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General Issue

FOREWORD TO UQLJ SPECIAL EDITION ON CLIMATE CHANGE, THE LAW AND LEGAL EDUCATION

BEN BATROS*

Few people reading this will need reminding of the challenge that climate change poses. As this Special Issue was being prepared, however, the Intergovernmental Panel on Climate Change ('IPCC') issued the first instalment of its Sixth Assessment Report.[1] This report framed the situation that we face in stark terms. Carbon dioxide concentrations in the atmosphere are now higher than any time in at least two million years; the changes that this causes have accelerated in recent decades; the damage that will result from exceeding the internationally-agreed target (limiting warming to 1.5, or well-below 2.0, degrees Celsius) is both more serious and more certain; and the pathways to avoiding this are increasingly narrow.

But the dice are not yet cast: within the lifetime of a child born today, the IPCC report calculates that the low emissions scenarios will likely result in 1.4 or 1.8 degrees Celsius of warming (meeting international targets); the intermediate scenario leads to a sustained 2.7 degree Celsius rise in temperatures (exceeding anything seen on earth for over three million years); and the highest emissions scenario raises temperatures by 4.4 degrees Celsius (the impact of which is almost incomprehensible).

The need for urgent action to address climate change is thus clear. While law cannot *solve* the climate crisis, lawyers can and must play an important part in our response. There are lawyers working to force governments to enhance and accelerate their decarbonization plans, suing corporations that continue to drive emissions, seeking justice for communities affected by the current and future impacts of climate change, and pushing investors to stop financing climate-destructive activities. Such climate litigation is growing, with the total number of cases globally doubling since 2015 and the number of 'strategic' cases that aim to

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1 Richard P Allan et al, 'Summary for Policymakers' in Valérie Masson-Delmotte et al (eds), *Climate Change 2021: The Physical Science Basis* (IPCC, 2021).

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bring about broader societal shifts is rising 'dramatically'.[2] The Australian legal community is playing an important part in this.[3]

These efforts to push for more ambitious climate action may garner most of the public attention, but lawyers also play an important role behind the scenes as enablers of climate action. Law is an important tool for turning policy commitments into the real-world change that we so urgently need. Lawyers are working with new industries to navigate the regulatory and licencing requirements for renewable energy, carbon capture and restorative agriculture projects. They are integral to developing new climate-friendly regulations and the framework of international agreements that are essential to any effective effort to address this global crisis.

Law students see the scale of the challenge. They feel the importance of this moment. They are already demanding that the legal profession respond and signalling that they wish to be part of the solution. And there is thus a hunger, a demand, from the current generation of law students for a legal education which equips them with the skills to participate in tackling the defining challenge of their generation[4] (which, as Danielle Ireland-Piper and Nick James point out, is also likely to be an increasingly important area of legal practice).[5]

However, the obligation on law schools to address climate change and its implications for their curriculum goes beyond serving those students who want to use the law to help address climate change. Indeed, as Ireland-Piper and James set out in this volume, if law schools limit themselves to training their students on how the law can advance climate action — to teaching the law *of* climate change — they will have failed to grasp the full implications of climate change and to rise to the challenge that it poses.

First, law schools have a wider obligation to prepare all of their students for practice. In addition to the demand for law graduates with expertise in climate change law, there will also be a much larger need for lawyers in other fields that are aware of the implications of climate change – 'climate literate' or 'climate conscious' lawyers. The law students of today are likely to be in practice in 2050 (when the IPCC and many national governments are targeting net-zero

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2 Joana Setzer and Catherine Higham, *Global Trends in Climate Litigation: 2021 Snapshot* (Policy Report, 2 July 2021) 5.

3 Australia has the second-most climate cases globally, with over one quarter of the cases filed outside the USA (115 of 454 cases outside the USA). See 'Climate Change Laws of the World', *Grantham Research Institute on Climate Change and the Environment* (Web Page, 2022) <https://climate-laws.org/>; see also Sabin Center for Climate Change Law, 'Australia', *Climate Change Litigation Databases* (Web Page, 2022) <http://climatecasechart.com/climate-change-litigation/non-us-jurisdiction/australia/>.

4 Although, as Taylor cautions in her contribution, we need to be conscious of the impacts that both climate change and legal education can have on those students' mental health. See Monica Taylor, 'Climate Crisis, Legal Education and Law Student Well-Being: Pedagogical Strategies for Action' (2021) 40(3) *University of Queensland Law Journal* 459.

5 See Danielle Ireland-Piper and Nick James, 'The Obligation of Law Schools to Teach Climate Change Law' (2021) 40(3) *University of Queensland Law Journal* 319, 330.

emissions), 2060 and beyond. The effects of climate change will be felt well before that. And many areas of law will be called upon to determine the legal consequences of those effects, attempts to adapt to them, and efforts to mitigate further climate damage.

While it seems obvious that those with an interest in environmental regulation or energy law should think about climate change, it cannot be so neatly confined to a handful of discrete practice areas. Just in this volume, Margaret Young outlines the ways that climate change will impact torts, corporations law, trade law, human rights, and law of the sea; and Ireland-Piper and James note the impact that it will have on constitutional law, administrative law, and dispute resolution. Climate change will also impact property law, town planning, investment arbitration, securities law, migration and refugee law, and more. Commercial lawyers are already seeing climate change arise in their work, from due diligence through to transaction execution. The Chancery Lane Project has mobilized hundreds of corporate lawyers to develop and use contract clauses that address climate risks and embed climate solutions. Few areas of practice will be unaffected — as the U.S. Special Presidential Envoy for Climate, John Kerry, recently put it to the American Bar Association, '[y]ou are all climate lawyers now, whether you want to be or not'.[6] This means that if you are a prospective lawyer today and you are not thinking about how climate change may impact the branch of law that you intend to practice, you are not thinking long term about your career in the law.

Second, beyond equipping individual lawyers to advise clients on the full range of legal questions and disputes that climate change will raise, there is also a broader obligation to consider systemically how law will influence the way in which society experiences and responds to climate change. One key role that law plays in society is allocating risk and cost, responsibility and authority. As the impacts of climate change accelerate in range and scale over the coming years, this allocation function will influence where the responsibility and authority for decisions on mitigation and adaption are located; who bears the risks of action or inaction; who bears the costs of climate impacts and our responses; and how the (inevitably) competing interests are balanced.

Legal principles will thus inevitably affect the calculus of decision makers, potentially limiting our options or preferencing certain interests. Yet, the principles that will determine all of this have been built up over decades, well before the reality of climate change became widely known or was being felt. Given the magnitude of the changes and challenges that climate change poses,

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[6] Karen Sloan, '"You Are All Climate Lawyers Now," John Kerry Tells ABA', *Reuters* (online, 6 August 2021) <https://www.reuters.com/legal/litigation/you-are-all-climate-lawyers-now-john-kerry-tells-aba-2021-08-05/>. Professor Young has made a similar point in an international law context: see Margaret A Young, 'We Are All Climate Change Lawyers Now' (2021) 115 *American Society of International Law Proceedings*, doi:10.1017/amp.2021.123 (forthcoming).

examining what will happen when existing legal principles are applied to the effects of climate change would allow us to identify the public policy choices that this implies, interrogate whether they are appropriate, and explore what the alternatives might be. We must identify the choices that law implicitly makes when its current rules are applied to the risks and costs of climate change, and the extent to which they favour or preclude particular responses; highlight the ways in which the costs of climate change are already being felt and allocated by existing principles; and make a proactive and informed assessment the options for how the law *should* address these effects moving forward.

Law schools can and should take a leading role in this endeavour: through research and scholarship, and by training the new generation of legal professionals to be attentive to these questions. Universities and law schools have an obligation to society and to the public good, as a number of contributors to this volume identify. This includes, as Young eloquently reminds us, to 'guide the student to pay attention "to the ends which law serves, the ideas and wants out of which law develops"', and that as a part of this 'it is imperative to understand how law might support climate change mitigation and adaptation or impede it'.[7]

Finally, law schools have an obligation to the institution of the law itself, which compels them to work with their students to understand and consider how climate change will impact and challenge each legal discipline. Climate change will shape the law, just as surely as the law will shape our response to climate change. We need to ask the same questions as Bonython asks regarding tort — not just "what can tort law do for climate change", but "what can climate change do for tort law" (or even, what *will* climate change do *to* tort law) — across the legal spectrum and across the law school curriculum.[8]

They say that hard cases make bad law. Climate change is going to present a lot of hard cases, across many legal disciplines. Indeed, it is doing so already. If lawyers and policy makers are not thinking systematically and proactively about how the law should respond to climate change, then the chance of these hard cases creating bad law rises dramatically. And that thinking starts with law schools teaching future lawyers and policy makers to identify where and how the law intersects with climate change — both its causes and its effects — and considering how the law should respond in a systematic rather than ad-hoc way.

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7 Margaret A Young, 'Climate Change and Law: A Global Challenge for Legal Education' (2021) 40(3) *University of Queensland Law Journal* 351, 352, citing O M Roe, 'Jethro Brown: The First Teacher of Law and History in the University of Tasmania' (1977) 5 *University of Tasmania Law Review* 209, 221, in turn citing W Jethro Brown, *The Study of the Law* (1902) 36.

8 Wendy Bonython, 'Tort Law and Climate Change' (2021) 40(3) *University of Queensland Law Journal* 421, 427. And Professor Kysar before her: see Douglas A Kysar, 'What Climate Change Can Do About Tort Law' (2011) 41(1) *Environmental Law* 1.

WHY WE DID THIS, WHAT'S INCLUDED, AND WHAT WE MISSED

DANIELLE IRELAND-PIPER* AND NICK JAMES†

I INTRODUCTION

It is customary in an introduction for guest editors to explain the theme of the special issue and introduce the authors. While we intend to do both of these things, we also want to explain why we chose to undertake this project and address and acknowledge some omissions. We begin, however, with our acknowledgements and thanks.

We finalised much of this special issue while working on the lands of the people of the Yugembeh language group, also known as the Gold Coast of Australia. To that end, we acknowledge and pay our respects to the traditional custodians of these lands and to elders past and present.

We sincerely thank Rebecca Annian-Welsh, Rick Bigwood, and Iain Field for agreeing to our proposal for a special issue of the *University of Queensland Law Journal* (UQLJ). It has been a pleasure to work with the UQLJ team on this project.

We are, of course, very grateful to our contributing authors: Narelle Bedford, Wendy Bonython, Jonathan Crowe, Nicole Graham, Tony McAvoy, Lindsey Stevenson-Graf, Monica Taylor, and Margaret A Young. We also thank Ben Batros of Strategy for Humanity, for sharing his expertise and writing the Foreword. It was a delight to work with you all.

Many thanks are owed to our research assistants, Jane Andrews, Samira Aziz, and Alana Bonenfant, all of whom are students (or former students) at Bond University, and to the UQJ student editors who assisted in bringing this special issue to publication.

Finally, thank you to the scholars and practitioners from all over the world who participated in the 2021 Bond University Conference on 'Climate Change, the Law and Legal Education', and whose ideas and insights inspired this special issue.

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II Why We Did This

The planet is warming, and this simple fact will inevitably impact all lives and all societies. It will trigger both catastrophic events and changes to our everyday routines, both small and large. It will provoke a range of legal actions including further international conventions, domestic legislative reforms, regulatory enforcement actions, and climate litigation. One way or another, it will transform law and regulation.

In August 2021, the Intergovernmental Panel on Climate Change released the report *Climate Change 2021: The Physical Science Basis*.[1] The report confirms that 'increases in well-mixed greenhouse gas (GHG) concentrations since around 1750 are unequivocally caused by human activities'[2] and that 'each of the last four decades has been successively warmer than any decade that preceded it since 1850'.[3] The report notes:

> Human influence has likely increased the chance of compound extreme events since the 1950s. This includes increases in the frequency of concurrent heatwaves and droughts on the global scale … fire weather in some regions of all inhabited continents … and compound flooding in some locations.[4]

In short, the report revealed that global temperatures could push to 1.5 degrees celcius above pre-industrial levels within a decade.[5] The United Nations has described the global climate forecast as a 'code red for humanity'.[6]

What difference can a special issue of a law journal make? In and of itself, likely very little. However, universities have a social and moral responsibility to engage with the challenges facing humanity and equip graduates with the skills to address those challenges. This special issue, in some small way, advances that goal. As legal scholars, we are duty bound to consider the implications of the

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1 IPCC, *Climate Change 2021: The Physical Science Basis* (Report, 7 August 2021) <https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_Full_Report.pdf>. The IPCC was established in 1998 by the World Meteorological Organisation and the United Nations Environmental Program, and was endorsed by the General Assembly of the United Nations. The purpose of the IPCC is to provide governments with scientific information that they can use to develop climate policies. At the time of writing, the IPCC had 195 member states. For further information on the IPCC, see, eg, 'About the IPCC', *IPCC* (Web Page) <https://www.ipcc.ch/about/>.

2 Ibid, 5.

3 Ibid.

4 Ibid, 11.

5 Michael Slezak and Penny Timms, '"Climate Change Report From IPCC a 'Code Red For Humanity", United Nations chief warns', *ABC* (online, 9 August 2021) <https://www.abc.net.au/news/2021-08-09/coal-climate-change-global-warming-ipcc-report-released/100355952> ; Michael Slezak and Penny Timms, 'The IPCC has Released the Most Comprehensive Climate Change Report Ever. Here's What You Need to Know', *ABC* (online, 10 August 2021) <https://www.abc.net.au/news/2021-08-10/coal-climate-change-covered-in-ipcc-reports-keyquestions/100355954>.

6 Ibid.

climate emergency on our respective areas of expertise and what this means for the way we deliver legal education. This special issue of the UQLJ seeks to engage with that duty and to encourage legal scholars and law schools to confront the climate emergency and embed climate law into the law curriculum. In turn, as our graduates step out into the world, this will contribute to enhanced community education and legal literacy: that is our action item.

This special issue also builds on momentum from the 'Climate Law' degree program built at Bond University,[7] which the Executive Dean of Law, Professor Nick James, officially launched in January 2021.[8]

III Content of the Special Issue

We are delighted that Narelle Bedford, Wendy Bonython, Jonathan Crowe, Nicole Graham, Tony McAvoy, Lindsey Stevenson-Graf, Monica Taylor, and Margaret A Young chose to publish their excellent articles with us. We are pleased to open this special issue with our own article, 'The Obligation of Law Schools to Teach Climate Change Law'. We thank Professor Jonathan Crowe for his time in independently arranging peer review of our paper. In this article, we make our case that law schools have an obligation to teach climate change law as well as considering the consequences for climate change and the law. James is a legal education scholar with extensive experience in curriculum design and Ireland-Piper is an experienced public law scholar and former legal practitioner. We drafted this article while building a climate law degree, which James led and launched in 2021. In many ways, the curriculum design and the writing of our article each informed and developed the other. Our article is also intended to represent a starting point to set the scene for the articles from our contributing authors.

Margaret A Young has taught Climate Change Law as an elective for over 10 years at the Melbourne Law School. In her article, 'Climate Change and Law: A Global Challenge for Legal Education', Young argues that lawyers dealing with climate change require proficiency across different areas of law, not just the law that seeks to limit greenhouse gas emissions and not just international law, either. Climate change is a global problem but solutions must not be limited to international law. Human rights lawyers are climate lawyers. Trade lawyers are climate lawyers. Environmental lawyers are climate lawyers. Tort lawyers are

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7 'Specialise in Climate Law', *Bond University* (Web Page) https://bond.edu.au/LLB-climate-law.

8 'Bond Launches First World-Class Climate Law Degree', *Bond University* (Media Release, 11 December 2020) <https://bond.edu.au/news/66951/bond-launches-world-first-climate-law-degree>; Jordan Baker, '"We Need People Who are Trained": University Offers First Climate Change Law Degree' *Sydney Morning Herald* (online, 10 December 2020) <https://www.smh.com.au/national/we-need-people-who-are-trained-university-offers-first-climate-change-law-degree-20201210-p56mco.html>.

climate lawyers. Corporate lawyers are climate lawyers. Government lawyers are climate lawyers. Local government lawyers are climate lawyers. Law of the sea specialists are climate lawyers. Many different actors, at many different levels, have a role to play in addressing climate change. Young explores theories by which to inform this reality.

In their article, 'First Nations People, Climate Change and Human Rights in a Legal Education', Narelle Bedford, Tony McAvoy, and Lindsey Stevenson-Graf present a First Nations perspective on climate change, informed by human rights law and legal education. They argue that, for any response to climate change to be effective, it must be grounded in the perspectives, knowledge, and rights of First Nations peoples. The utility of human rights instruments to protect First Nation interests during the current period of climate change is explored at the international and domestic level. They conclude that structural change must begin with both the Indigenisation of legal education and the embedding of legal responses to climate change into the law curriculum, and that in doing so, a holistic approach is necessary.

The issue moves on to an article by Nicole Graham, titled 'Teaching Private Law in a Climate Crisis'. Graham's article is premised on the notion that the physical manifestation of climate change challenges the logic and the operation of private law. Specifically, she suggests the way private law is practised will necessarily change as disputes escalate over, for example, resource insecurity, the meaning of damage and harm, where land, riparian and littoral boundaries have migrated, and what this all means for title and risk, foreseeability, reasonableness and vulnerability. In her view, this presents opportunities for law reform. In turn, argues Graham, effective law reform depends on a differently-educated generation of legal thinkers and practitioners. Legal education is, therefore, central to overcoming the barriers to effective climate change adaption.

The intersection between tort law and climate change is considered by Wendy Bonython, in her article 'Tort Law and Climate Change'. For Bonython, the primary role of tort law in climate change remains unclear but not hopeless, and certainly worthy of examination. Bonython starts her piece by acknowledgeing that few claims brought in tort have been successful. Notwithstanding that, Bonython engages with the question of 'what tort law can do for climate change litigation in Australia, and what climate change can do for tort law'. She ultimately argues that climate litigation in tort, even where immediately unsuccessful, can result in enough sustained pressure so as to result in change — 'such is the course of incrementalism'. Bonython makes the case that teaching students about climate change litigation — even cases that ultimately may not survive the appellate process — provides opportunities to explore relationships between law and justice outside of traditional places where that might take pace (such as in public law), and therefore, even if just for this reason, is a worthy pursuit.

In 'Climate Crisis, Legal Education and Law Student Well-Being: Pedagogical Strategies for Action', Monica Taylor examines the impact of the climate crisis on the mental health of law students. Taylor reviews the evidence on youth mental health regarding the climate crisis and applies it to what is already known about law student well-being. Drawing on theories of learning design, she then considers a range of pedagogical strategies that law schools can use to engage students who are committed to action on climate change through law. The Climate Justice Initiative at the TC Beirne School of Law is presented as one example of what is possible. Taylor emphasises the significance of a partnership approach to student engagement and argues that this may yield benefits, especially in the context of climate-change-related legal work. She concludes that, despite the negative psychological impact of the climate crisis on law students, there are practical activities that law schools can and should initiate to support student well-being.

We conclude the special issue with an elegant and rational call to action by Jonathan Crowe. In his article, '"It Makes No Difference What We Do": Climate Change and the Ethics of Collective Action', Crowe observes that opposition to collective action on climate change takes at least two forms. Some people deny that climate change is occurring or that it is due to human activity. Others maintain that, even if climate change is occurring, we have no duty to do anything about it because our efforts would be futile. Crowe rebuts the latter line of argument, persuasively arguing that everyone has a duty to do their share for the global common good, which includes doing one's part to combat climate change; the idea that taking action against climate change is futile should be treated with caution, because sometimes actions may seem to make no difference to climate change, when really they do; and in any event, the duty to do one's share to combat climate change still applies, even if it is ultimately futile, because not doing one's share for the common good harms oneself.

IV What We Missed

We were unable to include in this special issue an article addressing animal law or food law. While neither form part of the core law curriculum, and we do not necessarily say they should, changes in agricultural practice and legal reform of the way humans use animals in food systems is essential to responding to the climate emergency.

There is a substantial body of 'animal law' academic literature critical of contemporary animal welfare laws.[9] There is also abundant evidence that many of our current farming and animal husbandry practices are contributing to climate change.[10] The clearing of forests to create space to grow crops and rear animals removes vital carbon sinks and releases gases stored in the soil and vegetation.[11] Factory farming requires large amounts of energy in order to function.[12] Livestock farming produces 37 per cent and 65 per cent of our global methane and nitrous oxide emissions respectively, and these gases are much more potent than carbon dioxide.[13]

Fundamental reforms to the ways in which the law regulates our relationships with animals — including efforts to formally recognise the sentience of non-human animals — are predominantly driven by concerns that our current laws are generally ineffective in protecting large numbers of farmed animals from suffering, and that the law should recognise certain fundamental rights of non-human animals.[14] The recognition of animal sentience and animal rights will eventually and inevitably curtail the ability to engage in large-scale factory farming,[15] which will in turn contribute to our efforts to mitigate climate change and its effects.[16] At the same time, non-legal initiatives, such as raising consumer awareness of the realities of factory farming, and encouraging people to transition to plant-based diets, are likely to have similar consequences for climate change.[17] Law schools have a role to play in educating law students about these issues.

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9 See, eg, Philip Jamieson, 'Duty and the Beast: The Movement in Reform of Animal Welfare Law' (1991) 16(2) *University of Queensland Law Journal* 238; Steven White, 'Legislating for Animal Welfare: Making the Interests of Animals Count' (2003) 28(6) *Alternative Law Journal* 277; Jed Goodfellow, 'Regulatory Capture and the Welfare of Farm Animals in Australia' in Deborah Cao and Steven White (eds), *Animal Law and Welfare - International Perspectives* (2016, Springer).

10 Trevor J Smith, 'Corn, Cows, and Climate Change: How Federal Agricultural Subsidies Enable Factory Farming and Exacerbate US Greenhouse Gas Emissions' (2019) 9(1) *Washington Journal of Environmental Law & Policy* 26.

11 'Ending Factory Farming: Environmental Damage', *Compassion in World Farming* (Web Page, 2021) <https://www.ciwf.org.uk/factory-farming/environmental-damage/>.

12 David Pimentel, *Impacts of Organic Farming on the Efficiency of Energy Use in Agriculture* (The Organic Centre, 2006).

13 Henning Steinfeld, Pierre J Gerber and Tom Wassenaar, *Livestock's Long Shadow: Environmental Issues and Options* (United Nations Food and Agriculture Organization, 2006).

14 Tom Regan, *The Case for Animal Rights* (University of Californai Press, 1983); Tom Regan, *Defending Animal Rights* (University of Illinois Press, 2001); Cass R Sunstein and Martha C Nussbaum, *Animal Rights: Current Debates and New Directions* (Oxford University Press, 2004).

15 Jacky Turner and Joyce D'Silva, *Animals, Ethics and Trade: The Challenge of Animal Sentience* (Routledge, 2006).

16 Thomas Potthast and Simon Meisch (eds), *Climate Change and Sustainable Development; Ethical Perspectives on Land Use and Food Production* (Wageningen Academic Publishers, 2012).

17 Teea Kortetmäki and Markku Oksanen, 'Is There a Convincing Case for Climate Veganism?' (2020) 38 *Agriculture and Human Values* 729.

It would have been interesting and appropriate to examine these issues in more depth in this special issue. Fortunately, the conversation has only just begun.

A reader might also have expected an article focusing specifically on energy law and natural resource regulation. However, these issues are indirectly touched upon throughout the papers in this special issue, and there already exists a volume of literature on this topic. For this reason, we did not include a specific article on energy law, but refer our readers to existing scholarship on the topic.

IV Conclusion

Law is not and cannot be separated from the society it regulates. Correspondingly, legal education cannot ignore one of the most significant challenges to global human society. Climate change, the law and legal education are intimately and inextricably interconnected. We look forward to continuing the important conversations initiated in this special issue of the UQLJ.

The Obligation of Law Schools to Teach Climate Change Law

Danielle Ireland-Piper* and Nick James†

Climate change will impact most, if not all, aspects of law and regulation. Law is a key mechanism of social governance, and it has a key role to play in regulating and addressing the causes and consequences of climate change. In the midst of the unfolding climate crisis law schools have a clear and pressing obligation to contribute to efforts to address climate change and its consequences by ensuring climate change law occupies an appropriate place in the law curriculum. In this article we consider the obligation of universities, and law schools in particular, to respond appropriately to the climate crisis in their program offerings. We begin by reflecting on the obligation of law schools and universities to contribute to the public good, an obligation often downplayed given the contemporary emphasis upon the 'job-readiness' of graduates and other neoliberal priorities. We then focus on the obligation of universities and law schools to respond appropriately to climate change. We examine the landscape of climate change law and identify the essential elements of climate change law for inclusion in the law curriculum. And we conclude by identifying examples of ways in which law schools are already incorporating climate change law into their law programs.

I Introduction

While the threat of climate change is widely known and the seriousness of that threat is generally appreciated (deniers notwithstanding),[1] we commence with a brief recap of our situation:

> Earth's climate has changed over the past century. The atmosphere and oceans have warmed, sea levels have risen, and glaciers and ice sheets have decreased in size. The best available evidence indicates that greenhouse gas emissions from human activities are the main cause. Continuing increases in greenhouse gases will produce further warming and other changes in Earth's physical environment and ecosystems. … Climate change has impacts on ecosystems, coastal systems, fire regimes, food and water security, health, infrastructure and human security. Impacts on ecosystems and societies are already occurring around the world, including in Australia. The impacts will vary from one region to another and, in the short term, can be both positive and

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† Professor and Executive Dean, Faculty of Law, Bond University.

1 Riley E Dunlap and Aaron M McCright, 'Climate Change Denial: Sources, Actors and Strategies' in Constance Lever-Tracy (ed), *Routledge Handbook of Climate Change and Society* (Routledge, 2010) 240, 240.

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> negative. In the future, the impacts of climate change will intensify and interact with other stresses. If greenhouse gas emissions continue to be high, it is likely that the human-induced component of climate change will exceed the capacity of some countries to adapt.[2]

Climate change has important implications for law schools in three key respects.

First, law is a key mechanism of social governance, and as such it has a key role to play in regulating and addressing the causes and consequences of climate change. Law graduates will need to draw upon a thorough understanding of climate change law if they want to practice in what is likely to be an area of increasing importance,[3] or if they want to participate in or support efforts to reform our legal and social structures in order to better address climate change.

Second, climate change will impact many, if not most, aspects of law and regulation.[4] This means that many fields of legal research will need to engage with climate change either directly or indirectly, and that many law subjects taught at law school will need to acknowledge climate change and its impact upon the legal rules, processes and practices examined in the subject.

Third, and most importantly, law schools have a general obligation to serve the public good, and the public good is served by supporting our community to respond appropriately to climate change via its legal structures and processes. This is achieved by facilitating the creation of a new generation of legal practitioners adequately educated about climate change and its consequences.

The central contention of this article is that, given these three key implications of climate change, law schools have a specific obligation to ensure law students are educated in climate change law during the course of their studies.

The article is presented in four parts. In the Part I we reflect on the obligation of law schools and universities to contribute to the public good, an obligation often downplayed given the contemporary emphasis upon the 'job-readiness' of graduates and other neo-liberal priorities. In Part II, we focus on the obligation of universities and law schools to respond appropriately to climate change. In Part III we identify what should be included in the law curriculum by examining the landscape of climate change law and the implications of climate change for the law generally. Finally, in Part IV, we offer some examples of ways in which law schools are incorporating climate change law into their law programs.

A preliminary matter: this article is premised on the accuracy of the prevailing scientific view that humans 'are at the centre of global climate change:

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2 Australian Academy of Science, 'Summary', *The Science of Climate Change* (Web Page) <https://www.science.org.au/learning/general-audience/science-booklets/science-climate-change/summary>.

3 Hana Vizcarra, 'Climate Change is Changing the Practice of Law', *Harvard Law School Environmental and Energy Law Program* (Blog Post, 30 July 2020) <https://eelp.law.harvard.edu/2020/07/climate-change-is-changing-the-practice-of-law-beyond-environmental-law/>.

4 Richard Lord et al, 'Overview of Legal Issues Relevant to Climate Change' in Richard Lord et al (eds), *Climate Change Liability: Transnational Law and Practice* (Cambridge University Press, 2011) 23.

their actions cause anthropogenic climate change, and social change is key to effectively responding to climate change'.[5] We note that not all persons teaching law necessarily accept the scientific consensus on this point. As the United Nations Intergovernmental Panel on Climate Change ('IPCC') observed in 2018:

> People with particular political views and those who emphasize individual autonomy may reject climate science knowledge and believe that there is widespread scientific disagreement about climate change, inhibiting support for climate policy. This may explain why extreme weather experiences enhances preparedness to reduce energy use among left- but not right-leaning voters.[6]

Even supposing a legal educator does not accept anthropogenic climate change, it may be that such a person still accepts the warming of the planet (now widely evidenced) and recognises the need for the law to regulate its causes and consequences. Further, disagreement regarding the existence or causes of climate change or the need for climate change law does not affect the actual existence of such a body of law, and even the most climate-change-sceptical of legal educators must accept that employers prefer to see graduates equipped with an understanding of current and future regulatory frameworks. For these reasons, this article does not seek to engage in the debate as to the cause of climate change. We will leave that to the scientists. Here, we simply consider the responsibility of law schools to respond to the prevailing scientific view.

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5 Heleen de Coninck et al, 'Strengthening and Implementing the Global Response' in Valérie Masson-Delmotte et al (eds), *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, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, and Efforts to Eradicate Poverty* (IPCC, 2018) 313, 362 . See also Charles Vlek and Linda Steg, 'Human Behavior and Environmental Sustainability: Problems, Driving Forces, and Research Topics' (2007) 63(1) *Journal of Social Issues* 1, 1-19; Thomas Dietz, Paul C Stern and Elke U Weber, 'Reducing Carbon-Based Energy Consumption through Changes in Household Behavior' (2013) 142(1) *Daedalus* 78, 78-9; ISSC and UNESCO, *World Social Science Report 2013: Changing Global Environments* (OECD Publishing, 2013) 609; Heide Hackmann, Susanne C Moser and Asuncion Lera St Clair, 'The Social Heart of Global Environmental Change' (2014) 4(8) *Nature Climate Change* 653, 653–5.

6 de Coninck et al (n 5) 364 (citations omitted), citing Dan Kahan, 'Fixing the Communications Failure' (2010) 463(7279) *Nature* 296, 296–7; Saffron J O'Neill et al, 'On the Use of Imagery for Climate Change Engagement' (2013) 23(2) *Global Environmental Change* 413, 413–21; Charles Adedayo Ogunbode, Yue Liu and Nicole Tausch, 'The Moderating Role of Political Affiliation in the Link Between Flooding Experience and Preparedness to Reduce Energy Use' (2017) 145(3–4) *Climatic Change* 445, 445–58; Ding Ding et al, 'Support for Climate Policy and Societal Action are Linked to Perceptions about Scientific Agreement' (2011) 1(9) *Nature Climate Change* 462, 462–6; Aaron M McCright, Riley E Dunlap and Chenyang Xiao, 'Perceived Scientific Agreement and Support for Government Action on Climate change in the USA' (2013) 119(2) *Climatic Change* 511, 511–18.

II Contributing to the Public Good

Universities have a general obligation to contribute to the public good,[7] and the public good is served by supporting the community to respond appropriately to climate change. Law schools can achieve this by educating law students about climate change and its consequences.

Contemporary discourse in Australia about the role of universities often downplays the importance of contributing to the public good. Instead, the contemporary discourse is primarily vocational,[8] in that it prioritises employability as an outcome of higher education,[9] and emphasises the importance of practical and professional skills development within the curriculum.[10] The dominance of vocationalism is evidenced by the frequent assertion by the Australian government and others that universities' principal responsibility is to produce 'job ready' graduates,[11] capable of contributing to national productivity,[12] and the fact that the quality of a university and its teaching are, at least in part, determined by reference to the success of employment outcomes for its graduates, including the proportion of graduates in full-time employment and the salaries they earn.[13]

This emphasis upon the employability of graduates is perhaps understandable — if not inevitable — given the cultural predominance of capitalism and neoliberalism.[14] The role of universities within the capitalist,

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7 See, eg, Simon Marginson, 'Higher Education and Public Good' (2011) 65(4) *Higher Education Quarterly* 411.

8 W Norton Grubb and Marvin Lazerson, 'Vocationalism in Higher Education: The Triumph of the Education Gospel' (2005) 76(1) *Journal of Higher Education* 1.

9 See, eg, Andrew Trounson, 'Grim Jobs Outlook for New Graduates', *The Australian* (online, 24 July 2015) <http://www.theaustralian.com.au/higher-education/grim-jobs-outlook-for-new-graduates/news-story/3d6a774ebb995dc9ba3f178c721d50d5>; Hamish Coates, 'Employability: Time For Higher Education Sector to Step Up', *The Australian* (online, 25 November 2015) <http://www.theaustralian.com.au/higher-education/opinion/employability-time-for-higher-education-sector-to-step-up/news-story/bf2846cd3079752a796fc5981f9a239c>; Zena Hitz, 'Why Rebranding Higher Education as "Job Training" is an Offence to Humanism', *New Statesman* (online, 21 August 2020) <https://www.newstatesman.com/politics/education/2020/08/why-rebranding-higher-education-job-training-offence-humanism>.

10 See the focus upon different approaches to embedding practical skills in Richard Johnstone and Sumitra Vignaendra, 'Learning Outcomes and Curriculum Development in Law: A Report Commissioned by the Australian Universities Teaching Committee' (Higher Education Group Department of Education, Science and Training, 2003) 166.

11 Australian Government, 'Job-Ready Graduates Package', *Department of Education, Skills and Employment* (Web Page, 2021) <https://www.dese.gov.au/job-ready>.

12 See, eg, Simon Birmingham, 'Speech at Ai Group Launch of Graduate Employment Service' (Speech, Ai Group Launch of Graduate Employment Service, 11 October 2016).

13 Quality Indicators for Learning and Teaching, 'Graduate Outcomes Survey — Longitudinal', *Surveys* (Web Page, 2021) <https://www.qilt.edu.au/surveys/graduate-outcomes-survey---longitudinal-(gos-l)>. See also Margaret Thornton and Lucinda Shannon, '"Selling the Dream": Law School Branding and the Illusion of Choice' (2013) 23(2) *Legal Education Review* 249, 257–65.

14 Margaret Thornton, 'Among the Ruins: Law in the Neo-Liberal Academy' (2001) 20 *Windsor Yearbook of Access to Justice* 3.

neoliberal state is the creation of productive workers trained to transition easily into revenue-generating employment positions.[15] However, as many critics of vocationalism's dominance have pointed out, the contemporary emphasis upon graduate employability comes at a cost.[16] These costs include the risk of de-emphasising academic rigour,[17] the devaluing of an education in the liberal arts and humanities, and inadequate attention being paid to teaching critical thinking and the questioning of dominant ideologies, political views and social practices.[18] Most importantly for the purposes of this article, they also include the de-emphasis of the historical obligation of universities to contribute to the public good.

A *Universities and the Public Good*

Universities have long been recognised — at least as far back as 1200 AD — as having an obligation to serve the public good.[19] The notion extends all the way back to the establishment of the very first modern universities in Bologna, Paris

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15 A legal education that fails to provide students with the knowledge and skills needed for a successful career in law is portrayed by those who adhere to this view as fundamentally flawed: see, eg, Katherine Towers, 'Law Graduates Not Keeping Up with the Modern World', *The Australian* (online, 25 May 2016) <http://www.theaustralian.com.au/higher-education/law-graduates-not-keeping-up-with-the-modern-world/news-story/e2092d31bd445d4418d623b3d16a7537>; Stefanie Garber, 'Law Students Question Value of Their Degree', *Lawyers Weekly* (online, 3 August 2015) <http://www.lawyersweekly.com.au/news/16923-law-students-question-the-value-of-degree>; Linda Sheryl Greene, 'Law Schools Need to Better Prepare Their Students', *The New York Times* (online, 24 September 2015) <http://www.nytimes.com/roomfordebate/2015/09/24/is-the-bar-too-low-to-get-into-law-school/law-schools-need-to-better-prepare-their-students>.

16 See in particular the work of Margaret Thornton, including Margaret Thornton, 'Portia Lost in the Groves of Academe Wondering What to Do about Legal Education' (1991) 9(2) *Law in Context: A Socio-Legal Journal* 9; Margaret Thornton, 'Law as Business in the Corporatised University' (2000) 25(6) *Alternative Law Journal* 269; Margaret Thornton, 'The Idea of the University and the Contemporary Legal Academy' (2004) 26(4) *Sydney Law Review* 481; Margaret Thornton, *Privatising the Public University: The Case of Law* (Routledge, 2012). See also the 2013 special issue of the *Legal Education Review* focusing upon critical approaches to legal education, including Thornton and Shannon (n 13) 257–65; Paula Baron, 'A Dangerous Cult: Response to "The Effect of the Market on Legal Education"' (2013) 23(2) *Legal Education Review* 273; Gabrielle Appleby, Peter Burdon and Alexander Reilly, 'Critical Thinking in Legal Education: Our Journey' (2013) 23(2) *Legal Education Review* 345; Mary Heath and Peter D Burdon, 'Academic Resistance to the Neoliberal University' (2013) 23(2) *Legal Education Review* 379.

17 William L Twining, 'The Idea of Juristic Method: A Tribute to Karl Llewellyn' (1993) 48(1) *University of Miami Law Review* 119, 146. Non-legal scholars have been concerned with such issues for a very long time. Cardinal John Henry Newman in his book *The Idea of a University* (University of Notre Dame Press, 1852) acknowledged that the training of professional people came within the function of a university, but insisted that the education of the intellect was the essential function of a university.

18 See generally Nickolas John James, 'The Marginalisation of Radical Discourses in Australian Legal Education' (2006) 16(1-2) *Legal Education Review* 55.

19 Michael Cuthill et al, 'Universities and the Public Good: A Review of Knowledge Exchange Policy and Related University Practice in Australia' (2014) 56(2) *Australian Universities Review* 36, 36. See also Adrianna Kezar, Anthony C Chambers and John C Burkhardt (eds), *Higher Education for the Public Good: Emerging Voices from a National Movement* (John Wiley & Sons, 2015).

and Oxford.[20] For centuries, the distance — both physical and metaphorical — between the university and the worlds of commerce and politics was valued and protected. In order to avoid being influenced by political and commercial imperatives, scholars sought to maintain a distance between the 'profane' worlds of politics and commerce and the 'sacred' academy. From their 'ivory tower', they could observe and evaluate social events from an elevated, neutral, disinterested perspective.[21]

The role of the university in serving the public good included not only the preservation of humanity's knowledge and wisdom, the transmission of that knowledge and wisdom from one generation to the next, and the nurturing and growth of that knowledge and wisdom through meticulous and rigorous research and scholarship. It also included the dedication of the university's expertise to serving the needs of the community, while simultaneously seeking to preserve the distance from community concerns required to maintain the isolation required for scholarship.[22]

The particular way in which universities contribute to the public good has taken a variety of forms over the years,[23] including engaging with private, public and community sector stakeholders to contribute to social justice and development;[24] focussing on public policy;[25] interacting with industry;[26] and addressing the 'grand challenges' of the 21st century.[27] Today when the public role of universities receives attention in public discourse the focus is often upon the universities' obligation to contribute to economic prosperity,[28] and universities themselves are likely to refer to their contributions to the public good to justify public funding.[29]

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20 Michael Cuthill, 'A "Civic Mission" for the University: Engaged Scholarship and Community-Based Participatory Research' in Lorraine McIlrath, Ann Lyons and Ronaldo Munck (eds), *Higher Education and Civic Engagement: Comparative Perspectives* (Palgrave Macmillan, 2012) 81, 81–2.

21 Steven Shapin, 'The Ivory Tower: The History of a Figure of Speech and its Cultural Uses' (2012) 45(1) *British Journal for the History of Science* 1.

22 See, eg, Paul Chatterton, 'The Cultural Role of Universities in the Community: Revisiting the University' (2000) 32(1) *Environment and Planning A: Economy and Space* 165; Catherine Manathunga, 'Excavating the Role and Purpose of University Education in the Postmodern Age: Historical Insights from the South' (2017) 1(1) *Policy Reviews in Higher Education* 69.

23 Michael Cuthill et al (n 19) 37.

24 Cuthill (n 20) 81–99.

25 Niels Mejlgaard et al, *Monitoring Policy and Research Activities on Science in Society in Europe (MASIS)* (Final Synthesis Report, 2012).

26 Shiri M Breznitz and Maryann P Feldman, 'The Engaged University' (2012) 37 *Journal of Technology Transfer* 139.

27 Michael Barber, Katelyn Donnelly and Saad Rizvi, *An Avalanche is Coming: Higher Education and the Revolution Ahead* (Institute for Public Policy Research, 2013).

28 Belinda Robinson, 'Strong Tertiary Sector the Engine Room of Australia's Prosperity', *The Australian* (online, 1 June 2016) <http://www.theaustralian.com.au/higher-education/opinion/strong-tertiary-sector-the-engine-room-of-australias-prosperity/news-story/94e1b536f7b59d01eb951f1f34237c60>.

29 Stefan Collini, *What Are Universities For?* (Penguin Books, 2012).

The wider public still has an expectation that universities will take responsibility for contributing to the public good, an expectation that has apparently increased as a result of the COVID-19 pandemic. A recent analysis of Australian Leadership Index ('ALI') data revealed that, in contrast to the government's instrumental view of education and its focus on producing 'job-ready graduates', the public now takes a wider view of education as a public good. In most communities, 'public education, such as public schools and universities, is understood as serving the interests of the many, not the few.'[30]

It seems that despite the vocational and instrumental focus of government, the obligation of universities to contribute to the public good is still valued. As Solbrekke and Sugrue recently explained at length, the purpose of higher education is both *for* public good and *as* a public good, and that universities have 'a social and moral responsibility broader than merely reporting on pre-determined, transparent and quantifiable quality criteria and learning outcomes'.[31]

B *Law Schools and the Public Good*

What is the status of the obligation to contribute to the public good within the discipline of law? Law schools in Australia were initially controlled by the legal profession and their role was one that focussed upon training the next generation of practitioners.[32] In the mid-20th century, there was a deliberate effort to distance the academy from the profession, and achieve greater ideological alignment between the law school and other academic disciplines.[33] The dominant ideology within the law school became one that placed greater value upon scholarship and doctrine. It is too much, however, to say that law schools recommitted to the traditional role of the university. Instead, the focus of the law school narrowed, and the priority became the transmission of doctrine and, specifically, the prescribed areas of knowledge known as the 'Priestly 11'.[34]

It was not until the 1970s and 1980s, and the emergence of a critical or radical movement within law schools, that calls for a greater emphasis upon the social

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30 Melissa A Wheeler et al, 'Pandemic Widens Gap Between Government and Australians' View of Education', *The Conversation* (online, 12 November 2020) <https://theconversation.com/pandemic-widens-gap-between-government-and-australians-view-of-education-148991>.

31 Tone Dyrdal Solbrekke and Ciaran Sugrue, *Leading Higher Education As and For Public Good: Rekindling Education as Praxis Tone* (Routledge, 2020) 166.

32 Linda Martin, 'From Apprenticeship to Law School: A Social History of Legal Education in Nineteenth Century New South Wales' (1986) 9(2) *University of New South Wales Law Journal* 111, 121, 135–6.

33 Judith Lancaster, *The Modernisation of Legal Education: A Critique of the Martin, Bowen and Pearce Reports* (Centre for Legal Education, 1993) 2.

34 Dennis Pearce, Enid Campbell and Don Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Committee* (Australian Government Publishing Service, 1987).

obligation of law schools began to be heard.[35] Critical, radical and feminist scholars called for social justice and law reform to be included in the law curriculum. These calls were initially met with resistance,[36] but the efforts of such scholars persisted and while in some law schools they remain at the margins, in many law schools, critical perspectives on the law and initiatives focussed on social justice and public service are now explicitly promoted.[37]

The role that law schools can play in contributing to the public good includes more than the traditional responsibility for preserving and enhancing disciplinary knowledge. It also includes using the talent and expertise among its students, scholars and professional partners to assist the community. There are, of course, social and political contingencies that motivate law schools to disregard this role.[38] These include School and Faculty performance frequently being measured according to law-student employability; pressure from law students to focus upon assisting them to find employment; and restrictions upon spending and its limitation to revenue generating initiatives.[39] However, despite the pressures upon law-school leadership to focus upon revenue generation through student recruitment, research funding and philanthropic support, enhancing customer or student satisfaction, and cost minimisation,[40] many law schools continue to engage in activities concerned primarily (although not always solely) with serving the public good.

Legal research and scholarship are themselves ways in which law schools contribute to the public good. Research productivity for a law school, like most academic units, is predominantly measured in terms of quantum of quality publications, higher-degree research completions, and externally sourced grant income. These indicators typically inform the Key Performance Indicators by

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35 Nickolas John James, 'The Marginalisation of Radical Discourses in Australian Legal Education' (2006) 16(1-2) *Legal Education Review* 55.

36 Hilary Charlesworth quotes an article in the *Australian Financial Review*, which argues that radical legal theorists should not be allowed to teach in law schools, because 'it is their avowed intention not to teach law in a way that will be useful to practitioners in the actual legal system'; that Critical Legal Studies (CLS) 'represents the loony Left of the legal profession'; and that its advocates 'have many of the features of a fundamentalist sect, being intolerant of democracy and willing to employ intimidation and misrepresentation': 'New Directions in Legal Theory: Critical Legal Studies' (1989) 63 *Law Institute Journal* 248, 248, quoting Padraic P McGuinness, 'The Trouble with Law School', *Australian Financial Review* (Sydney, 1989).

37 See, eg, Southern Cross University, 'Welcome to the Faculty of Business, Law and Arts', *Business, Law and Arts* (Web Page) <https://www.scu.edu.au/school-of-law-and-justice/>.

38 The explanation of historical phenomena by way of identification of multiple 'contingencies' rather than a single 'cause' is consistent with Foucault's approach to historical analysis. Instead of seeking final causes and ultimate truths, Foucault recommended that the focus be upon identifying the conditions of a discourse's production. When he analysed knowledge and discourses, the question for Foucault was: 'How are [they] historically possible, and what are the historical consequences of their existence?': Colin Gordon, 'Afterword' in Colin Gordon (ed), *Michel Foucault. Power/Knowledge: Selected Interviews and Other Writings 1972–1977* (Pantheon Books, 1981), 230–1.

39 Nickolas James, 'Power-Knowledge in Australian Legal Education: Corporatism's Reign' (2004) 26(4) *Sydney Law Review* 587.

40 Ibid.

which the performances of law schools and law deans are judged. Similarly, the performance of individual academics is evaluated by reference to their research productivity, along with their teaching performance and fulfilment of service commitments. The motivation of many academics to engage in research and scholarship is not only extrinsic, such as the desire to meet their employer's performance expectations and earn rewards such as tenure, promotion, merit pay, travel provisions, payment of incidental expenses, clerical assistance, and special privileges. It is also intrinsic, including liking problem solving, enjoying a sense of competence and engaging in research for its own sake. Academic scholars seek answers to research questions because they have an intellectual interest in the subject matter or in the outcome of the research, and because they wish to participate in the collective academic endeavour of expanding, extending and renewing human knowledge about and understanding of the world.[41]

Many law schools operate or participate in *law clinics* where law students work alongside law teachers and legal practitioners to deliver legal services to members of the community on a pro bono basis.[42] There are several positive outcomes of such participation. The law students benefit from engaging in a clinical learning experience. The law school benefits from engagement with local legal practitioners. The community benefits from the provision of legal assistance to those who might otherwise be unable to access support.[43] In turn, this contributes to improving access to justice and strengthening the rule of law.

Clinics are not the only way in which law schools and legal academics contribute to achieving social justice. Many law schools also engage in and support community legal education initiatives,[44] hackathons,[45] and unjust imprisonment causes such as the Innocence Project.[46]

Law schools can also contribute to the public good by offering subjects and programs that educate students about specific issues of public importance such as climate change, and by exploring how the law can be used to mitigate and address the impact and consequences of such issues. The next section investigates this proposition in more detail, with a specific focus upon climate change.

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41 Paul Blackmore and Camille B Kandiko, 'Motivation in Academic Life: A Prestige Economy' (2011) 16(4) *Research in Post-Compulsory Education* 399.

42 Adrian Evans et al, *Australian Clinical Legal Education: Designing and Operating a Best Practice Clinical Program in an Australian Law School* (ANU Press, 2017).

43 Adrian Evans et al, *Best Practices Australian Clinical Legal Education* (Australian Government Office for Learning and Teaching, 2012).

44 Suzie Forell and Hugh M McDonald, 'Community Legal Education and Information: Model Priorities and Principles' [2017] 25 (June) *Justice Issues* 1.

45 'Disrupting Law National', *The Legal Forecast* (Web Page) <https://www.thelegalforecast.com/disrupting-law-national>.

46 'Our Work', *Innocence Project* (Web Page) <https://innocenceproject.org/about/#ourwork>.

III The Obligation To Teach Climate Law

We have already considered some of the ways in which commentators call upon universities to serve their communities. More recently, commentors have argued that universities have a role to play in addressing the causes and consequences of climate emergencies.[47] As Butler et al explain, '[e]ducational, learning and awareness-building institutions can help strengthen the societal response to climate change'.[48] Universities have the capacity to assist and support communities to respond to climate change by enhancing the community's understanding of climate change and its consequences and by facilitating improvement in the community's ability to adapt to change. Both are required to ensure an effective response to climate change.[49]

Pressure upon universities to do more to respond to climate change includes demands and expectations by students for a greater emphasis upon the climate crisis in their courses. A 2020 study by Cambridge International surveyed more than 11,000 students aged 13 to 19 in the US, Spain, India, the United Arab Emirates ('UAE'), South Africa, China, India, Indonesia, and the United Kingdom ('UK'). In this study, 26 per cent of the students who responded to the survey said they saw climate change as the biggest issue facing the world today, and 31 per cent complained that the courses and program in which they were currently enrolled paid inadequate attention to the issue of climate change.[50]

Pressure is also exerted by public entities such as the United Nations ('UN'). The UN secretary general, António Guterres, speaking at a World Leaders Forum on climate change at Columbia University on 2 December 2020, called on the world to take urgent action to combat climate change and praised the work of universities as 'essential to our success'.[51] He challenged all organisations to examine their own contribution to carbon neutrality, and explained that in the

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47 See, eg, Justin Bakor, 'Universities Have a Key Role to Play in Bushfire Recovery', *The Australian* (online, 22 January 2020) <https://www.theaustralian.com.au/higher-education/universities-have-a-key-role-to-play-in-bushfire-recovery/news-story/9e364b82a53565a1d2a5ca347eafdc9d>.

48 de Coninck (n 5) 362, citing JRA Butler et al, 'Scenario Planning to Leap-Frog the Sustainable Development Goals: An Adaptation Pathways Approach' (2016) 12 *Climate Risk Management* 83.

49 Le Thi Hong Phuong, G Robbert Biesbroek and Arjen EJ Wals, 'The Interplay between Social Learning and Adaptive Capacity in Climate Change Adaptation: A Systematic Review' (2017) 82(1) *Wageningen Journal of Life Sciences* 1.

50 Cambridge Assessment International Education, 'Cambridge Global Perspectives Survey Results', *Cambridge Global Perspectives* (Web Page, 2020) <https://www.cambridgeinternational.org/programmes-and-qualifications/cambridge-global-perspectives/survey-results/>.

51 António Guterres, 'State of the Planet' (Speech, Columbia University, 2 December 2020) <https://www.un.org/sg/en/content/sg/speeches/2020-12-02/address-columbia-university-the-state-of-the-planet>.

case of universities this means researching solutions as well as cutting their own carbon footprint and divesting from fossil fuels.[52]

Many universities have responded to these pressures, and the increasing interest in environmental programs, not only by introducing new programs,[53] but by publicly committing to prioritising climate change, environmentalism and sustainability in their program design and delivery and/or their planning and operations. Victoria University, for example, recently announced plans to embed planetary health ('the examination of human health through the prism of the natural systems that sustain life') across the entire suite of the university's activities.[54] Many other universities have identified sustainability as a strategic priority and committed to the UN Sustainable Development Goals.[55]

What about law schools? Commentators have already called upon legal practitioners to do more to address climate change. One way in which they can do so is by taking on climate-related pro bono work. Those who do so 'will not only be able to help mitigate the risk or impact of such environmental challenges, … but also adhere to the … underlying duty of legal practice: to improve access to justice.'[56] The Australian Pro Bono Centre identified 15 ways in which lawyers can engage in pro bono work that serves to combat the climate crisis:

1. Running strategic climate litigation
2. Working on law reform activities
3. Offering commercial legal advice to not-for-profit organisations and social enterprises
4. Establishing a climate justice clinic in collaboration with a university
5. Providing a secondee to a civil society organisation working to combat climate change

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52 Brendan O'Malley, 'Universities "Essential" to Climate Action, Says UN Chief', *University World News* (online, 5 December 2020) <https://www.universityworldnews.com/post.php?story=20201204092017670>.

53 Evan Young, 'More and More Uni Students in Australia are Choosing to Study the Environment', *SBS News* (online, 3 March 2020) <https://www.sbs.com.au/news/more-and-more-uni-students-in-australia-are-choosing-to-study-the-environment>.

54 John Ross, 'Australian University Adopts "Planetary Health" as Raison D'être', *Times Higher Education* (online, 13 March 2020) <https://www.timeshighereducation.com/news/australian-university-adopts-planetary-health-raison-detre>.

55 United Nations, 'Take Action for the Sustainable Development Goals', *Sustainable Development Goals* (Web Page) <https://www.un.org/sustainabledevelopment/sustainable-development-goals/>; SDSN Australia, New Zealand & Pacific, 'Getting Started with the SDGs in Universities', *Sustainable Development Solutions Network: A Global Initiative for the United Nations* (Web page) <http://ap-unsdsn.org/regional-initiatives/universities-sdgs/university-sdg-guide/>.

56 Jerome Doraisamy, 'Lawyers Must Help Address Climate Crisis Through Pro Bono Work', *Lawyers Weekly* (online, 31 August 2020) <www.lawyersweekly.com.au/biglaw/29316-lawyers-must-help-address-climate-crisis-through-pro-bono-work>.

6. Providing legal assistance to Indigenous peoples who are disproportionately affected by the climate crisis
7. Conducting legal research about the intersection between human rights and climate change
8. Providing legal advice, information and advocacy to those fighting climate change
9. Providing legal information and advice to those affected by a natural disaster
10. Offering immigration law advice to people displaced by the effects of climate change
11. Giving legal support to NGOs and developing country delegations in international climate change negotiations
12. Providing community legal education
13. Providing legal assistance to communities particularly affected by the climate crisis
14. Delivering training to community lawyers
15. Expanding the role of the pro bono lawyer by embedding climate transition and environmental factors in commercial decision-making[57]

In December 2020, the University of Western Australia Public Policy Institute launched the *Preparedness Report*. The report highlighted the nature and extent of retooling in six fields in response to climate change: engineering, architecture, law, economics, healthcare and oceanography.[58] In relation to the field of law, it noted:

> Academic law is heavily exposed, and its challenges … boil down to the laws and regulations that can be introduced to reduce emissions and assist people, species and ecosystems vulnerable to climate change. It is a question of intergenerational justice.[59]

Law schools can also contribute to efforts to respond to climate change by including climate change law in the curriculum.[60] By doing so they will not only prepare law students for what is likely to be an increasingly important area of legal practice,[61] they will empower law students to themselves contribute to the

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57 Australian Pro Bono Centre, *Pro Bono Guide to the Climate Crisis* (Online Report, 2020) 6 <https://www.probonocentre.org.au/climate-change-guide/>.

58 Shamit Saggar, 'How Universities and Professions are Preparing to Meet the Climate Challenge', *The Conversation* (online, 9 December 2020) <https://theconversation.com/how-universities-and-professions-are-preparing-to-meet-the-climate-challenge-151662>.

59 Ibid.

60 Ling Chen, 'Canadian Law Schools Must Do Their Part to Help Combat Climate Change', *Policy Options Politiques* (online, 18 February 2020) <https://policyoptions.irpp.org/magazines/february-2020/canadian-law-schools-must-do-their-part-to-help-combat-climate-change/>.

61 See, eg, Baker McKenzie, 'Environment & Climate Change', *Expertise* (Web Page) <https://www.bakermckenzie.com/en/expertise/practices/environment-and-climate-change>.

public good by using the law to respond to and mitigate the effects of climate change. In the next section we examine in detail the core content of climate change law.

IV The Content of Climate Change Law

It is a central contention of this article that law schools have an obligation to respond to climate change by, inter alia, including 'climate change law' in the law curriculum. In this section we identify what we consider to be the baseline scope and content of climate change law.

The first known scientific article discussing the possibility of global warming as a result of carbon dioxide emissions was published in 1896.[62] Today, climate change law exists at the intersection of a number of legal disciplines, including international law, environmental law, energy law, and business law.[63] It encompasses a considerable number of international and domestic instruments, agreements, initiatives, entities, and processes, as well as considerations of the ways in which a variety of legal doctrines, fields, and areas of practice are impacted by climate change. While it will not always be possible for a law program to include a comprehensive analysis of every aspect of climate change law, there are elements of climate change law that, in our view, form the 'bare minimum' for inclusion in the law curriculum. These are the key climate change institutions and instruments and an examination of the broader impacts of climate change on the law generally. In other words, the law curriculum should include consideration of both 'climate change law' and 'climate change *and* the law'.

A *Climate Change Law: Key Institutions and Instruments*

The body of law considered 'climate change law' is primarily comprised of international, environmental, and energy law. Key institutions include the *Intergovernmental Panel on Climate Change* ('IPCC'), and significant instruments include the *United Nations Framework Convention on Climate Change* ('*UNFCCC*'),[64]

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62 Svante Arrhenius, 'On the Influence of Carbonic Acid in the Air Upon the Temperature of the Ground' (1896) 41(251) *London, Edinburgh, and Dublin Philosophical Magazine and Journal of Science* 237, cited in Jacqueline Peel, 'Climate Change Law: The Emergence of a New Legal Discipline' (2008) 32(3) *Melbourne University Law Review* 922, 924.

63 John C Dernbach and Seema M Kakade, 'Climate Change Law: An Introduction' (2008) 29(1) *Energy Law Journal* 1, 2.

64 *United Nations Framework Convention on Climate Change*, opened for signature 4 June 1992, 1771 UNTS 107 (entered into force 21 March 1994) ('*UNFCCC*').

the *Kyoto Protocol*,[65] the *Doho Amendment*,[66] and the *Paris Agreement*.[67] Emissions Trading Schemes also form an important part of the climate change legal framework, as do domestic legal frameworks, such as planning and energy laws and laws setting emissions targets. For example, in late 2019 New Zealand enacted the *Climate Change Response (Zero Carbon) Amendment Act 2019*, which set a target of net zero by 2050 for CO2 emissions and established an independent expert body, the Climate Change Commission.[68] To date, only four Australian jurisdictions have passed specific legislation to promote action on climate change, including the abatement of GHG emissions (mitigation) and reducing the impacts of actual or projected climate change (adaptation). These are the ACT, South Australia, Tasmania and Victoria.

1 *The IPCC*

The IPCC was established in 1998 by the World Meteorological Organisation and the United Nations Environmental Program, and was endorsed by the General Assembly of the United Nations.[69] The stated objective of the IPCC is to 'provide governments at all levels with scientific information that they can use to develop climate policies.'[70] Reports produced by the IPCC are used as 'a key input into international climate change negotiations.'[71] At the time of writing, the IPCC has 195 member states.[72] Since 1988, in addition to specific reports, the IPCC has delivered five full Synthesis Assessment Reports:

- The First Assessment Full and Synthesis Report ('AR1') in 1990;[73]
- The Second Assessment Full and Synthesis Report ('AR2') in 1995;[74]

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65 *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 16 March 1998, 2303 UNTS 162 (entered into force 16 February 2005) ('*Kyoto Protocol*').

66 *Doha Amendment to the Kyoto Protocol*, opened for signature 8 December 2012, [2016] ATNIF 24 (entered into force 31 December 2020).

67 *Paris Agreement*, opened for signature 22 April 2016, [2016] ATS 24 (entered into force 4 November 2016).

68 Ministry of the Environment, 'Climate Change Response (Zero Carbon) Amendment Act 2019', *Acts and Bills* (Web Page, April 2021) <https://environment.govt.nz/acts-and-regulations/acts/climate-change-response-amendment-act-2019/>.

69 *Protection of Global Climate for Present and Future Generations of Mankind*, GA Res 43/53, UN Doc A/RES/43/53 (6 December 1998).

70 'About the IPCC', *IPCC* (Web Page) <https://www.ipcc.ch/about/> .

71 Ibid.

72 'List of IPCC Member Countries', *IPCC* (Web Page, 2019) <https://www.ipcc.ch/site/assets/uploads/2019/02/ipcc_members.pdf>.

73 'FAR Climate Change: The IPCC Response Strategies', *IPCC* (Web Page) <https://www.ipcc.ch/report/ar1/wg3/>.

74 'IPCC Second Assessment', *IPCC* (Web Page, 2018) <https://www.ipcc.ch/report/ipcc-second-assessment-full-report/>; Intergovernmental Panel on Climate Change, 'IPCC Second Assessment', *WMO-UNEP* (Online Report, 1995) <https://www.ipcc.ch/site/assets/uploads/2018/06/2nd-assessment-en.pdf>.

- The Third Assessment Report and Synthesis ('AR3') in 2001;[75]
- The Fourth Assessment Full and Synthesis Report ('AR4') in 2007;[76] and,
- The Fifth Assessment Full and Synthesis Report ('AR5') in 2014.[77]

The IPCC describes its reports as 'the most comprehensive scientific reports about climate change produced worldwide'.[78] At the time of writing, the IPCC is now in its sixth assessment cycle and will deliver its Sixth Assessment Report (AR6) in 2022.[79]

One of the more recent reports of the IPCC was in response to an invitation in the 'Decision of the 21st Conference of Parties of the United Nations Framework Convention on Climate Change to adopt the Paris Agreement'.[80] That invitation asked the IPCC to report 'on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways.'[81]

In so doing, the IPCC reported:

> Human activities are estimated to have caused approximately 1.0°C of global warming above pre-industrial levels, with a *likely* range of 0.8°C to 1.2°C. Global warming is *likely* to reach 1.5°C between 2030 and 2052 if it continues to increase at the current rate.[82]

The report then concluded that such an increase would result in '[c]limate-related risks to health, livelihoods, food security, water supply, human security, and economic growth'.[83] The IPCC plays a key role in informing the global response to climate change, and as such the law curriculum should include information on the IPCC and its various activities. The law curriculum should also include an examination of the key legal instruments described in the following sections to ensure appropriate legal literacy in graduates.

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75 'TAR Climate Change 2001: Synthesis Report', *IPCC* (Web Page) <https://www.ipcc.ch/report/ar3/syr/>. See also Daniel L Albritton et al, 'Climate Change 2001: Synthesis Report', *IPCC* (Report, 2001) <https://www.ipcc.ch/site/assets/uploads/2018/05/SYR_TAR_full_report.pdf>.

76 'AR4 Climate Change 2007: Synthesis Report', *IPCC* (Web Page) <https://www.ipcc.ch/report/ar4/syr/>.

77 'AR5 Synthesis Report: Climate Change 2014', *IPCC* (Web Page) <https://www.ipcc.ch/report/ar5/syr/>.

78 'History of the IPCC', *IPCC* (Web Page) <https://www.ipcc.ch/about/history/>.

79 'AR6 Synthesis Report: Climate Change 2022', *IPCC* (Web Page) <https://www.ipcc.ch/report/sixth-assessment-report-cycle/>.

80 Valérie Masson-Delmotte et al, 'Summary for Policymakers', in Valérie Masson-Delmotte et al (eds), *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, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, and Efforts to Eradicate Poverty* (IPCC, 2018) 1, 4.

81 *Report of the Conference of the Parties on its Twenty-First Session, held in Paris from 30 November to 13 December 2015*, FCCC Dec 1/CP.21, UN Doc FCCC/CP/2015/10/Add.1 (29 January 2016) pt II [21].

82 Masson-Delmotte et al (n 80) 4 (emphasis in original).

83 Ibid 11.

2 *The* UNFCCC

The *UNFCCC* is arguably the most important international treaty of relevance to climate change. The *UNFCCC* was agreed to in 1992 following the UN Conference on the Environment and Development held in Rio de Janeiro. It entered into force on 21 March 1994, and as at 2020, 197 countries have ratified it.[84]

While the 'ultimate aim'[85] of the *UNFCCC* is to prevent '"dangerous" human interference with the climate system',[86] it does not contain binding commitments to reduce greenhouse gas emissions by a specific amount by a specific date. However, it does anticipate more specific protocols and agreements to accomplish that result.[87]

The Preamble of the *UNFCCC* notes that

> the largest share of historical and current global emissions of greenhouse gases has originated in developed countries, that per capita emissions in developing countries are still relatively low and that the share of global emissions originating in developing countries will grow to meet their social and development needs.[88]

The *UNFCCC* distinguishes between the responsibility and contributions of developed as compared with developing countries in art 4. Article 4(2)(a) of the *UNFCCC* commits developed country state parties to 'adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs'.[89]

3 *Kyoto Protocol*

The *Kyoto Protocol* was the first major international treaty to operationalise the *UNFCCC* by committing the parties to the Convention to reducing GHG emissions in accordance with stated targets.[90] It was finalised in December 1997,[91] but 'owing to a complex ratification process',[92] it did not enter into force until February 2005. Currently, there are 192 Parties to the *Kyoto Protocol*.[93]

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84 'What is the United Nations Framework Convention on Climate Change?', *UNFCCC* (Web Page) <https://unfccc.int/process-and-meetings/the-convention/what-is-the-united-nations-framework-convention-on-climate-change>.
85 Ibid.
86 Ibid.
87 Dernbach and Kakade (n 63) 9.
88 *UNFCCC* (n 64) 2.
89 Ibid 12.
90 *Kyoto Protocol* (n 65).
91 Dernbach and Kakade (n 63) 10.
92 *UNFCCC*, 'What is the Kyoto Protocol?', *Process and Meetings* (Web Page) <https://unfccc.int/kyoto_protocol>.
93 Ibid.

'Annex B' of the Protocol sets binding emission reduction targets for 37 developed countries and the European Union.[94] State parties are obliged to meet their targets primarily through national measures. However, one significant aspect of the *Kyoto Protocol* was the establishment of additional market mechanisms by which state parties can meet targets emissions: Trading Schemes; the Clean Development mechanism (CDM); and 'Joint Implementation'.[95]

The *Kyoto Protocol* also established monitoring and compliance systems, wherein State Parties' actual emissions are to be monitored and records kept of any trades.[96] Specifically, the UN Climate Change Secretariat, based in Bonn, Germany, maintains an international transaction log to confirm transactions are consistent with the rules of the *Protocol*.[97] The *Protocol's* first commitment period was 2008 to 2012. All 37 countries that fully participated in the first commitment period complied with the *Protocol*.

4 *The* Doha Amendment

In Doha, Qatar, in December 2012, the *Doha Amendment* to the *Kyoto Protocol* was adopted, starting in 2013 and lasting until 2020. However, the *Doha Amendment* only recently came into effect. This is because 144 instruments of acceptance were required for entry into force of the amendment. In a 2013 letter to the Governments of the Kyoto Protocol Parties, the Secretary-General of the United Nations congratulated Parties on the adoption of the Amendment and encouraged its prompt acceptance.[98] In January 2018, the President of the Conference of the Parties[99] (the decision making body of the *UNFCCC*) and the Executive Secretary of the *UNFCCC* Secretariat,[100] issued a joint letter to Parties to the *Kyoto Protocol*,

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94 Ibid.

95 'The mechanism known as "joint implementation", defined in art 6 of the *Kyoto Protocol*, allows a country with an emission reduction or limitation commitment under the *Kyoto Protocol* (Annex B Party) to earn emission reduction units (ERUs) from an emission-reduction or emission removal project in another Annex B Party, each equivalent to one tonne of CO2, which can be counted towards meeting its Kyoto target': *UNFCCC*, 'Joint Implementation', *Mechanisms under the Kyoto Protocol* (Web Page) <https://unfccc.int/process/the-kyoto-protocol/mechanisms/joint-implementation>.

96 'What is the Kyoto Protocol?' (n 92).

97 Ibid.

98 See Letter from Ban Ki-moon to Governments that adopted the Doha Amendment, 13 February 2013 <https://unfccc.int/files/kyoto_protocol/doha_amendment/application/pdf/sg_letter_doha_amendment.pdf>.

99 *UNFCCC*, 'Conference of the Parties (COP)', *Supreme Bodies* (Web Page) <https://unfccc.int/process/bodies/supreme-bodies/conference-of-the-parties-cop>.

100 *UNFCCC*, 'About the Secretariat', *About Us* (Web Page) <https://unfccc.int/about-us/what-is-the-unfccc-secretariat>.

again urging them to accept the *Doha Amendment*.[101] By October 2020, the amendment had received the additional parties it needed to come into effect.[102]

The *Doha Amendment* included new commitments for the 'second commitment period' between 2013 and 2020, (the 'first commitment period' was between 2008 and 2012) and a revised reporting list of greenhouse gases, as well as technical amendments to wording that needed updating to account for the new commitment period.[103] During the first commitment period, 37 industrialised countries and the European Community 'committed to reduce GHG emissions to an average of five percent against 1990 levels'.[104] During the second commitment period, 'Parties committed to reduce greenhouse gas emissions by at least 18 percent below 1990 levels in the eight-year period from 2013 to 2020.'[105] However, the list of State Parties in the second commitment period is different from those in the first.[106] Post-2020 obligations are addressed in the *Paris Agreement*.

5 *The Paris Agreement*

The landmark COP21 (the 21st Conference of the Parties) took place in Paris in 2015. The focus was upon a new agreement that would succeed the *Kyoto Protocol* in 2020, and set out the world's climate action plan for the remainder of the century. The *Paris Agreement* entered into force on 4 November 2016 (after ratification by at least 55 parties to the *UNFCCC* accounting for at least 55 percent of the total greenhouse gas emissions).[107] The specific aim of the *Paris Agreement* is to keep 'a global temperature rise this century well below 2 degrees Celsius above pre-industrial levels and to pursue efforts to limit the temperature increase even further to 1.5 degrees Celsius'.[108] The *Paris Agreement* seeks to do this by requiring all Parties to 'put forward their best efforts through "nationally determined contributions" (NDCs) and to strengthen these efforts in the years ahead'.[109] For example, arts 4 (1), (2), and (3) provide as follows:

> Article 4(1). In order to achieve the long-term temperature goal set out in Article 2, Parties aim to reach global peaking of greenhouse gas emissions as soon as possible, recognizing that peaking will take longer for developing country Parties, and to

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101 Letter from Frank Bainimarama and Patricia Espinosa to Governments party to the Kyoto Protocol, 7 January 2018 <https://unfccc.int/sites/default/files/resource/cop%2023%20pres%20and%20es%20on%20doha%20amendment20180206-161356.pdf>.

102 *UNFCCC*, 'The Doha Amendment', *The Kyoto Protocol* (Web Page) <https://unfccc.int/process/the-kyoto-protocol/the-doha-amendment>.

103 'What is the Kyoto Protocol?' (n 95).

104 Ibid.

105 Ibid.

106 Ibid.

107 *Paris Agreement* (n 67).

108 *UNFCCC*, 'Key Aspects of the Paris Agreement', *Process and Meetings* (Web Page) <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement/key-aspects-of-the-paris-agreement>.

109 Ibid.

> undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century, on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty.
>
> Article 4(2). Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions.
>
> Article 4(3). Each Party's successive nationally determined contribution will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.[110]

There are also requirements to report regularly on emissions. For example, art 13(7) of the *Paris Agreement* provides:

> Each Party shall regularly provide the following information:
>
> (a) A national inventory report of anthropogenic emissions by sources and removals by sinks of greenhouse gases, prepared using good practice methodologies accepted by the Intergovernmental Panel on Climate Change and agreed upon by the Conference of the Parties serving as the meeting of the Parties to this Agreement; and
>
> (b) Information necessary to track progress made in implementing and achieving its nationally determined contribution under Article 4.111

The *Paris Agreement* has no mechanism for enforcing compliance. Instead, it relies on transparency to incentivise ongoing participation.

6 Emissions Trading Schemes

In addition to the various institutions and instruments described above, the law curriculum should include an explanation of the role played by emissions trading schemes ('ETS') in mitigating climate change.

An ETS puts a quantity limit and a price on emissions.[112] The 'currency' of an ETS is emission units issued by the relevant government.[113] Each unit is analogous to 'a voucher that allows the holder to emit one tonne of greenhouse gases'.[114] In

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110 *Paris Agreement* (n 67) arts 4(1)–(3).
111 Ibid art 13(7).
112 Catherine Leining, 'Climate Explained: How Emissions Trading Schemes Work and They Can Help Us Shift to a Zero Carbon Future', *The Conversation* (online, 28 August 2019) <https://theconversation.com/climate-explained-how-emissions-trading-schemes-work-and-they-can-help-us-shift-to-a-zero-carbon-future-122325>.
113 Ibid.
114 Ibid.

essence, emissions trading systems 'operate with the common currency of an emissions allowance'.[115] By way of example, under the New Zealand Emissions Trading Scheme, the price for a tonne of greenhouse gases is currently around NZ$25.[116]

7 Domestic Legal Frameworks

The law curriculum should include an examination of the legislative and political response to climate change by Australia and other countries. Most individual countries have enacted, or are in the process of enacting, legislation designed to acknowledge and recognise the need for action, and legal regulation thereof, on climate change. For example, Sweden,[117] France,[118] the UK,[119] and Scotland,[120] have passed laws to curtail carbon emissions. Suriname[121] and Bhutan[122] have reportedly declared themselves carbon negative. As noted above, New Zealand has passed legislation setting a net zero target.

In Australia there are several Federal government initiatives in response to climate change, although there is not yet national legislation in Australia setting a zero carbon target. On 25 February 2019, the Federal Government outlined its approach to action on climate change in the Climate Solutions Package. This included a commitment to direct investment in low-cost emissions abatement technology and clean energy through a climate fund. The focus of investment will shift away from wind and solar to storage and grid integration technologies. The Federal Government has made no commitment to carbon neutrality.

The state and territory governments have been more proactive: South Australia enacted the *Climate Change and Greenhouse Emissions Reduction Act* in 2007 and was the first Australian state to legislate targets to reduce GHG

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115 Dernbach and Kakade (n 63) 12–13.

116 Leining (n 112).

117 Sweden introduced a *Climate Act* in 2018: See 'Sweden's Climate Act and Climate Policy Framework', *Swedish Environmental Protection Agency* (Web Page, 26 October 2020) <http://www.swedishepa.se/Environmental-objectives-and-cooperation/Swedish-environmental-work/Work-areas/Climate/Climate-Act-and-Climate-policy-framework-/>; See also 'The Swedish Climate Act', *European Climate Initiative* (Web Page, 19 December 2018) <https://www.euki.de/wp-content/uploads/2019/09/20181205_SE_Swedish-Climate-Act_Study.pdf>.

118 The French Parliament enacted the *Energy and Climate Act* of 8 November 2019 following validation by the Conseil constitutionnel [French Constitutional Council], decision n° 2019-791 DC, 7 November 2019 reported in JO, 9 November 2019.

119 In the United Kingdom, the *Climate Change Act 2008* established the 'Independent Committee on Climate Change'. Section 1 of that Act sets a net UK carbon account target. See Leining (n 112); *Climate Change Act 2008* (UK).

120 In *Climate Change (Emissions Reduction Targets) (Scotland) Act 2019* (Scot), s 1(2) of the Act sets the 'zero-emissions target' as 2045.

121 UN News, 'Suriname's Climate Promise, For a Sustainable Future', *Climate and Environment* (Web Page, online, 31 January 2020) <https://news.un.org/en/story/2020/01/1056422>.

122 Climate Council, 'Bhutan is the World's Only Carbon Negative Country, So How Did They Do It?', *Climate Leaders* (Web Page, 2 April 2017) <https://www.climatecouncil.org.au/bhutan-is-the-world-s-only-carbon-negative-country-so-how-did-they-do-it/>.

emissions; in 2008 the Tasmanian Parliament passed the *Climate Change (State Action) Act*; the ACT enacted the *Climate Change and Greenhouse Gas Reduction Act* in 2010; and in 2017 Victoria passed the *Climate Change Act 2017* (Vic).[123] All Australian states and territories have committed to a target of net zero emissions by 2050 at the latest.

At the time of writing, Independent Member of Parliament, Zali Steggal, has proposed Australia enact a Climate Change Act at the Federal level, and the Climate Change (National Framework for Adaptation and Mitigation) Bill 2020 is currently before the House of Representatives**.** The available draft proposes a zero emissions target of 2050.[124]

Even in the absence of specific climate legislation, lawyers and petitioners have engaged with planning and environmental legal frameworks and with relevant human rights frameworks to pursue climate change mitigation and adaption. This will be discussed further below in the context of the broader impacts and implications of climate change on the law in general, and the need for law schools to include engagement with these developments in the law curriculum.

B *Climate Change and the Law: The Broader Impacts of Climate Change*

The consequences of climate change for human wellbeing are such that efforts to address the issue also raise important questions about the nature of the relationship between the state and the individual, between state and federal governments, and between countries. In this sense, climate change law has implications for constitutional law, administrative law, dispute resolution and, in the context of negligence and other torts, private law too. It is also 'likely to be relevant to insurers … international bodies concerned with threats to peace and security … and domestic energy retailers'.[125] The reality is that

> devising legal solutions to climate change is likely to involve profound changes to existing governance and regulatory frameworks, with reverberations felt in many other areas of law …[126]

In the Australian context, the absence of federal constitutional rights relating to life, health, and the environment, and the absence of any meaningful federal climate change legislation or other legal framework, mean that climate-related

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123 Victoria State Government, 'Climate Change Act 2017', *Legislation* (Web Page, 23 September 2020) <https://www.climatechange.vic.gov.au/legislation/climate-change-act-2017>. See *Climate Change Act 2017* (Vic).

124 'Climate Change (National Framework for Adaptation and Mitigation) Bill 2020', *Zali Steggall OAM MP* (Web Page, 9 January 2020) <https://www.zalisteggall.com.au/climate_change_national_framework_for_adaptation_and_mitigation_bill_2020>.

125 Peel (n 62) 923–4.

126 Ibid 924.

legal action often takes place in the context of planning and administrative law. It has been observed:

> In Australia, the more common approach has been to bring public law actions for judicial or merits review, challenging government decision-making on the basis that environmental impact studies for particular developments have inadequately considered potential climate change impacts.[127]

By way of example, in *Charles and Howard Pty Ltd v Redland Shire Council*,[128] it was held that a Judge of the Queensland Planning and Environment Court was

> entitled, as he did, to take into account … the impact of climate change on sea levels on the area proposed … and to accept … [that the] building site may be vulnerable to rising sea levels because of climate change …[129]

Notably, and perhaps surprisingly, outside of the United States of America ('USA'), Australia reportedly records the highest number of climate litigation cases.[130]

Constitutional law and human rights law, and the teaching of those subjects, are also impacted by climate change. In federal systems, constitutional issues may arise in terms of responsibility for action/inaction on the part of state and federal governments, and in countries with constitutional bills of rights, the legal consequences may be significant in a litigation context. A number of human rights, not least the right to life,[131] the right to health,[132] and rights to food and water,[133] will be affected by climate change. In the *State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v Stichting Urgenda*,[134] the Supreme Court of the Netherlands considered the obligations of the State of the Netherlands under arts 2 and 8 —which relate, respectively, to the right to life and the right to private and family life — of the *European Convention on Human Rights* ('*ECHR*').[135] In December 2019, the Supreme Court upheld an order directing the State to reduce greenhouse gases by the end of 2020 by at least 25% compared to 1990.[136] In a

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127 Ibid 956. See also reviews of relevant cases undertaken in Jacqueline Peel, 'The Role of Climate Change Litigation in Australia's Response to Global Warming' (2007) 24(2) *Environmental and Planning Law Journal* 90.

128 (2007) 159 LGERA 349.

129 Ibid 359 [28].

130 Joana Setzer and Rebecca Byrnes, *Global Trends in Climate Change Litigation: 2019 Snapshot* (Policy Report, July 2019) 3 <http://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2019/07/GRI_Global-trends-in-climate-change-litigation-2019-snapshot-2.pdf>.

131 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 6.

132 Ibid art 12.

133 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976) arts 11–12.

134 Hoge Raad der Nederlanden [Supreme Court of the Netherlands], 19/00135 ECLI:NL:HR:2019:2007, 20 December 2019 ('*Urgenda*').

135 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) arts 2, 8.

136 *Urgenda* (n 134).

summary attached to the English translation of the judgment, it is noted the Court found as follows:

> The Netherlands is a party to the United Nations Framework Convention on Climate Change (UNFCCC). The objective of that convention is to keep the concentration of greenhouse gases in the atmosphere to a level at which a disruption of the climate system through human action can be prevented. The UNFCCC is based on the premise that all member countries must take measures to prevent climate change … Each country is thus responsible for its own share. That means a country cannot escape its own share of the responsibility to take measures by arguing that compared to the rest of the world, its own emissions are relatively limited in scope and that a reduction of its own emissions would have very little impact on a global scale. The State is therefore obliged to reduce greenhouse gas emissions from its territory in proportion to its share of the responsibility. This obligation of the State to do 'its part' is based on Articles 2 and 8 of the ECHR, because there is a grave risk that dangerous climate change will occur that will endanger the lives and welfare of many people in the Netherlands.[137]

In February 2021, a court in France found the French State had failed to address the climate crisis and had not fulfilled its promises to tackle greenhouse gas emissions.[138] The court ruled that the applicants in that case were entitled to seek compensation in kind for the ecological damage caused by that failure.

At the international level, the link between human rights law and climate change has been acknowledged by the United Nations Human Rights Council. In a 2016 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment',[139] it was observed that 'human rights norms clarify how States should respond to climate change.'[140] Immigration and refugee law will also be impacted, due to the likelihood of 'peoples from low-lying island nations … [being] rendered homeless and stateless if sea levels continue to rise'.[141]

As was briefly noted above, the potential for legal action is not, however, limited to the public law sphere. Rather, '[c]limate change is coming to the common law.'[142] This could take the form, for example, of private law actions 'brought in negligence or nuisance against large industrial polluters'.[143] These claims would be made 'against carefully composed groups of greenhouse gas

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137 Ibid [5.6.1]–[5.8].

138 Administrative Court of Paris [Tribunal Administratif de Paris], 'The Case of the Century', *Tribunal News* (Press Release, 3 February 2021) <http://paris.tribunal-administratif.fr/Actualites-du-Tribunal/Communiques-de-presse/L-affaire-du-siecle>. See also Kim Willsher, 'Court Convicts French State for Failure to Address Climate Crisis', *The Guardian* (online, 4 February 2021) <https://www.theguardian.com/environment/2021/feb/03/court-convicts-french-state-for-failure-to-address-climate-crisis?cmp=share_iosapp_other>.

139 *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 GAOR, UN Doc A/HRC/31/52 (1 February 2016).

140 Ibid pt V [86].

141 Peel (n 62) 931.

142 Douglas A Kysar, 'What Climate Change Can Do about Tort Law' (2011) 41(1) *Environmental Law* 1, 2.

143 Peel (n 62) 956.

emitting defendants, seeking monetary damages and injunctive relief to lessen the threat and financial burden of climate change's harmful impacts.'[144] In terms of identifying the duty owed in the context of a tort, it has been argued that a duty attached at the time the *UNFCCC* entered into force.[145] There is still room for controversy in terms of proving causation, but as scientific consensus consolidates, this may start to prove less problematic.

Climate change has implications for most, if not all, law subjects taught in the law curriculum. This is not least because the regulatory tools required by climate change necessarily draw on a wide range of areas of law, including, but not limited to, 'administrative law, property law, tort law, corporations law, human rights law and international law'.[146]

Ultimately, the debate on climate change is premised on a basic question: 'what do we do with the information in front of us?'[147] The same question can be asked in the specific context of legal education. What do legal educators do with the information in front of them? How do legal educators prepare students for legal careers at a time in human history where '[u]nderstanding the legal, scientific, and other trends in climate change is as essential for lawyers as it is for their clients'?[148] One answer, among many, is the inclusion of climate change in the law curriculum; not simply as a one off isolated elective, but woven throughout various stages of a degree program.

In the following, final section of the article we consider additional ways in which law schools can, and already are, incorporating climate change law into the curriculum.

V Climate Change Law in the Curriculum

In the first part of the article we presented the range of factors motivating law schools to respond to climate change by, inter alia, including climate change law in the curriculum. These include the social obligation of law schools to serve the public good as well as the expectations of the community and demands from employers for graduates with expertise in an emergent practice area. As Mehling et al recently explained:

> As climate change mitigation and adaptation rise in importance, so should demand for legal expertise in government bureaucracies and international organisations, the judiciary, private corporations, civil society and interest groups, and traditional law firms and

144 Kysar (n 142) 2.
145 See, eg, Benito Müller, Niklas Höhne and Christian Ellermann, 'Differentiating (Historic) Responsibilities for Climate Change' (2009) 9(6) *Climate Policy* 593, 595; Kysar (n 142) 10.
146 Peel (n 62) 927.
147 Dernbach and Kakade, (n 63) 2.
148 Ibid 31.

> consultancies. Accompanying that demand is a growing interest in relevant courses and academic credentials through which to build and document climate law expertise.[149]

How should law schools respond to this pressure? As explained in the previous section, climate change law intersects with, and encroaches upon, a variety of legal subject areas. In this section we consider the incorporation of climate change law into the law curriculum by way of discrete, dedicated subjects and programs.

A *Climate Change Law Subjects*

In the past, climate change and climate change law were, at best, considered to be specific topics in environmental law subjects and chapters in environmental law textbooks. Now, there is an increasing number of degree programs and subjects,[150] textbooks,[151] and dedicated journals[152] focussing upon climate change law.[153] While some scholars have questioned the existence of, or the need for, 'climate change law' as a discrete field of scholarship or practice,[154] it is clear that it is emerging as a discrete new subject area within the law curriculum.[155]

In his contribution to the UWA Public Policy Institute's *The Preparedness Report*, David Hodgkinson helpfully outlined the possible content of a climate change law subject:

> [A]n intensive three- or five-day climate change law course could, in part, involve the international climate change regime, consisting of: (a) the United Nations Framework Convention on Climate Change; (b) its Kyoto Protocol; (c) the 2015 COP21 Paris Agreement; and (d) subsequent developments.
>
> Other matters to consider in any such course could include: geo-engineering (or bio-energy with carbon capture and storage [BECCS]); Australian climate change law and policy (including the Commonwealth and the states and territories); the National

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149 Michael Mehling et al, 'Teaching Climate Law: Trends, Methods and Outlook' (2020) 32(3) *Journal of Environmental Law* 417, 418.

150 See below nn 156–70, 172–6.

151 See, eg, Daniel Bodansky, Jutta Brunnée and Lavanya Rajamani, *International Climate Change Law* (Oxford University Press, 2017); Daniel A Farber and Cinnamon P Carlarne, *Climate Change Law* (Foundation Press, 2018); Richard G Hildreth et al, *Climate Change Law: Mitigation and Adaptation* (West Academic, 2009); Leonardo Massai, *European Climate and Clean Energy Law and Policy* (Routledge, 2011); John R Nolon and Patricia E Salkin, *Climate Change and Sustainable Development Law in a Nutshell* (West Academic, 2010); Hari M Osofsky and Lesley K McAllister, *Climate Change Law and Policy* (Aspen Publishers, 2012); Chris Wold, David Hunter and Melissa Powers, *Climate Change and the Law* (LexisNexis, 2nd ed, 2013); Edwin Woerdman, Martha Roggenkamp and Marijn Holwerda (eds), *Essential EU Climate Law* (Edward Elgar, 2015); Benoit Mayer, *The International Law on Climate Change* (Cambridge University Press, 2018).

152 See, eg, *Lexxion, Carbon & Climate Law Review*; *Brill, Climate Law*; *University of San Diego, San Diego Journal of Climate & Energy Law*; *Washington and Lee University, Washington and Lee Journal of Energy, Climate, and the Environment*.

153 Mehling et al (n 149) 417.

154 Bodansky, Brunnée and Rajamani (n 151) 11; JB Ruhl and James Salzman, 'Climate Change Meets the Law of the Horse' (2013) 62(5) *Duke Law Journal* 975, 1013.

155 Mehling et al (n 149) 417.

> Greenhouse and Energy Reporting Scheme; the Emissions Reduction Fund (ERF) and its safeguard mechanism; carbon capture and storage; decarbonising cities and low-carbon sustainable precincts; and the ethics of climate change law and policy.
>
> Learning outcomes could include: the critical analysis of instruments available to address the climate change problem, both in Australia and internationally; understanding the interaction between climate change law and policy, both in unitary and federal systems; and demonstrating an understanding of the ethical underpinnings of climate change law and policy, both at national and international levels.
>
> Outcomes could also include the development of key analytical skills through comparison of climate change law at local, state and federal levels (as appropriate), and the drafting of outline agreements that address particular climate change-related problems.[156]

Several Australian law schools now offer climate change law electives. These include the following:

- The Australian National University ('ANU') offers an intensive subject, Climate Change Vulnerability and Adaption,[157] which looks at climate change from a scientific, societal and policy perspective.
- The University of Queensland ('UQ') has in the past offered a postgraduate Climate Change Law and Policy subject that dealt with the legal and practical issues raised by climate change in Australia and around the world.[158] UQ also offers an International Regulatory Frameworks for Climate Change & Environmental Management subject which, although run by the School of Earth and Environmental Sciences, explores the role of regulatory frameworks created by international law, governance and policy in solving shared international environmental problems.[159]
- The University of Western Australia offers an elective subject on Climate Change Law and Emissions Trading.[160] The subject examines the Australian Government's clean energy legislation, issues for the various state governments, emissions trading schemes and carbon taxes more generally, and the international context in which they operate. Policy issues are also addressed.

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156 David Hodgkinson, 'Mitigation of Climate Change: Law, Policy and Ethics' in Shamit Saggar and Anna Zenz (eds), *The Preparedness Report* (UWA Public Policy Institute, 2020) 27, 31.

157 Australian National University, 'Climate Change Vulnerability and Adaptation', *Programs and Courses* (Web Page, 2021) <https://programsandcourses.anu.edu.au/2021/course/ENVS8003>.

158 The University of Queensland, 'LAWS7978: Climate Change Law and Policy', *Course Profiles* (Web Page) <https://course-profiles.uq.edu.au/student_section_loader/section_2/45123>.

159 The University of Queensland, 'ENVM7124: International Regulatory Frameworks for Climate Change & Environmental Management', *Course Profiles* (Web Page) <https://course-profiles.uq.edu.au/student_section_loader/section_2/108722>.

160 The University of Western Australia, 'LAWS5521 Climate Change Law and Emissions Trading', *Unit Details* (Web Page) <https://handbooks.uwa.edu.au/unitdetails?code=LAWS5521>.

- The University of Sydney offers Climate Justice and Disaster Law, which examines recent law and policy initiatives from developed to developing countries, such as the establishment of the UNFCCC and the Paris Agreement.[161] The subject details human and non-human climate justice and its application across all stages of disaster: prevention, response, recovery, compensation and risk transfer.
- The University of Melbourne also offers two subjects in Climate Change Law that deal with the laws and regulations covering domestic, comparative and international legal dimensions. Topics addressed in the first subject include the multidisciplinary nature of climate law study, structures for climate change governance at the international and domestic levels, modes of climate change regulation such as emissions trading schemes and renewable energy targets, litigation and its role in securing climate justice, and legal frameworks for climate change adaptation.[162] The second subject examines the UNFCCC and the associated Paris Agreement, and questions how international agreements can be translated into federal and state legislative responses to mitigation and adaptation, and their effects on Indigenous peoples.[163]
- The University of Adelaide offers several undergraduate and postgraduate subjects that concern environmental law generally, as well as climate change more specifically. Climate Change Law is an undergraduate subject that engages with legal regimes, approaches and responses to climate change at the international and national level from the UNFCCC to Australian federal, state and local legislation.[164] It also considers the broader scientific, policy, ethical and normative debates that overlay and add context to the legal measures and solutions undertaken to mitigate and adapt to climate change. The postgraduate subject International Environmental Law deals with the role of international law in addressing global environmental problems, in particular climate change and the protection of biological diversity.[165]
- Monash University offers an undergraduate International Environmental Law subject that outlines the broad political challenges raised by the

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161 The University of Sydney, 'Climate Justice and Disaster Law: LAWS6320', *Unit of Study* (Web Page, 2021) <https://www.sydney.edu.au/courses/units-of-study/2021/laws/laws6320.html>.

162 The University of Melbourne, 'Climate Change Law (LAWS50056)', *Subjects* (Web Page, 11 February 2021) <https://handbook.unimelb.edu.au/2021/subjects/laws50056>.

163 The University of Melbourne, 'Climate Change Law (LAWS70293)', *Subjects* (Web Page, 11 February 2021) <https://handbook.unimelb.edu.au/2021/subjects/laws70293>.

164 The University of Adelaide, 'LAW 2568:Climate Change Law', *University Course Planner* (Web Page) <https://access.adelaide.edu.au/courses/details.asp?year=2019&course=108949+1+3920+1>.

165 The University of Adelaide, 'LAW 7040: International Environmental Law (PG)', *Course Outlines* (Web Page) <https://www.adelaide.edu.au/course-outlines/103837/1/quad-4/2019/>.

global environmental crisis both in the developed and developing world.[166] The postgraduate subject The Law of Climate Change examines Australia's response to climate change at national and state levels and compares it to examples in foreign jurisdictions such as the European Union, America, and Asia.[167]

- The University of New South Wales ('UNSW') offers a Climate Law postgraduate subject. The subject examines the origins, evolution and practice of international climate change law, tracing it through to domains normally associated with private law and markets. It begins with an overview of the scientific, economic and normative debates about climate change and then examines the Australian and international legal regimes related to climate change. This includes the UNFCCC, the Kyoto Protocol and more recent negotiations. The subject examines ongoing debates about national emissions regulations, as well as more localised attempts to build a low emissions economy. It provides international comparisons to better situate Australia's legal regime.
- The University of Newcastle has in the past offered the subject Climate Change Law and Justice.[168] Aspects of international law and policy were considered, as well as the Paris Agreement and UNFCCC, from a legal and economic perspective. Environmental economics theory, its application to climate change policy, and environmental taxes and emissions trading were also studied. The University of Newcastle also offered a similar subject in International Climate Change Law and Policy, where students learned about the evolution and architecture of international law and the various policies and regulations put in place to combat climate change.
- The University of Technology Sydney ('UTS') offers the subject Climate Law and Carbon Markets that examines the existing and emerging legal rules and frameworks both internationally and in Australia, as well as the impacts of these on business and the response from industry.[169]
- The University of Tasmania offers the elective subject Climate Change Law and Policy within its LLB.[170] This subject looks at climate change mitigation and adaptation at all levels, the science of climate change, and

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166 Monash University, 'LAW4313: International Environmental Law', *2021 Handbook* (Web Page) <https://handbook.monash.edu/2021/units/LAW4313>.

167 Monash University, 'LAW5389: The Law of Climate Change', *2021 Handbook* (Web Page) <https://handbook.monash.edu/2021/units/LAW5389?year=2021>.

168 The University of Newcastle, 'LAWS5038 Climate Change Law and Justice', *Course Handbook* (Web Page) <https://www.newcastle.edu.au/course/LAWS5038>.

169 University of Technology Sydney, '76041 Climate Law and Carbon Markets', *Handbook 2021* (Web Page, 7 March 2021) <http://handbook.uts.edu.au/subjects/76041.html>.

170 University of Tasmania, 'Climate Change Law and Policy LAW656', *Courses & Units* (Web Page, 14 July 2020) <https://www.utas.edu.au/courses/cale/units/law656-climate-change-law-and-policy>.

the consequences likely to occur environmentally, socially and economically. The subject also considers the strategies that have been put in place to address greenhouse gas emissions, as well as the Kyoto Protocol and other legal developments.

B *Climate Change Law Programs*

According to Mehling et al, teaching climate change law requires 'a generalist perspective to capture its sprawling horizontal scale and manifold linkages' and 'a specialist perspective to reflect its vertical layers and complex technicalities'.[171] A thorough approach to inculcating an understanding of climate change and its impacts upon the law arguably requires far more than a single subject.

Several universities in Australia now offer graduate diplomas and Master of Laws degrees specifically relevant to climate change and the law.

- The ANU offers a Master of Climate Change (Environmental Science). This degree is a two-year graduate degree offered by the ANU College of Asia and the Pacific and covers climate change policy including adaption and vulnerability, as well as having a law elective option.[172]
- The University of Sydney offers a Master of Laws in Environmental Law and a Graduate Diploma in Environmental Law. Across both programs, subjects include Climate Justice and Disaster Law (described above); Environmental Law and Policy; Environmental Litigation; Pollution, Corporate Liability and Government; and Energy and Water Security Law. The University of Sydney also offers a Master of Environmental Science and Law.[173] The one-and-a-half-year program allows study in complementary subjects across both environmental science and environmental law, and is designed primarily for science graduates looking to engage with environmental policy and regulation.
- The University of Melbourne offers a Master of Environment Law.[174] The subjects within the program are focused on emerging national and international legal issues and practices such as water law, climate change law, animal law, waste management and general planning and development. Other areas include the negotiation of international

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171 Mehling et al (n 149) 419.

172 Australian National University, 'Master of Climate Change', *Programs and Courses* (Web Page) <https://programsandcourses.anu.edu.au/2020/program/MCLCH>.

173 The University of Sydney, 'Master of Environmental Science and Law', *Courses* (Web Page) <https://sydney.edu.au/courses/courses/pc/master-of-environmental-science-and-law.html>.

174 The University of Melbourne, 'Master of Environmental Law', *Study* (Web Page) <https://study.unimelb.edu.au/find/courses/graduate/master-of-environmental-law/>.

environmental treaties and the laws surrounding international 'commons' areas such as Antarctica, the high seas and outer space.

- UNSW offers a Master of Environmental Law and Policy that includes six compulsory and six elective subjects including climate change law subjects. [175]
- The University of Newcastle offers a Master of Laws in Environmental Law that includes several climate change law subjects.[176]

To date only one Australian University offers an undergraduate program that focuses upon climate change and the law.

C *Bond University: Double Major in Climate Law*

In 2021, Bond University launched the LLB (Climate Law).[177] The new program provides a mechanism for climate law and practice to be taught to those seeking the knowledge, skills and professional qualification to be maximally effective in understanding and addressing climate change and its consequences. The LLB (Climate Law) is an eight-semester full-time undergraduate program that combines the usual compulsory LLB subjects with climate change law subjects and non-law subjects relevant to climate change, and which satisfies the academic requirements for admission as a legal practitioner.[178] LLB students in this program have three options:

1 A Specialisation in Climate Law by completing four of the nine climate law subjects.
2 A Major in Climate Law by completing six of the nine climate law subjects.
3 A Double Major in Climate Law by completing all 12 climate law and non-law subjects.

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175 UNSW Sydney, 'Master of Environmental Law and Policy', *Degrees* (Web Page) <https://www.law.unsw.edu.au/degree/master-environmental-law-and-policy>.

176 The University of Newcastle, 'Master of Environmental Law', *Degrees* (Web Page) <https://www.newcastle.edu.au/degrees/master-environmental-law>.

177 Jordan Baker, '"We Need People Who Are Trained": University Offers First Climate Change Law Degree', *The Sydney Morning Herald* (online, 10 December 2020) <https://www.smh.com.au/national/we-need-people-who-are-trained-university-offers-first-climate-change-law-degree-20201210-p56mco.html>.

178 Bond University, 'Become a Climate Law Specialist and Advocate for Climate Reform', *Specialise in Climate Law* (Web Page) <https://bond.edu.au/LLB-climate-law>.

Climate law subjects	LAWS13-121 Climate Law in Context
	LAWS13-122 Law Reform and Critical Consciousness
	LAWS13-123 Wild Law Jurisprudence
	LAWS13-124 Climate Change and Natural Resources Law
	LAWS13-125 Negotiating Climate Disputes
	LAWS13-126 Climate Change and Human Rights
	LAWS13-127 Climate Liability and Risk Management
	LAWS17-219 International Emissions Trading Law
	LAWS17-557 International Environmental Law
Climate non-law subjects	GLBE11-100 Climate Change and the Future World
	SSUD11-102 Sustainable Development and Society
	SSUD11-105 Land Economy and the Environment

The target market for the program is predominantly undergraduate students — primarily school leavers — who wish to contribute to addressing climate change by leading regulatory reform. Interest in the program to date has been strong, consistent with the findings of the recent study by Cambridge International (referred to earlier) that young people around the world are deeply concerned about climate change.[179] The institution also has plans to introduce an LLM in Climate Law.

VI Conclusion

Climate change is one of the most pressing challenges facing the global community, and law schools have an important role to play in preparing law graduates to assist with mitigating and addressing the causes and consequences of climate change. The community does not only need more climate scientists and social workers; it also needs lawyers who understand climate change and how to

[179] Will Nott, 'Students Deeply Concerned About Climate Crisis', *The Pie News* (Web Page, 3 March 2020) <https://thepienews.com/news/students-deeply-concerned-about-climate-crisis/>.

work with our legal and political systems so that we can respond appropriately to climate change.

In this article, we have argued that law schools have a specific obligation to ensure law students are educated in climate change law during the course of their studies, not least because a) law schools and universities have an obligation to contribute to the public good; and b) in order to be job ready at this time in human history, law graduates must understand the impacts of climate change on law and regulation and the ensuing regulatory responses. To contextualise this need, we examined the landscape of climate change law and the implications of climate change for the law generally. Finally, we offered examples of ways in which law schools can incorporate climate change law into their law programs.

A law degree that includes a focus upon climate change law will provide students with the qualifications and the expertise they need to take effective action. Such a degree will be of interest not only to those already thinking about studying law and attracted to the idea of becoming a specialist in an emerging area of legal practice. It may also appeal to the student who perhaps has never considered studying law before but who wants to do something about climate change. A law degree that includes a focus upon climate change and the law will empower its graduates to go out and make a difference. It will give students committed to helping the community adapt and respond to climate change the tools they need to lead legal, social and political reform. And by providing such a program, law schools will once again be fulfilling their commitment to serve the public good.

CLIMATE CHANGE AND LAW: A GLOBAL CHALLENGE FOR LEGAL EDUCATION

MARGARET A YOUNG*

Climate change is a global problem. This characterisation has major consequences for international law, domestic law and legal education. Drawing on legal developments, scholarship and pedagogy, this article has three main claims. First, it argues that lawyers dealing with climate change require proficiency across different areas of law, not just the law that seeks to limit greenhouse gas emissions. Secondly, to better understand how these areas of law fit together, and how they should fit together, the article points to relevant theories, including ideas relating to fragmentation and regime interaction within international law. Thirdly, the article examines ways in which legal education can encourage ethical and moral evaluations as well as strategic awareness, especially to ensure that legal action to address climate change does not perpetuate inequalities and injustice within the community of states. Legal education and law have important roles in mitigating climate change and in fostering a sensibility that recognises the unequal burdens between and within countries. In training the arbiters of global destiny, today's law schools must continue to critique the law's relationship with modern production and consumption patterns.

I INTRODUCTION

It is timely to consider the subject of climate change, law and legal education. We do so at a moment of heightened popular, intellectual and academic engagement. Youth are striking from their schools and filing legal challenges.[1] Scientists have been leaving their laboratories to join protest movements.[2] Writers 'wonder

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1 Three cases are of particular note: (1) *Sharma v Minister for the Environment* (2021) 391 ALR 1 (see also *Sharma v Minister for the Environment [No 2]* [2021] FCA 774) ('*Sharma*'); (2) *O'Donnell v Commonwealth* [2021] FCA 1223; (3) *Waratah Coal Pty Ltd v Youth Verdict Ltd* [2020] QLC 33 ('*Waratah Coal*'). See also *Waratah Coal Pty Ltd v Youth Verdict Ltd [No 2]* [2021] QLC 4. These cases follow international leads such as *Juliana v United States of America*, 339 F Supp 3d 1062 (D Or, 2018). Cf *Juliana v United States of America* (9th Cir, No 18-36082, 17 January 2020). See also Laura Schuijers and Margaret A Young, 'Climate Change Litigation in Australia: Law and Practice in the Sunburnt Country' in Ivano Alogna, Christine Bakker and Jean-Pierre Gauci (eds), *Climate Change Litigation: Global Perspectives* (Brill, 2021) 47.

2 Charlie J Gardner and Claire F R Wordley, 'Scientists Must Act on Our Own Warnings to Humanity' (2019) 3(9) *Nature Ecology & Evolution* 1271.

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whether books are still an appropriate medium to convey the frightening speed of environmental upheaval'.[3] Medical professionals acknowledge climate change is a health emergency.[4] Eminent judges call for 'climate conscious lawyering' as part of daily professional and ethical duties.[5] Diplomats affirm the importance of education, training and public awareness in the global response to climate change.[6] Legal academics, responsible for shaping research, societal outreach, curriculum and epistemic priorities, must consider our disciplinary responsibilities.

Law is defined by, and operates within, a social and political context. It is one of the most rudimentary goals of legal education to show that this is so. As Australian jurist W Jethro Brown discussed in 1902, law schools should guide the student to pay attention 'to the ends which law serves, the ideas and wants out of which law develops, the economic relations from which it draws its chief meaning. … [The student] will seek to gain, moreover, some intelligible idea of the evolution of legal systems.'[7] Over a century later, when the structure and excesses of modern-day production and consumption have led to an average temperature rise in Australia of 1.44 degrees,[8] it is imperative to understand how law might support climate change mitigation and adaptation or, conversely, how it might *impede* it.

Education has a special role for law and society, as Brown was well aware. Noting the general responsibilities of teachers, he called attention to their enhanced responsibilities in the modern state: 'the teacher in a democratic community is not merely training citizens', he wrote '[the teacher] is training the arbiters of the national destiny.'[9] While many of the problems Brown was confronting resonate with our times (from the challenge of monopolies to the welfare of children), others are out-dated.[10] And even as many of the problems Brown identified were the result of global pressures, the focus for him (and the academy at that time) was domestic law and the nation-state. Nowadays, as climate change causes temperature rises around the world, and collective

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3 Alan Weisman, 'Burning Down the House' (2019) 66(13) *New York Review of Books* 2.

4 Australian Medical Association, 'Climate Change is a Health Emergency' (Media Release, 3 September 2019) <https://ama.com.au/media/climate-change-health-emergency>.

5 Justice Brian J Preston, 'Climate Conscious Lawyering' (2021) 95(1) *Australian Law Journal* 51, 62.

6 *Paris Agreement*, opened for signature 22 April 2016, [2016] ATS 24 (entered into force 4 November 2016) Preamble ('*Paris Agreement*').

7 O M Roe, 'Jethro Brown: The First Teacher of Law and History in the University of Tasmania' (1977) 5 *University of Tasmania Law Review* 209, 221, citing W Jethro Brown, *The Study of the Law* (1902) 36.

8 Australia's climate has warmed on average by 1.44 ± 0.24. See Commonwealth Scientific and Industrial Research Organisation and Bureau of Meteorology, *State of the Climate 2020* (Report, 2020) <https://www.csiro.au/-/media/OnA/Files/State-of-the-Climate-2020.pdf> ('*2020 CSIRO Report*').

9 W Jethro Brown, 'The Underlying Principles of Modern Legislation' (John Murray, 1912) 307.

10 See, eg, the framing of racial issues, ibid 283–329, which does not fit comfortably with modern Australia.

responses have taken the form of international law, transnational law and practice, national law and subnational law, how should legal education respond?

This article confronts the dilemma for law and legal education posed by the 'global' nature of climate change. In Part I of the article, I draw on my decade-long experience in teaching a legal subject on 'Climate Change Law' at the University of Melbourne Law School, together with broader research, scholarship and pedagogical trends.[11] I describe the global nature of the problem, and the tendency for responses to flow from different legal orders: domestic, international, transnational, national and subnational. Climate change mitigation alone involves a dizzying mix of treaties, private directives from transnational task forces, legislation and declarations from local councils, as well as case law from international tribunals and domestic courts. In Part II, I make three claims. First, I offer an argument about substantive law. Lawyers dealing with climate change — either in teaching, research, practice or broader advocacy — require proficiency across different areas of law, not just law seeking to limit greenhouse gas emissions. Secondly, to better understand how these areas of law fit together, and how they *should* fit together, there is a need to engage with theory — including but not limited to theories of fragmentation and regime interaction in international law.[12] Students should be encouraged to ask fundamental questions about the functions of legal rules, institutions and constitutional orders. Thirdly, legal education must incorporate a critical perspective, which encourages ethical and moral evaluations as well as strategic awareness. Engaging with critical perspectives also enables us to ensure that legal action to address climate change does not perpetuate structures within the international legal system that have historically marginalised and disadvantaged some members of the international community.

II The Global Problem of Climate Change

On the first day of the subject Climate Change Law, which I have taught as an elective for over 10 years at the Melbourne Law School, I situate our studies in the context of scientific developments — including the latest reports of the

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[11] For a survey of offerings in climate law in law schools, see Michael Mehling et al, 'Teaching Climate Law: Trends, Methods and Outlook' (2020) 32(3) *Journal of Environmental Law* 417. See also Amanda Kennedy et al (eds) *Teaching and Learning in Environmental Law: Pedagogy, Methodology and Best Practice* (Edward Elgar, 2021).

[12] See generally Margaret A Young (ed), *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press, 2012) ('*Regime Interaction in International Law*').

Intergovernmental Panel on Climate Change ('IPCC')[13] — and I inevitably include an arresting set of images of the latest climate-related disaster. In fact, I have a growing 'powerpoint slide pack' of bushfires (though a picture cannot show three billion animals that died or were displaced by the Australian fires last year),[14] floods (Queensland's experiences of 2017 will be replaced by New South Wales in 2021)[15] or mass coral bleaching in the Great Barrier Reef.[16] The visual display of catastrophic loss is not limited to Australia, of course. Although Australia is particularly vulnerable to climate change,[17] such impacts are occurring everywhere. This year, I will probably include the Texan deep freeze that led to deaths and billions of dollars of damage in the United States.[18] A ubiquitous image is of the polar bear, a species most Australians will never see, but whose plight is representative of biodiversity loss and individual suffering in faraway places.[19] Climate change is happening around the globe. The problem results from many ongoing activities which we think of as 'sectors': energy, agriculture, transport, building, and so on,[20] that occur in many places, especially the most industrialized nations with their massive legacy of fossil fuel use.[21] Climate change is a global problem. But what does this mean for *legal* solutions?

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13 Intergovernmental Panel on Climate Change, *Climate Change 2014: Synthesis Report* (Report, 2015) Summary for Policy Makers ('*2014 IPCC Special Report*'); 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, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, and Efforts to Eradicate Poverty* (Report, 2019); Intergovernmental Panel on Climate Change, *The Ocean and Cryosphere in a Changing Climate: A Special Report of the Intergovernmental Panel on Climate Change* (IPCC, 2019) Summary for Policy Makers ('*2019 IPCC Special Report*').

14 World Wide Fund for Nature Australia, *Australia's 2019–2020 Bushfires: The Wildlife Toll* (Interim Report, 2020).

15 Climate Council, *Intense Rainfall and Flooding: The Influence of Climate Change*, (Fact Sheet, 2017) <https://www.climatecouncil.org.au/uploads/5dafe61d7b3f68d156abd97603d67075.pdf>. See, eg, Climate Council, 'Climate Change Opens Up the Gate to Historic NSW Floods ', *Climate Council* (Article, 23 March 2021) <https://www.climatecouncil.org.au/climate-change-nsw-floods/>.

16 See, eg, Andreas Dietzel et al, 'Long-Term Shifts in the Colony Size Structure of Coral Populations Along the Great Barrier Reef' (2020) 287(1936) *The Royal Society of Publishing Proceedings B* 20201432: 1–9.

17 See, eg, *2020 CSIRO Report* (n 8). See generally Peter Christoff (ed), *Four Degrees of Global Warming: Australia in a Hot World* (Taylor & Francis Group, 2013).

18 Chris Sweeney, 'Texas Storm Offers Glimpse of How Climate Change Threatens Public Health', *Harvard T H Chan School of Public Health* (Article, 23 February 2021) <https://www.hsph.harvard.edu/news/features/texas-storm-offers-glimpse-of-how-climate-change-threatens-public-health/>; Justin Worland, 'The Texas Power Grid Failure is a Climate Change Cautionary Tale' *TIME Magazine* (online, 18 February 2021) <https://time.com/5940491/texas-power-outage-climate/>.

19 See Cristina Mittermeier, 'Starving Polar Bear Photographer Explains Why She Couldn't Help', *National Geographic* (online, 11 February 2017) <https://www.nationalgeographic.com/photography/article/mittermeier-polar-bear-starving-climate-change>.

20 Climate Council, 'What Is Climate Change and What Can We Do About It?', *Climate Council* (Article, 16 October 2019) <https://www.climatecouncil.org.au/resources/what-is-climate-change-what-can-we-do/#unique-identifier-2>.

21 *2014 IPCC Special Report* (n 13) 5, 46.

The closest we have to global law in the contemporary moment is public international law, or the law of nations. As all law students know, international law governs the relations between states, who are in turn expected to represent the needs and welfare of their citizens and those in their territory.[22] It is to be found primarily in treaties and custom. And indeed, both treaties and custom include obligations of states to mitigate and adapt to climate change. The 1992 *United Nations Framework Convention on Climate Change* ('*UNFCCC*')[23] and the 2015 *Paris Agreement*[24] contain express obligations of states, including a collective obligation to hold the increase in global warming to 1.5 or 2 degrees Celsius above pre-industrial levels,[25] and the achievement of a net zero of greenhouse gas emissions by the second half of this century.[26] Customary international law, such as the obligation to prevent transboundary environmental harm, has long been confirmed by international courts and tribunals,[27] and a range of other international norms and institutions are climate-focussed or climate-related,[28] as will be discussed later in this article.

Does this mean climate change law operates solely within the international realm? That a legal subject on climate change is confined to public international law and the narrow set of laws and institutions we know as the climate regime? That domestic litigation on climate change — now compiled in Australian[29] and international databases[30] — is misplaced? Was Alsup J of the United States District Court for the Northern District of California correct when he dismissed a lawsuit against BP, Chevron, Exxon Mobil and others for their historic complicity in climate change?[31] He reasoned that '[e]veryone has contributed to the problem of

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22 For an important historic overview of Australian legal education and public international law (which begins with the British acquisition of Australia and its implications), see James Crawford, 'Teaching and Research in International Law in Australia' (1981–3) 10 *Australian Year Book of International Law* 176.

23 *United Nations Framework Convention on Climate Change*, opened for signature 9 May 1992, 1771 UNTS 107 (entered into force 21 March 1994).

24 *Paris Agreement* (n 6).

25 Ibid art 2(1)(a).

26 Ibid art 4: '[S]o as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century'.

27 *Trail Smelter Arbitration (United States v Canada)* (Award, Charles Warren, Robert A E Greenshields and Jans Frans Hostie, March 11 1941) 3 *Report of International Arbitration Awards* 1905, 1965. See generally Rebecca M Bratspies and Russell A Miller (eds), *Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration* (Cambridge University Press, 2006).

28 United Nations Secretary-General, *Gaps in International Environmental Law and Environment-Related Instruments: Towards a Global Pact for the Environment*, UN GAOR, 73rd sess, Agenda Item 14, UN Doc A/73/419 (30 November 2018).

29 The University of Melbourne, *Australian Climate Change Litigation* (Database, 20 July 2021) <https://law.app.unimelb.edu.au/climate-change/index.php>.

30 Joana Setzer and Rebecca Byrnes, *Global Trends in Climate Litigation: 2020 Snapshot* (Policy Report, 3 July 2020); Joana Setzer and Rebecca Byrnes, *Global Trends in Climate Litigation: 2019 Snapshot* (Policy Report, 4 July 2019); Sabin Center, *Climate Change Litigation Databases* (Database, 20 July 2021) <http://climatecasechart.com/>.

31 *City of Oakland v BP PLC* (ND Cal, Nos C WHA, No C 17-06012 WHA, February 27 2018) ('*City of Oakland*').

global warming and everyone will suffer the consequences — the classic scenario for a legislative or international solution'.[32] The dangers raised in the plaintiffs' complaints, he found, were 'very real', but he concluded that as 'those dangers are worldwide … [t]heir causes are worldwide … [and] [t]he benefits of fossil fuels are worldwide … [T]he problem deserves a solution on a more vast scale than can be supplied by a district judge or jury in a public nuisance case.'[33] It is my contention, by contrast, that law addressing the global problem of climate change operates not only at the national and international level, but also at the subnational and transnational one. What is more, it is developed by courts, lawmakers and administrators at each of those levels. These issues have profound implications for legal research, practice and education.

III Legal Research, Practice and Education

The question for law and legal education cannot be answered through the example of one single (elective) law subject. It is imperative to consider the structure and conditions of legal education as a whole,[34] as well as broader societal conditions (as I learned when delivering a series of international law lectures at the State University of Saint Petersburg, Russia, in 2017). Yet, it is also instructive to consider what is taught when one seeks to teach 'Climate Change Law'.[35] In this Part, I make three arguments relating to the substance, theoretical context and critical engagement relevant to climate change law. By addressing these areas, scholars and practitioners will have tools to evaluate whether the framing of a climate problem as a question for another forum, as was done by Alsup J, is judicious deferral or audacious deflection.

A *We Are All Climate Lawyers Now*

A decade ago, my syllabus for Climate Change Law featured international and domestic climate-focussed legal developments. The *UNFCCC*, the *Kyoto Protocol*[36]

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32 Ibid 12.

33 Ibid 15.

34 W Jethro Brown, for example, advocated full-time legal study and appropriate resources for staff to undertake legal research in his goals for legal education (the fulfilment of which seems less settled now since the COVID-19 pandemic): W Jethro Brown, 'The Purpose and Method of a Law School — Part I' (1902) 18(1) *Law Quarterly Review* 78; W Jethro Brown, 'The Purpose and Method of a Law School — Part II' (1902) 18(2) *Law Quarterly Review* 192, cited in Mark Lunney, 'Legal Émigrés and the Development of Australian Tort Law' (2012) 36(2) *Melbourne University Law Review* 494, 497.

35 For a current survey of courses, degree programmes, teaching material, teaching methods and interdisciplinary approaches, see Mehling et al (n 11).

36 *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 16 March 1998, 2303 UNTS 162 (entered into force 16 February 2005).

and its associated market mechanisms, including the 'clean development mechanism', occupied the first few sessions. As for any topic of international law, the relevant set of international legal obligations is not limited to treaties, and we considered custom as well as emerging principles.[37] Theoretical assumptions about sovereignty and collective action problems have been a constant point of debate.[38] How to translate scientific conceptions of a carbon budget (which globalise the question of how much carbon is left to burn)[39] with legal conceptions of territorial emissions and permanent sovereignty over natural resources is another. The learning would then move to a comparative analysis of domestic responses, which included carbon trading and carbon taxes.[40] The integrity of carbon markets has been an important focus of study for lawyers, as we referred to fraud and the risk of double-counting of credits.[41] We have spent a good deal of time studying the leading jurisdictions — British Columbia's revenue-neutral carbon tax,[42] the European Union's carbon trading scheme[43] — before circling back to Australia's response. The yearly updates of lecture notes to record the fits and starts of Australia's clean energy package has been a grim but necessary task.[44]

Over time, the syllabus has been revised to include laws outside the conceptual framework of climate-focussed greenhouse gas emission reduction

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37 Expert Group on Global Climate Change Obligations, *Oslo Principles on Climate Change Obligations* (Eleven International Publishing, 2015); Global Network for the Study of Human Rights and the Environment, *Declaration on Human Rights and Climate Change* (Declaration, 2016) <http://gnhre.org/declaration-human-rights-climate-change/> ('*Declaration on Human Rights and Climate Change*').

38 Whether the atmosphere is a 'commons' has been an important question that I have enjoyed discussing with Damien Lockie, with whom I co-taught between 2013 and 2017. See further Margaret A Young, 'International Adjudication and the Commons' (2019) 41(2) *University of Hawai'i Law Review* 353 ('International Adjudication and the Commons'). On theory, see below Part III(B).

39 Scientists have modelled the carbon budget in terms of planetary capacity, showing how much oil, coal and gas can be burned until the limit of two degrees Celsius. See, Yann Robiou du Pont and Malte Meinshausen, 'Warming Assessment of the Bottom-up Paris Agreement Emissions Pledges' (2018) 9(1) *Nature Communications* 4810.

40 A useful resource from the World Bank Group provides an overview of domestic responses, in table form. See World Bank Group, *State and Trends of Carbon Pricing* (Report, May 2020) <https://openknowledge.worldbank.org/bitstream/handle/10986/33809/9781464815867.pdf?sequence=4&isAllowed=y>.

41 Damien Lockie's work remains the leader in the field. See, eg, *Clean Energy Law in Australia* (LexisNexis, 2012).

42 See Brian Murray and Nicholas Rivers, 'British Columbia's Revenue-Neutral Carbon Tax: A Review of the Latest "Grand Experiment" in Environmental Policy' (2015) 86 *Energy Policy* 674.

43 See A Denny Ellerman, *Pricing Carbon: The European Union Emissions Trading Scheme* (Cambridge University Press, 2010).

44 As captured yearly in the *Yearbook of International Environmental Law*. See, eg, Emma Jukić and Margaret A Young, 'Australia' (2013) 23(1) *Yearbook of International Environmental Law* 512. Seeing law graduates achieve their dream to work for Australia's Department of Climate Change, only to have the Department disbanded by Tony Abbott, was another sombre experience.

and carbon trading.[45] Climate change is legally disruptive, forcing legal doctrines to respond and evolve.[46] The current situation can be summed up by the title of a roundtable at the 2021 Annual Meeting of the American Society of International Law: 'We Are All Climate Lawyers Now'.[47] Legal developments in *just the last few months* demonstrate the point, and I will list just eight:

1. Human rights lawyers are climate lawyers. The current and former United Nations Special Rapporteurs on Human Rights and the Environment have reportedly filed an amicus brief48 in support of the group of Torres Strait Islanders who have challenged Australia at the Human Rights Committee for its failures to address climate change, submitting that these amount to violations of the International Covenant on Civil and Political Rights.[49] This follows an earlier Human Rights Committee ruling on climate displacement in 2020, brought by a national of Kiribati against New Zealand.[50]

2. Trade lawyers are climate lawyers. Notwithstanding ongoing efforts by Australia to reach a free trade agreement with the United Kingdom and the European Union, both of which have made net-zero commitments, Australia is facing the prospect of increased tariffs being applied to its exports if it fails to improve its climate response.[51] So-called 'border

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45 For a helpful survey of the body of legal rules and principles organised around the central problems of mitigating and adapting to climate change, see Jacqueline Peel, 'Climate Change Law: The Emergence of a New Legal Discipline' (2008) 32(3) *Melbourne University Law Review* 922.

46 Elizabeth Fisher, Eloise Scotford and Emily Barritt, 'The Legally Disruptive Nature of Climate Change' (2017) 80(2) *Modern Law Review* 173.

47 Panel with Carmen Gonzalez, Sailesh Mehta, Nilufer Oral, Hermann Ott, Margaret A Young and Rob Verchick (American Society of International Law, Online Panel, 25 March 2021). See also Margaret A Young, 'We Are All Climate Change Lawyers Now' (2021) 115 *American Society of International Law Proceedings*, doi:10.1017/amp.2021.123 (forthcoming).

48 Marian Faa, 'Torres Strait Islander Complaint Against Climate Change Inaction Wins Backing of UN Legal Experts' *ABC News* (online, 11 December 2020) <https://www.abc.net.au/news/2020-12-11/torres-strait-islander-complaint-against-climate-change-inaction/12972926>.

49 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*'). For useful background on the relevance of *ICCPR* rights to life, freedom of movement, culture of minorities and privacy, including arts 6(1), 12, 17(1) and 27, see generally Owen Cordes-Holland, 'The Sinking of the Strait: The Implications of Climate Change for Torres Strait Islanders' Human Rights Protected by the *ICCPR*' (2008) 9(2) *Melbourne Journal of International Law* 405.

50 Human Rights Committee, *Views: Communication No 2728/2016*, 127th sess, UN Doc CCPR/C/127/D/2728/2016 (7 January 2020) ('*Teitiota v New Zealand*'). The Kiribati national, who had had his asylum claim rejected by New Zealand, alleged New Zealand had violated his right to life because sea level rise and other effects of climate change made Kiribati increasingly uninhabitable.

51 Hans van Leeuwen, 'Australia Out of the "Climate Club" as EU Advances Carbon Border Tax', *Australian Financial Review* (online, 7 February 2021) <https://www.afr.com/world/europe/australia-out-of-the-climate-club-as-eu-advances-carbon-border-tax-20210205-p5703j>. See also Committee on the Environment, Public Health and Food Safety, 'Carbon Border

carbon adjustments', which could be imposed by the European Union as early as next year, are discussed at a time when the United Nations Secretary-General, together with President Biden, has called for new disciplines on fossil fuel subsidies,[52] which, like fisheries subsidy reform, can address the perverse incentives that make the production of oil, gas and coal far cheaper than it should be.[53]

3. Environmental lawyers are climate lawyers. Proposals for a new environmental treaty are gaining momentum, with the Coalition for the Global Pact for the Environment, supported by Laurent Fabius, Chair of the Paris Climate Conference, seeking a stronger and broader set of international protections.[54] I note also that a move towards 'rights for nature' is recognised in the legal orders of countries such as New Zealand and Colombia, which have granted legal personhood to rivers and mountains.[55] We may ask whether the preambular reference to 'Mother Earth'[56] in the Paris Agreement aligns sufficiently with the laws and customs of indigenous peoples, whose traditional knowledge and cultures are far removed from the extractive, emissions-intensive modern economies, and whose sacred reserves might provide a model for ecological restoration.[57]

Adjustment Mechanism', *European Parliament Committees* (Web Page) <https://www.europarl.europa.eu/committees/en/carbon-border-adjustment-mechanism/product-details/20201009CDT04181>. On border carbon adjustments, see Michael A Mehling et al, 'Designing Border Carbon Adjustments for Enhanced Climate Action' (2019) 113(3) *American Journal of International Law* 433.

52 United Nation Secretary-General, 'End Fossil Fuel Subsidies, Bolster Funding for Renewable Energy Particularly in Africa, Secretary-General Tell Round Table on Clean Power Transition' (Press Release, 11 January 2021) <https://www.un.org/press/en/2021/sgsm20530.doc.htm>; Exec Order No 14008, 86 FR 7619 (27 January 2021) <https://www.federalregister.gov/documents/2021/02/01/2021-02177/tackling-the-climate-crisis-at-home-and-abroad>. See especially s 209.

53 Margaret A Young, 'Energy Transitions and Trade Law: Lessons from the Reform of Fisheries Subsidies' (2017) 17(3) *International Environmental Agreements: Politics, Law and Economics* 371.

54 Le Club des Juristes, 'Toward a Global Pact for the Environment' (White Paper, September 2017) <https://globalpactenvironment.org/uploads/White-paper-Global-pact-for-the-environment.pdf> ('2017 White Paper'). See also Yann Aguila and Jorge E Viñuales, 'A Global Pact for the Environment: Conceptual Foundations' (2019) 28(1) *Review of European, Comparative and International Environmental Law* 3, 7.

55 See, eg, David R Boyd, *The Rights of Nature: A Legal Revolution That Could Save the World* (ECW Press, 2017). See also Katherine Sanders, '"Beyond Human Ownership"? Property, Power and Legal Personality for Nature in Aotearoa New Zealand' (2017) 30(2) *Journal of Environmental Law* 207, 208. See generally Erin O'Donnell, *Legal Rights for Rivers: Competition, Collaboration and Water Governance* (Routledge, 2019).

56 *Paris Agreement* (n 6) Preamble.

57 *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/37/59 (24 January 2018) 16–20. I note too that indigenous practices such as traditional fire burning techniques are demonstrated

4. Tort lawyers are climate lawyers. Eight young Australians have alleged that the Federal Minister for the Environment has breached a duty of care in approving the Whitehaven coal extension in northern New South Wales.[58] The case forces a legal appraisal of the relationship between the Minister and the teenagers, who will be strongly impacted by climate change but who have no voting rights.[59] This litigation operates alongside the claim brought by Bushfire survivors alleging breaches of duty by the NSW Environment Protection Authority.[60] The NSW Land and Environment Court has recently ruled that the applicants are permitted to adduce evidence on global warming and the Paris Agreement target from Australia's former Chief Scientist in their claim.

5. Corporate lawyers are climate lawyers. The challenge to superannuation fund Rest brought by Mark McVeigh has settled, with the fund agreeing to make changes toward a net-zero portfolio and report in line with the transnational Taskforce on Climate and Financial Disclosures.[61] Other recent developments in corporate law and climate change include the increasing use of shareholder resolutions to hold major companies to account for the climate impacts of their activities,[62] and the 2021 update of a series of legal opinions authored by Noel Hutley SC and Sebastian Hartford Davis on the implications of climate change for Australian company directors' duties.[63]

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to mitigate climate change and are now used as partial fulfilment of Australia's international climate pledges while also benefiting cultural rights. See Maureen F Tehan et al, *The Impact of Climate Change Mitigation on Indigenous and Forest Communities: International, National and Local Law Perspectives on REDD+* (Cambridge University Press, 2017) 31. For other examples of traditional knowledge, see, eg, David M Forman, 'Applying Indigenous Ecological Knowledge for the Protection of Environmental Commons: Case Studies from Hawai'i for the Benefit of "Island Earth"' (2019) 41(2) *University of Hawai'i Law Review* 300.

58 *Sharma* (n 1); Schuijers and Young (n 1) 63–4.

59 Laura Schuijers, 'These Aussie Teens Have Launched a Landmark Climate Case Against the Government. Win or Lose, It'll Make a Difference', *The Conversation* (online, 10 September 2020) <https://theconversation.com/these-aussie-teens-have-launched-a-landmark-climate-case-against-the-government-win-or-lose-itll-make-a-difference-145830>.

60 *Bushfires Survivors for Climate Action Inc v Environment Protection Authority* [2020] NSWLEC 152.

61 Rest, 'Statement from Retail Employees Superannuation Trust' (Media Release, 2 November 2020) <https://equitygenerationlawyers.com/wp/wp-content/uploads/2020/11/Statement-from-Rest-2-November-2020.pdf>.

62 Australasian Centre for Corporate Responsibility, 'Australian ESG Shareholder Resolutions', *Shareholder Hub* (Web Page, 20 July 2021) <https://www.accr.org.au/research/australian-esg-resolution-voting-history/>. This database shows the 2020 year-on-year increase in shareholder resolutions dealing with environmental and social issues, including climate-related lobbying, *Paris Agreement* goals and targets, and coal closure dates, put to the ASX 200.

63 Noel Hutley and Sebastian H Davis, *Climate Change and Directors Duties* (Further Supplementary Memorandum of Opinion, 23 April 2021) <https://cpd.org.au/wp-content/uploads/2021/04/Further-Supplementary-Opinion-2021-3.pdf>. The original memorandum of opinion was provided in 2016, with the first supplement issued in 2019. Sarah Barker instructed on the brief.

6. Government lawyers are climate lawyers. Policy responses to build back better after COVID-19, as suggested by domestic bodies,[64] as well as the Organisation for Economic Co-operation and Development, the World Bank, and others,[65] seek to align long-term emission reduction goals, resilience to climate impacts and a halt to biodiversity loss. In Australia, it is State governments that have often led the way on climate policy — for example, in September 2020 the Victorian government announced a market sounding process as part of its second Victorian Renewable Energy Target ('VRET') auction. The first VRET auction in 2018 supported 928 megawatts of new renewable energy projects in Victoria while aiming to contribute to capital investment and job creation.[66]

7. Local government lawyers are climate lawyers. A recent ranking of declarations of climate emergencies by Melbourne City Council and other local councils in Australia estimates over 35% coverage of such declarations by population.[67] Binding declarations now number over two thousand around the world.[68] With physical climate adaptation responses including protection (including through engineered structures such as seawalls), accommodation (including through building codes) and retreat,[69] local councils have recognised the need to be front-footed in planning and community engagement.

8. Law of the sea specialists are climate lawyers. The International Law Commission has released an issues paper on the legal and jurisdictional implications of sea-level rise, which has advanced over 15 cm during the

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64 Gabriella Marchant, 'Could a "Green Army" Save Not Just the Environment, but Economy from COVID-19?' *ABC News* (online, 26 May 2020) <https://www.abc.net.au/news/2020-05-27/farmers-and-environmentalists-push-for-a-green-army/12278290>.

65 Organisation for Economic Co-operation and Development, *Building Back Better: A Sustainable Resilient Recovery after COVID-19* (Report, 5 June 2020) <http://www.oecd.org/coronavirus/policy-responses/building-back-better-a-sustainable-resilient-recovery-after-covid-19-52b869f5/>.

66 Department of Environment, Land, Water and Planning (Vic), *Second VRET Auction* (Consultation Paper, September 2020).

67 'Climate Emergency Declarations in 2,307 Jurisdictions and Local Governments Cover 1 Billion Citizens' *Climate Emergency Declaration* (Web Page, 30 October 2021) https://climateemergencydeclaration.org/climate-emergency-declarations-cover-15-million-citizens/. Note that the exact figure cited on the spreadsheet is 37.53%.

68 Ibid: the figure is given as 2,307 local governments. See, eg, City of Melbourne, 'Future Melbourne Committee Minutes', *City of Melbourne* (Meeting Number 60, 16 July 2019) <https://www.melbourne.vic.gov.au/about-council/committees-meetings/meeting-archive/MeetingAgendaItemAttachments/864/JUL19%20FMC2%20CONFIRMED%20MINUTES.PDF>. Note that the City of Melbourne declared, inter alia, that 'climate change and mass species extinction pose serious risks to the people of Melbourne and Australia, and should be treated as an emergency': at 5.

69 *2019 IPCC Special Report* (n 13).

> 20th century.[70] The IPCC has demonstrated that the ocean is already 'warmer, more acidic and less productive'.[71] A ruling on the obligations of states and organisations for the protection of the oceans could be meaningfully pursued at the International Tribunal for the Law of the Sea ('ITLOS').[72] Meanwhile, nature-based solutions, including 'blue carbon' sequestration, promise mitigation opportunities,[73] merging aspirations for the blue economy and climate mitigation.

These rapid developments are just a sample. I could also have mentioned the expansion of refugee law, disaster responses, practices of central banks, and national security arrangements, but I know that this dizzying array is fatiguing for my students and overwhelming for non-lawyers. We cannot hope to cover all of this in one legal career, let alone one law degree! Yet it is also clear that legal education must retain an agility to operate in international, comparative, domestic and subnational domains, across diverse areas of public and private law.[74]

B *Theory about Law and Legal Orders*

The need for agility and proficiency takes me to my second claim, which might be presented in contrast as a need for slow engagement with theory. It is not enough to keep track of these developments — a true engagement requires a deeper understanding of the pluralities of legal orders and their underlying foundations, which helps develop normative approaches.

There are many examples of different areas clashing, deferring, cooperating or becoming co-opted on climate change issues. This phenomenon can be thought through in terms of legal pluralism, polycentric governance, systems theory, earth-systems jurisprudence, theoretical and historical accounts of the

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70 International Law Commission, *Sea-Level Rise in Relation to International Law: First Issues Paper by Bogdan Aurescu and Nilüfer Oral, Co-Chairs of the Study Group on Sea Level Rise in Relation to International Law*, UN Doc A/CN.4/740 (28 February 2020). See also David Freestone and Millicent McCreath, 'Climate Change, the Anthropocene and Ocean Law: Mapping the Issues' in Jan McDonald, Jeffrey McGee and Richard Barnes (eds), *Research Handbook on Climate Change, Oceans and Coasts* (Edward Elgar, 2020) 49.

71 *2019 IPCC Special Report* (n 13); see also United Nations Secretary-General, *Oceans and the Law of the Sea*, UN GAOR, 72nd sess, Preliminary List Item 78(a), UN Doc A/72/70 (6 March 2017).

72 Philippe Sands, 'Climate Change and the Rule of Law: Adjudicating the Future in International Law' (2016) 28(1) *Journal of Environmental Law* 19, 33.

73 Ove Hoegh-Guldberg et al, 'The Ocean as a Solution to Climate Change: Five Opportunities for Action', *Resources* (Institute Report, 2019) <http://www.oceanpanel.org/climate>. See also Justine Bell-James, '"Blue Carbon" and the Need to Integrate Mitigation, Adaptation, and Conservation Goals within the International Climate Law Framework' in Neil Craik et al (eds), *Global Environmental Change and Innovation in International Law* (Cambridge University Press, 2018) 81.

74 A separate point also notes that this is just *within* the law — there is a need to work across disciplines such as science and economics, as sought by the just-launched Melbourne Climate Futures, headed by my Melbourne Law School colleague, Professor Jacqueline Peel.

commons and common-pool resources,[75] and many other contributions, but let me focus specifically on theories relating to the fragmentation and diversification of international law.[76] We understand that law and institutions tend to isolate around functional objectives such as trade liberalisation, human rights, the law of the sea, and so on. At times, there is a sense of 'all hands on deck'.[77] Yet, the regimes are sometimes quite astoundingly divergent: witness the United States' challenge to India's solar cell program at the World Trade Organization ('WTO'),[78] launched at a time when countries were trying to convince India to join the *Paris Agreement*. There have been deferrals, such as the World Heritage Committee's aversion to imposing mitigation obligations on states parties to the *World Heritage Convention*[79] after climate petitions on behalf of the heritage-listed Great Barrier Reef.[80] There have also been avoidances, negotiated by powerful states, such as the decision to exclude fossil fuel subsidy reform from the *Paris Agreement*.[81] Methodological and conceptual problems may emerge when human rights treaties designed to protect individuals within a party's territory or jurisdiction are invoked to ground generalized mitigation obligations.[82]

Theoretical engagement with fragmentation and regime interaction demonstrates that collisions between norms are inevitable within the international legal system. As Martti Koskenniemi has shown, regimes are often hegemonic, in the sense that they are both operationally closed, and expansively imposing their particular outlook and epistemic preferences on the world.[83] The trade regime, for example, with its compulsory dispute settlement and strong institutions, is more powerful than the multilateral environment agreements seeking to conserve biodiversity or safeguard migratory species.[84] (The historic reasons for this, such as the hope and belief that free trade will lead to perpetual

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75 See further Young, 'International Adjudication and the Commons' (n 38).

76 See generally Young (ed), *Regime Interaction in International Law* (n 12).

77 See generally Remi Moncel and Harro van Asselt, 'All Hands on Deck! Mobilizing Climate Change Action beyond the UNFCCC' (2012) 21(3) *Review of European, Comparative & International Environmental Law* 163.

78 *India — Certain Measures Relating to Solar Cells and Modules*, WTO Doc WT/DS456/AB/R (16 September 2016) (Appellate Body Report).

79 *Convention for the Protection of the World Cultural and Natural Heritage*, opened for signature 16 November 1972, 1037 UNTS 151 (entered into force 17 December 1975).

80 Erica J Thorson, 'The World Heritage Convention and Climate Change: The Case for a Climate-Change Mitigation Strategy beyond the Kyoto Protocol' in William C G Burns and Hari M Osofsky (eds), *Adjudicating Climate Change: State, National and International Approaches* (Cambridge University Press, 2009) 255. See also Margaret A Young, 'Climate Change Law and Regime Interaction' (2011) 5(2) *Carbon & Climate Law Review* 147.

81 Meinhard Doelle, 'The Paris Agreement: Historic Breakthrough or High Stakes Experiment?' (2016) 6(1–2) *Climate Law* 1, 14.

82 Benoit Mayer, 'Climate Change Mitigation as an Obligation Under Human Rights Treaties?' (2021) 115(3) *American Journal of International Law* 409.

83 Martti Koskenniemi, 'Hegemonic Regimes' in Margaret A Young (ed), *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press, 2012) 305, 318.

84 Margaret A Young, 'Fragmentation' in Lavanya Rajamani and Jacqueline Peel (eds), *Oxford Handbook of International Environmental Law* (Oxford University Press, 2021) 85.

peace, need to be understood, especially at a time when sanctions on Australian coal by our powerful trading partners might be perceived as either threateningly nationalistic or environmentally enlightened). Understanding these dynamics is important for understanding processes of regime interaction and whether regime encounters are likely to lead to integration, or whether such integration will be resisted, and the competing norms unresolved.

Theoretical engagement demonstrates that international regimes are ill-equipped to allocate priority between norms, because they are limited to a functional orientation that often leads to 'tunnel vision' (in the words of Gunther Teubner)[85] and environmental blindspots.[86] This is one reason to support the *Global Pact for the Environment* ('*Global Pact*').[87] Its proposed right of every person 'to live in an ecologically sound environment adequate for their health, well-being, dignity, culture and fulfilment'[88] supports enhanced implementation and enforcement in domestic settings. Moreover, by centralising fundamental principles of international environmental law in a single instrument, the *Global Pact* is intended to counteract the proliferation of environmental law that has led to its fragmentation and a lack of coherence in competing environmental commitments.[89] While a sectoral approach to environmental law allows for some flexibility and efficiency in dealing with environmental issues, the existing approach to environmental regulation has led to a lack of clarity with respect to overlapping and inconsistent legal obligations. This is exacerbated by bilateral, regional and multilateral bases of regulation. The *Global Pact* represents an attempt to address these issues of fragmentation, by consolidating key principles of international environmental law in a binding, unitary instrument.[90]

More generally, the phenomenon of fragmentation invites us to think critically about the role and function of international law. How do we reconcile our participation as consumers and concerned citizens in a global economy with the foundations of international law, which are so often disconnected from direct citizen engagement? How do we – as Australians – account for the carbon

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85 Gunther Teubner and Peter Korth, 'Two Kinds of Legal Pluralism: Collision of Transnational Regimes in the Double Fragmentation of World Society' in Margaret A Young (ed), *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press, 2012) 23; Gunther Teubner, 'Societal Constitutionalism without Politics? A Rejoinder' (2011) 20(2) *Social & Legal Studies* 248.

86 See generally Oren Perez, 'Ecological Sensitivity and Global Legal Pluralism: Rethinking the Trade and Environment Conflict' (Hart Publishing, 2004).

87 'Where Are We Now?', *Global Pact for the Environment* (Web Page, 2021) <https://globalpactenvironment.org/en/the-pact/where-are-we-now/>. I note that I have been contributing as a member of the expert working group since 2017. See also above Aguila and Viñuales (n 54).

88 *Towards a Global Pact for the Environment*, GA Res 72/277, UN GAOR, 72nd sess, Agenda Item 14, UN Doc A/RES/72/277 (14 May 2018).

89 Le Club des Juristes, '2017 White Paper' (n 54) 26.

90 See Margaret A Young, 'Global Pact for the Environment: Defragging International Law?' *EJIL:Talk!* (Blog Post, 29 August 2018) <https://www.ejiltalk.org/global-pact-for-the-environment-defragging-international-law/>.

footprint of the goods and services that we import and consume, and the fossil fuels that we export and profit from? Could we justify seeking a territorial extension — in the sense used provocatively by Joanne Scott — to our regulatory power?[91] Can trade measures to address climate change be made consistently with the rules on jurisdiction and extraterritoriality that have been developed to placate sovereign states and preserve peace?[92] The ongoing search for global constitutionalism — for a polity and morality that guides global relations — remains fundamental to climate change.

For the domestic constitutional context, too, climate change demands close theoretical engagement with established theories of sovereignty and public law, as well as new ideas around ecocentric governance, wild law, rights for nature (including non-humans), and so on. To take one concept grappled with in the very first semester of a law degree: what does *federalism* mean for climate change law? Understanding the federal responsibilities for our 2020 calamitous bushfires, as investigated by the Royal Commission into National Natural Disaster Arrangements,[93] may require an historic understanding of the functional orientations — or 'tunnel vision' — of the Australian colonies, which behaved perhaps more like modern day WTO members in their interstate commerce and relations. The Commission concluded that 'Australia needs a national approach to natural disasters', in the form of a '"whole-of nation", "whole-of government" and "whole of society" cooperation and effort'.[94] While the states should retain their primary responsibility for disaster response, a national response, coordinated by the federal government, would mean enhanced cooperation, resource sharing, and availability of skills, technology, data and information. Understanding the respective roles and competencies of the Australian federal and state governments is particularly relevant to climate change in the light of the disjunct between the approaches of the federal government and state governments on the issue, as state governments adopt more ambitious emissions reduction targets without the backing of federal government policy.

What of the *separation of powers*? That concept has underpinned many of the dismissals of climate claims by Australian and other courts in the past. For instance, in dismissing the plaintiffs' claim in *City of Oakland v BP PLC*, Alsup J held that 'courts must also respect and defer to the other co-equal branches of government when the problem at hand clearly deserves a solution best addressed

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91 Joanne Scott, 'Extraterritoriality and Territorial Extension in EU Law' (2014) 62(1) *American Journal of Comparative Law* 87, 89.

92 Margaret A Young, 'Trade Measures to Address Climate Change: Territory and Extraterritoriality' in Panagiotis Delimatsis (ed), *Research Handbook on Climate Change and Trade Law* (Edward Elgar, 2016) 329.

93 *Royal Commission into National Natural Disaster Arrangements* (Report, October 2020).

94 Ibid 23 [30].

by those branches'.[95] However, it may be that the efficacy of this fundamental tenet needs renewed attention.[96] An assumption that courts lack the democratic legitimacy that necessarily supports the law-making functions of other branches of governments may not be strictly correct.[97] 'International lobbying law' is an area of study that documents, for example, the two-prong approach of the World Coal Association in targeting domestic and international law-making.[98] Factoring in the voice and access of fossil fuel lobbyists within the executive branch[99] may well displace the theoretical assumptions behind the separation of powers and alter a judicial sensibility whose due reticence can legitimately be replaced by due responsiveness.

C *Critical Engagement*

This brings me to my third claim: that climate change demands critical engagement in legal education. Recognising that law functions as a system of beliefs that make certain inequalities seem natural has been a key contribution of feminist legal studies by scholars such as Hilary Charlesworth.[100] In the climate context, expecting that climate change mitigation should be advanced without regard to underlying inequalities and impacts would be a misstep that critical engagement can expose. In our work on 'reducing emissions from deforestation and forest degradation', or REDD+, my Melbourne Law School colleagues Maureen Tehan, Lee Godden, Kirsty Gover and I found that climate change mitigation has disparate impacts on indigenous and forest communities.[101] REDD+ policies promoting carbon sequestration risk displacing the very people who have made the least contribution to the problem of climate change. We show how the risk differs depending on the local context of REDD+ implementation, the quality of free prior and informed consent, the protection of rights, the access to

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95 *City of Oakland* (n 31) 16.

96 Schuijers and Young (n 1) 56. To be clear, I do not mean to support any erosion of the independence of the judiciary. Such erosion is occurring through other means, as depicted by Stephen Gardbaum, 'The Counter-Playbook: Resisting the Populist Assault on the Separation of Powers' (2020) 59(1) *Columbia Journal of Transnational Law* 1. Rather, my focus here is on the ability of an independent judiciary to act within law, based on evidence, in the context of a lack of legislative and executive climate policy.

97 Laura Burgers, 'Should Judges Make Climate Change Law?' (2020) 9(1) *Transnational Environmental Law* 55, 60.

98 Melissa J Durkee, 'International Lobbying Law' (2018) 127(7) *Yale Law Journal* 1742, 1747.

99 See the joint letter by former Australian Prime Ministers Kevin Rudd and Malcolm Turnbull, 'Australia's Ambition on Climate Change is Held Back by a Toxic Mix of Rightwing Politics, Media and Vested Impacts', *The Guardian* (online, 21 April 2021) <https://www.theguardian.com/commentisfree/2021/apr/21/australias-ambition-on-climate-change-is-held-back-by-a-toxic-mix-of-rightwing-politics-media-and-vested-interests>.

100 See, eg, Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85(4) *American Journal of International Law* 613.

101 Tehan et al (n 57). See also Julia Dehm, *Reconsidering REDD+: Authority, Power and Law in the Green Economy* (Cambridge University Press, 2021).

benefits and the practices of the international funding institutions. From an international perspective, we also show that a recipient state's membership of a regime, such as the *Convention on Biological Diversity*,[102] the *Nagoya Protocol*[103] or the International Labour Organisation's *Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries*,[104] alters that state's legal obligations and protections, and thus tempers any overarching evaluation of REDD+.

Critical engagement can also maintain pressure for the implementation of principles that are often forgotten by states, such as the principle of 'common but differentiated responsibilities and respective capabilities, in the light of different national circumstances', and the principle of 'intergenerational equity'.[105] These principles may well find articulation in Australian cases such as *Sharma v Minister for Environment* and the Youth Verdict challenge to Waratah Coal's Galilee Coal Project.[106] A motion by Waratah Coal to strike out the challenge has been dismissed by the Queensland Land Court.[107] The members of 'Youth Verdict' call attention to the fact that they will be the most impacted by climate change. In line with my comments on theoretical engagement, the plight of young people demands a critical and philosophical assessment of the beneficiaries of our law and legal system. The Youth Verdict case is also seeking to protect the Bimblebox Nature Refuge. In this way, it can be said to resonate with the NGO-led global 'Declaration on Human Rights and Climate Change', which aims to protect the rights of 'all human beings, animals and living systems'.[108]

The Youth Verdict case will play out differently from others around the world, such as the Dutch *Urgenda Foundation v Netherlands* litigation,[109] but could mark an important turning point in the development of rights-based approaches to climate change in Australia. Although the Australian constitution includes only weak protections, the extension of human rights in Australian jurisdictions by the development of human rights charters in Victoria, the Australian Capital Territory, and, most recently, Queensland,[110] marks this case as particularly

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102 *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993).

103 *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity*, opened for signature 29 October 2010, UN Doc UNEP/CBD/COP/10/L.43/Rev.1 (entered into force 12 October 2014).

104 *Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries*, opened for signature 27 June 1989, 1650 UNTS 383 (entered into force 5 September 1991).

105 *Paris Agreement* (n 6) Preamble. See also art 2(2).

106 *Sharma* (n 1); *Waratah Coal* (n 1).

107 *Waratah Coal* (n 1).

108 *Declaration on Human Rights and Climate Change* (n 37). See generally, Kirsten Davies et al, 'The Declaration on Human Rights and Climate Change: A New Legal Tool for Global Policy Change' (2017) 8(2) *Journal of Human Rights and the Environment* 217.

109 *Stichting Urgenda v Government of the Netherlands (Ministry of Infrastructure and Environment)*, Rechtbank Den Haag [Hague District Court], C/09/456689/HA ZA 13–1396 (24 June 2015).

110 *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2004* (ACT); *Human Rights Act 2019* (Qld).

important.[111] The Youth Verdict case is the first in which a state human rights instrument (in this case, Queensland's *Human Rights Act*) has been used as a basis for climate objections to a mining application. The Queensland *Human Rights Act* came into effect on 1 January 2020. If the claim is successful, it could lead to a broader trend of human-rights-based climate claims in other Australian jurisdictions.[112] Rights-based approaches to climate change can help reframe the issue as a human one, with human, not just environmental, ramifications.[113] This reflects global and international trends towards recognising human-rights dimensions of climate change, and ideas of 'climate justice'.[114]

Aside from honing in on rights, critical perspectives acknowledge all environmental problems to be human ones, 'from the planet to the parish', as historian Tom Griffiths emphasises.[115] The proliferation of the term 'Anthropocene' in science and the humanities shows that the academy acknowledges this point.[116] Tim Stephens has argued that the Anthropocene has made clear that a distinction between the human and natural worlds can no longer be maintained, and that this interdependence and integration requires 'a wholesale re-examination and re-imagination of international environmental law's objectives', drawing on other disciplines such as Earth system science and Earth systems governance literature.[117] A critical perspective of climate law here in Australia recognises that our legal and political foundations have contributed to the global problem of climate change. The displacement of indigenous lore and culture, and the logging by settlers that saw drastic removal of carbon sinks, are examples from Australian history that are often hidden from legal practice. Maintaining our interrogation into the source and origin of our law is as important as our ongoing quest for future legal solutions.

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111 Justine Bell-James and Briana Collins, 'Queensland's Human Rights Act: A New Frontier for Australian Climate Change Litigation?' (2020) 43(1) *University of New South Wales Law Journal* 3.

112 Justine Bell-James, 'Comment: These Young Queenslanders Are Taking On Clive Palmer's Coal Company and Making History for Human Rights', *SBS* (online, 19 May 2020) <https://www.sbs.com.au/news/the-feed/comment-these-young-queenslanders-are-taking-on-clive-palmer-s-coal-company-and-making-history-for-human-rights>.

113 Bell-James and Collins (n 111) 9.

114 See, eg, Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights*, 10th sess, Agenda Item 2, UN Doc A/HRC/10/61 (15 January 2009); *Paris Agreement* (n 6) Preamble.

115 See, eg, Tom Griffiths, 'The Planet is Alive: Radical Histories for Uncanny Times' (2019) 63 *Griffith Review*.

116 See, eg, Tim Stephens, 'Reimagining International Environmental Law in the Anthropocene' in Louis J Kotzè (ed), *Environmental Law and Governance for the Anthropocene* (Hart Publishing, 2017) 31. See also Rakhyun E Kim and Klaus Bosselmann, 'International Environmental Law in the Anthropocene: Towards a Purposive System of Multilateral Environmental Agreements' (2013) 2(2) *Transnational Environmental Law* 285.

117 Tim Stephens, 'What Is the Point of International Environmental Law Scholarship in the Anthropocene?' in Ole W Pedersen (ed), *Perspectives on Environmental Law Scholarship: Essays on Purpose, Shape and Direction* (Cambridge University Press, 2018) 121, 138.

IV Conclusion

Climate change is a global problem but solutions must not be limited to international law. There are no immediate answers to the question of which form of authority can provide a solution to the global problem of climate change. Nor are there clear boundaries around what is appropriate and just in addressing climate change at the local, national and international level. I have identified three areas of focus for legal education. First, we must embrace the relevance of different areas of legal specialisation to legal solutions and work hard in understanding how different norms and legal orders fit together. It is not enough, alas, to identify climate law from a five-word proximity search of the acronym 'GHGs'. Secondly, we must revisit theoretical foundations of our legal orders, while recognising that these were laid during a time when climate change was unknown and other injustices were wilfully ignored. When working within a system to find solutions to the problem, we cannot lose sight of the fact that the system may be structured in a way that privileges certain views and approaches. Thirdly, we must maintain a critical perspective that allows us to decide where limited resources and energies are best-directed, and offers different ways of thinking through the appropriateness of proposed responses.

Critical perspectives also help us identify the use and misuse of jurisdictional conflicts. Mandate creep of international organisations can often be justified due to the urgency of the conditions I outlined at the beginning of this article. Yet, the globalising impulse may need to be checked if it obscures highly localised sources of the problem and the solution. Attention must be also given to the risk of derailing legal responses, not only the hoped-for cooperative steps that will be taken as states ratchet up their commitments under the *Paris Agreement*, but also the domestic litigation that is seeking to bring state and non-state actors to account. Recognising that many different actors, at many different levels, have a role to play in addressing climate change is a key contribution of scholarship. By way of example, I welcomed the reasoning of Preston CJ of the NSW Land and Environment Court in *Gloucester Resources Ltd v Minister for Planning*,[118] when his Honour ruled against arguments that his refusal to approve a coal mine would mean it would be built elsewhere, the so-called 'market substitution defence'. With deftness and integrity, Preston CJ called for evidence of this substitution. None was forthcoming, and the order of the Court was to refuse the coal mine licence, inter alia because of its potential contribution to climate change.[119]

Is there not a defensible approach in deferring to a different legal regime or rule *only if* that other regime — such as the *Paris Agreement* — is proving effective in mitigating climate change? Even if each country's 'nationally determined

[118] (2019) 234 LGERA 257.
[119] Ibid 403 [699].

contribution' under the *Paris Agreement* was fully complied with, the world would still be on track for a warming of at least 3 degrees Celsius.[120] Though we need to continue to support the ratcheting-up approach, we should not unwittingly tie our hands if other legal solutions are available. I like to think our lawyers, when confronting arguments about the interaction of legal regimes, or the priority of conflicting norms, can demand evidence, engage in rigorous analysis, and identify the best approach.

Today's lawyers, educated in substance, theory and critical engagement, should be able to evoke, understand and rank legal developments. In so doing, we help mitigate the global problem of climate change, but also help promote a safe and just society within and across national polities. Climate change is the imperative to start to train the arbiters of global destiny.

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120 United Nations Framework Convention on Climate Change Conference of the Parties, *Aggregate Effect of the Intended National Determined Contributions: An Update*, 22nd sess, Provisional Agenda Item X, UN Doc FCCC/CP/2016/2 (2 May 2016) 12 (Figure 2). At the time this article was going to press, parties to the Paris Agreement were meeting at COP 26 in Glasgow to improve upon their nationally determined contributions after considering, inter alia, *Nationally Determined Contributions under the Paris Agreement. Synthesis Report by the Secretariat*, UN Doc FCCC/PA/CMA/2021/8 (17 September 2021).

First Nations Peoples, Climate Change, Human Rights and Legal Rights

Narelle Bedford,* Tony McAvoy SC† and Lindsey Stevenson-Graf‡

This article provides a First Nations standpoint on climate change, informed by human rights law and legal education. It is co-authored by a Yuin woman who is a law academic, a Wirdi man who is a Queens Counsel, and a human rights law academic. The article argues that for any responses to climate change to be effective, they must be grounded in the perspectives, knowledge, and rights of First Nations peoples. The utility of human rights instruments to protect First Nation interests in a climate change milieu is explored at the international and domestic levels. Concomitantly, structural change must begin with the Indigenisation of legal education and the embedding of legal responses to climate change into the law curriculum. A holistic approach is necessary.

I Introduction

We acknowledge the First Nations peoples whose sovereignty over the lands now collectively known as Australia has never been ceded. We recognise the Ancestors who fought and died, protecting their people and their lands. We pay our respects to all the Elders and honour their role in preserving culture and communicating their knowledge and wisdom. We acknowledge the Traditional Owners of Country throughout Australia and their continuing connection to land, culture, and Ancestors.

'First Nations' is a term that has emanated from the Indigenous peoples of Canada.[1] It is intended to signify the pre-existing 'nation' status of Indigenous people in colonised territories. It is a term that has recently gained broader acceptance in Australia with the adoption of the Uluru Statement from the Heart

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1 Michael A Peters and Carl T Mika, 'Aborigine, Indian, Indigenous or First Nations?' (2017) 49(13) *Educational Philosophy and Theory* 1229.

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at a convention held at Yulara in the Northern Territory in 2017.[2] It is a term the authors favour over Indigenous people, or Aboriginal and Torres Strait Islander peoples, because it provides a much more positive assertion of political status by reference to territory. Simultaneously, we accept the criticism that any collective nouns can have the unintended effect of homogenisation and deny heterogeneity, self-identification, and self-selected terms.[3] However, it is not practical or feasible to refer to every individual group in an article of this nature; therefore, the authors have determined to use the preferable collective noun, First Nations.

Globally, First Nations have been in a state of transition since the 1960s, when a process often referred to as decolonisation first took shape and demanded action. The principle that the First Nations are entitled to self-determination has been recognised internationally, if not implemented domestically in Australia.[4]

This article argues that First Nations peoples must be centred as a priority in any examination of climate change, recognising their long-standing practices and cultural connection to the land. International and domestic human rights laws are potential avenues to protect both First Nations interests and the environment. To ensure lawyers are trained in skills that enable them to formulate such arguments, the nature of legal education in Australia must be reformed to embed Indigenous cultural awareness and climate change consciousness.

This article is structured into three parts. Part I is the introduction and setting of context. Part II considers the intersections between international human rights law and First Nations peoples with climate change, focussing on Australia, including a practitioner's perspective. Part III situates the analysis in the milieu of legal education from an educator's perspective. Finally, conclusions are offered, which include recommendations for future actions.

We commence this analysis by drawing on a personal experience of one of the authors, who in 2009, as a junior barrister, had the pleasure of acting for the Quandamooka People of the Moreton Bay Region of South East Queensland. The Quandamooka People are the bayside and island dialect groups of what is now called Moreton Bay. The matter involved the preparation of a native title claim by the Quandamooka People for what was, eventually, a legal recognition granted by the Federal Court of Australia of their native title over Minjerribah (or North Stradbroke Island as it is also known). That recognition occurred with the consent of the State of Queensland. Importantly, Dowsett J approached the matter with respect:

> I have not come here today to give anything to the Quandamooka People. These orders give them nothing. Rather, I come on behalf of all Australian people to recognize their existing rights and interests, which rights and interests have their roots in times

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2 *Uluru Statement from the Heart* (National Constitutional Convention, 26 May 2017).

3 Peters and Mika (n 1) 1230.

4 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/296, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) ('*Declaration*').

> before 1788, only some of which have survived European settlement. Those surviving rights and interests I now acknowledge.[5]

The process of preparing the native title claim centred on interviews with many witnesses. One of those witnesses was a Quandamooka Elder who told of how, when he was young, before sand mining closed access to large parts of the island, he would travel to the south of Minjerribah on foot or by horse. It was estimated that this might have been a distance of approximately 30 kilometres. He said that along the way, they would hunt and burn the grasslands. He said that the track they would travel was through the middle of the island, and they would often see the kangaroos off in the distance, not how it was now being mostly densely overgrown with scrub. When asked whether there was a certain time of the year that they would head to the south of the island, he replied that it was always in the summer. At this point, there was a little confusion as general knowledge of traditional burning regimes in the area was limited. The current understanding of the rural fire service considered that fire management should be done in late winter.

The Elder explained, rather patiently, that summer was the proper time to burn as the snakes and goannas were their totems, and if they burned in summer, those reptiles would be alert and able to get out of the way of the fire. He stated that because they burnt every summer, the fires were only ever grass fires.

During the summer, this burning practice was common along the length of the east coast, with early historical records from British observers noting extensive burning in December and January. And so it was, with a short series of questions and answers, the Elder disclosed practices which were no doubt of great antiquity and in respect of which of there is perhaps no greater act of possession of territory. The practices he spoke of were in keeping with spiritual belief and the notions of interconnectedness between all things. He had also turned on its head the former and current practices of the fire management authorities.

We retell this story because it is topical, given the wildfires that scorched the Australian continent from November 2019 through to February of 2020, and because it provides a relatable backdrop to the topic of climate change. It underscores the importance of the benefits to all concerned about climate change that can be harnessed from being open and receptive to First Nation wisdom and knowledge. It highlights the need for the rights of First Nations peoples to be at the centre of any legal response to climate change. It requires the embedding of First Nations' perspectives into the law curriculum to equip emerging lawyers with the necessary skills to tackle the complex problems implicit in climate change.

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5 *Delaney on behalf of Quandamooka People v Queensland* [2011] FCA 741, [21] (Dowsett J).

II Human Rights, Climate Change and First Nations Peoples: Reflections on the International and Australian Context

Having laid the foundation for this analysis, the next step is to critically analyse the human rights frameworks that could be drawn upon to promote First Nations peoples' rights and respond to the grave implications of climate change. While providing an academic synopsis of the relevant history of international human rights law, the first section also provides a unique standpoint in that it offers a First Nations practitioner's perspective on how this law has developed in Australia. The following sections focus specifically on how the international human rights framework has developed with respect to First Nations peoples, how human rights are structured domestically in Australia and, finally, how the rights considered go beyond conventional 'human' rights to include the necessary protection of our mother earth.

A *International Human Rights Frameworks Generally*

The *Universal Declaration on Human Rights* ('*UDHR*') proclaims, in Article 1:

> All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.[6]

The *UDHR* was passed at the General Assembly of the United Nations in 1948.[7] Since that time, there have been nine core United Nations conventions that have the effect of binding the signatory nations.[8] Australia is a party to seven of the core human rights instruments, and this provides the platform for domestic

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6 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) art 1 ('*UDHR*').

7 Ibid.

8 *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) ('*ICERD*'); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*'); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('*ICESCR*'); *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('*CRC*'); *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, opened for signature 18 December 1990, 2220 UNTS 3 (entered into force 1 July 2003); *International Convention for the Protection of All Persons from Enforced Disappearance*, opened for signature 6 February 2007, 2716 UNTS 3 (entered into force 23 December 2010); *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 30 March 2008).

implementation.[9] The United Nations has Expert Committees in respect of these human rights instruments to monitor and guide implementation.[10] From time to time, the Committees will issue 'Comments' concerning the relevant convention to deal with issues arising from it.[11]

In many countries, those Comments are used as aids by the court to interpret the domestic legislation enacted to implement the conventions. In Australia, the High Court has had differing views. A starting point to illustrate those differing views is the landmark 1992 decision of *Mabo v Queensland [No 2]* ('*Mabo No 2*'), where the doctrine of *terra nullius*, which held that Australia was the land of no people, was rejected.[12] Brennan J, in the lead judgment, had regard to international norms in reaching his decision that the racially discriminatory doctrine of *terra nullius* could no longer stand as good law in Australia:

> Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.[13]

However, in a later case, *Maloney v The Queen* ('*Maloney*'), the High Court took a different approach.[14] *Maloney* concerned a challenge to liquor licencing laws that restricted alcohol sale in the discrete Aboriginal community of Bwgcolman (also known as Palm Island) in Queensland. In that case, even though the High Court held that the restrictions were racially discriminatory, it found that the Queensland government had acted to impose a special measure for the benefit of the Aboriginal and Torres Strait Islander people resident on Bwgcolman/Palm

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9 See Attorney-General's Department, 'International Human Rights System', *Rights and Protections* (Web Page) <https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/international-human-rights-system>.

10 See, eg, the Committee on the Elimination of All Forms of Racial Discrimination, Human Rights Committee, Committee on Economic, Social and Cultural Rights, Committee on the Elimination of All Forms of Discrimination, Committee Against Torture, Committee on the Rights of the Child, Committee on Migrant Workers, Committee on Enforced Disappearances, Committee on the Rights of Persons with Disabilities and other United Nations Committees, United Nations Human Rights Office of the High Commissioner, 'Human Rights Treaty Bodies: Individual Communications', *Human Rights Bodies* (Web Page) <https://www.ohchr.org/en/hrbodies/tbpetitions/Pages/IndividualCommunications.aspx>.

11 See, eg, Committee on the Elimination of Racial Discrimination, *General Recommendation No. 36 (2020) on Preventing and Combating Racial Profiling by Law Enforcement Officials*, 102nd sess, UN Doc CERD/C/GC/36 (17 December 2020).

12 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 ('*Mabo No 2*').

13 Ibid 42 (Brennan J) (citations omitted).

14 *Maloney v The Queen* (2013) 252 CLR 168 ('*Maloney*').

Island.[15] Of central importance to the contentions, in that case, was the *International Convention on the Elimination of All Forms of Racial Discrimination*.[16] The Convention contains an article that enables States to take special measures that are racially discriminatory if such measures are for the benefit of the people who are the subjects of such measures.[17] That article was incorporated by reference in section 8 of the *Racial Discrimination Act 1975* (Cth) ('*RDA*').[18]

Again, an earlier decision of Brennan J's was the central focus of much of the argument. In 1985, Brennan J delivered the lead judgment in the case of *Gerhardy v Brown*.[19] In that case, it was held that there were four indicia to which the court ought to have regard in determining whether a purported special measure was, in fact, for the benefit of the subject community.[20] One of those indicia was whether the subjects of the purported benefit had consented to the action. Brennan J astutely noted that a purported benefit imposed upon a community against its will has the likelihood of being so disempowering as to outweigh any benefit said to be delivered.[21] Mrs Maloney relied upon those observations from Brennan J and a more recent 'Comment' from the Committee on the Elimination of all Forms of Racial Discrimination regarding the nature of free, prior and informed consent and how it should be understood in dealing with claims by States that discriminatory legislation were special measures.[22] However, the High Court ruled that it could not take into account the development of international norms when interpreting domestic legislative instruments.[23] It determined that the Court was bound to interpret the law as it was enacted, and s 8 of the Australian legislation had no requirement for the consent of the recipients.[24]

Former High Court Justice Michael Kirby has been critical of the High Court's approach to international norms.[25] He has done a great deal of work concerning the *Bangalore Principles on the Domestic Application of International Human Rights Norms*, in particular Principle 4, which recognises that regard may be had to international norms 'where domestic law — whether constitutional, statute or

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15 Ibid 193–4 [46].
16 *ICERD* (n 9).
17 Ibid art 1(4). See also ibid art 2(2).
18 *Racial Discrimination Act 1975* (Cth) s 8 ('*RDA*'). This section states that special measures are those referred to in paragraph 4 of Article 1 of the Convention, however, it does provide an exception to this under section 10(3) of the *RDA*.
19 *Gerhardy v Brown* (1985) 159 CLR 70.
20 Ibid.
21 *Maloney* (n 15) 221–3 [133]–[139] (Crennan J) citing *Gerhardy v Brown* (1985) 159 CLR 70, 135, 139 (Brennan J).
22 Ibid 180–1 [12]–[14] (French CJ), 185 [22]–[24] (French CJ), 255 [234] (Bell J).
23 Ibid 235 [175]–[176] (Kiefel J).
24 Ibid 185–6 [24] (French CJ), 208 [91] (Hayne J), 220–1 [132] (Crennan J), 238 [186] (Kiefel J), 257 [240] (Bell J), 300–1 [356]–[357] (Gageler J).
25 See Justice Michael Kirby, 'The Growing Impact of International Law on the Common Law' (2012) 33(1) *Adelaide Law Review* 7, 23.

common law — is uncertain or incomplete'.[26] Nevertheless, the High Court has not shifted.

The relevance of this for Australia is that, currently, Commonwealth human rights legislation remains in the form that it was enacted without the ability to interpret it in light of the recent developments in the international committees designed to provide assistance in implementation and interpretation, on which Australia has from time to time been represented.[27] The impact of that position is that much of what has occurred internationally in recent years, which might be regarded as expressions of international norms relating to climate change, will be unavailable to the Australian courts unless it is imported into domestic legislation.

With that in mind, the President of the then Human Rights and Equal Opportunity Commission identified that climate change would likely affect many human rights, including the right to life, the right to water, the right to health, the right to human security, and the rights of First Nations peoples. The President noted in relation to the rights of First Nations peoples in Australia that:

> [I]t has been predicted that northern Aboriginal communities will bear the brunt of climate change … facing serious health risks from malaria, dengue fever and heat stress, as well as loss of food sources from floods, drought and more intense bushfires.[28]

The effects of climate change will be felt most acutely by the poor, marginalised, and disadvantaged people worldwide. In Australia, there are no peoples who will be more affected than First Nations peoples.[29]

A mainstream example of the disproportionate effects of climate change can be found in an article on the Sydney Morning Herald's front page, which claimed that Australia could not meet its Paris Agreement commitments.[30] Australia is a party to the Paris Agreement, which builds on previous international efforts to respond to climate change. The Paris Agreement came into force in 2016.[31] Each

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26 Leigh A H Johns, 'Justice Kirby, Human Rights and the Exercise of Judicial Choice' (2001) 27(2) *Monash University Law Review* 290, 300.

27 Australia is a member of the United Nations Human Rights Council. Australia also remains engaged in international developments at the United Nations. See, eg, Australian Government, *Australian Statement to the Clustered Interactive Dialogue with the Special Rapporteur (SR) on Indigenous Issues and Expert Mechanism on the Rights of Indigenous Peoples* (National Statement, 18 September 2019).

28 John von Doussa, 'Human Rights and Climate Change: A Tragedy in the Making' (Speech, HREOC Seminar Series for the 60th Anniversary of the *Universal Declaration of Human Rights*, 20 August 2008).

29 James Ford, 'Indigenous Health and Climate Change' (2012) 102(7) *American Journal of Public Health* 1260. See also Donna Green, Garnaut Climate Change Review, *Climate Impacts on the Health of Remote Northern Australian Indigenous Communities* (Report, February 2008).

30 Christiana Figueres, 'Be Honest Australia, You're Not "Meeting and Beating" Your Emissions Targets', *Sydney Morning Herald* (online at 9 March 2020) <https://www.smh.com.au/environment/climate-change/be-honest-australia-you-re-not-meeting-and-beating-your-emissions-targets-20200307-p547u1.html>.

31 *Paris Agreement*, opened for signature 22 April 2016, [2016] ATS 24 (entered into force 4 November 2016)).

party to the Paris Agreement must submit emissions reductions commitments, known as Nationally Determined Contributions. In Australia, there was a mooted USD75 per barrel tax on oil. Of course, the people who will feel such an increase in fuel prices most acutely are those Aboriginal people who live in the remote communities in the Northern Territory. Their expenditure is controlled under income management laws that limit the range of places and purposes for which welfare might be spent.[32] It has been reported numerous times over many years that Aboriginal people in remote communities are already suffering significant disadvantage flowing from the inability to have sufficient cash to buy food at local stores and not having enough money to travel to regional centres to buy fresh food on a regular basis.[33]

It is also interesting to note that the Australian Human Rights Commission ('AHRC') recorded the impact of human rights upon policy responses to climate change.[34] It noted that people may possess individual rights that need to be taken into account, and that there will be differing impacts in different localities and local knowledge, including Indigenous knowledge, which should be considered, as well as the principles of non-discrimination and substantive equality so that minimum human rights standards are observed.[35]

The AHRC is silent on whether human rights may be used positively to protect those upon whom measurable impacts from climate change are likely to be added to or further exacerbated by government action. For instance, Torres Strait Islanders' right to own and inherit property, as recognised in art 5 of the *International Convention on the Elimination of All Forms of Racial Discrimination*, could potentially be used to argue that laws would be unlawful if they interfered with those rights in a way that other people's rights are not interfered with.

If that proposition is broken down, it can be anticipated that the government would first argue that the impact of climate change affects all people, and the result of rising sea levels will cause loss of property rights around Australia. The response to that argument might be that the rights to property that the Torres Strait Islanders and other First Nations peoples possess are rights to particular areas of the land and sea, which are not transportable and cannot be adequately remedied by compensation. First Nations peoples have different relationships with lands. Their identity is defined by their lands and the stories attached to the lands. Compensation is not adequate for the loss of the right to inherit those particular lands.

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32 Luke Buckmaster, Carol Ey and Michael Klapdor, *Income Management: An Overview* (Research Paper, Parliamentary Library, Parliament of Australia, 21 June 2012).

33 J Rob Bray et al, *Evaluating New Income Management in the Northern Territory: Final Evaluation Report* (Social Policy Research Centre UNSW Report, September 2014). See also Deloitte Access Economics, *Place Based Income Management: Medium Term Outcomes Evaluation Report* (Report, 9 April 2015) 4.3.1–4.3.6.

34 Australian Human Rights Commission, *Declaration Dialogue Series: Equality and Non-discrimination* (Declaration Dialogue Series Paper No 5, July 2013).

35 Ibid.

Second, it can be anticipated that the Australian government would argue that it has complied with, and is complying with, its international obligations and cannot be expected to do any more given the response to climate change requires a coordinated global effort. While this argument does have some merit, there may be some room to argue that legislative and regulatory regimes that allow for the continued extraction of thermal coal, or the continued clearing of native vegetation, directly contribute to increased carbon dioxide in the atmosphere.[36] A question may be asked whether the extraction of coal itself, as opposed to the burning of coal, ought to be counted against Australia in determining its contribution to global warming. The present international agreements on climate change calculate those emissions against the country which does the act of releasing the CO_2. However, in law, a person may be held liable for the reasonably foreseeable consequences of their actions. The question in human rights terms is whether the action or the law being challenged can be shown to have a discriminatory effect.

The government would no doubt argue that it has an obligation to act in the interests of all Australians by protecting the economy while observing its international obligations and that in doing so, no one sector of society is treated differently from any other. The parameters of this form of positive use of human rights instruments to protect First Nations peoples against government decisions or action, which increases CO_2 emissions, is worthy of further consideration and research. And it may be that a litigation option based on foreseeable consequences with a discriminatory effect is available.[37]

Overall, the capacity for human rights to be used to stop action contributing to the increase in CO_2 is limited because there are numerous competing forces at play. The investment in power generation through burning thermal coal is megalithic compared to First Nations people's rights and interests. Governments have underwritten it and in coal-producing countries, such as Australia, revenue from coal exports to a certain extent underpins the economy.[38] Indeed, the development of the western world to unprecedented levels of wealth and comfort has been achieved on the back of cheap electrical power and petroleum products, where the environmental cost has never been factored into the price.[39] Our houses are made of, and then filled with products and food from around the world,

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36 See, eg, 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.

37 The recent case of *Waratah Coal Pty Ltd v Youth Verdict Ltd* [2020] QLC 33 illustrated the use of *Human Rights Act 2019* (Qld) s 28 to construct an argument that a mining licence should not be granted as it was incompatible with the right to culture for First Nations people. As a result of the disproportionate impact on First Nations people, there may be a justiciable human-rights based argument that there is a positive obligation to protect First Nations people.

38 The Office of the Chief Economist has said that the Energy and Resources sector is forecast to produce $349 billion in exports in 2021–2022, making up more than half of total exports. See Office of the Chief Economist, *Resources and Energy Quarterly* (Forecast Report, September 2021, 4, 6).

39 Hans A Baer, 'The Nexus of the Coal Industry and the State in Australia: Historical Dimensions and Contemporary Challenges' (2016) 99 *Energy Policy* 194.

powered by electricity from burnt coal. We drive our two-tonne cars to the store to top up on groceries and catch planes to go on holidays. We live in times of gross excess, and our political system does not have a track record of taking voluntary decisions that may reduce the perceived standard of living.

This existence, and our acceptance of it, must be contrasted with the spiritual, cultural, and legal frameworks of First Nations peoples the world over. First Nations peoples are raised to understand and have an emotional response that forms part of their relationship with their country and mother earth.[40] An appreciation of the strength of that relationship can cause turmoil. There is nothing about the First Nations peoples' existence in Australia that is sustainable in the current approaches. First Nation peoples' understanding of country, which holds for First Nations peoples everywhere, is that the earth is finely balanced, and one cannot simply take from somewhere else without affecting that place. Nor can one take too much of their own resources for trade without causing damage to country and its own sustainability. The fact that in modern society, water is trapped in dams and then sent to entirely different valleys to drink from, wash under, use for agriculture and to remove effluent from, has an effect on the ecosystems in both the valley the water was taken from and the valley in which it is ultimately used.

Turning to the consideration of broader human rights impacted by and potentially capable of protection in a climate change context, there can be no doubt that the best-managed landscapes in any developed settler states are those managed by First Nations peoples. This phenomenon has been studied and was even the subject of Pope Francis's comment in 2016 that when First Nation peoples' land rights are protected, those communities are the best guardians of the world's forests and biodiversity.[41]

While the effects of human-induced greenhouse gas emissions on the climate have been acknowledged and reported upon in detail for more than 30 years, it is only in recent years that individuals and groups have turned to the human rights regime with the hope that it may be the impetus to drive the government into taking action.

There is now ongoing climate change litigation in both Australia (*Sharma by Her Litigation Representative Sister Marie Brigid Arthur v Minister for the Environment*

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40 Irene Watson, 'Sovereign Space, Caring for Country, and the Homeless Position of Aboriginal Peoples' (2009) 180(1) *South Atlantic Quarterly* 27, 37.

41 National Aboriginal and Torres Strait Islander Catholic Council, *Pope Francis Statement to National Aboriginal and Torres Strait Islander Catholic Church* (Statement, 27 November 2016) <https://www.natsicc.org.au/pope-francis-message-to-indigenous-australians.html>. See generally Julia E Fa et al, 'Importance of Indigenous Peoples' Lands for the Conservation of Intact Forest Landscapes' (2020) 18(3) *Frontiers in Ecology and the Environment* 135. See also Kaiwen Su et al, 'Efforts of Indigenous Knowledge in Forest and Wildlife Conservation: A Case Study on Bulang People in Mangba Village in Yunnan Province, China' (2020) 11(11) *Forests* 1178. See also Graeme Reed et al, 'Indigenous Guardians as an Emerging Approach to Indigenous Environmental Governance' (2020) 35(1) *Conservation Biology* 179, 181.

(Commonwealth))[42] and New Zealand (*Smith v Fonterra Co-operative Group Ltd).*[43] Likewise litigation has been undertaken around the globe, relying on the human right to life, to seek declarations and mandatory action by governments for inadequate responses to climate change. In many of these cases, the proceedings have been brought by young people whose lives will be impacted by global climate change.[44] In Canada, Belgium, Columbia, South Korea, France, Germany, Switzerland, the USA, Pakistan, Nepal and Aotearoa/New Zealand, there has been, or is currently, litigation on foot concerning government inaction on climate change.[45] There is even supra-national litigation in the European Court of

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42 (2021) 391 ALR 1.

43 [2020] 2 NZLR 394. For further analysis of the litigation in both cases, see Wendy Bonython, 'Tort law and Climate Change' (2021) 40(3) *University of Queensland Law Journal* 421.

44 See generally Jade S Sasser, 'The Wave of the Future? Youth Advocacy at the Nexus of Population and Climate Change' (2014) 180(2) *Geographical Journal* 102.

45 In Canada, the Federal Court in *La Rose v The Queen* (2020) FC 1008 dismissed a youth-led climate case on the ground of justiciability, at [26]. However, a provincial court, the Superior Court of Justice in Ontario, found in *Mathur v Ontario* (2020) ONSC 6918 that greenhouse gas emission targets were justiciable and that the *Canada Act 1982* (UK) c 11, sch B pt I ('*Canadian Charter of Rights and Freedoms*') applied to greenhouse gas emissions targets and policies, at [62]. In Belgium, litigation is currently ongoing to demand the government reduce its carbon omissions, see generally Klimaatzaak, 'Follow the Trial Closely' (Web Page, 2020) <https://www.klimaatzaak.eu/nl>. In Colombia, Colombia's Supreme Court decided in favour of 25 youth plaintiffs ('Future Generations') that the failure of the Colombian government's failure to reduce deforestation and comply with the Paris Agreement and National Development Plan 2014–2018 threatened constitutional rights, see *Demanda Generaciones Futuras v Minambiente* STC4360-2018, 5 April 2018. In South Korea, litigation is ongoing in South Korea's Constitutional Court. Nineteen youth members of 'Youth4ClimateAction' are arguing that the national climate change laws violate constitutional rights, see *Do-Hyun Kim et al v South Korea,* complaint lodged 13 March 2020 (Constitutional Court of South Korea). In France, four non-profits (Frondation pour la Nature et l'Homme, Greenpeace France, Notre à Tous, and Oxfam France) were successful in convincing the Administrative Court of Paris to recognise ecological damage from climate change and held the government was responsible for failing to meet its own climate targets in Tribunal Administratif de Paris [Paris Administrative Court], n°1904967, 1904968, 1904972, 1904976/4-1, 3 February 2021. In Germany, the German Administrative Court held that the government's climate policy may be reviewed by the court in *Family Farmers and Greenpeace v Germany*, Administrative Court of Berlin, VG 10 K 412.18, 31 October 2019. In Switzerland, the Union of Swiss Senior Women for Climate Protection filed litigation to the Supreme Court of Switzerland noting that due to the disproportionate effects of climate change on senior citizens, the Swiss Government failed to protect their human rights. The Supreme Court denied the appeal in *Verein KlimaSeniorinnen et al v Federal Department of the Environment, Transport, Energy and Communications* 1C_37/2019 (Federal Supreme Court, Public Law Division I, 5 May 2020), noting that the rights had not been suitably impacted and the remedy was not justiciable. In the United States of America, the high-profile litigation of *Juliana v United States*, 947 F 3d 1159 (9th Cir, 2020) was dismissed by the US Court of Appeals for the Ninth Circuit and reversed interlocutory orders for relief on the basis of harm due to climate change. In Pakistan, the Lahore High Court ruled that the Pakistani Government had failed to implement policies to prevent deforestation in *Sheikh Asim Farooq v Federation of Pakistan*, (Writ Petition No. 192069 of 2018, 30 August 2019). In Nepal, the Supreme Court of Nepal ordered that the Government of Nepal must enact climate change legislation in *Advocate Padam Bahadur Shrestha v The Office of the Prime Minister and the Council of Ministers, Singhadurbar, Kathmandu and others* (Decision no 10210, NKP, Part 61, Vol 3, 10th Day of Month of Poush of the Year 2075 BS). In Aotearoa/New Zealand, the High Court of New Zealand in *Thomson v Minister for Climate Change Issues* [2018] 2 NZLR 160 held that it had authority to review domestic climate change policy that discretion to enact policies and that the Minister had not made a reviewable error for the Court to intervene.

Justice.[46] In the main, this litigation relies on the constitutional or legislative protection of human rights as the foundation for these actions.

In Australia, the Constitution and statute law provide little protection of the human rights articulated in the *Universal Declaration of Human Rights*, the *International Convention on the Civil and Political Rights*, the *International Convention on the Economic Social and Cultural Rights*, and the *Convention on the Rights of the Child*.[47]

In Australian legislation, there is protection against discrimination on the basis of gender, disability, and race. The *Racial Discrimination Act 1975* (Cth) includes, as a schedule to the legislation, the *International Convention on the Elimination of All Forms of Racial Discrimination*.[48] This binds the parties to ensure that everyone is guaranteed the right to equality before the law noting specific rights including the right to security of the person and the right to equal participation in cultural activities. To gain access to those protections, it is necessary to establish not only that there is a denial of the right to security of the person, but also that the denial is discriminatory on the basis of race, colour, or national or ethnic origin.

The only other potential option, it appears, is to assert that the right to life is a *jus cogens* international law norm that is enforceable under domestic law. While this contention is presently untested in Australia, there is the potential for a case to be brought similar to *State of the Netherlands v Urgenda Foundation*, which the Netherlands Supreme Court determined in 2019.[49] In that matter, an environmental group (Urgenda) commenced litigation to oblige the government to improve upon its targets for emissions reductions. The Court agreed and ruled that the existing target was insufficient to meet its international obligations. Although that case was decided on the basis of obligations under the *European Convention on the Protection of Human Rights and Fundamental Freedoms*, there is an argument that the right to life, as an international norm, could form part of the Australian domestic law.

For First Nations peoples, the absence of a federal law protecting the right to life has meant that proceedings have been taken by certain Torres Strait Islanders via a complaint to the United Nations Human Rights Committee under the first

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46 On 25 March 2021, the European Court of Justice dismissed the appeal, arguing that the plaintiffs were not affected by the European Union's climate policies. See *Carvalho v Parliament and Council (Judgment)* (General Court (Sixth Chamber) Court of Justice of the European Union, Case C-565/19, 25 March 2021).

47 *UDHR* (n 7); *ICCPR* (n 9); *ICESCR* (n 9); *CRC* (n 9). Note that some of the rights in the *UDHR* and *ICCPR* overlap with the *ICERD*.

48 Note there is also equal opportunity or anti-discrimination legislation in all Australian States and Territories.

49 *State of the Netherlands v Urgenda Foundation*, Hoge Raad der Nederlanden [Supreme Court of the Netherlands], case 19/00135, ECLI:NL:HR:2019:2007 (20 December 2019). See also the earlier decisions in *Urgenda Foundation v The State of the Netherlands (Ministry of Infrastructure and the Environment)*, Rechtbank Den Haag [Hague District Court], case C/09/456689/HA ZA 13-1396 (24 June 2015) and *The State of the Netherlands v Urgenda Foundation*, Gerechtshof Den Hague [The Hague Court of Appeal], case 200.178.245/01 (9 October 2018).

optional protocol to the *International Covenant on Civil and Political Rights* ('*ICCPR*').[50] That complaint has been brought against Australia on the basis that its failure to adopt adequate measures to reduce greenhouse gas emissions or to build proper adaptation measures, such as sea walls on the islands, is a breach of the *ICCPR*. Most pressing is the seawater inundation of low-lying islands of the Torres Strait. The complainants have relied on impacts upon the right to life (protected by art 6), and specifically, the right to be free of arbitrary interference with privacy, family, and home (protected by art 17), and the right to culture (protected by art 27).

The Oslo Principles on Global Climate Change Obligations (the 'Oslo Principles') are of great importance to the initiatives taken by the various individuals and non-government organisations seeking legal sanctions against nation states for inaction on global climate change.[51] The Oslo Principles were prepared and endorsed by an eminent group of jurists, legal practitioners, and academics under the banner of the 'Expert Group on Global Climate Change Obligations', which included the Hon Michael Kirby. In 2015, the Oslo Principles were adopted by the Expert Group with the stated intention of seeking to overcome the generally abstract nature of previous efforts to define the scope of legal obligations relevant to climate change. It encompasses both:

1. the current obligations that all States and enterprises have to defend and protect the Earth's climate and, thus, its biosphere; and
2. the basic means of meeting those obligations.

The Oslo Principles function on the basis that a maximum of two degrees increase in global temperature over pre-industrial levels will have a 'profound, adverse and irreversible impact on human and other life and on the Earth'.[52] The Principles are detailed and operate on the precautionary principle — that is to say decisions and policies should be predicated on the basis of anticipating, avoiding, and mitigating threats to the environment. They allow for the transfer of effort between Nation States and relief for excessive hardship. Interestingly, the Oslo Principles provide that the State shall submit to the jurisdiction of courts and tribunals in which its compliance with the Principles can be challenged. There is also an obligation under the Oslo Principles to participate in the proceedings in

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50 See generally Ebony Back and Rebecca Lucas, 'Climate Change and Human Rights to Collide Before the United Nations Human Rights Committee' *Australian Public Law* (Web Page, 17 July 2019) <https://auspublaw.org/2019/07/climate-change-and-human-rights-to-collide-before-the-united-nations-human-rights-committee/>; Donna Green and Kirsty Ruddock, 'Could Litigation Help Torres Strait Islanders Deal with Climate Impacts?' (2009) 9(2) *Sustainable Development Law & Policy* 23; Owen Cordes-Holland, 'The Sinking of the Strait: The Implications of Climate Change for Torres Strait Islanders' Human Rights Protected by the ICCPR' (2008) 9(2) *Melbourne Journal of International Law* 405.

51 Global Justice Program Yale University, 'Oslo Principles on Global Climate Change Obligations' (Web Page, 30 March 2015) <https://globaljustice.yale.edu/sites/default/files/files/OsloPrinciples.pdf> ('Oslo Principles').

52 Ibid.

good faith. It has been reported that the Australian government has challenged the complaint to the UN Human Rights Committee by the Torres Strait Islanders on the basis that the complaint concerns future risks and not present risks or damage, and also that because Australia is not the main or only contributor to global warming, and that climate change action is not its responsibility.[53] The first argument is in direct conflict with the precautionary principle and the second argument denies the global responsibility of all States to act on climate change. Interestingly, both of these counterarguments were warned against in the Oslo Principles.[54]

It is concerning that, in potential legal proceedings, Australia might seek to argue contrary to the Oslo Principles. Further, the Australian government's conduct in the Torres Straits peoples' complaint raises serious apprehensions about its willingness to engage with First Nation peoples at all in relation to climate change. Where then do the Quandamooka people or other First Nation peoples go to seek protection of their lands from the effects of poor decision-making, non-compliance with the *Declaration on the Rights of Indigenous Peoples* ('*Declaration*'), or breaches of their right to life and culture? There has been limited interest by successive Australian governments to empower First Nation peoples to be the decision-makers in respect of their territories, and there does not seem to be any ambition to implement domestically many other international instruments and norms. Likewise, there does not appear to be any public interest to countenance the development of a new land ethic that might result in a different approach to the conceptualisation of existence on this continent.

Nevertheless, international developments regarding respect for the human right to life and overseas courts' willingness to hear actions against governments on this issue give hope for a greater role for First Nations peoples and greater accountability over the government's inaction.

In this regard, the second limb of the Uluru Statement from the Heart offers some hope. The second limb of the Uluru Statement calls for the establishment of a *Makarrata* Commission. The term *Makarrata* is a Yolngu word meaning 'settlement after a battle'.[55] It is intended to provide the space for entry into treaties between First Nations and the Australian governments. In Victoria, work has already commenced on establishing a treaty framework. A First Nations Peoples' Assembly has been confirmed and calls for a truth and justice

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53 Back and Lucas (n 49).

54 'Oslo Principles' (n 50).

55 According to Dani Larkin and Kate Galloway, 'Uluru Statement from the Heart: Australian Public Law Pluralism' (2018) 30(2) *Bond Law Review* 335, 344:

> The Makarrata Commission proposal, however, represents a concrete means of institutional implementation, finally, of a collective right to self-determination. By enacting the proposed Makarrata Commission, Australia would afford Indigenous Australians the means of attaining political equality, civic equality, and ultimately the protection of their cultural identity. The legally protected, constitutionally enshrined mechanism affords self-determination through consultation resulting in expression of a prior, informed voice in State governance processes.

commission to inform the treaty process.[56] In the Northern Territory and Queensland, treaty processes are also underway.[57] The hope exists that, within the context of settlement negotiations over the next decade, progress can be made on starting to reach fair and just accommodation which fixes that which could not be fixed in *Mabo No 2* and which respects the rights set out in the *Declaration*, and perhaps even leads the country towards some higher land ethic. And perhaps, just perhaps, the knowledge and practices of the First Nations Elders can be respected and given due deference.

The international human rights framework, in particular the *Declaration on the Rights of Indigenous Peoples*, provides a positive starting point for nations to acknowledge the rights of First Nations peoples and to increase accountability. The next section, accordingly, examines aspects of the *Declaration* and reflects on how common law nations, including Australia, have been hesitant to adopt it.

B *The Human Rights Framework for First Nations peoples*

The rights of First Nations peoples were formally recognised by the United Nations General Assembly's adoption of the *Declaration* in 2007.[58] Notably, Australia, Aotearoa/New Zealand, Canada, and the United States of America opposed the *Declaration* in the UN General Assembly.[59] They have all since ratified the *Declaration*, with Australia giving its endorsement in 2009.[60]

The principle collective right articulated in the *Declaration* is the right to self-determination. That right underpins the call in the Uluru Statement from the Heart for a constitutional amendment to insert a role for a body representative of

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56 See Daniel Andrews, 'Delivering Truth and Justice for Aboriginal Victorians' (Media Release, 11 July 2020). See generally Harry Hobbs, 'Victoria's Truth-Telling Commission: To Move Forward, We Need to Answer for the Legacies of Colonisation' *The Conservation* (online at 9 March 2021) <https://theconversation.com/victorias-truth-telling-commission-to-move-forward-we-need-to-answer-for-the-legacies-of-colonisation-156746>.

57 In Queensland, Premier Annastacia Palaszczuk and Craig Crawford announced on 13 August 2020 that the Queensland Government had established a Treaty Advancement Committee after three months of consultation. See Anastacia Palaszczuk and Craig Crawford, 'Queensland Government's Historic Commitment to Treaty-making Process' *Queensland Government* (Joint Statement, 13 August 2020) < https://statements.qld.gov.au/statements/90413>. In the Northern Territory, the Barunga Memorandum of Understanding was signed at the Barunga Festival on 8 June 2018 to develop a framework of a treaty. In 2020, the *Treaty Commissioner Bill 2020* ('NT') established the Northern Territory Treaty Commissioner. See Northern Territory Treaty Commission, *Interim Report of the Northern Territory Treaty Commissioner* (Interim Report, March 2020).

58 *Declaration* (n 4).

59 The four states that voted against the *Declaration* cited concerns with self-determination, land rights, and rights to redress. See 'Australia Opposes UN Rights Declaration', *ABC News* (online at 14 September 2007) <https://www.abc.net.au/news/2007-09-14/australia-opposes-un-rights-declaration/669612>.

60 Indigenous Affairs Minister Jenny Macklin at the time stated, 'Today Australia joins the international community to affirm the aspirations of all Indigenous peoples.' See Jenny Macklin, 'Statement on the United Nations Declaration on the Rights of Indigenous Peoples' (Speech, Canberra, 3 April 2009) <https://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/418T6/upload_binary/418t60.pdf;fileType=application%2Fpdf#search=%22media/pressrel/418T6%22>.

First Nations.[61] Although the proposal does not call for a decision-making power, the capacity to be heard is a critical aspect of self-determination.

First Nations peoples often understand self-determination to mean the same as sovereignty, even though the First Nations perspective of sovereignty might not be precisely the same as it is understood in international law.[62] The Uluru Statement refers to First Nations sovereignty being a *spiritual notion*. This is an expression borrowed from the 1975 International Court of Justice ('ICJ') Advisory Opinion on Western Sahara and later in Brennan J's judgment in the High Court of Australia decision in *Mabo No 2*.[63]

In the ICJ decision, it was recorded by the member of the court representing Zaire that the doctrine of *terra nullius* should be substituted by a spiritual notion. The ICJ stated:

> [T]he ancestral tie between the land, or 'mother nature', and the man who was born therefrom, remains attached thereto, and must one day return thither to be united with his ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty. This amounts to a denial of the very concept of terra nullius in the sense of a land which is capable of being appropriated by someone who is not born therefrom.[64]

This articulation of the relationship between people and their lands resonates very strongly with First Nations peoples in Australia, and by extension, with all First Nations peoples worldwide.

However, as the High Court held in *Mabo No 2*, domestic courts in Australia do not have the power to deal with challenges to Australian sovereignty.[65] Brennan J's judgment in *Mabo No 2* might be interpreted as the court acknowledging that the basis for the assertion of the acquisition of sovereignty is not supportable at international law but confirming that no Australian court can fix it and that all that can be done is to recognise the rights that are permissible to be recognised under the existing system.

In countries such as Australia, Aotearoa/New Zealand, Canada, and the United States of America, the failure of the imported British system to even contemplate flawed sovereignty in any political or legal sense makes the exercise of a right to self-determination within that system a poor, but nevertheless important, second-order outcome. Under the imported British system, the colonies determine the manner and extent to which self-determination is

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61 The Guiding Principles that preceded the National Constitutional Convention cited the need for the Uluru Statement from the Heart to advance 'self-determination and the standards established under the *United Nations Declaration on the Rights of Indigenous Peoples*'. See Reform Council, *Final Report of the Reform Council* (Report, 30 June 2017), 22–4.

62 Jane Robbins, 'A Nation Within? Indigenous Peoples, Representation and Sovereignty in Australia' (2010) 10(2) *Ethnicities* 257, 259.

63 *Western Sahara (Advisory Opinion)* [1975] ICJ Rep 12, 85 (Vice President Ammoun) ('*Western Sahara Advisory Opinion*'); *Mabo No 2* (n 13).

64 *Western Sahara Advisory Opinion* (n 62) 85–6 (Vice President Ammoun) (emphasis in original).

65 *Mabo No 2* (n 13) 31.

exercised, and that judgement cannot be challenged in any court. While something might be better than nothing, self-determination under those conditions remains a very poor second.

Returning to the *Declaration*, it should be observed that it can be implemented domestically in two ways. First, it can be enshrined in domestic legislation. This has occurred in numerous countries worldwide, including Bolivia, under Indigenous President Evo Morales' guidance.[66] However, this has not happened in three of the four objector countries to date.

In Canada, it is significant that the first initiative to do so was a private member's Bill introduced by Romeo Saganash, a Cree lawyer and parliamentarian. That Bill was presented to the Canadian Parliament in 2016 and almost achieved passage in 2019.[67] It would have required all existing legislation to be audited against the *Declaration* and all legislation to be interpreted harmoniously with the *Declaration*.

On 21 June 2021, the *United Nations Declaration on the Rights of Indigenous Peoples Act* SC 2021, c14 was passed by the Canadian Parliament. The Acts' Summary states:

> This enactment provides that the Government of Canada must take all measures necessary to ensure that the laws of Canada are consistent with the United Nations Declaration on the Rights of Indigenous Peoples and must prepare and implement an action plan to achieve the objectives of the Declaration.

The Act contains a provision mandating that the government of Canada 'must, in consultation and cooperation with Indigenous peoples, take all measures necessary to ensure that the laws of Canada are consistent with the Declaration'.[68] Importantly, the Act also entrenches an obligatory reporting cycle, requiring a report be prepared, again 'in consultation and cooperation with Indigenous peoples', within 90 days after the end of the fiscal year.[69] The Report must then be tabled in each house of parliament, and is permanently referred to the parliamentary committees, which review matters relating to Indigenous peoples, and also made public.[70]

Previously in Canada, the Parliament of British Columbia successfully passed legislation on the same topic.[71] To date, the Canadian example remains the only domestic legislative implementation of the Declaration by any of the four objector

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66 The Plurinational State of Bolivia implemented the *Declaration* into its legislation and Constitution. See Centre for International Governance Innovation, *UNDRP and the 2009 Bolivian Constitution: The Internationalization of Indigenous Rights* (Report, 2014).

67 Bill C-262 provided an opportunity for 'reconciliation' and 'that our minimum standards with [I]ndigenous peoples of this country to be set out in the UN Declaration on the Rights of Indigenous Peoples'. See Romeo Saganash, 'Moved that Bill C-262: An Act to Ensure that the Laws of Canada Are in Harmony with the United Nations Declaration on the Rights of Indigenous Peoples' (Speech, 5 December 2017).

68 s 5.

69 s 7(1).

70 s 7(2), (3) & (4).

71 *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c C-44.

countries. In 2019 the Aotearoa/New Zealand government commenced the development of a 'Declaration implementation plan' to set out how the aspirations in the Declaration would be achieved.[72]

The second way the Declaration might achieve domestic effect is from the courts taking into account the Declaration as an expression of international law. One example of the common law's evolution occurred in Brennan J's lead judgment in Mabo No 2, which was referred to earlier. Although the Declaration had not been adopted at the time of the Mabo No 2 decision in 1992, its contents were identifiable as international norms.[73] This is entirely consistent with the Vienna Convention on the Law of Treaties, an international instrument governing international treaties' interpretation and application.[74] It provides, in art 31, that subsequent agreements and subsequent practice shall be taken into account in the interpretation of treaties.

We reiterate our dissatisfaction that in 2012 the High Court did not take the Declaration into account in interpreting the Racial Discrimination Act 1975 (Cth) in the case of Maloney.[75] As discussed above, in Maloney the High Court accepted that alcohol restrictions were a special measure for the Bwgcolman/Palm Island community's benefit, notwithstanding the community's consent was neither adequately sought nor obtained.

Returning to the consideration of First Nations and the articulation of rights in the Declaration, it can be shown that Australia has failed to provide any domestic mechanism for collective self-determination (a matter which the Uluru Statement from the Heart seeks to redress in part). Additionally, there has been a failure to provide adequate protection for cultural heritage (of which Australians were sadly reminded with the destruction of Juukan Gorge in Western Australia).[76] Finally, Australia has failed to provide adequate mechanisms to give effect to the right of First Nations peoples to exercise their free, prior, and informed consent. Consider the example of the Barngarla peoples' opposition to the nuclear waste dump proposed for their country in Kimba, South Australia.[77] The National Indigenous Television network reported that the Australian Electoral Commission ballot conducted in the Kimba Council district returned a 61.58% 'yes' vote to the question 'Do you support the proposed National Radioactive

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72 Aotearoa/New Zealand's government has appointed a working group to provide advice on implementation of the framework. See Nanaia Mahuta, 'Government Moves on UN Rights Declaration' (Speech, 31 March 2019) <https://www.beehive.govt.nz/release/government-moves-un-rights-declaration>.

73 *Mabo No 2* (n 13) 42–3.

74 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTA 331 (entered into force 27 January 1980).

75 *Maloney v The Queen* (n 15).

76 John Southalan, 'Sorry, Not Sorry: The Operation of WA's Aboriginal Heritage Act' *Australian Public Law Blog* (Blog Post, 11 September 2020) <https://auspublaw.org/2020/09/sorry-not-sorry-the-operation-of-was-aboriginal-heritage-act/>.

77 Sarah Martin, 'South Australia Nuclear Waste Dump Could Face Roadblock in Senate', *The Guardian* (online at 26 February 2020) <https://www.theguardian.com/australia-news/2020/feb/26/south-australia-nuclear-waste-dump-could-face-roadblock-in-senate>.

Waste Management Facility being located at one of the nominated sites in the community of Kimba?' By contrast, an independent poll of 209 Barngarla Native Title holders showed that 100 per cent of those who participated voted 'no' to the proposed facility located 20 kilometres from the township.[78] The Barngarla peoples continue to oppose revised plans for a nuclear waste dump on their country.[79]

C *The Domestic Human Rights Framework*

Domestically, there are three jurisdictions in Australia (Victoria, the Australian Capital Territory and Queensland) that have enacted human rights legislation.[80] Each of these jurisdictions had the opportunity to formally implement the *Declaration of the Rights of Indigenous Peoples* in their respective human rights instruments, but none directly or explicitly did so.

A matter for consideration is the potential utility of the *Human Rights Act 2019* (Qld), as it requires decision-makers to take into account, among other matters, the effect of their decisions on the cultural rights of Aboriginal and Torres Strait Islander peoples.[81] To date, this provision has not been tested in the courts, but its potential applications are quite broad.

The constraint on the access to the Queensland *Human Rights Act*, as a mechanism for intervention by the courts into government decision-making, is the requirement that complaints under this Act may only be initiated through a 'piggy-back' on other causes of action.[82] By this, it is meant that a complainant would have to claim another statutory breach, or an administrative law ground of judicial review, in order to make the complaint of a breach of human rights contrary to the *Human Rights Act*.[83] It would nonetheless remain possible to make a human rights complaint to the Queensland Human Rights Commission, rather than commence proceedings in the Queensland Supreme Court.[84]

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78 See Douglas Smith, 'A Unanimous "No" Vote From Traditional Owners on SA's Proposed Nuclear Waste Dump', *SBS* (online at 21 November 2019) <https://www.sbs.com.au/nitv/article/2019/11/21/unanimous-no-vote-traditional-owners-sas-proposed-nuclear-waste-dump>.

79 See Royce Kurmelovs, 'Barngarla Continue Fight Against Plan to Dump Nuclear Waste on Country', *SBS* (online at 29 July 2020) <https://www.sbs.com.au/nitv/article/2020/07/29/barngarla-continue-fight-against-plan-dump-nuclear-waste-country>.

80 *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2004* (ACT); *Human Rights Act 2019* (Qld).

81 *Human Rights Act 2019* (Qld) s 28.

82 Ibid ss 58, 59.

83 Explanatory Memorandum, Human Rights Bill 2018 (Qld) 7-8.

84 *Human Rights Act 2019* (Qld) ss 64, 65.

D *Observations on the Human Rights Frameworks*

While existing human rights law and policy may be called upon to aid those most affected by climate change, the broader answers might not lie in human rights. After all, human rights were designed to protect the weak and the marginalised and promote human wellbeing. The climate change problem faced is not so much human wellbeing, but the wellbeing of the organism that is planet earth. In spiritual terms, many First Nations peoples conceive of this planet as our mother, having an identity, and to whom obligations are owed.

The question, then, is how this conception can be given form in the western legal sense. A precedent for recognising a legal personality in the natural forms has been achieved with the Whanganui River in Aotearoa/New Zealand.[85] When interviewed about the recognition, the lead negotiator for the Whanganui Iwi,[86] Gerrard Albert, stated:

> The reason we have taken this approach is because we consider the river an ancestor and always have. … We have fought to find an approximation in law so that all others can understand that from our perspective treating the river as a living entity is the correct way to approach it, as in indivisible whole, instead of the traditional model for the last 100 years of treating it from a perspective of ownership and management. … We can trace our genealogy to the origins of the universe. And therefore rather than us being masters of the natural world, we are part of it. We want to live like that as our starting point. And that is not an anti-development, or anti-economic use of the river but to begin with the view that it is a living being, and then consider its future from that central belief.[87]

As a result of legislation passed in the Aotearoa/New Zealand parliament, *Te Awa Tupua* (also known as the Whanganui River) has two guardians appointed to act for the river.[88] One guardian is from the government, and the other from the Whanganui Iwi. It is also important to note that the legislation recognising the *Te Awa Tupua* as a legal personality arose in the context of *Treaty of Waitangi* settlement negotiations.[89]

In terms of the proposition that mother earth might be recognised as a legal personality, jurisdictional issues need to be considered. But that is entirely within the domain of those State governments in Australia which are presently embarking on treaty discussions. It would be possible to recognise, at the request of the relevant First Nations, that our mother earth has a legal personality, and is

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85 *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) s 12 ('*Te Awa Tupua Act*').

86 Please note that 'Iwi' translates as clan or tribe.

87 See Eleanor Ainge Roy, 'New Zealand River Granted Same Legal Rights As Human Being' *The Guardian* (online at 16 March 2017) <https://www.theguardian.com/world/2017/mar/16/new-zealand-river-granted-same-legal-rights-as-human-being>.

88 *Te Awa Tupua Act* (n 84).

89 Toni Collins and Shea Esterling, 'Fluid Personality: Indigenous Rights and the *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* in Aotearoa New Zealand' (2019) 20(1) *Melbourne Journal of International Law* 1, 3–4.

entitled have people tasked with the role of guardian who can take steps to protect her from actions occurring within legal reach of that jurisdiction.

Ideally, at a macro-level, it would be desirable to have formal recognition that a legal personality can be accepted for the natural world. This could be achieved, for example, through the development of a United Nations convention on such a topic, which could require all signatory countries to take steps to progress the protection of the natural world and its key features.[90]

The connection between the land and First Nations peoples, this spiritual notion of sovereignty, is something the eminent Pawnee attorney Walter Echo-Hawk develops at length in his book.[91] He casts that connection into the construct of ethics and speaks of the need for an 'American land ethic'.[92] This term, he reminds us, was first used in 1948, and, while embraced by many, never blossomed.[93] According to Echo-Hawk, the absence of a land ethic permits the exploitation of the environment in a wholly unsustainable manner.[94] However, he makes clear that, in his opinion, if the US were to follow the leadership offered by Native Americans, it would instil in that nation some of the ethics that underpin the spiritual notion of belongingness to, and respect for, country.[95] The authors agree with his opinion and say that the same principle could apply in Australia. Without the development of such an ethic globally, our survival as a species is in great peril.

According to Echo-Hawk, colonists conquered the landscape and exercised a form of dominion over the land, people and environment. He argues that the colonial approach to land is one of the primary obstacles to the development of a land ethic that is based in sustainability and respect.[96] He claims the colonist in America only sees the landscape as something to be tamed and exploited for economic return.[97]

Turning to Australia, the *Native Title Act 1993* (Cth) and the determinations of native title made under it, now totalling more than 400 nationally, although only limited to recognition of rights and interests, is perhaps the best representation of State action consistent with the *Declaration* in Australia.[98]

The only other area in which it might be said that Australia has recognised Indigenous rights in a fuller sense is that of citizenry. The High Court of Australia's decision last year in the migration cases *Love v Commonwealth*; *Thoms*

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90 See, eg, the complexity of legal rights for the natural world in the New Zealand context: Abigail Hutchinson, 'The Whanganui River as a Legal Person' (2014) 39(3) *Alternative Law Journal* 179.

91 Walter Echo-Hawk and Anaya James, *In Light of Justice: The Rise of Human Rights in Native America and the UN Declaration on the Rights of Indigenous Peoples* (Fulcrum Publishing, 2018).

92 Ibid 133.

93 Ibid.

94 Ibid.

95 Ibid 138.

96 Ibid 134.

97 Ibid 135.

98 Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)* (Report No 126, 2015) 82.

v Commonwealth ('*Love*; *Thoms*') confirmed that only First Nations are able to determine the question of who are members of a First Nation; the determination of citizenry in this context was outside the remit of the Court.[99]

This article is not intended to be a treatise on native title. However, the decision in *Mabo No 2* in 1992 and the enactment of the Commonwealth *Native Title Act* in 1993 must be acknowledged as a recognition of rights of Indigenous peoples consistent with the *Declaration*, as mechanisms for the prevention or redress from the loss of territories. And even though native title is not, in fact, a form of title to land, but merely the recognition of rights and interests in relation to the land, the native title system in Australia represents the high-point in terms of domestic implementation of the rights later recognised in the *Declaration*.

There is a current example in the same vein, which may be a future exemplar. The Federal Attorney-General has released draft Bills to amend existing human rights legislation in Australia to provide for protection of religious beliefs.[100] In its current form, it seems the Bills, if enacted, could be interpreted to extend protection to First Nations religious beliefs — including those going to the identity and personality of mother earth and the beliefs as to her protection, and health and wellbeing. Notably, though, there is no record of the Attorney-General or the government giving sufficient thought to all the ramifications of such legislation, and the next iteration of the Bills may seek in some way to try to limit the access of First Nations, and perhaps other non-Christian beliefs, to those protections.[101]

This article has not considered the other forms of litigation that may be available or that have been used to challenge decisions by the government to approve projects that contribute to the present process of climate change (which could include but is not limited to environmental law, tort law, administrative law, and consumer protection law). However, any discussion of this topic would not be complete without reference to the decision of the Chief Justice of the New South Wales Land and Environment Court in the Rocky Hill coal mine case, formally known as *Gloucester Resources Limited v Minister for Planning*.[102] In this decision, Preston CJ found on environmental law grounds that the Minister for Planning's decision to refuse the proposed mine because the approval of new coal mines was inconsistent with the State of New South Wales meeting its own self-imposed target of net-zero emission of greenhouse gases by 2050.[103] Preston CJ conducted a comprehensive (if not exhaustive) analysis of the international and domestic climate policy legislative frameworks and climate litigation. It is proper to acknowledge Preston CJ as a thought-leader in environmental and planning

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99 *Love v Commonwealth*; *Thoms v Commonwealth* (2020) 375 ALR 597 ('*Love*; *Thoms*').

100 Religious Discrimination Bill 2019 (Cth); Religious Discrimination (Consequential Amendments) Bill 2019 (Cth); Human Rights Legislation Amendment (Freedom of Religion) Bill 2019 (Cth).

101 Darwin Community Legal Service, Submission to Australian Government Attorney-General's Department, *Religious Freedom Bills – Second Exposure Drafts Consultation* (3 March 2020) 3.

102 *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7 ('*Gloucester Resources*').

103 Ibid [526].

law in response to the climate change crisis. His judgment should be read and cited by all people interested in climate law and policy.

Importantly, after finding that the emissions from the proposed mine would be at least 37.8 megatonnes of CO_2, Preston CJ held:

> It matters not that this aggregate of the Project's GHG [(greenhouse gas)] emissions may represent a small fraction of the global total of GHG emissions. The global problem of climate change needs to be addressed by multiple local actions to mitigate emissions by sources and remove GHGs by sinks.[104]

Further, Preston CJ cited, with approval of Professor Steffen, an expert witness in the proceedings:

> All emissions are important because cumulatively they constitute the global total of greenhouse gas emissions, which are destabilising the global climate system at a rapid rate. Just as many emitters are contributing to the problem, so many emission reduction activities are required to solve the problem.[105]

Finally, concerning the Rocky Hill decision, it is also important to note that Preston CJ further held that the mine should not be approved because there was distributive inequality.[106] In other words, the burden to be borne by the residents in the nearby town of Gloucester was significantly greater than the benefit, and the environmental impact assessment carried out by the proponents did not adequately address nor mitigate those impacts.

The notion of distributive equity operates across society as a whole and requires examination of equity temporally, geographically, and socially. Dr Rebecca Lawrence gave evidence that Aboriginal people particularly suffer distributive inequity because they are 'a historically marginalised group who have experienced considerable impacts and harms from developments, but generally seen few net benefits'.[107] One might ask where the distributive equity is for First Nations, such as the Torres Strait Islander peoples, who will experience profound damage from the development of projects which contribute to increased greenhouse gases.

Turning to Australia's economic context, the Centre for International Development in the Kennedy School at Harvard University issued what it termed 'the Atlas of Economic Complexity'. It explores and analyses 133 national economies worldwide.[108] The Atlas shows that Australia fell from 57th to 93rd between 1995 and 2017. Australia is now in the company of Bangladesh, Cuba, Iran, and Mali on this scale. What this means in layman's terms is that Australia has increasingly relied on mining and exporting minerals and has very little else

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104 Ibid [515].
105 Ibid [450], [515].
106 Ibid [669].
107 Ibid [400].
108 ATLAS of Economic Complexity, 'Atlas of Economic Complexity' (Web Page, 2021) <https://atlas.cid.harvard.edu/>.

in terms of economic diversity to rely upon as a buffer against prolonged commodities downturns.

One question which can and should legitimately be asked is how successive governments allowed themselves to become so captured by the mining sector that Australia's economic security is almost entirely dependent upon one industry. The second question which might be asked is how that could have been allowed to happen given what has been known since well before 1995 — that greenhouse gases were eventually going to require the phasing out of coal. Rather than diversifying Australia's economic base, it has been left with far fewer alternatives. It can be speculated that acting in purely self-interest, the Australian coal sector might have calculated that having the Australian economy so beholden to coal was and is an important strategy in prolonging the government's commitment to coal mining.

In the meantime, Australians all, and particularly First Nations peoples, must insist that every government policy relating to climate change affecting human rights is developed and monitored in collaboration and in a spirit of genuine partnership. Ideally, all policy should be developed in a manner that takes into account the impact upon the rights of First Nations peoples and, with their consent, and makes use of their considerable knowledge. A current example of this occurred with the initiative taken by the Australian Commonwealth Scientific and Industrial Research Organisation ('CSIRO') in March 2021, which hosted 120 Traditional Owners at a five-day meeting in a regional city.[109] Those Elders represented more than 40 different First Nations groups.[110] This work needs to commence immediately with all speed to preserve the ancient wisdom for the preservation of First Nations culture and perhaps for the preservation of the country and all peoples of Australia.

III Legal Education

Many of the actions that can be initiated to address climate change that centre First Nations rights will occur in the political sphere and through the pressure that community engagement can generate. The Uluru Statement from the Heart stands as an open invitation to all Australians to work together on a journey of true reconciliation.

At an institutional level, the legal sector will undoubtedly play a crucial role in the development and recognition of First Nations rights and the inter-relationship between human rights and climate change. Inevitably, disputes

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109 Commonwealth Scientific and Industrial Research Organisation, 'Traditional Owners and Scientists Working To Tackle Common Climate Challenge' (Media Release, 25 March 2021) <https://www.csiro.au/en/news/news-releases/2021/traditional-owners-and-scientists-working-to-tackle-common-climate-challenge>.

110 Ibid.

about climate impacts and government decision-making will be initiated in the court system for resolution. Therefore, a holistic approach is needed to ensure that today's law students can in the future become effective climate advocates, acknowledging and aware of the differential impact of climate change on First Nations peoples. As a matter of priority, attention must be focused on how emerging legal professionals can be equipped with the skills to assume a leading place in future legal climate challenges and human rights developments informed by an appreciation of First Nations perspectives.

There is a substantial body of scholarship and official recognition in Australia that there needs to be greater engagement within the higher education sector generally, and legal education specifically, to embrace and include Indigenous knowledge and lived experiences.[111] In 2008 the Bradley Review of Australian Higher Education concluded First Nations knowledge needed to be recognised as an 'important, unique element of higher education'.[112]

Those conclusions were then reflected in the official policies developed by the peak body for the sector, Universities Australia, who formulated a broad definition of Indigenous cultural competency as:

> Student and staff knowledge and understanding of Indigenous Australian cultures, histories and contemporary realities and awareness of Indigenous protocols, combined with the proficiency to engage and work effectively in Indigenous contexts congruent to the expectations of Indigenous Australian peoples. Cultural competence includes the ability to critically reflect on one's own culture and professional paradigms to understand its cultural limitations and effect positive change.[113]

This was followed in 2012 by the Behrendt Review of Higher Education Access and Outcomes for Aboriginal and Torres Strait Islander people, which made 35 recommendations directed to universities and the Australian government

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111 Jack Frawley, Gabrielle Russell and Juanita Sherwood (eds), *Cultural Competence and Higher Education Sector: Australian Perspectives, Policies and Practice* (Springer, 2020). For the legal education context, see Marcelle Burns and Jennifer Nielsen, 'Dealing with the "Wicked" Problem of Race and the Law: A Critical Journey for Students (and Academics)' (2018) 28(2) *Legal Education Review* 375, 403, and related scholarship by Irene Watson and Marcelle Burns, 'Indigenous Knowledges: A Strategy for First Nations Peoples Engagement in Higher Education' in Sally Varnham, Patty Kamvounias and Joan Squelch (eds), *Higher Education and the Law* (Federation Press, 2015) 41. See also Heather Douglas, 'Indigenous Legal Education: Towards Indigenisation' (2005) 6(8) *Indigenous Law Bulletin* 12. More recently, see Ambelin Kwaymullina, 'Teaching for the 21st Century: Indigenising the Law Curriculum at UWA' (2019) 29 *Legal Education Review* 155 ('Teaching for the 21st Century').

112 Denise Bradley et al, *Review of Australian Higher Education* (Final Report, December 2008) 33.

113 Universities Australia, *National Best Practice Framework for Indigenous Cultural Competency in Australian Universities* (Framework, October 2011) 48. See also Universities Australia, 'Universities Australia's Indigenous Strategy 2017–2020' (Web Page) <https://www.universitiesaustralia.edu.au/policy-submissions/diversity-equity/universities-australias-indigenous-strategy-2017-2020/> and related annual reports issued on the implementation of the Indigenous Strategy.

designed to form a comprehensive package of reforms to improve the cultural understanding and awareness of staff and students.[114]

Acting to support these accumulated insights, the Indigenous Cultural Competency for Legal Academics Program ('ICCLAP') was established to engender action in legal education specifically. In 2019, ICCLAP issued a Final Report which set down a pathway for action in legal education. In that report, ICCLAP advocated that cultural competence should be an attribute of all law graduates, and it defined cultural competency as being primarily about 'fostering meaningful cross-cultural dialogue'.[115]

ICCLAP articulated one of the guiding principles for embedding Indigenous cultural competency in legal education, was to enable:

> [W]ork-integrated learning with Indigenous communities and organisations, providing transformative learning experiences that are effective in changing attitudes. Such programs must be done ethically, ensure cultural safety and be adequately supported so as not to create a burden on communities or organisations. Indigenous and non-Indigenous 'peer-to-peer relationships' are effective at building cultural understanding and promoting two-way learning.[116]

Most recently, the peak body for Australian law schools, the Council of Australian Law Deans ('CALD'), recognised the importance of First Nations perspectives and experiences of the law. It released a Statement on Australian Law's Systemic Discrimination and Structural Bias Against First Nations Peoples on 3 December 2020:

> CALD urges all Australian law schools to work in partnership with First Nations peoples to give priority to the creation of culturally competent and culturally safe courses and programs. In so doing, CALD acknowledges the part that Australian legal education has played in supporting, either tacitly or openly, the law's systemic discrimination and structural bias against First Nations peoples. At the same time, CALD affirms the positive contribution Australian law schools can, should and will make, in full partnership with First Nations peoples, in exposing, critiquing and remedying all forms of institutionalised injustice.[117]

Furthermore, the Australian Law School Standards, developed by the CALD, have been updated to include new areas of knowledge required for law degrees. In 2020

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114 *Review of Higher Education Access and Outcomes for Aboriginal and Torres Strait Islander People* (Final Report, July 2012) xvii. The Review of Higher Education Access and Outcomes for Aboriginal and Torres Strait Islander People highlighted the need for Indigenous Cultural Competency in university education. For analysis of the challenge of including Indigenous contexts in the law curriculum, see Kate Galloway, 'Indigenous Contexts in the Law Curriculum: Process and Structure' (2018) 28(2) *Legal Education Review* 1.

115 Marcelle Burns, Anita L Hong and Asmi Wood, *Indigenous Cultural Competency for Legal Academics Program* (Final Report, 2019) 16.

116 Burns, Hong and Wood (n 108) 20.

117 Council of Australian Law Deans, 'CALD Statement on Australian Law's Systemic Discrimination and Structural Bias Against First Nations Peoples (Statement, 3 December 2020) <https://cald.asn.au/blog/2020/12/03/cald-statement-on-australian-laws-systemic-discrimination-and-structural-bias-against-first-nations-peoples/>.

these standards included a statement that the law curriculum will 'develop knowledge and understanding of Aboriginal and Torres Strait Islander perspectives on and the intersections with the law'.[118] Whilst CALD had previously taken the initiative to facilitate the internationalisation of the law curriculum, it is notable that climate change is yet to be embedded into the Australian Law Schools Standards. Therefore, it is recommended that CALD continue to update and revise its standards to reflect current legal challenges likely to confront and be actioned by future legal practitioners, such as climate change.

There has been action and widespread, worldwide recognition of the impending need for changes in legal education to address the rights and interests of First Nations peoples.[119] Two specific and practical examples illustrate this shared understanding. Firstly, in Canada, the Final Report of the Truth and Reconciliation Commission ('TRC') stated, 'there has to be awareness of the past, acknowledgement of the harm that has been inflicted, atonement for the causes, and action to change behaviour.'[120] The TRC issued Calls For Action (rather than the more traditional term recommendations) with Calls 27 and 28 directed at Law Societies and Law Schools, respectively. The Federation of Law Societies of Canada is called upon to ensure lawyers receive appropriate skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism. Law schools are similarly called upon to provide training in all the same areas for law students, and to require all law students to 'take a course in Aboriginal people and the law', with an express reference to the *Declaration.*[121]

Secondly, a positive and impactful development of interest has occurred in Aotearoa/New Zealand. The *Te Kaupeka Tăti Ture* (Faculty of Law) at Te Whare Wănanga o Otăgo (Otago University) has released research that highlights the need to restructure its curriculum on the basis that Aotearoa/New Zealand has a bijural, bicultural and bilingual legal system.[122] Thus, there is evidence of the necessity to recognise Măori Law as a foundational component of the legal system there, and consequently in legal education. The research was supported and co-branded with every one of the six law schools in Aotearoa/New Zealand. The research report concluded '[t]here can be no systemic change to how we

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118 Council of Australian Law Deans, 'Australian Law School Standards with Guidance Notes', *Resources* (Web Page, 30 June 2020) <https://cald.asn.au/wp-content/uploads/2020/07/Australian-Law-School-Standards-v1.3-30-Jul-2020.pdf>.

119 Pooja Parmar, 'Reconciliation and Ethical Lawyering: Some Thoughts on Cultural Competence' (2019) 97(3) *Canadian Bar Review* 526; Kwaymullina, 'Teaching for the 21st Century' (n 104).

120 Government of Canada/The Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Report, 2015) 6–7.

121 Ibid 215.

122 Michael and Suzanne Borrin Foundation, *Inspiring National Indigenous Legal Education for Aotearoa New Zealand's Bachelor of Laws Degree* (Report, 2020) <https://www.borrinfoundation.nz/wp-content/uploads/2020/08/Inspiring-National-Indigenous-Legal-Education-Phase-1-Report.pdf>.

understand law in a contemporary Aotearoa New Zealand if we do not teach it differently in our law schools'.[123]

In terms of Australian developments in moves to Indigenise the law curriculum, the 2019 article by Ambelin Kwaymullina is comprehensive in its guidance and wisdom explaining the process of Indigenisation at the University of Western Australia (UWA) Law School.[124] Kwaymullina explained the three key understandings needed in developing cultural competency as:

> First, ... it is a journey not a destination; ...Second, ... an understanding of Indigenous peoples and contexts, ... Third, ... an ability to articulate and critically engage with one's own cultural and professional contexts.[125]

Kwaymullina emphasises the importance of equitable partnerships between Indigenous and non-Indigenous people as being 'vital to the success of any Indigenisation project',[126] and outlines 15 principles which justify and guide the UWA Indigenisation project.[127] She advises that it is critical that Indigenisation be relational and collaborative.[128] In recommending that Indigenisation must be integrated into the whole of the law degree and not contained within a specialist, elective subject, Kwaymullina acknowledges a main potential source of academic resistance —there is not enough space in the curriculum to absorb any additional content.[129]

The authors fully support and amplify all points made by Kwaymullina and, noting her advice, therefore offer a suggestion to counter any potential academic resistance or hesitancy. The Indigenisation of any law curriculum need not require the insertion of additional new content, but rather the cases analysed, and case studies explored, in any course can be switched to emphasise those that simultaneous allow engagement with First Nations knowledges and perspectives.

For example, in respect of the Australian Priestley 11 compulsory subjects, the authors offer the following indicative examples of potential content. In Criminal Law subjects, there could be focus on the Royal Commission into Aboriginal Deaths in Custody and its recommendations.[130] Tort Law could include a case study or tutorial/seminar examination of the concept of 'duty of care' through examination of the Stolen Generation compensation cases (*Cubillo v Commonwealth*, *Kruger v Commonwealth* and *Trevorrow v South Australia [No 5]*).[131] In Contract Law, two possible options are a focus on one of the leading substantive

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123 Ibid 46.
124 Kwaymullina, 'Teaching for the 21st Century' (n 104).
125 Ibid 172–3.
126 Ibid 160.
127 Ibid171–2.
128 Ibid 176.
129 Ibid 181.
130 *Royal Commission into Aboriginal Deaths in Custody* (Final Report, 1991).
131 *Cubillo v Commonwealth* (1999) 89 FCR 528 (strike out application); *Cubillo v Commonwealth [No 2]* (2000) 103 FCR 1 (trial); *Cubillo v Commonwealth* (2001) 112 FCR 455 (appeal); *Kruger v Commonwealth* (1997) 190 CLR 1; *Trevorrow v South Australia [No 5]* (2007) 98 SASR 136.

cases which features an Aboriginal party (*Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd*),[132] or a case study on misleading and deceptive conduct in respect of First Nations cultural designs as determined in the recent case of *Australian Competition and Consumer Commission v Birubi Art Pty Ltd*.[133] In Land Law or Property Law subjects, a critical examination could be undertaken of the native title, land rights systems in Australia and modern developments such as Indigenous Land Use Agreements. For Equity/Trusts, a case study on the settlement reached in the stolen wages class action case launched by First Nations peoples would be instructive.[134] Constitutional Law is rich with potential content, such as the invitation for Constitutional enshrinement of Voice made in the Uluru Statement from the Heart, or the recent cases of *Love*; *Thoms*.[135] In Administrative Law, there are several cases which could be featured such as *Onus v Alcoa of Australia Ltd* and *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd*,[136] both of which determined public interest standing for First Nations peoples or organisations. There is also the excellent article by Alexander Reilly which contains many other ideas for incorporating Indigenous perspectives into Administrative Law.[137] In Civil Dispute Resolution and Civil Procedure subjects, a case study could feature an interrogation of the impact of time limits on historical claims (such as Stolen Generations or Stolen Wages) or the use of class actions to redress past injustices. Evidence Law courses could refer to the Australian Law Reform Commission Report on Customary Law.[138] Corporations or Company Law could focus on the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) or the national Indigenous Procurement Policy.[139] There is also the excellent article by Heron Loban which contains many other ideas for incorporating Indigenous perspectives into corporate law subjects.[140] Last but by no means least, Legal Ethics courses could highlight the

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132 (2007) 233 CLR 115.

133 [2018] FCA 1595.

134 Further information can be located at Stolen Wages Settlement, 'Update on Finalisation of Stolen Wages Administration' (Web Page, 2021) <https://www.stolenwages.com.au/>.

135 *Love*; *Thoms* (n 92).

136 *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27; *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247.

137 Alexander Reilly, 'Finding an Indigenous Perspective in Administrative Law' (2009) 19(2) *Legal Education Review* 271.

138 Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws* (Report No 31, June 1986).

139 Further information can be located at National Indigenous Australians Agency, 'Indigenous Procurement Policy' (Web Page, 2021) <https://www.niaa.gov.au/indigenous-affairs/economic-development/indigenous-procurement-policy-ipp>.

140 Heron Loban, 'Embedding Indigenous Perspectives in Business Law' (2011) 5(2) *e-Journal of Business Education and Scholarship of Teaching* 11.

various Australian law society protocols/guides for working with First Nations clients.[141]

The authors agree with Young, who argues that 'lawyers dealing with climate change require proficiency across different areas of law, not just the law that seeks to limit greenhouse gases'.[142] Therefore, as other articles in this special edition have argued, climate change needs to be embedded into the law curriculum in both compulsory subjects and stand-alone electives. Equally, Australian legal education also needs to be reformed to ensure that emerging lawyers are exposed throughout their law studies to Indigenous perspectives on the law. If these two initiatives were simultaneously incorporated into the law curriculum, new law graduates would then be able to make the connection between First Nations perspectives on the law and how the law can be a site of reform and redress for climate change.

The actions of Australian law schools to embrace and embed First Nations knowledges and lived experiences throughout the law curriculum will ensure that future law graduates are equipped with awareness about the differential impact the law and justice system can have on Frist Nations peoples. These insights can in turn provide the foundational understanding of the importance of and disparity in impact climate change has in First Nations communities. Without a broader awareness of First Nations issues, the capacity of Australian law graduates to advocate on climate change and contribute to the design of culturally informed and sensitive responses to climate change will be lessened.

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141 For example, the Northern Territory Law Society has issued Indigenous protocols for lawyers: see Law Society Northern Territory, 'Indigenous Protocols For Lawyers' (Web Page, 2015) < https://www.lawsociety.com.au/sites/default/files/2018-03/indigenous_protocols_for_lawyers_0.pdf>. The Law Society of NSW has issued a resource document on Working with Indigenous Clients: see Law Society of New South Wales, 'Working With Indigenous Clients' (Web Page) <https://www.lawsociety.com.au/about-us/Law-Society-Initiatives/indigenous-issues/working-with-indigenous-clients>. The Law Society of Western Australia has issued protocols: see Law Society of Western Australia, 'Protocols for Lawyers with Aboriginal or Torres Strait Islander Clients in Western Australia' (Web Page) <https://www.lawsocietywa.asn.au/wp-content/uploads/2015/10/Protocols-for-Lawyers-with-Aboriginal-or-Torres-Strait-Islander-Clients-in-Western-Australia.pdf>. The Law Society of South Australia has similarly issued protocols, see Law Society of South Australia, 'Law Society of South Australia, Lawyers' Protocols for Dealing with Aboriginal Clients in South Australia' (Web Page, 2020) <https://www.lawsocietysa.asn.au/Public/Publications/Guidelines/Lawyers_Protocols_for_Dealing_with_Aboriginal_Clients.aspx>. The Law Society of Queensland has numerous resources developed by its First Nations Consulting Committee available on its website: see Queensland Law Society, 'First Nations Links' (Web Page) <https://www.qls.com.au/For_the_profession/First_Nations_Links>. Legal Aid Queensland has also issued best practice guidelines: see Legal Aid Queensland, 'Lawyers Working with Aboriginal and Torres Strait Islander Clients', *Best Practice Guidelines* (Web Page, 2016) <https://www.legalaid.qld.gov.au/About-us/Policies-and-procedures/Best-practice-guidelines/Lawyers-working-with-Aboriginal-and-Torres-Strait-Islander-clients>.

142 Margaret A Young, 'Climate Change and Law: A Global Challenge for Legal Education' (2021) 40(3) *The University of Queensland Law Journal* 351.

IV Conclusion

A holistic approach is necessary to tackle the conundrum of First Nations peoples and climate change. For any responses to climate change to be effective, actions must be grounded in the perspectives, knowledge, and rights of First Nations peoples. Recognition of the vital contribution of First Nations peoples to the protection of our environment is manifest in the *Declaration of the Rights of Indigenous Peoples*. It is hoped that Australia will move to enshrined in domestic legislation in the near future, mirroring the evolutionary trajectory of Canada.

As established in this article, recent developments around the globe demonstrate that human rights instruments have the potential to protect First Nations' interests in a climate change context. In the Australian legal system, where human rights protection is most effective when enshrined in domestic legislation, there needs to be a commitment to legal reform. Options for reform should be informed by advances from other nations that recognize and respect the connection between First Nations peoples and the land. In the interim, human rights arguments in Australia rely predominately on anti-discrimination legislation and/or the articulation and acceptance of novel interpretations of international instruments and the evolution of international human rights norms through common law.

Concomitantly, the legal sector can be a force for positive change. Structural change must begin with both the Indigenisation of legal education and simultaneously embedding legal responses to climate change into the Australian law curriculum. Understanding and promoting human rights at a domestic level will provide a first step in addressing the inordinate impact of climate change on First Nations peoples. Understanding the compelling need for embedding First Nations knowledges and lived experience into the law curriculum will have a multitude of positive consequences. One of the most important will be the ability to accept, recognise and prioritise the perspectives, knowledge, and rights of First Nations peoples and draw on this to advocate and assist in responding to the challenges of climate change.

TEACHING PRIVATE LAW IN A CLIMATE CRISIS

NICOLE GRAHAM*

First Nations analyses, climate science, social science and legal research indicate the significant role of private law in facilitating the conditions of climate change. Private law is a contingent feature of planetary health because its key concepts and institutions concentrate the legal rights to capital — the goods of life — in the private sphere. Private entitlements can act as shields against collective interests. Reforming law to address the climate crisis involves greater regulation of private interests to pursue the global goal of sustaining organised human societies, and thus addressing conflict between individual freedoms and collective exigencies. Reform depends on a differently educated generation of legal thinkers and practitioners.

I INTRODUCTION

The abstract conceptual fundaments of the logic of private law — the autonomous individual, legal personality, a legal right, a security, a boundary, alienability, exclusion, fault, agreement, limited liability, etc — are theoretically unaffected by materiality. But, the physical manifestation of climate change challenges the logic and the operation of private law in numerous ways. The way that private law is practised will necessarily change as disputes escalate over resource insecurity; the meaning of damage and harm; where land, and riparian and littoral boundaries, have migrated; and what this means for title and risk, foreseeability, reasonableness and vulnerability. On one view, climate change and the challenges it presents destabilise private law, and on another view they provide opportunities for reform. Either way, 'the significance of crises is the indication they provide that an occasion for retooling has arrived'.[1] Effective law reform depends on a differently educated generation of legal thinkers and practitioners. Legal education is, therefore, central to overcoming the institutional 'barriers to climate change adaptation'.[2]

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1 Thomas Kuhn, *The Structure of Scientific Revolutions* (Chicago University Press, 3rd ed, 1996) 76.

2 Jan McDonald, 'Mapping the Legal Landscape of Climate Change Adaptation' in Tim Bonyhady, Andrew Macintosh and Jan McDonald (eds), *Adaptation to Climate Change: Law and Policy* (Federation Press, 2010) 8.

DOI: 10.38127/uqlj.v40i3.6047

In addition to changing the way we 'do' private law — innovating its practice and operation — we also need to reformulate the discursive constructs of legal subjectivity and entitlement and the viability of the private–public taxonomy. First Nations analyses, climate science, social science and legal research indicate the central role of private law in facilitating the conditions of climate change. Private law is a contingent feature of planetary health because its key institutions, the corporation and private property, concentrate the legal rights to capital — the goods of life — in the private sphere. Private entitlements can act as shields against collective interests. Legal education plays an important role in facilitating or redressing climate change by reproducing or questioning the knowledge and skills used by generations of legal professionals and policy-makers to legitimate and prohibit economic and social relations and practices. By moving beyond a 'business-as-usual' approach to teaching private law, we could enable law graduates to contribute to a just transition to an environmentally viable future.

There are innumerable consequences of climate change. This article assumes that most of us are familiar with them, either generally or in detail, with corresponding degrees of pessimism.[3] Unfortunately, this pessimism might, in turn, manifest in various 'discourses of climate delay'.[4] The trouble with '"climate delay" discourses' is that they 'often lead to … a sense that there are intractable obstacles to taking action'.[5] The task of legal educators is first to work against any tendency to resignation and inaction in ourselves and then to encourage and enable law students to take on the challenge of rethinking and reframing the legal architecture and operation of climate change inducing law. Changing the way we teach private law might not be easy; change rarely is. There might be resistance from a range of stakeholders including teachers, students and the profession. But, in the third decade of the 21st century, law students are part of a generation of climate-striking children and young adults who are adopting a range of strategies, including litigation, to campaign against a range of unsustainable institutional forms and activities including the investment of superannuation funds in non-sustainable resources, the issuing of forestry licences and, more generally, the failure of governments to act in the best interests of future generations.[6] Teaching private law in a climate crisis is

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3 SR Morton, 'On Pessimism in Australian Ecology' (2017) 42(2) *Austral Ecology* 122, 122.

4 William F Lamb et al, 'Discourses of Climate Delay' (2020) 3 *Global Sustainability* 1.

5 Ibid.

6 See, eg, *Minors Oposa v Secretary of State of the Department of Environment and Natural Resources (DENR)* (1994) 33 ILM 173; *Mathur v Ontario* [2020] ONSC 6918; *Waratah Coal Pty Ltd v Youth Verdict Ltd* [2020] QLC 33; *O'Donnell v Commonwealth* [2021] FCA 1223; *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment (Commonwealth)* (2021) 391 ALR 1; *Juliana v United States*, 217 F Supp 3d 1224 (D Or, 2016), revd 947 F 3d 1159 (9th Cir, 2020). For commentary, see Rachel Johnston, 'Lacking Rights and Justice in a Burning World: The Case for Granting Standing to Future Generations in Climate Change Litigation' (2016) 21(1) *Tilburg Law*

challenging and important because of the role private law plays in the facilitation of climate change, and also because some law students are already mindful, and often motivated, to be agents of positive change. Teaching private law in a climate crisis can assist legal and policy professionals-to-be 'to understand trade-offs, to make choices and to invent solutions that can help us integrate choices that are environmentally sustainable within a larger framework of how we live'.[7] There are two parts to the argument in this article. The first set outs the significant relationship between climate change and private law. The second considers how legal education might disrupt and reformulate that relationship through the strategic adoption of alternative pedagogies towards supporting students in thinking about and eventually practising private law differently.

II Climate Change and Private Law

Climate change is part of the Earth's history. Presently, the Earth's climate is changing rapidly and significantly. The year 2020 was the warmest on record (tied with 2016),[8] with a global mean temperature of 1.2 degrees Celsius above pre-industrial levels. According to Petteri Taalas, the Secretary-General of the the World Meteorlogial Organisation, these 'are more than just statistics. Increasing temperatures mean more melting ice, higher sea levels, more heatwaves and other extreme weather, and greater impacts on food security, health, the environment and sustainable development.'[9] Higher global temperatures are driven by a range of factors, including greenhouse gas concentrations in the atmosphere. There is 45% more carbon dioxide in the atmosphere today than at the time of the Industrial Revolution, with the current level the highest it has been for at least 800,000 years.[10] Despite the COVID-19 pandemic, these concentrations rose in 2020. At current levels of emissions, 'the world remains on course to exceed the agreed temperature thresholds of … 2°C above pre-industrial

Review 31; Joel A Mintz, 'They Threw up Their Hands: Observations on the US Ninth Circuit Court of Appeals' Unsatisfying Opinion in *Juliana v United States*' (2020) 38(2) *Journal of Energy & Natural Resources Law* 201.

7 Fernando M Reimers, 'The Role of Universities Building an Ecosystem of Climate Change Education' in Fernando M Reimers (ed), *Education and Climate Change: The Role of Universities* (Springer International Publishing, 2021) 1, 8.

8 NASA, 'Global Temperature,' *Global Climate Change: Vital Signs of the Planet* (Web Page, 28 September 2021) <https://climate.nasa.gov/vital-signs/global-temperature/>.

9 Secretary-General Professor Petteri Taalas quoted in World Meteorological Organisation, 'New Climate Predictions Increase Likelihood of Temporarily Reaching 1.5 °C in Next 5 Years' (Press Release 27052021, 27 May 2021) <https://public.wmo.int/en/media/press-release/new-climate-predictions-increase-likelihood-of-temporarily-reaching-15-%C2%B0c-next-5>. See also World Meteorological Organisation, *State of the Global Climate 2020: Provisional Report* (Report, 2020) 2 <https://library.wmo.int/doc_num.php?explnum_id=10444>.

10 Climate Council, 'What Is Climate Change and What Can We Do About It?', *Resources* (Web Page, 16 October 2019) <https://www.climatecouncil.org.au/resources/what-is-climate-change-what-can-we-do/>.

levels'.[11] Worse still is the very real risk that such an increase could be locked in without immediate decarbonisation because 'it takes centuries to millenia for carbon dioxide already present in the atmosphere to be removed by natural processes'.[12] 'Carbon lock-in generally constrains technological, economic, political, and social efforts to reduce carbon emissions.'[13]

The seriousness of climate change data has transformed the discourse of scientists, who have conventionally been known for their cool detachment and objectivity. Scientists are changing their audience, their position in the world, and also their communication, translating complex, technical data (gathered over several decades by tens of thousands of scientists across a wide range of fields) into accessible information with a clear and unequivocal narrative of crisis. Frustrated by political inertia, scientists are now sounding alarm bells and publishing 'warnings' for public information. In November 2019, over 11,000 scientists from 153 countries declared 'clearly and unequivocally that planet Earth is facing a climate emergency'.[14] According to current data, 'we need bold and drastic transformations'[15] of the status quo to 'avoid untold suffering due to the climate crisis'.[16] The discursive shift from objective detachment to dire warnings corresponds with the unprecedented scale and impact of harms that the data records and predicts.

Climate change is not attributed to 'the human species as an undifferentiated whole' but rather to 'the operation of a specific economic system promoted by a global minority'.[17] Indeed, 'paramount to understanding the underlying causes and consequences of climate change'[18] is the identification of a highly particular and relatively recent economic model and attendant legal regime, rather than an inherently human condition. The critical analysis and synthesis of trade, GDP and emissions data point to the correspondence of 'Northern' affluence through 'appropriation (of labour and land)' and its corollary 'displacement (of work and

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11 World Meteorological Organization, *WMO Provisional Statement on the State of the Global Climate in 2019* (Provisional Statement, 2019) 24 <https://library.wmo.int/doc_num.php?explnum_id=10108>.

12 Valérie Masson-Delmotte et al (eds), *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, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, and Efforts to Eradicate Poverty* (IPCC, 2018) 9.

13 Karen C Seto et al, 'Carbon Lock-In: Types, Causes, and Policy Implications' (2016) 41(1) *Annual Review of Environment and Resources* 425, 427.

14 William J Ripple et al, 'World Scientists' Warning of a Climate Emergency' (2020) 70(1) *BioScience* 8, 8.

15 Ibid 10.

16 Ibid 8.

17 Alf Hornborg, 'Colonialism in the Anthropocene: The Political Ecology of the Money-Energy-Technology Complex' (2019) 10(1) *Journal of Human Rights and the Environment* 7, 8. See also Donna Haraway, 'Anthropocene, Capitalocene, Plantationocene, Chthulucene: Making Kin' (2015) 6(1) *Environmental Humanities* 159; Bruno Latour, 'Agency at the Time of the Anthropocene' (2014) 45(1) *New Literary History* 1.

18 Eduardo S Brondizio et al, 'Re-Conceptualizing the Anthropocene: A Call for Collaboration' (2016) 39 *Global Environmental Change* 318, 322.

environmental loads)' with climate change.[19] Hornborg concludes that 'even those of us who are most intent on saving the planet count among its heaviest burdens'.[20] This is increasingly recognised by climate scientists: '[t]he most affluent countries are mainly responsible for the historical GHG emissions and generally have the greatest per capita emissions'.[21]

Critical analysis of climate change data reveals that there are no solutions available to us by reproducing the economic models and legal doctrines 'born in colonial Britain'.[22] We need to think and learn about the world differently. In particular, there is an urgency for the world's affluent population living in 'nice places'[23] 'to open their eyes wide and to see and know law beyond the colonialist foundation.'[24] That foundation framed 'the natural world as property … [that] is divided up for sale, profit and exploitation'.[25] 'Questions of *episteme* (understanding)[,] *techne* (practice) and *phronesis* (values and power) arise simultaneously.'[26] Consequently, 'climate change calls on academics to rise above their disciplinary prejudices, for it is a crisis of many dimensions'[27] requiring a '"joined-up" analysis of the highest order, both within and between the environmental and social sciences'.[28] Social sciences and humanities researchers have already started to read and respond to scientific research data 'as an input'[29] and worked to connect it to relevant analyses of economies, laws, financial systems, political systems, social systems, histories and cultures. This work leads to more accurate and focused understandings of the precise locus of the problem so that effective solutions might become possible. The questions for law as a discipline, and for its practitioners, teachers, and students, are these: What is law's role in producing climate change? How could law work differently?

Legal scholars have researched the relationship of law to climate change both as a contributing factor (input) as a major socio-economic institution, and as an effect of climate change through direct regulatory responses to changing

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19 Hornborg (n 17) 15, 18.
20 Ibid 21.
21 Ripple et al (n 14) 8.
22 Hornborg (n 17) 16.
23 Val Plumwood, 'Shadow Places and the Politics of Dwelling' (2008) 44 (March) *Australian Humanities Review* 139.
24 Irene Watson, 'Aboriginal Relationships to the Natural World: Colonial "Protection" of Human Rights and the Environment' (2018) 9(2) *Journal of Human Rights and the Environment* 119, 138 ('Aboriginal Relationships to the Natural World').
25 Ibid 126.
26 Noel Castree, 'The Anthropocene and Geography I: The Back Story' (2014) 8(7) *Geography Compass* 436, 444 (emphasis in original).
27 Dipesh Chakrabarty, 'The Climate of History: Four Theses' (2009) 35(2) *Critical Inquiry* 197, 215.
28 Castree (n 26) 444.
29 Peter G Brown and Jon D Erickson, 'How Higher Education Imperils the Future: An Urgent Call for Action' (2016) 2 *Balance* 42, 43.

circumstances.[30] They have observed that there is a direct relationship between particular regulatory frameworks, legal practices and patterns of adverse environmental change. English legal scholar Anna Grear argues that 'patterned and predictable global and globalizing distributions of intra-species and inter-species injustice' are so 'foundational' that 'the current ecological crisis cannot really be understood without them'.[31] Legal research clearly suggests that the institutionalised and legally protected entitlement to, and the accumulation and disposal of, 'Cheap Nature'[32] at 'the scale of the global', established by European and British imperial powers in their colonisation of other places and peoples in the world,[33] is a leading agent of climate change.

First Nations scholarship also records the adverse impact of European and British colonisation and legal institutions on the landscapes and countries from which diverse Indigenous legal regimes derive.[34] The holistic ontologies of First

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30 Bram Akkermans, 'Sustainable Property Law: Towards a Revaluation of Our System of Property Law' in Bram Akkermans and Gijs van Dijck (eds), *Sustainability and Private Law* (Eleven International Publishing, 2020) 37; Rosemary Rayfuse, 'The Anthropocene, Autopoiesis and the Disingenuousness of the Genuine Link: Addressing Enforcement Gaps in the Legal Regime for Areas beyond National Jurisdiction' in Erik J Molenaar and Alex G Oude Elferink (eds), *The International Legal Regime of Areas beyond National Jurisdiction: Current and Future Developments* (Martinus Nijhoff Publishers, 2010) 165; William Boyd, 'Climate Change, Fragmentation, and the Challenges of Global Environmental Law: Elements of a Post-Copenhagen Assemblage' (2010) 32(2) *University of Pennsylvania Journal of International Law* 457; Louis J Kotzé, 'Rethinking Global Environmental Law and Governance in the Anthropocene' (2014) 32(2) *Journal of Energy and Natural Resources Law* 121; Shalanda Helen Baker, 'Adaptive Law in the Anthropocene' (2015) 90(2) *Chicago-Kent Law Review* 563; Eric Biber, 'Law in the Anthropocene Epoch' (2017) 106(1) *Georgetown Law Journal* 1; Sally Wheeler, 'The Corporation and the Anthropocene' in Louis J Kotzé (ed), *Environmental Law and Governance for the Anthropocene* (Hart Publishing, 2017) 289; John G Sprankling, 'Property Law for the Anthropocene Era' (2017) 59(3) *Arizona Law Review* 737; Tim Stephens, 'Governing Antarctica in the Anthropocene' in Elizabeth Leane and Jeffrey McGee (eds), *Anthropocene Antarctica: Perspectives from the Humanities, Law and Social Sciences* (Routledge, 2019) 17; Anna Grear, 'Deconstructing Anthropos: A Critical Legal Reflection on "Anthropocentric" Law and Anthropocene "Humanity"' (2015) 26(3) *Law and Critique* 225; Anna Grear, '"Anthropocene, Capitalocene, Chthulucene": Re-encountering Environmental Law and its "Subject" with Haraway and New Materialism' in Louis J Kotzé (ed), *Environmental Law and Governance for the Anthropocene* (Bloomsbury, 2017) 77; Andreas Philippopoulos-Mihalopoulos, 'Critical Environmental Law in the Anthropocene' in Louis J Kotzé (ed), *Environmental Law and Governance for the Anthropocene* (Hart Publishing, 2017) 117; Alain Pottage, 'Holocene Jurisprudence' (2019) 10(2) *Journal of Human Rights and the Environment* 153.

31 Grear (n 30) 85.

32 Jason W Moore, 'The End of Cheap Nature' in Christian Suter and Christian Chase-Dun (eds), *Structures of the World Political Economy and the Future of Global Conflict and Cooperation* (LIT Verlag, 2014) 285.

33 Grear (n 30) 83.

34 Nicole Redvers et al, 'Indigenous Natural and First Law in Planetary Health' (2020) 11(29) *Challenges* 1. See also Clinton L Beckford et al, 'Aboriginal Environmental Wisdom, Stewardship and Sustainability: Lessons from the Walpole Island First Nations, Ontario, Canada' (2010) 41(4) *Journal of Environmental Education* 239; John Borrows, 'Earth-Bound: Indigenous Laws and Environmental Reconciliation' in Michael Asch, John Borrows and James Tully (eds), *Resurgence and Reconciliation: Indigenous–Settler Relations and Earth Teachings* (University of Toronto Press,

Nations laws highlight and confound the anthropocentric logic of Cheap Nature through which Western laws construct regimes of dispossession[35] and entitlement:

> North American environmental and democratic systems are straining to sustain their current level of economic activity and material consumption … [and] [t]he viability of our settlements requires that our ideologies and decision-making structures take account of the fact that we are embedded in nature.[36]

First Nations laws are largely place-based — that is, particular to specific and dynamic geographical conditions and limits — rather than universal and abstract. Although there is no pan-Indigenous legal regime, many place-based Indigenous laws foreground the authority, contingency and presence of non-human life, the interdependence of all life, and the situation of life in the dynamism of time.[37] Place-based laws are at odds with legal regimes that facilitate economic models of infinite growth and global development.[38]

Many private law concepts and doctrines were developed to protect and defend the socio-economic institutions that facilitated climate change: 'a growth-based economy with its attendant political and economic philosophies of liberalism and capitalism'.[39] The taxonomic dichotomy of public law and private law is regarded as 'a keystone of the semantic architecture of Western law'[40] and is ordered hierarchically. Although the significance of the categories and the differences between them vary across jurisdictions and legal cultures, it is generally understood (if not accepted) that the distinction between private law and public law hinges on whether 'there is a legitimate basis for the law to regulate that conduct, or, to the contrary, it is a domain of unregulated individual choice in which the law does not belong'.[41] The research of legal historian Dan Priel suggests that the origins of the taxonomic separation of public law and

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2018) 49; Kim TallBear, 'Caretaking Relations, Not American Dreaming' (2019) 6(1) *Kalfou* 24; Watson (n 25); Marcia Langton, 'The "Wild", the Market and the Native: Indigenous People Face New Forms of Global Colonization' in William Adams and Martin Mulligan (eds), *Decolonizing Nature: Strategies for Conservation in a Post-Colonial Era* (Earthscan Publications, 2003) 79.

35 Michael Levien, 'Regimes of Dispossession: From Steel Towns to Special Economic Zones' (2013) 44(2) *Development and Change* 381.

36 John Borrows, 'Living between Water and Rocks: First Nations, Environmental Planning and Democracy' (1997) 47(4) *University of Toronto Law Journal* 417, 421–2.

37 Gay'Wu Group of Women, *Song Spirals: Sharing Women's Wisdom of Country through Songlines* (Allen & Unwin, 2019).

38 Sundhya Pahuja, 'Beheading the Hydra: Legal Positivism and Development' (2007) 1 *Law, Social Justice & Global Development Journal* 1.

39 Nicole Graham, 'This is Not a Thing: Land, Sustainability and Legal Education' (2014) 26(3) *Journal of Environmental Law* 395, 410 ('This is Not a Thing').

40 Alain Pottage and Martha Mundy, *Law, Anthropology and the Constitution of the Social: Making Persons and Things* (Cambridge University Press, 2004) 3.

41 Hanoch Dagan and Benjamin C Zipursky, 'Introduction: The Distinction between Private Law and Public Law' in Hanoch Dagan and Benjamin C Zipursky (eds), *Research Handbook on Private Law Theory* (Edward Elgar, 2020) 4. See also Thomas W Merrill, 'Private and Public Law' in Andrew S Gold et al (eds), *The Oxford Handbook of the New Private Law* (Oxford University Press, 2020) 575.

private law in the development of English law was 'manufactured' to 'shield' private interests from the 'pursuit of "collective goals"' in liberal democracies.[42] Legal scholars confirm that this shield-like function of private law persists well into the 21st century, 'especially in terms of the facilitation of markets and the granting of autonomy to private parties to organise themselves and reach their own solutions'.[43]

The view that the private–public law dichotomy is sacrosanct tends to be held by those who also consider that it is 'only within the mission of the latter, not the former, to make things better … for the community'.[44] Against this view, anti-formalist scholars regard it as 'untenable to pretend that social and political goals did or even could remain outside of the process of fashioning and applying legal doctrine in private law'.[45] Accounts of the historical development and contemporary function of the law's taxonomic separation of public and private laws are consistent with analyses of the current overarching regulatory framework of 'regulatory capitalism' through which markets themselves have now become 'important national, regional and global regulators',[46] protecting private interests from public interests such as taxation and industrial relations. Indeed, the largest economies in the world today are no longer those of nation states but of private corporations. The private sphere is thus the locus of most of the goods of life, and the legal rights to those goods are concentrated in the hands of private rights holders, largely through the key institutions of private law. As Akkermans observes, private law 'plays an instrumental role' in climate change through its regulation of 'the building blocks of economic development'[47] and by 'promoting the maximisation of economic growth'.[48]

Notwithstanding variations of legal culture across jurisdictions that support capital economies, the legal forms of private property and the corporation commonly underpin their function, socio-material relations and cultural discourses of entitlement.[49] These dominant and ubiquitous legal forms are

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42 Dan Priel, 'The Political Origins of English Private Law' (2013) 40(4) *Journal of Law and Society* 481, 504–5.

43 Gijs van Dijck and Bram Akkermans, 'Conclusion: Private Law on Sustainability' in Bram Akkermans and Gijs van Dijck (eds), *Sustainability and Private Law* (Eleven International Publishing, 2020) 177.

44 Dagan and Zipursky (n 41) 5.

45 Ibid 6.

46 John Braithwaite, *Regulatory Capitalism: How It Works, Ideas for Making It Work Better* (Edward Elgar, 2008) 29.

47 Akkermans (n 30) 38.

48 Massimiliano Montini, 'Designing Law for Sustainability' in Volker Mauerhofer, Daniela Rupo and Lara Tarquinio (eds), *Sustainability and Law* (Springer International, 2020) 33, 40.

49 Nicole Graham, 'Dephysicalisation and Entitlement: Legal and Cultural Discourses of Place as Property' in Brad Jessup and Kim Rubenstein (eds), *Environmental Discourses in Public and International Law* (Cambridge University Press, 2012) 96; Graham, 'This is Not a Thing' (n 39); Sarah Keenan, *Subversive Property: Law and the Production of Spaces of Belonging* (Routledge, 2015); Wheeler (n 30).

abstract, but they facilitate global environmental harms.[50] As Wheeler puts is, 'there are virtually always environmental effects that exacerbate climate change involved in most corporate activity.'[51] One explanation for the failure of law's key institutions is precisely their abstractness:[52] they are not conceptualised or situated within any geographical or metabolic relations or limits.[53] As such, 'the structure of the corporate form in terms of its purpose and its relationships is incompatible with the world's fragile environmental ecosystem'.[54] It is clear from First Nations analyses, climate science, social science scholarship and legal research that there is a profound relationship between private law and climate change. And since '[t]raditional legal education … is characterised by pedagogies which it has been proposed arose in response to the industrial revolution',[55] it is important to take seriously the role that legal education plays in reproducing that relationship. If 'the cradle of legal thought and practice is the law school',[56] then legal education can and should contribute meaningfully to addressing climate change. The following section will consider the ways in which we might, as law teachers, take up the challenge and opportunity of teaching private law in a climate crisis.

III Teaching Private Law Differently

> Students accept theories on the authority of teacher and text, not because of evidence. What alternatives have they, or what competence? The applications given in texts are not there as evidence but because learning them is part of learning the paradigm at the base of current practice.[57]

If private law is not understood as being directly relevant to the environment, or climate change, then that may be because this is what students of law are taught, and what they later, as practitioners of law, believe. Maureen Cain contends that

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50 Joseph L Sax, 'Environmental Law Forty Years Later: Looking Back and Looking Ahead' in Michael I Jeffery, Jeremy Firestone and Karen Bubna-Litic (eds), *Biodiversity Conservation, Law and Livelihoods: Bridging the North–South Divide* (Cambridge University Press, 2008) 9; Sean Coyle and Karen Morrow, *The Philosophical Foundations of Environmental Law: Property, Rights and Nature* (Hart Publishing, 2004); Graham, 'This is Not a Thing' (n 39); Sally Wheeler, 'Climate Change, Hans Jonas and Indirect Investors' (2012) 3(1) *Journal of Human Rights and the Environment* 92.

51 Wheeler (n 50) 95–6.

52 Nicole Graham, *Lawscape: Property, Environment, Law* (Routledge, 2011); Wheeler (n 30).

53 Wheeler (n 30); Nicole Graham, 'Dephysicalised Property and Shadow Lands' in Robyn Bartel and Jennifer Carter (eds), *Handbook on Space, Place and Law* (Edward Elgar, 2020); Jill Robbie, 'Moving beyond Boundaries in the Pursuit of Sustainable Property Law' in Bram Akkermans and Gijs van Dijck (eds), *Sustainability and Private Law* (Eleven International Publishing, 2020) 59, 74 ('Moving beyond Boundaries in the Pursuit of Sustainable Property Law').

54 Wheeler (n 30) 296.

55 Brad Jessup and Claire Carroll, 'The Sustainability Business Clinic: Australian Clinical Legal Education for a "New Environmentalism" and New Environmental Law' (2017) 34(6) *Environmental and Planning Law Journal* 542, 552.

56 Graham, 'This is Not a Thing' (n 39) 422.

57 Kuhn (n 1) 88.

lawyers are 'symbol traders'[58] who engage in and entrench abstract legal categories, resulting in a profession that is uncritically facilitative of modern economic relations. This is problematic, given that '[m]ainstream economists are convinced that their accounts of growth and technological progress have no use for thermodynamics. In their worldview, nature is irrelevant for the constitution of society'.[59] Legal and economic discourses might, increasingly and encouragingly, have 'green edges'. Ultimately, though, neoclassical economic theory and the jurisprudence of liberalism continue to be championed as enduring guides to ideal futures. The disconnection between scientific data about climate change and mainstream economic policy and its attendant legal apparatus is only possible because of what decision-makers learn, and the way they learn, about the world. As Haigh explains, many 'believe that our present educational structures are less appropriately geared to meeting the needs of the future than to reinforcing the destructive characteristics of our current age.'[60]

Across the world, universities continue to educate generations of economists, lawyers and scientists as disciplinary specialists without any mandatory interdisciplinary training. An important pathway towards addressing climate change effectively is to acknowledge and address the intellectual damage caused by the fragmentation of knowledge and information in modern universities. Universities facilitate the specialisation of expertise through their systems of disciplines in both research and teaching. The systems of the Earth, however, are integrated. David Orr contends that such intellectual abstraction of the world is, in part, a product of a particular kind of education system comprised of, among other features, siloed thinking:

> The great ecological issues of our time have to do in one way or another with our failure to see things in their entirety. That failure occurs when minds are taught to think in boxes and not taught to transcend those boxes or to question overly much how they fit with other boxes.[61]

A law degree is a remarkably siloed program of study that promotes the perspective that human laws are unrelated to the Earth's laws.[62] Law is principally regarded as a discipline concerned with many (human) things and thus a law degree covers a broad range of topics, necessitating a core curriculum that is larger than most other degrees. The degree is then heavily structured owing to the requirements of accreditation, leaving little room to undertake a 'major' and

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58 Maureen Cain, 'The Symbol Traders' in Maureen Cain and Christine Harrington (eds), *Lawyers in a Postmodern World: Translation and Transgression* (Open University Press, 1994).

59 Hornborg (n 17) 10.

60 Martin Haigh, 'Greening the University Curriculum: Appraising an International Movement' (2009) 29(1) *Journal of Geography in Higher Education* 31, 32 (citations omitted).

61 David Orr, *Earth in Mind: On Education, Environment and the Human Prospect* (Island Press, 2004) 94–5.

62 See Nicole Graham, 'Owning the Earth' in Peter Burdon (ed), *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (Wakefield Press, 2011) 259.

'minor' in one or another field, as students would do in less structured degree programs. But this does not in itself prohibit the recognition of 'the continuities between law as a subject of study and other disciplines and between law as practice and other practical activities.'[63] There is an intellectual insularity within legal education, including a reluctance to 'engage with other disciplines'[64] that will need to be overcome. 'While many forms of "modern" knowledge tend toward specialisation, the scope of the environment seems to compel an interdisciplinary, comprehensive focus.'[65]

Against conventionally siloed curriculum design, pedagogy and research in higher education, Dovers argues for a greatly increased capacity for '[i]ntegrative thinking'.[66] This approach would enable law students to draw connections between law and non-law disciplinary knowledge. Climate change can be classified in academic terms as a 'wicked problem',[67] meaning a problem that cannot be solved by existing rational systems and processes because they are too complex. Subsequently, the solutions to climate change cannot be found or delivered by any single field of experts. Rather, a 'collective response is required to tackle these challenges and researchers … need to engage with other disciplines, in order to understand the scope and scale of the problems facing us and also to collaborate on crafting responses.'[68] Holder has encouraged the use of 'law in action' and 'law in context' pedagogies to consider 'how law interacts with and impacts upon the natural world in a physical manner'.[69] Similarly, the Chief Judge of the Land and Environment Court of New South Wales observed (extra-curially) that environmental problems 'are polycentric and multidisciplinary'[70] and that, consequently, '[j]udges need to be educated about and attuned to environmental issues … [T]hey need to be environmentally literate'.[71] Adopting interdisciplinary as well as contextual approaches to legal education at the

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63 William Twining, *Blackstone's Tower: The English Law School* (Stevens & Sons/Sweet & Maxwell, 1994) 178. Cf Richard Collier, 'We're All Socio-Legal Now? Legal Education, Scholarship and the "Global Knowledge Economy" — Reflections on the UK Experience' (2004) 26(4) *Sydney Law Review* 503, 523.

64 Fiona Cownie, *Legal Academics: Culture and Identities* (Hart Publishing, 2004) 66–7.

65 Lee Godden and Pat Dale, 'Interdisciplinary Teaching in Law and Environmental Science: Jurisprudence and Environment' (2000) 11(2) *Legal Education Review* 239, 251.

66 Stephen Dovers, 'Clarifying the Imperative of Integration Research for Sustainable Environmental Management' (2005) 1(2) *Journal of Research Practice* 1, 2.

67 Horst Rittel, 'Second Generation Design Methods' in Nigel Cross (ed), *Developments in Design Methodology* (John Wiley & Sons, 1984) 317.

68 Robbie, 'Moving beyond Boundaries in the Pursuit of Sustainable Property Law' (n 4) 75.

69 Jane Holder, 'Identifying Points of Contact and Engagement between Legal and Environmental Education' (2013) 40(4) *Journal of Law and Society* 541, 546.

70 Brian Preston, 'Benefits of Judicial Specialization in Environmental Law: The Land and Environment Court of New South Wales as a Case Study' (2012) 29(2) *Pace Environmental Law Review* 396, 396. See also his Honour's application of the concept of polycentricity in land-use decision-making in *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Ltd* [2013] NSWLEC 48, [31]–[43], [483].

71 Preston (n 70) 425.

program level is necessarily subject to a carefully researched and performed curriculum review process. But both approaches can also be adopted at both the unit of study level and within the sub-program level of private law subject progression.

Context-free pedagogy reproduces the abstractness of law and detaches it from its physical or material conditions. This is particularly problematic for private law subjects because of their facilitation of the model of economic growth and the predisposition of private law to 'abstract away from, rather than embed' collective goals to preserve the veneer of political neutrality.[72] Highlighting the absence of materiality in private law increases students' understanding of the significance of place-based Indigenous laws and increases the pedagogical benefit of learning Indigenous perspectives on non-Indigenous laws.[73] Students of non-Indigenous legal systems have the opportunity to learn how laws can successfully regulate human relationships with the non-human world over long periods of time through studying the examples of numerous and diverse place-based Indigenous laws. It also invites authentic engagement with scientific knowledge about the laws and limits of the Earth's systems to increase environmental literacy[74] and integrative thinking.[75] Connecting diverse place-based Indigenous laws and Western scientific knowledge to foundational private-law concepts, such as the autonomous rights-holding individual, could help in overcoming institutional barriers to change. Since climate change is the product of culturally specific socio-economic histories, institutions and practices, private-law teachers could begin by foregrounding the cultural specificity of existing laws in the context of their environmental conditions and effects. This is different in significant ways from mainstream approaches to what is known as 'sustainability education', which tends to

> downplay (inferiorize, marginalize, invalidate, and exclude) [the] sustainability practices and pedagogic approaches from Indigenous communities from the 'global

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72 Dagan and Zipursky (n 41) 7.

73 Irene Watson and Marcelle Burns, 'Indigenous Knowledges: A Strategy for Indigenous Peoples Engagement in Higher Education' in Sally Varnham, Patty Kamvounias and Joan Squelch (eds), *Higher Education and the Law* (Federation Press, 2015) 167; Nicole Graham, 'Indigenous Property Matters in Real Property Courses at Australian Universities (2009) 19(1–2) *Legal Education Review* 289; Marcelle Burns, 'Are We There Yet? Indigenous Cultural Competency in Legal Education' (2018) 28(1) *Legal Education Review* 19, 26; Annette R Gainsford, 'Connection to Country: Place-Based Learning Initiatives Embedded in the Charles Sturt University Bachelor of Laws' (2018) 28(1) *Legal Education Review* 1; Teresa Lloro-Bidart, 'A Political Ecology of Education in/for the Anthropocene' (2015) 6(1) *Environment and Society: Advances in Research* 128; Beckford et al (n 34); Vivien Holmes, 'Climate Strikers Go to Law School' (Conference Presentation, Legal Education Research Conference, UNSW Law, 27–28 November 2019).

74 Graham, 'This is Not a Thing' (n 39) 411; Godden and Dale (n 65) 251; Lloro-Bidart (n 73).

75 Dovers (n 66); Graham, 'This is Not a Thing' (n 39).

> south' that have existed alongside … [the] universalized and hegemonic Western-Euro-Americentric approaches from the 'global north'.[76]

Situating private law subjects within their cultural and historical contexts and socio-economic function would enable students to understand the transformative potential of private law to effect real-world change. Learning law's taxonomy, subdisciplines and doctrines through contextual, interdisciplinary and critical pedagogies would reveal that their current operation conflicts directly with the changes to the legal system that would be necessary to redress the legal conditions of climate change. In his analysis of how law would be affected by adaptation to 21st century climate conditions, American legal scholar Eric Biber identified liberalism as the source of such conflict because it constructs individual freedom as morally prior to collective interests: 'No matter which strategy we adopt and no matter which specific legal approach we use, the dramatic increase in human impairments to global systems will trigger an increase in government intrusion in individual lives and decision-making.'[77] Closely regulating the private sphere is a contradiction of the structure and logic of Western law and will 'test a range of legal doctrines intended to protect individual rights against government overreach'.[78] Teaching private law in a climate crisis facilitates students' understanding of the fundamental challenges facing their generation and prepares them for the 'sharp, sometimes bitter, legal and political contests'[79] that they will confront.

If 'the end of the world is more easily imaginable than the end of capitalism',[80] then the way we teach private law is partly to blame. Climate change obliges law teachers to familiarise students with research data and non-Western observations, such as those described above, which indicate that affluent Western society 'has reached the end-point of its progress project and does not have the solutions to the crisis it constructed'.[81] The most important lesson of climate change education is also therefore the greatest challenge to its beneficiaries: individual freedoms must be sacrificed to collective exigencies. As Franzen argues:

> Overwhelming numbers of human beings … need to accept high taxes and severe curtailment of their familiar lifestyles without revolting. They must accept the reality of climate change and have faith in the extreme measures taken to combat it. … They

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76 Soul Shava, 'Sustainability Education from an Indigenous Knowledge Perspective' in Joan Armon, Stephen Scoffham and Chara Armon (eds), *Prioritizing Sustainability Education: A Comprehensive Approach* (Routledge, 2019) 111.

77 Biber (n 30) 5.

78 Ibid.

79 Ibid 65.

80 F Jameson, 'Future City' (2003) 21 *New Left Review* 65, 73, quoted in David Chandler, 'The Death of Hope? Affirmation in the Anthropocene' (2019) 16(5) *Globalizations* 695, 698.

81 Watson, 'Aboriginal Relationships to the Natural World' (n 24) 139.

> have to make sacrifices for distant threatened nations and distant future generations.'[82]

Climate change induced suffering is distributed unequally across the categories of nation, culture, class, race, gender and generation in part because of the developmentalist logic built into legal positivism and the rule of law.[83] It is also distributed irrespective of individual property, council, state and national boundaries. In this respect, '[a]ll land is connected to all other land. This has important consequences when considering the impacts of the use of one plot of land and therefore regulation of this use.'[84]

The transformative potential of private law to effect real-world change is only part of the message of legal educators for the 21st century; the other part is foregrounding the existing and increasing impacts of climate change on the private legal interests of those who have hitherto been regarded as autonomous individuals operating in a world of choice. Already climate change is disrupting established private law concepts and doctrines through, for example, the erosion and migration of coastal and riparian property boundaries; the decreasing availability and security of legal entitlements to water; and the identification and foreseeability of risks and harms to individuals, neighbourhoods, nations and undifferentiated non-human life. In other words, the pressure of climate change on the continued operation of private law in its current form is great and growing.[85] Unless law's teachers and practitioners adopt proactive mitigatory measures that attend to both the paradigm and the application of private law, the result will be regulatory dysfunction and, ultimately, irrelevance. Climate change is inevitably changing private law because it is changing the world in which contract, tort, property and the corporation operate. The idea that unregulated private individual choices can be facilitated and protected by law is fundamentally challenged by problems that are beyond the control of individuals, and that are beyond the scale of the individual. The 21st century has already seen novel litigation over harms that are not only beyond individual humans, but beyond nation states and the present generation.[86] The first common law negligence case for transboundary harm in Australia was handed down in early 2021.[87]

Climate change is bringing fundamental changes to private law concepts and their interaction and application. Such changes threaten the stability of private

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82 Jonathan Franzen, 'What If We Stopped Pretending?' *The New Yorker* (online, 8 September 2019) <https://www.newyorker.com/culture/cultural-comment/what-if-we-stopped-pretending>.

83 Pahuja (n 38).

84 Robbie, 'Moving beyond Boundaries in the Pursuit of Sustainable Property Law' (n 53) 74.

85 John D Echeverria, 'Climate Change and Property Law' in Rosemary Lyster and Robert RM Verchick (eds), *Research Handbook on Climate Disaster Law* (Edward Elgar, 2018) 332.

86 Justice Brian J Preston, 'What's Equity Got to Do with the Environment?' (2018) 92 *Australian Law Journal* 257, 265-268.

87 *Sanda v PTTEP Australasia (Ashmore Cartier) Pty Ltd [No 7]* [2021] FCA 237. See also above n 6 for references to youth-led climate change litigation in relation to intergenerational equity and environmental justice.

law, which is essential to the 'efficient functioning of the market economy'.[88] Climate change will necessarily lead to 'the development of new rules and institutions'[89] that will transform fundamentally the concepts and principles that underpin private law. This 'new' private law is likely to subrogate the paramountcy of the rights of autonomous individuals to the broader interests of society'; undermine the availability and reliability of the notions of foreseeability and proximity; subvert the priority of binding agreements between private individuals in a context of overarching harms to others; and explode the idea of 'the reasonableness of an owner's investment expectations'[90] where they are calculated without reference to the impacts of climate change. In this context, teaching private law in the same ways that we were taught is not a responsible option.

Conventional modes of legal education are unilateral and authoritative, reproducing legal positivism's hierarchical top-down approach, rather than facilitating bottom-up modes of interdependence. Unilateral instruction in law to students who, on graduation, will be responsible for innovating private law and transforming its key concepts and doctrines is, therefore, not appropriate. Unlearning the abstract logic of private law is a challenge for both law's teachers and its students, necessitating collaboration across disciplines, sectors, cultures, classes, races, genders and generations. Developing law students' collaboration skills with non-law partners is critical to their ability to challenge the dominant model of law and to their capacity to apply interdisciplinary knowledge to legal contexts. Law teachers and students could identify and invite non-law and non-academic experts to co-teach part of a topic with interdisciplinary dimensions to avoid siloed approaches to higher education, since 'new hybrid forms of knowledge' should be co-produced rather than led by a single discipline.[91] Connecting students' knowledge of climate change producing legal doctrines to their knowledge of other disciplines and other legal regimes avoids the 'splendid isolation' of environmental matters from the rest of the curriculum.[92]

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88 Echeverria (n 85) 333.

89 Ibid 337.

90 Ibid 342.

91 John Robinson, 'Being Undisciplined: Transgressions and Intersections in Academia and Beyond' (2008) 40(1) *Futures* 70, 72; Reinhold Leinfelder, 'Assuming Responsibility for the Anthropocene: Challenges and Opportunities in Education' in Helmuth Trischler (ed), 'Anthropocene: Envisioning the Future of the Age of Humans' (2013) 3 *RCC Perspectives* 9; Graham, 'This is Not a Thing' (n 39); David Rousell, 'Dwelling in the Anthropocene: Reimagining University Learning Environments in Response to Social and Ecological Change' (2016) 32(2) *Australian Journal of Environmental Education* 137; Brown and Erickson (n 29); Mari J Matsuda, 'Admit That the Waters around You Have Grown: Change and Legal Education' (2014) 89(4) *Indiana Law Journal* 1381.

92 Jason MacLean, 'Curriculum Design for the Anthropocene: Review of Meinhard Doelle & Chris Tollefson, Environmental Law' (2020) 16(1) *McGill Journal of Sustainable Development Law* 3; David Mohan Ong, 'Prospects for Integrating an Environmental Sustainability Perspective within the University Law Curriculum in England' (2016) 50(3) *Law Teacher* 276.

Prioritising collaboration skills builds on and activates existing student interest and agency in climate change law and policy.[93] By 'co-producing new and up-to-date research and curriculum in real time and in partnership with a growing diversity of climate governance actors',[94] thus facilitating contextual, interdisciplinary and collaborative learning, students are empowered to further develop their field. Collaboratively, we must connect law to geographically specific and dynamic ecological conditions and limits, research materially viable regulatory practices founded on knowledge of the Earth's laws that is manifest in non-Western legal regimes, and figure out how to prohibit the extraction, production and disposal of the goods of life in 'shadow places' for the almost exclusive benefit of the 'nice places'.[95] Visualising climate change through place-based learning[96] is another helpful pedagogy that can expose law students to 'the abattoirs, the hidden cities, the internal ecosystems, [and] the impacts of climate change',[97] to foreground questions of climate justice in material, rather than abstract, terms. There are many reasons (and resources) for law teachers to teach differently. Law teachers have detailed and deep knowledge of the topics that they teach and may already (be able to) adopt contextual and interdisciplinary pedagogies, drawing from a wealth of relevant research in environmental education, sustainability education and law reform. Law teachers could wait for 'top-down structural changes to happen over time',[98] but climate change is a time-sensitive problem and 'the rate at which these legal changes will be developed' won't wait.[99] Whether it is confidence, competence or permission that is needed, teachers must 'take up their potentially catalytic role in creating and sustaining social foresight'[100] as a matter of urgency, since 'all education is environmental education'.[101]

IV Conclusion

To facilitate institutional adaptation to climate change and address the existential threat of feedback processes, tipping points and lock-ins, it is necessary to confront the problem of private law. First Nations analyses, climate science,

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93 Amy Cutter-Mackenzie and David Rousell, 'Education for What? Shaping the Field of Climate Change Education with Children and Young People as Co-Researchers' (2019) 17(1) *Children's Geographies* 90; Robinson (n 91); MacLean (n 92) 25; Holmes (n 73).

94 MacLean (n 92).

95 Plumwood (n 23) 140; TallBear (n 34).

96 Estair Van Wagner, '"Seeing the Place Makes It Real": Place-Based Teaching in the Environmental and Planning Law Classroom' (2017) 34(6) *Environmental and Planning Law Journal* 522.

97 David Schlosberg, 'Environmental Management in the Anthropocene' in Teena Gabrielson et al (eds), *The Oxford Handbook of Environmental Political Theory* (Oxford University Press, 2016) 193, 206.

98 Rousell (n 91) 142.

99 Biber (n 30) 42; Richard A Slaughter, 'Welcome to the Anthropocene' (2012) 44(2) *Futures* 119.

100 Rousell (n 91) 142 (emphasis omitted).

101 Orr (n 61).

social science and legal research indicate that the interaction of Western private law and the Earth's laws adversely impacts on the Earth's systems. Private law is a contingent feature of planetary health because its key institutions, the corporation and private property, concentrate the legal rights to capital — the goods of life — in the private sphere. Private law establishes a suite of entitlements that act as shields against collective interests. Reforming law to address the climate crisis involves greater regulation of private interests to pursue the global goal of sustaining organised human societies. Simply put, unless 'law is made sustainable, it will protect unsustainable conducts.'[102] But closely regulating private interests undermines the structure and logic of law's public–private taxonomy and contradicts widely accepted truths about the latter, in particular the central role of individual autonomy. Teaching private law in a climate crisis requires preparing law students for bitter conflict over the planetary imperative that individual freedoms must be sacrificed to collective exigencies. Unilateral instruction is inadequate to teach the climate-striker generation whose interests, agency and skills are better served by co-producing alternative models of regulation. Collaboratively, we must connect law to geographically specific and dynamic ecological conditions and limits, research materially viable regulatory practices founded on the Earth's laws, and learn how to prohibit the extraction, production and disposal of the goods of life for the primary benefit of the unsustainably and inequitably (over-)developed world. To 'continue current global trends of "progress and development" is to ensure the decline of all life on earth.'[103]

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[102] Staffan Westerlund, 'Theory for Sustainable Development: Towards or Against?' in Hans Christian Bugge and Christina Voigt (eds), *Sustainable Development in International and National Law* (Europa Law Publishing, 2008) 47, 54, cited in Montini (n 48) 40 (emphasis omitted).

[103] Watson, 'Aboriginal Relationships to the Natural World' (n 24) 125.

TORT LAW AND CLIMATE CHANGE

WENDY BONYTHON*

Tort law presents doctrinal barriers to plaintiffs seeking remedies for climate change harms in common law jurisdictions. However, litigants are likely to persist in pursuing tortious causes of action in the absence of persuasive policy and regulatory alternatives. Ongoing litigation in Smith v Fonterra Co-operative Group Ltd *in New Zealand and* Sharma v Minister for Environment *in Australia highlights tensions between torts doctrine and climate change litigation in both countries. Regardless of its ultimate outcome, that litigation provides a valuable opportunity to integrate theoretical questions about the legitimacy of judicial lawmaking, and intersectional critical legal perspectives, into the teaching of torts.*

I INTRODUCTION

Anthropogenic climate change is predicted to have a significant long-term impact on the habitability of the planet.[1] Burdens attributable to climate change will be disproportionately borne by marginalised groups — including women,[2] migrants,[3] children,[4] older people,[5] indigenous peoples,[6] and residents of the

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1 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, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, and Efforts to Eradicate Poverty' in Christopher B Field et al (eds), *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects* (Cambridge University Press, 2014) 1.

2 Lorena Aguilar, Margaux Granat and Cate Owren (eds), *Roots for the Future: The Landscape and Way Forward on Gender and Climate Change* (International Union for Conservation of Nature and Global Gender Climate Alliance, 2015); Eric Neumayer and Thomas Plümper, 'The Gendered Nature of Natural Disasters: The Impact of Catastrophic Events on the Gender Gap in Life Expectancy, 1981–2002' (2007) 97(3) *Annals of the Association of American Geographers* 551; Peter Newell, 'Race, Class and the Global Politics of Environmental Inequality' (2005) 5(3) *Global Environmental Politics* 70; United Nations Environment Programme, 'Gender, Climate & Security: Sustaining Inclusive Peace on the Frontlines of Climate Change' (United Nations Environment Programme, 2020); Susan Buckingham and Virginie L Masson (eds), *Understanding Climate Change through Gender Relations* (Routledge, 2017); World Meteorological Organization, *Gendered Impacts of Weather and Climate: Evidence from Asia, Pacific and Africa* (Report, 2019).

3 Maria Waldinger, 'The Effects of Climate Change on Internal and International Migration: Implications for Developing Countries' (Working Paper No 192, May 2015).

4 UNICEF, An Environment Fit for Children (Report, 2019).

5 HelpAge International, *Climate Change in an Aging World* (Position Paper, 2015).

6 James Ford, 'Indigenous Health and Climate Change' (2012) 102(7) *American Journal of Public Health* 1260.

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global south[7] — at the national and global levels.[8] Many affected individuals will fall within more than one of those categories throughout their life course: intersectional disadvantage is a well-recognised consequence of climate change.[9]

Responsibility for anthropogenic causes of climate change remains vigorously contested within media, governments, and business. This reflects a broad spectrum of social, economic and political ideologies.[10] In the absence of consensus in global and national political responses, litigation — including private law claims brought against governments and corporations for climate change — has increased and will continue to increase,[11] as citizens and states seek remedies for climate change harms and foster effective political responses.[12]

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7 World Bank, 'Climate Change Affects the Poorest in Developing Countries', *The World Bank* (Feature Story, 3 March 2014) <http://www.worldbank.org/en/news/feature/2014/03/03/climate-change-affects-poorest-developing-countries>.

8 Irene Dankelman and Kavita Naidu, 'Introduction: Gender, Development, and the Climate Crisis' (2020) 28(3) *Gender and Development* 447; Anna Kaijser and Annica Kronsell, 'Climate Change through the Lens of Intersectionality' (2014) 23(3) *Environmental Politics* 417; Kirsten Vinyeta, Kyle Powys Whyte and Kathy Lynn, 'Climate Change through an Intersectional Lens: Gendered Vulnerability and Resilience in Indigenous Communities in the United States' *United States Department of Agriculture* (Report, 2015).

9 Barry Levy and Jonathan Patz, 'Climate Change, Human Rights, and Social Justice' (2016) 81(3) *Annals of Global Health* 310.

10 Mike Hulme, Why We Disagree About Climate Change: Understanding Controversy, Inaction and Opportunity (Cambridge University Press, 2009); Ross Garnaut, The Garnaut Climate Change Review: Final Report (Cambridge University Press, 2008); Maria Taylor, Global Warming and Climate Change: What Australia Knew and Buried ... Then Framed a New Reality for the Public (ANU Press, 2014); Riley E Dunlap and Robert J Brulle (eds), Climate Change and Society: Sociological Perspectives (Oxford University Press, 2015).

11 United Nations Environment Programme and Sabin Center for Climate Change Law, *The Status of Climate Change Litigation: A Global Review* (Report, 2017) <https://wedocs.unep.org/handle/20.500.11822/20767>; Joana Setzer and Rebecca Byrnes, *Global Trends in Climate Change Litigation: 2019 Snapshot* (Report, 2019); Katerina Mitkidis and Theodora Valkanou, 'Climate Change Litigation: Trends, Policy Implications and the Way Forward' (2020) 9(1) *Transnational Environmental Law* 11.

12 According to the Climate Change Litigation Database, there have been 1350 climate change cases brought in the US, 28 of which were common law claims, mainly brought by the state against corporate entities. See Sabin Center for Climate Change Law, 'Climate Change Litigation Databases' (Databases, 2021) <http://climatecasechart.com/climate-change-litigation/>. Excluding the US, 395 claims have been brought against governments with an additional 45 brought against corporations, 115 in Australia and 18 in New Zealand. Most claims have relied on human rights, planning law, regulatory non-compliance, advertising misconduct and a range of other public law-based claims, with only a small number brought under common law or private causes of action. Among overviews, see: Jacqueline Peel and Hari M Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge University Press, 2015); Michael Faure and Marjan Peeters (eds), *Climate Change Liability* (Edward Elgar, 2011); Jutte Brunnée et al, 'Overview of Legal Issues Relevant to Climate Change' in Richard Lord et al (eds), *Climate Change Liability: Transnational Law and Practice* (Cambridge University Press, 2012) 23; Christina Voigt, 'Climate Change and Damages' in Cinnamon P Carlarne, Kevin R Gray and Richard Tarasofsky (eds), *The Oxford Handbook of International Climate Change Law* (Oxford University Press, 2016) 464.

The primary role of tort law in climate change remains unclear. Few claims brought in tort have been successful,[13] substantiating academic commentary that seemingly insurmountable doctrinal barriers will defeat potential plaintiffs.[14]

Others predict a more indirect role for tort law in climate change litigation, identifying its potential as a regulatory tool — 'regulation through litigation'[15] — or as part of a broader body of 'strategic' litigation. Proponents of strategic climate change litigation[16] valorise indirect outcomes, with success measured both directly, such as remedies awarded, and indirectly, such as through publicity of the relevant issues, and policy development.[17]

Lytton, critiquing tort-based climate change litigation as a strategy for influencing regulatory policy, has identified advantages of 'regulation through litigation',[18] including 'fram[ing] issues in new ways, giv[ing] them greater prominence on the agendas of regulatory institutions, uncover[ing] policy-relevant information, and mobiliz[ing] reform advocates.' Among disadvantages, litigation is 'complex, protracted, costly, unpredictable, and inconsistent.'[19]

Peel and Osofsky, writing about the achievements of climate change litigation more broadly, including through environmental and administrative law pathways, observe that litigated cases 'have raised awareness of climate change as a key environmental issue in the public, business, professional and government sectors', resulting in both direct and indirect regulatory action.[20]

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13 R Henry Weaver and Douglas A Kysar, 'Courting Disaster: Climate Change and the Adjudication of Catastrophe' (2017) 93(1) *Notre Dame Law Review* 295, 329 ('Courting Disaster').

14 Douglas A Kysar, 'What Climate Change Can Do About Tort Law' (2011) 41(1) *Environmental Law* 1 ('What Climate Change Can Do About Tort Law'); Carlo Vittorio Giabardo, 'Climate Change Litigation and Tort Law: Regulation Through Litigation?' [2019] *Diritto and Processo* 361.

15 W Kip Viscusi (ed), *Regulation through Litigation* (Brookings Institution Press, 2002).

16 Jacqueline Peel, Hari Osofsky and Anita Foerster, 'Shaping the 'Next Generation' of Climate Change Litigation in Australia' (2017) 41(2) *Melbourne University Law Review* 793 ('Shaping the 'Next Generation' of Climate Change Litigation in Australia'); Jacqueline Peel and Hari Osofosky, 'Climate Change Litigation' (2020) 16 *Annual Review of Law and Social Science* 21; Jacqueline Peel and Hari Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge University Press, 2015).

17 Kim Bouwer, 'The Unsexy Future of Climate Change Litigation' (2018) 30(3) *Journal of Environmental Law* 483; Brian Preston, 'The Influence of Climate Change Litigation on Governments and the Private Sector' (2011) 2(4) *Climate Law* 485; Hari Osofsky, 'The Continuing Importance of Climate Change Litigation' (2010) 1(1) *Climate Law* 3, 4; Douglas A Kysar, 'The Public Life of Private Law: Tort Law as a Risk Regulation Mechanism' (2018) 9(1) *European Journal of Risk Regulation* 48. See also Kysar, 'What Climate Chane Can Do About Tort Law' (n 14); Giabardo (n 14).

18 Timothy Lytton, 'Using Tort Litigation to Enhance Regulatory Policy Making: Evaluating Climate-Change Litigation in Light of Lessons from Gun-Industry and Clergy-Sexual-Abuse Lawsuits' (2008) 86(7) *Texas Law Review* 1837.

19 Ibid.

20 Jacqueline Peel and Hari M Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge University Press, 2015).

The Dutch Supreme Court's decision in *The State of the Netherlands v Urgenda* ('*Urgenda*')[21] has renewed interest in the use of tort law to address climate change, including as a pre-emptive measure to restrict further anthropogenic climate change-caused harms through pursuit of injunctions and declarations, as well as for strategic purposes.[22] Part II of the article discusses the history and potential use of tort law in climate change litigation and reviews and critiques two recent Australasian decisions. The New Zealand High Court in *Smith v Fonterra Co-operative Group Ltd* ('*Smith*')[23] struck out nuisance and negligence claims brought by a traditional owner against corporate emitters of greenhouse gases, but not a claim based on a previously unrecognised tort. The Federal Court of Australia in *Sharma v Minister for Environment* ('*Sharma*')[24] found that a Federal Minister owes a duty of care to Australian children when exercising statutory functions under the *Environmental Protection and Biodiversity Conservation Act* ('*EPBC Act*') to approve expansion of a coal mine.[25] Part III considers what the scope and content of any inchoate tort directed towards climate change-caused harm might be, reflecting on extra-curial musings that influenced the court in *Smith*, and an alternative proposal for a 'tort to the environment' in response.[26]

Part IV shifts focus away from litigating climate change in tort law, to using climate change tort litigation as a tool to integrate critical theories — including intersectionality — into teaching of tort law. Teaching students about the limits of tort law as a mechanism for achieving climate change justice provides an opportunity to strengthen student understandings of critical legal studies and intersectionality, and gain a deeper understanding of how the common law has evolved and how it might be reformed. Part V concludes.

II Tort Law and Climate Change

'What can tort law do for climate change?'[27]

Prior to 2011, Dutch government policy sought to, by 2020, reduce greenhouse gas emissions to 30 per cent below 1990 levels. In 2011, those reduction goals were

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21 *Urgenda Foundation v The Netherlands* [2015] HAZA c/09/00456689 (Supreme Court of the Netherlands) ('*Urgenda*').

22 Peel, Osofsky and Foerster, Shaping the 'Next Generation' of Climate Change Litigation in Australia (n 16); Tim Baxter, 'Urgenda-Style Climate Litigation Has Promise in Australia' (2017) 32(3) *Australian Environment Review* 70.

23 [2020] 2 NZLR 394 ('*Smith*').

24 (2021) 391 ALR 1 ('*Sharma*').

25 Environment Protection and Biodiversity Conservation Act 1999 (Cth).

26 Maria Hook et al, 'Tort to the Environment: A Stretch Too Far or a Simple Step Forward?' (2021) 33(1) *Journal of Environmental Law* 195.

27 Kysar, What Climate Change Can Do About Tort Law (n 14).

lowered to a 20 per cent reduction. In *Urgenda*,[28] the Dutch Supreme Court upheld a District Court's findings that the government was required to reduce emissions by at least 25 per cent under the *European Convention on Human Rights* ('*ECHR*') Articles 2 and 8.[29] *Urgenda* is viewed as a watershed moment in global climate change litigation.[30] In the aftermath of *Urgenda*, perceptions of a local softening of judicial attitudes,[31] discernible from Australian judges' extra-curial engagement with climate change,[32] and successful high profile claims in other jurisdictions,[33] likely account for the increased attention tort law is receiving as a potential vehicle for climate change claims in many jurisdictions, including Australia.[34] Climate change tort litigation need not entail pursuit of compensatory damages for harms already sustained: future claims may be more like those in *Urgenda*, where the plaintiffs sought declarations and injunctions to limit further emission of greenhouse gases, and restrict or prevent future harms.

Caution is required when predicting the outcomes of *Urgenda*-style claims translocated to other jurisdictions. Although the *Urgenda* claim was initially brought as a tort claim under the Dutch civil code, the Supreme Court judgment ultimately relied on the *ECHR*.[35] Achieving an *Urgenda*-like result from an *Urgenda*-like claim in countries without an overarching Bill of Rights or other

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28 *Urgenda* (n 21).

29 Ibid; *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) ('*ECHR*').

30 Laura Burgers, 'Should Judges Make Climate Change Law?' (2020) 9(1) *Transnational Environmental Law* 55.

31 Allens Linklaters, *Climate Change Litigation in Australia: Key Trends and Predictions* (Report, 2020) <https://www.allens.com.au/insights-news/insights/2020/11/climate-change-litigation-in-australia/>.

32 Chief Justice Helen Winkelmann, Justice Susan Glazebrook and Justice Ellen France, 'Climate Change and the Law' (Asia Pacific Judicial Colloquium, Singapore, 28–30 May 2018) <https://www.courtsofnz.govt.nz/assets/speechpapers/ccw.pdf> ('Climate Change and the Law'); Geoffrey Palmer, 'Can Judges Make a Difference: The Scope for Judicial Decisions on Climate Change in New Zealand Domestic Law' (2018) 49(2) *Victoria University of Wellington Law Review* 191; Preston (n 17).

33 *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7; *Wildlife of the Central Highlands Inc v VicForests* [2020] VSC 10. See also Samantha Daly and Lara Douvartzidis, 'The Emergence of Climate Change Law in New South Wales and Beyond' (2019) 38(1) *Australian Resources and Energy Law Journal* 53; Matteo Fermeglia, 'Climate Science Before the Courts: Turning the Tide in Climate Change Litigation' in Laura Westra, Klaus Bosselmann and Matteo Fermeglia (eds), *Ecological Integrity in Science and Law* (Springer, 2020) 23.

34 See Peel, Osofsky and Foerster, Shaping the 'Next Generation' of Climate Change Litigation in Australia (n 16); Baxter (n 22); Allens Linklaters (n 31).

35 *Urgenda* (n 21); Burgers (n 30).

ECHR-comparable human rights protections,[36] or common law countries with substantially different tort-law regimes,[37] may prove challenging.[38]

The various[39] common law tort systems have been unsupportive of plaintiffs seeking remedies for past climate change harms, or for avoiding or mitigating future ones.[40] Douglas Kysar, writing about the uneasy relationship between tort law and climate change, noted that:

> [T]ort law seems fundamentally ill-equipped to address the causes and impacts of climate change: diffuse and disparate in origin, lagged and latticed in effect, anthropogenic greenhouse gas emissions represent the paradigmatic anti-tort, a collective action problem so pervasive and so complicated as to render at once both all of us and none of us responsible. Thus, courts will have ample reason — not to mention doctrinal weaponry — to prevent climate change tort suits from reaching a jury.[41]

Kysar's 'doctrinal weaponry' includes the test for duty/proximate cause, breach, causation, and harm as stages at which plaintiffs might encounter challenges in US torts law.[42] Plaintiffs in other jurisdictions — both non-US common law and civil law — encounter comparable doctrinal barriers.[43] In non-US common law jurisdictions, plaintiffs may struggle to establish duty of care, breach, and causation.[44] The significance of those barriers is not diminished by the fact that in

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36 *Urgenda* provides a poor precedent approach for Australian litigants in Australia, due largely to the absence of a comparable — and justiciable — human rights statute. New Zealand does have a Bill of Rights. The plaintiff in *Smith* is reported to have also commenced separate proceedings under that Bill. See Emmeline Rushbrook and Hannah Bain, 'Climate Change Litigation — Expect the Unexpected', *Russell McVeagh* (Article, 10 March 2020) <https://www.russellmcveagh.com/insights/march-2020/climate-change-litigation-expect-the-unexpected**>.**

37 See Peel, Osofsky and Foerster, Shaping the 'Next Generation' of Climate Change Litigation in Australia (n 16) 805.

38 Petra Minnerop, 'Integrating the 'Duty of Care' under the European Convention on Human Rights and the Science and Law of Climate Change: the Decision of The Hague Court of Appeal in the *Urgenda* Case' (2019) 37(2) *Journal of Energy and Natural Resources Law* 149; Robert F Blomquist, 'Comparative Climate Change Torts' (2012) 46(4) *Valparaiso University Law Review* 1053.

39 The US is a common law negligence jurisdiction; however, there are significant differences in the doctrinal development of negligence law in the US distinguishing it from other (non-US) common law jurisdictions, such as the United Kingdom, Australia, Canada, and New Zealand. Those countries, while developing independently, nonetheless remain more similar to each other overall than they do to the common law of negligence in the US. Both are distinguished from civil law countries based on Roman legal tradition, such as France, Germany, Austria, Japan, and Brazil.

40 Weaver and Kysar, Courting Disaster (n 13).

41 Kysar, What Climate Change Can Do About Tort Law (n 14) 3–4.

42 Ibid 12.

43 Giabardo (n 14).

44 Peel, Osofsky and Foerster, Shaping the 'Next Generation' of Climate Change Litigation in Australia (n 16). See also Nicola Durrant, 'Tortious Liability for Greenhouse Gas Emissions? Climate Change, Causation and Public Policy Considerations' (2007) 7(2) *QUT Law and Justice Journal* 403; Peter Cashman and Ross Abbs, 'Liability in Tort for Damage Arising from Human-Induced Climate Change' in Rosemary Lyster (ed), *In the Wilds of Climate Law* (Australian Academic Press, 2010) 235; Ross Abbs, Peter Cashman and Tim Stephens, 'Australia' in Richard Lord et al (eds), *Climate Change Liability: Transnational Law and Practice* (Cambridge University Press, 2012) 67, 85.

those jurisdictions judges may directly determine the outcome of claims, rather than determining whether those claims should be presented to a jury Kysar observes.

Kysar's observations about doctrinal limitations of tort law regarding climate change formed part of his response to the question: 'What can tort law do about climate change?'[45] The conclusion he reached was 'Not much'.[46] He instead recast the question to consider: 'What can climate change do for tort law?'[47] In answering that question, Kysar identified many areas ripe for reconsideration within torts, ultimately 'forc[ing] a re-evaluation of the existing system for compensating and deterring harm'[48] and shifting 'the bar for exoticism in tort',[49] making claims that have been previously described as frustrating 'judges because of their scale, scientific complexity, and widespread policy implications'[50] potentially soluble. Even 'claims involving toxic and environmental harm, tobacco and handgun marketing, or slavery and Holocaust reparations … seem less daunting when juxtaposed against "the mother of all collective action problems"'[51] that is climate change and the climate emergency.

Ultimately, many of the benefits Kysar foresaw for tort law were not direct 'wins' for plaintiffs, but rather consequences of some of the 'indirect' strategic objectives. In the process of highlighting limitations of the tort-law system in responding to climate change, the system's limitations regarding other challenging types of claims may also be revealed.

Part III of this article now examines the judgements in *Smith* and *Sharma*, two tort-based climate change claims brought in the aftermath of *Urgenda*, to determine whether Australasian tort law 'can do anything about' climate change for those plaintiffs, and whether those cases 'can do anything about' Australasian tort law.

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45 Kysar, What Climate Change Can Do About Tort Law (n 14) 1.
46 Ibid.
47 Ibid.
48 Ibid 4.
49 Ibid.
50 Ibid.
51 Ibid.

III Climate Change Claims in Australasia: *Smith* and *Sharma*

'What can climate change do for tort law?'[52]

A Smith

Smith[53] was an application to strike out claims brought by Michael Smith against seven New Zealand corporations in industries that directly emit or facilitate the emission of greenhouse gases.[54] Smith claimed customary interests in coastal and littoral land and resources threatened with inundation resulting from global warming. He identified loss of land, decreased productivity, loss of culturally and spiritually significant sites, including ceremonial and burial grounds, and loss of fishing and landing sites of traditional and cultural significance as consequences of inundation. The claim also identified ocean warming and acidification as causes of change in the coastal and freshwater fisheries he customarily uses, and adverse health impacts to which he, and Maori communities generally, are vulnerable.[55]

Smith claimed that the defendants 'unlawfully caused or contributed to a public nuisance'[56] — an interference with the right of the public to 'health, safety, comfort, convenience, and peace'[57] — through their emission or facilitation of emission of greenhouse gases.[58] Additionally, or alternatively, he claimed that the defendants breached their duty of care to not 'operate their business in a way that will cause him loss by contributing to dangerous anthropogenic interference in the climate system',[59] and that they knew or should reasonably have known of New Zealand's requirement to reduce their greenhouse gas emissions since 2007.[60] As a final option, Smith also claimed:

> [T]he defendants owe him a duty, cognisable at law, to cease contributing to damage to the climate system, dangerous anthropogenic interference with the climate system and adverse effects of climate change through their emission of greenhouse gases.[61]

Smith sought declarations and an injunction requiring the defendants to achieve net zero greenhouse gas emissions by 2030 through linear reductions in net

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52 Ibid.
53 *Smith* (n 23) 397 [2].
54 Ibid. The defendants were dairy corporations Fonterra Co-operative Group (Fonterra) and Dairy Holdings (DHL), energy providers Genesis Energy and Z Energy, steel group New Zealand Steel, oil and petroleum refinery New Zealand Refining, and coal miner BT Mining.
55 Ibid 397 [5], 399 [10].
56 Ibid 399–400 [12].
57 Ibid 399 [11].
58 Ibid 399 [11].
59 Ibid 400 [13].
60 Ibid.
61 Ibid 400 [15] (emphasis omitted).

emissions until the 2030 deadline, and relief deemed appropriate to mitigate or adapt 'to damage to climate systems said to be contributed to by the defendants.'[62] He did not specifically seek damages or costs.[63]

Conceding their status as greenhouse gas emitters, and acknowledging the relationship between greenhouse gas emission and global warming, the defendants argued that global efforts are required to address global warming, with their emissions being too small to contribute to the harm alleged; their emissions were lawful, and the issues were non-justiciable, either because they were complex policy issues better addressed by the parliament, or because existing legislation excluded justiciability.[64] Each sought to have Smith's claim struck out for failure to disclose a reasonably arguable cause of action.[65]

To strike out an application for failure to disclose a reasonably arguable cause of action, the Court must be satisfied that the cause of action is 'untenable', and 'certain that it cannot succeed'.[66] The strike-out power is to be exercised 'sparingly and only in clear cases'[67]; its strike-out 'jurisdiction is not excluded by the need to decide difficult questions of law, requiring extensive argument',[68] and '[c]ourts should be slow to strike out a claim in any developing area of the law, particularly where a duty of care is alleged in a new situation'.[69]

1 *The Public Nuisance Claim*

Public nuisance 'materially affects the reasonable comfort and convenience of life of a class of Her Majesty's subjects',[70] and is committed by doing an act not warranted by law or failing to discharge a legal duty.[71]

While standing is normally restricted to the Attorney-General, there are exceptions under which private citizens can also achieve standing to sue in public nuisance if they can demonstrate that they have suffered special damage — damage that is more significant than that experienced by the general community, usually because it is more extensive, or more serious, even if it is of the same

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62 Ibid 400 [16].

63 Ibid.

64 Ibid 400–1 [18].

65 Ibid 397 [4].

66 High Court Rules 2016 (NZ) r 15.1.

67 *A-G v Prince* [1998] 1 NZLR 262, 267 (Court of Appeal) ('*Prince*'), quoted in *Smith* (n 23) 402 [23].

68 Ibid.

69 Ibid.

70 *Smith* (n 23) 410 [56], quoting *A-G v PYA Quarries Ltd* [1957] 2 QB 169, 184 (Romer J) (Court of Appeal). The Australian equivalent statement is found in *Wallace v Powell* [2000] NSWSC 406 31 [32]. It additionally notes that 'those liable … would be the persons who created it, and also persons who unreasonably failed to end it'.

71 *R v Rimmington* [2006] 1 AC 459, 467–8 [5]–[7] (Lord Bingham) (House of Lords) ('*R v Rimmington*'), quoted in *Smith* (n 23) 410 [58].

type.[72] Smith claimed that he had experienced special damage that warranted the courts recognising his standing,[73] or, alternatively, that the special damage rule lacked principle, and was 'archaic, unnecessary and out of step with the liberal approach to standing adopted in other contexts by the Courts'.[74]

Special damage must be direct, rather than consequential, and substantial.[75] The New Zealand Court of Appeal further noted that the right of action available by special damage is an exception to the general rule, and as such, 'the right of action cannot depend upon the quantum of damage'.[76] Specifically, the plaintiff cannot be granted standing under the special damage rule just because the value of his claim for compensation is greater than the hypothetical value of the claims of his neighbours.

Wiley J found that Smith's claimed damage was 'neither particular nor direct', nor different to that faced by many other New Zealanders, and that he did not meet the 'special damage' exception.[77] Further, Wylie J concluded he was unable to overturn the special damage rule, and struck out the public nuisance claim.[78] That apparently misunderstood the decision he was required to make under the Rules, which required him to consider whether Smith's public nuisance claim was arguable, not whether it would be successful. Wylie J was not required to ultimately determine the merits of any argument that the special damage rule, laid down by a superior court, should be overturned. Instead, he was required to decide whether that argument was essential to the plaintiff's claim, and was so certain to be unsuccessful, that the Court should not be required to consider it. Smith did not have to prove that the special rule should be replaced. Instead, he only had to show that there was an arguable cause of action in negligence, which may have included an argument to overturn the special damage rule. As written, the judgment appears to pre-empt that argument, instead conflating Wylie J's acknowledged inability to overturn the doctrine with an implicit determination that a superior court, if presented with the argument, would not be persuaded by the argument. Importantly, adopting this approach means any claim challenging existing precedent should be struck out, regardless of its prospects of success, *because* it challenges existing law.

This approach further misunderstands the range of possible effects of a successful argument against the special damage rule. The rule creates an exception to the general principle, permitting private citizens to bring claims for public nuisance, which are otherwise restricted to the Attorney-General, in the

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72 *R v Rimmington* (n 71) 486 [44] (Lord Rodger), quoted in *Smith* (n 23) 410 [59].
73 *Smith* (n 23) 410–11 [60].
74 Ibid 412 [64].
75 *R v Rimmington* (n 71) 486 [44] (Lord Rodger), quoted in *Smith* (n 23) 411 [61].
76 *Mayor of Kaiapoi v Beswick* [1869] 1 NZCA 192, 208, quoted in *Smith* (n 23) 411 [61].
77 *Smith* (n 23) 411–12 [62]–[63].
78 Ibid 412 [64].

event they can demonstrate a heightened harm or damage. If the validity of the exception is rejected, what remains is the general principle the exception seeks to modify — specifically, that claims in public nuisance can only be brought by the Attorney-General. In order for the plaintiff to succeed, a more sophisticated argument than mere revocation of the special damage rule would need to be presented. For Smith's desired outcomes, there is no requirement to overturn or discard the rule, rather it should be reformed to expand standing for claims in public nuisance.

Perhaps more critically for the purposes of striking out the application, the defendants' compliance with legislative and regulatory requirements meant Smith's claim that the interference with the public rights identified was unlawful per se, if accepted, would have entailed the tort 'pulling itself up by its own bootstraps':[79] the defendant's activity would constitute a public nuisance because it is unlawful, and it would be unlawful because it was a public nuisance. This is doctrinally illogical. The unlawfulness of the relevant acts in public nuisance is external to the tort of public nuisance. It can arise from failure to perform statutory, regulatory, or other common law obligations to the required standard, but it does not arise from within the tort of public nuisance itself.

2 *The Negligence Claim*

All parties acknowledged the novelty of the contended duty of care: a duty owed by the defendants to the plaintiff 'to take reasonable care not to operate [their] business in a way that [would] cause him loss by contributing to dangerous anthropogenic interference with the climate system'.[80] As such, the limitations on striking out claims 'in any developing area of the law, particularly where a duty of care is alleged in a new situation',[81] suggests this claim should have proven difficult to strike out. Instead, Wylie J also struck out Smith's negligence claim.

Establishing a novel duty of care in negligence in New Zealand requires the court to consider

> a) whether the claimed loss was a reasonably foreseeable consequence of the alleged wrongdoer's acts or omissions;
>
> b) the degree of proximity or relationship between the alleged wrongdoer and the person said to have suffered loss; and

[79] Ibid 413 [71].
[80] Ibid 414 [75].
[81] Ibid 402 [23], citing *Prince* (n 67).

> c) whether there are factors external to the relationship which would make it not fair just and reasonable to impose the claimed duty. Policy factors can support or negative finding a duty. [82]

Wiley J also cited *Wagon Mound [No 2]*:[83]

> Damage is foreseeable only where there is a real risk of damage, that is one which would occur to the mind of a reasonable person in the position of the defendant and one which he would not brush aside as far-fetched.[84]

He also noted that 'the law can regard damage as 'such an unlikely result of the defendant's act or omission that it would not be fair to impose liability even if the act or omission was actually a cause or even the sole cause'.[85]

In finding the harm alleged was not a reasonably foreseeable consequence of the defendants' acts or omissions,[86] Wylie J noted a major conceptual defect in Smith's statement of claim. Although causally connecting emissions to climate change harms at a global level, it fails to draw a causal link between the harms particular to the plaintiff, and the emissions particular to the defendant.

Elsewhere, Wylie J highlighted Smith's failure to satisfy the 'but for' test of causation.[87] Even if the defendants were to stop emitting greenhouse gases, the anticipated harms would still occur as a consequence of the actions of other emitters. Wylie J also observed scientific limitations in establishing the proportion of damage pleaded as resulting from the defendants' contribution.[88]

In critiquing the judgment those difficulties are difficulties in proving causation, not foreseeability: the margins between foreseeability and causation have been problematically blurred. Further, the likelihood of the defendants contributing to climate change in the event they continue to emit is high, even if their net contribution is itself low, and therefore may not be so unlikely as to make it 'unfair' to impose liability. Based on the high threshold for striking out applications focussed on novel duty questions, the difficulties should not have influenced the foreseeability finding in strikeout but instead should have been considered at trial.

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82 Smith (n 23) 414 [76], citing *North Shore City Council v A-G* [2012] 3 NZLR 341 403–4 [158]–[160] ('*North Shore City Council*').

83 Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty Ltd [1967] 1 AC 617 (Privy Council) ('Wagon Mound [No 2]').

84 Ibid 643.

85 *North Shore City Council* (n 81), quoted in Smith (n 23) 414–5 [80].

86 *Smith* (n 23) 415 [82].

87 Ibid 415 [84].

88 Noted in Winkelmann, Glazebrook and France, 'Climate Change and the Law' (n 32) and Geetanjali Ganguly, Joana Setzer and Veerle Heyvaert, 'If At First You Don't Succeed: Suing Corporations for Climate Change' (2018) 38(4) *Oxford Journal of Legal Studies* 841. However, both note that technology is developing rapidly.

Wylie J found there was neither physical nor relational proximity between the plaintiff and defendants, and that there was nothing sufficiently special about Smith, or a class of people including him, to suggest that the defendants should have had him specifically in mind when considering the consequences of their actions.[89]

Policy considerations contraindicating recognition of the duty identified included: indeterminacy of plaintiff — that is, the inability of potential defendants to identify who might be affected by their actions — and its rarer counterpart indeterminacy of defendant, reflecting the duality of emitter/defendant and climate change victim/plaintiff, which potentially captures everyone on the planet.[90] Wylie J also noted that, rather than the defendants, the government is best positioned to protect citizens from the effects of climate change through coordinated regulation, legislation, and policy initiatives, and the potential for the common law to undermine the coherence of legislation and policy in the event it imposed obligations on actors that are inconsistent with, or in excess of, previously agreed and mandated tasks and functions.[91]

3 *The Inchoate Duty*

Smith 'made no attempt in pleading his third cause of action to refer to recognised legal obligations, nor to incrementally identify a new obligation by analogy to an existing principle.'[92] Regardless, the Court acknowledged the law's capacity to create 'new principles and causes of action', through 'the methodological consideration of the law that has applied in the past and the use of analogy',[93] notwithstanding the absence of both to justify preservation of the inchoate tort claim in either the judgment or the claim itself, based on the court's summary of it.

Wylie J acknowledged that the public policy considerations identified in the decision to strike out the negligence claim were also likely to apply to the inchoate tort claim,[94] but nonetheless he was 'reluctant to conclude that the recognition of a new tortious duty which makes corporates responsible to the public for their emissions, is untenable.'[95]

Referring to Winkelman, Glazebrook and France JJ's extra-curial predictions,[96] he speculated that the inchoate tort might 'result in the further

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89 *Smith* (n 23) 417 [92].
90 Ibid 418–20 [98].
91 Ibid.
92 Ibid 420–1 [102].
93 Ibid 420 [101].
94 Ibid 420–1 [102].
95 Ibid 421 [103].
96 Winkelmann, Glazebrook and France, Climate Change and the Law (n 32).

evolution of the law of tort', by either modifying the special damage rule, or advancements in climate change science leading to 'an increased ability to model the possible effects of emissions.'[97] He reasoned that those issues could only properly be explored at trial, and justified his decision not to strike out the cause of action, which would foreclose 'on the possibility of the law of tort recognising a new duty which might assist Mr Smith'.[98]

The Court's decision to not strike out the inchoate tort claim seems inconsistent with the reasoning behind the decisions to strike out the negligence and nuisance claims. An argument about the ongoing relevance of the special damage rule in public nuisance is, necessarily, better contextualised within a public nuisance claim, rather than loosely deferred to a trial on a novel tort whose elements may not relate to public nuisance, denying its context at best, and relevance at worst. Similarly, argument about ways of overcoming limitations of science and technology in proving causation are better situated in claims to which they are directly relevant that have proceeded to trial. *Fairchild v Glenhaven Funeral Services Ltd*[99] and the other cases grappling with scientific uncertainty mentioned in discussion of the struck-out negligence claim were pleaded as negligence cases, not as 'inchoate' torts. Nor does the vague formulation provided of 'a duty which makes corporates responsible to the public for their emissions' necessarily appear to reflect the gist of influential proposals for reform,[100] and nor does it support any determination of the tenability or otherwise of the cause of action.

B Sharma

In *Sharma*,[101] the child Applicants[102] claimed that the Commonwealth Minister for the Environment owes them personally, and as representatives of children generally, a duty to exercise statutory decision-making powers[103] to exercise 'reasonable care so as not to cause them harm'[104] in any decision to approve expansion of a coal mine. They sought declaratory and injunctive relief to prevent the Minister from approving the extension based on her inability to approve the expansion without breaching the contended duty of care.[105]

97 *Smith* (n 23) 421 [103].
98 Ibid.
99 Fairchild v Glenhaven Funeral Services Ltd [2003] 1 AC 32.
100 Winkelmann, Glazebrook and France, Climate Change and the Law (n 32).
101 *Sharma* (n 24).
102 Ibid 4 [4].
103 Environment Protection and Biodiversity Conservation Act 1999 (Cth) ss 130, 135.
104 *Sharma* (n 24) 5 [9].
105 Ibid 5 [10].

Vickery Coal — the second defendant in the application — is a wholly owned subsidiary of Whitehaven Coal, which had approval under New South Wales law to develop the mine.[106] Subsequent to obtaining that approval, the developers proposed to significantly expand the mine.[107] That expansion requires Ministerial approval under the *EPBC Act*.[108]

The applicants claimed increased risk of personal injury — mental and physical, including death — property damage, and pure economic loss[109] resulting from increased climatic hazards[110] as a consequence of increased CO2 emission. They restricted the duty owed by the Minister to 'children' in expectation that the most severe of the anticipated harm is likely to occur 'towards the end of this century', when 'unlike today's adults, today's children will be alive and will be the class of person most susceptible to the harms in question'.[111] Referencing the salient features approach — the criteria against which novel duty of care claims are evaluated in Australia[112] — the applicants specifically argued that the risk of harm was foreseeable; that the children were vulnerable; that the Minister knew of the risk, and was in a position to control it; and, that the children occupy a special position vis-a-vis the Minister.[113]

The Minister argued that other salient features, including coherence and indeterminacy, pointed overwhelmingly against the duty's recognition.[114] Even if the duty is recognised, there was no basis for apprehending that the Minister would breach it, and consequently no basis for granting the injunction sought by the applicants.[115]

The 'salient features approach' consists of seventeen considerations. These considerations are all derived from prior decisions of superior courts, evaluation of which can determine whether a novel duty of care should be recognised. Not all factors must be considered in every case and some factors will be more relevant in certain cases. Each factor need not be accorded any particular, or even equal, weighting; and the list is not exhaustive.[116]

The salient features approach has been applied by superior courts, including the New South Wales Court of Appeal and the Federal Court of Australia, in the aftermath of the High Court of Australia's formal rejection of proximity as the

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106 Ibid 4–5 [6].
107 Ibid 6 [19].
108 Ibid 5 [7].
109 Ibid 5 [11].
110 Ibid.
111 Ibid 5 [12].
112 Ibid 27 [96], citing *Plaintiff S99/2016 v Minister for Immigration and Border Protection* (2016) 243 FCR 17, 69–72 [202]–[209] (Bromberg J), *Caltex Refineries (Qld) Pty Ltd v Stavar* (2009) 75 NSWLR 649, 676 [102] (Allsop P) ('*Caltex*').
113 Ibid 5 [12].
114 Ibid 6 [15].
115 Ibid.
116 *Sharma* (n 24) 28 [99], quoting *Hoffmann v Boland* [2013] NSWCA 158 [31] (Basten JA).

determining criteria for establishing a duty of care.[117] Those applications of the approach overlook a critical aspect of its formulation and use. Although 'foreseeability of harm' was the first entry in the salient features 'checklist', the judgment subsequently acknowledges that foreseeability of harm is not the same as the other salient features: its demonstration is a pre-condition to undertaking a salient features analysis, rather than a component of it.[118] None of the cases cited by Bromberg J in *Sharma* appear to recognise this distinction. However, it may be important, as failure to treat foreseeability as a pre-conditional control factor , instead treating it in the same way as the other salient features, could potentially distort the evaluative process outlined by the formulation of the salient features approach, placing undue weight on a 'feature' which in fact is a pre-determined condition.

As *Sharma* was 'a special class of case, [raising] its own problems' based on the respondent [defendant] Minister's status as 'a repository of statutory power or discretion',[119] 'certain factors' — '[c]oherence with statutory scheme and policy considerations … control, reliance, vulnerability, and the assumption of responsibility' — may be of 'critical importance'.[120] Bromberg J accordingly applied selected salient features (control, vulnerability, reliance, and reasonable forseeability) in finding support for existence of the posited duty.[121]

1 *Foreseeability of Harm*

To determine whether the risk of harm was foreseeable,[122] the Court had to consider specifically the extent to which emissions from the Extension Project will 'materially contribute to the Children's risk of being injured by one of more of the hazards induced by climate change.'[123] The Minister's argument that foreseeability 'was causally negated by the complex interaction of factors that will evolve over the coming decades'[124] was rejected as it was 'founded upon a causal analysis', and '"reasonable foreseeability" is not a test of causation'.[125]

Nevertheless, Bromberg J found that, because the claim sought an injunction to prevent anticipated harms, he was required to consider 'the prospect of the Minister's conduct causing harm to the children'.[126] However, as the Minister's

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117 Sullivan v Moody (2001) 207 CLR 562 ('Sullivan v Moody').
118 *Caltex* (n 112) [106] (Allsop P).
119 Sullivan v Moody (n 117) 579–80 [50]; Hunter and New England Area Health District v McKenna (2014) 253 CLR 270, 278–9 [17]–[18].
120 *Sharma* (n 24) 31 [109].
121 Ibid 113 [490].
122 Ibid 22–3 [77].
123 Ibid 22 [76].
124 Ibid 50 [194].
125 Ibid.
126 Ibid 23 [78].

decision was not the sole direct source of risk associated with the claimed future harms, instead being a necessary but insufficient link in a chain of events leading to the harm, it was necessary to establish whether the Minister's proposed conduct would *materially contribute to a risk* of harm to the children.[127]

Of the various climatic events included in the plaintiffs' claim, only heatwaves and bushfires caused by climate change were identified as 'injury-inducing events which … expose[d] each of the Children to a real risk of harm from extreme weather events brought about by climate change.'[128]

Bromberg J initially formulated the 'proper inquiry' as whether 'the injury to the children is a foreseeable consequence of the Minister's approval of the extension project.'[129] That was subsequently qualified by recasting it as whether

> a reasonable person in the Minister's position would foresee that a risk of injury to the Children would flow from the contribution to increased atmospheric CO2 and consequent increased global average surface temperature brought about by the combustion of the coal which the Minister's approval would facilitate.[130]

Although both duty and breach rely on reasonable foreseeability tests, the content of those tests differs:

> [T]he foreseeability inquiry at the duty, breach and remoteness stages raises different issues which progressively decline from the general to the particular. The proximity upon which a Donoghue type duty rests depends upon proof that the defendant and plaintiff are so placed in relation to each other that it is reasonably foreseeable as a possibility that careless conduct of any kind on the part of the former may result in damage of some kind to the person or property of the latter. The breach question requires proof that it was reasonably foreseeable as a possibility that the kind of carelessness charged against the defendant might cause damage of some kind to the plaintiff's person or property. Of course, it must additionally be proved that a means of obviating that possibility was available and would have been adopted by a reasonable defendant. The remoteness test is only passed if the plaintiff proves that the kind of damage suffered by him was foreseeable as a possible outcome of the kind of carelessness charged against the defendant.[131]

The plaintiff's claim identified a class consisting of 5 million people. Bromberg J determined that relevant test of foreseeability was whether 'each member of that class is exposed to a real risk of harm from the Minister's conduct'.[132]

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127 Ibid 22–3 [76].
128 Ibid 53 [204].
129 Ibid 64 [247].
130 Ibid 64 [247].
131 Minister Administering the Environmental Planning and Assessment Act 1979 v San Sebastian Pty Ltd [1983] 2 NSWLR 268, 295–6 (Glass JA) (emphasis in original) (citations omitted).
132 *Sharma* (n 24) 49 [190].

Having applied the narrower test, Bromberg J then drew on Lord Atkin's canonical statement of the neighbour principle in *Donoghue v Stevenson*[133] to conclude that

> this is a case where the foreseeability of the probability of harm from the defendant's conduct may be small, but where the foreseeable harm, should the risk of harm crystallise, is catastrophic. The consequent harm is so immense that it powerfully supports the conclusion that the Children should be regarded as persons who are 'so closely and directly affected' that the Minister 'ought reasonably to have them in contemplation as being so affected when … directing [her] mind to the acts … which are called into question'.[134]

In doing so, Bromberg J relied on the likelihood of the harm occurring, and the magnitude of its consequences — considerations more commonly associated with foreseeability at the breach stage of enquiry — to establish foreseeability at the duty stage. This approach differs substantially from precedent. Foreseeability at the duty stage is a more general enquiry than foseeability at the breach stage. Forseeability at the breach stage involves calculation of likelihood of the harm occurring and magnitude of the consequences of a particular harm. Breach, unlike duty, relies on facts which include the actual harm the plaintiff is pleading. In the absence of actual realised harm – as in *Sharma* – no finding of breach can be made, as those facts have not yet materialised. That neither likelihood of harm, nor severity of consequences, expressly appear on the 'salient features' list is consistent with the dependency of their assessment on identification of the relevant harm to a greater level of specificity than does foreseeability at the duty stage.

2 *Control, Responsibility and Knowledge*

In observing that '[t]he greater the level of control over, responsibility for and knowledge of the risk of harm, the closer will be the relations',[135] Bromberg J concluded that '[t]he Minister has direct control over the foreseeable risk because it is her exercise of power upon which the creation of that risk depends', and that the relationship between her power, and the risk to the Children, is direct.[136]

Bromberg J also considered the 'situation' occupied by the Minister with respect to the statutory powers and duties to be informative,[137] noting that by virtue of the functions conveyed to her by the *EPBC Act*, 'she has responsibility over those aspects of the environment which the Commonwealth Parliament has

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133 [1932] AC 562 ('*Donoghue v Stevenson*').
134 Ibid 66 [257], quoting *Donoghue v Stevenson* (n 133) 580 (Lord Atkin).
135 Ibid 66 [258].
136 Ibid 68 [271].
137 Ibid 68 [272].

chosen to regulate'.[138] This includes the 'protection of the environment' and, ultimately, 'the interests of Australians including Australian children', reflected by the Acts objectives, jurisdictional operation, and express statement of the principle of inter-generational equity.[139] His Honour found that, supplementing the control exercised over the risk by the Minister, she also has knowledge of the risk of harm, not least because of the Minister's access to the extensive body of evidence presented during argument.

3 *Vulnerability, Reliance, and Recognised Relationship*

Focusing on the question of whether the Children were vulnerable in the limited context of the harm flowing from the Minister's exercise of her decision-making powers, Bromberg J considered the powerlessness of the Children to avoid that harm, specifically 'the steps the person can reasonably be expected to take to avoid the harm inflicted by a defendant', ultimately finding that no such steps were apparent.[140]

His Honour rejected the Minister's argument that the Children's vulnerability was not unique to them, but was common to children and adults globally: 'vulnerability to harm is not denied by the fact that there are others equally vulnerable or even others more vulnerable.'[141] 'Reliance' was satisfied by the Minister's responsibility to Australians generally under the *EPBC Act*.

Whether the Children, as minors, occupied a position of 'special vulnerability' with respect to the Minister rested on debate about the scope and content of the parens patriae jurisdiction, and discussion of some immigration cases involving best interests of minors in the context of cancellation of parental visas,[142] and parental deportation.[143] Ultimately the parens patriae argument remained unresolved.[144] However, Bromberg J observed that common law jurisdictions 'identify that there is a relationship between the government and the children of the nation, founded upon the capacity of the government to protect and upon the special vulnerability of children.'[145]

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138 Ibid 68 [273].
139 See ibid.
140 Ibid 73 [296].
141 Ibid 73 [297].
142 Minister for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273.
143 *Vaitaiki v Minister for Immigration and Ethnic Affairs* (1998) 150 ALR 608 (Federal Court of Australia — Full Court).
144 *Sharma* (n 24) 76 [311].
145 Ibid.

4 Coherence of the Posited Duty with the Statutory Scheme and Administrative Law

Coherence is a private law policy consideration which assists the courts in developing the common law as it interacts with statute and with other common law principles.[146] In the context of statutory interaction, coherence prevents the common law from developing (or being applied) in circumstances where it would 'undermine, contradict, or substantially interfere with the purpose, policy and operation of the statutory law already in place.'[147]

The Minister contended that the proposed duty of care is incoherent with the *EPBC Act*, and public law principles generally. That statutory incoherence arose because if the duty was found to exist, the discretion she was vested with in exercising her functions under the *EPBC Act* would be 'foreclosed' or pre-empted, and she would be compelled to reach a particular decision, specifically refusing the expansion application.[148] Alternatively, recognition of the proposed duty would '"skew" or "distort"' the Minister's statutory decision-making discretion, because consideration of the need to avoid harm to the Children would become a 'mandatory and paramount consideration'.[149]

Bromberg J determined that

> coherence between the imposition of liability for negligence and a statutory power or discretion requires a consistency assessment which has regard to both statutory purpose and statutory function and which will ordinarily give priority to consistency between the purpose of the statute and the concern or object of the duty of care.[150]

In applying that test to the Minister's functions under the *EPBC Act*, Bromberg J found that the posited duty was consistent with the purpose of the statutory scheme, in that both were 'concerned with the avoidance of various categories of harm to the Children', and 'a relevant consideration that the Minister must take into account in exercising her power of approval under ss 130 and s 133 of the *EPBC Act*'.[151] Preservation of human life and the avoidance of personal injury would be relevant in any decision presenting a risk of danger to human safety:

> An expectation that a statutory power will not be used without care being taken to avoid killing or injuring persons will almost always cut across the exercise or performance of a statutory power including a broad discretionary power. … It would therefore be surprising for incoherence to arise between a common law duty to take reasonable care for the lives and safety of persons and a statutory scheme which

146 Ibid 78 [321].
147 Ibid 78 [322].
148 Ibid 79–80 [329].
149 Ibid 80 [329].
150 Ibid 95 [396].
151 Ibid 95 [397].

> contemplates that the powers it confers would not be used to unreasonably endanger the lives and safety of persons.[152]

His Honour found that the avoidance of death and personal injury by the taking of reasonable care may legitimately be regarded as 'the obvious intent of any legislative scheme which confers functions or powers capable of creating a danger to human safety, unless a contrary intention is shown.'[153]

As such, Bromberg J found that human safety — including the safety of the Children — was a mandatory, rather than permissive, consideration for the Minister under the Act,[154] requiring her to 'give at least elevated weight to the need to take reasonable care to avoid that risk of harm.'[155] The posited duty was found to be 'in harmony with the statutory scheme' and as such unlikely to result in the Minister adopting 'a defensive frame of mind' in order to avoid liability which the Commonwealth of Australia, as the defendant, has the 'capacity to immunise itself from liability for damages' but had not done so.[156]

In considering the outcomes-based impairment identified by the Minister, Bromberg J noted that liability in negligence 'is imposed by breach of duty of care not simply by the recognition that a duty of care exists', so mere recognition of the duty would not foreclose the Minister's decision.[157] His Honour's conclusion with respect to the property and economic harms foreshadowed by the applicants was different. His Honour found that consideration of them was permissive, rather than mandatory, and as such incoherence was established, ruling out the existence of a duty of care 'extending to property and pure economic loss'.[158]

The determinative value of this finding is potentially important. It suggests that, of the salient features considered by Bromberg J, incoherence would be fatal to recognition of a purported duty. Whether that implies that Bromberg J was applying each of the relevant factors sequentially as a series of gates, all of which must be cleared in order for the duty to be recognised, or whether his Honour simply accorded much greater evaluative weight to coherence than other salient features — and if so, why? — is not clear from the judgment. The court also rejected the Minister's claim that recognising the posited duty of care was inconsistent with administrative law principles.[159]

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152 Ibid 95 [398].
153 Ibid 95–6 [399].
154 Ibid 97 [406].
155 Ibid 97 [407].
156 Ibid 97 [408]
157 Ibid 97–8 [410].
158 Ibid 99 [416].
159 Ibid 101 [427].

5 *Indeterminacy*

The Court rejected the Minister's claims that 'the 'magnitude of potential liability and the class of persons to whom the duty would be owed';[160] that restriction of the class to children only was arbitrary; and that recognition of the duty would 'bring about a potential liability of 'astonishing extent and breadth', of 'a vast scope even if confined to children as the potential claimants'.[161]

Indeterminacy is not, according to Bromberg J, determined by the number of claims — or at least not the number of claims alone — but rather the inability of the defendant to identify the 'nature and extent' of the claims.[162] Bromberg J noted that indeterminacy is 'less relevant and not commonly considered in relation to physical harm to person or property'.[163] In this instance, the Court had already rejected the possibility of property and economic harms falling within the scope of the posited duty on the basis of incoherence. Therefore, the only type of claims likely to arise from recognition of the posited duty were claims for personal injury, which, as noted earlier, seldom enliven consideration of indeterminacy.[164]

With respect to the arbitrariness of recognising Children as the plaintiff group, Bromberg J restated that the risk of injury must be real 'rather than a mere possibility',[165] and that the applicants 'rely on the intensity of exposure to harm and thus the significance of risk of harm as a defining characteristic which distinguishes children from adults',[166] which they linked to the risk of significant global warming that will be experienced in their later years, rather than the latter years of extant adults. Bromberg J did, however, acknowledge that there are some rational limitations on the distinction used by the applicants to define the class.[167]

Ultimately, Bromberg J rejected the Minister's claims regarding indeterminacy on three bases. First, the posited duty only related to personal injury, which typically does not attract indeterminacy considerations.[168] Second, the Minister is in a position to inform herself about the nature of claims, and the potential class of claimants, rendering any liability determinate.[169] Third, in the event of liability arising, it is unlikely that the Minister would be found to be solely liable, noting the contributions to the harm made by others.[170]

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160 Ibid 101 [428].
161 Ibid 103 [435].
162 Ibid 104 [438].
163 Ibid 102 [430].
164 Ibid 105 [447]–[448].
165 Ibid 107 [457].
166 Ibid 107 [458].
167 Ibid 107 [458]–[459].
168 Ibid 109 [469].
169 Ibid 109 [470].
170 Ibid 109–10 [471]–[472].

6 Other Control Mechanisms

The Minister contended that 'her statutory task was steeped in policy considerations appropriately dealt with by her without intervention by the common law',[171] and that

> how to manage the competing demands of society, the economy and the environment over the short, medium and long term, is a multifaceted political challenge ... within the context of evolving national and international strategies.[172]

Further, imposition of a common law duty of care rendering tortious all activities that involve generating (or allowing someone else to generate) material quantities of greenhouse gases is 'a blunt and inappropriate response'.[173]

Bromberg J found that this misconceived the effect of finding that a duty of care was owed. Contrary to the Minister's claim, that effect was not to address 'the problem of climate change and thus interfere with the statutory task given to the Minister' or to 'render tortious all or a multitude of activities that involve the generation of greenhouse gasses.[174] Instead '[a]ll that it can and will do' is impose an obligation on the Minister, when deciding whether or not to approve the Extension Project, to take reasonable care to avoid personal injury to the Children.[175]

Bromberg J also noted that courts 'are regularly required to deal with legal issues raised in the milieu of political controversy. A political controversy can never provide a principled basis for a Court declining access to justice.'[176] Bromberg J quoted with approval the view of Gaudron, McHugh and Gummow JJ that

> it is no answer to a claim in tort against the Commonwealth under s 75(iii) of the Constitution that its wrongful acts or omissions were the product of a 'policy decision' taken by the Executive Government; still less that the action is 'non-justiciable' because a verdict against the Commonwealth will be adverse to that 'policy decision'.[177]

In dismissing 'policy reasons' as a basis for not recognising the posited duty of care, Bromberg J also observed that it does not follow from recognition of a duty of care based on the relationship between the Minister and the Children that the Minister 'owes a duty of care to others or that anyone else involved in contributing to greenhouse gas emissions owes the same duty', noting that the relationship

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171 Ibid 111 [478].
172 Ibid 111 [478].
173 Ibid.
174 Ibid 111 [479].
175 Ibid 111 [481].
176 Ibid 112 [484].
177 Ibid 112 [485], quoting *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 560 [106].

existing between the Children and the Minister was unique to them based on the provisions of the *EPBC Act*.[178]

Despite finding the Minister did owe the posited duty of care not to cause the Children personal injury when exercising her statutory decision-making functions to approve the mine extension under the Act,[179] Bromberg J did not grant the injunction sought by the Applicants, finding that they could not demonstrate that a breach of that duty by the Minister was reasonably apprehended.[180] He did not issue the declaration sought by the Applicants, citing uncertainty about the utility and terms of the requested declaration.[181]

C Smith *in Australia?*

Based on the judgment in *Sharma*, how might a *Smith*-type claim against corporate, rather than state, defendants fare in Australia?

Like New Zealand, the civil procedure rules in Australia permit courts to strike out applications that do not disclose a cause of action.[182] The power is likewise to be used sparingly, particularly in cases where the law is uncertain or developing. Summarising the Australian position, Kirby J stated:

> If there is any reasonable prospect that the appellant might be able to make good a cause of action, it is not proper for a court, in effect, to terminate the appellant's action before trial. Where the law is uncertain, and especially where it is in a state of development, it is inappropriate to put a plaintiff out of court if there is a real issue to be tried. The proper approach in such cases is one of restraint. Only in a clear case will answers be given, and orders made, that have the effect of denying a party its ordinary civil right to a trial. This is especially so where, as in many actions for negligence, the factual details may help to throw light on the existence of a legal cause of action — specifically a duty of care owed by the defendant to the plaintiff.[183]

Procedurally, therefore, the law is likely to operate in much the same way, based on similar considerations.

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178 Ibid 112 [488].

179 Ibid 117 [513].

180 Ibid 117 [510].

181 Ibid 118 [518].

182 *Federal Court Rules 2011* (Cth) r 16.21; *Court Procedures Rules 2006* (ACT) r 425; *Uniform Civil Procedure Rules 2005* (NSW) r 14.28; *Supreme Court Rules 1987* (NT) r 23.02; *Uniform Civil Procedure Rules 1999* (Qld) r 171; *Uniform Civil Rules 2020* (SA) r 70.3; *Supreme Court Rules 2000* (Tas) r 258; *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 23.02; *Rules of the Supreme Court 1971* (WA) ord 20.19.

183 *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515, 565–6 [138] (citations omitted).

Doctrinally, public nuisance is very similar:[184] like New Zealand, Australia retains the 'special damage' rule, so a plaintiff would potentially struggle to achieve standing.

The negligence claim, however, would be dealt with quite differently. In lieu of proximity, plaintiffs in Australia would, as in *Sharma*, have to address the various salient features. However, the weight and relevance of each of those features may differ from those used in *Sharma*, reflecting the Federal Court's categorisation of *Sharma* as presenting particular difficulties.[185]

In the light of the reasoning in *Sharma,* plaintiffs in a *Smith*-type fact scenario would likely argue that the harm was not only foreseeable, but actually *known to the defendant.* Whether they could show that the specific harm to that specific plaintiff was foreseeable and known may prove challenging, but not necessarily fatal, in the overall evaluation of salient features.[186] Plaintiffs would also likely argue that defendants, by virtue of their role as emitters, have the *ability to exercise the control* required to avoid the harm, simply by refraining from the emitting conduct.[187] Plaintiffs would also likely contend that they were *vulnerable* to the harm,[188] lacking the capacity to take steps to protect themselves, potentially due to lack of transparency about the emission practices.

Proximity, as a salient feature, refers to physical, temporal, or relational nearness between the parties.[189] It is not essential under the salient features approach, and its availability will depend on the specific factual circumstances of the case. In an identical situation to *Smith*, it is unlikely to be satisfied. A salient feature which might work to the plaintiff's advantage is 'the nature or degree of hazard or danger liable to be caused by the defendant's conduct or the nature or substance controlled by the defendant'.[190] Similarly, the degree of control the defendant is able to exercise over the risk is likely to act in a potential plaintiff's favour. As noted throughout *Sharma*, the Minister's decision to approve the extension, while not sufficient to result in the harm, was nonetheless necessary. In the event the Minister approved the mine but the developers subsequently decided to abandon the project, the harm would not occur: control of the risk of harm, therefore, is distributed between the Minister and others involved in bringing the mine expansion into existence. Control, therefore, need not be exclusively exercised by the defendant. In a *Smith*-type claim, the decision to carry out greenhouse gas-emitting activities on a corporate scale — absent any

184 *Smith* (n 23).
185 *Sharma* (n 24) 31 [109].
186 *Caltex* (n 112) 676 [103] (Allsop P).
187 Ibid.
188 Ibid.
189 Ibid.
190 Ibid.

regulatory or other legitimate prohibition on doing so — is likely to lay within the control of the defendant.

Salient features likely to operate against recognition are those identified in the Minister's response in *Sharma*: indeterminacy of plaintiff,[191] and incoherence with other areas of law,[192] including creation of conflicting duties and obligations. The Court's response to the issue of indeterminacy of plaintiff in *Sharma* was not entirely persuasive. Although the Court restricted the applicant's representation to Australian children, and in places relied on the applicant's minority to invoke considerations including 'special vulnerability' in the context of the relationship between the Minister and the applicants, those points do not necessarily appear to be determinative. Indeed, the Court in *Sharma* acknowledged the potential for other classes of plaintiffs who could be owed comparable duties, but did not dwell on the number or types of classes it had in contemplation, leaving the indeterminacy of plaintiff feature somewhat unresolved.[193]

Incoherence with other areas of law might play out quite differently in the context of a *Smith*-type fact scenario. If defendants are carrying out a regulated activity in an approved or compliant way, a ruling preventing them from doing that which in the circumstances is otherwise lawful is likely to fall foul of the incoherence feature, echoing the position in *Smith* in the public nuisance claim. As noted in *Sharma*:

> It is not necessary for the common law to adhere to the existing statutory law as though they are glued together as a seamless whole. What is required by coherence-based reasoning is that the two laws cohere, one sitting compatibly alongside the other without 'incongruity' or 'contrariety'.[194]

If the plaintiff in the Australian iteration of *Smith* were indigenous, the framework for consultation and consideration of their interests in formulation of policy and legislation, potentially inconsistent with recognition of a novel duty, may be quite different. The Court in *Sharma* was not required to consider an 'indigenous tort' of the type envisaged in *Smith*, or speculate on how indigenous claims might be addressed under Australian law. Without obligations under a counterpart to the *Treaty of Waitangi* or even a bill of rights, the principles for indigenous engagement, and consideration of human rights, in developing policy and legislation are far more threadbare under Australian law. Failure to consider indigenous issues in formulating policy may or may not influence any judicial consideration of the adequacy of any policies or laws that might be cut across if a novel duty of the type proposed were recognised.

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191 Ibid.

192 Ibid.

193 *Sharma* (n 24) 107 [459].

194 Ibid 78 [322], quoting *Miller v Miller* (2011) 242 CLR 446, 473 [74] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

Assuming the plaintiffs prevailed on duty, they would face the same challenge in establishing causation that has stymied other plaintiffs thus far: proving that the contribution by a defendant to global greenhouse gas emissions necessarily has any effect — causal or contributory — on specific harms experienced locally by the plaintiffs.

Are these matters sufficient to warrant striking out a plaintiff's claim in nuisance or negligence under Australian law? The issues raised around coherence and determinacy may well ultimately determine the outcome of litigation in negligence. However, as noted above, an arguable case is not necessarily one that is certain to win. And, absent any precedent, it is difficult to predict whether a claim based on an inchoate tort as pleaded in *Smith* would survive a strike-out application in Australia.

The outcome of *Smith* was preservation of the plaintiff's claim for breach of an inchoate tort, accompanied by the demise of claims in negligence and nuisance. What is the scope and content of that inchoate tort likely to be? How will it overcome some of the doctrinal barriers arising under tort law elsewhere?

In their influential article, cited extensively in *Smith*, Winkelmann et al referred to four categories used to classify climate change litigation:[195] litigation seeking to hold government accountable for policy and legislative responses to climate change; litigation as regulation; litigation to protect the individual or group's interests in the environment, including compensation for harms to those interests; and litigation to enforce good corporate governance.[196] They added a fifth category to this list of overlapping and non-exhaustive entries: litigation by indigenous peoples.[197]

D An 'Indigenous' Tort?

In *Smith*, their Honours specifically noted New Zealand law's recognition of the unique relationship indigenous people have with land.[198] In particular, they identified interests and duties arising from that relationship that would not typically be recognised in private litigation. Their Honours stopped short of providing detail about how private law could be reformed to recognise indigenous

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195 Winkelmann, Glazebrook and France, Climate Change and the Law (n 32).

196 Ibid. The categorisation was developed by the London School of Economics' Grantham Research Institute.

197 Winkelmann, Glazebrook and France, Climate Change and the Law (n 32) 40.

198 Ibid 74.

interests, beyond their predictions for reform or challenges to private law generally. Instead, they focussed on public law litigation by indigenous groups.[199]

A claim by indigenous people seeking recognition for a novel type of harm, outside the traditional personal injury, damage to property or pure economic loss, might be recognised. Nothing in the legislative reforms in Australia prevent it: the provisions of the various civil liability statutes provide non-exhaustive definitions of harm,[200] permitting expansion of the categories, and the High Court in *Sullivan v Moody* expressly identified the 'type of harm' as a type of case requiring consideration of novel duties of care.[201] Claims relying on recognition of novel harms would fall within that category.

It then becomes axiomatic that plaintiff traditional owners must fall within a class of people who should have been within the consideration of the defendant if the court determines that causing harm to traditional cultural interests was a foreseeable consequence of the defendant's actions. Is that necessarily the basis on which the test would be formulated? Absent a statutory or policy requirement to consider indigenous interests — which may well apply to government officials or regulated corporate entities — it seems likely that foreseeability and causal potency could undermine any such claim.

Would a defendant livestock farmer, for example, foresee that (relatively minor) levels of emission, in combination with the greenhouse gas emissions of a very large number of other far more significant emitters from nearly every country, would cumulatively cause harm to the interests of an indigenous group who may or may not be physically or circumstantially proximate to them? All the uncertainty of foreseeing plaintiffs, individually or as part of a restricted group, combined with uncertainties about 'material contribution' and 'causal potency' would come to the fore. Policy considerations of the type alluded to by the High Court in *Sullivan v Moody*[202] and *March v E & MH Stramare Pty Ltd*,[203] reflected in the post-Ipp Report 'scope of liability' statutory reforms,[204] could certainly counter

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199 Ibid 77. The litigation included the United National Human Rights Committee application brought by eight Torres Strait Islanders against Australia for breaching its obligations under the *International Covenant on Civil and Political Rights*, and a Waitangi Tribunal application alleging breach of its obligations to 'actively protect' Maori custodial or guardianship relationships with the environment by the New Zealand government.

200 See, eg, *Civil Law (Wrongs) Act 2002* (ACT) s 40; *Personal Injuries (Liabilities and Damages) Act 2003* (NT) s 3; *Civil Liability Act 2002* (NSW) s 5; *Civil Liability Act 2003* (Qld) sch 2 Dictionary; *Civil Liability Act 1936* (SA) s 3; *Civil Liability Act 2002* (Tas) s 9; *Wrongs Act 1958* (Vic) s 43; *Civil Liability Act 2002* (WA) s 3.

201 *Sullivan v Moody* (n 117) 579–80 [50].

202 Ibid.

203 (1991) 171 CLR 506.

204 See, eg, *Civil Law (Wrongs) Act 2002* (ACT) s 45; *Personal Injuries (Liabilities and Damages) Act* 2003 (NT) s 3; *Civil Liability Act 2002* (NSW) s 5D; *Civil Liability Act 2003* (Qld) s 11; *Civil Liability Act 1936* (SA) s 34; *Civil Liability Act 2002* (Tas) s 13; *Wrongs Act 1958* (Vic) s 51; *Civil Liability Act 2002* (WA) s 5C.

any argument to hold accountable — or disproportionately burden, depending on your perspective — a local defendant whose restraint may not make any material difference to the harms anticipated by the plaintiff, but whose continued viability has significant social and economic benefits to their local community.

A limitation of *Smith*'s nuisance claim was that the harms relied on to satisfy the special damage rule were not specific to the plaintiff: recognition of the plaintiff's claim could potentially trigger the plaintiff indeterminacy problem. Could the reforms to the special damage rule posited by Wylie J via an inchoate tort result in recognition of harm to indigenous interests as a form of special damage? Such an outcome would potentially enable recognition of the harms complained of in *Smith*. However, other doctrinal barriers, including those of reasonableness and causation, are likely to remain. Similarly, it is difficult to see how the tests for duty in either Australia or New Zealand could be adjusted to accommodate identification of indigenous custodians as a specific class of plaintiff distinct from the world at large on the basis of harm and foreseeability.

Indeterminacy of plaintiff and defendant, in the absence of statutory control mechanisms such as those identified in *Sharma*, seem likely to remain insurmountable obstacles under common law, with the courts reluctant to open a floodgate of litigation in which potentially everybody can sue everybody else, being both harmed by and contributing to greenhouse gas emission.

Even if some doctrinal barriers confronting plaintiffs in climate change litigation can be overcome, other barriers to proving causation dependent on scientific evidence — particularly causal potency — still remain. In addition to the changes or requirements noted above, any architect of an inchoate tort will need to consider how the law should accommodate and respond to the challenge of contribution which may or may not be causally potent on a global scale, but whose causal potency locally may or may not be able to be scientifically proven, even if it is foreseeable.

It seems inevitable that climate change claims will reshape, or at least provide additional definition to, tort law within Australasia. *Smith* was a procedural determination apparently under appeal,[205] and substantive argument on the claim itself has not been heard. It seems unlikely to be abandoned, regardless of the outcome of the appeal, given the significant level of public interest in the case. *Sharma* is also likely to be appealed by the government. Regardless of the outcome of that decision, unless the applicants seeking approval of the mine extension ultimately abandon their plans, there is potential for litigation around the yet-to-be made approval decision to continue for the foreseeable future. In each case, the plaintiffs appear to have considerable financial and legal support for their claims, and the defendants are similarly not

[205] Hook (n 26). However, as at date of submission, the appeal has not been listed for hearing.

poor. It is unlikely either side will be forced to abandon their claims due to limited resources.

At a minimum, the litigation may provide further clarification of the existence of the purported 'inchoate' tort of harm to the environment, mooted in *Smith*, and what the parameters of any such claim might be.

Responding to the decision in *Smith*, Hook et al speculated that New Zealand courts might recognise a tort to the environment as a mechanism allowing corporations who cause damage to the environment to be sued.[206] Questioning the Court's decision to strike out the plaintiffs' claims in both negligence and nuisance, and citing the high threshold required for strike-out proceedings, the authors queried the validity of one of the Court's reasons for striking out the claim — the difficulty in attributing causation to individual large-scale emitters — citing the scientific evidence of RWE's contribution global emissions since industrialisation, accepted for procedural purposes by the German court in *Lliuya v RWE AG*.[207]

Hook et al consider that courts might be willing to consider harm to the environment 'in and of itself' as the wrong the defendant has committed/is committing, if those courts view such recognition as consistent with evolution in the underlying goals of tort law. Accordingly, it would be 'immaterial whether another person has suffered any loss or harm as a result.'[208] However, this model would not so much represent evolution in the development of tort law as it would an entirely new species of wrong that is entirely foreign to the common law tradition.

Citing an article by Lee,[209] Hook et al refer to 'many examples of courts taking account of public interests in the imposition of tortious liability.'[210] Problematically, however, in each of Lee's examples a private party has suffered harm of some sort. Public interest considerations may have been taken into account in the court's disposition of private claims of harm, but none of the cases were brought on the basis of harm purely to a public interest per se. It is difficult to see who might bring a claim on behalf of the environment. If the claim is brought by the state, for example, the tort looks far more like a public law action, underpinned by a breach of statute, or failure to comply with regulatory requirements. It is unlikely that the solution to the problem of indeterminacy of plaintiffs is to create a tort with no identifiable plaintiff at all.

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206 Ibid.

207 Oberlandesgericht Hamm [Higher Regional Court of Hamm], 2 I 285/15, 30 November 2017. See also Myanna Dellinger, 'See You in Court: Around the World in Eight Climate Change Lawsuits' (2017) 42(2) *William & Mary Environmental Law and Policy Review* 525.

208 Hook (n 26) 205.

209 Maria Lee, 'The Public Interest and Private Nuisance: Collectives and Communities in Tort' (2015) 74(2) *Cambridge Law Journal* 329.

210 Ibid.

Even if, as the authors propose, there is 'widespread legal recognition' of a 'duty to protect' the environment,[211] that duty may be derived either directly or by implication from legislation, or non-tort common law. If the former, the appropriate cause of action may be breach of statutory duty, assuming the wording of the relevant statute permits; if the latter, it seems more appropriately addressed through public law than torts.

The authors suggest, in response to concerns in *Smith* that tortious liability 'would potentially compromise Parliament's response',[212] that tort law could instead support the legislative framework, noting that '[o]ne of the strengths of the law of torts is its ability to provide justice … based on a range of factors that could not be properly balanced by way of *ex ante* regulation.'[213] This reasoning is not inconsistent with the Court's findings on coherence in *Sharma.* Problematically, however, Hook et al suggest that courts could be '[g]uided by international commentary such as the Principles on Climate Change Obligations of Enterprises' in order to determine whether a particular defendant acted 'unreasonably'.[214] This fails to note, first, that the 'international commentary' referred to is itself a form of *ex ante* regulation — albeit not one not agreed to by a domestic legislature, but *ex ante* regulation nonetheless — and, further, that in doing so, defendants are essentially being bound by two conflicting sets of obligations: the statutory obligations passed by the parliament, which are potentially less stringent as a consequence of the political compromise necessary to pass such laws; and an international non-binding set of obligations for the purposes of avoiding tortious liability. Such an outcome is precisely the situation Wylie J and other jurists are keen to avoid, noting among other issues its potential for conflict with such fundamental principles as the doctrine of parliamentary sovereignty and the rule of law.

In the event the tort is found to exist, it is likely to open up a new seam of tort litigation, which could potentially transform the civil liability environment for corporate defendants. Across the ditch in Australia, the decision in *Sharma* may require the High Court to once again grapple with the vexed issue of novel duties of care and how they relate to public and statutory authorities as a forerunner to similar claims based on *Smith*-type facts brought against corporate defendants. The multifactorial 'salient features' framework articulated in *Caltex* is already complicated: climate change litigation certainly seems to have the potential to make it even more so.

Both *Smith* and *Sharma* demonstrate the potential for power imbalances between parties to exist within the context of climate change relationships: in

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211 Hook (n 26) 206.
212 *Smith* (n 23) 419 [98].
213 Hook (n 26) 209 (emphasis added).
214 Ibid.

both cases, the defendants —multinational corporate New Zealand, and the Australian Federal government — occupy positions of significant power and resources. The plaintiffs, meanwhile, are representative of groups traditionally disempowered by law: traditional owners in *Smith*, and children in *Sharma.* Curiously, neither case examines the position of plaintiffs who experience disempowerment at the hands of the legal system on multiple fronts: would *Smith* have had a different outcome if the claim had been brought on behalf of future generations of traditional owners, for example? Or would the plaintiff's position in *Sharma* have been strengthened if one or more of the Children specifically identified as indigenous? In their respective judgements, the courts do not consider the impact of intersectionality on plaintiff claims, nor does the secondary literature necessarily engage with it, instead focussing on, for example, children's claims or indigenous claims. These are valid considerations in light of the documented intersectional effects of climate change[215] and, as the next section of the article argues, provide a valid lens through which to teach about climate change litigation in torts law for the purpose of considering its utility in the achievement of climate change justice.

IV What Can Climate Change Litigation Do For Teaching Tort Law?

Considering Kysar's earlier work on what climate change and tort law can do for one another through a legal education perspective, a related question emerges: what can climate change tort litigation do for *teaching* tort law? Examining some of the emerging climate change claims — such as *Smith* and *Sharma* — in the teaching of tort law provides an opportunity to educate students about some of the limitations of existing doctrine, and to explore why the status quo may be inadequate for the delivery of climate change justice.

The plaintiff and applicants in *Smith* and *Sharma*, respectively, are not parties with proprietary or possessory interests in the land on which the impugned conduct is occurring. As representative actions, both cases are brought not on the basis of harms that will necessarily affect the plaintiffs and their interests personally, but rather the interests of a class of people they claim to represent, challenging traditional notions of 'private' in private law. In S*mith*, the plaintiff is acting as a representative of traditional owners, while in S*harma* the plaintiffs are minors. In each case the defendants — the Commonwealth of Australia, and various large corporations — have access to significantly greater resources to support them in the litigation. Climate change tort litigation of this type,

[215] Ibid. See also Neumayer and Plümper (n 2); Newell (n 2); Waldinger (n 3); World Bank (n 7); Ford (n 6); Dankelman and Naidu (n 8); Kaijser and Kronsell (n 8); Vinyeta, Whyte and Lynn (n 8).

therefore, provides a valuable teaching opportunity to concurrently explore a range of critical legal perspectives, including Marxist theories of property and privatisation, legitimacy of judicial law-making, and intersectional critical feminist, racial, and disability perspectives; to critique the adequacy of existing law to respond to marginalisation and power imbalances within the status quo; and to formulate effective proposals for reform.

The appropriate scope and extent of legal-theory teaching within legal education has been a topic of longstanding debate, reflecting different conceptualisations of the discipline. From a vocational conceptualisation, theory is thought to have limited value. Its teaching is, consequently, viewed as a detraction from the curriculum's ability to provide a sufficient grounding in the posited 'black-letter' law and practical legal skills that students will ultimately be required to apply. Alternative views note that law is no longer purely or even largely a vocational qualification, instead calling for teaching in a wide array of skills, including critical thinking.[216] In Australia, a significant number of law graduates do not work in private practice, but instead work in policy, government, and an array of other roles.[217] The diversity of graduate destinations into a range of other fields of employment therefore necessitates graduates receiving an education that has a broader focus than doctrinally-focused material contained in the prescribed learning outcomes.[218]

Coleman, in defence of teaching theory in the US context, noted:

> Considerations of efficiency and justice are not just windows through which we can assess or reform existing law, they are important standards of law. Indeed, the view that such standards are not law is itself a theoretical claim about the nature of law. The truth of that claim cannot be presupposed by the law school curriculum.[219]

Rice recently argued that legal education demands critical perspectives, lamenting the absence of legal theory from the prescribed content of Australian law degrees.[220] Summarising views that the 'debate' was largely redundant as the

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216 Michael Coper, 'Educating Lawyers for What? Reshaping the Idea of Law School' (2010) 29(1) *Penn State International Law Review* 14; Nickolas James, 'Australian Legal Education and the Instability of Critique' (2005) 14(2) *Legal Education Digest* 54; David Barker, *A History of Australian Legal Education* (Federation Press, 2017) 3; Dennis Pearce, Enid Campbell and Don Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (Report, 1987); Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (Report No 89, February 2000).

217 Simon Rice, 'Why Prescriptive Legal Education Demands Critical Perspectives' in Kevin Lindgren, Francois Kunc and Michael Coper (eds), *The Future of Australian Legal Education: A Collection* (Lawbook, 2018) 217.

218 Ibid.

219 Jules L Coleman, 'Legal Theory and Practice' (1995) 83 *Georgetown Law Journal* 2579.

220 Rice (n 225) 217.

two perspectives are 'profoundly consistent',[221] Rice called for greater integration of teaching of critical theories into the prescribed legal curriculum, stating:

> Critical perspectives on legal doctrine and process can explain how law may be seen and appreciated differently, and may operate differentials, exposing and opening to challenge the many conceptions of justice in law, and the implicit values and biases in legal procedures. Critical perspectives help lawyers see the oppressive dimensions of law and the legal system — as well as its occasional liberating capacity — with greater clarity and insight. Marxism, feminism, critical race theory, critical disability theory, critical legal studies, are all ways of understanding how power operates in and through law; critical perspectives on law tell us how our clients see and experience law … And critical perspectives are understood best, or maybe only, in the social contexts of laws operation. This requires an appreciation of the many ways that law is experienced by those for whom law is chronically unjust, and provides material with which to examine embedded conceptions of justice in law.[222]

In providing examples of how critical perspectives could be embedded throughout subjects within the curriculum, Rice identified critical disability perspectives as a candidate for deepening student-understanding of torts, highlighting the 'many assumptions, against interest, that legal rules make about ability, capacity, autonomy and dependence'.[223]

Perhaps underemphasised by Rice are opportunities within the curriculum to explore intersectionality: the 'interaction between gender, race, and other categories of difference in individual lives … and the outcomes of these interactions in terms of power'.[224]

As noted above, climate change, in addition to being 'the mother of all collective action issues',[225] provides a vivid illustration of intersectional disadvantage arising from unjust and inequitable distribution of harms. Climate change disproportionately affects those who are already disadvantaged and marginalised, including indigenous peoples, displaced peoples, young people, the unemployed, women, and others who lack social and political power.[226] That those who are affected by climate change may fall within more than one of the identified vulnerable groups is also well-established. The intersectional effects of climate change, where the combined effects of belonging to more than one identified vulnerable group are amplified to a greater extent than the sum of the

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221 Ibid 218, citing Michael Coper, 'Legal Knowledge, the Responsibility of Lawyers, and the Task of Law Schools' [2006] *ALTA Law Research Series* 2.

222 Ibid 225.

223 Ibid 215–6.

224 Kathy Davis, 'Intersectionality as Buzzword: A Sociology of Science Perspective on What Makes a Feminist Theory Successful' (2008) 9(1) *Feminist Theory* 67, 68.

225 Kysar, What Climate Change Can Do About Tort Law (n 14).

226 See, eg, Neumayer and Plümper (n 2); Newell (n 2); Waldinger (n 3); World Bank (n 7); Ford (n 6); Dankelman and Naidu (n 8); Kaijser and Kronsell (n 8); Vinyeta, Whyte and Lynn (n 8).

disadvantage attributable to membership of each group individually, is also well established.[227]

Intersectionality can encompass a broad range of attributes. Originally, intersectional approaches considered race and gender.[228] However, it may be extended to include other attributes, such as sexuality, class, religion, age, able-bodiedness, and nationality, as appropriate.[229] A key principle of intersectionality is its examination of how those intersecting sources of injustice or disadvantage play out against the backdrop of power, including institutionalised power wielded by courts, parliaments and the executive, as well as the private sector.[230] Importantly, it can be used to frame discussions about the legitimacy of activities such as judicial law-making, and whether that is an acceptable use of the courts power, including in circumstances where political power in achieving a legislated alternative seems to have failed.

There is therefore scope to examine the justice of outcomes arising from strict application of existing tort-law doctrine on those groups through an intersectional lens. More broadly, however, we can use critical perspectives in the context of climate change to examine the foundational concepts underpinning tort law, starting with the interests it deems worthy of protection, the harms it recognises as warranting compensation, and the mechanisms it legitimises as appropriate for achieving recompense for harms to those interests.

An identified criticism of intersectionality as a general theory of identity is that it recognises a 'hypothetical' alternative person who does not share the intersecting identities of the subject (such as male, cis, hetero, white, wealthy, able-bodied, etc).[231] This criticism, directed against intersectionality in general, is precisely what makes it a useful theory for critiquing law, an institution which has been extensively criticised by academics precisely because it privileges those characteristics. Whereas other disciplines need to create an alternate who does not have the relevant disadvantaging characteristics in order to apply intersectional theory, in legal analysis the existing paradigm already embodies them.[232]

Outside of elective subjects based on discrimination law or gender, legal theory, or criminal law units that specifically examine intersectional offending,

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227 Dankelman and Naidu (n 8).

228 Kimberlé Crenshaw, 'Demarginalising the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' [1989] (1) *Chicago Legal Forum* 139.

229 Davis (n 229) 75.

230 Ibid.

231 Ben Smith, 'Intersectional Discrimination and Substantive Equality: A Comparative and Theoretical Perspective' (2016) 16 *Equal Rights Review* 73, 73.

232 The legal system's embodiment of those characteristics is the basis of much critical legal analysis, a body of scholarship too extensive to be detailed here.

intersectionality may receive limited express attention.[233] Teaching of critical perspectives will often occur in isolation, both of the critical approach concerned, and the legal issue it is applied to. In tort law, for example, critical feminist theories are commonly used to shed light on doctrinal principles such as the objective 'reasonable man' standard, the impact on women of wrongful birth claims, or quantification of future economic loss arising from personal injury. Critical race theories, particularly as they apply to property rights of traditional owners, may be discussed in the context of teaching *Wik*[234] and *Mabo [No 2]*[235] in property law or public law units, but may not be acknowledged in the teaching of property-related torts. This isolation is understandable: the volume of doctrinal and substantive law contained within the curriculum leaves limited space to add in anything more. Yet there remains an expectation that within that curriculum, academics teach about new and emerging issues within the subdiscipline. Climate change litigation meets that criterion within tort law. Teaching tort law with an emphasis on intersectional justice presents an opportunity to address several requirements — pedagogical and social — simultaneously.

How then should we teach climate change tort litigation through an intersectional lens?

Matsuda developed an approach that is both simple and effective for identifying intersectional issues.[236] Through what she called 'asking the other question', Matsuda sought to identify intersectional inequities by reformulating her initial question to focus on an alternative attribute:

> When I see something that looks racist, I ask, 'Where is the patriarchy in this?' When I see something that looks sexist, I ask, 'Where is the heterosexism in this?' When I see something that looks homophobic, I ask, 'Where are the class interests in this?'[237]

Applying Matsuda's approach to tort claims for climate change harms might, therefore, look something like 'tort law appears to disadvantage indigenous climate change plaintiffs: how does it respond to women plaintiffs?'; or 'tort law appears to disadvantage children: how does it disadvantage refugees?'. This approach identifies different and overlapping ways in which tort law might disadvantage plaintiffs bearing the brunt of inequitable distribution of those harms, identifying opportunities for law reform to address those injustices, and providing students with insight into the effectiveness of legal institutions in achieving climate change justice, including via tort law, and why those institutions may or may not be adequate.

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233 An exception may be some criminal law or sentencing units, which consider intersectionality, for example, in the context of offending by indigenous minors, or drug and alcohol offences.

234 *Wik Peoples v Queensland* (1996) 187 CLR 1, 173 (Gummow J).

235 Mabo v Queensland [No 2] (1992) 175 CLR 1.

236 Mari Matsuda, 'Beside My Sister, Facing the Enemy: Legal Theory out of Coalition' (1991) 43(6) *Stanford Law Review* 1183.

237 Ibid 1189.

V Conclusion

What, then, can tort law do for climate change litigation in Australasia, and what can climate change can do for tort law?[238] An answer may be that plaintiffs seeking justice for climate change caused harms via torts law will continue to encounter multiple insurmountable doctrinal barriers. Even if an inchoate tort is adopted, it is difficult to see how it could be designed in a way that would be capable of overcoming every one of the doctrinal challenges thrown up by tort law, unless it becomes something fundamentally different in character from a tort. With enough persistence and repeated exposure to climate change claims, enough of those barriers may crumble or stretch to accommodate a successful claim. Such is the course of incrementalism. Ironically, tort law itself may benefit from repeated exposure to climate change claims, particularly if those claims require the court to better articulate or reform areas of doctrine that have become stagnant.

Climate change offers us an opportunity to do more with the history of tort law than just legitimise change driven by social development. It offers an opportunity to critically re-examine existing or even old, possibly extinct, doctrine to determine whether, within those artefacts, there remains useful material that can assist with the challenge that climate change litigation poses to tort law.

Part IV proposed that climate change tort litigation can and possibly should be used to introduce students to intersectionality as a critical perspective for the evaluation of the capacity of legal institutions to deliver justice. To engage in that critical examination, students need to be introduced to the theories that support it. What climate change litigation does for tort-law teaching, therefore, is provide an opportunity to do just that. Climate change is a 'super wicked problem'.[239] Teaching students about climate change litigation — including about cases that ultimately may not survive the appellate process — provides opportunities to explore relationships between law and justice, and exposes students to the intersectional effects of different sources of disadvantage and injustice in a common law context, rather than within the more commonly encountered realms of human rights and discrimination law. In addition to providing an opportunity to examine issues of justice through an intersectional lens, climate change litigation offers an opportunity to examine the power relationships between different institutions, and between institutions and citizens, in more detail, to evaluate the legitimacy or otherwise of the law as practiced within courts for themselves.

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238 Kysar, What Climate Change Can Do About Tort Law (n 14) 1.

239 Richard J Lazarus, 'Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future' (2009) 94(5) *Cornell Law Review* 1153, 1159.

Climate Crisis, Legal Education and Law Student Well-Being: Pedagogical Strategies for Action

Monica Taylor*

This article addresses the impact of the climate crisis on the mental health of young people in the context of legal education. It reviews the evidence on youth mental health regarding the climate crisis and applies it to what is already known about law student well-being. Drawing on theories of learning design, the article considers a range of pedagogical strategies that law schools can use to engage students who are committed to action on climate change through law. A case study, the Climate Justice Initiative at The University of Queensland School of Law, is presented as one example of what is possible. This article emphasises the significance of a partnership approach to student engagement and contends that this may yield benefits especially in the context of climate change-related legal work. Despite the negative psychological impact of the climate crisis on law students, it concludes that there are practical activities that law schools can and should initiate to support student well-being.

I Introduction

A school-leaver who commences law in the year 2022 will have been born at some point in the early 2000s. They will have grown up alongside Greta Thunberg and may even share her birth year. They will probably have undertaken senior high school studies during the COVID-19 global pandemic, a crisis said to share commonalities and converging effects with the climate crisis.[1] This student and their generation will experience the full brunt of what is known as the 'iron law of climate change'; that those who are the least responsible for the climate crisis will be the most impacted by its devastating effects.[2]

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1 Editorial, 'Climate and COVID-19: Converging Crises' (2021) 397(10269) *The Lancet* 71.

2 Roger A Pielke, 'A Positive Path for Meeting the Global Climate Challenge', *Yale Environment 360* (Opinion, 18 October 2010) <https://e360.yale.edu/features/a_positive_path_for_meeting_the_global_climate_challenge>. This article intentionally uses the phrase 'climate crisis' to convey a sense of urgency regarding this issue. It is used interchangeably with the term 'climate change'.

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It is widely reported that young people today feel less in control of their lives now than at any other point in recent history.[3] In a 2019 global poll of more than 10,000 young people aged 18 to 25 years of age climate change ranked first as the most important global issue.[4] More than a decade ago, a survey by the Australian Childhood Foundation had already concluded that '[a] quarter of children are so troubled about the state of the world that they honestly believe it will come to an end before they get older'.[5] Young people's preoccupation about the planet includes concern for biodiversity loss and species extinction, unprecedented levels of air and sea pollution, sea level rise, deforestation and desertification, and the increase in extreme weather events. Versed and educated in the science of global warming and climate change, this generation will be less able to enjoy life's simple pleasures such as overseas travel without having regard to the carbon impact of their choices.[6] At a personal level, young people hold legitimate concerns about their own professional futures; what does the economic future hold for them, and what should they study?

In Australia it is estimated that up to 300,000 individuals, mostly high school students, attended the global student climate strike on 19 September 2019.[7] Some of these students may choose to embark upon a career in the law, perhaps inspired to learn how to use the law as a tool for action on climate change. It is, after all, their generation who are now plaintiffs, nationally and internationally, in various climate litigation cases currently before the courts.[8] As the relevance of the

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3 Jean M Twenge, Liqing Zhang and Charles Im, 'It's Beyond My Control: A Cross-Temporal Meta-Analysis of Increasing Externality in Locus of Control, 1960-2002' (2004) 8(3) *Personality and Social Psychology Review* 308; Peter Gray, 'The Decline of Play and the Rise of Psychopathology in Children and Adolescents' (2011) 3(4) *American Journal of Play* 443.

4 Amnesty International, 'Climate Change Ranks Highest as Vital Issue of Our Time — Generation Z Survey' (Press Release, 10 December 2019) <https://www.amnesty.org/en/latest/news/2019/12/climate-change-ranks-highest-as-vital-issue-of-our-time/>. Another recent large-scale study of 10,000 young people across ten countries found that 59 per cent of young people were very or extremely worried about climate change and over 50 per cent felt sad, anxious, angry, powerless, helpless, and guilty: Elizabeth Marks et al, *Young People's Voices on Climate Anxiety, Government Betrayal and Moral Injury: A Global Phenomenon* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3918955>.

5 Joe Tucci, Janise Mitchell and Chris Goddard, *Children's Fears, Hopes and Heroes: Modern Childhood in Australia* (Australian Childhood Foundation, June 2007) 7.

6 See, eg, Mucha Mkono, 'Eco-Anxiety and the Flight Shaming Movement: Implications for Tourism' (2020) 6(3) *Journal of Tourism Futures* 223.

7 'Global Climate Strike Sees "Hundreds of Thousands" of Australians Rallly Across the Country', *ABC News* (online, 21 September 2019) <https://www.abc.net.au/news/2019-09-20/school-strike-for-climate-draws-thousands-to-australian-rallies/11531612>.

8 In Australia, see, eg, *Sharma by Her Litigation Representative Sister Marie Brigid Arthur v Minister for the Environment (Commonwealth)* (2021) 391 ALR 1; *Sharma by Her Litigation Representative Sister Marie Brigid Arthur v Minister for the Environment [No 2]* [2021] FCA 774; *McVeigh v Retail Employees Superannuation Pty Ltd* [2019] FCA 14; *Waratah Coal Pty Ltd v Youth Verdict Ltd* [2020] QLC 33; *Waratah Coal Pty Ltd v Youth Verdict Ltd [No 2]* [2021] QLC 4. In Colombia, see, eg, *Demanda Generaciones Futuras v Minambiente* (2018) STC4360-2018 (Colombian Supreme Court, Judge Villabona, 4 April 2018) where 25 youth plaintiffs between the ages of seven and 26 sued several bodies within the government, Colombian municipalities and corporations to enforce their claimed

climate crisis grows as a contributing factor to youth anxiety and poor mental health,[9] but also a motivator to act, this article asks: what might law educators do to best harness students' passion for action on climate change in ways that are simultaneously protective of their mental well-being?

Part II of this article reviews the evidence on youth mental health regarding the climate crisis. Part III revisits the established evidence about the psychological well-being of law students and considers effective strategies for student engagement that are supportive of well-being. Part IV draws these threads together and discusses pedagogical strategies that law schools can use to engage students committed to action on climate change. Emphasis is given to the significance of student–staff partnerships as an approach to student engagement and a case study, the Climate Justice Initiative at The University of Queensland School of Law, is presented as one example of what is possible. Part V concludes that, despite the negative psychological impact of the climate crisis on law students, there are practical activities that law schools can and should initiate to support student well-being.

II Youth Mental Health in the Context of Climate Change

Evidence about the psychological effects of climate change on young people suggests climate change can directly and indirectly cause mental harm. Children and young people who live through extreme weather events such as bushfires, floods and drought are at risk of developing mental health issues including post-traumatic stress disorder, depression, anxiety, phobias, sleep and attachment disorders, and substance abuse.[10] Children and young people are also more severely psychologically impacted by severe weather events than their parents or other adults.[11]

As well as the direct impact of climate events on a young person's mental health, there is growing research about their indirect effects. A young person need not personally have to endure an extreme weather event in order to experience climate-induced psychological distress. Australian psychology scholars Searle

right to a healthy environment, life, health, food and water. In Portugal, see, eg, *Duarte Agostinho v Portugal* (European Court of Human Rights, Application No 39371/20, 9 February 2020), where six Portuguese youth filed a complaint with against 33 countries alleging that they had violated their human rights by failing to take sufficient action on climate change, and seeking an order requiring more ambitious action.

9 Haris Majeed and Jonathan Lee, 'The Impact of Climate Change on Youth Depression and Mental Health' (2017) 1(3) *The Lancet Planetary Health* 94–5.

10 Lisa R Fortuna, 'A Review of the Psychological Effects of Climate Change on Children: Considering Resilience, Vulnerability, and Inequity' (2020) 59(10) *Journal of the American Academy of Child & Adolescent Psychiatry* S38.

11 Susie EL Burke, Ann V Sanson and Judith Van Hoorn, 'The Psychological Effects of Climate Change on Children' (2018) 20 *Current Psychiatry Reports* 35:1–8, 2; Jessica G Fritze et al, 'Hope, Despair and Transformation: Climate Change and the Promotion of Mental Health and Wellbeing' (2008) 2 *International Journal of Mental Health Systems* 13:1–10, 3.

and Gow found increasing concern by the Australian public about climate change and a correlative relationship between this and symptoms of depression, anxiety and stress.[12] Although their study was focused on the general population, the results reveal that climate anxiety is not an evenly distributed phenomenon. An individual is more likely to be distressed if they are female, under the age of 35 years, have a pro-environmental orientation and possess personality traits such as high levels of future anxiety[13] — features that might also be used to describe a typical high-achieving law student.[14]

In what is now a burgeoning area of psychological inquiry, new terms are being coined to describe emergent forms of climate-change-related mental distress. Awareness of these new terms may assist law educators to better understand what climate distress is and how our students might experience it. It may also help us to identify strategies to engage them in ways that will help them cope. In this way, the American Psychological Association's call for mental health professionals to become climate-literate[15] bears similarity to the call by the Honourable Judge Preston for legal professionals to become 'climate-conscious' in daily legal practice.[16]

Research about the indirect impacts of climate change on youth mental health in the Australian context is instructive. Clayton notes that it is no coincidence that much research about climate distress comes from Australian scholars where the impacts of extreme weather events including drought, coral bleaching, flooding and bushfires are already visible.[17] In his influential 2005 article, Australian environmental philosopher Glenn Albrecht coined the term 'solastagia' to describe the emotional state of extreme distress that people feel in response to the loss of their home environment.[18] The concept of solastagia refers to 'the specific form of melancholia connected to lack of solace and intense desolation'.[19] Albrecht describes the strength of attachment to country felt by Indigenous Australians as a particular form of solastagia.[20] This deep attachment to place is documented as 'a living entity with a yesterday, today and tomorrow, with a consciousness, and a will toward life. Because of this richness, country is

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12 Kristina Searle and Kathryn Gow, 'Do Concerns about Climate Change Lead to Distress?' (2010) 2(4) *International Journal of Climate Change Strategies and Management* 362, 366.

13 Ibid.

14 Judy Allen and Paula Baron, 'Buttercup Goes to Law School: Student Wellbeing in Stressed Law Schools' (2004) 29(6) *Alternative Law Journal* 285, 287; Susan Daicoff, 'Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism' (1997) 46(5) *American University Law Review* 1337, 1416.

15 Susan Clayton et al, American Psychological Association and ecoAmerica, *Mental Health and Our Changing Climate: Impacts, Implications, and Guidance* (Guide, March 2017) 55.

16 Justice Brian J Preston, 'Implementing a Climate Conscious Approach in Daily Legal Practice' (Speech, Australian and New Zealand Legal Ethics Colloquium, Monash University, 4 December 2015).

17 Susan Clayton, 'Climate Anxiety: Psychological Responses to Climate Change' (2020) 74 *Journal of Anxiety Disorders* 1, 2.

18 Glenn Albrecht, '"Solastalgia": A New Concept in Health and Identity' [2005] (3) *Philosophy Activism Nature*.

19 Ibid 44.

20 Ibid 46–8.

home, and peace; nourishment for body, mind and spirit; heart's ease.'[21] A 16-year-old proud Kamilaroi woman at a Fridays for Future protest described her attachment to Country and the effect that climate change (drought) is having on her culture in these terms:

> I am here on the authority of my elders. I struggle to think of one way climate change doesn't affect our culture. I have had to help collect bottled water for our family in Walgett. Many other towns in NSW are facing the same crisis. We rely on Country and these rivers are our life.[22]

Similar to solastagia, 'ecological grief' is a term coined by Cunsolo and Ellis that refers to grief felt in relation to experienced or anticipated ecological losses, including the loss of species, eco-systems and landscapes due to acute or chronic environmental change.[23] Grief associated with the loss of the natural environment is 'disenfranchised grief' — a loss that is hidden, overlooked and largely absent in climate change narratives, policy and research.[24] It is also said to be 'ambiguous' because a person cannot easily articulate their feelings of loss and mourning for an anticipated future that will cease to be.[25] Acute and chronic ecological grief typically develops over time and is not linked to one particular event.[26] It is said to particularly impact children and young people who are growing up amidst 'doom and gloom' narratives.[27]

Another recent Australian empirical study sought to untangle the different emotional responses to the climate crisis. It found anger to be an emotional driver of constructive engagement with the climate crisis, suggesting that anger may encourage engagement with solutions to climate change as distinct from other negative eco-emotions.[28] The authors of this study suggest that encouraging eco-anger may promote pro-climate behaviour change while preserving mental health.

The climate crisis is impacting on individual youth behaviour in ways that have likely not been observed in previous generations. Young people are expressing a desire not to have children and are seeking out options for

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21 Deborah Bird Rose, *Nourishing Terrains: Australian Aboriginal Views of Landscape and Wilderness* (Australian Heritage Commission, 1996) 7.

22 Philippa Collin et al, 'Australia' in Joost de Moor et al (eds), *Protest for a Future II: Composition, Mobilization and Motives of the Participants in Fridays For Future Climate Protests on 20-27 September, 2019, in 19 Cities around the World* (Report, 2020) 35, 37 <https://osf.io/3hcxs/download>.

23 Ashlee Cunsolo and Neville R Ellis, 'Ecological Grief as a Mental Health Response to Climate Change-Related Loss' (2018) 8(4) *Nature Climate Change* 275; Kenneth J Doka, 'Disenfranchised Grief' (1999) 18(3) *Bereavement Care* 37, 38.

24 Cunsolo and Ellis (n 23).

25 Ibid.

26 Ibid.

27 Ibid; Clayton (n 17).

28 Samantha K Stanley et al, 'From Anger to Action: Differential Impacts of Eco-Anxiety, Eco-Depression, and Eco-Anger on Climate Action and Wellbeing' (2021) 1 *The Journal of Climate Change and Health* 1, 4.

sterilisation at a young age.[29] The proportion of young people opting to follow a vegan diet has also increased in recent years.[30] New climate-associative disorders such as 'carborexia' are being reported. Carborexia is a behavioural trait in which a person becomes obsessed with reducing their carbon footprint to the extent that it impacts upon normal daily life.[31] Albrecht uses the phrase 'eco-paralysis' to describe the paralysing impact of climate anxiety on behaviour; individuals become so overwhelmed and immobilised by the reality of climate change that they are unable to act and respond.[32]

The various terms outlined above in the literature can be summarised into a short table:[33]

Ecological grief	Grief felt in relation to experienced or anticipated ecological losses including the loss of species, ecosystems and landscapes due to acute or chronic environmental change.
Eco-anger	Feelings of anger or frustration about climate change.
Eco-anxiety	Anxiety experienced in response to climate change or environmental degradation.
Eco-depression	Feelings of depression and misery about climate change.
Expressive coping	Coping (e.g. with climate change) by expressing emotions, such as anger or sadness.
Solastagia	Distress caused by the painful 'lived experience' of environmental destruction to one's home environment.
Carborexia	Obsessive behaviour to reduce one's carbon footprint that impacts upon lifestyle or normal daily activities.
Eco-paralysis	The inability to meaningfully respond to climatic and ecological challenges.

As law educators, our role is not to diagnose or treat students' climate anxiety, and nor are we responsible for helping students to resolve their mental health

29 Matthew Schneider-Mayerson and Leong Kit Ling, 'Eco-Reproductive Concerns in the Age of Climate Change' (2020) 163(2) *Climatic Change* 1007, 1008–9.

30 Cynthia Radnitz, Bonnie Beezhold and Julie DiMatteo, 'Investigation of Lifestyle Choices of Individuals Following a Vegan Diet for Health and Ethical Reasons' (2015) 90 *Appetite* 31, 34.

31 Searle and Gow (n 12) 363.

32 Glenn Albrecht, 'Chronic Environmental Change: Emerging "Psychoterratic" Syndromes' in Inka Weissbecker (ed), *Climate Change and Human Well-Being: Global Challenges and Opportunities* (Springer, 2011) 43.

33 Stanley et al (n 28) 5. This table is a modified version of glossary definitions from this article including 'eco-anger', 'eco-depression' and 'expressive coping' For further consideration of the definitions of 'ecological grief' see Cunsolo and Ellis (n 23); 'eco-anxiety' see Pihkala Panu, 'Anxiety and the Ecological Crisis: Analysis of Eco-Anxiety and Climate Anxiety' (2020) 12(19) *Sustainability* 7836; 'solastagia' see Albrecht (n 18); 'carborexia' see Searle and Gow (n 12, 363); 'eco-paralysis' see Albrecht (n 32). The terminology in the table is not exhaustive and new terms will likely continue to emerge in this dynamic field of research.

difficulties.[34] However, informing ourselves of the psychological research on youth climate distress will assist us in our task of teaching and engaging law students in ways that are protective of their mental well-being.

Youth psychology research clearly points to health and well-being benefits from active involvement and engagement with action on climate change, especially reductions in anxiety and stress.[35] Positive psychology is recognised as a framework for strengthening the resilience and creativity of individuals and communities to work together against this common existential threat.[36] To move individuals from despair and hopelessness to a sense of empowerment, Searle and Gow argue that young people need to be encouraged that the future is not all bleak and that, on a personal level, much can be done through taking action and by managing the environment in a more positive way.[37] Bauer states that helplessness and frustration arise from feelings of being trapped and of not being able to make a difference: '[t]he way out is empowerment, action and student voice.'[38] Further, the degree of emotional activation is important. Anger, anxiety and depression are not all the same as they have different levels of 'activation' — that is, how much an emotion energises or inhibits action.[39] Thus, law students who may be passionate, angry and 'fired up' about climate change are more likely to want to translate that emotion into action, than are those who experience anxiety, grief or depression. How this corresponds with what we already know about law student well-being, and what we can and should do about it, is the focus of the next section.

III View from the Law School — Student Well-Being

For more than a decade, significant attention has been paid to the mental health of Australian law students. A landmark study by the Brain and Mind Research Institute in 2009 found that Australian law students had higher rates of depression than the general population, and that the individualistic and competitive law school environment was a contributing factor.[40] The *Courting the Blues* study generated much-needed attention on law student well-being across

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34 Chi Baik et al, *Enhancing Student Mental Wellbeing: A Handbook for Academic Educators* (Australian Government Department of Education and Training, 2017) 11, 53 <https://melbourne-cshe.unimelb.edu.au/___data/assets/pdf_file/0006/2408604/MCSHE-Student-Wellbeing-Handbook-FINAL.pdf>.

35 Fritze et al (n 11).

36 Ibid 9.

37 Searle and Gow (n 12) 374.

38 Stuart R Grauer, 'Climate Change: The Thief of Childhood' (2020) 101(7) *Phi Delta Kappan* 42, 45.

39 Stanley et al (n 28).

40 Norm Kelk et al, *Courting the Blues: Attitudes Towards Depression in Australian Law Students and Lawyers*, (Monograph, Brain & Mind Research Institute, January 2009) 46 <https://law.uq.edu.au/files/32510/Courting-the-Blues.pdf>.

the country, including through the publication of the *Good Practice Guidelines for Law Schools* by the Council of Australian Law Deans.[41]

There is now solid empirical evidence that students enter law school with levels of psychological well-being that are equal to or higher than the general population, but about one third experience psychological distress by the end of their first year of study.[42] It is also understood that the sources of law student psychological distress are complex and varied, and both structural and individual.[43] Structural factors include the neoliberal turn in legal education,[44] assessment styles that do not support teamwork or collaboration,[45] workplace cultures that foster bullying and harassment,[46] and the inherently adversarial nature of the profession.[47] Individual factors are said to include personality traits such as perfectionism[48] and competitiveness, which can drive unrealistic expectations of one's academic performance.[49] As Duncan and his colleagues surmise, there is 'nowhere to hide' from the reality that students experience psychological distress as a consequence of their interaction with the system of legal education.[50]

Despite the identification of many factors that contribute to law student mental distress, the relative importance of climate change on this phenomenon remains as yet unexplored in the literature. Although we have evidence about the deleterious impact of climate change on youth mental health generally, we cannot

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41 Council of Australian Law Deans, *Promoting Law Student Well-Being: Good Practice Guidelines for Law Schools* (Report, September 2014) <https://cald.asn.au/wp-content/uploads/2017/11/Promoting-Law-Student-Well-Being-Good-Practice-Guidelines-for-Law-Schools-March-2013-and-revised-September-2014.pdf> ('2014 Best Practice'). See also James Duffy, Rachael Field and Melinda Shirley, 'Engaging Law Students to Promote Psychological Health' (2011) 36(4) *Alternative Law Journal* 250.

42 The literature is vast and beyond the scope of this article to revisit: see, eg, Nigel Duncan, Rachael Field and Caroline Strevens, 'Ethical Imperatives for Legal Educators to Promote Law Student Wellbeing' (2020) 23(1–2) *Legal Ethics* 65.

43 Ibid 77.

44 Margaret Thornton, 'Law Student Wellbeing: A Neoliberal Conundrum' (2016) 58(2) *Australian Universities' Review* 42, 43.

45 Wendy Larcombe et al, 'Does an Improved Experience of Law School Protect Students against Depression, Anxiety and Stress? An Empirical Study of Wellbeing and the Law School Experience of LLB and JD Students' (2013) 35(2) *Sydney Law Review* 407, 429; Rachael Field and Sally Kift, 'Addressing the High Levels of Psychological Distress in Law Students through Intentional Assessment and Feedback Design in the First Year Law Curriculum' (2010) 1(1) *International Journal of the First Year in Higher Education* 65, 69.

46 Law Council of Australia, *National Inquiry into Sexual Harassment in Australian Workplaces* (Submission to Australian Human Rights Commission, 26 February 2019) <https://www.lawcouncil.asn.au/publicassets/1bde0b80-d23e-e911-93fc-005056be13b5/3587%20-%20AHRC%20NISHAW%20Submission.pdf>; Kieran Pender, *Us Too? Bullying and Sexual Harassment in the Legal Profession* (Report, 2019) 14 <https://www.ibanet.org/bullying-and-sexual-harassment.aspx>.

47 Tania Sourdin, 'Not Teaching ADR in Law Schools? Implications for Law Students, Clients and the ADR Field' (2012) 23(3) *Australasian Dispute Resolution Journal* 148, 152; Rachael Field and James Duffy, 'Law Student Psychological Distress, Alternative Dispute Resolution, and Sweet-Minded, Sweet-Eyed Hope' (2012) 23(3) *Australasian Dispute Resolution Journal* 195, 197.

48 Daicoff (n 14).

49 Council of Australian Law Deans (n 41).

50 Duncan, Field and Strevens (n 42) 68.

assert a direct causal link between fears and concern about climate change and the deterioration of law students' mental health. However, given what we already know about the rates of psychological distress of law students, it is fair to assume that climate distress will add to the mix of contributory, extrinsic factors. Students who already live with depression and anxiety may be more at risk from worsening symptoms brought on by anxiety over climate change. It is also conceivable that some future law students will enter law school with a heightened predisposition to adverse mental health due to unhealthy levels of concern about climate change. Much like the science about climate change itself, this article cautions against a denialist approach to this issue. As Grauer reflects, in the context of high school education:

> The reality of climate change can be debated to kingdom come, but the impact it is having on our youth is undeniable, immediate, and in some cases catastrophic. Because they stand to lose the most from our action or inaction on climate change, we owe them the facts from all sides — and the opportunity to respond.[51]

Fortunately, the considerable body of scholarship on law student well-being extends beyond problem identification and provides a clear picture of which intervention strategies are most likely to support student well-being. A whole-of-school approach that delivers substantial reform across all facets of teaching and learning — curriculum design, assessment, and pedagogical approaches — is ultimately what is required. Larcombe describes this as '[a] comprehensive, multi-level approach to prevention and intervention … [a]n institutionalized and sustainable approach to mental health promotion'.[52]

Large-scale structural reform is welcome, and it is noted that many law schools are steadily implementing changes to how they teach, assess, and engage students in the light of the overwhelming evidence about law student psychological distress. This is despite genuine constraints on law schools to change their business-as-usual approach, notably curriculum overcrowding as a result of the Priestley 11. Meanwhile, the science is unequivocal that now is the critical decade for action if we are to avoid catastrophic harm to the planet, communities and individuals.[53] It is therefore with some urgency that law schools should recognise and respond to the impact of climate change — at the very least

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51 Grauer (n 38) 44.

52 Wendy Larcombe, 'Towards an Integrated, Whole-School Approach to Promoting Law Student Wellbeing' in Rachel Field, James Duffy and Colin James (eds), *Promoting Law Student and Lawyer Well-Being in Australia and Beyond* (Routledge, 2016) 44, 47.

53 Will Steffen and Lesley Hughes, *The Critical Decade 2013: Climate Change Science, Risks and Responses* (Climate Commission Report, June 2013) <https://web.archive.org.au/awa/20130904112329mp_/http://climatecommission.gov.au/wp-content/uploads/The-Critical-Decade-2013_Website.pdf>; 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, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, and Efforts to Eradicate Poverty* (Report, 2019) <https://www.ipcc.ch/site/assets/uploads/sites/2/2019/06/SR15_Full_Report_High_Res.pdf>.

in the context of their students' mental health. Not only is there an ethical imperative on law schools to act on the knowledge they have about student well-being[54] but arguably a moral obligation for them to actively and immediately contribute to the concept of climate justice.[55] Already there are some innovative strategies being delivered in the realm of clinical legal education, and a bold move by the Faculty of Law at Bond University deserves recognition.[56] Drawing on theoretical frameworks for effective student engagement, the next part of this article addresses these and other initiatives to demonstrate what activities can be swiftly implemented.

IV Pedagogical Strategies for Action

The youth psychology research presented in Part I of this article indicates that young people cope best when they are actively involved and engaged on climate change issues. Providing students with the opportunity to share and act on their concerns about the climate crisis can boost their self-efficacy, hopefulness and resilience, and make them feel more supported.[57] Within the context of legal education, schools and law teachers must offer ways to facilitate student engagement on climate-change-related legal issues. There are many approaches to take, each with a varying degree of time, cost, and difficulty. Importantly, to achieve the goal of positively addressing student well-being pedagogical design for *how* students engage on this issue is as important as the introduction of new content about climate change and the law.

A branch of positive psychology known as self-determination theory (SDT) is recognised as a highly effective framework for designing law curricula, assessment and pedagogical approaches that support student well-being.[58] SDT is a theory of human motivation, which suggests that poor mental health is a consequence of unmet psychological needs.[59] To maximise one's intrinsic motivation, a human being is said to require regular experiences of autonomy,

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54 Duncan, Field and Strevens (n 42).

55 Adrian Evans, 'Greenprint for a Climate Justice Clinic: Law Schools' Most Significant Access to Justice Challenge' (2018) 25(3) *International Journal of Clinical Legal Education* 7, 9.

56 Bond University, 'Bond Launches World-First Climate Law Degree' (Media Release, 11 December 2020) <https://bond.edu.au/news/66951/bond-launches-world-first-climate-law-degree> ('Bond Article').

57 Jo Abbott et al, 'Young People and the Climate Crisis' (2019) 41(6) *InPsych 2019* <https://www.psychology.org.au/for-members/publications/inpsych/2019/december>.

58 Self-determination theory emerged in the 1970s and derives from the work of positive psychology scholars Edward L Deci and Richard M Ryan: Duncan, Field and Strevens (n 42) 78–82. See, eg, Richard M Ryan and Edward L Deci, 'Self-Determination Theory and the Role of Basic Psychological Needs in Personality and the Organization of Behavior' in Oliver P John, Richard W Robins and Lawrence A Pervin (eds), *Handbook of Personality: Theory and Research* (Guilford Press, 3rd ed, 2008) 654.

59 Deci and Ryan (n 58); CSDT, 'Theory' *Self-Determination Theory* (Encyclopedia, 31 March 2021) <https://selfdeterminationtheory.org/theory/>.

competence and relatedness.[60] These needs are so vital that they have been likened to a plant's need for sunlight, soil and water.[61] Therefore, any strategies to engage students in legal tasks related to climate change should activate these fundamental needs:

> [P]eople need to feel that they are good at what they do or at least can become good at it (competence); that they are doing what they choose and want to be doing, that is, what they enjoy or at least believe in (autonomy); and that they are relating meaningfully to others in the process, that is, connecting with the selves of other people (relatedness).[62]

A particular form of student engagement that is gaining traction in teaching and learning circles is a Students as Partners (SaP) approach.[63] SaP is defined as 'a collaborative, reciprocal process through which all participants have the opportunity to contribute equally, although not necessarily in the same ways, to curricular or pedagogical conceptualisation, decision making, implementation, investigation, or analysis'.[64] Student-staff partnerships position students as active participants in learning design alongside academic and professional staff. These partnerships are said to be a relationship rather than a product, one in which everyone 'stand[s] to gain from the process of learning and working together'.[65] Reciprocity is at the heart of the relationship,[66] where qualities like trust, inter-dependence and agency are brought to the fore.[67] Healey and his colleagues clarify that '[a]ll partnership is student engagement, but not all student engagement is partnership.'[68]

To illustrate how staff-student partnerships can engage the hearts and minds of students focused on climate crisis, a case study of an extracurricular project, the Climate Justice Initiative at The University of Queensland, is described below.

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60 Deci and Ryan (n 58).

61 Richard M Ryan, 'Psychological Needs and the Facilitation of Integrative Processes' (1995) 63(3) *Journal of Personality* 397, discussed in in Kennon M Sheldon and Lawrence S Krieger, 'Understanding the Negative Effects of Legal Education on Law Students: A Longitudinal Test of Self-Determination Theory' (2007) 33(6) *Personality and Social Psychology Bulletin* 883, 885.

62 Sheldon and Krieger (n 61) 885.

63 Also referred to in the literature as 'student-staff partnerships.' These terms are used interchangeably.

64 Alison Cook-Sather, Catherine Bovill and Peter Felten, *Engaging Students as Partners in Learning and Teaching: A Guide for Faculty* (Jossey-Bass, 2014) 6–7.

65 Mick Healey, Abbi Flint and Kathy Harrington, *Engagement Through Partnership: Students as Partners in Learning and Teaching in Higher Education* (Report, 2014) 12 <https://www.heacademy.ac.uk/system/files/resources/engagement_through_partnership.pdf>.

66 Ibid 7.

67 Ibid 12.

68 Ibid 15.

A *Extracurricular Pro Bono: Climate Justice Initiative*

The Climate Justice Initiative (CJI) is an extracurricular activity coordinated by the UQ Pro Bono Centre situated within the TC Beirne School of Law. The CJI was established because one of the priorities of the Pro Bono Centre under its 2018–21 Strategic Plan was a commitment to environmental sustainability through legal work. Similar to a club or grouping, the CJI brings together law students to undertake pro bono legal work that has a connection with climate justice. Approximately 12 students are involved in the CJI at any time, although that number can fluctuate depending on the time of year.

There are three key aims of the CJI. First, to create a community of practice for students who are passionate about climate justice.[69] Second, to undertake pro bono tasks on climate-justice-related issues. This may involve research to support pro bono litigation, internal capacity building for the legal assistance sector, or law reform. The third aim is to strengthen the Pro Bono Centre's engagement on climate justice both within the University and externally with the broader legal profession. Students may apply to join the CJI once they have completed their first year of law. Having studied environmental law is preferable, but it is not a precondition to student involvement. This is because there are many climate-related legal research tasks that fall into other areas of law (administrative, criminal, planning etc) so it is not necessary for students to have prior environmental law knowledge.

Since its establishment in late 2019, students in the CJI have had the opportunity to work in collaboration with staff on a variety of climate justice tasks, including drafting environmental law reform submissions and undertaking legal research to support pro bono litigation, primarily in the area of summary criminal defence work following charges arising from climate protests in Brisbane. Students also prepared submissions to the Royal Commission into National Natural Disaster Arrangements and the independent review of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).[70] At all times since the CJI's inception, students have led the progression of the work. Students set the agenda and goals for what they want to achieve and bring their ideas to regular meetings. They participate in shared exchanges with academic and professional staff, and stakeholders, including from community legal centres and groups like Lawyers for Climate Justice Australia. Virtual and in-person

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69 Etienne Wenger, Richard A McDermott and William Snyder, *Cultivating Communities of Practice: A Guide to Managing Knowledge* (Harvard Business Review Press, 2002). Note: the authors define a community of practice as a group of people 'who share a concern, a set of problems, or a passion about a topic, and who deepen their knowledge and expertise in this area by interacting on an ongoing basis': at 4.

70 Rose Foster, Priam Rangiah and Cara Scarpato, Submission No NND.001.00971 to Governor-General, *Royal Commission into National Natural Disaster Arrangements* (24 July 2020); Rose Foster, Lachlan Glaves and Angela Goggin, Submission No ANON-K57V-XQSB-B to Department of Agriculture, Water and the Environment, *Independent Review of the EBC Act* (16 April 2020).

exchanges provide the space for shared anger, despair and indignation about government inaction on climate change. In its short existence, the CJI has generated strong sentiments of belonging and social connectedness amongst participating students and staff. These feelings of mutual support and collective action reflect SDT needs for relatedness. Anecdotally, students report feeling good about applying their legal skills to something that really matters to them and about channelling their legal knowledge into projects that support the environment.[71] SDT needs of competence and autonomy are exemplified through this approach.

A systematic review of empirical research on student-staff partnerships found a focus on partnership activities that are small scale, at the undergraduate level, extracurricular, and focused on teaching and learning enhancement.[72] Pro bono activities like the CJI are therefore ideal student-staff partnerships as they allow for strong engagement outside the bounds of the formal curriculum.[73] Operating on a small scale supports episodic involvement by students and staff; students can dip in and out to participate when they have time. This flexible approach also means that the CJI can quickly assemble a surge workforce of student volunteers when needed, as the barriers to participation are low.

Matthews proposes five guiding heuristic principles that underpin good SaP practice. An effective staff-student partnership should aspire to: foster inclusion; nurture power-sharing relationships through dialogue and reflection; accept that it is a process with uncertain outcomes; be ethical; and be transformative.[74] A carefully designed staff-student partnership 'creates space to re-imagine expertise, particularly that of students in regards to learning, teaching and the student experience…'[75] Student expertise in the CJI is grounded in their knowledge of climate science, their familiarity with climate protesters' motivations to act and their connections with, and proximity to, the climate justice movement. Students are the experts on these issues instead of their law teachers. In this way, traditional assumptions about the identities of, and relationships between, learners and teachers are challenged and teachers learn equally if not more from the engagement process.[76] For example, in the CJI one of the academic coordinators is an environmental law scholar with expertise in environmental law. The CJI provides a levelling space for her as a coordinator to engage with students free from the more routine constraints of teaching a semester-long

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71 University of Queensland School of Law, *Climate Justice Initiative* (Web Page, 31 March 2021) <https://law.uq.edu.au/pro-bono/student-opportunities/join-pro-bono-student-roster/climate-justice-initiative>

72 Lucy Mercer-Mapstone et al, 'A Systematic Literature Review of Students as Partners in Higher Education' (2017) 1(1) *International Journal for Students as Partners* 1.

73 Natalie Skead and Shane L Rogers, 'Stress, Anxiety and Depression in Law Students: How Student Behaviors Affect Student Wellbeing' (2014) 40(2) *Monash University Law Review* 565.

74 Kelly E Matthews, 'Five Propositions for Genuine Students as Partners Practice' (2017) 1(2) *International Journal for Students as Partners* 2.

75 Ibid 3.

76 Ibid 1.

course. Thus, the partnership can be regarded as an 'act of resistance to the traditional, often implicit, but accepted, hierarchical structure where staff have power over students'.[77] This also goes some way towards addressing the culture of law schools,[78] where a perceived lack of understanding and approachability by lecturers is a significant cause of student psychological distress.[79]

One limitation of student-staff partnerships is scalability. The potential to upscale SaP initiatives like the CJI requires a commitment to embedding that practice across an institution so that working and learning in partnership becomes part of the culture and ethos.[80] Until that is possible, CJI and other similar extracurricular approaches will likely operate nimbly on a small scale. Regardless, this case study hopefully demonstrates that it can be an effective mode of student engagement. Student pro bono activities can create rich learning synergies as students apply their classroom learning in a pro bono context.[81] The benefits of pro bono include the formation of a professional identity and service to one's community.[82] Furthermore, at a time of curriculum overcrowding there is a deeply pragmatic reason to consider pro bono activities as a vehicle for action on climate change.

B Climate and Environmental Justice-Themed Law Clinics

The use of clinical teaching methods is said to be a premier form of learning and teaching about the law.[83] Clinics are especially important for the development of students' practical legal skills and their professional identity as future lawyers. Clinics develop students' emotional intelligence by exposing them to people and clients whose lives are less privileged than their own.[84] They also introduce students to notions of justice and power, and their role as future lawyers in supporting the resolution of their clients' legal problems.[85] Teaching students how to meaningfully reflect on their actions and experiences is an essential

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77 Ibid 6 (emphasis omitted).
78 Larcombe et al (n 45) 429.
79 Larcombe et al (n 45) 429.
80 Healey, Flint and Harrington (n 65) 26.
81 Monica Taylor and Clare Cappa, 'Student Pro Bono and its Role in Contemporary Australian Law Schools' (2016) 41(2) *Alternative Law Journal* 121, 122.
82 Ibid; John Corker, 'The Importance of Inculcating the "Pro Bono Ethos" in Law Students, and the Opportunities to Do it Better' (2020) 30(1) *Legal Education Review* 1, 10; Tracey Booth, 'Student Pro Bono: Developing a Public Service Ethos in the Contemporary Australian Law School' (2004) 29(6) *Alternative Law Journal* 280.
83 Adrian Evans et al, *Australian Clinical Legal Education: Designing and Operating a Best Practice Clinical Program in an Australian Law School* (Australian National University Press, 2017).
84 Colin James, 'Seeing Things as We Are — Emotional Intelligence and Clinical Legal Education' (2005) 8 *International Journal of Clinical Legal Education* 123, 129; Ross Hyams, 'Nurturing Multiple Intelligences through Clinical Legal Education' (2011) 15 *University of Western Sydney Law Review* 80, 89.
85 Evans et al (n 83); Heather Douglas and Monica Taylor, 'Understanding the Power of Law: Engaging Students in Criminal Law Casework' (2014) 24(1) *Legal Education Review* 29, 33.

feature of clinics. Reflective practice is built into clinic activities through assessment tasks, regular opportunities for supervisor and peer feedback, and debriefing. Being taught this professional skill at law school encourages an awareness of the importance of reflection throughout one's professional life.[86] Fostering a habit of reflective practice is an SDT-informed approach that supports student well-being.[87] The overarching positive impact of law clinics on students' mental well-being is implicitly asserted throughout the clinical legal education literature; however it is noted that some studies point to the need for caution.[88]

Law clinics have been a vehicle through which to engage students in environmental law issues since the 1970s.[89] The most recent edition of the national guide to Clinical Legal Education courses at Australian universities reveals environmental or climate law-related clinical offerings at eight separate law schools.[90] These include the Land and Environment Court Clinic run by the University of Western Australia, which seeks to develop students' understanding of procedural justice in an environmental law context.[91] The recently established Climate Justice Law Clinic at Monash University supports law students to use their legal skills to address climate change mitigation action.[92] Students in this clinic advise climate activists, non-governmental organisations and citizens to use legal tools in their fight for climate justice.[93] A sustainability business clinic at Melbourne Law School teaches students about new concepts of environmentalism.[94] Yet another interesting clinic is a three-way collaboration between the Macquarie Law School, Queensland University of Technology and the University of the South Pacific in Vanuatu. This clinic exposes students to the impacts of climate change and adaptation through a two-week, immersive in-

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86 See Donald Schön, *The Reflective Practitioner: How Professionals Think in Action* (Basic Books, 1983).

87 Duncan, Field and Strevens (n 42) 85.

88 Monica Taylor and Tamara Walsh, 'Perceptions of Competence and Well-being in Clinical Legal Education' (2018) 3(1) *Australian Journal of Clinical Education* 1, 2; Kate Seear, 'Do Law Clinics Need Trigger Warnings?: Philosophical, Pedagogical and Practical Concerns' (2019) 29(1) *Legal Education Review* 1, 13.

89 Brad Jessup and Claire Carroll, 'The Sustainability Business Clinic: Australian Clinical Legal Education for a "New Environmentalism" and New Environmental Law' (2017) 34(6) *Environmental and Planning Law Journal* 542, 554; Hope Babcock, 'Environmental Justice Clinics: Visible Models of Justice' (1995) 14(1) *Stanford Environmental Law Journal* 3, 15.

90 'Kingsford Legal Centre Clinical Legal Education Guide: Your Guide to CLE Courses Offered by Australian Universities in 2019/20' *Kingsford Legal Centre* (Guide, 14 March 2021) <https://www.klc.unsw.edu.au/sites/default/files/documents/2924%20CLE%20guide-WEB.pdf>. Note: It must be said that CLE offerings come and go and there may be more or less depending on university resources, and student and stakeholder interest.

91 Judith Preston and Shannon Peters, 'Collaborative Environmental Justice — the Land and Environment Court Clinic' (2020) 48(1) *University of Western Australia Law Review* 295, 307.

92 Monash University Faculty of Law, *The Climate Justice Clinic* (Web Page, 14 March 2021) <https://www.monash.edu/law/home/cle/clinics/The-Climate-Justice-Clinic>. See Evans (n 55).

93 Monash University Faculty of Law (n 92).

94 Jessup and Carroll (n 89).

country field trip.[95] These innovative courses reveal that Australian law schools are already engaging law students in environment and climate-change-related legal work. International examples point to students becoming involved in legal responses to climate disasters such as Hurricanes Katrina, Hugo, Harvey and Maria.[96] The literature on poverty and disasters in the United States is unequivocal that poor communities are more vulnerable to disasters because of where they live, their social exclusion and their reduced ability to cope, adapt and recover.[97] To the best of the author's knowledge, disaster law clinics do not yet feature in the Australian clinical legal education landscape. This is despite growing awareness also in Australia of the social impact of disasters on vulnerable population groups, and the need for local communities to prepare for the rise in frequency and severity of extreme weather events.[98] Disaster law clinics could arguably form part of the next wave of clinical legal education in Australia. Such clinics would not only facilitate rich learning for students about the expanding concept of social justice through the lens of climate, but they would also deliver a myriad of practical legal tasks, as described by US clinicians:

> In addition to the physical devastation that natural disasters cause, they also produce an onslaught of legal problems that require expertise from legal professionals. The range of legal issues that arise after a natural disaster are vast and compound problems particularly for marginalized and vulnerable populations. Once the immediate threat of danger clears, urgent needs for legal advice arise; for example, whether a tenant must pay rent on a now-uninhabitable apartment, whether someone qualifies for government assistance, or what to do if the natural disaster destroys legal documents that prove title, citizenship, ownership, or identity.[99]

There are important ways for law schools to assist communities and individuals at all stages of the disaster cycle — mitigation, preparedness, response and recovery.[100] This is an area of potential future growth for Australian clinical legal education, and law schools should be encouraged and supported to develop new clinic offerings.

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95 Paul Govind et al, 'Seeds of Change: Applying Transformative Learning and Thinking in Relation to Students Responding to Climate Change Challenges' in Walter Leal Filho, Mark Mifsud and Paul Pace (eds), *Handbook of Lifelong Learning for Sustainable Development* (Springer International Publishing, 2018) 359.

96 Jeffrey R Baker et al, 'In Times of Chaos: Creating Blueprints for Law School Responses to Natural Disasters' (2020) 80(2) *Louisiana Law Review* 421, 439.

97 Alice Fothergill and Lori A Peek, 'Poverty and Disasters in the United States: A Review of Recent Sociological Findings' (2004) 32(1) *Natural Hazards* 89, 90.

98 See, eg, Queensland Families & Communities Association, *Queensland Neighborhood Centres Strategy for Bushfire Resilience* (Web Page, 25 March 2021) <https://www.qfca.org.au/bushfire-project>; Collaboration 4 Inclusion, *Person-Centred Emergency Preparedness Toolkit* (Web Page, 4 April 2021) <https://collaborating4inclusion.org/pcep/>.

99 Baker et al (n 96) 423.

100 National Resilience Taskforce, *National Disaster Risk Reduction Framework* (Report, 2018) <https://www.homeaffairs.gov.au/emergency/files/national-disaster-risk-reduction-framework.pdf>.

While the educational and engagement benefits of clinical legal education are clear, there are some key constraints to this model of student engagement. The cost to law schools of running law clinics relative to conventional lecture or seminar-style teaching to larger numbers of students makes it an expensive prospect for a law school to fund.[101] Law clinics are usually available to students as an elective, which typically involves some form of graded or non-graded assessment (usually reflective journals) and a close student–lawyer supervisory ratio. This course scaffolding necessitates careful planning, and it can take some time for new clinics to be established. This contrasts with pro bono initiatives, which generally have a lower threshold for supervision and no requirement for assessment. However, notwithstanding these constraints, clinics are a beneficial model for engaging students on climate-change-related legal work. Law schools with active clinic programs are well-placed to grow existing offerings and seek out new ways to partner with the legal assistance sector in this space. In particular, disaster law clinics are a likely growth area and ought to be trialled by Australian law schools.

C *Embedding Climate Change Content throughout the Law Curriculum*

A comprehensive but time-consuming strategy is to embed climate change content across the law curriculum. This approach is similar to other calls to embed certain approaches throughout the LLB pathway. Calls to 'Indigenise' the curriculum,[102] prioritise social justice perspectives,[103] embed an ethics approach,[104] and increase the orientation on dispute resolution,[105] are all examples of perspective transformation within the study of law that have circulated for many years.

Described as a 'world first', Bond University in Queensland, Australia, recently launched a climate law degree for its undergraduate students wanting to 'fix the system from the inside.'[106] Students enrolled in the LLB will have the option of completing a specialisation, major or double major in climate law. According to the Executive Dean of Law at Bond University, Nick James, the degree will give students 'the tools they need to lead legal, social and political

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101 Jessup and Carroll (n 89) 557; Peter A Joy, 'The Cost of Clinical Legal Education' (2012) 32(2) *Boston College Journal of Law & Social Justice* 309, 321.

102 Heather Douglas, 'Indigenous Legal Education: Towards Indigenisation' (2005) 6(8) *Indigenous Law Bulletin* 12, 13.

103 Tamara Walsh, 'Putting Justice Back into Legal Education' (2007) 17 (1–2) *Legal Education Review* 119, 122.

104 See generally Michael Robertson et al (eds), *The Ethics Project in Legal Education* (Routledge, 2011).

105 Kathy Mack, 'Integrating Procedure, ADR and Skills: New Teaching and Learning for New Dispute Resolution Processes' (1998) 9(1) *Legal Education Review* 83, 91.

106 Bond University (n 56).

reform'.[107] It remains to be seen whether this exciting development will prompt other schools to take up the challenge to reconfigure their LLB offerings to comprehensively address climate change now and into the future. One qualification to embedding climate (or indeed any other) perspective across the degree is that its impact on student well-being will be undermined if SDT-informed approaches are not integrated within the new program. Traditional curriculum, assessment and pedagogical approaches that are unsupportive of student well-being will not give students what they need to regularly experience autonomy, competence and relatedness.

V Conclusion

Student psychological distress about the climate crisis has the potential to contribute to their negative mental outlook while at law school. Law schools that understand the contributory role of climate change as a factor in student distress will be better placed to support their student body. Despite the ongoing psychological impact that the climate crisis will have on youth mental health, this article shows that there a range of practical strategies that law schools can initiate to support student well-being. Extracurricular pro bono initiatives, clinical legal education and embedded climate change perspectives across the degree are all examples of what is possible.

As legal educators, there is an obligation upon us to become climate literate and to understand how this phenomenon is affecting our students. For many years, the Australian legal academy has grappled with the issue of student well-being and we already have the tools to design learning activities to alleviate the problem of law student psychological distress. Authentically engaging with our students as partners, and working alongside them to craft opportunities for their engagement in addressing climate change, is crucial. We must strive to find the space within the curriculum (and, if not, then through pro bono initiatives) to help spark their motivation and passion to act. Doing so will not only attenuate the distress they may feel but will also, hopefully, open up career paths that involve a long-term professional commitment to climate justice.

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[107] Ibid.

'It Makes No Difference What We Do': Climate Change and the Ethics of Collective Action

Jonathan Crowe*

Opposition to collective action on climate change takes at least two forms. Some people deny that climate change is occurring or that it is due to human activity. Others maintain that, even if climate change is occurring, we have no duty to do anything about it because our efforts would be futile. This article rebuts the latter line of argument. I argue that: (1) everyone has a duty to do their share for the global common good, which includes doing one's part to combat climate change; (2) the idea that taking action against climate change is futile should be treated with caution, because sometimes actions may seem to make no difference to climate change, when really they do; (3) in any event, the duty to do one's share to combat climate change still applies, even if it is ultimately futile; and (4) this is because not doing one's share for the common good harms oneself, regardless of whether it makes any difference to the wider outcome.

I Introduction

> 'Yes, but what is one to do?' people often ask in genuine perplexity. 'If everyone would stand out it would be something, but by myself, I shall only suffer without doing any good to anyone.'[1]

Opposition to action on climate change takes at least two forms. Some people deny that climate change is occurring or that it is due to human activity. This kind of climate change denialism has been widely rebutted by reference to scientific data on climate conditions over time and the proliferation of human-made pollutants such as greenhouse gases.[2] However, there is a second kind of scepticism about action on climate change that is potentially more difficult to counter. This is the argument that, even if climate change is occurring, we have no duty to do

* Professor of Law, Bond University. An earlier version of this article was presented at the *Climate Change, Law and Legal Education Conference* held at Bond University in February 2021. I am grateful to all who attended and contributed to the discussion. Thanks also to the anonymous reviewer for helpful feedback.

1 Leo Tolstoy, *The Kingdom of God is Within You*, tr C Garnett (Watchmaker Publishing, 1951) 157.

2 For an overview, see Intergovernmental Panel on Climate Change, *Climate Change 2014: Synthesis Report* (AR5 Synthesis Report, 2015) ('IPCC Synthesis Report').

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anything about it (or, at least, to increase our current level of action) because for us to do anything would be futile.

The latter argument frequently arises in political discourse around climate change. In November 2019, for example, Australia was ravaged by bushfires that many claimed were worsened by climate change. The Prime Minister, Scott Morrison, rejected calls for increased governmental action to combat climate change, arguing that greater action by Australia would be futile given the global nature of the phenomenon. Morrison seemed to accept that climate change was increasing the severity of bushfires, stating that 'the contribution of these issues to global weather conditions and to conditions here in Australia are known and acknowledged'.[3] However, he went on to state:

> [T]he suggestion that any way shape or form that Australia, accountable for 1.3% of the world's emissions, that the individual actions of Australia are impacting directly on specific fire events, whether it's here or anywhere else in the world, that doesn't bear up to credible scientific evidence … Climate change is a global phenomenon and we're doing our bit as part of the response to climate change — we're taking action on climate change … But I think to suggest that at just 1.3% of emissions, that Australia doing something more or less would change the fire outcome this season — I don't think that stands up to any credible scientific evidence at all.[4]

Morrison's suggestion seems to be that because Australia's contribution to climate change globally is relatively small, it would be useless for Australia to increase its contribution to climate change abatement. Any change in Australia's carbon dioxide emissions, for example, would make little if any difference in a global context and, in any case, would not materially affect the risk of bushfires. On the other hand, reducing carbon emissions would entail some inconvenience and potential economic costs to Australia. Therefore, since it would cost something and gain nothing, it should not be done.

My aim in the present article is to analyse and rebut this line of argument. I do so from the standpoint of normative ethics, drawing on my previous work on ethical theory in the natural law tradition.[5] My argument proceeds through four propositions. I argue that (1) everyone has a duty to do their share for the global common good, which includes doing one's part to combat climate change; (2) the idea that taking action against climate change is futile should be treated with caution, because sometimes actions may seem to make no difference to climate change, when really they do; (3) in any event, the duty to do one's share to combat

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3 Paul Karp, 'Scott Morrison Says No Evidence Links Australia's Carbon Emissions to Bushfires', *The Guardian* (online, 21 November 2019) <https://www.theguardian.com/australia-news/2019/nov/21/scott-morrison-says-no-evidence-links-australias-carbon-emissions-to-bushfires>.

4 Ibid.

5 See especially Jonathan Crowe, *Natural Law and the Nature of Law* (Cambridge University Press, 2019) chs 1–4 ('*Natural Law and the Nature of Law*'); Jonathan Crowe, 'Does Control Make a Difference? The Moral Foundations of Shareholder Liability for Corporate Wrongs' (2012) 75(2) *Modern Law Review* 159 ('Does Control Make a Difference?').

climate change still applies, even if it is ultimately futile; (4) this is because not doing one's share for the common good harms oneself, regardless of whether it makes any difference to the wider outcome.

II Common Good Duties

I have argued in detail elsewhere that everyone has a duty to do their share to promote the common good, conceived on a global as opposed to purely local level.[6] I offer a précis of that argument in this Part, before applying it to the issue of climate change. The notion of the common good is central to political philosophy in the natural law tradition. Natural law theories characteristically hold there are certain basic values towards which humans should orient their intentional actions.[7] These values play a central role in explaining the function and nature of human social institutions and practices. They are therefore fundamental to theories of politics and law. The pivotal idea of the common good describes the interest everyone has in being a part of a community where all members can lead flourishing lives by pursuing the basic values in a range of reasonable ways.[8]

Everyone has an interest in securing the common good in their communities for two fundamental reasons.[9] First, it is good for each person to live in a community where they themselves can pursue the basic goods, because pursuing the basic goods is what makes a human life go well. Second, it is good for each person to live in a community where others can pursue the basic goods, because helping others to pursue the basic goods is also part of living a good life. A community where one extra person can pursue the basic goods is, by that fact, a better community than one where the person cannot do so. We have reason to bring that community into being, because we have reason to help each person live a flourishing life. It follows that the best possible community is one where every member can pursue the basic goods. Each person has weighty reason to bring that community about.

The precise form the common good takes in each community is substantially determined by local social and legal norms.[10] There are, according to natural law theories, certain fundamental forms of flourishing that are common to all humans. However, these values may take different forms in diverse communities. Different societies, for example, recognise different forms of recreation and

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6 Crowe, *Natural Law and the Nature of Law* (n 5) ch 4.
7 Ibid ch 2.
8 Ibid 88–90.
9 Ibid 91–3.
10 Ibid 93–5. For further discussion, see Jonathan Crowe, 'Intelligibility, Practical Reason and the Common Good' in Jonathan Crowe and Constance Youngwon Lee (eds), *Research Handbook on Natural Law Theory* (Edward Elgar, 2019) 296 ('Intelligibility, Practical Reason and the Common Good').

aesthetic experience, as well as different kinds of meaningful social bonds. Local social and legal norms also play a crucial role in defining what counts as each person's fair contribution towards the common good. For example, legal institutions may define a certain level of income tax as each person's appropriate contribution to shared resources used for social improvement. If the income tax scheme is generally fair and reasonable, then it plausibly becomes part of what it means for each member to do her share in a moral sense to promote the common good.

The common good, then, depends importantly on local arrangements. Nonetheless, in a broader normative sense, the common good is global and not local.[11] We have strong reason to bring about the common good in our community because it would allow all members to flourish. However, members of other communities in the world are also humans capable of flourishing, so we have reason to promote the common good for them as well. It follows that local legal and social norms should be consistent with the pursuit of the global common good if they are to retain their moral force. Local norms should be structured so as to require members of that community to do their share for human flourishing not only on a local level, but globally. Each community must do its share for the worldwide common good.

Some readers may be inclined to respond to the preceding paragraphs by wondering where exactly the content of natural law duties come from.[12] Some contemporary natural law authors, such as John Finnis, present natural law as a set of timeless precepts existing in the mind of God.[13] I have argued, by contrast, for a hermeneutic and historicised view of natural law, which sees it as shaped by and discovered through human social practices.[14] Natural law, thus conceived, reflects ongoing human efforts to work out how best to cooperate and flourish in our shifting natural and social settings. This perspective, which I call *diachronic natural law*, recognises that the content of our moral duties as humans is responsive to the challenges we face at specific junctures in human history. Human nature, on this view, is not a static concept, but rather a product of our interactions with each other, as well as the broader natural environment.[15] It is, in

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11 Crowe, *Natural Law and the Nature of Law* (n 5) 95–8.

12 I thank the anonymous reviewer for prompting me to address this question.

13 John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 2nd ed, 2011) 24, 389–90. For critical discussion, see Jonathan Crowe, 'Is Natural Law Timeless?' (2021) 33(1) *Bond Law Review* 1 ('Is Natural Law Timeless?').

14 Crowe, *Natural Law and the Nature of Law* (n 5). See also Jonathan Crowe, 'Natural Law and the Nature of Law: A Response to Commentators' (2019) 44 *Australasian Journal of Legal Philosophy* 133 ('Natural Law and the Nature of Law: A Response to Commentators'); Jonathan Crowe, 'Philosophical Challenges and Prospects for Natural Law Foundations' in Mark Retter, Tom Angier and Iain Benson (eds), *The Cambridge Handbook on Natural Law and Human Rights* (Cambridge University Press, forthcoming) ('Philosophical Challenges and Prospects for Natural Law Foundations').

15 Crowe, 'Natural Law and the Nature of Law: A Response to Commentators' (n 14) 133–6.

other words, deeply relational. This conception of natural law is compatible with both theistic and non-theistic worldviews.[16]

Climate change is one of the foremost challenges facing the global common good today. If climate change continues at current levels, many people in the world will be deprived of secure and reliable food, shelter and livelihoods.[17] This will lead to large-scale global migrations that will be challenging to manage. Tensions between local communities are likely to be exacerbated by these trends, potentially causing outbreaks of violence. Many people will be unable to lead flourishing lives by accessing a rich array of basic goods in a safe and stable environment because of these developments. It seems clear, then, given what I have said above, that the duty to do our share for the global common good entails a duty to address global climate change. However, this conclusion potentially invites the objection raised at the start of this article: why should we take steps to combat climate change if doing so would be futile? I respond to this argument in the following Parts, showing how it does not remove our collective duty to do our share to promote the global common good.

III Making a Difference

Morrison claims that 'the suggestion that any way shape or form that Australia, accountable for 1.3% of the world's emissions, … [is] impacting directly on specific fire events … doesn't bear up to credible scientific evidence'.[18] This argument queries the link between Australia's carbon emissions and specific weather events that might be attributed to global climate change. The comment seems to assume that, in order for Australians to be responsible for specific climate change effects, the following chain of causation must be scientifically proven. First, it would have to be shown that Australia's carbon emissions make a significant difference to global climate change. Second, a link would have to be drawn between that contribution and specific weather events.

I will query later in this article whether this kind of causal connection is necessary in order for Australians to be responsible for responding to climate change. However, even granting that assumption, the argument outlined above is questionable. A central point to be made in this context is that sometimes actions may appear to make no difference to an outcome, when really they do. It is tempting to dismiss what we might term *micro-contributions* as having no significant impact on macro outcomes. However, this arguably misunderstands the way in which a phenomenon such as global climate change occurs. Climate

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16 For discussion, see Crowe, 'Is Natural Law Timeless?' (n 13); Crowe, 'Philosophical Challenges and Prospects for Natural Law Foundations' (n 14).

17 IPCC Synthesis Report (n 2) 67–71.

18 Karp (n 3).

change is caused not by the decisive contributions of a small number of main actors, but by the accretion of many contributions over time.[19] Some contributors are no doubt more instrumental than others in causing the outcome, but all plausibly bear some responsibility for it.

Walter Sinnott-Armstrong offers a philosophical argument against the moral significance of micro-contributions to climate change based on a narrow understanding of causation for normative purposes. He argues that if 'I pour a quart of water into [a] river upstream' and the river then floods, '[m]y act of pouring the quart into the river is not a cause of the flood'.[20] Likewise, if I drive my car for fun when it is not necessary to do so, I don't thereby cause any additional climate change, because '[n]o storms or floods or droughts or heat waves can be traced to my individual act of driving'.[21] However, these claims about causation are open to question. Shelly Kagan has argued in relation to pollution that even a contribution that makes an *imperceptible* difference to outcomes should be considered morally significant:

> In the pollution case, for example, there is more toxin released as a result of my act — and while this may not leave any given individual perceptibly worse off (since one molecule more or less makes no perceptible difference), we can say that those who inhale a molecule of my toxin have been made imperceptibly worse off.[22]

Kagan further points out that our evaluation of people's actions should take account not only of the imperceptibility of individual contributions, but the gravity of any overall harm that results:

> Such an imperceptible harm will, obviously, be very small, but since I will have similarly harmed thousands, or millions, the cumulative amount of harm that I will have done will be very great — indeed, 1/*n*th of all the harm done by the *n* polluters. Thus my act does make a difference, and the results would have been better had I not polluted.[23]

Kagan's analysis seems better suited than Sinnott-Armstrong's to capture our intuitions about the moral significance of micro-contributions to collective outcomes. Imagine a swimming pool that members of a local community fill cooperatively by emptying small buckets of water into it.[24] Some people contribute more buckets than others. Nonetheless, once the swimming pool is

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19 IPCC Synthesis Report (n 2) 44–7.

20 Walter Sinnott-Armstrong, 'It's Not My Fault: Global Warming and Individual Moral Obligations' in Stephen Gardiner et al (eds) *Climate Ethics: Essential Readings* (Oxford University Press, 2010) 332, 335.

21 Ibid 336.

22 Shelly Kagan, 'Do I Make a Difference?' (2011) 39(2) *Philosophy and Public Affairs* 105, 114 ('Do I Make a Difference?'). See also Avram Hiller, 'Climate Change and Individual Responsibility' (2011) 94(3) *Monist* 349.

23 Kagan, 'Do I Make a Difference?' (n 22) 114–15.

24 For a rich and illuminating discussion of a broadly similar example, see Derek Parfit, *Reasons and Persons* (Oxford University Press, 1986) 76–8.

full, everyone has contributed something to that outcome. Even a child who contributed only a small cup of water plausibly bears some responsibility for the outcome, even if not to the same extent as others. Furthermore, it seems correct to say that each contributor has made some difference to the result, since it was attained more quickly than it would have been without them. The swimming pool would have eventually been filled even if fewer people had contributed to the process. However, every bucket or cup of water hastens the outcome and so makes a difference overall. It may not change the ultimate nature of the outcome, but it changes its timing and how it occurs.

The actions of Australians, individually and collectively, plausibly make this kind of difference to climate change. It is no doubt true that global climate change would still be a very serious problem without Australia's contribution. Nonetheless, it also seems plausible that Australians' contributions are making the harms of climate change worse than they would otherwise have been. They do this by making the harms occur more quickly and in a more serious way that would otherwise have been the case. Every micro-contribution to climate change plausibly makes a micro-difference to the composition of the climate. It therefore potentially hastens and worsens the negative impacts in an imperceptible but nonetheless real way. Imperceptible contributions, as Kagan suggests, should not be discounted in attributing moral responsibility. Furthermore, small differences in the timing of outcomes can be critical for the most vulnerable, so we cannot discount that Australia's role in climate change makes a real difference for those most affected by it.

The connection between micro-contributions and responsibility for outcomes is further illustrated by the following example. Imagine that Marilyn is one of dozens of pilots involved in a wartime bombing raid.[25] Her bombs contribute to a firestorm that causes widespread death and destruction. However, the firestorm would have occurred in much the same way without her individual contribution. Suppose Marilyn thinks the bombing raid is morally unjustified. She is tempted not to release her bombs. However, she reasons that, since her contribution makes no difference overall, it does not matter either way, so she releases them. Later, can Marilyn disclaim responsibility for her role in the firestorm? If she did not release the bombs, she could say she did not contribute. However, since she did release them, she contributed and is partly responsible. She made a micro-contribution that plausibly made the firestorm worse (quicker and more serious) than it would otherwise have been.

The swimming pool and bombing raid examples are cases of micro-contributions that plausibly make a difference, albeit a small one. I have argued in this Part that such micro-contributions attract moral responsibility for the ensuing outcomes. I am not arguing, to be clear, that the scale of the contribution

[25] This is a variation on an example discussed in Crowe, 'Does Control Make a Difference?' (n 5) 163–4.

does not matter.[26] A large contribution to an outcome will generally attract greater moral responsibility than a small one. It is wrong to suggest, however, that micro-contributions attract no moral responsibility at all. The cumulative consequences of micro-contributions for overall outcomes also should not be overlooked. Individual Australians may make only a small contribution to climate change, but if they make that contribution in the knowledge that other Australians are doing likewise, they might plausibly be regarded as actors in a joint enterprise attracting a form of collective responsibility.[27] This collective responsibility, in turn, calls for a collective response, whether through government or other modes of social coordination.

The role of Australia's contributions to global climate change strikes me as analogous to the cases considered in this Part. The actions of individual Australians, I suspect, make a real, albeit relatively small, contribution to climate change on a worldwide level. However, there is no scope in this article to review the scientific evidence on how climate change specifically occurs.[28] I therefore cannot decisively refute the possibility that may be asserted by some opponents of climate change action: namely, that Australia's contributions make no difference at all to the overall outcome, even an imperceptible one. If that were the case, would it mean Australia has no responsibilities in this area? I do not think so. I argue in the following Part that, even if micro-contributions make no difference at all to the outcome, their contributors still bear some responsibility for what occurs.

IV Doing What We Can

There are some situations where a person's individual contribution to an outcome makes no difference at all to what happens. They do not hasten the outcome nor make it worse than it would have been. Consider, for example, the following scenario.[29] David is a vindictive man who would like the satisfaction of shooting his enemy, but he does not want to be morally responsible for doing so. He learns that, by coincidence, someone else has the same intention (his enemy is an unpopular person). David therefore waits until the other person aims at the enemy, then fires at the same time. Both bullets enter the enemy's body simultaneously and immediately cause his death. David's strategy is to avoid responsibility for his enemy's death by claiming that his actions make no

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[26] Thanks to the anonymous reviewer for prompting me to address this issue.

[27] For detailed discussion of collective responsibility for the harmful outcomes of joint enterprises, see Crowe, 'Does Control Make a Difference?' (n 5).

[28] For an overview, see IPCC Synthesis Report (n 2) 44–9.

[29] This is a variation on an example discussed in Crowe, 'Does Control Make a Difference?' (n 5) 164. For discussion of some similar cases, see Parfit (n 24) 70–3.

difference to the outcome. The outcome, he may claim, would have occurred in precisely the same way without his contribution.

Let us assume that David's causal claim is true: the enemy would have died immediately even without his bullet, so in this sense he made no difference to the outcome, not even a small one. Nonetheless, it seems that David's strategy fails: he cannot claim on this basis that he bears no moral responsibility for the death. This is partly because his intention was culpable: he wished the death to occur and acted accordingly. However, it is also because we would naturally say his actions *caused* the death, even though the death would still have occurred without them. The notion of causation operating in relation to moral responsibility is in this respect different to a simple 'but for' or counterfactual version, as has been observed in the philosophical literature on this issue.[30] David plausibly contributed to the outcome in a moral sense even though he technically made no difference to it.

The example of David's enemy shows that it is still wrong to contribute actively to a harm even if precisely the same harm would have occurred without your contribution. This seems analogous to the situation with Australia's contributions to global climate change. Australian carbon emitters plausibly contribute to global climate change; the preceding argument suggests they are therefore partly responsible for the harm even if it would still have occurred in exactly the same way without them. However, opponents of climate change action might be inclined to think about climate change in a different way: they might conceive it as something that is caused by external factors entirely independent of them. This strikes me as implausible, given that Australian carbon emissions are not zero, but suppose it was true. If a harm arises entirely independently of your actions and any response you would make would be futile, does this absolve you from any responsibility to address it?

The answer, I think, is no. Consider the following example. Imagine Bella sees her friend Edward get trapped under a fallen tree.[31] She knows he will be seriously injured or die if the tree is not removed. She also knows she doesn't have the strength to lift the tree and rescue him — but she still grabs hold of it and pulls with all her might until she is exhausted. It seems Bella has done the right thing in trying her best to pull away the fallen tree, even though she might reasonably and correctly judge her actions to be futile. Consider, by contrast, what we would say if she had just stood by and watched her friend die without doing anything. We might, of course, feel great sympathy that she found herself in such a tragic

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30 See, eg, Carolina Sartorio, 'How to Be Responsible for Something Without Causing It' (2004) 18(1) *Philosophical Perspectives* 315.

31 For additional (and more interesting) stories about Bella and Edward, see Stephenie Meyer, *Twilight* (Little, Brown and Company, 2005); Stephenie Meyer, *New Moon* (Little, Brown and Company, 2006); Stephenie Meyer, *Eclipse* (Little, Brown and Company, 2007); Stephenie Meyer, *Breaking Dawn* (Little, Brown and Company, 2008).

and distressing situation. We would be disinclined to judge her harshly in the circumstances. Nonetheless, it seems there is something less than ideal about her actions. We would like to think that, in the same situation, we would do everything possible before giving up.

Bella is the only one in this scenario who can help Edward. Her actions are futile because there is nobody else around to help her. Even so, there is some intuitive basis for saying she should do everything she can. However, the situation in relation to climate change is different. Climate change could still be mitigated (if not entirely reversed) if everyone did their part;[32] it is because many people (or communities) are not likely to do their part that action by some is potentially futile. Australians may therefore think, 'why should I do my part if others are not doing theirs?' It is the kind of situation described by Leo Tolstoy in the quotation at the start of this article: '[i]f everyone would stand out it would be something, but by myself, I shall only suffer without doing any good to anyone.'[33]

However, the fact that climate change features a collective action problem does not weaken the conclusion that we should do what we can to contribute our share to a solution. Let us imagine the Bella example, but with a variation. Suppose Bella is not alone when the tree falls on Edward; rather, there is a steady stream of passers-by who could also help. It would take a very large number of them working together to shift the tree; Bella may think it is highly unlikely that so many people would stop to help. Nonetheless, I think this circumstance strengthens, rather than weakens, our intuition that she should do what she can. Bella should not ideally think to herself, 'why should I do my part to lift the tree if others are not doing theirs?' Rather, she should do what she can, not only because there is inherent value in doing so (as in the previous example), but also because she might thereby encourage others to help.

Suppose Bella thinks that trying to encourage others to help is futile, because it is very unlikely and perhaps impossible that enough of them will stop and assist. Does this mean the existence of passers-by who could potentially help is irrelevant to her decision? I don't think so. If Bella does what she can, she acts in a hopeful and proactive way, assuming the best of the passers-by. On the other hand, if she decides to do nothing because it would be futile, she behaves in a pessimistic and passive way, assuming the worst of the passers-by (or at least a significant number of them). It is better, other things being equal, to adopt the hopeful and proactive attitude than the pessimistic and passive one.[34] This observation, I think, holds a clue in resolving a potentially puzzling question underpinning the discussion so far. How can we explain the conclusion we have

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32 IPCC Synthesis Report (n 2) 77–91.

33 Tolstoy (n 1) 157.

34 This is, for the moment, merely an assertion, but in Part V I provide further explanatory context to support it.

reached based on the preceding argument: that it is wrong not to act on climate change even if it would be futile?

V Moral Self-Harm

I argued in Part IV that we have a duty to do our share for the common good, even if this is entirely futile. This means we should do our share to combat global climate change, even if it would make no difference at all to the outcome. It bears emphasising here that I believe it is not, in fact, the case that Australia's actions on climate change make no difference overall; it is more plausible that they do make a difference, albeit a relatively small one compared to the members of other global communities. Nonetheless, even if we were to grant the version of the facts most favourable to opponents of climate change action — namely, that Australia's actions make no difference whatsoever to the overall situation — then it would still not be the case that we have no responsibility to act. This conclusion may strike some readers as counterintuitive. It will be helpful, then, to try to explain it. *Why* do we have a duty to do our share, even when it is futile?

This conclusion might seem particularly puzzling from a consequentialist perspective. Consequentialism holds, roughly, that the rightness or wrongness of an action depends solely on its consequences.[35] An action that makes no difference to the harms that result therefore cannot be wrongful from a consequentialist perspective. It may appear, then, that any explanation for why it is wrong not to take futile measures would have to appeal to deontic standards that apply independently of consequences. We would have to say, for example, that it is inherently wrong not to do our share for the common good, irrespective of outcomes. However, I believe this contrast between consequentialist and deontological approaches is a red herring in this context. It is possible to explain our conclusion in a way that is compatible with (certain forms of) consequentialism. We need only expand our understanding of the consequences that follow from adopting a stance of inaction in response to harm.

We have been positing, for the sake of argument, that Australians' actions do not make any impact on climate change, in the sense that they do not change the overall harms of climate change for other members of the global community (or indeed for Australians themselves). In this sense, we have supposed, the actions do not make a difference. However, they might make a difference in another way. My proposal is that not doing our share for the global common good by combating climate change *harms ourselves*, even if it does not harm others because it does not affect global outcomes.[36] Not doing our share harms us in two distinctive but

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[35] For a helpful overview, see Shelly Kagan, *Normative Ethics* (Westview Press, 1998) 59–69.

[36] For a related discussion of how acting for certain motives can harm ourselves, see Crowe, *Natural Law and the Nature of Law* (n 5) 78–9.

interrelated ways. First, it makes us complicit in human suffering because it involves standing by and doing nothing while grave global harms occur to people more vulnerable than us. Second, it sets back our project of being engaged and active moral agents because it involves imagining ourselves as mere patients of what is occurring, as opposed to engaged actors who can assume responsibility for improving outcomes.

Why is it a form of self-harm to be complicit in human suffering? I have argued elsewhere that one of the basic forms of value for humans is the good of life, understood as involving an attitude of openness to human flourishing in all its manifestations.[37] This good is represented most obviously in the high value humans and their communities place on parenting, but it is not limited to that context. Inaction in the face of human suffering sets back participation in this value and to that extent is a form of harm. Likewise, it is a form of self-harm to situate ourselves as passive moral patients rather than active and engaged actors. This is partly because this behaviour sets back another basic human value, the good of meaning.[38] This good consists in pursuing basic value commitments that enable us to create meaning in our lives by forging a meaningful self-identity. Active engagement with moral challenges such as climate change enables us to define ourselves as kind, generous, compassionate and caring moral agents. Ignoring these challenges, by contrast, set back this good by missing an opportunity for positive self-definition.

The forms of self-harm outlined in the previous paragraph have both individual and collective dimensions. Individually, they set back the goods of life and meaning in the ways described above. Collectively, they potentially create a social environment where the goods in question are not prioritised but rather devalued. We risk creating the kind of community that overlooks rather than confronts human suffering and fails to promote opportunities for positive moral self-definition. This is not the best kind of community to live in, because it fails to fully support its members to participate in these goods. Basic human values are not only facilitated by the social environment but also partly constituted by them.[39] A community that fails to nourish participation in a wide range of forms of value risks impoverishing the forms of flourishing available to its members. We should prefer, other things being equal, to contribute to and live in a community that promotes and encourages active engagement with moral challenges rather than treating this as futile.

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37 Ibid 39–41.
38 Ibid 53–5.
39 For further discussion, see Crowe, 'Intelligibility, Practical Reason and the Common Good' (n 10).

VI Conclusion

It has become progressively more difficult to deny the existence of anthropogenic climate change as the scientific evidence has mounted. However, many Australians — including prominent politicians — remain opposed to taking action to combat this issue. Those who are opposed to such action sometimes justify their stance by suggesting that even though climate change is real and dangerous, there is no obligation to do anything further about it, because this would be futile. I have sought in this article to refute this line of argument. I argued that (1) everyone has a duty to do their share for the global common good, which entails combating climate change; (2) even micro-contributions to climate change plausibly create a moral responsibility to counteract their effects; (3) in any case, we would still have a duty to combat climate change even if, contrary to the evidence, this made no difference whatsoever to the outcome; (4) this result can be explained by appealing to the fact that not doing one's share constitutes a kind of individual and collective self-harm.

I conclude that Australians, like everyone else, should do their share to combat climate change. Even if our actions wouldn't make as much difference as those of other world communities, we should still take steps to reduce our contribution to this grave global problem. And even if fighting climate change is ultimately pointless — even if our actions make no difference at all to the outcome — we should still do what we can. If we do not, we alienate ourselves from our values, making ourselves less caring and engaged both individually and as a community. We reduce our opportunities to affirm our support for human flourishing in all its varieties. And we erode our capacity to build our character as kind, generous, compassionate and engaged moral agents. This constitutes a form of self-harm that we have reason to avoid — in addition to the already strong reasons we have to ameliorate, as far as possible, the harms climate change causes to those more vulnerable to its effects than ourselves.

REGULATING HIDDEN RISKS TO CONSERVATION LANDS IN RESOURCE RICH AREAS

REBECCA NELSON*

Australia leads the world in formally dedicating private land to environmental conservation, helping governments protect critical biodiversity without straining the public purse. In Queensland, the booming resources sector threatens this biodiversity protection, even beyond landholders' well-recognised lack of veto power over mining approvals on their land. Three structural legal biases increase this vulnerability. To differing degrees, Queensland's laws assume that mining affects only land under or adjoining mining tenures, overlooking scientifically likely longer-distance impacts ('boundary bias'); they emphasise protecting built and commercial infrastructure over ecological assets, overlooking significant investment in species and ecosystems ('infrastructure bias'); and they allow consideration of proposed mining in isolation, without considering cumulative impacts on ecological assets ('singularity bias'). Fortunately, Queensland law and policy precedents suggest potential corrective reforms.

I INTRODUCTION

When one thinks about environmental conservation and wilderness, national parks and other public lands tend to come to mind. Less well known, but increasingly vital, are privately owned conservation lands. These lands represent the offspring of a union between public interest environmental conservation and private property. In 2021, the concept marks its 70th birthday in Australian law,[1] and almost 200 years in use abroad,[2] having also achieved recognition in

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1 Mathew J Hardy et al, 'Exploring the Permanence of Conservation Covenants' (2017) 10(2) *Conservation Letters* 221, 224 (referring to Australia's first conservation covenant established in 1951 in NSW).

2 Leticia Ochoa-Ochoa et al, 'The Effects of Governmental Protected Areas and Social Initiatives for Land Protection on the Conservation of Mexican Amphibians' (2009) 4(9) *PLoS ONE* e6878, 1–9, 2.

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international legal regimes.[3] Under these arrangements, private landholders agree, and are legally bound under, agreements, covenants or other similar arrangements,[4] to manage their property for ecological outcomes[5] ('private conservation land'). Private conservation land is thus a conceptual sibling to important environmental mechanisms like carbon and biodiversity offsets, which create private value for land management in the public interest, and cousin to environmental policy concepts like 'natural capital' and ecosystem services,[6] which encourage valuing nature through the lens of markets, assets, capital, and property. Yet, increasing reliance on these concepts, and widespread national and international enthusiasm for them,[7] have not necessarily been accompanied by meaningful protections usually associated with assets and capital. This is especially clear in the case of conflicts with incompatible land uses that have the potential to impair conservation outcomes on private conservation land, including some Indigenous protected areas.[8] As governments increasingly encourage and rely on private conservation lands to deliver environmental conservation in the public interest, the growth of conflicting land uses has emerged as a serious problem for legal and regulatory resolution. Resolving this problem would not only better protect conservation outcomes, but it would also benefit other rural landholders and public conservation lands.[9]

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3 Conference of the Parties to the Convention on Biological Diversity, *Ecosystem Conservation and Restoration*, 12th mtg, UN Doc UNEP/CBD/COP/DEC/XII/29 (17 October 2014) 107 [2] (recognising the importance of private protected areas in biodiversity conservation and sustainable ecosystem management).

4 These agreements have diverse names across different jurisdictions, including conservation covenants, conservation easements, private protected areas, nature sanctuaries, and voluntary conservation use areas: Heather Bingham et al, 'Privately Protected Areas: Advances and Challenges in Guidance, Policy and Documentation' (2017) 23(1) *Parks* 13, 15–17. The extent to which, and the ways in which, the owner is legally bound, vary with the terms of the specific agreement.

5 For a range of jurisdictional approaches to implementation of the concept, see Law Commission No 349, *Conservation Covenants* (Report, 2014) (recommending statutory establishment of conservation covenants in England and Wales).

6 See generally Colin T Reid and Walters Nsoh, *The Privatisation of Biodiversity?: New Approaches to Conservation Law* (Edward Elgar, 2016); Natural Resource Management Ministerial Council, *Australia's Biodiversity Conservation Strategy 2010–2030* (2010) 3, 10; *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth).

7 For recent examples, see, eg, Greening Australia, *Year in Review 2019* (Report, 2019) 5 <https://www.greeningaustralia.org.au/wp-content/uploads/2020/01/CKA9866_GA.YearIn Review2019_LINKS_S.pdf>; KPMG and National Farmers Federation, *A Return on Nature: Enabling the Market for Sustainable Finance and Ecosystem Services* (Report, December 2019); Food and Agriculture Organisation of the United Nations, 'Ecosystem Services & Biodiversity' (Web Page, 2021) <http://www.fao.org/ecosystem-services-biodiversity/en/>.

8 See below n 26.

9 Similar problems of conflict are also likely to arise in the context of Aboriginal and Torres Strait Islander values associated with elements of the environment. These values are distinct from, though overlap in some respects with, Western ecological values. This context involves additional important legal regimes that lie outside the scope of this paper to discuss, for example native title and cultural heritage laws, which warrant dedicated and sustained future attention.

Australia now has the largest area of private conservation lands in the world,[10] and areas are increasing rapidly.[11] This growth is occurring in the shadow of increasing potential conflict between conservation lands and a booming resources sector that is thirsty for water, especially groundwater. At the same time, scientific knowledge has grown about the needs of key ecological assets — including water needs — and the ways that mines, gas developments and other extractive activities can affect groundwater conditions over wider distances than previously thought.[12] Queensland epitomises the uncomfortable intersection of these trends: government policy promotes mining as economically critical while simultaneously seeking to expand private protected areas and investing in ecological water science.[13] Some conflicts at this intersection end in court.[14] Recent reforms to conservation laws try to address the potential for conflict.[15] However, these laws equally raise questions for private conservation landholders, environmentalists, and government as an investor in conservation, about the need for more thorough protections.

The tensions epitomised in Queensland arise around Australia[16] and seem likely to grow. Climate change will likely increase water and ecological stress[17] as the pandemic threatens to shrink public resources available to expand public conservation lands like national parks, and governments encourage private conservation to fill the breech. Risks to conservation lands may well increase as governments 'fast-track' resources projects to restart stuttering post-pandemic economies.[18] Environmental offsets — often secured by, and therefore reliant on,

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10 Bingham et al (n 4) 19.

11 Hardy et al (n 1) 222.

12 See discussion in Part IIC.

13 See discussion in Parts IIA, C.

14 See, eg, *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd* (2021) 386 ALR 212 (with earlier litigation leading to this appeal focusing on groundwater-related impacts of mining on landscapes); *Hancock Coal Pty Ltd v Kelly and Department of Environment and Heritage Protection (No 4)* [2014] QLC 12 ('*Hancock Coal*').

15 The *Nature Conservation (Special Wildlife Reserves) and Other Legislation Amendment Act 2019* (Qld) establishes a new form of private protected area, the 'special wildlife reserve', specifically intended to 'allow for the protection of lands of outstanding conservation value from incompatible land uses': Explanatory Notes, *Nature Conservation (Special Wildlife Reserves) and Other Legislation Amendment Bill 2018* (Qld) 1. See also Parts IIIB2, D2.

16 In South Australia see, eg, Alexandra Wawryk, 'Conservation and Access to Land for Mining in Protected Areas: The Conflict Over Mining in South Australia's Arkaroola Wilderness Sanctuary' (2014) 26(2) *Journal of Environmental Law* 291, and in Western Australia see, eg, Paul Vogel, 'The Balance between Mining and Conservation', *ABC News* (online, 18 November 2013) <https://www.abc.net.au/news/2013-11-18/vogel-mining-conservation-balance/5099404>.

17 Olivia Woolley, 'What Would Ecological Climate Change Law Look Like? Developing a Method for Analysing the International Climate Change Regime from an Ecological Perspective' (2020) 29(1) *Review of European, Comparative and International Environmental Law* 76, 78–80.

18 Scott Morrison, 'Address to the Committee for Economic Development of Australia 15 June 2020', (Address, CEDA's State of the Nation Conference, 15 June 2020) <https://www.pm.gov.au/media/address-%E2%80%93-ceda%E2%80%99s-state-nation-conference>.

private conservation land[19] — will likely grow with new resources developments and voluntary markets driven by climate change concerns. After 70 years, deeper legal reform is needed to support increasing reliance on private property that is used to produce public benefit ecological outcomes.

Part II of this article briefly reviews the rise of private conservation lands, the growing resources sector, and scientific knowledge about groundwater conditions and impacts in general and with respect to Queensland. Part III undertakes detailed statutory analysis to explore the key ways in which private conservation lands in Queensland are vulnerable to the impacts of resources activities, focusing on groundwater. It identifies three categories of structural legal biases — implicit assumptions that run through a complex system of laws and act as blinkers to exclude important considerations — that give rise to important vulnerabilities for private conservation lands, with a focus on groundwater. Part IV investigates ways to strengthen protections for private conservation lands both through law reform and using existing laws. Part V concludes.

II Background: Conservation Landholders, Miners, and Scientists

A *The Rise of Private Conservation*

Landscape-scale conservation is critical to safeguarding species and ecosystems as climate change threatens to change their distributions.[20] Unfortunately, public protected lands are often fragmented and do not comprehensively represent species and ecosystems, with 'the overwhelming majority of poorly represented biodiversity features occurring primarily on private land'.[21] Scientists have urged an expansion to private conservation lands to deal with problems of representativeness and fragmentation in public conservation lands.[22]

Over their 70-year history in Australia, private conservation areas have been established in every State and Territory,[23] and both governments and non-

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19 See, eg, the BioBanking, BushBroker and Conservation Banking schemes explained in Irene Alvarado-Quesada, Lars Hein and Hans-Peter Weikard, 'Market-Based Mechanisms for Biodiversity Conservation: A Review of Existing Schemes and an Outline for a Global Mechanism' (2014) 23(1) *Biodiversity and Conservation* 1, 7–8. See also Reid and Nsoh (n 6) 6, 184, 189–90.

20 Department of Environment and Science (Qld), *Queensland's Protected Areas Strategy 2020–2030: Protecting Our World-Class Natural and Cultural Values* (2020) 13 ('*Queensland's Protected Areas Strategy 2020–2030*').

21 Ielyzaveta M Ivanova and Carly N Cook, 'The Role of Privately Protected Areas in Achieving Biodiversity Representation within a National Protected Area Network' (2020) 2(12) *Conservation Science and Practice* e307:1–12, 7.

22 Ibid.

23 See generally Hardy et al (n 1) 224, 225.

government organisations have embraced the concept.[24] Queensland hosts Australia's largest private protected lands network, accounting for 31 per cent of the state's protected lands by area, and protecting ecosystems found only on private land.[25] Diverse landholders own these lands, from Aboriginal and Torres Strait Islander peoples, to hobby farmers, to national environmental NGOs, to the nation's largest pastoral company.[26] Recent government strategy aims to 'accelerate' conservation landholdings using 'investment partnerships' and 'strategic incentives',[27] highlighting the importance of ensuring genuine and reliable protection for these lands.

As biodiversity protection increasingly relies on private lands, risks to these lands threaten Australian biodiversity as a whole. Globally,[28] and in Australia,[29] mining directly on and under conservation areas is known to be a serious threat to these areas.[30] It is perhaps less well known that mining *outside* the boundaries of conservation lands is a threat of significant concern for private conservation. In Queensland, local advocacy groups and conservation landholders have brought legal challenges against mines,[31] facing the threat of being bankrupted by litigation costs in the process.[32] Mining may also pose a more indirect threat to conservation and climate change mitigation if it affects ecosystems subject to biodiversity and carbon market mechanisms,[33] which fund management of some conservation land. Mining-related threats may also disincentivise philanthropic

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24 See, eg, WWF Australia, *Regenerate Australia: A Roadmap to Recovery and Regeneration* (Prospectus, October 2020) 14 (contemplating a 'Land Fund to create new private native species arks').

25 *Queensland's Protected Areas Strategy 2020–2030* (n 20) 6.

26 Katie Moon and Chris Cocklin, 'Participation in Biodiversity Conservation: Motivations and Barriers of Australian Landholders' (2011) 27(3) *Journal of Rural Studies* 331, 336; *Queensland's Protected Areas Strategy 2020–2030* (n 20) 21 (referring to the ownership of Queensland's largest nature refuge by Queensland's largest pastoral company). Examples of Aboriginal ownership of land covered by a nature refuge are the Jamba Dhandan Duringala Indigenous Protected Area: *Nature Conservation (Protected Areas) Regulation 1994* (Qld) sch 5; 'Jamba Dhandan Duringala IPA', *National Indigenous Australians Agency* (Web Page) <https://www.niaa.gov.au/indigenous-affairs/environment/jamba-dhandan-duringala-ipa> and the Olkola Nature Refuge: *Nature Conservation (Protected Areas) Regulation 1994* (Qld) sch 5; Cameron Atfield, 'Cape York Land Handed Back to Traditional Olkola Owners', *Brisbane Times* (online, 6 December 2014) <https://www.brisbanetimes.com.au/national/queensland/cape-york-land-handed-back-to-traditional-olkola-owners-20141206-121q87.html>.

27 *Queensland's Protected Areas Strategy 2020–2030* (n 20) 19, 21, 22.

28 See generally Rachel E Golden Kroner et al, 'The Uncertain Future of Protected Lands and Waters' (2019) 364(6443) *Science* 881.

29 See generally Philippa England, 'Conservation Covenants: Are They Working and What Have We Learned?' (2015) 34(1) *University of Tasmania Law Review* 92; Wawryk (n 16).

30 See generally Wawryk (n 16); Vanessa M Adams and Katie Moon, 'Security and Equity of Conservation Covenants: Contradictions of Private Protected Area Policies in Australia' (2013) 30(1) *Land Use Policy* 114. Other threats may also be internal to conservation reserves. For concerns about landholder behaviour, trespassers, and the adequacy of monitoring: see, eg, Hardy et al (n 1) 225, 227; England (n 29) 103–4.

31 See, eg, *Waratah Coal Pty Ltd v Youth Verdict Ltd* [2020] QLC 33.

32 See, eg, *New Acland Coal Pty Ltd v Oakey Coal Action Alliance Inc* [2020] QSC 212, [55].

33 *Queensland's Protected Areas Strategy 2020–2030* (n 20) 14, 21. Owners of nature refuges may apply for rights to deal with carbon abatement products on the land: *Nature Conservation Act 1992* (Qld) s 39F ('*Nature Conservation Act*').

investment in conservation.[34] These concerns are serious enough to have attracted legislative attention: mining is forbidden on lands protected by Queensland's newly created 'special wildlife reserve' mechanism — the only such protection for private conservation lands in Australia.[35] This protection is intended, at least in part, to attract national and international investment to Queensland by conservation organisations.[36] Even so, like the nature refuges that comprise most of Queensland's private conservation lands, special wildlife reserves may be affected by resources activities outside their boundaries – the focus of this article.

B *The Growth and Facilitation of Resources Activities and Their Water Use*

As private conservation has grown, resources activities have also increased. The gross state product of mining in Queensland has increased from AUD3.8 billion in 1989–90 to AUD39.2 billion in 2019–20.[37] Globally, economic goals to facilitate resources activities have triggered legislative attempts to 'streamline' regulations, a trend that seems likely to increase further with post-pandemic economic recovery strategies.[38] These 'streamlining' trends are problematic in the light of the clear risks that mining activities can pose to biodiversity at the site, regional and global scales.[39] Regional and cumulative environmental impacts of mines 'have received little attention'.[40] This is unsurprising given that regulatory approval processes tend to focus on the mine's direct impacts on the site of extraction.[41] By contrast, analysing cumulative effects means considering where 'impact zones' overlap. The proximity of a mine to a valued ecosystem is 'not the decisive factor'[42] to its significance, and assuming that an ecosystem is

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34 *Queensland's Protected Areas Strategy 2020–2030* (n 20) 35.

35 *Nature Conservation Act* (n 33) s 27; Queensland Government, 'Special Wildlife Reserves', *Private Protected Areas* (Web Page, 25 January 2021) <https://www.qld.gov.au/environment/parks/protected-areas/private/special-wildlife-reserves>.

36 *Queensland's Protected Areas Strategy 2020–2030* (n 20) 20.

37 Australian Bureau of Statistics, *Australian National Accounts: State Accounts 2019–2020* (Catalogue No 5220.0, 20 November 2020).

38 See, eg, Executive Office of the President, *Accelerating the Nation's Economic Recovery from the COVID-19 Emergency by Expediting Infrastructure Investments and Other Activities* (Executive Order 13927, 4 June 2020) <https://www.federalregister.gov/documents/2020/06/09/2020-12584/accelerating-the-nations-economic-recovery-from-the-covid-19-emergency-by-expediting-infrastructure>. For Queensland's approach to streamlining, see discussion of the *State Development and Public Works Organisation Act 1971* (Qld), below in Part IIIC2.

39 See generally Laura J Sonter, Saleem H Ali and James E M Watson, 'Mining and Biodiversity: Key Issues and Research Needs in Conservation Science' (2018) 285(1892) *Proceedings of the Royal Society B: Biological* 1.

40 Ibid 2.

41 Ibid 3.

42 Council on Environmental Quality (United States), *Considering Cumulative Effects under the National Environmental Policy Act* (Report, 1997) 17 ('*Considering Cumulative Effects under the NEPA*').

safe from the impacts of a relatively distant mine overlooks potentially significant 'long-range' risks.

Water use is an important pathway by which mines may cause off-site cumulative environmental effects.[43] Resources developments may use water intentionally, for activities such as dewatering, dust suppression and processing.[44] Water use may also be unintentional but unavoidable: in the case of coal seam gas extraction, groundwater is an unavoidable by-product of extracting the gas over the life of the operation;[45] in the case of a mine void, water is 'used' as it flows into and evaporates from the mine void in perpetuity.[46] Although mining uses only around 15% of global water use, and 4% of water use in Australia (mostly through coal mining),[47] there is significant variation in the water efficiency of mining operations.[48] Groundwater impacts can also propagate long distances, causing declining groundwater levels tens of kilometres away from the tenure site.[49] Legislatures, litigants and the media are becoming increasingly aware of the potential for mine water use to cause severe ecological damage in some local areas.[50]

C *Scientific Knowledge about Ecological Dependence on Groundwater*

A wide range of species and ecosystems — from streams receiving baseflow, to desert springs, to terrestrial forests and even cave-dwelling microfauna — depend on groundwater for all or part of their water needs.[51] These 'groundwater dependent ecosystems' ('GDEs') have an increasing profile in law and policy, in line with increasing focus on 'environmental flows' in the surface water context.[52]

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43 See generally J Sreekanth et al, 'Regional-Scale Modelling and Predictive Uncertainty Analysis of Cumulative Groundwater Impacts from Coal Seam Gas and Coal Mining Developments' (2020) 28(1) *Hydrogeology Journal* 193.

44 See generally Wendy A Timms, Sudeep Nair and Rebecca Nelson, 'More Joules Per Drop: How Much Water Does Unconventional Gas Use Compared to Other Energy Sources and What Are the Legal Implications?' (2019) 36(5) *Environmental and Planning Law Journal* 565.

45 Sreekanth et al (n 3) 194. See also Department of Environment and Science (Qld), 'Coal Seam Gas Water', *Water* (Web Page, 28 June 2021) <https://environment.des.qld.gov.au/management/activities/non-mining/water/csg-water>.

46 *Hancock Coal* (n 14) [197].

47 Timms et al (n 4) 566–7.

48 Ibid 568.

49 See, eg, below n 1688 and accompanying text.

50 See, eg, above nn 31-32 and accompanying text; Richard Baker, 'South Australia's Disappearing Springs Raise Questions for Miner BHP', *The Age* (online, 23 November 2020) <https://www.theage.com.au/environment/sustainability/south-australia-s-disappearing-springs-raise-questions-for-miner-bhp-20201117-p56f6m.html>.

51 See generally Moya Tomlinson, 'Ecological Water Requirements of Groundwater Systems: A Knowledge and Policy Review' (Waterlines Report Series No 68, National Water Commission, December 2011).

52 See generally Rebecca Nelson and Philippe Quevauviller, 'Groundwater Law' in Anthony J Jakeman et al (eds), *Integrated Groundwater Management: Concepts, Approaches and Challenges* (Springer Nature, 2016) 173.

Australian national water reforms in the 2000s required statutory water plans to make provision for ecological water requirements, including as to groundwater.[53] Federal and state governments have also funded substantial initiatives to identify and map GDEs across Australia.[54]

Any GDE is directly threatened by groundwater withdrawals that, cumulatively, reduce their access to groundwater below ecologically relevant thresholds. For example, aquifer drawdown may reduce or stop the flow of springs that support desert wetlands, or lower water tables accessed by the roots of vegetation.[55] The impacts of multiple withdrawals may overlap, increasing the severity of impacts like water level declines in the overlapping zone. However, uncertainty about ecological thresholds for groundwater access is often high.[56]

Groundwater withdrawals may also threaten ecological restoration and ongoing conservation management practices. Conservation landholders may make substantial investments in restoring GDEs, for example releasing and safeguarding captive-bred endangered species into groundwater spring habitats.[57] Groundwater wells may support the domestic needs of on-site conservation reserve managers. One might speculate that, in the future, landholders may even resort to pumping groundwater directly to support species and ecosystems that are not naturally groundwater dependent. For example, such an approach could help 'tide over' high-value species or ecosystems affected by drought or to protect species threatened by drying trends heralded by climate change.[58] 'Artificially' using groundwater is already practised and legally recognised in some Australian and overseas jurisdictions.[59] This may become

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53 Ibid 180–1.

54 See, for example, 'Groundwater Dependent Ecosystems Atlas', *Bureau of Meteorology* (Web Page) <http://www.bom.gov.au/water/groundwater/gde/>; Department of Science, Information Technology and Innovation (Qld), *Queensland Groundwater Dependent Ecosystem Mapping Method: A Method for Providing Baseline Mapping of Groundwater Dependent Ecosystems in Queensland* (Report, April 2015); Tomlinson (n 1).

55 Tomlinson (n 51) 39, 47 (in respect of vegetation); Angela H Arthington et al, 'Springs of the Great Artesian Basin: Oases of Life in Australia's Arid and Semi-Arid Interior' (2020) 126 *Proceedings of the Royal Society of Queensland* 1, 5.

56 Melissa M Rohde, Ray Froend and Jeanette Howard, 'A Global Synthesis of Managing Groundwater Dependent Ecosystems Under Sustainable Groundwater Policy' (2017) 55(3) *Groundwater* 293, 293, 295, 298.

57 Ellie Grounds, 'Captive-Bred Populations of Critically Endangered Red-Finned Blue-Eye Fish Released into Wild for First Time', *ABC News* (online, 17 February 2021) <https://www.abc.net.au/news/2021-02-17/red-finned-blue-eye-fish-released-critically-endangered/13158496>.

58 See generally Gregor W Schuurman et al, *Resist-Accept-Direct (RAD): A Framework for the 21st Century Natural Resource Manager* (Report No 2213, 2020).

59 For example, national wildlife refuge managers in Montana, USA, are granted water rights for 'wildlife habitat maintenance and enhancement' purposes: 85–20–1301 Mont Code Ann § tit 85 ch 20 pt 13 art III(F) (2021); Craig Clifton et al, 'Water and Climate Change: Impacts on Groundwater Resources and Adaptation Options' (Water Working Notes No 25, Water Sector Board of the Sustainable Development Network of the World Bank Group, June 2010) 58. See also n 254 below and accompanying text. For further discussion, see generally Rebecca Nelson, 'Water Rights for Groundwater Environments as an Enabling Condition for Adaptive Water Governance' (2022) *Ecology and Society* (forthcoming).

more common as conservation managers consider how to respond to the potential effects of extreme heat or rainfall variability caused by climate change.

III Diagnosing Legal Vulnerabilities at the Intersection of Private Conservation Lands, Resources Extraction, and Groundwater

A *Analytical Framework*

1 *Relevant Laws and Approaches to Assessing Vulnerability*

Taking Queensland laws at the intersection of private conservation, mining and water, this Part addresses the question: How does Queensland law provide protection for, and redress in relation to, ecological assets on private conservation land that are at risk as a result of extractive activities that occur on and off the land? This analysis draws on three areas of law: first, laws that directly protect ecological assets by establishing conservation reserves and other place-based conservation measures (Part IIIB);[60] second, laws that control environmental harms by providing for resources development authorisations and associated environmental impact assessment ('EIA') processes (Part IIIC); and third, water laws that protect the hydrological foundations of ecological assets — the water upon which they rely (Part IIID). While Commonwealth requirements also influence the practice of EIA, the focus here is state law, with reference made to existing work dealing with Commonwealth laws where appropriate. In any case, previous empirical research suggests that state laws influence a proponent's approach to complying with federal law.[61]

For each area of law, this article analyses both *procedural* and *substantive* protections.[62] *Procedural* protections here refer to legal requirements to notify certain persons about the application for, or grant of, a relevant approval, giving that person an opportunity to comment, object or appeal. In the context of long-range groundwater impacts, effective procedural protections extend notification and objection provisions beyond the holder of the land proposed to be subject to a resources activity to other landholders who may be affected or to the public generally, ideally through direct notification of those who may be affected.

Substantive protections here refer to a requirement for a decision-maker to take into account environmental matters, including potential effects outside the

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60 It is important to note that local land use regulations may also affect available protections but are outside the scope of this article to analyse.

61 Rebecca Nelson, 'Big Time: An Empirical Analysis of Regulating the Cumulative Environmental Effects of Coal Seam Gas Extraction under Australian Federal Environmental Law' (2019) 36(5) *Environmental and Planning Law Journal* 531, 545–6, 548 ('Big Time').

62 Modifying and extending the framework used in Wawryk (n 16) 292–3.

boundary of the resources tenure, when considering whether to approve a resources development and the conditions to apply to an approval. Considerations expected to be most effective specifically recognise the environmental importance of groundwater or GDEs, and the potential for multiple developments to cause cumulatively significant effects. Another substantive protection is a requirement to compensate a private landholder for damage caused by a resources development. This is a secondary protection, since it will often be practically difficult to reverse ecological damage to sensitive systems[63] or even retrospectively attribute responsibility to individual human activities in the context of multiple groundwater-affecting activities and climate change effects.[64]

2 *Key Vulnerabilities: The Boundary Bias, the Infrastructure Bias, and the Singularity Bias*

This Part applies the framework advanced above, revealing the potential for environmental and development legislation to entrench serious vulnerabilities for private protected areas. These vulnerabilities stem from three outdated assumptions or structural biases entrenched in both the substantive and procedural aspects of the law. The first assumption is that the significant effects of mining are confined to areas within the boundary of the mine tenure and perhaps adjacent areas ('boundary bias'). This ignores the scientific fact that hydrological impacts may extend over long distances. Legally, this manifests in: (1) procedural provisions that restrict notification, objection and appeal rights to holders of the land subject to the resources activity, or adjacent to it; and (2) substantive provisions that only require environmental effects predicted to occur on the resources tenure (or adjacent lands) to be considered, even if they may, or are predicted to, extend further.[65]

The second assumption and structural bias is that protecting infrastructure assets and commercial assets suffices to neutralise the effects of mining on landholders ('infrastructure bias'). This ignores the fact that environmental policy increasingly relies on ecological assets located on private land formally dedicated to conservation, rather than built assets used for profit-making purposes. This bias manifests in provisions that restrict consideration or compensation in respect of effects to built infrastructure or narrow categories of ecological elements.[66]

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63 Laurel Saito et al, 'Managing Groundwater to Ensure Ecosystem Function' (2021) 59(3) *Groundwater* 322, 323.

64 See generally Dapeng Feng et al, 'An Integrated Hydrological Modeling Approach for Detection and Attribution of Climatic and Human Impacts on Coastal Water Resources' (2018) 557 *Journal of Hydrology* 305, 305–6 (using a complex model to attribute changes in water resources to human activities and climate change).

65 See rows 1 and 2 in Figure 1 below: Part IIIE.

66 See row 3 in Figure 1 below: Part IIIE.

The third is that the impacts of a proposed activity can be considered in isolation, without considering the significance of that activity in the light of the impacts of other activities on the same environment and the effects of climate change ('singularity bias').[67] This ignores the growth in resources developments, locked-in climate change effects, and the need to consider the cumulative effects of developments.[68] This Part describes the legal sources of these three key vulnerabilities and explains that, while important legislative amendments have properly started to correct these biases in narrow statutory contexts in Queensland, further reform is required.

B *Protecting Ecological Assets: Place-Based Ecological Conservation and Private Conservation Land*

1 *Nature Refuges*

Queensland's most common private protected area is the nature refuge.[69] Individual nature refuges are listed in regulations[70] issued under the *Nature Conservation Act 1992* (Qld) ('*Nature Conservation Act*') and administered by the Environment Minister.[71] A landholder (which is broadly defined)[72] voluntarily agrees[73] to manage a nature refuge under a conservation agreement to conserve their 'significant cultural and natural resources'[74] by undertaking (or refraining from) specified land management practices, potentially with State-provided financial or technical support.[75] A conservation agreement binds its parties and successor landholders.[76] Since the mechanism is based on consent, it does not

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67 See row 4 in Figure 1 below: Part IIIE.

68 For a discussion of considering cumulative effects in groundwater law, see Rebecca Louise Nelson, 'Regulating Cumulative Impacts in Groundwater Systems: Global Lessons from the Australian Experience' in Cameron Holley and Darren Sinclair (eds), *Reforming Water Law and Governance: From Stagnation to Innovation in Australia* (Springer, 2018) 237.

69 The full suite of protected area types is outlined in *Nature Conservation Act* (n 33) s 14.

70 *Nature Conservation (Protected Areas) Regulation* (n 26) sch 5. Thus, revocation requires a regulation: *Nature Conservation Act* (n 33) s 50. But note that a landholder may request to terminate a conservation agreement under *Nature Conservation Act* (n 33) s 47(2)(a)(i).

71 Currently the Minister for Environment and the Great Barrier Reef ('Environment Minister') and Department of Environment and Science: Governor in Council (Qld), *Administrative Arrangements Order (No 2)* (7 October 2021) 31–2 ('*Administrative Arrangements Order*').

72 The term 'landholder' is broadly defined to include 'a person having an interest in land': *Nature Conservation Act* (n 33) s 44(6). Accordingly, leasehold land as well as freehold land may be declared a nature refuge.

73 Note that a nature refuge may also be the subject of a compulsory declaration: *Nature Conservation Act* (n 33) s 49.

74 *Nature Conservation Act* (n 33) s 22(a). A conservation agreement for the refuge lists 'the significant cultural and natural resources and values of the nature refuge' and permits, restricts or requires to be conducted, certain activities and uses of the refuge land: *Nature Conservation (Protected Areas) Regulation* (n 26) s 8(1)(a)–(b).

75 *Nature Conservation Act* (n 33) s 45.

76 Ibid s 51(1).

affect activities beyond the boundaries of the refuge land that may impact the refuge.

Even within nature refuge boundaries, there is no statutory prohibition on mining, nor any requirement for the Environment Minister's consent for mining, nor an automatic requirement for a form of EIA, as there is for some public protected areas.[77] No legal mechanism under the *Nature Conservation Act* provides for considering the adverse effects on conservation land of activities that are undertaken off the refuge land either individually or cumulatively. This reflects the boundary bias by limiting protection for conservation objectives on refuge land to the refuge boundaries rather than the statute addressing external risks to the refuge acknowledged by other statutes or referring to that acknowledgement.[78] Queensland's central nature conservation law leaves nature refuges completely vulnerable to resources activities both within and outside refuge boundaries.

2 *Strategic Environmental Areas*

In the context of increasing conflict between miners and landholders, the *Regional Planning Interests Act 2014* (Qld) ('*Regional Planning Interests Act*')[79] sought to 'provide the ability to manage the impacts of resource activities and regulated activities in areas of regional interest that contribute, or are likely to contribute, to Queensland's economic, social and environmental prosperity'.[80] Though largely focused on agricultural land,[81] the *Regional Planning Interests Act* also protects designated 'strategic environmental area[s]'[82] by requiring a 'regional interests development approval' to undertake a new resources activity in such an area.[83] This mechanism can therefore be considered another form of 'place-based' protection for ecological assets. While strategic environmental areas currently cover few nature refuges,[84] as discussed below, the regime likely offers Queensland's best place-based protection at the intersection of mining, conservation, and water. This highlights the relative attractiveness of strategic

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77 Ibid ss 34(1), 53–5.

78 See discussion below in Parts IIIC, D.

79 *Regional Planning Interests Act 2014* (Qld) ('*Regional Planning Interests Act*'). The Act is an amalgam of the former *Wild Rivers Act 2005* (Qld) and the *Strategic Cropping Land Act 2011* (Qld): Environmental Defenders Office (Qld), *Review of the Regional Planning Interests Act 2014* (undated) 1, <https://d3n8a8pro7vhmx.cloudfront.net/lockthegate/pages/6385/attachments/original/1572913356/190904_Brief_Report_on_the_RPI_Act_2014.pdf?1572913356> ('*Review of the Regional Planning Interests Act*').

80 Explanatory Notes, Regional Planning Interests Bill 2013 (Qld) 1.

81 *Regional Planning Interests Act* (n 79) ss 8, 10 ('priority agricultural area[s]' and 'strategic cropping area[s]', respectively).

82 Ibid s 11.

83 Ibid s 19. Pre-existing resource activities are exempt from the scheme: s 24.

84 The current spatial extent of both strategic environmental areas and nature refuges can be viewed interactively on the Queensland Globe: Queensland Government, *Queensland Globe* (Web Page, 2021) https://qldglobe.information.qld.gov.au/ (Add layers > Planning cadastre > Areas of regional interest > Strategic Environmental Area and Environment > Nature refuge).

environmental areas, and especially designated precincts within these areas, for expanding private conservation in the future.

Procedurally, protections for strategic environmental areas resist the boundary bias: notice and comment provisions for a regional interests development approval apply not only to the landholder[85] but also the broader public,[86] though there is no requirement to directly notify potentially affected landholders outside the proposed approval site. The apparent strength of this provision is also undermined by the potential to grant an exemption to the public notification requirement, which effectively makes public notification discretionary.[87] Public submissions must be considered in an approval decision,[88] which any holder of affected land (even beyond the immediate landholders) may appeal.[89]

Substantively, the strategic environmental area regime offers comparatively good (though not entirely secure) protections from mining within these areas. It also specifically recognises the ecological importance of groundwater and goes some way to displacing the boundary bias. Activities within 'designated precincts' must not 'compromise the preservation of the environmental attribute',[90] though outright prohibitions on mining are rare and the requirements of 'preservation' are unclear.[91] Outside these precincts, but within the strategic environmental area, the process for a regional interests development approval involves considering whether a resource activity[92] may contravene a prohibition on 'widespread or irreversible impact on an environmental attribute' of the area.[93] This may involve considering effects beyond the tenure area (though this is unclear), but does not clearly require considering cumulative effects (though 'widespread … impact' seems to suggest this). Diverse hydrological features, such as aquifers, springs, waterholes, and GDEs, appear frequently among listed environmental attributes.[94] Conversely, conditions applied to regional interests development approvals (including conditions with an environmental purpose) must not 'unreasonably' impose on an activity,[95] a term that is not defined in

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85 *Regional Planning Interests Act* (n 79) s 35(1)(b).

86 Ibid ss 35, 37; *Regional Planning Interests Regulation* (Qld) r 13(2) (requiring publication in a newspaper at least once) ('*Regional Planning Interests Regulation*').

87 Ibid s 34(3). An exemption may be granted if the chief executive is 'satisfied there has been sufficient notification under another Act or law of the resource activity or regulated activity to the public', even though other Acts will not apply the same criteria for approval: *Review of the Regional Planning Interests Act* (n 79) 4.

88 *Regional Planning Interests Act* (n 79) s 49(1)(c).

89 Ibid ss 52(2)(c), 71 (definition of 'affected land owner'), 72, 73.

90 *Regional Planning Interests Regulation* s 14, sch 2 pt 5 item 15.

91 Ibid. Broader prohibitions apply only to the prescribed Cape York designated area: sch 2 item 15(2)(a). Precisely what is required to 'preserve an attribute' is unclear, so the strength of this formulation is uncertain: *Review of the Regional Planning Interests Act* (n 79) 4–5.

92 *Regional Planning Interests Act* (n 79) s 49(1)(b).

93 *Regional Planning Interests Regulation* (n 6) sch 2 pt 5 item 14.

94 Ibid ss 7(a)(iv), (b), 8(a)(ii), (e), 9(a)(iv), (d)(ii), (e), 10(e).

95 *Regional Planning Interests Act* (n 79) s 50(2).

legislation, regulation or policy. Strategic environmental areas receive no explicit protection from effects caused by activities outside their boundaries.[96] This regime would give consideration to important ecological attributes of nature refuges within a strategic environmental area that could be threatened by resources activities within that area, but not from resources activities outside the area. The *Regional Planning Interests Act* also does not require compensation in respect of damage to strategic environmental areas. More broadly, administration of the regime by the Minister for State Development, Infrastructure, Local Government and Planning[97] appears poorly aligned with ecological goals.

C *Controlling Development Impacts: Resources Tenures and Associated Environmental Approvals*

As distinct from directly protecting ecologically-valuable places, legislative frameworks for resources tenures and associated environmental approvals provide an alternative opportunity to protect these places from the effects of resources activities by constraining those activities. While the analysis here is restricted to systematically considering each of these regulatory regimes in general, it is important to note that they may interact and apply in complex, potentially ambiguous and controversial ways that are unique to individual projects.[98]

1 *Resources Tenures*

The state grants resources tenures to permit exploration and commercial production of resources like petroleum, coal, gas, or metals,[99] which are owned by the Crown.[100] Tenures may be granted on any land,[101] other than a national park, conservation park, or special wildlife reserve, on which these activities are prohibited.[102] No similar prohibition applies to nature refuges, and the

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96 Ibid s 19(2): 'a person must not carry out … a resource activity or regulated activity *in an area of regional interest* unless the person holds, or is acting under, a regional interests development approval for the activity' (emphasis added).

97 *Administrative Arrangements Order* (n 1) 3.

98 See, eg, the description as applied to a coal mine declared to be a significant project in *Hancock Coal* (n 14) [55]–[130].

99 Note that the focus here is relatively large-scale resource activities, excluding artisanal mining. Mineral development licences, which are issued to exploration permit holders and allow more intensive viability tests like drilling and seismic surveys, are here classified in the category of 'exploration'.

100 *Mineral Resources Act 1989* (Qld) ss 6, 8 ('*Mineral Resources Act*'); *Petroleum and Gas (Production and Safety) Act 2004* (Qld) s 26 ('*Petroleum and Gas Act*').

101 *Mineral Resources Act* (n 100) s 9(3).

102 *Nature Conservation Act* (n 79) s 27. Also note that the landholder's consent is required in relation to 'restricted land' near certain buildings and structures: *Mineral and Energy Resources (Common Provisions) Act 2014* (Qld) ss 68 ('restricted land'), 70 ('*Mineral and Energy Resources Act*').

landholder's consent is not required — a position that both the legal[103] and global conservation[104] literatures consider deeply unsatisfactory. Both exploration and production may pose ecological risks. The apparently benign concept of 'exploration'[105] may involve significant disturbance, as with digging large test pits to mine over one hundred thousand tonnes of coal under a single exploration permit, in basins that may be covered by more than one hundred such permits.[106]

Separate resources tenure laws apply to approvals for exploring and producing gas and petroleum, and minerals, including coal (which, for simplicity, are here generically termed 'resources tenures').[107] These laws operate alongside the *Environmental Protection Act 1994* (Qld) ('*Environmental Protection Act*'),[108] which provides for assessing and controlling likely harms.

Procedural protections may theoretically arise at multiple stages in processes related to resources tenures through legal mechanisms that call for proponents or regulators to consult widely and, ideally, directly, with potentially affected landholders. The first occasion for this arises in calling for tenders for resources tenures.[109] However, there is no legal requirement to consult, and in practice, consultation undertaken as a matter of policy may be tokenistic in respect of farmers and non-existent in respect of conservationists.[110] No substantive requirement to consider environmental issues or incompatible land uses applies to releasing land for tenders. This is an important omission for which later environmental authorities cannot fully compensate, since in some respects, the horse has already bolted once land is released.

Procedural protections might next arise in notification and comment processes for an individual application for a resources tenure. These procedures are weak for mining and non-existent for petroleum and gas: direct notification requirements do not apply to petroleum authorisations[111] or minerals exploration,[112] but apply to 'affected persons' for mining leases.[113] Reflecting a boundary bias, only owners of the subject land, adjoining land, or access land are

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103 See, eg, Wawryk (n 16).

104 Adams and Moon (n 30) 117. See also above Section IIIB1.

105 Entitlements under an exploration permit are set out in *Mineral Resources Act* (n 100) s 129.

106 'Current Activity and Tenements: Resource Assessment for the Galilee Subregion', *Bioregional Assessments* (Web Page, 5 January 2018) < https://www.bioregionalassessments.gov.au/assessments/12-resource-assessment-galilee-subregion/122-current-activity-and-tenements>.

107 *Petroleum and Gas Act* (n 101); *Mineral Resources Act* (n 101). Note that offshore petroleum regulation is beyond the scope of the current article.

108 See below n 136 and accompanying text.

109 *Petroleum and Gas Act* (n 100) ss 35 (tenders for an authority to prospect), 127 (tenders for a petroleum lease); *Mineral Resources Act* ss 136C (exploration permit for coal), 317Z (tenders for a mining lease).

110 Queensland Audit Office, *Managing Coal Seam Gas Activities* (Report No 12, 2019–20) 11 ('*Managing Coal Seam Gas Activities*').

111 *Petroleum and Gas Act* (n 100) ch 2 pts 1–2.

112 *Mineral Resources Act* (n 100) chs 4 (exploration permits), 5 (mineral development licences).

113 Ibid s 252A(1).

considered 'affected', excluding others within the area of likely physical impact.[114] Mining lease applications are also published in newspapers and posted online,[115] with a basic search function.[116] However, understanding potential off-site impacts of applications, particularly given the scientific complexity and potentially large areas of impact,[117] puts a heavy ongoing burden on conservation landholders to keep abreast of applications that may affect them. Any 'entity' may object to the grant of a mining lease and trigger a hearing in the Land Court, assuming they discover the application and recognise that they may be affected.[118]

Despite having objectives to minimise land use conflict and encourage environmental responsibility alongside purposes to facilitate resources activities,[119] and despite major resources tenures legally authorising interference with groundwater,[120] resources tenure laws make scant mention of considering environmental issues and no mention of conflicts with ecological investments in private conservation land. These matters are largely left to EIA laws,[121] despite the fact that resources tenure laws do deal with conflicts with more traditional forms of investment in private land. Where environment-related considerations do appear in resources tenure laws, there is no express requirement to consider cumulative effects and strong evidence of the infrastructure and boundary biases. No environmental provisions apply under resources tenure laws to approving minerals exploration[122] or petroleum tenures.[123] The internal departmental templates that apply to the latter mention environmental issues,[124] but, in practice, these matters are given little weight in non-transparent decision-making processes.[125] Environmental considerations that apply to other resources tenures are broad and vague, making no reference to conservation land.[126] Resources tenure laws do not explicitly provide for imposing environmental

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114 Ibid s 252A(1), (7). The applicant must also advertise the application in a local newspaper: s 252A(3). Entry onto land also requires notice: *Mineral and Energy Resources Act* (n 102) s 39.

115 *Mineral Resources Act* (n 100) s 252A(3); Business Queensland, 'Mining Lease Application Notices', *Appling for a New Mineral or Coal Resource Authority* (Web Page, 5 October 2021) <https://www.business.qld.gov.au/industries/mining-energy-water/resources/minerals-coal/authorities-permits/applying/mining-lease-application>.

116 Business Queensland, 'Public Searches For Resource Authorities', *Business Queensland* (Web Page, 10 November 2021) <https://www.business.qld.gov.au/industries/mining-energy-water/resources/minerals-coal/online-services/searches>.

117 See above n 49 and below n 8 and accompanying text.

118 *Mineral Resources Act* (n 100) ss 260, 265 (in relation to a mining lease).

119 See, eg, *Mineral Resources Act* (n 100) ss 2(c), (d), (g).

120 *Mineral Resources Act* (n 100) ss 334ZP (in relation to mineral development licences and mining leases); *Petroleum and Gas Act* (n 100) s 185. As a result, grounds for objection to a relevant tenure are likely to include matters related to groundwater impacts. See further discussion in Part IIID2.

121 See discussion in Part IIIC2.

122 *Mineral Resources Act* (n 100) ss 136 (minerals other than coal), 136K (permit after a tender process), 136S (application, other than tender). Note narrow reference to the 'public interest' in relation to some coal exploration permits: s 136S(1)(b), (5).

123 *Petroleum and Gas Act* (n 100) ss 43 (criteria regarding authority to prospect for petroleum); 134 (criteria regarding petroleum lease).

124 Queensland Audit Office, *Managing Coal Seam Gas Activities* (n 110) 12.

125 Ibid 11–12.

126 *Mineral Resources Act* (n 100) ss 269(4)(j), 271(b).

conditions on a tenure.[127] The applicable land access code is affected by the infrastructure and boundary biases: it protects only infrastructure and introduced livestock, not native species or ecosystems or underlying water resources, and even its protections only apply on land affected by authorised activities.[128] Similarly, both the infrastructure and boundary biases affect requirements to compensate landholders for damage.[129] The compensation regime contemplates only damage[130] to operational, rather than adjoining or more distant land,[131] and does not clearly encompass damage to original or restored ecosystems within the central concepts of 'diminution of use' of the land, 'improvements', or 'loss or expense'.[132] Using formal land valuations for compensation also disadvantages owners of nature refuges,[133] since refuge declarations may reduce land value,[134] and replacing[135] unique, high conservation value land may be impossible.

2 *Assessing the Environmental Impacts of Resources Tenures*

Resources tenure laws lack meaningful procedural and substantive protections to benefit nature refuge lands, leaving EIA law as their major line of defence. Resources activities require an environmental authority under the *Environmental Protection Act* before a resources tenure can issue.[136] Three types of authorities may

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127 *Mineral Resources Act* (n 100) s 141 (exploration permit for minerals); s 231G (mineral development licences, though there is mention of conditions in the 'public interest': s 231G(2)); s 276 (mining leases, with analogous mention of the 'public interest': s 276(1A)); *Petroleum and Gas Act* (n 100) s 20 (petroleum titles). A minor exception is a condition that applies in relation to weeds: *Mineral Resources Regulation 2013* (Qld) sch 1 cl 2. See discussion of environmental authorities in Part IIIC2.

128 *Mineral Resources Act* (n 100) s 141 (compliance with land access code is a condition of an exploration permit for coal); Department of Natural Resources and Mines (Qld), *Land Access Code* (September 2016) 7–9 <https://www.resources.qld.gov.au/___data/assets/pdf_file/0004/442633/land-access-code-2016.pdf>.

129 Note that separate regimes apply under the *Mineral Resources Act* (n 101) for mining leases, and under the *Mineral and Energy Resources Act* (n 102) for petroleum licences, mining exploration permits and mineral development licences, though the regimes are substantively similar in terms of the features discussed here.

130 *Mineral and Energy Resources Act* (n 102) ss 15A, 43.

131 Ibid s 81(1)(a); *Mineral Resources Act* (n 100) s 279(1)(a) (in relation to a mining lease).

132 *Mineral Resources Act* (n 100) ss 281(3)(ii), (iii), (v) (in relation to a mining lease); *Mineral and Energy Resources Act* (n 102) ss 81(4)(a)(ii), (iii), (v).

133 Department of Natural Resources, Mines and Energy (Qld), 'A Guide to Landholder Compensation for Mining Claims and Mining Leases', *Department of Resources* (Guide, September 2020) 7 <https://www.resources.qld.gov.au/___data/assets/pdf_file/0007/1441447/landholders-compensation-guide.pdf>.

134 'Claiming Conservation Covenant Concessions', *Australian Taxation Office* (Web Page, 13 January 2020) <https://www.ato.gov.au/non-profit/gifts-and-fundraising/in-detail/fundraising/claiming-conservation-covenant-concessions/>.

135 *Mineral Resources Act* (n 100) s 281(4)(a).

136 *Environmental Protection Act 1994* (Qld) ss 18 (meaning of 'environmentally relevant activity'), 107 (meaning of 'resource activity'), 110 (meaning of 'mining activity'), 111 (meaning of 'petroleum activity'), 426 (environmental authority required to carry out an 'environmentally relevant activity') ('*Environmental Protection Act*'); *Petroleum and Gas Act* (n 100) s 41(2)(b)(iii) (regarding authority to prospect for petroleum), 132(2)(b)(iv) (regarding petroleum leases); *Mineral Resources Act* (n 100) s 391A(3) (mining tenements); Queensland Audit Office, *Managing Coal Seam Gas Activities* (n 110) 12 .

be issued, in increasing order of complexity and environmental scrutiny: (1) a standard authority with standard conditions for 'low-risk' sites; (2) an authority with a variation to standard conditions; and (3) a site-specific authority with site-specific conditions.[137] All petroleum leases require site-specific authorities, whereas most coal seam gas activities are approved under standard authorities involving 'limited' environmental assessment,[138] and high reliance on the applicant's self-assessment of their ability to comply with standard conditions.[139] The type of authority required for a mining lease will depend on the proposed activities.[140] From 2017–20, of 1076 applications for environmental authorities for resource activities (excluding coal seam gas, and amendment applications), 93% were for standard authorities, and only 3% were for site-specific conditions.[141] Though the standard authorities were likely for lower-risk activities, a clear question arises as to the potential for cumulative effects.

The assessment required to support an environmental authority depends on whether the project is a large 'coordinated project' subject to regulatory streamlining under the *State Development and Public Works Organisation Act 1971* (Qld) ('*State Development Act*'),[142] or not (a 'regular project'). A regular project that requires a site-specific environmental authority may require an environmental impact statement ('EIS') to assess its likely impacts,[143] whereas the EIA for a coordinated project occurs under the *State Development Act*. As a preliminary matter, it should be noted that the *Environmental Protection Act* references cumulative effects in defining 'environmental harm', stating that 'environmental harm may be caused by an activity … whether the harm results from the activity alone or from the combined effects of the activity and other activities or factors'.[144] Although this concept appears in the Act's offence provisions,[145] it is not directly referenced in the provisions relating to the grant of environmental authorities. There appears little empirical evidence and no caselaw indicating the degree to which the concept of cumulative effects is operationalised in that context. The international literature on cumulative effects assessment gives one pause, suggesting that even where cumulative effects assessments are clearly

137 Queensland Audit Office, *Managing Coal Seam Gas Activities* (n 110) 13.
138 Ibid (but note that this publication does not differentiate between exploration tenures and petroleum leases; the 'coal seam gas activities' indicated may refer to exploration activities).
139 Ibid 15.
140 Queensland Government, 'Environmental Authorities For Mining Projects', *Community Involvement in Mining and Petroleum Lease Approvals* (Web Page, 15 November 2021) <https://www.qld.gov.au/environment/pollution/management/impacts-approvals/impacts-mining>.
141 Email from Department of Environment and Science to Lucas Volfneuk, 29 April 2021.
142 *State Development and Public Works Organisation Act 1971* (Qld) s 27(2) ('*State Development Act*').
143 *Environmental Protection Act* (n 136) ss 143.
144 Ibid s 14(2)(b).
145 Ibid ss 319, 437, 438 and 493A.

required, poor implementation may be the norm rather than the exception — the requirement viewed as a mere 'irritant to the completion' of EIA.[146]

(a) Coordinated Projects

Coordinated projects are those declared as such because they have significant environmental effects, significant infrastructure requirements, strategic state significance, or complex approval requirements.[147] Recent examples include three large coal mine projects.[148] The regime resists the boundary bias by identifying 'affected persons' in a way that appears to extend beyond landholders,[149] assessing 'the significance of the relevant impacts', including long-term impacts,[150] and identifying safeguards and mitigation measures.[151]

Procedural protections for coordinated projects vary. Comprehensive, multi-stage public notice and comment procedures apply to the more onerous EIS process,[152] which informs the Coordinator-General in evaluating the environmental effects of the project and recommending approvals and desirable conditions[153] for the resources tenure[154] and proposed environmental authority.[155] In contrast, the 'streamlined'[156] process for 'impact assessment reports' is simpler and may omit public notification altogether.[157]

An EIS for a coordinated project under the *State Development Act* (which is distinct from an EIS under the *Environmental Protection Act*, discussed below) is guided by formal, project-specific terms of reference, which may require cumulative impact analysis,[158] and a generic policy guideline. While the project-

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146 See Jenny Pope et al, 'Advancing the Theory and Practice of Impact Assessment: Setting the Research Agenda' (2013) 41 *Environmental Impact Assessment Review* 1, 5; A John Sinclair, Meinhard Doelle and Peter N Duinker, 'Looking Up, Down, and Sideways: Reconceiving Cumulative Effects Assessment as a Mindset' (2017) 62 *Environmental Impact Assessment Review* 183, 183.

147 *State Development Act* (n 142) s 27(2).

148 Coordinated project declarations are gazetted: ibid s 26(1). See, eg, Coordinator-General of Queensland, 'Significant Project Declaration: Alpha Coal Project' in Queensland, *Queensland Government Gazette*, No 60, 24 October 2008, 1085; China Stone Coal: Coordinator-General of Queensland, 'Declaration of a Significant Project' in Queensland, *Queensland Government Gazette*, No 53, 31 October 2012, 275; Olive Downs Coal Project: Coordinator-General of Queensland, 'Declaration of a Coordinated Project' in Queensland, *Queensland Government Gazette*, No 29, 17 February 2017, 237.

149 *State Development and Public Works Organisation Regulation 2020* (Qld) sch 1 s 7 item 3(i) ('an identification of affected persons, including a statement mentioning any communities that may be affected and describing the communities' views').

150 Ibid sch 1 s 7 items 4(b), (d).

151 Ibid sch 1 s 7 item 5.

152 *State Development Act* (n 142) ss 29, 34D, 52 (notice of the requirement for assessment, draft terms of reference, draft statement).

153 Ibid ss 34D, 52.

154 Ibid ss 45, 46 (mining lease), 49B (petroleum lease).

155 Ibid s 47C. For a discussion of environmental authorities, see above n 136 and accompanying text.

156 Explanatory Note, *State Development and Public Works Organisation Amendment Regulation (No.2) 2014* (Qld) 2.

157 *State Development Act* (n 142) ss 34E–L.

158 See, eg, *Hancock Coal* (n 14) [15].

specific terms of reference determine the required content of an EIS, the Act's broad definition of the 'environment' is notable. It appears to avoid the boundary and infrastructure biases by broadly including references to natural resources and biodiversity in a spatially unlimited way, and social, economic and cultural conditions related to the environment, perhaps allowing consideration of nature refuges as social-economic structures for conservation.[159]

Under the policy guideline, proponents should consider the scale of an impact by considering cumulative effects, among other things,[160] averting the singularity bias at a basic level. Unfortunately, there is no regulatory or policy guidance on what constitutes adequate consideration of cumulative effects. This is a significant omission, given concerns about the rigour of cumulative effects assessment in Australia and internationally,[161] and the fact that past experience in Queensland shows the clear potential for cumulative adverse effects on other landholders. Cumulative groundwater effects were a significant issue[162] in litigation brought by landholders (including a nature refuge owner) against the proposed Alpha Coal Mine in the Galilee Basin, a declared 'significant project' under the *State Development Act*.[163] In relation to the groundwater modelling undertaken for the potentially impacted off-tenure areas under the relevant EIS, there was 'insufficient hard data to have a sufficient level of confidence that groundwater impacts will be as predicted by the model … [I]mpacts unforseen by the model may very well occur to the disadvantage of landholders'.[164] Moreover, the Coordinator-General's recommended groundwater monitoring network only included locations on mine tenure sites, rather than outside their boundaries, and the Court was not satisfied that future impacts on landholders would be picked up, anticipating 'a potential tragedy to those landholders' if impacts were undetected due to inadequate monitoring justified by 'groundwater modelling and evidence [that] is far from precise'.[165]

Analogous disputes about cumulative effects have arisen in litigation brought by landholders against the proposed Kevin's Corner Mine, another

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159 The full definition is as follows: 'environment includes: (a) ecosystems and their constituent parts, including people and communities; and (b) all natural and physical resources; and (c) the qualities and characteristics of locations, places and areas, however large or small, that contribute to their biological diversity and integrity, intrinsic or attributed scientific value or interest, amenity, harmony and sense of community; and (d) the social, economic, aesthetic and cultural conditions that affect, or are affected by, things mentioned in paragraphs (a) to (c)': *State Development Act* (n 142) sch 4 (definition of 'environment').

160 Department of State Development, Tourism and Innovation (Qld), *Preparing an Environmental Impact Statement: Guideline for Proponents* (Guidelines, October 2020) 4.

161 See, eg, Rebecca Nelson, 'Water Data and the Legitimacy Deficit: A Regulatory Review and Nationwide Survey of Challenges Considering Cumulative Environmental Effects of Coal and Coal Seam Gas Developments' (2019) 23(1) *Australasian Journal of Water Resources* 24; Sinclair et al (n 146); Pope et al (n 146) ; Nelson, 'Big Time' (n 61).

162 *Hancock Coal* (n 14) [140]–[200], [337]–[364].

163 Ibid [25], [30].

164 Ibid [193].

165 Ibid [349].

declared significant project in the Galilee Basin.[166] In that case, the court noted the lack of 'legislative[ly] endorse[d]' guidance on cumulative impact assessment.[167] Landholders noted that the bore survey undertaken by the proponent had not identified their bores, and model outputs had failed to show areas likely to be affected by groundwater drawdown, despite the fact that other nearby mines were predicted to impact bores located up to 30 kilometres away.[168] These cases suggest that the framework for analysing the cumulative effects of resources developments would benefit from more strongly resisting the singularity bias through clear guidance on cumulative impact analysis, beyond a mere policy mention. The framework would also benefit from specific attention to the position of private conservation landholders, which currently may be overlooked in practice.

(b) Regular EIA

A regular resources project that requires a site-specific authority generally requires an EIS under the *Environmental Protection Act*[169] — recalling that these account for only 3% of projects and represent a 'best case scenario' in terms of the robustness of environmental controls. The relevant provisions use the same broad definition of the environment as applies to coordinated projects.[170] When deciding whether an EIS is required, the department must consider a legally binding list of standard criteria, which includes 'all submissions', but does not expressly mention cumulative effects.[171] However, current policy requires consideration of 'the spatial and chronological extent of potential cumulative impacts', noting that a 'project [that] is likely to contribute substantially to cumulative impacts' may require an EIS.[172] It adds that '[u]nacceptable cumulative impacts may occur when the environmental impacts of a project are added to existing environmental impacts contributed to by other activities over space and time, [for example,] impacts to the local airshed, a regional water catchment, or the environmental values of aquifers.'[173] Information noted as relevant to a determination about cumulative impacts includes various kinds of

166 See generally *Hancock Galilee Pty Ltd v Currie* [2017] QLC 35.
167 Ibid [90].
168 Ibid [91].
169 Exceptions apply to coordinated projects: *Environmental Protection Act* (n 136) ss 125(3), (6) (in relation to mining leases), 126(3) (in relation to coal seam gas activities) and projects subject to joint state-federal assessment: *Environmental Protection Regulation 2019* (Qld) ss 4, 6, 7.
170 *Environmental Protection Act* (n 136) s 8, sch 4 (definition of 'environment').
171 Ibid sch 4 (definition of 'standard criteria'); Department of Environment and Science (Qld), *Guideline: Criteria for Environmental Impact Statements for Resource Projects under the* Environmental Protection Act 1994 (Guideline ESR/2016/2167, 2016) 3, 6 (app B). Note that cumulative effects may implicitly fall within one of the listed criteria, eg, precautionary principle, intergenerational equity, or conservation of biological diversity and ecological integrity.
172 Ibid 3.
173 Ibid 3–4.

environmental plans and assessments and 'matters of national and state environmental significance',[174] but conservation land is not expressly mentioned.

Procedural protections are limited compared to coordinated projects: the boundary bias emerges in a limited way in that only interest-holders in the operational and adjoining lands are considered 'affected persons'[175] who receive direct notifications[176] in addition to the regular public notice requirements.[177] Any person may make a submission about the EIS,[178] which must be published online, though only for a limited period of time.[179] Submissions inform the Department's recommendations in an EIS assessment report about the suitability of the project and appropriate conditions.[180] There is a further public submissions stage in relation to the grant of an environmental authority, but generally only if there have been significant changes in environmental risks since the EIS was notified.[181] Any submitter may object to the grant of an environmental authority for a mining lease or other resource before the Land Court.[182] Although this alleviates the boundary bias in a basic way, as noted in relation to mining lease applications, this burdens individual landholders with the need to keep abreast of applications that may affect them, though they are more distant from the relevant site.[183]

Substantively, an EIS assesses a project's likely impact on 'environmental values',[184] defined in formal policies,[185] under project-specific terms of reference guided by a policy template[186] that is much more detailed than that available for coordinated projects. The terms of reference template explicitly refers to off-site conservation properties and groundwater: it requires the proponent to '[d]escribe and illustrate the precise location of the proposed project in relation to any designated and protected areas and waterbodies', to show aquifers that could be influenced by the proposed project's activities,[187] and to describe proposed 'take of surface and groundwater (both direct and indirect)'.[188] However, documented state-wide and basin-specific[189] environmental values for water (including

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174 Ibid 4.
175 *Environmental Protection Act* (n 136) ss 38 (definition of 'affected person'), 41(3)(d) (note this also includes local government).
176 Ibid ss 43(3)(a) (in relation to draft terms of reference), 51(2)(a)(i) (in relation to the EIS).
177 Ibid s 51 (in relation to the EIS).
178 Ibid s 54.
179 Ibid s 51(4).
180 Ibid ss 58, 59.
181 Ibid ss 150, 160 (an 'entity' may make a submission).
182 Ibid ss 182, 183, sch 2 pt 1 div 3.
183 See above n 117 and accompanying text.
184 *Environmental Protection Act* (n 136) ss 4, 9 ('environmental value'), 125(1)(l)(i).
185 Ibid ss 26, 27(2)(d).
186 Department of Environmental and Science (Qld), *Draft Terms of Reference for an Environmental Impact Statement under the* Environmental Protection Act 1994 (ESR/2017/4038, 2017) <https://environment.des.qld.gov.au/___data/assets/word_doc/0024/208077/eis-fm-generic-tor.docx>.
187 Ibid 5–6.
188 Ibid 7.
189 *Environmental Protection (Water and Wetland Biodiversity) Policy 2019* (Qld) sch 1.

groundwater and associated 'aquatic ecosystems')[190] do not quantify relevant protections, and appear to focus narrowly on water quality despite including broader management goals.[191] Coal seam gas and coal projects, which involve 'underground water rights', benefit from additional information requirements about water.[192] They require a description of how aquifer decline may affect environmental values and strategies for avoiding, mitigating or managing these impacts.[193]

Policy requires that the EIS consider cumulative effects in determining the scale of the impact of the project, including cumulative effects on water resources.[194] However, there are no guidelines to describe what is required of a cumulative effects assessment. Policy also expressly requires the consideration of GDEs and the 'integrity of landscapes and places (including wilderness, areas of high conservation value and similar places, connectivity of habitats and ecosystems)',[195] though there is no direct link to cumulative impact concerns. These factors resist the infrastructure and singularity biases, but there is no mention of private conservation land. This omission appears incongruous given that other important land uses are specifically called out as requiring attention in the EIS, including impacts on agricultural activities, recreational activities, and native title and cultural heritage,[196] and given that 'designated and protected areas' are called out in the terms of reference guidelines.[197]

An EIS can result in conditions on an environmental authority for preventing or rehabilitating environmental harm, including by using offsets, and restraining the exercise of underground water rights.[198] Such conditions seem unlikely to reliably restrain long-range harms to private conservation land without a requirement to consider this matter. As a matter of policy, activities *in* nature refuges are considered in setting conditions of standard environmental authorities for mining leases and 'where necessary and desirable' for site-specific environmental authorities, but this is not required if activities occur within a buffer zone around the refuge, as applies to public conservation land.[199] Unlike

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190 Ibid sch 2: definitions of 'aquatic ecosystem', 'groundwater' and 'waters'.

191 See, eg, Department of Environment and Science (Qld), *Queensland Murray-Darling and Bulloo River Basins: Groundwater Environmental Values and Water Quality Objectives* (Policy Document, October 2020) 32 (setting a management goal to 'maintain or improve water-dependent ecosystems of the Murray-Darling Basin').

192 *Environmental Protection Act* (n 136) ss 126, 127. See also below n 231 and accompanying text.

193 *Environmental Protection Act* (n 136) ss 126, 126A.

194 Department of Environment and Science (Qld), *Guideline: The Environmental Impact Statement Process for Resource Projects under the Environmental Protection Act 1994* (2019) 14, 29.

195 Ibid 35.

196 Ibid 34, 37.

197 See above n 187 and accompanying text.

198 *Environmental Protection Act* (n 136) s 207.

199 Department of Environment and Heritage Protection (Qld), *Eligibility Criteria and Standard Conditions for Mining Lease Activities: Version 2* (ESR/2016/2241,2016) 1, 7 (condition A13), 31–2 (app 3) (nature refuges are 'category C environmentally sensitive areas' requiring consultation with the Environment Department).

public protected areas and special wildlife reserves,[200] no offsets are required to counterbalance harms to nature refuges[201] unless they meet certain narrow requirements.[202] While the language of the Act appears broad enough to encompass effects that are caused by actions off-site, policy guidance focuses on direct impacts, such as vegetation clearing undertaken in the course of the resources activity.[203]

In summary, the spatially limited conception of 'affected persons' — the boundary bias — reduces the chance that nature refuge owners will find out about an application, the scope for investigation does not clearly address long-range risks to refuges, and there are no quantified levels of protection, though there is consideration of cumulative effects on water resources and ecological connectivity. These weaknesses in the regime that shoulders the greatest share of the burden of protecting the environment from the adverse effects of resources activities are plainly inconsistent with the state's desire to encourage private conservation, leaving these investments in conservation vulnerable to damage.

D *Protecting Ecological Foundations: Water Law and Groundwater-Dependent Ecosystems*

Similar to the bifurcation in EIA between coordinated and regular projects, Queensland water law applies different water rights arrangements to resources projects depending on whether they fall into a general category subject to regular water entitlement and planning frameworks, as do irrigation and other commercial activities, or the special category of activities that benefit from 'underground water rights' and guaranteed legal access to water under rights that are not available to other water users. This Part reviews the general case first, before analysing the special case of underground water rights.

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200 *Environmental Offsets Act 2014* (Qld) s 8(5) (excepting nature refuges from the provision that refers generally to protected areas) ('*Environmental Offsets Act*'); *Nature Conservation Act* (n 33) s 14. Note policy suggests the contrary: Department of Environment and Heritage Protection (Qld), *Queensland Environmental Offsets Policy: Significant Residual Impact Guideline* (Policy Guideline, 2014) 14 (stating that nature refuges are included within the concept of protected areas that may suffer from a significant residual impact and require an offset) ('*Queensland Environmental Offsets Policy*').

201 Resources activities are prescribed activities: *Environmental Offsets Regulation 2014* (Qld) sch 1 cl 1; sch 2 cl 7 ('*Environmental Offsets Regulation*'). This constitutes a 'significant residual impact': *Environmental Offsets Act* (n 200) s 8(2).

202 *Environmental Offsets Regulation* (n 201) sch 2 cls 2 (endangered regional ecosystems, of concern regional ecosystems, essential habitat, etc); 3 (certain remnant vegetation in connectivity areas); 4 (high ecological value waters); 5 (designated precincts in strategic environmental areas); 6 (protected wildlife habitat).

203 See, eg, *Queensland Environmental Offsets Policy: Significant Residual Impact Guideline* (n 200) 5 (in relation to regulated vegetation). Note that other sections of this policy guideline are not phrased in a way that is clearly restricted to direct impacts: see 10 (in relation to wetlands and watercourses), 11 (in relation to protected wildlife habitat).

1 *General Water Law*

Over most of Queensland, regulatory water plans require a person to apply for a water licence to take surface water or groundwater.[204] These plans are intended to ensure the 'sustainable management of Queensland's water', taking into account principles like providing for broad community involvement, the precautionary principle and the principle of intergenerational equity.[205]

Procedurally, an application for a water licence is publicly notified (though no direct notifications of potentially affected landholders are expressly required by statute) and any entity may make a submission,[206] averting the boundary bias at a basic level. Entities that have made a submission may appeal a decision.[207] A decision on a water licence must also be consistent with the relevant water plan.[208] That makes these plans an important way to control aggregate withdrawals of water that they cover (though without an express requirement to consider cumulative impacts at the ecosystem level), and potentially a powerful way to recognise impacts on the ecological assets protected by private conservation lands. However, water plans do not control the issue of temporary water permits used for resources exploration and other temporary purposes,[209] which separately require consideration of general criteria such as 'impacts on natural ecosystems' and 'the public interest'.[210]

A plan must state desired economic, social, cultural and environmental outcomes and arrangements for providing water for the environment,[211] may include criteria for deciding whether to grant a water licence, and provides for a water management protocol,[212] which implements the plan and sets out water sharing rules.[213] Procedurally, there are comparatively few opportunities for public involvement in Queensland water plans compared to arrangements in some other states:[214] they are prepared by the Minister rather than a stakeholder committee; the public may only make written submissions;[215] and consultation is not mandatory before a full draft is available.[216] Water management protocols are even less transparent, requiring only 'adequate consultation with persons

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204 *Water Act 2000* (Qld) ss 101(1)(c), 808 ('*Water Act*'). Plans now commonly apply across Queensland: Queensland Government, *Queensland Globe* (Web Page) <https://qldglobe.information.qld.gov.au/qldglobe/public/water-plan-areas-1>.

205 *Water Act* (n 204) ss 2(2) (defining 'sustainable management' as incorporating the principles of ecologically sustainable development), 7 (meaning of principles of ecologically sustainable development), 37 (linking water plans with sustainable management).

206 Ibid s 112.

207 Ibid ss 114(7), 851(1) ('interested persons'), 862 (internal review), 877 (external review).

208 Ibid ss 114, 129(1).

209 Ibid s 137.

210 Ibid s 138(a)–(e).

211 Ibid ss 43(1)(b), (d).

212 Ibid ss 43(2)(h), (l).

213 Ibid ss 67, 68.

214 Alex Gardner et al, *Water Resources Law* (LexisNexis Butterworths, 2nd ed, 2018) 327–34.

215 *Water Act* (n 204) s 46.

216 Ibid ss 42, 44(1), 46.

affected by the protocol'.[217] There are no minimum environmental protections to be included in water plans in general, unlike under the federal requirements for an 'environmentally sustainable level of take' of water in the Murray-Darling Basin, including the portion of the Basin in Queensland.[218]

Outside water plans, substantive protection for nature refuges may theoretically arise under a requirement for ecological impacts to be considered in deciding whether to grant or refuse a licence.[219] They may also arise through conditions requiring the licensee to provide alternative water supplies to a person who is authorised to take water, and who would be affected by the grant of a licence.[220] The provision does not contemplate 'making good' effects on such a person where the water use is *in situ* and not directly 'taken', though perhaps there is potential to interpret it this way. This provides some potential (albeit untested) for nature refuge owners who are able to obtain a groundwater licence for *in situ* environmental water use — or even for water actively withdrawn to create refugia or otherwise mitigate climate change effects — to object to the grant of a water licence for resources extraction purposes and argue for alternative supplies to be provided. Although these provisions provide theoretical protection against the infrastructure bias, none makes express reference to impacts on the ecological assets of private conservation landholders.

2 *Special Arrangements for Resources Activities*

Whereas water licences and permits control the volumes of water used by the holder, special 'underground water rights' apply to important, but not all,[221] resources extraction activities. These rights allow unlimited groundwater withdrawal as a by-product of the resources extraction activity ('associated water').[222] This includes dewatering coal seams to release coal seam gas, dewatering a coal mine to allow pit operations, and evaporation of water from a mining pit.[223] Removing these uses from regular water entitlement frameworks arguably fundamentally 'abandons' the nationally agreed preference that water

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217 Ibid s 68(1), (2)(c).

218 Rebecca Nelson, 'Breaking Backs and Boiling Frogs: Warnings from a Dialogue between Federal Water Law and Environmental Law' (2019) 42(4) *University of New South Wales Law Journal* 1179, 1208–9, quoting *Water Act 2007* (Cth) s 4(1) (definition of 'environmentally sustainable level of take').

219 *Water Act* (n 204) s 113(e).

220 Ibid s 118(2)(b).

221 See, eg, withdrawal for direct use in processing (termed 'non-associated water'): 'Water Reporting for Coal and Mineral Activities' Business Queensland (Web Page) <https://www.business.qld.gov.au/industries/mining-energy-water/resources/minerals-coal/reports-notices/water-reporting>..

222 *Petroleum and Gas Act* (n 100) s 185; *Mineral Resources Act* (n 100) s 334ZP (implicitly in the latter case). Note that transitional provisions requiring a water licence apply in relation to projects already being actively considered before 2014: *Mineral Resources Act* (n 100) s 839.

223 *Mineral Resources Act* (n 100) s 334ZP(1) (introduced by the *Water Reform and Other Legislation Amendment Act 2014* (Qld) s 11).

plans should manage the aggregate effects of all water uses.[224] It also reduces procedural protections for affected landholders — underground water rights arise as an incident of the mining activity and there is no public consultation process as for water licences.[225] This 'light touch' approach to water rights was justified as being an 'offset' against the increased regulatory burden of the special arrangements for resources authority holders in cumulative management areas, described below.[226]

Nature refuges have limited protections under these special arrangements. Resource tenure holders must measure and report volumes taken[227] and comply with the two major limbs of their 'underground water obligations':[228] first, monitoring impacts on aquifers and springs; and second, 'making good' water-related impacts on landholders' bores.[229] Obligations to prepare 'underground water impact reports' apply to individual tenure holders or to the Queensland Office of Groundwater Impact Assessment in declared 'cumulative management areas' affected by multiple resources tenures.[230] This obligation, and other related obligations, ultimately fail to protect private conservation lands.

First, and positively, the 'underground water impact report',[231] which assesses resources-related impacts and strategies and responsibilities for managing them, is subject to a public submissions process before it is finally approved.[232] The report must include a long list of environmental matters, including affected aquifers, water level trends, areas predicted to decline more than threshold values over different time periods, a water monitoring strategy, and a spring impact management strategy.[233] However, most information items are qualified by the requirement to demonstrate a causal link between an impact and 'the exercise of underground water rights'. Demonstrating this link requires removing the influence of other water-taking activities, like agriculture, as well as the background effects of climate variability. This is both technically complex[234] and conflicts with tenets of cumulative effects assessment, which are

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224 Gardner et al (n 214) [27.22].

225 Note, however, the potential to object in relation to water concerns under resources laws: see above nn 111-118, 120 and accompanying text, and under EIA laws: see above nn 152-7 and accompanying text in relation to coordinated projects and nn 1755–83 in relation to 'regular' EIA).

226 Queensland, *Parliamentary Debates*, Legislative Assembly, 11 September 2014, 3259 (AP Cripps).

227 *Mineral Resources Act* (n 100) s 334ZP(5).

228 Ibid s 334ZP(2)(b); *Petroleum and Gas Act* (n 100) s 185(2)(b).

229 *Water Act* (n 204) s 361(2)(a)(i).

230 Ibid ss 365, 370.

231 Ibid s 370.

232 Ibid ss 381–86.

233 Ibid ss 376–9. Note that some of these elements are also required for corresponding environmental authorities: *Environmental Protection Act* ss 126, 126A.

234 Matthew J Knowling, Adrian D Werner and Daan Herckenrath, 'Quantifying Climate and Pumping Contributions to Aquifer Depletion Using a Highly Parameterised Groundwater Model: Uley South Basin (South Australia)' (2015) 523 *Journal of Hydrology* 515, 515–16. See generally Feng et al (n 64).

accepted globally and in Australia,[235] and which are premised on considering and responding to the aggregate effects of all actions that impact the same environmental value.[236] In terms of ecological impacts, the water monitoring and spring impact management strategies focus narrowly on springs rather than the more comprehensive range of GDEs considered in other contexts, including watercourse-related GDEs and terrestrial vegetation.[237] There is no mandate to prevent or mitigate impacts to springs,[238] and even the mandatory components of underground water impact reports do not bind resources tenure holders if they have 'a reasonable excuse'.[239] More generally, the provisions for these obligations are curiously unmoored from the principles of ecologically sustainable development, including intergenerational equity, that apply to the water plan provisions.[240]

The second limb of a tenure holder's underground water obligations is to assess and 'make good' the impacts of the exercise of underground water rights on a bore[241] by providing 'monetary or non-monetary compensation' or appropriate substitute water.[242] The great detail of this framework — spread over 63 provisions — makes the omission of any mandate to 'make good' ecological damage all the more striking, and continues the infrastructure bias evident in compensation arrangements under resources tenure laws. The significant uncertainty that often surrounds relevant predictions of impacts, which may not prevent approvals, and the feasibility of compensating for decades- or centuries-long impacts, are also problematic.[243]

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235 Tom Kaveney, Ailsa Kerswell and Andrew Buick, *Cumulative Environmental Impact Assessment Industry Guide: Adaptive Strategies* (Industry Guide, July 2015) 32 (stating that a 'major consideration for selecting these other actions is whether the action causes *similar effects* on the same environmental values/sensitive receptors as the project under assessment' (emphasis added)); Nelson (n 218) 1197–8 (meaning of 'other developments' in the definitions of 'coal seam gas development' and 'large coal mining development' under s 528 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)).

236 F Chris Jones, 'Cumulative Effects Assessment: Theoretical Underpinnings and Big Problems' (2016) 24(2) *Environmental Reviews* 187, 191.

237 See above n 94 and accompanying text.

238 *Water Act* (n 204) s 379(1)(d).

239 Ibid s 390.

240 Cf ibid ss 2(1)(a)(i), 37 (sustainable management in the context of water planning) and ss 2(1)(c) 361 (purpose of ch 3, which only mentions 'management of impacts'). See also Part IIID1 above.

241 *Water Act* (n 204) ch 3 pt 5.

242 Ibid s 421.

243 See, eg, Matthew J Currell et al, 'Problems with the Application of Hydrogeological Science to Regulation of Australian Mining Projects: Carmichael Mine and Doongmabulla Springs' (2017) 548 *Journal of Hydrology* 674.

E *Summary of Legal Vulnerabilities and Current Good Practice in Queensland*

A complex assemblage of interacting areas of law and legal mechanisms regulates the potential for resources activities to damage private conservation lands beyond the boundary of the resources tenure. Procedurally and substantively, these regimes often leave private conservation lands vulnerable to ecological damage from resources activities through an assumption that a resources activity may damage only lands covered by, or adjacent to, a resources authority (boundary bias), a bias towards considering and protecting built infrastructure and commercial assets rather than ecological assets (infrastructure bias), and a bias towards considering the effects of individual developments in isolation, when they may have collectively significant effects (singularity bias). This Part summarises these biases, noting positive elements, before Part IV makes recommendations for strengthening protections for private conservation land.

The structural biases analysed here leave private nature conservation lands vulnerable to cumulative ecological damage from resources activities. They also reflect larger problems in insufficiently integrating legislative regimes across place-based protection mechanisms, development controls and natural resources planning laws. Consciously considering ecosystems as well as infrastructure in approvals processes (resisting the infrastructure bias) is laudable, but ineffective to address the harms in focus here if these considerations stop at the tenure boundaries (substantive boundary bias). Equally, legal directions to consider impacts beyond the resources tenure boundaries (resisting the substantive boundary bias) are meritorious, but may not amount to anything if conservation landholders are not notified about a resources proposal and cannot comment on the impacts of the proposal on their ecological assets or appeal a decision (procedural boundary bias). Similarly, legal directions to consider impacts beyond the resources tenure boundaries will offer limited benefits to conservation landholders if consideration only extends to impacts on infrastructure, not ecological assets (infrastructure bias). Even if a legal mechanism contains good notification and appeal provisions and considers impacts beyond the tenure boundaries, including in relation to ecosystems, protections will necessarily be inadequate if there is no provision for considering the cumulative effects of a proposed activity together with the effects of other human activities (singularity bias). Anything less under-estimates the true 'real world' environmental effect of resources proposals.

Even if all these requirements are fulfilled, one can only speak of a 'chance' of protection for nature conservation lands in which the state encourages private investment. Assuming relevant ecological information is available, a decision-maker may take these matters into account, but approve a project on economic development or other grounds. Accordingly, removing these biases offers a bare

minimum approach — just *considering* private conservation lands in ways that are consistent with Queensland's environmental reliance on them. In other words, even a relatively favourable assessment of the performance of a legal mechanism may not necessarily offer optimal protection for nature refuges, despite better resisting the relevant bias than in other cases. For example, the strategic environmental area regime resists the infrastructure bias since it explicitly requires consideration of ecological assets, but this is undermined by only prohibiting harm to the extent that this would not 'unreasonably' impose on a resources activity. Equally, an EIS that informs the grant of a site-specific environmental authority benefits from taking a broad ecological scope (that is, apparently low infrastructure bias in matters *considered*), but no offsets are required to counterbalance damage that this EIS predicts will occur (high infrastructure bias in matters *protected*).

In the absence of firm mandatory protections, matters considered may not ultimately be protected. In relation to the procedural issue of notification and appeal rights, even though a wide range of stakeholders may comment on or object to the approval of a permit, licence or plan, these comments may not sway the relevant administrator. Indeed, administrative arrangements show clear potential for decision-makers to have conflicting objectives that may limit their inclination to give weight to environmental objections. The Minister responsible for regional development is also responsible for administering the ecological protections under the water licensing, planning and underground water rights regimes,[244] which in theory could constrain industrial aspects of regional development. The Minister responsible for state development and infrastructure is also responsible for the ecological protections under strategic environmental areas that in theory could constrain construction of infrastructure. The Coordinator-General responsible for significant major projects may state conditions for environmental authorities, and other conditions of the Environment Minister or Land Court may not be inconsistent with these.[245]

Figure 1 summarises how different individual elements of these legal regimes manifest the boundary, infrastructure and singularity biases using 'traffic light' matrix diagrams for legal mechanisms within three areas of law – resources development, place-based nature conservation, and water. Analyses are presented using a separate matrix diagram for each of multiple legal mechanisms discussed within each area of law (for example, nature refuges under the *Nature Conservation Act 1992* (Qld) ('*Nature Conservation Act*') and strategic environmental areas under the *Regional Planning Interests Act*). The matrix diagrams synthesise performance in terms of the boundary bias (substantive and procedural), infrastructure bias and singularity bias. Performance is classified as poor, moderate or good based on the definitions set out in the key. Where a legal

244 *Administrative Arrangements Order* (n 71) 25.
245 *State Development Act* (n 142) s 47C; *Environmental Protection Act* (n 136) s 205(4).

regime provides for multiple processes, each regime is described using the 'best case scenario' of the most rigorous process, even where this is relatively uncommon (for example, a site-specific environmental authority rather than a standard authority or an authority with a variation to standard conditions under the *Environmental Protection Act*).[246]

Figure 1 is necessarily general and intended to capture the main findings of the article in relation to overall regulatory approaches (discussed in subsections 1 to 4 below), rather than how these findings would apply in the case of a specific resource development. That approach aligns with the focus of this article on the cumulative threats of multiple, and sometimes numerous, resources activities to private conservation lands. However, for completeness, it should be noted that in the case of a single resources development, in some cases, a weakness (bias) in one legal mechanism may be corrected by a stronger approach (resistance to bias) in another. For example, a public notice requirement under EIA law may alert a nature refuge owner to a nearby resources proposal even where resources tenure laws do not require the applicant for the tenure to give general public notice of the application. In other cases, weaknesses will run through multiple legal mechanisms that apply to a specific project, or ways of protecting key ecosystems, and leave key ecological assets on nature refuges fundamentally unprotected. This cumulative vulnerability is particularly evident for groundwater-dependent vegetation on nature refuges: these ecosystems are ignored by substantive protections under the land access code and compensation regimes that apply to resource tenure holders, and ignored by both information collection provisions and protections against damage in the context of underground water rights.

Given the complexity of the arrangements described here, visualising these biases across areas of law and legal mechanisms assists in making some general observations about the extent to which important legal mechanisms relevant to protecting nature conservation lands from resources activities evidence the boundary, infrastructure and singularity biases. It also assists in identifying legal mechanisms that perform well in relation to each area of structural bias — good practices that could be extended to help remedy vulnerabilities for conservation lands. General observations are presented for each bias in turn below.

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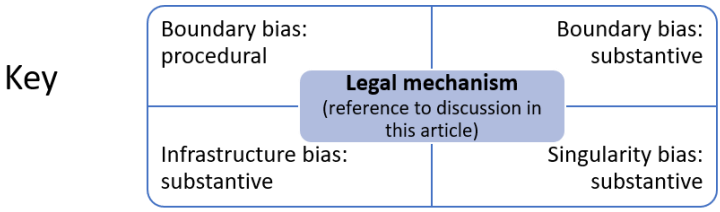
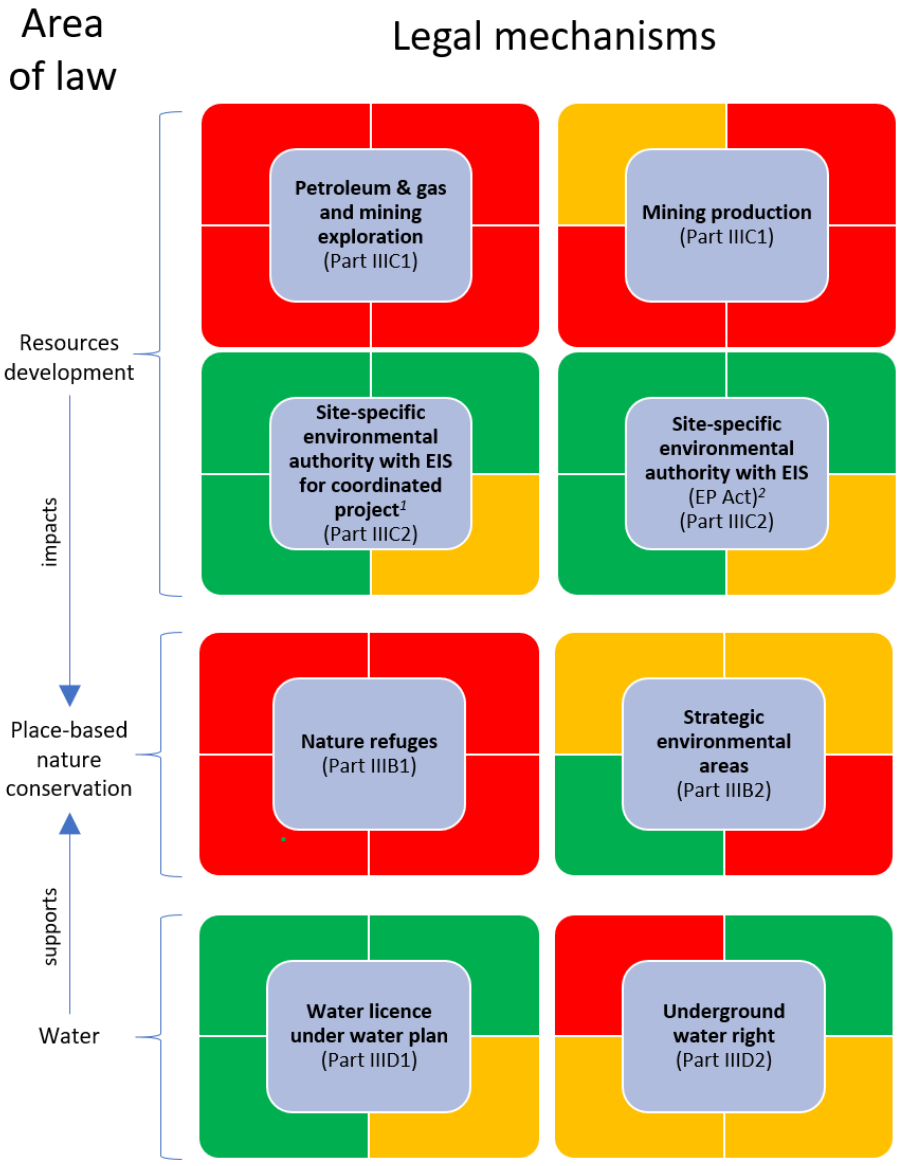
246 See above n 137 and accompanying text.

Figure 1: Dimensions of Structural Legal Bias Affecting Protections for Private Conservation Lands from Cumulative Resources Threats, by Area of Law and Legal Mechanism



Relative performance*	**Poor performance**	**Moderate performance**	**Good performance**
Boundary bias: procedural	Notification/ appeal rights only for owner of land subject to activity	Notification/appeal rights for owner of land subject to activity + owners of adjacent land (mandatory) or others (discretionary)	Notification/appeal rights for owners of physically affected land or general public (mandatory)
Boundary bias: substantive	Must consider effects only on land subject to activity	Must consider effects only on land subject to or adjacent to activity, or other spatial limit	Must consider any land likely to be affected
Infra-structure bias: substantive	Must consider/ compensate only effects on built infrastructure / commercial assets	Must also consider/ compensate effects on the environment generally (vaguely expressed), or narrowly specified ecological elements	Must consider/ compensate effects on nature refuges or water-dependent ecosystems (expressly mentioned)
Singularity bias: substantive	May consider effects of proposed activity in isolation from other activities	Must consider cumulative effects of proposed activity along with effects of narrowly specified other activities, or policy-based direction to consider cumulative effects	Must consider cumulative effects of proposed activity together with effects of other human activities and background effects (eg climate change)

* Describes performance as the provision appears on paper, relative to other mechanisms in effect in Queensland (not intended to describe performance in absolute or empirical terms)



[1] Represents 'best case scenario' relative to EIA undertaken by the streamlined process for impact assessment reports

[2] Represents 'best case scenario' relative to more commonly used standard authorities

1 Notification and Appeal Rights for Private Conservation Landholders Potentially Affected by the Off-Site Effects of a Resources Activity (Procedural Boundary Bias)

The upper left cell of each matrix diagram in Figure 1 summarises how a legal mechanism performs against the procedural dimension of the boundary bias — the degree to which notification and appeal rights are available to landholders who may be affected by the impacts that a resources development may cause outside the development's boundaries. These cells show that these rights are quite constrained in relation to approvals under mining and petroleum laws, for projects in strategic environmental areas and in relation to underground water rights, but broader for approvals for coordinated projects, in relation to site-specific environmental authorities, and for projects that require water licences for substantial activities. Laws exhibiting 'good' performance on this dimension do so on the basis of broad mandatory public notification. None of the laws reviewed here include a requirement to directly notify holders of non-adjacent lands that may be ecologically impacted by a resources project, even if the project operators have predicted, or might reasonably expect, those non-adjacent lands to experience environmental changes. This burdens nature refuge owners mindful of such threats with the task of keeping abreast of public notices of applications in newspapers and online, and the details of EISs, to assess the likelihood and significance of a threat. This is inefficient, at the very least, given that project proponents who analyse the spatial extent of the possible environmental impacts of their projects could identify potentially impacted parcels and notify parcel owners with relative ease. Even if a private conservation landholder has rigorous internal processes to identify project applications, publicly available EIS documents are not typically accompanied by modelling information that would be sufficient for that landholder to assess ecological risks to its parcel.

2 Consideration of Effects on Private Conservation Land beyond the Resources Tenure (Substantive Boundary Bias)

The upper right cell of each matrix diagram in Figure 1 summarises how a legal mechanism performs against the substantive dimension of the boundary bias – the degree to which approvals processes consider off-site impacts of a resources activity on the land of private conservation landholders as a factor relevant to a decision whether or not to approve the activity or to apply conditions to it. Similar to the procedural boundary bias, these cells show that considerations are quite limited in relation to approvals under mining and petroleum laws, somewhat unclear for projects in the few spatially limited strategic environmental areas, and that the nature refuge law is not linked to other relevant laws and does not itself impose any relevant obligations. Considerations are broader for approvals for coordinated projects, in relation to environmental authorities (though specific

references to private conservation lands are rare, sometimes unclear, and found in policy rather than law), projects that require water licences for substantial activities, and in relation to underground water rights (but only in relation to springs and within defined declared areas — as discussed below). From a regulatory perspective, then, some important laws are relatively well able to see beyond the boundaries of the resources tenure in *considering* potential impacts of the resources activity, though this vision does not apply equally across the state and for all resources projects.

3 Consideration of Effects on Ecological Assets on Private Conservation Land Beyond the Resources Tenure (Infrastructure Bias)

The lower left cell of each matrix diagram in Figure 1 summarises how a legal mechanism performs against the infrastructure bias — the degree to which approvals processes consider and protect against the off-site impacts of a resources activity on the ecological assets of private conservation landholders. Considering the legal mechanisms across the relevant areas of law together, it is evident that many mechanisms evidence significant infrastructure bias (resources exploration, mining production, underground water rights), and those that resist this bias tend to apply to narrow categories of resources developments (coordinated projects, site-specific environmental authorities, water licence requirements) or spatially limited areas (strategic environmental areas).

Importantly, no legal mechanism analysed here includes a requirement to specifically consider potential impacts on ecological assets on private conservation land, as distinct from ecological impacts (or certain narrow kinds of ecological impacts) more generally.[247] This is risky given that decision-makers may overlook or lack good information about the value of privately held ecological assets. The lack of express legal attention to ecological assets on nature refuges is incongruous given that the state encourages and invests in private conservation land as an important element of its biodiversity protection strategy.

Visualising the legal analysis also shows that for a particular legal mechanism, a weakness in one dimension of potential bias can undermine strength in another dimension. In the case of underground water rights under the *Water Act 2000* (Qld) ('*Water Act*'), the substantive boundary bias does not prevent the law from considering effects beyond tenure boundaries (upper right cell). However, an infrastructure bias (lower left cell) prevents these considerations from translating into comprehensive ecological considerations (including categories of GDEs beyond springs, such as terrestrial vegetation) or substantive protections. As a result, even though the underground water rights regime looks beyond artificial tenure boundaries, it cannot achieve an adequate level of

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247 There is a limited exception to this in the policy-based terms of reference for EIS guidelines under the *Environmental Protection Act* (n 136): see above n 187-1878 and accompanying text.

ecological protection. Equally, the positive aspects of site-specific environmental authorities are undermined by insufficient attention to cumulative effects (the singularity bias — see below) as well as limitations to the scope of use of site-specific environmental authorities.

4 Consideration of the Effects of a Single Resources Activity in Isolation from the Overlapping (Cumulative) Effects of Other Resources Activities (Singularity Bias)

The lower right cell of each matrix diagram in Figure 1 summarises how a legal mechanism performs against the singularity bias — the degree to which the law directs a decision-maker to consider the cumulative environmental effects of the proposed activity together with the effects of other human activities, including climate change. No identified legal mechanism does this to an extent judged 'good'. Some legal mechanisms resist this bias to a moderate degree but fall short of 'good' because a direction to consider cumulative effects is contained in a brief policy mention rather than in law, supported by detailed guidelines. This is the case for projects requiring a site-specific environmental authority under the *Environmental Protection Act*, either as coordinated projects assessed by EIS under the *State Development Act* or by EIS under the *Environmental Protection Act*. Others fall short of 'good' because of the narrowness of cumulative effects assessment legally required to be undertaken. This is the case with the regime for underground water rights under the *Water Act*, which considers only cumulative effects on bores and springs, rather than GDEs generally. The pervasive weakness of cumulative effects considerations across these regimes marks this issue out for particular attention in reform efforts.

IV Strengthening Protections for Private Conservation Lands

Queensland's nature refuges are even more vulnerable than the problem of mining within their boundaries suggests. They are not expressly considered in regimes for dealing with the environmental harms of resources activities, despite the state recognising that their 'significant cultural and natural resources' deserve state financial and technical support, with the landholder agreeing to manage the land accordingly.[248] This vulnerability could be remedied by amending legislation and regulations to correct the boundary, infrastructure and singularity biases that emerge strongly in laws at the intersection of conservation lands, resources and water. Existing good practices revealed by the analysis above, and drawn out here, provide Queensland precedents for doing so. In the

[248] *Nature Conservation Act* (n 69) ss 22, 45.

shorter term, the analysis above reveals potential for non-regulatory change, for example through amending policy guidelines and agency templates. The analysis also exposes potential for nature refuge owners to use current laws to reduce their vulnerability to off-site resources developments.

Resisting the boundary bias at the procedural level would involve giving rights to be notified directly, comment on, and object to, the granting of relevant resources authorisations not just to the immediate landholder, but to all property interest holders within the area that might be affected by the application in relation to a project — or, even better, by a proposed decision to release land for tender for resources tenures. This would amount to legally shifting a view about 'affected persons' that is limited by the artificial boundaries of property tenures to one that is based on scientific evidence about potential physical effects. These science-informed boundaries may evolve with time as understanding about effects increases. For example, a preliminary view of the spatial scope of potential effects at the stage of a draft terms of reference for an EIS may, with the benefit of additional data collection and modelling, differ from what is understood by the time the draft EIS is produced. The spatial application of notice, comment and objection provisions should change accordingly to ensure that those potentially affected are alerted to this possibility and involved in decision-making processes. The current good practice of granting public comment rights in relation to EISs for coordinated projects and under the *Environmental Protection Act* could be extended to other regimes and improved by requiring direct notification of potentially affected persons, determined in a science-informed way, to reduce the burden on landholders to keep abreast of applications that may affect them. *At minimum*, as a matter of policy, government could institute a simple email sign-up list for landholders and interested parties to be informed of resources applications within a geographic area.

Similarly, resisting the boundary bias in terms of substantive protections would require uniformly considering whether the effects of a resource activity might extend beyond the resources tenure and immediately adjacent areas. This currently occurs under EISs for coordinated projects. Consistent with this good practice approach, damage caused outside the tenure boundaries by a resource activity should also be eligible for compensation. Reforms should also include regulating resources activities that have long-range effects on areas that currently have special environmental status, such as strategic environmental areas, as if they were located within the area (that is, requiring a regional interests development approval for an activity that is likely to affect a strategic environmental area even if it is located outside that area).[249] The potential for an activity to affect a distant protected matter is long-established in the context of Commonwealth environmental law.[250]

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[249] See Part IIIB2.

[250] Gerry M Bates, *Environmental Law in Australia* (LexisNexis Butterworths, 8th ed, 2013) 361.

Addressing the infrastructure bias involves more consistently applying the implicit understanding in the *Nature Conservation Act* and recent policy[251] that private investment in ecological assets — valuable plants and animals — is just that: an investment. Damaging that investment is as important to the conservation landholder as damage to the investment of a resident or farmer in a house, fences, or livestock. Permanently damaging valuable ecological assets also damages more than private property: it impairs the common heritage of all Australians and, more prosaically, the government's co-investment in that heritage. Policy guidelines for terms of reference for EISs under the *Environmental Protection Act* provide support for specifically considering impacts on conservation properties outside the resources tenure and should be made mandatory and extended to other regimes, expressly calling attention to conservation land under the *Nature Conservation Act*.

At minimum, damage to investments in ecological assets should be treated in the same way as damage to built infrastructure. Opportunities to correct a current infrastructure bias arise in the land access code for resources authority holders (which only protects built infrastructure and livestock); the underground water obligations regime (which only provides for monitoring and protecting bores and springs, rather than GDEs more comprehensively); and the compensation regime applicable to resources authorities. Legislation ought also to refer specifically to nature refuges in the context of lists of statutory environmental considerations and key documents like environmental protection policies under the *Environmental Protection Act*, preferably accompanied by quantified standards for protecting GDEs. Expressly recognising nature refuges would be consistent with the broad definition of the 'environment' under the *State Development Act* and *Environmental Protection Act*, which includes the 'social, economic, aesthetic and cultural conditions' related to ecosystems.

Considering cumulative effects is not unknown to Queensland law. The guidelines for EISs for coordinated projects, underground water impact reports and the definition of environmental harm under the *Environmental Protection Act* are good current examples of this. However, more is needed to effectively combat the singularity bias. Clear guidelines are needed, ideally with regulatory status, mirroring the approach long taken in overseas jurisdictions[252] and now also taken in management of the Great Barrier Reef.[253] Those guidelines should also expressly call out conservation lands.

Nature refuge owners could also explore options to strengthen their protection from off-site resources activities. To confront the infrastructure bias, they should document the ways in which their operations rely on built infrastructure (for example, bores, modified springs, etc, used to support on-site

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251 See above n 27 and accompanying text.

252 See, eg, *Considering Cumulative Effects under the NEPA* (n 42).

253 See generally Great Barrier Reef Marine Park Authority, *Reef 2050 Plan: Cumulative Impact Management Policy* (Report, July 2018).

reserve managers or provide supplementary water for ecological assets during drought) and document investments in restoring ecological assets. Further, they might themselves apply for groundwater licences for ecological purposes (either in situ, to support GDEs), or to provide supplementary water in the future, as a way to make concrete their interests in water resources that might otherwise be more difficult to defend. Holding groundwater licences for wildlife or environmental purposes is uncommon, but not unheard of, in both Australia and other jurisdictions.[254]

Nature refuge owners or sector leaders might address procedural weaknesses that could leave nature refuge owners unaware of nearby resources applications (for example, because they are not required to be directly notified) by aggregating public notices of applications and providing alerts to landholders within a reasonable distance of an application.

V Conclusion

Despite justifiably celebrated improvements in Queensland's environmental protection regime in relation to special wildlife reserves, its complex laws in relation to mining-related risks have not kept up with increasing reliance on private investment in ecological outcomes. Relevant laws tend to take a spatially limited view of potentially affected landholders in a way that does not reflect the scale of modern resources activities. They overlook the potential conservation purposes of landholdership, which are encouraged by government. They tend to ignore the implications of modern scientific evidence about the importance of groundwater to maintaining a broad suite of conservation values, and the potential for adverse effects to propagate over long distances through groundwater systems, unseen. These laws are also built on biases that keep the law focused on isolated impacts that are spatially proximate and concerned with built infrastructure rather than ecological assets. Unaddressed, these biases enable government to 'have its cake and eat it'. On the one hand, government may reduce or avoid public expenditure on national parks by encouraging private landholders to expend resources on public interest environmental outcomes for the long term. On the other hand, government overlooks the kind of protections that would secure those outcomes in the face of the sustained and compounding effects of a burgeoning resources industry that delivers short-term economic benefits.

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254 See, eg, Department of Agriculture, Water and the Environment (Cth), 'Environmental Water Holdings', *Managing Water for the Environment* (Web Page) <https://www.environment.gov.au/water/cewo/about/water-holdings>; ND Cent Code § 61-04-02 ; Barton Springs/Edwards Aquifer Conservation District, *Final Habitat Conservation Plan for Managed Groundwater Withdrawals from the Barton Springs Segment of the Edwards Aquifer* (Report, 2018) 148, 164.

The new legislative mechanism of the special wildlife reserve is to be lauded, but it should also be accompanied by honest reflection on the conflict inherent between conservation and resources development and appropriate legal mechanisms for addressing it. As a whole, Queensland's laws leave significant vulnerabilities for protected areas, and particularly those on private land, to long-range groundwater-related impacts caused by resources development. This conclusion emerges from analysing the 'best case' of the most rigorous legislative frameworks, from which most projects do not benefit. Ecosystems protected by nature refuge agreements and special wildlife reserves should be given special consideration in these regimes through (1) procedural protections that notify and seek submissions from landholders outside the tenure boundaries that may be affected by a project, and (2) substantive requirements to consider and mitigate these impacts, and, if necessary, compensate unforeseen impacts, analogous to the requirements that apply to the investments of agricultural and pastoral landholders. Avoiding and mitigating these impacts is not only vital to protect biodiversity now — it will be even more important in the future. In the Queensland government's words, '[a]s the effects of climate change increase, protected areas will become even more essential and at the core of how society, biodiversity and landscape processes change and adapt to new environmental conditions'.[255]

[255] *Queensland's Protected Areas Strategy 2020–2030* (n 20) 7.

LOST IN TRANSLATION: INDONESIAN LANGUAGE REQUIREMENTS AND THE VALIDITY OF CONTRACTS

NADIRSYAH HOSEN,* JEREMY J KINGSLEY† AND TIM LINDSEY‡

This article investigates Indonesian laws that require contracts to be in the Indonesian language if a party is Indonesian or an Indonesian entity is 'involved'. It identifies the problems this creates for business arrangements in Indonesia, particularly those involving investors from English-speaking backgrounds. The article begins with an account of relevant Indonesian statutes and regulations before exploring a series of judicial decisions regarding language requirements for a valid contract. It finds that the Indonesian courts have been inconsistent in their application of law in this area, and that this has created significant uncertainty. It then examines the implications of this situation for legal practice, showing that it has led to increased risks and costs for foreign and local businesses. It concludes with two alternative proposals for reform.

I INTRODUCTION

'[The] cardinal virtues of drafting — clarity, precision, and good sense'.[1]

Contracts always contain some degree of ambiguity, but it is a basic assumption of legal practitioners across the globe that careful and intelligible drafting is essential for a contract to be effective[2] — that is, the wording of the document should reflect contractual negotiations and the intentions of the parties as precisely as possible. One of the key elements of these basic expectations about contractual agreements is choice of language and its use. Where language is unclear or imprecise, problems can easily follow.[3] Where the parties to a contract have a poor understanding of one another's languages, drafting takes place in

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1 Vincent A Wellman, 'Essay: The Unfortunate Quest for Magic in Contract Drafting' (2006) 52(3) *Wayne Law Review* 1101, 1101.

2 Cynthia M Adams and Peter K Cramer, *Drafting Contracts in Legal English: Cross-Border Agreements Governed by U.S. Law* (Wolters Kluwer, 2013) 13–14.

3 Ambiguity is a significant problem with the application and enforcement of contractual arrangements: see Olivette E Mencer, 'Unclear Consequences: The Ambient Ambiguity' (1995) 22(2) *Southern University Law Review* 217; Alan Schwartz and Robert E Scott, 'Contract Theory and the Limits of Contract Law' (2003) 113(3) *The Yale Law Journal* 541; Johan Steyn, 'The Intractable Problem of the Interpretation of Legal Texts' (2003) 25(1) *Sydney Law Review* 5.

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translation, or versions are created in different languages, these problems are magnified. This is a common challenge in international business contexts, where contracts are often made between parties who speak different first languages.

Indonesia is no exception to these challenges.[4] Article 31 of Law No 24 of 2009 on the Flag, Language, State Emblem, and National Anthem (Indonesia) ('2009 Language and Symbols Law') has created ambiguity about how contracts involving Indonesians should be drafted. In particular, there is now uncertainty as to the legal standing of contracts (or versions of contracts) in a language other than Indonesian, and even whether they are valid at all. In response, major Indonesian law firms now usually draft all contracts involving foreign parties bilingually, with one version in Indonesian,[5] but it is not clear whether this practice entirely satisfies the requirements of art 31.

This article investigates art 31 and the problems it creates for business arrangements in Indonesia, particularly those involving investors from English-speaking backgrounds.[6] It begins with an account of Indonesian regulations and judicial decisions regarding language requirements for a valid contract, and then examines their implications for legal practice.

In this article, we argue that art 31 is an impediment to business activities in Indonesia. The major problems are that it leads to uncertainty as to the applicable language for contracts, makes contract enforcement unpredictable, and creates additional work for lawyers who have little choice but to routinely draft bilingually. This is a recipe for contractual uncertainty. We conclude with two alternative recommendations for the amendment of art 31: to clarify the applicable language requirements, and make contractual enforcement more straightforward and predictable. Additionally, we recommend all existing implementing regulations and other non-statutory instruments that relate to art 31 should be rescinded to avoid confusion.

II Indonesian Language Regulatory Requirements: Agreements

Article 31 of the 2009 Language and Symbols Law states:

> The Indonesian Language must (wajib) be used for memoranda of understanding or agreements that involve (melibatkan) state institutions, agencies of the

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4 Rachmi Dzikrina, 'Subjective and Objective Approaches to Contractual Interpretation in Civil Law and Common Law Countries: Indonesia and Canada' (2017) 5(2) *Juris Gentium Law Review* 53.

5 See Jeremy Kingsley, 'Drafting Inter-Asian Legalities: Jakarta's Transnational Corporate Lawyers' (2021) 42(1) *Adelaide Law Review* 197.

6 This drafting problem has long been of concern to lawyers. See, eg, 'Indonesian Language in Contracts - A Strict Requirement' *HFW Briefings* (Web Page, November 2013) <https://www.hfw.com/Indonesian-language-in-contracts-November-2013>.

> government of the Republic of Indonesia, Indonesian private institutions or individuals of Indonesian nationality.[7]

This requirement also applies to agreements in electronic form. Article 48(1) of Government Regulation 82 of 2012 on Electronic Systems and Transactions (Indonesia) ('2012 Government Regulation') states that 'use of Indonesian is required for electronic contracts and other contracts intended for Indonesian citizens'.[8]

Neither the 2009 Language and Symbols Law nor the 2012 Government Regulation set out the consequences of non-compliance with their provisions. However, art 1335 of Indonesia's Civil Code [*Kitab Undang-Undang Hukum Perdata* or *Burgerlijk Wetboek voor Indonesië*] states that '[a]n agreement without a cause or concluded pursuant to a fraudulent or prohibited cause does not comply with the law and is not valid'. Article 1320 adds that, '[i]n order [for an agreement] to be valid … there must be a permitted cause'. Article 1337 similarly says that '[a] cause is prohibited if it is prohibited by law, or if it violates morality or public order.' 'Cause' in this context means 'purpose' (the Indonesian term used is *sebab*). A contract that is not in Indonesian language, and to which one of the parties is a state institution or agency of the government of the Republic of Indonesia, an Indonesian private institution or an individual of Indonesian nationality, does not comply with, and is not permitted by, the 2009 Language and Symbols Law or the 2012 Government Regulation. By reason of the operation of the Civil Code, its purpose is prohibited by law and the contact is therefore invalid, and, consequently, unenforceable.

There are two other instruments issued by the Indonesian government that purport to regulate matters covered by the 2009 Law: a ministerial letter and a presidential regulation. We take each in turn.

A *The Ministerial Circular Letter*

The Minister of Law and Human Rights Circular Letter M.HH.UM.01.01-35 of 2009 on Clarification of the Implications and Implementation of Law 24 of 2009 ('Ministerial Circular Letter') purports to modify the effect of the 2009 Language and Symbols Law but, for the reasons explained below, it has not been effective in doing so. In summary, the Ministerial Circular Letter provides that:

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7 *Pasal 31: Bahasa Indonesia wajib digunakan dalam nota kesepahaman atau perjanjian yang melibatkan lembaga negara, instansi pemerintah Republik Indonesia, lembaga swasta Indonesia atau perseorangan warga negara Indonesia.*

8 Rimba Supriyantna, M Yasin, and Mahinda Arkyasa, 'Government Mandates Some Electronic Contracts to Be Written in Bahasa Indonesia' *Hukumonline* (7 January 2013).

- private commercial contracts prepared 'in foreign languages, particularly English', will not be invalid simply because they are not in Indonesian;[9] and
- contracting parties may prepare contracts in dual languages. They may then choose which language version prevails if a dispute or difference in interpretation arises, or in the event of inconsistency between them. The Ministerial Circular Letter even suggests a form of words by which the parties can prefer English terms over Indonesian ones.[10]

The Ministerial Circular Letter also states that, because the 2009 Language and Symbols Law does not have retrospective effect, contracts made before 2009 will not be affected by the requirement that relevant contracts be in Indonesian.[11]

The Ministerial Circular Letter was clearly an attempt to provide greater clarity for foreign businesses regarding the application of the 2009 Language and Symbols Law by allowing them to continue to use languages other than Indonesian to document commercial agreements. However, it has been unable to achieve this because of Indonesia's so-called 'hierarchy of laws', stipulated in art 7(1) of Law 12 of 2011 on the Making of Laws (Indonesia) ('2011 Lawmaking Law'). The effect of the hierarchy is that the authority of a ministerial letter is too weak for these purposes, as we now explain.

The hierarchy sets out a formal order of priority or ranking of Indonesia's many regulatory sources of law. The following table summarises the hierarchy, with laws listed in the order in which they are ranked on it.[12]

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9 The Ministerial Circular Letter is in the form of text without numbered paragraphs. The relevant passages, summarised above, read: '*penandatanganan perjanjian privat komersial (private commercial agreement) dalam bahasa Inggris tanpa disertai versi bahasa Indonesia tidak melanggar persyaratan kewajiban sebagaimana ditentukan dalam Undang-Undang tersebut.*' [The English is in the original].

10 The relevant passages, summarised above, read '*para pihak pada dasarnya secara formal bebas menyatakan apakah bahasa yang digunakan dalam kontrak adalah bahasa Indonesia atau bahasa Inggris atau keduanya … maka para pihak juga bebas menyatakan bahwa jika terdapat perbedaan penafsiran terhadap kata, frase, atau kalimat dalam perjanjian, maka para pihak babas memilih bahasa mana yang dipilih untuk mengartikan kata, frase, atau kalimat yang menimbulkan penafsiran dimaksud. Klausula yang lazim digunakan dalam perjanjian, misalnya, "dalam hal terjadi perbedaan penafsiran terhadap kata, frase, atau kalimat dalam bahasa lnggris dan bahasa Indonesia dalam perjanjian ini, maka yang digunakan dalam menafsirkan kata, frase, atau kalimat dimaksud adalah versi bahasa Inggris*".'

11 The relevant passages, summarised above, read: '*Selain itu, sesuai dengan asas peraturan perundang-undangan yang berlaku, setiap peraturan perundang-undangan yang disahkan atau ditetapkan dan kemudian diundangkan, maka peraturan perundang-undangan tersebut berlaku setelah diundangkan sampai peraturan tersebut dicabut.*'

12 Simon Butt and Tim Lindsey, *Indonesian Law* (Oxford University Press, 2018) 37. Reproduced with the permission of the authors.

Table 1: Indonesia's Hierarchy of Laws

English	Indonesian	Abbreviation	Lawmaking Law Article
1945 Constitution	*Undang-Undang Dasar* 1945	UUD 1945	7(1)(a)
People's Consultative Assembly Decision	*Ketetapan Majelis Permusyawaratan Rakyat*	KepMPR	7(1)(b)
Statute/legislation (produced by the national legislature, the DPR)	*Undang-undang*	UU	7(1)(c)
Interim Emergency Law (literally, 'Government regulation in lieu of Law')	*Peraturan Pemerintah Pengganti Undang-undang*	PerPPU/PerPu	7(1)(c)
Government regulation	*Peratran Pemerintah*	PP	7(1)(d)
Presidential regulation	*Peraturan Presiden*	PerPres	7(1)(e)
Provincial regulation	*Peraturan Daerah Provinsi*	Perda Provinsi	7(1)(f)
County/city regulation	*Peraturan Daerah Kabupaten/Kota*	Perda Kabupaten/ Kota	7(1)(g)

Ministerial circular letters do not appear in this hierarchy. That the hierarchy is incomplete is acknowledged in art 8(1) of the 2011 Lawmaking Law, which refers to types of laws not referred to in art 7(1) but widely used in the Indonesian legal system. These include, among others, regulations (*peraturan*) stipulated by state agencies, but the term 'law' can sometimes also be understood to include many bureaucratic instruments, including (but not limited to) decisions (*keputusan*) or letters (*surat*) produced at ministerial level or below, such as the Ministerial Circular Letter. Under art 8(2) of the 2011 Lawmaking Law, these unlisted types of laws may be recognised and have binding legal force if they are required by higher-level laws or are otherwise issued under 'legitimate authority' — that is, authority provided by law to perform particular functions of government.[13]

Although the 2011 Lawmaking Law does not explain in any detail how the hierarchy works, it is generally agreed by Indonesian jurists that a lower-level law may not conflict with a higher-level law. For example, a government regulation may not contradict the 1945 Constitution, which sits at the pinnacle of the hierarchy, or a statute (*undang-undang*) produced by Indonesia's national legislature, *Dewan Perwakilan Rakyat* ('DPR').[14] However, a government

[13] For example, government regulations are usually issued in response to a statutory provision that directs the government to issue a government regulation to explain a matter only mentioned briefly or covered generally in the statute. See ibid 36, 51–5.

[14] *Dewan Perwakilan Rakyat*, People's Representative Assembly.

regulation will prevail over a presidential regulation in the event of any inconsistency.[15]

For these reasons, most Indonesian lawyers would agree that a ministerial letter, such as the Ministerial Circular Letter — a form of instrument that does not appear in the hierarchy — cannot override a government regulation, such as the 2012 Government Regulation, let alone a DPR statute such as the 2009 Language and Symbols Law.

Unfortunately, the Ministerial Circular Letter contradicts both the 2012 Regulation and the 2009 Language and Symbols Law, and therefore also the Civil Code (which is a statute). Specifically, the Ministerial Circular Letter purports to save private commercial contracts prepared 'in foreign languages, particularly English' from invalidity, even though that contradicts the provisions of:

- the 2009 Language and Symbols Law, which make Indonesian language mandatory for any contract involving an Indonesian entity (art 31);
- the 2012 Government Regulation, which makes Indonesian language mandatory for any contract intended for an Indonesian citizen (art 48(1)); and
- the Civil Code, which provides that a contract that does not comply with the law (in this case, the Law and the Regulation) is not valid.

The Ministerial Circular Letter is therefore ineffective to the extent of these contradictions, although any provisions of the Letter that do not contradict these higher instruments are probably valid. For example, the Letter states that contracting parties may prepare contracts in dual languages. This is not at odds with the higher instruments, so long as one of the versions is in *bahasa Indonesia*.

As mentioned, the Ministerial Circular Letter also states that the 2009 Language and Symbols Law will not apply retrospectively, so contracts made in a language other than Indonesian before that Law came into force will remain valid despite the introduction of that Law. The 2009 Language and Symbols Law itself is silent on the question of retrospectivity, but art 155 of the Appendix (*Lampiran*) to the 2011 Lawmaking Law states that 'the coming into force of a law or regulation cannot be stipulated earlier than the moment of enactment'. The Ministerial Circular Letter is consistent with this, and so there is statutory authority for its restriction of the application of the 2009 Language and Symbols Law to contracts made after 2009, although this has not been tested in court.

[15] Butt and Lindsey (n 12) 36–51.

B *The 2019 Presidential Regulation*

By contrast to the 2009 Ministerial Circular Letter, Presidential Regulation 63 of 2019 ('2019 Presidential Regulation') was issued under the authority of the 2009 Language and Symbols Law, specifically in order to implement the law. Further, unlike circular letters, presidential regulations are named in the hierarchy. For both reasons, therefore, the 2019 Presidential Regulation has much clearer authority than the 2009 Ministerial Circular Letter. It is generally consistent with the Law and was likely a response to the shortcomings of the Circular Letter.[16] In any case, this instrument modifies the application of the 2009 Language and Symbols Law in one significant way, as we now explain.

Article 26(1) begins by restating the provisions in art 31(2) of the parent legislation. It then states in art 26(2) that, where there is a foreign party to the contract, a version may be prepared in English or any other language of that party.

Article 26 adds:

> (3): The national language of the foreign party and/or the English language … is used as an equivalent (*padanan*) or translation (*terjemahan*) of the Indonesian language to align understanding of the memorandum of understanding or agreement with the foreign party.17
>
> (4): In the event there is a difference in interpretation of the equivalent or translation referred to in paragraph (3), *the language used shall be the language agreed in the memorandum of understanding or agreement*.[18]

The effect of this is that, while contracts involving Indonesian entities must be in Indonesian, a version in another language (most commonly, English, the international language of business) can also be prepared that is equal in standing and, just as the Ministerial Circular Letter stipulated, the parties may choose which version prevails in the event of dispute over interpretation.

The 2019 Presidential Regulation is a useful compromise for foreign investors, but its effectiveness is subject to dual-language contracts including a provision identifying the parties' preferred language.

Likewise, two documents in different languages are a recipe for accidental (or even purposefully crafted) ambiguity. As mentioned, drafting 'clarity' and 'precision' are essential for contract law efficacy.[19] If a preferred language clause is omitted from a contract involving an Indonesian person or institution that is

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16 We note that the 2009 Ministerial Circular expressly anticipated that a presidential regulation would eventually be issued to implement the 2009 Language and Symbols Law.

17 Pasal 26(3): *Bahasa nasional pihak asing dan/atau bahasa Inggris sebagaimana dimaksud pada ayat (2) digunakan sebagai padanan atau terjemahan Bahasa Indonesia untuk menyamakan pemahaman nota kesepahaman atau perjanjian dengan pihak asing.*

18 Pasal 26(4): *Dalam hal terjadi perbedaan penafsiran terhadap padanan atau terjemahan sebagaimana dimaksud pada ayat (3), bahasa yang digunakan ialah bahasa yang disepakati dalam nota kesepahaman atau perjanjian* (emphasis added).

19 Wellman (n 1) 1101.

prepared in two versions, then the 2019 Presidential Regulation creates a significant margin of risk regarding its interpretation, particularly for foreign investors who are not fluent in Indonesian. This is because if the parties become involved in a dispute that involves contractual interpretation, and there is no preferred language provision and they cannot agree which version to use, it is not clear which version of the agreement will prevail. However, in our view, an Indonesian domestic court is more likely to choose the Indonesian language version because the Regulation states the non-Indonesian version is merely an 'equivalent' or 'translation' used to 'align understanding' for the foreign party.

III Indonesian Language Regulatory Requirements: Notarial Deeds

The requirement that Indonesian language be used to record agreements is not limited to contracts; it extends also to notarial deeds. Of course, a notarised agreement, just like one that is not notarised, will be subject to art 31 of the 2009 Language and Symbols Law. However, art 43(1) of Law 30 of 2004 on Notaries (Indonesia) ('2004 Notaries Law') expands the ambit of the rule — it has the effect that any document, whether or not it is an agreement, must be in Indonesian if it is notarised.

The consequences of non-compliance are, again, spelt out in the Civil Code, in this case, art 1877, which provides that a deed that does not fulfil the criteria for a valid notarial deed (*akta otentik*) will be deemed a mere 'deed under hand' (*akta di bawah tangan*). The distinction between these two kinds of deeds matters a great deal in the Indonesian legal system, for two reasons. First, as in many other European-origin legal systems, notaries play a far more important role in validating transactions in Indonesia than they do in the common law systems with which most English-speaking investors will be more familiar, where notaries play a relatively small role. In Indonesia, a wide range of agreements and other commercial documents must be formalised in writing and prepared as a formal deed (*akta notaris*) to be valid. These include:

- certain dispute resolution agreements (for example, to settle disputes by arbitration, or if parties cannot sign in person: art 9(2) of Law No 30 of 1999 on Arbitration and Alternative Dispute Resolution (Indonesia);
- certain corporate transactions (for example, changes to company articles of association and deeds of mergers and acquisitions: arts 21 and 128 of Law No 40 of 2007 on Limited Liability Companies (Indonesia);
- marriages (art 147 of the Civil Code) and marriage-related agreements (such as pre-nuptial agreements, donations, or gifts to fiancés prior to marriage: art 176 of the Civil Code);

- real estate transactions (including land purchase and transfer agreements: art 16 of Law No 4 of 1992 on Housing and Residential Areas (Indonesia));
- mortgage certificates: Law No 4 of 1996 on Mortgages on Land and Land-Related Objects (Indonesia)); and
- fiduciary security agreements: art 5 of Law No 42 of 1999 on Fiduciary Securities (Indonesia).[20]

Many other kinds of document are also routinely notarised, such as wills, gifts and loans.

Second, a compliant notarial deed (*akta otentik*) constitutes absolute proof of its contents and binds the parties unless fraud can be proven in relation to its formation.[21] This is because of the 'notary's obligation to work independently without any influence from other parties'.[22] By contrast, the authenticity and substance of a deed 'under hand' may be challenged, very significantly weakening its evidentiary weight in litigation.[23]

Article 43(1) of the 2004 Notaries Law has become problematic in recent years because transnational transactions involving Indonesians have significantly increased. Such deals typically involve the notarising of an agreement between the parties, and often this is in English. In response to this, art 43(3)–(6) was inserted into the 2004 Notaries Law in 2014.[24] Article 43(3) permits deeds to be made in a language other than Indonesian, unless another law requires Indonesian to be used. This is problematic because it contradicts art 43(1), which was unaffected by the amendments, and, as mentioned, makes the use of Indonesian mandatory. This would seem to render art 43(3) ineffective but, to the best of our knowledge, this issue has not been tested, so uncertainty remains as to whether a notarial deed that is only in a language other than Indonesian is valid.

Article 46(3) of the 2004 Notaries Law adds a requirement that, where a foreign language is used, the notary must ensure the parties understand the meaning of that version of the deed. This means the notary must either understand the other language himself or herself, or use a translator to explain the foreign language version. This is also problematic, because if a dispute arises it may be difficult to prove that a party that speaks only Indonesian did, in fact, fully understand the content of a foreign language deed.

In any case, art 46(6) says that, if a dispute arises about different language versions of a deed, the Indonesian version prevails. The effect of this is that a non-

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20 Butt and Lindsey (n 12) 314.
21 Arts 1870, 1871, Civil Code.
22 Adha Dia Agustin, 'The Independence of Notary in the Civil Partnership of Notary' (2014) 1(2) *Rechtsidee* 131146, 131.
23 Butt and Lindsey (n 12) 120.
24 Law No 2 of 2014 on the Amendment of Law No 30 of 2004 on Notaries.

Indonesian version of a notarised deed can really only be relied on as a guide for non-Indonesian speaking parties and is not conclusive as to its contents.

IV Indonesian Language Requirements in the Courts

A *The Bangun Karya Pratama v Nine AM Case*

We were unable to locate any judicial decisions dealing directly with the language requirements of the 2004 Notaries Law, however, the courts have considered the application of art 31(1) of the 2009 Languages and Symbols Law in a number of cases, which we now summarise.[25]

In a landmark 2013 decision, *PT Bangun Karya Pratama Lestari v Nine AM Ltd* ('*Bangun Karya Pratama Lestari*'),[26] the West Jakarta District Court decided that a loan agreement between an Indonesian company borrower and a US-based lender involving a fiduciary security was void because the contract was not executed in Indonesian.

The Indonesian plaintiff sought to escape liability under the loan agreement on the grounds that it was in English and there was no Indonesian language version. The Court reasoned that, because Indonesian was mandatory under art 31(1) of the 2009 Language and Symbols Law, the contract was invalid by reason of the operation of arts 1335 and 1337 of the Indonesian Civil Code (discussed above). The Court noted the stipulation in the Ministerial Circular Letter that contracts prepared in English will not be invalid simply because they are not in Indonesian, but said that because ministerial letters are not included in the hierarchy of Indonesian laws and regulations, discussed above, it would give the Circular Letter no weight.

The Court added, somewhat glibly, that if a party did not agree with the word 'must' (*wajib*) in relation to the obligation to use Indonesian language in contracts per art 31(1) of the statute, the correct procedure was not to ignore it, but to challenge that provision in the Constitutional Court. That court has the exclusive power to decide challenges to the constitutionality of national legislation brought by citizens and various legal entities. If the Constitutional Court decides that a statute under review violates the *1945 Constitution*, it can

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[25] These cases were located through a search of the Indonesian Supreme Court's database of judicial decisions (https://putusan3.mahkamahagung.go.id/). This database is neither complete, reliable nor consistent in its listings, which are subject not only to addition of decisions, but also unexplained removal of decisions and technical problems such as the failure of links to cases or corruption of text and so on. We therefore do not claim that the cases discussed in this article are the only the relevant cases that have been decided, only that these are the only relevant cases we could access at the time of our search.

[26] Indonesian decisions do not use the name of the parties. They are usually referred to only by a decision number. Here we use the parties' names for convenience. The correct reference for this case is Decision 451/Pdt.G/2012/PN.Jkt.Bar. of 20 June 2013, 61.

invalidate that statute, or a provision of it, and declare it no longer binding. However, this was cold comfort for the US lender defendant, as foreigners lack standing to bring constitutional challenges in Indonesia.[27]

In any case, the West Jakarta District Court decision was affirmed on appeal by the Jakarta High Court and, on cassation,[28] by the Supreme Court.[29] The position has not been altered by the subsequent issue of the 2019 Presidential Regulation, and the option to use dual language contracts with a preferred language provision that it created, as an Indonesian language version is still required for the contract to be valid.

B *Other Cases*

The interpretation of the 2009 Language and Symbols Law established by the Supreme Court in *Bangun Karya Pratama Lestari* has been the subject of further litigation since 2015. We now briefly describe the resulting judicial decisions in chronological order, before comparing them and analysing their effect in the next section. All the cases discussed involved agreements written in English, without an Indonesian version.

August 2017: Buxani v Vatvani (Central Jakarta District Court) ('Buxani')[30]

The agreement in this case contained a clause stating that any dispute arising under it was to be resolved by arbitration.

Article 3 of Law No 30 of 1999 on Arbitration and Alternative Dispute Resolution (Indonesia ('1999 Arbitration Law') states that the 'District Court does not have authority to decide a dispute between parties bound by an arbitration agreement',[31] and art 11(1) provides that 'the existence of a written arbitration agreement eliminates the parties' rights to seek resolution of a dispute or difference of opinion as to the contents of the agreement by the District Court'.[32] The effect of these provisions is that, once a District Court becomes aware that an agreement before it contains such a clause, it may not decide any dispute regarding the agreement and must dismiss the claim. Because all civil matters are

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27 In Constitutional Court Decision 2-3/PUU-V/2007, for example, Scott Rush, an Australian prisoner on death row, was denied standing to challenge the statute under which he was sentenced to death, Law 35 of 2009 on Narcotics, because he was not an Indonesian citizen.

28 Cassation is an appeal to the Indonesian Supreme Court from a provincial level High Court on a point of law. For further discussion, see Sebastiaan Pompe, *The Indonesian Supreme Court: A Study of Institutional Collapse* (Cornell University Press, 2005) 228–37.

29 See Jakarta High Court Decision 48/Pdt/2014/PT.DKI of 7 May 2014; Indonesian Supreme Court Decisions 601/K/Pdt/2015 of 31 August 2015; 1572 K/Pdt/2015 of 23 October 2015.

30 Central Jakarta District Court Decision 472/Pdt.G/2015/PN.Jkt.Pst, 28 August 2017.

31 *Pengadilan Negeri tidak berwenang untuk mengadili sengketa para pihak yang telah terikat dalam perjanjian arbitrase.*

32 *Adanya suatu perjanjian arbitrase tertulis meniadakan hak para pihak untuk mengajukan penyelesaian sengketa atau beda pendapat yang termuat dalam perjanjiannya ke Pengadilan Negeri.*

heard at first instance in the District Court, this provision is an effective ban on the judicial determination of any dispute regarding an agreement with an arbitration clause.

The Central Jakarta District Court therefore held that it lacked authority to hear this case by reason of the operation of the 1999 Arbitration Law. In dismissing the case, the Court said the dispute between the parties could only be decided by arbitration. The Jakarta High Court affirmed this decision.[33]

March 2018: Gatari Air Services vs Jasa Angkasa Semesta Tbk (South Jakarta District Court) ('*Gatari Air Services*')[34]

The salient facts of this case were essentially the same as in *Buxani*, but here the Court asserted that it did have jurisdiction to decide the matter and held the agreement to be invalid by reason of the operation of the 2009 Language and Symbols Law. It did not explain why it did not apply arts 3 and 11 of the 1999 Arbitration Law to dismiss the case.

The matter went on appeal to the Jakarta High Court, which upheld the original decision.[35] That decision was then taken on cassation to the Supreme Court, but no decision is yet available.

July 2018: PT Catur Jaya v Hotels Asia Pacific Limited (Central Jakarta District Court) ('*Catur Jaya*')[36]

In this case, the plaintiff asked the Court to declare invalid three 'hotel development services agreements' for The Park Inn by Radisson in Makassar. However, the defendant argued that the court had no jurisdiction because the agreements contained a clause referring any dispute under the agreement to the Singapore International Arbitration Centre ('SIAC').

The Court agreed and dismissed the case, stating that it lacked authority to hear the case by reason of the 1999 Arbitration Law, and that the dispute should instead be decided by SIAC. This decision was affirmed on appeal to the Jakarta High Court and then on cassation by the Supreme Court.

July 2018: Dendy Kurniawan v PT Kone Indo Elevator (Central Jakarta District Court) ('Kurniawan')[37]

The Court in this case found for the plaintiff and enforced a contract that was not in Indonesian. In its judgment, the Court entirely ignored the defendant's submissions that the fact that there was no Indonesian language version of the agreement made it invalid under the 2009 Language and Symbols Law.

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33 Jakarta High Court Decision 794/PDT/2018/PT DKI, 31 January 2019.
34 South Jakarta District Court Decision 617/Pdt.G/2017/ PN.Jkt.Sel, 14 March 2018.
35 Jakarta High Court Decision 408/PDT/2018/PT DKI, 7 September 2018.
36 Central Jakarta District Court Decision 461/PDT.G/2017/PN.JKT.PST, 10 July 2018.
37 Central Jakarta District Court Decision 407/Pdt.G/2017/PN.Jkt.Pst, 25 July 2018.

The defendant appealed to the Jakarta High Court, again submitting that the agreement was invalid because the only version of it was in English. The High Court dismissed the appeal, affirming the District Court decision and likewise making no comment on the language issue.[38]

September 2018: PT Multi Spunindo Jaya v PT Asuransi Astra Buana (Central Jakarta District Court) ('Multi Spunindo Jaya')[39]

The Court in this case found that the agreement contained a clause stating that disputes under the agreement must be dealt with by SIAC arbitration. It held that it therefore did not have jurisdiction to decide the case. There was no appeal.

October 2018: Ivan Chrisna vs Hilton Bandung (Bandung District Court) ('Chrisna')[40]

The plaintiff in this case relied on the Supreme Court decision in *Bangun Karya Pratama Lestari* to argue that the agreement should be invalidated. The defendant argued that *Bangun Karya Pratama Lestari* was not binding because Indonesia follows the European Civil Law legal system, and so has no system of precedent. The Court disagreed that this meant the 2009 Language and Symbols Law could not be applied and declared the agreement invalid. However, the agreement contained an arbitration clause that stated:

> 20(2): Arbitration of disputes arising out of or in connection with this agreement shall be resolved in the jurisdiction in which the hotel is located under the rules of Arbitration of [sic] ... the arbitration shall be conducted in English and this agreement will governed by and interpreted pursuant to the law of the jurisdiction in which the hotel is located.

On appeal, the Bandung High Court held that this clause meant the Indonesian courts had no jurisdiction to hear a dispute arising under the agreement,[41] finding that it should instead be decided by the Bandung branch of the Badan Arbitrase Nasional Indonesia [National Arbitration Board] ('BANI').

The matter then went on cassation to the Supreme Court, but no decision is yet available.

January 2019: PT UOB Property v PT Millenium Penata Futures and PT Starpeak Equity Futures (Central Jakarta District Court) ('UOB Property')[42]

In this case, the Court declared the agreement to be valid, offering two arguments to justify its decision. The first was that, because the plaintiff and defendant were both domestic Indonesian companies, use of English in the Agreement was

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38 Jakarta High Court Decision 21/PDT/2019/PT.DKI, 9 April 2019.
39 Central Jakarta District Court Decision 472/PDT.G/2017/PN.JKT.PST., 19 September 2018.
40 Bandung District Court Decision 61/PDT.G/2018/PN.BDG, 10 October 2018.
41 Bandung High Court Decision 73/PDT/2019/PT BDG, 12 June 2019.
42 Central Jakarta District Court Decision 222/Pdt.G/2018/PN Jkt.Pst, 30 January 2019.

permitted. In other words, according to the Court, the terms of the 2009 Language and Symbols Law apply to invalidate an agreement solely in English only if a foreign company is involved.

In taking this view, the Court distinguished *Bangun Karya Pratama Lestari* on the basis that it involved a foreign company. It did not explain why the distinction between a foreign company and a domestic company was significant however, and it is hard to understand the Court's reasoning: the 2009 Language and Symbols Law does not differentiate between foreign and domestic companies, and, in any case, a foreign company is more likely than a domestic company to use English, which is the international language of business. It makes little sense for a foreign company to be prohibited from using English in its agreements, while domestic companies, which are less likely to have staff fluent in legal English, are allowed to.

Second, the Court found that the argument that the agreement was invalid because it was only in English was raised because the defendant wished to escape obligations under the agreement. However, the 2009 Language and Symbols Law simply declares agreements only in English to be invalid; it is not concerned with the motives of parties seeking to enforce this rule. Further, it is inevitable that parties will be released from obligations under an agreement if it is invalidated. On the Court's logic, contracts could rarely ever be invalidated, which would defeat the purpose of the 2009 Language and Symbols Law.

There was no appeal.

April 2019: Ford v Ford Cheung (Amlapura District Court) ('Ford')[43]

This case related to a married couple living in Bali. The plaintiff, who was a British citizen, and the defendant, who was a Chinese citizen, jointly owed an Indonesian company, PT Alba Indah. Upon divorce, they entered into a written agreement to divide their joint marital assets, including their interests in the company. The agreement was in English with no Indonesian translation. The plaintiff sought invalidation of the agreement for failure to comply with art 31 of the 2009 Language and Symbols Law. It is not stated in the decision on what basis the plaintiff claimed this Law applied to the agreement (presumably it was that the agreement involved an Indonesian company, a 'private institution' for the purposes of art 31) but the Court nevertheless appears to have accepted that it did.

The Amlapura District Court held that failure to comply with art 31 did not render an agreement invalid pursuant to art 1320 and 1337 of the Civil Code, which require agreements to have a 'permitted cause' (discussed above). The Court found that, so long as the purpose of the agreement was not fraudulent, prohibited by law, or contrary to moral standards and public order, it will be permitted. The Court appears to have taken the view that, because the 2009

[43] Amlapura District Court Decision 254/Pdt.G/2019/PN Amp, 1 April 2019.

Language and Symbols Law did not articulate the consequences of non-compliance with art 3, such non-compliance was not prohibited, and so the agreement could not be considered to have a non-permitted purpose. In this case, the Court was at odds with the Court in *Bangun Karya Pratama*, which found exactly the opposite, namely that failure to comply with art 31 meant the agreement lacked a permitted purpose under the Civil Code and so was void.

It is difficult to understand the Court's reasoning in *Ford*. Article 31 of the 2009 Language and Symbols Law uses the term *wajib* (mandatory) when imposing the Indonesian language requirement and the court itself held that this made Indonesian language a 'necessity' (*suatu keharusan*) for contracts involving Indonesian persons and institutions. If the statute makes Indonesian language compulsory for a particular kind contract, it therefore prohibits such contracts being made solely in another language. Accordingly, the contract in this case should have been held to be for a purpose prohibited by law and so invalid under the Civil Code for lacking a permitted purpose, like the contract in *Bangun Karya Pratama Lestari*.[44] This decision was not appealed.

April 2020: Hyun International Co Ltd v PT Kwanglime Yh Indah (Subang District Court) ('Hyun International')[45]

In this case, strangely, no argument was made at first instance that the contract was invalid because the only version was in English, so the Court accepted it as valid evidence (*barang bukti yang sah*).

This decision was then appealed to the Bandung High Court,[46] where submissions this time included the argument that the contract should be declared invalid because it was written only in English. However, the High Court dismissed the appeal, entirely ignoring this argument in its judgment.

June 2020: Jiang v Reliance Coal Resources and Others (Central Jakarta District Court) ('Jiang')[47]

The agreements in dispute in this case were notarised, but not in Indonesian language. The plaintiffs argued that the agreements were invalid as they were in breach of the 2009 Language and Symbols Law, relying on the Supreme Court

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44 As mentioned, art 1335 of Indonesia's Civil Code states that '[a]n agreement without a cause or concluded pursuant to a fraudulent or prohibited cause does not comply with the law and is not valid' (Pasal 1335: *Suatu persetujuan tanpa sebab, atau dibuat berdasarkan suatu sebab yang palsu atau yang terlarang, tidaklah mempunyai kekuatan*). Article 1320 states that '[i]n order to be valid … there must be a non prohibited cause' (Pasal 1320: Supaya terjadi persetujuan yang sah … suatu sebab yang tidak terlarang). Article 1337 states that '[a] cause is prohibited if it is prohibited by law, or if it violates morality or public order' (Pasal 1337: *Suatu sebab adalah terlarang, jika sebab itu dilarang oleh undang-undang atau bila sebab itu bertentangan dengan kesusilaan atau dengan ketertiban umum*).

45 Subang District Court Decision 46/Pdt.G/2019/PN Sng., 9 April 2020.

46 Bandung High Court Decision 378/PDT/2020/PT BDG.

47 Central Jakarta District Court Decision 590/Pdt.G/2018/PN Jkt.Pst, 23 June 2020.

decision in *Bangun Karya Pratama Lestari* decision.[48] The Court agreed and declared the agreements invalid. There was no appeal.

V Analysis of Cases

There is significant inconsistency in the decisions described above. This is not unusual in Indonesia. As one of the parties argued in *Chrisna*, the adoption of a colonial form of the civil law system from the Dutch means there is no formal system of precedent or independent body of judge-made law.[49] Accordingly, an Indonesian judge may follow a previous decision from a higher-level or equal-level court, but is not usually required to do so. Formally, Indonesian court decisions bind only the parties involved in the case relating to that decision.[50]

Despite this situation, Indonesian judges do generally consider selected, prominent decisions of the Supreme Court (*yurisprudensi* or 'jurisprudence', which is occasionally collected and published in hard copy or online by the Court) to be highly persuasive, and so are often reluctant to depart from a line of consistent Supreme Court decisions on a particular point of law.[51] This is especially true if the Supreme Court has stated that a particular decision should be followed, as it sometimes does in practice notes, known as 'circular letters' (*surat edaran*). However, opinions differ in Indonesia as to whether judges *must* follow Supreme Court decisions and even whether *yurisprudensi* is an official source of law. Many judges claim absolute freedom to depart from such decisions.[52] This means the cases we examine in this article, even those decided by the Supreme Court, can only be considered examples of how the law has been applied, not binding precedent.

With this in mind, we return now to the decisions. In only two cases did the courts follow *Bangun Karya Pratama Lestari* and invalidate the agreement. In *Jiang*, the Central Jakarta District Court simply applied the 2009 Language and Symbols Law to do so. In *Gatari Air Services*, the South Jakarta District Court did the same thing, but first rejected the argument that it was deprived of jurisdiction because the agreement contained an arbitration clause. In doing so, the Court was at odds with the courts in four other decisions made around the same time: the Central Jakarta District Court in *Buxani v Vatvani*, *Catur Jaya*, and *Multi Spunindo*, and the Bandung District Court in *Chrisna*. In each of these decisions, the courts held that the existence of an arbitration clause meant it had no jurisdiction over any dispute

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48 Indonesian Supreme Court Decision 1572 K/Pdt/2015, 23 October 2015.

49 This paragraph draws on Simon Butt and Tim Lindsey, 'Liability for the Death of Aircraft Passengers in Indonesia' (2020) 85(4) *Journal of Air Law and Commerce* 573.

50 Mohamad Isnaini (1971) *Hakim Dan Undang-Undang* 13.

51 Paulus Effendie Lotulung, *Peranan Yurisprudensi Sebagai Sumber Hukum* (Badan Pembinaan Hukum Nasional, 1997).

52 E Utrecht and Moh Saleh Djindang, *Pengantar Dalam Hukum Indonesia* (Ichtiar Baru, 10th ed, 1983) 204.

arising under the agreement, and this was confirmed by the Supreme Court in its cassation decision in *Catur Jaya*.

These cases suggest a trend of Indonesian courts refusing to hear a case under the 2009 Language and Symbols Law, involving the invalidation of an agreement not written in Indonesian if it contains an arbitration clause, on the grounds that disputes about such an agreement can only be dealt with by arbitration. The courts have been consistent in this approach in every case involving an arbitration clause, except *Gatari Air Services*, and that case has gone to the Supreme Court for cassation. If the Supreme Court follows its own decision in *Catur Jaya* and overturns the District Court and High Court decisions in *Gatari Air Services*, that would further confirm the trend. The same would be true if the Supreme Court upholds the District Court and High Court decisions in *Chrisna*, which applied the 1999 Arbitration Law.

It is more difficult to draw any clear conclusion from the remaining four cases. *UOB Property* is perhaps best considered an outlier, for two reasons. First, in no other decision has a court used the two arguments the Central Jakarta District Court relied on in this case — that the 2009 Language and Symbols Law does not apply to agreements involving a foreign company, and that it cannot be applied to assist a party to avoid contractual obligations. Second, as we have explained, the reasoning used by the Court to support these arguments was entirely unconvincing.

In two other cases, *Kurniawan* and *Hyun International*, the court simply ignored submissions about the application of the 2009 Language and Symbols Law, as did the High Courts to which each of these decisions were appealed. There is no legal basis for the courts to ignore a clearly relevant law without giving any reason for doing so, although this is not uncommon in Indonesia. While judges are required by art 50(1) of Law 48 of 2009 on Judicial Power (Indonesia) to give reasons for their decisions, they often simply briefly repeat the submissions of one of the parties, ignoring alternative arguments. This, of course, facilitates improper decision-making. We do not know whether these two decisions were the result of improper influence — for example, a bribe (which is common in Indonesian courts, as senior judges and a series of Indonesian presidents have publicly acknowledged) — but that is always a possibility.[53]

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[53] On the problem of widespread corruption in Indonesian courts and the so-called 'judicial mafia', see World Bank, *Combating Corruption in Indonesia: Enhancing Accountability for Development* (Report No 27246-IND, 12 November 2003) 81; Indonesia Corruption Watch, *Menyingkap Tabir Mafia Peradilan* (Indonesia Corruption Watch, 2001). See also Gary Goodpaster, 'Reflections on Corruption in Indonesia' in Tim Lindsey and Howard Dick (eds), *Corruption in Asia: Rethinking the Governance Paradigm* (Federation Press, 2002) 87–108; Satuan Tugas Pemberantasan Mafia Hukum, *Mafia Hukum: Modus Operandi, Akar Permasalahan dan Strategi Penanggulangan* (Pemberantasan Mafia Hukum, 2011) 4; Febrina Ayu Scottiati, 'Titik-titik Permainan Mafia Hukum di Pengadilan', *Detik News* (online, 22 December 2010) <https://news.detik.com/berita/d-1530929/--titik-titik-permainan-mafia-hukum-di-pengadilan>; Butt and Lindsey (n 12) 299–303. On Indonesian judicial decision-making, see Butt and Lindsey (n 12) 73–82.

In the final case, *Ford*, the Court, as mentioned, took the exact opposite view to the court in *Bangun Karya Pratama Lestari* regarding the relationship between art 31 of the 2009 Language and Symbols Law and arts 1320 and 1337 of the Civil Code. However, the reasons it gave for doing so are, in our view, incoherent and unconvincing. We also note that this is a decision of a District Court, while *Bangun Karya Pratama Lestari* was approved by the Supreme Court and so would be viewed by most Indonesian judges as carrying more weight.

In summary, the cases decided in the wake of *Bangun Karya Pratama Lestari* have done little to clarify the status of foreign language contracts under Indonesian law, save to establish that the courts, while somewhat unpredictable in their approach to the 2009 Language and Symbols Law, are generally likely to refuse to hear any claim for invalidation of an agreement for breach of that Law if the agreement contains a clause referring any dispute arising under it to arbitration. In such a case, the matter will usually be sent to arbitration in accordance with the terms of the relevant clause.

Of course, it remains possible that an arbitration might still result in the agreement being invalidated under the 2009 Language and Symbols Law. We have only been able to locate one arbitral decision where this argument was raised, which we now discuss.

22 August 2017: PT Kerui Indonesia v Badan Arbitrase Nasional Indonesia and PT Agung Glory Cargotama AGC ('BANI')

In this case, the agreement, which was only in English, contained an arbitration clause. At arbitration by BANI, it was submitted that the agreement was unenforceable because there was no Indonesian language version. In its decision,[54] BANI dismissed this argument, simply saying that 'the use of English language in the agreement was not contrary to morals and does not contravene public order'.[55] This was presumably a reference to the terms of art 1337 of the Civil Code, discussed above, although BANI failed to mention that another ground for invalidity under this provision is 'prohibition by law'. This was relevant because the agreement was clearly prohibited by law as it was only in English, contrary to the 2009 Language and Symbols Law.[56] In fact, the arbitrators did not explain why they made these findings and why they did not consider the provisions of the 2009 Language and Symbols Law at all.

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54 BANI Decision 809/III/ARB-BANI/2016, of 24 February 2017.

55 BANI Decision 809/III/ARB-BANI/2016, of 24 February 2017, cited in South Jakarta District Court Decision No 244/PDT.G.ARB/2017/PN.JKT.SEL, at 71.

56 '*[P]enggunaan Bahasa Inggris dalam perjanjian a quo tidak berlawanan dengan kesusilaan dan tidak melanggar ketertiban umum.*' Article 1337 of the Civil Code says that '[a] cause is prohibited if it is prohibited by law, or if it violates morality or public order.' (*Pasal 1337: Suatu sebab adalah terlarang, jika sebab itu dilarang oleh undang-undang atau bila sebab itu bertentangan dengan kesusilaan atau dengan ketertiban umum*).

The defendants appealed the arbitral award to the South Jakarta District Court,[57] relying on, among other things, the 2009 Language and Symbols Law. However, the District Court found that its power to annul an arbitral award was confined to the grounds in art 70 of the 1999 Arbitration Law, all of which grounds relate to fraud or deceit by a party and do not include the language of the contract.[58] The Court therefore dismissed the application to annul the award.

The matter then went on cassation to the Supreme Court,[59] but that Court dismissed the application without considering the substance of the dispute, finding that a District Court decision to dismiss an application to annul an arbitral award cannot be appealed.[60]

The decisions in this case emphasise the value of including arbitration clauses in commercial agreements in Indonesia, as Indonesian courts will generally decline jurisdiction and leave the disputes about such an agreement to the arbitrator. However, this does not necessarily create certainty because of the absence of a system of binding precedent. Where an agreement is only in English, it is still possible that a court might declare such an agreement invalid under the 2009 Language and Symbols Law regardless of whether it includes an arbitral clause.

Most contracting parties involved in major commercial transactions in Indonesia want certainty and so their lawyers elect to abide by the Indonesian language requirement in the 2009 Language and Symbols Law. They do this by drafting documents bilingually with a clause specifying Indonesian as the operational language, the so-called 'trumping language' provision.[61] This cautious approach is followed by most major Indonesian law firms, which take the view that any practice other than this would be imprudent.[62] In the next section,

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57 South Jakarta District Court Decision No 244/PDT.G.ARB/2017/PN.JKT.SEL.

58 Article 70: An application to annul an arbitration award may be made if any of the following conditions are alleged to exist: (a) letters or documents submitted in the hearings are acknowledged to be false or forged or are declared to be forgeries after the award has been rendered; (b) after the award has been rendered documents are founded which are decisive in nature and which were deliberately concealed by the opposing party; or (c) the award was rendered as a result of fraud committed by one of the parties to the dispute (*Pasal 70: Terhadap putusan arbitrase para pihak dapat mengajukan permohonan pembatalan apabila putusan tersebut diduga mengandung unsur-unsur sebagai berikut: (a). surat atau dokumen yang diajukan dalam pemeriksaan, setelah putusan dijatuhkan, diakui palsu atau dinyatakan palsu; (b). setelah putusan diambil ditemukan dokumen yang bersifat menentukan, yang disembunyikan oleh pihak lawan; atau (c). putusan diambil dari hasil tipu muslihat yang dilakukan oleh salah satu pihak dalam pemeriksaan sengketa).*

59 Supreme Court Decision 8 B/Pdt.Sus-Arbt/2018 of 22 August 2017.

60 The Supreme Court found, however, that a District Court decision to *uphold* an application to annul an arbitral award *can* be appealed: *Putusan pengadilan negeri yang menolak permohonan pembatalan putusan arbitrase nasional tidak dapat diajukan upaya hukum banding ke Mahkamah Agung. Permohonan banding ke Mahkamah Agung atas putusan pengadilan negeri yang menolak permohonan pembatalan putusanarbitrase harus dinyatakan tidak dapat diterima.*

61 Choice of language clauses are standard form in most bilingually-drafted contracts. See Marshall Morris (ed), *Translation and the Law* (John Benjamin Publishing, 1995) 160.

62 'New Regulation on Mandatory Use of Bahasa Indonesia Falls Short of Expectation', *Assegaf Hamzah and Partners* (Blog Post, 2019) <https://www.ahp.id/client-update-11-october-2019>.

we consider some of the practical challenges that this practice creates for contract drafters.

VI Drafting Indonesian Language Contracts: In Practice

Bilingual drafting is not a complete solution — it has its own problems. The most obvious is that linguistic double-handling adds costs to commercial transactions. These can be significant if parties hire their own translators to review versions drafted by the other party, as experienced and reliable translators with expertise in both Indonesia's legal system and the relevant foreign legal system are very rare and can be expensive. It is particularly difficult to find appropriately skilled translators who are not Indonesian nationals. For example, in Australia, where Indonesian language was once widely offered in schools, Indonesian language capacity is fast evaporating. In 2009, there were as few as 1,167 Australian students enrolled in Year 12 Indonesian. Victoria, the state with the highest number of Indonesian programs, made up 351 of the total number in 2009. However, by 2018, the number of Victorian students who studied Indonesian in Year 12 had dropped to just 249, amid a general perception that Indonesian language was not worth pursuing. This is a miniscule number given that there were 61,394 Victorian students enrolled in Year 12 that year.[63]

Even if a skilled translator is located, clearly ascertaining the intent of the contracting parties can be difficult if negotiations have occurred in different languages and then translated into Indonesian, or vice versa.[64] This is because subtle, but pivotal, terms can have nuanced definitions, which can be lost in translation when words have similar but not identical meanings or intricate concepts are overly simplified by the exigencies of transition to a different grammatical structure.[65]

Moreover, translation between Indonesian and English is particularly difficult when legal terminology is involved. This is chiefly because the Indonesian legal system is a member of the 'Civil Law' or 'Continental Law' group of systems found in European countries such as France, Germany and Holland and their former colonies or client states,[66] as opposed to the Anglophone 'Common Law' systems such as those of the United Kingdom and its former colonies or clients, including the United States and Australia. The many differences between these systems gives rise to different understandings of how law operates that

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63 This paragraph draws on Melinda Heap and Jeremy Kingsley, 'The Indonesia–Australia Comprehensive Economic Partnership Agreement: Consequential Legal Document?' (2020) 21(2) *Australian Journal of Asian Law* 131, 136.

64 Muhammad F Muttaqin, 'A Self-Reflective Study: Strategies in Translating Shipbuilding Contracts in PT PAL Indonesia' (Honours Thesis, Universitas Airlangga, 2019).

65 Morris (n 61) 160–4.

66 See John H Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* (Stanford University Press, 2nd ed, 1985).

create significant challenges for translators working between English and Indonesian.

For example, in English, 'common law' can refer to a form of legal system derived from English traditions or the body of laws based on judicial precedent (*stare decisis*). However, Indonesia, as mentioned above, has no system of *stare decisis*, and so no body of 'common law' in that sense. Largely as a result of this, it also has no system of 'tort' law and no body of jurisprudence on 'negligence' (in the common law sense), to give two examples chosen from many. In fact, there is no word for 'tort' and *kelalaian* (negligence, carelessness) does not convey the complex meaning attached to the tort of negligence in common law systems. These terms therefore cannot be translated into Indonesian in a way that preserves their English meaning without a good deal of detailed explanation of a kind that would not usually be appropriate for a commercial contract.

For similar reasons, Indonesia has no equivalent of 'equity', in the sense of a body of judge-made legal principles intended to temper the application of regulations. Although 'equity' in the sense of 'equality' has Indonesian equivalents (*persamaan*, *kesetaran*, *kewajaran*, etc), 'equity' can also mean 'shareholding' or 'financial interest' in English, and it requires a degree of expertise in English language legal terminology for an interpreter to pick the right meaning from these four options.

Likewise, in Indonesian criminal law, the notion of declaring a person a 'suspect' (*terdakwa*) is, in fact, more similar to charging a person in a common law criminal system, although formal 'charging' does not actually happen in the Indonesian system until charges are read out in court.[67] It would be incorrect to describe this process as 'charging a person', but it would also not convey the correct meaning to literally translate it as 'declaring a person suspect'.

These few examples suffice to demonstrate that, unless a highly skilled expert interpreter is used, the likelihood of inaccuracy in contract translation between English and Indonesian is high. As this suggests, it is easy for the intricacies of complex commercial arrangements involving foreign investors to become clouded by the requirement that primary documents be in the Indonesian language.[68]

VII Conclusion and Proposals for Reform

There are two alternative reforms that Indonesian lawmakers could introduce to resolve the problems identified in this article and remove ambiguity about the rules governing the applicable language of Indonesian contracts. To remove the

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67 Butt and Lindsey (n 12) 219.

68 Ashley Lee, 'How to Contract with Indonesian Counterparties' *International Financial Law Review* (Article, 29 April 2015) <https://www.iflr.com/article/b1lsqgx8x7tw8j/how-to-contract-with-indonesian-counterparties>.

uncertainty created by competing lower-level regulations, this should be done by amending the relevant statutes — the 2009 Language and Symbols Law and the 2004 Notaries Law — and not by introducing a regulation, ministerial circular letter or other lower-level instrument of uncertain status and effect. Although the alternative reforms we propose are polar opposites, either would reduce some of the uncertainty about contract-making and enforcement underpinning the commercial risk matrix for foreign investment in Indonesia. They could therefore also help give life to trade agreements intended to attract foreign investors to Indonesia, like the *Indonesia-Australia Comprehensive Economic Partnership Agreement*.[69]

The first option would be to remove flexibility and make it absolutely unambiguous that all commercial agreements involving Indonesians must be in the Indonesian language. A contract or deed could be bilingually drafted but the English (or any other) language version of the contract would only be for the non-Indonesian party's reference and would not be legally binding: only the Indonesian language version would be enforceable in court. This option would deliver certainty about the rules but would still leave foreign investors with the burden of obtaining translations of Indonesian language versions for guidance during negotiations and afterwards, with no certainty that these versions are entirely accurate.

The alternative approach would be to maximise flexibility, by making it clear that choice of language clauses are enforceable in Indonesian courts. The parties to a contract or deed would have unfettered ability to select the official language of a contract and courts would then enforce that choice. Of course, that still leaves unanswered the question of how a court would deal with a foreign language contract, given that few Indonesian judges would be able to fully understand its nuances. Most likely the court would have to rely on competing and disputed translations into Indonesian provided by the parties.

While neither of these reforms fully resolve all the difficulties, and both still leave parties the task of managing the problems of legal translation, either would be an improvement on the current situation. If neither option is adopted, lawyers handling transnational transactions in Indonesia will keep drafting bilingually and will also have to continue to carefully advise their clients that Indonesian courts might only recognise the *bahasa Indonesia* version, regardless of whether it contains an arbitration or choice of language clause.

Avoiding reform would mean that the problems of added expense and complexity in the formation of agreements, and uncertainty of interpretation in their application, will continue to be among the factors contributing to

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[69] *Indonesia-Australia Comprehensive Economic Partnership Agreement*, signed 4 March 2019, [2020] ATS 9 (entered into force 5 July 2020).

Indonesia's poor reputation for contract enforcement[70] — and, therefore, its difficulties in attracting the foreign capital it needs to support economic growth and, in particular, service its pressing infrastructure needs.[71]

[70] See Ross H McLeod, 'Doing Business in Indonesia: Legal and Bureaucratic Constraints' (Working Paper, Research School of Pacific and Asian Studies — Australian National University, October 2006) <https://devpolicy.crawford.anu.edu.au/acde/publications/publish/papers/wp2006/wp-econ-2006-12.pdf>; Butt and Lindsey (n 12) 312.

[71] Heap and Kingsley (n 63) 4.

SHOULD JUDGES JOIN IN? A NORMATIVE STUDY OF JOINT JUDGMENTS IN SELECTED AUSTRALIAN INTERMEDIATE APPELLATE COURTS

JAMES ANTHONY JOHN DUNN *

In the light of both the Chief Justice of the High Court of Australia Susan Kiefel's extra-judicial comments on the 'institutional responsibility' of appellate courts to decide cases by joint judgment where possible, and literature that indicates an increase in the expression of reasons through joint judgment in the High Court of Australia since the beginning of former Chief Justice Robert French's tenure, there has been much debate on the desirability of joint judgments. In this article, I present empirical information on selected New South Wales and federal intermediate appellate court judgment writing practices from 2009 to 2019. I do so to address former President of the New South Wales Court of Appeal Margaret Beazley's 'dalliance on a curiosity'[1] concerning both joint judgment trends and whether Australian intermediate appellate courts should, given the example set by certain Justices of the High Court, preference joined reasons to separate individual concurrences.

I INTRODUCTION

In 2014, Justice Susan Kiefel of the High Court of Australia ('HCA') wrote that '[i]t is the institutional responsibility of the members of a [multi-member] court' to 'reduce the number of judgments in any matter' and to strive to provide joint judgment.[2] Shortly after her elevation to Chief Justice of the HCA in 2017, her Honour again emphasised the precedential and institutional benefit of joint judgments in encapsulating 'the voice of the Court' rather than 'the sound of self'

* BCom, LLB (Hons 1) (UNSW). My gratitude goes to Professor Andrew Lynch for his wisdom, insightful guidance, and excellent supervision of this research whilst then Acting Dean of the University of New South Wales Faculty of Law. I wish to thank my friend Andrei Smolnikov for his support and encouragement, and the anonymous peer reviewers for their comments. Any errors are my own.

1 President Margaret Beazley, 'Judgment Writing in Final and Intermediate Courts of Appeal: "A Dalliance on a Curiosity"' (2015) 27(9) *Judicial Officers' Bulletin* 79.

2 Justice Susan Kiefel, 'The Individual Judge' (2014) 88(8) *Australian Law Journal* 554, 560 ('The Individual Judge').

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through the alternate practice of writing separate concurring reasons.[3] Chief Justice Kiefel's push towards a greater use of joint judgments, whereby some or all judges in a matter ascribe their names equally to a set of reasons,[4] builds upon that of her immediate predecessor, Chief Justice Robert French, who emphasised the 'very important place for joint judgments' in 'authoritatively and clearly stat[ing] the law'.[5]

Lynch and Williams' empirical studies of HCA judgment writing practices highlight a trend towards greater joined expression under Chief Justice Kiefel and Chief Justice French's leadership. Lynch acknowledges that the HCA is not immune from 'the tension between judicial emphasis on the institution on one hand and the individual on the other in the process of decision-making'.[6] However, Lynch and Williams' data, which captures information on all HCA matters on an annual basis and has been collected since 2003,[7] illustrates that the Kiefel Court clearly 'striv[es] for consensus … in order to meet the institutional aspirations' to expand joint judgment usage.[8] While HCA unanimity rates

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3 Chief Justice Susan Kiefel, 'Judicial Methods in the 21st Century' (Speech, Supreme Court of New South Wales Oration, 16 March 2017) 8–9 <https://cdn.hcourt.gov.au/assets/publications/speeches/current-justices/kiefelj/KiefelCJ16Mar2017.pdf> ('Judicial Methods in the 21st Century').

4 The scope of 'joint judgment' is contested. One view, and the view to which this article proceeds under, is that a joint judgment can describe any single judgment with two or more justices' names ascribed to it equally, including unanimous joint judgments (or judgments of the Court). See, eg, Andisheh Partovi et al, 'Addressing "Loss of Identity" in the Joint Judgment: Searching for "The Individual Judge" in the Joint Judgments of the Mason Court' (2017) 40(2) *University of New South Wales Law Journal* 670, 692 where the authors use the term 'unanimous joint judgment'; Michael Coper, 'Concurring Judgments' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 129, 129 ('Concurring Judgments') where Coper defines joint judgments as including judgments 'of the Court as a whole or of a majority'; Damien Carrick, 'Retiring Chief Justice Robert French', *The Law Report* (ABC Radio National, 13 December 2016) <https://www.abc.net.au/radionational/programs/lawreport/retiring-chief-justice-robert-french/8105828> where Chief Justice Robert French said 'then that becomes a joint judgment of the two of them. And sometimes you'll get a cascade of those concurrences, so that you'll end up with a joint judgment sometimes of everybody'. See generally Justice Patrick Keane, 'The Idea of the Professional Judge: The Challenges of Communication' (Speech, Judicial Conference of Australia Colloquium, 11 October 2014) <https://www.hcourt.gov.au/assets/publications/speeches/current-justices/keanej/The_Idea_of_the_Professional_Judge_-_JCA_Colloquium_Noosa_October_2014_-_Justice_P_A_Keane.pdf>. The other view is that of Chief Justice Kiefel. Her Honour would only call a judgment a joint judgment if some justices agree, and would not consider judgments of the Court, where all justices agree, as joint judgments. See ibid 6. See also Justice Susan Kiefel, 'Reasons for Judgment: Objects and Observations' (Speech, Sir Harry Gibbs Law Dinner, 18 May 2012) 4 <https://www.hcourt.gov.au/assets/publications/speeches/current-justices/kiefelj/kiefelj-2012-05-18.pdf>.

5 Carrick (n 4).

6 Andrew Lynch, 'The High Court on Constitutional Law: The 2019 Statistics' (2020) 43(4) *University of New South Wales Law Journal* 1226, 1239 ('2019 Statistics').

7 For their first article in their annual series, see Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2003 Statistics' (2004) 27(1) *University of New South Wales Law Journal* 88.

8 Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2018 Statistics' (2019) 42(4) *University of New South Wales Law Journal* 1443, 1455 ('2018 Statistics').

fluctuate over time,[9] possibly due to the inherent difficulty of consistently achieving complete consensus, Lynch and Williams' statistical information ultimately demonstrates a 'trend towards an "institutional voice"',[10] underpinned by the very high prevalence of judges joining together in plurality in situations where unanimity is not possible.

Former President of the New South Wales Court of Appeal ('NSWCA') Margaret Beazley described the HCA's movement towards joint judgments as part of a 'discernible shift in [its] writing process'.[11] Indeed, Smyth and Narayan observed that 'separate and dissenting opinions have been a fairly regular feature of the [High] Court's decision making' from 1906 to their paper's time of publication in 2004, with joint judgments having a sporadic and inconsistent role in court practice throughout that period.[12] However, President Beazley asked whether the HCA's trend, 'assuming it is a trend', towards increased joint expression has normative 'implications' for intermediate appellate courts. In particular, she questioned whether intermediate appellate court judgment writing should remain more 'discursive and detailed' through, inter alia, a practice of writing separate concurring judgments in multi-member matters, or whether courts of appeal should adopt a more minimalist approach through a greater usage of joint judgments.[13]

I analyse joint judgment prevalence and desirability in the NSWCA, the New South Wales Court of Criminal Appeal ('NSWCCA') and the Federal Court of Australia – Full Court ('FCAFC'). By doing so, I aim to respond to President Beazley's 'dalliance on a curiosity'[14] of whether the various mid-level courts of appeal are, like the HCA, trending toward a greater usage of joint judgments, and whether there is normative evidence to suggest that intermediate appellate courts should preference joint judgments over separate concurring reasons.

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9 See, eg, Lynch, '2019 Statistics' (n 6) 1238, where unanimity in 2019 was comparatively 'very scarce' to prior years.

10 Lynch and Williams, '2018 Statistics' (n 8) 1454. See also Joe McIntyre and Jordan Tutton, 'Continuity or Change? Judicial Behaviour and Judgment Writing in the High Court of Australia 2000-2018' (Paper, 16 December 2019) 34–5, 41 <https://ssrn.com/abstract=3676042>, where the authors observe a 'demonstrable shift in the decision-making patterns' of the French and Kiefel Courts to favour joint judgments.

11 Beazley (n 1) 79, where her Honour observed that HCA writing has shifted away from an era of '5–7 separate judgments' per matter to a 'minimalist, largely propositional style of reasons, often with a plurality judgment'.

12 Russell Smyth and Paresh Kumar Narayan, 'Hail to the Chief! Leadership and Structural Change in the Level of Consensus on the High Court of Australia' (2004) 1(2) *Journal of Empirical Legal Studies* 399, 404.

13 Beazley (n 1) 79.

14 Ibid.

In this article, I first explore the 'small explosion in the literature'[15] on joint judgments in the HCA and the conversely scant commentary on intermediate appellate courts. I then conduct an original empirical study of NSWCA, NSWCCA, and FCAFC judgment writing from 2009 to 2019 inclusive. In doing so, I address a deficiency in academic knowledge on the contemporary judgment writing practices of these courts. To inform later normative analysis, I provide detailed information to highlight trends and demonstrate varying or similar writing practices in these courts. I finally evaluate whether Chief Justice Kiefel's joint judgments as an 'institutional responsibility'[16] proposition is similarly congruous with intermediate appellate court functions and current practice. To do so, I offer my own judgment on whether judges in courts such as the NSWCA, NSWCCA, and FCAFC should prefer joint judgments to separate concurring reasons.

II Background

In Australia, there is a general constitutional requirement for those exercising judicial power to enter reasons for judgment.[17] Precisely *how* judicial officers express their reasons, however, is discretionary. In the case of agreement on a multi-member court, judges might choose to join in with similarly minded colleagues and draft a joint judgment. Joint judgments appear in two forms. The first is a unanimous joint judgment (or judgment of the Court) where all justices agree and subscribe their names to a single set of reasons. The second is a plurality judgment where some justices agree and place their names to a set of reasons.[18] For example, in a three-member court a joint judgment may appear as:

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15 Andrew Lynch, 'Keep Your Distance: Independence, Individualism and Decision-Making on Multi-Member Courts' in Rebecca Ananian-Welsh and Jonathan Crowe (eds), *Judicial Independence in Australia: Contemporary Challenges, Future Directions* (The Federation Press, 2016) 156, 158 ('Keep Your Distance').

16 Kiefel, 'The Individual Judge' (n 2) 560.

17 See generally Luke Beck, 'The Constitutional Duty to Give Reasons for Judicial Decisions' (2017) 40(3) *University of New South Wales Law Journal* 923.

18 Plurality is a nebulous term. In the United States, a plurality is 'the existence of a majority agreement' on a 'result' without a majority agreement on the 'reasons' or 'underlying rationale that supports' the result: Ryan C Williams, 'Questioning *Marks*: Plurality Decisions and Precedential Constraint' (2017) 69(3) *Stanford Law Review* 795, 827. Australia 'has not adopted' the United States definition and instead 'has developed its own use': David Ash, 'The Vogue Word "Plurality"' (Summer, 2018) *Bar News: The Journal of the NSW Bar Association* 56, 56. In Australia, a "'judgment of the plurality'" is when 'a number' of, but not all, justices agree and write together: Kiefel, 'Judicial Methods in the 21st Century' (n 3) 6. For example, on a seven-member court, a jointly written set of reasons with two, three, four, five, or six justices' names placed on it is a plurality judgment, and in a three-member court, a jointly written set of reasons with two justices' names placed on it is a plurality judgment. Ash identified, at 62, two relevant HCA uses of the term: in *Commissioner of Taxation v Jayasinghe* (2017) 260 CLR 400 (five justices presiding) where Gageler J agreed with the 'orders proposed by the plurality' of Kiefel CJ, Keane, Gordon and Edelman JJ, and

> **The Court** (*a unanimous joint judgment or a judgment of the Court*)
> Reasons for judgment.

Or:

> **Judge A and Judge B** (*a plurality judgment*)
> Reasons for judgment.
>
> **Judge C** (*a separate concurring judgment*)
> I agree with the judgment of Judge A and Judge B.

Judges may also opt to write separate individual judgments, which appear as:

> **Judge A**
> Reasons for judgment.
>
> **Judge B**
> Reasons for judgment.
>
> **Judge C**
> Reasons for judgment.

As former President of the Supreme Court of the United Kingdom David Neuberger observed, the choice for a judge to write jointly or separately is far from clear:

> There is much debate around the issue … At one extreme is the [European Union], Luxembourg, Court civilian law model, where the court must produce a unanimous,

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in *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215 (six justices presiding) where French CJ agreed with 'the orders proposed in the plurality judgment of Gummow, Hayne and Heydon JJ'. In Australia, there can be more than one plurality judgment in a matter. See *Darby v R* [2016] NSWCCA 164 where Rothman J, at [143], cited 'the plurality' of Gleeson CJ, Hayne and Callinan JJ and then at [144] cited 'the other plurality judgment' of McHugh, Gummow and Kirby JJ from *MFA v The Queen* (2002) 213 CLR 606 (six justices presiding). Intermediate appellate courts have also adopted the term 'plurality judgment'. See *Jamsek v ZG Operations Australia Pty Ltd* [2020] FCAFC 119 where Anderson J, at [183], cited the 'plurality judgment' of North and Bromberg JJ in *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* (2015) 228 FCR 346 (three justices presiding). Lower courts have applied the plurality judgments of intermediate appellate courts. See *Dincel Construction System Pty Limited v AFS Systems Pty Ltd (No 2)* [2017] FCA 791 where Nicholas J at [60] noted the 'plurality judgment' of Besanko, Foster, Nicholas and Yates JJ in the FCAFC in *AstraZeneca AB v Apotex Pty Ltd* (2014) 226 FCR 324 (five justices presiding). See also *Imagatec Pty Ltd v Gosley-Fuller* [2012] QDC 15 where Dorney DCJ at [25] applied the 'plurality judgment of Warnick and Boland JJ' in the Family Court of Australia – Full Court in *Puddy & Grossvard and Anor* [2010] FLC 93-432 (three justices presiding).

> somewhat anonymous, judgment … At the other extreme is the traditional UK House of Lords model … with the multiple, idiosyncratic, judgments …[19]

Underpinning the desirability of joint judgments is a broader schismatic question of judicial independence and collective responsibility. On the one hand, individualism would champion each judge's unique voice, and would offer scepticism over the anonymising and minimalist effects of joint judgments. Institutionalism, meanwhile, would prefer a unified court where possible. It would view joint judgments as preferable by instilling both authority to, and clarity within, a court's ratio decidendi, and criticise separate concurring judgments as 'unnecessary gloss'.[20]

Historical HCA practice reflects this dichotomy, fluctuating towards and away from joint judgments. However, contemporary HCA practice appears to have shifted towards consistent use of the style. What is much less clear is the extent to which Australian intermediate appellate courts draft, and broadly accept, joint judgments.

A *High Court of Australia*

There is conflicting literature on early HCA judgment writing practices. On the one hand, Bagaric and McConvill's empirical study found that, from 1954 to 2003, 'certainly the portion of separate majority decisions had not increased' over time, and that HCA judgments were 'not in 2003 more fragmented' by separate concurring opinion 'than in other years'.[21] The authors answered their hypothesis that the HCA had an 'increasing tendency to deliver multiple majority judgments'[22] in the negative, suggesting that joint judgments have been consistently well-utilised in HCA practice. However, as the authors acknowledged, their results are 'of course not conclusive'[23] as their methodology examined HCA judgments in 'only [the] four years'[24] of 1954, 1978, 1993, and 2003.[25] If the authors completed a population study of all judgments in between two dates, or gathered an appropriately larger sample while using systematic or stratified statistical techniques, their trend identification could be more definitive.

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19 Baron David Neuberger, 'Sausages and the Judicial Process: The Limits of Transparency' (Speech, Annual Conference of the Supreme Court of New South Wales, 1 August 2014) [31] <https://www.supremecourt.uk/docs/speech-140801.pdf> ('Sausages and the Judicial Process').

20 Coper, 'Concurring Judgments' (n 4) 129.

21 Mirko Bagaric and James McConvill, 'The High Court and the Utility of Multiple Judgments' (2005) 1(1) *High Court Quarterly Review* 13, 28.

22 Ibid 13.

23 Ibid 28.

24 Ibid.

25 Ibid 14–15.

Other literature indicates that HCA use of joint judgments ebbed and waned[26] and widely fluctuated[27] for most of the 20th century. In their empirical study of HCA judgment writing practices, Groves and Smyth observed 'historical highs' in the HCA's joint judgment use 'in the early 1920s, in the 1950s, and 1990s', and 'historical lows in the late 1930s to mid-1940s and in the 1970s'.[28] They observed that the extent to which the HCA produced joint judgments is somewhat correlated to a Chief Justice's preference for institutionalism, and also a Chief Justice's ability 'to build a more collegial atmosphere'.[29] Consistently with Groves and Smyth's study, Sir Anthony Mason observed that joint judgments were prevalent under Chief Justices Knox and Dixon, and less prevalent under Chief Justices Griffith, Isaacs, Duffy, Latham, Barwick, and Gibbs.[30]

Literature indicates that the Mason Court produced a comparatively higher proportion of joint judgments than earlier courts.[31] With this in mind, it is unsurprising that Sir Anthony himself expressed an institutionalist view, stating that 'it is the Court, rather than the individual Justices, that decides the case and declares the law'.[32] He viewed it as the 'strong responsibility' of the Chief Justice and all puisne justices to 'explore the possibility of delivering' a joint judgment.[33] While 'the move towards joint judgments gained some momentum' under Mason's leadership, it was 'not to the extent that we had hoped', with joint judgments remaining as an underutilised tool in his Court's judicial inventory.[34] Indeed, President Beazley characterises the Mason era as a time of '5–7 separate judgments of 100 plus pages'.[35] Sir Anthony attributed the persistent judgment fragmentation in his Court to, inter alia, the fundamental 'right of a Justice to deliver his own judgment in order to do justice to his own independent and impartial opinion'.[36] He also attributed his Court's frequently separated judgments to 'deep-seated divisions within the Court' and the absence of a collective desire to compromise, and in the 'lack of consensus as to the role of the

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26 Partovi et al (n 4) 703. See also Graeme Orr, 'Verbosity and Richness: Current Trends in the Craft of the High Court' (1998) 6(3) *Torts Law Journal* 291, 292.

27 Matthew Groves and Russell Smyth, 'A Century of Judicial Style: Changing Patterns in Judgment Writing on the High Court 1903–2001' (2004) 32(2) *Federal Law Review* 255, 266–7.

28 Ibid.

29 Ibid 268.

30 Sir Anthony Mason, 'The High Court of Australia: Reflections on Judges and Judgments' (2013) 16 *Southern Cross University Law Review* 3, 3–9 ('Reflections'). On Griffith CJ, cf Smyth and Narayan (n 12) 404 where '[u]nder the leadership of the High Court's first Chief Justice, Griffith (1903–1919), between 1903 and 1906, the High Court experimented with a single opinion of the Court'.

31 Partovi et al (n 4) 671.

32 Sir Anthony Mason, 'Chief Justice, Role of' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 90, 91.

33 Ibid.

34 Mason, 'Reflections' (n 30) 9.

35 Beazley (n 1) 79.

36 Mason, 'Reflections' (n 30) 10.

Court'.[37] His reflection suggests that joint reasons require active judicial collaboration, and that such judgments are neither precipitous nor unexpected.

Empirical evidence indicates that Justices on the Brennan Court had a somewhat lower tendency to join in.[38] The Gleeson Court, meanwhile, 'curiously manage[d] to combine strong levels of agreement with the presence of significant individualism from several of its members'.[39] Nevertheless, the Gleeson Court still experienced some 'remarkable' division in the writing of its judgments,[40] especially in its early years.[41] As a pertinent example, Justice Michael Kirby, a 'determined individualist' who presided on both the Brennan and Gleeson Courts,[42] pushed against joint judgments on the grounds that they can cloud judicial function, stating that 'honesty and transparency encourage and reinforce the proper discharge of the judicial function. Where necessary this requires the provision of separate reasons'.[43]

Similarly, Justice Dyson Heydon, who sat on the Gleeson Court, comprehensively rejected joint judgments and any collaboration, stating that the practice of joining in completely undermines judicial independence.[44] Despite routinely participating in joint judgments early in his HCA appointment,[45] Justice Heydon later took the view that to join in reasons that were authored primarily by another suggested 'that the judicial process has been skimped or nonchalant or "perfunctory"', and that joining in demonstrates 'judicial herd behaviour'.[46] Justice Heydon, quoting Roderick Munday, submitted that separate reasons instil 'humanity' into the court's overall judgment, and provide necessary evidence 'that each member of the court has fully met [his or her judicial] responsibilities and given the arguments presented scrupulous attention'.[47]

The contemporary HCA offers a dramatically stronger acceptance of joint judgments.[48] In 2014, Justice Susan Kiefel attempted to rebut Heydon by emphasising that joint judgments assist in achieving 'clarity, certainty and

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37 Ibid.

38 Andrew Lynch, 'Does the High Court Disagree More Often in Constitutional Cases? A Statistical Study of Judgment Delivery 1981–2003' (2005) 33(3) *Federal Law Review* 485, 508–10.

39 Ibid 513.

40 Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2007 Statistics' (2008) 31(1) *University of New South Wales Law Journal* 238, 240.

41 Beazley (n 1) 79.

42 Andrew Lynch, 'The Gleeson Court on Constitutional Law: An Empirical Analysis of Its First Five Years' (2003) 26(1) *University of New South Wales Law Journal* 32, 59. See also Orr (n 26) 299–301.

43 Justice Michael Kirby, 'Judicial Dissent: Common Law and Civil Law Traditions' (Speech, Law Quarterly Review, 2007) 39–40 (citations omitted) <https://cdn.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_06.pdf>.

44 Justice Dyson Heydon, 'Threats to Judicial Independence: The Enemy Within' (2013) 129 (April) *Law Quarterly Review* 205, 221–2.

45 Lynch, 'Keep Your Distance' (n 15) 161.

46 Heydon (n 44) 215, 217 (citations omitted).

47 Ibid 207, quoting Roderick Munday, 'Judicial Configurations: Permutations of the Court and Properties of Judgment' (2002) 61(3) *Cambridge Law Journal* 612, 634.

48 Kiefel, 'The Individual Judge' (n 2) 557; Kiefel, 'Judicial Methods in the 21st Century' (n 3) 11.

timeliness'[49] and a 'proper understanding of what the court is saying'.[50] Justice Kiefel encouraged the 'discipline' in tempering individualism and working collegially toward an 'authoritative voice' of the court, especially in matters of 'considerable controversy'.[51] Interestingly, Justice Kiefel stated that modern HCA practice is for a single judge to write the leading judgment, to which other justices then join should they concur.[52] The general lack of a substantively collaborative writing effort could generate some scepticism about whether joint judgments crafted under Justice Kiefel's method are actually reflective of each individual judge's true views and understanding, as a 'joint judgment does not necessarily imply joint authorship'.[53]

Justice Patrick Keane and Justice Virginia Bell agree with Justice Kiefel's reasons for joint judgments. Justice Keane reminded his colleagues at a judicial colloquium that '[t]he administration of justice is not the work of individual judges … [but] of an institution, and we have responsibilities for that institution'.[54] He noted that the HCA's trend towards joint judgments 'is not a bad thing', as joined reasons are 'inherently more authoritative' and better 'fulfil [the court's] duty to the development of the law, and their duty to society'.[55] Justice Bell described joint judgments as a 'public service' as they assist legal practitioners, law students, and lower courts in identifying with confidence what the law is.[56] Her statements that 'judges have an institutional responsibility with respect to judgment writing that outweighs self-expression' and '[i]f the price of certainty and clarity is the loss of the individual judge's "voice", I suspect that few outside the Academy would count that as a bad thing'[57] strongly demonstrate the apparent pendulum shift towards joint judgments and collectivism in the Kiefel Court. Described as a 'troika',[58] Chief Justice Kiefel, Justice Bell and Justice Keane adopt a true institutionalist mindset, viewing judgments as a product *of the court* rather than of individual judges.

While the Kiefel Court has normalised joint judgments, Chief Justice Kiefel prudently observes that '[o]ne cannot say that this method is here to stay' and

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49 Kiefel, 'The Individual Judge' (n 2) 560.
50 Ibid 556.
51 Ibid 560.
52 Ibid 558–9; Kiefel, 'Judicial Methods in the 21st Century' (n 3) 4. See Michael Pelly, 'High Court Troika "The Most Powerful Bloc of Judges in History"', *The Australian Financial Review* (online, 9 August 2018) <https://www.afr.com/companies/professional-services/high-court-troika-the-most-powerful-bloc-of-judges-in-history-20180731-h13cmt>. See also *Calidad Pty Ltd v Seiko Epson Corporation* (2020) 94 ALJR 1044, 1068 [112] (Gageler J) ('*Calidad*').
53 *Calidad* (n 52) [112] (Gageler J).
54 Keane (n 4) 13.
55 Ibid 15–16.
56 Justice Virginia Bell, 'Examining the Judge' (Speech, Launch of Issue 40(2) of the *University of New South Wales Law Journal*, 29 May 2017) 2 <https://cdn.hcourt.gov.au/assets/publications/speeches/current-justices/bellj/bellj29May2017.pdf.pdf>.
57 Ibid 2–4 (citations omitted).
58 Pelly (n 52).

that much depends on the 'continued acceptance' of joining in.[59] Indeed, the costs of reduced opinion diversity and pursuing '[p]roductivity over prose'[60] include a greater tendency for 'very dry writing' and minimalist reasoning in order to reach compromise and consensus.[61] With the departure of Justice Bell, a key proponent of joint judgments, and also Justice Geoffrey Nettle, the broad acceptance of joint judgments in the HCA was set to change if individualist judges were appointed. This is especially so with Justice Keane set to depart the HCA in 2022. Consequently, with the appointments to the HCA of former Federal Court Justice Jacqueline Gleeson and Justice Simon Steward, it is timely to ascertain the institutional practices of intermediate appellate courts such as the FCAFC. If judges appearing in the FCAFC consistently express their reasons through joint judgment, it seems likely that those judges would continue to operate with an institutionalist perspective if appointed to the HCA. If this is so, Chief Justice Kiefel's wishes for continued acceptance of joint judgments will be more likely realised with the appointment of Justices Gleeson and Steward.

B *Intermediate Appellate Courts*

One empirical study indirectly discussing joint judgment prevalence in Australian intermediate appellate courts was a 100-year review of the Supreme Court of Victoria's ('VSC') citation practices.[62] The study found that 18.1 per cent of judgments in the VSC were joint judgments in 1975, but in 2005 the joint judgment proportion reduced to 5.7 per cent, indicating an increased preference for individualised reasons over time.[63] The authors suggest that other intermediate appellate courts would have similar judgment writing practices to the VSC because they all 'share many of the same characteristics' and fundamental functions.[64] The study ultimately provides some limited evidence to suggest that Victoria's superior court had a historically individualist approach to judgment writing.

Providing a more recent contrast to these empirical findings, Justice Robert Redlich states that the Victorian Court of Appeal ('VCA') prefers joint judgments.[65] He identifies that the VCA's contemporary practice of using joint judgments is

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59 Kiefel, 'Judicial Methods in the 21st Century' (n 3) 11.

60 Katie Walsh, 'Productivity Over Prose for High Court in 21st Century: Chief Justice Susan Kiefel', *The Australian Financial Review* (online, 16 March 2017) <https://www.afr.com/politics/productivity-over-prose-for-high-court-in-21st-century-chief-justice-susan-kiefel-20170315-guyz3m>.

61 Pelly (n 52). See also Beazley (n 1) 79.

62 Dietrich Fausten, Ingrid Nielsen and Russell Smyth, 'A Century of Citation Practice on the Supreme Court of Victoria' (2007) 31(3) *Melbourne University Law Review* 733.

63 Ibid 745.

64 Ibid 737.

65 Justice Robert Redlich, '20th Anniversary of the Court of Appeal' (Speech, Court of Appeal of the Supreme Court of Victoria, 20 August 2015) 2–3 <https://www.supremecourt.vic.gov.au/sites/default/files/assets/2017/09/c1/0bcfb7eb7/coa%2B20th%2Banniversary%2Bspeech.pdf>.

indicative of a 'strong collegiate spirit' within the court and, quoting Sir Raymond Evershed, demonstrates 'combined judicial operation' where VCA justices 'work truly together'.[66] Justice Redlich submits that joint judgments 'generally enhance' the overall quality of the VCA's reasons and enable the court to provide better guidance with 'greater certainty and consistency'.[67] His Honour draws on anecdotal evidence, which indicates a significant shift in Victorian appellate practice towards institutionalism expressed through greater joint judgment use. The degree, intensity, and general desirability of this shift, though, remains unclear.

The reflections of senior members of the NSW judiciary suggest that NSW courts' current approaches to judgment writing differs from Justice Redlich's account of Victorian practice in that joint judgments are not widely prevalent in the NSW appellate sphere. Sir Anthony Mason, for example, observed that NSWCA practice, when he was a Judge of Appeal (1969 to 1972), was to 'deliver separate individual judgments'.[68] President Beazley believes that current NSWCA and other intermediate appellate court practice is much less 'propositional' or minimalist when compared to HCA writing.[69] NSW Chief Justice Thomas Bathurst has stated that judgment '[c]larity is undoubtedly greatly assisted by brevity … but, like all virtues, [brevity] should not be taken to excess'.[70] His Honour makes no direct argument for joint judgments, but does indirectly point to their potential utility, stating that NSW courts must push against 'over-complication'[71] and 'inaccessible' judgments that 'lack clarity'.[72]

Meanwhile, extra-judicial writing points to some joint judgment use in the Federal Court. Justice Debbie Mortimer, a current Federal Court judge, argued that '[s]eparate appellate judgments can invite a lack of clarity', while joint judgments, in 'putting aside judicial ego', enhance judgment '[c]larity, accessibility and certainty'.[73] Strikingly, her Honour submits that long and complex reasons and multiple judgments 'obscure the exercise of judicial power, rather than reveal it'.[74] Justice Peter Heerey, using simple cost-benefit analysis, argues that the benefits of joint judgments in speeding up judicial deliberation far

66 Ibid 3.
67 Ibid.
68 Mason, 'Reflections' (n 30) 7.
69 Beazley (n 1) 82.
70 Chief Justice Thomas Bathurst, 'Writing Judgments with the Parties in Mind' (Keynote Address, National Judicial College of Australia 'Writing Better Judgments Program', 3 April 2017) [31]. <https://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2017%20Speeches/Bathurst%20CJ/Bathurst_20170403.pdf>.
71 Ibid [28].
72 Ibid [26].
73 Justice Debbie Mortimer, 'Some Thoughts on Writing Judgments In, and for, Contemporary Australia' (2018) 42(1) *Melbourne University Law Review* 274, 290.
74 Ibid 296.

outweigh any perceivable cost.[75] Justice Heerey believes that the Federal Court should, and generally does, eschew multiple separate judgments because they severely reduce clarity in developing the law, delay cases, and waste resources.[76] Nevertheless, in contrast, Justice Katrina Banks-Smith argues that judges are 'fully entitled to add their own colour'. This proposition resonates with President Beazley's comments, which question the minimalist features of joint judgments, and could indicate some continued use of additional separate reasoning in the Federal Court.[77]

Overshadowing these judicial comments is an optional 2017 'Judgment Writing Protocol for Intermediate Appellate Court Judges'.[78] While the Protocol requests that judges reject '[u]nnecessarily long' judgments,[79] the Protocol states that any rule requiring courts to preference joint judgments is 'not suitable'.[80] It nevertheless encourages the '[j]oint preparation of opinions' in 'difficult or contentious appeals, where the court has conflicting precedents, and where the reasons are clearly divisible'.[81] Importantly, this Protocol indicates that there might not be uniformity or even similarity in how Commonwealth, state, and territory intermediate courts of appeal approach the question of joint judgment desirability.

A shortage of empirical and, indeed, anecdotal evidence on intermediate appellate court writing practice provides a fragmented and limited picture of joint judgment prevalence and desirability in these courts. While the HCA has shifted to a practice of joined expression where possible, reflecting the emphasis under Chief Justices French and Kiefel for a more institutional approach, it is largely unclear whether intermediate appellate courts adopt a broadly similar or contrary approach, and whether this differs across jurisdictional setting.

III Profile of Judgment Writing Practices

To address the deficit of empirical information on intermediate appellate court judgment writing practices, I completed a statistical study involving all

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75 Peter Heerey, 'The Judicial Herd: Seduced by Suave Glittering Phrases?' (2013) 87(7) *Australian Law Journal* 460.

76 Ibid 463.

77 Justice Katrina Banks-Smith, 'More Than Just Precedent: Perspectives on Judgment Writing' (Speech, The Honourable David Malcolm Annual Memorial Lecture, Notre Dame University School of Law, 10 October 2019) [41] <https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-banks-smith/banks-smith-j-20191009>.

78 'Judgment Writing Protocol for Intermediate Appellate Court Judges', *National Judicial College of Australia*, (Web Page) <https://njca.com.au/wp-content/uploads/2017/12/Appeal-Court-Judgment-Writing-Protocol.pdf>.

79 Ibid 1 [7].

80 Ibid 4 [21].

81 Ibid 4 [21].

judgments entered by the NSWCA, NSWCCA, and FCAFC in each calendar year from 2009 to 2019 inclusive.

Empirically ascertaining the historical decision-making practices of courts provides an informative context for, as an example, normative analysis of joint judgments. By profiling how multi-member courts enter reasons for judgment over time, the Academy may better understand the tendencies and movements in how judges approach their principal craft of judgment writing.[82]

A total of 10,144 judgments were delivered between the three intermediate appellate courts from 2009 to 2019: 4,455 from the NSWCA, 3,533 from the NSWCCA, and 2,156 from the FCAFC. For NSW courts, judgments were collected from NSW Caselaw,[83] while FCAFC judgments were sourced from the Federal Court website's 'Judgments Search' function in its Digital Law Library.[84]

In line with best empirical practice and to ensure that 'the reader [can] assess for himself the accuracy and value of the information conveyed',[85] a live hyperlink to the Excel spreadsheets containing the raw data for each of the 10,144 judgments screened is available in this article's Appendix. A detailed guide on how to read the raw data is contained in the first tab of each spreadsheet.

A *Empirical Methodology*

The calendar years 2009 to 2019 inclusive were chosen to approximately coincide with the French and Kiefel Courts. Given the resources required to manually discern and process every case number for each year, I decided to focus on three intermediate appellate courts: the NSWCA, NSWCCA, and FCAFC. NSW was selected as a geographic jurisdiction as this study is a response to former NSWCA President Beazley's article. The FCAFC was chosen to enable some comparative analysis of a court with co-ordinate jurisdiction and to provide a more comprehensive picture of the varying or similar practices and approaches used by intermediate appellate courts.

The study's first step was to distinguish all medium neutral citation case numbers for one calendar year into an 'eligible population' and an 'excluded population'.

As this study is interested only in judgment writing practices in multi-member matters, and because joint judgments can only occur where two or more judges preside, case numbers where only a single judge presided were placed in

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82 See, eg, Andrew Lynch, 'Dissent: Towards a Methodology for Measuring Judicial Disagreement in the High Court of Australia' (2002) 24(4) *Sydney Law Review* 470, 472–3.

83 'Advanced Search', *New South Wales Caselaw* (Web Page, 8 September 2021) <https://www.caselaw.nsw.gov.au/search/advanced>.

84 'Digital Law Library: Judgments Search', *Federal Court of Australia* (Web Page, 2021) <https://www.fedcourt.gov.au/digital-law-library/judgments/search>.

85 Louis Henkin, 'The Supreme Court: 1967 Term' (1968) 82(1) *Harvard Law Review* 63, 302.

the 'excluded population'. Case numbers where two or more judges entered reasons were placed in the 'eligible population', except in two instances.

The first instance was when the case number was not in use at the time of examination. For example, the case number '[2019] NSWCCA 34' was not used by that Court, and no reasons were entered under that case number. Consequently, it was placed in the 'excluded population'.

The second instance was when the case number was restricted at the time of examination. For example, the case number '[2019] NSWCCA 6' was restricted by that court, and the judgment text is completely redacted. Because the writing practices used within that judgment cannot be ascertained, it was placed in the 'excluded population'.

The FCAFC had no restricted cases listed from 2009 to 2019, and the NSWCA had only three restricted cases in 2016 (0.91 per cent of total cases for that year) and none in other years. Restricted cases in the NSWCCA ranged from 0 in 2010 to a high of 13 cases in 2019 (4.08 per cent of total cases for that year).

The study's second step was to capture information on how judges in 'eligible population' case numbers for the calendar year entered their reasons. Data on the proportion of the reasons that were in the form of the following categories was manually recorded:

- Joint judgment (two or more judges placing their names, equally and jointly, to a set of reasons. This includes any joint reasons in dissent, or are the leading judgment and provide the orders of the court, or that are in concurrence through the form of 'we agree' or through additional or different reasons. It also includes unanimous reasons if all judges ascribe their name to the reasons equally).
- Single leading judgment (one judge's set of reasons that contain the orders that a majority of other judges concur with separately. If a joint judgment contained the orders of the court, it would not be placed into this category. Rather, it would be categorised as a joint judgment).
- Concurrence with the leading judgment with a separate 'I agree' statement, or words to that effect, including brief comments or observations that are non-substantive.
- Concurrence with the leading judgment, but with additional or different reasons (this category captures any separate concurring reasons that are substantive).
- Standalone dissent (individual reasons that provide different orders to the leading judgment).

Differentiating between a concurrence with a separate 'I agree' statement or words to that effect, and a concurrence but with additional or different reasons, could from time-to-time involve discretion. For example, a set of reasons that

states agreement with the leading judge but then offers a brief comment on how interesting the matter was would be categorised as a concurrence with the leading judgment with a separate 'I agree' statement or words to that effect, as the very short remark on the interesting nature of the case is non-substantive reasoning.

To illustrate the data categorisation process, the case number '[2019] NSWCA 243' had five judges presiding. Bell P provided an individual judgment that contained the Court's orders, so his Honour's judgment was categorised as the 'single leading judgment'. Meagher and Payne JJ entered into a joint judgment, in which they agreed with Bell P's orders and his Honour's reasons, but added additional remarks. Meagher and Payne JJ's judgment was categorised as a 'joint judgment'. Macfarlan J separately wrote the following reasons: 'I agree with Bell P'. His judgment was categorised as a concurrence with the leading judgment with 'I agree'. Finally, White J gave a separate individual bare concurrence with Bell P. White J's judgment was categorised, like that of Macfarlan J, as a concurrence with the leading judgment with 'I agree'.

Each case number could have a different number of judges presiding. Thus, case numbers required normalisation. To normalise each case, I assumed each case number had a numerical value of 1. I then ascribed a decimal value for each judge in that case proportionate to the total number of judges presiding. When added, these decimal values would equal 1. I observed how each judge in that case number entered their reasons according to this study's identified categories, and then captured this information in proportionate decimal form.

For example, the case number '[2019] NSWCCA 1' had three judges presiding. One judge entered a single leading judgment, one judge concurred with that leading judgment in the form of 'I agree', and one judge concurred with the leading judgment but with additional or different reasons. Consequently, 0.33 (ie, 1/3) of the judges in this case number were recorded as writing a single leading judgment, 0.33 was recorded under concurrence with 'I agree', and 0.33 was recorded under concurrence with additional or different reasons.

As another example, the case number '[2018] NSWCCA 70' had five judges presiding. One judge entered a leading judgment, and four judges entered separate concurring judgments with additional or different reasons. Consequently, 0.2 (ie, 1/5) of the judges in this case number were recorded as writing a single leading judgment, and 0.8 (ie, 4/5) was recorded under concurrence with additional or different reasons.

After initial collection, I validated the data's accuracy and reliability through random case number checks. Any residual categorisation errors, if they appear, are my responsibility.

The study's third step, once all case numbers and their proportions for a calendar year were captured, was to sum all the values for each category, divide the result over the eligible population, multiply the figure by 100 and round it to two decimal places to obtain a 'proportion percentage' for that category in that year.

For example, for the year 2019 in the NSWCCA, the eligible population was 306 judgments. The proportion of reasons that appeared in the form of joint judgment was 29.34. Thus: (29.34/306)*100 = 9.59 per cent. This means that 9.59 per cent of the NSWCCA's reasons in matters involving multiple judges were entered in the form of joint judgment in 2019.

The study repeated steps one to three for each year from 2009 to 2019 inclusive for each of the NSWCA, NSWCCA, and FCAFC.

The study's fourth step was to create visual material to display the 'proportion percentage' movements through bar charts of the joint judgment, concurrence with 'I agree', and concurrence with additional or different reasons categories. Because the data collected is a time series, an Excel generated 10-year moving average line is plotted on each bar chart to smooth out the jagged effect of short-term fluctuations and facilitate long-term trend identification.[86]

I do not provide information on single leading judgments. Leading judgment data is only recorded in the spreadsheets for data collection completeness and to facilitate information capture on joint judgments and separate reasons. Standalone dissent data is also not displayed. Since any dissents in joint judgment are included in the 'joint judgment' category, the standalone dissent category does not provide a complete picture of dissent movement over time. Like leading judgments, standalone dissent proportions were captured in the spreadsheets to ensure data collection completeness.

Two confounding variables potentially limit the utility of this study's results. The first confounder is the type of law examined in each case. Some types of law may facilitate more joint judgment than other types of laws due to factors such as difficulty or the need for clarity, and certain years might have higher rates of matters concerning that type of law than other years, leading to an exaggerated increase in joint judgments. As Justice Kiefel observed, for example, from her experience judges in constitutional law cases 'write separately' more often due to the 'novel questions' presented.[87] The second confounder is the individual judges presiding in each case. Some judges, for example, may have a disproportionately higher tendency to enter into joint judgment than other judges. If certain joint judgment preferencing judges appear more regularly than non-joint judgment preferencing judges in a particular year, then joint judgment usage could increase for that year. The same logic applies vice versa: if individualistic judges appear more frequently in one year, then joint judgment usage could decrease for that year. Further, as Justice Kiefel identified, the specific judicial composition for each case may also affect potential for joint judgment: if, for example, the judges listed in a certain case all enjoy good working relationships or are 'of a similar cast of

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86 See Stephanie Glen, 'Moving Average: What It Is and How to Calculate It', *Statistics How To* (Web Page, 2021) <https://www.statisticshowto.com/probability-and-statistics/statistics-definitions/moving-average/>.

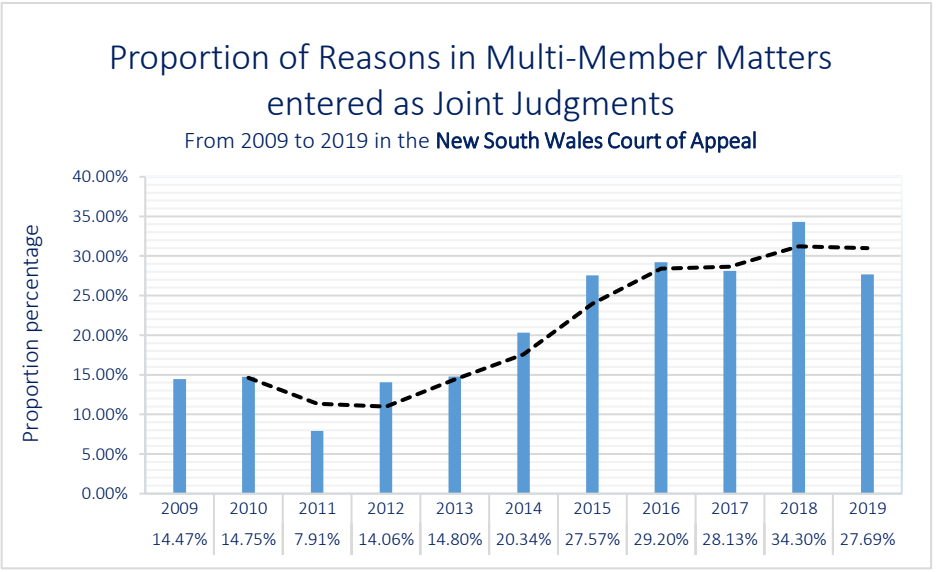
87 Kiefel, 'The Individual Judge' (n 2) 559.

mind', they 'are simply more likely to agree'.[88] Analysing the impact, if any, of these confounding variables is outside the scope of this study. However, raw data on both confounding variables for every case number is captured in the Excel spreadsheets found at this article's Appendix (the exception being the law type variable in the NSWCCA, as the law type examined in every NSWCCA case is criminal law and procedure).

B *Results*

1 *NSWCA*

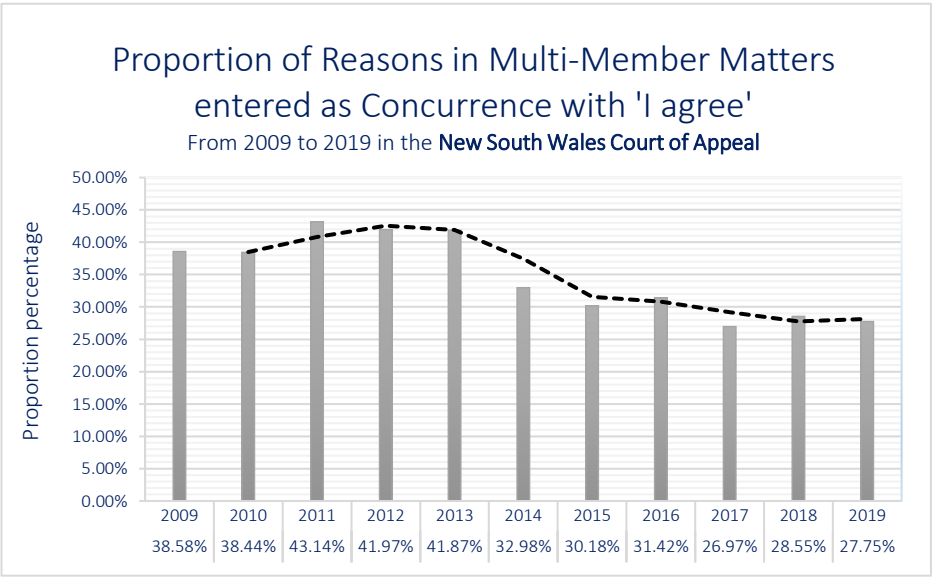
(a) Joint judgments



The proportion of NSWCA reasons entered as joint judgments more than quadrupled from a trough of 7.91 per cent in 2011 to a peak of 34.30 per cent in 2018.

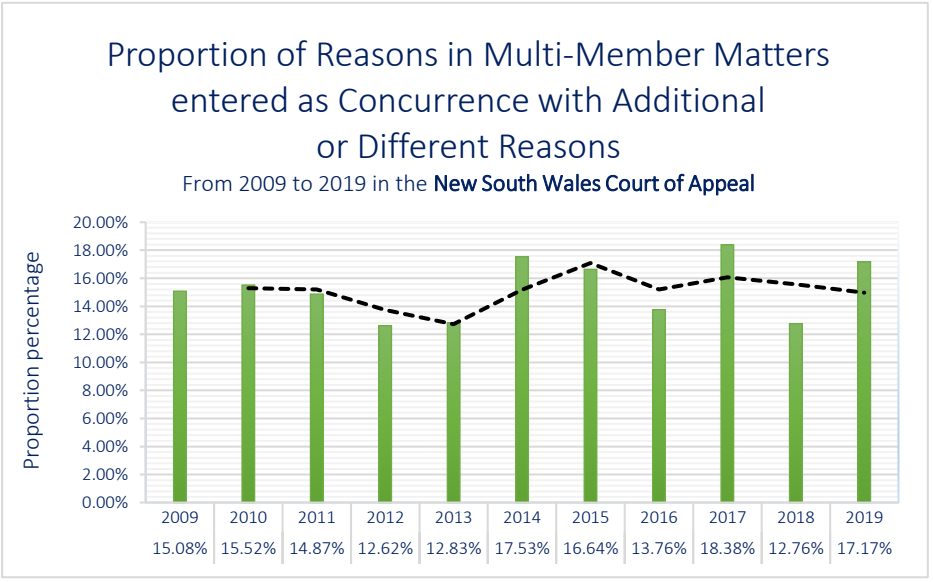
[88] Ibid 555.

(b) Concurrence with 'I agree'



The proportion of NSWCA reasons entered as a concurrence with the leading judgment in the form of 'I agree' or words to that effect reduced significantly from a peak of 43.14 per cent in 2011 to a trough of 26.97 per cent in 2017.

(c) Concurrence with additional or different reasons



The proportion of NSWCA reasons entered as concurrence with the leading judgment with additional or different reasons has remained relatively static, offering slight growth over 11 years from 15.08 per cent in 2009 to 17.17 per cent in 2019.

(d) NSWCA: Discussion

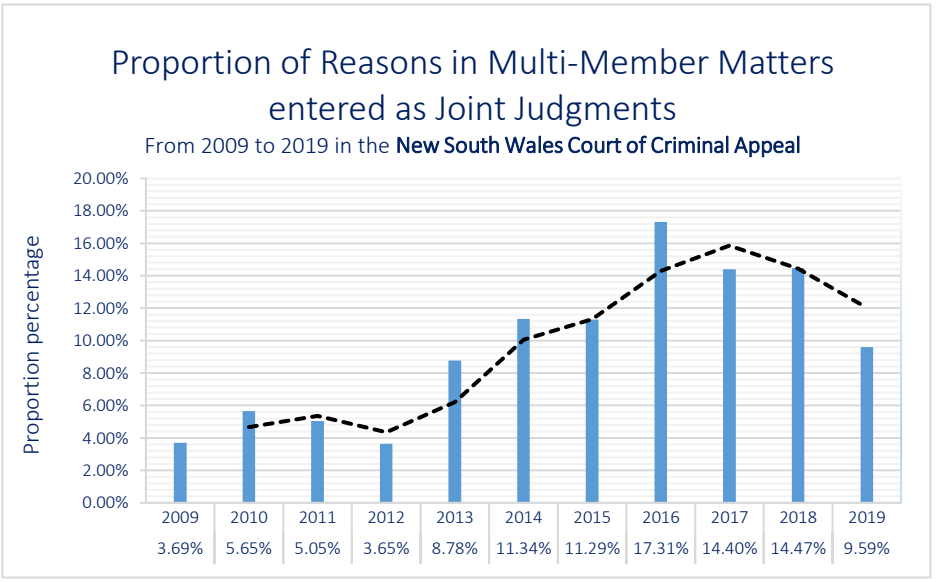
There is a very strong upward trend in the usage of joint judgments in the NSWCA. In only nine years, joint judgments in the NSWCA have rapidly transitioned from a rarer form of expression to a commonplace means by which members of the Court provide their reasons.

As the use of joint judgments rises, entering reasons in the plain form of 'I agree' has commensurately dropped. This demonstrates that the practice of bare individual concurrence is becoming less prevalent in the NSWCA and suggests that judges who agree with the leading judgment are now more likely to join into that judgment rather than simply agree with it through a separate entry. What has not decreased with the rise of joint judgments, however, is the NSWCA's expression of concurrence with additional or different reasons. Instead, concurrence with substantive reasons has grown, albeit only slightly, over the 11 years examined. This indicates that an increase in joint judgments has seemingly no effect on reducing multiple substantive judgments.

Nevertheless, NSWCA judges appear to face a transitional moment in the norms of their judgment writing practices. Joint judgments have become so prevalent that they now complement the historically dominant practice of concurrence with a single leading judgment through an 'I agree' entry. However, if NSWCA judges increasingly accept joint judgments as desirable, and the form continues to grow in use as rapidly as it has in the past nine years, joint judgments will surpass bare concurrence proportions and become the primary way of entering reasons.

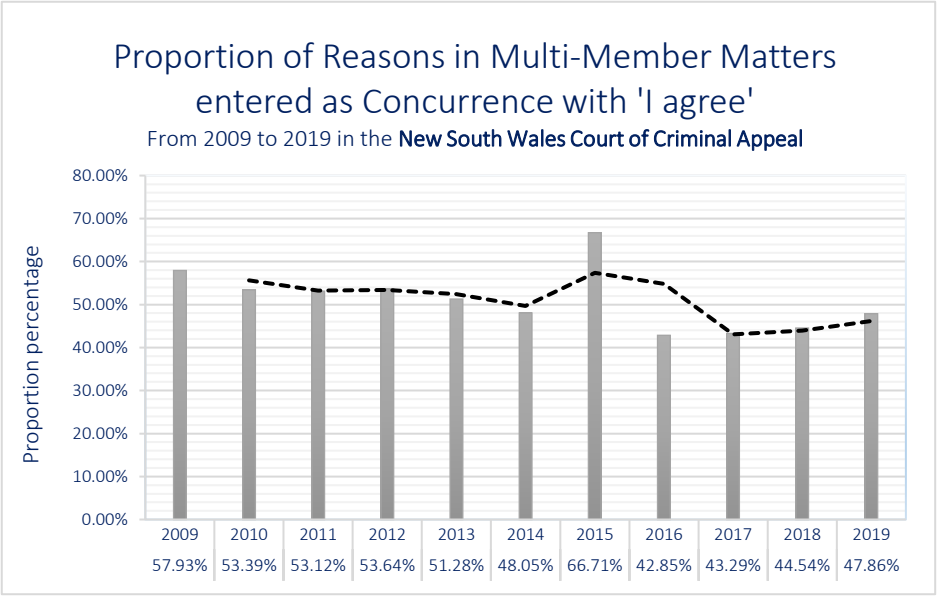
2 *NSWCCA*

(a) Joint judgments



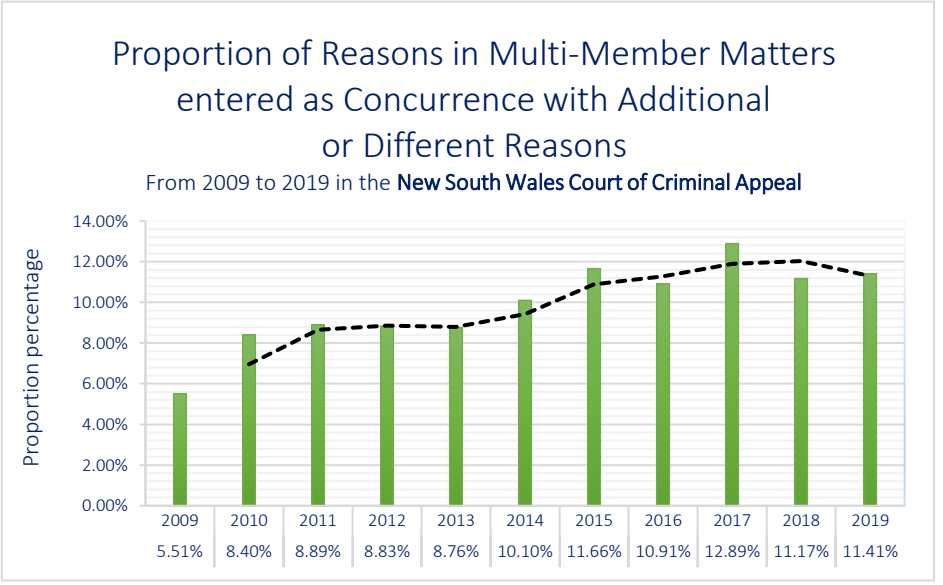
The proportion of NSWCCA reasons entered as joint judgments more than quadrupled from a trough of 3.65 per cent in 2012 to a peak of 17.31 per cent in 2016.

(b) Concurrence with 'I agree'



The proportion of NSWCCA reasons entered as a concurrence in the simple form of 'I agree' reduced from a high of 57.93 per cent in 2009 to a low of 42.85 per cent in 2016 (excluding the 66.71 per cent outlier in 2015).

(c) Concurrence with additional or different reasons



The proportion of NSWCCA reasons entered as concurrence but with additional or different reasons displayed gradual growth from 5.51 per cent in 2009 to 11.41 per cent to 2019.

(d) NSWCCA: Discussion

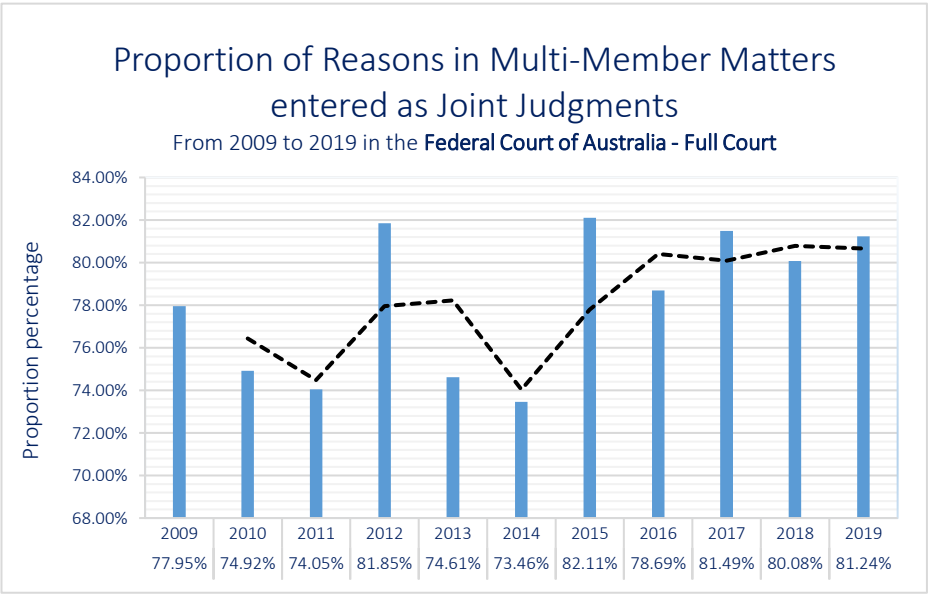
There is a very strong upward trend in the usage of joint judgments in the NSWCCA. Over nine years, joint judgments have emerged from an almost non-existent way of entering reasons, to a somewhat recurrent feature in judgments. However, despite becoming much more prevalent in NSWCCA practice, joint judgments do not yet complement the Court's historically and presently dominant form of concurrence through the simple 'I agree' form with a single leading judgment. Indeed, in 2019, a separate concurrence with an 'I agree' was about five times more prevalent than joint judgments (9.59 per cent joint judgment proportion to a 47.86 per cent 'I agree' proportion). This statistic, however, is relevantly down from a concurrence with 'I agree' being almost 15 times more prevalent than a joint judgment in 2012 (3.65 per cent joint judgment proportion to a 53.64 per cent simple 'I agree' proportion). This highlights the

rapid rate by which joint judgments have grown in NSWCCA practice, and how concurrence via 'I agree' is becoming less prevalent.

Like the NSWCA, a rise in joint judgments in the NSWCCA does not appear to reduce the prevalence of multiple substantive reasons. Instead, from 2009 to 2019, the prevalence of concurrences with additional or different reasons more than doubled.

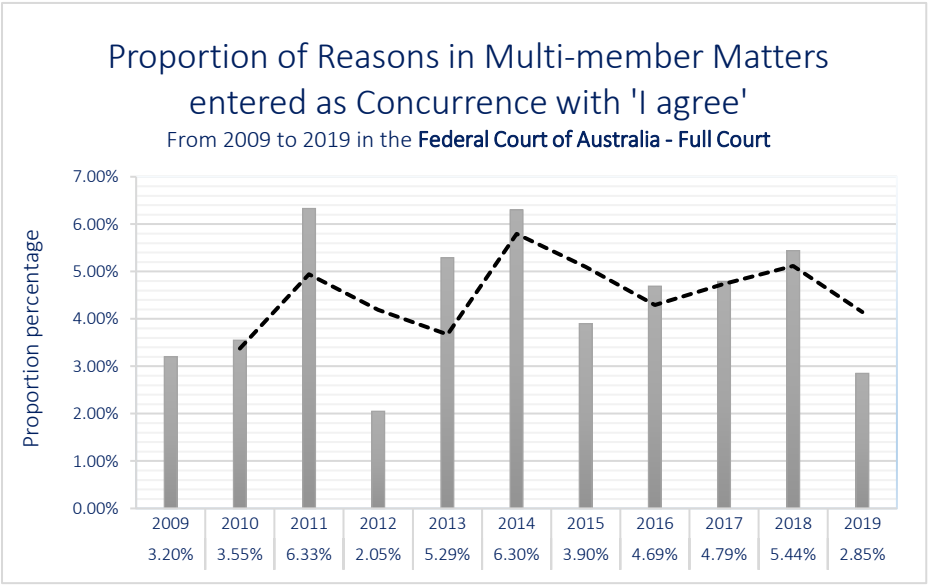
3 *FCAFC*

(a) Joint judgments



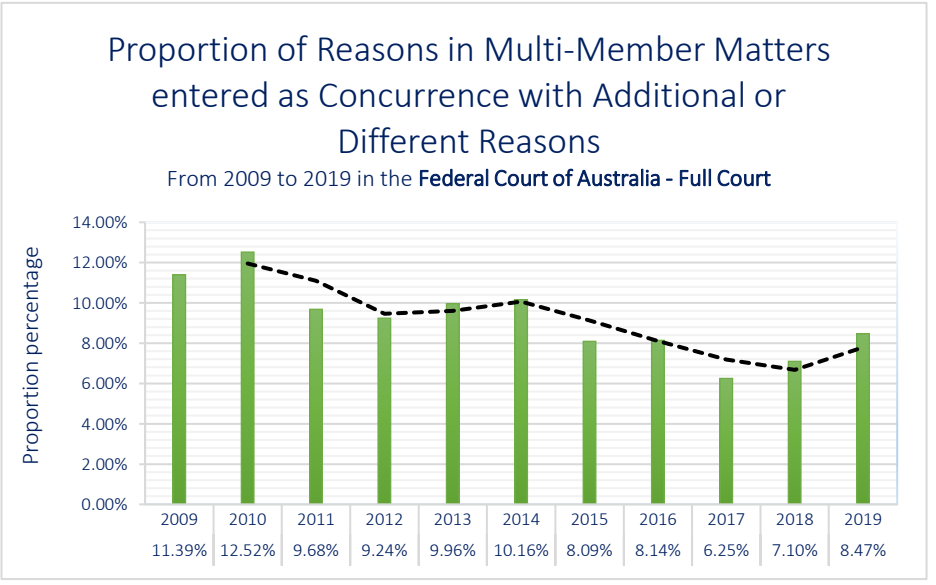
The proportion of FCAFC reasons entered as joint judgments has remained consistently very high. Only moderate volatility is observed, with a range between a low of 73.46 per cent in 2014 to a high of 82.11 per cent in 2015.

(b) Concurrence with 'I agree'



The proportion of FCAFC reasons entered in the simple form of 'I agree' has remained consistently very low. Only slight volatility can be seen, with a range between a low of 2.05 per cent in 2012 and a high of 6.33 per cent in 2011.

(c) Concurrence with additional or different reasons



The proportion of FCAFC reasons entered as concurrence but with additional or different reasons dropped from a peak of 12.52 per cent in 2010 to a trough of 6.25 per cent in 2017.

(d) FCAFC: Discussion

Joint judgments are clearly the FCAFC's dominant form of entering reasons. Whilst acknowledging that courts cannot be characterised as 'monolithic institution[s]' with stable cultures and practices,[89] the FCAFC's joint judgment use has been so consistently high from 2009 to 2019 that joined reasoning may be described with some accuracy as the Court's de facto institutional writing practice.

Contrastingly, it is rare for a judge presiding in a FCAFC matter to enter reasons as a concurrence with 'I agree'. Judges presiding in FCAFC matters clearly prefer to join in with the leading judgment if they find themselves in substantive agreement with it.

C *General Discussion*

This study's empirical results demonstrate that in and before 2012, NSW intermediate appellate courts and the FCAFC presented diametrically different joint judgment practices. Judges within NSW intermediate appellate courts had a clear historical preference for individualism via multivocal and separate judgments. In times of concurrence in multi-member matters, NSW practice was for judges to separately assent, mostly through a simple 'I agree' statement. Meanwhile, the FCAFC strongly preferred joint judgments, where judges appear to have eschewed individualism in favour of an institutional judgment.

However, this study illustrates a striking upward trend from 2012 in joint judgment use in NSW intermediate appellate courts, with both the NSWCA and NSWCCA demonstrating approximately quadruple growth in their joint judgment usage from 2011/2012 to 2018. Some difference in joint judgment practice remains between these two intermediate appellate courts. In the NSWCA, joint judgments in 2019 were used just as frequently as concurrence with 'I agree', but a judge sitting in a NSWCCA matter was still far more likely to enter a separate 'I agree' than to join in with a leading judgment. Nevertheless, despite significant growth in joint judgment usage, NSW appellate court decision-making still strongly contrasts with the FCAFC, where, from 2009 to 2019, judges have consistently used joint judgments as their dominant writing practice.

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[89] Sir Anthony Mason, 'Foreword' in Haig Patapan, *Judging Democracy: The New Politics of the High Court of Australia* (Cambridge University Press, 2000) viii, viii.

In both the NSWCA and NSWCCA, expressing reasons through a simple individual 'I agree' statement has reduced as joint judgments have become more prevalent. What has not reduced over time is the prevalence of concurring judgments with additional or different reasons. Rather, across each of the NSWCA, NSWCCA, and FCAFC, the proportion of reasons in the form of concurrence with substantive reasons has remained commonplace. Even in the FCAFC, where joint judgments normally reach an ≈80 per cent proportion of reasons, concurrence with additional or different reasoning persists as a regular form of entering reasons. Thus, there appears to be no apparent correlation between an increase in joint judgment use and a decrease in separate additional or different reasons that concur with the leading judgment. This statistic could also indicate that 'unnecessary' concurring judgments with different or additional reasons do not reduce commensurately with an increase in joint judgment use, as Chief Justice Kiefel may have hoped.[90] It might also suggest that there will always be a point to which judges who otherwise concur with the leading judgment's orders cannot compromise or negotiate their reasoning into that leading judgment, and thus turn to authoring a separate concurring opinion.

Ultimately, in 2012, a jurisdictional contrast in joint judgment use was apparent, where NSW courts opted for individual judgments and the FCAFC tended to a much higher expression of joint judgments. Over nine years, NSW intermediate appellate courts demonstrate a strong trend towards joining in over separately concurring, and as such joint judgments have become much more prevalent. In the light of this trend, NSW intermediate appellate court judges would appear to face a normative choice: to either continue growing joint judgment use so that it becomes the dominant form of entering reasons, complement joint judgments with separate concurrences, or reverse the trend back towards individualism and the dominance of separate reasons.

IV Addressing President Beazley's Curiosity

With a sustained surge in joint judgment usage in NSW intermediate appellate courts, there is immediate significance in addressing Beazley's 'curiosity' on the normative aspects of judgment writing practice and in considering whether minimalist mechanisms like joint judgments should be increasingly utilised. If members of NSW appellate courts decide to readily accept the applicability and relevance of Justice Kiefel's proposition of joint judgment usage as *any* appeal court's 'institutional responsibility',[91] observers should reasonably expect higher uniformity and a push toward greater joint judgment usage similar to the FCAFC's ≈80 per cent proportions. Indeed, FCAFC judges would likely see congruity with

[90] Kiefel, 'Judicial Methods in the 21st Century' (n 3) 4, 6–7.
[91] Kiefel, 'The Individual Judge' (n 2) 560.

their practices and Chief Justice Kiefel's arguments, with strikingly high joint judgment rates emphasising institutional acceptance and a strong adherence to the mode of judicial expression. However, should members of the NSW appellate cluster and other jurisdictions decide to view intermediate appellate courts as functionally distinct to the HCA and dismiss the HCA debates as idiosyncratic to that Court, one might expect HCA practices to have minimal or no implications on those intermediate appellate courts. Alternatively, intermediate appellate courts could share some functional similarities but also several differences with the HCA. Under this view, whether the move towards joint judgments in the HCA has relevance to intermediate appellate courts would depend on the nature of the shared characteristics between an intermediate appellate court and the HCA, and if they are sufficiently proximate to warrant potential comparison.

Consequently, the first step in assessing the implications of the HCA's practices is to examine the degree to which intermediate appellate courts such as the NSWCA, NSWCCA, and the FCAFC have functional similarity to the HCA.

A *Characterising Intermediate Appellate Court Functions*

Courts within Australia may express two functions in exercising judicial power.[92] The first is a disposition function, whereby courts apply the law to either initially resolve a matter or, in the case of appeal courts, to correct an error or affirm a decision from a court lower in the hierarchy. The second is a developmental (or declaratory) function, in that a court's judgment contributes to the common law by, for example, clarifying procedure, extracting the meaning of statutes, or making policy determinations according to law.[93]

Courts vary in how they exercise these two functions. For example, the Local Court of NSW, being a trial and fact-finding court that hears hundreds of thousands of matters without need for leave,[94] would focus almost exclusively on its disposition function. Its declaratory function would be extremely limited, given its inability to form substantive and binding precedent, and the fact that most Local Court judgments are unpublished, often cursory, and delivered *ex tempore*.[95] The HCA, meanwhile, as Australia's apex court, which accepts only

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92 See especially President James Allsop, 'Appellate Judgments – The Need for Clarity' (2010) 9(4) *The Judicial Review* 403, 403 ('Appellate Judgments'); Justice Ronald Sackville, 'Why Do Judges Make Law? Some Aspects of Judicial Law Making' (2001) 5(1) *University of Western Sydney Law Review* 59; Michael McHugh, 'Law Making in an Intermediate Appellate Court: The New South Wales Court of Appeal' (1987) 11(2) *Sydney Law Review* 183, 184–5.

93 See generally Richard S Kay, 'Judicial Policy-Making and the Peculiar Function of Law' (2007) 26(2) *University of Queensland Law Journal* 237.

94 See Local Court of New South Wales, *Annual Review 2019* (Review, 2020) 17, 20 <https://localcourt.nsw.gov.au/documents/annual-reviews/Local_Court_Annual_Review_2019_v1_accessible.pdf>.

95 See, eg, Mortimer (n 73) 284.

tens of cases a year on legal significance grounds,[96] can be functionally juxtaposed with the Local Court. Naturally, the HCA must utilise its dispositive functions. However, the HCA would have a much more considerable and concentrated focus on its declaratory functions to proclaim Australian law authoritatively and conclusively. Thus, because the Local Court and HCA exercise their functions dichotomously, it would be, for example, an erroneous endeavour to say that HCA judgment writing practices should apply to the Local Court of NSW.

On intermediate appellate courts, Federal Court Chief Justice James Allsop submits that they have an 'important role' in espousing 'doctrines and conceptions concerning our constitutional and institutional freedoms'.[97] However, when President of the NSWCA, he argued that an intermediate appellate court's dispositive function 'outweighs' its declaratory role, and that the situation is 'vice versa' for the HCA.[98] If his Honour's supposition holds true, and the functions of the HCA and intermediate appellate courts are sufficiently asymmetric, then the HCA's debates on joint judgments would have little relevance to intermediate appellate court practice.

President Beazley also raises questions over whether the declaratory function of intermediate appellate courts is proximate to the HCA, stating that middle courts of appeal 'do not have the same constitutional function as the High Court, and there remains debate as to their declaratory role in the development of law'.[99] Clearly, the HCA, as Australia's federal supreme court, provides highly visible and impactful declarations of law, to the extent that a HCA majority judgment's 'seriously considered' obiter dicta constitutes binding precedent upon all lower courts.[100] There are certainly persistent questions on the degree to which intermediate appellate courts can actively develop the law. Indeed, as Mortimer J identified, the FCAFC's 'law announcing' or declaratory function is 'not freestanding', because any legal development must be to 'resolve the application of law to facts existing in a dispute' and also satisfy the HCA, if a matter is appealed, that the law has been applied and developed correctly.[101] In other words, the declaratory powers of intermediate appellate courts are restricted through the final court's oversight and also the opportunities presented by the issues raised in a particular matter.

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96 See High Court of Australia, *Annual Report: 2018–19* (Report, 2019) 5, 9 <https://cdn.hcourt.gov.au/assets/corporate/annual-reports/HCA_Annual_Report_2018-19.pdf>.

97 Chief Justice James Allsop, 'The Role and Future of the Federal Court within the Australian Judicial System' (Speech, 40th Anniversary of the Federal Court of Australia Conference, 8 September 2017) 2. <https://www.fedcourt.gov.au/digital-law-library/judges-speeches/chief-justice-allsop/allsop-cj-20170908#>.

98 Allsop, 'Appellate Judgments' (n 92) 404–5.

99 Beazley (n 1) 82.

100 See *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 150–1 [134] ('*Farah*'); *Chief Commissioner of State Revenue v Benidorm Pty Ltd* (2020) 104 NSWLR 232, 253 [103] (Leeming JA).

101 Mortimer (n 73) 284–5.

However, I would ultimately argue that Australian intermediate appellate courts and the HCA are sufficiently similar in their functions to enable fair and proper comparisons of their practices. Intermediate appellate courts are, of course, different to the HCA, and will, as Chief Justice Allsop identified, have varying focuses and operational needs. However, I would argue that the nature and degree of the functional similarities between middle courts of appeal and the HCA are enough to say that the HCA's trends and debates on joint judgments have relevance to intermediate appellate court writing practices.

Like the HCA, intermediate appellate courts are superior courts of record[102] and may exercise their appellate jurisdiction in equity and at common law,[103] demonstrating jurisdictional congruity between intermediate appellate courts and the HCA. Indeed, when he was Commonwealth Attorney-General (1958–64), Sir Garfield Barwick advocated for a Federal Court that would 'relieve' the HCA of its workload,[104] especially in the HCA's original jurisdiction.[105] According to Beaumont, Sir Garfield's view 'prevailed'.[106] This reflection emphasises that despite the obvious hierarchy, the HCA and Federal Court are foundationally analogous.

The unanimous HCA decision in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* ('*Farah*')[107] exemplifies the significance of an intermediate appellate court's declaratory function and emphasises symmetry in the functional operations between middle courts of appeal and the HCA. In *Farah*, the Court held that if an intermediate appellate court interprets a Commonwealth law or uniform legislation in a certain way, or propounds *any* non-statutory law, its ratio is binding upon all courts in other Australian jurisdictions, including other intermediate appellate courts, unless the ratio is 'plainly wrong'.[108] This is because intermediate appellate court decisions are integral to the 'common law of Australia'.[109] Allsop CJ notes that the *Farah* requirement for intermediate appellate courts to follow decisions of other Australian courts of co-ordinate jurisdiction recognises a 'national integrated legal system and one Australian common law'.[110] Thus, how an intermediate appellate court decides to shape

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102 See, eg, *High Court of Australia Act 1979* (Cth) s 5; *Federal Court of Australia Act 1976* (Cth) s 5(2); *Supreme Court Act 1970* (NSW) s 22.

103 See, eg, *Federal Court of Australia Act 1976* (Cth) s 5(2); *Supreme Court Act 1970* (NSW) s 44.

104 Chief Justice Garfield Barwick, 'The Australian Judicial System: The Proposed New Federal Superior Court' (1964) 1(1) *Federal Law Review* 1, 3.

105 Ibid 15.

106 Justice Bryan Beaumont, 'Federal Court of Australia' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 272, 272.

107 *Farah* (n 100).

108 See especially Antonia Glover, 'What's Plainly Wrong in Australian Law? An Empirical Analysis of the Rule in *Farah*' (2020) 43(3) *University of New South Wales Law Journal* 850.

109 *Farah* (n 100), 151–2 [135].

110 *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v FAK19* [2021] FCAFC 153, [5] (Allsop CJ).

certain laws has the same legal effect on every jurisdiction in Australia, almost as if the HCA itself had made that decision. In other words, the declaratory function of intermediate appellate courts is substantial and, aside from the HCA's final authoritative reviewing of intermediate decisions, symmetrical in effect to the HCA. As Justice Steven Rares of the Federal Court emphasises, all Australian intermediate appellate courts play undeniably major roles in the incremental development of the general 'unwritten law':[111] they create most of Australia's precedent, and it is 'essentially unrealistic' to expect the HCA to oversee the 'development of the whole of Australian law'.[112]

Indeed, like the HCA, intermediate appellate courts must utilise their developmental function *as if* they were the final voice in a matter. Stewart and Stuhmcke studied the 783 applications for special leave to the HCA from 1 March 2013 to 3 February 2015. They found that only 10.22 per cent of applications (80 matters) were successful.[113] For the 89.78 per cent of refused applications for special leave (703 matters), and for the entirety of judgments from intermediate appellate courts that were not appealed to the HCA, any law declared in those judgments formed part of the binding common law of Australia until, and if, the HCA says otherwise.[114] Justice Robert Sharpe, a judge of the Court of Appeal for Ontario in Canada, confirms that intermediate appellate courts 'do decide many precedent-setting appeals' and 'do have a significant law-making role'. He submits that when a decision of an intermediate appellate court is 'not appealed, or leave to appeal is denied', their 'role is not unlike that of the Supreme Court [of Canada]' or an apex court in developing the law.[115] Justice Banks-Smith emphasises that intermediate appellate courts, similar to the HCA, focus 'very much on the law and whether there has been an error below', not only to dispositively correct errors of law, but to discern and declare what the law is.[116]

Despite some debate about *Farah*'s general desirability,[117] the HCA decision nevertheless emphasises that intermediate appellate courts, similar to the HCA, place great emphasis on their declaratory function to substantively develop the common law of Australia.

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111 Justice Steven Rares, 'The Role of the Intermediate Appellate Court after *Farah Constructions*' (Speech, 4th Appellate Judges Conference of the Australasian Institute of Judicial Administration, 7 November 2008) 11 <https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-rares>.

112 Orr (n 26) 297.

113 Pam Stewart and Anita Stuhmcke, 'Litigants and Legal Representatives: A Study of Special Leave Applications in the High Court of Australia' (2019) 41(1) *Sydney Law Review* 35, 36–8.

114 See Oliver Jones, 'Are the High Court's Reasons for Refusing Special Leave Binding?' (2013) 87(11) *Australian Law Journal* 774 for discussion on whether the High Court's seriously considered reasons for refusal of special leave, if provided, constitute binding precedent. At 782, Jones concludes that '[t]he preponderance of authority suggests that the High Court's reasons for refusing special leave are not binding. They merely offer guidance to lower courts'.

115 Robert Sharpe, *Good Judgment: Making Judicial Decisions* (University of Toronto Press, 2018) 96.

116 Banks-Smith (n 77) [18]–[19].

117 See, eg, Rares (n 111) 10–12.

As President Beazley points out, intermediate appellate courts do not have the same constitutional regimes as the HCA. However, *Farah* demonstrates that these constitutional arrangements do not irreparably differentiate intermediate appellate court declaratory functions from those of the HCA. For example, sitting Federal Court judges actively examine not only 'what the High Court is writing' but 'what the Full Court [of the Federal Court] is writing' and 'comparable intermediate courts around the country — the state Supreme Courts and their Courts of Appeal' for binding precedent.[118] While the HCA must declare law with a *sense* of finality, it is not prudent, according to former NSW Chief Judge at Common Law Peter McClellan, to believe that the 'latest judgment from the High Court in a particular area has finally explained the law and it will not require re-examination or revision'.[119] McClellan emphasises the common constitutional requirement of Australian courts of superior record to identify legal deficiencies, opportunities, and 'contemporary community needs' through the dispute resolution process.[120]

Nevertheless, one key functional difference between intermediate appellate courts and the HCA is found in court workload. While the HCA can triage matters through special leave determinations, intermediate appellate courts generally face less decisional autonomy over which cases they can hear, resulting in higher case volumes and increased pressures to turnover judgments.[121] Potentially, such pressures could practically reduce an intermediate appellate court's capacity to proclaim the law. The HCA, meanwhile, has a lower caseload, exercises a 'very high level of control' over its matters, and has considerably more time to consider cases before it and develop the law.[122]

However, I would argue that both courts share a pressure to exercise their functions in a timely manner. Indeed, the HCA itself held that '[s]peed and efficiency, in the sense of minimum delay and expense, are seen as essential to a just resolution of proceedings'.[123] Justice Kiefel explicitly included the HCA in her statement that '[m]ost appellate courts are subject to the pressures of time', and stated that 'our system of justice could not tolerate each judge writing independently in every case'.[124] Baron Neuberger believes that *both* apex and intermediate appellate court pressures to speedily dispense with cases 'ha[s]

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118 Mortimer (n 73) 288.

119 Justice Peter McClellan, 'Courts in the 21st Century: Should We Do Things Differently?' (Speech, Australian Court Administrators Group Conference, Courts and Tribunals in the Community: The Role of Administrators, 24 November 2005) 1 <https://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/McClellan/mcclellan_2005.11.24.pdf>.

120 Ibid 8.

121 Justice Stephen Gageler, 'Why Write Judgments?' (2014) 36(2) *Sydney Law Review* 189, 201.

122 Ibid.

123 *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175, 213 [98] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

124 Kiefel, 'The Individual Judge' (n 2) 556. Cf Gageler (n 121).

never been greater', and he attributes this to the 'smaller and more international' world with increasingly 'sophisticated … electronic developments'.[125] While the HCA ordinarily has more time to consider disputes than intermediate appellate courts, I submit that there is similarity between the HCA and intermediate appellate courts in needing to dispose of matters without unnecessary delay, and, potentially, in finding practices that might increase judgment writing efficiency. I would further argue that the comparatively pronounced pressure on intermediate appellate courts to manage their workloads does not create sufficient asymmetry in dispositive function to say that court judgment writing practices should not be compared.

In summary, while the HCA's more visible, finite, and relatively unrestricted declaratory function separates it from intermediate appellate courts, there is still substantial similarity in their developmental functions as both intermediate appellate courts and the HCA congruously shape the common law of Australia. Both courts also share symmetry in their dispositive functions by reviewing, as courts of superior record, decisions of lower courts in a timely manner. Intermediate appellate courts, however, do experience greater pressure than the HCA to manage and process their workloads, to the extent, as Chief Justice Allsop suggests, that their dispositive responsibility outweighs their declaratory role. However, I would not consider that these differences meet a threshold required to render any comparison inappropriate. Instead, I would say that the key characteristics of intermediate and apex court functions in Australia are sufficiently similar to deem the HCA's developments and arguments on judgment writing as relevant to the practices of intermediate appellate courts.

B *Addressing the Implications: Should Judges of Intermediate Appellate Courts Preference Joint Judgments?*

One of the principal arguments for joint judgments is that, by bringing judges together, the court's reasons are 'more conducive to clarity'.[126] The legal certainty and authority underpinned by joint judgments, according to Justice Keane, better 'fulfil' an appellate court's 'duty to the development of the law'.[127] Justice Keane proposes, for example, that the influence of *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd*[128] comes not from the quality of the HCA's reasons or its language, but rather the 'unified statement of [the Court's] position' through the joint judgment expression.[129]

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125 Neuberger, 'Sausages and the Judicial Process' (n 19) [39].
126 Keane (n 4) 15.
127 Ibid 15–16.
128 (1920) 28 CLR 129.
129 Keane (n 4) 17.

By presenting a unified message instead of multiple distinct opinions, joint judgments may also improve 'access to justice'.[130] Shorter joined reasons assist judgment consumers, such as legal practitioners and judicial officers, to more readily understand the law and apply or advise it.[131] Thus, 'downstream' stakeholders, including litigants, enjoy benefits such as reduced legal fees.[132] Sir Frank Kitto's remark that judges tend to 'rejoice' when discovering that a relevant precedent is expressed through joint judgment emphasises that the form engenders a degree of certainty and clarity that members of the profession appreciate.[133] Conversely, judgments with separately authored reasons can often 'chagrin' readers 'who have to spend many hours sifting the sediment to find the gold[en]' ratio.[134]

While joint judgments may be perceived to offer greater clarity, I submit that legal certainty is not necessarily intrinsic to joined reasons. As Justice Dyson Heydon explains, the absence of alternative viewpoints does not mean that a joint judgment automatically instils greater certainty.[135] Indeed, Baron Neuberger's argument that 'it is often positively helpful to have more than one judgment to take the debate forward' in areas like 'tort',[136] emphasises that joint judgments can be rather undesirable by stalling legal development and clouding meaning in particular contexts.

Separately, Chief Justice Allsop's view that the 'explanatory power of language' has its 'limits' and that '[t]o truly understand some conceptions, description, context, evaluation and intuition need to be appreciated',[137] emphasises that joint judgments have the capacity to underdeliver clarity, and that multiple well-considered reasons can enhance a reader's overall understanding of the court's opinion. In fact, according to Chief Justice Allsop, comprehensive 'context (human and legal) is critical' to understanding how 'lawyers and jurists … impose certainty through the reduction of legal principle into textually expressed statements'.[138] Multiple separate voices can, in many cases, better encapsulate context and consequently improve clarity.

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130 Cosmas Moisidis, 'Achieving World's Best Practice in the Writing of Appellate Judgments' (2002) 76(10) *Law Institute Journal* 30, 35. See also Mortimer (n 73) 283.

131 See Enid Campbell, 'Reasons for Judgment: Some Consumer Perspectives' (2003) 77(1) *Australian Law Journal* 62, 64–5.

132 Moisidis (n 130) 32.

133 Sir Frank Kitto, 'Why Write Judgments' (1992) 66(12) *Australian Law Journal* 787, 797.

134 Michael Coper, 'Joint Judgments and Separate Judgments' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 367, 368 ('Joint Judgments and Separate Judgments').

135 Heydon (n 44) 212.

136 Neuberger, 'Sausages and the Judicial Process' (n 19) [32].

137 Chief Justice James Allsop, 'Uncertainty as Part of Certainty: Appreciating the Limits of Definitional Clarity and Embracing the Uncertainty Inherent in Any Matter of Complexity' (Speech, Australian Academy of Science and Australian Academy of Law Joint Symposium, 23 August 2018) [5] <https://www.fedcourt.gov.au/digital-law-library/judges-speeches/chief-justice-allsop/allsop-cj-20180823>.

138 Ibid [2].

The compromise often required for joint judgment can also prevent desirable legal development by shadowing alternatives[139] and consequently 'impede rather than develop the law, and reduce its clarity and predictability'.[140] The precise level of risk in whether a joint judgment potentially undermines the development of the common law, however, is unclear. Chief Justice John Doyle would characterise the risk as only 'slight'.[141] Baron Neuberger, however, adopts a much stronger tone. He identifies that a judge's individually developed reasons 'can be jettisoned on the road to agreement', which he submits is rarely 'helpful' to the law because the result will not be reflective of the beliefs actually held by the court.[142] The authority embedded within unified judgments may also not always be correct or long-standing: Justice Heydon critiqued both joint judgments and bare concurrences by pointing to the 1961 murder appeal of *Director of Public Prosecutions v Smith*,[143] where a speech delivered by Lord Kilmuir and concurred by all the presiding Law Lords has been regarded by '[v]ery few' as 'correct or clear'.[144]

Another argument for joint judgments is that the writing practice is more efficient than reasons delivered *in seriatim*. Joint judgments, and their often associated practice of collaborative conferences between judges to identify judicial synergies and negotiate compromises, are said to eclipse the problem of 'undisciplined individualism' that can reduce appellate work to 'mere confusion'.[145] Justice Keane submits that the joint judgment writing process champions judicial professionalism over self-indulgence.[146] He believes that the conferencing process to design a joint judgment considerably 'sharpens up' the overall quality of reasons, because the reasons benefit from three, five, or seven minds rather than one.[147] Chief Justice Kiefel sees joint reasoning as one possible antidote to backlogs, stating that multiple reasons 'will at some point delay the court giving judgment' and diminish the court's reputation 'as a whole'.[148]

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139 See discussion on the 'ripple effects' of opinion divergence in Kenneth J Kress, 'Legal Reasoning and Coherence Theories: Dworkin's Rights Thesis, Retroactivity, and the Linear Order of Decisions' (1984) 72(3) *California Law Review* 369, 380.

140 Baron David Neuberger, 'Developing Equity: A View from the Court of Appeal' (Speech, Chancery Bar Association Conference, 20 January 2012) 6 [22] ('Developing Equity') <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Speeches/mr-speech-chancery-bar-assoc-lecture-jan12.pdf>. See also Sarah Murray, 'The High Court on Constitutional Law: The 2016 Term' [2017] (2) *University of New South Wales Law Journal: The Forum* 1, 9.

141 Chief Justice John Doyle, 'Judgment Writing: Are There Needs for Change?' (1999) 73(10) *Australian Law Journal* 737, 739.

142 Neuberger, 'Developing Equity' (n 140) 6 [22].

143 [1961] AC 290.

144 Heydon (n 44) 212.

145 Alfred Simpson, 'Lord Denning as Jurist' in JL Jowell and JP WB McAuslan, *Lord Denning: The Judge and the Law* (Sweet and Maxwell, London, 1984) 441, 451.

146 Keane (n 4) 19. See also Coper, 'Joint Judgments and Separate Judgments' (n 134).

147 Keane (n 4) 19.

148 Kiefel, 'The Individual Judge' (n 2) 556. See also Kiefel, 'Judicial Methods in the 21st Century' (n 3) 8–9.

Indeed, the HCA's fast turnaround of unanimous judgments during the politically turbulent Australian federal parliament eligibility crisis[149] was, in Lynch and Williams' view, 'highly valued'.[150]

Collegiality and speed, though, come with costs. Lynch and Williams identify that the price of compromise may be elegance of expression and a judgment narrowed to the immediate issues. This may reduce creativity and create blandness.[151] Sir Frank Kitto agrees that sometimes 'justice delayed is justice denied', but insufficiently done justice is 'manifestly' worse.[152] His argument that it is often better that each judge 'individually, exactingly, intensely [put] in writing what the Judge believes ought to be said'[153] emphasises that justice is frequently not about producing an authoritative or unanimous judgment, but rather about achieving the *best* judgment for the circumstances.

The joint judgment crafting process also has significant free-rider risks which can reduce an appeal court's general institutional utility. Sir John Latham identified such risks in 1950, stating that the consultative process which facilitates joint judgment writing may lead 'one judge to do all the work and really make up the mind of the Court'.[154] In line with Sir Latham's observation, Justice Steven Gageler uses Condorcet's Theorem to demonstrate a potentially suboptimal effect of joint expression. He explains that if each appellate judge decides and reasons independently, the risk of judicial error is reduced, as three, five, or seven judges have thought through the problem in separate writing and arrived at the same, or a sufficiently similar, point.[155] Meanwhile, if only one judge decides and reasons independently, and all other judges agree without a substantive reasoning process equal to the lead judge, the risk of an erroneous judgment is significantly increased.[156] Justice Gageler also identifies the risk that, in a post-trial conference where judges discuss the possibility of joining together in judgment, judges are more likely to agree with a lead judge to avoid disapproval and to achieve intellectual conformity. The result, then, is judges joining to reasons that do not actually reflect what they think or what they could potentially think if they had undergone a substantive independent reasoning process, reducing not only judicial independence but the benefits from 'the de-correlation

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149 See Paul Karp, 'Australia Citizenship Crisis Reignites as Senator and Four MPs Quit', *The Guardian* (online, 9 May 2018) <https://www.theguardian.com/australia-news/2018/may/09/australia-citizenship-crisis-reignites-as-senator-and-four-mps-quit>.

150 Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2017 Statistics' (2018) 41(4) *University of New South Wales Law Journal* 1134, 1154 ('2017 Statistics'). See also Murray (n 140) 4. Cf McIntyre and Tutton (n 10) 40.

151 Lynch and Williams, '2017 Statistics' (n 150). See also Coper, 'Joint Judgments and Separate Judgments' (n 134).

152 Kitto (n 133) 790.

153 Ibid 798.

154 Clem Lloyd, 'Not Peace but a Sword!: The High Court under JG Latham' (1987) 11(2) *Adelaide Law Review* 175, 186.

155 Gageler (n 121) 196. Cf Keane (n 4) 19.

156 Gageler (n 121) 196.

of individual error'.[157] As Justice Heydon put it, '[i]t is wrong, then, for judges to abstain' from drafting separate reasons 'to seek to achieve the *appearance* of unity and uniformity'.[158] Nevertheless, Justice Virginia Bell believes that judges accept 'responsibility' for 'subscrib[ing]' to a joint judgment, and she submits that the judge's name appearing in those reasons is sufficient accountability and transparency.[159] However, I would note that the risks of suboptimal performance through free-riding and the application of behavioural tendencies to conform would still remain.

One final argument for joint judgments is that they are an effective counter to verbosity.[160] Sir Frank Kitto concedes that appellate courts generally suffer from '[t]he menace of prolixity, irrelevant wandering and imprecision', and accepts that joined reasoning can sometimes reduce these features.[161] Nevertheless, separate judgments are not *the* cause of verbosity and prolix, and joint judgments do not always alleviate a court of irrelevant or indulgent writing. Instead, as Justice Heydon puts it, a separate concurring opinion 'need not be a long separate opinion'.[162] Mason also questions the utility in 'judicial minimalism', stating that it is an appeal court's duty to address contentious facts and law comprehensively and completely.[163] Indeed, the risk of 'gnomic … brevity' in a joint judgment is *just as*, if not more, detrimental as verbosity.[164] As Bagaric and McConvill argue, treating courts like committees and pursuing the absolute prioritisation of direct relevancy over subtle nuance may 'transform the craft of judicial decision writing to something akin to the legislative writing process, where brevity and outcomes have long trumped purpose and reasoning'.[165]

Ultimately, to address President Beazley's curiosities on the desirability of joint judgments, it appears that there is 'validity in both sides of [the] equation'.[166] I would agree with Lynch that judgment writing is 'inherently something about which reasonable minds may differ', and thus a soft or hard protocol, rule, or principle on joint judgments is 'neither required nor possible'.[167] Sir Frank Kitto agrees that no 'categorical answer ought to be attempted [on] whether and when a member of a multiple court is justified in simply concurring in a judgment written by a colleague', because 'there is no [one] way of writing judgments'.[168] Justice Kiefel herself concedes that 'it is not possible to state a rule,

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157 Ibid 197.
158 Heydon (n 44) 221 (emphasis added). See also Coper, 'Concurring Judgments' (n 4) 130.
159 Bell (n 56) 3.
160 See especially Orr (n 26) 295.
161 Kitto (n 133) 795.
162 Heydon (n 44) 221.
163 Mason, 'Reflections' (n 30) 20.
164 Neuberger, 'Developing Equity' (n 140) 6 [22].
165 Bagaric and McConvill (n 21) 42.
166 Lynch and Williams, '2017 Statistics' (n 150) 1155.
167 Lynch, 'Keep Your Distance' (n 15) 158, 162.
168 Kitto (n 133) 787, 796.

such as that each judge should write separately in every case', due to the undefinable list of instances a judge may find it preferable to write jointly or individually.[169]

In my view, a judge's choice in whether they opt for a formulaic writing approach, or whether they strive for elegance, or whether they generally prefer individualism against institutionalism or vice versa, is necessarily a personal decision. I argue that a judge should *consider* the possibility and the implications of a joint judgment in each case. However, to maximise judicial independence, a judge's consideration must not be disturbed by a pressure or procedure to join or separate. As Chief Justice Allsop emphasises, courts are *human* institutions, and as such, the 'human aspects of judicial life should dominate and pervade the institutional life and structures of the Court'.[170]

Having said this, a dalliance on a curiosity of my own is whether a current English method of judgment writing should have a place in Australian practice. In the Supreme Court of the United Kingdom, judges who wish to affix their name to a lead set of reasons are not necessarily listed as having written those reasons equally and jointly.[171] Instead, they can be listed as having agreed with the lead author. For example, in *Stoffel & Co v Grondona*,[172] judges were listed as follows:

> Lord Lloyd-Jones (with whom Lord Reed, Lord Hodge, Lady Black and Lady Arden agree)

In this case, Lord Lloyd-Jones wrote the Court's reasons and his colleagues provided simple assent.

Variations to this method are possible. Judges who offered substantial contributions but did not principally write the judgment could be listed as such. For example, a three-member hypothetical listing in the NSWCA could appear with the lead author first in bold, and then the concurring justices listed thereafter according to their contribution:

> **Bathurst CJ**
>
> with whom Bell P agreed and substantially contributed, and
>
> with whom Meagher J agreed in full

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169 Kiefel, 'The Individual Judge' (n 2) 555.

170 Chief Justice James Allsop, 'Courts as (Living) Institutions and Workplaces' (Speech, 2019 Joint Federal and Supreme Court Conference, 23 January 2019) 19 <https://www.fedcourt.gov.au/digital-law-library/judges-speeches/chief-justice-allsop/allsop-cj-20190123> ('Courts as Institutions').

171 Joint judgments can and still do occur in the Supreme Court of the United Kingdom. See, eg, *Her Majesty's Attorney General v Crosland* [2021] UKSC 15, where a judgment of the Court is issued. See also *Ho v Adelekun* [2021] UKSC 43 where judges were listed as follows: Lord Briggs and Lady Rose (with whom Lady Arden, Lord Kitchin and Lord Burrows agree).

172 [2021] AC 540.

I speculate that this method could add some value to the judicial writing mix. First, it removes the need for imperfect methods such as 'computational linguistics' to detect which judge actually wrote joint reasons.[173] It encourages judges to consent to colleagues 'join[ing] in'[174] because the method does not anonymise individual efforts and thus, as Justice Kiefel notes, provides the lead author the 'simple pleasure' of acknowledgment.[175] The proportionate allocation of acknowledgment also has the potential to alleviate free-riding and the impacts of heuristics. As Baron Neuberger observes, only 'saint[s]' would scrupulously contribute to a judgment that they do not receive credit for.[176] If judges who, say, substantially contribute to a leading judgment receive acknowledgment, this method might improve court collegiality while encouraging healthy compromise without undermining independence. Finally, by bringing judges together, the style brings all the apparent authority, certainty, and clarity of a joint judgment without its dehumanising elements.

V Conclusion

Commensurately with the HCA, NSW intermediate appellate court judges have increasingly accepted and used joint judgments from 2009 to 2019. This is a striking departure from NSW courts' historically dominant practice of entering reasons separately. Meanwhile, the rate at which FCAFC judges express their reasons in joined form is so consistently high that joint judgments can be described as the institution's dominant writing practice. Despite the difficulty in writing jointly, joint judgments are becoming more prevalent across the examined jurisdictions and, indeed, increasingly seen as potentially desirable.

Likely suspecting these trends, President Beazley asks what the implications should be for intermediate appellate courts. I would suggest that a practical consequence of this trend should *not* include a deliberate push towards a disciplined practice of entering joint judgments. Instead, joint judgments should complement separate concurrences in the judicial armoury.

In line with Chief Justice Kiefel's arguments, it is probably the institutional responsibility of appellate court members to *consider* writing jointly. But I would add that consideration is the appropriate threshold to satisfy institutional responsibilities, and that any requirement, expectation, or pressure to join in is manifestly undesirable. Joint judgments, in encapsulating an appeal court's voice, undoubtedly can, in some cases, deliver legal certainty, clarity in reasons,

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173 See Partovi et al (n 4). See also Yanir Seroussi, Russell Smyth and Ingrid Zukerman, 'Ghosts from the High Court's Past: Evidence from Computational Linguistics for Dixon Ghosting for McTiernan and Rich' (2011) 34(3) *University of New South Wales Law Journal* 984.

174 Kiefel, 'The Individual Judge' (n 2) 557.

175 Ibid.

176 Neuberger, 'Sausages and the Judicial Process' (n 19) [34].

and rapid judgment turnover. Joined reasons contribute, necessarily at times, to improved public perceptions of appeal courts as authoritative third arms of government that provide definitive, rather than confusing or fractured, declarations of law. Nevertheless, from as early as 1932, it has been prudently observed that 'humanity will stain the law reports until the courts are manned by Robots'.[177] In other words, differing perspectives, contributions, and processes of reasoning are, and should be, an enduring characteristic of multi-member courts. Separate reasons can, when appropriate, likewise add to clarity and certainty and, similar to a dissenting view, enable the court to explore different legal avenues that might later become preferable. What I have argued is that joint judgments and separate reasons each deliver benefits on different occasions, and thus there should be no formal or informal rule or principle that encourages judges to use one form over the other.

To describe my proposition plainly, a judge is the best judge on how to write *their* judgments. A judge's overriding responsibility is to apply their conscience and enter reasons in a way that they think best disposes of the specific dispute and develops the law. While appellate court judges should always consider the utility that a joint judgment could deliver in each case, their discretion to enter reasons separately should not, in my opinion, be curtailed.

As a final comment, potentially minimalist mechanisms such as joint judgments might maximise a court's efficiency. But if the price is 'a loss of human context, a loss of the expression of the human purpose of the law',[178] perhaps the minimalist trend is one deserving serious attention and examination before judges ultimately decide to join in.

Appendix

The Excel spreadsheets containing the raw data used for 'Part III: Profile of Judgment Writing Practices' can be accessed in the hyperlink below. Please note that this hyperlink will direct you to a folder stored on the file hosting service 'Dropbox'.[179]

https://www.dropbox.com/sh/g6zwzrc2ktfpu4a/AACB40C4rIougWO04kC8wfGUa?dl=0

177 Cecil Fifoot, *English Law and Its Background* (G Bell and Sons Ltd, 1932) 249.
178 Allsop, 'Courts as Institutions' (n 170).
179 This hyperlink is functional at the time of publication. Please note, however, that as this archive is stored on a third-party service provider, the ongoing usability and accessibility of this archive may not be possible.

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