. Yet within the hierarchy of interests, the estate prevails.

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[38] *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 70.

[39] See, eg, Lisa Strelein, 'Conceptualising Native Title' (2001) 23(1) *Sydney Law Review* 95; Sean Brennan et al, (eds) *Native title from Mabo to Akiba: A vehicle for change and empowerment?* (Federation Press, 2015).

[40] *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 9.

[41] Ibid 29–30.

[42] *Native Title Act 1993* (Cth) s 23B.

[43] *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

[44] *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 64.

[45] Sir William Blackstone *Commentaries on the Laws of England* (1765-1769) Book 2, ch 1 <http://www.lonang.com/exlibris/blackstone/bla-201.htm>.

[46] See, eg, Larissa Behrendt, *Achieving Social Justice: Indigenous Rights and Australia's Future* (Federation Press, 2003); Dani Larkin and Kate Galloway, 'Uluru Statement from the Heart: Australian Public Law Pluralism' (2018) 30(2) *Bond University Law Review* 335.

An example of the paramountcy of interests other than native title lies in the so-called Future Acts regime of the *Native Title Act*.[47] Where a party intends to undertake activities on land the subject of a native title determination or a claim, they must engage in negotiation with the relevant claimant group to validate such 'future acts'. Claimant groups therefore hold a right to negotiate in respect of such acts. The right is a slim one, affording authority to 'sit at the table' and yet no authority to veto activity. The process can afford claimant groups concessions including payments, employment opportunities, and the chance to engage fruitfully concerning the appropriate use of land. However, the regime cannot be said to comprise substantive rights—property rights—over the land concerned.

Despite the native title process demanding that each component right in a native title claim be particularised, and that at least some of these rights will encompass cultural heritage, cultural heritage does not form part of native title.[48] Instead, cultural heritage comprises rights derived from a different framework again.

D Cultural Heritage

Native title rights – property rights – are derived from the fact of possession of land prior to colonisation, and the laws that supported that possession and gave it form. Cultural heritage, by contrast, is not a property right and is not reflective of First Nations law. It is an administrative right of the State that has been described as a significant national responsibility'[49] yet not one that is designed to benefit Aboriginal and Torres Strait Islander peoples themselves. Thus, the Court found in *Bropho v Western Australia*[50] that the cultural heritage existed 'for the benefit of the community – all Western Australians – with a view to the preservation of objects and places' regarded by that community as 'being of significance in the context of the traditional cultural life' of Indigenous people.

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[47] *Native Title Act 1993* (Cth) pt 2 div 3.

[48] For an overview, see Galloway, 'Legal Lacuna' (n 1).

[49] Elizabeth Evatt, *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (AGPS, 1996) [3.2].

[50] (1990) 171 CLR 1.

In some jurisdictions, cultural heritage is protected through vesting property in the protected object or place. Aboriginal and Torres Strait Islander people might be afforded property in human remains or objects, however where sites comprise property, it vests in the State.[51]

Objects situated on land, and protected sites, might be located upon places that themselves are subject to property rights – an estate or native title – or to mining rights. And all three, cultural heritage, property, and mining rights, might exist in the same space. Thus, in Queensland for example, where the State has property in protected objects, that is separate from the land itself. [52] In these circumstances, the landowner's property rights subsist but they must not be exercised so as to unlawfully damage or destroy the object.[53]

Given that there are provisions that may permit the damage or destruction of such objects,[54] the ordering of rights over cultural heritage works in two ways to prioritise an estate, or a mining interest. First, cultural heritage does not vest any substantive interest in First Nations people who are necessarily connected with the declared object or site. The rights vest in the State to protect the heritage,[55] leaving First Nations without substantive remedies, despite various other procedural rights under the legislation. Secondly, cultural heritage law leaves the State itself as the arbiter of whether to permit destruction or not. Where all of the competing rights necessarily emanate from the State – estates, native title, mining, and cultural heritage – the State is left to juggle those rights according to its own priorities.

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[51] See, eg, *Aboriginal Cultural Heritage Act 2003* (Qld) s 20.

[52] *Aboriginal Cultural Heritage Act 2003* (Qld) s 20(4); *Torres Strait Islander Cultural Heritage Act 2003* (Qld) s 20(4).

[53] *Aboriginal Cultural Heritage Act 2003* (Qld) s 21; *Torres Strait Islander Cultural Heritage Act 2003* (Qld) s 21.

[54] See, eg, *Aboriginal Cultural Heritage Act 2003* (Qld) s 105, that provides that a cultural heritage management plan for a project may provide for 'whether Aboriginal cultural heritage is to be damaged, relocated or taken away, and how this is to be managed'. A project, under Schedule 2, includes 'a development or proposed development; and an action or proposed action; and a use or proposed use of land.' In the case of the Juukan Gorge, the mining company had permission under s 18 of the *Aboriginal Heritage Act 1972* (WA).

[55] See, eg, *Aboriginal Cultural Heritage Act 2003* (Qld) s 20(2).

And these priorities have, to date, omitted consideration of self-determination—a legal concept that might support reorganisation of priorities to provide a more sustainable approach to cultural heritage.

III SELF-DETERMINATION

Before the High Court decision in *Mabo*,[56] First Nations' claims to land were framed as land rights.[57] Understanding such claims as land rights is to encompass a claim broader than property as conceived by the Australian system.[58] Further, and beyond Western framings of law altogether, First Nations' claims to land are grounded in First Nations' laws.[59] However, given the domination of the settler-colonial state these claims necessarily coincide with various common law frameworks. Thus, claims under First Nations' law might equate with property,[60] that is rights of user and exclusive possession, with sovereignty,[61] and with cultural heritage.[62] Common law framing of First Nations' claims thus reorients their nature from an assertion of self-determination to a matter for consideration by the State apparatus according to its own sovereign status.[63]

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[56] (1992) 182 CLR 1.

[57] See, eg, David Mercer, 'Terra Nullius, Aboriginal Sovereignty and Land Rights in Australia: The Debate Continues' (1993 12(4) *Political Geography* 299; Ronald Paul Hill, 'Blackfellas and Whitefellas: Aboriginal Land Rights, the *Mabo* Decision, and the Meaning of Land' (1995) 17 *Human Rights Quarterly* 303.

[58] Gaetano Pentassuglia, 'Towards A Jurisprudential Articulation Of Indigenous Land Rights' (2011) 22(1) *European Journal of International Law* 165; Damien Short, 'The Social Construction of Indigenous Native Title Land Rights in Australia' (2007) 55(6) *Current Sociology* 857; David Mercer, 'Patterns Of Protest: Native Land Rights and Claims in Australia' (1987) 6(2) *Political Geography Quarterly* 171.

[59] See, eg, Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Routledge, 2014).

[60] *Milirrpum v Nabalco* (1971) 17 FLR 141.

[61] *Coe v Commonwealth* (1993) 118 ALR 193.

[62] *Bropho v Western Australia* (1990) 171 CLR 1.

[63] See, eg, Larkin and Galloway (n 46).

Following the *Mabo* decision and in particular the legislative response of the *Native Title Act 1994* (Cth), First Nations' claims to land have been conducted within the realm of native title, rather than the more expansive frame of land rights. Not only does native title dispense with the broader scope of land rights, it does so by compartmentalising claims to land within a property framework and exclusive of other types of claims, such as cultural heritage.[64]

Despite the common law's categorisation of First Nations' rights and interests in land according to different legal constructs, we suggest that there is a common underlying principle from the standpoint of Western law: the principle of self-determination. Thus, what might appear to be a battle over property rights in the form of native title remains at its heart a test of human rights—land rights in its broadest sense.

The source of the right to self-determination lies in Australia's international treaty obligations. Both the *International Covenant on Civil and Political Rights*[65] and the *International Covenant on Economic, Social and Cultural Rights*,[66] provide for self-determination in their first article. The principle was subsequently entrenched within the 2007 United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**), endorsed by Australia in 2009.[67]

The right of self-determination is well known to the law, particularly as it applies to indigenous peoples.[68] Its principal, uncontroversial, import is that people should have

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[64] *Western Australia v Ward* (2002) 213 CLR 1, 209.

[65] Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

[66] Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

[67] Australia announced its support of the UNDRIP on 3 April 2009: see, eg, Jenny Macklin, 'Statement on the United Nations Declaration of Indigenous Peoples' (Media Release, 3 April 2009) <http://www.un.org/esa/socdev/unpfii/documents/Australia_official_statement_endorsement_UNDRIP.pdf> .

[68] See, eg, Benedict Kingsbury, 'Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law' (2001) 34 *New York University Journal of International Law and Politics* 189; Patrick Thornberry, *Indigenous Peoples and Human Rights* (Manchester University Press, 2005); S James Anaya, *International Human Rights and Indigenous Peoples* (Aspen Publishers, 2009); Megan Davis, 'Indigenous Struggles in Standard-setting: the United Nations Declaration on the Rights of Indigenous Peoples' (2008) 9(2) *Melbourne Journal of International Law* 439.

control over, and be empowered to make, decisions over their lives as a collective. In Australia, as elsewhere, self-determination embraces a spectrum of expression from self-government to land rights.

Self-determination for indigenous peoples might manifest in two ways. The first is 'constitutive'.[69] In this iteration, the governing institutional order is to be 'guided by the will of the peoples who are governed.'[70] To represent constitutive self-determination, the political order must reflect 'the collective will of the peoples concerned'. It requires that those governed participate in and consent to the institutions and processes of governance, particularly in times of institutional development and reform.[71]

Although First Nations peoples were excluded from the establishment of Australia's colonial constitutional governance—and therefore precluded from exercising constitutive self-determination in the founding of the Australian state—self-determination also has an on-going aspect. Regardless of the means of creation of the nation state, to fulfil their right of self-determination indigenous peoples must be able to 'live and develop freely on a continuous basis.'[72] This necessarily requires the establishment and maintenance of institutions 'under which individuals and groups are able to make meaningful choices in matters touching upon all spheres of life on a continuous basis'.[73] In addition to these foundational rights of self-determination, the UNDRIP and a range of other international instruments provide for the right vested in indigenous peoples to exercise free, prior, and informed consent on matters affecting them and their communities.[74]

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[69] S James Anaya, *Indigenous Peoples in International Law* (Oxford University Press, 2004) 104–5.

[70] Ibid.

[71] As would be represented by the Voice to Parliament proposal contained in the *Uluru Statement from the Heart* (2017).

[72] Anaya (n 69) 106.

[73] Ibid.

[74] See, eg, Convention on Biological Diversity, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993) art 8(j); International Labour Organisation Indigenous and Tribunal Peoples Convention 1989 (No 169), opened for signature 27 June 1989 (entered into force 5 September 1991); United Nations Conference on Environment and Development, Rio

The United Nations' Expert Mechanism on the Rights of Indigenous Peoples provides detailed examination of the meaning of the four elements contained in 'free, prior and informed consent'.[75] 'Free' relates to the absence of 'coercion, intimidation or manipulation'. 'Prior' entails obtaining consent before commencing the relevant activity yet with ample time for the people concerned to engage in appropriate decision-making themselves. 'Informed' relates to the provision of relevant information relating to the decision to be made. The information must be 'objective, accurate and presented in a manner and form understandable to indigenous peoples.'[76] Lastly, 'consent' signifies that the people concerned agree to the relevant action.

Free, prior, informed consent is no merely procedural construct. As the Expert Mechanism on the Rights of Indigenous Peoples points out, the State's responsibility to secure such consent 'entitles indigenous peoples to effectively determine the outcome of decision-making that affects them, not merely a right to be involved in such processes'.[77]

On the basis that free, prior, informed consent is a feature of self-determination, and that self-determination involves control over decisions affecting First Nations peoples' collective lives, rights vested in Indigenous people concerning land fail to meet the threshold for self-determination. And yet as recent events have highlighted, speaking for land is of deep concern to Aboriginal and Torres Islander peoples.

Declaration, UN Doc A/CONF.151/26 (Vol 1) (28 September 1992); United Nations Conference on Environment and Development, Agenda 21 (1992); Human Rights Committee, General Comment No 23: Article 27 (Rights of Minorities), 50th sess, UN Doc CCPR/C/21/Rev.1/Add.5 (8 April 1994).

[75] Expert Mechanism on the Rights of Indigenous Peoples, Human Rights Council, 'Final Report of the Study on Indigenous Peoples and the Right to Participate in Decision-Making', 18th sess, Agenda Item 5, UN Doc A/HRC/18/42 (17 August 2011) 27.

[76] Ibid.

[77] Ibid 26.

As Watson explains:

> To own the land is a remote idea. The indigenous relationship to ruwe, is more complex. In Western capitalist thought, ruwe becomes known as property, a consumable which can be traded or sold. We live as a part of the natural world; we are it also. The natural world is our mirror. We take no more than necessary to sustain life; we nurture ruwe as we do our self, for we are one. Westerners live on the land taking more than needed, depleting ruwe and depleting self. So self can be no more tomorrow. Westerners are separate and alien to ruwe and are unable to understand how it is we communicate with the natural world. We are talking to relations and our family, for we are one.[78]

IV RECALIBRATING THE HIERARCHY OF RIGHTS IN LAND

The current hierarchy of rights in land represents rights derived in every case from the State. The State's radical title empowers it to create rights in land, invoking the Australian doctrine of tenure[79] leaving room for the State's own determination, through its courts, of the existence of native title. Dependence upon the State's courts to determine Indigenous interests in land contradicts First Nations' laws, highlighting the erosion of the expression of self-determination.

> Seeking a declaration from the coloniser and the granting of title to land has never been my ancestors' journey or mine. We know the land is belonging to the ancestors and us in their place. We are both owners and carers during our short time on earth. It is the frog who is in need of legitimacy. Native title is a way of giving the frog what it does not have. We have never consented.[80]

The State's other rights over minerals and its interest in the 'patrimony of the nation' empower it to provide for mining and cultural heritage. In the case of native title, mining, and cultural heritage, there is recognition of the necessary link between First Nations

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[78] Irene Watson, 'Kaldowinyeri—Munaintya—In the Beginning' (2000) 4 *Flinders Journal of Law Reform* 3, 6.

[79] As provided for in *Mabo* (n 7).

[80] Watson (n 82) [27].

peoples and land. However, except for the native title determination process, there is little by way of substance in the rights involved. This disempowers First Nations people in relation to their lands, relative to other interest holders. Thus, self-determination within the suite of rights and interests in and over land is lacking.

One consequence of precluding First Nations peoples from self-determination accorded through substantive rights is the kind of damage seen through the recent high-profile example of Juukan Gorge. The response of the wider public to this tragic loss is recognition of the need to recalibrate the hierarchy of interests, giving voice to the First Nations communities.

We suggest that to provide for sustainable land use demands a balance between the rights of stakeholders in the land. The interests of First Nations peoples underpin all other interests and, in alignment with the State's obligations of self-determination, should be afforded primacy within the framework of interests in and over land. While complex given jurisdictional differences, a coherent approach to recognising the underlying beneficial title held by First Nations peoples, and the necessary connection with land that gives rise to a declaration of Indigenous cultural heritage, lies at the foundation of a sustainable – and just – system of land rights.

A DUTY OF CARE AND DECOLONISING ENVIRONMENTAL LAW: RE-IMAGINING SUSTAINABILITY PRACTICES IN AUSTRALIA

Lee Godden*

Ecologically Sustainable Development (ESD) has been the mainstay of environmental law and policy in Australia for three decades. While the causes of ecological decline are complex, it is clear that ESD is not driving clear outcomes for environmental protection. The inherent balance model enshrined in ESD in practice still tends to favour development over protection. This article looks to the derivation of sustainability as a matter of Eurocentric state practice. It draws on Scott's seminal scholarship, 'Seeing like a State' to explore why nation states such as Australia cannot 'see' the unfolding ecological crisis. It suggests that major trends in environmental law; the adoption of duty of care concepts and a move to decolonise environmental law by better integration of Indigenous values may offer pathways for a revisioning of environmental law.

I INTRODUCTION

A cross current of concerns have raised the profile of environmental law, while making it subject to scrutiny in terms of how effectively it addresses the deep challenges of environmental change and destruction that our society faces. In turn, other commentators label environmental law as 'lawfare' when it facilitates challenges to the prevailing development trajectory.[1] Environmental law operates as a highly contested body of law.[2] Conventionally, the concept of sustainable development, which in Australia has the qualifier, *ecologically* sustainable development (**ESD**), tries to bridge that controversy by providing a unifying paradigm or meta-principle to unite disparate perspectives on the proper function of environmental law.[3]

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[1] Claire Konkes, 'Green Lawfare: Environmental Public Interest Litigation and Mediatized Environmental Conflict' (2018) 12 *Environmental Communication* 191.

[2] Elizabeth Fisher, 'Environmental Law as "Hot" Law' (2013) 25(3) *Journal of Environmental Law* 347.

[3] Lee Godden, Jacqueline Peel and Jan McDonald, *Environmental Law* (Oxford University Press, 2018) 57.

This article examines whether sustainable development and its Australian counterpart, ESD can, or indeed should, be the platform for measures to reduce escalating environmental impacts. Such impacts are reflected in profoundly disturbing indicators, such as the rapidity of biodiversity loss in Australia which results from cumulative, multiple causes, including climate change.[4] In the context of escalating environmental risks, the article examines the viability of sustainability as a guiding value for environmental laws, and an ultimate outcome to be achieved. It explores why nation states such as Australia may not 'see' the unfolding ecological crisis. It suggests that two emergent but significant influences on environmental law may offer pathways for change. Those key potential changes to the framing and practices of environmental law comprise the integration of Indigenous peoples' law and governance – however partial and incomplete at present, and the adoption of a duty of care in a range of statutory and judicial contexts. These two influences challenge the underpinning values and the posited outcomes of environmental law as sustainability in specific, but potentially convergent ways. This article charts the possibilities for future changes in environmental law and the revision of sustainability practices.

II ENVIRONMENTAL LAW: A NARRATIVE OF EVOLUTION

The development of environmental law is understood as embedded within the evolution of sustainability as encapsulating human-environment interdependency as articulated in the 1972 *Stockholm Declaration on the Human Environment* (**Stockholm Declaration**).[5] The Stockholm Declaration imported concepts such as the 'no harm' principle from international law, while recognising national sovereignty over land and resources.[6]

[4] See eg, Senate Environment and Communications References Committee, Parliament of Australia, *Australia's faunal extinction crisis* (Interim report, April 2019) [2.8]-[2.10].

[5] Report of the United Nations Conference on the Human Environment, UN Doc A/CONF.48/14/Rev.1 (1973) cl 1.

[6] See generally, Hon Justice Brian Preston and Charlotte Hanson, 'The Globalisation and Harmonisation of Environmental Law: An Australian Perspective' (2013) 16 *Asia Pacific Journal of Environmental Law* 1.

The Stockholm Declaration thus balances environmental protections with retention of the nation-state's sovereignty; prefiguring a priority of exploitation over protection,[7] and a prerogative of national interests.[8]

While the sustainable development principle was ground-breaking at the time, from the vantage of a half-century later, it is increasingly apparent that it allows for a relatively simplistic compromise between environmental law and the imperatives of nation-state economic development.[9] Historically, instrumental economic value (even if equated broadly with utilitarian, human well-being outcomes) typically is given precedence over protection of nature.[10] Environmental law with its sustainability paradigm is now typically the facilitator of a balancing exercise between development and environmental trade-offs, predicated on the 'three pillars' model of sustainability. This model is, 'typically realised as the balancing of trade-offs between seemingly equally desirable goals within these three categorisations'.[11] Unavoidable tensions in balancing competing priorities have continued to plague the implementation of sustainability.

Following the Stockholm Declaration, the sustainable development agenda took expansive legal shape, with the need for environmental protection expressed in a plethora of multilateral environmental agreements.[12] Correlative national legislation in many countries

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[7] Klaus Bosselmann, The Principle of Sustainability: Transforming Law and Governance (Taylor & Francis Group, 2008) 148.

[8] Cf, Cait Storr, 'Denaturalising the Concept of Territory in International Law' in Julia Dehm and Usha Natarajan (eds), *Locating Nature: Making and Unmaking International Law* (Cambridge University Press, 2020) (forthcoming).

[9] See eg, Usha Natarajan and Julia Dehm, 'Where is the Environment? Locating Nature in International Law', *Third World Approaches to International Law Review* (Reflections, 30 August 2019) <https://twailr.com/where-is-the-environment-locating-nature-in-international-law>.

[10] The term 'nature' rather than environment or ecology was more common until the mid-twentieth century.

[11] Ben Purvis, Yong Mao & Darren Robinson, 'Three pillars of sustainability: in search of conceptual origins' (2019) 14 *Sustainability Science* 681, 685.

[12] For detail, Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (Cambridge University Press, 4th ed, 2018).

adopted the sustainability objectives that increasingly informed international environmental law.[13] The 1992 Rio Declaration built on the Stockholm Declaration to outline a set of foundational principles for modern environmental law. [14] The multilateral processes at International Law that gave rise to the Rio Declaration also revealed a global, North-South 'divide' that subsequently, strongly influenced the direction of international environmental law. Countries of the global South raised the need for sustainability to simultaneously address economic need and poverty, as well as environmental protection, as expressed most recently in the Sustainable Development Goals 2015.[15]

Sustainable development, its objectives and principles also shaped the wider environmental movement in the twentieth century. While that movement was informed by multiple values deriving from religion, ethics, economics, science, politics, custom and culture, that value set was largely compressed as 'sustainability' in formal legal sources.[16] The sustainability movement sought to capture aspirations for a post-industrial society that '[w]as much a state of being as a mode of conduct or a set of policies ... [c]ertainly it can no longer be identified simply with the desire to protect ecosystems or conserve resources'.[17] Even so, if we unpack the origins of sustainability it reveals a bifurcated sustainability agenda that in its narrow form was marked by a concern with conservation and wise use of resources, alongside more radical visions of the intrinsic value of ecosystems and nonhuman species that found a place within late twentieth century environmental philosophies.

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[13] Brian Preston and Charlotte Hanson, 'The Globalisation and Harmonisation of Environmental Law: An Australian Perspective' (2013) 16 *Asia Pacific Journal of Environmental Law* 1.

[14] Rio Declaration on Environment and Development (1992) 31 ILM 874 ('Rio Declaration').

[15] *Transforming Our World: The 2030 Agenda for Sustainable Development*, UNGA Res 70/1, 70th sess, Agenda Item 15 and 116, UN Doc A/RES/70/1 (21 October 2015) ('Transforming Our World'). See further, Tim Stephens and Ed Couzens, 'The 2030 Agenda for Sustainable Development' (2016) 19 *Asia Pacific Journal of Environmental Law* 19, 1.

[16] Godden, Peel & McDonald (n 3) 9.

[17] Timothy O'Riordan, *Environmentalism* (Pion, 2nd ed, 1981) ix.

III ESD OBJECTIVES IN AUSTRALIAN ENVIRONMENTAL LAW

Principles based on sustainability and their implementation now provide the legal conceptual architecture for almost all environmental law in Australia.[18] An early 1990s policy platform that was adopted in Australia was designed to reorient the model of sustainability towards stronger ecological outcomes by instituting five principles of ecologically sustainable development.[19] The result, ESD is now a widely-used legislative objective, despite its [at times] contested normative content.[20] Accordingly, ESD to be effective must operate as an 'interstitial normativity', pushing and pulling the boundaries of composite norms when they threaten to overlap or conflict with each other.[21] At a practical level, it often becomes a negotiation between powerful and less powerful 'stakeholder' interests to achieve some measure of environmental protection while development still proceeds.

ESD principles include those of particular pertinence to biodiversity protection, including: that conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making; the intergenerational equity principle; and that if there is a threat of serious or irreversible harm, lack of full scientific certainty should not be a reason to postpone measures to prevent environmental degradation (the precautionary principle). Jurisprudence interpreting the scope and application of the precautionary principle in Australia has been prominent in legal actions seeking to address biodiversity loss.[22] Interpretation of these ESD principles however also needs to reconcile potentially contrary positions. For example, the temporal 'balancing of interests' formula implicit to

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[18] Godden, Peel & McDonald (n 3) 50.

[19] The ESD principles emerged in the National Strategy on Ecologically Sustainable Development Australia: Ecologically Sustainable Development Steering Committee, *National Strategy on Ecologically Sustainable Development* (December 1992) and the Australian Government, *Intergovernmental Agreement on the Environment* (1 May 1992).

[20] Bosselmann (n 7) 50.

[21] Lowe, as cited in Bosselman (n 7) 543.

[22] See, for recent application of the principle, *Friends of Leadbeater's Possum Inc v VicForests (No 4)* [2020] FCA 704.

intergenerational equity represents an effort to realign existing inequities entrenched within past and current development trajectories toward more ecologically sound future pathways.

On a more positive note, sustainable development has provided the momentum for efforts to reorient the classic economic orientation of the nation-state, and to offer a counterpoint to the predominantly economic agendas that influence nation state policies.[23] Yet, despite the institutionalisation of sustainability in public law and civic society, the failure of these objectives to arrest serious environmental decline has raised questions about their feasibility and integrity. Does environmental law require alternative or supplementary objectives, principles and practices for the future?

The co-mingled and diffuse influences on environmental law that have overtaken the sustainability program have become more pressing. Many parts of Australian society are registering a deep angst about environmental destruction, together with growing activism to develop measures that transcend conventional sustainability pathways.[24] Ironically, more people are isolated from 'nature' and depend upon a highly abstracted system to deliver 'life support'. Accordingly, the conflicts generated around sustainability in the trajectories of post-industrial society are only partially, and inadequately mitigated by integration of sustainability within the mainstream governance models deployed in environmental law. As Levi-Faur notes, '[t]he penetration of regulation as an institutional design, as a practice and as a discourse to all spheres is captured by the concept of regulatory capitalism'.[25] This governance mode finds clear expression in sustainability models, and in well-established tools of environmental law such as environmental impact assessments.[26]

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[23] See, Sophie Riley, 'From Smart to Unsmart Regulation: Undermining the Success of Public Interest Litigation' (2017) 34 *Environmental and Planning Law Journal* 299.

[24] Ben Richardson, 'Climate strikes to Extinction Rebellion: environmental activism shaping our future' (2020) 11 *Journal of Human Rights and the Environment* 1–9, 1.

[25] David Levi-Faur, 'Regulatory capitalism' in Peter Drahos (ed) *Regulatory theory: foundations and applications* (Australian National University Press, 2017) 289, 289.

[26] See generally, Mandy Elliot, *Environmental Impact Assessment in Australia: Theory and practice* (Federation Press, 6th ed, 2014).

Any amelioration of developmental impacts that can be achieved by a sustainability-based models of environmental law appears likely to be offset by the increasing interdependency and urbanisation of societies.[27] The retreat from globalism and consumerism initially signalled by the COVID-19 pandemic,[28] and strategies such as 'build back better',[29] now sound hollow, given the resumption of high-intensity societies, global financial resurgence and resource demands, infrastructure stimulus packages, and incentives to recommence consumer spending.

IV STATES OF SUSTAINABILITY, METHOD AND PRACTICE

Beyond the sustainability principles adopted in law lies a large body of sustainability practices, some of which are formalised, but many remain matters of social practice and moral exhortation. Formal sustainability practices within settings such as natural resource management rely on authoritative expertise and institutionalised knowledge settings. Western scientific knowledge has played a prominent role in environmental law. Yet the underlying epistemology of environmental law compliments, rather than comprehensively challenges the knowledge paradigms of contemporary legal and science traditions. Instead, environmental law reworks those traditions and accompanying epistemology toward different outcomes.[30] Thus, ecological science is the platform for identifying biodiversity problems; proposing resilient models of the environment; as well as the source of many rules and techniques adopted in environmental management.[31] Similar tandems of scientific knowledge modes of problem identification, method and solution framing are apparent in

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[27] See eg, Kirsten Parris, *Ecology of Urban Environments* (Wiley-Blackwell, 2016) 56.

[28] K. Rajendra et al, 'Blessing in Disguise in the Megacities: Environmental Co-benefits in Air Quality Amid Covid-19 Lockdown in Kolkata' in Mukunda Mishra and R.B. Singh (eds) *COVID-19 Pandemic Trajectory in the Developing World* (Springer, 2021) 101.

[29] Organisation for Economic Cooperation and Development, *Building back better: A sustainable, resilient recovery after COVID-19* (OECD Policy Responses to Coronavirus (COVID-19), 5 June 2020).

[30] Nicole Graham, Margaret Davies and Lee Godden, Broadening law's context: materiality in socio-legal research, (2017) 26 *Griffith Law Review* 480, 488.

[31] Tracy-Lynn Humby, 'Law and Resilience: Mapping the Literature' (2014) 4 *Seattle Journal of Environmental Law* 85, 88.

'new' planetary boundary concepts where post-industrial development pathways are predicted to overshoot the planet's carrying capacity.[32]

The classic model of scientific method and practice that posits a linear trajectory from problem identification to legislative sustainability 'solution' often fail to comprehend complex, multifaceted situations.[33] At a policy level, it appears easier to regret what is *not* sustainable after environmental damage has manifested, rather than to reprioritise economic imperatives.[34] This policy impasse has deep historical roots in the knowledge patterns supporting natural resource management that Eurocentric nation states developed over several centuries to realise economic value.

A The Sustainable State (Seeing like a State)

Sustainability is cast as a duty of nation-states under international instruments,[35] national constitutions [36] and national (domestic) legislation. [37] Australian governments have

[32] Will Steffen, et al, 'Planetary Boundaries: Guiding Human Development on a Changing Planet' (2015) 347(6223) *Science* 736.

[33] Humby (n 31) 87-88.

[34] Bosselmann, (n 7) 9.

[35] See Transforming Our World (n 15). See also *World Charter for Nature*, UNGA Res 37/7, 37th sess, 48th plen mtg, UN Doc A/RES/37/7 (9 November 1982) annex I, [1]-[5]; Rio Declaration (n 14) principle 4.

[36] See for example, *Constitution of the Oriental Republic of* ***Uruguay***, art 47: "The protection of the environment is of general interest."; *Constitution of the Republic of* ***Maldives,*** art 22: "The state has a fundamental duty to protect and preserve the natural environment, biodiversity, resources and beauty of the country for the benefit of present and future generations. The state shall undertake and promote desirable economic and social goals through ecologically balanced sustainable development and shall take measures necessary to foster conservation, prevent pollution, the extinction of any species and ecological degradation from any such goals." *Basic Law for the Federal Republic of* ***Germany***, art 20a: "[T]he state shall protect the natural foundations of life and animals by legislation and in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order." *Constitution of the Republic of* ***Ecuador***, art 71: "Nature … has the right to integral respect for her existence, her maintenance, and for the regeneration of her vital cycles, structure, functions, and evolutionary processes. All persons… can call upon public authorities to enforce the rights of nature. […] The State shall give incentives to natural persons and legal entities and to communities to protect nature and to promote respect for all the elements comprising an ecosystem."

[37] Environment Protection Act 2017 (Vic) ss 16, 23.

interpreted such duties from within a colonial legacy of administrative control over land and resources. When environmental concerns surfaced as a public policy problem, the solutions were regarded as falling clearly within governmental control and responsibility. Beginning in the 1970s, designated parts of the administrative and legal system were assigned responsibility for redressing the predominately pro-development ethos inculcated by earlier governmental resource exploitation and management responsibilities. [38] These developments facilitated the classic, 'administrative rationalist' mode of governance as the dominant model in Australian environmental law.[39] To date, the state is still posited as the central institution of environmental law and governance, despite the advent of a deregulatory, liberalisation agenda that has decentred the state from a range of essential utility services such as provision of water supply and environmental management activities.[40]

Many non- government groups, including international organisations, business and industry, and civil society now operate under a broad sustainability paradigm. Nonetheless, the 'hollowing out of the state'[41] constrains the viability of state-centric sustainability models. The state remains nominally accountable for environmental protection under most legislation. Changed governance configurations however have placed limitations on the state's institutional reach, severe restrictions on its resources, and at times constraints on its capacity for monitoring, compliance and enforcement. [42] In short, the scientific and technological methods typically attributed to the state to enact sustainability may no longer be at its ready 'command'. The metrics of sustainability remain in place, but the capacity of the state to achieve sustainability is dwindling.

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[38] Godden, Peel & McDonald (n 3) 129.

[39] Ibid 133.

[40] Ibid 134.

[41] See e.g., Bob Jessop, 'Hollowing Out the "Nation-State" and Multi-Level Governance' in Patricia Kennett (ed), *A Handbook of Comparative Social Policy* (Edward Elgar Publishing, 2nd ed, 2013) 11, 18.

[42] Ibid 19.

B Sustainability as Reducing Complexity

Yet, in its signature metric of sustainable development – denoted by the collapse of complex variables to a balancing formula, sustainability-based governance in environmental law remains an exemplar of the modern, scientific state project. As James C Scott notes, '[c]ertain forms of knowledge and control require a narrowing of vision. The great advantage of such tunnel vision is that it brings into sharp focus certain limited aspects of an otherwise far more complex and un-wieldy reality.'[43] Scott articulates how modern states, particularly in the Westphalian tradition, rely on science and mathematics as reductionist knowledge forms which make phenomena legible by reducing complexity. When phenomena become legible and able to be readily 'seen' by the state, in lists, data bases, and as 'best evidence', then they are susceptible to careful measurement and calculation.[44]

Of particular relevance, is Scott's proposition that though this legibility methodology, phenomena such as forests and natural resources are rendered amenable to utilisation or conservation in the interests of the state. In tracing the rise of modern liberal states and institutions that adopt such methods of control, Scott posits the history of scientific forestry in the 18th century, 'as a metaphor for the forms of knowledge and manipulation characteristic of powerful institutions with sharply defined interests, of which state bureaucracies and large commercial firms are perhaps the outstanding examples.'[45] Of pertinence to the alignment of sustainability with scientific method, Scott describes how the complex 'real' forest was replaced by an abstraction of calculation and measurement which substituted the complex and stochastic ecology of trees for public fiscal value, which in turn served then as an indicia for scientific management of forests.[46] The highly-regimented German-managed forest became the archetype for imposing scientific order on unruly nature.

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[43] James C Scott, Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed (Yale University Press 1998) 11.

[44] Ibid 11-12.

[45] Ibid 11.

[46] Ibid 13-15.

Similarly, the rise of Enlightenment thought with its emphasis on rational thinking and empirical observation, 'revolutionised not only the way the physical world (nature) was perceived, but also the way the cultural world (society) was perceived… Social norms (whether moral or legal) had to be 'reasoned', i.e. tested against rationality and scientific evidence'.[47] While many scholars link the rise of rationality with modernism, other scholars refute the linkage.[48] Even so, the association of empiricism, observation and scientific method can be traced to highly influential sets of practice that emerged in Eurocentric state-centric knowledge systems.

Tellingly, Scott details the rapid diffusion of scientific forestry practices to a wide range of natural resource management settings – many of which would now be regarded as sustainable environmental practices.[49] Bosselmann, unlike Scott, regards forestry practices of the late 18th and 19th centuries as integral to German holistic philosophies – which later manifested as ecological world views.[50] Bosselmann cites the Bavarian Forest Act of 28 March 1852 which stated, '[t]he management of state-owned forests has to follow sustainability as its highest principle'.[51] This duty echoes similar managerial orderings of recent sustainability-based legal schemes, and ties sustainability to state practice. Moreover, sustainable management processes were not confined to forestry, but widely disseminated within professions managing natural resources.[52] In the USA, these ideas heavily influenced the early conservation movement.

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[47] Bosselmann (n 7) 16.

[48] See most famously Bruno Latour, *We Have Never Been Modern* (Harvard University Press, 1993).

[49] The term sustainability according to Bosselmann was invented during the Age of Enlightenment and was characteristic of the move to a secular state and accompanying knowledge system - Bosselmann, (n 7) 16.

[50] Ibid 20.

[51] Ibid 21.

[52] Scott (n 43) 19.

Even the seminal work of Aldo Leopold –who is regarded as inspirational in the adoption of ecology in that nation – exemplifies Eurocentric sustainability-style practices of empiricist methodology and meticulous record-keeping.[53] What illuminates Leopold's ecological vision is his attention to local practices and places, lifting it from the narrow, state centric vision of the nation state that is aligned to economic valuation.

In this vein, Scott argues that local practices were displaced by the state-centric scientific methods and value calculus inherent to nation-state building during the early modern period.[54] The adoption of state-centric methods historically brought unprecedented economic prosperity to many, but not the whole global population. The consequence of the state centric vision – often realised much later – was an unprecedented ecological failure. 'Finding ways out of this failure requires rethinking. It is doubtful that pure rationality provides sufficient guidance.'[55]

Sustainable development has become an institutionalised abstraction – from not only the raw data of complex ecological realities – that might be recovered through methodological mimesis, but from what is actually occurring in local places. The capacity of modern states to gauge sustainability by measurement, metrics and indicators and thus to only 'see' a predominantly economic value for its *raison d'etre* remains largely unqualified. This gives us the question: can the nation-state see the ecological crisis that is unfolding?

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[53] Aldo Leopold was employed by the US Forest Service, but his scholarship was more extensive. For his legacy see 'The Land Ethic', *The Aldo Leopold Foundation* (Web Page) <https://www.aldoleopold.org/about/the-land-ethic/>.

[54] Scott (n 43) 25-26.

[55] Bosselmann (n 7) 17.

V THE ECOLOGICAL CRISIS

Ironically, it is 'indicators' across environmental law that alert us to the impending crisis. Biodiversity loss is an important indicator of unsustainable development.[56] This loss has reached such extremes that it is being designated as a sixth global mass extinction.[57] A succession of reports from the Intergovernmental Panel on Climate Change identifies the widespread environmental and social impacts as the world moves closer to dangerous anthropogenic climate change.[58] Within Australia there is growing concern that we are reaching critical thresholds for many ecosystems and species as ESD has failed to achieve its core objectives.[59] Continuing decline in the indicators of environmental health, biodiversity, and natural resources nationally reinforce the view that new paradigms may be required that replace or complement ESD.[60]

The severity of environmental degradation has been highlighted by the independent, 10-yearly review of the *Environment Protection and Biodiversity Act 1999* (Cth) (**EPBC Act**). The overarching conclusion was that the Act was not meeting its key objectives in protecting Australia's environment.[61] Samuels concluded that the EPBC Act is ill-suited to meet

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[56] Secretariat of the Convention on Biological Diversity, *Global Biodiversity Outlook 5* (Full Report, 2020).

[57] Gerardo Ceballos, Paul Ehrlich and Peter Raven, 'Vertebrates on the Brink as Indicators of Biological Annihilation and the Sixth Mass Extinction' (2020) 117 *Proceedings of the National Academy of Sciences* 13596.

[58] See generally, Intergovernmental Panel on Climate Change, Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (Cambridge University Press, 2021) <https://www.ipcc.ch/report/ar6/wg1/#FullReport> ('IPCC 2021').

[59] See for example, The Australian Panel of Experts in Environmental Law, *Blueprint For The Next Generation of Environmental Law* (August 2017).

[60] See e.g., The Australian Panel of Experts in Environmental Law, *The Foundations for Environmental Law: Goals, Objects, Principles and Norms* (Technical Paper 1, April 2017) 3: 'The Commonwealth government should initiate a wide-ranging, national consultative process for the purpose of building substantial agreement on a new societal goal for Australia that would enhance or replace the current ESD goal.'.

[61] Graeme Samuel, Independent Review of the EPBC Act: Final Report (Report, October 2020) 16.

current and future environmental challenges, including climate change and the increased occurrence of extreme events such as bushfire and flood as cumulative threats to biodiversity and human well-being.[62] A core weakness of the EPBC Act identified by the review is that ESD objectives are not directly enforceable, nor do they adequately prescribe what will happen in practice.[63] The central measures to redress the weaknesses of the Act was the proposed national standards for conservation and restoration.[64] Restoration though is not easily integrated into the conventional sustainable development models that are largely oriented to balancing current environmental and development trade-offs'.

The EPBC Act review is only one of several reviews and reports that have surveyed the escalating loss of Australia's unique flora and fauna. Continuing controversies over environmental damage to the World Heritage listed Great Barrier Reef suggest that the nation state as yet very imperfectly can 'see' the ecological crisis.[65] Local populations that experienced the immense human and environmental toll of the bushfires in Australia in 2019-20 were faced with a very stark vision of the future ecological crisis. The fires burned approximately 19.4 million hectares – an area 'larger than the Amazon and California combined'.[66] The scale, speed and rapidity of the fire spread had been predicted by climate scientists and fire ecologists, who had warned of the increasing risk of climate change exacerbating the bushfire threat.[67] In these contexts, ESD and its principles seem ill-equipped to deal with the momentous scale of the loss, or to offer a viable form of calculation of the costs of such ecological crises.

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[62] Ibid 40-56.

[63] Samuel (n 61) ch 9.

[64] Ibid 49-50, app B.

[65] After intense lobbying by the Australian government, The World Heritage Committee did not place the reef on the World Heritage in Danger list.

[66] Ben Huf and Holly Mclean, *2019-20 Bushfires Quick Guide* (Research Note No 1, February 2020) 2.

[67] Climate Council, "This is Not Normal": Climate change and escalating bushfire risk (Briefing Paper, 12 November 2019).

VI REVISION OR REPLACEMENT OF ECOLOGICALLY SUSTAINABLE DEVELOPMENT?

Despite long standing critiques of ESD in Australia there is some hesitancy around displacing it as an overarching objective and set of principles. This hesitancy may be due in part to views that hard won environmental law reforms could be jeopardised.[68] The campaigns to paint environmental activism as lawfare,[69] and calls to reduce 'greentape' may contribute to a cautious approach, especially in the economically volatile era of the COVID-19 pandemic. It is also a lengthy, complex endeavour to conceptualise new approaches to environmental protection and management, and to reorganise institutional arrangements, methods, measurements, and practice to that end.

Some assistance in the revisioning of ESD may be gained from the integration of areas of law not previously regarded as instrumental to environmental law that could inform new governance measures. In the climate change context, corporations law and financial regulation have been used in both climate litigation and regulatory responses. Criminal law has long formed a part of the regulatory 'tools' of environmental law. Over time criminal sanctions and penalties have been strengthened.[70] As non-conventional areas of law progressively are utilised to address emergent concerns, we should seek to not only widen the scope of environmental regulation but to re-envisage environmental governance. The significance of revisioning is to significantly reformulate what it means to 'see like a state'. Rather than adopting a prescriptive reform process, the proposal here is to identify pathways[71] to revise ESD (or develop alternatives) that acknowledge a spectrum of potential approaches to dealing with the accelerating ecological crisis.

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[68] For an example of proposed 'roll back', see Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015 (Cth).

[69] Cf, Samuel (n 61) ch 4 (key points).

[70] Brian Preston, 'Principled Sentencing for Environmental Offences' in LeRoy Paddock (ed), *Compliance and enforcement in environmental law: toward more effective implementation* (Edward Elgar Publishing, 2011) 16.

[71] See reform pathways Samuels (n 61) ch 12.

In Australia, as a settler colonial nation, the project of reimagining ESD also should be better aligned with measures toward reconciliation and decolonisation. This reimagination of how the state 'sees' environmental law could begin with re-thinking the knowledge systems that are utilised in understanding the relationship between the environment and society.[72] Indigenous peoples' connection to traditional land and waters, and their careful management of habitat and food systems over millennia belatedly is being acknowledged in Australia. One pathway to reimagining ESD therefore involves engaging more fully with Indigenous law, practice and traditional ecological knowledge systems. Environmental law and practice gradually are becoming more inclusive of the participation of Aboriginal peoples and Torres Strait Islanders. The integration to date though has been selective and not specifically directed to revising ESD concepts and principles.

Typically, Indigenous peoples' participation has focussed on co-management regimes in protected areas, and environmental management on Indigenous held lands. Native title, a hybrid system whereby settler law 'recognises' the pre-existing rights to land and waters of Traditional Owners[73] has provided significant leverage for stronger levels of Indigenous participation. Yet Aboriginal peoples and Torres Strait Islander involvement in mainstream environmental law that is geared to assessment, decision-making and the approval of development has not been substantial. This pathway to reimagining the function of ESD highlights the need to simultaneously better understand the relationships that are embedded in the ESD model. The ESD model is predicated upon the primacy of the nation-state and its delegated decision-makers who engage other groups through a procedurally organised 'relationship'.

[72] There is growing acknowledgment of the value of traditional ecological knowledge. See, eg, Emma Woodward et al (eds), Our Knowledge, Our Way in Caring for Country: Indigenous-led Approaches to Strengthening and Sharing our Knowledge for Land and Sea Management (NAILSMA and CSIRO 2020).

[73] *Native Title Act 1993* (Cth) s 223.

VII 'SEEING' RELATIONSHIPS

Effectively, a second pathway to revisioning or replacing ESD would involve thinking differently about environmental governance and for 'whom' governance is implemented. ESD has started the shift from the conventional model of economic value to integrate a stronger public participatory function in environmental law.[74] Two current trends suggest another, incipient pathway to expand those entities involved in environmental law and governance, and to refocus attention on those whom environmental governance is designed to protect.

The first trend is a move to better reflect ecological relationships in law. ESD has long been regarded as importing ecological models into environmental law and for placing humans 'in' ecology.[75] Yet, given the derivation of sustainable development and the compromises of the balance formula, the focal point of governance implicitly has continued to be the human community. The identification of alternative legal and governance models that are inclusive of non-human life, such as 'rights for nature'[76] have given legal articulation to ideas that have formed part of community relationships with the natural world for many years.

Landmark opinions which accorded standing for protection of the environment and for cultural heritage interests in the face of development pressures,[77] long ago began the transition to include all life within the ambit of environmental law. These legal milestones mark an important shift in what the state had to 'see' in its governance for sustainability. While no longer revolutionary, recent judicial decisions to identify 'rights' for elements of the natural world and to institute measures to give them legal effect reflect serious consideration of alternative modes.

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[74] Indigenous cultural heritage for example has long been acknowledged as a component of environmental law. See *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 12. For discussion, see Samuel (n 61) ch 2.

[75] Godden, Peel & McDonald (n 3) ch 1.

[76] Christopher Stone, *Should Trees Have Standing? Law, Morality, and the Environment* (Oxford University Press, 3rd ed, 2010).

[77] *Onus v Alcoa Australia Ltd* (1981) 149 CLR 27.

Such alternative models could transform ESD as legislative objective. In several jurisdictions, determinations of 'rights for nature' are accompanied by directives to governments to initiate stronger protections for the holder of such rights or to initiate actions where governments have been found severely wanting in their duties of conservation and restoration. [78] New Zealand is a jurisdiction with comprehensive experimentation with new environmental governance forms.[79] These legal developments have been strongly informed by Māori views of their relationships with rivers and mountains.[80] The adoption of ground-breaking models for environmental law such as a corporation to govern rivers rests on long term Māori Iwi advocacy of how they 'see' rivers.[81] If a rights for nature model is integrated into ESD, it is vital that Indigenous peoples' rights and their relationships to land and culture are not displaced. [82]

There is clear potential for correlation in Australia to bring together in environmental law, the integration of Indigenous peoples' ecological knowledge and 'rights for nature' as suggested pathways to reforming ESD. These models are infused by the type of local practices that Scott argued were a strong counterpoint to the conventional measures involved in 'seeing like a state'. Potentially, these two developments can catalyse a viable alternative to ESD, even though there are complex legal and practical challenges in their effective realisation as forms of environmental governance.

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[78] In 2016, the Constitutional Court of Colombia, in its judicial Sentence T-622, recognised the Atrato River as a subject of rights. In 2018, the Supreme Court of Colombia held the Colombian Amazon was entitled also to be included in its judicial sentence STC4360-2018.

[79] See Erin O'Donnell, 'Rivers as Living Beings: Rights in Law, but No Rights to Water?' (2021) 29(4) *Griffith Law Review* 643.

[80] The *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) accorded legal personhood to the Whanganui River in Aotearoa New Zealand.

[81] Jacinta Ruru, 'Who are your waters?', *e-flux Architecture* (Liquid Utility, July 2019) <https://www.e-flux.com/architecture/liquid-utility/259674/who-are-your-waters/>.

[82] Ariel Rawson and Becky Mansfield, 'Producing Juridical Knowledge: "Rights of Nature" or the Naturalization of Rights?' (2018) 1(1–2) *Environment and Planning E: Nature and Space* 99.

The above pathway may also merge with a reimagination of the government duty concept. Such a revisioning of the classic ESD duty and the application of intergenerational equity can be found in the decision of Justice Bromberg in *Sharma v Minister for the Environment.*[83] Specifically, the decision provides a forward-looking orientation to the ESD ecological objectives under the EPBC Act in acknowledging the physical impacts of enhanced climate risk on future generations. [84] The application was brought by a group of Australian children seeking an injunction to prevent the Commonwealth Environment Minister, (the first respondent) responsible for administering the EPBC Act from giving an approval under the EPBC Act for the extension of the Vickery Coal operated coal mine near Gunnedah in New South Wales.[85] the eight Australian children not only brought the proceeding on their own behalf, but as a representative proceeding on behalf of all children who ordinarily reside in Australia as well as impacted children residing anywhere in the world.[86] On behalf of the children it was argued that the Minister has a duty to protect young people from the accelerating impacts of climate change in Australia. [87] Justice Bromberg affirmed the existence of such a duty.[88] Specifically, this duty requires the Minister in exercising powers under the EPBC Act to avoid personal injury to young people. Justice Bromberg concluded that:

> It follows that the applicants have established that the Minister has a duty to take reasonable care to avoid causing personal injury to the Children when deciding, under s 130 and s 133 of the EPBC Act, to approve or not approve the Extension Project.[89]

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[83] *Sharma v Minister for the Environment (No 1)* [2021] FCA 560 ('*Sharma (No 1)*'); *Sharma v Minister for the Environment* (No 2) [2021] FCA 774 ('*Sharma (No 2)*').

[84] ESD is an objective of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3A. See also *Sharma (No 1)* (n 83) [150]–[153].

[85] Ibid [7]-[10].

[86] This was later amended to be all Australian children, see, *Sharma (No 1)* (n 83) [4].

[87] For the detail of the Court's reasoning on the duty see *Sharma (No 1)* (n 83) [91]- [109].

[88] *Sharma (No 2)* (n 83) [1].

[89] *Sharma (No 1)* (n 83) [491].

This judgment, although currently on appeal by the respondents,[90] potentially provides an important foundation for reimagining the scope of the duties of the nation state in achieving ESD. ESD is one of the considerations that the Minister must have regard to in deciding a controlled action application such as the coal mine project. The Bromberg duty concept reframes how the state is to see the future.

Significantly, while the duty is future oriented, it is place- and people-specific in the manner in which the judgment reinterprets the ESD principles of intergenerational equity and precaution. Thus although the *Sharma* duty looks primarily to avoidance of physical injury to children from the enhanced risk of bushfires due to climate change,[91] indirectly that duty may require the Commonwealth government to undertake substantive measures to decrease climate change impacts, and to extend a duty of care to the more-than-human world.[92] Governments might now be regarded as having a duty of care for the future state of the environment as a component of ESD, whether that is clearly assumed or not. The state will need to 'see' ESD differently to fulfill such a duty.

[90] The judgement is on appeal, to be heard over 3 days in October 2021 (18-20 October). The Minister's outline of submissions can be found here: <https://www.fedcourt.gov.au/services/access-to-files-and-transcripts/online-files/minister-for-the-environment-v-sharma/vid-389-of-2021-filed-documents/Appellant-Outline-Submissions-20210913.pdf>.

[91] *Sharma (No 2)* (n 83) [48].

[92] For an earlier application of how a duty of care might transform ESD in a climate change context, see Lee Godden, 'Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment and Heritage and Others' in Heather Douglas et al (eds) *Australian Feminist Judgments: Righting and Rewriting Law* (Hart Publishing, 2014) 138, 140.

VIII CONCLUSION

Converging trends are placing pressure on the conventional model of sustainable development. ESD was an Australian 'twist' to the sustainability concept designed to tip the balance formula between environment and development toward ecological outcomes. The mounting evidence in Australia is that the ESD concept, predicated on conventional state-centric governance methods has proved inadequate to that task. If anything, the challenges seem to be overwhelming the current ESD objectives. Despite experimentation with decentred governance forms that have widened the actors who participate in environmental law, and the integration of new legal fields to regulate environmental impacts, environmental law is losing momentum. Environmental law requires fresh inspiration, and either a replacement of ESD as the core guiding concept or at least a radical revision of that model.

This article has suggested possible pathways for such revision. The first is to more fully and meaningfully incorporate Indigenous peoples' ecological knowledge in managing the environment. This process should occur on a more equitable, genuinely participatory basis, and it should not be confined to a consultative process with Indigenous communities as a 'tick off the box' subset of sustainability practices. Secondly, the trend to respect 'more than human' rights and to broaden the duty of care concept needs to be supported by institutional innovation if it is to achieve a significant reorientation of the duties and future responsibilities of the state. While the ontological premises of sustainability are clearly Eurocentric, if we have started to 'hear the rivers sing',[93] perhaps the state may also begin to 'see' the environment more generally as animate and life-giving, and take more proactive steps to ensure its future.

[93] Christy Clark et al., 'Can you hear the rivers sing? Legal personhood, ontology, and the nitty gritty of governance', (2019) 45(4) *Ecology Law Quarterly* 787.

SURVIVAL STRATEGIES FOR CLIMATE LITIGATORS

Dr Chris McGrath[1]

Lawyers representing victims of climate change (and other environmental and human rights abuses) against governments and large corporations face substantial barriers for access to justice. Climate litigation against governments and large corporations is often a difficult war of attrition, involving very complex legal and factual disputes, huge stress and effort. Cases can stretch over many years with very limited resources against opponents with effectively unlimited resources. The personal toll can be very high, especially in the context of the aching sense of loss from the catastrophic damage that is unfolding due to climate change. This article suggests five survival strategies for climate litigators to build personal and professional resilience and to help avoid burnout and depression.

Content warning: This article discusses depression, anxiety and suicide.

I INTRODUCTION

The content of this article will seem like a foreign language to lawyers who have "ethical apathy"[2] and are uninterested in little more than money and prestige in their careers. But it is not aimed at them. It is aimed at young lawyers: who care about people and the world we live in; who will work trying to find remedies for many clients and places who suffer damage due to climate change; who recognise their responsibility to help protect society in responding to the climate crisis we face, where enormous losses are already being suffered. We can call people who take on these roles in their careers "climate litigators".

A global challenge for lawyers now and in coming decades is to find remedies for people who are and will be harmed by human-driven climate change. There is nothing particularly exceptional about this idea given the current reality of climate change and that a core job of lawyers is to find remedies for our clients. As lawyers, we need to understand the facts and the law sufficiently to advise our clients on the best course of action to avoid or remedy

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[1] LLB (UQ), BSc (UQ), LLM (QUT), PhD (QUT). Barrister. Website: <http://www.envlaw.com.au>. Thanks to Rachna Nagesh, Thomas Moore, Jemima Jacobson, Susheena Subramaniam and Yonnie Lipshatz for helpful comments on drafts of this article.

[2] Brian Preston, 'Climate Conscious Lawyering: Five Ways that Lawyers can Implement a Climate Conscious Approach in their Daily Legal Practice' (2021) 95 *Australian Law Journal* 51, 65.

legal problems they face, including seeking compensation when our clients have been harmed by others.

In terms of understanding the facts, we know that extensive and severe damage is already occurring and will occur to billions of people, trillions of dollars of property and ecosystems driven largely by greenhouse gas emissions from fossil-fuels. For instance, at present levels of warming of around 1°C mean global temperature rise,[3] Australia has already experienced catastrophic bushfires in the 2019/2020 summer that caused an estimated A$1.9 billion in damage[4] and multiple Australian ecosystems are collapsing.[5]

The harm caused by climate change will increase massively in coming decades even if the global community achieves the objectives of the *Paris Agreement* to stabilise mean global temperature rises beneath the hard target of 2°C or the aspirational target of 1.5°C above pre-industrial levels.[6] For instance, if mean global temperatures rise to 1.5°C above pre-industrial levels, most coral reefs are expected to be lost around the globe, including Australia's iconic Great Barrier Reef, while at 2°C virtually all coral reefs are expected to be lost, severely impacting hundreds of millions of people who depend on them for food.[7] Much of this harm – such as inundation of entire islands in the Pacific to the point of

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[3] See Intergovernmental Panel on Climate Change, *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2021) ('IPCC 2021') <https://www.ipcc.ch/report/ar6/wg1/#FullReport>.

[4] Insurance Journal, 'Insured Losses for 2019/2020 Australia Bushfires Estimated at A$1.9B (US$1.3B): PERILS' (Article, 7 July 2020) <https://www.insurancejournal.com/news/international/2020/07/07/574617.htm>.

[5] Dana M. Bergstrom et al, 'Combating ecosystem collapse from the tropics to the Antarctic' (2021) 27(9) *Global Change Biology* 1.

[6] *Paris Agreement to the United Nations Framework on Climate Change*, opened for signature 22 April 2016, [2016] ATS 24 (entered into force generally on 4 November 2016 and for Australia on 9 December 2016).

[7] Intergovernmental Panel on Climate Change, *Global Warming of 1.5°C: An IPCC Special Report on the Impacts of Global Warming of 1.5°C above Pre-industrial Levels and Related Global Greenhouse Gas Emission Pathways* (WMO, 2018) 10, 226, 229–230, 235, 254 <http://www.ipcc.ch/report/sr15/> ('IPCC 2018'); Chris McGrath, 'Paris agreement goals slipping away & with them Australia's chance to save the Great Barrier Reef' (2019) 36(1) *Environmental and Planning Law Journal* 3.

extinction[8] and displacement of entire populations[9] – will be impossible to prevent or fully redress. But perfection is not the measure of the law; nor are legal remedies refused merely because they do not fully redress harm.[10]

At present, lawyers representing clients who have suffered damage due to climate change typically face large disparities in the resources available for their clients in suing governments and large corporations that have caused the damage. Lack of resources is a key limiting factor to climate litigation at present, not lack of liability.[11] Even so, the legal obligations for climate change, such as company directors' duties, are rapidly evolving at present and this will continue into the future.[12] Some remarkable wins are occurring, such as the recent ground-breaking decision in *Sharma v Minister for the Environment* [2021] FCA 560, in which Bromberg J found (at [491] and [513]) a novel duty of care existed under which that the federal Environment Minister "has a duty to take reasonable care to avoid causing personal injury to the Children when deciding … to approve or not approve [a coal mine expansion]".

In this context, particularly the enormous scale of damage being suffered, we can expect to see litigation related to climate damages expand exponentially in coming decades. A tidal wave of climate litigation is coming.

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[8] Kya Raina Lal, 'Legal Measures to Address the Impacts of Climate Change-induced Sea Level Rise on Pacific Statehood, Sovereignty and Exclusive Economic Zones' (2017) 23 *Te Mata Koi: Auckland University Law Review* 35.

[9] Thea Philip, 'Climate Change Displacement and Migration: An Analysis of the Current International Legal Regime's Deficiency, Proposed Solutions and a Way Forward for Australia' (2018) 19(2) *Melbourne Journal of International Law* 1.

[10] Saul Holt and Chris McGrath, 'Climate Change: Is the Common Law up to the Task?' (2018) 24 *Te Mata Koi: Auckland University Law Review* 10, 11.

[11] Chris McGrath, 'Identifying opportunities for climate litigation: a transnational claim by customary landowners in Papua New Guinea against Australia's largest climate polluter' (2020) 37(1) *Environmental and Planning Law Journal* 42, 45.

[12] See, eg, Noel Hutley SC and Sebastian Hartford Davis, *Climate Change and Directors' Duties* (Further Supplementary Memorandum of Opinion, 23 April 2021) <https://cpd.org.au/2021/04/directors-duties-2021/>.

My aim here is to help lawyers representing victims of climate change (and other environmental and human rights abuses) against governments and large corporations where a lack of resources poses an immense barrier for access to justice. Litigation against governments and large corporations is often a difficult war of attrition, involving very complex legal and factual disputes, huge stress and effort stretching over many years. The personal toll can be very high, especially in the context of the aching sense of loss from the catastrophic damage that is unfolding due to climate change. My career over the past 20 years has included many large climate cases and I have endured many, soul-shattering losses.[13] One such loss was failing to stop the Adani Coal Mine despite, in my view, overwhelming evidence against it in terms of impacts to groundwater, threatened species and climate change, coupled with the economic and financial stupidity of the mine.[14]

I have learnt from these losses that, to survive, climate litigators need to build personal and professional resilience to avoid burnout and depression. The survival strategies discussed in the next section may also be helpful for others working to protect the climate, though the examples given relate to litigators.

II SURVIVAL STRATEGIES

A Five survival strategies for climate litigators

I suggest that five survival strategies for climate litigators are:

1. Be kind to yourself: remember why you started your journey.
2. See your career as a marathon, not a sprint.
3. Recharge regularly:
    - get enough sleep
    - exercise

[13] See Environmental Law Australia (Website) <http://www.envlaw.com.au>. This is my website; it provides case studies of many of the cases I have acted in.

[14] For a case study of this litigation, see Environmental Law Australia, 'Carmichael Coal ('Adani') Mine Cases in Queensland courts' (Web Page) <http://envlaw.com.au/carmichael-coal-mine-case/>.

- spend time with your friends, your family and doing things you love
- take weekends off (turn off the news) and holidays
- connect, collaborate with, and be inspired by others on a similar journey.

4. Accept that it is rational to despair in the face of the crises facing the Earth. Move beyond acceptance of that to work for positive change despite the potential for failure.
5. Choose to use the skills and tools you have to save what you can. Choose to fight to protect the people and places you love.

I will unpack each of them a little to explain the background to them and their intended meaning.

B Unpacking your survival strategies a little

1 *Be kind to yourself: remember why you started your journey*

Several years ago, a friend of mine committed suicide. We'd been good friends growing up and I remembered him as a happy boy I liked playing with. We'd lost touch after school for 20 years but he contacted me out of the blue when we were both in our early 40s. I was surprised and excited to hear from him and I was looking forward to seeing him when he next passed through Brisbane, where I live. A couple of months later, I learnt he committed suicide. I went to a memorial service for him and could not understand what had gone so wrong for my friend in his life. I never learnt the reason why he committed suicide, but I wondered if it started with him not being kind enough to himself; seeing what he saw as his own imperfections and failures in life not balanced by the many successes he'd had.

I've thought about my friend's death many times since and the lesson I take from it is that I need to be kind to myself and forgive myself for my many failures and inadequacies.

While I work hard and hold degrees in science, law and a PhD, I know I am only an average lawyer and there are many, far better lawyers: they are smarter, speak and write better than I do. As a climate litigator I typically face opponents who represent government and major corporations who have effectively unlimited resources to defend their cases. They hire the best lawyers that money can buy, so I see my own inadequacies and lack of skill on an almost daily basis. No matter how much I work, I know I'll never be as good as them. I know that

and I forgive myself for it. Climate litigation can involve huge amounts of work and there are very few lawyers who are willing to do that work for no fee or only nominal payment. My clients often have little or no money, so much of my work is pro bono (that is, done as a service for the community in the public interest for no fee). I know that if I didn't represent them, often they would have no barrister willing to represent them. In that context, I forgive myself for not being a brilliant lawyer. I resolve to work hard and try to make up for lack of skill through sheer effort and time.

I also remind myself that I originally chose to study law and science (in ecology) to try to protect the environment (and, thereby, help and protect the people and places I love like the Great Barrier Reef). I remind myself that is why I started my journey and I see my legal career in that context. It helps me a lot not to lose hope and despair at my lack of skill.

If you've read this far, I am sure you also have a deep reason for starting your law career that involves helping people.

2 *See your career as a marathon, not a sprint*

I learnt this second strategy many years ago as a keen (though not very good) distance runner but I think the metaphor will have meaning for others too. We all know from running at school and in our lives that you can only sprint for a short distance before you need to stop or slow down. Even if you haven't run a marathon, you know anyone running one needs to pace themselves so they don't hit a wall of fatigue that forces them to stop, exhausted before the finish.

In a similar way to someone who sprints at the start of a marathon then burns out, I've seen many people enter the conservation sector and/or work for community legal centres who work extremely hard in poorly paid roles, only to leave the sector, exhausted (or looking for a job that pays more money) after a few years.

If you study law in your early 20s, you should expect your career will last around 40 years. If you work to protect the environment and our community as a climate litigator, you will waste a huge amount of the potential contribution you can make to protecting the world if you burn yourself out after a few years.

You need to pace yourself and think about the long-term. There will be periods when you are extremely busy, working weekends and late into the night but they should be the exception, not the norm. If they are the norm, you risk burning yourself out early. If you do, that will be a huge loss of your potential contribution over the lifetime of your career. Pace yourself, see your career as a marathon lasting 40 years, not a sprint that will be over in a few years.

An important part of pacing yourself for this marathon is to look after your mental well-being and only engage with what you feel capable of doing and at a pace you can cope with. You need to be very aware of your personal mental state and take ownership of it.[15] Problems like depression and anxiety are various and complex, often overlapping with multiple parts of your life. Pace yourself and take care of your mental well-being amidst all of the complexity and pressures of your life and your career.

In her inspiring book, *A Field Guide to Climate Anxiety*, Sarah Jaquette Ray talks of resisting burnout by practising self-care so that you can heal and prioritise daily. She lists among the most effective methods of self-care practical things such as: get enough sleep; foster a support network; celebrate successes; and seek beauty and pleasure.[16] These ideas reflect a strategy I call "recharge regularly".

3 *Recharge regularly*

Coupled with seeing your career as a marathon and pacing yourself, another strategy for surviving is to recharge yourself (and your spirit) regularly. Five very practical things you can do to recharge are to:

- get enough sleep;
- exercise;
- spend time with your friends, your family and doing things you love;
- take weekends off (turn off the news) and take holidays;

[15] I thank a former student of mine for raising these points with me on an anonymous basis.

[16] Sarah Jaquette Ray, *A Field Guide to Climate Anxiety: How to Keep Your Cool on a Warming Planet* (University of California Press, 1st ed, 2020) 132.

- connect, collaborate with, and be inspired by others on a similar journey.

These strategies are commonly recommended by psychologists and groups helping people cope with anxiety, depression and burnout both in general,[17] and specifically in relation to climate change.[18] Sarah Jaquette Ray calls them "self-care" to heal and avoid burnout.[19]

These seem obvious, but they are easy to forget in the pressure of a busy career. Early in my career as a barrister I would routinely work through the weekend and for several years did not take holidays because there was always something urgent that I felt I had to prepare for. After a few years I realised that even if I did take time off, I felt guilty about not being at work. I realised that was a red flashing light warning me what I was doing wasn't healthy or sustainable. I made a conscious effort to try to work 9am-5pm Monday to Friday and to see taking time off on the weekend as a reward for solid work during the week. I go bushwalking to recharge and reconnect with nature. I also try to lock in regular, longer holidays to recharge either walking in wilderness somewhere or with my family. Like many people who work to protect the natural world, I find the solitude and peace of wilderness and nature have a tremendous revitalising effect. For me, this has been vital to surviving for two decades. I think similar strategies will be vital for you too.

You can also be recharged by connecting and collaborating with like-minded people or seeking comfort and inspiration from a community.[20] This can help greatly to overcome feelings of loneliness and isolation. So, connect with others on a similar journey.

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[17] See, eg, Beyond Blue (Website) <https://www.beyondblue.org.au>.

[18] See, eg, Ray (n 19) 132; Good Grief Network (Website) <https://www.goodgriefnetwork.org/>; Psychology for a Safe Climate, (Website) <https://www.psychologyforasafeclimate.org/>; and Is This How You Feel? (Website) <https://www.isthishowyoufeel.com/>.

[19] Ray (n 19) 132.

[20] Thanks to Jemima Jacobson, Susheena Subramaniam and Yonnie Lipshatz for this point.

4 *Accept that it is rational to despair in the face of the crises facing the Earth. Move beyond acceptance of that to work for positive change despite the potential for failure.*

This fourth survival strategy is based on the insights of Joanna Macy about despair and empowerment.[21] She writes that it is rational to feel despair in the face of the crises facing the Earth such as climate change and collapse of biodiversity; however, we need to move beyond that to work for positive change despite the potential for failure.[22] Practice active hope:[23]

- Take in a clear view of reality.
- Identify your vision for what you hope will happen.
- Take active steps to help bring that vision about.

I find this such an important and powerful insight in the context of the tsunami of science showing the unfolding climate crisis that we face now and the political gridlock stopping emergency action to solve this crisis. It is easy (and perfectly logical) to despair looking at this present reality, yet hope is an essential part of success. We all need hope and taking action is the best way to keep it alive.

As Vicktor Frankl wrote after surviving the Holocaust in World War II, our fundamental freedom is the freedom to choose how we respond to any situation and the circumstances we face in our lives, however, terrible.[24]

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[21] See Joanna Macy (Website) <https://www.joannamacy.net/main>.

[22] See, eg, Joanna Macy and Chris Johnstone, *Active Hope: How to Face the Mess We're in without Going Crazy* (New World Library, 2012).

[23] Ibid.

[24] Victor Frankl, *Man's Search for Meaning* (originally published 1946; Pocket Books, 1985).

In helping despairing inmates of Nazi concentration camps choose to fight for survival despite the atrocities committed against them daily, he said (emphasis in original):[25]

> What was really needed was a fundamental change in our attitude toward life. We had to learn ourselves and, furthermore, we had to teach the despairing men, [women and children] that *it did not really matter what we expected from life, but rather what life expected from us*. We needed to stop asking about the meaning of life, and instead to think of ourselves as those who were being questioned by life – daily and hourly. Our answer must consist, not in talk and meditation, but in right action and in right conduct. Life ultimately means taking the responsibility to find the right answers to its problems and to fulfill the tasks which it constantly sets for each individual.

We are all being asked by our lives right now what we will do to stop the climate crisis worsening. Maintaining hope is crucial for taking action to answer this enormous global challenge. As Al Gore said, "lots of people go from denial to despair [about climate change] without pausing in between."[26] The common outcome of denial and despair is that we don't take action. If we deny something is a problem, there is no need to take action because there isn't a problem to deal with. If we despair about a problem, we don't need to take action because there is nothing we can do. We need to work in between these two extremes to take action. The action of young people like Greta Thunberg refusing to surrender to catastrophe and demanding change is a great source of hope for the future. Keep in mind too the inspiring words of Nelson Mandela: "Every important change in history was impossible until it happened."

In working for the future we want, we need to provide positive solutions to address climate change, widespread biodiversity loss and poverty. We need to understand and practice in working for positive solutions that to succeed, environmental programs must be linked to jobs and poverty alleviation.[27] As the late Nobel Peace Laureate from Kenya, Wangari Muta

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[25] Ibid 98.

[26] Al Gore, *An Inconvenient Truth* (Paramount Classics, 2006).

[27] Van Jones, *The Green Collar Economy* (Harper Collins, 2008).

Maathai said: "You cannot protect the environment unless you empower people, you inform them, and you help them understand that these resources are their own, that they must protect them."

5 *Choose to use the skills and tools you have to save what you can. Choose to fight to protect the people and places you love.*

Many ecosystems are already collapsing due to climate change and further, incalculable losses are inevitable under current global policy settings[28] but we can choose to use the skills and tools we have to save what we can. Our children will inherit whatever we can save. Doing nothing, curling up into a ball and crying, will not save anything. Having said this, I curl up into a ball and cry over large losses like failing to stop the Adani Coal Mine knowing the damage that will occur. Crying and feeling immeasurable loss is natural in the reality we currently face but it should not stop you taking action.

We all have different skills and levels of ability for saving what we can in the current climate crisis. Whatever skills you have, you can choose to apply them to fight for solutions.

We need to recognise that we must fight for the future we want. It is obvious from the tsunami of scientific reports on the climate crisis the world faces while our governments continue to support unlimited exploitation of coal and other fossil fuels that being nice, passively expecting others to be reasonable and that our governments will take action necessary to prevent climate change is not working at present.

"Fighting" in this context does not mean acts of aggression but refusing to passively accept unacceptable outcomes and actively working to avoid those outcomes through any non-violent political, public and personal actions available to you. Don't accept unacceptable behaviour or government policies. Under current policies of the Australian and State governments, Australia is on course to lose the Great Barrier Reef.[29] That is simply not acceptable, and we should fight against it in any way we can.

[28] Bergstrom (n 8) and IPCC 2018 (n 7).

[29] McGrath (n 10).

As lawyers, one of the key tools we have is litigation to protect and seek remedies for our clients. For climate litigators facing large and well-resourced opponents, the litigation we work on can be a very difficult war of attrition. You will need courage and tenacity to succeed and to survive the hard losses in your career. Narrowing and avoiding disputes through negotiation and compromise are important and you should always pursue them where possible but sometimes you need to fight, and you will need courage and tenacity to do this.

In this battle to protect our climate it is not just the big wins, like *Sharma v Minister for the Environment* [2021] FCA 560, that make a difference. Even small, seemingly incremental wins can play an important role.[30] Many thousands of lawyers have roles in this fight.

Linked to this, make a spirit of service part of who you are and your future. Several years ago I was reminded of the importance of seeing our roles as lawyers in a spirt of service by Richard Bourke, an inspiring Australian lawyer working for US prisoners facing the death penalty.[31] Some self-interest is healthy, but it should not be 100% of our worldview. Humanity's strength is our ability to collaborate and support each other. We need to rekindle a spirit of service as a core of who we are as a community. We also need to actively work to change the culture of our society so that a core tenet of our culture is restoring the health of global ecosystems as the foundation for our prosperity.

[30] Justine Bell-James and Sean Ryan, 'Climate change litigation in Queensland: a case study in incrementalism' (2016) 33(6) *Environmental and Planning Law Journal* 515.

[31] See Richard Bourke's inspiring TEDx talk at TEDx Talks, 'Killing people is always wrong | Richard Bourke | TEDxSydney' (YouTube, 2 July 2015) <https://www.youtube.com/watch?v=gVSPVe4mQ5k>.

III CONCLUSION

Lawyers who care about people and the world we live in will increasingly face climate change issues in their practice. They will face the task of trying to find remedies for many clients and places who suffer damage due to climate change. The challenges of this litigation and the personal and professional pressures you will face are immense. I hope the strategies outlined in this article will help you protect your clients and society in responding to the climate crisis we face, where enormous losses are already being suffered.[32]

[32] I highly recommend Sarah Jaquette Ray's book (n 19) for more survival strategies and inspiration.

AN INTERVIEW WITH ASSOCIATE PROFESSOR JUSTINE BELL-JAMES

Thomas Moore

In this interview, Associate Professor Justine Bell-James reflects on her career in academia, specifically how she found herself in the then niche of environmental law. She discusses the growth of environmental legal practice and jurisprudence over her career, specifically the use of various legal 'tools' by practitioners in climate litigation. Finally, she discusses the tangible impact of academia, not only on developing jurisprudence, but also in impacting environmental and climate policy and decision-making. We are very thankful to Associate Professor Lewis for taking the time to participate in this interview.

What prompted or pushed you towards environmental law as the focus of your research?

I was a school student of the 1990s, when environmental issues were not a huge part of the curriculum. We did a little bit about recycling, and that was it. I was a law student of the early 2000s, and environment and climate issues were definitely something that students talked a little about, but it certainly was not as much a part of the 'collective consciousness' as it is these days.

I thought environmental law looked like an interesting elective, so I decided to do it and was very lucky to study under Professor Douglas Fisher at QUT, who is one of the 'grandfathers' of environmental law in Australia. I also got a job as a research assistant working for some academics at QUT that happened to be working on environmental law matters. It was just those things happening together that made me think environmental law was something I was very interested in pursuing. I learnt a lot more about climate change and what was happening in that space and decided that that was where I wanted to spend my time.

In terms of why I went into academia rather than practice, I was working at a boutique law firm as a paralegal at the same time as being a research assistant and I was juxtaposing the two experiences to see what I preferred to determine what I was really interested in. I had accepted a graduate job at a large commercial law firm and my plan was always to spend a few years and come back to academia.

However, the professor at QUT that I worked for happened to get a research grant just as I was finishing my law degree that had a PhD scholarship attached to it, so I decided to stay on and pursue that. I got admitted, I did my legal practice course, so I have that if I ever want to move back into practice, but I have never practiced formally as a legal practitioner.

What have been some key developments in environmental law academia, either recent or since you started your career?

I have been at UQ for just over 12 years now. I started my PhD in 2007 when Kevin Rudd became Prime Minister. This was when climate change really found its way onto the federal agenda. Environmental academia has certainly grown, and I consider myself very lucky to have started at that point of time. I was headhunted for my job at UQ because there were so few people that were qualified in that area. The Dean of the UQ Law School at that time sent me an email out of the blue to see if I was interested in a job, and I walked into a job with qualifications that would not even get me an interview these days! I was very much at the right place at the right time, I think.

In the 12 years I have been at UQ, I think environmental law as an academic discipline in Australia has grown exponentially, and the fact that I am not particularly old but am probably one of the most experienced academics in some circles demonstrates that it is a real growth area. A myriad of conferences and academic journals have begun and there are so many new threads of research that people are pursuing.

Climate change law, as well, emerged over that time as its own discipline. Back when I started, there was very little climate change jurisprudence around, and now there is an extensive body of jurisprudence in Australia. It's been a very exciting area of law to be a part of and will continue to be so into the future.

One thing I see is that a lot of academics in this space have experience in environmental law, but mostly they are focused on other areas like cultural heritage and native title. Environmental law seems to be frequently viewed through that lens.

Certainly! The academic that I worked for, who supervised my PhD, is a property lawyer. She found herself in the niche of environmental law because of its intersections with

property, and I think that is how probably a lot of the more senior academics in Australia have gotten into the area. The next generation of academics, like myself, are more environmental scholars in their own right, and have always been. I think we are now seeing people in their 20s who are purely climate law academics and started their careers in that specific space.

You spoke a while ago about how there is now a human rights focus in environmental law. Along those lines, are there any new developments other than a shift to pure climate change jurisprudence?

When you talk about academics from other disciplines becoming involved in environmental law, administrative lawyers and property lawyers have had a significant role to play in the past. With the new *Human Rights Act 2019* (Qld), I think we are seeing a lot more human rights scholars that are becoming interested. I also think corporate law is the other very big space where we are seeing developments now. So, I think we are getting a lot of pure corporate law scholars that are becoming interested in the area, which is great!

The United States Special Presidential Envoy for Climate, John Kerry, recently told the General Assembly of the 2021 American Bar Association Hybrid Annual Meeting, 'you are all climate lawyers now'.[1] I think that is a very interesting quote, because climate change is becoming a far-reaching problem that is impacting on just about every area of law now. I think, going forward, we might see even more varieties of lawyers becoming involved in the area. It is certainly something that has evolved a lot in the time I have been involved, and will continue to do so, I think.

[1] 'John Kerry to ABA: "You are all climate lawyers now"', *American Bar Association* (ABA News, 11 August 2021) <https://www.americanbar.org/news/abanews/aba-news-archives/2021/08/john-kerry-to-aba---you-are-all-climate-lawyers-now-/>.

I attended a virtual summit for environmental law last year, and I was amazed at how much of it was just about corporate law issues, such as trading blue carbon credits. It certainly was not what I envisaged environmental law to be!

Exactly! If you think about the recent New Acland case that was before the High Court,[2] it is probably one of the first climate law cases that we have had before the High Court in Australia. It was argued on purely administrative law matters! You don't necessarily see arguments on purely environmental grounds happening in these fora, but the fact that it is furthering environmental objectives is still something.

I think environmental and climate lawyers in practice, particularly in litigation, have had to be very nimble about what tools they pick up. Often, it is the corporate law and administrative law tools that you don't expect that gets the best outcome for the client and the environment.

As a final question, how do all the aspects of academia and research generally contribute to environmental law practice and jurisprudence?

There are academics whose work is contributing directly on the development of law, policy and jurisprudence. Academics at this Law School work directly with governments, law reform agencies and non-governmental organisations. We see lots of research being cited in judgments of various courts, so there is a very clear path to impact.

Where I have seen the most benefit from my own work has been in a couple of spaces. I have worked a lot with the Environmental Defenders' Office over the years, which has helped with their policy submissions as well as their litigation. I have been very lucky to have done consultancy projects for all levels of government, most recently for the Federal Government by looking at blue carbon and getting that into Australia's Emissions

[2] *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd* [2021] HCA 2. For information, see 'New Acland Coal Mine Case', *Environmental Law Australia* (Web Page) <http://envlaw.com.au/acland/>.

Reductions Fund,[3] that is, our federal climate change policy. I also chair a climate change innovation hub that is located within the Whitsundays Regional Council.[4]

Although I feel very strongly about legal scholarship and consider it is an important discipline, and I do want to contribute to broader debate and scholarship in the area, having that very tangible impact on things happening in the real world is one of the most gratifying aspects of the job.

[3] 'About the Emissions Reductions Fund', *Australian Government Clean Energy Regulator* (Web Page, 9 September 2021) <http://www.cleanenergyregulator.gov.au/ERF/About-the-Emissions-Reduction-Fund>.

[4] 'Meet the Climate Hub Advisory Panel: Dr Justine Bell-James', *Whitsunday Climate Change Innovation Hub* (Web Page, 4 June 2021) <https://www.innovationhub.whitsundayrc.qld.gov.au/news/article/9/meet-the-climate-hub-advisory-panel-dr-justine-bell-james>.

A TREATY BETWEEN AUSTRALIA AND ITS INDIGENOUS PEOPLES: RECONCILIATION VERSUS RESTITUTION?

Dr Johnathan Fulcher

Australia and none of its States made treaties with their indigenous inhabitants. This is being rectified at the State level by treaty processes. These are examined in summary as to their status at the time of writing. At the same time, the High Court having ruled on the value of native title in Griffiths v Northern Territory, many registered native title holders have moved to make compensation determination applications in the Federal Court Few States have made more than a contingency note in their balance sheets and budgets for the cost of these compensation claims. No connection has been made in State treaty processes between native title compensation and restitution payments contemplated by the treaty processes. This may be quite reasonable in a technical legal sense. However, this could also constitute a lost opportunity to make concrete restitution proposals to quantify the likely amounts required to address historic wrongs. In this sense, the politics of Mabo may be about to heat up again.

I INTRODUCTION: RESTITUTION VERSUS RECONCILIATION?

This essay examines the treaty-making being undertaken around Australia, at State level as the Commonwealth does not have a policy to engage on the *Uluru Statement from the Heart*. It builds on work already completed about why Australia requires a treaty: to ensure that alleged European acquisition of sovereignty over the Australian continent has a solid domestic legal foundation, as well as an international one. It argues that a significant opportunity is being squandered in the current debate about these issues.

That opportunity involves placing compensation for loss of land and sovereignty by Australia's Indigenous Peoples at the centre of treaty discussions. Currently, the provision in State and Federal budgets for such compensation is focussed more narrowly on native title compensation. It is also a contingent liability, one that at present is difficult if not impossible to quantify with any degree of accuracy. This is the sleeper economic issue of our times. It also looms to become a massive social and political issue. As the pace of determination of native title compensation increases, pressure on Government budgets already facing unprecedented COVID-related stress will mount even further. There is a window, still open, by which these issues might be addressed now.

But many Governments are avoiding the subject and treating negotiations towards a treaty as an exercise in reconciliation, not restitution. This just "kicks the can" of reckoning in relation to these issues "down the road".

Ultimately, leaders hope that a reconciliation approach will be enough to avoid social and political conflict over treaties. But, as we have seen from other jurisdictions such as Canada and New Zealand, this is the triumph of hope over experience. The window to address restitution fully now is not closing at present, but the window can't be open forever. Once the treaty processes based on reconciliation are finalised, it will be more difficult politically to address restitution.

Calls for restitution will not go away, as we have seen in other countries. The debate over reparations for slavery has gathered pace in the United States (**US**) in recent years, despite changes in political climate and Government debt levels never seen before. This is an analogous situation which demonstrates the political and social conflict inherent in differences in black and white experiences within these nations. Australia has not been, is not and will not be able to escape this conflict. It may not be as explosive as the "Black Lives Matter" protests in the US in the last two years. In British Columbia, the Canadian Province, native title claims and treaty claims have been litigated and fought by the Provincial Government for generations. Now, however, the province has embraced the United Declarations on the Rights of Indigenous Peoples (**UNDRIP**) by passing legislation in November 2019 to recognise it.[1] The legislation requires the provincial government to take all necessary measures to ensure that, in consultation and cooperation with the Indigenous Peoples of BC, provincial laws are consistent with UNDRIP. But deep divisions over race still lie just below the surface of in Canadian, New Zealand and Australian political and social life, and will rise to the surface as they have periodically for decades.[2]

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[1] *United Nations Declaration on the Rights of Indigenous Peoples Act 2019 (BC)*: in part, this Act will allow First Nations in BC to be equal partners with Government in assessing approvals for major developments, including mining.

[2] Rise of One Nation in the mid-1990s, the Culture Wars, the Adam Goodes incidents, to name but a few. See also Tim Soutphommasane et al, *"I'm Not Racist, But…": 40 Years of the Racial Discrimination Act* (New South Publishing, 2015).

II THE LEGAL BASIS FOR THE ESTABLISHMENT OF DOMESTIC SOVEREIGNTY IS NOT SETTLED

One of these fault lines is the legal conflict over settlement by Europeans in Australia. Legal and historical scholars have for many years now questioned the basis of European claims to sovereignty and dominion over the soil of the whole country. I have tried to summarise some of this work in two short articles which attempt to establish ten propositions which demonstrate just how shaky those legal foundations were, and therefore are.[3]

III TEN PROPOSITIONS WHICH RENDER CLAIMS TO DOMESTIC SOVEREIGNTY BY AUSTRALIAN GOVERNMENTS UNSAFE

Briefly these 10 propositions are:

1. *Terra nullius* (land without an owner) is a concept with its origins in Roman natural law, as does *territorium nullius* (country with no internationally recognised sovereign). This in turn is based on the Roman law idea of the first taker: that which is captured by the first or original taker becomes his or her property. The land of a country with no internationally recognised sovereign passed in law to the occupiers: the Indigenous inhabitants owned the soil.

2. Initially the concept of *terra nullius* was used in the 16th century to justify Indigenous rights to land, as land occupied by them was considered already owned by the first taker. That land was not therefore 'desert and uninhabited' for the purposes of international sovereignty law at the time. In 19th century NSW, this was not accepted by the Supreme Court. In *Attorney-General v Brown*[4] Crown sovereignty grounded absolute beneficial ownership in the Crown. The status of Indigenous inhabitants as 'first takers' was ignored. Instead, the Crown was considered 'first

[3] Jonathan Fulcher, 'A short legal justification for a treaty between Australia and its Indigenous peoples – Part 1' (2018) 2(8) *Australian Energy and Resources Law Bulletin*; 'A short legal justification for a treaty between Australia and its Indigenous peoples – Part 2' (2018) 2(9 and 10) *Australian Energy and Resources Law Bulletin*.

[4] (1847) 1 Legge 312.

taker'. This led to subsequent court decisions, notably a Privy Council decision in *Cooper v Stuart* (1889), using the word 'practically' to qualify the phrase 'desert and uninhabited', thus by a simple adverb, Indigenous rights to land as first taker were airbrushed from the law.

3. The Renaissance view of Indigenous inhabitants as first takers was turned on its head in the 19th century scramble for Africa by European powers. It was explicitly racist: land could nevertheless be considered *terra nullius* if the Indigenous inhabitants were "so low in the scale of social organisation that their usages and conceptions of rights and duties are not to be reconciled with the institutions or legal ideas of civilised society."[5]

4. But *terra nullius* was not used by the British Crown to justify the acquisition of territory in Australia. In *Attorney-General v Brown*, the Court wrote: "… in a newly discovered country, settled by British subjects, the occupancy of the Crown is no fiction…. Here is a property, depending for its support on no feudal notions or principle".[6]

5. In *Cooper v Stuart*, the Privy Council was influenced by the reversal of the basis on which Indigenous peoples' rights a first takers were recognised, during the scramble for Africa. In 1971, *Cooper v Stuart* was cited as the precedent which prevented Justice Blackburn in *Milirrpum v Nabalco* from recognising Indigenous rights to land in Australia.

6. But by the early 1970s, international law had swung back again. In a retreat from the Southern Rhodesian decision, the International Court of Justice returned to establishing Indigenous land rights on the basis of the first taker doctrine. This enabled by Mr P Coe, in *Coe v Commonwealth*, to discredit the notion of *terra nullius* insofar as he alleged that Roman law idea had grounded British justifications for the acquisition of absolute beneficial ownership of Australian land by the Crown.

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[5] *In Re Southern Rhodesia*, cited in Fulcher (n 3).

[6] Cited in *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 27.

7. This is why, wrongly, the *Mabo* decision was said to overturn *terra nullius* as the justification for Crown acquisition of all the land in Australia when it acquired international sovereignty recognition by settling the country. As their Honours Deane and Gaudron put it in their judgment in *Mabo*, all of the Australian cases asserting absolute beneficial ownership of all waste lands by the Crown are ultimately "little more than bare assertion."

8. To justify the acquisition of land in Australia, the British combined the common law notion of settlement (from Blackstone), an argument of Indigenous rights to land where the Indigenous people were in "actual occupation", and a scale of civilisation framework borrowed from both the Lockean idea of property rights being generated from labour mixing with the soil and the Scottish moral philosopher's four stages of civilisation arising out of political economy (hunter-gatherers, agriculture, mercantilism and industrialisation). Despite New Zealand's (**NZ**) Treaty of Waitangi, this idea of actual occupation coupled with the labour theory of property was applied not just by British settlers and the Crown in Australia (where no treaties were made by the Crown) but by the Crown in New Zealand as well. Like the qualification to the phrase 'desert and uninhabited with the word 'practically', the adjective 'actual' to describe 'occupation' was open to serious dispute. In NZ it was used as phrase in the 1844 Select Committee on NZ. In South Australia, the *Letters Patent* instructed the Protector of Aborigines to confine the legal meaning of Indigenous rights to land to "cover only lands used for cultivation, fixed residence or 'funereal purposes'."

9. As a result of the preceding propositions, neither conquest, cession by treaty nor settlement establishes an incontestable legal relationship to property of each State or Territory in the lands those jurisdictions encompass.

10. A political compact or settlement which addresses past wrongs, establishes a proper basis for the acquisition of land by the Crown, and settles the compensation which is required to seal that compact between the States, the Territories and the Commonwealth on the one hand, and the Indigenous peoples of Australia on the other, should now be actively debated by Australian society at large, not just by

academics and elites. Only then can the Crown in each of its capacities in Australia establish a legal relationship between its claims to sovereignty and rights in the land. This issue will not go away.

IV TREATY PROCESSES JURISDICTION BY JURISDICTION

So, what is going on in the treaty space around the country? At first glance, it is not all doom and gloom. Several States have commenced the development of treaty frameworks to conduct dialogues in their jurisdiction leading to a treaty between black and white citizens of those States. First thing to note, however, is a distinct lack of bipartisanship on these dialogues. Until early June 2021, not one conservative State, Federal or Territory Government has commenced treaty dialogues. In early June, the then NSW Premier embraced the *Uluru Statement from the Heart* and urged the Commonwealth to change tack on the issue. Nevertheless, no formal talks have as yet begun around a treaty in NSW. All States and Territories developing treaties are Labour States and Territories. In South Australia (**SA**), when it came to power recently the Liberal Government stopped the treaty process begun by Labour. Interestingly, Gladys Berejiklian was quoted in *The Herald* on 8 June 2021 as saying that all referenda which had succeeded had bipartisan support, and all had been championed by the Liberal Party. So, she urged the Commonwealth to act on a treaty process.

A Queensland

But this hardly constitutes ideological consensus on the issue. The Uluru Statement[7] seems to have prompted Labour States into action, likely as much to do with the Liberal Party under Malcolm Turnbull's rejection of it as it was fulsome support for reconciliation. In Queensland, the Labour Government issued a Statement of Commitment in July 2019. It sought to reframe the relationship between the State Government and Indigenous Queenslanders. Local decision-making agreements were developed in different regions to ensure a full canvassing of Indigenous voices. From October to December 2019, a Treaty

[7] 'The Uluru Statement from the Heart', *The Uluru Statement* (Webpage) <https://ulurustatement.org/the-statement>.

Working Group toured country Queensland to consult, and an Eminent Panel was appointed to receive and comment on the report from the Treaty Working Group. COVID-19 seems to have arrested the progress of discussions, but they have been funded and a framework for ongoing dialogue is being established.

The idea in Queensland is to have "raw and open" truth-telling at community fora. A First Nations Treaty Institute for ongoing research is proposed. A First Nations Treaty Future Fund is also proposed, for the redress of the baleful effects of colonisation and dispossession. It is unclear if funding has commenced for this as yet, due to the cost pressure placed on the budget in managing the COVID pandemic response. A Treaty Tribunal to hear disputes relating to treaty discussions and implementation is also proposed. To get 'treaty- ready', all of this needs a public awareness campaign, capacity-building of the Government as well as Indigenous people and communities. Three possible treaty models have been proposed: first, a State-wide treaty; second, community-level treaties for each First Nation; or third, an umbrella State-wide agreement with local-level agreements. While it is true that reparations and restitution are explicitly to be considered by these agreements, native title compensation is not included and is not mentioned. This points to a legalistic stance being taken by the State, which is contract to the manner in which Victoria is proposing to handle these issues.

B Victoria

Victoria has passed legislation to advance treaty-making in that State.[8] The purposes of the Act are stated to be:

1. "To advance the treaty process between Aboriginal Victorians and the state.
2. To establish that the Aboriginal Representative Body will be the sole representative of Aboriginal Victorians, as recognised by the state, for the purpose of establishing the framework necessary to support future treaty negotiations.
3. To enshrine principles of the treaty process.

[8] *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic).

4. To require that the Aboriginal Representative Body and the state to work together to establish elements necessary to support future treaty negotiations."

A Treaty Advancement Commissioner was appointed and charged with the task of creating the First People's Assembly, which in turn was to lay down the ground rules for treaty negotiations.

The First Nations Assembly met at the end of 2019, starting the second phase of the process. The Treaty framework involves four elements:

1. Treaty Authority;
2. Treaty framework;
3. Self-determination fund; and
4. Dispute resolution mechanisms

Phase 3 involves the negotiation of treaties to recognise historic wrongs, promote reconciliation and "other benefits" This phase has not yet started (caused by COVID-19 delays). The principal function of the First Nations Assembly will be to administer the self-determination fund to ensure a level playing field between the Government and Indigenous negotiators. As can be seen, there is explicit attention in these structures to restitution for as well as recognition of historic wrongs.

C Northern Territory

In the Northern Territory, the Government has provided very useful graphical representations of the treaty process there.[9] It was a process established by the Barunga Agreement, which set up a Treaty Commission to conduct consultation about a treaty framework and steps towards making a treaty. The Agreement expressly recognises that "recognises that the First Nation Peoples of the NT never ceded sovereignty of their lands, seas or waters and previously self-governed in accordance with their traditional laws and customs."

[9] They are replicated here at pages 66 and 71 <https://treatynt.com.au/__data/assets/pdf_file/0008/906398/treaty-discussion-paper.pdf>.

D Australian Capital Territory (**ACT**)

Currently in consultation mode, by the end of 2021 the Northern Territory expects to have a solidified framework and negotiation model for negotiating a treaty. In the Australian Capital Territory, the same extensive development process for a treaty is underway. Since 2018, the ACT Government released its ACT Aboriginal and Torres Strait Islander Agreement 2019 – 2028 which "sets out the direction of Aboriginal and Torres Strait Islander Affairs" for the next decade. The areas of focus under the Agreement in relation to a treaty are:

1. lifelong learning;
2. cultural integrity;
3. justice;
4. economic participation;
5. children and young people;
6. health and wellbeing;
7. inclusive community;
8. housing;
9. connecting the community; and
10. community leadership.

Phases have been set which coincide with the elections of the Aboriginal and Torres Strait Islander Elected Body (**ATSIEB**).

Phase One	February 2019 – December 2021
Phase Two	January 2022 – December 2024
Phase Three	January 2025 – December 2027
Phase Four	January 2028 – December 2028

The first phase involves reporting progress and outcomes against each of the topics listed above (in a manner similar to the Commonwealth' *Closing the Gap* annual reporting). The current report is vague in its assessment of progress, but again that may have much to COVID-19 disruption.

E Western Australia

In the west, a different and interesting path has been taken by the State of Western Australia. It has entered into long-term native title settlements covering several First Nation peoples, including the Noongar People (South West WA) and the Yamitji Nations (Geraldton). No doubt the Government is considering this for the Pilbara if not the Kimberley. In short, these settlements can be characterised as buying native title by way of comprehensive compensation agreements to further and enable development without further reference to native title. As the resulting agreements are registered as Indigenous Land Use Agreements under the *Native Title Act 1993 (Cth)* (**NTA**), s 49 of the NTA applies (compensation is only payable once for essentially the same act). This means that WA is dealing with its compensation liability at the same time as developing these comprehensive regional settlement agreements. But they do not, as far as it is possible to determine due to confidentiality restrictions in viewing these agreements, address past wrongs and the wholesale impacts of colonization. All other treaty processes that propose a payment for past dispossession keep native title compensation separate from monies paid for historical wrongs.

F New South Wales, South Australia and Tasmania

The Coalition has not embraced the treaty idea like their Labor counterparts. The apparent change of heart about a treaty has already been noticed in NSW, but unlike the other States and Territories summarised above, no formality or framework has yet been commenced in NSW. The SA Labor Government entered into a service level agreement with the Indigenous people of the Yorke Peninsula in 2018, but this was discontinued when the Liberal Government came to power. No treaty discussions are happening currently in SA under the Liberal Government of Stephen Marshall. This is remarkable because SA has historically been a leader amongst the States in progressive Indigenous affairs. Tasmania believes treaty-making is a Commonwealth responsibility, although there has been some expression from the Government in 2019 about a "reset" of the Government's relationship with its First Nations people.

G Commonwealth

Perhaps the least progressive Government when it comes to treaty making is the Commonwealth. At a press conference on Thursday 18 March 2021 at Parliament House in Canberra, the Prime Minister was questioned regarding his willingness to consider a referendum to enshrine a voice into the Constitution. "It has never been the Government's policy to have that process enshrined in the constitution,"[10] replied the Prime Minister. "That never has been the Government's policy. I think that is pretty clear. It is not the Government's policy." The Prime Minister ruled out the option of a referendum. The Prime Minister Scott Morrison then claimed there was no mainstream support for constitutional recognition.[11] It seems as though we are a long way as a nation from fundamental recognition of Indigenous peoples as first takers.

H International contexts: New Zealand

In other countries, these issues have been no less protracted. But different attitudes have fostered different outcomes. New Zealand was founded on the Treaty of Waitangi in 1840. As we have already seen, the Crown and Maori people saw this treaty very differently in its early stages. The Treaty of Waitangi contains three main articles:

1. The Maori signatories' acceptance of the British queen's sovereignty in their lands;
2. The crown's protection of Maori possessions, with the exclusive right of the queen to purchase Maori land; and
3. full rights as British subjects for the Maori signatories.

[10] Ken Wyatt, the Minister for Indigenous Affairs, had been promising a referendum on the Voice to Parliament proposed by the Uluru Statement.

[11] Rachel Knowles, 'Prime Minister says no 'mainstream support' for constitutional recognition, ignores Uluru Statement', *National Indigenous Times* (online, 19 March 2021) <https://nit.com.au/prime-minister-says-no-mainstream-support-for-constitutional-recognition-ignores-uluru-statement/>.

The Crown has been found to have breached the treaty over time, so the Waitangi Tribunal was established in 1975 to investigate and make recommendations on claims brought by any Maori person regarding a disadvantage by "any legislation, policy or practice of the Crown since" the signing of the Treaty.

The Waitangi Tribunal cannot enforce law, so it makes regular reports to Parliament. Disadvantages found by the Tribunal are consider by it to be breaches of the Treaty. These breaches are then negotiated with the Crown through the Office of Treaty Settlements. As of August 2018, 73 settlements had been reached at a cost of 2.2 billion NZD. There are still 53 settlements outstanding.

That is a lot of fiscal work to do. If anyone thinks that a treaty will not lead to difficulties, disputes and rising costs, they should think again. However, a treaty framework, properly implemented, funded and followed, with dispute resolution provisions is a significant improvement on uncapped and contingent liabilities for dispossession, native title compensation and the redress of historical wrongs. In Waitangi, there are three components to settlements:

1. An historical account: an agreed statement of facts of the wrongs to be redressed;
2. Cultural redress: vesting of lands of cultural significance to an Iwi, joint management, place name changes, protocols for full involvement on Government departments' decision-making, legal personhood for natural features (e.g. Wanganui River); and
3. Commercial redress: cash, the acquisition of government properties within the claimant group's area of interest, rights of first refusal to purchase government properties in the future, or the acquisition of Crown forestry land and the accumulated rentals from forestry licenses.

I International Contexts: Canada

In Canada, too, treaty management over several centuries has not been handle well at all times. The Royal Proclamation of 1763 recognised the role Indigenous tribes played in supplying fur to the British and assisting them in their war with the French. It created a fiduciary relationship between the Crown in Canada and its First Nations. The treaties (there

were 280 treaties entered into between 1680 and 1890) recognized the right of Indians to unceded lands in their possession and evidenced that such rights can only be ceded to the Crown. Many of the earliest treaties seem to embody the origin of the phrase "beads and mirrors."

One such example should suffice to demonstrate this: the Quebec Treaty 2, of June 1790. In return for renouncing all claims in perpetuity to the land, the Chippewa and other Nation received 1200 pounds and 800 or so pairs of blankets, yards of different coloured cloths, ribbon and thread, black silk handkerchiefs, hats, kettles, knives, guns, ball and shot, flints, 30 dozen mirrors, scissors, pen knives, fishhooks, ivory and horn combs, rum, a cow, tobacco and something called cuttcaw knives.[12]

The parties to these arrangements had very different ideas about the effect of entering into them. The Crown thought it was gaining territory by treaty, the extinguishment of all Aboriginal title and subjecting the treaty nations to the authority of the Crown. The Crown's representatives over successive decades relied on the literal, written treaty to ascertain its meaning.

Indian treaty nations, on the other hand, saw the treaties as an affirmation of nationhood, a set of solemn, oral and mutual promises to coexist in peace and for mutual benefit. The First Nations tended to emphasise the oral arrangements accompanying the written treaty as the true reflection of the consensus reached by the parties. They sought to enforce the idea of the Honour of the Crown.

This Honour has been recognised by the Canadian courts and the fiduciary obligation owed by the Crown frames much of the Canadian land rights jurisprudence. But that Honour has been abrogated many times under many treaties. It has led to calls for Indigenous sovereignty to be recognised: "for Indians, sovereignty is a matter of the heart – not an intellectual concept", said Youngblood Henderson, Cree activist and lawyer. Sovereignty is an instrument to check the intrusion of external authority and power into Indigenous social and political structures and territory, designed to be asserted to exclude the Canadian

[12] Canada, *Indian Treaties and Surrenders Volume 1: from 1680 to 1890* (Fifth House, 1992) 1-4.

Government from their lives and lands. These calls frame and encourage as well as echo the Australian calls for a treaty.

V CONCLUSION: HOW SHOULD WE AS AUSTRALIANS WORK THIS OUT?

How we as Australians approach these issues around treaty-making matters. That is not just because of the past wrongs suffered by our First Nation peoples. It is because our legal system needs a proper legal foundation to underpin the Europeans' claim to be on this continent lawfully. If as lawyers and as a nation we believe in the rule of law, then we must address this issue.

We need several things to happen in order to get there. We need to heed Gladys Berejiklian's recent call for bipartisanship on this fundamental issue. We do not have that yet, despite her recent change of heart and statement that "this is an issue all of us should be united on."[13] We need more education for ordinary Australians about these issues of law and land rights. We should also be considering, like some States have, reparations as well as reconciliation for the healing of past wrongs. In Queensland's consultation rounds, reparations were consistently called for by Aboriginal Queenslanders. Western Australia has a different approach but may end up paying twice: once for native title and again for dispossession for those not beneficiaries of the native title compensation. If the treaty processes do not sufficiently consider reparations, the issue may haunt the nation for years to come. A contingent liability may remain on Government balance sheets even for those States that have comprehensively addressed native title compensation.

COVID-19 and climate change may leave a massive intergenerational equity issue for subsequent Governments to deal with. But they are issues only two years and one or two generations old respectively. The fact that Governments are only now addressing the inequities around dispossession and native title compensation is an issue that each generation for 200 years has "kicked down the road." These are not legacies our children

[13] Rob Harris, 'Gladys Berejiklian backs the Voice, urges embrace of Indigenous reconciliation', *Sydney Morning Herald* (online, 8 June 2021) <https://www.smh.com.au/politics/federal/gladys-berejiklian-backs-the-voice-urges-embrace-of-indigenous-reconciliation-20210608-p57z7f.html>.

want or need to handle. They will have enough on their plate for any generation to handle. We should try to fix this land rights issue comprehensively now.

TREADING WATER ON INDIGENOUS WATER RIGHTS: THE SERIOUS DEFICIENCIES OF WATER ALLOCATION PLANNING AND MANAGEMENT IN NSW UNDER THE MURRAY DARLING BASIN PLAN

Sue Jackson, Emma Carmody And Lana Hartwig

Structural changes made to the Australian water sector since the 1990s have not engaged substantively with Indigenous interests in water, notwithstanding the inclusion of customary rights to water as an incident of native title. The modest policy and regulatory changes made in response to the Mabo decision have failed to address Indigenous water dispossession and, in the Murray-Darling Basin, more recent reforms to Commonwealth water law and policy continue to privilege the interests of non-Indigenous land and water entitlement holders. Indigenous rights and interests are, for the most part, treated as tokenistic 'ornamental extras' in the Water Act 2007 (Cth) and its delegated instrument, the 2012 Murray-Darling Basin Plan. We reviewed 10 surface and groundwater plans from NSW submitted for accreditation under the Basin Plan. NSW was selected because it has the largest Indigenous population of Basin jurisdictions. Indigenous peoples in this part of the Basin comprise almost 10% of the population yet currently own a mere 0.2% of available surface water. We assessed the publicly available water resource plans against the procedural requirements of the Basin Plan which refer to the five inter-related sets of obligations: identifying certain matters; having regard to certain matters; specifying opportunities to strengthen and protect; providing a minimum baseline of legal protection; and consulting about certain matters. Our analysis highlights not only the limited nature of the provisions in the Water Act, but the poor performance of NSW in satisfying even these weak obligations. We argue that opportunities to redress the dispossession of Aboriginal water rights in NSW are being forgone through the implementation of this major reform and that Basin governments have a moral obligation to exceed the minimalist requirements of the current water allocation framework.

I INTRODUCTION

The Murray-Darling Basin (**MDB**) encompasses the territories of forty autonomous Indigenous (First) Nations and the region is home to approximately 15% of Australia's Indigenous population.[1] River valleys and their networks of waterways provided natural enclaves for Indigenous societies who over successive centuries of occupation vested the Basin's land and waterways with religious and cultural significance.[2] Through various livelihood strategies, tenurial arrangements and ritual practices, lands and waters were managed sustainably for millennia. Group or joint property rights over land and water regulated access to territory, including rivers and waterholes, and natural resources.[3] In contrast, water sharing in the relatively short settler colonial era (1770 to present) has been the source of intergovernmental and interpersonal contestation and conflict,[4] and in the stories told about the success of agriculture in the MDB,[5] the disastrous and often violent impact of the imposition of settler laws and land uses on First Nations is largely overlooked.

As a nation, we are now more willing to acknowledge that the introduced systems of water regulation have resulted in serious environmental degradation and in some instances, near-ecological collapse.[6] Many Australians support the successive waves of water reform and

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[1] Lana Hartwig, Francis Markham, and Sue Jackson, 'Benchmarking Indigenous water holdings in the Murray-Darling Basin: A crucial step towards developing water rights targets for Australia' (in press) *Australasian Journal of Water Resources*.

[2] Jessica Weir, 'The traditional owner experience along the Murray River' in Emily Potter, Stephen Mackenzie, Alison Mackinnon and Jennifer McKay (eds), *Fresh Water: New Perspectives on Water in Australia* (Melbourne University Press, 2007) 59.

[3] Phillip Allen Clarke, 'Aboriginal Culture and the Riverine Environment' in John Jennings (ed), *The Natural History of the Riverland and Murraylands* (Royal Society of South Australia, 2009) 146-147.

[4] Daniel Connell, *Water politics in the Murray-Darling Basin* (Federation Press, 2007); Lee Godden and M Gunther, 'Realising capacity: Indigenous involvement in water law and policy reform in south-eastern Australia' (2009) 20(5) *Journal of Water Law* 243, 244.

[5] Jessica Weir, *Murray River Country: An Ecological Dialogue with Traditional Owners* (AIATSIS Press, 2010).

[6] Australian Academy of Science, Investigation of the Causes of Mass Fish Kills in the Menindee Region NSW over the Summer of 2018–2019 (Report, February 2019).

legislative changes implemented since the 1990s to reverse some of this ecological decline.[7] Far less public attention is paid to the inequitable distribution of water and the social justice implications of water allocation arrangements embedded in colonial power relations.[8] The early models of Basin water governance excluded Indigenous peoples, enabling colonial water laws to play a pivotal role in their dispossession[9] and giving rise to an enduring system of water governance that Hartwig et al. describe as 'water colonialism'.[10] Major structural and distributive changes introduced to the water sector in the 1990s and early 2000s did not engage substantively with Indigenous interests in water, notwithstanding the inclusion of customary rights to water as an incident of native title.[11] Since then, modest policy and regulatory changes have largely failed to address Indigenous water dispossession,[12] instead perpetuating the status quo which privileges the interests of non-Indigenous land and water entitlement holders.[13]

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[7] Barry Hart et al, *Murray-Darling Basin, Australia: Volume 1: Its Future Management* (Elsevier, 2020).

[8] Sue Jackson, 'Enduring injustices in Australian water governance' in Anna Lukasiewicz, Stephen Dovers, Libby Robin, J M McKay, Steven Schilizzi and Sonia Graham (eds), *Natural Resources and Environmental Justice: The Australian Experience* (CSIRO Publishing, 2017) 121-132; Virginia Marshall, *Overturning Aqua nullius: Securing Aboriginal Water Rights* (Aboriginal Studies Press, 2017); Jessica Weir, 'Water Planning and Dispossession' in Daniel Connell and R Quentin Grafton (eds), *Basin Futures: Water Reform in the Murray-Darling Basin* (ANU E Press, 2011).

[9] Marshall (n 8); Weir, 'Water Planning and Dispossession' (n 8).

[10] Lana Hartwig et al, 'Water colonialism and Indigenous water justice in south-eastern Australia' (2021) *International Journal of Water Resources Development* 1.

[11] Lee Godden, Sue Jackson and Katie O'Bryan, 'Indigenous water rights and water law reforms in Australia' (2020) 37(6) *Environmental Planning & Law Journal*, 655; Poh-Ling Tan and Sue Jackson, 'Impossible Dreaming - does Australia's water law and policy fulfil Indigenous aspirations?' (2013) 30(2) *Environment and Planning Law Journal* 132; Godden & Gunther (n 4).

[12] Lana Hartwig, Sue Jackson, and Natalie Osborne, 'Trends in Aboriginal water ownership in New South Wales, Australia: The continuities between colonial and neoliberal forms of dispossession' (2020) 99 *Land Use Policy* 1; Weir, 'Water Planning and Dispossession' (n 11).

[13] Weir, 'Water Planning and Dispossession' (n 8); Hartwig et al (n 10).

The *Water Act 2007* (Cth) (**Water Act** or **Act**) and its delegated instrument, the 2012 Murray-Darling Basin Plan (**Basin Plan** or **Plan**), were heralded as innovative reforms. They were also creatures of the post-Mabo era and as such presented an historic opportunity to not only set water management on a sustainable footing, but to finally advance Indigenous water rights across the MDB. Unfortunately, the moment was not seized: extractions remain unsustainably high,[14] and compliance with Basin Plan processes has been low in places, notably NSW.[15] The central statutory regimes for water use throughout south-eastern Australia continue to provide only limited recognition of Indigenous interests in their water allocation and distribution frameworks.[16] Indigenous rights and interests are for the most part treated as 'ornamental extras' in the Act, Plan and associated catchment-scale instruments known as 'water resource plans' (**WRPs**). Indeed, this latest wave of reform, much like corporate greenwashing, has been crafted to create the impression of progress – for example focusing on consultative processes – without delivering any concrete outcomes for the First Nations that span the length and breadth of Australia's largest river basin.[17]

Despite – or perhaps because of – these deficiencies, Basin states and territories (Queensland, NSW, Victoria, ACT and South Australia) have a moral obligation to exceed the minimalist requirements of the Act and Plan and to implement meaningful policies which reverse Indigenous water dispossession. This is particularly true in the NSW part of the MDB, where the amount of water held by First Nations organisations has declined by 17.2% over the past decade.[18] As a consequence, Indigenous peoples in this part of the Basin currently own a mere 0.2% of available surface water despite comprising almost 10% of the population.[19] As WRPs in NSW are yet to be finalised and accredited under the

[14] Australian Academy of Science (n 6).

[15] Godden, Jackson & O'Bryan (n 11) 665.

[16] Godden & Gunther (n 4); Tan & Jackson (n 11).

[17] Katie O'Bryan, *Indigenous Rights and Water Resource Management: Not Just Another Stakeholder* (Routledge, 2019).

[18] Hartwig, Jackson and Osborne (n 12).

[19] Ibid.

Water Act, the State Government has a genuine opportunity to move beyond the window dressing of non-binding clauses and an outdated consultation paradigm, to instead facilitate substantive change, including the redistribution of water to First Nations.

The aim of this paper is therefore to assess the progress made implementing the Indigenous related provisions of the new water allocation planning and management measures enacted by the Basin Plan in the NSW portion of the MDB. The article is organised as follows. First, we briefly introduce the water management framework of the MDB, focusing on the central role of water allocation planning. We then describe in greater detail how Indigenous rights and interests are addressed under the Water Act and Basin Plan. In the substantive section to follow we examine the available NSW Water Resource Plans submitted under the Water Act against the requirements of the Basin Plan. Recommendations for reform are made in the final section.

II THE WATER MANAGEMENT FRAMEWORK OF THE BASIN

The Water Act was passed by the Howard government at the height of the Millennium Drought (1997-2009) with the chief objective of reinstating an 'environmentally sustainable level of take' (**ESLT**) across the ailing MDB. It proposed to do this by establishing an overarching legal framework for Commonwealth governance of the Basin, a core component of which was the creation of the Murray-Darling Basin Authority (**MDBA**) and the Commonwealth Environmental Water Holder (**CEWH**). The former was charged with drafting and implementing the Basin Plan, which set limits on water extraction for each of the major catchments across the MDB; the latter with managing water licences purchased from farmers and reallocated to the environment, with this reallocation serving to achieve the new extraction limits set out in the Plan.

Basin States have continued to play a major role in surface water and groundwater allocation and management across the MDB, notably through the preparation of WRPs for defined catchments (or **WRP areas**)[20] within their territory. WRPs, which are legislative instruments,

[20] Across the Basin, there are 33 WRP areas; 19 surface water and 19 groundwater, including five which overlap both. See Murray-Darling Basin Authority, *Water resource plans – May 2021 Quarterly*

are arguably the most important element of the MDB water reform package insofar as they give effect to the core requirements of the Basin Plan (including extraction limits for surface water and groundwater resources within each catchment area). As such, they are required to comply with specific provisions in both the Water Act and Basin Plan, including in relation to 'Indigenous values and uses'. What follows is an analysis of the deficiencies of these provisions.

III INDIGENOUS 'RIGHTS' UNDER THE WATER ACT AND BASIN PLAN

While the Water Act compels the reallocation of water to the environment to reinstate an ESLT, it does not include any requirement to address the claims of First Nations for water rights. Indeed, when the statute was enacted, it failed to include an express reference to Indigenous interests in water, beyond a 'savings' provision concerning the interaction between the Water Act and the *Native Title Act 1993* (**NTA**).[21]

Several commentators have noted the limitations of the Act, including the fact that there was 'little, if any, consultation with Indigenous people in relation to its development'.[22] The Act was amended following review in 2014 and improvements were made to the Indigenous representation on the Basin Community Committee.[23] Indigenous representation was further enhanced in February 2019 when, after some delay, an amendment required the appointment of an Indigenous member to the MDB Authority.[24]

The interests of Indigenous people are acknowledged in s 21(4)(c)(v) of the Act. O'Bryan[25] notes that they are merely one of several matters in sub-s (v) to which the MDBA and the

Report (Report, June 2021) 1 <https://www.mdba.gov.au/sites/default/files/pubs/water-resource-plan-quarterly-report-may-2021.pdf>.

[21] See *Water Act 2007* (Cth) s 13.

[22] O'Bryan (n 20) 65; Godden & Gunther (n 4).

[23] *Water Act 2007* (Cth) s 202(5)(c).

[24] Ibid s 177(b).

[25] O'Bryan (n 17) 90.

Minister must 'have regard' in preparing the Basin Plan, the others being 'social, cultural, and other public benefit issues'. This is compounded by the fact that sub-s (v) itself is only one of ten matters listed in s 21 (4)(c).[26] The Basin Plan is specifically required to provide information about use of Basin water resources by Indigenous people (s 22 (1)). Godden et al 2020[27] argue that the benefit of this clause is that those uses must be ascertained, which necessarily implies consultation with Indigenous people, however there are no obligations regarding what is to be done with the information once it has been included in the Basin Plan.[28] Significantly, neither s 21 nor s 22 actively facilitates Indigenous participation in the management of the Basin's resources.[29]

Under the Water Act, State and Territory governments are responsible for developing proposed WRPs for defined water management areas,[30] which must meet the requirements stipulated in Chapter 10 of the Basin Plan. Each WRP comprises locally specific rules as to how available water is allocated at a catchment level. The rules include setting limits on water to be withdrawn from the system, the water available to the environment, and measures for compliance with water quality standards.[31] State and Territory governments submit prepared WRPs to the MDBA for accreditation, which subsequently prepares recommendations to the Commonwealth Minister as to whether the plan should be adopted[32] based on consistency with the Basin Plan.[33] Part 14 of Chapter 10 relates to Indigenous values and uses in WRPs, with this being the focus of our analysis in the next section.

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[26] O'Bryan (n 17) 91.

[27] Godden, Jackson & O'Bryan (n 11) 667.

[28] O'Bryan (n 17) 91,

[29] O'Bryan (n 17) 91.

[30] *Basin Plan 2012* (Cth).

[31] See generally, *Water Act 2007* (Cth) ss 54–70.

[32] *Water Act 2007* (Cth) s 63.

[33] Ibid s 55.

Part 14 includes requirements that relate specifically to consultation with Indigenous peoples and/or organisations within regional water management areas. These consultation requirements compel Basin States to 'have regard to' Indigenous views about a range of matters. In the preparation of WRPs, these matters may be summarised as:

- objectives and outcomes based on Indigenous values and uses (sec 10.52)
- consultation and preparation of WRPs relevant to native title matters; registered Aboriginal heritage; Indigenous representation and the encouragement of active and informed participation; social, cultural, spiritual and customary objectives, and strategies for achieving these objectives; risks to Indigenous values and uses (sec 10.53)
- cultural flows (sec 10.54)
- retention of the current level of protection of Indigenous values and uses (sec 10.55).

Section 10.54 refers to cultural flows which are a relatively new water management concept. In the 2000s, First Nations leaders across the Basin developed the concept of cultural flows 'to speak to policy-makers accustomed to the terminology of environmental flows'.[34] Weir explains that by using the word 'cultural', First Nations assert their 'distinct Indigenous identity and political status' in contests over water allocation and management.[35] The concept was formally defined in 2007 to mean 'water entitlements that are legally and beneficially owned by the Nations of a sufficient and adequate quantity and quality to improve the spiritual, cultural, natural, environmental, social and economic conditions of those Nations'.[36] This definition is acknowledged in Schedule 1 to the Basin Plan, which describes uses of the Basin's water resources, but not as a formal legislative definition that State and Territory jurisdictions are required to adopt.

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[34] Weir (n 5) 124.

[35] Ibid 244.

[36] Murray Lower Darling Rivers Indigenous Nations, *Cultural Flows* (Web Page) <https://www.mldrin.org.au/what-we-do/cultural-flows/>.

A note to Chapter 10 Part 14 sees the MDBA engage with two Indigenous water alliances within the Basin, the Murray Lower Darling Rivers Indigenous Nations (MLDRIN) and Northern Basin Aboriginal Nations (NBAN),[37] to provide advice on the adequacy of each WRP in meeting these requirements. Their advice is submitted unaltered to the MDBA members and then considered by the MDBA when it prepares its recommendations for the Minister.

As noted above, the 'obligations' arising out of Part 14 of Chapter 10 are attenuated by the use of the phrase 'have regard to'. This phrase has been subject to some considerable discussion, including in relation to Indigenous interests,[38] leading to the adoption by the MDBA of a Position Statement (referred to as 1B).[39] In that statement, the MDBA established three categories of 'obligation' arising from this phrase, ranging from consideration of the matter at hand to 'consideration' coupled with some additional descriptive material in each WRP. The matters concerning Indigenous values and uses are placed in Category A, the least onerous.

The MDB Royal Commission interpreted this Position Statement in the following terms: 'The effect is that the MDBA considers that the duty of Basin States is at the minimum level of 'have regard', with no need for WRPs to describe or explain how it was met or to include any other additional material".[40] This is consistent with High Court jurisprudence, which provides that the phrase, while requiring a decision-maker to give genuine consideration to the specified issue, does not impose an obligation to take any substantive action in relation

[37] MLDRIN and NBAN led the assessment process for the surface water and groundwater WRPs that fall in the Southern Basin and Northern Basin, respectively. Where this distinction was not straightforward (e.g., NSW MDB Fractured Rock WRP, NSW MDB Porous Rock WRP, and Darling Alluvium WRP), it was agreed that the organisation covering the area with the greater number of Nations would lead the assessment.

[38] See eg, *Royal Commission into the Murray-Darling Basin Plan* (Final Report, 29 January 2019).

[39] Murray-Darling Basin Authority, *Basin Plan Water Resource Plan Requirements – Position Statement 1B – Interpreting 'have regard to'* (Position Statement No 1B, 23 March 2017) <https://www.mdba.gov.au/sites/default/files/pubs/WRP-Position-Statement-1B-Interpreting-have-regard-to_0.pdf>.

[40] *Royal Commission into the Murray-Darling Basin Plan* (n 38) 487.

to that issue (such as acting on the basis of best-available information about Indigenous values).[41] We may therefore deduce that the phrase has been employed to avoid any consequential outcome, action, or addition to a WRP that would interfere with other, consumptive uses. It is a position supported by the conclusion of the Commissioner Bret Walker SC who considered that the MDBA's Position Statement "is suggestive of discriminatory treatment, and it must be understood as disrespectful to Aboriginal people".[42]

These shortcomings, while significant, do not prevent Basin States from taking proactive steps to introduce more substantive obligations in WRPs to address Aboriginal water dispossession. Indeed, Part 14 of Chapter 10 includes a provision which invites Basin States to (at their discretion), 'strengthen protection of Indigenous values and uses' in their respective WRPs.[43] However, and as we will show for NSW at least, Indigenous 'values and uses' are not given proper and genuine consideration and protection is certainly not bolstered in any meaningful fashion.

IV NSW WATER RESOURCE PLANS AND THE INDIGENOUS SPECIFIC REQUIREMENTS OF THE BASIN PLAN

At the time of writing, NSW – which is responsible for preparing the greatest number of WRPs – is the only Basin government that has not had its plans accredited and made law. Having benefited from several extensions, it finally submitted all 20 of its draft WRPs to the MDBA between March and June 2020.

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[41] See eg, *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507, 540 [105], in which Gleeson CJ and Gummow J stated that the phrase required decision-makers to give "genuine" consideration to the prescribed factors and "to bring to bear on those issues a mind that was open to persuasion."

[42] *Royal Commission into the Murray-Darling Basin Plan* (n 37) 487.

[43] *Basin Plan 2012* (Cth) cl 10.52(3).

However, by April 2021 it became apparent that most WRPS would need to be withdrawn due to inconsistencies with the Basin Plan[44] and by the time of publication, NSW had withdrawn 17.[45]

While WRPs must meet the requirements set by the Basin Plan, the process and formulation of doing so is up to each State and Territory.[46] Rather than stand-alone plans, the NSW WRPs operate like a large compendium, directing readers to clauses and sections of numerous Schedules, Attachments, and other instruments to demonstrate compliance with each Basin Plan requirement. With NSW WRPs containing up to 10 Schedules, some around 300 pages in length,[47] they are long and complex documents.

NSW's approach to WRPs relied heavily on its established water management framework; specifically, its Water Sharing Plans (**WSPs**). WSPs set rules for how water is to be distributed between different uses of a defined water source (such as town supply, rural domestic supply, stock watering, industry, irrigation, and the environment) and are legally binding under the *Water Management Act 2000* (NSW).[48] Importantly, WSPs operate independently from WRPs under state laws. But, in preparing WRPs, NSW reviewed and amended and/or replaced its WSPs to address some Basin Plan requirements, including alignment with WRP areas.[49] Some of these amended WSPs have been gazetted in NSW under state water laws, despite the fact that they have not yet been accredited for the

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[44] Emma Carmody and Huw Calford, 'NSW's Overdue Water Resource Plans Hampered by Further Delays', *Environmental Defenders Office* (Blogpost, 23 April 2021) <edo.org.au/2021/04/23/nsws-overdue-water-resource-plans-hampered-by-further-delays/>.

[45] Murray-Darling Basin Authority, 'Murray-Darling Basin Authority Communique', *Australian Government* (Communique, 31 August 2021) <https://www.mdba.gov.au/media/mr/murray-darling-basin-authority-communique-30AUG2021>.

[46] 'Murray-Darling Basin Authority', *Water Resource Plans* (Web Page) https://www.mdba.gov.au/basin-plan-roll-out/water-resource-plans.

[47] These specific examples are taken from the Macquarie Castlereagh Surface Water WRP but are typical of other surface water WRPs.

[48] *Water Management Act 2000* (NSW) ch 2 pt 3.

[49] For example, separate WSPs now exist for unregulated systems and groundwater systems, whereas previously, these were combined.

purposes of the Water Act[50] (and may not satisfy the requirements of the Basin Plan, which would, *inter alia*, give rise legal concerns of a constitutional nature).[51] One or more WSP is accordingly attached to each NSW WRP in Schedule A.

We reviewed 10 of NSW's surface and groundwater WRPs[52] submitted for accreditation and available on the MDBA website (as of June 2021). We assessed them against the requirements of the Basin Plan listed in Table 1 which refer to five inter-related sets of obligations: identifying certain matters; having regard to certain matters; specifying opportunities to strengthen and protect; providing a minimum baseline of legal protection; and consulting about certain matters.

[50] See for example the *Water Sharing Plan for the Barwon-Darling Unregulated Water Source 2012* (NSW).

[51] By virtue of the operation of *Australian Constitution* s 109.

[52] Barwon-Darling Watercourse; Intersecting Streams; Macquarie Castlereagh (surface water); Macquarie Castlereagh (alluvium); Darling Alluvium; Lachlan Alluvium; Murray Alluvium; MDB Fractured Rock; Murrumbidgee Alluvium; Great Artesian Basin Shallow.

Section of Chapter 10, Part 14	Requirement of a water resource plan
10.52(1)(a)	Identify objectives of Indigenous people in relation to managing the water resources of the WRP area
10.52(1)(b)	Identify outcomes for the management of the water resources that are desired by Indigenous people
10.52(2)	In identifying these objectives and outcomes, regard must be had to Indigenous peoples' social, spiritual and cultural values and uses of the water resources of the WRP area, as determined through consultation
10.52(3)	A person or body preparing a WRP may identify opportunities to strengthen protection of Indigenous values and uses
10.53	A WRP must be prepared having regard to the views of relevant Indigenous organisations with respect to these matters: native title; cultural heritage; Indigenous representation; social, cultural, spiritual and customary objectives and strategies for achieving these; active and informed participation; and risks to Indigenous values and uses.
10.54	A WRP must be prepared having regard to the views of Indigenous people with respect to cultural flows
10.55	A WRP must provide at least the same level of protection of Indigenous values and uses as provided in a) A transitional WRP for the WRP plan area b) An interim WRP for the WRP plan area

Table 1. Requirements of WRPs relating to Indigenous interests

In doing so we took account of the MDBA's Position Statement 14a (Aboriginal values and uses) [53] and its WRP Guidelines for Chapter 10, Part 14. [54] The Guidelines were recommended by the independent review of the Water Act in 2014[55] and developed by the MDBA with input from representatives of MLDRIN and NBAN.[56] We also drew on publicly available assessments from MLDRIN which is one of the Indigenous organisations that has a formal role in providing advice to the MDBA and Minister on the adequacy of WRPs in meeting the Basin Plan requirements.[57]

The analysis below is organised thematically: identification of (non-binding) Indigenous objectives; strategies for meeting cultural objectives; improving protections; treatment of Indigenous input; and sustainable levels of extraction. Overall, we found that most text was replicated nearly identically across the WRPs and WSPs we viewed, with only plan names and areas differing, suggesting there was little room for First Nations to influence the content of both instrument types.

(i) Indigenous objectives are non-binding and negligible effort is given to strengthening protection of Indigenous values and uses

WSPs, which are an important part of WRPs, set out how water is to be shared between different water users (including the environment) at a catchment scale. They include a range of binding provisions regarding overall extraction limits, the circumstances in which water can be diverted by individual licence holders, drought reserves and environmental watering.

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[53] Murray-Darling Basin Authority, *Basin Plan – Water Resource Plan Requirements – Position Statement 14A – Aboriginal values and uses* (Position Statement, No 14A, 14 August 2015) <https://www.mdba.gov.au/sites/default/files/pubs/WRP-position-statement-14A-Aboriginal-objectives-and-outcomes.PDF>.

[54] Murray-Darling Basin Authority, *Water Resource Plans – Part 14 Guidelines* (Guidelines, updated 14 January 2021) 1 <https://www.mdba.gov.au/sites/default/files/pubs/D17-6996-WRP-requirements-Part-14-Aboriginal.pdf> (*'WRP Guidelines'*).

[55] Eamonn Moran et al, *Report of the Independent Review of the* Water Act 2007 (Report, November 2014) 19.

[56] Ibid 2.

[57] These assessments were made available following an Order for Papers resolution of the Legislative Council under Standing Order 52 on 5 May 2021.

They also contain non-substantive objectives and vision statements which do not give rise to any binding obligations in-and-of-themselves. The material effect of NSW's efforts to protect or advance Indigenous interests in water will therefore depend on how Indigenous interests are treated in the substantive sections of WSPs, which we consider in more detail below. First, we comment on the heavy reliance on non-binding sections/clauses to discharge the meagre obligations of the Basin Plan (which itself reflects the dearth of substantive obligations regarding Indigenous rights in the enabling legislation, namely the Water Act).

Although the Basin Plan does not require that WRPs strengthen the consideration of Indigenous values and uses as it relates to Basin water resources, the MDBA acknowledges that it would be 'best practice' to do so.[58] In their Guidelines they provide an example:

> … best practice would be to plan to incorporate ways to share economic benefits of water resource development with TOs. While this is beyond the scope of the Basin Plan requirements, there is opportunity and it would be of merit to include it in a WRP.

Yet every WRP we viewed commits to no more than maintaining the status quo and included the following formulaic statement:

> For the purpose of section 10.55 of the Basin Plan, this Plan provides for a level of protection of Aboriginal values and Aboriginal uses[59] in the [plan's name] WRP area that is, at a minimum, equal to that which existed under NSW water management arrangements prior to this Plan, as shown in Table 4-2.

Table 4-2[60] in each WRP lists a series of near identical water management arrangements that appear to relate to First Nations values and uses, but notably, only one is listed as an improvement across all surface water plans: 'Acknowledgement of and identification of Indigenous cultural objectives, strategies and performance indicators' in

[58] Murray-Darling Basin Authority, *Water Resource Plans – Part 14 Guidelines* (n 54) 2.

[59] In some cases, *Indigenous* values and *Indigenous* uses.

[60] Or table with equivalent information in each WRP.

WSPs. This same content was reproduced in every surface water and groundwater WRP to demonstrate maintenance of the status quo or an improvement that, in our view, represents a marginal or negligible advance. Groundwater WRPs include one other claimed 'improvement': Part 9 of their WSP apply rules for managing water supply works near groundwater dependent culturally significant areas. However, in some cases, these rules applied prior to the WRP so do not transparently constitute an 'improvement' as claimed.[61]

Moreover, the purported improvement rests heavily on acknowledging Indigenous cultural objectives and 'having regard to' a range of matters, rather than ensuring these objectives and matters are acted upon and satisfied.[62] All the WSPs we viewed listed a formulaic set of 'Aboriginal cultural objectives'. For surface water plans: *'The broad Aboriginal cultural objective of this Plan is to maintain, and where possible improve, the spiritual, social, customary and economic values and uses of water by Aboriginal people'*.[63] Whereas the broad objectives for the groundwater plans did not contain the aspiration, albeit discretionary, to improve outcomes for Aboriginal peoples: '*The broad Aboriginal cultural objective of this Plan is to maintain the spiritual, social, customary and economic values and uses of groundwater by Aboriginal people'*.[64] While both surface water or groundwater WSPs then present near identical but more targeted objectives, none concern 'economic' values and uses. The objectives, strategies and performance indicators that appear in these WSPs are more substantive than previous WSPs, however these non-binding clauses are opaque, difficult to measure, and offer no legal certainty.

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[61] For example, the Murrumbidgee Alluvium WRP (p. 38) asserts that Part 9 of the *WSP for the Murrumbidgee Alluvium Groundwater Sources 2020* is an improvement to existing protection of Aboriginal people's values and uses. However, the interim WRP (*WSP for the Murrumbidgee Unregulated and Alluvial Water Sources 2012*, cl 69) has contained these provisions since 2012, though in some slightly different language.

[62] There is no mandatory requirement in the Basin Plan for steps to be put in place to achieve the Indigenous objectives specified – see O'Bryan (n 17) 92.

[63] *Intersecting Streams Water Resources Plan 2019* (NSW) pt 2 cl 11.

[64] *Water Sharing Plan for the NSW Murray Darling Basin Fractured Rock Groundwater Sources 2020* (NSW) pt 2 cl 11.

Also, significantly, these WSP provisions were not derived through consultation with local Nations,[65] even though WRPs claim otherwise.[66]

Further support for our conclusion that the Basin Plan (and under it, the WRPs) treat Indigenous interests superficially can be found in the decision of the MDBA to not assess "the veracity of the Aboriginal objectives and outcomes and associated values and uses identified in water resource plans" (MDBA Position Statement 14a). Such a position means that any discrepancies in NSW WRPs identified by either NBAN or MLDRIN (or others) would unlikely be acted upon by the MDBA. Uses, values, objectives and outcomes become free-standing items in a process that weakly acknowledges, or has regard for, rather than mandates additions to a WRP and generates consequential outcomes or actions.

(ii) Strategies for reaching the targeted Aboriginal cultural objectives in WSPs are weak

As noted, each WSP refers to a set of standard strategies for reaching the targeted Aboriginal cultural objectives. For example, from the Lachlan Alluvial WSP,[67] these are:

(a) manage access to groundwater consistently with the exercise of native title rights

(b) provide for groundwater associated with Aboriginal cultural values and purposes[68]

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[65] See, eg, Murray Lower Darling Rivers Indigenous Nations, *NSW Murray Darling Porous Rock Assessment Summary*, (Report, 7 May 2021) 23-24 ('Porous Rock Assessment Summary').

[66] Specifically, each WRP states that "That consultation identified the objectives and outcomes listed in the Attachments to Schedule C [First Nations Consultation Reports]. Those objectives and outcomes informed the provisions relevant to Aboriginal people in relation to water management in the [Plan name] WRPA as set out in Part 2 of each of the [Water Sharing Plan/s]".

[67] *Water Sharing Plan for the Lachlan Alluvial Groundwater Sources 2019* (NSW) cl 11(3), but these are consistent across groundwater WSPs.

[68] The WSP contained the following note: The provisions in Part 7 provide opportunities for Aboriginal people to access water by allowing for the granting of an aquifer access licence of the subcategory "Aboriginal cultural".

(c) manage extractions under access licences and basic landholder rights within the extraction limits[69]

(d) manage the construction and use of water supply works to minimise impacts on groundwater quality[70]

(e) manage the construction and use of water supply works to minimise impacts on groundwater-dependent culturally significant areas[71].

These 'strategies' are only effective if they link to substantive requirements, actions or options, and most are not new or any different to provisions that were available in previous WSPs. We accordingly note that native title determinations are largely absent across NSW, and as we will discuss further below, the Barkandji native title determination over the Darling River/Barka has not resulted in any tangible improvements in relation to water rights for Traditional Owners. Similarly, references to 'Aboriginal cultural' licences must be considered within the broader legislative context, which imposes significant limitations on their availability and size.[72] Specifically, 'Aboriginal Cultural Water Access Licences' are a creature of the Water Management Act[73] and clauses in each WSP which explicitly limit the maximum share component of any such licence to 10ML.[74] In this sense, they are limited volumetrically and constrained to certain uses, and to that extent cannot be considered to operate on an equal footing with other licence categories.

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[69] The WSP contained the following note: The provisions in Part 6 manage extraction of groundwater within the extraction limits for the groundwater sources. This helps to protect any culturally significant areas from damage.

[70] The WSP contained the following note: The provisions in Part 9 manage the location, construction and use of water supply works to prevent impacts from sources of contaminated water.

[71] The WSP contained the following note: The provisions in Part 9 manage the location, construction and use of water supply works to prevent impacts on culturally significant areas.

[72] Tan & Jackson (n 11).

[73] *Water Management Act 2000* (NSW) ss 57(2), 61(1)(a); *Water Management (General) Regulation 2018* (NSW) cl 10(1)(g), sch 3.

[74] See eg, *Water Sharing Plan for the Barwon-Darling Unregulated River Water Source 2012* (NSW) cl. 40(1); *Water Sharing Plan for the Lachlan Alluvial Groundwater Sources 2019* (NSW) cl 35(2).

Finally, managing approvals for 'works' (for pumps or floodplain structures, for example) to minimise impacts on culturally significant groundwater-dependent sites depends on adequate mapping of cultural values and registration of sites of cultural heritage. In many instances, this work is incomplete, with some Traditional Owners being hesitant to register culturally significant sites. Furthermore, no mechanisms for assessing or measuring impacts on culturally significant groundwater-dependent sites are provided.

We further note that there are no strategies pertaining to Aboriginal economic values and uses. This is linked to the lack of a corresponding 'targeted' objective to this effect in the generic set of Aboriginal cultural values in WSPs. The Basin Plan does not require WRPs to have regard to Indigenous peoples' economic values and uses, or Indigenous peoples' views about economic objectives or strategies for achieving them. However, this omission contradicts the object of NSW's Water Management Act[75] and the broad Aboriginal cultural objective of each WSP which *does* include economic values and uses.

(iii) Advancing the status quo is a voluntary option for the future

NSW's WRPs consistently defer any steps that would substantially strengthen protections or significantly improve Indigenous access to and control of water. The following statement in the NSW MDB Fractured Rock WRP is typical of all plans we viewed:

> The consultation undertaken as part of the development of the WRPs is the first step in an ongoing process that will work with traditional owners and Aboriginal people and organisations to achieve the following outcomes around Indigenous water objectives:
>
> • enhance cultural flows, economic opportunities, and access to water entitlements
>
> • seek shared benefits by using water allocated for environmental and consumptive purposes to deliver cultural benefits where synergies exist
>
> • acknowledge water is critical to the health and wellbeing of communities
>
> • enable access to Country

[75] *Water Management Act 2000* (NSW) s 3(c)(iv).

> • embed Aboriginal participation, partnerships and communication into water management and government decision-making.[76]

It is perhaps not surprising that the WRPs do not stretch current performance when the MDBA interprets clause 10.52(3) in the following terms:

> As this section is voluntary, MDBA's assessment role is to note arrangements. In other words, if no arrangements are specified under this sub-section it would not be likely to impact on MDBA's recommendation to accredit or not accredit a WRP. The value of the section is in the scope to initiate consideration and collaboration about arrangements for water resource management that has potential to deliver further positive outcomes for Aboriginal people.[77]

There are other instances where NSW WRPs put off making assessments and improvements to the future, including in the sections titled Risk Assessments. Section 10.53(1)(f) requires that a WRP must have regard to the views of relevant Indigenous organisations with respect to the 'risks to Indigenous values and uses arising from the use and management of the water resources of a water resource plan area'.[78] However, the Risk Assessment of each WRP (Schedule D) shows that Indigenous people were not considered a distinct category of interest group for the purposes of the assessment, and instead, were included in a general category referred to as 'public benefit values'. Further, NSW did not assess risks associated with this category, instead it deferred this action: 'Future risk assessments will include an assessment of these risks as further data becomes available'.[79] Risk assessments in groundwater WRPs prescribe even less certainty, stating such future

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[76] *Murray–Darling Basin Fractured Rock Water Resource Plan 2019* (NSW) 55.

[77] *WRP Guidelines* (n 53) 6.

[78] *Basin Plan 2012* (Cth) ch 4 pt 2, ch 10 pt 9. Chapter 4, Part 2 together with Chapter 10, Part 9 also set out matters that must be considered in WRP risk and management strategies, including risks and impacts from insufficient water availability and quality to maintain Indigenous values.

[79] This phrasing appears in each surface water WRP Risk Assessment. See eg, Murray-Darling Basin Authority, *Risk assessment for the Intersecting Streams Surface Water Resource Plan Area (SW13)* (Risk Assessment, December 2019) 74.

risk assessments *could* include risks to First Nations.[80] Delaying assessment of risks to Indigenous values also delays devising and implementing mitigation strategies. This serves to prolong mitigation or restoration of the damage associated with historic and current water management practices.

(iv) Fragmented approach to assessing Indigenous input

Next, we highlight NSW's approach to addressing many of the Part 14 requirements by referring to material in separate First Nations' Consultation Reports. To address the Basin Plan requirement to identify First Nations' objectives and outcomes (10.52), every NSW WRP refers to a series of tables in Attachments to Schedule C (First Nations Consultation Reports) that list Aboriginal values and uses. These values and uses were formulated into objectives and outcomes also listed in the tables in these separate consultation reports. The WRPs also claim NSW had regard to the views of Indigenous peoples in relation to cultural flows (10.54) and risks to Indigenous values and uses (10.53(1)(f)) by presenting those views in these Consultation Reports. Contrary to MDBA's assessment guidelines, NSW WRPs offer no description of how properly considering these views has (or has not) influenced the content of the WRP.[81]

There are several problems with this approach to addressing requirements which ultimately raise questions about the degree to which decision-makers could genuinely have had regard for these matters in preparing the WRPs. First, it appears to have enabled NSW to prepare WRPs without comprehensively consulting all affected First Nations in a timely manner. Every WRP we reviewed was placed on public exhibition without completely consulting with the relevant First Nations. In the worst case, the draft Murrumbidgee Alluvium WRP was placed on public exhibition before consultation workshops with any affected First Nations had commenced.

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[80] This phrasing appears in each groundwater WRP Risk Assessment. See eg, Murray-Darling Basin Authority, *Risk Assessment for the Lachlan Alluvium Water Resource Plan Area (GW10)* (Risk Assessment, 2018) 95.

[81] *Water Resource Plans – Part 14 Guidelines* (n 53) 6-7.

This raises procedural questions about opportunities for Nations to review and comment on their consultation outputs *and* the influence that consultation outcomes had on the WRP more substantively.

Publicly available WRP assessments from MLDRIN reveal a range of consultation shortcomings that also apply across the southern NSW WRPs we assessed, and which compound concerns about the possible impact of First Nations' input on WRPs. Several WRPs submitted to the MDBA for review refer to a failure to complete consultation with various First Nations. For example, consultation with the Tati Tati and Weki Weki Nations was incomplete when Murray Alluvium and Fractured Rock Alluvium WRPs were submitted. Clearly, deferring engagement and consideration of the outcomes of such engagement until WRP preparations are complete makes it impossible to affect the course of action or decision-making in preparing those plans, as required by the Basin Plan. MLDRIN documented instances of inadequate resourcing leading to compressed timetables; limited scope and scale of discussions and engagement; insufficient opportunities for engagement activities on Country; and insufficient involvement of First Nations in drafting, reviewing, and approving written outputs from consultation. Several Nations reported not been engaged at all about groundwater values and uses.[82] In at least one case, the Lachlan Surface Water Resource Plan, the MDBA advised that a major reason for not accrediting that plan in late 2020 was 'systemic issues' relating to Indigenous consultation.[83]

The WRPs affecting Barkandji interests represent a particularly egregious example. All NSW WRPs that overlap with the Barkandji native title determination area were submitted *while the Barkandji consultation report remained incomplete*. In 2018, Hartwig, Jackson and Osborne were critical of the failure by NSW to account for the native title rights and interests of

[82] Porous Rock Assessment Summary (n 64).

[83] Email communication from the MDBA cited by Cameron Gooley, 'Water talks latest in Aboriginal consultation bungles by NSW Government', *Sydney Morning Herald* (online, 19 September 2021) <https://amp.smh.com.au/national/nsw/water-talks-latest-in-aboriginal-consultation-bungles-by-nsw-government-20210914-p58rho.html>.

Barkandji in the development of WSPs in north-western NSW[84] and the issue was subject to further adverse comment by the NSW Natural Resources Commission in its review of the Barwon-Darling WSP (2012).[85] The claim was determined in 2015 yet the native title holders remain no better off. In July 2020, NSW gazetted changes to the WSP, including in relation to native title, the protection of environmental water held by the CEWH and resumption of flows,[86] but these fell well short of the amendments required to improve the health of the Darling River/Barka and deliver concrete water rights to the Barkandji. Although the plans we reviewed (see Barwon-Darling, Darling Alluvium, Lachlan Alluvium, MDB Fractured Rock) that overlap with Barkandji land include a requirement to satisfy native title rights, the volume of water take is not specified. The NSW MDB Fractured Rock WRP states, for example, that 'the volume of water take may be identified through Indigenous Land Use Agreement (ILUA) negotiations with the recognised Native Title holders'.[87]

The reliance on referring to detached consultation reports that contain the substance of Indigenous input makes it more difficult for decision-makers and others to consider as they implement the WRP. Additionally, many of the consultation reports are not available to be viewed, which limits the capacity of Traditional Owners or the public to ensure compliance. It is acknowledged that NSW and the MDBA have withdrawn some reports from public access on the request of First Nations, we suggest however that a mechanism for protecting confidential information while maintaining transparency should have been agreed prior to commencement of the public notification period.

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[84] See generally Lena Hartwig, Sue Jackson and Natalie Osborne, 'Recognition of Barkandji water rights in Australian settler-colonial water regimes' (2018) 7(1) *Resources* 16.

[85] NSW Natural Resources Commission, *Review of the Water Sharing Plan for the Barwon-Darling Unregulated and Alluvial Water Sources 2012* (Final Report, September 2019) 5.

[86] *Water Sharing Plan for the Barwon-Darling* (n 71) cl 20, 42A, 50.

[87] *Water Sharing Plan for the NSW Murray Darling Basin Fractured Rock* (n 63) 108.

(v) ESLT and Planned Environmental Water (PEW)

While environmental and cultural water requirements are not one and the same,[88] First Nations advocates maintain that healthy Country depends on sustainable management practices and sufficient flows as a minimum. Therefore, the well-documented failure to limit extractions under the Basin Plan to an ESLT[89] will exacerbate water dispossession, including by degrading rivers (the entirety of which are spiritually significant)[90] and limiting watering of other culturally significant places not yet receiving environmental water. Of additional concern is the possibility that environmental water known as 'PEW', which is provided for in rules in WSPs, will not be adequately protected by NSW in its updated WSPs (which as noted above, sit within WRPs). Any such erosion would fall foul of the Water Act and Basin Plan, both of which prohibit any net reduction in the level of protection provided for PEW under state water laws in force immediately before the Basin Plan took effect (in late 2012).[91] Notwithstanding this prohibition, PEW rules in some updated draft WSPs have been changed,[92] giving rise to the possibility of a reduction in this form of environmental water. As NSW's WRPs (and the WSPs that sit within them) are yet to be finalised and accredited under the Water Act, it is difficult to draw any definitive conclusions as to whether these rule changes will be given the 'green light' by the MDBA and Minister. If they are, they will invariably add to the list of provisions that favour consumptive uses at the expense of First Nations responsibilities to Country.

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[88] Murray Lower Darling Rivers Indigenous Nations, Submission No 60 to Productivity Commission, *National Water Reform Public Inquiry* (2017) 10.

[89] See eg, *Royal Commission into the Murray-Darling Basin Plan* (Final Report, 29 January 2019); Emma Carmody, 'The Unwinding of Water Reform in the Murray-Darling Basin: A Cautionary Tale for Transboundary River Systems' in Cameron Holley and Darren Sinclair (eds), *Reforming Water Law and Governance* (Springer, 2018) 33.

[90] Tony McAvoy, 'Water – Fluid Perceptions' 2006 1(2) *Transforming Cultures eJournal* 97.

[91] *Water Act 2007* (Cth) s 21(5); *Basin Plan* (n 73) cl 10.28.

[92] *Draft Water Sharing Plan for the Upper Namoi Regulated River Water Sources 2020* (NSW); Commonwealth Environmental Water Holder, Submission to the Murray-Darling Basin Authority, *Draft Namoi Surface Water Resource Plan* (October 2019).

V DISCUSSION AND CONCLUSION

From assessment of the available WRPs in the NSW portion of the MDB, we identified significant shortcomings in consultation procedures and found that the treatment of Indigenous interests was formulaic, tokenistic, and overwhelmingly descriptive. By way of contrast, rights for consumptive users—the majority of whom are irrigators—are legally defined, enforceable, and subject to compensation in certain circumstances.[93] This distinction reflects the neo-colonial nature of water law and policy and the failure to reverse over two centuries of dispossession. We accordingly see no possibility of any real increase in the level of protection for Indigenous rights and interests through WRPs under the minimum standard currently prescribed in law. This result is consistent with the Indigenous provisions of the Water Act which seek to merely improve consultation and not to redistribute water allocations and management control to First Nations.[94]

Other Basin jurisdictions demonstrate a more responsive and progressive approach to consultation and engagement and are taking modest steps towards recognising First Nations water rights, despite the confines of the Federal framework. For instance, Queensland's WRPs in the northern MDB commit to returning portions of unallocated groundwater to First Nations people which, following feedback received during Indigenous consultation and in line with the definition of cultural flows, will be able to be used for any purpose (including economic or commercial).[95] In parallel with its water resource planning, Victoria is working to implement its state water policies to better address Aboriginal values and uses, boost Indigenous participation in water management and decision-making, and develop a Roadmap for increasing Aboriginal water access.[96] Certainly, there are opportunities for

[93] See eg, *Water Management Act 2000* (NSW) ch 3 pt 2 div 9.

[94] Godden, Jackson & O'Bryan (n 14); Tan & Jackson (n 11).

[95] Murray-Darling Basin Authority, *Aboriginal Peoples Water Needs in the Murray-Darling Basin* (Guide, February 2019) 76.

[96] See eg, Department of Environment, Land, Water and Planning (Victoria), *Victoria's North and Murray Water Resource Plan* (Plan, 2019) ch 8, 331

these actions and commitments to go further,[97] but against the backdrop of Australia's colonial water history and the current Federal water framework, these are important developments that provide pertinent examples for NSW to consider.

As NSW revises its WRPs for resubmission to the MDBA, it will be imperative that it pays attention and responds appropriately to the critiques contained here and the feedback produced though MLDRIN and NBAN's assessments, as well as the MDB Royal Commission. It is acknowledged that some of the issues documented in this paper stem from the weaknesses of the Federal water framework for the Basin with respect to Indigenous water rights. However, in 2021, it is no longer acceptable for NSW to struggle to meet the woefully low ambitions of water law in the MDB. Indigenous consultation approaches must be appropriate and genuine, and decision makers must ensure local First Nations' interests and views are accommodated within, and impact upon, the substance of water planning instruments and processes.

Ultimately, water allocation planning should be a means of effecting change to the distribution of highly valuable water rights so that First Nations are no longer locked out of using water for commercial gain (or any other purpose).[98] Economic outcomes for First Nations remain an outstanding challenge for MDB jurisdictions, as acknowledged in the recent review of the Basin Plan by the MDBA. That assessment recommended that 'First Nations, Basin government and the MDBA should develop a critical pathway for the use of water for cultural and economic outcomes'.[99] As the 2026 review of the Basin Plan approaches, we implore federal policy makers to carefully review the severe limitations and injustices that the current Water Act, Basin Plan and WRP frameworks perpetuate. Action must entail early and informed engagement with First Nations and their peak bodies as well as a genuine willingness to transform law and policy. Australian governments can no longer tread water on this vital element of Indigenous rights.

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[97] Erin O'Donnell, Lee Godden and Katie O'Bryan, *Cultural Water for Cultural Economies* (Final Report, 2021) 49.

[98] Hartwig et al (n 10).

[99] Murray-Darling Basin Authority, *The 2020 Basin Plan Evaluation* (Report, 2020) 126.

INTELLECTUAL PROPERTY, TRADITIONAL KNOWLEDGE, AND NATIVE BIODIVERSITY: CONVENTION AND PROGRESSION IN THE *TRANS-PACIFIC PARTNERSHIP*

David J. Jefferson and Kamalesh Adhikari

The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (**Trans-Pacific Partnership** *or* **Partnership***) is a major multilateral trade agreement between Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam that entered into force in December 2018. The Partnership, like many other bilateral, regional, and trans-regional trade treaties that have been enacted since the mid-1990s, is polemical, due in large part to its perceived effects on small scale agriculture, native biodiversity, and local and Indigenous peoples. Civil society criticisms have centred especially on how the Trans-Pacific Partnership's provisions on intellectual property might encourage the privatisation of plants, seeds, and other genetic resources at the expense of customary practices. The present article analyses these provisions, while also discussing the treatment of traditional knowledge in the Partnership, which is relatively progressive in comparison to prior free trade agreements. The article concludes by deriving lessons that civil society activists, local and Indigenous communities, and domestic authorities could derive from the Trans-Pacific Partnership, towards the end of identifying policy space for the protection of traditional knowledge and native biodiversity.*

I INTRODUCTION

Throughout the course of negotiations that led to the signing of the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (**Trans-Pacific Partnership** or **Partnership**), a multilateral trade agreement that entered into force in 2018, civil society protests in several member countries railed against the perceived effects of the treaty on small scale agriculture, native biodiversity, and local and Indigenous peoples. The tensions that characterised these manifestations had similarly underpinned decades of criticism of prior trade agreements, dating to the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (**TRIPS**) of the World Trade Organization (1995).

Subsequently, a series of bilateral and regional accords continued to provoke social unrest, culminating with the Trans-Pacific Partnership and the correspondingly expansive *Regional Comprehensive Economic Partnership* (2020).[1] While the controversy that these commercial treaties have provoked generally arises out of dissatisfaction with the globalised neoliberal economic model, the potential disruption of ancestral forms of agricultural production and uses of native biodiversity are particularly polemical issues.

Civil society activism in this space has specifically targeted trade agreements that require member countries to implement domestic intellectual property laws that are consistent with the 1991 Act of the *Union for the Protection of New Varieties of Plants* (**UPOV**; 1991). This Act provides a mechanism through which plant breeders can claim exclusive legal rights to new plant varieties, enabling the formation of temporary commercial monopolies over the production, reproduction, and sale of these plants. For decades, critics have derided the UPOV model as detrimental to small-scale traditional agricultural production, which remains significant for cultural reification and provides the basis for food and livelihood security in places where local and Indigenous peoples rely on the regular use and circulation of native crops and plants. The international not-for-profit organisation GRAIN conceptualises the problem as the privatisation of seeds, because intellectual property and related legal regimes tend to favour large-scale commercial production to the detriment of intergenerational practices of seed conservation, utilisation, and exchange by local and Indigenous peoples.[2]

In contrast to mandating adherence to certain intellectual property standards, free trade agreements do not require parties to join other international treaties that are designed to enable local and Indigenous peoples to better manage, and to benefit from, biodiversity and associated traditional knowledge. The most prominent of these treaties are the *Convention on*

[1] Note that the Regional Comprehensive Economic Partnership was signed in 2020 but at the time of writing had not yet entered into force. For an overview of the criticisms that have been launched against the TRIPS Agreement, see Carlos M Correa, *Intellectual Property Rights, the WTO and Developing Countries: The TRIPS Agreement and Policy Options*. (Zed Books, 2000).

[2] 'Asia Under Threat of UPOV 91', *GRAIN* (Article, 3 December 2019) <https://grain.org/en/article/6372-asia-under-threat-of-upov-91>.

Biological Diversity (**CBD**; 1993) and its *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization* (**Nagoya Protocol**; 2014), and the *International Treaty on Plant Genetic Resources for Food and Agriculture* (**Plant Treaty**; 2004). While far from perfect, these 'access and benefit sharing'[3] agreements require member countries to adopt national legal and policy frameworks to ensure that native biodiversity and traditional knowledge are not misappropriated. The CBD, Nagoya Protocol, and Plant Treaty further aim to protect the rights of local and Indigenous peoples in accordance with the internationally-agreed principles of prior informed consent and benefit sharing.[4]

Given that the Trans-Pacific Partnership expressly endorses the UPOV Convention but not the CBD, the Nagoya Protocol, or the Plant Treaty, it is not surprising that environmental and Indigenous rights activists sought to derail negotiations towards this regional trade agreement. Civil society concerns were compounded by the fact that the United States, Japan, and Singapore had initially proposed a clause that would require parties to the Partnership to make patents available for inventions involving plants and animals.[5] While the UPOV Convention provides an international framework for the protection of plant varieties via plant breeders' rights, patents are often used to claim rights related to transgenic plants and animals.

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[3] Access and benefit sharing refers to the way in which 'genetic resources', that is, materials pertaining to or derived from natural biodiversity, may be obtained, and how the benefits that result from their use should be shared between the people or countries using the resources and the people or countries that provide them. 'Introduction to Access and Benefit Sharing', *Secretariat of the Convention on Biological Diversity* (Brochure, 2010) <https://www.cbd.int/abs/infokit/brochure-en.pdf>.

[4] Kamalesh Adhikari, 'Reconceptualising Access: Moving Beyond the Remits of International Biodiversity Laws' in Charles Lawson and Kamalesh Adhikari (eds), *Biodiversity, Genetic Resources and Intellectual Property: Developments in Access and Benefit Sharing* (Routledge, 2018).

[5] 'Updated Secret Trans-Pacific Partnership Agreement (TPP) – IP Chapter (second publication), *WikiLeaks* (Blog Post, 16 October 2014), art QQ.E.1(3), <https://wikileaks.org/tpp-ip2/>.

The possibility that the Trans-Pacific Partnership would enable more widespread commercialisation of agricultural biotechnologies was met by local protests against genetically-modified seeds and foods, in countries including Chile,[6] Malaysia,[7] and Aotearoa New Zealand.[8] More broadly, the negotiation process provoked contentious reactions to the speculation that the Partnership, and neoliberal approaches to transnational relations in general, might further marginalise ethnic minority and Indigenous communities. For instance, Māori activists in New Zealand argued that the special protections they enjoy under the Treaty of Waitangi were directly threatened by the trade deal.[9]

In the context of this history of activism against trade treaties, the present article analyses key provisions of the Trans-Pacific Partnership that are relevant to the protection of local and Indigenous peoples' traditional knowledge and practices in relation to agricultural production and biodiversity conservation. In so doing, the article critically assesses the provisions of the agreement's 'intellectual property' and 'environment' chapters. These chapters contain provisions designed to regulate a common set of biological objects, including plants, seeds, and other genetic resources. Furthermore, both of these chapters provide a basis to identify the policy space that countries may require for the creative formation of domestic legislative and regulatory frameworks on plant variety protection, patent examination, traditional knowledge protection, and access and benefit sharing related to the utilisation of plants, seeds, and other genetic resources.

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[6] 'Guardadora de Semillas Explica Por Qué Está Contra el TPP 11: "Es un Nuevo Colonialismo"', *El Mostrador* (Article, 2 April 2019) <https://www.elmostrador.cl/noticias/pais/2019/04/02/guardadora-de-semillas-explica-por-que-esta-contra-el-tpp-11-es-un-nuevo-colonialismo/>.

[7] 'New Trade Deals Legalise Corporate Theft, Make Farmers' Seeds Illegal', *GRAIN* (Article, 18 July 2016) <https://grain.org/article/entries/5511-new-trade-deals-legalise-corporate-theft-make-farmers-seeds-illegal>.

[8] Kirsty McMurray, 'Protesters Join Global Call Against Monsanto', *Stuff* (online, 27 May 2013) <http://www.stuff.co.nz/taranaki-daily-news/8719648/Protesters-join-global-call-against-Monsanto>.

[9] Corinne David-Ives, 'New Transnational Neoliberal Frameworks and Indigenous Peoples: Māori Response to the Trans-Pacific Partnership in New Zealand' (2020) 23 *Cultures of the Commonwealth* 109.

In prior works, Jefferson (2020) argued that countries could pursue a strategy of 'compliance with resistance' when implementing obligations under free trade agreements at the national level.[10] This notion, which refers to actions that countries can take to uphold their treaty obligations while simultaneously exploiting gaps in dominant legal regimes to generate alternative, local approaches to agroeconomic and environmental governance, remains relevant following the adoption of the Trans-Pacific Partnership. The diverse biocultural realities of Partnership member countries continue to require space for the formation of domestic laws that both uphold international commitments and are responsive to local needs.

II INTELLECTUAL PROPERTY, PLANT VARIETIES, AND INDIGENOUS RIGHTS

The negotiations during which the Trans-Pacific Partnership was developed formally commenced in February 2008. The secrecy and lack of transparency with which initial talks were conducted drew widespread criticism.[11] Opponents of the Partnership were partially vindicated by the release of the agreement's draft intellectual property chapter by WikiLeaks in October 2014. The preliminary chapter on intellectual property contained several provisions that confirmed civil society organisations' concerns, including the requirement that all parties ratify or accede to UPOV 1991[12] and the aforementioned mandate that members 'shall make patents available for inventions for plants and animals'.[13] Notably, however, the text alternately proposed an exclusion from patentability for plants and

[10] David J Jefferson, 'Compliance with Resistance: How Asia Can Adapt to the UPOV 1991 Model of Plant Breeders' Rights' (2020) 15(2) *Journal of Intellectual Property Law & Practice* 1012; David J Jefferson, 'Plant Breeders' Rights Proliferate in Asia: The Spread of the UPOV Convention Model' in Kamalesh Adhikari and David J Jefferson (eds) *Intellectual Property Law and Plant Protection: Challenges and Developments in Asia* (Routledge, 2019).

[11] Sasha Maher, 'Behind Closed Doors: Secrecy and Transparency in the Trans-Pacific Partnership Trade Negotiations' (2016) 13(2) *Sites: A Journal of Social Anthropology and Cultural Studies* 187.

[12] 'Updated Secret Trans-Pacific Partnership Agreement (TPP) – IP Chapter' (second publication), *WikiLeaks* (Blog Post, 16 October 2014), art QQ.A.8(c), <https://wikileaks.org/tpp-ip2/>.

[13] Ibid art QQ.E.1(3).

animals other than microorganisms, which all parties to the negotiations other than the United States, Japan, and Singapore endorsed.[14] Consistent with the TRIPS Agreement,[15] this alternative proposal would allow parties to provide intellectual property protection for plant varieties under either existing patent laws or *sui generis* legal frameworks designed by lawmakers at the national level.

In its enacted form, the intellectual property chapter of the Trans-Pacific Partnership generally reproduces the terms of the TRIPS Agreement, allowing plants to be excluded from patentability. However, unlike TRIPS and the initial drafts of the Partnership, the final agreement mandates that members provide intellectual property protection for inventions that are derived from plants under their national patent laws.[16] The meaning of 'derivation' is not provided in the treaty, so presumably this concept is left to domestic lawmakers to define. The Partnership further requires parties that are not currently members of the UPOV Convention to ratify or accede to the 1991 Act.[17] Countries are afforded a brief transition period in which to pursue UPOV membership, amounting to three years for Brunei Darussalam[18] and four years for Malaysia[19] and Mexico.[20]

Meanwhile, the agreement grants special concessions to Aotearoa New Zealand, allowing the country to elect to join UPOV 1991, or adopt a *sui generis* plant variety rights system that 'gives effect to UPOV 1991' within three years of the date of entry into force of the Partnership.[21] The difference between these options is subtle, and it is unclear who would

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[14] Ibid art QQ.E.1(ALT 3).

[15] See *Agreement on Trade-Related Aspects of Intellectual Property Rights*, signed 15 April 1994, entered into force 1 January 1995, art 27.3(b).

[16] *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, opened for signature 8 March 2018, entered into force 30 December 2018, art 18.37(4).

[17] Ibid art 18.7(2)(d).

[18] Ibid art 18.83(4)(a)(i).

[19] Ibid art 18.83(4)(b)(iv).

[20] Ibid art 18.83(4)(c)(i).

[21] Ibid annex 18-A(1).

be responsible for determining whether a prospective New Zealand plant variety rights law adequately gives effect to the 1991 Act of UPOV. If this were left to national lawmakers to decide, then New Zealand could potentially avoid implementing the most controversial provisions of the UPOV framework, such as restrictions on the saving and exchange of seeds by local and Indigenous cultivators.[22]

Furthermore, the Trans-Pacific Partnership specifically states that the intellectual property obligations which New Zealand has assumed under the agreement do not preclude the ability of the country to adopt 'measures it deems necessary to protect indigenous plant species in fulfilment of its obligations under the Treaty of Waitangi'.[23] The exception may have been prompted by a claim that prominent Māori individuals and groups lodged before the Waitangi Tribunal [24] in 2016. [25] While the New Zealand government's lack of consultation with *rūnanga* and *iwi* in developing this exception should be understood as a procedural failure under the Treaty of Waitangi framework, the express exemption from the UPOV 1991 obligation has been interpreted as a positive outcome for Māori.[26]

Unfortunately, however, similar exceptions to the intellectual property requirements imposed by the Trans-Pacific Partnership were not recognised for parties other than

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[22] These provisions pertain to the scope of the breeder's right defined in UPOV 1991, which requires authorisation from the breeder to utilise propagating material and harvested material of protected plant varieties for most purposes, other than acts done privately and for non-commercial purposes, or for experimental purposes. *See International Convention for the Protection of New Varieties of Plants*, signed 2 December 1961, as Revised at Geneva on 10 November 1972, on 23 October 1978, and on 19 March 1991, arts 14, 15.

[23] *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, opened for signature 8 March 2018, entered into force 30 December 2018. Annex 18-A(2).

[24] The Waitangi Tribunal is a standing commission of inquiry that has exclusive authority to determine the meaning and effect of the Treaty of Waitangi. It makes recommendations on claims brought by Māori relating to legislation, policies, actions, or omissions of the New Zealand government that are alleged to breach the promises made in the Treaty of Waitangi. 'About the Waitangi Tribunal', *Waitangi Tribunal* (Web Page) <https://waitangitribunal.govt.nz/about-waitangi-tribunal/>.

[25] Amokura Kawharu, 'Process, Politics and the Politics of Process: The *Trans-Pacific Partnership* in New Zealand' (2016) 17(2) *Melbourne Journal of International Law* 286, 307.

[26] Ibid.

Aotearoa New Zealand. This means that all of the other countries that have joined the Partnership must ratify or accede to UPOV 1991. For several parties this requirement is inconsequential, given that at the time of signing Australia, Canada, Japan, Peru, Singapore, and Vietnam were already members of UPOV 1991. In contrast, for other countries, namely Brunei, Chile,[27] Malaysia, and Mexico, the obligation to adhere to the 1991 Act of UPOV is expected to have a significant impact on domestic policy, and by extension on local agricultural practices.

In this way, the Trans-Pacific Partnership may be viewed through the lens of older critiques of 'TRIPS-plus' free trade agreements, which sought to impose intellectual property obligations on countries over and above the relatively more flexible terms of the TRIPS Agreement.[28] Nevertheless, the policy space carved out by New Zealand provides an interesting example of how countries could resist the globalisation of intellectual property norms in favour of protecting local biodiversity and Indigenous peoples' interests.

III PATENT EXAMINATION, TRADITIONAL KNOWLEDGE, AND GENETIC RESOURCES

Although the intellectual property chapter of the Trans-Pacific Partnership is generally conventional, mirroring the terms of other recent bilateral and regional free trade agreements, its provisions on traditional knowledge are unusual. The Partnership appears to be the first major trade treaty to explicitly acknowledge 'the relevance of intellectual property systems and traditional knowledge associated with genetic resources to each other'.[29] Furthermore, parties to the agreement have undertaken a commitment to cooperate, through their national intellectual property agencies or other relevant institutions,

[27] Note, however, that Chile had previously incurred the obligation to join UPOV 1991 through other trade agreements, including with the United States, Japan, and Australia. David J Jefferson, *Towards an Ecological Intellectual Property: Reconfiguring Relationships Between People and Plants in Ecuador* (Routledge, 2020) 66.

[28] See, eg, Peter Drahos, 'BITs and BIPs: Bilateralism in Intellectual Property' (2001) 4(6) *Journal of World Intellectual Property* 791.

[29] *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, opened for signature 8 March 2018, entered into force 30 December 2018, art 18.16(1).

to enhance the understanding of issues arising out of the relationship between traditional knowledge and genetic resources.[30] These concepts are not defined in the Partnership, but their meaning may be imputed by referring to other international instruments including the CBD, Nagoya Protocol, and Plant Treaty, which are implicitly referenced in the trade and biodiversity section of the environment chapter.[31]

The primary form of cooperation that the Partnership describes is to 'pursue quality patent examination'.[32] This is relevant because over the past several decades, numerous patents in countries around the world have been challenged and, in some instances, rescinded based on evidence that the claimed invention was not novel, but in fact was directly informed by the ancestral knowledge of local or Indigenous people. Most of these cases of 'biopiracy'[33] have involved inventions that were analogous to or derived from customary uses of native plants and other genetic resources. Notorious examples include patent claims for fungicidal uses of the neem tree (*Azadirachta indica*),[34] utilisation of *Hoodia gordonii* as an appetite suppressant,[35] and extracts from Kakadu plum (*Terminalia ferdinandiana*) for cosmetic products.[36]

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[30] Ibid art 18.16(2).

[31] See ibid art 20.4 (stating that 'The Parties recognise that multilateral environmental agreements to which they are party play an important role, globally and domestically, in protecting the environment…').

[32] Ibid art 18.16(3).

[33] Biopiracy is a term that encompasses various forms of misappropriation of biological resources or traditional knowledge, including through intellectual property claims filed by people living outside of the communities in which a given resources or knowledge was obtained. Daniel Robinson, *Confronting Biopiracy: Challenges, Cases and International Debates* (Routledge, 2010) 21.

[34] Vandana Shiva, 'Special Report: Golden Rice and Neem: Biopatents and the Appropriation of Women's Environmental Knowledge' (2001) 29(1/2) *Women's Studies Quarterly* 12.

[35] Rachel Wynberg and Roger Chennells, 'Green Diamonds of the South: An Overview of the San-*Hoodia* Case' in Rachel Wynberg et al (eds) *Indigenous Peoples, Consent and Benefit Sharing* (Springer, 2009) 89.

[36] Daniel Robinson and Margaret Raven, 'Identifying and Preventing Biopiracy in Australia: Patent Landscapes and Legal Geographies for Plants with Indigenous Australian Uses' (2017) 48(3) *Australian Geographer* 311.

Although the Trans-Pacific Partnership does not create a mechanism to mitigate against the misappropriation of traditional knowledge, the agreement does mandate that its parties 'shall endeavour' to improve their patent examination processes.[37] The Partnership suggests that this could be achieved by implementing new protocols that patent examiners would need to follow, including the requirement to take publicly available traditional knowledge into account when determining prior art for inventions involving genetic resources.[38] National intellectual property offices could also permit third parties to lodge written submissions that would have the effect of undermining the novelty of inventions for which there is relevant traditional knowledge.[39] The Partnership further envisages that countries could utilise databases or digital libraries containing local and Indigenous knowledge in the course of patent examination, and that Partnership parties could cooperate in the training of patent examiners in the assessment of applications related to traditional knowledge.[40]

These provisions are noteworthy because they acknowledge that existing intellectual property frameworks should be modified to prevent the misappropriation of traditional knowledge about native biodiversity. Such misuse is relevant to international trade, which frequently involves the privatisation and commercialisation of plants, seeds, and other products derived from genetic resources originally obtained from local and Indigenous communities. However, it is unclear whether the Partnership's language on cooperation in the area of traditional knowledge will lead to any actual changes in national patent examination protocols.

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[37] *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, opened for signature 8 March 2018, entered into force 30 December 2018, art 18.16(3).

[38] Ibid art 18.16(3)(a).

[39] Ibid art 18.16(3)(b).

[40] *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, opened for signature 8 March 2018, entered into force 30 December 2018, arts 18.16(3)(c) and (d).

Rather than agreeing to reform their respective domestic legal and regulatory systems, the parties to the Partnership have merely stated that they 'shall endeavour to pursue quality patent examination',[41] a phrasing that does not impose any enforceable obligations.

Furthermore, it is important to recognise that the provisions on traditional knowledge that appear in the enacted version of the Partnership are significantly weaker than the language that some parties proposed during the negotiation process. The draft intellectual property chapter that was leaked in 2014 revealed that several countries endorsed a clause that would have read: 'The Parties recognize that the intellectual property system may be one possible means to protect the traditional knowledge associated with genetic resources and traditional cultural expressions of indigenous and local communities'.[42] Although this clause would not have required member countries to actually reform their domestic intellectual property laws, it might have encouraged some governments to develop *sui generis* legal frameworks designed to enable local and Indigenous communities to protect their knowledge and cultural expressions.

Another proposal that was advanced in the 2014 draft agreement but not included in the final text would have required that parties 'take appropriate, effective and proportionate measures to address situations of non-compliance' with laws that govern the access and use of genetic resources and associated traditional knowledge.[43] Although few of the countries that have ratified the Partnership have enacted national policy frameworks to regulate the access and utilisation of genetic resources and traditional knowledge,[44] the proposed clause potentially could have allowed parties that have enacted such laws to use trade sanctions under the Partnership as an enforcement tool.

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[41] Ibid art 18.16(3).

[42] 'Updated Secret Trans-Pacific Partnership Agreement (TPP) – IP Chapter (second publication), *WikiLeaks* (Blog Post, 16 October 2014), art QQ.E.23(4), <https://wikileaks.org/tpp-ip2/>.

[43] Ibid art QQ.E.23(7).

[44] These countries are Japan, Mexico, and Vietnam, in addition to certain Australian jurisdictions (notably Queensland and the Northern Territory). Peru has also implemented an access and benefit sharing domestic policy framework; however, this country has signed but not yet ratified the Trans-Pacific Partnership.

Finally, another provision that was proposed in the 2014 draft stated that 'each party may establish appropriate measures to respect, preserve and promote [alternatively, 'protect'] traditional knowledge and traditional cultural expressions'.[45] This language was proposed by all of the signatories to the Partnership except Canada and Japan, with no opposition noted in the 2014 document, so it is unclear why it was not adopted in the final agreement.

In addition to the provisions on traditional knowledge and genetic resources that appear in the intellectual property chapter, the Partnership contains a chapter on environmental issues. This is not entirely novel, given that prior free trade agreements including several treaties executed between the European Free Trade Association (**EFTA**) and other countries also included sections on trade and sustainable development.[46] Similarly, many of the commercial agreements that the United States has signed with trading partners include chapters on environmental protection.[47] It is possible that the language employed in the environment chapter of the Trans-Pacific Partnership was originally drafted by negotiators from the United States, prior to its withdrawal from the agreement in 2016. This can be deduced from the fact that Article 20.13 on Trade and Biodiversity of the Partnership's environment chapter is an almost verbatim reflection of the language that appears in Article 24.15 of the United States-Mexico-Canada Free Trade Agreement.

Notwithstanding its appearance in other international agreements, the trade and biodiversity provisions that were included in the Partnership are noteworthy for their recognition of the importance of respecting, preserving, and maintaining local and Indigenous communities'

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[45] 'Updated Secret Trans-Pacific Partnership Agreement (TPP) – IP Chapter (second publication), *WikiLeaks* (Blog Post, 16 October 2014), art QQ.E.23(6), <https://wikileaks.org/tpp-ip2/>.

[46] These include the free trade agreements in place between the EFTA and Montenegro, Bosnia and Herzegovina, the Central American States, Georgia, Philippines, Ecuador, Indonesia, Turkey, Albania, and Serbia. 'Trade and Sustainable Development in EFTA's FTAs', *European Free Trade Association* (Web Page) <https://www.efta.int/Free-Trade/Trade-and-Sustainable-Development-EFTAs-FTAs-520246>.

[47] These include the free trade agreements in place between the United States and Australia, Bahrain, CAFTA-DR, Chile, Colombia, Korea, Morocco, Oman, Panama, Peru, and the United States-Mexico-Canada Trade Agreement. 'Free Trade Agreements', *Office of the United States Trade Representative* (Web Page) <https://ustr.gov/trade-agreements/free-trade-agreements>.

knowledge and practices.[48] Furthermore, the Partnership also acknowledges that some member countries have made international commitments or adopted national measures relating to access and benefit sharing,[49] and it provides that parties 'shall cooperate to address matters of mutual interest', which may include exchanging information and experiences related to access and benefit sharing.[50] Finally, the Partnership states that given the importance of public participation and consultation in the development and implementation of policies concerning conservation and sustainable use of biodiversity, member countries 'shall make publicly available information' about their programmes and activities related to these issues.[51]

The explicit recognition of local and Indigenous peoples' interests in the conservation and sustainable use of biodiversity, the acknowledgement of the significance of public participation and consultation, and the commitment to cooperation among members of the Trans-Pacific Partnership should be regarded as indicators of the extent to which concerns over environmental issues have permeated international legal discourse. However, like the express inclusion of traditional knowledge in the intellectual property chapter, in practice it is unlikely that the Partnership's provisions on trade and traditional knowledge will actually operate to curtail international commercial activities between member countries.

These provisions could have been strengthened, for example, by mandating that parties to the Partnership adhere to the Nagoya Protocol and the Plant Treaty, and that they adopt national legal frameworks designed to give effect to these treaties' provisions on access, benefit sharing, and the rights of local and Indigenous communities, including in relation to their traditional knowledge. In theory, the inclusion of such a requirement would have been practicable, given that the Partnership explicitly requires adherence to other international agreements such as the UPOV Convention, as described above.

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[48] *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, opened for signature 8 March 2018, entered into force 30 December 2018, art 20.13(3).

[49] Ibid art 20.13(4).

[50] Ibid art 20.13(6).

[51] Ibid art 20.13(5).

Furthermore, the environment chapter of the Partnership requires that all parties 'shall adopt, maintain and implement laws, regulations and any other measures to fulfil its obligations under the *Convention on International Trade in endangered Species of Wild Fauna and Flora* (**CITES**)'. This provides a template for how a similar condition could be formulated in relation to the Nagoya Protocol and the Plant Treaty.[52]

It is logical that requiring parties to enact national legal regimes consistent with CITES would not have been controversial, given that all Partnership member countries had already joined this agreement by the time negotiations towards the Partnership began. However, like numerous other free trade agreements that have been signed in the late twentieth and early twenty-first centuries, the Partnership requires member countries to adhere to intellectual property treaties of which they were not previously members. This has not been the case for international access and benefit sharing agreements.

In order to truly realise its declared commitment to the protection of biodiversity and the interests of local and Indigenous peoples, the Trans-Pacific Partnership should have required member countries to join the Nagoya Protocol and the Plant Treaty. Such a requirement would have obligated members of the Partnership to implement domestic policies for the governance of access and benefit sharing, including the protection of local and Indigenous peoples' traditional knowledge. Although the scope of the Partnership is no longer negotiable, civil society activists should advocate for future trade agreements to require adherence to the access and benefit sharing treaties as a fundamental condition of membership.

IV CONCLUSION

The Trans-Pacific Partnership is largely a conventional trade deal, taking the form of an agreement whose intellectual property conditions have been essentially standardised over the past twenty-five years. Despite widespread civil society protests during negotiations, the enacted version of the Partnership requires member countries – with the notable exception of Aotearoa New Zealand – to adopt UPOV 1991 as a form of intellectual property for

[52] Ibid art 20.17(2).

plant varieties. Furthermore, although the controversial proposal that would have required signatories to make patents available for inventions involving plants and animals was dropped from initial drafts of the Partnership, the final version still requires member countries to provide protection for inventions that are derived from plants under their national patent laws. The net effect of these provisions is to 'ratchet up' intellectual property standards for agricultural innovations, mandating forms of protection that may not be appropriately tailored to local conditions.

On the other hand, the Trans-Pacific Partnership includes certain provisions that acknowledge concerns that civil society environmental and Indigenous rights advocates have long expressed, representing an advance over earlier free trade agreements. These include the commitment that member countries have made to improve their patent examination processes to avoid the misappropriation of traditional knowledge related to genetic resources, and the recognition of the importance of respecting, preserving, and maintaining local and Indigenous communities' knowledge and practices. It is also notable that New Zealand was able to carve out a special exemption to the requirement to join UPOV 1991, in addition to policy space to adopt measures the New Zealand government deems necessary to protect indigenous plant species in fulfilment of its obligations under the Treaty of Waitangi. While early drafts of the Partnership contained more ambitious language in relation to the protection of traditional knowledge and cultural expressions as intellectual property, the final version nevertheless demonstrates that possibilities for experimentation remain available when negotiating international commercial agreements.

Civil society activists, local and Indigenous communities, and domestic authorities could learn several lessons from the Trans-Pacific Partnership. Foremost, the experience of New Zealand in negotiating towards the Partnership demonstrates that activism by ethnic minority and Indigenous peoples can have a tangible effect on international trade agreements. However, this effect may depend on the provision of sufficiently robust legal protections for Indigenous rights at the national level, similar to the Treaty of Waitangi framework in New Zealand. The Partnership further demonstrates that goals related to safeguarding traditional knowledge and native biodiversity can be integrated into a globalised trade and intellectual property regime.

Future international commercial agreements should build upon the example of the Trans-Pacific Partnership by requiring signatories to adhere to and implement national laws consistent with the access and benefit sharing treaties, especially the Nagoya Protocol and the Plant Treaty. Although it is likely that local and Indigenous peoples' interests and the conservation of native biodiversity could best be advanced by curtailing the expansion of globalised neoliberal capitalism in favour of alternative economic models, the examples of policy space described in this article should be explored and exploited.

FIXING A BROKEN SYSTEM: PRACTICAL TRAJECTORIES BEYOND REPRESENTATIVE DEMOCRACY

Jonathan Sri[1]

From the perspective of a serving local politician, this article looks at the flaws of hierarchical centralised decision-making within representative democracy and suggests that shifting towards participatory democracy systems would lead to better outcomes for the environment and the general public. I reflect on our various local trials of decentralised decision-making processes within the Gabba Ward of Brisbane City Council, including forms of online community voting, participatory budgeting to allocate funding to local infrastructure projects, and participatory design workshops for public park upgrades. I highlight key lessons from our trials over the past five years and unpack some of the tensions between maximising participation via online direct democracy versus encouraging deeper deliberation via face-to-face engagement.

I INTRODUCTION

A growing number of Australians believe our current political system isn't working very well.[2] When I was first elected as a city councillor in 2016, one of my most widely publicised campaign priorities was to 'help fix our broken democracy.' It was an admittedly simplistic slogan, but the implied systemic critique evidently resonated with many voters. We argued that the big challenges humanity faces – from global warming to biodiversity collapse to inequitable management and distribution of resources – can't be properly addressed unless we also rectify fundamental weaknesses of our current democratic system itself.

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[1] Councillor Jonathan Sri has represented the Gabba Ward of Brisbane City Council since 2016 and is Queensland's first elected Greens city councillor. He holds a dual Bachelor of Arts/Bachelor of Laws (Hons) and a Graduate Certificate in Writing from the University of Queensland.

[2] In Sarah Cameron & Ian McAllister, *Trends in Australian Political Opinion: Results from the Australian Election Study 1987–2019* (Australian National University, 2019) <https://australianelectionstudy.org/wp-content/uploads/Trends-in-Australian-Political-Opinion-1987-2019.pdf>, the authors find that 56% of Australians believe government is run for the benefit of 'a few big interests,' and that only 59% of Australians were 'satisfied with democracy,' down from 72% in 2013 and 86% in 2007.

We could see that large numbers of people are losing faith in representative democracy, and believe it's not resulting in decisions that serve the public interest, which prompts the question: what practical alternatives should we be advocating for?[3]

Over the past five years, while representing the Gabba Ward of Brisbane City Council (**BCC**), I've been experimenting with a range of democratic decision-making processes that might represent viable alternatives or augmentations to our current system. We've identified both advantages and limitations of the various participatory decision-making processes we've trialled, and gained valuable insights which indicate that a renewed focus on decentralising and localising decision-making power could help meet the social and environmental storms on our shared horizon.

So many local decisions have significant ramifications for our communities and the wider environment. Should we take space away from cars to make more room for buses and bikes? How can our city house a growing population without clearing more land and consuming more non-renewable resources? Should residents in flood-prone coastal areas be supported to relocate now, or do we wait for the seas to rise? Too often, politicians only think short-term, or avoid tough decisions altogether. So, is participatory democracy a better way forward?

In exploring these questions, I must acknowledge the Jagera and Turrbal peoples, on whose land I live and work – specifically the areas known as Woolloongabba and Kulpurum (East Brisbane/Norman Creek). I pay respects to the Elders and custodians of this land and recognise that legitimate treaties have not yet been signed. First Nations sovereignty over this continent has never been ceded, and this always was and always will be Aboriginal land.

[3] My use of 'we' in this essay refers primarily to my office staff, who are actively involved in philosophical and strategic discussions about how I should operate as a councillor, as well as to a wider layer of volunteers, supporters and Greens members to whom I feel accountable and seek advice from.

I've deliberately included this specific acknowledgement within the body of this essay, as I don't believe we can credibly theorise the efficacy of our democracy while overlooking the shaky foundations of our entire legal and political system.[4] We still have much to learn from the less hierarchical decision-making processes and structures used by Aboriginal and Torres Strait Islander legal systems. Such learning must come alongside meaningful action to rectify injustice and empower First Nations communities, rather than simply extracting knowledge for the benefit of non-Indigenous power structures.

In exploring how we might improve our democracy; we must remember that the fundamental injustice of our mainstream colonial political system is its refusal and apparent inability to meaningfully engage with First Nations sovereignty and calls for decolonisation. While decentralising and localising decision-making power may well constitute a step in the right direction, such reforms don't necessarily go to the heart of those deeper questions, which are beyond the scope of this paper, but can't be ignored in bigger conversations about the future of our democracy.

II SO WHAT'S GOING WRONG?

While a lot of people seem to agree our political system is failing to serve the public interest and protect the environment, diagnoses of the problem vary. Some commentators blame a sensationalist and overwhelmingly conservative media landscape.[5] Others point to campaign financing, aggressive lobbying and the disproportionate influence of big corporations,[6] or to careerist politicians whose privileged lives insulate and detach them from the material concerns of the people they represent.

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[4] This is an unresolved tension in my work as a city councillor, where I'm simultaneously seeking to make the best of an unjust and inherently oppressive system of government while also hoping to help create a very different kind of world where violent colonial nation-states no longer exist.

[5] Kevin Rudd, Submission No 52 to the Senate Standing Committees on Environment and Communications, Parliament of Australia, *Inquiry into Media Diversity in Australia* (11 December 2020).

[6] Richard Holden, 'Campaign Finance is a big problem - here's how we could go about fixing it', *Crikey* (Online, 25 March 2021) <https://www.crikey.com.au/2021/03/25/campaign-finance-dirty-country/>.

I think all of these explanations are partly true. But after five years as a city councillor, I'm realising that the common – but often-overlooked – thread is the over-centralisation of power itself, which is an entrenched feature of representative democracy in colonial nation-states.

In theory, representative democracy involves voters from different electorates choosing individuals who enact policies and make laws that serve their constituents' interests. In practice, our system is far less democratic and responsive to voters. While small decisions – such as how to allocate a local grants budget – might sometimes be made by individual elected representatives who are directly accountable to voters, bigger policy and budgeting decisions are usually centralised under the control of individual ministers at the state and federal levels, or a mayor or committee chairperson at the local government level.

This mismatch between how we're told our democracy works and how it actually works is not surprising when we remember that disempowering and subjugating people is a core element of Western colonialism and imperialism.[7]

The winner-takes-all nature of a majoritarian voting system means that whoever can cobble together a stable alliance representing at least 51% of the seats ends up with 100% of executive power. This creates the pressure for political parties to form (and to merge into larger formal coalitions) and means that even in jurisdictions without formalised political parties, factions and voting blocs commonly emerge.[8] The formation of political parties and the resulting adversarialism between parties and factions tends to reward and reinforce further concentration of power.[9]

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[7] Nick Estes, 'You Can't Vote Harder: Between American Indian Citizenship and Decolonization' *Verso* (Online, 7 February 2019) <https://www.versobooks.com/blogs/4227-you-can-t-vote-harder-between-american-indian-citizenship-and-decolonization> .

[8] SC Stokes 'Political Parties and Democracy' (1999) 2 *Annual Review of Political Science* 243 <https://www.annualreviews.org/doi/10.1146/annurev.polisci.2.1.243>.

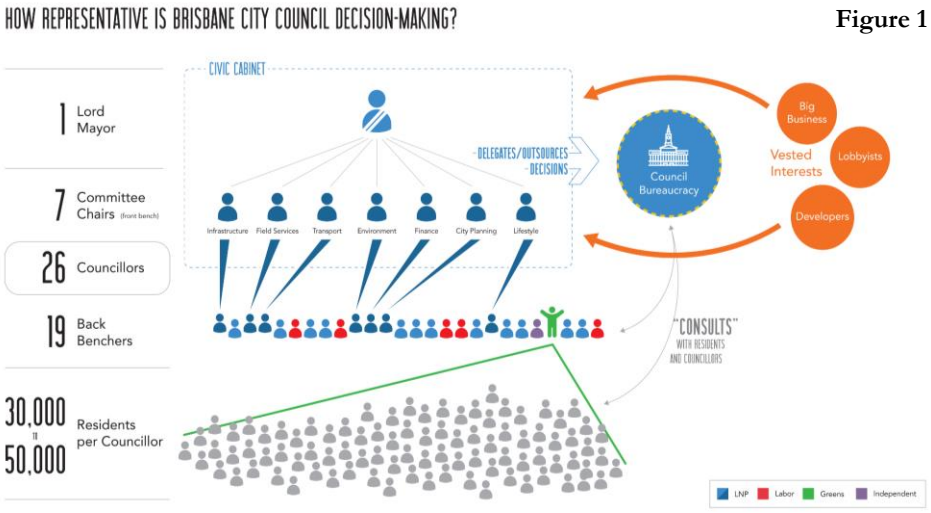
[9] Simone Weil, 'On the Abolition of All Political Parties' (1957) tr Simon Leys (2013) <https://libcom.org/library/abolition-all-political-parties-simone-weil>.

Centralised decision-making power serves the interests of the corporate sector, because a given industry lobbyist only needs to influence and convince one or two government decision-makers to secure support for a favourable policy initiative, as opposed to winning over dozens of elected representatives or indeed entire populations of voters. In the Australian context, it's easy to find examples where the corporate sector has actively lobbied for changes which centralise and concentrate government decision-making power, such as the constant pressure to amalgamate local councils which are more responsive to residents' views into larger 'regional' councils.[10] Whether it's within a local council or the federal government, centralisation empowers big business and disempowers the broader public.

A Power is heavily centralised in the hands of 'ruling party' senior politicians

From my own experience on BCC, I've seen that no substantive decisions are made by the twenty-six city councillors and the Lord Mayor engaging in open dialogue during full council meetings.

Figure 1



[10] Dana McQuestin, Joseph Drew and Brian Dollery, 'Do Municipal Mergers Improve Technical Efficiency? An Empirical Analysis of the 2008 Queensland Municipal Merger Program' (2018) 77(3) *Australian Journal of Public Administration* 442 <https://opus.lib.uts.edu.au/bitstream/10453/117902/3/29.9.17%2BDo%2BMunicipal%2BMergers%2BImprove%2BTechnical%2BEfficiency%2BACCEPTED%2BVERSION.pdf>.

Currently, the Liberal National Party holds nineteen of Brisbane's twenty-six council wards, as well as the mayoralty (a directly-elected role). Five wards are held by the Labor Party, one is held by an Independent councillor (previously an LNP member), and I hold the Gabba Ward for the Greens. Only senior LNP members loyal to the mayor are appointed to chair the council committees overseeing different council responsibilities such as parks, infrastructure, community facilities etc.[11] These council committees all have a membership of four LNP councillors and two non-LNP councillors. This strong majority is used to rubber-stamp any decisions made by committee chairs and keep controversial discussion topics off the meeting agenda entirely.

So, for Brisbane City Council, decisions are actually made behind closed doors either by the chair of the relevant council committee or by the mayor himself. Particularly significant decisions are made by the 'Civic Cabinet' (which comprises the mayor and the seven committee chairs) and are rubber-stamped by routine motions at full council meetings.

Any attempts to openly discuss policy or budgeting decisions in public council meetings are ignored or derailed by the LNP using their strong majority. Party allegiances and bloc-voting effectively reinforce the centralisation of decision-making power in the hands of committee chairs and the mayor's office.

This same phenomenon is obvious to anyone who watches state or federal parliamentary debates. MPs vote along party lines, and decisions about a party's position on a new bill are made behind closed doors, well before the meeting. Just like BCC's Civic Cabinet, it is the Ministerial Cabinet and the Prime Minister or Premier who ultimately decide the government's direction. The primary role of governing party backbenchers is to mindlessly endorse and vote through whatever decisions their ministers have made.

[11] See accompanying Figure 1. Note that the names and responsibilities of BCC Committees change every few years according to the whims of the administration. A new committee has been created with specific responsibilities for the Brisbane 2032 Olympics.

B Time-poor politicians outsource to unaccountable decision-makers

Of course, a government minister or local council mayor doesn't have time to meaningfully reflect upon all the decisions that they are technically responsible for. In practice, a lot of power rests with senior public servants, who tell the politician what to say and do. These public servants frequently make political judgments about what decision best serves the public interest but are not directly accountable to the public via elections.[12] In other cases, private consultants are contracted to study problems and recommend solutions, allowing both politicians and public servants to avoid taking responsibility for tough decisions.[13]

Even where a minister or other elected representative is actually making a substantive decision themselves, politicians with large electorates simply don't have time to hear meaningful feedback from every single person they supposedly represent. Thus, they rely heavily on the advice of public servants, but also on the advice of other people whose opinions they respect. This might be friends, family members, prominent community leaders, high-profile media commentators, political party strategists and powerbrokers, and in some cases, lobbyists and well-connected businesspeople.[14] Members of these latter categories often have direct financial interests in influencing and manipulating political decisions, and will expend significant time and resources seeking to do so. To put it crudely, the political elites who hold power don't have time to hear from everyone in their electorate about what decisions they should make, so they predominantly end up hearing from other well-connected elites.

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[12] Richard Mulgan, *Politicising the Australian Public Service* (Research Paper 3, Parliamentary Library, Parliament of Australia, 10 November 1998).

[13] Markus Mannheim, 'Federal Government spending $5 billion per year on contractors as gig economy grows inside public service', *ABC* (Online, 10 September 2020) <https://www.abc.net.au/news/2020-09-10/contractors-and-the-public-service-gig-economy/12647956>.

[14] Cameron Murray and Paul Frijters, *Game of Mates, How favours bleed the nation* (Publicious Book Publishing, 2017).

C A spiral of disengagement

With little opportunity for meaningful involvement in the big decisions that shape our lives, it's hardly surprising that most voters are relatively disengaged from conversations about government policy. So even on the rare occasions that a political leader is genuinely interested in representing and implementing the will of the electorate, it can be difficult to motivate voters to provide feedback, let alone participate in collective decision-making.

In an increasingly individualistic society, most of us are rarely invited to think like policymakers and make big decisions about the long-term public interest. We are denied access to a sufficient knowledge base to make informed decisions, and most of us don't have the time to critically analyse sophisticated propaganda. We don't get much practice at policymaking.

Consequently, many public servants and politicians from across the political spectrum take a default view that 'the voters don't know what's good for them' and 'ordinary people can't be trusted to make the right decisions.' This disdain for others' opinions extends towards opposition party politicians and sometimes even to backbenchers from one's own party. Senior politicians assume they have access to more information than anyone else, and that negotiation or consultation with others is thus a waste of time. This paternalistic elitism is embodied in tokenistic public consultation processes which are designed to give the appearance of caring about voters' views, when in fact many senior government decision-makers firmly believe they know best.

III REBUILDING FROM THE BOTTOM UP

This fractured political landscape is the backdrop for the experiments in local participatory democracy that we've initiated through the Gabba Ward Office of Brisbane City Council over the past five years. In addition to surveys and other traditional forms of soliciting public feedback, we've trialled a range of processes and techniques to help decentralise decision-making, including:

1. Participatory budgeting to allocate a local infrastructure budget
2. Direct voting about changes to public spaces and new transport infrastructure
3. Consensus-based participatory design processes for specific park upgrade projects

Feedback from participating residents has been overwhelmingly positive. By decentralising decision-making power and involving people who are directly impacted by decisions, we get higher-quality outcomes that are more responsive to localised needs.

A key difference between our Gabba Ward processes, and the polls, surveys and consultations that BCC ordinarily runs, is our genuine willingness and intention to treat the outcomes as binding rather than advisory. We learned early on that people were more eager to participate if they felt confident the process would lead to tangible outcomes.

An underlying goal of these processes was to give residents more practice in non-adversarial collective decision-making. Through my work, I've found that many residents are accustomed to advocating only for their own immediate self-interest when engaging with government, and either lack, or avoid using, basic skills of compromise and collaboration. Making local decisions via participatory democratic processes is thus valuable because it develops and spreads those skills within our community, gradually opening up opportunities to make other bigger decisions via similar processes.

The following sections outline the different processes we've trialled since 2016.

1 Participatory budgeting

Brisbane City Councillors have broad control over the allocation of a Suburban Enhancement Fund (**SEF**) for their ward of approximately $450 000 per year. This money can be used for minor upgrades to local public spaces, such as new footpaths, playgrounds, basketball courts and park lighting. Most councillors take suggestions on how to allocate this money from council officers and occasionally from community groups, and make the funding allocation decisions themselves.

In the Gabba Ward, we use a different process. Residents are proactively invited to suggest local projects via a web platform,[15] and we then talk to council officers about whether the suggested projects are feasible. If they are able to be delivered via the SEF budget, they are added to an 'Eligible Projects' list with a rough cost estimate. Residents are then invited to vote via an online platform for their preferred projects by allocating funding to Eligible Projects up to the total value of the Gabba Ward's annual SEF budget.

As well as allocating funding to their preferred projects, residents are encouraged to comment on each other's project suggestions, and also use 'Like' and 'Dislike' buttons to signal further support or opposition. Online voting is open to anyone who wants to have a say on the future of their neighbourhood, including under-18s and non-citizens (however we don't collect detailed data on the age or residency status of participants).

Through this process, we've found residents tend to support a longer list of smaller projects with highly localised benefits, as opposed to voting for just one or two of the more expensive 'high-profile' project suggestions that would have been prioritised if the decision was left up to politicians seeking favourable media coverage. Many project suggestions have had a strong social justice element, such as requests for showers and lockers in public parks to support homeless people,[16] and residents consistently showed that they were thinking about their area's long-term needs, proposing projects that would help mitigate and adapt to global warming, such as removing parking spaces to plant more street trees. This contrasts with the local projects that seem to be prioritised in other wards around the city, where councillors routinely cater to demands from vocal motorists to convert areas of parkland into car parks.

In addition to the online voting and commenting, we also organised face-to-face forums to encourage residents to meet and discuss their ideas. We reasoned that facilitating direct deliberation between residents was more meaningful than participants simply voting via an

[15] *Gabba Community Voting* (Web Page) <https://gabba.communityvotingsystems.com>.

[16] Unfortunately, the LNP-dominated council administration has been very resistant to such proposals, deeming them out of scope of the Suburban Enhancement Fund budget.

online platform. Unfortunately, low turnouts made these small-group meetings less valuable as decision-making spaces.

2 Participatory design

In 2018 and 2019, we decided (unilaterally) to allocate a large portion of the SEF budget to two individual parks, then organised participatory design processes to involve residents in decision-making about how that money should be spent within the park.

For Buranda Common on Carl Street, and the much smaller Queen Bess Park (both in Woolloongabba) we organised on-site workshops for residents, with volunteer architecture and design experts on hand to provide advice. Each workshop attracted 5 to 15 participants. Residents talked about their priorities for the park, and we mapped out different layout options for where to locate various features and facilities. For Buranda Common, we also organised a large community festival to draw more people into the space and collect general feedback about priorities.

The workshops were great for involving residents in deeper deliberation about the design of a local space that was important to them, but were time-intensive to organise, and required participants to set aside a couple of hours on a weekend afternoon, which meant attendance was low.

Crucially, there were difficult-to-resolve mismatches between residents' aspirations for the park, and council regulations about what could actually be delivered. BCC has one-size-fits-all rules that strictly constrain possibilities for public space design, which meant the outcomes ultimately delivered in the park by council were a little different to the concept designs agreed upon by residents.

Nevertheless, we concluded that similar participatory processes could be applied to other decisions, such as redesigning an entire neighbourhood.

3 Online voting

For more straightforward local decisions, we've also used direct voting via online polls, where the results update publicly in real-time. For some issues that I have direct control over, such as the preferred location of a dog off-leash area,[17] or turning part of an open field into a nature reserve, these polls are highly influential over the final decision, and are effectively treated by my office as binding. For other decisions which I am taking a public position on, but which I don't have final say over – such as the location of a large new green bridge[18] – the polls are simply a source of guidance about what residents want me to support, but won't necessarily determine the final choice, which ultimately depends on a full council vote.

These two kinds of polls are run on the same online platform but exemplify different styles of democracy. The former, binding polls are a form of direct democracy – effectively a plebiscite on a specific local issue, whereas the latter advisory polls are little different to the non-binding consultation processes that many elected representatives rely upon to guide their decisions.

We found that publishing real-time vote tallies on our website as soon as a participant selects an option helps strengthen faith in the process and results in comparatively high participation rates.

Compared to face-to-face meetings and workshops, direct online voting potentially offers fewer opportunities for robust discussion and deliberation between residents. However, a small minority of passionate residents do take the time to post comments and attempt to influence their neighbours' voting choices, even though there's no requirement or pressure to comment or engage in dialogue.

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[17] *Gabba Community Voting - Which is the better site for a fenced dog off-leash area in Kangaroo Point?* (Online Poll) <https://gabba.communityvotingsystems.com/poll/pLG223oeuKBNh7c7P>.

[18] *Gabba Community Voting - Do we need both the Toowong-West End bridge and the St Lucia-West End bridge?* (Online Poll) <https://gabba.communityvotingsystems.com/poll/zEethzk7hATzXftcd>.

Unfortunately, even where a well-promoted poll shows clear majority support for a particular option, it's not unusual for a small number of participants who are unhappy with the outcome to criticise the legitimacy of the process and the accuracy of the public vote. Most commonly, these critiques are based on the debatable assertion that people who live further away from a public space should have less say in how it is designed and used.[19]

IV KEY LESSONS

A Multiple benefits

In addition to the overarching benefit of making decisions that more closely align with residents' priorities and expectations, our focus on participatory democracy has:

- Helped create a more engaged population with a greater understanding of local council and the work I do
- Reduced the potential for vocal or well-connected stakeholders to disproportionately influence or manipulate local decision-making
- Ensured greater public support for the outcomes and decisions

This last advantage is particularly noteworthy. Most government decisions are rightly the subject of public scrutiny and critique, and it's inevitable some of those who are unhappy with a decision - such as industries who don't want to reduce fossil fuel emissions, or developers who oppose tighter regulations against tree clearing - will raise ongoing objections. This can contribute to unnecessary reviews and reopening of decisions, significant public service resources expended on responding to complaints and explaining why decisions were made, and even to decision paralysis where nothing gets done for fear of public backlash.

In contrast, when it's clear that a decision has been made by the community itself via a transparent and accessible process, retroactive challenges to an outcome are less strident and less likely. So, although involving residents in a participatory planning or community

[19] Jonathan Sri, 'Who Gets a Say in the Design of Public Space?' (Blog Post, 10 April 2018) <www.jonathansri.com/planningpublicspace>.

voting exercise might seem more time-consuming at first glance, it can save time and resources in the long-run, ensuring that decisions have a stronger public mandate and are less prone to being reversed later on.

B Clear, binding results reinforce participation

Public participation tends to be higher where there's a clear connection between the process and an identifiable outcome. Many of the footpath and park upgrade projects chosen through our participatory budgeting system are delivered within a year or two, so residents can see an obvious return on the time they've invested in engaging with the process. You vote for a basketball court in Musgrave Park, and twelve months later you're shooting hoops there.

When promoting these processes, we strive to clearly identify whether a particular vote is binding or simply advisory. Vote tallies remain online and can be easily accessed and reviewed even after a decision is finalised.[20]

A In-person versus online: Quality of deliberation versus accessibility and mass participation

When we began our participatory budgeting trials in 2016, we scheduled eight face-to-face workshops in parks and meeting halls around the Gabba Ward. These were promoted online via email and social media, but also via printed newsletters delivered to every household in the electorate. Our primary goals for the in-person meetings were to facilitate higher-quality deliberation and dialogue, as well as to ensure that residents who weren't computer-literate still had opportunities to contribute to the participatory budgeting process and were offered a paper ballot if they needed one.

Attendance at these in-person participatory budgeting workshops was consistently poor. The best-attended sessions attracted around twenty residents, and most only attracted one to five residents, meaning they couldn't be relied upon as formal decision-making spaces.

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[20] *Gabba Community Voting* - Decisions (Online Poll) <https://gabba.communityvotingsystems.com/polls/decision>.

However, the quality of discussion at these small meetings was uniformly very high. Great ideas were proposed, becoming formal project suggestions that residents could vote on via the online platform. Those who attended the meetings gained a deeper understanding of how the council delivers local infrastructure projects and the various technical considerations that limit what can be constructed in certain spaces.

In contrast, the online participatory budgeting platform usually has 300 to 500 residents casting their votes each year. While this is still a relatively small proportion of the 45 000+ residents who live in the Gabba Ward, it's a more reasonable sample size for the kind of project decisions that are currently made via the participatory budgeting system, and certainly includes a lot more people in the decision than if I'd simply allocated the funding myself.

Out of the hundreds of people who vote for particular local projects online, only a small proportion (in the range of 1% to 5% depending on the project) post comments before casting their vote. We don't know for sure how many comments and how much information people read before voting, but it seems likely that most online participants don't take much time to hear a range of perspectives before expressing a view.

For most residents, participating in online votes is significantly easier than finding the time to attend in-person public forums. Straw polls conducted at many of the public meetings I've organised about local issues and projects suggest that proportionally speaking, older home-owners are likely to be over-represented, while younger people and renters are under-represented.

The discrepancies in both sentiment and demographics between in-person meetings and online votes highlight that the specific format of a participatory democracy process is a major variable affecting the outcome. For example, the recent (non-binding) online polls we organised regarding green bridges from West End to Toowong and St Lucia attracted 600 to 700+ responses depending on the question.[21] In contrast, an in-person public meeting about those same bridges on a Saturday afternoon (organised in partnership with

[21] Jonathan Sri, 'West End Bridges Consultation Results' (Blog, 12 May 2021) <www.jonathansri.com/bridgevoteresults>.

relevant State MPs) attracted just over 100 attendees. A vote conducted at the start of this meeting found that 53% (out of 92 respondents) were generally opposed to a pedestrian and cycling bridge between West End and St Lucia.[22] Whereas for the larger online vote, only 20% of respondents were opposed to such a bridge.[23] This marked discrepancy – 53% opposition at the in-person meeting compared with 20% opposition via the online poll – suggests that at least for this issue, opponents were much more motivated than proponents to attend the public meeting.

Thus, a key challenge for advocates of participatory democracy is to balance the goals of maximising participation and accessibility, with ensuring quality deliberation where participants take the time to consider different perspectives rather than hastily (and mindlessly) voting in accordance with their own self-interest.

Increasingly, our approach has been to rely on online voting to maximise participation, complemented with in-person forums and meetings to increase public knowledge of an issue and ensure participants have more information available before making a decision. The online platform allows users to log back in and update their votes repeatedly before the closing deadline, creating opportunities for participants to change their mind in response to new information.

However, a mixed model still doesn't fully resolve concerns about majoritarianism and over-representation of more privileged members of society. A variety of barriers prevent many community members from participating in any kind of civic engagement process. For people in crisis or severe housing stress, people with time-intensive care responsibilities, and some people with disabilities, neither online voting platforms nor large in-person meetings are accessible.

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[22] Michael Berkman MP, 'Toowong and St Lucia Green Bridges Submission' (Online letter, 31 March 2021) 8 <https://d3n8a8pro7vhmx.cloudfront.net/maiwargreens/pages/2510/attachments/original/1617174390/2021-03-31_Green_bridges_submission.pdf?1617174390>.

[23] Sri (n 21).

V DEEPER TRANSFORMATION

A Structural barriers to engagement and empowerment

It's not hard to find examples of purportedly 'progressive' political projects which seek to empower residents through direct democracy via online voting platforms.[24] Many such projects seem to assume that civic disengagement can be solved primarily through the development and use of more efficient online systems, overlooking the fact that not everyone is equally capable of participating in such processes, and that it's difficult to efficiently decentralise decision-making about complex systems which are designed to be hierarchically controlled.

When residents are working long hours to pay the bills and caring for children or other dependents, jumping online (let alone attending a public meeting) to decide whether their local park needs a new toilet block or a dog off-leash area may not be high on their priority list.

In 2018, our local survey of 1100 Gabba Ward residents found that just over half of respondents believed residents should have control over decisions about public space upgrades via direct voting or other deliberative democracy processes.[25] The other 47% of respondents preferred that the decisions should be made by me as the elected representative.

It seems likely that if residents were offered control over larger, more significant decisions, more of us would make time to participate. Participatory democracy could empower more people to have a meaningful say over the government policies and projects that affect them, and would likely lead to both a more informed populace and better quality outcomes.

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[24] See Flux (Web Page) <https://voteflux.org>, New Vote (Web Page) <https://newvote.org/home>, Senator Online (Web Page) <http://www.senatoronline.org.au/>, Geoff Ebbs, 'Karel Boele, People Decide Candidate for the Gabba Ward' Westender (Online 31 January 2016) <https://westender.com.au/karel-boele-people-decided-candidate-for-the-gabba-ward-bccvotes/>.

[25] Jonathan Sri, 'Local Survey 2018: Results Summary' (Blog, 10 December 2018) <https://www.jonathansri.com/surveyresults2018>.

However, the same people who are the most marginalised and excluded by existing government structures – particularly people experiencing housing insecurity, First Nations peoples, people with disabilities, and new migrants – would also likely be under-represented in decentralised community decision-making processes.

This underscores the importance of using processes which foster deliberation and consideration of marginalised perspectives, as opposed to direct voting in online plebiscites, which may tend to reinforce individualism and encourage participants to simply vote according to their own perceived short-term self-interest. Ultimately, introducing a more accessible voting system simply isn't enough to rectify the deeper power imbalances embedded within our society.

B What's up for discussion?

Our participatory democracy trials have given me greater confidence that similar processes could efficiently facilitate public control over much more significant government decisions, particularly in terms of urban planning, climate change adaptation and the shift to more sustainable transport systems.

We already know it's possible to decentralise decision-making, and the benefits clearly justify the costs. But those who gain the most from current centralised, hierarchical decision-making structures have a strong interest in resisting change.

Unfortunately, if not accompanied by a robust critique of capitalism and entrenched inequality, participatory democracy can easily be co-opted as a tool of neoliberalism, forcing residents to choose between a narrow range of options while bigger choices aren't up for discussion. Expecting residents to choose between Option A or B while ignoring a broader range of possible responses to a problem can tend to reinforce the status quo rather than transforming it.

VI CONCLUSION

From First Nations communities calling for genuine self-determination, to the Extinction Rebellion demands for citizen assemblies,[26] there's a broad, growing appetite for rethinking, decentralising and even abolishing top-down government power structures. My experiences with participatory democracy contradict the political establishment's narrative that voters are irredeemably disengaged. The more decision-making power you give 'ordinary' people, the more responsible and thoughtful they become about exercising it.

Participatory democracy processes can be time-intensive, and aren't without their weaknesses, but they are arguably more efficient than adversarial representative democracy systems, and less prone to manipulation by vested interests. They empower more people, so the resultant decisions benefit from greater legitimacy and public support.

While it's obvious to me that more residents would be keen to have a say on the bigger decisions that shape our society, it's equally obvious that major party politicians and their allies in big business are reluctant to relinquish that power. Our trials in participatory budgeting, participatory design and community voting show that alternatives are possible, but the radical potential of decentralising decision-making and empowering voters means that such systems will not be adopted on a wider scale without a fight.

Conventional government power structures and processes have led to the degradation and catastrophic destabilisation of local ecosystems and the entire biosphere. But positive change is still possible. If we can use participatory democracy to redistribute power away from politicians and back to the people, we may yet have a chance of cleaning up this mess.

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[26] John Harris, 'If democracy looks doomed, Extinction Rebellion may have an answer' *The Guardian* (Online, 30 August 2020) <https://www.theguardian.com/commentisfree/2020/aug/30/extinction-rebellion-democracy-climate-emergency-bill-citizens-assembly>.

AN INTERVIEW WITH ASSOCIATE PROFESSOR BRIDGET LEWIS

Thomas Moore and Rachna Nagesh

In this interview, Associate Professor Bridget Lewis discusses the use of human rights law in recent environmental legal cases, such as Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors [2020] QLC 33 *and* Sharma v Minister for the Environment [2021] FCA 560. *Associate Professor Lewis touches on the use of intergenerational equity and cultural rights as powerful arguments in support of climate litigation, and discusses the future viability of the former in an era where existing generations themselves will be impacted by environmental decisions by the Executive. She also provides valuable insights into specialised courts and tribunals operating in the environmental legal space and the importance of a 'gendered perspective' in climate change. We are very thankful to Associate Professor Lewis for taking the time to participate in this interview.*

Associate Professor Lewis, thank you so much for agreeing to be interviewed by Pandora's Box for our 2021 edition:* 'Unsustainable Practices: Law and the Environment'. *To start things off, broadly speaking, what is the interplay between human rights and environmental protection?

We normally talk about that relationship as being *mutually supporting*. Most obviously, you would recognise that a certain quality of environment is necessary for the enjoyment of human rights. That is clear for rights like the right to health, or adequate standard living involving food, water and housing. If you are relying on a polluted river for water, then obviously that is going to have implications for your health and your standard of living, and even your life overall. In this very fundamental way, the environment is a precondition for the enjoyment of a wide range of human rights. We call this the 'greening' of human rights. This is most acute in places where people are relying on the environment directly for their subsistence, opening up a wider range of ways in which environmental problems can impact on human rights. It is not just their physical health, but also their economic rights and ability to participate in government.

Aside from this direct way in which environmental protection underpins human rights enjoyment, we should also consider that there are broader and less direct ways in which the environment starts to impact on human rights. We have seen this come out especially in cases heard in the European Court of Human Rights. Some cases have identified that if you have to live near a toxic waste dump, that is a breach of your right to privacy and your right to enjoyment of family life, since it impacts your quality of life.[1]

The flip side of the notion that human rights and environmental protection are mutually supporting concepts, is that the protection of human rights also facilitates the protection of the environment. This is probably not explored as much, however rights like freedom of expression and access to information are essential to knowing what is happening in the environment and to take action and challenge decisions. Taking this view, access to justice, equality before the law, and the right to participate in democratic elections - basically, civil and political rights - are all very important to know the quality of your environment and do something about it if it is being badly affected. Bound up in this is the need for a strong system of human rights protections so that when your rights are being affected, you can seek a remedy and know you will get a fair trial or process in doing so. What this shows is that not only cultural, economic and social rights are affected, but also civil and political rights. What we see is that often where some of the worst environmental problems exist, we also have weak protections of human rights.

It is interesting that you mention that places with the worst environmental damage have the weakest protections. I was under the impression that Chile and other similar countries were taking more active steps in this area. Although, I note that South American and African countries are perhaps not as well-known as the Australian protections. Did you have anything to speak to in relation to those jurisdictions?

[1] See eg, *López Ostra Vs. Spain* (European Court Of Human Rights, Application No 16798/90, 9 December 1994).

Yes, a separate standalone right to a healthy environment has been recognised in constitutions across the world. Sometimes the phrasing is 'right to a clean environment' or 'decent environment'... there is a range of language used and the exact content differs between jurisdictions. The concept is that this is a separate human right guaranteeing some minimum quality of the environment. The places where this process has been most noticeable is in Southern and Central America, in African nations, and in a number of former Soviet states. This may be a reaction to some of that serious environmental exploitation that happened where there was inadequate protection. A lot of these countries are also places that have had the opportunity to draft a new constitution in the last thirty to forty years! You compare that to a country like Australia where constitutional reform is just so rare and difficult to implement a change; whether we try to follow those steps is one question, but whether we would get it through Parliament is an entirely separate one...

We are now also starting to see the litigation of these constitutionally-enshrined rights in those countries. There is a case in Colombia that was brought on behalf of future generations based on their right to a healthy environment, the claim there was that Colombia's failure to protect the Amazon rainforest and the impact of that failure constitutes a breach of the right to a healthy environment for future generations.[2] This claim would never work in Australia since we are missing some key pieces in our legal system.

Of course, the value of these constitutional rights depends on their justiciability, and what processes are put in place to ensure they are not just aspirational statements, but supported by some enforceability. This is an important consideration as such rights do not always result in strong action. I should note though that even if they are aspirational statements, they still serve a purpose and a starting point for some form of action.

[2] *Demanda Generaciones Futuras v Minambiente* (Supreme Court of Justice of Colombia, Application No 11001-22-03-000-2018-00319–01).

In terms of recent developments, how have human rights been used in the climate justice sphere (both domestically and abroad)? What are some key legal challenges with effectively employing international human rights law to address climate change?

We think about climate change as being an environmental rights problem… but surprisingly the climate change litigation has made little use of human rights. There have been very few cases that have tried to make arguments directly based on human rights. I think there are a few reasons for that and some of it has to do with the way we typically understand human rights as being a special relationship between a government and its citizens. International human rights law fits within this state-centric paradigm; you can enforce your rights against your government, but it becomes very difficult if you try to enforce them against somebody else. So, that rights-holder/duty-bearer relationship limits the utility of human rights law in the context of climate change, since climate change is this huge global cumulative long-term problem. Initially, when we first started exploring human rights-based approaches to climate change, lots of people were saying that a human rights case will not work because whichever government you try to bring your action against will simply point to every other government and say, "it's not us causing this problem", or at least "it's not *only* us that's causing this problem". Along these lines, we see a 'but for' reasoning being used: "we emit X greenhouse gases, but for these emissions, the problem of climate change would still exist, and therefore we are not responsible for the impacts on your human rights". It was compelling reasoning to be honest, and it was difficult to see how you would get around that. I think we probably started looking elsewhere for legal strategies for climate change.

In recent years, things have shifted for a number of reasons. Firstly, climate change is no longer a future problem, it's absolutely happening now. Whatever uncertainty there was about climate change and human rights impacts, and issues around foreseeability and responsibility, has been settled now. We can see what is happening, science has advanced a lot in terms of being able to track the impacts of a particular country's contributions. This has removed a lot of the uncertainty that made the legal arguments difficult. Secondly, we have also been able to focus our attention not just on preventing or reducing greenhouse gas emissions – the mitigation side of the problem – but also the adaptation side of climate

change and the duty to prevent the harm to human rights. This brings questions like, "what are you going to do about the sea levels that are rising *right now*?" and, "what are you going to do to protect these communities from storm surges and extreme weather?". Given everything has gotten much more real, the legal arguments have become more clear-cut. You may be aware of the case that the Torres Strait 8 currently have in the United Nations Human Rights Committee (**UNHR Committee**) [that is, the body that oversees the implementation of the *International Covenant on Civil and Political Rights*]. It's a complaint against Australia that is on foot, a number of Torres Strait Islander people have made this argument in relation to rights to life and culture under the *International Covenant on Civil and Political Rights* (**ICCPR**).[3] This targets both Australia's weak policies on greenhouse gas reductions, but also our adaptation measures such as inaction in building seawalls, and things like that. The human rights arguments are tightening up in relation to specific rights and certain kinds of government action and inaction.

We are also seeing that human rights can be used to inform or flesh out other responsibilities and causes of action. We saw this in the case of *Urgenda*,[4] which wasn't strictly a human rights case but in interpreting what the Dutch government's duty of care entailed, the Court was prepared to hold that the obligations and responsibilities under international human rights law have to go hand in hand with the government's duty of care to its citizens. So, those responsibilities gave content to what that duty of care would look like. This indirect influence that human rights can have on some of those arguments is extremely valuable.

My own view is that human rights has a place in climate litigation, but it is only one of many strategies. Climate litigators continue to use a multi-pronged approach to ensure they cover all bases, and currently human rights is simply starting to get more of a foothold. The

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[3] Our Island Our Home, *Our Story* (Webpage) <https://ourislandsourhome.com.au/about-the-campaign/about-the-campaign-copy/>. See also Abbie O'Brien, 'In a critical year for climate justice, these Torres Strait Islanders are leading the fight', *SBS News* (online, 4 July 2021) <https://www.sbs.com.au/news/in-a-critical-year-for-climate-justice-these-torres-strait-islanders-are-leading-the-fight/bc4ec81b-d070-473c-b982-c4ad42e3ea8f>.

[4] *State of the Netherlands v Urgenda Foundation* (Supreme Court of the Netherlands) 19/00135, ECLI:NL:HR:2019:2007, 20 December 2019).

Federal Court's recent decision in *Sharma* shows us that we don't need a human rights cause of action, since it goes back to first principles of negligence and torts law.[5] What this shows is that we may not need to have those specific rights enshrined when what we are concerned with is a fundamental responsibility that a government has towards its citizens.

I think your discussion regarding specific rights versus a general underpinning of environmental duties and considerations may go back to how human rights are framed in an inherently individualistic way. Now that we are seeing a more tangible effect and consequence, it is easier to use the framework in the first place.

Absolutely. I think that is a very important point. The uncertainty about who the victims would be was a problem in those early cases because you could not point to an actual harm. Human rights law, at least at the international level, has typically needed you to show that you were the victim of an actual harm or at least an imminent harm. Without that relationship, you weren't going to get very far. It is probably a sad indictment of our inaction on climate change, but it does make the legal arguments more clear-cut.

I was looking at the Torres Strait 8 complaint, is there an expected timeline for when that is going to be resolved?

No, it's a bit opaque since we don't get access to the complaint itself and so far, very little information has come out. Those cases can take several years to work their way through the system. One of the things we expect will happen is that Australia will challenge the admissibility of that complaint because for complaints under the ICCPR, you are supposed to exhaust your local remedies first before going to the international committees. The complainants have not taken any legal action domestically, and I suspect they will argue that there isn't a reasonable option for a domestic remedy in Australia that would work in the first place, and accordingly will request a waiver of that requirement.

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[5] *Sharma v Minister for the Environment* [2021] FCA 560 ('*Sharma* case'). For more information, visit Environmental Law Australia, *Sharma v Minister for the Environment* (Webpage) <http://envlaw.com.au/sharma/>.

We are waiting to see how the UNHR Committee is going to deal with that requirement to exhaust local remedies. This is only the second climate change case that has gone to the UNHR Committee, so there is a suspicion that they would be keen to consider the issue and make some comments about what states are required to do. However, there is still a long way to go.

I guess the lack of a human rights framework at the federal level in Australia makes it easier for them to go straight to the UNHR Committee.

Yes, and I was doing some reading about this the other day, and an interesting point that was being made was that challenging a country on its climate policies really is looking at numerous specific pieces of law and regulation that make up those policies. If you want to challenge that, how would you actually go about unpicking it? There are numerous administrative decisions that you could attempt to challenge, but whether any one of them would achieve what you are trying to achieve out of a complaint to the UNHR Committee is probably very questionable. It is arguable that it is unreasonably burdensome to expect a person to exhaust all those domestic channels. That is probably the kind of argument the Torres Strait 8 will make about why they should not have to exhaust all local remedies.

There are also a couple of other cases on foot in the United Nations Committee on the Rights of the Child (**UNCRC**) being led by Greta Thunberg. She has partnered up with 15 other children and they are running this case against five countries, arguing that their policies fall short of their obligations under the Paris Agreement.[6] They raise similar human rights as the Torres Strait 8, but similarly have not taken any domestic actions. So, again we are waiting to see how an international committee will deal with the requirement to exhaust local remedies. They also have the added problem that they are trying to bring an action, for most of them, against foreign governments. This brings in questions of extraterritorial duties. It will be fascinating to see what the UNCRC will do there.

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[6] *Chiara Sacchi and Others v Argentina, Brazil, France, Germany & Turkey* (United Nations Committee on the Rights of the Child, Petition 104/2019-108/2019, 23 September 2020). For a discussion, see Christine Bakker, '"Baptism of Fire?" The first climate case before the UN Committee on the Rights of the Child' (2021) 77 *Questions of International Law* 5.

There is another case in the European Court [of Human Rights] where there are five Portuguese young people who have brought a petition against 33 different European countries,[7] which is massive! Their argument is that there is no way they can bring such actions if they had to go through the domestic process first, however it brings up issues of sovereign state immunity. Their other argument is that climate change must be dealt with now, and if they are expected to exhaust the various domestic remedies first, it is inconsistent with the urgency with which we should be dealing with climate issues. These are some of the complexities with the human rights cases running at the moment.

This discussion leads very nicely into our next question! In Queensland, the Waratah Coal case[8] stands as the first major litmus test for human rights as an avenue for climate justice litigation - what are your thoughts on the possible ramifications from this case, in Queensland and Australia more broadly?

It has already been very helpful because we have a case where a judge has looked at the *Human Rights Act 2019* (Qld) (**the HR Act**) and started to clarify what the obligations are for public entities. President Kingham has in particular looked at what her job is with respect to the Act, and how the Act applies for the Land Court and how it influences the work of the Land Court.[9] Her Honour has made clear that in making her decision, she must consider human rights and cannot act in a way that is incompatible with human rights.[10] When the Land Court is acting in its administrative capacity, there is an independent obligation to consider human rights and to act compatibly with them.[11] That struck me because it means human rights are in *every one of these decisions*, without requiring human rights issues to

[7] *Duarte Agostinho and Others v Portugal and 32 Others* (European Court of Human Rights, Application No 39371/30) ('*Portuguese Children case*'). For more information, visit Global Legal Action Network, *The Case* (Webpage) <https://youth4climatejustice.org/the-case/>.

[8] *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors* [2020] QLC 33 ('*Waratah Coal case*').

[9] Ibid [65]-[77]. See *Human Rights Act 2019* (Qld) s 58(1).

[10] Ibid.

[11] *Waratah Coal case* (n 8) [72]-[77].

'piggyback' off an existing cause of action.[12] This is the peculiarity of the Land Court in having both an administrative and judicial role.

This already is a useful piece of judicial interpretation of the Act, and given how new the Act is, any piece of jurisprudence in relation to it is hungrily devoured. The substantive questions about human rights and fossil fuel exploitation are what people like me working in this space are most anticipating. If the decision was made that granting an environmental approval for this coal project was not compatible with human rights, this potentially has ramifications for any new fossil fuel project in the Australian jurisdictions that have human rights legislation. Therefore, it may be of limited application in Australia broadly because of our limited human rights law, but in Queensland, the decision would apply to any decision the Queensland Government would be making. Such a decision of incompatibility would be based on the climate change consequences of the mine. There are always, in any kind of environmental problem, the inner circle of impact - the people who live close by who are affected and the human rights impacts for them.

However, if you are talking about climate change, then you are expanding that out, and hence the duties get stretched out. The *Waratah Coal case* will have to look at this, since the people who are objecting are not just part of the inner circle of impact. The case is very much focused on the future climate change consequences of the mine than the impact on local water supply or health. Such a decision also has widespread implications outside of mining, such as land clearing where you lose tree cover and hence impacts our net position on greenhouse gases.

One of the things that is observable in climate litigation so far is, we have cases running all over the world, but those lawyers are collaborating. You get a cross-fertilisation of ideas, arguments from certain jurisdictions that are tried, refined and presented slightly differently in numerous countries. I think some momentum is building, and I think if this case succeeds, there is a potential for it to have an influence not just in Queensland, but beyond!

[12] *Human Rights Act 2019* (Qld) ss 58-59.

That being said, there are a number of decision-makers involved in a mine approval that are not all bound by the same kinds of human rights obligations. So, the human rights arguments and the ultimate value of a human rights decision has to be assessed against the backdrop of the environmental regulations as well. The HR Act operates with respect to any Queensland [public entity][13] but does not apply to the Federal government. It may be that a Queensland ruling is enough to stop this particular project because it requires a Queensland approval at some point in the pipeline, but it does not necessarily mean that it will prevent every other coal mine. It will always depend on the complex matrix of environmental decision-making and where human rights overlays that. Regardless, the bottom line is, it would be hugely influential for a ruling to state that coal extraction violates human rights because of the impacts on climate change, and at a more fundamental level, it would be very significant for a Queensland court to reject a coal mine! From talking to other human rights and climate change academics in different parts of the world, people are certainly keeping an eye on it.

I should also note that the cultural rights arguments being made are a reason why this case is so important. I also think those arguments are one of the reasons why it might succeed where other cases might not. I discussed earlier the one of the difficulties of running a human rights argument is that it is difficult to pinpoint exactly what the impact of climate change will be on your human rights, especially given the effects of climate change materialise over a long timeframe. However, I feel that of all the rights in the HR Act, the thing that might have the most potential is the section that guarantees the cultural rights of Aboriginal and Torres Strait Islander people.[14] Recognition of Indigenous rights in particular, set aside from cultural rights generally, opens up this opportunity to run those environmental rights arguments. In comparison, the right to life is known to have environmental dimensions, and the UNHR Committee has talked about the importance of addressing climate change, that global warming is a threat to life, and so on.[15] However, for

[13] Ibid ss 5(2)(c), 9.

[14] Ibid s 28.

[15] Human Rights Committee, *General Comment No 36*: *Article 6 of the International Covenant on Civil and Political Rights, on the right to life*, 124th sess, UN Doc CCPR/C/GC/36 (30 October 2018) [62].

an individual person, it is very difficult to show that it has reached that level of gravity *for you* that it breaches your right to life. It certainly could impact on your quality of life, and in the case of natural disasters climate change is certain life-threatening, but whether you can show that nexus between that kind of environmental havoc and your personal existence is a difficult legal proposition. But, if you are a member of an Aboriginal and Torres Strait Islander community that has particular cultural value on certain aspects of the landscape, places and ecosystems, it becomes a lot easier to establish.

I know that such arguments have been made in relation to the groundwater and rivers of Western Queensland, the 'Channel Country' and Lake Eyre Basin.[16] These areas have significant cultural heritage values and are important spiritual places for the Traditional Owners. If climate change causes those places to dry up or affects the species that live there, a cultural argument arises. This is why the cultural rights argument is an extremely important part of the *Waratah Coal* case.

Talking about how cultural rights are more tangible brings to mind a follow up question. What do you think is the viability of intergenerational justice and intergenerational rights? This is another dimension that is a lot more intangible. How might it be difficult to hold governments accountable for inaction using that framework?

It is really difficult! Particularly if you are talking about 'proper future generations', that is, those who are not born yet. You are very limited legally, at least in Australia. Due to our preliminary questions of standing, we do not have easy ways for getting a case before a court on behalf of people who don't exist yet. There are numerous models around the world, and some places that have a more developed process specifically for future generations. I mentioned the Colombian case earlier, this is an example of a place where there is a pathway to get to the Constitutional Court and you can run that kind of case on behalf of people who don't yet exist. Because we don't have this in Australia, it is very difficult to bring an action on behalf of proper future generations.

[16] Our Water Our Future (Webpage) <https://our-water-our-future.com/the-statement/>.

However, what we have seen in a couple of cases is that in the absence of a dedicated pathway to bring that kind of case, we have seen courts being prepared to have regard to intergenerational justice when they are making their decisions, and use it as an interpretive tool. This is sometimes because it is in the legislation. In the EPBC Act, we have the concepts of ecologically sustainable development, which includes intergenerational equity as a factor to be considered. Although a future generations claim is not being run, these considerations can still be woven into the argument. Depending on how receptive the court is, you might get a decision that says there is a failure to strike the appropriate balance between economic outcomes, social outcomes and environmental protections (and the impact on future generations).

The *Sharma* case is an example of how we no longer need to be running it as a 'future generations' case because you can run a case brought by children or young people, since in their lifetime the consequences we are discussing are going to be felt. So, we are still talking about intergenerational equity because we are looking at what my generation and my parents' generation owe to your generation and to younger people. The questions about fairly distributing the burdens of climate change still arise in this context, making it an intergenerational equity question that is much more tangible than proper future generations. Consequently, our deficiencies in relation to a proper future generations claim are less important. I had a conversation once with John Knox, who was the UN Special Rapporteur on Human Rights and the Environment, about whether you *need* anything for future generations specifically. His view was that, as long as he can protect the human rights of his three-year-old niece, then that covers a sufficient period of time. It means that he would not have to worry about the people who have not been born yet, as long as we protect the children.

At the time, I was insisting that that wasn't enough, and we need more to protect future generations who aren't yet born. However, looking back, I think he was probably right! There is a truth to that because practically it doesn't matter; it's an interesting intellectual question about what to do regarding people who have not been born yet, but if we what we want to do is change the trajectory of climate change, then protecting the rights of children is going to get us a long way down that path.

To come back to the case law, the *Sharma* case does a good thing there, because it recognises that children are vulnerable to the impacts of climate change and the decision of the Minister [for the Environment], and this vulnerability is an important factor in identifying that duty of care.[17] I think we are seeing more arguments about fairness and justice arising from the power imbalance between the Minister and children (and really the public as a whole) intersecting with the human rights arguments.

There was a recent case in Germany brought by Luisa Neubauer. She is a young climate activist involved in the Fridays for Future movement along with Greta Thunberg. They brought a case in the German Federal Constitutional Court challenging that the climate policies in Germany are insufficient. One of the things that the Court considered in that ruling was that, if we do not put stronger policies now, we are being unfair to future generations who will have to clean up the mess down the track. This made it very much an intergenerational equity consideration. The Court said we cannot continue delaying our response and shifting it down the line to someone else to deal with. Given the opportunity to bring those considerations in, I think we are seeing courts do that more and more. There remains a threshold question about from where they can draw those principles, but if there is something in the legislation that makes it a relevant factor or if there is a constitutional factor, I think courts are willing to weave those fundamental justice considerations and questions of equity into their decisions. They are aware that, as a global community, we have reached a point where we can no longer deny the injustice of this anymore.

I would say that even having young people bringing the actions themselves emphasises that climate change and related environmental concerns are going to affect younger generations to a greater extent. A young person who is bringing a class action against the government, makes it unavoidable that you have to consider the consequences to* them *as they are bringing the action.

I agree, and on a more cynical note, it is a very good strategy! The reality of climate litigation is that almost all of these cases are not exclusively about getting a remedy for the people involved. The power of the cases is what they achieve at the policy level as much as a

[17] *Sharma* case (n 5) [289]-[315].

particular ruling or remedy. When you are talking about big coal mines, if you can get a decision that the mine cannot go ahead, it is a big win, but it is still open to the government to legislatively permit the mine to go ahead if they really want it to. The power is that of advocacy, the attention drawn to the issue, the extra voices that are added to the calls for stronger action. Having young people being the plaintiffs in these cases assists with this kind of publicity and advocacy. It is also very difficult to look a young person in the face and tell them that you do not care about their future! If you are the Minister that does that, it's both brave and cruel, but also bad publicity to be fighting against kids. All of these things strengthen the legal claim. That is absolutely something the young people involved are conscious of.

There is an interesting movement happening at the moment which is called 'Youth Climate Courts'. The first was run in New South Wales last year.[18] It is not a real legal proceeding, but a kind of practice run where it is possible to develop the arguments and put the case before judges sitting in their personal capacity. Those judges give their official legal assessment of the arguments. It is based on the model of the Permanent Peoples Tribunal,[19] which is a longstanding human rights tribunal without strict jurisdiction but a good reputation for a place where important cases are litigated that can't get to a court in any other way. I suspect that we may see some more of this happening.

I think this may go to the Land Court as well, and the way they look at evidence and civil procedure. How important do you think is the role of specialist forums in climate justice?

I think they are important, but there are arguments both ways here. Decisions [related to environmental law] are so often related to quite sophisticated questions regarding the likely impact on the environment. Because of our adversarial system, you will get experts for both sides who will not agree and give conflicting evidence on the seriousness of the impact on

[18] Youth Climate Courts, *Gwydir Wetlands Case, Sydney, Australia* (Webpage) <https://www.youthclimatecourts.org/archives/gwydir-wetlands/>.

[19] Permanent People's Tribunal (Webpage) <http://permanentpeoplestribunal.org/?lang=en>.

groundwater or the adequacy of the carbon offset site. Adding on top of this is the climate modelling, which is hugely complex and challenging. So, I think having specialised courts is a great advantage because you know you have people who are more experienced with digesting and assessing that kind of evidence. However, the trade off with that is the specialised courts are dependent on the framework that creates them, and what the decision-making context is… The broader principles around justice, equity and duty of care don't get a place in this decision-making process because of the framework being strictly to review decisions under particular legislation. The scientific stuff also brings into question the precautionary principle and other environmental concepts that are intended to help us make good environmental decisions but in practice are very difficult to apply.

One other observation is that if you have a specialised court, you have specialised judges, and the influence of an individual judge can be immense... Some judges have a way of thinking about their role and the role of environmental law that develops into a specific approach in cases, for good or for bad.

I think that is a very fair observation because, from my understanding, the Land Court used to be wardens. They came from an environment where they were essentially government officials with specialist knowledge in mining. Obviously over time they have evolved to be judicial officers, but looking at the background, it's clear that they have been selected due to their familiarity and experience with land use methods and the like.

Exactly. There are great practical benefits to this as well. You don't have to spend as much time getting across basics and have a level of assumed knowledge that means you can delve directly into the tricky issues of the case. Certainly, the influence of certain judges and new knowledge is evident now, perhaps most in the approach to Scope 3 emissions. The decision in *Sharma* very effectively demonstrates that Scope 3 emissions absolutely matter. This may be influenced by the *Rocky Hill* decision,[20] which involved such considerations. It solidified that, fundamentally, every contribution to climate change *counts* and you have to *own* that

[20] *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7 ('*Rocky Hill*').

contribution. So, if you are interested in intergenerational equity and want to try to reduce the impacts of climate change for future generations, then you have to stop burning fossil fuels! The science is fairly clear about that, and the impact of every contribution. Justice Bromberg's assessment of that scientific evidence in *Sharma* is really interesting from that perspective, since it essentially says that if the expansion of the mine goes ahead, it will make a *small but measurable contribution* to increasing temperatures.[21] I hope that the days of the market substitution defence are over, but these recent decisions are really powerful for shifting our attitude towards shared responsibility about climate change. This is not really relevant to human rights, but a change in the way we are understanding how climate change works and shifting our ideas of legal responsibility to keep up with that scientific understanding. It changes the way we think about causation.

Coming back to the fundamental question about human rights and climate change and government broadly, while there are ways that human rights can be a legal tool (and we have discussed various cases and models), the dream I think is that the legislature and the executive, when they are coming up with laws and policies, think ahead about how to protect human rights. Their job is to advance the enjoyment of human rights, and not for human rights just to be an adversarial tool to challenge a decision down the track. Human rights shouldn't be employed only as a reactive thing. This is one of the objectives of the HR Act, to promote a human rights culture in Queensland and that we will see positive human rights policies being put in place from the beginning rather than human rights just being another tool to challenge government decision-making.

If we really wanted a human rights-based approach to climate change, then we shouldn't be talking about litigation at all! We should be talking about positive discussions and engagement with the community, figuring out what we want the future to be like, and how we are going to make that as good for human rights as possible. The ideal scenario being we never need to get to the litigation. In Australia, currently, I don't have a lot of hope for that kind of thinking, at least at the federal level. There are not a lot of signs that we are about to change our position. But I think internationally there are reasons to be hopeful all

[21] *Sharma* case (n 5) [253].

over the place. Certainly, at the UN level, my sense is that the environmental rights space, human rights and climate change advocacy has kicked up a gear. I don't think there is any argument anymore that climate change is a massive human rights issue. Everyone now accepts that. More and more countries are taking stronger action accordingly. I'm sure litigation has a part to play in that, but there are lots of things that are driving that change.

On a different note, what would a gendered perspective on climate change look like and how might it reinforce a human rights-based approach to climate change policy?

I would just say a couple of things here, since this involves things we have touched on before. Basically, a gendered perspective is recognising that climate change doesn't impact on everyone in the same way. You can say that about a lot of different considerations other than gender. I think race, class and disability are all areas where we can have the same kinds of questions. The push for a gendered perspective on climate change has been a campaign at the UN level to try and mainstream gender issues into climate policy-making. Initially, it wasn't something that had much visibility at the international level. On one hand, climate change doesn't discriminate, obviously. But people's lived experiences absolutely determine the extent to which climate change will impact them.

The gendered perspective is about understanding the differential impact of climate change on women. It's not something we talk about a lot in Australia, but in other parts of the world it's important. It involves acknowledging that women are in a different position in society for various reasons. They have different levels of social, economic and political power, and agency, all of which will impact how serious climate change will be for them and what they can do about it. If you are in a culture where the women mostly work in agricultural fields to earn a living and look after their families, then drought and flooding is going to have a significant impact on them. And this translates into various perspectives.

The point is to understand that existing inequities between genders will play out when climate change is affecting those communities. To counter that, it is essential that women are part of the conversation about climate policy. In the same way, you absolutely have to include Indigenous people's perspectives in the conversation.

That diversity of views in participation and consultation is essential in developing policy. Seems like it should be a no-brainer, but it surprisingly hasn't been. This could be because climate change was introduced as a big scientific challenge, and it has taken a while for us to get across the human impact and the more nuanced dimensions of that like gendered perspectives.

As a final note, you were speaking at the start about how human rights and environmental justice are mutually supporting. At the least, we now have a language or a way to communicate with people who perhaps don't have an understanding of the intricacies of environmental law or climate science. What are your thoughts on this?

That's right. It was one of the really, I think, positive contributions of that human rights and climate change work early on. It helped to put climate change in a very human-centred context. Maybe these days, it may be hard to appreciate, but 15 or 20 years ago, climate change was a future problem riddled with impenetrable science, even for educated but non-scientific people. The IPCC Reports were so difficult to understand, because they were being careful about their language. It felt like climate change was a scientific problem and the impact on people was hard to pin down.

Human rights is one way of easily demonstrating the impact on communities and individuals. It gave us a language to put that human impact at the centre of the conversation. One of the earliest manifestations of that was this image of rising sea levels and sinking islands in the South Pacific. It was such powerful and shocking imagery when it was put in those terms about what it is going to mean for those people. We started to hear those stories of the Carteret Islanders in Papua New Guinea, who were one of the first people to say that they had to *move* their village because they could not live there anymore. That was the start of our real reckoning that it was no longer a future problem but something happening to real people now.

So, human rights gives you that language, and the other reason we love human rights is that it has that moral dimension to it. While we have been talking about litigation and the rights enshrined in law, even without the law, there is a potency that comes with [human rights] language. It's centuries old, it means something when you are talking about fundamental rights and dignity and livelihoods and survival. It's important to remember then that a human rights victory may come even if you are not successful in court. You might still get very powerful language and be able to shed light on people's experiences and tell those stories. And that's not nothing.

INDIGENOUS CULTURAL RIGHTS: A PATHWAY FOR CARING FOR COUNTRY

The Honourable President Fleur Kingham

Against the background of increasing interest in and support for Indigenous inclusion in environmental decision-making, the author considers the potential for Indigenous cultural rights to provide a pathway for caring for Country, unconstrained by the vagaries of the native title system.

I INTRODUCTION

The theme for this year's NAIDOC[1] week was "Heal Country, heal our nation", which advocates greater management, involvement, and empowerment of First Nations peoples in protecting Country and culture.

The public narrative concerning the Black Summer Bushfire season of 2019–2020 reveals a popular interest in Indigenous knowledge and management of the Australian environment. The same sentiment underpins the recommendations made by Professor Graeme Samuel in his report on the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth): to enhance the inclusion of Indigenous Australians in environmental decision-making, and to reposition Indigenous knowledge alongside Western science in the decision-making hierarchy.[2]

First Nations peoples are increasingly involved in environmental management of land they hold under a native title determination or exclusive tenure, but the constraints of the *Native Title Act 1993* (Cth) mean there is a mixed legacy for Indigenous peoples.

A recent development in the law in Queensland offers a potential pathway for Indigenous peoples to care for Country that does not depend upon exclusive tenure. The *Human Rights Act 2019* (Qld) protects the cultural rights of Aboriginal and Torres Strait Islander peoples to conserve and protect the environment and the productive capacity of their land,

[1] National Aborigines and Islanders Day Observance Committee.

[2] Graeme Samuel, *Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (Final Report, October 2020).

territories, waters, coastal seas and other resources.[3] If the objective is participation in environmental management, this pathway may prove easier to access and provide a more direct route than a native title claim.

II RESPECTING INDIGENOUS PEOPLES' RELATIONSHIP WITH THE LAND

History is replete with events which, in retrospect, present as seminal, shaping the future course of a people or a nation. In Australia, the Black Summer Bushfire Season of 2019–2020 may well prove to be a seminal event, marking a shift in perceptions about Indigenous knowledge of the Australian environment.

The scale of that disaster was immense. 1.8 million hectares across south-eastern Australia were burned by high severity fires. Billions of animals were killed.[4] Thousands of homes were lost. The public narrative about how to prepare for future bushfire seasons prominently featured traditional Aboriginal burning practices as a better way to manage fuel load.[5]

While this heightened interest in their traditional practices might have been welcomed by Indigenous leaders, the focus on fuel load is a narrow lens for understanding the relationship of Indigenous peoples and the Australian environment.

The Royal Commission into National Natural Disaster Arrangements, established to consider the fires and responses to them, noted that Indigenous land management "aims to protect, maintain, heal and enhance healthy and ecologically diverse ecosystems, productive landscapes and other cultural values. It is not solely directed to hazard reduction."[6]

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[3] *Human Rights Act 2019* (Qld) s 28(2)(e).

[4] World Wide Fund for Nature Australia, *Impacts of the Unprecedented 2019-20 Bushfires on Australian Animals* (Final Report, November 2020).

[5] Bhiamie Williamson, Francis Markham, and Jessica K Weir, 'Aboriginal Peoples and the Response to the 2019-2020 Bushfires' (CAPER Working Paper 134/2020, Centre for Aboriginal Economic Policy Research, ANU college of Arts & Social Sciences) 1.

[6] *The Report of the Royal Commission into National Natural Disaster Arrangements* (Final Report, 28 October 2020) [18.1].

This is an important distinction, because "hazard reduction burning" also applies to the use of fire to clear an area of forest. While cultural burning may encompass fuel and hazard reduction, it can also include: burning, or preventing burning, to protect flora and fauna; or it may be used to gain access to country and to clean up important pathways to maintain cultural responsibilities.[7]

The importance of this cultural dimension of caring for Country is at the heart of the theme for NAIDOC week 2021: "Heal Country, heal our nation". In developing the theme, the National Aborigines and Islanders Day Observance Committee explain that Country is inherent to identity:

> Healing Country means hearing those pleas to provide greater management, involvement, and empowerment by Indigenous peoples over country. Healing Country means embracing First Nation's cultural knowledge and understanding of Country as part of Australia's national heritage. That the culture and values of Aboriginal peoples and Torres Strait Islanders are respected equally to and the cultures and values of all Australians. The right to protect Country and culture is fundamental.[8]

What emerges from this explanation is at least two matters of significance in environmental management: the sense of responsibility that Indigenous peoples' have towards the land, and their plea for respect for the knowledge of people who have lived on the land for thousands of generations.

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[7] Bhiamie Williamson, 'Reigniting Cultural Burning in South-Eastern Australia: the ACT Aboriginal Cultural Fire Initiative' (2017) 2 *Native Title Newsletter* 18, 20.

[8] NAIDOC, *Heal Country* (Web Page, 2021) <https://www.naidoc.org.au/get-involved/2021-theme>.

A The relationship of Indigenous peoples to land

Morgan, Strelein and Weir say the relationship of Indigenous peoples to the land brings a distinctly different engagement with the environment. Caring for Country reinforces spiritual connections, while they undertake responsibilities inherited from their ancestors, which are also their children's inheritance.[9]

The relationship is foreign to a system of real property law, that largely confers rights, rather than imposing obligations, and is premised on ownership and control of land, rather than belonging to it.

In 1971, in *Milirrpum v Nabalco Pty Ltd*,[10] Justice Blackburn described the relationship in spiritual terms:

> the fundamental truth about the aboriginals' relationship to the land is that whatever else it is, it is a religious relationship… There is an unquestioned scheme of things in which the spirit ancestors, the people of the clan, particular land and everything that exists on and in it, are organic parts of one indissoluble whole.[11]

Later, in 2002, in *Western Australia v Ward*,[12] High Court Justices Gleeson, Gaudron, Gummow and Hayne noted the difficulty of expressing that relationship in terms of rights and interests, as required for a native title claim. The translation of the spiritual or religious into the legal "requires the fragmentation of an integrated view of the ordering of affairs into rights and interests which are considered apart from the duties and obligations which go with them."[13]

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[9] Monica Morgan, Lisa Strelein, and Jessica Weir, 'Authority, Knowledge and Values: Indigenous Nations Engagement in the Management of Natural Resources in the Murray-Darling Basins' in Marcia Langton et al., (eds), *Settling with Indigenous People* (The Federation Press, 2006) 141.

[10] (1971) 17 FLR 141.

[11] Ibid 167.

[12] (2002) 213 CLR 1.

[13] Ibid 64–65 [14].

More recently, in *Northern Territory v Griffiths*,[14] the High Court explored the nature of this relationship when determining an appeal against the first award of compensation for extinguishment of native title. At first instance, the trial judge had included a component for a sense of failed responsibility for the obligation under traditional laws and customs to have cared for and looked after the land. The appellant argued there was no evidence that the claim group experience any such feelings over all the land, or that it was distinct from the feelings about loss of control of the land which had occurred long before the compensable acts.

Chief Justice Kiefel, and Justices Bell, Keane, Nettle and Gordon, rejected that argument:

> Compensation for the non-economic effect of compensable acts is compensation for that aspect of the value of land to native title holders which is inherent in the thing that has been lost, diminished, impaired or otherwise affected by the compensable acts. It is not just about hurt feelings, although the strength of feeling may have evidentiary value in determining the extent of it. It is compensation for a particular effect of a compensable act – what is better described as "cultural loss".
>
> As the trial judge explained, his Honour's task was to determine the essentially spiritual relationship which the Ngaliwurru and Nungali Peoples have with their country and to translate the spiritual hurt from the compensable acts into compensation.[15]

This reasoning about cultural loss has relevance for engaging with Indigenous peoples in environmental management. Whether it is articulated as a right or not, the courts have accepted the relationship of traditional owners with their land involves a cultural responsibility to care for Country.

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[14] [2019] HCA 7.

[15] Ibid [154]–[155].

The same acceptance is evident in Professor Graeme Samuel's report into the review of the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBCA**), the principal Commonwealth environmental protection law. He devoted a chapter of his report to Indigenous knowledge and participation, and observed:

> The [EPBCA] heavily prioritises the views of western science, with Indigenous knowledge and views diminished in the formal provision of advice to decision-makers. This reflects an overall culture of tokenism and symbolism, rather than one of genuine inclusion of Indigenous Australians.[16]

Professor Samuel made strong recommendations to remedy this, including the immediate adoption of a National Environment Standard for Indigenous engagement and participation, and to incorporate Indigenous views and knowledge into regulatory processes. He published a draft standard, developed in detail during the Review through an Indigenous led process. He called for Indigenous knowledge to be on an equal footing with western science in the provision of formal advice to the Environment Minister.

B Indigenous knowledge and environmental protection

The concept of Indigenous knowledge is complex. There is no set definition. There are multiple regimes of recognition in place. In international instruments it is presented as a form of intangible cultural heritage. In intellectual property law as a form of property. In native title as a system of laws and cultures.

In the context of environmental protection, rights-based mechanisms for protection are mainly limited to artifacts and sites, through cultural heritage protection laws. This does not provide any means for practice or renewal of culture.[17]

Nor does it recognise a landscape connection or ecosystem knowledge that can inform environmental management.

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[16] Graeme Samuel, *Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (Final Report, October 2020) 2.2.1.

[17] Tran Tran and Clare Barcham, '(Re)defining Indigenous Intangible Cultural Heritage' (Discussion Paper No 37, AIATSIS, June 2018) 4.

Writing about Indigenous engagement in management of the Murray-Darling Basins, Morgan, Strelein and Weir argue cultural mapping of landscape can reveal the natural ecology of a place. Midden and burial sites along the Murray River mark living places for Indigenous peoples, located on high ground above historical flood zones. Oral histories of the use and enjoyment of a place can reveal information about indigenous resident species and migratory practices.[18]

Indigenous knowledge, often encompassed by ceremonies and songs, is transmitted through performance and is subject to group correction and validation, ensuring the continuity of content.[19] Land-based songs, or song lines, amongst other purposes, provide a mnemonic device to guide people to geographical features, such as waterholes, thus helping people live well on the land.[20]

Helping people to live well on the land could be a neat vision statement for environmental regulation. The challenge in achieving that vision is how to give respect to First Nations peoples' relationship with the land and how to include Indigenous knowledge and Indigenous peoples in environmental protection and restoration.

One way is to provide Indigenous peoples with control over their traditional lands. The primary mechanism for achieving this is through native title, but its legacy is mixed.

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[18] Monica Morgan, Lisa Strelein, and Jessica Weir, 'Authority, Knowledge and Values: Indigenous Nations Engagement in the Management of Natural Resources in the Murray-Darling Basins' in Marcia Langton et al., (eds), *Settling with Indigenous People* (The Federation Press, 2006) 141.

[19] *Griffiths v Northern Territory of Australia* [2006] FCA 903, [398].

[20] Grace Koch, *We have the song, so we have the land: song and ceremony as proof of ownership in Aboriginal and Torres Strait Islander land claims* (Research Discussion Paper, No 33, AIATSIS, July 2013) 5.

III THE MIXED LEGACY OF NATIVE TITLE

A The benefits of native title

The High Court's decision in *Mabo*[21] was greeted by Indigenous people with a sense of "joy and celebration."[22] In his second reading speech on the Native Title Bill 1993 (Cth), then Prime Minister Paul Keating described the government's twin objectives in developing legislation to respond to the High Court's decision: "to do justice to the Mabo decision in protecting native title and to ensure workable, certain, land management."[23]

The *Native Title Act 1993* (Cth) (**NTA**) does not *create* native title. It is an attempt to provide a workable system for recognising Indigenous connection with land whilst prioritising real property interests inherited upon colonisation. The NTA allows for declarations that native title does or does not exist for specified claimants in relation to particular land. In striving to achieve the twin objectives, the NTA allows for validation of past (pre-NTA) and future acts and grants that did or might affect native title. It also provides for claims for compensation for extinguishment or impairment of native title by any acts or grants that post-dated the commencement of the *Racial Discrimination Act 1975* (Cth). In that sense, the NTA prioritises land interests granted by the Crown over pre-existing Indigenous interests.

A native title determination operates *in rem*, binding the world at large, not only the parties to the native title claim proceedings.[24] So it provides a secure platform for asserting rights and has affected how governments and others perceive Indigenous peoples and their right to be involved in a much larger spectrum of decision-making. Government agencies and private sector entities look to native title holders to consult with on a range of matters.

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[21] *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

[22] Patrick Dodson, 'Reconciliation and the High Court's Decision on Native Title' (1993) 3(61) *Aboriginal Law Bulletin* 6.

[23] Commonwealth, *Parliamentary Debates*, House of Representatives, 16 November 1993, 2877 (Paul Keating, Prime Minister).

[24] *Wik Peoples v State of Queensland* (1994) 120 ALR 465, 472.

In Queensland, Indigenous peoples' have gained significant ground in controlling traditional lands. Native title is now recognised in nearly 30% of the state. A further approximately 25% of the state is subject to claims not yet resolved. The overwhelming majority of finalised claims have been resolved by agreement (144 out of 156). In addition to the land subject to native title claim, Indigenous peoples hold title to more than 6 million hectares of land returned by the Queensland government in recognition of their traditional connection to the land. [25]

There are some good news stories for environmental management on Indigenous controlled land. In Queensland, Traditional Owners are supported to burn according to seasonal need and cultural knowledge. One example involves Queensland's first all-women Aboriginal ranger crew, who are part of the Girringun Aboriginal Corporation rangers, based in Cardwell on the coast of north Queensland. As well as dealing with hazard reduction, the rangers are working with environmental scientists to save the habitat of the endangered mahogany glider. Fire management is critical to that project.

Another example is the Olkola Aboriginal Corporation, one of the largest landholders in the Cape York Peninsula. Established under a different name in 1995, it has progressively increased its landholdings, whether leasehold or aboriginal freehold land, and its joint management of national parks. It now either holds and manages 869,822 ha, represents the Olkola People of Cape York, and is the cultural heritage body for this area. With Australian government support, the Olkola rangers are working with the Queensland government to protect and restore the habitat of the golden shouldered parrot.[26]

[25] The Queensland Cabinet and Ministerial Directory, 'Nearly One Third of Queensland Recognised as Native Title' (Media Statement, 9 July 2021).

[26] Olkola Aboriginal Corporation, *Olkola* (Web Page, 2021) <https://www.olkola.com.au/ >.

With ownership or exclusive control over land comes economic benefits. The Olkola Ajin Savannah Burning Project commenced in 2014. By reducing late season wildfires, and therefore the amount of greenhouse gas emissions, Olkola is earning credits under the Commonwealth's Carbon Farming Initiative.[27]

There are now 29 Indigenous owned savanna burning projects across the north of Australia registered with the Emissions Reduction Fund, covering 17.9 million hectares, abating over 5.23 million tons of greenhouse gas emissions between 2013 and 2020, and employing Indigenous ranger groups. The $80 million earned in Australian Carbon Credit Units is invested in local communities, including into programs supporting land management, protection of sacred sites and intergenerational exchange of traditional knowledge.[28]

There are similar programs on other Indigenous Protected Areas, which may be declared over land or sea owned by Traditional Owners, including native title holders, who enter into a formal conservation agreement with the Australian Government. IPAs are included in the National Reserve System, a network of protected areas, and the country's premier investment in biodiversity conservation.[29]

B The limitations of native title

While those who succeed in securing a form of exclusive title are well placed to assert their role in caring for Country, this leaves behind those with less secure title, such as non-exclusive native title, or those whose title has been extinguished by the acts or grants by our governments.

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[27] Australian Government Department of Industry, Science, Energy and Resources, *Emissions Reduction Fund* (Web Page, 2021) <https://www.industry.gov.au/funding-and-incentives/emissions-reduction-fund>.

[28] Indigenous Carbon Industry Network, Submission to the Climate Change Authority,*2020 Review of the Emissions Reduction Fund* (15 June 2020).

[29] Australian Government Department of Agriculture, Water and Environment, *About the National Reserve System* (Web Page, 2021) <http://www.environment.gov.au/land/nrs/about-nrs>.

The limitations of the native title system are well documented. Williams and Hobbs provide a useful summary of criticisms of the NTA in concluding it has created a mixed legacy for Indigenous peoples. They say the benefits are unevenly distributed.[30] That is illustrated by the accompanying map[31] which shows what land in Queensland has been determined to be subject to native title and, of those areas, which title is exclusive (~2.5%).

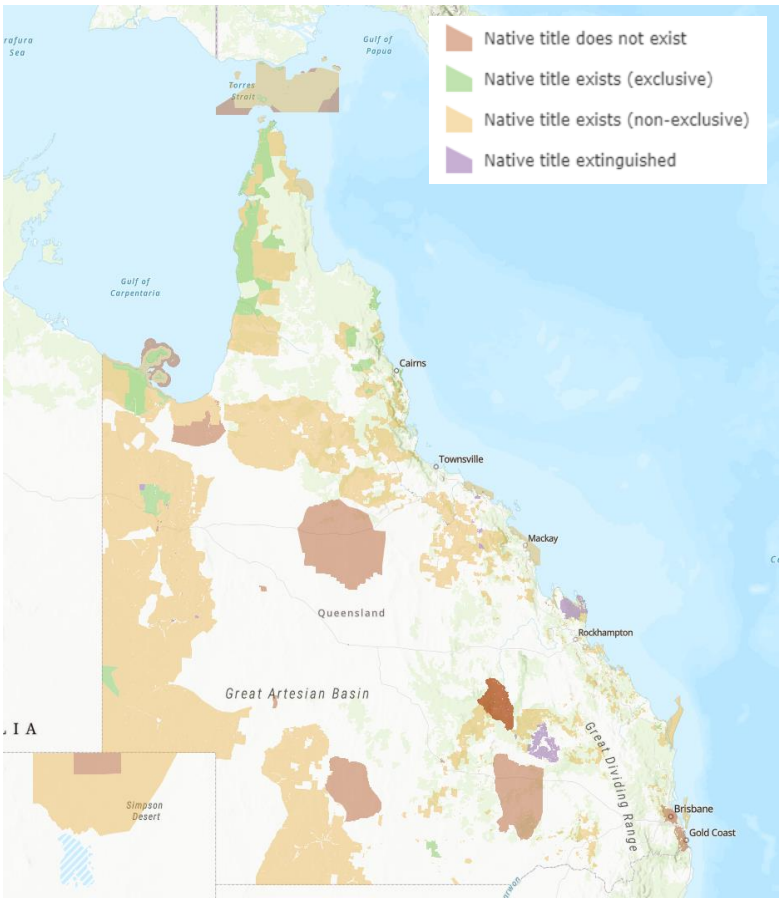

Figure 1: Native Title in Queensland

[30] George Williams and Harry Hobbs, *Treaty* (The Federation Press, 2nd ed, 2020) 207.

[31] National Native Title Tribunal Queensland, *Native Title Vision* (Web Page, 2021) <https://nntt.maps.arcgis.com/apps/webappviewer/index.html>.

While exclusive possession native title can deliver benefits to those who hold it, that is little comfort to those who do not possess it. Non-exclusive native title does not meet the expectations of native title holders, something starkly demonstrated by another significant event in 2020, the destruction of the Juukan Gorge caves by Rio Tinto, ironically on the Sunday before NAIDOC Week 2020.

The uneven distribution of native title is explained by several features of the NTA. Its extinguishment rules are severe. Claimants face high hurdles in demonstrating their traditional connection to land. Those who have been most severely dispossessed are penalised.[32] Further, while the NTA may provide the workable certainty about land management that Prime Minister Keating spoke of, a native title claim does not necessarily reinforce spiritual connections or promote genuine engagement with Indigenous peoples in environmental management.

June Oscar, the Human Rights Commission's Social Justice Commissioner observed in a recent report that:

> Western perceptions of interests in land and land ownership have informed the power structures impeding Aboriginal and Torres Strait Islander women from realising their interests in land. We are required to undergo lengthy processes of defining ourselves in a Western framework within which we risk losing sight of our inherent knowledge systems and values. In this way, rather than strengthen us, the native title system can be socially destructive and cause lateral violence.[33]

Native title can offer nothing for those Indigenous peoples who are disconnected from their country, or who were born or live on other people's country. Without the sense of ancestral belonging and long-term traditional obligation that comes with being on their own land, there is a greater complexity in defining their connection to country.

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[32] Williams and Hobbs (n 29) 237.

[33] June Oscar, *Wiyi Yani U Thangani (Women's Voices): Securing Our Rights, Securing Our Future* (Report, Australian Human Rights Commission, October 2020) 332.

Finally, the native title system does not ensure that Indigenous knowledge is valued and respected when environmental protection policies are developed and implemented, as Professor Samuel observed.

The Samuel recommendations about greater use of Indigenous knowledge and participation in developing environmental protection policies do not stand alone. A recommendation of the Royal Commission into National Natural Disaster Arrangements is that all governments should work with Traditional Owners to explore the relationship between indigenous land management and natural disaster resilience and leverage indigenous land and fire management insights in the development, planning and execution of public land management activities.[34]

Another example from Queensland followed the K'gari (Fraser Island) fire at the end of 2020. In a report of the investigation into that fire, the Inspector-General Emergency Management recommended the prescribed burn program for K'gari be developed by the Department of Environment and Science, in collaboration with the Locality Specific Fire Management Group and the Butchulla people.[35]

It is too early to say what impact these recommendations, and those in the Samuel report on the EPBCA, will have on the development of environmental laws and policies.

With respect to the EPBCA, early indications are not promising.

In her second reading speech for the Environment Protection and Biodiversity Conservation Amendment (Standards and Assurance) Bill 2021, which is still before Federal Parliament, Minister Ley said the Bill delivers on the government's commitment to bilateral agreements with the states and territories, underpinned by strong Commonwealth led national environmental standards.

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[34] *The Report of the Royal Commission into National Natural Disaster Arrangements* (Final Report, 28 October 2020).

[35] Inspector-General Emergency Management, *K'gari (Fraser Island) Bushfire Review* (Report No 1, March 2021) 11; see recommendation 8.

However, initially, that would involve "standards that reflect the current requirements of the EPBCA".[36] The draft National Environment Standard for Indigenous engagement and participation prepared during the review of the EPBCA has not been adopted. That leaves only a guideline issued in 2016.[37] This falls a long way short of Samuel's call for immediate adoption of the draft standard developed during the review.

However, in Queensland, a recent legislative development provides some prospect of such recommendations being embraced.

IV THE HUMAN RIGHTS ACT PATH TO CARE FOR COUNTRY

In 2020, the *Human Rights Act 2019* (**HRA**) commenced. This may well be another seminal event for Indigenous peoples' engagement in environmental management. The HRA recognises, and seeks to protect, the following Indigenous cultural rights:

> **28 Cultural rights—Aboriginal peoples and Torres Strait Islander peoples**
>
> (1) Aboriginal peoples and Torres Strait Islander peoples hold distinct cultural rights.
>
> (2) Aboriginal peoples and Torres Strait Islander peoples must not be denied the right, with other members of their community—
>
> (a) *to enjoy, maintain, control, protect and develop their identity and cultural heritage, including their traditional knowledge, distinctive spiritual practices, observances, beliefs and teachings;* and
>
> (b) to enjoy, maintain, control, protect, develop and use their language, including traditional cultural expressions; and
>
> (c) to enjoy, maintain, control, protect and develop their kinship ties; and

[36] Commonwealth, *Parliamentary Debates*, House of Representatives, 25 February 2021, 1957 (Sussan Ley, Minister for the Environment).

[37] Australian Government Department of the Environment, *Engage Early – Guidance for proponents on best Practice Indigenous Engagement for Environmental Assessments Under the Environment Protection and Biodiversity Conservation Act 1999* (Report, February 2016).

> (d) *to maintain and strengthen their distinctive spiritual, material and economic relationship with the land, territories, waters, coastal seas and other resources with which they have a connection under Aboriginal tradition or Island custom; and*
>
> *(e) to conserve and protect the environment and productive capacity of their land, territories, waters, coastal seas and other resources.*
>
> (3) Aboriginal peoples and Torres Strait Islander peoples have the right not to be subjected to forced assimilation or destruction of their culture.
>
> (emphasis added)

These rights, which draw upon the UN Declaration on the Rights of Indigenous Peoples (**UNDRIP**), might provide a platform for Indigenous people to insist on incorporating Indigenous views and knowledge in regulatory processes and providing opportunities for Indigenous peoples in culturally appropriate land and sea management, regardless of land tenure. Some context about the HRA is necessary to understand that potential.

A The goals of the Human Rights Act

The principal aim of the HRA is to embed respect for human rights in the culture of the Queensland public sector and for public functions to be exercised in a principled way that is compatible with human rights.[38] That focus is critical for environmental management given the public sector's regulatory responsibilities.

The HRA adopts a "dialogue model" for human rights protection. That is, it sets up a dialogue between the Judiciary, Parliament, and the Executive about human rights matters.

Although the Supreme Court may make a declaration that legislation is not consistent with human rights, it cannot strike it down on that basis.[39] Ultimately it is a matter for Parliament how to respond if such a declaration is made.[40] This role for the court contrasts with a

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[38] Queensland, *Parliamentary Debates*, House of Representatives, 31 October 2018, 3183 (Yvette M D'ath, Attorney-General and Minister for Justice).

[39] *Human Rights Act 2019* (Qld) ss 4(g), 49, 53, 54.

[40] Ibid ss 53(4), 53(5), 55, 56.

constitutional model, such as that in the United States, which gives the courts the final say on whether rights have been limited impermissibly.

The primary focus of the HRA is on administrative decision makers. Section 58 imposes obligations on their decision-making processes. It is unlawful for them to:

> (a) act or make a decision in a way that is not compatible with human rights; or
>
> (b) in making a decision, fail to give proper consideration to a human right relevant to the decision.[41]

This imposes a substantive and a procedural duty. The substantive duty is not to act or make a decision in a way that is incompatible with a human right, unless the public entity could not reasonably have acted differently, or made a different decision, because of a legal requirement applying to the act or decision. The procedural duty is to properly consider any relevant human right in making a decision.[42]

The rights are cumulative. It is possible to fulfill one while breaching the other. For example, the act may be compatible with a human right, but the public entity may have failed to give proper consideration to it. Or a decision may be incompatible with a human right, even though the public entity did give it proper consideration. Either way, it would be unlawful.

The protection conferred by the HRA is not absolute. An act, decision or statutory provision is compatible with human rights if:

> (a) it does not limit a human right; or
>
> (b) limits a human right only to the extent that is reasonable and demonstrably justifiable.[43]

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[41] Ibid s 58.

[42] *Innes v Electoral Commission of Queensland & Anor (No 2)* [2020] QSC 293 at [261]–[301]; *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors* [2020] QLC 33.

[43] *Human Rights Act 2019* (Qld) s 8.

The HRA defines how a human right may be limited.[44] A human right can only be subject to "reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom".[45] Several factors may be relevant in determining whether the limits are reasonable, including the importance of the purpose of the limitation, the importance of preserving the human right, given the nature and extent of the limitation, and the balance between those two matters.[46]

If a public entity does not fulfil its obligations under s 58, the act or decision is unlawful. However, the consequence of unlawfulness in challenging that act or decision is limited. Unlawfulness does not provide a cause of action itself. It can only be raised under what is called the piggyback provision;[47] that is, where the person has a right, independent of the HRA, to seek relief or remedy about the act or decision. So, if there is an avenue to appeal an administrative decision, whether it is merits or judicial review, human rights might be raised as one ground for setting aside the decision.

B The dialogue model of the Human Rights Act

The lack of a directly justiciable human right might be considered to provide limited protection. However, the dialogue model, which "favours discussion, awareness raising and education about human rights",[48] may further the objectives of Indigenous peoples who seek a greater say in caring for Country.

The HRA confers a dispute resolution function on the commission. This complements the dialogue model, by providing "an accessible, independent and appropriate avenue for members of the community to raise human rights concerns with public entities with a view to reaching a practical resolution".[49]

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[44] Ibid s 13.

[45] Ibid s 13(1).

[46] Ibid s 13(2).

[47] Ibid s 59; see *Innes v Electoral Commission of Queensland & Anor (No 2)* [2020] QSC 293, [259]–[270].

[48] Explanatory Notes, Human Rights Bill 2018 (Qld) 7.

[49] Ibid 7.

The commissioner must or may refuse to deal with a human rights complaint in limited circumstances.[50] However, if the commissioner accepts the complaint, they may conduct a conciliation conference to promote its informal, quick and efficient resolution.[51] The commissioner may direct a person to attend,[52] and can decide whether the a person attending may be represented.[53] The conciliation is not subject to the rules of evidence and is held in private.[54] Evidence of what is said or done is not admissible in any criminal, civil or administrative proceeding unless the complaint and respondent agree.[55]

Participating in conciliation does not affect a person's right to seek relief or remedy for a contravention of the public entity's obligations under s 58.[56]

A conciliation is not without potential consequence for a public entity. If the commissioner accepts a human rights complaint for resolution, and that complaint is not resolved, whether by conciliation or otherwise, the commissioner must prepare a report as soon as practicable. The report must include the substance of the complaint and any action taken by the respondent to resolve it. It may also include actions the commissioner considers the respondent should take to ensure its acts and decisions are compatible with human rights.[57] Those details may also be included in the commissioner's annual report to the Attorney-General.[58]

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[50] *Human Rights Act 2019* (Qld) ss 69, 70.

[51] Ibid ss 79, 80.

[52] Ibid s 81.

[53] Ibid s 83.

[54] Ibid s 85.

[55] Ibid s 86.

[56] Ibid s 87.

[57] Ibid s 88

[58] Ibid s 91.

Further, a public entity that is the subject of a human rights complaint must include in its annual report the details of any action they have taken to further the objects of the HRA, any complaints received under that Act and any policies, programs, procedures, practices, or services reviewed for their compatibility with human rights.[59]

Most importantly for those seeking a place at the table, this complaint and conciliation procedure provides a mechanism for Indigenous peoples to assert a right to be directly engaged in, and influence the way, Country is cared for. Whether its potential is realised will depend on how it is interpreted and implemented. As this is a novel feature for the HRA, not found, for example, in the Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic), the Commission will be traversing unchartered territory in undertaking this function.

Further, the content of Indigenous cultural rights is by no means certain, and there is little to guide those who must act compatibly with them.

V INTERPRETING INDIGENOUS CULTURAL RIGHTS

Section 28 identifies the Indigenous cultural rights protected by the HRA. Again, there is no counterpart in other Australian human rights legislation that can provide guidance in interpreting these rights.

The section is modelled on both the UNDRIP and the *International Covenant on Civil and Political Rights* (**ICCPR**). Article 27 of the ICCPR makes no reference to Indigenous peoples, but protects the rights of persons belonging to ethnic, religious, or linguistic minorities to enjoy their own culture.

The Explanatory Notes specifically identify the following articles of UNDRIP:

> … These articles recognise that Indigenous peoples and individuals have the right: not to be subjected to forced assimilation or destruction of their culture (article 8) to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas (article 25); to conserve and protect the environment and the

[59] Ibid s 97.

> productive capacity of their lands, territories and waters (article 29); and to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions (article 31).[60]

It is beyond the scope of this paper to examine those articles and how they have been interpreted and applied, and international precedents are thin on the ground. However, the specific reference to stated articles of UNDRIP in the notes for s 28 is significant for interpreting Indigenous cultural rights protected by the HRA.

In cases of statutory ambiguity, legislation may be interpreted in accordance with international customary law.[61] UNDRIP is a non-legally binding document, but, as recorded in the Explanatory Notes, the Australian government supports the declaration. It has had persuasive authority in the Australian legal and political system, particularly in the interpretation of native title law.[62] This is grounded in its high degree of legitimacy, a function of it being formally endorsed by an overwhelming majority of UN Member states, and also because "the norms of the Declaration substantially reflect Indigenous peoples' own aspirations, which after years of deliberation have come to be accepted by the international community."[63]

The Law Council of Australia has adopted the position that:

> The UNDRIP, whilst lacking the status of a binding treaty, embodies many human rights principles already protected under international customary and treaty law and sets the minimum standards for States Parties' interactions with the world's indigenous peoples.[64]

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[60] Explanatory Notes, Human Rights Bill 2018 (Qld) 23.

[61] *Polites v Commonwealth* (1945) 70 CLR 60.

[62] Megan Davis, 'To Bind or Not to Bind: The United National Declaration on the Rights of Indigenous Peoples Five Years On' (2012) 19 *Australian International Law Journal* 17, 48.

[63] James Anaya, *Situation of Human Rights and Fundamental Freedoms of Indigenous People,* UN Doc A/65/264 (9 August 2010) 17 [61].

[64] Law Council of Australia, 'Policy Statement on Indigenous Australians and the Legal Profession' (Background Paper, February 2010) 6.

So, the courts can be expected to look to UNDRIP if required to determine the content of the rights identified in s 28. In that context, international obligations are construed more liberally than domestic statutes.[65] Courts favour a construction of legislation enacted in accordance with international obligations consistent with those obligations.[66]

Jurisprudence arising from native title law is also likely to guide the interpretation of these rights. The HRA does not affect native title rights and interests and must be interpreted in a way that does not prejudice those rights to the extent that they are recognised and protected under the NTA.[67] That may have implications for identifying the peoples with whom a public entity should engage. However, there is nothing in the HRA to suggest that a person asserting Indigenous cultural rights under the HRA would need to meet the tests applied to claimants under the NTA before being able to assert those rights.

That is relevant when deciding what "their land" means when used in s 28(e) which identifies the Indigenous cultural right to *conserve and protect the environment and productive capacity of* ***their*** *land, territories, waters, coastal seas and other resources.*

If that is interpreted liberally, Indigenous peoples may be able to rely on it to advocate for their voice to be heard in formulating policy about land with which they hold a traditional connection, whether or not they hold a native title declaration. That approach is consonant with the use of the phrase "traditionally owned or otherwise occupied and used" in article 25 of UNDRIP.

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[65] *Pilkington (Australia) Ltd v Minister for Justice and Customs* (2002) 127 FCR 92, 100 [26].

[66] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 [29] (Gleeson CJ).

[67] *Human Rights Act 2019* (Qld) s 107.

Further, the High Court's acceptance of responsibilities for Country being an aspect of the relationship of Indigenous peoples to the land, may support a broad interpretation of other Indigenous cultural rights, such as the right:

> (a) *to enjoy, maintain, control, protect and develop their identity and cultural heritage, including their traditional knowledge, distinctive spiritual practices, observances, beliefs and teachings;* and
> …
>
> (d) *to maintain and strengthen their distinctive spiritual, material and economic relationship with the land, territories, waters, coastal seas and other resources with which they have a connection under Aboriginal tradition or Island custom;*

Framed as a cultural responsibility, this opens up a broader range of engagements with Indigenous people, regardless of land tenure.

VI IMPLICATIONS FOR PUBLIC ENTITIES

The focus of the HRA is on decision making by public entities. In environmental and natural resource management, there is a range of public entities with responsibility for developing and implementing plans that Indigenous peoples may wish to engage with.

Two key Acts provide a very clear link between the public entities' responsibilities and Indigenous cultural rights.

Under the *Environmental Protection Act 1994* (Qld) (**EPA**), the Minister has responsibility for making environmental protection policies.[68] That Act is to be administered, as far as practicable, in consultation with, and having regard to the views and interests of, amongst others, Aborigines and Torres Strait Islanders under Aboriginal tradition and Island custom.[69] That provides a solid foundation for Indigenous peoples to be directly engaged in the development of these important statutory instruments.

Likewise, under the *Planning Act 2016* (Qld), the Minister and local authorities have responsibility for developing various planning instruments. Importantly, one of the

[68] *Environmental Protection Act 1994* (Qld) s 26.

[69] Ibid s 6.

purposes of that Act is to maintain the cultural wellbeing of people and communities.[70] Further, an entity that performs a function under the Act must perform it in a way that advances the purpose of the Act. That includes "valuing, protecting and promoting Aboriginal and Torres Strait Islander knowledge, culture and tradition'.[71]

Other natural resource management Acts may not draw such an explicit link.[72] However, in interpreting the requirements of an Act under which they operate, a public entity must, to the extent possible that is consistent with the purpose of the Act, interpret the Act in a way that is compatible with human rights.[73]

Accordingly, all public entities with environmental and natural resource management responsibilities, will need to consider the implications of the HRA for their engagement with Indigenous peoples.

The decision of the Land and Environment Court NSW in *Bushfire Survivors for Climate Action Incorporated v Environment Protection Authority*[74] illustrates the potential for indigenous peoples to rely on provisions of that nature. In that case, Chief Justice Preston found the NSW Environmental Protection Authority (**the Authority**) had not fulfilled its statutory duty to develop environmental quality objectives, guidelines and policies to ensure the protection of the NSW environment from climate change. The Chief Justice recognised the Authority had some discretion in the exercise of that duty, but undertook a detailed analysis of their claim to have fulfilled the duty, in order to determine whether the Authority's actions were legally sufficient to fulfil the duty. His Honour found they were not.

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[70] *Planning Act 2016* (Qld) s 3(3)(c).

[71] Ibid ss 5(1), 5(2)(d).

[72] See, for example, the *Mineral Resources Act 1989* (Qld), the *Regional Planning Interests Act 2014* (Qld), and the *Water Act 2000*.

[73] *Human Rights Act 2019* (Qld) s 48.

[74] [2021] NSWLEC 92.

VII CONCLUSION

Indigenous peoples in Queensland have control over a significant portion of the state. Where they do, they are increasingly involved in environmental and natural resource management activities. However, the Indigenous estate is geographically constrained and subject to the limitations of the NTA or other Acts providing for Indigenous landholdings. This limits the opportunities and benefits that will arise from collaboration between western science and Indigenous knowledge. It also constrains both environmental and cultural restoration on land outside the Indigenous estate.

Indigenous peoples continue to advocate for greater respect for their relationship to land, their knowledge of the environment and their aspiration to care for Country. There is popular support for that, as well as authoritative recommendations to reform our laws and regulatory approaches accordingly.

The HRA recognises Indigenous cultural rights, requires public entities to interpret relevant Acts in a way that is compatible with those rights, and provides that they must not act or make a decision that is not compatible with human rights, and must not fail to give them proper consideration in making a decision. Most importantly, the HRA provides an accessible practicable conciliation process that Indigenous peoples may use to bring public entities to the table. This novel feature of the HRA offers a new a pathway for Indigenous peoples to further their aspirations to have their knowledge valued and respected, and to fulfil their cultural responsibilities for Country.

AN INTERVIEW WITH HARRY JONAS

Thomas Moore and Rachna Nagesh

In this interview, Harry Jonas discusses his philosophical approach to law and social change, and how that has informed his legal career. Mr Jonas discusses the principles of conservation justice as enshrined in the Convention on Biological Diversity*, specifically considering the framework regarding the term 'other effective area-based conservation measure' which he has helped develop. Finally, Mr Jonas canvasses the biodiversity conference to be held this year and the latest draft strategic plan released ahead of the conference. This interview provides valuable insight into the international environmental framework in the field of biodiversity. We are very thankful to Mr Jonas for taking the time to participate in this interview.*

Harry Jonas, thank you very much for agreeing to be interviewed by Pandora's Box for our 2021 edition: Unsustainable Practices: Law and the Environment. Before getting into the substantive issues, it would be interesting to hear an overview of your work thus far, to get a sense of your general approach to law and social change.

Thanks also to you for this opportunity. While reading politics as an undergraduate, I took an international environmental law elective and knew at once that this would become my life calling. The subject combined many of the issues in which I was interested, including Nature, power and justice.

I became fascinated by the idea of law as a *locus* of political struggle and lawyering as a *means* of effecting social and environmental change. It was also a period of difficult realisations, including coming to understand that laws and judicial systems are not necessarily conduits of justice. Oftentimes they instead entrench injustice, particularly for individuals and groups without significant political or financial resources.

After deepening my legal studies and qualifying as a lawyer, I co-founded an NGO in South Africa called Natural Justice: Lawyers for Communities and the Environment.[1] The organisation now provides legal support to Indigenous Peoples and local communities across the African continent on issues such as climate change, infrastructure projects and

[1] *Natural Justice* (Web Page) <www.naturaljustice.org>.

natural resource rights. My particular focus was on conservation justice, which I'm sure we'll further discuss. In the meantime, my wife – Holly Jonas, also an international lawyer – and I moved to the Malaysian state of Sabah where we were fortunate to work in solidarity with organisations such as Forever Sabah and PACOS Trust on issues including land rights, oil palm and conservation.[2] I've also always been interested in critical pedagogy and contributed to launching the Forever Sabah Institute[3] and running the UQ international law clinic.[4]

How do injustices occur in conservation and what is conservation justice?

All human cultures have used elements of Nature and changed their environments to some extent – both inadvertently as well as very deliberately. But the advent of the European colonial era and then industrialisation led to much more rapid forms of ecological change. The over-exploitation and even wanton destruction of nature caused by settlers in North America, for example, led to a movement to protect nature *from humans.*[5] This impulse gave rise to the word's first 'modern' protected areas, in the form of Yosemite and Yellowstone National Parks, both in the 19th century. The tragic paradox of the birth of the conservation movement, however, is that the lands on which these parks were established had been actively managed through forms of customary use by Native Americans since humans arrived on the continent.[6] The British and then American governments had been waging

[2] *Forever Sabah* (Web Page) <www.foreversabah.org>. *PACOS Trust* (Web Page) <www.pacostrust.org>.

[3] *Forever Sabah Institute* (Web Page) <www.foreversabahinstitute.org>.

[4] 'From Brisbane to Borneo', *University of Queensland* (Web Page) <https://stories.uq.edu.au/law/from-brisbane-to-borneo/index.html>.

[5] See, eg, the extinction of the passenger pigeon and the near extinction of bison, both in the 19th century: 'Passenger Pigeon', *Wikipedia* (Web Page, 13 September 2021) <https://en.wikipedia.org/wiki/Passenger_pigeon>; 'Bison Hunting', *Wikipedia* (Web Page, 25 August 2021) <https://en.wikipedia.org/wiki/Bison_hunting>.

[6] Joel Janetski, *Indians in Yellowstone National Park* (University of Utah Press, 2002).

wars against every Native American tribe they encountered.[7] The parks' establishment became a further mechanism that denied Native Americans of their natural, cultural and spiritual heritage, and customary rights and responsibilities *vis-à-vis* their lands and waters. It emanated from and also fuelled the notion of 'pristine wilderness'.

This model, based on Cartesian dualism – the notion that humans are apart from nature as opposed to a part of nature, was then replicated across the world. A report by Victoria Tauli-Corpuz, then Special Rapporteur on the Rights of Indigenous Peoples, estimates that at least 50% of the world's protected areas were established on Indigenous Peoples' territories and that this figure may be as high as 90% in Latin America. This legacy has led to significant lasting impacts that are still being felt, perpetuated and grappled with today. Importantly, protected areas law, policy and practice has improved greatly in many parts of the world, through a more acute focus on 'governance', and the Indigenous Protected Areas Programme in Australia provides a good example of a much improved approach.

I'd like to note that this is a very complex topic, and this is but a short introduction to the issues. Nevertheless, I hope it provides the basis for what follows.

In this context, 'conservation justice' is both the focus of a broad movement that aims to critique approaches to the conservation of Nature from a range of perspectives, as well as a normative description of a way of conserving and sustainably living with non-human nature in ways that conform to universal and culturally-defined human rights standards. The movement for the rights of Nature is related and equally dynamic.

You have been involved in developing the international law and policy around 'other effective area-based conservation measures'. Can you explain more about that work and update on the latest developments?

I witnessed conservation injustices when living in southern Africa and subsequently became aware of this history as well as the many diverse people committed to equitable conservation. I learnt about the issues from colleagues in the International Indigenous Forum on

[7] Dee Brown, *Bury my Heart at Wounded Knee: An Indian History of the American West* (Picador, 1st ed, 2007).

Biodiversity and the ICCA Consortium, among others, and am grateful for their deep insights.[8] The question I posed myself was: what does an international lawyer have to offer?

Histories are important. If we don't know the past, we cannot understand the present, and without a sense of the current zeitgeist we're much less able to imagine emerging futures or lead processes towards new horizons. Put another way, if you want to change the world you must first understand how earlier dynamics led us to where we are today. In this context, I read about how the International Union for Conservation of Nature (**IUCN**) had run a process to develop a revised definition of a protected area that culminated in 2008.[9] The final formulation states that to be a protected area, a site must be dedicated to the conservation of biodiversity. This makes a lot of sense, in the first instance. But colleagues in the Pacific helped me understand that this approach had the effect of denying the value of areas such as 'locally-managed marine areas' that might not be dedicated to the conservation of biodiversity but are managed in ways that ensure the integrity of the ecosystem as well as sustain local livelihoods.[10]

This definitional issue provided a new way of looking at a paradox I mentioned earlier, whereby the Indigenous Peoples and local communities whose ways of life were integral parts of living landscapes and seascapes remained to a significant extent marginalised and excluded from 'conservation' efforts and protected areas. My initial assessment was that the definition of a protected area was not the issue, *per se*; the issue was that the 'protected areas paradigm' was considered within mainstream conservation law, policy and practice to be the only viable approach to area-based conservation. This framework effectively devalued other world views and equally valid approaches.

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[8] *International Indigenous Forum on Biodiversity* (Web Page) <https://iifb-indigenous.org>. *ICCA Consortium* (Web Page) <www.iccaconsortium.org>.

[9] Nigel Dudley (ed), *Guidelines for applying protected area management categories* (IUCN Best Practice Protected Area Guidelines Series No 21, 2008).

[10] Hugh Govan and Stacy Jupiter, 'Can the IUCN 2008 protected areas management categories support Pacific island approaches to conservation?' (2013) 19.1 *PARKS* 73.

In 2010, Parties to the Convention on Biological Diversity (**CBD**) had agreed to conserve 17% of terrestrial and freshwater areas and 10% of marine and coastal areas though "well connected systems of protected areas and other effective area-based conservation measures".[11] At the time, the term 'other effective area-based conservation measure' (**OECM**) was undefined.[12] In light of what I have just set out, and after an intense process of consultation, a number of colleagues from the ICCA Consortium and I suggested that it would be beneficial to define the term to give greater recognition to areas *beyond protected* that deliver the long-term conservation of biodiversity.[13]

Kathy MacKinnon [then Chair of the World Commission on Protected Areas] and I subsequently co-chaired the IUCN Task Force on OECMs and we delivered our technical advice to the CBD in early-2018.[14] Parties negotiated a decision on protected areas and OECMs at their intersessional meeting held mid-year and adopted the decision at their 14th meeting of the Conference of the Parties [COP] in late-2018.[15] 'Other effective area-based conservation measures' are now defined as areas that are: a) geographically defined, b) not part of a protected area, c) have legitimate governance, d) sustained management, e) achieve the long-term *in-situ* conservation of biodiversity, f) support associated ecosystem functions and services, and g) promote cultural, spiritual, socio–economic, and other locally relevant values.

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[11] 'Strategic Plan 2002-2010', *Convention on Biological Diversity* (23 December 2010) <https://www.cbd.int/sp/2010/>.

[12] Harry Jonas and Sarah Lucas, *Legal aspects of the Aichi biodiversity target 11: a scoping study.* (IDLO Working Paper, 2013).

[13] Harry Jonas et al, 'New Steps of Change: Looking Beyond Protected Areas to Consider Other Effective Area-based Conservation Measures' (2014) 20.1 *PARKS* 111.

[14] The Task Force completed its work in 2018. See, eg, Harry Jonas and Kathy MacKinnon, *Advancing Guidance on Other Effective Area-based Conservation Measures: Report of the Second Meeting of the IUCNWCPA Task Force on Other Effective Area-based Conservation Measures* (Report, 4 July 2016). There is now an IUCN WCPA Specialist Group on OECMs: 'OECMs', *IUCN* (Web Page) <https://www.iucn.org/commissions/world-commission-protected-areas/our-work/oecms>.

[15] *Protected areas and other effective area-based conservation measures*, COP CBD Dec 14/8, 14th mtg, Agenda Item 24, UN Doc No CBD/COP/DEC/14/8 (30 November 2018) ('CBD Dec 14/8').

There are now over 500 sites that have been identified and reported as meeting the OECM criteria, covering *circa* 1.3 million square kilometres of terrestrial areas and *circa* 300,000 square kilometres of marine areas. I am hopeful that the advent of OECMs will increase the diversity of actors and places that are valued for their contribution to the long-term conservation of biodiversity, thereby enabling more equitable and effective forms of area-based conservation.[16]

It's important to underscore that it's critical to have equitable and effective protected area systems as well as properly identified OECMs and other sustainable systems coexisting within landscapes and seascapes, it's not an either or and neither protected areas nor the OECM framework is inherently 'better' than the other. But one or other framework may well be more appropriate in specific contexts.

Does the OECM framework enshrine principles of conservation justice?

CBD Decision 14/8 on protected areas and OECMs clearly references Indigenous Peoples' and local communities' rights in two main sections.[17] Annex II on good governance sets out steps for enhancing and supporting governance diversity. It states that Indigenous Peoples and local communities have the right to provide or withhold free, prior and informed consent (**FPIC**) over the implementation of any of the suggested steps set out in the annex and should be based on respect for their rights, knowledge and institutions. Annex II also states that good governance principles should be applied to protected areas and OECMs. It explains that equity is one element of good governance, and sets out the three dimensions of equity, namely: recognition, procedure and distribution.

[16] A film series on OECMs is available online. See IUCN, International Union for Conservation of Nature, 'Nature Stewardship Beyond Protected Areas: Other Effective Area-based Conservation Measures' (YouTube, 31 August 2021) <https://www.youtube.com/watch?v=kL3h6MPRtwI&t=4s>.

[17] CBD Dec 14/8 (n 15).

Annex III on OECMs is also very clear about the rights-based standards that should be applied in the context of OECMs. It underscores that any work on OECMs should take into account, where appropriate, the 2016 report of the United Nations Special Rapporteur on the rights of Indigenous Peoples[18] on the theme 'Indigenous Peoples and conservation' and the 2017 report of the United Nations Special Rapporteur on human rights and the environment.[19] It underscores that any engagement with Indigenous Peoples and local communities should be on the basis of self-identification and with their FPIC. Where they consent to their areas being identified and reported as OECMs, there should be at least the offer of measures to enhance the governance capacity of their legitimate authorities.

The decision also makes clear that 'Indigenous and local knowledge' should be used, where appropriate, and in line with international obligations and frameworks, such as the United Nations Declaration on the Rights of Indigenous Peoples.[20] Finally, governance and management should uphold local values – such as cultural and spiritual values – and should respect and uphold the knowledge, practices and institutions that are fundamental for the *in-situ* conservation of biodiversity.[21] On rights, therefore, the decision is unequivocal and places a duty on a wide range of conservation actors.[22] But there remain legitimate questions about how the framework will be applied in practice.

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[18] Victoria Tauli-Corpuz, *Report of the Special Rapporteur of the Human Rights, Council on the rights of indigenous peoples*, UN Doc A/71/229 (29 July 2016).

[19] *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN Doc A/HRC/34/49 (19 January 2017).

[20] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Agenda Item 68, UN Doc A/RES/61/295 (13 September 2007).

[21] For a deeper engagement with this issue, see Holly Jonas, Harry Jonas and Suneetha M. Subramanian, *The Right to Responsibility: Resisting and Engaging Development, Conservation and the Law in Asia* (Natural Justice and United Nations University – Institute of Advanced Studies, 2013).

[22] Jael E. Makagon, Harry Jonas and Dilys Roe, *Human Rights Standards for Conservation: Part I. To Which Conservation Actors do International Standards Apply* (Discussion Paper, July 2014)

You have also written about the private business sector. What has been the response to the OECM framework by sectoral actors?

In the main, environmental degradation occurs due to the activities of actors in various economic sectors, including agriculture, forestry, oil and gas, mining, infrastructure, and construction. The companies that operate in their sectors are extremely diverse. Some have horrendous human rights and environmental records and engage in intense and often long-term campaigns to cover up their abuses. At the most extreme end of the scale, environmental human rights defenders are killed for standing up for social and ecological injustice.[23] Other actors are making genuine attempts to conduct themselves and reform their industries to develop products and services within circular and equitable economies. The first point is that the economic system needs fundamental reform to transition towards fairer and a more circular and sustainable collective future.

But actively governing and managing areas for the integrity of their ecosystems is a critical part of a broader strategy of reversing biodiversity loss and engaging sectoral actors in that effort is important. When incentivised, the private sector can be powerful driver of change. At the same time, it will be important to ensure that economic interests do not attempt to use the framework to legitimise a business-as-usual scenario; 'rights-washing' human rights abuses or 'greenwashing' areas in which ecosystems are being degraded. The CBD Decision on OECMs calls for transparent monitoring and reporting of performance, which should further encourage actors to use the framework with probity.[24]

2021 is the belated 'super year for the environment' with the UN climate and biodiversity conferences scheduled. Can you provide an overview of what is on the agenda at the biodiversity conference and which aspects you are focusing on?

By way of background, the Convention on Biological Diversity (**CBD**) was agreed in 1992 and since then Parties engage with each other at meetings of the Conference of the Parties

[23] Global Witness, *Last Line of Defence* (Report, September 2021).

[24] Georgina Gurney et al, 'Biodiversity needs every tool in the box: use OECMs' (2021) 595 *Nature* 646.

(COPs) every two years. This meeting will be the 15th COP. It is an important meeting, because every 10 years, Parties to the CBD agree a new 10-year strategic plan that sets global ambition for the decade. Parties agreed the last strategic plan in 2010, and the new one was planned to be adopted in 2020. But here we are, due to COVID-19, still trying to move through the inter-sessional meetings required to negotiate the text in preparation for the COP.

The first full draft of the post-2020 global biodiversity framework – i.e., the new strategic plan – has just been released. It contains a theory of change, a 2050 vision and 2030 mission, four goals, ten milestones and twenty-one targets. While all the targets should be read as interrelated elements, I have a particular focus on Target 1 on spatial planning, Target 2 on restoration, Target 3 on area-based conservation, and Target 21 on the rights of Indigenous Peoples, local communities, women, girls, and youth.

Target 3 has received a lot of attention due to its call to conserve 30% of the planet by 2030. But some groups have expressed concern about this '30 x 30 target'. What are their concerns and how can they be addressed?

There has been an understandable concern from Indigenous Peoples, local communities and human rights-focused NGOs about the evolution of this target due to the fear that a call to conserve 30% of the planet by 2030 might incentivise states to further expropriate territories, lands and water for conservation. Despite what I'm about to say, this may still happen in some cases, though any such actions would directly contravene human rights norms and CBD Parties' standards as adopted in a range of decisions, including most recently Decision 14/8 on protected areas and OECMs [discussed above]. I can't underscore enough that any work towards this target must be human rights-based.

There has, however, been some confusion with some commentators arguing against the target based on the misunderstanding that the 30% target can only be achieved through protected areas. In fact, as currently drafted, the percentage target – whatever figure is finally agreed – can be achieved though protected areas and OECMs.

In addition, Indigenous Peoples' and local community advocates are assessing whether to call for the addition of a third category that directly references their territories, lands and waters, and that is an important discussion. I hope Parties carefully consider their arguments at the next intersessional meetings.

For the reasons I outlined earlier, I am hopeful that the OECM framework is a prospect worth exploring for some Indigenous Peoples and local communities. Taking a broader view, I am optimistic that the framework can promote an ever-greater focus on equity and effectiveness across protected and conserved areas.[25]

As a closing question, you've been operating in the sphere of environmental justice for a while now – what developments/directions do you see this area of law moving towards in the future and how can young students and lawyers get involved in this space?

At a practical level, the first thing to say is that you belong and have as much right and responsibility as anyone else to engage with a very important facet of our collective future. The movement towards a fairer world needs grounded lawyers. But having invited yourself, it's important to listen to others and seek out advice from a wide range of people involved in the area or issue in which you are interested, especially rights-holders and marginalised groups you might be keen to support. At the same time, with all due respect to the individuals you are talking to, don't take any single person's views as the be all and end all. Listen carefully but feel free to engage in robust conversation and cross-check what people convey as 'fact' or 'realistic'. Figure out your own preferences and motivations and what is meaningful for you; being at the front of a rally is not the right fit for everyone, nor is legal research – but both have their place in a diverse movement.

As a practical first step, I advise students to do some outlandish googling: if you are interested in gender issues, canopy-level biodiversity and speaking Spanish – Google it and see what comes up; you'll be amazed at the diversity of groups operating around the world.

[25] Harry Jonas et al, 'Equitable and effective area-based conservation: Towards the conserved areas paradigm' (2021) 27(1) *PARKS* 71.

Reach out, people are generally more welcoming than we sometimes think we deserve. Then join groups of like-minded people, even if you do not yet feel like you have the qualifications or experience – that's how you get it. The Global Youth Biodiversity Network [www.gybn.org], for example, is a highly motivated group of young people engaging at the CBD, and there will be similar bodies for the issues and locations in which you are interested. If not, consider starting one.

At a more philosophical level, it's important to start as early as possible to grapple with the politics of law. You hear things like 'the law says x'. But the law does not say anything, per se; people with power say things and then turn their views *into laws* or interpret things *from* the law. So, the quicker the transition is made to appreciating the political, power-laden nature of law, the more readily one can start to engage critically with concepts such as law, justice and rights. People have their own approaches, but for critically minded people interested in environmental issues and law, I suggest engaging rigorously with Indigenous Peoples' declarations, political ecology as well as more 'legal' concepts presented within jurisprudence, critical legal studies, legal pluralism and legal geography. I call the resulting theoretical framework 'legal and political ecology' – which I have found helpful in my work. But there are other approaches that will also enable one to critically examine systems, dynamics and outcomes, present normative proposals for change and – as a result – become a transformative changemaker. Go for it.