

A new justice for Australian environmental law

A thesis submitted for the degree of Doctor of Philosophy
of The Australian National University

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September 2019

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Declaration of originality

Except as acknowledged throughout the thesis, this is my own original work.

This thesis has produced and builds on the following work published during my candidature:

Brad Jessup, 'Investing the law with an environmental ethic: Using an environmental justice theory for change' in Erika Techera (ed), *Environmental Law, Ethics and Governance* (Inter-Disciplinary Press, 2010) 21.

Brad Jessup, 'Victoria and the Channel Deepening Project' in Tim Bonyhady and Andrew Macintosh (eds), *Mills, Mines and Other Controversies: The Environmental Assessment of Major Projects* (Federation Press, 2010) 104.

Brad Jessup, 'The Port Phillip Channel Deepening Project and environmental law: A model for ecologically sustainable development?' in Warwick Gullett, Clive Schofield and Joanna Vince (eds), *Marine Resources Management* (LexisNexis Butterworths, 2011) 297.

Brad Jessup, 'The journey of environmental justice through public and international law' in Brad Jessup and Kim Rubenstein (eds), *Environmental Discourses in Public and International Law* (Cambridge University Press, 2012) 47.

Brad Jessup, 'Environmental justice as spatial and scalar justice: A regional waste facility or a local rubbish dump out of place?' (2013) 9(2) *McGill International Journal of Sustainable Development Law and Policy* 69.

Brad Jessup, 'Justice, recognition and environmental law: The Wielangta Forest conflict, Tasmania, Australia' (2015) 34 *University of Tasmania Law Review* 5.

Brad Jessup, 'Trajectories of environmental justice – From histories to futures and the Victorian environmental justice agenda' (2017) 7 *Victoria University Law and Justice Journal* 48.

This thesis contains 87680 words (excluding footnotes and bibliography).

Brad Steven Jessup

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Acknowledgments

This thesis represents and reflects more work than I ever imagined. While it is my hard work and ideas – the errors belonging to me – I had significant support and help throughout the decade-long journey of conceptualising, theorising, researching, writing and finishing this thesis on a part-time basis. I am extremely grateful for that support – whether it was offered in 2008 or in 2018 or sometime in between.

At the start of my candidature, I began to compile a list of all the people who helped me, who brainstormed with me, who steered me on my path, who were convinced I could get this done even at those times of illness, who reminded me of what I have accomplished. That list is far too long to reproduce, but it includes former workmates at Freehills, who supported my departure and transition into the academy; teachers at The University of Cambridge, who convinced me that a PhD was a good idea; academic colleagues, fellow students and friends from the ANU College of Law, who gave me a great start into the PhD; the many librarians and court officials from far afield as Canberra, the Bay Area, Oxford and London, Molong, the suburbs of Melbourne, and the corporate offices of Hobart, who helped me navigate archives and guide my research; my professional peers at Melbourne Law School, who nurtured me as I found my feet in the most intense and time-consuming job I have ever held; my disciplinary peers – environmental lawyers and legal geographers – who treated me as though I already had a PhD; and my band of friends, family and loved ones who have known when not to ask about the thesis, but have celebrated the milestones and helped plan the huge party that will happen once I am finished with it.

I do, however, want to especially acknowledge and thank a number of people and teams by name. Susan Owens, who got me thinking about environmental justice; Catherine Gross, whose research on environmental justice helped me find my space in the field; Alice Kaswan, Julie Sze, Angela Harris, and the team at the University of California – Berkeley Center for Law, Energy and Environment, who helped me make sense of my position within the scholarship and movement of environmental justice in the US; Elizabeth Fisher and Bettina Lange who helped me more critically engage with environmental law through methodology; and Wolfson College, who hosted me during my stay in Oxford.

I want to thank the ANU College of Law for appointing me as an untried academic, providing me with travel funds to conduct my field work, and being so patient as I finished the PhD from a distance.

I thank Kirsti Halcomb, Tyrone Burleigh and Maya Costa Pinto for their assistance in editing my footnotes and bibliography, and Louise Marsters for bringing her editorial expertise to the thesis. Louise, a professional editor who used to edit my environmental law newsletters at Freehills, proofread my thesis, correcting grammatical errors and applying a rigour of consistency over the presentation of my work.

I am extremely grateful to my supervisors, Tim Bonyhady and John Dryzek, for their contribution to my thinking, for the challenges they set me, and for the high expectations they had for my work. They made me a better writer, a more confident academic. They made me earn this PhD. They gave me space when I needed it, offered advice even when it was difficult to do so, yet remained unwavering in their support of the project.

I want to acknowledge the best doctors that I know: those scholars with whom I had the pleasure of sharing a perilous PhD journey (in no particular order): Elinor, Rebecca, Fanny, Mary, Wendy, Alison, Owen, Nabil, Cobi, Maya, Ruth, Ashleigh, Yee-Fui, Joanne, Leilani and Claire. There ended up being more ups than downs, but more talking than writing.

This thesis is my story about Australia's environmental laws. It is about me trying to make sense of what I see as being wrong with our country's legal system for the environment. The PhD process helped me find the story that I really only had a hunch about when I was in practice. But my journey in finding my voice depended on the stories of many people who were involved with the three environmental disputes at the centre of this thesis. I am indebted to those people who shared their views and experiences; sometimes it was difficult for them to do so. They let me use their stories around which I could build my own. To my interviewees: the 20, who spoke to me about the Orange Waste Project; the 15, who told me about the Channel Deepening Project; and the 13, who shared their experiences about the Wielangta Forest conflict, thank you so very much. I hope that our collective experiences captured in this thesis can make our environmental laws better for us and the environment we inhabit. Because for the differences you held, that is what you all wanted.

For Paulie. It's done. We probably should get married now. x

Abstract

Environmental justice is about fairness, equality and equity in decisions concerning the environment. It is about who benefits or is disadvantaged by environmental conditions – both good and bad. It is about vulnerable communities being recognised, protected and having influence over their localised livelihoods. Explained and understood this way, it is unquestionable that the law, with its universally accepted goals of protection, recognition and equal treatment, should have a role in achieving environmental justice. And it should be criticised when it does not achieve it.

In recent decades, environmental justice has been at the fringes of an Australian environmental legal system hamstrung by its focus on the concept of ecologically sustainable development and an idea that participation is sufficient where access to courts and decision makers is available. Where justice has been raised in debates, submissions or in the arguments of communities, consideration of it has been limited, and the role of communities has been marginal. The present position of justice in environmental law is confined by the administrative law system and the sustainability frameworks that the law is still grappling to interpret and often implements in ways that take us further from the environmental protection objectives explicit in our laws. Invited into the legal system, communities exposed to pollution or threats to ecosystems that they value share stories of being unjustly treated by industry and government, but the law has seldom intervened for them in a responsive, let alone restorative, way.

This thesis argues that Australia needs a new justice framework for its environmental laws: a framework that is drawn from the communities that have endured injustices and that is conceptualised as a plural and multifaceted idea that is not simple to define but is easy to explain. At its core, the framework would involve prioritising human and ecological communities of disadvantage above other interests or goals, and imposing expectations on governments that they will not frustrate the realisation of a recalibrated distribution of power and control within the law. The thesis uses three case studies – from New South Wales, Victoria and Tasmania – to highlight the presence of justice arguments within Australian environmental law and, through a critical appraisal of the outcomes of those case studies, to emphasise the relevance of a new justice-based foundation for the law.

Table of contents

<i>Table of figures</i>	x
1. Introduction	1-1
1.1 Finding environmental justice	1-1
1.2 The environmental legal context for the thesis	1-6
1.3 Revisiting the sustainability paradigm	1-14
1.4 A concept of environmental justice in law	1-22
1.5 Research questions	1-38
1.6 Thesis overview	1-39
2. The foundations for an environmental justice framework	2-1
2.1 Justice and the environment	2-1
2.2 A starting point for environmental justice in the law	2-9
2.3 A multifaceted, discursive and plural definition of environmental justice	2-23
2.4 Distribution	2-28
2.5 Participation	2-33
2.6 Recognition	2-42
2.7 Capabilities and capacity	2-48
2.8 Environmental justice linkages. Recognition and capacity. Space and scale.	2-52
2.9 An environmental justice framework for environmental law	2-60
3. Method and approach	3-1
3.1 Justice as a critical approach to the field of environmental law	3-1
3.2 Research methods and environmental law	3-5
3.3 Case study approach and theory	3-13
3.4 Interviews and information sources	3-19
3.5 Choice of cases	3-23
3.6 A focus on law in action, place and space	3-28
3.7 Case study for law	3-34

4. The Orange Waste Project – A wasted democracy?	4-1
4.1 Introduction	4-1
4.2 The Orange Waste Project and the site objections	4-6
4.3 Molong and Orange	4-15
4.4 The court case	4-21
4.5 Three days of justice	4-27
4.6 Enter Part 3A	4-30
4.7 A 'regional' project approved. A local injustice realised.	4-39
4.8 Conclusion	4-48
5. The Channel Deepening Project – Dredged and dragged through the law	5-1
5.1 Introduction	5-1
5.2 Advancing the project and avoiding law reform	5-9
5.3 The Channel Deepening Project and its first assessment	5-19
5.4 Trialling and supplementing	5-32
5.5 The Commonwealth dimension and the second tranche of cases	5-41
5.6 Conclusion	5-48
6. The Wielangta Forest conflict – Seeing recognition in the trees	6-1
6.1 Introduction	6-1
6.2 A recent history of legal conflict in Australian forests	6-7
6.3 The Wielangta Forest conflict	6-17
6.4 The court cases	6-24
6.5 Species prioritisation as recognition	6-34
6.6 The stakeholders of environmental justice	6-37
6.7 Conclusion	6-47
7. Conclusion	7-1
7.1 A thesis about law and justice. A thesis about power.	7-1
7.2 Thesis summary	7-5
7.3 An environmental theory for environmental law	7-16
7.4 Conceptualising environmental justice for Australian environmental law	7-26

Bibliography	B-1
Cases and court documents	B-1
Legislation, policy and international materials	B-5
Articles, books and other materials	B-8

Table of figures

Figure 1: Case study site locations – south-eastern Australia	1-43
Figure 2: Orange Waste Project, New South Wales – location	1-44
Figure 3: Port Phillip Channel Deepening Project – location	1-45
Figure 4: Wielangta Forest coupe logging project – location	1-47

Chapter 1

Introduction

1.1 Finding environmental justice

About this thesis

This thesis is about the position and possibility of environmental justice in Australian environmental law. At its core, it is a critical environmental law inquiry, with a jurisdictional and geographic focus on Australia. The thesis is about how, where and why laws, legal processes and legal agents operating with a purpose of environmental protection or sustainable land management intersect with the human and non-human environment in Australia. It reflects on the state of environmental law. It searches within the law for a concept of environmental justice drawn from international and domestic experiences and theories, and from three case study investigations. It challenges environmental law and demands improvements to it.

The overarching problem that inspired this thesis is that Australia's environmental laws and its ecologically sustainable development objective lack an environmental ethic.

Consequently, the law creates processes that do not prioritise the achievement of environmental outcomes nor seek to address the environmental concerns held by those communities that are driven to take part in the law to conserve the environment and the well-being of humans dependant on the environment. Others have directed consideration to an ethical position for environmental law based in earth jurisprudence,¹ democracy² or governance.³ This thesis, however, argues that a multifaceted theory of environmental justice, drawn from threads of policy, activism, scholarship and jurisprudence within Australia, offers a compelling theorised ethical position that justifies not only the current suite of environmental laws, but also a more protective interpretation and implementation

¹ Peter D Burdon, 'A theory of Earth jurisprudence' (2012) 37 *Australian Journal of Legal Philosophy* 28.

² Robyn Eckersley, *The Green State: Rethinking Democracy and Sovereignty* (MIT Press, 2004).

³ Cameron Holley, Neil Gunningham and Clifford Shearing, *The New Environmental Governance* (Earthscan, 2012).

of current laws and sustainability concepts.

A timely new jurisprudence

When I began working on this thesis in 2008, judges of the New South Wales Land and Environment Court were positioning themselves at the forefront of environmental law, and setting out a pathway to develop a uniquely Australian interpretation of the principle of ecologically sustainable development.⁴ A new environmental jurisprudence was emerging, especially in the climate change cases of *Walker*⁵ and *Gray*,⁶ where the court interpreted ecologically sustainable development as a principle embedded into the more broadly understood and affective notion of the 'public interest'. The court found that it was a concept that served the public and could not be avoided in matters of demonstrable public interest.⁷ Moreover, in *Bentley*⁸ and *Taralga*,⁹ Chief Justice Preston integrated and formulated views about the interpretation and application of the law to concepts of ecological integrity and intergenerational equity. These cases revealed within Australia's only specialised environmental court of record a renewed interest in environmental concepts, and a search for overarching theories or principles to direct the future development of environmental law in Australia.

The concern about harm across species and generations, and the prioritising of the interests of the public within environmental law, resonated with a concept of environmental justice that, long entrenched in the realm of environmental ideas, in 2007 with the publication by David Schlosberg of his book *Defining Environmental Justice*,¹⁰ became the subject of

⁴ Commonwealth of Australia, *National Strategy on Ecologically Sustainable Development* (1992) noted the goal of ecologically sustainable development is '[d]evelopment that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends'.

⁵ *Walker v Minister for Planning* (2007) 157 LGERA 124 ('Walker').

⁶ *Gray v Minister for Planning* (2006) 152 LGERA 258.

⁷ *Walker* (2007) 157 LGERA 124.

⁸ *Bentley v BGP Properties Pty Limited* (2006) 145 LGERA 234.

⁹ *Taralga Landscape Guardians Inc v Minister for Planning and RES Southern Cross Pty Ltd* (2007) 161 LGERA 1.

¹⁰ David Schlosberg, *Defining Environmental Justice: Theories, Movements, and Nature* (Oxford University Press, 2007).

discussion in Australian environmental law circles. Environmental justice has multiple facets connected by a concern to prioritise, to recognise and to protect the interests of the vulnerable, the silent or even the future. It burdens governments with responsibility and demands fairness between industry and community. Whereas ecologically sustainable development is offered as a principle by business that can be objectively reported on,¹¹ environmental justice is laden with value and a morality that is inescapable.¹² Although the bounds of environmental justice are undefined, there is agreement that the concept demands redress of inequitable historical distributions of environmental harm, and the empowerment of vulnerable communities over environmental decisions that affect their futures. There is an expectation that governments, agencies and industry uphold the interests of the public and respond to community environmental concerns respectfully, recognising the value of their lived experience, and to build within communities a capacity to endure and flourish.

As this research commenced, it was timely to explore the principle of environmental justice in Australian environmental law, to build on the early grappling with the concept both explicitly and implicitly in the jurisprudence of the New South Wales Land and Environment Court, and to ask whether infusing concepts of environmental justice into environmental law would make a difference – to the decisions that are made, the cases that are decided and to the experiences of communities that are involved in the law. Would redress or a new equilibrium for the environment come from an environmental law that unquestionably sought to achieve fairness, equity and justice?

An idea for a thesis

Ideas, principles and theories such as the concept of environmental justice can invigorate laws; they can redirect them when the law fails to fulfil its purpose. They do not necessarily depend on dramatic shifts in global legal frameworks,¹³ or the rise of community

¹¹ Kathryn M Davidson, 'Reporting systems for sustainability: What are they measuring?' (2011) 100 *Social Indicators Research* 351.

¹² Peter S Wenz, *Environmental Justice* (SUNY Press, 1988).

¹³ See, eg, *Environment Protection (Sea Dumping) Act 1981* (Cth), or indeed much of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

consternation about the effective nature of laws and their implementation, as precursors to change.¹⁴ Ideas developed across disciplines, practised elsewhere, or explored through scholarship and research can nudge the law or refashion it.

The recent history of Australian environmental law following the incorporation of the concept of ecologically sustainable development in 1992, at a time of earnest international environmental lawmaking, has seen ideas, principles and theories change the law. Although most changes have accorded with sustainability principles,¹⁵ none has been influenced by an overarching notion of environmental justice or a clear environmental morality. The adoption of economic instruments to reduce pollution emissions,¹⁶ the advent of 'fast-track' environmental assessment laws for projects declared to be of particular significance,¹⁷ the use of civil penalties to punish environmental crimes,¹⁸ and the sharing of environmental co-regulation responsibilities among community members, industry and the regulator¹⁹ have all been devised to give effect to principles. Neo-liberalism and its embrace of environmental economics and markets, representative parliamentary democracy, criminal shaming and restorative justice, and community management and co-regulation, respectively, guided these legal modifications.

These examples show that in advancing legal change, ideas and theories are influential; some, especially the neo-liberal turn, more influential than others. This thesis proposes environmental law be recast using a concept of environmental justice grounded in empirical

¹⁴ This was the trigger for the recent review of the *Environment Protection Act 1970* (Vic): see Stan Krpan, *Compliance and Enforcement Review: A Review of EPA Victoria's Approach*. Publication 1368 (2011); Victorian Government EPA Inquiry, *Independent Inquiry into the Environment Protection Authority* (2016).

¹⁵ *Environment Protection Act 1970* (Vic) ss 1B–1L.

¹⁶ *Environment Protection Act 1970* (Vic) ss 19AA and 19AB.

¹⁷ Independent Commission Against Corruption, *The Exercise of Discretion Under Part 3A of the Environmental Planning and Assessment Act 1979 and the State Environmental Planning Policy Major Development) 2005* (2010).

¹⁸ *Environment Protection Act 1993* (SA) s 104A; *Environment Protection Act 1970* (Vic) ss 67AC; *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

¹⁹ Neighbourhood Environment Improvement Plans in *Environment Protection Act 1970* (Vic) 19AI. Neil Gunningham, 'The new collaborative environmental governance: The localization of regulation' (2009) 36 *Journal of Law and Society* 145.

study and applied at the meta scale; a concept grounded in an ethic of protecting the interests of the vulnerable and achieving a fairer balance of power in environmental decision-making. It will argue that environmental justice ideas will enable the taking back, and the reorienting of environmental law, to its core purpose – of environmental protection.

A new meta theory or concept is needed for environmental law to recharge the state and operation of Australian environmental laws, which have been framed and interpreted since the 1990s²⁰ through the concept of ecologically sustainable development. Since this time, statutes have stagnated and jurisprudence interpreting the principle has been mixed. There is a lack of clarity about what it means in and for the law. The process of revisiting this concept has more recently been undertaken by the Australian Panel of Experts on Environmental Law, which concluded that the principle of ecologically sustainable development should be reinterpreted or understood as being directed to different objectives than in the past, possibly including justice.²¹ The message was clear, however, that Australia's environmental laws can and must be better. Primarily, they must be better at achieving what the community expects of environmental laws, and of fulfilling the objectives the laws purport to achieve: of protecting the environment.²²

Compared with the evolving jurisprudence of the New South Wales Land and Environment Court, the deficiency of Australia's environmental laws and its overarching principles was highlighted in a period of 15 months from 2006 when the Federal Court of Australia delivered two judgments that underlined the failure of each of the three branches of government to make, interpret and implement laws to mitigate human-induced climate change and lessen the harm predicted to be caused by a changed climate. Another judgment decreed that community opportunities to contribute to environmental decisions can be curtailed by government and can diminish public confidence in environmental laws,

²⁰ Commonwealth of Australia, above n 4.

²¹ Australian Panel of Experts on Environmental Law, *The Next Generation of Australia's Environmental Laws: Introductory Paper* (2015) 5.

²² Allan Hawke, *The Australian Environment Act – Independent Review of the Environment Protection and Biodiversity Conservation Act 1999 – Final Report* (October 2009) 17 proposes a refocused environmental legislative purpose of conservation and protection.

but will still be lawful. Then, in a 2008 Victorian Supreme Court decision, Cavanagh J conceded that he was bound by legal precedent in finding that there exists no legal guarantee that affected communities can speak about the environmental health harms they confront.

In a decision of the High Court of Australia during the same period, the court made clear one reason for the intransigence: that our legal system still considers environmental regulation to be a burden, that the primary objective of law is to protect human interests, particularly the exploitation of property. Where values or ethics exist in environmental law, they are not environmental ones. This was despite the rise of ecologically sustainable development in the Australian environmental legal system.

These cases collectively illustrate gaps within the law, a reluctance of the law to embrace advancements in physical and social science, and a deficiency in the underlying concept for environmental laws. They offered a counterpoint to the vitality of environmental law thinking and developing emerging from the New South Wales Land and Environment Court, making stark the pathways for the development of environmental law. The cases showed judges, governments and parliaments had a limited view about the roles of environmental laws, and an unwillingness to respond to community demands for involvement in the implementation of environmental laws, let alone embrace them and prioritise their interests.

1.2 The environmental legal context for the thesis

A jurisprudential low point

In 2006, John Howard's decade-long conservative government was nearing its end. In part, its downfall was attributed to its intransigence in addressing climate change during its final term,²³ with his more progressive political opponent presenting climate policy as a symbol of his promise for change to the Australian political discourse, including to grapple with

²³ Christopher Rootes, 'The first climate change election? The Australian general election of 24 November 2007' (2008) 17 *Environmental Politics* 473.

complexity, morality and a global dimension in national policy.²⁴

Part of the Howard Government legacy was the approval of new coal mines along the eastern seaboard, which were opposed in the federal courts by environmental groups concerned about the effects of global climate change on local environments, particularly the Great Barrier Reef, which had been recognised as being threatened by warming oceans.²⁵ *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment & Heritage*²⁶ was one such notable case. It was heard by Dowsett J, appointed in 1998 by the Howard Government from the Queensland Supreme Court,²⁷ at a time of heightened awareness of the ideology of judicial appointees.²⁸ Justice Dowsett, himself, later acknowledged the prejudices judges bring to their role.²⁹

The judgment by Dowsett J illustrated the difficulties many judges have in accepting, understanding – and applying – the many integral principles of ecologically sustainable development, including the precautionary principle.³⁰ This principle – of acting with caution in the face of uncertain science about environmental impacts – has had a sometimes-celebrated incorporation into Australian environmental law.³¹ It has not, however, been interpreted as disrupting existing environmental power dynamics or of prioritising

²⁴ Kevin Rudd, 'Faith in politics' *The Monthly* (online, October 2006) <<https://www.themonthly.com.au/monthly-essays-kevin-rudd-faith-politics--300>>.

²⁵ Ove Hoegh-Guldberg, 'Climate change, coral bleaching and the future of the world's coral reefs' (1999) 50 *Marine and Freshwater Research* 839.

²⁶ (2006) 232 ALR 510 ('*Whitsunday*').

²⁷ Justice John A Dowsett, 'The Australian judges – Who do they think they are?' (Speech given at 'Reappraising the Judicial Role – European and Australian Comparative Perspective', Centre for European Studies Conference ANU, Canberra, 14 February 2011).

²⁸ Justice Michael Kirby, 'Judicial dissent' (Speech to Law Students Society of James Cook University, Cairns, 26 February 2005).

²⁹ Justice John A Dowsett, 'Prejudice – The judicial virus' (Speech to National Judicial College of Australia 'Judicial Reasoning: Art or Science' Conference, ANU, Canberra, February 2009).

³⁰ Warwick Gullett, 'The precautionary principle in Australia: Policy, law and potential precautionary EIAs' (2000) 11(2) *Risk: Health, Safety and Environment* 93.

³¹ Jacqueline Peel, *The Precautionary Principle in Practice: Environmental Decision-making and Scientific Uncertainty* (Federation Press, 2005).

environmental interests. In the *Whitsunday* case, concerning two new Queensland coal mines, the principle had no meaningful influence over decision-makers,³² and Dowsett J misunderstood it. The judge expected the applicants in the case to demonstrate direct, particularised and attributable future environmental impacts of the contested coal mining projects on the Great Barrier Reef,³³ rather than himself undertake a process of acknowledging risks, situating the project's risks within its cumulative context, evaluating the seriousness of the risks and determining management actions to hedge against the realisation of the risks.³⁴ His dismissal of the applicants' case – as 'really based upon the assertion that greenhouse gas emission is bad, and that the Australian government should do whatever it can to stop it'³⁵ – also demonstrated a narrow understanding of the interrelatedness of actions and impacts of climate change and represented an eschewal of sustainability concepts of intergenerational equity and regard for cumulative impacts.³⁶ Together with his unarticulated deference to government, it displayed a lack of respect for the concerns raised by the community group, articulated within a cumbersome statutory framework, despite those community concerns being acknowledged by the government as logical, feasible and based on existing climate science.³⁷

Peel fixed on this case in a series of feminist legal critiques of Australian court judgments because she saw it as producing an obvious inequity arising out of Australian environmental

³² Affidavit of Mark Flanigan in the matter of the *Whitsunday* case (2006) 232 ALR 510 (October 2005) where the decision-maker under statute declared but did not explain that the decision 'took account of the precautionary principle as expressed in the EPBC Act' (para [25]).

³³ *Whitsunday* (2006) 232 ALR 510, para [40].

³⁴ This approach is consistent with the application of the precautionary principle: see Adrian Deville and Ronnie Harding, *Applying the Precautionary Principle* (Federation Press, 1997).

³⁵ *Whitsunday* (2006) 232 ALR 510, para [72].

³⁶ Jacqueline Peel (together with Lee Godden), 'Addressing climate change inequities: The contribution of a feminist judgment' in Heather Douglas, Francesca Bartlett, Trish Luker and Rosemary Hunter (eds), *Australian Feminist Judgments: Righting and Rewriting Law* (Hart, 2014) 133. As Peel notes, the judge 'questioned the applicability of the precautionary principle and the utility of interpreting [the law] in light of Australia's international obligations, and rejected the relevance of assessing the cumulative impacts' while also downplaying the extent of impacts of the coal mine on the consequent and observed effects of climate change (para [135–6]).

³⁷ Affidavit of Mark Flanigan in the matter of the *Whitsunday* case (2006) 232 ALR 510 (October 2005).

law.³⁸ Justice Dowsett did not see the environment in an integral or systemic way, and viewed his role not being concerned with the longevity of humans and non-human species.³⁹ His failure to evaluate harms over time and place, especially by adopting a narrow and isolated view of impact and harm, and his unwillingness to acknowledge and consider community knowledge, underscored the injustice in the case to the vulnerable, the unrepresented and the future.⁴⁰

Yet, Stone J upheld Dowsett J's reasoning and approach, and confirmed his conclusion in *Anvil Hill Project Watch Association v Minister for the Environment* – a case concerning another coal mine that confronted similar arguments about impacts associated with climate change – a year later.⁴¹ Justice Stone applied a limited view of legal responsibility for harms that may eventuate from a project in the longer term. She determined that an applicant must prove a factual causal connection between an activity and harm. In doing so, she rejected arguments that the tort law test for causation in circumstances where impacts are uncertain or unknown should apply. Justice Stone held that such a test – of asking whether it is fair and appropriate that a person be attributed with responsibility for harm⁴² – should not be incorporated into environmental law.⁴³ The effect of this conclusion is to limit the asking of questions about fairness and justice within environmental law. It distances environmental law from tort law – a part of the legal system from which it evolved. As a result, environmental law is confined and restricted to the community that seeks to use environmental law to achieve goals of protection and conservation.

³⁸ Peel, above n 36.

³⁹ This is framed by *ibid*, as a “‘duty of care’ for creatures (human and non-human) that are most vulnerable and closely dependent on a healthy environment’ (para [136]). In Godden’s rewritten judgment that follows, she focuses on that ‘duty of protection’ (p 138, para [2],) as the starting point for environmental laws.

⁴⁰ Godden (in Peel, above n 36) emphasised the need to protect the ‘vulnerable and dependent’ and to preserve the ‘enduring connection between humanity and the life-world’ (p 139, para [4]), while respecting the values of life and culture through environmental laws. To not be captured or limited by linear, contemporary or hierarchical thinking about environmental impacts (p 143, para [20]).

⁴¹ (2007) 159 LGERA 8 (*Anvil Hill*), para [39].

⁴² See the discussion in *Strong v Woolworths Limited* (2012) 246 CLR 182.

⁴³ *Anvil Hill* (2007) 159 LGERA 8, para [34].

The contribution of engaged members of a community is undervalued within environmental law processes. This was highlighted in the 2007 case of *Wilderness Society Inc v Turnbull*.⁴⁴ The majority of the Full Federal Court conceded that environmental assessments relevant to the case under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) had been undertaken in 'studied haste'.⁴⁵ The effect was to limit the capacity of members of the community to contribute their knowledge, expertise and views, and ultimately to influence the decision-making process. Justices Branson and Finn⁴⁶ explained that the purpose of the environmental law in question was not to seek quality or coverage of community contributions. In years prior, Branson J had broadened the sphere of influence of community members over environmental laws by recognising the role that communities and scientists have in initiating public interest environmental litigation.⁴⁷ The effect, however, of her and Finn J's reasonings in the *Wilderness Society* case is that while a party may be entitled to standing at law, that right provides little by way of a role in or an avenue to influence the operation of environmental law. Also arguably incommensurate with their conclusion were Finn J's views on government accountability.⁴⁸ In the *Wilderness Society* case, the judges closed off the capacity for important community actors to have fairness in environmental laws. Their conclusion was that if an opportunity to comment on a project the subject of consideration by the government under the law is not 'illusory or wholly unreasonable', then the law will not interfere with that process, even if it is defective and even if it would lead to a lowering of public confidence in the law. The judges commented that:⁴⁹

It is not to the point that a more generous period would possibly have enhanced the quality

⁴⁴ (2007) 166 FCR 154 ('*Wilderness Society*').

⁴⁵ *Ibid*, para [84].

⁴⁶ Tamberlin J, dissenting, agreed with Branson and Finn JJ on this point (see *Ibid*, para [94]), although disagreed with them on other matters the subject of review, including the need to consider wider, and incidental, environmental impacts, relevantly from logging, when appraising the environmental impacts of the pulp mill (see *Ibid*, from about para [108]).

⁴⁷ *Booth v Bosworth* (2001) 114 FCR 39.

⁴⁸ Paul Finn, 'Public trust and public accountability' (1994) 13 *Griffith Law Review* 224.

⁴⁹ *Wilderness Society* (2007) 166 FCR 154, para [86].

of the comment that might have been made. It is not to the point that the period chosen might seriously compromise the comment which particular persons or entities wished to, or were able to, make.

Difficulties translating environmental objectives into law

Justice Cavanagh of the Victorian Supreme Court reached a similar conclusion about the fairness of environmental law – or lack of it – for community members in *Geelong Community for Good Life Inc v Environment Protection Authority*.⁵⁰ In this case, the environmental regulator gave insufficient information about a pollution licence amendment⁵¹ to a community group that had been engaged in the environmental co-management of a nearby polluting industrial complex for more than a decade.⁵² The regulator acted to advance the commercial interests of the licensed polluter by excluding the community from involvement, and denying it influence in the process of deliberation about the licence amendment.⁵³ Under the law, the judge found the affected community had no greater right to be involved in environmental decisions under the Act than the rest of the Victorian population.⁵⁴ The local community members were not entitled to an expectation to be consulted or to be involved in environmental processes,⁵⁵ and no other party or government agency owed it a duty to act fairly.⁵⁶

Adopting the perspective of Aronson, Dyer and Groves about administrative review of decisions with manifold issues,⁵⁷ the judge contemplated a direction for the law that might

⁵⁰ (2008) 20 VR 338 (*Geelong Good Life*).

⁵¹ *Ibid* 357–9.

⁵² *Ibid* 352–5.

⁵³ *Ibid* 357–8.

⁵⁴ *Ibid* 347.

⁵⁵ *Ibid* 343–5.

⁵⁶ *Ibid* 350.

⁵⁷ Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook, 3rd ed, 2004) 429, who argue that 'adjudicative' processes that give affected people a right to be heard with respect to polycentric decisions are inappropriate. Brian J Preston, 'The art of judging environmental disputes' (2008) 12 *Southern Cross University Law Review* 103, 107 made a similar point, citing Lon L Fuller, 'The forms and limits of adjudication' (1978) 92 *Harvard Law Review* 353. Both say that resolving one aspect of a problem at law may not resolve the broader issue of interest to and for the community.

achieve the kind of fairness a community would expect – to be at the forefront of government thinking, to be involved in decisions that they are affected by – a kind of justice not available under administrative law. Framed through the language of administrative law, Justice Cavanagh suggested:⁵⁸

a duty to consult might be thought suitable in relation to polycentric decisions affecting the public as a whole or large sections of the public, given that in such situations the adjudicative style of procedure (which rests from giving affected individuals a right to be heard under the principles of natural justice) is inappropriate.

He conceded, however, that such a duty to consult was unlikely to be adopted by the High Court.⁵⁹ In fact, a contemporaneous High Court decision – *Chang v Laidley Shire Council*⁶⁰ – revealed the High Court’s lack of enthusiasm for community interests and rights in environmental decision-making processes. The *Chang* case concerned the denial of compensation for a landowner whose plans to subdivide land was stymied by a change in planning provisions to create an area to preserve environmental and rural landscape. The plurality⁶¹ dealt with the matter as a statutory interpretation exercise, while Kirby J and Callinan J separately prioritised the private over the public interest in environmental laws. Justice Callinan argued for the dominance of the individual over the community, and of private capital over public interest,⁶² within laws affecting environmental protection.⁶³

Increasingly prescriptive, restrictive, intrusive and even wrong-headed planning and heritage legislation and instruments, which go far beyond what a modern law of nuisance, taking account of denser populations, closer settlements, burgeoning industries, and other contemporary conditions could possibly insist upon, should not, as I fear they oppressively are, be used as a cloak to reduce, or extinguish valuable rights of, or attaching to, property.

Although Kirby J acknowledged that planning laws do not provide private property

⁵⁸ (2008) 20 VR 338, 359.

⁵⁹ *Ibid.*

⁶⁰ (2007) 234 CLR 1 (*‘Chang’*).

⁶¹ *Ibid* (Hayne, Heydon and Crennan JJ).

⁶² *Ibid*, para [123]. Callinan J notes that the planning law change was a part of the changes to laws made for ‘some apprehended public interest’.

⁶³ *Ibid*, para [124].

guarantees⁶⁴ he saw planning laws as creating and valuing private 'interests'.⁶⁵ The approach of the state to reduce access to compensation was, in his view, a loss of entitlement, a deprivation and an unfairness in and of the law.⁶⁶ Without acknowledging the public interest in the change of the law – to protect landscapes of environmental significance – Kirby J was critical of the Queensland Parliament for not taking responsibility or accountability for the effect of the amendments on a small number of private landholders.⁶⁷

Environmental law has been portrayed as having developed and evolved in a progressive manner over much of the past century, and that it has been responsive to social circumstances, political movements and experiences of harm.⁶⁸ But the cases show how conceptual barriers and frustrations persist within the environmental law framework.⁶⁹ The broad category of environmental laws is seen as 'wrong-headed' and 'oppressive' towards property rights. Despite the attempts to infuse notions of responsibility, fairness and restorative justice in environmental laws,⁷⁰ they seldom achieve an adjustment in power between governments, proponents and community groups. They do not seek fairness to its participants and its objects. The attempts to allocate responsibility⁷¹ and distribute just outcomes simply remain attempts.⁷²

⁶⁴ Ibid, para [21].

⁶⁵ Ibid, para [27].

⁶⁶ Ibid, paras [82], [85].

⁶⁷ Ibid, para [85].

⁶⁸ Justice Brian Preston, 'Environmental law 1927–2007: Retrospect and prospect' (2007) 81 *Australian Law Journal* 616.

⁶⁹ Writing in 1994, Freyfoyle argued that environmental law was hamstrung by an embrace of ill-suited, and typically property or economic-based, tools and conceptualisations for environmental law, and an absence of an ethical standard and a value set for environmental law: see Eric T Freyfoyle, 'The ethical strands of environmental law' [1994] *University of Illinois Law Review* 819, 834, 840.

⁷⁰ See, eg, the *Contaminated Sites Act 2003* (WA) s 8.

⁷¹ Carbon pricing legislation is just one example.

⁷² For example, the Victorian EPA appears to have decided not to persist with its environmental restorative justice program following its first attempt concerning the Hallam Road landfill: see EPA Victoria, *Hallam Road*

1.3 Revisiting the sustainability paradigm

The popularity and complexity of sustainability

If any concept could be identified in Australia as representing a standard within environmental law, it is the incarnation of the globally defined concept of sustainable development⁷³ in Australia as 'ecologically sustainable development'.⁷⁴ The cases detailed above⁷⁵ were all decided and relevant government decisions were made purportedly giving effect to the concept of ecologically sustainable development. Policy inquiries have entrenched it and described it as a 'cornerstone' concept for environmental law.⁷⁶ Sustainable development has policy legitimacy because of its popularisation and reiteration through international law.⁷⁷ Yet, the concept is highly contentious and often criticised, and decisions framed by sustainability have offered doubt about its utility in achieving environmentally beneficial outcomes.⁷⁸ Of special relevance to this thesis, the current 'sustainability paradigm' is questioned because the concept attempts to reflect and advance incommensurable values and consequently lacks a clear ethical underpinning. In contrast, it has been argued that the concept of environmental justice has a 'fundamental core' or clear agenda of environmental protection and community empowerment that actors 'could coalesce around if they so wished'.⁷⁹

Landfill: Enforceable Undertaking. Publication 1489 (July 2012).

⁷³ Global definitions are traced to the World Commission on Development and Environment, *Our Common Future* (Oxford University Press, 1987).

⁷⁴ This can be traced to the advent of the National Strategy on Ecologically Sustainable Development in 1992: see Commonwealth of Australia, above n 4.

⁷⁵ *Whitsunday* (2006) 232 ALR 510; *Anvil Hill* (2007) 159 LGERA 8; *Wilderness Society* (2007) 166 FCR 154; *Geelong Good Life* (2008) VR 338; and *Chang* (2007) 234 CLR 1.

⁷⁶ Hawke, above n 22, 14.

⁷⁷ Andrew Dobson, *Justice and the Environment: Conceptions of Environmental Sustainability and Theories of Distributive Justice* (Oxford University Press, 1998) 19.

⁷⁸ Brad Jessup, 'The Port Phillip Channel Deepening Project and environmental law: A model for ecologically sustainable development?' in Warwick Gullett, Clive Schofield and Joanne Vince (eds), *Marine Resources Management* (LexisNexis, 2010) 297.

⁷⁹ Duncan French, 'Sustainable development and the instinctive imperative of justice in the global order' in Duncan French (ed), *Global Justice and Sustainable Development* (Martinus Nijhoff, 2010) 3, 22.

Over the past 25 years in Australia, the concept of ecologically sustainable development, particularly with its subsidiary principles of precaution and equity across generations,⁸⁰ has been incorporated into environmental laws and policies, sometimes slowly and other times monumentally. The principle has been inserted into purpose sections of statutes and has been used as benchmarks for government decisions.⁸¹ Yet, the way the principles are framed, with difficult-to-achieve environmental and social mandates compared with the more readily achievable goals of efficiency and economic development, has meant that the goal of environmental protection in the law has not been met.⁸² The precautionary principle has almost always been misunderstood and poorly applied – including in the case that is celebrated in Australia as giving it meaning – the *Telstra* case.⁸³ A ‘culture of consent’ in environmental laws, identified in the 1990s, directs the administration of those laws. Laws that are intended to evaluate project environmental impacts operate by approving projects.⁸⁴ Development laws are used to approve development activities, environmental impact assessment laws do not halt controversial projects,⁸⁵ pollution control laws license polluting industry just as before,⁸⁶ and biodiversity conservation laws have overseen

⁸⁰ See Commonwealth of Australia, *Intergovernmental Agreement on the Environment* (1992) and the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

⁸¹ Justice Peter Biscoe, ‘Ecologically sustainable development in New South Wales’ (Paper delivered at the 5th Worldwide Colloquium of the IUCN Academy of Environmental Law, Paraty, Brazil, 2 June 2007). See, eg, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), the *Protection of the Environment Administration Act 1991* (NSW) and Commonwealth of Australia, above n 4.

⁸² Michael Howes, *Politics and the Environment: Risk and the Role of Government and Industry* (Allen & Unwin, 2005) 126 claims that ‘Australian ESD policies were much more narrowly defined and emphasised the economic rather than the ecological dimension’.

⁸³ See, eg, *Whitsunday* (2006) 232 ALR 510. In *Telstra Corp Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256 the objective of the judge – Chief Justice Brian Preston – to define the principle in the form of a legal test has seen the principle focus on questions of science rather than ideas of precaution.

⁸⁴ Andrew H Kelly and David Farrier, ‘Local government and biodiversity conservation in New South Wales’ (1996) 13 *Environmental and Planning Law Journal* 374.

⁸⁵ For example, the Macarthur River Mine in the Northern Territory, which proceeded only after executive and parliamentary intervention; the Channel Deepening Project in Victoria, which was approved after a second environmental assessment process; and the Gunns Pulp Mill, which was approved after the proponent withdrew from the environmental assessment process, forcing Commonwealth and Tasmanian governments to retrofit assessment processes.

⁸⁶ See, eg, EPA Victoria, *EPA Annual Report 2008* (2009) A8, EPA Victoria, *EPA Annual Report 2013* (2014) 20 and EPA Victoria, *EPA Annual Report 2016* (2017) 23, which show that works approval grants (and, since 2014, with the passage of the *Environment Protection and Sustainability Victoria Amendment Act 2014* (Vic),

continued species threats and habitat loss.⁸⁷

There have been glimpses of progress in climate cases in Australia where planning tribunals have had regard to climate adaptation and, implicitly, intergenerational equity and resilience concerns that are integral to sustainable development, by refusing to permit some small coastal developments.⁸⁸ However, big energy-intensive and coal mining projects with clear and significant increases in greenhouse gas emissions have not been stopped,⁸⁹ even when the merits of the project have been shown to be overwhelmed by the harm of the project and where the New South Wales Land and Environment Court has resoundingly rejected the projects.⁹⁰ Governments have changed 'environmental protection policies' to prioritise economic development over environmental protection.⁹¹ Concurrently, 'greener' judicial interpretations of laws have been unambiguously overturned on appeal⁹² or amended by parliaments concerned that more judicial activism might mean that laws are used to prohibit potentially harmful activities – and, as a corollary, become more capable of

combined with exemptions) remain relatively constant since 2003, with only a dip arising from reduced applications in 2017. There were 70 approvals in 2006 and 74 approvals and exemptions in 2016.

⁸⁷ See, eg, International Union for Conservation of Nature and Natural Resources, *The IUCN Red List of Threatened Species*, 2019, data version 2018.2 <<http://www.iucnredlist.org>>. The list shows the overwhelming trend of decline not recovery of threatened species.

⁸⁸ See, eg, *Gippsland Coastal Board v South Gippsland Shire Council* (No 2) [2008] VCAT 1545 and *Northcape Properties Pty Ltd v District Council of Yorke Peninsula* [2007] SAERDC 50, upheld by *Northcape Properties Pty Ltd v District Council of Yorke Peninsula* [2008] SASC 57.

⁸⁹ See, eg, *Australian Conservation Foundation v Latrobe City Council* (2004) 140 LGERA 100 and *Whitsunday* (2006) 232 ALR 510. Most recently, see *Australian Conservation Foundation Incorporated v Minister for the Environment and Energy* (2017) 251 FCR 359.

⁹⁰ *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Ltd* (2013) 194 LGERA 347 ('*Bulga*'), and on appeal *Warkworth Mining Ltd v Bulga Milbrodale Progress Association Inc* (2014) 86 NSWLR 527.

⁹¹ See the 2013 amendments to the State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007 (NSW), which ultimately were tempered. See also Tristan Orgill, 'The perils of fast-tracking mining development: An examination of the Mining SEPP "resource significance" amendments' 32 *Environmental and Planning Law Journal* 486.

⁹² See, eg, *Walker* (2007) 157 LGERA 124, overturned by *Minister for Planning v Walker* (2008) 161 LGERA 423; *Brown v Forestry Tasmania (No 4)* (2006) 157 FCR 1, overturned by *Forestry Tasmania v Brown* (2007) 167 FCR 34.

protecting the environment.⁹³

Within Australia, an environmental rights agenda has slowly risen to political attention,⁹⁴ and there have been attempts by scholars to reassert the importance of the 'ecological' and 'environmental' to ecologically sustainable development.⁹⁵ Human health concerns,⁹⁶ standards for species resilience,⁹⁷ habitat health⁹⁸ and duties of care⁹⁹ now inform understandings and implementation of environmental laws – all of which have resulted from sustainability thinking. Yet these changes would be more widespread, more entrenched and orthodox in an environmental legal system with sustainability reimagined through the concept of environmental justice. These proposals and changes would no longer be matters to balance or equivocate over; they would be the standard that communities can expect of an environmentally just law.

By the mid-2000s,¹⁰⁰ the orthodoxy of ecologically sustainable development in Australia was that policymakers had stopped inquiring about the meaning and purpose of the principle. The policy and ideal of sustainability were left to languish as the national environmental priorities turned first to community-led conservation through the National

⁹³ For example, the insertion of s 527E of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) through the enactment of the *Environment and Heritage Legislation Amendment Act (No 1) 2006* (Cth) which bounded the breadth of 'indirect impacts' raised in *Queensland Conservation Council Inc v Minister for the Environment and Heritage* [2003] FCA 1463 and confirmed in *Minister for the Environment and Heritage v Queensland Conservation Council Inc* (2004) 139 FCR 24. Amendments to the Regional Forest Agreement between the Commonwealth of Australia and the State of Tasmania on 23 February 2007 nullified the effect of *Brown v Forestry Tasmania (No 4)* (2006) 157 FCR 1.

⁹⁴ Brad Jessup and Annette Jones, 'In one ear and out the other: Human rights consultations and environmental discourses for human rights in Australasia' in Anna Grear and Louis Kotzé (eds), *Research Handbook on Human Rights and the Environment* (Edward Elgar, 2015) 249.

⁹⁵ Tim Bonyhady, 'Putting the environment first?' (2012) 29 *Environmental and Planning Law Journal* 316.

⁹⁶ Victorian Government EPA Inquiry, above n 14.

⁹⁷ See *Brown v Forestry Tasmania (No 4)* (2006) 157 FCR 1.

⁹⁸ The Murray Darling Basin Plan and environmental river flows is one example: see Commonwealth of Australia (Murray–Darling Basin Authority), 2014–15 *The Living Murray Annual Environmental Watering Plan* (2014).

⁹⁹ See, eg, *Environmental Protection Act 1994* (Qld) s 319.

¹⁰⁰ Howes, above n 82, 124.

Heritage Trust and then a demarcation of environmental responsibility between the states and the Commonwealth through the enactment of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). Since 2010, the national priority has been to divest environmental regulatory oversight to the states and territories.

Critiques of sustainability

Reflecting on its implementation globally, sustainability has been used in a 'weak' eco-modernist form, unable to trigger the change to the status quo that it promised.¹⁰¹ Its translation, especially by industry, into a concept with tripartite goals – economic advancement, social development and environmental protection – has meant that it is too often used as a tool of negotiation, efficiencies and trade-off,¹⁰² rather than one for environmental protection or conservation. Adams has argued that it no longer serves, if it ever did, its primary goal or its intended beneficiaries.¹⁰³ That is because it no longer has a clear goal or intended beneficiaries. The experience of ecologically sustainable development and sustainable development more generally is that it is pursued and argued for by people of incompatible world views with different environmental objectives.¹⁰⁴

Some have gone so far as to claim that sustainable development has been 'hijacked' by corporate interests¹⁰⁵ in order to serve a neo-liberal and free market agenda promoted by international institutions populated by economists.¹⁰⁶ The notion of sustainability has been used to promote the economic quantification of the environment. The rise of ecosystem

¹⁰¹ Harriet Bulkeley and Gordon Walker, 'Environmental justice: A new agenda for the UK' (2005) 10 *Local Environment: The International Journal of Justice and Sustainability* 329, 330.

¹⁰² Markus J Milne and Rob Gray, 'W(h)ither Ecology? The triple bottom line, the Global Reporting Initiative, and corporate sustainability reporting' (2013) 118 *Journal of Business Ethics* 13. Australian Panel of Experts on Environmental Law, above n 21, 5.

¹⁰³ William Adams, *Green Development: Environment and Sustainability in a Developing World* (Routledge, 2nd ed, 2001).

¹⁰⁴ Dire Tladi, 'Sustainable development, integration and the conflation of values: The *Fuel Retailers Case*' in Duncan French (ed), *Global Justice and Sustainable Development* (Martinus Nijhoff, 2010) 75, 77.

¹⁰⁵ Richard Welford, 'From green to golden: The hijacking of environmentalism' in Richard Welford (ed), *Hijacking Environmentalism: Corporate Responses to Sustainable Development* (Earthscan, 1997) 16.

¹⁰⁶ Juan Cervantes, 'Ideology, neoliberalism and sustainable development' (2013) 7 *Journal of Studies and Research in Human Geography* 325.

services has been encouraged by some conservationists though strongly resisted by others – and, despite cautions about its enthusiastic embrace,¹⁰⁷ it feeds into the economic discourse of the environment and has overlooked the fact that environmental law, a key institution to give effect to sustainability, should be based on a moral responsibility to protect and not an ideology to exploit.¹⁰⁸

This reformulation of sustainability means it is used to support the development agenda of the most powerful and wealthy in society,¹⁰⁹ including industries that view the environment as a resource. This is so particularly as the concept is narrowly cast by lawyers and planners within an individualistic and growth paradigm. There is an absence of community voices, a lack of plurality and an absence of equity¹¹⁰ within the sustainable development discourses of corporate and industrial Australia.

In response to the release of the United Nations Sustainable Development Goals, an expression of and particularisation by the international community about the ongoing contribution that the concept has to poverty alleviation and environmental protection, Holden et al¹¹¹ emphasise the absence of a prioritisation and articulation of environmental concern. An 'ethical turn'¹¹² in the understanding of and expectations for sustainable development means that sustainable development should address the moral imperatives of satisfying needs, ensuring equity and respecting environmental limits; a rediscovering and returning to the original Brundtland conception of sustainable development.¹¹³

¹⁰⁷ Bhaskar Vira and William M Adams, 'Ecosystem services and conservation strategy: Beware the silver bullet' (2009) 2 *Conservation Letters* 158; Brian J Miller, Michael E Soulé and John W Terborgh, "'New conservation" or surrender to development?' (2014) 17 *Animal Conservation* 509.

¹⁰⁸ Daniel A Farber, 'Taking responsibility for the planet' (2010) 89 *Texas Law Review* 147.

¹⁰⁹ Emily Fisher, 'Sustainable development and environmental justice; Same planet, different worlds?' (2003) 26 *Environs* 201.

¹¹⁰ *Ibid* 201, 204.

¹¹¹ Erling Holden, Kristin Linnerud and David Banister, 'The imperatives of sustainable development' (2017) 25 *Sustainable Development* 213.

¹¹² *Ibid* 214.

¹¹³ World Commission on Development and Environment, above n 73, ch 2 paras [25]–[26] notes the connection between environmental limits and inequity and the need to redress economic and social injustice

Sustainability with a justice-based ethic

The view of the Australian Panel of Experts on Environmental Law is also that it is time to restore and reinvigorate the principle of sustainability for Australia; to re-equilibrate the goals of ecologically sustainable development, to instil an environmental ethic into laws and identify 'an agreed societal goal that underpins'¹¹⁴ the concept of sustainability. Bringing environmental justice into the framework for environmental law would respond to the demands that environmental laws represent an environmental value, be open to critique for the outcomes produced and procedures followed, and be honest about the normativity within environmental law.¹¹⁵

When Low and Gleeson argued in the 1990s that justice within the environment had been neglected in the pursuit of sustainability,¹¹⁶ they were at the forefront of exploring ecological justice and in calling for an application of environmental justice ideas to non-humans. Imposing ecological justice on sustainability would challenge the neo-liberal ideology that has been infused into the sustainable development framework. It would highlight more explicitly the plight of the environment, and introduce a discourse of limits, rather than goals.¹¹⁷ As Bosselmann,¹¹⁸ a defender of the concept of sustainable development, notes, the rubric of sustainable development is supposed to support notions of intragenerational equity and intergenerational equity. These are seemingly forgotten or overlooked ethical components that direct attention to the effects of activities on

as a precursor to the attainment of the common interest in sustainable development within and among nations.

¹¹⁴ Australian Panel of Experts on Environmental Law, above n 21, 5.

¹¹⁵ Stephen Connelly and Tim Richardson, 'Value-driven SEA: Time for an environmental justice perspective?' (2005) 25 *Environmental Impact Assessment Review* 391, 393, 397.

¹¹⁶ Nicholas Low and Brendan Gleeson, *Justice, Society, and Nature: An Exploration of Political Ecology* (Routledge, 1998), 20–1. A comparable view from a human development perspective has also been offered by Julian Agyeman, *Introducing Just Sustainabilities: Policy, Planning, and Practice* (Zed Books, 2013).

¹¹⁷ Ted Benton, 'Ecology, community and justice: The meaning of being green' in Piers Beirne and Nigel South (eds), *Issues in Green Criminology: Confronting Harms Against Environments, Humanity and Other Animals* (William Publishing, 2007) 1, 9–10. Agyeman, above n 116.

¹¹⁸ Klaus Bosselmann, 'Ecological justice and law' in Benjamin J Richardson and Stepan Wood (eds), *Environmental Law for Sustainability: A Reader* (Hart Publishing, 2006) 129.

stakeholders, and, combined with Low and Gleeson's ecological justice, provide a foundation for an intrinsic and future valuation of the environment.¹¹⁹

This thesis argues that the principle of sustainability cannot stand apart as the guiding principle for environmental law. The core tenets of sustainability – human welfare and environmental protection – and its integrated principles of cross-generational and cross-species concern and its possibility to support rights and develop resilience are all worth keeping within a system of law and governance. The many notions of environmental justice that will be explored in this thesis – fairness, respect and compassion among them – would support those aspects while shedding sustainability of its technocentric and neo-liberal disguise.

Agyeman and Evans propose bringing parts of sustainability and environmental justice together through a notion of 'just sustainability'.¹²⁰ They draw on the similarities and the shared emphasis in the two concepts on environmental democracy, liveable communities and regard for the ecological integrity of the planet.¹²¹ Bosselmann, by contrast, sees ecological and environmental justice as separate to sustainable development. They are what sustainable development is not: an 'ethical and legal commitment'¹²² to environmental protection. An environmental justice framework discards the triple-bottom-line view of sustainable development. The bottom-line becomes environmental justice.

Environmental justice brings a theoretical rigour and offers a more critical frame¹²³ for the environmental compared to sustainability, a concept often maligned for being morally empty. It promises policy and intellectual richness to help grapple with multidimensional

¹¹⁹ Ibid 131.

¹²⁰ Julian Agyeman and Tom Evans, 'Toward just sustainability in urban communities: Building equity rights with sustainable solutions' (2003) 590 *The Annals of the American Academy of Political and Social Science* 35, 35. See also Julian Agyeman, Robert D Bullard and Bob Evans, 'Joined-up thinking: Bringing together sustainability, environmental justice and equity' in Julian Agyeman, Robert D Bullard and Bob Evans (eds), *Just Sustainabilities: Development in an Unequal World* (MIT Press, 2003) 1, 5.

¹²¹ Agyeman and Evans, above n 120, 37.

¹²² Klaus Bosselmann, 'Environmental justice v deregulation? Themes on an environmental law conference in Auckland' (1998) 2 *New Zealand Journal of Environmental Law* 209, 214.

¹²³ David Naguib Pellow, *What is Critical Environmental Justice?* (Polity, 2018).

and multi-scalar conflicts, manifestations and implications.¹²⁴ It acknowledges and responds to complexity not by simplifying or disaggregating an environmental principle, but by providing an ethical pathway to determine a fair response to that complexity. The embedding of environmental justice into environmental law also clarifies that the law and, for that matter, its component parts, including sustainability, are normatively directed to protect the environment and human health. How and what should be sustained becomes clearer. Outcomes and processes must be just¹²⁵ and governance more resemble an environmental democracy.¹²⁶ This would mean that there is a greater role for deliberation in environmental law,¹²⁷ a prioritisation of attending to voices dissenting to potentially harmful activities, and an acknowledgment of the interests of non-human parts of the environment insofar as human agents highlight harms brought on them.

1.4 A concept of environmental justice in law

The environmental justice gap in environmental law

Institutions, policymakers and the legal profession have recognised a discrete notion of environmental justice, and they have identified and categorised those laws that promote fair environmental processes and that can be used to avert disproportionate environmental damage on human communities.¹²⁸ Environmental justice, however, has not been a principle used to guide the evolution and implementation of environmental laws. This marginal progress at an overarching legal principle of environmental justice is despite the development of the concept of environmental justice by political scientists over more than

¹²⁴ Gordon Walker and Harriet Bulkeley, 'Geographies of environmental justice' (2006) 37 *Geoforum* 655, 658.

¹²⁵ Miriam Greenberg, 'What on earth is sustainable? Toward critical sustainability studies' (2013) 3(4) *Boom: A Journal of California* 54, 57–58, 62. Agyeman and Evans, above n 120, describe 'just sustainabilities' as integrating sustainable development and social justice (pp 36–38) and that presently sustainable development is 'virtually devoid of an appreciation of social justice' (p 40).

¹²⁶ Michael Mason, *Environmental Democracy* (Earthscan, 1999).

¹²⁷ Matt Watson and Harriet Bulkeley, 'Just waste? Municipal waste management and the politics of environmental justice' (2005) 10 *Local Environment: The International Journal of Justice and Sustainability* 411, 422.

¹²⁸ See, eg, Michael B Gerrard and Sheila R Foster (eds), *The Law of Environmental Justice: Theories and Procedures to Address Disproportionate Risks* (American Bar Association, 2nd ed, 2008).

30 years,¹²⁹ and its presence in United States policy and advocacy since the 1990s.¹³⁰ It has also been because of the narrow focus of the environmental justice movement¹³¹ on the distribution of environmentally harmful industry and land use¹³² and the effect of land uses on a narrow class of communities.¹³³

The limited adoption of environmental justice into law is also likely a consequence of the principle being understood and treated as having relevance only in the United States, where distributive environmental injustice in environmental policymaking and land-use planning decisions has been researched and demonstrated.¹³⁴ Environmental justice has also been resisted because it is disruptive. Environmental justice arguments 'attack the roots of sustainable development decisions, challenging the validity of process, the domination of expert knowledge, the robustness of decision tools and the openness of processes'.¹³⁵ It seeks to empower those overlooked or denied influence by a culturally homogenous legal system devised, implemented and maintained by the socially privileged.¹³⁶ This thesis,

¹²⁹ Luke W Cole and Sheila R Foster, *From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement* (NYU Press, 2001). See especially ch 1 'A history of the environmental justice movement' where the origins of the concept of environmental justice are explored. These origins are traced to academia, the civil rights movement and the increased prevalence and awareness of toxic waste in the United States.

¹³⁰ Ibid; Clifford Rechtschaffen and Eileen Gauna (eds), *Environmental Justice: Law, Policy and Regulation*, (Carolina Academic Press, 2nd ed, 2003). The key moments in the formalising of environmental justice in United States politics were the 1991 First National People of Color Environmental Leadership Summit and President Clinton's United States Executive Order No 12898, 59 Fed. Reg. 7629 (11 February 1994) *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*.

¹³¹ David Schlosberg, 'Reconceiving environmental justice: Global movements and political theories' (2004) 13 *Environmental Politics* 517, 529, describes discrete theories of environmental justice, including the theory of distributive justice promoted by the environmental justice movement as 'disappointing' because of their lack of integration.

¹³² Dobson, above n 77.

¹³³ Brad Jessup, 'Trajectories of environmental justice – From histories to futures and the Victorian environmental justice agenda' (2017) 7 *Victoria University Law and Justice Journal* 48.

¹³⁴ Cole and Foster, above n 129, Appendix.

¹³⁵ Judith Petts, 'Enhancing environmental equity through decision-making: Learning from waste management' (2005) 10 *Local Environment: The International Journal of Justice and Sustainability* 397, 398.

¹³⁶ Kristin Shrader-Frechette, *Environmental Justice: Creating Equality, Reclaiming Democracy* (Oxford University Press, 2002); Schlosberg, above n 131.

however, demonstrates that the concept and theory of environmental justice is not confined by one understanding of its history, but that it has a presence, relevance and utility in environmental law, and there is a groundwork and groundswell of interest in environmental justice in Australia.

Threads of justice in Australian environmental law

In Australia, environmental justice is becoming connected within the law in more a complex way than the intersection observed between the environmental justice movement and environmental law in the United States. Brian Preston, Australia's leading environmental jurist, highlighted environmental justice in his swearing-in speech as Chief Justice of the New South Wales Land and Environment Court:¹³⁷

the Court has a role in shaping concepts of justice. In particular, it can develop a concept of environmental justice. The protection of the marginalised, the poor and the disenfranchised in society is a feature of the law. In an environment context, these sectors of society suffer disproportionately from environmental pollution and other environmental degradations. Addressing these issues delivers justice to these sectors. The Court can explore the concept of poverty in the environmental context. Poverty is not just an economic condition; it is an environmental one. It is a state of defencelessness against the forces of assault and expropriation. The Court has a role here too.

This thinking has culminated in the *Bulga* and *Rocky Hill* cases.¹³⁸ Across these two cases, Preston CJ cast justice as being distributive, intergenerational, enmeshed with ecologically sustainable development, grounded in place and wellbeing, and drawing on local histories, context and vocabulary.¹³⁹ A plural and robust understanding of an Australian environmental justice is evident in these judgments. As will be explored below, there is also a long and critical engagement with participatory justice within Australia. What has arisen is an environmental justice with a different starting point from elsewhere in the world,

¹³⁷ Chief Justice Brian Preston, 'Swearing in ceremony of the Hon Brian John Preston as Chief Justice of the Land and Environment Court of New South Wales' (Speech given at the Supreme Court of NSW, Sydney, 14 November 2005) paras [81]–[85].

¹³⁸ *Bulga* (2013) 194 LGERA 347; *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7 ('*Rocky Hill*').

¹³⁹ Anna R Davies, 'Environmental justice as subtext or omission: Examining discourses of anti-incineration campaigning in Ireland' (2006) 37 *Geoforum* 708, 711 notes the importance of context, politics and the already strong movements for social justice and environmental protection in the UK and Ireland as reasons for a localised interpretation of environmental justice in those nations.

especially the United States.¹⁴⁰

An Australian conceptualisation of environmental justice has emerged from the country's leading environmental court and judiciary.¹⁴¹ On its establishment, the New South Wales Land and Environment Court was recognised as having the capacity to lead 'an emergent environmental justice system'.¹⁴² Its personnel, including its current Chief Justice and Justice Nicola Pain, who were both former principal solicitors of the Sydney-based Environment Defenders Office, have specialised understandings of the environment and the environmental principles developed by and dependent on the law.¹⁴³

Chief Justice Preston has also explained environmental justice as having the objective of a right to enjoy a healthy and clean environment.¹⁴⁴ He is supported by environmental law practitioners, advocates and scholars, who are drawing connections between a right to access courts, and human rights and environmental law in the pursuit of justice.¹⁴⁵

Environmental groups have also sought to integrate an environmental duty within a legislated version of environmental justice,¹⁴⁶ while the court has countenanced arguments

¹⁴⁰ Elisa Arcioni and Glenn Mitchell, 'Environmental justice in Australia: When the RATS became IRATE' (2005) 14 *Environmental Politics* 363, 365 suggest that reasons for a different starting point in Australia relative to the United States are that in Australia there is an absence of implicit environmental racism, a lack of grassroots environmental justice activism, an unwilling academy and a failure of government acknowledgement.

¹⁴¹ Brian J Preston, 'Benefits of judicial specialization in environmental law: The Land and Environment Court of New South Wales as a case study' (2012) 29 *Pace Environmental Law Review* 396.

¹⁴² Patricia Ryan, 'Court of hope and false expectations: Land and Environment Court 21 years on' (2002) 14 *Journal of Environmental Law* 301, 302.

¹⁴³ Preston, above n 141.

¹⁴⁴ *Bulga* (2013) 194 LGERA 347, para [492].

¹⁴⁵ Environment Defenders Office (NSW) and Environment Defenders Office (Victoria) Ltd, *Protection of Human Rights and Environmental Rights in Australia*. Discussion Paper (22 May 2009). Recognition is an obvious frame to connect environmental justice and human rights: see, eg, Lyla Mehta, Jeremy Allouche, Alan Nicol and Anna Walnycki, 'Global environmental justice and the right to water: The case of peri-urban Cochabamba and Delhi' (2014) 54 *Geoforum* 158. The Victorian Environmental Citizenship Strategy also articulated a view that Victorians have 'a right to experience a healthy environment': see EPA Victoria, *EPA Environment Citizenship Strategy*. Publication 1519 (February 2013) 5.

¹⁴⁶ Environmental Justice Australia, *Submission to the Inquiry into the Environment Protection Authority* (31 October 2015) 6–7.

about a general duty with respect to emissions.¹⁴⁷

For the first time in Australia, Victoria and its Environment Protection Authority have developed,¹⁴⁸ and are continuing to explore, environmental justice strategies and programs responding to that state's social and political context and history.¹⁴⁹ This is a process that has occurred elsewhere, including outside the United States, in Canada. Communities and governments have enunciated a contextually relevant and historically sensitive version of environmental justice.¹⁵⁰ They are using environmental principles and governance theories to temper the militancy with which environmental justice is often associated.¹⁵¹

A 2015 discussion paper¹⁵² characterised environmental justice for Victoria as having multiple conceptualisations including, but not limited to, equal protection from hazards and equal access to decision-making (an equality aspect); a right to healthy places to live, work and enjoy; and a fair share in environmental resources matched by a responsibility to future generations (a rights and responsibilities aspect). It should involve ways of considering the distribution of environmental risks and how to involve the public in decision-making (a distributive and participatory justice aspect). It also needs to systematically respond to wrongdoing in a healing way (a restorative justice aspect).

¹⁴⁷ *Gray v Macquarie Generation (No 3)* [2011] NSWLEC 3. See also Alex Gardner and Jessica Lee, 'Case note: *Macquarie Generation v Hodgson* [2011] NSWCA 424' (2012) 24(9) *Australian Environment Review* 321.

¹⁴⁸ EPA Victoria, above n 145.

¹⁴⁹ These are outlined in Victorian Government EPA Inquiry, above n 14.

¹⁵⁰ Randolph Haluza-DeLay et al, 'Introduction. Speaking for ourselves, speaking together: Environmental justice in Canada' in Julian Agyeman et al (eds), *Speaking for Ourselves: Environmental Justice in Canada* (UBC Press, 2009) 1, 3. See also Roger Keil, Melissa Ollevier and Erica Tsang, 'Why is there no environmental justice in Toronto? Or is there?' in Julian Agyeman et al (eds), *Speaking for Ourselves: Environmental Justice in Canada* (UBC Press, 2009) 65, 66, where Keil et al argue that 'The challenge for Canadian environmental justice researchers is to avoid simply borrowing American theoretical and methodological approaches that may be inappropriate to the Canadian context'.

¹⁵¹ Julie Sze and Jonathan K London, 'Environmental justice at the crossroads' (2008) 2 *Sociology Compass* 1331, 1346.

¹⁵² Ministerial Advisory Committee for the Inquiry into the Environment Protection Authority, *Examining the Future Task of Victoria's Environment Protection Authority* (Discussion Paper) (August 2015) 26.

Connections with social justice

Like the United Kingdom,¹⁵³ and different from the United States, the longer history of Australian engagement with justice concepts in environmental law and sustainability have centred on the theory of social justice.

Since at least the 1990s¹⁵⁴ in Australia, it has been argued that sustainability objectives must achieve social goals and improve economic well-being and health for the least advantaged in a society and its future generations.¹⁵⁵ There has also long been an acknowledgment that environmental impacts are cumulative¹⁵⁶ and they affect and entrench harm on those members of society who are least mobile and least capable of defending themselves from harm. This was powerfully argued in the context of uranium mining, with its long-term ecological harms and permanent impacts on indigenous communities.¹⁵⁷ The Australian Conservation Foundation and the Australian Council of Social Services have collaborated on a policy of 'liveable communities' drawing on social and environmental justice,¹⁵⁸ and research linking social justice ideals with environmental policy is now two decades mature.¹⁵⁹ The Victorian Labor Party, for instance, is positioning environmental justice as a new phase of social justice,¹⁶⁰ benefitting the working classes rather than the middle classes who identify as conservationists. Similarly, the Victorian Environment Defenders Office (as it then was) argued that, in the absence of a civil rights movement in Australia, environmental justice is a natural fit with the social justice and workers' rights movements

¹⁵³ Davies, above n 139.

¹⁵⁴ Clive Hamilton, 'Generational justice: The marriage of sustainability and social equity' (1996) 3 *Australian Journal of Environmental Management* 163, 163.

¹⁵⁵ *Ibid* 164.

¹⁵⁶ Sze and London, above n 151, 1338.

¹⁵⁷ Bernice Bovenkerk, 'Is smog democratic? Environmental justice in the risk society' (2003) 29 *Melbourne Journal of Politics* 24.

¹⁵⁸ Mick Hillman, 'Environmental justice: A crucial link between environmentalism and community development?' (2002) 37 *Community Development Journal* 347.

¹⁵⁹ Catherine Gross, 'Community perspectives of wind energy in Australia: The application of a justice and community fairness framework to increase social acceptance' (2007) 35 *Energy Policy* 2727, 2729.

¹⁶⁰ Personal communication with Tim Sonnreich, Office of the Premier of Victoria, 29 September 2015.

deeply entrenched in Australia.¹⁶¹ Emphasising the integration of the environmental with social justice, the Australian Greens party has policies on social justice¹⁶² but not environmental justice.

Wastes, hazards and environmental justice

For an even longer period than the decades of the greening of social justice, fundamental questions of fairness and equity have charged Australian environmental conflicts over waste and pollution.¹⁶³ This can be seen from as early as the 1890s, in a dispute between the unfranchised working classes and the property-owning classes with mining ambitions in Sydney.¹⁶⁴ There is a long history of resistance and concern – including Aboriginal opposition – to nuclear experiments and the fuel cycles in Australia dating from at least the late 1950s, and in the 1970s on the realisation of the use of Aboriginal land in Maralinga for atomic testing.¹⁶⁵ There was also a clearly articulated justice narrative framed by opponents to uranium mining in the Northern Territory during the 1990s,¹⁶⁶ and more recently in response to plans to locate a nuclear waste storage facility in the Muckaty landscape.¹⁶⁷

Environmental justice ideas and arguments were also central to the rise of an anti-toxics movement,¹⁶⁸ as a counter movement to the mainstream environmental movement,¹⁶⁹

¹⁶¹ Environment Defenders Office (Victoria), *Environmental Justice Project: Final Report* (2012) 14.

¹⁶² Australian Greens, *Social Justice* <<http://greens.org.au/policies/social-justice>>.

¹⁶³ Environment Defenders Office (Victoria), above n 161, 11.

¹⁶⁴ Tim Bonyhady, *The Colonial Earth* (Melbourne University Press, 1998) ch 11.

¹⁶⁵ Elizabeth Tynan, *Atomic Thunder: The Maralinga Story* (New South Publishing, 2016). See also Cobi Calyx and Brad Jessup, 'Nuclear Citizens Jury: From local deliberations to transboundary and transgenerational legal dilemmas' (2019) 13 *Environmental Communication* 491.

¹⁶⁶ Nicholas Low and Brendan Gleeson, *One Earth: Social and Environmental Justice* (Australian Conservation Foundation, 1999).

¹⁶⁷ Beyond Nuclear Initiative, *Muckarty* <<http://beyondnuclearinitiative.com/issues/muckarty/>>.

¹⁶⁸ Culminating in the formation of the National Toxics Network in 1993: see *National Toxics Network* <<http://www.ntn.org.au/about-us>>.

¹⁶⁹ Philip Alviano and David Mercer, 'The Dandenong Offensive Industry Zone: A case study in environmental conflict' (1996) 27 *Australian Geographer* 101.

throughout the 1980s¹⁷⁰ and the fierce battles over landfills in Victoria, especially throughout the 1990s.¹⁷¹ At that time, an articulation of environmental justice concerns in Australia was unmistakable. Alviano and Mercer¹⁷² wrote about 'concentrations of toxic chemical industries' in New South Wales and Victoria and communities there being 'burdened' by environmental harms arising because of an historical legacy of inequity in wealth and the presence of working-class and migrant populations in these geographies.¹⁷³ These were communities with little engagement in environmental matters beyond the local, and dependent on regulators who delegitimised alternative voices on science and risk. The Australian book *Local Heroes* is a record of Australian community battles against industrial pollution, contamination and toxicity¹⁷⁴ – battles about justice. It tells how, in the 1980s and 1990s, activists around Australia had insufficient access to information¹⁷⁵ and avenues to express opposition, were not taken seriously and treated by government agencies in a paternalistic and insincere manner leading to a 'travesty of justice'.¹⁷⁶ The concern of communities was geographic and cumulative, and the priority was to protect

¹⁷⁰ Kathleen McPhillips (ed), *Local Heroes: Australian Crusades from the Environmental Frontline* (Pluto Press, 2002). Cole and Foster, above n 129, 22 note the contribution of the US anti-toxics movement to the development of environmental justice at the same time. Lawrence Buell, 'Toxic discourse' (1998) 24 *Critical Inquiry* 639 similarly sees environmental justice as aligned with the anti-toxics discourse of the 1980s.

¹⁷¹ Paul Strangio, *No Toxic Dump! A Triumph for Grassroots Democracy and Environmental Justice* (Pluto Press, 2001) 11 describes the scholarship as 'a study of one community's fight for environmental justice and the integrity of its local environment'.

¹⁷² Alviano and Mercer, above n 169. Other environmental justice writing connected with the anti-toxics movement in this period includes G J Smith *Toxic Cities* (New South Wales University Press, 1990); Lauren Costello and Kevin Dunn, 'Resident action groups in Sydney: People power or rat-bags?' (1994) 35(1) *Australian Geographer* 61; Stephen Darley, 'But the working class don't care about the environment ... do they?' (1994) 13(2) *Social Alternatives* 37; Neil Gunningham and Amanda Cornwall, 'Legislating the right to know' (1994) 11 *Environmental and Planning Law Journal* 274.

¹⁷³ Alviano and Mercer, above n 169.

¹⁷⁴ McPhillips, above n 170.

¹⁷⁵ Mariann Lloyd-Smith, 'Rights and wrongs of knowing in chemical conflict' (2002) 2(3) *The Drawing Board: An Australian Review of Public Affairs* 131 notes the peaking of the campaign for right-to-know laws in 1991. The National Pollutant Inventory was enacted in 1998: *National Environment Protection (National Pollutant Inventory) Measure* (Cth).

¹⁷⁶ Kathleen McPhillips, 'Introduction' in Kathleen McPhillips (ed), *Local Heroes: Australian Crusades from the Environmental Frontline* (Pluto Press, 2002) xi, xii.

those most vulnerable members of society from harms – now and into the future.¹⁷⁷

Communities already receiving more than their share of harmful emissions were expected to accommodate more.¹⁷⁸ They had no access to legal aid and confronted long and costly legal processes that were defended by vested interests.¹⁷⁹ They observed a battle between power and money, and health and fairness; of being sidelined through the law and dismissed through legislative change.¹⁸⁰

Within Victoria, environmental health concerns were articulated by people in Melbourne's inner west proximate to the Coode Island chemical complex who identified as being within a community of working class and migrant citizens,¹⁸¹ and who understood middle- and upper-class communities in other geographies were not confronting similar risks.¹⁸² Justice narratives included those of information being difficult to access,¹⁸³ of demanding government responsibility,¹⁸⁴ and feelings of 'betrayal' and of being ignored¹⁸⁵ and

¹⁷⁷ Anti-lead campaigns had a focus on the interests of children: see Elizabeth O'Brien, 'The LEAD Group: Responding to the problem of lead contamination' in Kathleen McPhillips (ed), *Local Heroes: Australian Crusades from the Environmental Frontline* (Pluto Press, 2002) 1, 10–11.

¹⁷⁸ James Whelan, 'Smogbusters in Queensland' in Kathleen McPhillips (ed), *Local Heroes: Australian Crusades from the Environmental Frontline* (Pluto Press, 2002) 20, 25.

¹⁷⁹ Mariann Lloyd-Smith, 'Not just a city problem: The saga of contaminated cattle tick dipsites on the NSW north coast' in Kathleen McPhillips (ed), *Local Heroes: Australian Crusades from the Environmental Frontline* (Pluto Press, 2002) 90, 99.

¹⁸⁰ Helen Hamilton, 'Port Kembla and the fight against the state' in Kathleen McPhillips (ed), *Local Heroes: Australian Crusades from the Environmental Frontline* (Pluto Press, 2002) 65, 81 notes the effect of the enactment of laws that resulted in the reopening of the smelter on her community and the 1997 changes to the *Environment Planning and Assessment Act 1974* (NSW) introduced by the *Environment Planning and Assessment Amendment Act 1997* (NSW) that created state-significant project laws, which consolidated decision-making power in the Minister for Planning.

¹⁸¹ Aynsley Kellow, 'Balancing risks to nature and risks to people: The Coode Island/Point Lillias Project in Australia' in S Hayden Lesbirel and Daigee Shaw (eds), *Managing Conflict in Facility Siting: An International Comparison* (Edward Elgar, 2005) 179. Kellow notes that Coode Island had been encroaching on residents of Melbourne's poorer western suburbs since the 1960s (p 181).

¹⁸² Colleen Hartland, 'The Coode Island disaster and HAZMAG' in Kathleen McPhillips (ed), *Local Heroes: Australian Crusades from the Environmental Frontline* (Pluto Press, 2002) 172, 174.

¹⁸³ *Ibid* 175–6.

¹⁸⁴ *Ibid* 178.

¹⁸⁵ *Ibid* 179.

sacrificed¹⁸⁶ when the chemical complex caught fire and the government refused to relocate it afterwards. There was an expectation of a 'basic right of all communities to live in safety'.¹⁸⁷ The Coode Island fire was a milestone in Australian environmental justice history, having an impact on our national consciousness.¹⁸⁸ But unlike the experience in the US, this environmental injustice was not linked to race, and did not depend on quantitative data gathering, or the term 'environmental justice'. It was not centred exclusively on distributional justice concerns, a limitation of the environmental justice scholarship of the time in the United States.¹⁸⁹

More recently, environmental justice has been argued as being a factor within an objective of fairness in planning law in a submission on behalf of RATWISE (Residents Against Toxic Waste in the South East) opposing the expansion on a waste facility in Lyndhurst, Victoria:

This area is one of the most disadvantaged areas in Victoria, and yet shoulders a disproportionately high share of the State's industrial emissions. ... The nexus of low socio-economic status with high industrial emissions in Melbourne's outer suburbs was identified in the February 2011 Report of its compliance and enforcement activities. The Report identified that this issue engages the principle of 'environmental justice' ... a concept to which the Panel can and should have regard to when considering what is a 'fair' planning outcome in relation to the subject site.¹⁹⁰

Yet the inquiry panel did not reference the concept and offered no basis for concluding that the proposal for the expansion of the waste facility was 'fair', one of the objectives of the

¹⁸⁶ Colleen Hartland, 'Presentation' (Speech given at Environmental Justice Symposium, Environment Defenders Office, Melbourne 27 July 2012) reflected of feeling in response to the Coode Island explosion and the government decision not to relocate the facility that 'they don't care – we are just westies – sacrificial'. Kellow, above n 181, explains that the decision not to relocate the plant meant that the most disadvantaged members of Melbourne would remain so because it was decided that the community and environment in a lower-risk geography was treated as having greater value.

¹⁸⁷ Hartland, above n 182, 181.

¹⁸⁸ Ken J Walker, *The Political Economy of Environmental Policy: An Australian Introduction* (UNSW Press, 1994) 7.

¹⁸⁹ David Schlosberg, 'Theorising environmental justice: The expanding sphere of a discourse' (2013) 22 *Environmental Politics* 37.

¹⁹⁰ Nicola Collingwood and Environment Defenders Office (Victoria), *Submissions on behalf of RATWISE in the Matter of the Greater Dandenong Planning Scheme Amendment C125 / Permit Application 2010/013898* (17 June 2011) paras [46]–[51]. This is the first time the Victorian EDO made justice claims in a legal submission.

Act.¹⁹¹ Instead it concluded that the project would result in a 'net community benefit',¹⁹² the 'community' presumably being much wider in scope than the collection of individuals who live nearest to the facility.

Despite the notion of 'fair share' and 'fair go'¹⁹³ having long had a place in the Australian vocabulary, especially a fair treatment between the city and the country, it has only been recently that scholars and environmental groups in Australia have begun to link socio-economic disadvantage and environmental degradation through a frame of distributive environmental justice, in the manner that scholars and communities in the United States had from at least the 1970s.¹⁹⁴ The Hazelwood Mine Fire¹⁹⁵ was a notable turning point. Rural communities confronting environmental health hazards, with little capacity or support to relocate or endure the more-than-month-long smoke haze, claimed that they had long been treated unjustly compared with their community counterparts throughout the state. They described their community as a 'sacrifice zone',¹⁹⁶ where environmental harms were consolidated, rather than them being equitably distributed throughout the state.¹⁹⁷ In doing so, these communities offered a critique of a suite of laws complicit in the fire: environmental laws, planning laws, workplace laws and mining laws. The critique was not one based on sustainability principles, but an ethical, moral and normative position, of why and how these laws create harms on communities and why that ought to change. Environmental lawyers were influential in the adoption of this discourse of environmental

¹⁹¹ *Planning and Environment Act 1987* (Vic) s 4(1)(a).

¹⁹² *Greater Dandenong C125* (PSA) [2011] PPV 82, 49.

¹⁹³ Low and Gleeson, above n 166, 2.

¹⁹⁴ Robert D Bullard, 'Neighbourhoods zoned for garbage' in Robert D Bullard (ed), *The Quest for Environmental Justice: Human Rights and the Politics of Pollution* (Sierra Club Books, 2005) 43 recalls resistance to the siting and operation of Texan landfills in the 1960s.

¹⁹⁵ Hazelwood Mine Fire Inquiry, Parliament of Victoria, *Hazelwood Mine Inquiry Report*. Report 342 (2014).

¹⁹⁶ Climate and Health Alliance, *Submission to Hazelwood Mine Fire Inquiry* (August 2015). Environment Defenders Office (Victoria), above n 161, 24 record the existence of 'sacrifice zones' to the west and north-west of Melbourne and in Victoria's Latrobe Valley. They are zones where residents accept they have a lower quality of life than others in the community, are at greater danger than others, but cannot easily leave or refuse to leave.

¹⁹⁷ *Ibid.*

justice,¹⁹⁸ hence of transitioning to a more complex and plural conceptualisation of the term.

A focus on participation and access to justice

This change in understanding was precluded by a focus on participation as justice.¹⁹⁹ In fact, much of the attention of Australian environmental justice scholarship has been on matters of fair procedures and rights of participation within the law,²⁰⁰ rather than outcomes. This focus²⁰¹ had emerged from the general administrative law objectives of the Access to Justice Advisory Committee and the Australian Law Reform Commission into standing and equality before the law,²⁰² and an appreciation of the connection of human rights and the environment. Anton, for instance has argued from an Australian perspective, that:

the strongest argument linking the environment and human rights focuses not on environmental quality, but on procedural rights, including participation in environmental decision-making and access to environmental justice.²⁰³

More particularly, the concept of sustainable development and the prioritisation given to participation in environmental decision-making in international,²⁰⁴ regional²⁰⁵ and domestic environmental laws was influential in this participation-as-justice focus.²⁰⁶ This starting

¹⁹⁸ Nicola Rivers, 'Hazelwood Mine Fire: One year on, community still waits for answers' on *Environmental Justice Australia* (10 February 2015) <<https://envirojustice.org.au/blog/hazelwood-mine-fire-one-year-on-community-still-waits-for-answers>>.

¹⁹⁹ Similarly in New Zealand: Justice Peter Salmon, 'Access to environmental justice' (1998) 2 *New Zealand Journal of Environmental Law* 1.

²⁰⁰ Judith Brett, 'Fair share: Country and city in Australia' (2011) 42 *Quarterly Essay* 1, 13–14.

²⁰¹ Deirdre Pirro, 'Access to environmental justice: A national perspective' (2008) 38 *Environmental Policy and Law* 272.

²⁰² See, eg, Australian Law Reform Commission, *Standing in Public Interest Litigation*. Report 27 (1985); Australian Law Reform Commission, *Beyond the Doorkeeper – Standing to Sue for Public Remedies*. Report 78 (1996); Australian Law Reform Commission, *Equality Before the Law*. Report 69 (1994).

²⁰³ Donald K Anton, *Reforming the Law of Environmental Standing and Third Party Appeal Rights in Victoria*. ACEL Occasional Paper (2000) 3.

²⁰⁴ *Rio Declaration on Environment and Development* (14 June 1992), Principle 10.

²⁰⁵ Jonas Ebbesson, 'Environmental justice through the Aarhus Convention' (Speech delivered at the Environmental Rights in Europe and Beyond Conference, Lund University, 21 April 2016).

²⁰⁶ Lee McIntosh, 'Access to environmental justice' (Presentation to the Access to Environmental Justice

point for environmental justice in Australia is significant if its future is situated within the concept of sustainable development and a broad conception of the public interest.²⁰⁷

Extracurricularly, Australian judges²⁰⁸ have engaged with participation-based notions of equity and fairness and attempted to bring them to the environmental law field, rather than engage with notions of justice grounded in theory or in the United States-inspired notions of environmental justice. Judges,²⁰⁹ environmental law scholars²¹⁰ and practitioners²¹¹ have argued for participatory justice through easing tests of standing, citizen enforcement of laws, funding of environmental legal bodies, encouraging public interest environmental law cases, confining exposure to legal costs,²¹² limiting strategic cases to stymie public involvement in the law²¹³ and creating specialised environmental courts.

In its own reporting of justice, and consistent with the views of global environmental jurists,²¹⁴ the New South Wales Land and Environment Court has emphasised affordable

Conference, Environmental Defender's Office Western Australia, 20 February 2004).

²⁰⁷ In *Brown v Environment Protection Authority (No 2)* (1992) LGERA 119, Pearlman J connected third-party rights with an overarching public interest goal.

²⁰⁸ Former Federal Court judge Justice Ronald Sackville included environmental standing issues within the access to justice rubric: Ronald Sackville, 'Access to justice: Towards an integrated approach' (Speech delivered at National Access to Justice and Pro Bono Conference 2010, Brisbane, 27–28 August 2010) and Justice Ronald Sackville, 'Some thoughts on access to justice' (Speech delivered at the First Annual Conference on the Primary Functions of Government: Courts, Victoria University of Wellington, New Zealand, 28–29 November 2003). See also Justice Peter McClellan, 'Access to justice in environmental law – An Australian perspective' (Speech delivered at Commonwealth Law Conference 2005, London, 11–15 September 2005) who explicitly positions environmental law standing dilemmas within an access-to-justice frame.

²⁰⁹ Paul Stein, 'The role of the NSW Land and Environment Court in environmental crime' (Speech delivered at the Environmental Crime Conference, Hobart, 1993). In the UK, see also Lord Harry Woolf, 'The courts' role in achieving environmental justice' (2002) 4 *Environmental Law Review* 79.

²¹⁰ Michael I Jeffrey, 'Environmental governance: A comparative analysis of public participation and access to justice' (2005) 9(2) *Journal of South Pacific Law* 1 makes the point that the Aarhus Convention has been a landmark for explaining good environmental governance beyond Europe.

²¹¹ See Environment Defenders Office (NSW), *Policy and Law Reform – Submissions* <www.edo.org.au/edonsw/site/policy_submissions.php#5>.

²¹² Kirsty Ruddock, 'Protective costs orders and access to justice: The Coxs River case' [2010](1) *National Environmental Law Review* 48.

²¹³ Greg Ogle, 'Anti-SLAPP law reform in Australia' (2010) 19 *Review of European, Comparative & International Environmental Law* 35.

²¹⁴ United Nations Environment Programme, *UNEP Global Judges Programme* (UNEP, 2005); Global Judges

access, access to information, and available and responsive court services.²¹⁵ Its jurisprudence is not highlighted in its reporting of its environmental justice activities and successes. Similarly, the New South Wales Environment Defenders Office, the state's community environmental legal centre, has highlighted its native title and Aboriginal heritage work, and its provision of legal services to Australia's most disadvantaged communities, rather than offering a broader narrative of justice, in its reporting of environmental justice activities.²¹⁶

Communities have also viewed limits on participation and lack of access to the law and political system as barriers to the realisation of just outcomes.²¹⁷ Community right-to-know campaigns led by the anti-toxics movement in the 1980s and 1990s, which triggered laws that created the National Pollutant Inventory,²¹⁸ were emblematic in linking access and justice. In her fieldwork, Gross recorded that 'many of the perceptions of injustice were related to actions taken by government agencies',²¹⁹ where community members translate and equate an experience of procedural unfairness as unjust outcomes,²²⁰ leading her to conclude that the focus of law should be on fair processes rather than techniques to achieve public participation.²²¹ This is a subtle but significant shift from the idea that participation delivers justice. The experience of communities is that, even when they are involved, when they have participated in environmental law, they have felt powerless and have observed

Symposium, *The Johannesburg Principles on the Role of Law and Sustainable Development* (adopted at Johannesburg, South Africa on 18–20 August 2002).

²¹⁵ See, eg, Land and Environment Court of NSW, *Annual Review 2010* (September 2011).

²¹⁶ See EDO (NSW), above n 211.

²¹⁷ Hillman, above n 158; Arcioni and Mitchell, above n 140.

²¹⁸ McPhillips, above n 176, xvi. See also Gunningham and Cornwall, above n 172.

²¹⁹ Catherine Gross, 'A measure of fairness: An investigative framework to explore perceptions of fairness and justice in a real-life social conflict' (2008) 15 *Research in Human Ecology* 130, 138.

²²⁰ Catherine Gross, 'Why justice is important' in Daniel Connell and Quentin Grafton (eds), *Basin Futures: Water reform in the Murray–Darling Basin* (ANU ePress, 2011) 149, 150.

²²¹ Gross, above n 159, 2730.

being shut down in debates and denied capacity to influence decisions.²²²

Scholars have highlighted the limits of participation as justice to achieve the overarching objectives of communities to be heard, to be acknowledged and to realise fairness.²²³ In Australia, Eckersley has argued that 'access to environmental justice means much more than having access to legal redress for environmental harm ... environmental justice (as an outcome) is something that we should expect to flow from environmental democracy (as a fair/inclusive procedure)'.²²⁴ Her thesis confronts long-standing ideas and even recent experiences that an environmentally democratic process will not always result in an environmentally just outcome.²²⁵ The challenge is not so much to tinker with avenues of participation, or to focus exclusively on participatory justice in law, but to reconsider the underpinning theory for environmental laws and the democratic state.²²⁶

A broad idea for the future development of environmental justice

In Australian law, environmental justice has a place, a relevance and a legacy. Unlike the United States, it has not been a discrete movement²²⁷ like the anti-toxics movement; rather it is a frame or a theory deployed especially in socio-political-legal conflicts. Conceptually,

²²² Arcioni and Mitchell, above n 140, 376 note that for the community in that case 'the very institution that many saw as protecting the interests of the citizens had turned on them'.

²²³ See, eg, Leire Urkidi and Mariana Walter, 'Dimensions of environmental justice in anti-gold mining movements in Latin America' (2011) 42 *Geoforum* 683.

²²⁴ Robyn Eckersley, 'The state and access to environmental justice: From liberal democracy to ecological democracy' (Speech delivered at the Access to Environmental Justice Conference, Environmental Defender's Office Western Australia, 20 February 2004).

²²⁵ With respect to the disconnection between participation and human agency for 'nature' and environmental outcomes: see Robert E Goodin, 'Enfranchising the Earth, and its alternatives.' (1996) 44 *Political Studies* 835 and Louis J Kotzé and Paola Villavicencio Calzadilla, 'Somewhere between rhetoric and reality: Environmental constitutionalism and the rights of nature in Ecuador' (2017) 6 *Transnational Environmental Law* 401. Compare Tom R Tyler, 'Social justice: Outcome and procedure' (2000) 35 *International Journal of Psychology* 117.

²²⁶ This is a theme to which Eckersley returned to: see Robyn Eckersley, 'What is environmental justice?' (Public Presentation to Environment Defenders Office (Vic), Melbourne, 28 June 2011).

²²⁷ Attempts to curate a movement by plaintiff law firm Shine Lawyers' 2011-initiated Environmental Justice Society, appears not to have succeeded: see National Toxics Network, 'Erin Brockovich launches Environmental Justice Society in Australia' 14 February 2011 <<http://www.ntn.org.au/toxic-free-living/erin-brockovich-launches-environmental-justice-society-in-australia>>. The URL for the society now redirects to Shine Lawyers' 'Environmental Claims' webpage.

environmental justice has been particularised to a geographic and disciplinary context in Australia. Low and Gleeson, for instance, show an Australian environmental justice connected with class and economic disadvantage,²²⁸ associated with ignorance about and denial of land rights of indigenous people and framed by international legal interactions and developments, especially Australia's enthusiastic adoption of sustainable development principles.²²⁹ What these authors further demonstrate and illustrate²³⁰ is that justice interests, arguments and framings have transcended species in Australia. This has been evident in the linking of ecosystem with human concerns about uranium mining and, more recently, in the ongoing battles over logging in East Gippsland in Victoria, where the loss of biodiversity and indigenous forests is framed as an injustice to future generations of humans and to the ecosystem.²³¹

The forgoing discussion highlights the complexity of environmental justice as an idea, its strands and its scope, its history but also the possibility to continue to develop environmental justice for Australian law as policymakers, judges and scholars²³² explore its boundaries. In chapter 2, I will explore those opportunities for advancing the concept by reference to scholarship about the origins, meanings and evolutions of environmental justice drawn especially from the many literatures of environmental justice. This thesis views environmental justice more broadly than it has been seen, understood and employed to date in Australia, and seeks to develop principled and ethical pathways to integrate environmental justice into Australian environmental law.

Low and Gleeson indicate reasons why Australia might be a suitable jurisdiction for growth and expansion of environmental justice. Australians purport to care for and connect with

²²⁸ Low and Gleeson, above n 166.

²²⁹ Ibid 18–9.

²³⁰ Low and Gleeson, above n 116; Low and Gleeson, above n 166, 20.

²³¹ Ed Hill, 'Supreme Court injunction halts logging of old growth forest', *Goongerah Environment Centre* (1 November 2017) <http://www.geco.org.au/supreme_court_injunction_halts_logging_of_old_growth_forest>.

²³² Most recently Amanda Kennedy, who has explored capacity as environmental justice in land-use conflicts over resources in Australia: see Amanda Kennedy, *Environmental Justice and Land Use Conflict: The Governance of Mineral and Gas Resource Development* (Earthscan, 2017).

the non-human environment,²³³ they challenge orthodox thinking, and seek to deliver benefits to the disempowered and the frequently harmed.²³⁴

1.5 Research questions

This thesis looks deeply, critically and empirically²³⁵ at the position of environmental justice within environmental law, located within Australia. The thesis seeks to contribute new ways of critiquing the law, of understanding frustration with the law, and to present new ways of devising arguments to advance and advocate for reform of the law. The starting point, as introduced above, is that change is warranted and change is being theorised by others. The focus is on frameworks and foundations, on conceptions of the law, about revisiting the purpose of the law and what it should achieve, for whom or for what.

A preliminary question, principally answered in Chapter 2, is *what theories and principles of environmental justice, drawn from across the disciplines of the social sciences and in the experiences of environmental opponents, provide a theoretical foundation for environmental laws?*

The **second question**, principally answered in the first two chapters of the thesis and then tested in the case study chapters (4, 5 and 6) is about whether there already exists a familiarity with environmental justice principles and ideas within the law. *Has the law been aware of and attuned to environmental justice argument and ideas, such that it could incorporate environmental justice principles?*

The **third question** is *whether in practice and outcome, are Australian laws seen by those communities engaged with the law to be environmentally just?* The test, the principles on which the answer will be formed, will be adduced in Chapter 2, drawing on Schlosberg's

²³³ Low and Gleeson, above n 166, 20 discuss the Australian connection with the non-human environment and the willingness to challenge orthodox thinking in this regard, suggesting an Australian acceptance of the idea that species should be treated fairly.

²³⁴ Jessup and Jones, above n 94, regarding proposals for a human right to environmental protection; Calyx and Jessup, above n 165, regarding uranium waste storage.

²³⁵ Walker and Bulkeley, above n 124, 656 suggest that much of the scholarly engagement with environmental justice has lacked interrogation, rigour and precision.

scholarship. Like Schlosberg, the test or definition of environmental justice will be pluralistic and not exclusively anthropocentric, allowing much more complex insights about the cases studied for this dissertation. This question will be answered by case study research, the method for which is explained in Chapter 3 and the data and analysis on which an answer will be offered is presented in chapters 4, 5 and 6.

The **fourth and final question** is *how would environmental laws operate, what would they look like, and how might cases be treated and concluded, if there existed an institutionalised pursuit of environmental justice ideals?* A preliminary answer to this question is suggested in this chapter, as I introduced ideas of connecting environmental justice within the sustainable development paradigm. Each case study analysis will turn to consider reform options, and a modest contribution to ideas for a change to environmental law will be offered in the concluding chapter 7.

1.6 Thesis overview

Principles

The following chapter of this thesis surveys and critiques the literature on environmental justice, discussing principles and a theory of environmental justice. It forms the basis for analysing Australia's domestic legal system, particularly in the context of the dissertation's three case studies, and for proposing a more principled, ethical and just approach to the experience of the law, the purpose of the law and the content of, and prioritisation within, the law. The thesis treats the concept of environmental justice as a very broad one, drawn from a plurality of ideas and scholarly and activist contributions, and seeks to advance an understanding of, and meaning for, environmental justice for law and for Australia. Hence, the literature reviewed and analysed covers many disciplines and perspectives about what environmental justice is, what it achieves, and who and what it benefits. The focus of chapter 2 is on the experience of environmental justice, how it has been defined and what the concept is composed of, rather than how the concept has been philosophised.

Chapter 2 also engages with, and provides insights into, contemporary debates about, whether and how, why and why not, the theory, principle and movement of environmental justice should evolve. To ground this discussion, the thesis adopts a common path by

explaining the rise of the environmental justice movement in the United States, the focus of that movement and the principles that the movement devised for itself and its compatriots. It picks up on the encouragement of Sze and London²³⁶ to consider who and what is being brought into the movement as it continues to transcend its environmental racism roots, and as it becomes more global as the climate justice discourse takes hold.²³⁷

Chapter 2 shows that Australians have engaged in environmental justice struggles, though they were not labelled that way, and that the Australian experience has for a relatively longer period than in the United States been less structured and less confined by the movement's origins. It was Australians Low and Gleeson²³⁸ in the early 1990s who argued that ecological justice aligned with an environmental justice theory. That is, that environmental justice was not just about fairness for people but comprised a morality towards non-human parts of the ecosphere. This is a position that I pursue, arguing that environmental justice is multifaceted, not just a movement, but a theory based on environmental morality and ethics. Seen this way, environmental justice is not simply an argument, something around which opposition to harmful activities and development coalesces. It becomes meaningful and especially useful as a framework to critique environmental systems, including legal systems.

In building a framework I rely especially on the environmental justice scholarship by and responding to Schlosberg since the 2000s.²³⁹ With others,²⁴⁰ Schlosberg defines environmental justice into themes, or what I have called aspects of environmental justice, that are familiar to a legal audience. They are distribution, participation, recognition and capacities. It is against these aspects of environmental justice that I subsequently analyse

²³⁶ Sze and London, above n 151.

²³⁷ Gordon Walker, 'Globalizing environmental justice: The geography and politics of frame contextualization and evolution' (2009) 9 *Global Social Policy* 355.

²³⁸ Low and Gleeson, above n 116.

²³⁹ Schlosberg, above n 10.

²⁴⁰ Including Gary C Bryner, 'Assessing claims of environmental justice: Conceptual frameworks' in Kathryn M Mutz, Gary C Bryner and Douglas S Kenney (eds), *Justice and Natural Resources: Concepts, Strategies and Applications* (Island Press, 2002) 31.

Australia's environmental laws.

Method

Chapter 3 explains how the research questions and problems detailed in this first chapter will be answered, using the principles, theory and framework introduced and developed in chapter 2. Chapter 3 makes explicit a departure from conventional legal research and analysis. It presents a methodology that allows me to traverse disciplines: to bring law and social science perspectives into analysis using a theory developed from political and social inquiry. The analysis is qualitative rather than quantitative and depends on a case-study approach, and sources data from court documents, public inquiry submissions, historic archives and media. These sources are complemented by interviews with actors in each case study: the protagonists, the experts and government representatives. This material offers narratives about the fairness of the legal processes and outcomes of each case, about experiences and perspectives of the law and of power. It emphasises the value and importance of place to those who were aggrieved by the projects explored as case studies as well as acknowledging that those within place know the law by virtue of their lived experiences with it.²⁴¹ The chapter positions the dissertation within the broad research field of law and society and presents the analysis as contributing to the still formative critical study of law and geography. It draws on the tradition of legal ethnography, particularly guided by the approach adopted by Merry in her renowned research in the 1980s into domestic law court disputes.²⁴²

The case studies were chosen for analysis in this thesis for a number of reasons. They comprise controversies at the local level (Orange Waste Project), the state level (Channel Deepening Project) and the national level (Wielangta Forest conflict). They therefore represent cases of having different profiles and interest to and by different Australian publics. They also offer jurisdictional coverage (Tasmania, Victoria, New South Wales and the Commonwealth), and an opportunity to explore laws that have different purposes

²⁴¹ Robyn Bartel, 'Place-thinking: The hidden geography of environmental law' in Andreas Philippopoulos-Mihalopoulos and Victoria Brooks (eds), *Research Methods in Environmental Law* (Edward Elgar, 2017) 159.

²⁴² Sally Engle Merry, *Getting Justice and Getting Even: Legal Consciousness Among Working-Class Americans* (University of Chicago Press, 1990).

(planning laws, environmental assessment laws and forestry laws) while sharing common features, notably the goal of achieving ecologically sustainable development and the involvement of the community in decision-making. They each led to a community encountering the law when the courts helped expand or clarify the meaning of ecologically sustainable development. The cases collectively touched on the holism of that principle (Channel Deepening Project), the notion of intergenerational equity (Orange Waste Project) and of ecosystem and species resilience, integrity and conservation (Wielangta Forest conflict).

The cases studies were paradigmatic²⁴³ in the sense that they are symbolic, celebrated and drew in the communities of interest. At law, they stand for more than the outcome of the case. The three disputes are atypical of most environmental cases in a number of ways. The fact that the conflicts went to court, supported by lawyers acting at reduced fees, is the first unusual feature. Most environmental controversies and conflicts do not make it to court. The most unusual feature of each case study is there was a point where both the proponent and the opponents experienced success and failure. This was an important feature, however, because it meant that the conflicts could illustrate the changeability in legal controversies and the influence of personality and politics on environmental governance. It also facilitated a contrast in outcomes. I was able to ask: was one outcome in each case study more or less just than the other?

Case studies

Chapters 4, 5 and 6 analyse the three case studies in south-eastern Australia (see Figure 1), to illustrate Australian environmental law in action. Each of these chapters records an environmental controversy, explains how it encountered the legal system and then critiques the legal system particularly from the viewpoint of the actors and stakeholders involved in the project that gave rise to the controversy.

²⁴³ Bent Flyvbjerg, 'Five misunderstandings about case-study research' (2006) 12 *Qualitative Inquiry* 219, 231.

Figure 1: Case study site locations – south-eastern Australia



Orange Waste Project

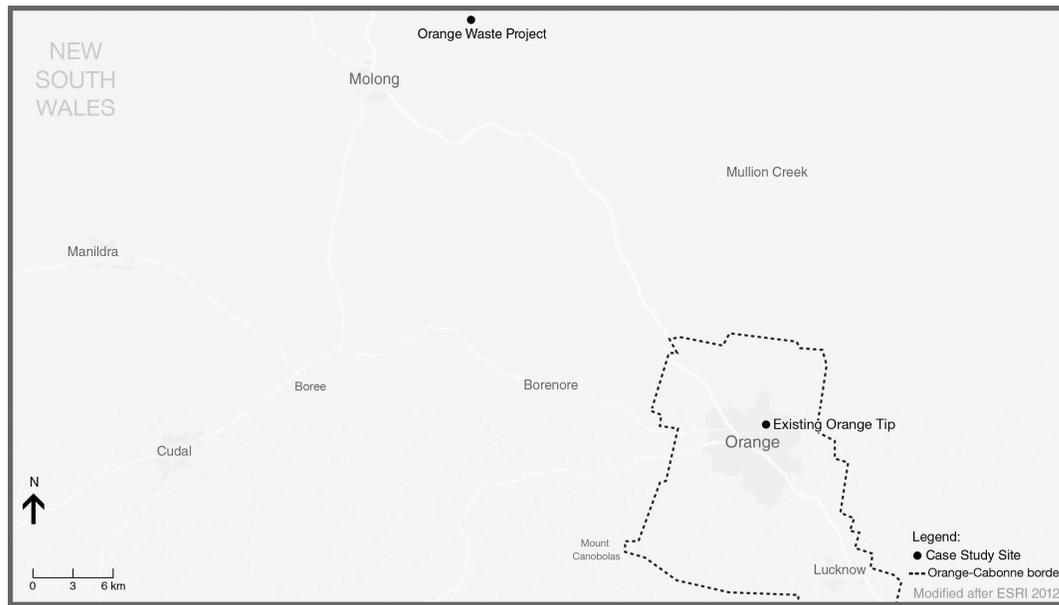
The case study explored in chapter 4, the Orange Waste Project, was originally conceived as a waste recovery facility and associated landfill to service the municipalities of Orange and Cabonne in rural New South Wales, and to be located in the small country town of Molong (see Figure 2). The 'Existing Orange Tip', which was assessed as nearing the end of its life, would close.²⁴⁴ This meant that the City of Orange would not have a waste facility within its boundary. The project, which was subject to studies and conceptualisation from 2002 to 2010, required development assessment and approval under the *Environmental Planning and Assessment Act 1979* (NSW). Originally, this assessment was made with the Local Environment Plan²⁴⁵ as the primary legal instrument for consideration. However, after the project was rejected by the New South Wales Land and Environment Court in *Hub Action Group v Minister for Planning*,²⁴⁶ the project and its assessment changed shape.

²⁴⁴ NSW Department of Planning, *Assessment Report: Proposed Landfill & Regional Resource Reprocessing Facility, Molong* (December 2006).

²⁴⁵ *Cabonne Local Environment Plan 1991*.

²⁴⁶ (2008) 161 LGERA 136.

Figure 2: Orange Waste Project, New South Wales – location



After the Shire of Cabonne withdrew from a joint-venture agreement about the project with the City of Orange, the project was changed so that waste would be delivered, sorted, baled and wrapped at the Orange tip site before being buried at a reconfigured landfill in Molong – a landfill acclaimed as representing best environmental practice and reflecting a vision of sustainable development.²⁴⁷ The assessment of the project was also changed. The new project was declared to be a project of state significance, so was assessed under so-called ‘fast-track’ planning and environmental assessment laws.²⁴⁸ These laws consolidated power in the Minister for Planning and enabled local planning policies and laws to be disregarded. The project opposition was led by the community organisation the Hub Action Group, and the nature of the opposing arguments centred on concerns for the long-term agricultural use of the land, unfairness at Molong being the site for waste that its residents would not generate, and a denial of access to courts and influence because the project was assessed under laws the New South Wales community²⁴⁹ saw as unfair.

²⁴⁷ Interview with Jason Scarborough, New South Wales EPA, 11 August 2011; Total Environment Centre, *Cabonne Council Dumps on Orange* (Media Release, 25 November 2009).

²⁴⁸ *Environmental Planning and Assessment Act 1979* (NSW), pt 3A (since repealed).

²⁴⁹ Kristian Ruming, ‘Cutting red tape or cutting local capacity? Responses by local government planners to NSW planning changes’ (2011) 48 *Australian Planner* 46, 49.

Port Phillip Channel Deepening Project

The case study explored in chapter 5, the Port Phillip Channel Deepening Project, involved the dredging of shipping channels in, and at the entrance to, Port Phillip leading to the Port of Melbourne (see Figure 3). The purpose of the project was to allow larger ships to access the busy container port through deeper channels. The project, which was assessed and performed from 1999 to 2008, was subject to environmental impacts assessments undertaken under state and federal laws.²⁵⁰

Figure 3: Port Phillip Channel Deepening Project – location



The project was advanced by the state statutory authority the Port of Melbourne Corporation,²⁵¹ and was subject to inquiry by Planning Panels Victoria, a discrete branch of the Victorian Planning bureaucracy that reports to the Minister for Planning and was accredited as an inquiry agency for the purposes of the federal environmental law. The project was opposed by a wide cross section of the Victorian community, including conservation groups, concerned scientists, shipping personnel and groups, and recreationalists and tourism providers. The opposition, however, was led by the Blue

²⁵⁰ *Environment Effects Act 1978* (Vic); *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

²⁵¹ *Port Services Act 1995* (Vic).

Wedges Coalition Inc. It participated in two environmental assessment processes²⁵² and was the applicant in three court cases – one in the Supreme Court of Victoria²⁵³ and two in the Federal Court of Australia.²⁵⁴ These cases concerned the necessary procedures for environmental assessment in Victoria, the function of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) and the meaning of ecologically sustainable development in that statute.

The project was opposed because of the concerns about the unknown impacts on a complex ecosystem and human and commercial uses of the bay, concerns about human impacts of disturbing contaminated sediments and because of the questionable need and economics that underpinned the project justification. Throughout the project design and assessment, there were claims of government interference in process, submissions being ignored, submitters being disrespected, and social and environmental impacts of concern being ignored.

Wielangta Forest conflict

The case study explored in chapter 6, the Wielangta forest conflict, concerned a decision of the Tasmanian forestry agency, Forestry Tasmania, to approve logging activities in accordance with Tasmanian law²⁵⁵ in coupes of forest in the Wielangta area, north east of Hobart in south-east Tasmania (see Figure 4). Before the initiation of the court case that was the trigger for the three-year conflict focused on the protection of species, the forest reserve that encompassed the historic former forestry town of Wielangta²⁵⁶ was not well

²⁵² Rynd Smith et al, *Report of the Advisory Panel into the Channel Deepening Project Environment Effects Statement* (11 February 2005); Allan Hawke, Kathryn Mitchell and Mike Lisle-Williams, *Port Phillip Bay Channel Deepening Supplementary Environment Effects Statement Report of the Inquiry* (1 October 2007).

²⁵³ *Blue Wedges Inc v Port of Melbourne Corporation* [2005] VSC 305.

²⁵⁴ *Blue Wedges Inc v Minister for Environment Heritage and the Arts* (2008) 165 FCR 211; *Blue Wedges v Minister for Environment Heritage and the Arts (No 2)* (2008) 167 FCR 463.

²⁵⁵ *Forestry Act 1920* (Tas).

²⁵⁶ Astrid Ketelaar and Parry Kostoglou, *A Short History of the Timber Industry in the Wielangta State Forest* (Forestry Tasmania, 1993); Tasmania, *Tasmanian Government Gazette*, Vol CXIV No 7233, 14 June 1910.

known or instrumental in the decades-long battles of forests in Tasmania.²⁵⁷ The forest reserve was subject to the Tasmanian Regional Forest Agreement,²⁵⁸ and was assumed by governments to be exempt from the federal law designed to protect endangered species: the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).²⁵⁹

Figure 4: Wielangta Forest coupe logging project – location



The lead opponent of the proposed logging activities was Australian Greens Senator for Tasmania Dr Bob Brown. He sought to use the conflict to highlight the failures of the Regional Forest Agreements to protect endangered species.²⁶⁰ The conflict, the subject of two cases and an application for leave to the High Court of Australia,²⁶¹ focused on the impacts of logging on three species protected at state and federal law: the Tasmanian wedge-tailed eagle, the swift parrot and an endemic and rare stag beetle that came to be

²⁵⁷ Anna Krien, *Into the Woods: The Battle for Tasmania's Forests* (Black Inc, 2010).

²⁵⁸ Made under the federal *Regional Forest Agreements Act 2002* (Cth).

²⁵⁹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 38 provides that the parts of the Act that prohibit activities that are likely to have a significant impact on protected parts of the environment do not apply 'to an RFA forestry operation that is undertaken in accordance with an RFA'.

²⁶⁰ Interview with Margaret Blakers, campaigner, 16 August 2011.

²⁶¹ *Brown v Forestry Tasmania (No 4)* (2006) 157 FCR 1; *Forestry Tasmania v Brown* (2007) 167 FCR 34; *Brown v Forestry Tasmania* [2008] HCATrans 202.

known as the Wielangta stag beetle. Each species was differently dependent on the forest ecosystem. Opponents argued that the species would be further threatened and endangered by the logging, and that under law the species had to be protected. The arguments about the conflict also spilled over into debates about truth and integrity in science and policymaking and the appropriate level of influence of the forestry agency over the government directs and decisions. The court cases also brought into question costs barriers to public interest environmental litigation.²⁶²

²⁶² Alexandra de Blas, 'Can a parrot get justice under a Regional Forest Agreement?' (2009) 150 *ECOS Magazine* 9.

Chapter 2

The foundations for an environmental justice framework*

2.1 Justice and the environment

An overview. Who defines environmental justice?

The meaning of justice is contested and debated, as it has been for centuries.¹ There are a plurality of theories, views and philosophies.² However, this diversity of opinion and thought has not lessened the importance of justice, its symbolic and base meaning of fair and impartial treatment. Justice has been defined and theorised by reference to the interests of others, equality, equity, natural law, distribution, commitment, liberty, rationality, community, morality, utility, desert, respect, ignorance, rights, law, caring, objectivity, ethics, merit and aid. Within the literature, there are both shared notions and apparently fierce disagreements about the foundational ideas for justice, some of which will be identified below. However, there is no trend suggesting the departure from justice as an ideal, despite critiques that it has not delivered meaningful improvement to our lives.³

Contemporary debates about the meaning of justice were triggered by, and remain linked

* This chapter has been through many iterations and has been the subject of a number of challenging discussions. I am especially grateful to those scholars who shared their time and wisdom with me while I was a visitor at the University of California, Berkeley. In particular, I thank Alice Kaswan, Julie Sze, Angela Harris, Helen Kang, Alan Ramo, Michelle Wilde Anderson, Daniel Farber and Holly Doremis. Aspects of this chapter have been more deeply discussed or draw on the following publications: Brad Jessup, 'Investing the law with an environmental ethic: Using an environmental justice theory for change' in Erika Techera (ed), *Environmental Law, Ethics and Governance* (Inter-Disciplinary Press, 2010) 21; Brad Jessup, 'The journey of environmental justice through public and international law' in Brad Jessup and Kim Rubenstein (eds), *Environmental Discourses in Public and International Law* (Cambridge University Press, 2012) 47; Brad Jessup, 'Justice, recognition and environmental law: The Wielangta Forest conflict, Tasmania, Australia' (2015) 34 *University of Tasmania Law Review* 5; Brad Jessup, 'Trajectories of environmental justice – From histories to futures and the Victorian environmental justice agenda' (2017) 7 *Victoria University Law and Justice Journal* 48.

¹ Loretta Capeheart and Dragan Milovanovic, *Social Justice: Theories, Issues and Movements* (Rutgers University Press, 2007), especially ch 2.

² See, eg, the commentary in pt 1 of David Schlosberg, *Defining Environmental Justice: Theories, Movements, and Nature* (Oxford University Press, 2007) and Jekwu Ikeme, 'Equity, environmental justice and sustainability: Incomplete approaches in climate change politics' (2003) 13 *Global Environmental Change* 195.

³ Chandran Kukathas, 'Justicitis' in Manuel Knoll, Stephen Snyder and Nurdane Şimsek (eds), *New Perspectives on Distributive Justice: Deep Disagreements, Pluralism, and the Problem of Consensus* (De Gruyter, 2018) 187.

to, the contributions of John Rawls in the early 1970s. Rawls's position,⁴ encapsulated in the phrase 'justice as fairness' was that humans, stripped of their position and made strangers to themselves and situated in an anonymous setting,⁵ would act cooperatively and decide objectively and rationally to treat others equally in accordance with collective principles of justice. Rawls's conception of justice attempts to disassociate morality from justice and as cogently explained by Graham, is focused on humans.⁶ This has led to his ideas as being characterised as an unsuitable framework for the environment. Without moral principles, it has been asked, can people have a latent sense of justice,⁷ and indeed how people could apply justice notions to non-human parts of the environment. In a similar vein, Rawls's theory has been critiqued because it does not account for values, especially those shared within a community,⁸ including non-human values.

Rawls and others offer first principle ideas – especially on fairness, morality and values – relevant to a discussion about, and the development of a framework for, justice and the law. However, they are ideas deficient as a basis for a justice of and for the environment. In this chapter, ideas and challenges posed by them, as well as political and environmental philosophers, will be canvassed; however, they will not be the focus of the discussion on the environment and justice, nor the figures around whom environmental justice is defined, for several reasons.

First, as already alluded to, Rawls⁹ offered a political philosophy not a moral philosophy and, as will become apparent throughout this chapter, the theory of environmental justice that I employ is drawn from notions of morality and ethics. Rawls's ideas do not address all

⁴ See John Rawls, *Justice as Fairness: A Restatement* (Harvard University Press, 2001).

⁵ This is Rawls's 'veil of ignorance'. Ibid 15. Further commentary and explanation is offered by Paul Graham, *Rawls* (Oneworld, 2007) chs 2, 3 and 6.

⁶ Graham, above n 5, 26, recognises that the principles of justice that are devised under Rawls's original position are a moral position so they may not accord with pre-existing moral values; C Edwin Baker, 'Sandel on Rawls' (1985) 133 *University of Pennsylvania Law Review* 895.

⁷ Brian Barry, *The Liberal Theory of Justice: A Critical Examination of the Principal Doctrines in A Theory of Justice by John Rawls* (Clarendon Press, 1973) 14.

⁸ Graham, above n 5, 88.

⁹ Rawls, above n 4, 10.

subjects and all values, and clearly not all environmental one.¹⁰ Although scholars have attempted to argue that Rawls does grapple with ideas of duties, if not justice, to non-humans,¹¹ it is forced. His is a framework for domestic societies rather than global communities,¹² and insofar as it is structured around law, rights and moral positions, it does not engage with the non-human world¹³ – realms that are increasingly subject to justice claims. Rather, the focus of Rawls's theory is how a modern liberal society treats its citizens. It is about the basic rights and liberties to which they are entitled wherever they are located,¹⁴ and how to regulate social and economic inequalities among and between citizens.¹⁵ These ideas, however, remain germane, especially insofar as environmental justice is considered a political campaign or ideal, a legal principle or motivator for legal activism.¹⁶

Second, the concept of environmental justice did not originate from theoretical inquiry. Instead, it grew out of the vocabulary of dissent and anguish of social movements.¹⁷ My thesis, through its empirical lens, is centred on the activists and campaigners of environmental justice. Cole and Foster's pre-eminent work¹⁸ recognises the value of this approach. For them, environmental justice is a narrative of dissent. It is defined by those

¹⁰ Mary Midley, 'Duties concerning islands' in Robert Elliot and Arran Gare (eds), *Environmental Philosophy* (University of Queensland Press, 1983) 166.

¹¹ Derek R Bell, 'Political liberalism and ecological justice' (2006) 28 *Analyse & Kritik* 206, 201–11.

¹² Thomas W Pogge, *Realizing Rawls* (Cornell, 1989) leveraged Rawls's theory for global justice.

¹³ Graham, above n 5, 27. Rawls did grapple with the international sphere, especially global standards of justice, and translated ideas of justice into human rights in John Rawls, 'The law of peoples' (1993) 20 *Critical Inquiry* 36, 57.

¹⁴ Rawls, above n 13.

¹⁵ Graham, above n 5, 41.

¹⁶ Alice Kaswan, 'Environmental justice: Bridging the gap between environmental laws and "justice"' (1997) 47 *The American University Law Review* 221.

¹⁷ Nicholas Low and Brendan Gleeson, *Justice, Society, and Nature: An Exploration of Political Ecology* (Routledge, 1998) 100. Low and Gleeson assert that 'justice emerges from a discursive struggle, a dialectic, which is entwined with politics and power in the material world'.

¹⁸ Luke W Cole and Sheila R Foster, *From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement* (NYU Press, 2001).

who speak in their own terms and words – it is built from ‘the ground up’, by people ‘speaking for themselves’.¹⁹ As Low and Gleeson point out in the environmental context, ‘conceptions of justice do not originate in the abstract logical systems of philosophers but in the everyday reflections of people’.²⁰

Finally, other thinkers have critiqued and explored the originating theories of justice from an environmental perspective in depth and extracted from them the most compelling and pertinent components and lessons. By way of example, the principles of social justice of need, desert and equality can be applied to the ecosphere to support a human-centred environmental justice. Capeheart and Milovanovic formulate a multilayered argument using social justice theories that communities need a clean and healthy environment; they and future generations deserve an environment free from pollutants; and people should be entitled to equal access to a healthy environment.²¹ Throughout this chapter, I will return to the work of Gary Bryner,²² who saw environmental justice as being less theoretical and more categorical. I depend primarily on the work David Schlosberg, who has used philosophies and ethics of justice to support a complex definition of environmental justice. My contribution will be to make the connection between his work and the experience and effect of environmental law.

Schlosberg is a political theorist and political scientist whose research program has focused on environmental movements since the 1990s. His first book, which emerged from his doctoral thesis,²³ *Environmental Justice and the New Pluralism: The Challenge of Difference for Environmentalism* (Oxford University Press, 1999), starts from a position that environmental groups and movements are characterised by their difference. In more recent

¹⁹ Ibid 1.

²⁰ Low and Gleeson, above n 17, 99.

²¹ Capeheart and Milovanovic, above n 1, ch 7.

²² Gary C Bryner, ‘Assessing claims of environmental justice: Conceptual frameworks’ in Kathryn M Mutz, Gary C Bryner and Douglas S Kenney (eds), *Justice and Natural Resources: Concepts, Strategies and Applications* (Island Press, 2002) 31.

²³ Submitted in 1996 and titled: ‘Diversity, action, and participation in the US environmental movement: The case for a critical pluralism’.

work in Australia this has been translated as meaning that environmental movements are grounded in distinct places.²⁴ Schlosberg does not see stasis in environmental justice or approach it with conceptual rigidity. His 2004 article on 'reconceiving environmental justice' demonstrated that environmental justice is a broad term in a dynamic space, that moves and expands. This work culminated in the monograph most central to this thesis: *Defining Environmental Justice: Theories, Movements, and Nature* (Oxford University Press, 2007), which was published just before my candidature began. Through this book in particular, Schlosberg offers alternative and plural frames of justice for the environment beyond the idea the environmental justice is only a matter of equal distribution.²⁵ In thesis I will building on the explanation in the previous chapter of justice within Australian environmental legal and political conflicts being drawn from multiple beginnings. Similar to Schlosberg, I will chart contemporary understandings of justice that are more complex and multi-layered than how the concept has long been debated.

The purpose of the chapter is to engage in a broad and multifaceted discussion of the meaning and purpose of environmental justice and ecological justice drawn from the literature centred around Schlosberg's 2007 book. It will connect these ideas with the case studies explored in chapters 4, 5 and 6. With a broad, and plural and layered explanations of environmental justice offered in this chapter, I will attempt to apply them to law, and view them through the experience of the law and environmental conflict of three community groups.

In encounters with Australian environmental laws, community members are typically unfamiliar with justice theories when they describe their perceptions of just and unjust environmental decisions.²⁶ Aggrieved citizens cannot explain what justice or injustice means. They do not invoke justice philosophies or concepts. They know it when they see it.

²⁴ David Schlosberg, Lauren Rickards and Jason Byrne, 'Environmental justice and attachment to place: Australian cases' in Ryan Holifield, Jayajit Chakraborty and Gordon Walker (eds), *The Routledge Handbook of Environmental Justice* (Routledge, 2017) 591.

²⁵ David Schlosberg, *Defining Environmental Justice: Theories, Movements, and Nature* (Oxford University Press, 2007) 12 ('*Defining Environmental Justice*').

²⁶ Catherine Gross, 'A measure of fairness: An investigative framework to explore perceptions of fairness and justice in a real-life social conflict' (2008) 15 *Human Ecology Review* 130.

It is when they describe fair or unfair, just or unjust situations, that parallels with philosophical thought can be identified and those theoretical positions illustrated and given meaning in a lived experience. In researching this thesis, most of the voices I heard came from groups that do not identify as being part of an environmental justice movement – but this fact should not limit what environmental justice is.²⁷ Meanings of environmental justice should not simply be a summary of those claimants that have adopted this terminology. The loudest environmental justice activists do not define the term. Instead, it is necessary to listen to the expression of dissent. This is especially so in Australia, where community groups have not built a mass popular environmental justice movement in the manner observed in the US.²⁸

Schlosberg has contributed greatly to understanding that environmental justice is defined in plural terms²⁹ and by groups and individuals engaged in matters of environmental controversy.³⁰ His concept of environmental justice recognises differing experiences and that, unlike mainstream environmental groups, 'the environmental justice movement is based on the acknowledgment of diversity'.³¹ It offers a 'useful corrective to the universalism of mainstream environmentalism'.³² Through a frame of environmental justice, the class of 'environmentalist' becomes wider. Who must be listened to in order to define the term is broader. Therefore, a focus on justice within environmental conflicts extends the community of interest – from environmental conservationists to include landowners and tenants, neighbourhoods and workers – and helps to make sense of sometimes disparate arguments that, at their core, have a shared articulation of unfairness or poor treatment.

²⁷ Alison Hope Alkon, Marisol Cortez and Julie Sze, 'What's in a name? Language, framing and environmental justice activism in California's Central Valley' (2013) 18 *Local Environment* 1167.

²⁸ Andrew Szasz, *Ecopopulism: Toxic Waste and the Movement for Environmental Justice* (University of Minnesota Press, 1994).

²⁹ David Schlosberg, *Environmental Justice and the New Pluralism: The Challenge of Difference for Environmentalism* (Oxford University Press, 1999) ('New Pluralism').

³⁰ Schlosberg, *Defining Environmental Justice*, above n 25.

³¹ Schlosberg, *New Pluralism*, above n 29, 11.

³² Andrew Dobson, *Justice and the Environment: Conceptions of Environmental Sustainability and Theories of Distributive Justice* (Oxford University Press, 1998) 19.

In this thesis, the communities of environmental justice include landowners near the Molong waste facility, mixed communities of interest around Port Phillip, and scientists, conservationists and non-human communities with interests in Tasmanian forests.

The environment of environmental justice

Just as the communities of environmental justice may be broad, so is the 'environment' of environmental justice. Environmental justice brings within the environmental movement diverse actors of dissent with varied concerns across a range of environmental landscapes.³³ Attentiveness to environmental justice creates an acknowledgement that the 'environment' matters in untouched places as well as in factories, farmlands, polluted neighbourhoods or industrial heartlands.³⁴ In the US, the environmental justice movement has been credited with challenging a vision of the environment defined by whiteness.³⁵ Its actions are affirmation that conventional aspects of environmental law, such as air and water quality, and less conventional aspects, such as human health impacts of developments, are matters of the 'environment'.³⁶

In Australia, definitions of 'the environment' have been cast widely in modern legislation³⁷ and, in recent years, courts have acknowledged that the social, cultural and economic harms suffered by communities as a result of environmental change constitute environmental impacts or must be considered as a component of an integrated environmental assessment.³⁸ This broader perspective opens up the possibility for

³³ Ibid.

³⁴ David Naguib Pellow and Lisa Sun-Hee Park, *The Silicon Valley of Dreams: Environmental Injustice, Immigrant Workers, and the High-Tech Global Economy* (New York University Press, 2002).

³⁵ Walter Willard, 'Environmental racism: The merging of civil rights and environmental activism' (1992) 19 *Southern University Law Review* 77. See also a UK perspective in Julian Agyeman, 'Black people in a white landscape: Social and environmental justice' (1990) 16 *Built Environment* 232.

³⁶ Kaswan, above n 16, 257. In Victoria, for example, this is evidence in the *Environment Protection Act 1970* (Vic) and the suite of State Environment Protection Policies that support that law.

³⁷ See, eg, the definition of 'environment' in the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 528, which includes humans, places, social and economic characteristics as well as ecosystems and natural and physical resources in the definition of environment.

³⁸ *Friends of Mallacoota Inc v Minister of Planning* (2010) 28 VR 257; *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts* (2008) 167 FCR 463.

environmental justice research.³⁹

The focus of this chapter is on the broadening of environmental justice to identify common or shared perspectives. The chapter moves between ideas and events, scholars and scholarship that have overseen conceptual (and social movement) development, hybridisation and translocation of environmental justice – transforming the concept from a notion of US environmental racism⁴⁰ to one incorporating global climate justice, species justice and geographical justice.⁴¹

Environmental justice in this thesis

Schlosberg⁴² has provided one of the contemporary holistic definitions of environmental justice. Relying on environmental and philosophical theories to explain and justify the change in discourse of environmental justice,⁴³ he defines environmental justice within four aspects that are sequentially addressed in this chapter: the fair distribution of environmental goods and harm; the recognition of human and non-human interests in decision-making and distribution; the existence of deliberative and democratic participation; and the building of capabilities and capacity among individuals, groups and non-human parts of nature.

The chapter will explore Schlosberg's definition in depth and, in particular, situate his work alongside the scholarship of other environmental justice writers, and connect that work with an Australian and legal experience. Before unpacking Schlosberg's work, however, the chapter begins, in part chronologically, by retelling the story of the sociopolitical

³⁹ Environment Defenders Office (Victoria), *Environmental Justice Project: Final Report* (2012) notes the ways that environmental justice can be used as a framework for critique of environmental laws.

⁴⁰ Robert D Bullard, 'Environmental justice in the 21st century: Race still matters (2001) 49 (3/4) *Phylon* 151; Robert D Bullard, Paul Mohai, Robin Saha and Beverly Wright, 'Toxic wastes and race at twenty: Why race still matters after all of these years' (2008) 38 *Environmental Law* 371.

⁴¹ Gordon Walker and Harriet Bulkeley, 'Geographies of environmental justice' (2006) 37 *Geoforum* 655.

⁴² Schlosberg, *New Pluralism*, above n 29; Schlosberg, *Defining Environmental Justice*, above n 25; David Schlosberg, 'Reconceiving environmental justice: Global movements and political theories' (2004) 13 *Environmental Politics* 517 ('*Reconceiving Environmental Justice*').

⁴³ Schlosberg, *Defining Environmental Justice*, above n 25.

emergence of the concept, the discourse and the movement of 'environmental justice'. This is not simply a retelling of a story to set the context but to pry open that context. It is also intended to demonstrate how the concept and discourse, if not the movement, have altered over three decades such that there is no one meaning of environmental justice. There were, have been and still are 'preoccupations'⁴⁴ about certain aspects of justice; however, environmental justice never was and nor is not simply racial justice, American justice, distributive justice or even human justice.⁴⁵ The telling of the environmental justice story will offer plural histories and plural geographies, as well as plural futures for justice concepts of and for the environment. The chapter will then explore justice intersections with sustainability, critical geographies and the law.

2.2 A starting point for environmental justice in the law

Environmental justice and the United States EPA

The US experience of environmental justice is a conventional starting point for introducing environmental justice,⁴⁶ though it is an experience that should not frame and does not limit the meaning of environmental justice.⁴⁷ The United States Environmental Protection Agency's (US EPA) definition has driven and underpinned policy and legal decisions in the US,⁴⁸ which is especially important for this thesis situated within the law. For this chapter, the US EPA's initial description and action around environmental justice will also act as a

⁴⁴ Ryan Holifield, Michael Porter and Gordon Walker, 'Introduction: Spaces of environmental justice: Frameworks for critical engagement' in Ryan Holifield, Michael Porter and Gordon Walker (eds), *Spaces of Environmental Justice* (Wiley-Blackwell, 2010) 1, 1.

⁴⁵ Brad Jessup, 'Trajectories of environmental justice – From histories to futures and the Victorian environmental justice agenda' (2017) 7 *Victoria University Law and Justice Journal* 48.

⁴⁶ See, eg, Kristin Shrader-Frechette, *Environmental Justice: Creating Equity, Reclaiming Democracy* (Oxford University Press, 2002), who offers a framework for environmental justice and relies heavily on the US experience of environmental injustice in her own work.

⁴⁷ Gordon Walker, 'Globalizing environmental justice: The geography and politics of frame contextualization and evolution' (2009) 9 *Global Social Policy* 355, 364. Dennis C Cory et al, *Environmental Justice and Federalism* (Edward Elgar, 2012). Cory et al argue that the US Government adopts a cooperative model for environmental justice implementation and enforcement.

⁴⁸ US Environmental Protection Agency (US EPA) will consider environmental justice when 'setting standards, permitting facilities, awarding grants, issuing licenses and regulations and reviewing proposed actions by the federal agencies': see US EPA, *Environmental Justice: Learn About Environmental Justice* (29 March 2016) <<https://www.epa.gov/environmentaljustice/learn-about-environmental-justice>>.

milestone point.⁴⁹ The definition and the motivations for the US EPA to engage with environmental justice will provide a basis for an inquiry into the historic movement of environmental justice, and invite a temporal context for the analysis, criticism and questioning of the concept that occurred in the 1990s concurrently with government endorsement. It will also provide a counterpoint to a contemporary understanding of environmental justice. The definition can be contrasted with the exploratory work, below, on an environmental justice framework for environmental law.

Environmental justice, in its most modern iteration, is especially difficult to define – and there are difficulties in expressing the meaning of a notion still subject to debate and experienced by people and ecosystems across the globe. Perhaps it is undesirable to fix a definition of the term that is permeating international and local political and social movements. I, therefore, introduce this definition with caution. In addition, the US EPA definition of environmental justice is understandably designed to suit and reflect the dominant concerns in the US context, and the US EPA is still grappling with a very restrictive view of the beneficiaries of environmental justice.⁵⁰ Nevertheless, this starting definition will illustrate that the concept of environmental justice has both distributional and participatory elements and is directed at a qualitative assessment of human experience. This is a framework understanding that will be explored and then unpacked.

The US EPA defines environmental justice as:⁵¹

The **fair treatment** and **meaningful involvement** of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.

Fair treatment means no group of people should bear a disproportionate share of the negative environmental consequences resulting from industrial, governmental and commercial operations or policies.

Meaningful Involvement means: (1) people have an opportunity to participate in decisions

⁴⁹ For a longer discussion on the embrace by the US EPA of environmental justice: see Low and Gleeson, above n 17, 110 ff.

⁵⁰ Lisa R Pruitt and Linda T Sobczynski, 'Protecting people, protecting places: What environmental litigation conceals and reveals about rurality' (2016) 47 *Journal of Rural Studies* 326.

⁵¹ US EPA, above n 48. Emphasis in original.

about activities that may affect their environment and/or health; (2) the public's contribution can influence the regulatory agency's decision; (3) community concerns will be considered in the decision making process; and (4) decision makers will seek out and facilitate the involvement of those potentially affected.

The Clinton Executive Order

The EPA definition emerged from, and can be traced to, the Clinton Administration's Executive Order of 1994, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*.⁵² The Executive Order represented an acceptance and acknowledgement by the US federal executive that there was a deficiency in environmental regulations. They were capable of having, and, in fact, were being administered by environmental agencies in a way that had, a discriminatory effect.⁵³ The Executive Order led to the development of an environmental justice policy and was accompanied by the establishment of the US's Office of Environmental Justice.⁵⁴ This office had a mission of ensuring that adverse environmental effects resulting from administrative action and policy did not fall disproportionately on disadvantaged communities. It directed the operation of the suite of federal environmental statutes.⁵⁵ Elsewhere in the US, and most enthusiastically in California, environmental justice policies, programs and laws were also developed.⁵⁶

Through the Obama administration,⁵⁷ the EPA continued to be at the forefront of the

⁵² United States Executive Order No 12898, 59 Fed. Reg. 7629 (11 February 1994) *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*.

⁵³ Veronica Eady, 'Environmental justice in state policy decisions' in Robert D Bullard, Julian Agyeman and Bob Evans (eds), *Just Sustainabilities: Development in an Unequal World* (Routledge, 2003) 168.

⁵⁴ For an overview of the Executive Order and subsequent administrative directions and programs: see Ronald Bass, 'Evaluating environmental justice under the National Environmental Policy Act' (1998) 18 *Environmental Impact Assessment Review* 83.

⁵⁵ Richard J Lazarus and Stephanie Tai, 'Integrating environmental justice into EPA permitting authority' (1999) 26 *Ecology Law Quarterly* 617 offer an extensive account of the guidelines directing EPA decisions about statutory permits.

⁵⁶ Jonathan K London, Julie Sze and Raoul S Liévanos, 'Problems, promise, progress, and perils: Critical reflections on environmental justice policy implementation in California' (2008) 26 *UCLA Journal of Environmental Law & Policy* 255, 256, 262.

⁵⁷ Lindsey Dillon et al 'The Environmental Protection Agency in the early Trump Administration: Prelude to regulatory capture' (2018) 108 *American Journal of Public Health* S89 note shifts in the environmental justice program of the EPA early in the Trump Administration.

administrative promotion of environmental justice principles within the US, and its early environmental justice initiatives continue to have a symbolic importance and relevance.⁵⁸ The significance and lasting importance of the Executive Order is that it embeds environmental justice into the political structure. The impact of the order is difficult to separate from the impact of a more vocal, active community of opposition, which can be discerned from the mid-1980s as battles over waste – incinerators and landfills – became local political struggles.⁵⁹ It did more, however, than simply articulate a state of affairs at the time. It was, at a minimum, an endorsement of a way forward. The Executive Order did, and continues to, arm the community with a policy basis to critique how governments fulfil functions, particularly who is prioritised, who is empowered and disempowered. It reinforces the view that 'environmental justice' is a political term and 'the environmental crisis' is a political crisis.⁶⁰ It acknowledges the role of the citizenry in redressing environmental injustice. While the Executive Order was a statement of policy at the federal level, its influence was particularly notable locally where most battles over waste were being played out. For instance, the 'comprehensive' Californian response to the order, including mandating restrictions on waste-site aggregation and socio-economic impact analysis of land-use decisions, has been lauded.⁶¹

Gaps in the US legal and political environmental justice landscape

The EPA's supervision of environmental justice and its pursuit of its own policy have not been without, and is still subject to, criticism.⁶² The Executive Order did not, for instance,

⁵⁸ Cory et al, above 47, 154 note that the US EPA released its EJ Plan 2014 as a 'roadmap' to the advancement of environmental justice principles within administrative decision-making at the federal level.

⁵⁹ David Naguib Pellow and Robert J Brulle, 'Power, justice, and the environment: Toward critical environmental justice studies' in David Naguib Pellow and Robert J Brulle (eds), *Power, Justice, and the Environment: A Critical Appraisal of the Environmental Justice Movement* (MIT Press, 2005) 1, 8.

⁶⁰ David E Camacho, 'The environmental justice movement: A political framework' in David E Camacho (ed), *Environmental Injustices, Political Struggles: Race, Class, and the Environment* (Duke University Press, 1998) 11, 13.

⁶¹ Cory et al, above n 47, 6–7.

⁶² Pruitt and Sobczynski, above n 50.

result in participatory decision-making.⁶³ It was implemented through efforts at consultation and seeking advice from communities – passive forms of participation – rather than by letting communities have greater control, power and justice over decisions that affect their lives – influential or decisive forms of participation.⁶⁴ It has had no noticeable effect on the judiciary, while communities have been channelled into an administrative complaints process.⁶⁵ Within that process, they are hidden and unrecognised. Schlosberg suggests that the focus of the EPA and its environmental justice policy and program has been on the distributional limb of its definition of the concept. Participation that empowers communities and, significantly and relatedly for Schlosberg, ‘recognition’ have been overlooked.⁶⁶ These perspectives underlie the limitations of the EPA’s definition, conception and presentation of environmental justice. They direct us to look further, deeper, wider, to more fully understand what environmental justice means, and who benefits from it.

The experience of the EPA’s environmental justice mission, too, cannot be seen as an end point to the promise of environmental justice. There is much still to be done to realise the ambition of environmental justice, even for the segments of society prioritised by that agency in its policies. Kang, whose educational environmental justice clinic at Golden Gate University⁶⁷ represents clients who identify as being within the environmental justice movement, accepts that the Executive Order stimulated policy and legal developments that encompassed environmental justice goals. However, the EPA has not pursued the goals vigorously.⁶⁸ Like others, Kang does not identify any transformational effect from the

⁶³ Christopher H Foreman Jr, *The Promise and Peril of Environmental Justice* (Brookings Institution, 1998).

⁶⁴ *Ibid.*

⁶⁵ Cory et al, above n 47, 38.

⁶⁶ Schlosberg, *New Pluralism*, above n 29, 12.

⁶⁷ Golden Gate University, School of Law, *On-Site Clinics: Environmental Law and Justice Clinic* <<http://law.ggu.edu/clinics-and-centers/clinics/environmental-law-and-justice>>.

⁶⁸ Helen H Kang, ‘Pursuing environmental justice: Obstacles and opportunities—Lessons from the field’ (2009) 31 *Journal of Law and Policy* 121, 124. Thanks to Helen Kang for meeting with me to discuss her clinic and experience in San Francisco in 2013.

introduction of the Executive Order.⁶⁹ Moreover, the behaviour of polluters has not changed in any discernible way since the advent of the Executive Order and the rise of interest in environmental justice within the EPA. Meanwhile, the drivers of the unequal distribution of environmental harms continue to be present.⁷⁰ Where there is evidence about environmental justice, it is that environmental injustice is much easier to observe.⁷¹ Researchers have been called on to respond to this imperative, including by pushing the boundaries of the meaning of environmental justice.⁷² This thesis is part of the attempt at recasting environmental justice, especially to see environmental justice in law differently, more deeply and more fully integrated and influential than can be attributed to the US EPA policy framework.

The making of the Executive Order occurred at a time when legal scholars began to discuss, question and critique environmental justice.⁷³ This was despite the movement and social science scholarship being active at least in the decade beforehand.⁷⁴ Within US legal writing, some of the early distributional claims of environmental justice were challenged using public choice theory and as being unsupported by objective statistical evidence,⁷⁵ and the concept of environmental justice began to expand – most notably to clearly encompass the participatory aspect that was incorporated into the US EPA definition through the concept of ‘meaningful involvement’. In California, this aspect has been a notable priority,

⁶⁹ Ibid.

⁷⁰ Ibid. Ryan Holifield, ‘Defining environmental justice and environmental racism’ (2001) 22 *Urban Geography* 78, 78 notes that the order did not direct the curtailment of the disposal and production of toxic waste.

⁷¹ Kang, above n 68.

⁷² Maureen G Reed and Colleen George, ‘Where in the world is environmental justice’ (2011) 35 *Progress in Human Geography* 835.

⁷³ Lynn E Blais, ‘Environmental racism reconsidered’ (1996) 75 *North Carolina Law Review* 75, 89; Richard J Lazarus, ‘Pursuing “environmental justice”: The distributional effects of environmental protection’ (1993) 87 *Northwestern University Law Review* 787, 790–1. Legal scholars were among the first to employ the term, in the context of workers’ rights: see Joseph A Page and Gary B Sellers, ‘Occupational safety and health: Environmental justice for the forgotten American’ (1970) 59 *Kentucky Law Journal* 114.

⁷⁴ See, eg, Robert D Bullard, ‘Solid waste sites and the black Houston community’ (1983) 53 *Sociological Inquiry* 273.

⁷⁵ Blais, above n 73; Vicki Been, ‘What’s fairness got to do with it? Environmental justice and the siting of locally undesirable land uses’ (1993) 78 *Cornell Law Review* 1001.

so much so that scholars have argued that California has overlooked other aspects of environmental justice.⁷⁶

One notable and highlighted limitation of the EPA's implementation of its environmental justice definition has been its blinkered view of environmental injustice as being something experienced only by people of colour. As will be noted below, one of the landmark moments for the rise of a grassroots activist environmental justice movement was the contamination saga at Love Canal, a pollution event that affected a relatively less advantaged white community. The recent scholarship of Pruitt and Sobczynski reveals the US EPA still being stuck on distributional environmental impacts based on race.⁷⁷ This chapter, however, will argue that environmental justice is much more than that. Environmental injustice can be experienced by people and non-humans owing to their relative sociocultural–political–species disadvantage, and that experience will not always, and typically will not, be distributive in character.

Histories and futures for understanding environmental justice

Most historical explanations for the rise of interest and development of policy in environmental justice begin with the events of Warren County, North Carolina in the late 1970s and early 1980s, when a marginalised black community was confronted with a poisonous waste dump.⁷⁸ This controversy is commonly identified and analysed,⁷⁹ along with the Love Canal⁸⁰ residential and community development on toxic land⁸¹ in New York

⁷⁶ London, Sze and Liévanos, above n 56.

⁷⁷ Pruitt and Sobczynski, above n 50.

⁷⁸ For just one illustrative example: see Stephen Sandweiss, 'The social construction of environmental justice' in David E Camacho (ed), *Environmental Injustices, Political Struggles: Race, Class, and the Environment* (Duke University Press, 1998) 31, 35.

⁷⁹ See, eg, Robert D Bullard, *Dumping in Dixie: Race, Class, and Environmental Quality* (Westview Press, 3rd ed, 2000) 14.

⁸⁰ Shrader-Frechette, above n 46, 6. Indeed, Linda McKeever Bullard was represented by Margaret Bean in a court case using the US Civil Rights Act to oppose a landfill development in Houston. Bullard's husband assisted in that case with a social study from which he would advance the concept of environmental racism and justice: see Second National People of Color Environmental Leadership Summit, *Celebrating Our Victories, Strengthening Our Roots – Environmental Justice Timeline – Milestones* (October 2002).

⁸¹ This conflict was led by a group also considered part of a discrete anti-toxics movement: see Cole and Foster, above n 18, 22. They argue that this movement coalesced with others (the civil rights movement, the

State⁸² and Cancer Alley in Louisiana,⁸³ as a key trigger moment for the environmental justice movement born from resistance.⁸⁴ Yet, despite pleas not to 'retreat from race',⁸⁵ the decision and fierce opposition to relocate illegally dumped industrial waste into a poor black neighbourhood in North Carolina did not mark the beginning, or restrict the future definition, of the concept of environmental justice.

The concern articulated by the Warren County community – of unequal distribution of pollution – has existed since the late 1880s and early 1900s, when the age of industrialisation confronted the emergence of urban metropolises and the growth of the affluent class.⁸⁶ Other local environmental conflicts have been recognised as resulting from an imbalance in power between the state, the community and business.⁸⁷ Within the US, for

labor movement, the academy, and some Native American and environmental activists) to champion environmental justice.

⁸² Dobson, above n 32, 19; John S Dryzek, *The Politics of the Earth: Environmental Discourses* (Oxford University Press, 2nd ed, 2005) 210. For a detailed account of the history and politics of the Love Canal controversy see: Judith A Layzer, *The Environmental Case: Translating Values into Policy* (CQ Press, 2nd ed, 2006) ch 3.

⁸³ Robert D Bullard and Beverly Wright, 'Race, place, and the environment in post-Katrina New Orleans' in Robert D Bullard and Beverly Wright (eds), *Race, Place and Environmental Justice After Hurricane Katrina: Struggles to Reclaim, Rebuild, and Revitalize New Orleans and the Gulf Coast* (Westview Press, 2009) 19, 23.

⁸⁴ John Byrne, Cecilia Martinez and Leigh Glover, 'A brief on environmental justice' in John Byrne, Leigh Glover and Cecilia Martinez (eds), *Environmental Justice: Discourses in International Political Economy, Energy and Environmental Policy* (Transaction Publishers, 2002) 3.

⁸⁵ Clifford Rechtschaffen, 'Strategies for implementing the environmental justice vision' (2007) 1 *Golden Gate University Environmental Law Journal* 321.

⁸⁶ David H Getches and David N Pellow, 'Beyond "traditional" environmental justice' in Kathryn M Mutz, Gary C Bryner and Douglas S Kenney (eds), *Justice and Natural Resources: Concepts, Strategies, and Applications* (Island Press, 2002) 3, 6. Getches and Pellow cite Martin Melosi, *Garbage in the Cities: Refuse, Reform and the Environment* (University of Pittsburgh Press, revised ed, 2005). Melosi notes of the industrial era: 'The major physical consequence of the Industrial Revolution was the tremendous environmental change in cities. As never before, urbanites were forced to confront massive pollution in many forms. In this context, the refuse problem emerged as a major blight' (p 6). While commenting that 'even the quarters of the ruling classes were befouled and overcrowded' (p 7), Melosi notes that the 'the crush of people and the concentration of industry in and around cities produced living and working conditions of incredible deprivation, especially for the poor and working class' (p 8). Julian Agyeman, *Sustainable Communities and the Challenge of Environmental Justice* (NYU Press, 2005) notes that environmental justice concerns date to the late 1400s.

⁸⁷ Bullard, above n 79, 3 notes that '[t]he problem of polluted black communities is not a new phenomenon. Historically, toxic dumping and the location of locally unwanted land uses (LULUs) have followed the "path of least resistance"'. He recalls black resistance to the siting and operation of Texan landfills in the 1960s: see Robert D Bullard, 'Neighbourhoods zoned for garbage' in Robert D Bullard (ed), *The Quest for Environmental Justice: Human Rights and the Politics of Pollution* (Sierra Club Books, 2005) 43.

instance,⁸⁸ Plater's account of the contamination of James River in the state of Virginia and the poisoning of the air by corporate manufacturers of Kepone pesticide from the mid-1960s offers particularly pertinent reflections. Environmental justice comprised three limbs of objection: human health, environmental protection and economic security. It is an example of congruence between human and ecological environmental justices even before the conventional starting point for environmental justice.⁸⁹

Leading environmental justice scholar, Bullard, has been at the forefront of charting the intersections between environmental racism and environmental justice.⁹⁰ Bullard's conception of environmental justice was one that originated in black America and for decades, particularly as it was overwhelmingly asserted in the US, was an issue of race.⁹¹ A more nuanced view, however, and one that provides a plural future for environmental justice, is that environmental justice and environmental racism intersect. The initial focus on race by the environmental justice movement was an acknowledgment that mainstream environmentalism had ignored race⁹².

Global, transnational and contextual dimensions

The contexts and geographies of environmental justice and the components of the concept of environmental justice have changed. The environmental justice movement exists beyond the US, and the concept appears and has been analysed globally.⁹³ This is especially so

⁸⁸ Zygmunt J B Plater, 'Facing a time of counter-revolution: The Kepone incident and a review of first principles' (1995) 29 *University of Richmond Law Review* 657, 667.

⁸⁹ Yet Walker, above n 47, 358–60, has identified seven particular national dimensions to the environmental justice frame in the US that have restricted its traditional adherents from acknowledging the broadening of the movement and concept: the race, ethnicity and culture dimension; the anthropocentric dimension; the waste and hazards dimension; the distributive justice dimension; the industry, corporation and bureaucratic power dimension; the intranational networking and scalar dimensions; and the managerial definition dimension.

⁹⁰ Bullard, above n 79, 14.

⁹¹ Robert D Bullard, 'Introduction' in Robert D Bullard (ed), *The Quest for Environmental Justice: Human Rights and the Politics of Pollution* (Sierra Club Books, 2005) 1, 1.

⁹² Daniel Faber, *Capitalizing on Environmental Injustice: The Polluter-Industrial Complex in the Age of Globalization* (Rowman & Littlefield Publishers, 2008) 240.

⁹³ Dobson, above n 32, 18 notes especially the presence of the concept and movement in the UK and India.

around issues of class and environmental exposure, political disempowerment and vulnerability. Moreover, whereas the concept of environmental justice was once shunned by the US mainstream environmental groups,⁹⁴ beyond the US it is being adopted by such groups. They see value in the concept driving the restructure of power dynamics within the environmental realm and in drawing together campaign and political activism.⁹⁵ They see environmental justice as a plural and dynamic term. It means more than equitable distribution. It is more than fair involvement in decision-making.

Environmental justice no longer sits apart from notions more often understood as affiliated with sustainable development. Consequently, and this is especially the case in Australia through the work of Environmental Justice Australia, there is an increasing sophistication in environmental opposition, pluralising of concerns and a crossover between the human health and environmental harm perspectives under the banner of 'environmental justice'. Environmental Justice Australia identifies its mission as supporting vulnerable communities, protecting the environment, and holding business and government to account.⁹⁶ It is a pragmatic view of justice within the environmental sphere that enriches and supports grassroots groups to resist state exertion of power.⁹⁷

There is also an acceptance that there are direct links between the protection of the environment and the health of communities.⁹⁸ Ecological science is now present in

⁹⁴ Schlosberg, *New Pluralism*, above n 29, 107, recalls that the environmental justice grassroots groups have been alienated from the mainstream environmental 'lobby' and larger groups have dismissed their concerns on matters such as production and maldistribution of hazards.

⁹⁵ Ibid 22. See also Anna R Davies, 'Environmental justice as subtext or omission: Examining discourses of anti-incineration campaigning in Ireland' (2006) 37 *Geoforum* 708, 714 who, in the case study the focus of her work, observed national and local groups coordinate to campaign against incineration policies and projects, whose alliances were strategic and convenient; Kimberley K Smith, 'Natural subjects: Nature and political community' (2006) 15 *Environmental Values* 343, 343–4, notes that environmental issues across their spectrum – from human to non-human – are political, and this aspect links them as justice issues.

⁹⁶ Brendan Sydes, Environmental Justice Australia, Email to supporters: 'Will you help get justice for communities?' (12 May 2016).

⁹⁷ Mick Hillman, 'Environmental justice: A crucial link between environmentalism and community development?' (2002) 37 *Community Development Journal* 349.

⁹⁸ Barry E Hill and Nicholas Targ, 'The link between protecting natural resources and the issue of environmental justice' (2000) 28 *Boston College Environmental Affairs Review* 1, 5.

environmental justice scholarship.⁹⁹ A notion of ecological justice bridges environmental justice and ecological sustainability tensions by situating justice discourses within the environment and within which the political or distributive contests are occurring.¹⁰⁰ Pellow and Brulle urge a critical environmental justice scholarship that seeks to achieve 'ecological protection and social justice' in order to continue and advance the environmental justice movement, which they concede has not significantly altered dominant power and institutional structures.¹⁰¹ Others note that 'expanding the reach of environmental justice to include access to natural resources is a compelling goal'.¹⁰²

Ideas of just communities and just sustainabilities¹⁰³ and transnational environmental justice,¹⁰⁴ with complex and traversing concepts, have developed and are being empirically evidenced. Davies sees and supports a view through her case study research that 'just sustainability' is a broader conception of environmental justice that incorporates non-human species into the community of environmental justice, and also increases the scale and temporal geographies of environmental justice.¹⁰⁵ The aim of just sustainability is not simply about distribution of risk but of eliminating risk entirely. There is also a recasting of environmental justice for the global poor and for the future under way that does not depend on the terminology of environmental justice, but rather on the positions and arguments of globally diffuse communities.¹⁰⁶

⁹⁹ Julie Sze and Jonathan K London, 'Environmental justice at the crossroads' (2008) 2 *Sociology Compass* 1331, 1345.

¹⁰⁰ Mick Hillman, 'Situated justice in environmental decision-making: Lessons from river management in southeastern Australia' (2006) 37 *Geoforum* 695.

¹⁰¹ Pellow and Brulle, above n 59, 3. Byrne, Martinez and Glover, above n 84, 13, make a similar point that, together, notions of environmental justice and ecological justice offer 'a framework that can critically assess the local and systemic expressions of social and natural processes'.

¹⁰² Bryner, above n 22, 32.

¹⁰³ Agyeman, above n 86.

¹⁰⁴ David Naguib Pellow, *Resisting Global Toxics: Transnational Movement for Environmental Justice* (MIT Press, 2007).

¹⁰⁵ Davies, above n 95, 711.

¹⁰⁶ Pellow, above n 104.

The globalised environmental justice movement is finally fulfilling the goals foreshadowed in the principles of environmental justice developed in the 1990s.¹⁰⁷ It has been the shift away from environmental justice being understood exclusively as distributive that has led these changes. This move is alternatively explained as being one from distributive justice to a form of justice that produces capacity in communities,¹⁰⁸ allowing the confrontation of political injustices and striving for democratic justice and an environmental citizenship. In this conception, the law becomes especially pertinent. With the change in shape and understanding of environmental justice, lawyers – and the law – have become interested in, and of interest to, the environmental justice movement.¹⁰⁹

From the human to the human and environmental

Ignoring the breadth of justice misses 'possible convergences between social justice and sustainability'.¹¹⁰ It was observed during the 1990s, a time when legal scholars became interested in the concept, that arising from the policy goals of environmental justice 'the benefits of environmental protection are obvious and significant. A reduction in pollution decreases the public health risks associated with exposure to pollution'.¹¹¹ That is, there has long been an appreciation of a congruence between environmental protection goals often articulated in law and the environmental justice mission. Even when environmental justice was confined to distributional concerns, it was argued that distribution occurs within the legal objective of overall environmental protection improvement.¹¹²

Agyeman, whose work has been influential in this thesis, has staked out battle grounds for

¹⁰⁷ Dobson, above n 32, 23.

¹⁰⁸ Faber, above n 92, 262.

¹⁰⁹ Kaswan, above n 16, 223 recalls in the 1990s a scepticism within the environmental justice movement to the law and lawyers.

¹¹⁰ Schlosberg, *Reconceiving Environmental Justice*, above n 42, 530–1.

¹¹¹ Lazarus, above n 73, 793. See also 796–7.

¹¹² *Ibid* 747. Lazarus also explored the process for elimination of risks, which raises other distributive concerns – about where risk are eliminated first and whether processes entrench risks in those places not originally prioritised.

environmental justice. He has sought to 'bridge'¹¹³ notions of environmental justice and sustainable development. He argues that a just sustainability is the concept to connect them. His work is a reminder that the essence of environmental justice is twofold: humans and the environment.

Despite this bridging of justice, among those scholars who see justice as being applicable to human and non-human interests, most persist in dividing or keeping separate the principles of 'environmental justice' and 'ecological justice'. In fact, a common starting point to explain and define ecological justice is to contrast it with environmental justice.¹¹⁴ However, Bell's philosophical work, from which these perspectives are drawn, is intended to demonstrate the comparability between a human-centred, Rawlsian political liberalism and an ecocentric ecologism, rejecting the dominant view of incomparability between environmental justice and environmental sustainability.¹¹⁵

Because environmental ethics cannot be entirely divorced from a theory of or about the environment,¹¹⁶ environmental ethics will inform debates about the meaning of environmental justice and ecological justice. On this theme, Low and Gleeson¹¹⁷ assert that there is no defensible reason to limit environmental morality to human species. An engagement with theories of justice therefore demands an inquiry as to how they can cross between species. Upon a review of theories of justice, they argue that justice for all species – environmental justice or ecological justice – could be grounded on principles of care and respect,¹¹⁸ but also need, especially a need for flourishing, a fullness of existence, and

¹¹³ Agyeman, above n 86, 61, 79.

¹¹⁴ Bell, above n 11, 208 notes the view that ecological justice is "justice between human beings and the rest of the natural world". It is distinguished from "environmental justice", which concerns the distribution of environmental benefits and burdens among human beings'.

¹¹⁵ Dobson, above n 32.

¹¹⁶ Klaus Bosselmann and Benjamin J Richardson, 'Introduction: New challenges for environmental law and policy' in Klaus Bosselmann and Benjamin J Richardson (eds), *Environmental Justice and Market Mechanisms: Key Challenges for Environmental Law and Policy* (Kluwer, 1999) 1, 5.

¹¹⁷ Low and Gleeson, above n 17.

¹¹⁸ *Ibid* 137.

respect – ideas shared by those political theorists attuned to justice as recognition¹¹⁹ and capacity, which I will return to below.

These ethical and moral positions are both anthropocentric and ecocentric.¹²⁰ Ecological justice is not to deny human justice¹²¹ and ecocentricism is not misanthropic or anti-human; rather, it is a theory that embraces a sensitivity towards the interests and needs of others – humans and human cultures, as well as other species, being able to flourish alongside other species.¹²² Eckersley describes environmental justice informed by ecocentricism as being concerned with more than participation and distributive justice goals.¹²³ It is about recognising communities of species, human or otherwise. Concordantly, scholarship has shown that pollution and fishing needs connect humans and non-humans through a framework for justice.¹²⁴ Native American connections to place, the function of wetlands and the resilience of fish species are all inseparable and contemporaneous justice concerns. In an affiliated frame of rights, Godden has argued that a right to water ‘could capture aspects of human rights based around fundamental “needs” as well as the protection of ecosystems’.¹²⁵

Any insistence of difference between ecological justice and environmental justice reflects a moral position – a view of human superiority over the environmental interests – rather than conceptual or theoretical distinctions.¹²⁶ The purpose of a theory of ecological justice is to

¹¹⁹ Ibid, especially 152ff.

¹²⁰ Ibid 10.

¹²¹ Bell, above n 11, 218.

¹²² Robyn Eckersley, *Environmentalism and Political Theory: Toward an Ecocentric Approach* (SUNY Press, 1992), 56–7.

¹²³ Ibid 10–11.

¹²⁴ Hill and Targ, above n 98.

¹²⁵ Lee Godden, ‘Property in urban water: Private rights and public governance’ in Patrick Troy (ed), *Troubled Waters: Confronting the Water Crisis in Australia’s Cities* (ANU E Press, 2008) 157, 165.

¹²⁶ Klaus Bosselmann, ‘Justice and the environment: Building blocks for a theory of ecological justice’ in Klaus Bosselmann and Benjamin J Richardson (eds), *Environmental Justice and Market Mechanisms: Key Challenges for Environmental Law and Policy* (Kluwer, 1999) 30, 34.

represent non-human interests in a wide community of justice, which will inevitably include humans.¹²⁷ And the reverse is true of environmental justice. Both environmental and ecological concepts share common underpinnings and so it is also unlikely that a theoretical difference is readily noticeable within a conflict setting. The essential difference is the community of justice claims. Communities of opposition make their arguments 'over political and cultural power'¹²⁸ and engage in 'place-based activism'¹²⁹ in a way that means it is difficult to distinguish categories of human and non-human environmental justice.¹³⁰ That was a lesson from the field-based research for this thesis.

In what follows, I hope to show comparability in justice concerns across species and to continue the development of a concept that can be applied across humans and non-humans, whatever that concept might be called or however that concept might be differently framed.¹³¹

2.3 A multifaceted, discursive and plural definition of environmental justice

Approaches to 'defining' environmental justice

Lawyers have an eagerness to define terms, to find clarity in concepts and to interpret through principles.¹³² However, the purpose of this chapter so far has been to demonstrate that definitions of environmental justice will be fraught: in part because of an absence of agreement about the meaning and boundaries of the term; in part because of the fluidity

¹²⁷ Brian H Baxter, 'Ecological justice and justice as impartiality' (2000) 9 *Environmental Politics* 43.

¹²⁸ Jonathan K London, 'Common roots and entangled limbs: Earth First! and the growth of post-wilderness environmentalism on California's north coast' (1998) 30 *Antipode* 155, 170.

¹²⁹ *Ibid* 171.

¹³⁰ Bell, above n 11, 216.

¹³¹ David Harvey, 'The environment of justice' in Frank Fischer and Maarten Hajer (eds), *Living with Nature: Environmental Politics as Cultural Discourse* (Oxford University Press, 1999) 153, 178 argues that 'the discourse in a language of sacredness and moral absolutes' that exists across the concepts of justice and the environment, and deployed by communities in environmental struggles, 'creates a certain homology' between those struggles about environmental human risks, nature conservation and development in the majority world.

¹³² Alan Boyle, 'Human rights and the environment: Where next?' (2012) 23 *European Journal of International Law* 613, 628 notes this in the context of a right to a decent environment.

and plurality of the concept; and in part because the future of the concept remains unfixed. Definitions, such as that offered by the US EPA highlighted at the start of this chapter, represent a limited temporal and jurisdictional understanding of the term, and lead almost immediately to critiques of a blinkered view of the concept.

A more satisfactory way to define environmental justice is to unpick its components¹³³ and to resituate it within its context,¹³⁴ so to understand it more as a discourse, an argumentative device to challenge norms.¹³⁵ In 2000, Kuehn¹³⁶ explained environmental justice as having four discrete but not mutually exclusive components. He adopted a categorisation approach to understanding environmental justice as something to understand the causes and solutions for environmental justice.¹³⁷ The four components he identified were distributive justice, procedural justice, corrective justice and social justice. His starting point was that “environmental justice” means many things to many people’ across local, national and international spheres,¹³⁸ and a desire to develop a framework of unifying themes for lawyers to understand allegations of injustice.¹³⁹

Whereas Kuehn looked for existing justice theories to bring together disparate views about environmental justice, in 2002 Bryner looked for broader frameworks or principles existent in law, policy, practice and theory.¹⁴⁰ For him, environmental justice drew from frameworks and language of civil rights, distributive justice and environmental ethics, public

¹³³ Feng Liu, *Environmental Justice Analysis: Theories, Methods, and Practice* (CRC Press, 2000) section 2.0 argues that environmental justice in 2000 remained in ‘the preparadigm period’ when consensus would not be likely, but explanations of environmental justice possible by recourse to various theories and hypotheses.

¹³⁴ Walker and Bulkeley, above n 41.

¹³⁵ Dryzek, above n 82; John Dryzek, ‘Paradigms and discourses’ in Daniel Bodansky, Jutta Brunée and Ellen Hey (eds), *Oxford Handbook of International Environmental Law* (Oxford University Press, 2007) ch 3. Dryzek identified environmental justice, sustainability, survivalism and environmental problem-solving as discourses for an international legal sphere.

¹³⁶ Robert R Kuehn, ‘A taxonomy of environmental justice’ (2000) 30 *Environmental Law Reporter* 10681.

¹³⁷ *Ibid* 10681–2.

¹³⁸ *Ibid* 10681.

¹³⁹ *Ibid* 10683.

¹⁴⁰ Bryner, above n 22.

participation, social justice and ecological sustainability. It was a concept that can be approached from multiple, sometimes overlapping or otherwise independent perspectives. What was common about their approaches to understanding environmental justice was to map the meaning of environmental justice through the experience and expression of opposition by community groups.

It is this perspective, in particular, that directed me to the scholarship of Schlosberg, whose definition and theoretical attention on environmental justice is shaped by an understanding of the concept as a plural one, and who has interpreted environmental justice as a discourse.¹⁴¹ That is, the environmental justice movement is a plural network; its members acknowledge varied experiences and diverse understandings of environmental problems.¹⁴² It is a movement and a concept that is 'ideologically inclusive',¹⁴³ shared, experienced and self-supporting.¹⁴⁴ Schlosberg acknowledges that others before him, such as Wenz¹⁴⁵, have explored environmental justice in a similar light.

Schlosberg and reflexive environmental justice

Schlosberg¹⁴⁶ offers a broad, integrated and reflexive conceptual definition of environmental justice. He relies on environmental and philosophical theories, discourses of environmental justice, draws in ideas of ecological justice,¹⁴⁷ and looks closely at the activities of social movements. Like Kuehn and Bryner beforehand, Schlosberg tackles the task of making sense of environmental justice by looking for common and often

¹⁴¹ David Schlosberg, 'Theorising environmental justice: The expanding sphere of a discourse' (2013) 22 *Environmental Politics* 37 ('*Theorising Environmental Justice*').

¹⁴² Schlosberg, *New Pluralism*, above n 29, 109.

¹⁴³ *Ibid* 155.

¹⁴⁴ *Ibid* 125.

¹⁴⁵ Peter S Wenz, *Environmental Justice* (SUNY Press, 1988); Schlosberg, *Reconceiving Environmental Justice*, above n 42, 533.

¹⁴⁶ Schlosberg, *New Pluralism*, above n 29; David Schlosberg, *Defining Environmental Justice*: above n 25; David Schlosberg, *Reconceiving Environmental Justice*, above n 42. The significance of Schlosberg's contribution in shifting scholarship on environmental justice is recognised in Holifield, Porter and Walker, above n 44.

¹⁴⁷ Schlosberg, *Defining Environmental Justice*, above n 25.

overlapping themes or threads across these sources. He defines environmental justice as having four interlinked¹⁴⁸ aspects or realms: the fair distribution of environmental goods and harm; the recognition of human and non-human interests in decision-making and distribution; the existence of deliberative and democratic participation; and the building of capabilities among individuals, groups and non-human parts of nature – a form of capacity building.¹⁴⁹ He asserts that achieving 'justice' in one realm is not justice.¹⁵⁰ Environmental justice must exist across all realms.¹⁵¹ Significantly, Schlosberg reflects on environmental justice as an historical concept but also foreshadows changes and connections that could come within his approach. The four aspects have theoretical and historical bases but are capable of accommodating change and added plurality within the concept and movement of environmental justice. They are more like signposts than scriptures.

While Schlosberg's scholarship provides the principal conceptual framework for this thesis, I do not embrace it fully; rather I approach Schlosberg's ideas with two distinctions. First, I see participation and recognition as being less divisible than Schlosberg presents through his categories of environmental justice. There is no neat division, for instance, between participation being about the fact and method of involvement, and recognition being about degrees or extent of involvement, which a superficial inquiry into an environmental controversy might identify. Rather, recognition is about improving the quality and the experience of participation of groups involved in environmental processes, including environmental law, and about bringing in alternative voices, knowledge and vulnerabilities. I therefore see these two aspects as being discrete but interweaved, and while I attend to them separately, there is a blurring of them. I highlight the thinking of legal scholar, Alice Kaswan on this point – that it is political empowerment not participation that communities

¹⁴⁸ Schlosberg, *Reconceiving Environmental Justice*, above n 42, 521.

¹⁴⁹ Robyn Eckersley adds precaution and compensation as elements of environmental justice: see Robyn Eckersley, *The State and Access to Environmental Justice* (Speech delivered at the Access to Environmental Justice Conference, Environmental Defender's Office Western Australia, 20 February 2004).

¹⁵⁰ As Julian Agyeman, *Introducing Just Sustainabilities: Policy, Planning, and Practice* (Zed Books, 2013) 7 explains, just sustainabilities require a holistic perspective of justice. Agyeman writes of 'four essential conditions for justice and sustainable communities' though 'just sustainabilities can only be fully interpreted as an integrated whole'.

¹⁵¹ Schlosberg, *Reconceiving Environmental Justice*, above n 42, 528.

seek, and that empowerment is premised on the kind of recognition that Schlosberg discusses.

Secondly and relatedly, and informed by my legal and geographic background, I also approach Schlosberg's fourth aspect of justice differently. Schlosberg theorises capabilities from a philosophical position. What I see in his explanation, however, is found in resource management scholarship on capacity building,¹⁵² and in public interest legal arguments about the need for community supports – through things like legal aid, community legal centres, community legal education, and the availability of low-cost tribunals. Capacity, which contributes to the empowerment of communities, develops as communities are invested with management responsibility or are given the opportunity to learn through supported practice.

Schlosberg's contribution to the meaning of environmental justice¹⁵³ is especially important for researchers of environmental controversies outside the US, because Schlosberg's environmental justice is not limited or fixated on distributive harms on a specific characteristic of the community of justice, and because of its focus on political aspects that have driven the transportability of the concept globally and internationally. Indeed, the three aspects of participation, recognition and capabilities (or capacity, as I prefer) are all directed towards political equality. In explaining his scholarship,¹⁵⁴ and on reflecting on its contribution,¹⁵⁵ Schlosberg saw environmental justice becoming more than the conventional distributive US model. He combined theoretical and empirical study to develop a conception of environmental justice. He discovered that, while academics import an equity or distributive definition to environmental justice¹⁵⁶ and theorists are most at ease

¹⁵² See, eg, Andrea J Leys and Jerome K Vanclay, 'Social learning: A knowledge and capacity building approach for adaptive co-management of contested landscapes' (2011) 28 *Land Use Policy* 574; Jennifer Andrew and Ian Robottom, 'Communities' self-determination: Whose interests count' in Meg Keen, Valerie A Brown and Rob Dyball (eds), *Social Learning in Environmental Management: Towards a Sustainable Future* (Routledge, 2005) 61.

¹⁵³ See especially Schlosberg, *Defining Environmental Justice*, above n 25.

¹⁵⁴ David Schlosberg, 'Public presentation' (Speech delivered at the Environment Defenders Office Victoria, 29 June 2011).

¹⁵⁵ Schlosberg, *Theorising Environmental Justice*, above n 141.

¹⁵⁶ Some scholars, like Schlosberg, have distinguished notions of equity (considered exclusively distributive in

in explaining environmental justice in distributive terms, groups looked for more. They wanted justice, not equity. They wanted a functioning community, respect and enfranchisement. They wanted to survive and flourish.¹⁵⁷ Hence, environmental justice is understood as being 'multifaceted'.¹⁵⁸ It is individual as well as communitarian, and the emerging language used suggests a transposition from the human to the non-human environment.¹⁵⁹

2.4 Distribution

An introduction to distribution

The first aspect of Schlosberg's concept of environmental justice is distribution. This aspect is the most commonly understood form of environmental justice: the fair distribution of environmental harm and goods. It was the focus of 'the earliest academic reflections on environmental justice' with scholars tracing the 'existence of inequity in the distribution of environmental bads'. There was a simplicity and persuasiveness in the distributive frame: 'the concept was used to illustrate that some communities received more environmental risks than others'.¹⁶⁰ Equally, other communities received greater access to parks, open space and community infrastructure.

It is an idea with a long and philosophical history. Kuehn, who cites Dworkin and Aristotle, explains that distributive justice is 'the right to equal treatment, that is, to the same distribution of goods and opportunities as anyone else has or is given'.¹⁶¹ He continues:¹⁶²

In an environmental context, distributive justice involves the equitable distribution of the burdens resulting from environmentally threatening activities or of the environmental

concern) from justice (with a broader concern, including retributive, distributive and procedural in concern): see especially Ikeme, above n 2, 199.

¹⁵⁷ Schlosberg, *Defining Environmental Justice*, above n 25.

¹⁵⁸ *Ibid* 9.

¹⁵⁹ Schlosberg, *Theorising Environmental Justice*, above n 155, 44.

¹⁶⁰ *Ibid* 38.

¹⁶¹ Kuehn, above n 136, 10683.

¹⁶² *Ibid* 10684.

benefits of government and private sector programs. More specifically, in an environmental justice context, distributive justice most commonly involves addressing the disproportionate public health and environmental risks borne by people of color and lower incomes.

Distributive justice remains the focus of the environmental justice movement in the US, which uses the term to explain and challenge the nexus between minority and disadvantaged communities and polluting and contaminating industry and activities.

Early and ongoing approaches to environmental justice have attempted to quantify disparate impacts across communities.¹⁶³ Distributive environmental justice has thus been the domain of quantitative scholars more than critical scholars. In the US, it draws in philosophies of egalitarianism as well as notions of equality and individualised rights.¹⁶⁴ Legal scholars¹⁶⁵ adopted an early focus on distributive justice because it shares similarities and philosophical starting points with civil rights and equal opportunity laws, which create civil penalties for discriminating against humans on the basis of a characteristic,¹⁶⁶ and which were one of the stimuli for the formation of the environmental justice movement.¹⁶⁷ While these laws do not at present ordinarily provide grounds for complaint of discrimination on the basis of location or social status, they do so on the basis of race, ethnicity and parental or marital status¹⁶⁸ – all of which have been linked with higher exposure to environmental pollution.

Distribution and remedy

Bryner sees close links in language and claims between distributive justice, civil rights, social

¹⁶³ Schlosberg, *Defining Environmental Justice*, above n 25, 55. In Australia: see Jayajit Chakraborty and Donna Green, 'Australia's first national level quantitative environmental justice assessment of industrial air pollution' (2014) 9(4) *Environmental Research Letters* 044010.

¹⁶⁴ Bryner, above n 22.

¹⁶⁵ Been, above n 75; Blais, above n 73.

¹⁶⁶ See, eg, the *Equal Opportunity Act 2010* (Vic) s 182.

¹⁶⁷ Cole and Foster, above n 18. See especially the discussion on the 'Civil Rights Movement'.

¹⁶⁸ See, eg, the *Equal Opportunity Act 2010* (Vic) s 6.

justice and affirmative action.¹⁶⁹ Affirmative action and distributive justice are both considered forms of corrective justice. Although corrective justice is different from distributive justice, one ordinarily follows the other and corrective justice is generally consequent on maldistribution of harms, and an expectation of a harmed community. To Bryner, claims about “retributive justice,” “compensatory justice,” “restorative justice,” and “commutative justice” [come] within the distributive aspect of environmental justice’.¹⁷⁰ What is meant and sought from environmental distributive justice is broadened. It is not just about how environmental harms are spread throughout a geographical frame, but about how institutions like the law remedy or punish harms having inequitable effects. Accordingly:¹⁷¹

Distributive justice in an environmental justice context does not mean redistributing pollution or risk. Instead, environmental justice advocates argue that it means equal protection for all and the elimination of environmental hazards and the need to place hazardous activities in any community. In other words, distributive justice is achieved through a lowering of risks, not a shifting or equalizing of existing risks.

This view aligns with the concept of just sustainabilities where distribution is measured in terms of improved wellbeing and quality of life, which would involve an adjustment to growth and consumption patterns of the most wealthy and polluting.¹⁷² Distributive justice can also be achieved procedurally through the replication and application of environmental command-and-control rules,¹⁷³ and by setting environmental priorities.¹⁷⁴ Implicitly, environmental processes ought to be driven by distributive ideals about lowering, removing, sharing and compensating for harms. Distributive injustice has also been observed arising from unequal levels of enforcement of environmental regulations across

¹⁶⁹ Bryner, above n 22.

¹⁷⁰ Kuehn, above n 136, 10693–10694.

¹⁷¹ Ibid 10684.

¹⁷² Agyeman, above n 150, 8.

¹⁷³ Schlosberg, *Defining Environmental Justice*, above n 25, 13 notes that the Rawls’s view of distributive justice is procedural and impartial, rules based rather than utilitarian.

¹⁷⁴ Mick Hillman, ‘Justice in river management: Community perceptions from the Hunter Valley, New South Wales, Australia’ (2005) 43 *Geographical Research* 152, 153.

communities.¹⁷⁵ An understanding of distributive justice being associated with legal enforcement also creates a logical link with the participatory aspect of environmental justice, with issues of the role of the community in the enforcement of the law a matter of ongoing debate.¹⁷⁶

Distribution and non-human species

Distributive justice is drawn from justice theories, especially emanating from the work of Rawls,¹⁷⁷ which is overwhelmingly anthropocentric and affords little scope for inclusion of the non-human world. Other scholars have addressed the necessary requirement of responsibility for the realisation of distributive justice, and through concepts of responsibility, distributive justice becomes less anthropocentric.¹⁷⁸ From an international justice legal perspective, for instance,¹⁷⁹ distributive justice connotes and contains an obligation not to do harm (a principle of the rejection of injury) in addition to the risk or freedom not to be unfairly burdened with harm. In this sense, there is a morality integral to distributive justice, and also a capacity to integrate an environmental ethic, which is supposed by Bryner, who sees principles of polluter pays, intergenerational equity and spatial equity, including an equality to species and not simply to humans, as being within a 'distributive justice and environmental ethics' framework for environmental justice.¹⁸⁰ He argues that distributive justice is based on a philosophy of egalitarianism,¹⁸¹ which dovetails with the view that egalitarianism is a concept that applies across species,¹⁸² and the

¹⁷⁵ Kuehn, above n 136, 10694. Schlosberg, *Defining Environmental Justice*, above n 25, 57 explains that distributive environmental justice is both personal and communal in character.

¹⁷⁶ Clifford Rechtschaffen, Eileen Gauna and Catherine O'Neill, *Environmental Justice: Law, Policy, & Regulation* (Carolina Academic Press, 2nd ed, 2009).

¹⁷⁷ Rawls, above n 4.

¹⁷⁸ See, eg, H P Visser't Hooft, *Justice to Future Generations and the Environment* (Kluwer, 1999) 3–4.

¹⁷⁹ Onora O'Neill, *Towards Justice and Virtue: A Constructive Account of Practical Reasoning* (Cambridge University Press, 1996). A critique of O'Neill's thesis is offered by Charles Jones, *Global Justice: Defending Cosmopolitanism* (Oxford University Press, 1999), 85ff.

¹⁸⁰ Bryner, above n 22, 39–40.

¹⁸¹ *Ibid.*

¹⁸² Harvey, above n 131, 180.

approach of ecotheorists that non-human parts of the environment can be implanted within 'traditional conceptions of liberal justice',¹⁸³ be treated as rights bearers,¹⁸⁴ or be conceived within a non-species specific community of justice.¹⁸⁵

Distribution, morality and responsibility to future generations

Bringing together strands of these theoretical arguments, Barry¹⁸⁶ has argued that the distributive interests of future generations impose on current generations a responsibility to limit resource depletion and environmental damage.¹⁸⁷ Sustainability is treated as a necessary pre-condition to distributive justice:¹⁸⁸ that is, there is a necessity to protect the environment, and to act with a conserving attitude towards the environment, for the attainment of distributing human wellbeing now and into the future.¹⁸⁹

Notwithstanding the complexity identified within and connections across distributive justice with other environmental concepts, Schlosberg has sought to distance environmental justice from distribution because, in part, distribution has proven to be an unsuitable framework for non-human justice.¹⁹⁰ Moreover, a focus on distribution fails to tackle the causes of the maldistribution.¹⁹¹ In some respects, this critique can be tempered if distribution is also understood as being procedural and as incorporating principles such as

¹⁸³ This is the view of Klaus Bosselmann, 'Ecological justice and law' in Benjamin J Richardson and Stepan Wood (eds), *Environmental Law for Sustainability: A Reader* (Hart Publishing, 2006) 129. Bosselmann offers multiple bases as points of compatibility between liberal justice and 'ecologism', including moral commitment for good, sustenance of humanity and avoidance of harm; Schlosberg, *Defining Environmental Justice*, above n 25, 111.

¹⁸⁴ Chris Miller, *Environmental Rights: Critical Perspectives* (Routledge, 1998).

¹⁸⁵ *Ibid* 117.

¹⁸⁶ Brian Barry, 'Circumstances of justice and future generations' in R I Sikora and Brian Barry (eds), *Obligations to Future Generations* (White Horse Press, reissued 1978 ed, 1996) 204.

¹⁸⁷ *Ibid*. See also Agyeman, above n 150, 7.

¹⁸⁸ Brian Barry, 'Sustainability and intergenerational justice' in Andrew Light and Holmes Rolston III (eds), *Environmental Ethics: An Anthology* (Wiley-Blackwell, 2002) 487, 488, 493.

¹⁸⁹ *Ibid* 497.

¹⁹⁰ Schlosberg, *Defining Environmental Justice*, above n 25, 121.

¹⁹¹ *Ibid* 14.

polluter pays and intergenerational equity. Then the causative elements of inequity can be attributable to processes, failures to cost pollution, and ignorance of the rights and needs of future communities; however, this raises another critique: that the causative elements in distributive justice are constantly the subject of objection and challenge,¹⁹² and that justice cannot be achieved without changing institutions or the distribution of power within society.¹⁹³

2.5 Participation

Participation and political justice

The second aspect of Schlosberg's concept of environmental justice is participation – the existence of 'fair and equitable institutional processes'.¹⁹⁴ He approaches the idea of participatory justice¹⁹⁵ in a similar manner to Cole and Foster, who argue that:¹⁹⁶

Communities should speak for themselves, that those who must bear the brunt of a decision should have an equal and influential role in making the decision.

Throughout the 1990s, this aspect of justice was highlighted in the literature. Participation within democratic governance systems was framed as being a right or an essential element of an environmental democracy and a necessary precursor to the realisation of distributive justice.¹⁹⁷ The more contemporary goal of this aspect of justice is not the articulation and fulfilment of a right to participate in decisions, but 'broader and more authentic public participation',¹⁹⁸ an inclusion within the political process leading to the 'elimination of

¹⁹² Kuehn, above n 136, 10685–6. See also Been, above n 75; Blais, above n 73.

¹⁹³ Bryner, above n 22, 39.

¹⁹⁴ Schlosberg, *Defining Environmental Justice*, above n 25, 25.

¹⁹⁵ Schlosberg, *Theorising Environmental Justice*, above n 155, 40.

¹⁹⁶ Cole and Foster, above n 18, 106.

¹⁹⁷ Schlosberg, *Defining Environmental Justice*, above n 25, 67–9.

¹⁹⁸ David Schlosberg, 'The justice of environmental justice: Reconciling equity, recognition, and participation in a political movement' in Andrew Light and Avne De-Shalit (eds), *Moral and Political Reasoning in Environmental Practice* (MIT Press, 2002) 77, 84.

institutionalized domination and oppression'.¹⁹⁹ These goals often see this element of justice referred to as 'procedural justice'²⁰⁰ or sometimes 'political justice'.²⁰¹

Across the environmental justice literature, participation is concerned with embracing a plurality of voices.²⁰² It is about identifying under-represented voices and inserting them within processes,²⁰³ and in doing so it is about challenging conventionally constructed decision-making or political processes and holding traditionally powerful actors accountable to community members.²⁰⁴ This requires more than giving communities a right to be involved in procedures that affect them. Kaswan writes:²⁰⁵

I've called the goal not just procedural justice but political justice, to indicate that the goal is not just about having fair procedures – not just the right to testify, for example, which could be considered a fair procedure. It's also about being heard. It's about a community having the political power to influence the decisions in which they're participating. It's about the institutions which are listening – really listening and paying attention to those concerns. I think we often get this dichotomy between distributive justice and procedural justice. I like to think of it as going even further, to a deeper-[seated], more substantive political justice.

I see this explanation of participation as 'political justice', arguably the essence of environmental justice,²⁰⁶ as a conceptual link between Schlosberg's realms of participation, recognition and capabilities.

Participation and procedure in law

Within the law, procedural justice can variously be perceived by communities as control over the representation of the problem; consistency, accuracy, fairness and impartiality in

¹⁹⁹ Ibid.

²⁰⁰ Ibid.

²⁰¹ Laurel Firestone, Alice Kaswan and Sandra Meraz, 'Environmental justice: Access to clean drinking water' (2006) 57 *Hastings Law Journal* 1367, 1369; Kaswan, above n 16.

²⁰² Bernice Bovenkerk, 'Is smog democratic? Environmental justice in the risk society' (2003) 29 *Melbourne Journal of Politics* 24.

²⁰³ Bryner, above n 22, 44.

²⁰⁴ Ibid 55.

²⁰⁵ Firestone, Kaswan, and Meraz, above n 201, 1369.

²⁰⁶ Kaswan, above n 16.

decision making; avenues for correctability and complaints; and an ethical, concerned or empathetic approach to decision-making.²⁰⁷ With respect to ethicality or empathy, a key quality of procedural justice is dignified treatment and an avoidance of burden on voluntary participants in processes – both in terms of time and cost.²⁰⁸ There are crossovers with concepts of good environmental governance; yet, environmental justice is more normative and reflexive, and less capable of a criteria-based assessment than that concept.²⁰⁹ Ideas of good governance are typically advanced by experts, approached analytically and directed to a broader social good – such as democracy;²¹⁰ whereas procedural justice or political justice, within the discourse of environmental justice, arises in a more ad-hoc argumentative way and is typically directed to a feeling of empowerment and acknowledgement within discrete controversies.

Environmental law is littered with procedure, so participatory or procedural justice is a logical legal entry point for the institutions and agents of law into environmental justice,²¹¹ and it has long been the subject of debate about its meaning, extent and support. Legal scholars, Layard and Holder, suggest that procedural justice has been central to environmental justice. They claim that ‘the procedural strand of environmental justice, focusing on public participation and access to decision-making was central to claims of environmental justice from the outset’.²¹² Others have formulated environmental justice as access to justice.²¹³ However, the legal rights to participate in environmental decision-

²⁰⁷ Tom R Tyler, ‘What is procedural justice? Criteria used by citizens to assess the fairness of legal procedures’ (1988) 22 *Law and Society Review* 103.

²⁰⁸ Robert E Lane, ‘Procedural goods in a democracy: How one is treated versus what one gets’ (1988) 2 *Social Justice Research* 177, 178.

²⁰⁹ Fred Gale, ‘Tasmania’s Tamar Valley pump mill: A comparison of planning processes using a good governance framework’ (2008) 67 *Australian Journal of Public Administration* 261.

²¹⁰ Karen Bäckstrand et al, ‘The promise of new modes of environmental governance in Karen Bäckstrand et al (eds), *Environmental Politics and Deliberative Democracy* (Edward Elgar, 2010) 3.

²¹¹ Luke W Cole, ‘Environmental justice litigation: Another stone in David’s sling’ (1994) 21 *Fordham Urban Law Journal* 523, 527.

²¹² Antonia Layard and Jane Holder, ‘Seeking spatial and environmental justice for people and places within the European Union’ in Andreas Philippopoulos-Mihalopoulos (ed), *Law and Ecology: New Environmental Foundations* (Routledge, 2011) 171, 179.

²¹³ *Ibid* 179. Lord Henry Woolf, *The Pursuit of Justice* (ed Christopher Campbell-Holt) (Oxford University Press,

making or access the courts do not reflect the notion of political justice described by Kaswan. Nor do they realise the participatory goals of environmental justice or procedural elements, as explained above, or achieve the standards demanded by theorists and political scientists about environmental participation, as explored below. Participation in environmental law, especially coloured by the *Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*,²¹⁴ is understood to refer to a right to be informed and heard on environmental matters and also a right to affect decision-making.²¹⁵ In practice, although courts recognise the value of public participation in achieving accountability in administrative law,²¹⁶ the law does not embrace processes designed to break down the dominance of privileged groups,²¹⁷ including in moments when 'less articulate communities' encounter legal processes.²¹⁸

Even in Europe, despite its goal of redressing the 'green democratic deficit',²¹⁹ the *Aarhus Convention* has not yet shaken the conservative and orthodox view on matters of administrative law; nor has the vesting of 'rights' in the community made debates and decisions of importance to environmental groups more open and participatory.²²⁰

Access to environmental justice, framed within conceptions of human rights and democracy, must also include broadening the community of justice to those people

2008) 392. See also Felicity Millner, 'Access to environmental justice' (2011) 16 *Deakin Law Review* 189.

²¹⁴ United Nations Economic Commission for Europe, *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (opened for signature: 25 June 1998; entered into force: 30 October 2001) ('*Aarhus Convention*'); Michael I Jeffrey, 'Environmental governance: A comparative analysis of public participation and access to justice' (2005) 9 *Journal of South Pacific Law* 1 makes the point that the *Aarhus Convention* has been a landmark for explaining good environmental governance beyond Europe.

²¹⁵ Stephen Davies, 'In name or nature? Implementing international environmental procedural rights in the post-Aarhus environment: A Finnish example' (2007) 9 *Environmental Law Review* 190, 192.

²¹⁶ Cole, above n 211, 529.

²¹⁷ Alice Kaswan, 'Distributive justice and the environment' (2003) 81 *North Carolina Law Review* 1031, 1133.

²¹⁸ Stephen Connolly and Tim Richardson, 'Value-driven SEA: Time for an environmental justice perspective?' (2005) 25 *Environmental Impact Assessment Review* 391, 404.

²¹⁹ Maria Lee, *EU Environmental Law: Challenges, Change and Decision-Making* (Hart Publishing, 2005) 121.

²²⁰ *Ibid.*

otherwise absent from the law.²²¹ Without such a change, the dominant influence of the middle classes within public interest environmental litigation becomes a middle class preserve persist, with participation within the law socially stratified, and consequently less diversity of voices influencing environmental jurisprudence.²²²

So it can be seen that legal rights of participation do not transform environmental processes, authorities or power.²²³ Legal procedures and doctrines do not affirm the under-represented and do little to enhance democratic participation.²²⁴ It is the limitations within the law in this respect that have triggered scholarly interest in new framework concepts such as earth jurisprudence and earth tribunals,²²⁵ and an exploration of recognition as an alternative justice concept for environmental law.²²⁶

Participation and planning law processes

The notion of participation as a right in the specialised field of planning law is similarly critiqued. Within planning law and policy processes, agencies typically fail to 'recognise the legitimacy and value of the cultures of the "publics" they hope to engage', rendering the participatory process alienating and antagonistic, especially to those with an unfamiliarity with those processes.²²⁷ The participation achieves no meaningful purpose or difference.²²⁸

²²¹ Leïla Choukroune and Michael Faure, 'Environmental democracy and access to justice: A comparative law and society approach' in Michael Faure and Niels Philipsen (eds), *Access to Justice in Environmental Matters* (Eleven International Publishing, 2014) 75.

²²² Ibid 80.

²²³ London, Sze and Liévanos, above n 56, 258.

²²⁴ Bryner, above n 22, 44–5.

²²⁵ Peter Burdon, *Earth Jurisprudence: Private Property and the Environment* (Glasshouse, 2014); Michelle Maloney, 'Finally being heard: The Great Barrier Reef and the International Rights of Nature Tribunal' (2015) 3 *Griffith Journal of Law and Human Dignity* 40.

²²⁶ Brad Jessup, 'Justice, recognition and environmental law: The Wielangta Forest conflict, Tasmania, Australia' (2015) 34 *University of Tasmania Law Review* 5. Schlosberg, *Defining Environmental Justice*, above n 25, 26–7.

²²⁷ London, Sze and Liévanos, above n 56, 288.

²²⁸ Fraser M Shilling, Jonathan K London and Raoul S Liévanos, 'Marginalization by collaboration: Environmental justice as a third party in and beyond CALFED' (2009) 12 *Environmental Science & Policy* 694, 699–702 note that participatory processes can lead to marginalisation, especially where issues are sidelined or stuck in committees away from the central decision-making sphere and contained within a bureaucratic and

These rights do not lead to changed paradigms;²²⁹ rather, they reproduce existing power structures oftentimes for the individual, and against the collective, good.²³⁰ Hence the need for participatory planning process to change so as to incorporate those likely to bear the greatest environmental risk of decision-making as a starting point.²³¹ Within planning law, participatory justice is, moreover, determined by who sets the dominant dialogues, and how wide the capacity to influence is shared.²³² It is accepted that most people engage in decision-making processes for a communal reason – speaking for those without voice or agency, to improve government process, to uphold the interest of the wider public (indeed to demonstrate that there is not just one public of interest²³³) – and hence participatory justice ought to be seen as a communal interest, even though typically in planning law it is individualised or aggregated.²³⁴

Participation critiques

Deliberative, environmental and place-based democracy theorists²³⁵ have also explored the appropriate effective or authentic²³⁶ nature of deliberative participation, generally unbounded by legal doctrine. Consequently, scholars are increasingly connecting theories with legal norms to set participation ideals. Concepts of self-determination²³⁷ and human

sanitised, ghettoised, powerless process.

²²⁹ Eileen Gauna, 'The environmental justice misfit: Public participation and the paradigm paradox' (1998) 17 *Stanford Environmental Law Journal* 3.

²³⁰ Geraint Ellis, 'Discourses of objection: Towards an understanding of third-party rights in planning' (2004) 36 *Environment and Planning A* 1549, 1549.

²³¹ Gauna, above n 229.

²³² Ellis, above n 230, 1552.

²³³ *Ibid* 1565.

²³⁴ See, eg, *Planning and Environment Act 1987* (Vic), ss 21A and 51(3).

²³⁵ See, eg, Michael Mason, *Environmental Democracy* (Earthscan, 1999); David Harvey, *Social Justice and the City* (University of Georgia Press, revised ed, 2009); David Harvey, 'The right to the city' (2008) 53 *New Left Review* 23 ('*Right to the City*'); John S Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* (Oxford University Press, 2000).

²³⁶ Dryzek, above n 232, 1–2.

²³⁷ Matt Watson and Harriet Bulkeley, 'Just waste? Municipal waste management and the politics of environmental justice' (2005) 10 *Local Environment: The International Journal of Justice and Sustainability* 411,

rights, collective decision-making and international principles, especially the participation principle of the *Rio Declaration*,²³⁸ support a view that an environmental democracy required deliberation, not simply participation.²³⁹

These legal norms lead the inquiry to question reflections of fairness of communities.²⁴⁰ Shrader-Frechette uses the legal principle of free, prior and informed consent as a benchmark for adequacy for participatory justice.²⁴¹ Similarly, Tyler has asked whether participants in legal processes experience fairness or feel empowered by the process or whether they can see how their involvement has contributed to the outcome reached.²⁴² Others go further, arguing that participatory justice entails community-led regulation and agency given to communities to make or trigger government intervention in environmental policy and enforcement decisions. This is a way to disrupt entrenched power relationships in environmental law in the manner that Harvey argues for a reorganising of capital and control in the city,²⁴³ and in a way that situates the lived environment within its governance.²⁴⁴ Devolved, collective and collaborative decision-making is recommended²⁴⁵ as a means of achieving more engaged, less adversarial and less technocratic decisions

414.

²³⁸ *Rio Declaration on Environment and Development*, (14 June 1992), Principle 10.

²³⁹ Mason, above n 235.

²⁴⁰ Gross, above n 26.

²⁴¹ Shrader-Frechette, above n 46, 56, 73–77. Chukwumerije Okereke, *Global Justice and Neoliberal Environmental Governance: Ethics, Sustainable Development and International Co-operation* (Routledge, 2008) 90, 97 notes that notions of participation, such as 'prior informed consent' under the Basel Convention, often facilitate injustices on local communities – a form of 'garbage imperialism' created by rational economic behaviours by the world's poorest nations.

²⁴² Tom R Tyler 'Justice and power in civil dispute processing' in Bryant G Garth and Austin Sarat (eds), *Justice and Power in Sociolegal Studies* (Northwestern University Press, 1998) 309, 312–3.

²⁴³ Harvey, *Right to the City*, above n 235.

²⁴⁴ Jeff Romm, 'The coincidental order of environmental injustice' in Kathryn M Mutz, Gary C Bryner and Douglas S Kenney (eds), *Justice and Natural Resources: Concepts, Strategies and Applications* (Island Press, 2002) 117, 127.

²⁴⁵ Sheila Foster, 'Environmental justice in an era of devolved collaboration' in Kathryn M Mutz, Gary C Bryner and Douglas S Kenney (eds), *Justice and Natural Resources: Concepts, Strategies and Applications* (Island Press, 2002) 139; James Radcliffe, *Green Politics: Dictatorship or Democracy?* (Palgrave Macmillan, revised ed, 2002).

based on wider expertise and subject to less industrial influence.²⁴⁶ Likewise, an international environmental democracy with a focus on deliberation²⁴⁷ and highlighting the use of localised knowledge is another way to advance those currently unheard within international governance.²⁴⁸

Over and above legal notions, a legitimate environmental democracy requires participation early in a process and to be equally funded, especially in strategic planning stages of policies and programs.²⁴⁹ It must also prioritise through the participatory process 'long-term generalisable interests', including those of future generations and the protection of the environment.²⁵⁰ Democratic legitimacy depends on public authorities representing and considering, not passively listening to, community interests and concerns;²⁵¹ adopting transparent and honest justification for decisions;²⁵² and embracing a contestation of discourses.²⁵³

The prevailing approach to participation within environmental law – constituted by an ability to contribute opinions, to access decision-makers and a right to receive automated and desultory reasons for decisions – does not meet the objectives of an environmental democracy. It undermines it. The need for political, often simplified, techno-economic, decisions within a complex context leads to the disenfranchisement of citizens, discounting

²⁴⁶ Scholars have argued that community involvement should extend to the performance of science for decisions and the determination of adequate standards and acceptable limits of environmental harm arising from decisions that bring with them the potential or reality of environmental damage. See, eg, Bovenkerk, above n 202; Alan Ramo, 'California's energy crisis: The perils of crisis management and a challenge to environmental justice' (2002) 7 *Albany Environmental Law Outlook Journal* 1, 18.

²⁴⁷ Walter F Baber and Robert V Bartlett, *Global Democracy and Sustainable Jurisprudence: Deliberative Environmental Law* (MIT Press, 2009). They advance the concept of citizen juries within an international juristic democracy: see especially chs 6 and 7.

²⁴⁸ *Ibid* 126.

²⁴⁹ Mason, above n 235, 78.

²⁵⁰ *Ibid* 51.

²⁵¹ *Ibid* 12.

²⁵² John Dryzek and Simon Niemeyer, *Foundations and Frontiers of Deliberative Governance* (Oxford University Press, 2010) 15, 21.

²⁵³ John S Dryzek, 'Legitimacy and economy in deliberative democracy' (2001) 29 *Political Theory* 651, 657.

their interests and ideologies, and a failure to engage with an environmental value system to guide decisions about the environment.²⁵⁴ Environmental issues are essentially issues of value, hence participatory processes must be designed in a way to ensure a plurality of values are presented to and taken into account by decision-makers.²⁵⁵ Devolved decision-making ensures a plurality of values, including non-human ones, are present and become the subject of deliberation in the decision-making process.²⁵⁶

Goodin has argued that 'natural processes'²⁵⁷ have value, so should feature in decision-making deliberations.²⁵⁸ Dryzek approaches the issue of human and non-human participation slightly differently. He argues that there must be a transcendent and integrated political and ecological²⁵⁹ communication across the 'boundary of the human and non-human worlds';²⁶⁰ that 'human dealings with the natural world'²⁶¹ should be 'egalitarian' and decisions about these dealings determined less by human superiority. The ecological communication he refers to includes 'signals emanating from the natural world':²⁶² feedback loops, ecological cycles, ecological signals of distress, harm and disruption.²⁶³ These are the kinds of communications that require human recognition of non-human value as a starting point.

²⁵⁴ Mason, above n 235, 20 and 21.

²⁵⁵ Graham Smith, *Deliberative Democracy and the Environment* (Routledge, 2003) 1.

²⁵⁶ Foster, above n 245, 150.

²⁵⁷ Robert E Goodin, *Green Political Theory* (Polity, 1992) 81.

²⁵⁸ *Ibid* 28.

²⁵⁹ Dryzek, above n 235, 146.

²⁶⁰ *Ibid* 6.

²⁶¹ *Ibid* 146.

²⁶² *Ibid* 149.

²⁶³ *Ibid* 154.

2.6 Recognition

Making participation meaningful

The third aspect of Schlosberg's concept of environmental justice is recognition, which can be understood as the linkage between distributional outcomes, participatory inclusion and capacity building.²⁶⁴ According to Schlosberg, a lack of recognition is a key reason and process determining environmental maldistribution,²⁶⁵ and it is his preferred frame to explain community perceptions of environmental injustice.²⁶⁶ Others have explained recognition as a precondition to distributional justice.²⁶⁷ It also animates, and occurs alongside, meaningful participation. Generally understood – and explored more fully below – recognition is respecting, acknowledging and preserving diverse cultures, identities, ways of knowing, being and practices.²⁶⁸ When it is observed and experienced, recognition is a relationship between decision-makers and communities brought about through participatory moments that socially, culturally and symbolically prioritise community autonomy, resilience and deference.²⁶⁹ In open and accessible environmental procedures, communities seek recognition in and from their involvement with environmental decision-making: for example, within the debates about action on climate change, and within the discourses swirling around climate justice, recognition of the plight of vulnerable people and indigenous group interests is the central and primary goal.²⁷⁰

²⁶⁴ Eckersley, above n 149.

²⁶⁵ Schlosberg, *Reconceiving Environmental Justice*, above n 42, 520.

²⁶⁶ David Schlosberg and David Carruthers, 'Indigenous struggles, environmental justice, and community capabilities' (2010) 10 *Global Environmental Politics* 12, 20. In the context of development on indigenous lands, the objections were not about distribution, but denial.

²⁶⁷ London, Sze and Liévanos, above n 56, 258.

²⁶⁸ *Ibid* 524, 526.

²⁶⁹ On resilience, Gina Ziervogel et al, 'Inserting rights and justice into urban resilience: A focus on everyday risk' (2017) 29 *Environment and Urbanization* 123, 128 make the point that resilience and recognition justice approaches to governance empower vulnerable communities as justice claims support entitlements and rights that augment community resilience.

²⁷⁰ Bertie Russell, Andre Pusey and Leon Sealey-Huggins, 'Movements and moments for climate justice from Copenhagen to Cancun via Cochabamba' (2012) 11 *ACME: An International E-Journal for Critical Geographies* 15.

As explained above, participation, as the central tenet of environmental justice, is insufficient in current political structures because public participation processes typically 'leave in place the underlying social relationships of its participants'²⁷¹ – they do not change the power distribution, they do not compel decision-makers to treat equally the viewpoints of the various interested parties in an environmental conflict. Too often in environmental decisions communities encounter a 'wall of indifference, disinformation and lack of respect'²⁷² from proponents and government agencies. Such processes entrench political and distributive inequality,²⁷³ leading to the view that environmental processes resemble a mainstream, 'white' and privileged way of community interaction, with other ways of knowing and doing disregarded.²⁷⁴ Governments often engage in a different process – of managing, defusing and co-opting the community.²⁷⁵ Recognition seeks to overcome the bases of these critiques.

From participation to recognition and capacity

There needs to be a different conceptualisation of participation in law – one that is concerned less with access and more with recognition of communities. In Australian law, Justice Sackville offers the view that justice depends on human dignity (a recognition ideal) and political equality (a participation ideal).²⁷⁶ Communities of opposition want to be listened to, to be empowered, and for their contributions to be valued. They do not want to be dismissed as ignorant or misunderstood,²⁷⁷ as often happens when they are afforded little more than a chance to make an oral submission about a proposal or write a letter of

²⁷¹ Cole and Foster, above n 18, 104.

²⁷² Ibid 105.

²⁷³ Shrader-Frechette, above n 46, 27.

²⁷⁴ Hilary Gibson-Wood and Sarah Wakefield, "'Participation", white privilege and environmental justice: Understanding environmentalism among Hispanics in Toronto' (2013) 45 *Antipode* 641, 652, 654 and 656.

²⁷⁵ Cole and Foster, above n 18, 111.

²⁷⁶ Justice Ronald Sackville, 'Some thoughts on access to justice' (Speech delivered at First Annual Conference on the Primary Functions of Government Courts, Victoria University of Wellington, 28 and 29 November 2003).

²⁷⁷ London, Sze and Liévanos, above n 56, 276.

objection to a government body or panel of experts in a legal hearing. Participation and recognition will typically go hand in hand, with recognition being realised within participatory decision-making that engages with community values in both process and outcomes and a shifting away from technocratic-led processes and outcomes.²⁷⁸ Yet Preston²⁷⁹ sees the law sometimes misrecognising or malrecognising (recognition of a malignant kind), expressed procedurally through vindictive strategic law suits designed to stifle and frighten public participation.²⁸⁰ Legal doctrine also continues to grapple with how to recognise interests²⁸¹ – especially in contemporary climate change cases where participants are required to creatively situate themselves within doctrine developed decades previously and unsettled international law.²⁸²

Making sense of recognition

Fraser sees recognition as the new 'paradigmatic form of political struggle', a reaction to cultural domination and power.²⁸³ This is because of the invisibility, stereotyping and disrespect that vulnerable communities experience. Where they lack representation and agents of communication they are not recognised. Hillman illustrates the dispossession, alienation and exclusion of indigenous Australians from place and decision-making functions leading to their interests being unrecognised in law and policy.²⁸⁴ In his Hunter Valley case study he records that in the 1950s decision-making and power was consolidated in a group that 'was exclusively white, male and dominated by riparian landholders and

²⁷⁸ Hillman, above n 174.

²⁷⁹ Hon Justice Brian Preston, 'The effectiveness of the law in providing access to environmental justice: An introduction' in Paul Martin et al (eds), *The Search for Environmental Justice* (Edward Elgar, 2015) 23.

²⁸⁰ *Ibid* 40.

²⁸¹ Hon Justice Brian J Preston, 'The environment and its influence on the law' (2008) 82 *Australian Law Journal* 180, 180, 185.

²⁸² *Urgenda Foundation v Kingdom of the Netherlands* [2015] Case C/09/456689/HA ZA 13-1396.

²⁸³ Nancy Fraser, 'From redistribution to recognition? Dilemmas of justice in a "post-socialist" age' (1995) 212 *New Left Review* 68.

²⁸⁴ Hillman, above n 100, illustrates this point in his analysis of historical river management in the Hunter Valley.

state government agencies – in particular water resources engineers'.²⁸⁵ The privilege afforded to this group in decision-making 'has in turn been naturalised to become the common sense view of who has a stake'.²⁸⁶

With a comparable context in mind, Fraser defines recognition as:

upwardly revaluing disrespected identities and the cultural products of maligned groups. It could also involve recognising and positively valorising cultural diversity ... of calling attention to, if not performatively creating, the putative specificity of some group, and then of affirming the value of that specificity.²⁸⁷

Recognition is removing oppression or displacing dominant perspectives and politics, validating identity and interests, acknowledging and prioritising experiences and subjective knowledge, offering dignity and respect, appreciating and providing for community, and cultural wellbeing and survival.²⁸⁸

Achieving recognition

Institutions – especially the law – have a role to achieve recognition through the acknowledgement of group difference, particularly among those groups in society historically oppressed or dominated.²⁸⁹ The law can, for instance through norms or rules, offer an 'equal voice or "place at the table" to those whose understanding or experiences of "the environment" or "environmentalism" is outside of dominant understandings or experiences'.²⁹⁰ To strive to recognise will therefore mean the law confronting and displacing historical and geographical disadvantage – to prioritise society's interests over institutional uniformity. In Holifield's work, it is apparent that a focus on recognition in environmental justice is particularly advantageous to historically colonised indigenous groups, whose claims of territory, sovereignty, knowledge and legality have routinely been

²⁸⁵ Hillman, above n 100, 698.

²⁸⁶ Ibid 704.

²⁸⁷ Fraser, above n 283, 73–74.

²⁸⁸ Schlosberg, *Defining Environmental Justice*, above n 25, 59–64, 87.

²⁸⁹ Iris Marion Young, *Justice and the Politics of Difference* (Princeton University Press, 1990).

²⁹⁰ Ibid.

denied.²⁹¹

A recognition approach to justice incorporates multiple levels of recognition – from the individual to the community or even nation-state – reinforcing the view that justice is multivalent.²⁹² This is a departure from the historical individual and contractual model of justice advanced by early modern scholars, and it assists in arguing that justice is not simply about defending one's own human wellbeing, but imposes duties on humans to protect, be compassionate to, and to do no harm to, groups of other humans and non-humans.²⁹³ It shares conceptual foundations with other justice ideals that have heritage in the law, including human rights, citizenship, administrative law and criminal justice. Recognition is certainly more capable of 'bringing in' to the law, considering and prioritising newer or different perspectives, including indigenous²⁹⁴ and ecological ones.²⁹⁵ Because recognition is about listening to and valuing alternative perspectives it also allows for new justice concepts – such as food justice and spatial justice – to be acknowledged as subject matters of interest and important to communities of justice.

Recognition, insofar as it acknowledges community practice, knowledge and beliefs, aids the functioning of a community.²⁹⁶ An 'overall well functioning of society'²⁹⁷ is essential to the realisation of justice²⁹⁸ and links recognition to capabilities – or, as I refer to it in an

²⁹¹ Ibid.

²⁹² Fraser, above n 283.

²⁹³ Midley, above n 10. Explained another way, Hayward has argued that it is in human self-interest to protect environmental values and human recognition will not be complete unless humans assert their interest in, and need for recognition of, non-human parts of the environment: see Tim Hayward, *Political Theory and Ecological Values* (St Martin's Press, 1998) 113ff.

²⁹⁴ Ryan Holifield, 'Environmental justice as recognition and participation in risk assessment: Negotiating and translating health risk at a superfund site in Indian country' (2012) 102 *Annals of the Association of American Geographers* 591; Laura Westra, *Environmental Justice and the Rights of Indigenous Peoples* (Earthscan, 2008).

²⁹⁵ Sze and London, above n 99.

²⁹⁶ Schlosberg and Carruthers, above n 266, 20.

²⁹⁷ Gross, above n 26, 138.

²⁹⁸ Catherine Gross, 'Community perspectives of wind energy in Australia: The application of a justice and community fairness framework to increase social acceptance' (2007) 35 *Energy Policy* 2727, 2729.

environmental law context, capacity – Schlosberg's fourth aspect of environmental justice. Gross notes that recognition in a planning process enhances a community's perceptions of its health, and its ability to react, respond and adapt to change.²⁹⁹ The linkages between recognition and the other elements of environmental justice reinforce its pertinence. This is why it is an especially useful concept for exploring and expanding the boundaries of environmental justice.

Recognition and non-humans

The breadth of recognition can also incorporate ecocentric values within a broad concept of environmental justice. As well as ensuring that all human interests are recognised within decision-making and environmental distributions rather than being dominated or oppressed by institutions like the law, this aspect of environmental justice can recognise non-human aspects of nature as having interests, of offering value to the overall functioning of the ecosphere,³⁰⁰ and of requiring preservation actions to maintain ecological integrity.³⁰¹ This is a theme explored by Westra, who dedicates a book to the principle of integrity,³⁰² particularly how a human morality of care and trust for community can extend to affording non-humans integrity. An integral community is one that is resistant, that can withstand outside pressures and stresses, and be capable of regeneration and ongoing change and development unconstrained by human interruption.³⁰³

Recognition is concerned with respect for humans and non-humans, an end of

²⁹⁹ Ibid 2728.

³⁰⁰ Val Plumwood, 'Nature as agency and the prospects for a progressive naturalism' (2001) 12 *Capitalism, Nature, Socialism* 3, 7.

³⁰¹ In Australia, the objective of using environmental law to secure ecological integrity of the ecosystem can be at least traced to Commonwealth of Australia, *Intergovernmental Agreement on the Environment* (1992), cl 3.5.3. Bosselmann charts the use of the concept 'ecological integrity' at international law to at least 1978: see Klaus Bosselmann, 'The rule of law in the Anthropocene' in Paul Martin et al (eds), *The Search for Environmental Justice* (Edward Elgar, 2015) 44, 55.

³⁰² Laura Westra, *An Environmental Proposal for Ethics: The Principle of Integrity* (Rowman & Littlefield, 1994). For an international law context: see also Peter Miller and Laura Westra, 'The Earth Charter' in Peter Miller and Laura Westra (eds), *Just Ecological Integrity: The Ethics of Maintaining Planetary Life* (Rowan and Littlefield, 2002) 1.

³⁰³ Westra, above n 302, 24–5.

marginalisation, stereotyping, denigration and invisibility, and has obvious connections with standing doctrines in law. It was these common law doctrines that Stone challenged in his seminal work³⁰⁴ in the 1970s. At common law, however, the rules remain deeply instrumental and anthropocentric – with individuals, corporations or groups having to show a proprietary or personal and specific interest, as distinct from an intellectual or emotional interest, before the court will entertain their application.³⁰⁵ If recognition is to have a counterpart, it would be obligation. The idea of environmental obligations is explored in the environmental citizenship literature. To be an environmental citizen vests recognition but also reciprocally requires the fulfilment of obligations. Those obligations are increasingly being defined as obligations to species and to ecosystems.³⁰⁶

2.7 Capabilities and capacity

Justice as capacity building

The fourth aspect of Schlosberg's concept of environmental justice is capabilities,³⁰⁷ which shares close similarities with Cole and Foster's exploration of 'transformations' and expands the temporality of recognition.³⁰⁸ This means that environmental justice should build capabilities in individuals and groups for their futures, enabling 'individuals and groups to function as they desire'.³⁰⁹ Within environmental policy and management literature, the concept is often understood as 'capacity' or 'capacity building': the building of skills to

³⁰⁴ Christopher D Stone, 'Should trees have standing? Toward legal rights for natural objects' (1972) 45 *Southern California Law Review* 450.

³⁰⁵ Matthew Groves and H P Lee, *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007). See also *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493.

³⁰⁶ Mark J Smith and Piya Pangsapa, *Environment and Citizenship: Integrating Justice, Responsibility and Civic Engagement* (Zed Books, 2008), 27, 80–81. Smith, above n 95, 348 extends these ideas to 'ecological citizenship'.

³⁰⁷ Schlosberg, *Defining Environmental Justice*, above n 25.

³⁰⁸ Cole and Foster, above n 18, ch 7.

³⁰⁹ Amanda Kennedy, *Environmental Justice and Land Use Conflict: The Governance of Mineral and Gas Resource Development* (Earthscan, 2017) 30.

participate in environmentally just outcomes.³¹⁰

The idea of capabilities is that there should be some lasting effect of community or individual recognition in environmental decision-making. Capabilities would generally be a by-product of just treatment, participation and outcomes. It is about being capable of responding to a subsequent controversy with assurance, of being more resilient in the face of harms or hazards.³¹¹

In the legal field, the aspect is particularly relevant at the institutional and advocate level, in terms of capacity or rights to revisit decisions and to be adequately funded and supported with advocacy expertise to do so. Participation is often the mechanism through which capabilities are built or capacity strengthened. Capabilities are the things that humans need to function and flourish politically, emotionally, physically, socially, economically, legally and spiritually. They are about putting rights and opportunities to use.³¹² In environmental law, they would include gaining respect from decision-makers; having an ability to present alternative perspectives to decision-makers in many unrestricted, environments; being protected from environmental degradation; accessing, learning and using advocacy and activism skills; and community and affiliation building. It is a means of avoiding repeated ignorance or denial of existence or interests.

For future generations, capability could mean bestowing them with a right of 'no greater risk of harm'³¹³ and an obligation on present generations 'to do whatever is necessary to provide future generations with the same level of opportunity as they would have if we had not displaced some resources or polluted their environment'.³¹⁴

Schlosberg and Carruthers emphasise the relevance of this aspect of environmental justice

³¹⁰ Mariann E Lloyd-Smith and Lee Bell, 'Toxic disputes and the rise of environmental justice in Australia' (2003) 9 *International Journal of Occupational and Environmental Health* 14, 22.

³¹¹ Lena Dominelli, *Green Social Work: From Environmental Crises to Environmental Justice* (Polity Press, 2012).

³¹² Cole and Foster, above n 18.

³¹³ Shrader-Frechette, above n 46, 104.

³¹⁴ *Ibid* 103.

for indigenous people engaged in ongoing struggles for land and cultural recognition.³¹⁵ Capabilities, in this context, include the conditions necessary for a fully functioning life and a freedom to exercise choice over lives. The connection with rights of self-determination are self-evident. The agents of capabilities are individuals and groups engaged in environmental decisions, not the corporate or government entity or the community at large.³¹⁶ In this sense, there is a link with other aspects of justice – the focus of distribution being historically disadvantaged sections of society, the focus of participation being those involved in community struggle, the focus of recognition those historically silenced or out of view in decision-making processes.

Capacity, capabilities and communities in the law

Capacity is 'achieving confidence', gaining expertise and building skills – all transformative consequences of meaningful or determined involvement with environmental law processes. Another capacity or capability is a refined understanding of environmental law. Views of agency and power can be refined through environmental justice struggles either directed by the process or despite it: 'the individual realizes that the obstacles she is facing are not the result of her own behavior or situation but the result of a system or structure of society'.³¹⁷ Relatedly, an involvement within environmental justice conflicts can build a 'civic engagement' about the environment that was previously absent.³¹⁸ This is seen by members of the environmental justice movement having the experience of being transformed from activists to stakeholders – being 'empowered'.³¹⁹ In so doing, they have begun demanding not simply protection from harm, but access to resources and broader health outcomes for their communities, typically within more mainstream bureaucratic processes.³²⁰

³¹⁵ Schlosberg and Carruthers, above n 266, 24.

³¹⁶ Ibid.

³¹⁷ Cole and Foster, above n 18, 155.

³¹⁸ Smith and Pangsapa, above n 306, 240.

³¹⁹ Ibid.

³²⁰ Ibid 241–243.

In her research on the extractive permitting of extractive industry in Australia, Kennedy concluded about the law that individuals and groups lacked capacities, disabling them from effectively participating in legal processes. Kennedy explains:³²¹

the capabilities of individuals and groups to participate effectively in land-use decision making was often constrained because of the restriction or removal of certain factors for consideration from decision making processes. In particular, the privileging of expert scientific evidence and the limited opportunities to raise place-based concerns diminished the capacity of citizens to contest industry and government hegemony.

Despite the possibility and opportunity for organically acquired capabilities by virtue of activism in environmental struggles, the potential of capabilities or the building of capacity would only be realised through or by law with a shift in environmental power; an embrace of more deliberative forms of decision-making; an acceptance of non-human environmental values in the policy framework; a reassessment of meanings of fairness, impartiality and equity to include ecosystem values; and a commitment to maintain ecosystem integrity. The principle would act to counter the techno-economic approach to development within existing liberal democratic structures.³²²

Capacity and non-human species

Like recognition, capabilities and capacity can also attach to the ecosystem. At the ecosystem level, capacity is ecological health and system and process integrity. On this aspect, Schlosberg advances the theoretical contribution of Nussbaum,³²³ who uses a capabilities approach to justify justice for non-humans. She argues that 'core human entitlements' – that is, the 'bare minimum of what respect for human dignity requires' – should be respected by all governments.³²⁴ Although 'doing justice to the claims of non-human animals requires further development of the approach',³²⁵ all species warrant dignity

³²¹ Kennedy, above n 309, 177.

³²² Schlosberg, *Defining Environmental Justice*, above n 25.

³²³ Martha Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Belknap Press, 2006). Nussbaum explains that the theory has parallels with Sen's economic, and anthropocentric, theory of capabilities: see Amartya Sen, *Development as Freedom* (Oxford University Press, 1999).

³²⁴ Nussbaum, above n 323, 70.

³²⁵ *Ibid* 93. Nussbaum offers tentative views about species capabilities at p 357.

and a capacity to flourish,³²⁶ and that because 'species are becoming extinct, typically, because human beings are killing their members and damaging their natural environment',³²⁷ they should be afforded attention to ensure the species' continued existence and flourishing.³²⁸ Schlosberg notes that '[if] the capabilities approach is about flourishing, and most animals flourish in particular environments, flourishing in this respect means contributing to the set of relationships that make up, and support, the system as a whole'³²⁹ – our focus being on addressing any factors that inhibit relational and contextual systemic flourishing.³³⁰

A slightly different approach linking non-human species capabilities with distributive justice ideas is to draw attention to the needs of non-human species across ecosystem geographies to achieve their fully functioning existence.³³¹ This is a contribution that demonstrates the intersectionality of environmental justice concepts, but also a blending of concepts of environmental justice and ecological justice.

2.8 Environmental justice linkages. Recognition and capacity. Space and scale.

Linkages, not universalities

Throughout this chapter, I have attempted to offer an idea of environmental justice not limited by a confined view of its history, framed by one school of philosophical thought nor developed exclusively by the environmental justice movement predominately resident in the US. The concept explored is a broad one. It both addresses limits with sustainability and co-opts principles integrated within that concept – such as intergenerational equity and polluter pays. It is primarily an argumentative tool that seeks to add to concepts embedded

³²⁶ Ibid 346.

³²⁷ Ibid 357.

³²⁸ Ibid 358, 380. Brian Baxter, *A Theory of Ecological Justice* (Routledge, 2005) 8 argues more forcefully that 'other species have rights ... to survive, flourish and perpetuate'.

³²⁹ Schlosberg, *Defining Environmental Justice*, above n 25, 148.

³³⁰ Ibid 149.

³³¹ Preston, above n 279, 31.

in environmental law and policy – such as conservation, duty of care and precaution – and it helps orient more emergent environmental concepts such as resilience and the environmental rule of law.³³² I have noted the blurred edges and intersections between human environmental justice and environmental justice for non-humans, the geographic critique of the concept; and demonstrated, through the four aspects of environmental justice articulated by Schlosberg,³³³ common theoretical underpinnings for justice claims for humans and non-humans.

My goal has not been to merge concepts or seek to claim comparability in justice needs for humans and non-humans. Rather, it has been to clarify a coherent underpinning for 'justice' for the 'environment' without closing down space for environmental claims to be made within a discourse of environmental justice. By exposing the plural histories, contemporary trends and legal and geographic criticisms in the concept, a vibrancy in environmental justice appears and, consequently, an increased scholarly interest and political and legal relevance to it, albeit if that means a departure from a tightly construed, North American framework for the concept.

According to Schlosberg, adding recognition and capabilities³³⁴ to the more commonly understood strands of environmental justice – participation and distribution – extends our understandings, communities and geographies of justice.³³⁵ Indeed, two meaningful and significant effects of Schlosberg's scholarship and his conceptual understanding of justice is the bridging of the individual and the communal, and the human and ecological, within justice. Low and Gleeson³³⁶ describe ecological justice and environmental justice as 'interlocking' justice concepts that are especially connected through human responsibility and equity, rights and needs. Likewise, the concept of impartiality can apply across the

³³² IUCN *World Declaration on the Environmental Rule of Law* (2016).

³³³ Schlosberg, *Defining Environmental Justice*, above n 25, 129ff.

³³⁴ *Ibid.*

³³⁵ Schlosberg, *Defining Environmental Justice*, above n 25, 138.

³³⁶ Nicholas Low and Brendan Gleeson, *One Earth: Social and Environmental Justice* (Australian Conservation Foundation, 1999) 2.

various communities of environmental justice.³³⁷

Despite views that distributive justice and environmental sustainability are incompatible,³³⁸ I have recorded intersections and linkages between human environmental justice and ecological justice across each of the distributive, participatory, recognition and capacity aspects. It is worth reiterating that when the starting point for attempting to understand environmental justice is the communities that have made claims about unfairness or felt their views of opposition have been futile, environmental justice cannot be conceived in a narrow or limited way – especially when communities do not always seek or demand distributive equity and take for granted a right to access the law.³³⁹

One final task, before turning to apply these ideas of justice, is to solidify the link between the conventionally understood discrete concepts of ecological justice and environmental justice.³⁴⁰ Those linkages are most evident by exploring the ideas of community health (a form of capability) and place, and recognition.

Communities and place

Community structures are shared across species. Each has needs to survive, cope, recover and flourish. This is the crux of the notion of integrity advanced by Westra,³⁴¹ intrinsic to Baxter's ecological justice and the notion of impartiality,³⁴² and essential to the concept of capability advanced by Nussbaum³⁴³ and developed by Schlosberg.³⁴⁴ It is through these shared needs that justice concepts strongly connect. Arguments to advance justice for humans and non-humans are grounded in the same needs and flourishing vocabulary and

³³⁷ Baxter, above n 127.

³³⁸ Dobson, above n 32, 19.

³³⁹ Schlosberg, *Reconceiving Environmental Justice*, above n 42, 520.

³⁴⁰ Bosselmann, above n 183; Bell, above n 11.

³⁴¹ Westra, above n 302.

³⁴² Baxter, above n 127.

³⁴³ Nussbaum, above n 323.

³⁴⁴ Schlosberg, *Defining Environmental Justice*, above n 25.

discourse. Moreover, environmental degradation by humans has led to the state of the planet, where there is a co-dependence between species necessary to achieve this need,³⁴⁵ and an understanding that there exists 'planetary boundaries' within which both human and ecological health must be realised.³⁴⁶

An analysis of 'sustainable human flourishing'³⁴⁷ sees sustainable human development as being entirely comparable and symbiotic with environmental justice and ecological justice. Communities driven by ecological imperatives or human development goals must have the power to reject environmental burdens and curate benefits to aid their fulfilment and health.³⁴⁸ Similarly, 'a sustainable approach to river management'³⁴⁹ requires an integration of justice concepts to achieve a functional and restoring environment for the betterment of human and non-human 'communities of justice' and 'environments of justice'. Zerner³⁵⁰ and Watts³⁵¹ articulate similar views about the effects of overconsumption and resource extraction respectively – activities that impair the health of both resident and distant human and non-human communities.³⁵² Zerner concludes that an interest in environmental justice is an interest in community.³⁵³ Getches and Pellow go further situating

³⁴⁵ Klaus Bosselmann, above n 301. Bosselmann argues that the onset of the Anthropocene triggers a need to rethink our approach to the environment and human relations to it.

³⁴⁶ Ibid 55. See also Agyeman, above n 150, 7.

³⁴⁷ Emily Fisher, 'Sustainable development and environmental justice: Same planet, different worlds?' (2003) 26 *Environs* 201.

³⁴⁸ Ibid 202.

³⁴⁹ Hillman, above n 100, 697.

³⁵⁰ Charles Zerner, 'Introduction: Toward a broader vision of justice and nature conservation' in Charles Zerner (ed), *People, Plants, and Justice: The Politics of Nature Conservation* (Columbia University Press, 1999) 3.

³⁵¹ Michael J Watts, 'Contested communities, malignant markets, and gilded governance: Justice, resource extraction, and conservation in the tropics' in Charles Zerner (ed), *People, Plants, and Justice: The Politics of Nature Conservation* (Columbia University Press, 1999) 21.

³⁵² Zerner, above n 350, 16; Ibid 58.

³⁵³ Zerner, above 350, 25. Schlosberg and Carruthers, above n 266, 13 describe environmental justice as a defensive concept for the protection of the existence and functioning of communities, especially through capabilities with an inquiry about capabilities typically framed within claims about long-term 'justice for communities' (p 17).

environmental justice as community justice.³⁵⁴ Environmental justice is also an interest of community in place.³⁵⁵

Despite concerning itself with landscapes, wide environments, environmental processes and ecosystems, environmental law is infrequently operationalised on a community scale. Federal species protection laws do not protect vulnerable ecological communities,³⁵⁶ while its policy about threatened ecological communities entails offsetting those communities with preservation of the environment elsewhere.³⁵⁷ In Victoria, laws designed to protect critical habitat for ecological communities on public or private land have never been used,³⁵⁸ while community groups are still awaiting recognised interests in any environmental law.³⁵⁹ Even in the *Planning and Environment Act 1987*, with its open standing provisions,³⁶⁰ communities are treated as being a collection of potentially affected people. If they do not exist as an incorporated form with a discrete and specific impact from a development proposal, they may only apply to challenge development applications jointly³⁶¹ or appoint a spokesperson to speak on their behalf.³⁶² They cannot present themselves collectively as a

³⁵⁴ Getches and Pellow, above n 86, 24.

³⁵⁵ Davies, above n 95, 711, argues that injustices occur in places.

³⁵⁶ Allan Hawke, *The Australian Environment Act – Independent Review of the Environment Protection and Biodiversity Conservation Act 1999 – Final Report* (October 2009) 210.

³⁵⁷ Katherine L Miller et al, 'The development of the Australian environmental offsets policy: From theory to practice' (2015) 42 *Environmental Conservation* 306.

³⁵⁸ Victorian Department of Environment, Land, Water and Planning, *Review of the Flora and Fauna Guarantee Act 1988 – Consultation, Submission and Response Summary* (2017) 9; Environment Defenders Office (Victoria), *Where's the Guarantee? Implementation and Enforcement of the Flora and Fauna Guarantee Act 1988 & Wildlife Act 1975*. Monitoring Victoria's Environmental Laws Report No 3 (2012), 14.

³⁵⁹ See, eg, *Geelong Community for Good Life Inc v Environment Protection Authority* (2008) 20 VR 338. The *Environment Protection (Amendment) Act 2018* (Vic), when it enters into force, will provide third-party rights but not at the communal level.

³⁶⁰ See, eg, *Planning and Environment Act 1987* (Vic) s 114(1), which empowers 'any person' to seek an order to enforce the planning law.

³⁶¹ Victorian Civil and Administrative Tribunal, *Application for Review – Objectors – Planning and Environment List* (August 2017).

³⁶² Victorian Civil and Administrative Tribunal, *Statement of Grounds – Planning and Environment List* (August 2017).

community nor articulate a voice on behalf of a place.

One exception to the experience of a denial of community interests in Australian environmental law was the approach (successfully appealed) of the Federal Court in the *Tasmanian Aboriginal Centre* case.³⁶³ In that case, the trial judge, Mortimer J, interpreted the protection of a National Heritage-listed place under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) as applying 'not only to individual sites but to the area as a whole, recognising that the integrity of landscapes in their totality were of value to Aboriginal peoples'.³⁶⁴ The case directs a way forward for an environmentally just environmental law.

Recognition as a connection point

Recognition has had long, lasting and plural relevance to environmental management, law and philosophy. It is a concept transcendent across ecological justice³⁶⁵ and the movement of environmental justice,³⁶⁶ and various other principles that have engaged with policy, theory and law. It is a concept capable of connecting critical viewpoints about environmental law. It is also useful to identify what is missing in environmental law: interests overlooked, local knowledges discarded and communities diminished.

The uncertain legal doctrine of the public trust,³⁶⁷ the notion that the government holds for the benefit of its citizens on trust the environmental values, functions and qualities of

³⁶³ *Tasmanian Aboriginal Centre Inc v Secretary, Department of Primary Industries, Parks, Water and Environment [No 2]* (2016) 337 ALR 96. Overturned on appeal in *Secretary, Department of Primary Industries, Parks, Water and Environment v Tasmanian Aboriginal Centre Inc* (2016) 244 FCR 21.

³⁶⁴ Lauren Butterly and Justice Rachel Pepper, 'Are courts colourblind to country? Indigenous cultural heritage, environmental law and the Australian judicial system' (2017) 40 *UNSW Law Journal* 1313.

³⁶⁵ Low and Gleeson, above n 17; Bosselman, above n 183.

³⁶⁶ Schlosberg, *Reconceiving Environmental Justice*, above n 42.

³⁶⁷ Thomas More Hoban and Richard Oliver Brooks, *Green Justice: The Environment and the Courts* (Westview Press, 2nd ed, 1996) 173ff.

parks,³⁶⁸ coastlines,³⁶⁹ forests and waterways³⁷⁰ – and even the air,³⁷¹ for instance – could be understood as being an expression of a desire for recognition of community interests or rights in shared or common environmental goods.³⁷² The recognition of interests that would follow the endorsement of the doctrine would act as a limit on government control, reordering democratic power in the fashion urged by environmental justice scholars.³⁷³

The doctrine of the public trust – and its recognition of interests and rights – is aligned with the principle of ecologically sustainable development and an environmental stewardship,³⁷⁴ so it is not disconnected with the law as we know it. Ecological integrity, and non-human recognition, can be achieved accordant with the public trust doctrine by imposing environmental obligations on property owners,³⁷⁵ in the very way the Victorian Government has conceded it has been unwilling to do notwithstanding it has the legislative power.³⁷⁶ This reimagining of property rights to entrench recognition of interests and rights of people and non-humans other than the holder of the proprietary interest is a long-standing critique of the existing legal system.³⁷⁷ Freyfole argues that predominant legal concepts and

³⁶⁸ *Willoughby City Council v Minister Administering the National Parks and Wildlife Act* (1992) 78 LGERA 19.

³⁶⁹ Bruce Thom, 'Climate change, coastal hazards and the public trust doctrine' (2012) 8 *Macquarie Journal of International and Comparative Environmental Law* 21; Joseph L Sax, *Defending the Environment: A Strategy for Citizen Action* (Knoff, 1971), 167.

³⁷⁰ Hoban and Brooks, above n 367, 169–70.

³⁷¹ Mary Christina Wood, *Nature's Trust: Environmental Law for a New Ecological Age* (Cambridge University Press, 2013).

³⁷² See, eg, Tim Bonyhady, 'A usable past: The public trust in Australia' (1995) 12 *Environmental and Planning Law Journal* 329, 334, 337.

³⁷³ See, eg, Cole and Foster, above n 18.

³⁷⁴ Hon Justice Paul L Stein, 'Ethical issues in land-use planning and the public trust' (1996) 13 *Environmental and Planning Law Journal* 493, 496.

³⁷⁵ *Ibid.*

³⁷⁶ Victorian Department of Environment, Land, Water and Planning, above n 358.

³⁷⁷ At least traceable to Aldo Leopold, *A Sand County Almanac and Sketches Here and There* (Oxford University Press, 1949).

discourses of individual rights in property and concepts of personal ownership,³⁷⁸ or in Graham's view of human entitlement over property,³⁷⁹ deny non-human parts of the ecosystem recognition. A focus on health and restoration over entitlement and ownership³⁸⁰ by contrast achieves integrity and stability in,³⁸¹ visibility and value in,³⁸² and recognition of, the non-human world. Through recognition, and by prioritising the position of the community over the individual, environmental justice becomes possible.

Another approach to achieving respect and conservation of the non-human environment is through the acknowledgement and recognition of 'agency in nature'.³⁸³ This is a revisitation of Stone's thesis about standing for non-humans, based on human guardianship of the environment.³⁸⁴ So, too, is the 'wild law' movement³⁸⁵ and the theory of earth jurisprudence. Both situate 'nature' within the governance system, with its interests recognised as being equivalent to those of humans. Under a reconceived wild law governance system 'if laws are to be effective they need to recognise the inherent nature of the subject matter with which they are concerned'.³⁸⁶

Although some of the new earth jurisprudence literature reiterates an imperative for human activism³⁸⁷ and guardianship for the benefit of the environment,³⁸⁸ its foundation is

³⁷⁸ Eric T Freyfoyle, *Justice and the Earth: Images of Our Planetary Survival* (Free Press, 1993) 51–57.

³⁷⁹ Nicole Graham, *Lawscape: Property, Environment, Law* (Routledge, 2010).

³⁸⁰ Freyfole, above n 378, 157.

³⁸¹ *Ibid* 158.

³⁸² Eric T Freyfoyle, 'The ethical strands of environmental law' (1994) 4 *University of Illinois Law Review* 819, 829.

³⁸³ Dryzek, above n 235, 148.

³⁸⁴ Stone, above n 304, 18.

³⁸⁵ Cormac Cullinan, *Wild Law: A Manifesto for Earth Justice* (Chelsea Green Publishing, 2nd ed, 2011).

³⁸⁶ *Ibid* 26.

³⁸⁷ Sax, above n 369.

³⁸⁸ Peter Burdon, 'The great jurisprudence' in Peter Burden (ed), *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (Wakefield Press, 2011) 59, 71.

recognition, especially the view that there is one 'Earth community' with non-humans particularly interconnected, sustaining and not subservient to humans.³⁸⁹ More broadly, it has been explained that the recognition inherent in ecological integrity of the Earth community and acceptance of the interconnectedness of the environment is a precursor to sustainability³⁹⁰ – the same rationale explained by other scholars advancing capacities, justice and recognition as concepts to guide environmental decisions.

2.9 An environmental justice framework for environmental law

The role of the law in environmental justice in Australia

Environmental law is an area of law that remains formative,³⁹¹ and subject and open to the influence of new principles as they emerge and are developed.³⁹² Despite sharing a vocabulary with environmental justice, however, environmental law has mostly provided a forum for the failure to perform environmental justice, rather than contributing to the meaning of the concept. One key exception has been the development of the *Aarhus Convention*; however, as detailed above, notwithstanding its symbolism and its intersections with justice theories,³⁹³ that legal instrument has barely shifted the institutional foundations of the law.³⁹⁴ There seems no more justice in accessing the law, participating in the law or retrieving legal information than there was before the advent of the treaty in Europe.

The separation of environmental justice and environmental law is remarkable because both were invigorated by similar concerns and because it has long been realised that

³⁸⁹ Burdon, above n 225, particularly ch 3.

³⁹⁰ Peter Burdon, 'Wild law and the project of Earth democracy' in Peter Burdon and Michelle Maloney and Peter Burdon (eds), *Wild Law – In Practice* (Routledge, 2014) 19, 24–5. See also *ibid*.

³⁹¹ Elizabeth Fisher et al, 'Maturity and methodology: Starting a debate about environmental law scholarship' (2009) 21 *Journal of Environmental Law* 213.

³⁹² Eloise Scotford, *Environmental Principles and the Evolution of Environmental Law* (Hart Publishing, 2017).

³⁹³ Jonas Ebbesson, 'Environmental justice through the Aarhus Convention' (Speech delivered at the Environmental Rights in Europe and Beyond Conference, Lund University, 21 April 2016).

³⁹⁴ Lee, above n 219.

environmental injustice can be redressed by environmental laws.³⁹⁵ Environmental law from the 1960s was directed towards the protection of environmental health and human welfare; just as environmental justice was from the 1980s, with a narrower attention on vulnerable communities. The mode of environmental regulation developed in the late 1960s and early 1970s was congruent with the goals of reducing environmental harm and achieving an overall improvement in the environmental condition that would have achieved improved living conditions, especially for those communities most exposed to pollution.³⁹⁶

It appears that environmental justice has been masked or made absent in environmental law as governments have retreated from the original environmental regulatory models and embraced alternative regimes to achieve pollution control.³⁹⁷ Environmental justice groups in California have argued that market mechanisms generate environmental injustices. There, environmental justice groups have supported mandated emission reductions applying across all polluting sources instead of a cap and trade scheme, which they consider would exacerbate pollution hotspotting.³⁹⁸ Writing in the late 1990s, Bosselmann argued that environmental law needs to reconcile goals of environmental justice with its mission for self-regulation, the market and deregulation.³⁹⁹

Despite the separation between them, environmental laws have powerful components that may inform environmental justice. They detail criminal offences; specify prohibitive conduct considered harmful to the environment; require government permission and oversight of activities; provide rights to communities, protecting personal and proprietary

³⁹⁵ Lazarus and Tai, above n 55, 618–9.

³⁹⁶ Klaus Bosselmann, 'Environmental justice v deregulation? Themes on an environmental law conference in Auckland' (1998) 2 *New Zealand Journal of Environmental Law* 209.

³⁹⁷ A shift argued forcefully in Bruce A Ackerman and Richard B Stewart, 'Reforming environmental law: The democratic case for market incentives' (1988) 13 *Columbia Journal of Environmental Law* 171.

³⁹⁸ Seth B Shonkoff et al, 'Minding the climate gap: Environmental health and equity implications of climate change mitigation policies in California' (2009) 2 *Environmental Justice* 173; Alice Kaswan, 'Reconciling justice and efficiency: Integrating environmental justice into domestic cap-and-trade programs for controlling greenhouse gases' in Denis Arnold (ed), *The Ethics of Global Climate Change* (Cambridge University Press, 2011) 232, 240.

³⁹⁹ Bosselmann, above n 396.

interests from harms;⁴⁰⁰ and impose obligations on landholders to act for the wider interest of the environment.⁴⁰¹ Environmental law already grapples with distribution of harms through nuisance laws, though not always equitably,⁴⁰² and the use of the polluter pays principle means that responsibility for remediation of harm is applied to those who caused it.⁴⁰³ Environmental laws can set standards for environmental exposure⁴⁰⁴ and shine a light on injustice – requiring explanation and justification of decisions⁴⁰⁵ – making transparent who gets what and how and why environmental distributions occur.⁴⁰⁶ Moreover, the law has a primary role in determining the communities of justice,⁴⁰⁷ and further to reconceive what a community of justice is – in order for justice to be distributed to them, for the law to recognise their interests and facilitate their participation.

There is also scope for environmental justice to guide the deployment of the law, identify justice agency through the law, to mirror community demands of transparency and acceptance of hazard, and to inform the development of future laws. One dilemma, however, is that the involvement of the law and lawyers often brings its own complexity and frustration to the realisation of environmental justice, particularly when environmental justice is given meaning by vulnerable communities.⁴⁰⁸ The law is slow, confining, often

⁴⁰⁰ Preston, above n 281, 185, notes that tort law can achieve distributive justice, especially toxic tort suits and class actions.

⁴⁰¹ Ibid 180.

⁴⁰² *Clarey v The Principal and Council of the Women's College* (1953) 90 CLR 170; *Munro v Southern Dairies Ltd* [1955] VLR 332; and *Oldham v Lawson* [1976] VR 654 each illustrate that the standard of amenity protected by the law of private nuisance depends on the geographical context. All communities cannot expect equal levels of amenity.

⁴⁰³ Brad Jessup, 'Investing the law with an environmental ethic: Using an environmental justice theory for change' in Erika Techera (ed), *Environmental Law, Ethics and Governance* (Inter-Disciplinary Press, 2010) 21, 28.

⁴⁰⁴ Kaswan, above n 16.

⁴⁰⁵ Ibid.

⁴⁰⁶ Hillman, above n 100.

⁴⁰⁷ Preston, above n 279.

⁴⁰⁸ Environment Defenders Office, above n 39, 48–9.

costly and difficult to access even when access to the law is a right.⁴⁰⁹ Environmental laws, especially those grounded in administrative law, are notoriously difficult for communities to navigate, which has led Kawsan⁴¹⁰ to assert that environmental laws can be a key cause of environmental injustice or of being responsible for the entrenching of environmental and political disadvantage.⁴¹¹ As discussed at length above, this is because legal and political power in environmental law does not lie with communities. The law seems disinterested in any project to recalibrate environmental power.

Environmental justice has been included as an ambition in policy or strategy documents, including in the US,⁴¹² and that is the likely first step in introducing the concept authoritatively into the legal and political order in Australia.⁴¹³ Where such strategies lack clarity, certainty and mandates,⁴¹⁴ however, the law can play a role. Where there is a danger that environmental justice becomes a checklist,⁴¹⁵ especially through environmental assessments, the law can offer substantive rights and impose overarching principles for interpretation.⁴¹⁶

⁴⁰⁹ Environment Defenders Office, *Major Increase to VCAT Fees Proposed* (17 January 2013). Aimee Amiga, 'Somers community fears being priced out of VCAT in case against Mornington Council', *The Age* (24 October 2016) <<http://www.theage.com.au/victoria/somers-community-fears-being-priced-out-of-vcac-in-case-against-mornington-council-20161023-gs8098.html>> reports on a case of costs limitations to access the state's planning tribunal.

⁴¹⁰ Kaswan, above n 16, 268.

⁴¹¹ *Ibid* 273.

⁴¹² US EPA, *Plan EJ 2014* (September 2011).

⁴¹³ Victorian Labor Party, *Platform 2014* <<https://www.viclabor.com.au/wp-content/uploads/2014/05/Victorian-Labor-Platform-2014.pdf>> 21. Victorian Government EPA Inquiry, *Independent Inquiry into the Environment Protection Authority* (2016) Recommendations 7.1 and 7.3, xxi. Elisa Arcioni and Glenn Mitchell, 'Environmental justice in Australia: When the RATS became IRATE' (2005) 14 *Environmental Politics* 363, 376 note that legal and political consequences will follow the strategic endorsement of environmental justice in Australia.

⁴¹⁴ Hamil Pearsall and Joseph Pierce, 'Urban sustainability and environmental justice: Evaluating the linkages in public planning/policy discourse' (2010) 15 *Local Environment* 569, 570–1.

⁴¹⁵ For an overview of the Executive Order and subsequent administrative directions and programs: see Bass, above n 54.

⁴¹⁶ Environmental Justice Australia, *Submission to the Inquiry into the Environment Protection Authority* (31 October 2015).

This part of the thesis begins the process of asking: what might a future relationship between environmental law and environmental justice look like? Will it resemble earlier efforts to constrain administrative action like the attempts of the US EPA introduced above? Does environmental justice most sensibly belong within a framework of human rights and ecological rights, especially if environmental justice is framed around notions of recognition and capabilities? Should environmental justice reflect the kind of laws that I identify below as presenting models of environmental law aligned with environmental justice? My focus is selective – on those categories of laws that are most pertinent to the case studies that are the subject of this thesis.

Environmental Justice Australia has argued⁴¹⁷ that the minimum legal qualities required to effectuate environmental justice in Victoria are a human right to environmental protection; the achievement of open standing;⁴¹⁸ entrenched and readily available merits review processes; a guarantee of access to information;⁴¹⁹ the advent of environmental justice assessments to complement environmental impact assessments; state funding of lawyers and experts for community members involved in public interest environmental litigation, including through the creation of a public interest litigation fund; and the prioritisation of intra-generational equity as an environmental principle in law. Many of these qualities will be referred to below and addressed more fully throughout the remainder of the thesis.

Environmental assessment processes in California offer an indication of what an environmental justice assessment might entail. In California,⁴²⁰ where environmental justice strategy and policy is long standing, environmental justice policy includes community funding, the promulgation of environmental justice indicators, ongoing monitoring and research of environmental justice conditions, the inclusion of environmental justice as a mandatory consideration in decision-making processes integrated with the precautionary

⁴¹⁷ Ibid.

⁴¹⁸ Compare *Thirteenth Beach Coast Watch Inc v The Environment Protection Authority* (2009) 178 LGERA 232.

⁴¹⁹ Compare the cases concerning attempts to seek review of decisions and avail information concerning the Shell Refinery in Geelong: *Geelong Community for Good Life Inc v Environment Protection Authority* (2008) 20 VR 338, and *Geelong Community for Good Life Inc v Environment Protection Authority* [2009] VCAT 2429.

⁴²⁰ London, Sze and Liévanos, above n 56, 256, 262, 266.

principle,⁴²¹ the evaluation of cumulative and long-term impacts, and the developments of strategic action plans and cross-community working groups. In addition to integrated principles and cumulative assessment, social impact assessments and health impact assessments⁴²² have been advocated and employed,⁴²³ so that the people's lives that will be affected by a project, not simply the jobs or local economic windfalls of a development, are central to decision-making.

Walker claims that a focus on equity and social impact in environmental assessment, and the use of strategic environmental assessments,⁴²⁴ are a pathway to achieving environmental justice in Britain. This is a theoretically compelling form of assessment routinely misused by governments with short-term agenda.⁴²⁵ Moreover, the inclusion of a distributive impact analysis of alternatives and the use of scenario planning would enable inequities of projects subject to assessment to be identified. Communities of risk or impact can then be primary participants in assessments, with inequities mitigated, managed, compensated or the community otherwise benefited.⁴²⁶ While outcomes might not be just, or ultimately fair, through such an analysis the politics becomes plain and the systemic injustices apparent.

Distribution of, or community benefit arising from, environmental harms

For decades, discussions around compensation within the planning system have focused on

⁴²¹ Shilling, London and Liévanos, above n 228, 697, argue that advocacy of the precautionary principle is within the ambit of environmental justice, 'the idea that the burden of proof should be on the manufacturer, user and/or regulator of a potentially harmful substance or technology not on the communities who are likely to bear the effects'.

⁴²² Judith Petts, 'Enhancing environmental equity through decision-making: Learning from waste management' (2005) 10 *Local Environment: The International Journal of Justice and Sustainability* 397, 403.

⁴²³ *Bulga Milbrodale Progress Association v Minister for Planning and Infrastructure* (2013) 194 LGERA 347 ('*Bulga*') 404ff illustrates the use of these assessments.

⁴²⁴ Gordon Walker, 'Environmental justice, impact assessment and the politics of knowledge: The implications of assessing the social distribution of environmental outcomes' (2010) 30 *Environmental Impact Assessment Review* 312, 315.

⁴²⁵ See, eg, Simon Marsden, 'Strategic environmental assessment of Australian offshore oil and gas development: Ecologically sustainable development or deregulation?' (2016) 33 *Environmental and Planning Law Journal* 21.

⁴²⁶ Walker, above n 424, 315-16.

redress for property holders being 'denied' 'rights' to use 'their' land.⁴²⁷ It is a debate that persists, led principally by farmers opposed to the regulation of native vegetation removal,⁴²⁸ despite the law being clear about the limited circumstances where a land-use control gives rise to compensation.⁴²⁹ Cases such as *Chang v Laidley Shire Council*⁴³⁰ are a reminder that parts of the judiciary remain unconvinced by the public value of planning and environmental laws. Yet, an environmental justice lens applied across the law would instead direct questions about compensation to those communities that bear most of our collective environmental harms: to the locales and neighbourhoods supporting our polluting industry. Within international law, especially in the context of climate change, those communities are identifiable with ease.⁴³¹ Through planning law, those communities are clearly mapped. They are known but typically they are not involved in an administrative legal system that is not designed with their lived experience in mind. Because the distribution of environmental burdens is difficult to achieve, because of historically entrenched geographic advantage, and is not desirable for strategic planning reasons, community consent and compensation should be integrated into environmental decision-making frameworks.

With non-human communities, the law is beginning to achieve a similar distributive justice objective through the use of offsets, when – all too rarely – they are thoughtfully used and deliberately protect at-threat communities.⁴³² However, the experience of offsets has been that they have led to trade-offs,⁴³³ with some species within communities disregarded,

⁴²⁷ Rachele Alterman, *Takings International: A Comparative Perspective on Land Use Regulations and Compensation Rights* (American Bar Association, 2010).

⁴²⁸ Robyn Bartel and Nicole Graham, 'Property and place attachment: A legal geographical analysis of biodiversity law reform in New South Wales' (2016) 54 *Geographical Research* 267.

⁴²⁹ See, eg, *Planning and Environment Act 1987* (Vic) s 98, where compensation is payable when land is reserved for a public purpose. See also *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513.

⁴³⁰ (2007) 234 CLR 1.

⁴³¹ Michael G Faure and André Nollkaemper, 'International liability as an instrument to prevent and compensate for climate change' (2007) 43A *Stanford Journal of International Law* 123.

⁴³² *Gerroa Environment Protection Society Inc v Minister for Planning and Cleary Bros (Bombo) Pty Ltd* [2008] NSWLEC 173.

⁴³³ Philip Gibbons and David B Lindenmayer, 'Offsets for land clearing: No net loss or the tail wagging the dog?' (2007) 8 *Ecological Management and Restoration* 26.

dislocated and diminished.⁴³⁴ In *Bulga*, the court found the proposed offsets were simply insufficient to overcome the extent of environmental impact.⁴³⁵ Chief Justice Preston reasoned that the offsets 'would not provide sufficient, measurable conservation gain for the particular components of biological diversity impacted by the Project',⁴³⁶ the proponent had not shown a relationship between the offsets and the impacts.⁴³⁷ That is, there were no compensation for harm; rather a proposal to replace one habitat with a different one. Yet most offsets arrangements are not subject to merits review by the courts. Instead, they are negotiated between developers and governments with no capacity or position for non-human communities within the negotiation process.

Environmental law processes must prioritise the interests of potentially affected communities – both human and non-human. Developments should not proceed without consent or compensatory arrangements. In this sense, recognition and capacities are necessary pre-conditions to a fair outcome as understood in a distributive justice scheme.

In addition, where communities suffer harm because of the conduct of private enterprise or government injustice – such as the examples I offer elsewhere⁴³⁸ of the Morwell community following the coal mine fire at Hazelwood, or members of the Cranbourne community whose homes were affected by methane gas leaks because of deficient state agency practice – there must be some restoration or correction. It should not be necessary for communities to turn to activism or to class action litigation funders for them to seek recovery for environmental harms. In this sense, to achieve environmental justice, environmental law needs to be distanced and distinguished from tort law. This is not a great leap. Parts of environmental law are strict liability,⁴³⁹ where proof of causation is all that is

⁴³⁴ For instance, the conditions attached to approval upheld in *Tarkine National Coalition Incorporated v Minister for the Environment* (2014) 202 LGERA 244 relating to the Tasmanian Devil.

⁴³⁵ (2013) 194 LGERA 347.

⁴³⁶ *Ibid*, para [202].

⁴³⁷ *Ibid*, para [206].

⁴³⁸ Jessup, above n 45.

⁴³⁹ *Allen v United Carpet Mills Pty Ltd* [1989] VR 323.

necessary to establish liability for harm.

Unfettered access to the court in the public interest

In Australia much of the legal scholarly attention on justice has been centred on access to justice: access to courts and third-party rights to appeal. The submission of Environmental Justice Australia to the review of Victoria's environmental protection legislation⁴⁴⁰ has highlighted these aspects and homed in especially on open standing and rights to seek review as tools to entrench environmental justice, in an attempt to prise open further the access achieved so far. Those successes include relaxed standing rules,⁴⁴¹ limited third-party review rights and the rare citizen suit,⁴⁴² public enforcement of environmental and planning laws,⁴⁴³ and public interest grounds to limit environmental groups' exposure to legal costs.⁴⁴⁴ What is left unachieved by the law, despite four decades of debate and provocation, is a recognition of 'non-consumer' interests (notably future generations and non-humans, and in this sense⁴⁴⁵ few laws fully meet their Rio participation goals)⁴⁴⁶ – few achieve broad participation, especially by vulnerable or affected communities rather than privileged and educated ones, and rarely do laws embrace participatory justice for non-humans and future generations.

Although environmental groups and scholars argue about modifications to administrative law arrangements when dealing with the environment in order to improve environmental protection, an environmentally just environmental law might instead reconsider the

⁴⁴⁰ Environmental Justice Australia, above n 416. See, more recently, Environmental Justice Australia, *Submission to the Access to Justice Review* (19 February 2016).

⁴⁴¹ For example, the standing provisions in the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss 475 and 487.

⁴⁴² These appeal rights are generally confined to planning laws: see, eg, *Environmental Planning and Assessment Act 1979* (NSW) s 98.

⁴⁴³ For example, *Planning and Environment Act 1987* (Vic) s 114; *Protection of the Environment Operations Act 1997* (NSW) ss 219 and 252.

⁴⁴⁴ *Blue Mountains Conservation Society Inc v Delta Electricity* (2009) 170 LGERA 1.

⁴⁴⁵ Preston, above n 279.

⁴⁴⁶ *Rio Declaration on Environment and Development*, (14 June 1992).

administrative law enterprise altogether. Perhaps environmental law, often dismissed by law students as a green brand of administrative law, needs to reform itself. The experience of administrative law in Australia since the 1980s⁴⁴⁷ has been that environmental law has in small measure been responsible for its adjustment and clarification. Yet the experience of environmental law has been that administrative law, through its doctrine of standing and principles of review, has created barriers to access to courts and a capacity for independent adjudication on matters of the public environmental interest. An alternative regime would be to reconceive the role of specialised judges in environmental law matters as mediators, conciliators and educators who attend to community group issues and explain the law and its limits before the initiation of proceedings, rather than being often uncomfortably bound by doctrine once in a formal and adversarial setting.

Preston⁴⁴⁸ argues that environmental litigation in the public interest – the law when exercised by those groups capable of doing so – contributes to participatory justice, recognition and capabilities. This means unfettered access to judges and courts is paramount. This emphasises the need to facilitate – to recognise and build capabilities in – communities to access the law. Litigation is a legitimate supplement to conventional political techniques,⁴⁴⁹ but is often the only means to achieve political and legislative restraint where the law is not being followed. In an endorsement of Sax's thesis on defending the environment,⁴⁵⁰ Preston asserts that 'by restraining conduct of the government or industry causing or threatening environmental harm, courts can thrust upon those interests the best access to the legislature the burden of obtaining legislative

⁴⁴⁷ See especially *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493; *Bropho v Western Australia* (1990) 171 CLR 1; *Tickner v Chapman* (1995) 87 LGERA 291.

⁴⁴⁸ Justice Brian J Preston, 'The role of public interest environmental litigation' (2006) 23 *Environmental and Planning Law Journal* 337.

⁴⁴⁹ Contrast this with the debates about proposals to return to common law standing rules in the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), especially played out in the context of coal mine development in northern Queensland: Lenore Taylor, 'Carmichael coal mine: Politics, activism and the search for truth', *The Guardian* (8 October 2016) <<https://www.theguardian.com/australia-news/2016/oct/08/carmichael-coal-mine-politics-activism-and-the-search-for-truth>>; Chris McGrath, 'Myth drives Australian government attack on standing and environmental lawfare' (2016) 33 *Environmental and Planning Law Journal* 3.

⁴⁵⁰ Sax, above n 369.

action'.⁴⁵¹ Yet this outcome should not only be available to those communities willing and able to litigate. While Preston cited the *Corkill* case⁴⁵² and iconic Australian environmental law cases as moments when law reform and executive reconsideration were initiated by community members, there are many other examples of the case law not triggering legal change and of refusing to question decisions.⁴⁵³ Those interests around which reform is initiated may be human or non-human interests; they have included interests affected indirectly⁴⁵⁴ or interests encapsulated in the environmental values of an area.⁴⁵⁵

As an institution in the advancement of recognition and capacity aspects of justice, courts facilitate scrutiny and insist on integrity, impartiality and logic.⁴⁵⁶ They are responsive to community, especially insofar as jurists equipped in this area of the law⁴⁵⁷ engage with their interpretative role to give meaning and clarity to environmental principles around which community members may have framed a case.⁴⁵⁸

Inclusive and unconstrained involvement in planning law and environmental assessments

If access to the courts, especially to ventilate concerns about decision-making processes, is

⁴⁵¹ Preston, above n 448, 339.

⁴⁵² *Corkill v Forestry Commission of NSW* (1991) 73 LGRA 126.

⁴⁵³ Especially in the context of climate change adaptation law and policy: see Marion Manifold and Brad Jessup, 'Shifts in Victorian climate law and the planning system: Intersected views from the field and academia' (2016) 39 *UNSW Law Journal* 1652.

⁴⁵⁴ *Queensland Conservation Council Inc v Minister for the Environment and Heritage* [2003] FCA 1463, which led to changes to the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), especially the insertion of s 527E.

⁴⁵⁵ *Booth v Bosworth* (2001) 114 FCR 39, which triggered the development of government policy on the meaning of 'significant impact'.

⁴⁵⁶ Preston, above n 448, 340–1.

⁴⁵⁷ Brad Jessup, 'The journey of environmental justice through public and international law' in Brad Jessup and Kim Rubenstein (eds), *Environmental Discourses in Public and International Law* (Cambridge University Press, 2012) 47, 63.

⁴⁵⁸ Hon Justice Brian J Preston, 'Leadership by the courts in achieving sustainability' (Paper presented at the Resource Management Law Association of New Zealand 2009 Conference, Wellington Convention Centre, 2 October 2009) 9 cites some of his own cases as examples where meaning has been given to the precautionary principle, ecologically sustainable development and intergenerational equity.

a hallmark of environmental justice for environmental law, then a meaningful involvement for communities, and not simply individuals, during the primary decision-making process must be accepted as a legal standard for environmental justice. This is particularly true if environmental justice is understood as not exclusively distributional in character. Through environmental assessment and planning and development processes, there is an opportunity, often not satisfied, to empower, to listen and to respect other voices and views.⁴⁵⁹ The fact that environmental assessment processes are disjoined from approval decisions⁴⁶⁰ significantly lessens its justice potential because communities fail to see how their contribution has influenced outcomes, and brings into question the transparency and purpose of the process. Because environmental assessment is a suitable forum for 'experiential, embodied, local or indigenous knowledge'⁴⁶¹ – not simply expert, rational, technical, academic knowledge – it must be employed to capture that knowledge. Moreover, local knowledge and values are formalised – that is, capabilities are developed – through deliberative assessment processes rather than an adversarial one.⁴⁶²

Environmental law processes that do little more than enable interested parties a chance to write a statement of objection⁴⁶³ fail this first requirement for justice; the precondition to deliberative environmental assessment is 'inclusiveness and unconstrained dialogue'.⁴⁶⁴ Inclusiveness is an entitlement to participate, an equal right to introduce and question claims, to put forward reasons, to express or challenge needs or interests – and, above all, a right not to be excluded or denied. Unconstrained dialogue are interactions that are egalitarian, with shared power and position and a capacity to frame and present arguments as they please. They are discussions that are genuinely open-ended and inviting, rather than

⁴⁵⁹ Shilling, London and Liévanos, above n 228, 697.

⁴⁶⁰ Jessup, above n 403, 31.

⁴⁶¹ Shilling, London and Liévanos, above n 228, 702.

⁴⁶² Petts, above n 422, 404. Jane Holder, *Environmental Assessment: The Regulation of Decision Making* (Oxford University Press, 2004) 195 writes of 'the deliberative ideal' of environmental assessment laws.

⁴⁶³ For instance, where project assessment occurs merely on documentary evidence and written statements under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth): see ss 87, 94–95C.

⁴⁶⁴ Smith, above n 255, 56.

strategic or tokenistic, and that allow for a relaxation of the scientifically rational and the introduction of experiences, stories and local perspectives,⁴⁶⁵ with no constraints on the value sets the subject of dialogue – whether they are humanistic or ecological.⁴⁶⁶

Assessment processes that add rigour, define limits and set standards for community exposure direct distributive outcomes.⁴⁶⁷ Distributional harms and impacts can especially be evaluated through strategic assessments and cumulative impact assessments, the latter embraced by Shilling et al as advancing environmental justice within the assessment-of-impacts process.

The experience of environmental assessments in Australia is that they rarely meet these qualities.⁴⁶⁸ Australian environmental assessment processes frustrate environmental justice – because of the legally mandated requirement to weigh up social, economic and environmental spheres of sustainability, with the exercise of balancing them within the discretion of government.⁴⁶⁹ Other critiques that diminish the prospect of environmental assessment realising environmental justice are the use of adaptive management,⁴⁷⁰ the technicality of assessments matched with the restrictive time for communities dependant on volunteers to digest and respond to reports,⁴⁷¹ and the lack of impartiality of the decision-maker or assessor.⁴⁷² Searching through the regimes that exist in Australia, the focus appears to be on the technical components of environmental assessments,⁴⁷³ rather

⁴⁶⁵ Ibid 62.

⁴⁶⁶ Ibid 65.

⁴⁶⁷ Schlosberg and Carruthers, above n 266, 24.

⁴⁶⁸ See Tim Bonyhady and Andrew Macintosh, *Mills, Mines and Other Controversies: The Environmental Assessment of Major Projects* (Federation Press, 2010).

⁴⁶⁹ Hillman, above n 97. Tim Bonyhady, 'Putting the environment first?' (2012) 29 *Environmental and Planning Law Journal* 316 argues that this equal treatment should be revisited in the context of the application of the principle of ecologically sustainable development in Australia's environmental assessment laws.

⁴⁷⁰ Jessica Lee, 'Theory to practice: Adaptive management of the groundwater impacts of Australian mining projects' (2014) 31 *Environmental and Planning Law Journal* 251.

⁴⁷¹ Environment Defenders Office, above n 39, 36.

⁴⁷² Ibid 39–40.

⁴⁷³ Mandy Elliott, *Environmental Impact Assessment in Australia: Theory and Practice* (Federation Press, 6th ed,

than in the qualities that will transform them into models for environmental justice.

Species laws that recognise species

The law has so far only been able to recognise a human construct⁴⁷⁴ of 'wilderness' or the 'wild' when confronting the place of non-humans in law; that is, in responding to the goal of environmental conservation, the law has prioritised areas or objects where human influence and laws are absent and remain so.⁴⁷⁵ Laws developed with the objective of sustainable development have been able to identify endangered species but not fully recognise them – in the sense of achieving ecological integrity, regeneration and affirming their essential value. The listing of such species is traditionally too late to achieve their recognition,⁴⁷⁶ representing only an effort at offering limited redress for past human ignorance of the value and needs of those species.

To achieve environmental and ecological justice, laws must do more than identify species that are threatened,⁴⁷⁷ or transpose species into emblems.⁴⁷⁸ They must demand that species and habitat are managed,⁴⁷⁹ protected,⁴⁸⁰ recognised. Explained another way, laws must recognise the ecosphere for more than its services to humans,⁴⁸¹ and as more than a

2014).

⁴⁷⁴ Holmes Rolston III, 'Duties to endangered species' (1985) 35 *BioScience* 718, 719 argues that the concept of 'species' is also a human construct.

⁴⁷⁵ David Delaney, *Law and Nature* (Cambridge University Press, 2003) 166–71.

⁴⁷⁶ Hawke, above n 356, 197.

⁴⁷⁷ Preston, above n 448, citing *Hornsby Shire Council v Vitone Developments Pty Ltd* (2003) 132 LGERA 122.

⁴⁷⁸ As it has especially done with whales: see *Environment Protection and Biodiversity Conservation Act 1999* (Cth) pt 13, div 3. See also Jessup, above n 457, 65.

⁴⁷⁹ Environment Defenders Office (Victoria), *Where's the Guarantee? Implementation and Enforcement of the Flora and Fauna Guarantee Act 1988 & Wildlife Act 1975* (23 March 2012).

⁴⁸⁰ Environmental Justice Australia, *Fixing Victoria's Broken Nature Laws: A Reform Proposal for the Flora and Fauna Guarantee Act* (August 2016).

⁴⁸¹ Holmes Rolston III, above n 474, 71; Bhaskar Vira and William M Adams, 'Ecosystem services and conservation strategy: Beware the silver bullet' (2009) 2 *Conservation Letters* 158.

subject for an obligation on humans.⁴⁸² They must produce a positive benefit for species. Earth jurisprudence scholars similarly argue about the need to resituate laws beyond the human, of equalising and maintaining relationships between all species and designing laws in the interests of the communities for which the laws are objectively designed to serve, including where this might disadvantage human individualised proprietary interests.⁴⁸³

In this sense, and contrasted with a notion of duty on humans to the environment, Laitos argues for the development of a concept of non-use for the benefit of the non-human world.⁴⁸⁴ This is similar to the articulated right of the environment to be in an unaffected state.⁴⁸⁵ Not being used would allow 'all natural organisms and entities to thrive, evolve or play some role in the environmental health of this planet'.⁴⁸⁶ This would entail in laws '[a]n acknowledgement of ecosystem function and also empowerment so that human interests cannot always trump non-use interests'.⁴⁸⁷ Preston⁴⁸⁸ notes that it is rare to find in environmental laws mandates to consider independently of the human and to prioritise non-human interests. One such law is the *Water Management Act 2000* (NSW), which requires a consideration of dependant ecosystems by decision-makers.

Environmental rights

The trend towards the adoption of constitutionally entrenched human rights to environmental health and protection⁴⁸⁹ has invited a critique of the possible connections

⁴⁸² Such as through affirmative duties on landowners: see Preston, above n 281, 180.

⁴⁸³ Cullinan, above n 385, 98, 109.

⁴⁸⁴ Jan G Laitos, *The Right of Nonuse* (Oxford University Press, 2012).

⁴⁸⁵ Robert Elliot, 'Faking nature' (1982) 25 *Inquiry* 81.

⁴⁸⁶ Laitos, above n 484, 201.

⁴⁸⁷ *Ibid* 208.

⁴⁸⁸ Preston, above n 279, 33. Bosselmann, above n 126, 52 advocates an environmental law framework based on the New Zealand *Resource Management Act 1991*. That Act is structured around the core objectives and principles of maintaining ecological function, intergenerational equity, resources allocated based on needs, and an acknowledgment and need to have regard to the intrinsic values of the environment. See also Tony Jackson and Jennifer Dixon, 'The New Zealand Resource Management Act: An exercise in delivering sustainable development through an ecological modernisation agenda' (2007) 34 *Environment and Planning B: Planning and Design* 107.

⁴⁸⁹ David R Boyd, 'Constitutions, human rights, and the environment: National approaches' in Anna Grear and

between human rights and environmental justice, and the avenues to use rights to achieve distributive justice, political justice, recognition and capabilities.⁴⁹⁰ In Australia in particular, debates about the recognition of rights and the realisation of environmental justice have been blended⁴⁹¹ in a way that has not especially advanced the cause of law reform for either.⁴⁹² Nevertheless, the concept of rights is compelling, especially when environmental justice is understood as attempting to achieve recognition and capacity in communities.

Substantive rights – of environmental health, wellbeing and protection – offer minimum accepted standards and, in theory, reduce environmental risks for all.⁴⁹³ Rights challenge ‘dominant political and economic structures’ of the decision-making sphere.⁴⁹⁴ They are an authoritative language⁴⁹⁵ that entrench the mission of environmental protection within the public consciousness and interest, and rights to transparent information, meaningful participation and objection deepen environmental democracy and are therefore facilitative, if not directly causative, of environmental justice and ecological justice.⁴⁹⁶

Osofsky advocates a discourse of international environmental rights to be based on the concept of environmental justice.⁴⁹⁷ She sees environmental justice as being a bridge

Louis J Kotzé (eds), *Research Handbook on Human Rights and the Environment* (Edward Elgar, 2015) 170, 177.

⁴⁹⁰ Ibid 192.

⁴⁹¹ Brad Jessup and Annette Jones, ‘In one ear and out the other: Human rights consultations and environmental discourses for human rights in Australasia’ in Anna Grear and Louis J Kotzé (eds), *Research Handbook on Human Rights and the Environment* (Edward Elgar, 2015) 249.

⁴⁹² Ibid.

⁴⁹³ Eckard Reh binder, ‘Environmental justice in Germany: Legal aspects of spatial distribution of environmental quality’ (2007) 37 *Environmental Policy and Law* 177. By contrast, and writing from an exclusively US perspective framed by the experience of the Civil Rights Act and seeing civil rights as equivalent to non-discrimination, Tseming Yang, ‘Melding civil rights and environmentalism: Finding environmental justice’s place in environmental regulation’ (2002) 26 *Harvard Environmental Law Review* 1 suggests that environmental protection and rights are typically incompatible.

⁴⁹⁴ Kerri Woods, ‘What does the language of human rights bring to campaigns for environmental justice?’ (2006) 15 *Environmental Politics* 572, 578.

⁴⁹⁵ Ibid 577.

⁴⁹⁶ Ibid 580.

⁴⁹⁷ See Hari M Osofsky, ‘Learning from environmental justice: A new model for international environmental

between international environmental law and international human rights law – a way to advance both the wellbeing of the planet and its people and to empower harmed communities to advocate for just remedies.

Other scholars see a rights frame as a bridge between the human and the ecological. For instance, it has been argued that ‘an environmental right to a functioning ecosystem is a necessary (although not sufficient) condition for a functioning democratic polity’ and an essential component of the process of ‘ecological democratisation’ of society.⁴⁹⁸ Within earth jurisprudence scholarship, there is enthusiasm for ‘rights of nature’,⁴⁹⁹ triggered especially by the introduction of such so-called rights in Ecuador,⁵⁰⁰ to be used to recentre priorities and concerns, and to broaden recognition, in fundamental environmental laws, to include all species equally.⁵⁰¹ These rights have been resisted,⁵⁰² and their experience shows an inability to operate or be enforced without an affiliated human interest,⁵⁰³ suggesting that a more ‘elegant’,⁵⁰⁴ and arguably more tangible, way to achieve justice for non-humans needs to be found. The recognition, and obligation to ensure the resilience, of ecological communities might be such a way.

rights’ (2005) 24 *Stanford Environmental Law Journal* 71.

⁴⁹⁸ Smith, above n 255, 105.

⁴⁹⁹ Jules Cashford, ‘Dedication to Thomas Berry’ in Peter Burdon (ed), *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (Wakefield Press, 2011) 3, 8–9.

⁵⁰⁰ Cormac Cullinan, ‘A history of wild law’ in Peter Burdon (ed), *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (Wakefield Press, 2011) 12, 21.

⁵⁰¹ See generally Peter Burdon (ed), *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (Wakefield Press, 2011).

⁵⁰² Ole W Pedersen, ‘Environmental justice in the UK: Uncertainty, ambiguity and the law’ (2011) 31 *Legal Studies* 279, 298.

⁵⁰³ Erin Daly ‘The Ecuadorian exemplar: The first ever vindications of constitutional rights of nature’ (2012) 21 *Review of European Community and International Environmental Law* 63, 64–5.

⁵⁰⁴ Eckersley, above n 122, 58 argues that rather than using concepts of rights we must search for ‘simpler and more elegant ways of enabling the flourishing of a rich and diverse nonhuman world’.

Chapter 3

Method and approach

3.1 Justice as a critical approach to the field of environmental law

Overview

This chapter explains the approach to researching and analysing the laws that were encountered by the parties to the controversies detailed in this thesis. It moves from trying to understand the meaning of environmental justice from the literature to drawing lessons from practice and experience. The goal of the chapter is to explain the process of exposing the law to the concept of environmental justice, and to ask how or whether environmental law can integrate or reflect the four aspects of the concept summarised through Schlosberg's scholarship.¹

The chapter is designed to do four things. First, the chapter situates this thesis within critical environmental legal scholarship. The use of environmental justice as a conceptual framework allows for a critique of contemporary Australia's environmental legal experience.² The preliminary parts of this chapter explain how this thesis views, and argues for further attempts at, critical legal scholarship for environmental law. Second, the chapter introduces methodological opportunities for environmental law and begins the process of explaining and justifying the methodological approach used in this thesis. The approach combines critical, contextual, geographical and qualitative elements. Third, the chapter attempts to bring understandings of case study methodology from the social sciences into environmental law and, in doing so, to challenge conventional understandings of 'cases' by legal scholars and to deepen the understandings for legal scholars about case study research, especially through the use of interviews and non-legal data. Fourth, and finally, the chapter explains how the research, including the methodology, has responded to and

¹ Particularly culminating in David Schlosberg, *Defining Environmental Justice: Theories, Movements, and Nature* (Oxford University Press, 2007). Earlier David Schlosberg, *Environmental Justice and the New Pluralism: The Challenge of Difference for Environmentalism* (Oxford University Press, 1999); David Schlosberg, 'Reconceiving Environmental Justice: Global Movements and Political Theories' (2004) 13 *Environmental Politics* 517.

² David Naguib Pellow, *What is Critical Environmental Justice?* (Polity, 2018) positions environmental justice as a critical framework for analysis.

contributes to the law about particular places, agents and spaces. It highlights the legal geography lens that has coloured the research throughout the compilation and writing of the thesis and acknowledges the value of a methodological approach that is deeply contextual, and connected to place and the people who have engaged with the law.

A thesis about environmental law

Whereas others have gone to great lengths to define the field of environmental law,³ in this thesis the environmental laws are those laws raised, challenged and debated that affected the environments and communities of the three case study sites and projects.

Environmental law is vast, and the boundaries of the field are fluid. Each Australian state and territory administers multiple statutes that deal with human relationships with the environment and that purport to conserve or protect the environment. The state of Victoria lists more than 120 pieces of current environment-related legislation under the administration of five ministers with various responsibilities for the conservation or development of the environment and its resources.⁴ The Commonwealth of Australia's principal environmental statute is complex and massive, an anthology of previous laws, dealing with matters as diverse as requiring environmental assessments, providing protection for heritage places, issuing whale-watching permits and managing the trade in endangered species.⁵ The New South Wales Land and Environment Court, and to a lesser degree the specialist environmental courts and tribunals throughout the country that sit lower in their respective court hierarchies, is a constant source of environmental law jurisprudence, incrementally and, at times, unexpectedly, changing the foundations of environmental law.⁶ Any thesis on environmental law will therefore necessarily be selective

³ Todd S Aagaard, 'Environmental law as a legal field: An inquiry in legal taxonomy' (2010) 95 *Cornell Law Review* 221, 262, suggests that one broad definition of environmental law is laws that may affect the natural environment enacted with a conscious consideration of the environment. Elizabeth Fisher et al, 'Maturity and methodology: Starting a debate about environmental law scholarship' (2009) 21 *Journal of Environmental Law* 213, 217, simply define environmental law as those laws tackling environmental problems.

⁴ They are the Ministers for Agriculture; Energy, Environment and Climate Change; Planning; Resources; and Water. See Victoria, Office of the Chief Parliamentary Counsel, *Acts Administrators Report* (20 September 2016).

⁵ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 75, 238, 303BA–303GY, 324JL.

⁶ The New South Wales Land and Environment Court is particularly celebrated for its advancement of the precautionary principle. See, eg, *Leatch v National Parks and Wildlife Service* (1993) 81 LGERA 270 and *Telstra*

and narrowly focused.

Moreover, environmental law is an area of the law that deals with contestation.

Environmental law is the law that deals with problems and decisions that are 'polycentric':⁷ having multiple influences, objectives and expectations, and so requiring and involving governance across scales, values and disciplines.⁸ Part of the function of environmental law and its lawyers is to make sense of these problems and decisions, to apply the depth, breadth and history of legal knowledge.⁹ Australian environmental lawyers should be public lawyers, common lawyers and international lawyers.¹⁰ Often they are cross-disciplinarians, and increasingly they are interdisciplinarians, bringing to bear on legal issues perspectives from affiliated disciplines, including climate science, geology and geography. Today's environmental lawyer confronts changing regulatory models, and should be familiar with social, cultural, scientific and policy developments in the domestic and international spheres on dynamic contemporary environmental issues such as climate change and water scarcity.

This has encouraged me to devise research questions and seek out research methods that blur boundaries of and within law and between the law and other disciplines. It is in this sense that the thesis can be understood as being both critical and blended. It is deliberately not doctrinal: that is, it does not seek to explain the law or its development or delve into

Corporation Ltd v Hornsby Shire Council (2006) 67 NSWLR 256. More recently, it has been at the forefront of recognising that the principles of ecologically sustainable development are part of the public interest. See *Minister for Planning v Walker* (2008) 161 LGERA 423, which, although successfully appealed, remains good law on bounds of the public interest.

⁷ This concept was referred to in *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure* (2013) 194 LGERA 347, where Preston CJ defined a 'polycentric problem' as one that 'involves a complex network of relationships, with interacting points of influence' with decisions about such problems requiring the weighing and balancing of often competing goals. In *Drake-Brockman v Minister for Planning* (2007) 158 LGERA 349, Jagot J described a polycentric decision-making process as one that must deal with 'many, potentially competing, objects'. Similarly, the New South Wales Court of Appeal in *Tubbo Pty Ltd v Minister Administering the Water Management Act 2000* (2008) 302 ALR 299 described a 'polycentric decision-making process' as 'involving interconnected and incommensurable interests in the context of the public interest'.

⁸ Elizabeth Fisher, 'Environmental law as "hot" law' (2013) 25 *Journal of Environmental Law* 347, 354.

⁹ Aagaard, above n 3, 280–2.

¹⁰ Ole W Pedersen, 'The limits of interdisciplinarity and the practice of environmental law scholarship' (2014) 26 *Journal of Environmental Law* 423, 429, notes that 'environmental law necessitates knowledge and understanding of other sub-disciplines within law'.

issues of complexity around the literal application of the law. Rather, its starting point is that this field of law is not fulfilling its environmental purpose. It seeks to understand why it is not achieving its purpose. Are there faults in environmental law or is it the context within which the law operates, or something else entirely, which means the law is failing to respond to environmental dilemmas? And, finally, would a different analytical or principled framework better achieve the goals of environmental law? The complexity explored is with more than the words of law.

The thesis does not start from a position of neutrality, but with a view that the law requires investigation through a critical, questioning position.¹¹ The thesis has contemporary peers in the scholarship emerging in the area of law and geography, an area of inquiry that can be understood as a modern subset of the law and society and critical legal studies movements of past decades,¹² which seeks to understand the law through the space, place and material within which it is encountered.¹³

Given the coverage of environmental law, its position on the borders of multiple disciplines and its dynamism, writing a critique of environmental law is a task beyond any one person or any one piece of work. This is evident in Australia's leading environmental law scholarship, with output overwhelmingly incremental or topic specific.¹⁴ Bates noted in the foreword to his seventh edition of *Environmental Law in Australia* that the state of environmental law is changeable, a 'moving feast'¹⁵ with regulatory and judicial activity in the area in an excited state in the face of ever-present environmental predicaments,¹⁶ novel

¹¹ Daniel M Trubek, 'Where the action is: Critical legal studies and empiricism' (1984) 36 *Stanford Law Review* 575, 578–9.

¹² Mark Tushnet, 'Critical legal studies: A political history' (1991) 100 *Yale Law Journal* 1515, who offers a polemic of the development of the critical legal studies movement. The debates that persisted through the 1980s and 1990s in the US about critical legal studies have largely ended. Mariana Valverde, 'Between a rock and a hard place: Legal studies beyond both disciplinarity and interdisciplinarity' (2014) 1 *Critical Analysis of Law* 51, introduces the notions of critical analysis of law and post-disciplinary law.

¹³ Robyn Bartel et al, 'Legal geography: An Australian perspective' (2013) 51 *Geographical Research* 339.

¹⁴ Gerry Bates, *Environmental Law in Australia* (LexisNexis Butterworths, 9th ed, 2016).

¹⁵ Gerry Bates, *Environmental Law in Australia* (LexisNexis Butterworths, 7th ed, 2010) vii.

¹⁶ Multiple environmental problems across scales were confronted by Preston CJ in *Bulga Milbrodale Progress Association v Minister for Planning and Infrastructure* (2013) 194 LGERA 347.

approaches to subordinate regulation,¹⁷ and parliamentary intransigence to the improvement of environmental statutes.¹⁸

The intention of the thesis is to offer a novel way of thinking about a framework for the analysis of environmental law, and to again highlight the power imbalances, the unfairness and the permitted environmental modification that are central to the current environmental legal system, which while having an (unfulfilled) environmental *purpose* lacks an environmental *ethic*. It will do this by building on the work of social scientists, environmental philosophers and legal geographers, and by offering insights into the Australian experience of the operation of the law from those most closely affected by the laws: principally the antagonists in disputes about the environments of valued locales, expert witnesses and lawyers.

My approach is to use a theoretical framework with a much longer tradition outside legal scholarship and a research methodology that is most commonly used outside legal research, including critical legal scholarship. By extracting themes and ideas from theory, I hope to make the project of the law comprehensible to a wide audience and to challenge the foundations or benefactors of the law.

3.2 Research methods and environmental law

A focus on methodology for environmental law

In keeping with the transdisciplinary nature of this project, the research will employ forms of contextualised legal research methods, critical and socio-legal methods and social science research methods. Each of these will be discussed in this chapter. It is my intention to synthesise these methods rather than deal with each discretely because my approach or

¹⁷ For instance, EPA Victoria's experiment with restorative justice conferencing in the Hallam Road Landfill following interventions by the EPA in 2012 due to odour complaints about the site. Outcomes from the restorative conferencing with the community influenced the terms of Enforceable Undertaking: see EPA Victoria, *Hallam Road Landfill Enforceable Undertaking – Community Information*. Publication No 1503 (2012); EPA Victoria, *Hallam Road Landfill Final Enforceable Undertaking*. Publication No 1489 (2012). See also EPA Victoria, *EPA Environmental Citizenship Strategy*. Publication No 1519 (2013).

¹⁸ For instance, in the wholesale rejection of proposed reforms to Australia's national environmental law as outlined in Allan Hawke, *The Australian Environment Act – Independent Review of the Environment Protection and Biodiversity Conservation Act 1999 – Final Report* (October 2009).

methodology – that is, the doing of the research – did not distinguish between them. Rather, they were all happening all the time.

This chapter responds to the urging of Braverman to reflect on the process of legal geography research, noting that 'one's choice of methodology is hardly marginal or technical'.¹⁹ Instead, it 'is the substrate for establishing our knowledge of the world',²⁰ the craft of the scholar working through an inquiry,²¹ that is often silent or resigned to an annotation in legal scholarship but at the forefront of scholarship of disciplines that environmental law connects with. Moreover, she argues that an engagement with method will 'strengthen our ability to carry out transdisciplinary conversations' of the type I am attempting to undertake.²² For Fisher et al, there is a 'need for environmental lawyers to take a harder look at, and talk more about, what they do, how they do it and why they do it' to address a 'perception of enduring immaturity' within environmental law scholarship.²³

One starting point for an inquiry into method is offered by Martin and Craig, who assert that environmental law does not have its own research methods, with no shared theory or empirical approach.²⁴ Another is that, like other legal scholars, environmental law scholars are not reflective about methodology because it is considered irrelevant:²⁵ that what environmental law scholars do is an exercise of commonly understood practice but a method all the same. A third view is offered by Fisher et al, which is that environmental law scholarship is plagued by poor methodological choices.²⁶ The reality is that environmental

¹⁹ Irus Braverman, 'Who's afraid of methodology? Advocating a methodological turn in legal geography' in Braverman et al (eds), *The Expanding Spaces of Law: A Timely Legal Geography* (Stanford University Press, 2014) 120, 120.

²⁰ Ibid.

²¹ Ibid 121.

²² Ibid 123.

²³ Fisher et al, above n 3, 214.

²⁴ Paul Martin and Donna Craig, 'Accelerating the evolution of environmental law through continuous learning from applied experience' in Paul Martin and Amanda Kennedy (eds), *Implementing Environmental Law* (Edward Elgar, 2015) 27, 36–7.

²⁵ Braverman, above n 19, 122.

²⁶ Fisher et al, above n 3, 227.

law research lies somewhere between these three characterisations about the state of environmental law methodology.

Environmental law scholarship and method is normative and reform based. It 'is more than functional and is not values-free. ... It often takes a stance upon issues of justice that is counter to the views of power holders'.²⁷ At its core, it is directed to achieving an improved environmental welfare, either by demonstrating limitations in the law, celebrating or explaining novel environmental law advents, or advancing a view about how environmental law can improve.²⁸ Environmental law is about the environment, which necessarily brings in the surroundings and places of law into all environmental law research.²⁹ It is research about someplace, some process, some harm. Just as environmental law is argued as being reflexive,³⁰ the method of environmental law scholarship is also reflexive, even if it is not articulated this way.³¹ Environmental law is especially, though not uniquely, multi-jurisdictional,³² transnational and international.³³ It is therefore part of the comparative law project,³⁴ especially when it responds to emerging environmental threats and innovative regulatory approaches: that is, comparisons are often drawn to demonstrate possible legislative or regulatory pathways or to illustrate the lagging approach of particular nations. Environmental laws can be, and have been, analysed using quantitative research methods,³⁵

²⁷ Martin and Craig, above n 24, 35.

²⁸ Fisher et al, above n 3, note that some environmental law scholarship drifts into polemic or lacks an academic engagement with the law in order to advance a normative position.

²⁹ Jane Holder and Donald McGillivray, 'Bringing environmental justice to the centre of environmental law research: Developing a collective case study methodology' in Andreas Philippopoulos-Mihalopoulos and Victoria Brooks (eds), *Research Methods in Environmental Law: A Handbook* (Edward Elgar, 2017) 184, 193–4.

³⁰ Lee Godden, 'Climate change: Limits discourses at the interface of international law and environmental law' in Brad Jessup and Kim Rubenstein (eds), *Environmental Discourses in Public and International Law* (Cambridge University Press, 2012) 263.

³¹ Braverman, above n 19, 122.

³² Fisher et al, above n 3, 215.

³³ Kai Kokko, 'Methods of environmental law in Finland' (2014) 59 *Scandinavian Studies in Law* 285, 308–13.

³⁴ *Ibid*, 310.

³⁵ For instance, the mostly quantitative critique of Australia's *Environment Protection and Biodiversity Conservation Act 1999* (Cth) by Andrew Macintosh: see Andrew Macintosh, 'Why the Environment Protection and Biodiversity Conservation Act's referral, assessment and approval process is failing to achieve its

producing persuasive and compelling findings about the operation and implementation of laws and offering snapshots, or aggregated impressions, of laws. Often this scholarship is prodding the law while simultaneously trying to understand the uncertainty about the problems the law is intended to resolve. In this sense, environmental law scholarship and methods need to be interdisciplinary.³⁶ Interdisciplinarity and empirical inquiry have been encouraged,³⁷ though cautioned.³⁸ There is a renewed interest in constitutionalism within environmental law especially brought about through research connecting human rights law and environmental law: a cross-disciplinary enterprise.³⁹ Scholars are undertaking ethnography,⁴⁰ frame analysis and process tracing,⁴¹ supplementing doctrinal research with interviews, and participatory action research,⁴² and the voices and narratives of the affected.⁴³

The current approach to environmental law methodology is to embrace pluralism, recognising the multifaceted aspects and disciplinary intersections of and with

environmental objectives' (2004) 21 *Environmental and Planning Law Journal* 288; Andrew Macintosh and Debra Wilkinson, 'EPBC Act – The case for reform' (2005) 10 *Australasian Journal of Natural Resources Law and Policy* 139; Andrew Macintosh, 'The Environment Protection and Biodiversity Conservation Act 1999 (Cth): An evaluation of its cost-effectiveness' (2009) 26 *Environmental and Planning Law Journal* 337; Andrew Macintosh, 'The Australian government's environmental impact assessment (EIA) regime: Using surveys to identify proponent views on cost-effectiveness' (2010) 28 *Impact Assessment and Project Appraisal* 175.

³⁶ Martin and Craig, above n 24, 29, argue that 'any scholarly approach to improving environmental law implementation must involve insights from other disciplines, different types of research questions, and different methodologies to those of traditional legal scholarship'.

³⁷ Dave Owen and Caroline Noblet, 'Interdisciplinary research and environmental law' (2014) 41 *Ecology Law Quarterly* 887 note the reservations and rejections of interdisciplinary environmental law scholarship.

³⁸ Pedersen, above n 10, 426. Though Pedersen does note that interdisciplinary research is important for storytelling and for offering perspectives on the law in need of reform, to explain the law to a wider audience.

³⁹ Anna Grear and Louis J Kotzé (eds), *Research Handbook on Human Rights and the Environment* (Edward Elgar, 2015).

⁴⁰ Braverman, above n 19.

⁴¹ Louisa Parks and Elisa Morgera, *An Inter-Disciplinary Methodology for Researching Benefit-Sharing as a Norm Diffusing in Global Environmental Law* (2014, BENELEX Working Paper 2) 24–5.

⁴² *Ibid.*

⁴³ Robyn Bartel, 'Vernacular knowledge and environmental law: Cause and cure for regulatory failure' (2014) 19 *Local Environment* 891.

environmental law.⁴⁴ In the 2015 edition of *Transnational Environmental Law*, the editors celebrated 'progressive approaches towards environmental scholarship',⁴⁵ especially focusing on transnationalism, comparativism, institutionalism and social science methods, including discourse analysis, quantitative case analysis and case study inquiry within the law, in one volume of the journal. It is within the pluralising, interdisciplinary and progressive trend that this thesis is also located.

An explanation of methodology in this thesis

It is important to clarify that what this thesis hopes to offer: experiences, narratives, an abundance of context and a deep understanding about what the law does and achieves for those submerged in it. It is a qualitative approach to research endorsed by scholars of research philosophy and design.⁴⁶

Like others engaged in qualitative research, I reject any hypothesis of quantitative research superiority over it.⁴⁷ The particular advantage of qualitative research is that it can 'describe life-worlds "from the inside out", from the point of view of the people who participate'.⁴⁸ It helps the researcher, and by extension the reader and audience, better understand a phenomenon or incident, and it can lead to the identification of patterns or commonalities.⁴⁹ For law, this is particularly so. Legal developments are usually traced through individual cases, judges are given the task to identify and extrapolate patterns, and

⁴⁴ Martin and Craig, above n 24, 37.

⁴⁵ Thijs Etty et al, 'By all available means: New takes on established principles, actions and institutions to address today's environmental challenges' (2015) 4 *Transnational Environmental Law* 235.

⁴⁶ See, eg, John A Hughes and Wesley W Sharrock, *The Philosophy of Social Research* (Longman, 3rd ed, 1997); John W Creswell, *Qualitative Inquiry and Research Design: Choosing Among Five Traditions* (Sage Publications, 1998); Gary King, Robert O Keohane and Sidney Verba, *Designing Social Inquiry: Scientific Inference in Qualitative Research* (Princeton University Press, 1994) 14; Andrew Bennett and Colin Elman, 'Qualitative research: Recent developments in case study methods' (2006) 9 *Annual Review of Political Science* 455.

⁴⁷ See the contributions to Henry Brady and David Collier (eds), *Rethinking Social Inquiry: Diverse Tools, Shared Standards* (Rowman & Littlefield Publishers, 2nd ed, 2010), in particular chs 1 and 2 by the editors together with Jason Seawright.

⁴⁸ Uwe Flick, Ernst von Kardorff and Ines Steinke, 'What is qualitative research? An introduction to the field' tr Bryan Jenner in Uwe Flick, Ernst von Kardorff and Ines Steinke (eds), *A Companion to Qualitative Research* (Sage, 2004) 3.

⁴⁹ Ibid.

parliaments are responsible for reorientating such developments or filling perceived gaps drawn from common experiences. Qualitative research offers us a window into the lived experience – an observation point to see the ups and the downs and the effect of the legal system on people and community. It bares the power and powerlessness of the law in a way that reading a judgment, a case note, a statute or a doctrinal textbook does not.

My research questions are laid out in chapter 1. By way of reminder, those questions focus on the following: is there a narrative or discourse of environmental justice in Australian environmental law? In practice and outcome are Australian laws environmentally just? How would environmental laws operate, what would they look like, how might cases be treated and concluded, if there existed an institutionalised pursuit of environmental justice ideals?

The research questions could be tackled by reviewing environmental laws and court decisions and analysing them to identify the presence or absence of a doctrine of environmental justice or, in a more nuanced manner (in light of the ecologically sustainable development paradigm of Australian environmental laws), a 'just sustainability' principle. The question of whether our laws are environmentally just could alternatively be answered within a philosophical or ethical framework and the foreshadowing of a future regime could build on the findings from both of these inquiries. This thesis will do these things; it is arguably impossible not to in a thesis that is engaged in the law and pondering about theory. The goals (the 'what') of the research, however, are greater. It seeks to colour and exemplify the doctrinal and theoretical discussions with empirical findings. The nature of the research questions points the research in this direction. Detailed case investigations and story gathering through interviews and materials from those people involved in cases will offer a richness of perspectives (the 'how' of the research). Consequently, there will be a more robust discursive and narrative analysis, a less legalistic evaluation of the justness of laws, and a contextual setting within which to draw out conclusions about the fairness of processes and outcomes and to recast environmental laws. It shares similarities with the work of Pellow in *Garbage Wars*⁵⁰ and Sze in *Noxious New York*:⁵¹ two monographs that investigate and document environmental racism and justice discourses through case studies

⁵⁰ David Naguib Pellow, *Garbage Wars: The Struggle for Environmental Justice in Chicago* (MIT Press, 2004).

⁵¹ Julie Sze, *Noxious New York: The Racial Politics of Urban Health and Environmental Justice* (MIT Press, 2006).

and that depend greatly on determining the social, political and historical contexts and processes of the places within which the disputes arose.⁵² Sze argued that her work documents and details environmental justice campaigns as a way to understand them and the state of social, political and cultural structures.⁵³

This approach responds to the caution of King et al not to allow theory and empirical inquiry to 'exist in isolation' instead to use empirics 'to evaluate theories and learn about the world'.⁵⁴ In many ways, however, the nature, objectives and approach of the research will not lead to a right or wrong answer. That is not so much the point of it. The point is whether it is the right approach to challenge as well as answer the questions I have, particularly whether environmental laws are directed at justice, or if they present merely a veneer of concern for the interests of the public, they lack an environmental ethic and that they can be, and often are, used against, not for, the environment. In fact, my conversations with the actors in environmental conflicts have challenged some of the assumptions that I held about what people expect of environmental law or how they would prefer environmental laws to operate.

I have opted to use a case study approach, a common method in environmental research,⁵⁵ supported by documentary and contextual analysis, and narratives based on interviews, as my research methods.⁵⁶ My three case studies have been introduced in chapter 1. I researched them successively. The first case study I completed, during 2008 and 2009, is the Victorian case study of the Port Phillip dredging: an environmental conflict featuring the Port of Melbourne Corporation and the Blue Wedges Coalition that involved Victorian and

⁵² Bennett and Elham, above n 46, 459, argue that an historical perspective is important. The case study must start at a moment that ensures the origins of the case are explained.

⁵³ Sze, above n 51, 6.

⁵⁴ Gary King, Robert Keohane and Sidney Verba, 'The importance of research design in political science' (1995) 89(2) *American Political Science Review* 475, 476.

⁵⁵ Holder and McGillivray, above n 29, 193.

⁵⁶ The 48 interviews were carried out in accordance with ethics approval (ANU Human Ethics Protocol number 2008/475 'Environmental Justice in Australian Environmental Laws'), with written consent given by the interviewees identified in this thesis to be so identified. All interviewees were given the opportunity to review their attributions and how they are identified.

Commonwealth environmental assessment laws. The second case study, researched during 2009 and 2010, is the case study situated in Tasmania of the logging of the Wielangta Forest, a conflict that reached national prominence because it was pursued in the federal courts by Australian Greens Senator Robert Brown against Forestry Tasmania. The third case study, researched in 2010 and 2011, was a more local conflict about a landfill and recycling facility in rural NSW in the town of Molong, close to the city of Orange. This case concerned NSW land use planning laws, encountered the state's significant projects laws, and was the subject of proceedings before the Land and Environment Court, Australia's only superior court dedicated to environmental matters. They are cases that help 'show the reality [of the law] and to evaluate it in a critical way'.⁵⁷

I will discuss the rationale for choosing these cases, below. I decided, given the bounds of PhD research, that three case studies was an appropriate number. More empirical work was not needed because it would not have suited research that is about the nature of things rather than the number of things.⁵⁸ The thesis is not only about objective 'facts'; rather, it contains stories and ideas about the way things are and how they should not be. While the thesis was inspired by my hypotheses, the research was not about proving or disproving them, but exploring explanations for the state of Australia's environmental laws. It involves 'process tracing' the cases and it falls more into the 'causes-of-effects' case study template.⁵⁹ The thesis does not set out to be objective to the exclusion of subjective views,⁶⁰ because it is these views, collected as narratives using semi-structured interviews,⁶¹ that in large part aid in understanding experiences with, and failures of, the law; and it is these views that uncover the values driving human behaviour with respect to the environment within the law. These views are important to environmental law and its scholarship because is normative. It is not values neutral.

⁵⁷ Kokko, above n 33.

⁵⁸ Hughes and Sharrock, above n 46.

⁵⁹ Bennett and Elman, above n 46, 458. Bennett and Elman contrast this template with the effects-of-causes template that is more commonly pursued by quantitative researchers.

⁶⁰ Hughes and Sharrock, above n 58.

⁶¹ Flick, von Kardorff and Steinke above n 48, 6.

3.3 Case study approach and theory

From legal cases to case studies

So much of our understanding about environmental law is developed through cases. The common law method has dominated understandings of law and approaches to legal research.⁶² Historic torts, such as those that gave rise to an action for the escape of pollution⁶³ or the creation of a private nuisance,⁶⁴ originated in the common law and developed through case law. Modern environmental legislation is drafted ambiguously, framed within vague but agreeable objectives such as sustainable development and precaution, but lacking definitions of key terms such as 'significant impact'⁶⁵ and 'public interest'.⁶⁶ It is the courts through cases that define and apply these terms – if and when disputes get brought before them. Of course, so many disputes about the environment do not reach the judiciary – either by design or circumstance they do not become legal 'cases'. Parliaments routinely exclude avenues for court intervention in environmental laws, while public interest environmental litigation can typically only be pursued if pro bono support can be found to run cases. When cases do reach the courts, they offer rich data and stories that, if captured, provide deep and personal insights into human experience with the environmental law and process. Lawyers seldom explore this data, presumably considering it the domain of sociologists or anthropologists. Rather, when presented with a concluded case, lawyers rarely see their role as looking beyond the text of the judgment and the legal framework within which the dispute was set. Lawyers and legal academics (myself

⁶² David Sugarman, 'Legal theory, the common law mind and the making of the textbook tradition' in William Twining (ed), *Legal Theory and Common Law* (Blackwell, 1986) 26.

⁶³ *Rylands v Fletcher* (1868) LR 3 HL 330 ('*Rylands v Fletcher*').

⁶⁴ See *Cambridge Water Co v Eastern Counties Leather* [1994] 2 AC 264. In this case, the history of the doctrine of private nuisance is chartered and the doctrine contrasted with the principle arising from the decision in *Rylands v Fletcher*, *ibid*.

⁶⁵ This term is not defined in the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) despite being critical to its operation.

⁶⁶ *Environmental Planning and Assessment Act 1979* (NSW). The public interest has been considered a mandatory consideration for decisions made under the Act (s 79C(1)(e)): see *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256, 268, para [123]. In *BGP Properties Pty Ltd v Lake Macquarie City Council* (2004) 138 LGERA 237, McClellan J noted that it is in the public interest to have regard to the purpose of legislation; and hence consideration of ecological sustainable development, precaution and intergenerational equity were considered to be in the public interest.

sometimes included) analyse the outcome, foreshadow what might be the wider consequences of a decision and, where dissatisfied with the outcome, offer their views on the ways that the law can be changed.⁶⁷

This thesis is designed to capture those stories ordinarily missed by lawyers and to reflect critically on the experiences members of our society have with environmental laws. Its purpose is to align the law of the academy with the real, lived world of the law.⁶⁸ It is an approach that some environmental law academics take; whose thinking about the law moves beyond judgments and enquires into the contexts and politics of the making, experience and interpretation of the law.⁶⁹ It is also the approach encouraged by law reformists.⁷⁰ The feature of the thesis is three disputes that reached the courts. They will be analysed not simply in the legal tradition, but also as cases in social science.

In law, a 'case' is the legal judgment. Its extent is how it is framed and discussed by a judge. It starts with the first day of hearings and ends with the publication of the judge's finding. By contrast, the social science literature recognises that the case study is a method as well as a subject; it is a process of inquiry as well as a product of inquiry,⁷¹ insofar as a case study cannot be fully defined until research is well under way. A social science case study of law could entail researching statutes, parliamentary or deliberative decision-making processes that do not lead to court proceedings or a judgment. The 'case' is a happening, an event, a

⁶⁷ See, eg, Donald R Rothwell and Brad Jessup, 'The limits of the Great Barrier Reef Marine Park: Defining bays and redefining regulatory control' (2009) 37 *Federal Law Review* 71.

⁶⁸ Sugarman, above n 62.

⁶⁹ Alexander Gillespie, 'Transparency in international environmental law: A case study of the International Whaling Commission' (2001–2002) 14 *Georgetown Environmental Law Review* 333; Neil Gunningham, 'Social license and environmental protection: Why businesses go beyond compliance' (2004) 29 *Law & Society Inquiry* 307; Daniel A Farber, 'Taking slippage seriously: Noncompliance and creative compliance in environmental law' (1999) 23 *Harvard Environmental Law Review* 297. This is especially true of international environmental law: see, eg, Jutta Brunnée, 'COPing with consent: Law-making under multilateral environmental agreements' (2002) 15 *Leiden Journal of International Law* 1.

⁷⁰ Terry Hutchinson, 'The doctrinal method: Incorporating interdisciplinary methods in reforming the law' (2015) 8(3) *Eramus Law Review* 130.

⁷¹ Robert E Stake, 'Case studies' in Norman K Denzin and Yvonna S Lincoln (eds), *Strategies of Qualitative Inquiry* (Sage, 2nd ed, 2003) 86.

controversy. A case study also typically 'entail[s] multiple methods',⁷² as it has in this research, which has included textual, contextual and archival and historical analysis, interviews and ethnographic inquiries. If the case study is used to inquire into a society then it requires a contextual and historical review.⁷³ The research cannot begin with the assumption that nothing preceded the case in review. The starting point for the case will typically be hard to pin down. So, for instance, in this thesis it was important to review the Ports Strategic Study and the efforts at environmental assessment reform in Victoria, as well as the history of dredging in Port Phillip – events that predated the proposal to deepen the shipping channels. It was also important to revisit the Regional Forest Agreement between Tasmania and the Commonwealth, and the history of logging and land reservation in the Wielangta Forest region, in order to understand the case that, for convenience, can be understood to have begun with the proposal to log two forest coupes, but symbolised and meant so much more to both parties. Finally, in order to understand the relationship between Orange and Molong in their landfill and recycling centre dispute, it was important to reflect on the history of development of the two historically very similar villages into a provincial city and small country town, respectively.

The goals of case study research

In many ways, the case study represents a means of either compartmentalising or coordinating the research effort or providing a type of vestibule within which to undertake research – confined, enclosed and safe, from which to look forward or into the subject matter while remaining still somewhat on the outside where the broader picture or message is to be found. It is a kind of research that does not defer to the words of judges⁷⁴ and it seeks to broaden the voices heard within a critique of the law.⁷⁵

Case study research is directed towards developing as full an understanding of the

⁷² Catherine Marshall and Gretchen B Rossman, *Designing Qualitative Research* (Sage, 4th ed, 2006) 56.

⁷³ *Ibid* 107.

⁷⁴ Sugarman, above n 62.

⁷⁵ Susan S Sibley and Austin Sarat, 'Critical traditions in law and society research' (1987) 21 *Law & Society Review* 165.

happening, event or controversy as possible.⁷⁶ Unlike the adversarial approach taken by the Australian judicial system to resolving disputes, it is investigative and inquisitorial. In this respect it has particular value, because disputes in court are narrowly presented and largely without context. Case study research is also typically part-analytical,⁷⁷ particularly because it evaluates happenings, and part-narrative,⁷⁸ especially in that each case will have a story to be told. As noted above, researchers may employ additional and various techniques to achieve this purpose of full understanding.

The case study findings are valuable even if only to understand the cases in and of themselves⁷⁹ and to present the stories within the case. In their legal research, Parks and Morgera proposed choosing a small number of cases with 'thick and detailed data'⁸⁰ to understand how laws developed in context 'without necessarily making claims of generalization';⁸¹ however, so much more can be made of case studies. The method is an appropriate means to collect data on which broader findings can be based. The instrumental case study, for instance, can give insight into a particular theory or issue. As Flyvbjerg has forcefully argued, it is a misunderstanding that one cannot draw general conclusions even from a single case study.⁸² Deep and detailed understanding is often

⁷⁶ Keith F Punch, *Introduction to Social Research: Quantitative and Qualitative Approaches* (Sage, 2nd ed, 2005) 144 notes that 'the case study aims to understand the case in depth, and in its natural setting, recognizing its complexity and its context'.

⁷⁷ Alexander L George and Andrew Bennett, *Case Studies and Theory Development in the Social Sciences* (MIT Press, 2005) 205–11.

⁷⁸ George and Bennett, *ibid*, describe the case study as a 'post-modern narrative'. Narratives are interspersed with other methods and forms of analysis to explain a chaotic policy setting, as distinct from their traditional use in social studies to explain policy development over an elongated period of stability: see Michael Howlett and Jeremy Rayner, 'Understanding the historical turn in the policy sciences: A critique of stochastic, narrative, path dependency and process-sequencing models of policy-making over time' (2006) 39 *Policy Sciences* 1.

⁷⁹ Punch, above n 76.

⁸⁰ Elisa Morgera and Louisa Parks, *An Inter-Disciplinary Methodology for Researching Benefit-Sharing as a Norm Diffusing in Global Environmental Law* (Research Paper No 2014/42, BENELEX Working Paper 2, Edinburgh School of Law, University of Edinburgh, 14 November 2014) 20.

⁸¹ *Ibid* 22.

⁸² Bent Flyvbjerg, 'Five misunderstandings about case-study research' (2006) 12 *Qualitative Inquiry* 219 ('*Five Misunderstandings*'). Flyvbjerg's contribution to social science methodology has not been universally endorsed. For instance, it is criticised in David D Laitin, 'The Perestroikan challenge to social science' (2003) 31 *Politics Society* 163. A vigorous defence is offered in Bent Flyvbjerg, 'A Perestroikan straw man answers back:

gained from intimate knowledge on a few matters rather than competence on wider occurrences or theories. The case study is not about proof but understanding or learning.⁸³ In his own work,⁸⁴ Flyvbjerg showed how a single case study investigation on the planning process for a bus depot could offer generalised insights, just as a scientific experiment can be used to draw conclusions about the way things are.⁸⁵ The collective case study approach provides even greater scope to manifest commonality, to investigate a phenomenon or general condition among a small number of cases that share a likeness.⁸⁶

George and Bennett argue that 'within-case analysis and cross-case comparisons' of a small number of cases offer the 'strongest means of drawing inferences from cases'.⁸⁷ They make the point that there is much worth in few cases. This is particularly evident in the work done in New York by Sze,⁸⁸ mentioned above. It may be the historical explanations offered by the case analysis, the new connections identified between cases or with the cases, and other research findings that challenge current perceptions, theories or viewpoints.⁸⁹ Understanding few cases in detail offers a foundation for theorising about a still larger collection of cases.⁹⁰

I intend to use the three case studies both instrumentally and collectively as explained above to draw out experiences and offer theoretical insights. I will use the case studies to look for similarities and differences within and between specific Australian environmental

David Laitin and phronetic political science' (2004) 32 *Politics Society* 389.

⁸³ Flyvbjerg, *Five Misunderstandings*, above n 82, 224.

⁸⁴ Bent Flyvbjerg, *Rationality and Power: Democracy in Practice* (University of Chicago Press, 1998).

⁸⁵ Flyvbjerg, *Five Misunderstandings*, above n 82.

⁸⁶ Stake, above n 71.

⁸⁷ George and Bennett, above n 77, 18.

⁸⁸ Sze, above n 51.

⁸⁹ George and Bennett, above n 77, 123–4.

⁹⁰ Stake, above n 71, 138.

law regimes.⁹¹

I will use the cases collectively and as a single case study of Australia to investigate the system of environmental law, and offer insights, not only on Australian laws but on the state of environmental laws in context.⁹² That context includes the fact that Australia is one of the wealthiest places in the world where environmental knowledge is substantial, strategies to alleviate environmental harm acknowledged and available, but where motivation to prioritise environmental protection over development is lacking.⁹³

Theory in case studies

The purpose of using a theory is to bring the cases together, to make connections, to see them as having common features, and to apply a consistent form of analysis to the cases.⁹⁴ By using a single theory, the analysis also highlights differences in cases and can aid in forming views about the applicability of the theory.⁹⁵ In this respect, I am using the case study technique to ‘theory test’, to assess the scope of validity and application of theory.⁹⁶ I am not explicitly employing grounded theory or adaptive theory techniques: that is, I am not deliberately subjecting a theory to revision or, as Gross⁹⁷ did in her work analysing the justice perspectives of communities confronting contentious development and

⁹¹ The legal tradition of comparison is to seek out and explain similarity and, to a lesser extent, differences. This thesis is not in that tradition of legal comparison. It is not, for instance, using legal analysis to understand culture or to offer a basis for legal pluralism: see, eg, Roger Cotterrell, ‘Comparative law and legal culture’ in Reinhard Zimmermann and Mathias Reiman (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2008) 709.

⁹² Holder and Donald McGillivray, above n 29, 195 claim that ‘the main aim of using collective case studies is to shed light on the context and complex features of a particular phenomenon from a variety of perspectives’.

⁹³ The Australian Government’s efforts to satisfy irrigators and environmentalists in the Murray–Darling Basin is one example: see, eg, James Massola, ‘Water minister Tony Burke says the draft Murray–Darling plan was the best compromise’, *The Australian* (28 November 2011).

⁹⁴ George and Bennett, above n 77, 179.

⁹⁵ Joachim Blatter and Markus Haverland, *Designing Case Studies: Explanatory Approaches in Small-N Research* (Palgrave Macmillan UK, 2012) 175.

⁹⁶ *Ibid* 75.

⁹⁷ Catherine Gross, ‘Community perspectives of wind energy in Australia: The application of a justice and community fairness framework to increase social acceptance’ (2007) 35 *Energy Policy* 2727; Catherine Gross, ‘A measure of fairness: An investigative framework to explore perceptions of fairness and justice in a real-life social conflict’ (2008) 15 *Human Ecology Review* 130.

environmental policy, using one theory and expanding to an untested circumstance. Rather, I am primarily using theory as a critical tool. I am asking whether the outcomes of, and experiences with, cases might be different if an environmental justice framework did exist. In some respects, this is more than testing a theory. I am using case studies normatively⁹⁸ and critically.⁹⁹ I am asking about and analysing values to understand the ways things are.¹⁰⁰ I am asking: how would that theory change the law? Or: is there a theory that can be developed particularly for environmental law? This task does not fit neatly into the theory-testing case categories¹⁰¹ because it is taking a theory developed outside the law and inquiring into whether it can be adapted into the law, and how that theory might need to change to reflect the difference circumstances, approaches and traditions of the law.

3.4 Interviews and information sources

Interview data

The techniques or materials used in the research differed from case study to case study, depending on the availability of materials and the approaches that would best fulfil the goal of a full social and legal understanding of the cases. The goal was to collect sufficient data to study the cases broadly – covering the law, context and personality.¹⁰² Obtaining a breadth of data was prioritised over using uniform sources for each case study. Interviews were especially important across the three case studies, however. I conducted 15 interviews for the Port Phillip Channel Deepening Project, 13 for the Wielangta Forest conflict and 20 for the Orange Waste Project. The interviews were semi-structured and ranged in duration from half an hour to many hours over a series of sittings. Other than one, all interviews were conducted in person in a location chosen by the interviewee. The interview subjects were mostly objectors and supporters who contributed to the environmental assessment of the Channel Deepening Project case; mostly lawyers and expert witnesses for the Wielangta

⁹⁸ David Thacher, 'The normative case study' (2006) 111 *American Journal of Sociology* 1631.

⁹⁹ Holder and Donald McGillivray, above n 29, 195 explain that collective case studies can help to understand and critique the law.

¹⁰⁰ Thacher, above n 98.

¹⁰¹ George and Bennett, above n 77, 159.

¹⁰² Morgera and Parks, above n 80, 20.

case; and, for the Orange Waste Project case, included a mix of people from both of these groups as well as a number of government officials. The differences in actors can be explained by the nature of the environmental or planning process the projects were subject to: the Channel Deepening Project was assessed over months in two environmental assessment panels before venturing to court; the Wielangta Forest conflict was mostly confined to the courts; and the Orange Waste Project processes saw the debate move from court to assessment hearings to the NSW Department of Planning offices. I identified interviewees generally in advance or based on discussions I had with central figures in the environmental conflicts early in my research. The unavailability of some key protagonists meant that I supplemented interviews with publicly available material from which I could decipher positions, values and perspectives.

There was a dual purpose to some of the interviews. The interviews with those people conventionally understood and presented as experts, both legal and non-legal (for example, scientists and environmental consultants), were an avenue to collect expert opinion, reflection and analysis on the particular case and those cases similar to it, and a means of collecting empirical data insofar as the interviewee was willing to retrace their involvement and offer their impressions of the environmental conflict in which they were involved.¹⁰³ These interviews proved especially useful to pinpoint what the technicians understood and pursued as the most important matters in the dispute. As will be seen in chapter 6, Forestry Tasmania's scientific witnesses were in a unique situation – as experts presented as independent from their employer but at the same time employed to represent the interests of Forestry Tasmania. Among all my interviewees, Forestry Tasmania personnel included some of the most generous people with their time and insights.

By and large, the purpose of the interviews was to allow the interviewees to narrate their experience. A narrative can be powerful and deeply illustrative.¹⁰⁴ Rather than a focus on questions, letting the narrator lead the discussion seeks to find answers to a complex

¹⁰³ A discussion of interview techniques such as those employed in this research is in Christel Hopf, 'Qualitative interviews: An overview' tr Bryan Jenner in Uwe Flick, Ernst von Kardorff and Ines Steinke (eds), *A Companion to Qualitative Research* (Sage, 2004) 203.

¹⁰⁴ Flyvbjerg, *Five Misunderstandings*, above n 82, 240.

problem. When speaking with interviewees, I considered my role was to 'mobilize their memories'.¹⁰⁵ I attempted to maintain a naivety,¹⁰⁶ only offering my own preliminary findings to progress the dialogue. I had a list of leading questions. I asked interviewees about why they got involved in the environmental dispute, how they contributed to the case, about their feelings at key moments and their perceptions of pivotal points. Most interviews were structured chronologically. I invited interviewees to offer comparisons to cases they knew, about past experiences or to how they expected the law and process to work. I encouraged interviewees to reflect on what they saw as fair or unfair. I avoided using the term 'justice', though all the participants knew this was a theoretical framework that I was using to analyse the cases. I listened carefully for a discourse of justice, but did not pursue interviewees when that discourse became apparent. I was particularly conscious not to cross-examine the interviewees. As lawyers know, parties involved in legal disputes are very often aggrieved at not being able to tell their story in court. It appeared that, for many of the protagonist interviewees, the experience of meeting with me was an opportunity to record experiences in their words, on their terms. I was content to facilitate this by offering time and passivity on my part. Some interviewees were guarded and disinclined to share their experiences. On these occasions the interviews became more structured, though questions remained open-ended.

Complementary documentary data

This interview material was interposed and correlated with documentary evidence. I did not attempt to code the interviews.¹⁰⁷ Given the objects of the research generally and the purpose of the interviews especially, I was reluctant to aggregate or analyse the data in this way. In some respects my role resembled that of a judge: to weigh up the spoken word with the documentary evidence; to check accuracy of reflections, some of which may have

¹⁰⁵ Hopf, above n 103, 206.

¹⁰⁶ Harry Hermans, 'Interviewing as an activity' tr Bryan Jenner in Uwe Flick, Ernst von Kardorff and Ines Steinke (eds), *A Companion to Qualitative Research* (Sage, 2004) 209, 213.

¹⁰⁷ In this aspect I disagree with an implication in the suggestion by King, Keohane and Verba, above n 46, 45 that valid conclusions can only be drawn from comparative case studies when standards and procedures are followed that interview data ought be treated as quantitative material.

faded.¹⁰⁸ The interview setting was helpful in this regard because it served a reflective purpose. I spoke with participants within two or three years of the event, whereas the documents I reviewed were all produced contemporaneously. The passage of time and distance from the thrust of the conflict meant that the interviewees were able to better distinguish between the most critical and the more trivial aspects of the case.

The types of documents that I could analyse were dictated by their availability. The submissions and assessments and reports of the inquiry into the Channel Deepening Project were a rich source for that case. I sat in on one day of the hearing presided by North J of the Federal Court.¹⁰⁹ The transcripts and documents, including expert evidence, made available by the Federal Court in Hobart offered a depth of data that I had not expected to be able to access for the Wielangta Forest conflict case and, together with the documents posted on the internet by Senator Brown,¹¹⁰ provided a near-complete record of the trial court case for the dispute. Unfortunately, these types of documents were not available for the Orange Waste Project. The New South Wales Land and Environment Court had returned, rather than retained, most documents on its file. In that case, the local print news media¹¹¹ was a rich source of data, as were the documents prepared for, and submitted to, the Part 3A assessment of the project. What I had achieved was to unearth vast amounts of information.¹¹² The challenge remained to find a fit between this data, the research

¹⁰⁸ Stephan Wolff, 'Analysis of documents and records' tr Bryan Jenner in Uwe Flick, Ernst von Kardorff and Ines Steinke (eds), *A Companion to Qualitative Research* (Sage, 2004) 284.

¹⁰⁹ This hearing culminated in the decision of North J in *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts* (2008) 167 FCR 463. Because I was able to involve myself in this case, at least for part of this case study, I was able to engage in a form of prospective case study analysis, testing my hypothesis in the midst of the case: see, eg, Alex Bitektine, 'Prospective case study design: Qualitative method for deductive theory testing' (2008) 11 *Organizational Research Methods* 160 for a discussion on prospective case studies. It was apparent from this day that North J was frustrated with the case argued by Blue Wedges as well as the strictures of his decision-making function, which is clear in his written judgment: see more in chapter 5.

¹¹⁰ Bob Brown, *Wielangta Forest Landmark Trial* (2005)
<<https://web.archive.org/web/20131126071555/http://www.on-trial.info/>>.

¹¹¹ I am grateful to two members of the Hub Action Group for allowing me to review and scan copies of boxes of many years' worth of newspaper clippings and pamphlets relating to the Orange Waste Project, and to the staff at the *Molong Express* who provided me with copies of otherwise hard-to-find archived editions of that newspaper.

¹¹² King, Keohane and Verba, *Designing Social Inquiry*, above n 46, 4.

questions and the theory that had been chosen to link and analyse the cases.¹¹³ I will return to some of the connecting themes, below.

3.5 Choice of cases

Choosing case studies

Researchers have recognised that one of the most challenging dimensions of case study research is how to choose cases to study. Within the social sciences literature, there are an abundance of bases for making decisions about, and a variety of justifications for particular processes of, case selection. For instance, the choice of cases could be based on their similarity and dissimilarity; even their redundancy and variety.¹¹⁴ Cases can be chosen because they belong to a general 'class'.¹¹⁵

Some scholars are less relaxed than me about the process and criteria for choosing cases. In recent legal scholarship employing case study method, Gellers¹¹⁶ adopted a quantitative approach to case study selection, choosing states to compare according to the degree of values alignment among them. This reflected his goal of comparing different ways of constitutional legal responses in a relatively common contextual setting. King et al argue that selection bias can arise from the choice of cases, and urge choosing case studies on the basis of difference in the independent variable.¹¹⁷ The key independent variables for my case study selection were the subject matter of the laws and the legal jurisdictions of the conflicts. The problem with a more randomised selection of cases is that that is neither satisfying nor appropriate for qualitative research of a small numbers of cases analysed interpretatively.

It is also vital to have some knowledge about the theory and some data before commencing

¹¹³ Ibid 13.

¹¹⁴ Stake, above n 71.

¹¹⁵ George and Bennett, above n 77, 69.

¹¹⁶ Joshua C Gellers, 'Environmental constitutionalism in south Asia: Analyzing the experiences of Nepal and Sri Lanka' (2015) 4 *Transnational Environmental Law* 395.

¹¹⁷ King Keohane and Verba, *Designing Social Inquiry*, above n 46, 127.

research proper¹¹⁸ – in order to devise questions and develop a research strategy. Cases should be chosen because they contribute to the researcher’s research goal. Cases should not be chosen until the researcher knows how and why they are being used. There should be a deliberate, considered and consistent selection process.¹¹⁹ This was so for my research. I spoke to judges, academics and legal practitioners about key cases before starting the research for this thesis. They led me to the three cases, among others that I discounted for reasons of lack of difference, an absence of community narrators or the cases’ age (having decided to research cases that were current or ongoing at the time of my research planning).

In the Australian social-legal environmental field, case selection based on detailed knowledge of laws and cases can be seen in the work of Toyne in *The Reluctant Nation*,¹²⁰ where the cases were those in which the author had acquired knowledge or impressions through his role at the Australian Conservation Foundation. It is also evident in the book *Places Worth Keeping*.¹²¹ In that book, Bonyhady chose cases that were emblematic, especially insofar as they were representative of contemporary limits of the law, and often familiar and contentious. They helped him narrate a generational story – his independent variable being time – on the relationship between law, politics and the environment. The cases dealt with questions of law, were situated in valued environmental places and became highly politicised in their time. So, too, were my three cases.

While it is considered inappropriate to choose cases solely on their interestingness and ease of access to data,¹²² the fact that the cases in this thesis, like most heavily contested environmental legal conflicts, captured community and media attention, was incidental. Cases were chosen because they offered stories and featured prominent community figures or groups around whom a narrative about the law could be told. The point of critical or

¹¹⁸ Ibid 46.

¹¹⁹ Ibid.

¹²⁰ Phillip Toyne, *The Reluctant Nation: Environment, Law, and Politics in Australia* (ABC Books, 1994).

¹²¹ Tim Bonyhady, *Places Worth Keeping: Conservationists, Politics, and Law* (Allen & Unwin, 1993).

¹²² George and Bennett, above n 77, 69.

discursive environmental law scholarship is to make cases interesting, such that they stand for something; they have a legacy. These cases did have a depth of data – but much of it was not simple to access.

The cases were also chosen because they could be considered representative of particular laws in time and were therefore capable of some lessons.¹²³ The cases tell us about planning laws at the height of community disgruntlement with them in NSW, environmental assessment laws at a time when government involvement in them was concerning to the community, and forestry and species protection laws clashing as they have over decades in Australia.

They also invited historical or contextual comparison about the approach to a variety of areas of law. As recognised by Bonyhady,¹²⁴ forestry and the protection of forests from forestry activities, such as in the Wielangta Forest conflict, have been a regularly recurring matter before Australia's environmental courts,¹²⁵ and the environmental issue that triggered the most intense environmental activism of the 2000s,¹²⁶ before the rise of climate activism in Australia. The Orange Waste Project invites insights into the jurisprudence of the NSW Land and Environment Court and the operation and community rejection of the now repealed Part 3A of the *Environmental Planning and Assessment Act 1979* (NSW). Finally, Channel Deepening Project was subject to environmental assessment under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), the law heavily scrutinised by scholars, and this nation's most prominent environmental law.

¹²³ Stake, above n 71.

¹²⁴ Bonyhady, above n 121, x.

¹²⁵ The High Court has resolved questions of law relating to forests: see, eg, *Richardson v Forestry Commission* (1988) 164 CLR 261 and *Queensland v Commonwealth* (1989) 167 CLR 232. The NSW Forestry Commission has been a regular respondent in cases before the NSW Land and Environment Court, particularly on environmental impact assessment matters: see, eg, *Jarasius v Forestry Commission of NSW (No 1)* (1988) 71 LGRA 79. The Victorian Supreme Court has heard cases brought against VicForests for breaches of laws and logging processes: see, eg, *Environment East Gippsland v VicForests* (2010) 30 VR 1.

¹²⁶ See, eg, Greg Buckman, *Tasmania's Wilderness Battles* (Allen & Unwin, 2008). Amanda Lohrey, 'Groundswell: The rise of the Greens' (2002) 8 *Quarterly Essay* 1 demonstrates the contribution of forestry conflicts to the evolution of the Australian Greens political party and movement.

Exploring variations and experiences through case studies

In their book exploring how social (environmental) movements influence national environmental governance and outcomes, Dryzek et al¹²⁷ sought variation in circumstances and outcomes in their case studies.¹²⁸ They acknowledged, however, that in advance of conducting research one cannot be sure that there will be the expected variation in outcomes. In their minds, what was important is that 'one should not pick only cases with similar outcomes'.¹²⁹ For me, the outcome itself is less important than the process that was followed, and the law that was involved. Nonetheless, I looked for cases with different bases for outcomes, even though invariably in environmental law outcomes are generally the same – a controversial project is approved, an aggrieved community is left aggrieved. I also looked for different contexts and subject matter.

I was hopeful of learning that the participants' perspectives of the outcomes of each case were variable: that is, that there was subjective difference in outcomes even if the legal determination of each case may have been similar. In this respect, Tyler¹³⁰ notes a broader shift in research interest from the objective to a more subjective evaluation of experiences with the law and subjective evaluations of fairness and justice. This research is part of this shift of interest.

As explained above, I attempted to choose for difference – on the basis of laws, subject matter, status of the antagonists, expected views about outcomes and outcomes; however, the cases proved to be more alike than I had expected. While the processes followed were very different, the recalled experiences were similar, claims about unfairness had a universality and the trust in the legal system and distrust in the political system was shared. I was aware of each case while they were in train – from news reports, my own involvement

¹²⁷ John Dryzek et al, *Green States and Social Movements: Environmentalism in the United States, United Kingdom, Germany and Norway* (Oxford University Press, 2003).

¹²⁸ George and Bennett, above n 77, 23 counsel against selecting cases based on their particular outcome.

¹²⁹ Ibid 17.

¹³⁰ Tom R Tyler, 'Justice and power in civil dispute processing' in Bryant G Garth and Austin Sarat (eds), *Justice and Power in Sociolegal Studies* (Northwestern University Press, 1998) 309.

or the advice of others to pay attention.¹³¹ For each I had preconceptions, and for each I was surprised.¹³² For instance, I was long certain that the Blue Wedges were destined not to succeed in their opposition because of the strength of commitment of the Victorian government to do the Channel Deepening Project and I expected opposition to dwindle. However, I was surprised by how long the case dragged on and how a disempowered group battled. I was surprised by the initial outcome in the case between Bob Brown and Forestry Tasmania, in particular that Brown's legal team could convince the Federal Court of the environmental impact of the forestry activities and of the inapplicability of the forestry exemption in the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). I also did not expect to hear about the affinity that Forestry Tasmania staff have with the forests they work in. I expected the frustration of the Molong community to the Part 3A process. I expected the opponents to mount a second court challenge, but they did not. This was put in perspective when I learnt about the dramatic changes that had been made to the project by the City of Orange to secure its approval from the New South Wales Minister for Planning.

The contextual influence of the law

Another feature of the legal context is important to highlight at this point. The three case studies researched and analysed in this thesis do not exist in isolation.¹³³ Rather, they are part of a broader jurisprudence that incorporates many more cases, judgments about which have been placed on the public record. They also intersect with matters of environmental politics and policy. Each case contributed to legal change – either explicitly or indirectly. The advantage of law over other social sciences is that many cases are written about.

Dissatisfying as they are for being more technical and confined than inquisitorial and narrative, legal analysis of many cases exists and the three case studies in this thesis are positioned within that contextual analysis. Hence, conclusions or inferences made in this thesis are not simply drawn from the detailed analysis of the case studies, but may also be drawn from, compared with and contrasted to the many other conflicts recorded in

¹³¹ I am particularly grateful to Brian Preston for alerting me to the Orange Waste Project.

¹³² Flyvbjerg, *Five Misunderstandings*, above n 82, 235.

¹³³ King, Keohane and Verba, above n 54.

judgments of the courts of the country and in the words and arguments made by parliamentarians. The prospect for bias and of limitations arising from the selection of three cases is therefore significantly diminished.

3.6 A focus on law in action, place and space

From data and design to a deeper understanding of context

What is described above is the method and process that I undertook to perform the research for this thesis in a way that allowed me to exploit the most useful approaches across part of the social sciences and law. It was the methodological design or the doing of the thesis. What follows, by contrast, is a presentation of two perspectives that I intend to use to understand and explain my data within an environmental justice theory. It is an overview of my methodological thinking for this thesis. Each perspective is a part of the critical scholarship that I was guided by in analysing data and critiquing the secondary materials that I had unearthed. First, a notion of law and place, especially considered through frames of power and justice. Second, a consideration of participant consciousness, especially about the law and place. These perspectives traverse law and are typically used by law and society scholars, but they are not conventional critical legal approaches. While I see them as being methodological, others might consider them theoretical perspectives. I am not concerned about their categorisation, but in recording them for the use they were put in this thesis. This part of this chapter is one of the thesis bridges – it links the discussion and critique of literature about environmental justice in chapter 2 with the case studies presented in chapters 4, 5 and 6. It does this because each perspective is concerned with the experience of a case study and the justness of that experience over time, place and across society.

Above all, this thesis is about the regulation and value of place across space – and the different beliefs about the appropriate level and purpose of legal and governmental intervention across scales (and, in a legal sense, jurisdictions) of the human-affected environment, and how that environment ought to be able to alter or influence the law. It will add to the eclectic collection of works¹³⁴ within the area of legal geography that explore

¹³⁴ See, eg, Nicholas Blomley, David Delaney and Richard T Ford (eds), *The Legal Geographies Reader: Law, Power, and Space* (Blackwell Publishers, 2001).

the contribution of 'law' in defining, producing and normalising places and power and, contemporaneously, the role of society, culture and place in understanding, creating and recasting 'law'; of work that sees law and space as being indivisible,¹³⁵ and of notions of space and power being the common concern of geographers and lawyers.¹³⁶

Case studies in place

Individualised, and typically localised, case studies can tell us much about the law and spatiality of political life within a particular context. The struggles over the direction of public life and the distribution of power is encapsulated in place-based controversy, while the meaning given to, and understanding of, law – and justice – can be appreciated through an inquiry into the controversy over local spaces.¹³⁷ Case studies ground inquiry, they relate people to place and power, and they materialise the law.¹³⁸ This is because in particular places communities are connected with their locale, they have stories about it, histories to reflect on and for its future. The allocation and exercise of power is most apparent to the community.

Place is an especially important concept to this work. Place and sociocultural power are intertwined.¹³⁹ Space is about control and domination. Law sanctions this control by creating spaces and territory, ownership and rights – and embeds power.¹⁴⁰ Places are accompanied by expectations and proprietary notions¹⁴¹ and, so often characterised as being beyond the private, are subject also to legal regimen. It is within these regimes that

¹³⁵ Nicholas K Blomley, *Law, Space, and the Geographies of Power* (Guilford Press, 1994) 37.

¹³⁶ *Ibid* 28.

¹³⁷ *Ibid* 7.

¹³⁸ Robyn Bartel, 'Place-thinking: The hidden geography of environmental law' in Andreas Philippopoulos-Mihalopoulos and Victoria Brooks (eds), *Research Methods in Environmental Law* (Edward Elgar, 2017) 159.

¹³⁹ Tim Cresswell, *In Place/Out of Place: Geography, Ideology, and Transgression* (University of Minnesota Press, 1996) 8.

¹⁴⁰ Franz von Benda-Beckmann, Keebet von Benda-Beckmann and Anne Griffiths, 'Space and legal pluralism: An introduction' in Franz von Benda-Beckmann, Keebet von Benda-Beckmann and Anne Griffiths (eds), *Spatializing Law: An Anthropological Geography of Law in Society* (Ashgate, 2009) 1, 3–5.

¹⁴¹ Tim Cresswell, *Place: A Short Introduction* (Blackwell Publishing, 2004) 11.

'what is right, just and appropriate'¹⁴² for a place is translated into laws. Laws and 'orderings' about places tell us about what sort of a society we are; moreover, what we want to be. Escobar discusses the contests over the meaning of place particularly by government policies.¹⁴³ He notes that 'senses of place have been shown to change with the deterioration of local landscapes following the environmental impact of activities such as mining'.¹⁴⁴ On this theme, in her study Sze¹⁴⁵ analyses how communities in New York 'created a shared sense and place and identity'.

What will be seen in this thesis is that each of the groups opposing development frame the development as not being appropriate nor belonging to the place – as being 'out of place':¹⁴⁶ logging in an important forest habitat, dredging in a multipurpose and recreational bay, siting a landfill on prime agricultural land. Hence, 'place is used in the construction of ideas about who and what belongs where and when'.¹⁴⁷ For instance, in the case studies I explore in this thesis, a long-term forestry reservation becomes a habitat for species, an often-polluted and long-neglected body of water becomes a cherished bay, and land not recently used for farming becomes highly valuable agricultural land.

Routledge introduced the notion of 'terrains of resistance',¹⁴⁸ which exist within places. It is another way to conceptualise a legal, social and political struggle over space. Inquiries into these terrains explore more than a particular social movement and its contribution to a controversy. It includes exploring how groups are formed, their strategy, symbols, practices and networks. It extends to their 'physical expression' – protests, non-cooperation,

¹⁴² Cresswell, above n 139.

¹⁴³ Arturo Escobar, 'Culture sits in places: Reflections on globalism and subaltern strategies of localization' (2001) 20 *Political Geography* 139.

¹⁴⁴ Ibid 148–9.

¹⁴⁵ Sze, above n 51, 2.

¹⁴⁶ Cresswell, above n 139, 10.

¹⁴⁷ Cresswell, above n 141, 13.

¹⁴⁸ Paul Routledge, 'Critical geopolitics and terrains of resistance' (1996) 15 *Political Geography* 509. Routledge's context is very different to my own. His interest was in social movements of the majority world – the often repressed engaged in activities to wrest power from the state.

roadblocks, for example. All of these expressive practices were tried within the case studies that I have researched. The terrains notion accepts that knowledge and power are contested, and the terrain occurs within 'sites of contestation between differing beliefs, values, goals and imaginings'.¹⁴⁹ This is a theme I especially intend to pursue when discussing the conflict over forestry activities in Tasmania – where beliefs about science and ecological value were clearly matters of contestation.

The importance of, and focus on, place is a feature of environmental justice studies and inquiries. Insofar as environmental justice is a critique of maldistribution of harm permitted by law, the connection of law and place is obvious. Bullard and Wright, for instance, write of 'the geography of vulnerability'¹⁵⁰ in their environmental justice analyses. For them, the law creates these vulnerabilities across, or particular to, specific places, but it can also be employed to address them. For example, with respect to the idea that law creates vulnerabilities, in the collection of essays they edited on the effects and aftermath of Hurricane Katrina,¹⁵¹ they show how place and environmental justice are connected and the role the law places in creating (for instance, through zoning and civic building laws), exacerbating (for instance, through a refusal to recognise place as a basis for different beneficial treatment)¹⁵² and entrenching (for instance, in immigration and work requirement enforcement and entitlements, and in the rebuilding priorities and benefactors) this.¹⁵³

¹⁴⁹ Ibid 517.

¹⁵⁰ Robert D Bullard and Beverly Wright, 'Introduction' in Robert D Bullard and Beverly Wright (eds), *Race, Place and Environmental Justice After Hurricane Katrina: Struggles to Reclaim, Rebuild, and Revitalize New Orleans and the Gulf Coast* (Westview Press, 2009) 1, 8.

¹⁵¹ Robert D Bullard and Beverly Wright (eds), *Race, Place and Environmental Justice After Hurricane Katrina: Struggles to Reclaim, Rebuild, and Revitalize New Orleans and the Gulf Coast* (Westview Press, 2009).

¹⁵² See especially Debra Lyn Bassett, 'The overlooked significance of place in law and policy: Lessons from Hurricane Katrina' in Robert D Bullard and Beverly Wright (eds), *Race, Place and Environmental Justice After Hurricane Katrina: Struggles to Reclaim, Rebuild, and Revitalize New Orleans and the Gulf Coast* (Westview Press, 2009) 49, 58.

¹⁵³ See also Patrick Vinck et al, 'Inequalities and prospects: Ethnicity and legal status in the construction labor force after Hurricane Katrina' (2009) 22 *Organization & Environment* 470.

The 'environmental space'¹⁵⁴ is where questions of justice, principally human justice, and sustainability meet. This space is not located but reproducible in every environmental controversy. It might have been conceived as being dephysicalised but can readily be grounded. The space might be a parcel of land, a communal tenure, a park or reserve. It could also be an institutional place or forum – the court room, the parliament or roundtable.

Law as experienced

In light of discussion on the subjectivity of law and justice, it is unsurprising that the thesis also borrows from the legal ethnography tradition¹⁵⁵ and studies of 'law in action'¹⁵⁶ in order to explore connections between people, place, the law and the environment.¹⁵⁷ Continuing the discussion of 'space' and 'place', Merry¹⁵⁸ saw domestic and neighbourhood conflicts as out of place in the courts, drawing analogy with Mary Douglas's classification of dirt as matter out of place.¹⁵⁹ The controversies I investigated were not private matters and the participants had a familiarity with the court system; however, what is similar is that the courts were used strategically and hopefully.¹⁶⁰ Those going to court understood them as being places where their dispute would more likely be successful than in other less formal institutions and practices. The place of the court is of central importance to this thesis. It will be seen that from the moment the controversies entered the court, when the place of the

¹⁵⁴ Julian Agyeman, Robert D Bullard and Bob Evans, 'Joined-up thinking: Bringing together sustainability, environmental justice and equity' in Julian Agyeman, Robert D Bullard and Bob Evans (eds), *Just Sustainabilities: Development in an Unequal World* (MIT Press, 2003) 1, 9.

¹⁵⁵ See, eg, Sally Engle Merry, *Getting Justice and Getting Even: Legal Consciousness Among Working-Class Americans* (University of Chicago Press, 1990); von Benda-Beckmann, von Benda-Beckmann and Griffiths, above n 140.

¹⁵⁶ Bryant G Garth and Austin Sarat, 'Justice and power in law and society research: On the contested careers of core concepts' in Bryant G Garth and Austin Sarat (eds), *Justice and Power in Sociolegal Studies* (Northwestern University Press, 1998) 1, 2.

¹⁵⁷ It is, though, out of its usual law and development setting: see Anne Griffiths, 'Using ethnography as a tool in legal research: An anthropological perspective' in Reza Banakar and Max Travers (eds), *Theory and Method in Socio-Legal Research* (Hart Publishing, 2005) 113.

¹⁵⁸ Merry, above n 155.

¹⁵⁹ Mary Douglas, *Purity and Danger: An Analysis of Concepts of Pollution and Taboo* (Routledge, first published 1966, 2002 ed).

¹⁶⁰ Bob Brown, *Optimism: Reflections on a Life of Action* (Hardie Grant, 2014).

conflict was altered, the power dynamics of each controversy changed. Control was given over to the technicians of the law. From the viewpoint of participants, judges and bureaucrats handle cases differently, with judges seen as being more independent with arguments narrowed into causes of action. This is especially evident in the second Federal Court case involving the Blue Wedges¹⁶¹ and the Full Federal Court case between Bob Brown and Forestry Tasmania.¹⁶²

Merry¹⁶³ explained that her ethnographic approach was to explore legal consciousness: 'the ways people understand and use the law', about how people determine that a problem or a conflict is a legal one.¹⁶⁴ Legal consciousness is also about how the law is experienced in context.¹⁶⁵ In addition, this thesis is concerned with place consciousness – understanding how people conceived the place the subject of the dispute. My inquiry is not simply contemporary and legal, but it invites historical and sociocultural reflections about key figures in the disputes and the spaces over which parties were fighting. It explores the origins of places, the growth of community, the long-held ambition of authorities, and the changing political and regulatory context. The research was 'contextual, dynamic, reflexive' and, recalling the research design with its focus on stories from narratives derived from semi-structured interviews, 'tentative, multi-textured, open-ended and discursive'.¹⁶⁶

I have also attempted to allow the stories of the antagonists to frame the thesis case study chapters. I have drawn on 'everyday evidence' of the experience of environmental law.¹⁶⁷ I have sought to allow personal consciousness to be explained in either their words or a

¹⁶¹ *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts* (2008) 167 FCR 463.

¹⁶² *Forestry Tasmania v Brown* (2007) 167 FCR 34.

¹⁶³ Merry reflects on her method of legal ethnography in an interview contained in Simon Halliday and Patrick Schmidt, *Conducting Law and Society Research: Reflections on Methods and Practices* (Cambridge University Press, 2009) 129.

¹⁶⁴ Merry, above n 155, 37.

¹⁶⁵ Patricia Ewick and Susan S Sibley, *The Common Place of Law: Stories from Everyday Life* (University of Chicago Press, 1998) 35.

¹⁶⁶ John Flood, 'Socio-legal ethnography' in Reza Banakar and Max Travers (eds), *Theory and Method in Socio-Legal Research* (Hart Publishing, 2005) 33, 34.

¹⁶⁷ Holder and Donald McGillivray, above n 29, 186.

framework that they understand. While the work is not participatory, there has been an effort to consider the people I interviewed not as research subjects¹⁶⁸ but as case study storytellers,¹⁶⁹ as contributors to the knowledge produced by this thesis. This is evident in the manner through which I collected their stories, including by conducting the interviews in place, and in their setting, using their words.¹⁷⁰ Consistent with the ethics approval for the thesis, interviewees have been able to choose to be identified by name in the thesis.

3.7 Case study for law

The goal of this chapter was to explain the scholarly purpose of this thesis: that is, to contribute a critical and theoretical perspective to environmental law, and to explain how the analysis integral to that perspective has been structured, the research approached, and data collected and used to evidence the analysis. The use of social science case study methodology, blended with jurisprudential insights, is central to this thesis, which is deliberately qualitative, doctrinal and geographic in its approach.

The conceptual idea for the critique in the thesis can be understood as a concept of geography, and so the overarching contribution of the thesis can be seen as straddling critical environmental law and the emergent sub-discipline of law and geography, especially insofar as the critical perspective extracted from the case study analysis touches on concepts such as place, power and experience. The next three chapters in this thesis analyse three social, political, geographic and legal controversies using the concept of environmental justice.

It is an approach that is replicable and achieves an understanding and a critique of environmental law, and environmental law cases, complementary to, and more holistic than, a conventional legal case analysis. The benefit of this approach is that the law can be analysed from multiple perspectives, the context of the case is demonstrated as being valuable to understanding the responses of community and lawmakers to legal outcomes, and the implications of the law are seen as being experienced or felt.

¹⁶⁸ Morgera and Parks, above n 41, 24–5.

¹⁶⁹ Ewick and Sibley, above n 165, 259.

¹⁷⁰ Bartel, above n 43.

Chapter 4

The Orange Waste Project – A wasted democracy?*

4.1 Introduction

The goals of the chapter

The first case study of this thesis bears the greatest familiarity to the stories regularly explored by environmental justice scholars.¹ Like many projects that are part of the environmental justice movement in Australia and elsewhere, the arguments raised about the siting, assessment and development of the Orange Waste Project reflect those distributive justice claims articulated by early campaigners highlighted in chapter 2. During the project, justice ideals and discourse evolved – like the concept itself – to encompass concerns about participation, politics and process. In this way, the Orange Waste Project reflects the first two stages of the ideation of environmental justice translated into the Australian legal regime. The views of the community on the project and its position in the controversy correspond with the first two aspects of environmental justice drawn from the work of Schlosberg and explained in chapter 2 – those of distribution and participation.

The case study also engages with justice as viewed through a legal geography lens. Scalar justice, including the recognition of the scales of concerns to participants in an environmental dispute, is a key feature of this case study, leading to an argument that distributive environmental justice and participatory environmental justice can be conceived across scales, and laws must acknowledge the scale of concern of those potentially affected by project developments.² The endorsement of the principle of intergenerational equity in

* Parts of this chapter have been published as Brad Jessup, 'Environmental justice as spatial and scalar justice: A regional waste facility or a local rubbish dump out of place?' (2013) 9(2) *McGill International Journal of Sustainable Development Law and Policy* 69.

¹ Christopher Rootes and Liam Leonard, 'Environmental movements and campaigns against waste infrastructure in the United States' (2009) 18 *Environmental Politics* 835 note that opposition to waste facilities was one of the early features of the environmental justice movement in the United States. Robert Bullard, *Dumping in Dixie: Race, Class, and Environmental Quality* (Westview Press, 3rd ed, 2000) 29 notes that the environmental justice movement rose from the 'hostility to facility siting decisions that were seen as unfair, inequitable, and discriminatory toward poor people and people of color'.

² Kristin Shrader-Frechette, *Environmental Justice: Creating Equality, Reclaiming Democracy* (Oxford University Press, 2002) argues on this point that there are 'no morally relevant grounds for arguing that national interests

the decision of the New South Wales Land and Environment Court³ to refuse planning approval for the first iteration and assessment of the project also highlights the relevance of temporality to issues of environmental justice.

Finally, this case study offers an example of the incommensurability of the concepts of environmental sustainability or sustainable development and environmental justice in a manner not unlike the dilemma between the concepts constructed by Dobson⁴ in his work that argues for a preference of sustainability over justice for the environment. The Orange Waste Project was designed and intended to result in less waste and greater recovery of resources, while adopting the most advanced practices in waste management to minimise in-ground waste disposal and associated environmental harms.⁵ It was promoted as an environmentally sustainable project and was acknowledged and endorsed by environmental groups, and the state environmental regulator, for its best practice components.⁶ The EPA explained that the project 'went pear shaped for non-environmental reasons'.⁷

outweigh those of communities' (p 33) and that environmental justice requires an acknowledgement and assessment of local inequality (p 46). See also Leire Urkidi and Mariana Walter, 'Dimensions of environmental justice in anti-gold mining movements in Latin America' (2011) 42 *Geoforum* 683 who argue that a mismatch in scale of action and regulation can lead to environmental injustice.

³ *Hub Action Group v Minister for Planning* (2008) 161 LGERA 136, para [72].

⁴ Andrew Dobson, *Justice and the Environment: Conceptions of Environmental Sustainability and Theories of Distributive Justice* (Oxford University Press, 1998).

⁵ Richard T Drury, 'Moving a mountain: The struggle for environmental justice in southeast Los Angeles' in Clifford Rechtschaffen and Denise Antolini (eds), *Creative Common Law Strategies for Protecting the Environment* (Environmental Law Institute, 2007) 173 notes the difficulty of maintaining objections to waste facilities where the sustainability credentials of a project satisfy mainstream environmental groups.

⁶ Neil Jones and Stephen Nugent, (letter to the editor), 'ECCO Orange clarifies position' *Central Western Daily* (Orange) (28 August 2006); Total Environment Centre, *Cabonne Council Dumps on Orange* (Media Release, 25 November 2009); Lisa Cox, 'Green group recycles its idea on Hub' *Central Western Daily* (Orange) (27 November 2009); Bevan Shields, 'Consultant is no longer Mr Wright' *Central Western Daily* (Orange) (18 June 2008); Interview with Jason Scarborough, New South Wales EPA, 11 August 2011.

⁷ Interview with Jason Scarborough, New South Wales EPA, 11 August 2011. Letter, untitled, from Richard White to Felicity Greenway, 6 March 2009, summarises those 'environmental' matters of interest to the EPA as ground water quality, surface water quality, noise amenity, air quality, threatened species, native vegetation, Aboriginal cultural heritage, waste avoidance and resource recovery, and greenhouse gas emissions.

Instead of seeing incommensurability between sustainability and environmental justice in this chapter, the goal is to suggest how attention to justice can reconceptualise sustainable development for environmental law. The framework principles of environmental law should be altered so that the typically localised concerns about a contentious project are not cast aside in pursuit of a quick, convenient and difficult-to-challenge approval. This chapter will argue that an environmental legal system will not be, cannot be, just – or sustainable – where approval decisions are fast-tracked, and review avenues tightly restricted; nor where those members of the community who are hosting an offensive land use have marginal influence over the project's framework for assessment.⁸

Landfills as places of environmental justice

The Orange Waste Project was, and is on construction, a landfill; the same land use that triggered claims for environmental justice in the American south,⁹ and a land use routinely contentious.¹⁰ As a consequence of the now-built project, the processed waste of the residents of the City of Orange is being trucked about 40 kilometres and disposed underground in the farming district of the town of Molong.

Petts has argued that waste is always an 'equity issue',¹¹ and a matter for geographic

⁸ On this point, Luke Cole and Sheila Foster, *From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement* (NYU Press, 2001), 106 note that 'communities should speak for themselves, that those who must bear the brunt of a decision should have an equal and influential role in making the decision'. Shrader-Frechette, above n 2, 77 also notes that siting decisions can lack participative justice because of the manner of decisions – their criteria, an absence of free and informed consent, a lack of disclosure, and a lack of understanding and voluntariness and competence among the community.

⁹ See, eg, Bullard, above n 1.

¹⁰ Paul Strangio, *No Toxic Dump: A Triumph for Grassroots Democracy and Environmental Justice* (Pluto Press, 2001) reflects on the community opposition to a landfill in Werribee, Australia; Iosif Botetzagias and John Karamichas, 'Grassroots against waste disposal sites in Greece' (2009) 18 *Environmental Politics* 939; Louise Gallagher, Susana Ferreira and Frank Convery, 'Host community attitudes towards solid waste landfill infrastructure: Comprehension before compensation' (2008) 51 *Journal of Environmental Planning and Management* 233; Kin Che Lam and Lai Yan Woo, 'Public perception of locally unwanted facilities in Hong Kong: Implications for conflict resolution' (2009) 14 *Local Environment* 851. Contemporary scholarship, notably from Europe, also focuses on opposition to, and conflict arising from, proposals for waste incineration sites: see, eg, Darren McCauley, 'Wasting energy? Campaigns against waste-to-energy sites in France' (2009) 18 *Environmental Politics* 917; Anna R Davies, 'Incineration politics and the geographies of waste governance: A burning issue for Ireland?' (2005) 23 *Environment and Planning C: Government and Policy* 375.

¹¹ Judith Petts, 'Enhancing environmental equity through decision-making: Learning from waste management' (2005) 10 *Local Environment: The International Journal of Justice and Sustainability* 397.

contestation. Waste management, the process of collecting, diverting and disposing of unwanted material, involves the moving of waste from one place to be processed, stored or dematerialised elsewhere. Tellingly, for the conflict explored in this chapter, Rootes notes that '[t]he modern management of waste, even with newer modular technologies, requires a measure of centralisation of waste treatment such that the few will inevitably play host to the unlovely facilities that treat the waste of the many'.¹² Inequity is often a result and a strategic by-product of the planning processes that support the 'sustainable' management of waste.¹³ Despite the inherent equity issues and differences of harm or impact at play, sustainability assessments of waste projects, including the Orange Waste Project, overlook equity matters largely owing to their light treatment of the social dimensions of sustainability in preference to inquiries into risk and waste reduction.¹⁴ Because of the experience of objection to landfills, Australian law typically constructs avenues to bypass the full exposure of the project to the legal arguments of opposition or to prescribe processes to assure ongoing landfill supply.¹⁵ It is the indifference to difference¹⁶ that inspires the narratives of environmental justice in communities – and that was the story of the Orange Waste Project.

The project was constructed as a battle between a large provincial and historically wealthy city with an increasingly diverse economy and a small country village largely reliant on agriculture. It provides an illustration of a dispute between two communities producing an environmental injustice – not because one community is grossly disadvantaged or historically discriminated against, but because one community is relatively disempowered by law and geography; and disempowered by scale, with its sense and experience of place

¹² Christopher Rootes, 'Environmental movements, waste and waste infrastructure: An introduction' (2009) 18 *Environmental Politics* 817, 832.

¹³ Jeffrey K Seadon, 'Sustainable waste management systems' (2010) 18 *Journal of Cleaner Production* 1639.

¹⁴ Petts, above n 11, 402–3.

¹⁵ *Barro Group Pty Ltd v Brimbank City Council* (2012) 36 VR 381. See especially the engagement with the suite of Victorian policies and processes that produced a list of potential landfill sites that disabled decision-makers from revisiting decisions about the suitability of a landscape for a landfill.

¹⁶ Elisa Arcioni and Glenn Mitchell, 'Environmental justice in Australia: When the RATS became IRATE' (2005) 14 *Environmental Politics* 363, 376.

ignored. It demonstrates how within this controversy, like many others, law and place were connected and cross-referential. The development of the township and city of Molong and Orange respectively have been marked through legal instruments, creating the difference, separation and boundaries that fomented the discord between the opposing parties. The law also specifies regulatory scales – the 'state', 'regional' and 'local' – and then devises regimes for the assessment of projects of each category. It was the shifting of decision-making interest from the local scale to a broader scale that generated deep anger about the project and suspicion about the process for its assessment and ultimate approval.¹⁷ Meanwhile, the agricultural quality of the land, the sense of place, a community charged by dissent, the threat to amenity and the importance of the rural landscape were all geographic facets of the case that the law had to confront.

Chapter overview

This chapter begins with an historical account of the project, its key opponent and the locality of the dispute – including its geographical, physical, economic and social aspects. This is necessarily contextual – it attempts to offer historical, cultural, social, political and environmental insights into the place of conflict. The chapter then explores the legal dimensions of the conflict, framed by the Land and Environment Court's rejection of the project in 2008 and the project's revival under the former Part 3A of the *Environmental Planning and Assessment Act 1979* (NSW).¹⁸ The operation of this contentious part of the Act was to alter the legal and spatial settings of the dispute. It refocused decision-making on a particular geographic scale – the regional scale. Place-based concerns would not halt a project of decreed significance. The decision of the executive branch of the New South Wales government to declare the project of regional importance highlighted how the most powerful legal actors are capable of redefining the space and scale of a project, ensuring its approval. It was this action, and not the distributive unfairness that had triggered the

¹⁷ Christine McIntosh, *Presentation to the Planning Assessment Commission Public Hearing* (8 December 2009).

¹⁸ That part of that Act consolidated immense decision-making power, and often unconstrained discretion, in the Minister and her Department. The decisions made under Part 3A proved extremely difficult to challenge, and the process was shown to be corruptible (see the discussion of the *Gwandalan* case, below n 191). Kristian Ruming, 'Cutting red tape or cutting local capacity? Responses by local government planners to NSW planning changes' (2011) 48 *Australian Planner* 46, 49 records the criticisms of professional planners to the laws. The community criticism was more intense.

community's interest in the project and around which a narrative of justice was constructed, that was the most notable environmental injustice of the project.

4.2 The Orange Waste Project and the site objections

The project conception

The Orange Waste Project had its origins in 1996,¹⁹ when the Orange City Council and Cabonne Council first met to discuss a joint waste project.²⁰ Orange City Council had been searching for a new 'waste solution',²¹ building on its leadership in waste recovery and minimisation,²² and was approached by Cabonne Council to develop a joint project.²³ The former Mayor of Cabonne Council recalls unsuccessfully trying to find a new landfill site for that council since the 1980s,²⁴ with a number of options planned and tried. Directed by the state to work collaboratively with other councils, Cabonne had spoken to 13 nearby municipalities to explore ways to develop a project together.²⁵ Both Orange and Cabonne councils had worked out how much landfill space they had remaining and the figures calculated were sobering. Orange would need more rubbish capacity within two decades and Cabonne even sooner.²⁶ It became obvious that the most efficient, convenient and potentially less contentious option was to work together. After initial inquiries, in 2000 the councils formally decided that they would devise a 'regional' solution to their respective

¹⁹ Orange City Council, (advertisement), 'The Hub: Sorting the facts from the rubbish' *Central Western Daily* (Orange) (15 July 2006) 7.

²⁰ See Orange City Council, *Environmental Impact Statement Hub Regional Resource Reprocessing Facility: Euchareena Road, via Molong* (Corkery & Co, April 2005), section 2, 3.

²¹ Orange City Council, above n 19, 7.

²² Interview with Jason Scarborough, New South Wales EPA, 11 August 2011; Interview with Stephen Sykes, administrator, Orange City Council, 12 January 2011; Interview with Wayne Davis, administrator, Orange City Council, 19 August 2011.

²³ Interview with Stephen Sykes, administrator, Orange City Council, 12 January 2011.

²⁴ John Farr, (letter to the editor) 'Mayor replies to waste facility protesters' *Molong Express* (27 March 2002); Mark Filmer, 'Ratepayers deceived' *Central Western Daily* (Orange) (17 July 2005).

²⁵ Interview with John Farr, former mayor of Cabonne Shire, 12 August 2011.

²⁶ Orange City Council, above n 20, section 2, 3.

problems.²⁷

The 'regional' characterisation of the landfill stuck even after Cabonne Shire walked away from the project when it was rejected by the Land and Environment Court.²⁸ This left Orange City Council on its own to argue that it should be permitted to build a landfill in a neighbouring municipality. The project was ultimately approved because it was a 'regional' project,²⁹ although the fact that the landfill traversed local jurisdictions was, according to one Orange councillor, responsible for '99% of the controversy' that surrounded the project.³⁰

A feasibility study into a 'regional landfill' was initiated, culminating in a 1997 report by the consultant that would prepare the first environmental assessment for the project.³¹ That report, and a series of reports from around that time and that would follow, focused on site constraints, site possibilities, and criteria for a landfill and accompanying waste recycling and composting facility. There were very few details about what the project was or where it would be located. Consultative documents indicate that the priority of the councils was to name and brand the project – setting the parameters for its future assessment – rather than define it, leaving it to each community member's imagination as to what the project entailed. For instance, in a document distributed to households in the two municipalities the councils stated that:

The project will be known as the Reprocessing Hub Resource Farm. The logo graphic on the front of this discussion paper shows visually how our Councils intend to manage waste now

²⁷ Orange City Council and Cabonne Council, *Reprocessing Hub Resource Farm: Part of the NetWaste Group* (2000). Brochure provided to residents in June 2000. See Ian Gosper, (letter to the editor), 'No community meeting on Hub' *Central Western Daily* (Orange) (27 July 2006).

²⁸ *Hub Action Group v Minister for Planning* (2008) 161 LGERA 136.

²⁹ The Council and the Minister for Planning could only use Part 3A of the *Environmental Planning and Assessment Act 1979* (NSW) to shepherd through an approval for the landfill if it was a 'regional' one. If it could use these provisions, then the spaces cultivated by opponents to the project would be displaced.

³⁰ Interview with John Davis, then City of Orange Mayor, 19 August 2011.

³¹ The report, *Regional Landfill Investigations/Feasibility Study*, was prepared by Corkery & Co. See Christine McIntosh, (letter to the editor), 'Questions for Councillor Farr' *Central Western Daily* (Orange) (22 June 2006).

and in the future.³²

The controversy over the siting of the project

The historical record³³ indicates that the councils and its consultants were particularly attuned to the need to site the landfill in an appropriate location having regard to a long list of social, economic and environmental factors. They involved the community in setting and explaining the site selection criteria. Despite this, the councils made decisions that diminished their capacity to ensure that they located the facility on land that would be most appropriate. The councils resolved not to use compulsory acquisition powers to purchase land.³⁴ As a part of their formal joint-venture agreement entered into in March 2000,³⁵ they excluded the entire Orange Local Government Area, deciding that the project would be located only in Cabonne Shire.³⁶ In doing so, they overlooked a principle of environmental justice that waste should be managed as close as possible to the place of its production.³⁷ The councils did not publicly locate any potential sites within a corridor of land identified as being unconstrained³⁸ by factors such as potential for water contamination and potential displacement of mineral interests, yet they had identified three possible sites in private that were not disclosed in order to minimise the creation of diffuse groups of opposition.³⁹ Finally, the process adopted by the councils to identify sites relied on expressions of

³² Orange City Council and Cabonne Council, above n 27.

³³ See Orange City Council, above n 20, section 2, 3–6.

³⁴ Orange City Council, *Summary of the Environmental Impact Statement Hub Regional Resource Reprocessing Facility: Euchareena Road, via Molong* (Corkery & Co, April 2005) 3; Hub Action Group, *History of the Hub Timeline* (March 2008).

³⁵ Orange City Council and Cabonne Council, above n 27. This was provided to residents in June 2000: see Gosper, above n 27.

³⁶ Orange City Council, *Environmental Impact Statement: Hub Regional Resource Reprocessing Facility: Euchareena Road, via Molong* (April 2005, Corkery & Co) section 2, 30.

³⁷ Matt Watson and Harriet Bulkeley, 'Just waste? Municipal waste management and the politics of environmental justice' (2005) 10 *Local Environment: The International Journal of Justice and Sustainability* 411, 416–7.

³⁸ Orange City Council, above n 20, section 2, 5.

³⁹ Interview with Stephen Sykes, administrator, Orange City Council, 12 January 2011.

interest.⁴⁰ The expressions of interest process garnered offers of just two sites from landowners, despite the expectation of many more.⁴¹ One was a site 85 kilometres from Orange and in the far south-west corner of Cabonne Shire, which was quickly rejected on the basis of its distance from the key waste sources.⁴² The other site offered was a property on Euchareena Road in Molong, approximately 40 kilometres from Orange, which was subsequently chosen for the project following an unsophisticated comparative alternatives evaluation,⁴³ but was described by the EPA as 'as good a site as you'd find elsewhere'.⁴⁴ The likely opposition to the site was foreshadowed, with the former Mayor of Cabonne Council privately reflecting 'people will hate this ... they bought a block of land where every [garbage] truck will have to go through [the town centre] of Molong. Orange rubbish is coming to Molong'.⁴⁵

Sometime after June 2001, a decision was made to locate a waste facility at Molong on Euchareena Road, five kilometres north east of the town centre. It is not clear when this occurred. The first environmental impact statement for the project simply notes that, following a decision to proceed with this site, there were lengthy confidential negotiations with the landowner about its purchase.⁴⁶ The purchase of the land occurred in December 2001⁴⁷ and settlement occurred on 31 January 2002.⁴⁸ The community claimed it did not

⁴⁰ Orange City Council and Cabonne Council, (advertisement), 'Site selection criteria: Regional waste management facility' *Central Western Daily* (Orange) (22 February 2001) 14.

⁴¹ Interview with Stephen Sykes, administrator, Orange City Council, 12 January 2011.

⁴² Orange City Council, *EIS Supplement: Hub Regional Resource Reprocessing Facility* (Corkery & Co, September 2007), section 3, 6.

⁴³ Orange City Council, above n 20, section 2, 27–28. For a defence of the process adopted: see Orange City Council, *Hub Regional Resource Reprocessing Facility: Response to Key Issues Raised in Submissions* (Corkery & Co, January 2006), 85.

⁴⁴ Interview with Jason Scarborough, New South Wales EPA, 11 August 2011. This was not a universally shared view, with concerns about the suitability of the site, which was located over a fault line, and the displacement of agricultural land raised by experts: see Interview with David McKenzie, soil scientist and consultant, 19 August 2011.

⁴⁵ Interview with John Farr, former mayor of Cabonne Shire, 12 August 2011.

⁴⁶ Orange City Council, above n 20, section 2, 29.

⁴⁷ Letter from Wayne Davis, Orange City Council to General Manager, Cabonne Council (10 December 2001), titled 'Re: Regional Resource Reprocessing Facility – "The Hub"'.

know of the purchase until advised by the media in February,⁴⁹ and it perceived that the purchase and decision about the location of the tip had been part of a plan hatched in secrecy.⁵⁰ This infuriated a number of Molong landowners, especially those living near the selected site. They were originally viewed as the 'out-of-towners' 'coming in from the paddocks',⁵¹ a mix of new arrivals and long-standing farming families. The opposition spawned what later became known as the Hub Action Group (the project was locally referred to as 'the [Waste] Hub'), the incorporated association whose vocal objection continued until the project received its final approval. It also infused the project with distrust and suspicion about the exercise of discretion from the start.

The then Molong Concerned Landholders Group objected to the state's Independent Commission Against Corruption⁵² and the New South Wales Ombudsman,⁵³ because the site had been purchased from a former councillor and not in accordance with the procedure specified in the councils' consultative newsletters. Material produced by the councils stated that 'the site will be acquired with the community's consent' and that 'site alternatives will be presented for community input'.⁵⁴ This did not happen for commercial reasons.⁵⁵ The objection to the state-level inquiry body was not pursued,⁵⁶ but the failure of the councils to follow the process they said they would, something they later recanted, was a constant source of objection throughout the case. In the Assessment Report of the Project in 2006,

⁴⁸ Orange City Council, above n 20, section 2, 29.

⁴⁹ Letter from Bill Dunlop to General Manager, Orange City Council (3 May 2002) titled 'Proposed tip site on the Euchareena Road, Molong'. The local newspaper first reported the site location in: 'Molong property selected as waste system "Hub"' *Molong Express* (27 February 2002) 1.

⁵⁰ Rod Maxey, (letter to the editor), 'Hub public hearing' *Molong Express* (17 December 2009).

⁵¹ Interview with Paul Mullins, *Molong Express*, 24 February 2011.

⁵² Mark Filmer, 'EIS next step in waste centre plan' *Central Western Daily* (Orange) (21 May 2002).

⁵³ Orange City Council, *Responses to Hub Action Group Submission* (2010), 10.

⁵⁴ Orange City Council and Cabonne Council, above n 27; 'Chance to have a say on site' *Central Western Daily* (Orange) (21 May 2002).

⁵⁵ Interview with Stephen Sykes, administrator, Orange City Council, 11 January 2011 explained the commercial risks of publicising the potential purchase of their only site option.

⁵⁶ Orange City Council, above n 53, 10.

the Department of Planning noted:

In fact, arguments over the choice of site, selection of feasible alternatives, and evaluation of these alternatives tended to dominate the objectors' submissions. In other words, a large proportion of the issues raised in submissions tended to focus on what the proposal was not, rather than on the actual proposal ...⁵⁷

This line of objection was clear from the contributions of commentators to a forum set up even later to elicit community views about the strategy behind the project, which veered into objections about the acquisition of the site:

This issue was badly handled from the start. The site was secretly purchased from a councillor in Cabonne, and there was no community discussion.⁵⁸

This proposal has been a debacle from the start 8 years ago when OCC purchased an unsuitable landfill site without any long-term waste management plan or proper site selection process.⁵⁹

In fact, objections to the site selection process were raised throughout the assessment and were reiterated in the final submissions made by opponents to the Department of Planning in November 2009.⁶⁰ The Hub Action Group stated its belief that 'this proposal inevitably continues to be tainted by the original "consultation" and site acquisition process'.⁶¹ One expert involved in the project reflected that the opposition to the project stemmed from and concerned its siting.⁶²

The focus on process and the siting of the facility was especially understandable in the early instance, because the lack of detail about the project meant there was very little else on

⁵⁷ NSW Government, Department of Planning, *Assessment Report: Proposed Landfill & Regional Resource Reprocessing Facility, Molong* (December 2006) 13.

⁵⁸ See Leeco, 'comment' to Bang the Table forum: *What are Your Views on Orange City Council's Proposal for Waste Management for the Next 40 Years?* (28 May 2009, 3:32pm). This quote has been corrected for typographical errors.

⁵⁹ See iauto, 'comment' to Bang the Table forum: *What are Your Views on Orange City Council's Proposal for Waste Management for the Next 40 Years?* (20 May 2009, 12:35pm).

⁶⁰ Ian Gosper, *Submission to Planning Assessment Commission* (12 November 2009). Botetzagias and Karamichas, above n 10, 941, reflect on research that concludes that opposition to waste facilities is more likely to arise when the siting process is seen as being unfair and inequitable.

⁶¹ Hub Action Group, *Submission to Planning Assessment Commission* (12 November 2009) 10.

⁶² Interview with David Gamble, waste management consultant, 8 June 2011.

which the community could form a judgement about the project. It also fed into conflicting narratives of distributional justice and NIMBYism. The project was at once about Molong being burdened with Orange's waste and about a small segment of a community irrationally opposing a project without regard for its impacts merely owing to its location.⁶³

The changing project and the basis for opposition

The project was defined and refined throughout the assessment process,⁶⁴ which is not atypical for large projects subject to environmental assessments.⁶⁵ By the time the first environmental impact statement was released in April 2005, the project comprised a collection/drop-off point for a variety of wastes – 'conventional' rubbish, recyclables and compostables, including household food and garden waste, and sewerage sludge – a 'resource recovery facility' where compost would be created and sold and recyclables sorted and recycled, and a conventional landfill and associated infrastructure with supporting land-use changes.⁶⁶ All of this infrastructure and activity would occur at the Euchareena Road site in Molong. The project was refined in a supplementary environmental impact statement⁶⁷ in response to directions of the Land and Environment Court when the project approval was appealed. Nevertheless, at that time it remained much the same project.

It was, however, only through the Part 3A process, which will be explained below, that the project changed substantially. The changes were in part offered by the Orange City Council in its third environmental impact assessment, particularly to show how it could mitigate environmental risks to agriculture,⁶⁸ and in part required of it by the Minister for Planning as conditions of approval. The principal change was the relocation of the collection of waste, recyclables and compostables to Orange City's waste facility at Ophir Road in Orange, with

⁶³ Interview with Alison Trowbridge, Hub Action Group, 17 March 2011; Interview with John Davis, then City of Orange Mayor, 19 August 2011.

⁶⁴ *Hub Action Group Inc v Minister for Planning* (2008) 161 LGERA 136, paras [16]-[17].

⁶⁵ *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts* (2008) 165 FCR 211.

⁶⁶ Orange City Council, above n 34.

⁶⁷ Orange City Council, above n 42, section 5.

⁶⁸ Interview with John Davis, then City of Orange Mayor, 19 August 2011.

the sorted waste arriving at Molong in fewer truck movements, the landfill waste baled and wrapped in plastic. The ultimate function of the Molong site would be a rubbish tip – a 'big hole in the ground', as opponents refer to it.⁶⁹

The project did not immediately inspire broad opposition, and there were minimal outspoken voices against the project in Orange.⁷⁰ The initial outrage of the surprise purchase of the block⁷¹ subsided during the early parts of the first environmental assessment. The local newspaper reported a general disinterest from the community at about the time the first environmental assessment was released. Greens councillors of the Orange City Council supported the project. There appeared to be apathy in the media in the early stages, with muted support and minimal critique. A reason for this may have been that the landfill was a sufficient distance from most people in Orange not to inspire objection,⁷² and it was located in a part of the district the people of Orange rarely visit.⁷³ Still, 139 submissions objecting to the project were made with respect to the first environmental assessment.⁷⁴

The central objections to the project were grounded in the planning policies and law that the community believed would determine the project's fate.⁷⁵ There was also a focus on the likely experienced impact of the project, especially the effect of truck movements in town⁷⁶

⁶⁹ Interview with Alison Trowbridge, Hub Action Group, 17 March 2011.

⁷⁰ Interview with Stephen Sykes, administrator, Orange City Council, 12 January 2011.

⁷¹ Alan Dick, 'Molong "outrage" at waste plan' *The Land* (North Richmond, NSW) (15 September 2005) 27.

⁷² Gallagher, Ferreira and Convery, above n 10, explore a distance effect to objection (distance being a proxy for perceptions of environmental risk in locations where people have not experienced living near to a waste facility). For a critique by the media of the muted level of objection: see, eg, 'Examine EIS with equal vigour' *Central Western Daily* (Orange) (4 May 2005); and 'Winning the battle for the Hub' *Central Western Daily* (Orange) (2 August 2005).

⁷³ Interview with Paul Mullins, Molong Express, 24 February 2011.

⁷⁴ NSW Government, Department of Planning, above n 57. See also 'Strong local support for Hub protect group' *Molong and District Advocate* (20 July 2005).

⁷⁵ Hub Action Group Inc, *Submission on Environmental Impact Statement on Proposed Regional Resource Reprocessing Facility DA 95-4-2005-i. Lot 10 DP1034198, Cnr of Euchareena Road and Shades Creek Road, via Molong NSW ("Proposal")* (1 July 2005).

⁷⁶ Interview with Alison Trowbridge, Hub Action Group, 17 March 2011.

– perceived harms that would be experienced by a wider cross section of the Molong community than the farmers who lead the local opposition movement.⁷⁷ The suite of objections ventilated in 2005 persisted throughout the life of the project. The Orange Waste Project was opposed because it was located on the wrong site. It lacked the necessary environmental strategies and planning support, with the *Cabonne Local Environment Plan 1991*⁷⁸ protecting the prime agricultural land of the site from adverse impacts.⁷⁹ There would be a risk to the local apiary business, and particularly to the neighbouring landowner's use of his land for beekeeping, and the local community would suffer amenity impacts, especially from trucks driving to and from the site through Molong's town centre.

Overlaying these objections, however, was a moral objection to the project, encapsulated in the imagery presented to the community by the Hub Action Group. Molong would cease to be a food bowl of the region, instead becoming the dumping ground for the city of Orange.⁸⁰ One place would generate waste, the other receive it and bury it, and suffer lasting local effects. The justice narrative at this stage – of a small town being tarnished as a tip town for the benefit of its more populous neighbour⁸¹ – was articulated in the media and in the sphere of public discussion and vented angrily and hurtfully.⁸²

Opponents asserted that:

[Orange City Council] has no concern for Molong business that may be significantly affected. The applicant has no concern for those residents whose homes and lifestyles will be seriously affected. The applicant is insistent it is right, its offside (Cabonne) hasn't got a

⁷⁷ Interview with Paul Mullins, Molong Express, 24 February 2011.

⁷⁸ Christine McIntosh, (letter to the editor), 'Dumping the facts on Farr' *Central Western Daily* (Orange) (10 September 2005).

⁷⁹ Ross Yelland, (letter to the editor), 'Land statement is rubbish' *Central Western Daily* (Orange) (22 September 2005).

⁸⁰ Hub Action Group Inc, (advertisement), "'The Hub" rubbish dump' *Central Western Daily* (Orange) (16 June 2006) 14.

⁸¹ The narrative was perceived within Orange City Council as 'an ugly monster is out to destroy a community': see interview with Stephen Sykes, administrator, Orange City Council, 12 January 2011.

⁸² Interview with John Davis, then City of Orange Mayor, 19 August 2011.

clue what it [has] got into.⁸³

For landholders in the vicinity there are no apparent benefits and plenty of costs associated with having the Hub nearby.⁸⁴

What really irked people in and around Molong was that their community was being used as a dumping ground for Orange rubbish.⁸⁵

Dumping Orange's waste on Cabonne's prime agricultural land is not the way to go.⁸⁶

Whenever Orange ratepayers are disgruntled, Mayor Davis seems to bend over backwards to be seen to be listening to their concerns. However, because Orange City Council managed to buy a prime block of agricultural real estate 40 kilometres from Orange to dump all of its rubbish, the concerns of those directly affected near, and on route to, the site seem to be of little relevance.⁸⁷

Insofar as the justice discourse referenced the agricultural aspects or quality of Molong and the site it was connected with, the more central and forcefully put argument that the selected site of the landfill was the wrong one for the project.

4.3 Molong and Orange

An historical perspective on difference

How places come to be and how they are viewed are of critical importance to understanding narratives of justice and foundations for senses of injustice. As Sze and London explain, 'a focus on historical research shows that the answers to why environmental inequalities exist depend on the particulars – the place, population, political contexts, and time period'.⁸⁸ For Molong and Orange, the history records do not show a relationship of conflict or opposition

⁸³ Jeff Rogers, (letter to the editor), 'Councils put on notice over Hub' *Central Western Daily* (Orange) (7 December 2007).

⁸⁴ 'Winning the battle for the Hub', *Central Western Daily* (Orange) (2 August 2005). Those local impacts included land use changes, odour, dust and truck movements.

⁸⁵ Nick Redmond, 'Anger at Hub meeting' *Central Western Daily* (Orange) (8 January 2007).

⁸⁶ Greg McFarland, 'Hub court challenge' *Central Western Daily* (Orange) (16 February 2007). Quoting Christine McIntosh, Hub Action Group.

⁸⁷ Christine McIntosh, (letter to the editor), 'Hub appeal no surprise' *Central Western Daily* (Orange) (23 February 2007).

⁸⁸ Julie Sze and Jonathan K London, 'Environmental justice at the crossroads' (2008) 2 *Sociology Compass* 1331, 1341.

beyond the sporting field⁸⁹ but of increasing separation and difference in views about the relevance of each place relative to the other. Orange has come to be seen as the central place; Molong, the peripheral place.

When Australia's first federal parliament was searching for a capital city, Orange offered itself as a candidate. Not content with being rejected the first time, the people of Orange tried again.⁹⁰ Despite being overlooked for the capital twice, the townsfolk of Orange had high opinions of their home, proclaiming:

the healthiness of the district is proverbial, and medical gentlemen highly recommend it as a health resort. The locally-born persons are famous for longevity. Orange is frequently quoted as one of the healthiest places in Australia all the year round.⁹¹

This was an attitude held by their neighbours in Molong. Just a decade after the exclamations of the Orange Federal Capital League, Fitzpatrick, the then state Member of Parliament for the area,⁹² wrote of 'Molong, little Molong dumped down in a fertile spot two hundred miles and more from the site of Australia's first settlement'.⁹³ According to Fitzpatrick, Molong's two dominant characteristics were the fertility of its soil and its distance from Sydney. These two characteristics proved to be pivotal to the legal dispute arising almost 100 years later. Molong residents wanted to protect its fertile land from sterilisation, but its distance from the capital increased its difficulty in swaying the opinions of state politicians and administrators.

Molong has never shared the prominence and platitudes received by Orange; however, it

⁸⁹ Interview with Rozzie Smith, Molong Express, 18 March 2011.

⁹⁰ The *Seat of Government Act 1908* (Cth) named Canberra as Australia's capital city. Section 2 of that Act repealed the *Seat of Government Act 1904* (Cth), which had proclaimed Dalgety, New South Wales, as Australia's future capital.

⁹¹ The Orange Federal Capital League, *Canobolas: The Ideal Site for the Federal Capital* (1902) 3. The reference to the 'district' refers to the immediate surrounds of the then township of Orange and the area immediately (approximately 8 kilometres) to its south west known as Canobolas.

⁹² Jill Waterhouse, 'Fitzpatrick, John Charles Lucas (1862–1932)' *Australian Dictionary of Biography* (National Centre of Biography, ANU, 1981). Fitzpatrick, a former journalist and newspaper owner, was a parliamentary representative for the district over a period of 35 years. He owned the *Molong Argus* for two years and, during his time in parliament, 'compiled several books of reminiscences', including about Molong.

⁹³ J C L Fitzpatrick, *The Good Old Days of Molong* (The Cumberland Argus, 1913) 13.

has always been a separate place, with its own identity and legal structures. The discovery of copper in Molong in the mid-1840s⁹⁴ proved to be less profitable and iconic than the discovery of gold in Orange just a few years later.⁹⁵ The fact that the Packham pear was first propagated in Molong and the town's first vineyard dates to the 1910s⁹⁶ is overlooked when Orange is presented as the district's wine and food hub.⁹⁷ While in many respects Molong is a place that has existed in the shadows of the neighbouring city of Orange, it has only been since the end of the Second World War that the differences between the two places have become pronounced.⁹⁸ Europeans arrived in the Wiradjuri⁹⁹ country, which spanned both towns and beyond, in the early 1800s, with records of cattle being run in Molong in 1819, residents arriving in 1830s¹⁰⁰ and the displacement of the local Aborigines shortly after.¹⁰¹ Both towns were officially recognised as separate villages in the 1840s¹⁰² and were being administered by their own local councils by the end of the 1870s.¹⁰³ The local railway arrived in Orange in 1877 and then Molong in 1885¹⁰⁴ to transport the produce, particularly orchard

⁹⁴ J Kay Donald, *Exploring the Golden West* (Kangaroo Press, 1991); D C Goldney and I J S Bowie, *The National Trust of Australia (NSW) Scenic and Scientific Survey of the Central Western Region – A Report to the Australian Heritage Commission Vol 1* (1987).

⁹⁵ Goldney and Bowie, above n 94.

⁹⁶ Karen Brown, *Our Memories of Molong* (Molong Senior Citizens History Group, 1983).

⁹⁷ The Orange F.O.O.D. Week (Food of Orange District) prioritises, and is centred around, the City of Orange. The local winemaking association is the Orange Region Vignerons Association and wines are classified as being from the Orange Wine Region.

⁹⁸ Scott Carpenter, *Cabonne Shire Heritage Report Part 1* (1997).

⁹⁹ Goldney and Bowie, above n 94.

¹⁰⁰ R D Drummond, *Walkabout Through History: A Pedestrian Guide to Molong's Past* (1985) notes that the first residents established a home on the Euchareena Road, the road on which the Molong landfill was to be located.

¹⁰¹ Donald, above n 94; Goldney and Bowie, above n 94, 43: note that in the decades following the arrival of Europeans there was a 'disastrous decline' in the Aboriginal population.

¹⁰² Orange first in 1846, then Molong in 1848: see Goldney and Bowie, above n 94.

¹⁰³ The municipality of Orange was established in 1860: see R C Sheridan, *Early Orange* (1971). The municipality of Molong was created in 1879: see D A Rutherford, *One Hundred Years of Local Government in Molong 1879–1979* (The Molong Historical Society, 1979).

¹⁰⁴ Goldney and Bowie, above n 94.

fruit and flour that were the main industries of the time, to faraway Sydney.¹⁰⁵ By the late 1800s, both towns were prosperous and the population of Molong, supported by the ready access to cheap agricultural land, was quickly increasing.¹⁰⁶

It was in the 1940s and 1950s – after the war and the arrival of the car – that marked the onset of the stagnation and decline of Molong relative to the growth of Orange,¹⁰⁷ with Orange becoming a city in 1946¹⁰⁸ and Molong staying much as it always had been. Thereafter, there also began a distinction between the townies and the cockies of Molong, a social stratification of the local population that was apparent in the early opposition to the Orange Waste Project.¹⁰⁹ Goldney and Bowie note that the ‘changing economic, transport and social patterns’ post-war ‘created a hierarchy of towns’ throughout the district with places such as Orange rising to towns and cities, becoming hubs for government and commercial services, and places such as Molong remaining villages.¹¹⁰ Amid the debate about the Orange Waste Project, residents from Orange were curious about why people from Molong would object to a project for a city they depend on for social activities, recreation, education and shopping. Molong, they thought, is ‘an outer suburb of Orange’¹¹¹ – though one they would rarely visit or appreciate, and whose ignorance has led to

¹⁰⁵ Orange City Council, *A Brief History of the City of Orange* (1973).

¹⁰⁶ Yvonne McBurney, *Road to Molong* (1992).

¹⁰⁷ Carpenter, above n 98.

¹⁰⁸ Orange City Council, ‘Our Council’ *Orange City Council* <<http://www.orange.nsw.gov.au/site/index.cfm?display=147016>>.

¹⁰⁹ Interview with Paul Mullins, *Molong Express*, 24 February 2011. Interview with Rozzie Smith, *Molong Express*, 18 March 2011.

¹¹⁰ Goldney and Bowie, above n 94, 55. Brown, above n 96, 5 notes that ‘we saw the business heart shrink when good roads and motor vehicles made travel to larger centres an everyday event, but Molong always survived’; and ‘In the first half of the century, Molong’s business district was much larger and busier than it is today [in 1984]’ (p 16).

¹¹¹ Charles Everett, (letter to the editor), ‘Land claim rubbish’ *Central Western Daily* (Orange) (4 April 2008) 8. Judith Brett, ‘Fair share: Country and city in Australia’ (2011) 42 *Quarterly Essay* 1, 8–9 argues that larger ‘sponge cities’ such as Orange have ‘drained many small towns of purpose, marooning older residents and providing a rich reservoir for pathos in images of boarded-up shops and a few remnant locals with memories of grander days’.

economic decline, and whose belittling of Molong was noticed.¹¹² Descriptions and reflections of Molong for the half-century that followed barely deviate from a common script. Past residents remember the small, safe, out-of-the-action, country-life and bush setting of Molong.¹¹³ In the 1980s, Molong was described as a 'pretty town' where the 'pace of life is very steady and relaxed',¹¹⁴ and in the 1990s as a 'very pretty town' with 'the atmosphere of a quiet, peaceful village'.¹¹⁵ Contemporary tourism marketing promises 'a trip back into the past when you visit the olde worlde charm of Molong',¹¹⁶ while the local newspaper, in the context of the Orange Waste Project approval, claimed that 'Molong people are prepared to continue the fight in order to save the beautiful and safe town and district we call "home"'.¹¹⁷

Molong and controversy

While their town is peaceful and has historic charm, Molong residents have not been a socially or politically ambivalent community nor immune from controversy. Ten months after the formation of the local council in 1879, the local community began to object about road conditions, poor drainage, nuisance from washing horses and the erosion of paths.¹¹⁸ The community considered controversial the purchase of land to create the Fairbridge Farm in Molong, a child migrant home that itself became part of an international controversy.¹¹⁹ The opposition to the Orange Waste Project was intense and lasted the best part of a decade and was led, organised and financed principally by the people of Molong.

As will be detailed below, the opposition coalesced, was emboldened and could be most

¹¹² Interview with Rozzie Smith, *Molong Express*, 18 March 2011.

¹¹³ Bruce Paul, *Cracks in the Soul* (2004), 1–8.

¹¹⁴ Brown, above n 96, 4.

¹¹⁵ Yvonne McBurney, above n 106, 36.

¹¹⁶ Cabonne Council, *Villages of Cabonne Country* (brochure) (approx 2010) 12.

¹¹⁷ 'Hub: Where to from here?' *Molong Express* (Molong) (20 May 2010).

¹¹⁸ Rutherford, above n 103.

¹¹⁹ David Hill, *The Forgotten Children: Fairbridge Farm School and its Betrayal of Australia's Child Migrants* (Random House, 2007).

clearly characterised as being between a small rural town and a larger municipal city, after the opponents' success in challenging the original approval for the waste facility in 2008.¹²⁰ At this time, the project became Orange's alone, as the opponents slowly garnered the support of their own local council. Opinion turned against the proponent as they sought to employ, and attempted to justify using,¹²¹ laws despised throughout the state to sidestep the findings of the Chief Justice of the Land and Environment Court and procure the planning approval necessary for the waste project.¹²²

It was the people of Molong who offered the media the storyline of a David versus Goliath battle:¹²³ of the small and outnumbered taking on the large and powerful.¹²⁴ They were the ones who defined themselves as being other than from Orange, from being localised in a place distinct from the major rural city. Data does show some significant differences between the two communities suggesting some truth to the perception that the combatants were not on equal footing. The people of the township of Molong are outnumbered by a ratio of 16:1 by the residents of the City of Orange.¹²⁵ While separated by just over 30 kilometres, Molong residents are employed in lower-paying, typically agricultural jobs.¹²⁶ While there is little difference between the two locales in the Australian

¹²⁰ *Hub Action Group v Minister for Planning* (2008) 161 LGERA 136.

¹²¹ Orange City Council, (advertisement), 'An open letter to the residents of Orange' *Central Western Daily* (Orange) (5 April 2008) 12.

¹²² Interview with Neil Jones, Environmentally Concerned Citizens of Orange, 23 February 2011.

¹²³ This is a metaphor used elsewhere in environmental justice struggles. For instance, Cole and Foster, above n 8, 1 describe the Kettleman City opposition to a toxic waste plant as a 'classic David and Goliath tale'.

¹²⁴ Ellen Vaz, 'Why Hub is just rubbish to some' *Central Western Daily* (Orange) (5 September 2007). A billboard-sized painting near the waste site used the David and Goliath battle as an allegory for the waste conflict.

¹²⁵ See Australian Bureau of Statistics, *Basic Community Profiles – Molong NSW (Suburb)* (2007) and Australian Bureau of Statistics, *Basic Community Profiles – Orange NSW (Local Government Area)* (2007). The population of Molong was 2,135 and Orange 35,339.

¹²⁶ Residents of Orange earn more money than those in Molong – household weekly income is AUD\$935 compared with AUD\$803, and 18 per cent of Orange residents reported earning more than AUD\$1,000 a week compared with 12% of Molong residents. This is despite unemployment being lower in Molong (3.3%) than in Orange (5.8%). Employment participation is equivalent, with the major difference being in employment sectors. Agricultural jobs dominated in Molong, whereas health and retail were the two most common employment industries in Orange.

Bureau of Statistics' measure of advantage and disadvantage, the scores indicate that the Molong township is a slightly more disadvantaged township than Orange City Council is a local government area.¹²⁷ For the purpose of the Orange Waste Project, however, the principal difference that supports a justice analysis is not a disadvantage based on wealth or race. Rather it is that of scale. Orange City was able to characterise itself as a regional centre, whereas Molong was disadvantaged by the law because of its local perspective, interest and status.

4.4 The court case

Landfill rejected on merits

The dispute was reshaped and power within the conflict recalibrated by the decision of Chief Justice Preston of the Land and Environment Court to reject the merits of the project.¹²⁸ The Hub Action Group had exercised its right under section 98 of the *Environmental Planning and Assessment Act 1979* (NSW) to seek merits review of the Minister for Planning's decision to approve the project under the Act.¹²⁹

The Minister for Planning, based on the first environmental impact assessment carried out for the project and having considered the more than one hundred objections to the project, approved the proposal on 15 January 2007.¹³⁰ His decision was considered a forgone conclusion, with a combined Orange and Cabonne project perceived as wielding much greater influence and power than the objectors ever could.¹³¹ The Minister approved the project in accordance with the recommendation of his Department, which acknowledged

¹²⁷ Australian Bureau of Statistics, *Socio-economic Indexes for Areas (SEIFA) Data Only* (2006). See Table 2 in the dataset for Statistical Local Areas (Orange 966) and State Suburbs Codes (Molong 950). Within the same dataset, Molong (950) is relatively more disadvantaged/less advantaged than most of Orange's suburbs. Orange (990), Bletchington (994), Lucknow (960), Calare (1036), Warrendine (953), Clifton Grove (1096) and Shadforth (1010) all score more highly than Molong; only Glenroi (812) scores lower.

¹²⁸ *Hub Action Group Inc v Minister for Planning* (2008) 161 LGERA 136.

¹²⁹ 'Appeal to proceed: Euchareena Rd waste site decision to be tested in court' *Molong Express* (15 February 2007). The appeal was lodged on 14 February 2007.

¹³⁰ New South Wales Minister for Planning, *Development Consent DA 95-4-2005* (15 January 2007).

¹³¹ 'Hub approval a forgone conclusion' *Central Western Daily* (Orange) (17 January 2007).

'community concerns about the proposal'; however, the Department concluded that these concerns were overwhelmed by the demand for additional landfill space and a desire to facilitate the development of a 'long-term waste management strategy' for the two local councils. It explained that the local community would benefit from new services and infrastructure, like road upgrades. In addition, the Department recommended that trade-offs be made. Specifically, it considered that the project should proceed despite 'the loss of at least 21 hectares of prime cropping land; [an] increase [to] the risks of disease at the adjoining apiaries; and [a potential] increase [to] the costs of mineral exploration or extraction on the site'.¹³²

This decision and the foundations for it were comprehensively rejected by the Land and Environment Court. In particular, the Court's interpretation of the relevant planning policy was at odds with the very relaxed interpretation used by the Department and Minister to justify the conclusion that the landfill could be built on prime agricultural land.¹³³

The decision was one of the first to apply the principle of intergenerational equity in Australia, and had a number of elements. Of particular importance, the judge was dissatisfied with the proposal to develop the site in stages, with the second stage – the development of a waste recovery facility – only proposed to be built a number of years into the life of the landfill. Absent this part of the project, and without any enforceable waste minimisation strategies on which the project appeared to depend,¹³⁴ the judge found it failed to meet the requirements of ecological sustainable development. He considered there to be a gap between the good words and intentions of sustainability and the proposed actions. He stated that 'In order to achieve sustainability, ... hortatory statements of principle and aspirational goals are insufficient; the grand strategy must be translated into

¹³² NSW Government, Department of Planning, above n 57, 36.

¹³³ Department officials viewed the approach taken by Preston CJ as adopting a literal interpretation to the law, which had been drafted in an anomalous way in the local plan, that would prevent any development that would have an adverse impact on the landscape. This, they claimed, was inconsistent with overarching policy intent to manage sometimes conflicting land uses: see Interview with David Kitto, NSW Department of Planning, 11 August 2011.

¹³⁴ *Hub Action Group Inc v Minister for Planning* (2008) 161 LGERA 136, para [127].

action'.¹³⁵ While the Minister had been swayed by the councils' argument about a combined development that would normally be evaluated separately¹³⁶ – that to define and commit to a waste recovery facility upfront might result in the choice of dated technology,¹³⁷ but to propose a landfill without commitments to resource recovery might not achieve greater waste management outcomes¹³⁸ – the judge was not. He reiterated that:

The great bulk of environmental benefits the Orange City Council claims will be achieved depend on the implementation of the resource reprocessing facility. Conversely, without the resource reprocessing facility, the proposed development is unsustainable and unacceptable.¹³⁹

The Department of Planning and Minister appeared resigned to accommodate the approach taken by the councils, despite opposition to it and valid criticism that without details of the particular facility environmental impacts could not be known with any clarity. It commented that it was not responsible for the waste strategy, did not have the power to direct that the resource recovery facility be built elsewhere, and would not expedite its construction to ensure that the site would be more than a landfill.¹⁴⁰ In the public documents, it did not venture to challenge the proponents. The usual course was seemingly followed. Proponents were given the benefit of the doubt and opponents simply given the benefit of being heard. What the Minister, together with the Department, did have the power to do, but did not exercise, was to reject the project. In this case, that was left to the Court.

The most forceful finding of the judge was that the project was not supported by local planning policy. In essence, the judge concurred with the project opponents that the site was not appropriate. The Molong waste site was zoned No 1(a) General Rural. The objectives of the zone were to protect, enhance and conserve the landscape for agricultural

¹³⁵ Ibid, para [2].

¹³⁶ Interview with David Gamble, waste management consultant, 8 June 2011.

¹³⁷ NSW Government, Department of Planning, above n 57, 17.

¹³⁸ Interview with David Kitto, NSW Department of Planning, 11 August 2011.

¹³⁹ *Hub Action Group Inc v Minister for Planning* (2008) 161 LGERA 136, para [102].

¹⁴⁰ NSW Government, Department of Planning, above n 57, 17–18.

use and resource conservation and extraction. These were locally designated objects for this particular type of land in the municipality. The landfill was permissible with a permit; however, like all developments subject to development applications, it had to be assessed against relevant land-use policy. The relevant provision of the *Cabonne Local Environment Plan 1991* in this case was clause 10. It provided that:

(1) The Council shall not consent to an application to carry out development on land within Zone No 1 (a) ... unless it has made an assessment, where relevant, of the effect of the carrying out of that development on:

(a) the present and potential use of the land for the purposes of agriculture,

...

and the Council is satisfied that the development will not have an adverse effect on the long term use, for sustained agricultural production, of any prime crop and pasture land.

(2) In assessing the effect referred to in sub-clause (1), the Council shall have regard not only to the land the subject of the application but also to land in the vicinity.

Chief Justice Preston found that the development would have an adverse effect on the site, which was prime agricultural land, reducing its current and future use for agriculture. The landfill would displace agricultural uses while in operation and, after rehabilitation, the soil profile above the landfill cap would be reduced, limiting the types of crops that could be grown on the site.¹⁴¹ The judge considered that these limitations could lead to a lowering of the agricultural class of the land, especially for future generations of farmers.¹⁴² In addition, the development would have an adverse impact on the nearby land used to farm bees and produce honey.¹⁴³ This was because of a risk of contamination to the bees from the landfill. The judge concluded that:

[T]o approve a development which is likely to have these adverse effects on the long term use, for sustained agricultural production, of prime crop and pasture land would not be consistent with the principles of ecologically sustainable development. ...

The provisions of the [Local Environmental Plan] relating to the 1(a) zone, including cl 10(1), are part of a law supporting sustainable development, by protecting, enhancing and conserving the valuable resource of agricultural land and in particular prime crop and

¹⁴¹ *Hub Action Group Inc v Minister for Planning* (2008) 161 LGERA 136, para [13] and [56]–[67].

¹⁴² *Ibid*, paras [39]–[55].

¹⁴³ *Ibid*, paras [13], [66] and [73]–[101].

pasture land in a manner which ensures its use for sustained agricultural production. ...

The principle of inter-generational equity involves the right of the present generation to use and enjoy the resources of the earth but without compromising the ability of future generations to do likewise. The present generation needs to ensure that the health, diversity and productivity of the environment are maintained and enhanced for the benefit of future generations. This obligation of inter-generational equity would be breached by the carrying out of development which has an adverse effect on the long-term use, for sustainable agricultural production, of prime crop and pasture land. Such development compromises future generations' ability to use and enjoy to the same degree as the present generation the prime crop and agricultural land.¹⁴⁴

The judge demonstrated a concern for a much broader interest than the Department in its assessment. He was conscious of the implications for justice and fairness of the development locally as well as across time, with his application of the principle of intergenerational equity. By highlighting intergenerational equity as a component of sustainable development, the judge also charted a principled path to draw justice concepts within sustainability in a way that other jurists in Australia had not done before. Chief Justice Preston positioned the provisions of the planning policy that sought to preserve the agricultural quality of land as being directed at the safeguarding of a food-secure future for the local area and its progeny. As will be shown later, in the Part 3A process the public interest was defined in a much different manner.

The government's misinterpretation

Similar findings of fact about the impacts of the landfill and associated facilities had earlier been reached by the Department of Planning. In its assessment, the Department found that 'the proposal would have an impact on both the present and potential use of this land on the site' with grazing reduced and part of the land no longer being suitable for cropping, even after rehabilitation. It conceded that the development would cause the agricultural classification of the land to be lowered.¹⁴⁵

It still considered that it could approve the development in an overreach of administrative function and in disregard for the principles of statutory interpretation and of the local condition of the land. It was a behaviour that would later be replicated in interpreting the

¹⁴⁴ Ibid, paras [67]–[72].

¹⁴⁵ NSW Government, Department of Planning, above n 57, 20.

meaning of 'regional' with respect to Part 3A of the *Environmental Planning and Assessment Act 1979* (NSW). The Department claimed that it would not follow a 'narrow' reading of the clause because to do so would mean that very few non-agricultural land uses could occur on the land, even though such uses were not prohibited under the planning control. The Department overlooked the fact that clause 10 was intended to operate, and did in fact operate, as a qualitative fetter on development in rural zoned land. It was wrong when it claimed that:¹⁴⁶

while Clause 10 makes it clear that development that is likely to have an adverse effect on prime crop or pasture land should be avoided, it does not prohibit any development that would have an adverse impact on such land.

The provision makes no reference to avoidance. It specifies that a decision-maker 'shall not consent to' a development in specified circumstances, even if it may be permissible under the relevant control. The words and the intent are clear, and there is no deference given to other parts of the *Local Environmental Plan*. There is no call or justification to do as the Department did – to 'examine the significance of the impact on the agricultural capability both of the site and the LGA as a whole', to preference other matters not directly and specifically relevant to the proposal, and to 'then consider on balance, whether such impacts are justified by the proposal'.¹⁴⁷

As a sign of things to come, the Department even went so far as to claim that the development should not be refused because it would not have a 'significant impact on the agricultural capability of the area or region'¹⁴⁸ owing to its relatively small footprint; that is, the people of Molong now and into the future would be burdened locally with reduced farming capacity because that burden was at a scale of disinterest to the Department. Nothing in the relevant planning provisions warranted such an assessment. It appeared that the Department was willing to allow agricultural land in Cabonne to be swallowed up for other uses, small part by small part, as it had allowed the cumulative development of coal

¹⁴⁶ Ibid.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid. Emphasis added.

mines elsewhere in the state.¹⁴⁹ It unilaterally, and without legal foundation, changed the scale on which the assessment for the project would be made.

4.5 Three days of justice

The immediate response of the project opponents to the decision of the New South Wales Land and Environment Court was delight and relief. It was a long battle thought won, adjudicated by an independent arbiter.¹⁵⁰ The Hub Action Group felt legitimised, with those less closely involved in the opposition becoming convinced that the people from Molong were right about the inappropriateness of the development.¹⁵¹ Whereas beforehand the group felt ignored and isolated, it now had a voice.¹⁵² Meetings it wanted to arrange now were arranged.¹⁵³ Concerns of the group that had been dismissed were now of interest.¹⁵⁴ The solidarity within Orange City Council and between the Orange and Molong councils also began to waver and ultimately splinter. Yet the community group from Molong still felt that it had no political leaders, no representatives in places of political power.

Early in the court case, the judge adjourned to provide an opportunity for Orange City Council to clarify its proposal and make changes to it.¹⁵⁵ Observing from the sidelines, government officials detected that the project in the mind of the councils had changed from the project that had been assessed by the government.¹⁵⁶ A supplementary environmental

¹⁴⁹ NSW Government, Department of Planning, *Independent Review of Cumulative Impacts on Camberwell* (July 2010).

¹⁵⁰ Daniel Briggs, 'Jumping for joy: The Hub objectors delight in garbage disposal' *Central Western Daily* (Orange) (19 March 2008) 1.

¹⁵¹ Interview with Alison Trowbridge, Hub Action Group, 17 March 2011.

¹⁵² Interview with Christine McIntosh, Hub Action Group, 25 February 2011 / 19 March 2011.

¹⁵³ Interview with Ian Gosper, Hub Action Group, 19 March 2011.

¹⁵⁴ Interview with Christine McIntosh, Hub Action Group, 25 February 2011 / 19 March 2011.

¹⁵⁵ 'Councils withdraw to get their act together' *Molong Express* (16 August 2007). The Chief Justice had reportedly expressed concern about the lack of detail of the project, commenting that he was not sure what it was that he was being asked to approve: 'It is extraordinary that the Council put forward something that is incapable of being approved': see 'My pen is poised ... I am ready to go' *Molong Express* (16 August 2007).

¹⁵⁶ Interview with David Kitto, NSW Department of Planning, 11 August 2011.

impact statement was prepared, generating more than twice the number of objections than the first statement.¹⁵⁷ It would be a crude use of data to suppose that the level of opposition had actually doubled; however, by the end of the court case and in reaction to the response of the Orange City Council afterwards, it was clear that the opposition to the project was at its greatest while Orange City Council was still iterating the project to attend to issues that needed to be addressed arising from the court case.¹⁵⁸ It was only by the time the Council would make a subsequent application for approval – foreshadowed just days after the judgment¹⁵⁹ – that it knew the technology it would use for the comprehensive waste project it originally set out to develop.¹⁶⁰

The attention of the principal project opponents was directed to convincing their local council, Cabonne Shire, to walk away from the revised project.¹⁶¹ They achieved this. In May 2008, Cabonne Council voted by a narrow margin not to support Orange City Council's efforts to reactivate the project development application.¹⁶² In September 2008, six months after the court decision, local council elections saw the make-up of the Cabonne Shire change with candidates who opposed the project elected,¹⁶³ including beekeeper and Hub Action Group member Ian Gosper. This led to a change in Mayor. John Farr, a re-elected supporter of the Orange Waste Project, was displaced from his mayoral position. The new council commissioned another inquiry into its landfill capacity. Using new calculations, it discovered that it had as much as 30 to 50 years of landfill capacity remaining.¹⁶⁴ The

¹⁵⁷ Ellen Vaz, 'Group says submissions show public's concern for tip project' *Central Western Daily* (Orange) (23 November 2007). Two-hundred-and-ninety-one submissions were lodged; almost all were objections.

¹⁵⁸ Interview with David Gamble, waste management consultant, 8 June 2011.

¹⁵⁹ Interview with Christine McIntosh, Hub Action Group, 25 February 2011 / 19 March 2011. McIntosh noted that the group had just three days to absorb its victory before hearing that Orange City council would trigger Part 3A.

¹⁶⁰ Interview with Stephen Sykes, administrator, Orange City Council, 12 January 2011.

¹⁶¹ Interview with Christine McIntosh, Hub Action Group, 25 February 2011 / 19 March 2011.

¹⁶² 'Cabonne not to support Part 3A application' *Molong Express* (29 May 2008) 1.

¹⁶³ Vaz, above n 42.

¹⁶⁴ Ben Brennan, 'Shire steps back from Hub tip plan' *Central Western Daily* (Orange) (27 May 2008); Bevan Shields, 'Duffy, Kidd trash talk over dump' *Central Western Daily* (Orange) (15 June 2009).

urgency and rationale for the project¹⁶⁵ was supposedly removed.

Finally, in June 2009 Cabonne Shire terminated the joint-venture agreement with Orange City Council that it had entered into almost a decade earlier, leaving Orange to pursue the project on its own.¹⁶⁶ This was not a decision that was universally supported throughout the shire, with some constituents aggrieved at having paid extra rates moneys over previous years to fund a project that Cabonne was walking away from.¹⁶⁷ The effect of the shift in view of Cabonne Shire was profound. It represented heightened attention to local concerns and crystallised the allegation that this project was about Orange dumping its waste on Molong,¹⁶⁸ a project that affected spatial justice.¹⁶⁹ It was also crucial to the claim that the project was not a regional one.

Cabonne Shire's decision to distance itself from the project also triggered the fracturing of the united support for the project within Orange City Council,¹⁷⁰ with Greens Councillor Jeremy Buckingham withdrawing his support for the project.¹⁷¹ In his view, without Cabonne Shire's waste, it was no longer the regional solution that was promised. The great

¹⁶⁵ A belief that Cabonne was running out of waste capacity that triggered the joint project (the first EIS). It was claimed that with the exception of one, 'Cabonne landfills ... are either closed or almost exhausted, creating an urgent need for a new facility': see 'Last chance for protest' *Molong Express* (4 May 2005). However, this belief and claims of urgency were questioned: see Gosper, above n 27.

¹⁶⁶ Cabonne Council, (advertisement), 'An important message about Orange City's new rubbish tip' *Central Western Daily* (Orange) (18 June 2009) 5. In Cabonne Council, *Cabonne Council Annual Report 2008/2009* (2009) 3, the Council clarified that 'Following an independent evaluation of council's future landfill capabilities Council took action to dissolve the joint Waste Management Agreement for the HUB proposal with Orange City Council'.

¹⁶⁷ ABC, 'Cabonne ratepayers call for tip money refund', *ABC Regional News* (21 May 2009).

¹⁶⁸ Hub Action Group (pamphlet), *Orange City Council – Proposed Orange Resource Recovery and Waste Management Project. Community Information Days – Go Up and Tell Them What You Think* (approx. 1 May 2009).

¹⁶⁹ Gordon Walker, 'Beyond distribution and proximity: Exploring the multiple spatialities of environmental justice' (2009) 41 *Antipode* 614.

¹⁷⁰ Ben Brennan, 'United front from Council on Hub issue' *Central Western Daily* (Orange) (5 April 2008). A full page 'open letter' from Orange City Council signed by all councillors and the General Manager appears in the paper on the same day. That letter opens by stating that the Council is 'united to deliver affordable and environmentally responsible waste solutions'.

¹⁷¹ Bevan Shields, 'Buckingham's Hub backflip' *Central Western Daily* (Orange) (29 May 2008).

attraction of 'diverting half of the region's waste from landfill'¹⁷² could not be fulfilled. Other Orange councillors followed in withdrawing their support.¹⁷³

The objections to the project became unrelenting, well organised and sophisticated. The opposition led by the Hub Action Group swayed the community. The group became idolised by the media for its court success. The group built social and political power, but that power and influence was always localised within Molong, lacking the networked or multi-scaled resistance uncovered by Davies in her research into waste conflicts in Galway, Ireland.¹⁷⁴ It was never so great to disturb the distribution and exercise of power in Orange or at the state level. It could not halt the regional rescaling of the project that allowed the project to be approved.

4.6 Enter Part 3A

The power and process of Part 3A

The decision of the Land and Environment Court, particularly its interpretation of clause 10 of the *Cabonne Local Environment Plan*, was definitive: under existing planning laws, a landfill could not be located on the chosen Molong site. Without a change to Cabonne's planning policy, which seemed unlikely given Cabonne Council's retraction of support for the project, a new proposal or an appeal to the New South Wales Court of Appeal was unlikely to succeed. Given the findings about the impacts of the project on bee farming, the Council itself was unsure about any prospects of succeeding on appeal;¹⁷⁵ however, the success of the Hub Action Group,¹⁷⁶ and its position of influence, would be undone by the activation of the Part 3A planning laws. This now-repealed part of the *Environmental Planning and Assessment Act 1979* (NSW) would allow the project to be revised and revived

¹⁷² Ellen Vaz, 'Landfill goals achievable but Buckingham says Hub is the key' *Central Western Daily* (Orange) (10 December 2007) 1.

¹⁷³ Bevan Shields, 'Council makes titanic effort to pursue Hub' *Central Western Daily* (Orange) (7 June 2008); 'Orange to stick with Hub site' *Molong Express* (12 June 2008) 1.

¹⁷⁴ Ellen Vaz, 'Shake-up at Hub of matter in Cabonne' *Central Western Daily* (Orange) (15 September 2008). Davies, above n 10, 388.

¹⁷⁵ Interview with Stephen Sykes, administrator, Orange City Council, 12 January 2011.

¹⁷⁶ Briggs, above n 150.

with decision-making and political power reverting once more to the Department of Planning, the Minister and, as a proponent of a project subject to the 'fast-track' planning laws, by proxy to Orange City Council. As a result of the activation of these laws, the conflict would become even more partisan and personal. The debate would be infused with a narrative of injustice and unfairness. An 'us against them' mentality charged local opposition. The 'us' were the people of the Molong, and the 'them' were no longer just the Orange officials overseeing the project but their perceived political peers in Sydney.

Part 3A was introduced into the *Environmental Planning and Assessment Act 1979* (NSW) in June 2005, following the proclamation of the *Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Act 2005* (NSW). Its stated purpose was to 'reform' planning in New South Wales, to 'streamline' assessments and facilitate 'projects of significance to the State'.¹⁷⁷ Implicit in the decision of the then government to pursue legislative change, was a belief that the existing process for state-significant projects, the process through which the Orange Waste Project was first assessed and then rejected, was not working. The new law was directed at making it easier and quicker to make decisions approving developments, at a time when property development had stalled in the state,¹⁷⁸ with greater certainty that those approvals would not be overturned by courts. No other meaning could reasonably be distilled from these opening words in the Minister's second-reading speech to Parliament:

By establishing greater certainty in the assessment of projects of State significance and major infrastructure projects, the [B]ill further assists in the Government's desire to afford opportunities for the private sector to participate in the delivery of our infrastructure programs.

There is no doubt that this [B]ill dramatically improves the climate in which to do business in this State.¹⁷⁹

The provisions of the amended Act reinforced this. Under Part 3A, the Minister for Planning

¹⁷⁷ See Explanatory Memorandum, *Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Bill 2005* (NSW).

¹⁷⁸ Interview with Kirsty Ruddock, then principal solicitor, Environment Defenders Office (NSW), 27 October 2010.

¹⁷⁹ NSW, *Parliamentary Debates*, Legislative Assembly, 27 May 2005, 16332 (Craig Knowles).

would declare projects to be of critical importance or of state or regional significance. Generally, this was achieved through creating a list of development types of significance in the relevant State Environmental Planning Policy.¹⁸⁰ The list proved particularly controversial for its inclusion of coastal residential development.¹⁸¹

Declarations of state or regional significance could also be done on a project-by-project basis within the Minister's discretion.¹⁸² Once a project was within the Part 3A system, it would be subject to a project-specific environmental assessment.¹⁸³ Decisions about whether to approve projects would be broadly discretionary with mandatory considerations excluded from the Act. This would make judicial review actions extremely difficult to substantiate. As well, a large proportion of projects, those that were approved at the conceptual level or that underwent a public planning assessment, were immune from merits review.¹⁸⁴ The result was that developments, including large-scale coastal developments, could be approved with insufficient regard to the possible local effect of climate-change-related sea-level rises on the development.¹⁸⁵ There was simply no hook to challenge

¹⁸⁰ Originally the State Environmental Planning Policy (State Significant Development) 2005, the State Environmental Planning Policy (Major Projects) 2005, and later the State Environmental Planning Policy (Major Development) 2005.

¹⁸¹ See *Minister for Planning v Walker* (2008) 161 LGERA 423, which was a judicial review appeal to an approval of a residential and retirement village development on the coast near Wollongong, a project that was deemed to be of state significance under the Policy. See the commentary by Robert Ghanem, Kirsty Ruddock and Josie Walker, 'Are our laws responding to the challenges posed to our coasts by climate change?' (2008) 31 *UNSW Law Journal* 895. When the New South Wales Government moved to repeal Part 3A, its first step was to amend the Policy 'to remove residential, commercial and retail development and coastal subdivisions from the operation of Part 3A' and to revoke existing declarations about such developments: see NSW Government, Department of Planning and Infrastructure, *Fact Sheet: Removing Coastal Subdivision and Residential, Commercial & Retail Developments from Part 3A* (May 2011).

¹⁸² *Environmental Planning and Assessment Act 1979* (NSW) s 75B(1)(b). It was the existence of this broad discretion that led the New South Wales Independent Commission Against Corruption to conduct an inquiry into the corruptibility of the law: see NSW Independent Commission Against Corruption, *The Exercise of Discretion under Part 3A of the Environmental Planning and Assessment Act 1979 and the State Environmental Planning Policy (Major Development) 2005* (December 2010).

¹⁸³ *Environmental Planning and Assessment Act 1979* (NSW) s 75F.

¹⁸⁴ *Environmental Planning and Assessment Act 1979* (NSW) ss 75K(1) and 75L(1). Under the laws that replaced Part 3A, merits review is still unavailable; however, there is more scope to initiate judicial review proceedings as the Minister must consider a variety of matters, including environmental impacts.

¹⁸⁵ *Minister for Planning v Walker* (2008) 161 LGERA 423.

decisions that were made subject to immensely broad discretion. Judicial creativity that tried to incorporate mandatory considerations was challenged by a minister intent on retaining utmost executive power.¹⁸⁶ The Minister went so far as to argue that he was not even required to consider ecological sustainable development,¹⁸⁷ the environmental principle that has reached hegemonic status in Australia,¹⁸⁸ and that was so important in the decision of Preston CJ in his rejection of the Orange Waste Project, when making decisions under Part 3A.¹⁸⁹

The claim that the amendments to the Act would 'strengthen the rigour, transparency and independence of the process of assessment'¹⁹⁰ cannot be substantiated. In fact, the case of *Gwandalan Summerland Point Action Group Inc v Minister for Planning*¹⁹¹ suggests that Part 3A could be used for the exact opposite purpose – opaqueness. In that case, one of the few successful Part 3A judicial review decisions initiated by project objectors, Lloyd J of the Land and Environment Court, upheld a claim that the Minister for Planning had breached principles of natural justice. Justice Lloyd found that the Minister approved a large coastal subdivision in exchange for the developer giving the government land that it would reserve to fulfil a strategic policy commitment (the creation of parkland). The Minister had pre-judged his decision. In other instances, too, there had been 'up-front certainty for the proponent'¹⁹² from very early in the process.

¹⁸⁶ See *Gray v Minister for Planning* (2006) 152 LGERA 258 and *Walker v Minister for Planning* (2007) 157 LGERA 124 then *Minister for Planning v Walker* (2008) 161 LGERA 423. See also Anna Rose, 'Gray v Minister for Planning: The rising tide of climate change litigation in Australia' (2007) 29 *Sydney Law Review* 725 who charts a high point in consideration of climate-change concern and ESD principles within the limited confines of Part 3A.

¹⁸⁷ *Drake-Brockman v Minister for Planning* (2007) 158 LGERA 349.

¹⁸⁸ Brad Jessup, 'The Port Phillip Channel Deepening Project and environmental law: A model for ecologically sustainable development?' in Warwick Gullett, Clive Schofield and Joanna Vince (eds), *Marine Resources Management* (LexisNexis, 2010) 297.

¹⁸⁹ *Drake-Brockman v Minister for Planning* (2007) 158 LGERA 349.

¹⁹⁰ NSW, *Parliamentary Debates*, above n 179.

¹⁹¹ (2009) 75 NSWLR 269.

¹⁹² NSW, *Parliamentary Debates*, above n 110. Notably the Independent Commission Against Corruption, above n 182, recommended changes to Part 3A to limit the possibility of corruption arising from the use of the

The temptation and terror of Part 3A

Orange City Council, following the court decision, was aware that a Part 3A alternative was available to it,¹⁹³ and was left with few options to continue with the project than to use that process¹⁹⁴ – a process that the Council described to its constituents as ‘a legal right ... offering a fair and reasonable opportunity for approval’.¹⁹⁵ The Department of Planning had also advised the Council that the project could have been assessed under Part 3A of the Act if the original development application had been submitted shortly later than it was.¹⁹⁶ After the decision was handed down, Stephen Sykes, the Council officer with principal oversight of the project, said that once the Council had digested the decision it would ‘get some advice on what the planning options might be and then get the council to determine how we deal with those’.¹⁹⁷ He gave no indication as to an appeal. The Hub Action Group hoped that the shock of the court judgment might have dissuaded the Council from revising its project.¹⁹⁸ Yet, Orange City Council administrators dug in¹⁹⁹ and started advancing a Part 3A proposal, a response it argued was responsible and economically efficient, making best use of the time, effort and funds already invested in the project.²⁰⁰

This was a decision that some in the community found objectionable, unfair and

law.

¹⁹³ Interview with John Davis, then City of Orange Mayor, 19 August 2011.

¹⁹⁴ Interview with Wayne Davis, administrator, Orange City Council, 19 August 2011.

¹⁹⁵ Orange City Council, above n 121.

¹⁹⁶ NSW Government, Department of Planning, above n 57, 8. The first application for development approval for the project was lodged on 26 April 2005. The notice of motion for amendments to the Act to incorporate Part 3A was made on 14 May 2005. The amending Act received royal assent on 16 June 2005.

¹⁹⁷ ABC, ‘Court rejects Molong waste hub plan’, *ABC News* (18 March 2008) <<http://www.abc.net.au/news/2008-03-18/court-rejects-molong-waste-hub-plan/1075788>>.

¹⁹⁸ Interview with Christine McIntosh, Hub Action Group, 25 February 2011 / 19 March 2011.

¹⁹⁹ ‘Public look at court rulings’ *Central Western Daily* (Orange) (19 March 2008) notes that the Council blocked a motion to conduct an inquiry into the planning processes that saw the project rejected by the Land and Environment Court. Daniel Briggs, ‘Council won’t give up on Hub’ *Central Western Daily* (Orange) (21 March 2008).

²⁰⁰ Daniel Briggs, ‘Back door tactics: Group slams Council for continuing with Hub site’ *Central Western Daily* (Orange) (26 March 2008) 1.

undemocratic. Adopting the words of Botetzagias and Karamichas,²⁰¹ the people of Molong felt that they were 'dragged into an "unfair" deal'; that their predicament was a consequence of them lacking the political allies to shield them from the development. Their despair and disappointment is captured in the submission by Ian Gosper to the Department of Planning and considered by the Planning Assessment Commission established for the Part 3A assessment. He wrote:

The Hub Action Group, myself and the community in general were told by the Department of Planning way back in early 2002 ... that if we wanted to object to the proposal we could have input into the EIS, which we did. We were then told we could make submissions if we disagreed with the EIS, which we did. We were then told if we disagreed with the Department of Planning's decision we could go to the Land and Environment Court and get a Judgement ruling, which we did, but only after consideration because of the large financial cost involved. The one thing we were not told way back in early 2002 was that if you want to object to this proposal, don't bother, don't go to the Land and Environment Court and spend large amounts of money because we will change the law.²⁰²

People questioned the regard Orange City Council had for the judicial process and claimed that its decision to reapply for approval just days after the court case reflected an arrogant treatment of the residents of Orange and Cabonne; yet there remained significant support for the project and the council within Orange,²⁰³ and a concern that an abandonment of this project might make it even more difficult for the Council to secure approvals for a landfill in the future.²⁰⁴ Meanwhile, the basis for objection, particularly in Molong, was extended to incorporate process concerns.²⁰⁵ The *Molong Express* editorialised:

OCC intend to lodge a "Part 3A application" with the NSW Department of Planning. Under this planning provision the Minister can deem the proposal "state significant" and rubber stamp the HUB proposal on prime agricultural land on Shades [sic] Road. And no one, not

²⁰¹ Botetzagias and Karamichas, above n 10, 941. See also *Ibid*.

²⁰² Gosper, above n 60.

²⁰³ Interview with John Davis, then City of Orange Mayor, 19 August 2011.

²⁰⁴ Interview with Wayne Davis, administrator, Orange City Council, 19 August 2011.

²⁰⁵ D and A Trowbridge, (letter to the editor), 'No regard for judicial process' *Central Western Daily* (Orange) (26 March 2008). See Douglas J Lober, 'Why not there? The importance of context, process and outcome on public attitudes toward siting of waste facilities' (1996) 9 *Society and Natural Resources: An International Journal* 375, 384-386.

even our Courts, can stop him. The “back door” route.²⁰⁶

These concerns were shared by environmental and community groups in Orange, leading to an informal alliance between groups across geographies who were especially concerned about issues of good environmental governance.²⁰⁷

The fear was that the Minister would overlook the findings of the Land and Environment Court, particularly those local concerns relating to the agricultural value of the land, the potential impact to the neighbouring apiary interests and, critically, that the site was inappropriate for the development. The project opponents’ interpretation of the judge’s decision was that no landfill would be suitable for the site, emphasising that the judge had commented that his finding ‘does not mean that *another proposal at another site would not be acceptable*’.²⁰⁸

The Molong community had reason to be concerned that its interests would be displaced by Part 3A. Under s 75J(3) of the *Environmental Planning and Assessment Act 1979* (NSW), together with the regulations under the Act,²⁰⁹ the Minister in a Part 3A decision was no longer constrained by the provisions of the *Cabonne Local Environment Plan 1991* that were decisive in the court case. Provided the development was not prohibited by the plan, and in this case it was not, the Minister was not required to take into account the provisions in the plan – local laws could be, and were, sidestepped. The Minister was able to ignore clause 10, which sought to protect prime agricultural land from any adverse impacts. The community would also have been aware of the very small rejection rate for Part 3A applications; of the fait accompli of approval arising from the activation of Part 3A.²¹⁰ It had become lore in New

²⁰⁶ “‘Appeal’ ... What appeal? Orange City Council resorts to misinformation’ *Molong Express* (27 March 2008) 1. The project was proposed for Euchareena Road, not Shades Road.

²⁰⁷ Interview with Neil Jones, Environmentally Concerned Citizens of Orange, 23 February 2011.

²⁰⁸ ‘Orange City Council’s tactics stink’ *Molong Express* (27 March 2008) 1. Emphasis added.

²⁰⁹ *Environmental Planning and Assessment Regulation 2000* (NSW) reg 80.

²¹⁰ Interview with Kirsty Ruddock, then principal solicitor, Environment Defenders Office (NSW), 27 October 2010.

South Wales.²¹¹ Between the 2006–07 and 2009–10 reporting years, just six of 442 applications were rejected.²¹² Not one of the rejected applications was lodged by a local council. By contrast, in the 2005–06 reporting year, when records combine Part 3A rejection figures with those of the previous regime, there were 34 rejections of 173 original applications.²¹³ Part 3A cultivated a normalisation and an expectation of approval. The Hub Action Group acknowledged that it did not expect to stop the project once it was in the ‘monstrous’ Part 3A process.²¹⁴

Orange’s application under Part 3A as an assertion of power

Orange Mayor, John Davis, was correct in claiming that it was within his Council’s legal right to use the process in Part 3A to secure approval for its waste project.²¹⁵ It was an avenue open to all developers that were able to convince decision-makers that their project or site qualified as being of state significance. Nevertheless, the preference to pursue this legal route rather than attempt to appeal the decision of the Land and Environment Court angered Molong residents²¹⁶ and Cabonne councillors – their former project partners.²¹⁷ Notwithstanding the judgment of the Land and Environment Court, Orange City Council was able to dramatically and unquestionably resume the dominant position in the controversy. It appeared willing to face criticism for doing so, maintaining that it was acting

²¹¹ NSW Greens, ‘Part 3A’ *No New Coal* <<http://nonewcoal.greens.org.au/on-the-burner>> note a 99.6% approval rate in one year. See also Brian Robins, ‘New Minister hastens developer approvals’ *Sydney Morning Herald* (24 February 2009).

²¹² NSW Government, Department of Planning, *New South Wales Major Development Monitor 2006–2007* (2007); NSW Government, Department of Planning, *New South Wales Major Development Monitor 2007–2008* (2008); NSW Government, Department of Planning, *New South Wales Major Development Monitor 2008–2009* (2010); NSW Government, Department of Planning, *New South Wales Major Development Monitor 2009–2010* (2011).

²¹³ NSW Government, Department of Planning, *New South Wales Major Development Monitor 2005–2006* (2006). The figure of 173 applications does not include those applications that were withdrawn or that related to modifications to approvals.

²¹⁴ Interview with Christine McIntosh, Hub Action Group, 25 February 2011 / 19 March 2011.

²¹⁵ Interview with John Davis, then City of Orange Mayor, 19 August 2011.

²¹⁶ Emma Buckley, (letter to the editor), ‘New DA just “spin” for Hub appeal’ *Central Western Daily* (Orange) (7 April 2008).

²¹⁷ ‘How the day unfolded’ *Molong Express* (29 May 2008) 4.

in its community's best interests²¹⁸ and claiming that 'Part 3A was created to ensure State-significant developments, like The Hub, had a fair and reasonable opportunity to be approved'.²¹⁹ This was a claim that was unsupported by legislative history but was a catch phrase reused,²²⁰ while the invocation of a state scale was employed in order to reject accusations that it was being unfair and acting in its own interests.

Its claims on even-handedness were diminished, not by its own doing however, when the then member of the New South Wales Parliament for the electorate of Orange, and former local councillor, Russell Turner,²²¹ made an extraordinary and insolent incursion into the debate to support the Council's Part 3A efforts, as claims against the Council of unfairness and arrogance were rising.²²² Turner said, 'I believe the Chief Justice of the Land and Environment Court was totally biased in his findings and some of his comments were so far from reality that it defies belief'. He equated Orange City Council's use of Part 3A to the Hub Action Group's use of a merits review court process. He argued that he, as a former farmer, was better equipped than the city-based judge to determine impacts on agricultural land.²²³ He also called on majoritarian arguments asserting that the majority of his wider constituency 'desire a new waste facility'.²²⁴ He was justifiably criticised,²²⁵ and his manoeuvre increased community anxiety about the project assessment.²²⁶ It also

²¹⁸ John Davis, 'Why the Hub is our best option' *Central Western Daily* (Orange) (19 June 2008).

²¹⁹ Briggs, above n 199.

²²⁰ 'Council's bid to state govt for Hub plan' *Central Western Daily* (Orange) (15 June 2008); Davis, above n 218.

²²¹ He was a councillor of Orange City Council when it entered into the project joint-venture agreement with Cabonne Shire in 2000.

²²² Russell Turner, (advertisement), 'It is time to bring some common sense back into the Hub debate' *Central Western Daily* (Orange) (16 April 2008) 7.

²²³ Letter from Russell Turner to unspecified addressee (21 May 2008).

²²⁴ Russell Turner, 'Majority backing Hub' *Central Western Daily* (Orange) (24 April 2008).

²²⁵ Toby Tancred, 'When politicians criticise judges they are out of line' *Whiteley Ironside & Shillington* (2008) <<http://www.whiteleys.com.au/thats-the-law/thats-the-law-when-politicians-criticise-judges-they-are-out-of-line.html>>. Ben Brennan, 'Turner under fire over judicial shot' *Central Western Daily* (Orange) (18 April 2008).

²²⁶ Editorial, 'Trash talk over garbage site' *Central Western Daily* (Orange) (18 April 2008). Hub Action Group, (advertisement), 'Questions for Russell Turner about the Hub' *Central Western Daily* (Orange) (19 April 2008).

demonstrated the sense of infallibility and impertinence of those associated with a Part 3A application.

4.7 A 'regional' project approved. A local injustice realised.

The regional frame

The State Environmental Planning Policy (Major Projects) 2005 specified at schedule 1, clause 27 that certain landfills and waste recovery facilities²²⁷ were of state or regional significance to which Part 3A of the *Environmental Planning and Assessment Act 1979* (NSW) applied. That clause stated, as relevant, that the following were of state or regional significance:

- (1) Development for the purpose of regional putrescible landfills or an extension to a regional putrescible landfill that:
 - (a) has a capacity to receive more than 75,000 tonnes per year of putrescible waste, or
 - (b) has a capacity to receive more than 650,000 tonnes of putrescible waste over the life of the site, or
 - (c) is located in an environmentally sensitive area of State significance.
- (2) Development for the purpose of waste transfer stations in metropolitan areas of the Sydney region that handle more than 75,000 tonnes per year of waste.
- (3) Development for the purpose of resource recovery or recycling facilities that handle more than 75,000 tonnes per year of waste or have a capital investment value of more than \$30 million.

Orange City Council sought to qualify its project as a regional landfill with a capacity to receive more than 650,000 tonnes of waste over the 40-year life of the development.²²⁸ It would not qualify under sub-section (3) because the waste recovery component of the development did not meet the minimum tonnage or capital levels. As will be discussed

²²⁷ The heading to clause 27 refers to 'resource recovery or waste facilities'; however, the clause that Orange City Council relied on refers only to landfills. Section 35(2) of the *Interpretation Act 1987* (NSW) provides that the heading is not part of the SEPP, so the reference to landfills in this instance cannot be conflated with waste recovery facilities. As noted in text, different state-significance qualifications apply to waste recovery facilities.

²²⁸ In the environmental impact assessment, it estimated that the landfill would be required to accommodate approximately 30,000 tonnes per year: see Orange City Council, *Orange Resource Recovery and Waste Management Project Environmental Assessment* (GHD, September 2009), D.1–5.

below, the Department of Planning decreed that the development satisfied the qualification in clause 27(1)(b) in schedule 1 of the Major Projects Policy.²²⁹ It was no doubt helped by the fact that Orange City Council had represented its project as a regional one. Mayor Davis, for instance, in the period following the Council's public confirmation that it would apply for a development approval under Part 3A, argued that:

Orange City Council has a responsibility to act in the best interests of the community to provide long-term regional waste management strategies ... This proposal will deliver waste management solutions for the region well into the second half of this century.²³⁰

The Council had long considered its project one for the region, but it originally had no legal or strategic benefit from describing it this way. It was unlikely to have been invoked as a frame when the project was first conceived; rather, a term used to describe a vision that both councils shared. When the first landfill investigation – the *Regional Landfill Investigations/Feasibility Study* – was presented to Orange City Council in 1997, the law provided no windfall for regional landfills. Then, the only notable consequence of the councils working in unison was that the Minister for Planning, rather than the local authority of the land where the landfill was to be located, would be the determining authority for any development application.²³¹ When the 1997 amendments to the *Environmental Planning and Assessment Act 1979* (NSW)²³² came into force, the concepts of 'state-significant development' and 'regionally significant development' were first introduced into the Act and certain landfills were identified as such significant development.²³³ These provisions were later reinforced, entrenched and remain in the legislative landscape even after the repeal of Part 3A.²³⁴ The amendments facilitated greater ministerial control over

²²⁹ Ibid, A.2–4.

²³⁰ Davis, above n 218. Typographical errors amended.

²³¹ At the time, clauses 6 and 7 of the *State Environmental Planning Policy No 48—Major Putrescible Landfill Sites* (SEPP48) provided that the Minister was the consent authority for landfills with a lifetime capacity of more than 650,000 tonnes and that service more than one local government area.

²³² *Environmental Planning and Assessment Amendment Act 1997* (NSW) sch 1.

²³³ NSW Government, Department of Planning, above n 57, 8. The declaration, made on 30 June 1998, stipulated that all landfills subject to SEPP48 were state-significant development for the purpose of the Act and subject to the revised Part 4 assessment process.

²³⁴ *Environmental Planning and Assessment Amendment (Part 3A Repeal) Act 2011* (NSW) replaced the state-

developments within the state and reduced community involvement – and consequently environmental justice – in many land-use planning decisions.²³⁵

The sequential amendments to the Act over at least a decade were a continuation of the retreat from the purposes and deliberative focus of the planning laws of New South Wales, and highlighted the imposition of centralist and technocratic decision-making – a trend towards a neoliberal model of environmental law that has been pursued nationwide.²³⁶

What arose through the use of the regional frame within the context of Part 3A assessment was a form of 'scale politics', there being an 'antagonistic relationship between a societal problem and its political problem'. The effect was to simultaneously empower and disempower at the respective scales of concern – an inequity that Williams argues is at the core of environmental justice.²³⁷

The overwhelming message from the opponents to the development, however, was that the project would benefit Orange alone. It lacked regional support and it was not servicing the region. The official position of the Hub Action Group was that the project was not a regional one. Its members argued that:

It portrays itself to be a regional solution. *It is not*. It is not supported by any other regional [local government area] and is opposed by the host Council, Cabonne. It has been 'dressed

significant development provisions in Part 3A with a new Part 4, Division 4.1 (State-significant development) [now Division 4.7] and a new Part 5.1 (State-significant infrastructure) [now Division 5.2]. Davies, above n 10, 391 also identifies the trend towards centralised, critical infrastructure planning decisions.

²³⁵ Tim Bonyhady, 'The disappointment of the law' in Stephen Dovers and Su Wild River (eds), *Managing Australia's Environment* (Federation Press, 2003) 463, 468 claims, quoting former Justice Stein, having discussed various other legislative reforms, 'As a result of Labor's legislation in the second half of the 1990s, "the last vestiges of traditional planning and genuine public participation have been largely abandoned"'.

²³⁶ Ibid. See also the critique of Ian Ratcliff, 'Community involvement and appeal rights limited by Part 3A of the EP&A Act' (2006) 56 *Law Society Journal* 54. Ruming, above n 18, notes that the laws reflected the direction embraced by the Development Assessment Forum, a national forum that recommends uniform planning-law objectives. Brendan Gleeson and Nicholas Low, "'Unfinished business': Neoliberal planning reform in Australia' (2000) 18 *Urban Policy and Research* 7 describe the 'neoliberal project' in planning. See also Patricia F Ryan, 'Did we? Should we? Revisiting the 70s' environmental law challenge in NSW' (2001) 18 *Environmental and Planning Law Journal* 561, 572.

²³⁷ Robert W Williams, 'Environmental injustice in America and its politics of scale' (1999) 18 *Political Geography* 49, 56.

up' as a regional landfill for the purposes of Part 3A qualification. But in substance it is not.²³⁸

The group's own place-based narrative, embedded with notions of fairness and environmental injustice, that the project would turn Molong into 'Orange's Waste Basket'²³⁹ and derail efforts of rural rejuvenation,²⁴⁰ had deep emotion.²⁴¹ While energising opposition locally, it had little traction with the Department of Planning once the Part 3A application was in train. Its view of its role was to decide to approve or reject the project on the site as presented to it within the policy framework set by the law. By being unconstrained by local laws, it could also use the process to achieve great environmental improvements associated with the management of waste as part of the project.²⁴² While feeling as though they were heard and helped through the process by a Department mindful of equality to access and information,²⁴³ the opponents' appeal was at the local level with localised impacts, while the decision-maker's interest was at a different scale with broader environmental goals. The interests of Molong that figured prominently in the investigation by Preston CJ had been displaced by the subsequent legal deliberations; so did the community's capacity to exert influence over decision-making. As von Benda-Beckmann et al note, there was a mismatch between scales: 'the scale at which regulation is made has implications for the scope of issues that are regulated and the perceived actors involved. However, quite often the scale of regulation does not quite fit the space in which the issue is perceived to exist'.²⁴⁴

The most illustrative indication that the regional categorisation of the project was essential

²³⁸ McIntosh, above n 17. Emphasis in original.

²³⁹ This is a parody of Cabonne's institutional brand of 'Australia's Food Basket'. See, eg, advertisement in *Molong Express*, 15 June 2005.

²⁴⁰ The *Molong Express* asked 'who wants to move to a "Hub Dump Town" if they want to be part of a positive image and dynamic future?': see 'One of the three r's hits a town's nerve' *Molong Express* (22 February 2007).

²⁴¹ Vaz, above n 124.

²⁴² Interview with David Kitto, NSW Department of Planning, 11 August 2011.

²⁴³ Interview with Christine McIntosh, Hub Action Group, 25 February 2011 / 19 March 2011; Interview with David Kitto, NSW Department of Planning, 11 August 2011.

²⁴⁴ Franz von Benda-Beckmann, Keebet von Benda-Beckmann and Anne Griffiths, 'Space and legal pluralism: An introduction' in Franz von Benda-Beckmann, Keebet von Benda-Beckmann and Anne Griffiths (eds), *Spatializing Law: An Anthropological Geography of Law in Society* (Ashgate, 2009) 1, 15.

to its approval is in the report of the Planning Assessment Commission to the Minister for Planning. One of three functions of the Planning Assessment Commission, whose appointment and narrow commission meant that there would be no avenue for merits review appeal to the Land and Environment Court,²⁴⁵ was whether the project would be in the 'public interest'.²⁴⁶ Within its report, the Commission repeatedly framed the project as being in the public interest, which it assessed at a regional scale rather than a local one. The interest of the Molong community was not a high concern.

The Commission concluded, almost mimicking the assessment made four years earlier by the Department of Planning,²⁴⁷ though this time in a way permitted by, rather than inconsistent with, the law, that evaluations of the impact on agricultural land could, and should, be cast within a regional perspective. It wrote:

the [environmental assessment] has satisfactorily considered the impact of the Project on the agricultural capability of the Euchareena Rd site and adjoining land and is taking the necessary measures to mitigate and manage this. In making this judgement, the PAC takes into consideration the agricultural capability of the Region, not just the site in question.²⁴⁸

The Commission recognised that:

It is likely that many of the residents of Molong would believe that the siting of the landfill (and to a lesser degree the composting facility) at Euchareena Rd is not in their 'interest'. The proposal under consideration is not supported by their own Council. Residents of Molong are unlikely to see the greater environmental outcomes of the Project and may argue that there is no improvement in their amenity or convenience.²⁴⁹

Nevertheless, it believed 'that the *public interest is best served by the Orange region* achieving a sustainable solution to waste management, with minimal impact on *people in the region, businesses and the environment*'.²⁵⁰

²⁴⁵ *Environmental Planning and Assessment Act 1979* (NSW) ss 75K(1)(c) and 75L(1)(c).

²⁴⁶ NSW Government, Planning Assessment Commission, *Review of Orange Resource Recovery and Waste Management Project* (March 2010) 1.

²⁴⁷ NSW Government, Department of Planning, above n 57.

²⁴⁸ NSW Government, Planning Assessment Commission, above n 246, 17.

²⁴⁹ *Ibid* 28.

²⁵⁰ *Ibid* 27. Emphasis added.

The Commission accepted that the proposal would potentially have adverse amenity impacts on the people of Molong, though in common with other Part 3A assessments, it did so from a position far removed from the local context.²⁵¹ It would also create a risk to bee farming around the waste site. Nevertheless, in both instances these concerns to the local community were considered capable of being reduced to a 'reasonable level' or an 'acceptable level'²⁵² by changes in the handling of waste and the imposition of conditions on approval. The Commission considered that 'most concerns'²⁵³ of opponents could be addressed by conditions and project restrictions. This reflected a view that the local was capable of self- or delegated regulation, while the law and the investigation of the state should occur at another scale²⁵⁴ – the 'region'.

The project would proceed because it had 'regional potential'.²⁵⁵ The Commission's view on the composting facility – that it was 'infrastructure that could not be built by smaller communities'²⁵⁶ – was an important factor in this regard. Yet that infrastructure on its own would not have been a Part 3A project. It was only assessed as a component of a Part 3A landfill. The landfill itself was not recognised as having particular regional features by the Commission.

Was the project ever a regional one?

In the lead up to the approval and in the immediate aftermath, there was disagreement about whether the project was a regional one at law, not merely in essence and purpose. Under the State Environmental Planning Policy (Major Projects) 2005, the project had to meet capacity levels *and* be a 'regional' facility. The *Molong Express* declared '[t]he decision

²⁵¹ Ibid 18 and Ruming, above n 18, 49, who identifies the main criticism of professional planners to Part 3A decisions is that they are made 'by a Minister who has limited knowledge of the local context'.

²⁵² NSW Government, Planning Assessment Commission, above n 246, 29.

²⁵³ Ibid 27.

²⁵⁴ Carol J Greenhouse, 'Figuring the future: Issues of time, power, and agency in ethnographic problems of scale' in Bryant G Garth and Austin Sarat (eds), *Justice and Power in Sociolegal Studies* (Northwestern University Press, 1998) 108, 109–10.

²⁵⁵ Ibid 29.

²⁵⁶ Ibid.

is wrong and it seems misinformed... *It is not a "regional" facility*'.²⁵⁷ The debate focused on this question because it would also be the only point of law that objectors could potentially pursue in court. Ultimately they did not do so, although they did receive legal advice, because they could not bear another court battle, particularly concerning a law that offers immense discretionary scope to the Minister.²⁵⁸ The effect of the law, however, was not only to diminish local concerns through a prioritisation of an alternative scale – it was to immune itself from challenge by locals.

The basis for Orange City Council's belief that the project did qualify as a regional facility was that it would meet the 'future needs of the region', not simply Orange, and emphasised the 'regional opportunity' for nearby councils to produce compost and to recycle at greater rates, which they will increasingly be required to do under waste-recovery strategies pursued by the state (the non-recoverable material of such waste diversion would then be directed to the Molong landfill). It also noted that the road on which the landfill would be located was a 'regional road' linking Molong with even smaller localities such as Belgravia and Euchareena (within neighbouring Wellington Shire).²⁵⁹ It also continued to assert that the landfill would inevitably be used by Cabonne,²⁶⁰ implicitly rejecting findings that Cabonne had decades of landfill capacity remaining, and setting up the project as potentially servicing four neighbouring councils: the City's Netwaste regional partners.²⁶¹ Unquestionably it saw its project as something grand, innovative and an inevitable temptation to the Central West region of New South Wales. The regional dimension, though, was simply an 'opportunity' and an expectation.

²⁵⁷ Rozzi Smith, (editorial), 'Molong – Don't give up' *Molong Express* (6 May 2010). Emphasis added. By this time, the Minister for Planning was Tony Kelly. Frank Sartor had earlier been replaced as relevant minister by Kristina Keneally.

²⁵⁸ Erin Somerville, 'Hub group opts out of legal action' *Central Western Daily* (Orange) (14 August 2010). Interview with Christine McIntosh, Hub Action Group, 25 February 2011 / 19 March 2011.

²⁵⁹ Stephen Sykes speaking with Angela Owens, 'Molong rubbish tip' *ABC Radio Central West Mornings* (30 April 2010).

²⁶⁰ Orange City Council, *Orange Resource Recovery and Waste Management Project: Preliminary Environmental Assessment* (GHD, February 2009) 5.

²⁶¹ *Ibid* 2, 9, 14, 76.

Cabonne Shire, particularly through its new Mayor, Kevin Duffy, persisted that without its involvement the project could not be a regional one. Cabonne's position was to offer to find a regional solution together with Orange City Council – subject to the landfill being located at a different site. He commented:

I'd like to see it turned down simply because we could then go away and have a regional approach to the situation where it would involve other local government and shires associations.²⁶²

While arguing that the Part 3A proposal 'lacks regional support',²⁶³ the Hub Action Group employed the fear of regionalism in some of its materials, referring to the landfill as a regional one, and highlighting Orange's position that the landfill offers a regional solution. It did this to create suspicion that Molong could also take the waste of neighbouring municipalities and entrench the view point of the town as the regional waste dump. The Hub Action Group asked, 'what other councils will be dumping their waste in Molong ... does this mean that Blayney, Wellington, Parkes, Forbes, Cowra, Dubbo will all be sending their waste to Molong?'²⁶⁴

The decision that the project was a regional one, notwithstanding that it was a decision that could legally have been reached,²⁶⁵ was a poor one based again on deficient statutory interpretation by the Department of Planning. A more adequate construction of the policy would have concluded that the project was not a regional one and that it was appropriate to prioritise more the concerns identified at the local scale. The reasoning given by the Department, just as it did when interpreting clause 10 of the *Cabonne Local Environment Plan*, demonstrates a wilful disregard of how to give meaning to the law. Where decision-

²⁶² ABC, 'Council meeting to discuss tip stance' *ABC Regional News* (6 July 2009) <<http://www.abc.net.au/news/2009-07-06/council-meeting-to-discuss-tip-stance/1342410>>.

²⁶³ 'Molong fights for its future' *Molong Express* (12 November 2009).

²⁶⁴ Hub Action Group Inc, (pamphlet), *Orange City Council – Proposed Orange Resource Recovery and Waste Management Project Community Information Days* (May 2009).

²⁶⁵ Clause 6(1) of the State Environmental Planning Policy (Major Projects) 2005, supported by s 75B of the Act, stipulated that a project would 'be declared to be a project to which Part 3A applies' if that development is 'in the opinion of the Minister' of a kind described in one of the relevant schedules to the policy. That policy includes in schedule 1, clause 27, which is produced above, certain regional landfills. Obiter dictum of the majority in the case of *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 280 ALR 18, para [106] suggested that a ministerial opinion is not a jurisdictional fact.

makers decide for themselves the status of the law, rather than deferring to legal doctrine, the hopes of environmental justice are diminished.

The Department did not look at usual and ordinary meanings of the word 'regional'. It failed to interpret the clause contextually, as demanded by the High Court in *Project Blue Sky Inc v Australian Broadcasting Authority*,²⁶⁶ and conflated the clear and public purpose of the law²⁶⁷ with an internal and private understanding of the reasons behind an alteration to the policy.²⁶⁸ What it means to propose a 'regional' waste tip was not considered.

Had the Department followed a proper course, it would have observed that section 4 of the Act, the interpretation provision, does not give a definition of a 'region'. It simply notes that a region may consist of local government areas or parts of those areas.²⁶⁹ The Macquarie Dictionary definition of 'regional' emphasises that the term refers to 'an area of considerable extent; not merely local'.

There is, however, a very commonly understood meaning of what the regions of New South Wales are. Regions have been created socially, culturally and politically throughout the state. Orange and Cabonne are identified in sociocultural terms as being part of the state's Central West. This is a region recognised by, among others, the Australian Bureau of Statistics (as a statistical division),²⁷⁰ NSW's Department of Trade and Investment,²⁷¹ the Australian Broadcasting Corporation,²⁷² even geographers.²⁷³ Clause 27(2) of the policy

²⁶⁶ (1998) 194 CLR 355, paras [69]–[78].

²⁶⁷ *Interpretation Act 1987* (NSW) s 33.

²⁶⁸ NSW Government, Department of Planning, *Director-General's Environmental Assessment Report – Major Project Assessment – Orange Waste Project* (April 2010) 10, where the Director General argues that, because of a change to the policy, it was no longer a requirement that waste come from more than one local government area for a tip to be classified as being 'regional'. The Director General then dismisses the ongoing importance or relevance of the reference to a waste facility being 'regional' within the policy.

²⁶⁹ With reference to the *Local Government Act 1993* (NSW).

²⁷⁰ Australian Bureau of Statistics, *Statistical Geography: Volume 1: Australian Standard Geographical Classification*. Doc No 1216.0 (2011).

²⁷¹ NSW Government, Department of Trade and Investment, *NSW Regions – Central West*, <www.business.nsw.gov.au/invest-in-nsw/regional-nsw/nsw-regions/central-west>.

²⁷² ABC, *ABC Central West NSW* <www.abc.net.au/centralwest>.

gives a contextual understanding of the meaning of 'regional' and suggests that the state-wide recognised regional divisions are the meaning intended by legislators. Sub-clause 2 refers to the 'metropolitan areas of the Sydney region', indicating that 'regional' does not mean 'rural'.

In addition, section 23G of the Act empowers the formation of 'joint regional panels'. These panels have been created to represent a series of large regions throughout the state broadly according with the state's pre-existing regional divisions. They have not been so localised to represent one or two councils. Finally, the Department misconceived the purpose of the policy. While within the bureaucracy the purpose of the drafting of clause 27 may well have been to centralise power in the Minister and deny communities and local governments a functional contribution to planning decisions, the objects of the clause and the policy must also be set within the broader objects of the Act. Those objects expressly include allocating responsibility for decision-making and encouraging the economic and orderly use of land,²⁷⁴ and implicitly facilitating controversial development. They also include, however, objects of fairness in decision-making, of community participation, of ecological sustainable development – and those factors considered so important by Preston CJ, such as the principle of intergenerational equity.

4.8 Conclusion

The *Environmental Planning and Assessment Amendment (Part 3A Repeal) Act 2011* (NSW) came into force on 1 October 2011,²⁷⁵ bringing to an end a law that many communities throughout New South Wales experienced just like the people of Molong, with localised impacts of projects ignored in favour of benefits invoked at a regional or state scale at the unchallenged declaration of the Minister for Planning. The ending of the Part 3A law did not

²⁷³ See, eg, Kevin Dunn and Amy McDonald, 'The geography of racisms in NSW: A theoretical exploration and some preliminary findings from the mid-1990' (2001) 32 *Australian Geographer* 29, 37. Tim Cresswell, *Place: A Short Introduction* (Blackwell, 2004) 16-18 makes the point that geographers have long agonised over what a region is, and that regions have been deliberately produced and institutionalised through politics for purposes of governance.

²⁷⁴ *Environmental Planning and Assessment Act 1979* (NSW) s 5.

²⁷⁵ It received assent on 27 June 2011. A revised policy on state significance, the State Environmental Planning Policy (State and Regional Development) 2011 (NSW), was also developed.

and does not, however, signify the end of laws that diminish the influence of the courts and communities of opposition in environmental assessments. Such laws are likely to be with us for many years to come in some form – they have become a standard feature in Australian planning and environmental law, with decisions of law and questions of scale and geography centrally controlled. In New South Wales, one law simply replaced the other;²⁷⁶ elsewhere in Australia these laws are reserved for projects that governments expect quickly transition from being a concept to being shovel-ready.²⁷⁷

The activation of these laws ought to be capable of legal challenge or critique. This is because ministerial decisions (especially those of questionable foundation) have immense social, legal and political effect. They generate unfairness across place and scale resulting in a real sense of injustice. They enable the bypassing of locally experienced social and environmental harms that the laws are directed to mitigate in an effort to 'streamline' and 'fast-track' project approval of government-preferred developments. It is little wonder that, despite quashing local laws, they do little to quell local dissent. Where dissent arises, typically because members of society are frustrated by an inability to have a meaningful say over their day-to-day lives, it is an expression of environmental injustice and powerlessness. The danger for our system of laws and governance is that community members misunderstand these fast-track laws as providing legal avenues to halt a project. Insofar as they are concerned with justice, the laws sometimes provide moments of engagement and opportunities to ventilate concerns; but there is no pretence in them of equality of influence or equity in outcome.

The Orange Waste Project was just one of the many projects approved under fast-track approval laws, but it does have lasting and telling lessons for the law and environmental justice because of the dual assessment and court review that the project went through.

Throughout the years of opposition, the distributive justice claims were little more than a

²⁷⁶ The new state significant development provisions are in Division 4.7 of the *Environmental Planning and Assessment Act 1979* (NSW). The new laws temper the most objectionable parts of the former Part 3A, including enabling approval of otherwise prohibited development, and opening up some further avenues for challenge; yet decisions remain centralised and appeals limited.

²⁷⁷ *Major Transport Projects Facilitation Act 2009* (Vic).

trope. While forcefully believed, the narrative of Orange dumping on Molong was used to inflame, to aggravate, to humour and to sensationalise, not to articulate the primary concerns of the community group that led the opposition to the project. This is not to diminish the experience of communities confronting inequitable exposure to environmental harms, rather to reiterate the view of leading scholars²⁷⁸ that what is a central demand of groups involved in the law – and typically absent – is power to influence environmental decision-making. Within the Orange Waste Project, NIMBY claims were shrugged off by members of the Hub Action Group, confident in their evaluations of the impacts and unsuitability of the various proposals on the chosen landscape for the landfill, and supported by the opinion of the New South Wales Land and Environment Court.²⁷⁹

The justice aspects that were constant and that frustrated and angered community members were participatory in nature: the community members were denied a say in site selection; they were not heard during the early stages of the assessment; they had limited access to their representatives and bureaucrats, they felt obliged to do the work of identifying problems or articulating alternatives to the proposed project. They felt forced to go to court to be heard on the matters that were important to them and to be respected by an independent adjudicator. Throughout the Part 3A process, the initiation of which triggered a narrative of democratic injustice, they could do little to influence the outcome, instead taking solace in the improvements to the project that they contributed to.²⁸⁰

The universal view of the environmental law process was that it generated a more sustainable project; however, the original concept for the project was approved by the government, indicating that environmental laws allow the endorsement of unsustainable projects. Achieving a sustainable design for the Orange Waste Project required great time and came at incredible social cost. Insofar as ecologically sustainable development

²⁷⁸ Alice Kaswan, 'Environmental justice: Bridging the gap between environmental laws and "justice"' (1997) 47 *The American University Law Review* 221; Cole and Foster, above n 8.

²⁷⁹ Interview with Alison Trowbridge, Hub Action Group, 17 March 2011.

²⁸⁰ Interview with Alison Trowbridge, Hub Action Group, 17 March 2011. Interview with Christine McIntosh, Hub Action Group, 25 February 2011 / 19 March 2011.

incorporates public participation,²⁸¹ this project was never sustainable. The concept of environmental justice, which can be used to evaluate the fairness of participation, demonstrated this. An environmental justice critique of the project concludes that the political exclusion of the community most affected by the project justifies the project's rejection.

The inquiry into this New South Wales case also emphasises the valuable contribution accessing a specialised court has to the realisation of justice in an environmental legal system: in this case study, it was the Land and Environment Court through its chief justice. Throughout the controversy, there was only one occasion when the community's localised space was acknowledged, in the way that it was required under the Cabonne *Local Environment Plan*. That occasion was in the judgment of the Land and Environment Court. Preston CJ also applied rigour to the interpretation of the law. He based his reasons, in part, on equity within and across generations. In so doing, Preston CJ advanced the meaning and the presence of environmental justice in Australia, moving it closer to a position of orthodoxy in Australian law.

²⁸¹ Commonwealth of Australia, *National Strategy on Ecologically Sustainable Development* (1992) says that it does – a guiding principle being that 'decisions and actions should provide for broad community involvement on issues which affect them'.

Chapter 5

The Channel Deepening Project – Dredged and dragged through the law*

5.1 Introduction

The goals of the chapter

This chapter will analyse the second case study of the thesis through participatory justice – the second of Schlosberg’s aspects of environmental justice detailed in chapter 2. The case study in this chapter comprises the dispute about the proposal to deepen the shipping channels to the port of Melbourne that was controversial in Victoria throughout the 2000s,¹ as well as the failed attempts to reform the law – the *Environment Effects Act 1978* (Vic) – under which the project was assessed and that was central to the ultimate approval of the dredging project.² Many of the same actors were involved throughout the decade-long duration of the case study. At the start, they were contributing to consultation processes before the project evaluation was finalised; at the end, they were giving evidence to the parliamentary committee tasked with reviewing the laws that were shown to be deficient throughout the Environment Effects Statement assessment and approval stages of the project.³ The objectors’ insights about the law, drawn from their experience and observation, are more critical and angrier than those of the protagonists surveyed for the other case studies.⁴ There was a deep frustration that the law did not provide what the

* Parts of this chapter have been drawn from the following earlier work: Brad Jessup, ‘Victoria and the Channel Deepening Project’ in Tim Bonyhady and Andrew Macintosh (eds), *Mills, Mines and Other Controversies: The Environmental Assessment of Major Projects* (Federation Press, 2010) 104 and Brad Jessup, ‘The Port Phillip Channel Deepening Project and environmental law: A model for ecologically sustainable development?’ in Warwick Gullett, Clive Schofield and Joanna Vince (eds), *Marine Resources Management* (LexisNexis Butterworths, 2011) 297. From 2003 to 2005, I advised the Port of Melbourne Corporation on environmental law aspects of its Channel Deepening Project.

¹ The Channel Deepening Project came to dominate news in Victoria, so much so that the reporting of the project became a matter of debate: see Statement of support accompanying motion of *The Age* journalists before the House Committee and Independence Committee (10 April 2008).

² In Victoria, the project was approved under the *Coastal Management Act 1995* (Vic), an approval being required to develop coastal Crown land (see s 37).

³ Resulting in: Parliament of Victoria, Environment and Natural Resources Committee, *Inquiry into the Environmental Effects Statement Process in Victoria* (September 2011).

⁴ Michelle Quigley, barrister, interview, 31 March 2009 observed during the late 2000s heightened tensions

community expected: an equal say, a fair evaluation of the environmental credentials of the project and a regime that would listen to the matters of concern to them.⁵ The court cases exposed the very limited framework for the review of environmental laws in Australia under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) and exposed the concept of ecologically sustainable development under that Act as being ill-equipped to deliver its environmental protection objectives.

This chapter will show how a narrow conception of participation as access cannot support or deliver justice. In this case study, the controversial project was subject to two environmental assessments⁶ through which submissions were invited, two public hearings where presentations were made⁷ and four court cases.⁸ Access to the law and the arena of decision-making, though never difficult, was hard work.⁹ It was costly,¹⁰ unsupported by the

and an increase in aggression in environmental assessment matters, including those under the *Environment Effects Act 1978* (Vic).

⁵ Patsy Crotty, Blue Wedges Coalition, interview, 3 February 2009 explained that the consultation she experienced was a process of being told information, not an exercise in listening. Within the second panel hearing, Crotty noted that there was unequal access to experts, with opponents not permitted to ask questions contemporaneously with evidence.

⁶ Port of Melbourne Corporation, *Channel Deepening Project Environment Effects Statement* (July 2004) ('*First EES*'); Port of Melbourne Corporation, *Channel Deepening Project Supplementary Environment Effects Statement*, (March 2007) ('*Supplementary EES*').

⁷ Rynd Smith et al, *Report of the Advisory Panel into the Channel Deepening Project Environment Effects Statement* (11 February 2005); Allan Hawke, Kathryn Mitchell and Mike Lisle-Williams, *Port Phillip Bay Channel Deepening Supplementary Environment Effects Statement Report of the Inquiry* (1 October 2007).

⁸ *Blue Wedges Inc v Port of Melbourne Corporation* [2005] VSC 305 ('*Blue Wedges Trial Dredging*'); *Stephen Ross Douglas v State of Victoria* (Unreported, Mandie J, 8 August 2005); *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts* (2008) 165 FCR 211 ('*Blue Wedges Project Description*') *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts* (2008) 167 FCR 463 ('*Blue Wedges ESD*').

⁹ Barry Robinson, Blue Wedges Coalition, interview, 29 December 2008 noted that professional full-time work was easier than the work involved in opposing the project. Patsy Crotty, Blue Wedges Coalition, interview, 3 February 2009 took long-service leave to contribute to the process. Jenny Warfe reported her role as being more than a full-time job: Karen Kissane, 'Rocking the boat', *The Age* (13 August 2005) <<https://www.theage.com.au/national/rocking-the-boat-20050813-geoomy.html>>.

¹⁰ The Victorian Civil and Administrative Tribunal, the low-cost planning tribunal, was not available to community groups for this project because the project did not require planning approval – the bay is not subject to a planning scheme. This gap was noted by Michelle Quigley, barrister, interview, 31 March 2009; and Jenny Warfe, Blue Wedges Coalition, interview, 29 December 2008. Mary Rington, Mordialloc Beaumaris Conservation League, interview, 4 February 2009 noted the difficulties for a community group trying to pay for consumables while wanting to pay for a single expert or a sole lawyer. Marc Moncrief, 'Blue Wedges a costly irritant', *The Age* (17 March 2008) reported that the Blue Wedges had spent about \$25,000

state, time consuming, and restricted by the legal avenues that were open to the community groups concerned about the effects of the project on the environment¹¹ and the matters set out in law¹² or determined by the state.¹³ The case study is confirmation that something more than a right to access or be involved in the law must be incorporated into an environmental legal system for it to be environmentally just. The principle of ecologically sustainable development, which in this case was presented and applied in a corporatised form, did not and could not offer justice, because all it provided was a requirement for decision-makers to turn their minds to the manifold impacts of a project.¹⁴

At the very least, members of a community who forgo their own time to contribute to the process of environmental decision-making should be treated respectfully and should feel that their contributions count for something.¹⁵ Alternatively, our conception of what constitutes participation or procedural justice needs reconsideration. Schlosberg argues that recognition and capabilities or capacity are features of environmental justice.¹⁶ Consistent with these ideas, I will argue that a process of legal improvement – law reform – is an important component of an environmentally just legal system. In this case study, law reform would have respected the voluntary contribution that community members put into environmental decision-making and built capacity in them and other groups to achieve

fighting the project.

¹¹ Anne Kallies and Lee Godden, 'What price democracy? Blue Wedges and the hurdles to public interest environmental litigation' (2008) 33 *Alternative Law Journal* 194, 197.

¹² Crucially, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 136.

¹³ Victorian Government, Department of Sustainability and Environment, *Assessment Guidelines for the Port Phillip Bay Channel Deepening Project Environment Effects Statement* (2002) ('2002 Assessment Guidelines'). Victorian Government, Department of Sustainability and Environment, *Assessment Guidelines Issued by the Minister for Planning for the Port Phillip Bay Channel Deepening Supplementary Environment Effects Statement* (2005) ('2005 Assessment Guidelines').

¹⁴ There was no discussion of sustainable development comprising meaningful participation, as international environmental law expects: see, eg, the *Rio Declaration on Environment and Development* (14 June 1992), principle 10; and sustainable development goal 16: United Nations General Assembly, *Transforming our World: The 2030 Agenda for Sustainable Development* (21 October 2015).

¹⁵ Frank Hart, retired sea captain, interview, 4 February 2009 described the legal process as like 'talking to a brick wall'.

¹⁶ David Schlosberg, *Defining Environmental Justice: Theories, Movements, and Nature* (Oxford University Press, 2007).

environmental justice. However, what occurred after this case was that other community groups experienced the law as supporting a disempowering, rather than a participatory, process.¹⁷

The limits of procedural justice in environmental law

On 28 March 2008, Justice North of the Federal Court of Australia offered 'a final observation' on the Channel Deepening Project in the case that would end the environmental law process that resulted in the approval of the project.¹⁸ Justice North's conclusion in the *Blue Wedges ESD* case¹⁹ highlighted the gap between what environmental law provided to the community group that had vocally and publicly opposed the project and what it wanted from the law. After nine years of planning, evaluation and objection, the law would not stop the Port of Melbourne Corporation undertaking its project to dredge the shipping channels of Port Phillip leading to the port of Melbourne; but the law could not offer a view on the merits and justness of the project. As Justice North said:²⁰

It is important to emphasise that in this case, the Court was not called upon to make a judgment as to whether the channel deepening project is a good thing or a bad thing or whether it is harmful to the environment or not.

State and Federal laws provide for a very elaborate process of assessment of those matters. The law then requires the Minister to evaluate the benefits and detriments of the proposal.

The Court has a limited function. It can only consider challenges to the process by which the Minister made his decision and determine whether the Minister acted in accordance with the law.

These comments were directed at the Blue Wedges Inc, a coalition of individuals and conservation groups who joined to oppose the dredging project. The coalition, which

¹⁷ Stephen Cannon, Watershed Victoria, *Transcript of Evidence to Environment and Natural Resources Committee Inquiry into the Environment Effects Statement Process* (Melbourne, 24 May 2010).

¹⁸ *Blue Wedges ESD* case (2008) 167 FCR 463, para [127]. However, public discussion and debate about the project did not end: see, eg, Port of Melbourne Corporation, *Channel Deepening Complete* (Media Release, 25 November 2009). The project is regularly referred to as the likely cause of beach erosion at well-heeled coastal town Portsea, close to the Port Phillip Heads: see, eg, Mike Hast, 'Push for dredging not seawall at Portsea', *Southern Peninsula News* (11 July 2017) 3.

¹⁹ (2008) 167 FCR 463.

²⁰ *Ibid*, para [129]–[131].

rapidly rose to state attention²¹ from the sitting rooms of the bayside suburbs where the community conservation groups regularly met,²² initiated the court action as a final attempt to halt the project that they had rallied against for more than five years. They perceived that they had no other option.²³ They felt voiceless outside the courtroom²⁴ and 'got nowhere' engaging with parliamentarians.²⁵ They were optimistic that justice would be done, and that their earlier successes to delay the project would be repeated. However, many within the coalition were frustrated²⁶ that the law could deny them the conclusion they sought – a decision about whether the project was right or wrong.²⁷ They described the court case as 'people talking about technical [legal] issues while the [dredging] boat is in the harbour', and environmental laws being ineffectual when the ultimate decision about whether to approve a project under environmental law did not even look at the impacts on the environment of the project.²⁸

The limitations that lawyers understand as inherent in judicial review are not widely known by the wider community. While this fact, when contrasted with the community expectations of the law, provides an entry point into a critical analysis of the law or to advance support for more merits review in environmental law,²⁹ in this chapter my aim is greater. The Channel Deepening Project and the laws that approved it will be analysed not simply as a critique of the limits of judicial review of administrative decision-making, and

²¹ Kissane, above n 9.

²² I was invited a meeting of the Mordialloc Beaumaris Conservation League conducted in the sitting room of its Secretary Mary Rimington on 4 February 2009.

²³ Jenny Warfe, Blue Wedges Coalition, interview, 29 December 2008 noted that no one in government was listening; at least in the courtroom the judge would.

²⁴ Interview with Jenny Warfe, Blue Wedges Coalition, 29 December 2008.

²⁵ Interview with Jenny Warfe, Blue Wedges Coalition 29 December 2008, in particular with reference to efforts to engage with Commonwealth Transport Minister John Anderson, and the Victorian Government generally.

²⁶ Interview with Patsy Crotty, Blue Wedges Coalition, 3 February 2009.

²⁷ Interview with Patsy Crotty, Blue Wedges Coalition, 3 February 2009.

²⁸ Interview with Patsy Crotty, Blue Wedges Coalition, 3 February 2009.

²⁹ Kallies and Godden, above n 11.

not simply by looking at the failed administrative law challenge as determined by Justice North. It will challenge the law to be more just – by being more responsive to communities and less controlled by governments. Despite the law not allowing the courts to offer communities what they wanted,³⁰ in the courtroom the opponents to the Channel Deepening Project did not feel ‘belittled’, ‘discredited’, ‘denigrated’, ‘disrespected’, ‘treated with contempt’ and ‘whitewashed’ as they had described feeling during other parts of the decision-making processes³¹ – processes that are supposed to, and are presented as being, directed towards equity and fairness. The *Ministerial Guidelines for Environment Effects Statements* explains that the process the Channel Deepening Project was subjected to should ‘provide public access to information regarding potential environmental effects as well as fair opportunities for participation in assessment processes by stakeholders and the public’, and to assess projects consistently with the principle of ecologically sustainable development, including ‘to provide for equity within and between generations’ and ‘to facilitate community involvement in decisions and actions on issues that affect the community’.³²

These processes, often informal and, in Victoria, not detailed in law but controlled by government officials and ministers, deliver environmental injustices with regularity. American scholars Cole and Foster note that processes like Victoria’s environmental impact assessment use technical language as a mode for disempowerment, silencing and belittlement, leading to community groups being ‘in the dark about issues that fundamentally affected their health and quality of life’ and feeling ‘unacknowledged and unheard’ when they learn to engage in discussions in technical language. Their explanation,

³⁰ Jenny Warfe, Blue Wedges Coalition, interview, 29 December 2008 explained that she felt that the judge at least understood and acknowledged his limited capacity to do anything but uphold the decision. For her, the lesson from the courtroom was less about participation but about institutional barriers to good environmental decisions.

³¹ Interview with Len Warfe, Port Phillip Conservation Council, 29 December 2008; Interview with Jenny Warfe, Blue Wedges Coalition, 29 December 2008; Interview with Barry Robinson, Blue Wedges Coalition, 29 December 2008. Maria Adebawale, *Using the Law: Access to Environmental Justice: Barriers and Opportunities* (Capacity Global, 2004) notes that groups involved in environmental law experience intimidation, perceptions of unequal treatment and unequal enforcement of law.

³² Victorian Government Department of Sustainability and Environment, *Ministerial Guidelines for Assessment of Environmental Effects under the Environment Effects Act 1978* (7th ed, 2006) 3. The definition of ecologically sustainable development is drawn from the *Commissioner for Environmental Sustainability Act 2003* (Vic) s 4.

which accords with the experience of opponents to the Channel Deepening Project, is:

Although concerned residents had tried to work through the system, acquiring technical knowledge about the facilities, reading all of the public documents, and requesting information from decision-makers, they had come to realize that their concerns would not be addressed, much less resolved, if they continued to rely on that tactic alone.³³

Moreover, Cole and Foster argue that, 'given the barriers to meaningful participation and influence' through these processes, 'it is not surprising that many community groups turn to litigation as part of their struggle'³⁴ 'to influence both the structure of, and their inclusion in, environmental decision-making'.³⁵ The end result sometimes is to entrench disadvantage and set back their struggles: a denial rather than a building of capacity to continue to contribute to the law. This was the case for the Blue Wedges Coalition, which at the end of the series of court cases it had initiated was pursued for legal costs rendering it silent.³⁶

The principal barrier to participation in environmental impact assessment law is the power that resides in the state and the proponent in the processes the law creates.³⁷ This is so in Victoria and was apparent in this case study because responsibility to prepare environmental assessments rests with the proponent, here the Port of Melbourne Corporation, which at the time was an emanation of the state.³⁸ The bounds, features and environmental science of projects are all predetermined before participatory processes are initiated, meaning that '[w]here the communities are able to participate in the legal process to fight facilities, often they are required to focus on objections that are peripheral to their

³³ Luke W Cole and Sheila R Foster, *From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement* (NYU Press, 2001) 42. Interview with Frank Hart, retired sea captain, 4 February 2009; Interview with Barry Robinson, Blue Wedges Coalition, 29 December 2008.

³⁴ Cole and Foster, above n 33, 121.

³⁵ *Ibid* 105.

³⁶ Patsy Crotty, Blue Wedges Coalition, interview, 3 February 2009 noted that after the costs order by the Federal Court from the decision of North J: see *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts (No 2)* [2008] FCA 1106 ('*Blue Wedges Costs*') the Blue Wedges could not operate; they could not be seen as doing anything.

³⁷ Cole and Foster, above n 33, 129.

³⁸ *Port Services Act 1995* (Vic).

substantive concerns'.³⁹ If the process goes awry, when the state sees a priority project encountering potential difficulty in its assessment, the state has the capacity to change the ground rules, exacerbating the political disadvantage of the objecting community, highlighting how fragile procedural justice is.⁴⁰ The Supplementary Environment Effects Statement process for the Channel Deepening Project was an example of the Victorian government doing exactly this, and from that moment community members feared there would be no justice for them coming from the procedure of evaluating the project.⁴¹

Chapter overview

This chapter begins by outlining the policy and political context that substantiated the need for the Channel Deepening Project and for law reform of the *Environment Effects Act 1978* (Vic) – the Act that set out the environmental assessment process for the project. It highlights the efforts to reform the law, which have not resulted in changes despite widespread agreement about the need for legal review, including the need to enhance and guarantee transparency and participation in the process.⁴² It then introduces the key opposing voices to the project and describes the Channel Deepening Project and its feared environmental impacts, many of which were not prioritised in the supplementary

³⁹ Alice Kaswan, 'Environmental justice: Bridging the gap between environmental laws and "justice"' (1997) 47 *The American University Law Review* 221, 244 quoting attorney Michael Gerrard.

⁴⁰ Alan Ramo, 'California's energy crisis: The perils of crisis management and a challenge to environmental justice' (2002) 7 *Albany Law Environmental Outlook Journal* 1, 23. This was the case in the Channel Deepening Project, the north–south pipeline project and the Victorian desalination plant. Catherine Gross, *Fairness and Justice in Environmental Decision Making: Water Under the Bridge* (Routledge, 2014) discusses the north–south pipeline. On the desalination plant: see Tanya King and Kristina Murphy, 'Procedural justice and Australian environment: The case of the Wonthaggi water desalination plant' (2009) 4(2) *Public Policy* 105. The controversy over the desalination plant led to the case of *Your Water Your Say Inc v Minister for the Environment, Heritage and the Arts* [2008] FCA 670, which concerned the exemption of preliminary works from environmental assessment.

⁴¹ Kathleen O'Gorman, *Submission to the Channel Deepening Project Supplementary Environment Effects Statement*. Submission 178 (2007); Queenscliffe Community Association Inc, *Submission to the Channel Deepening Project Supplementary Environment Effects Statement*. Submission 172 (2007).

⁴² See, eg, John Thwaites, *Greater Transparency and Accountability for Environmental Assessments* (Media Release, 1 November 2000); Parliament of Victoria, Environment and Natural Resources Committee, above n 3, 149 (Recommendation 7.1) recommended: 'The environmental impact assessment legislation be amended, based on best practice principles, to define opportunities for public participation at key stages of environmental assessment including the referral, scoping, public exhibition and inquiry panel stages; and specify that the Minister for Planning must consider such public comment'.

environmental assessment process that ultimately led to the project's approval. It analyses the procedures for assessment of the project, drawing on community perspectives on the changing procedural framework that the project was subjected to, and the various cases that were triggered by the project assessment and approval. None of the processes that the lead opponents engaged in delivered them procedural justice; rather, the processes facilitated moments of disrespect, dismissal and silencing.

5.2 Advancing the project and avoiding law reform

The policy support for the Channel Deepening Project

The conceptual origins of the Channel Deepening Project occurred out of the public realm. The *Victorian Ports Strategic Study* was the first policy support for the Channel Deepening Project.⁴³ Commissioned in 1998, the study's stated objective was to inform and brief the government on the state of ports in the state and on opportunities for future expansion.⁴⁴ It was intended to build on the reforms that commenced in 1995 with the privatisation of ports facilities and the restructuring of port corporations through the enactment of the *Ports Services Act 1995* (Vic). The study was not intended to support a predetermined outcome, yet it homed in on an initiative to deepen the shipping channels that led from Bass Strait to the port of Melbourne through Port Phillip.

Despite the importance of the study to the Victorian community and economy, it was largely carried out behind closed doors. Businesses, operators and government agencies were consulted. The general public was not, surprising many outside the bureaucracy and commerce when it was released in 2000. Brian Cumming, a vocal voice for the preservation of Western Port, the second of Melbourne's twin bays, was not expecting the publication, referring to its 'appearance' as 'extraordinary' in light of the historically regular forums on the development of port facilities on Western Port.⁴⁵

⁴³ Affidavit of Stephen George Bradford in the matter of the *Blue Wedges Trial Dredging* case [2005] VSC 305.

⁴⁴ Maunsell McIntyre, *Victorian Ports Strategic Study* (January 2000).

⁴⁵ Brian Cumming, *Submission on the Victorian Ports Strategic Study by the Westernport and Peninsula Protection Council* (15 September 2000).

Because the authors of the study did not consult widely, and because they were directed to focus on infrastructure issues,⁴⁶ the environmental effects of the proposed developments were understated. The summary of the environmental and social impacts of the various options for expansion of the shipping industry did not include many of the contentious environmental issues raised throughout the assessment of the Channel Deepening Project, including effects of turbidity, rock removal at Port Phillip Heads or the disturbance of contaminated sediments at the mouth of the Yarra River. The summary did note 'significant impacts' arising from dredging and other works on Western Port, reflecting the contribution of environmental groups from the Western Port region and underscoring the lack of involvement of community groups based on the fringes of Port Phillip, particularly those groups that later formed the Blue Wedges Coalition.

After the study had been completed, a post-hoc consultation process was belatedly carried out. However, it did not advance knowledge or deliberation about the study, nor did it enlighten the community about the potential effects of deepening shipping channels in Port Phillip. Meetings were confined to Melbourne, not in the areas around the beachside areas of the bay where opposition eventually consolidated and where the effects of the implementation of strategic options for the port of Melbourne were to be greatest. The consultation was also criticised as being short and superficial. The fact that the government pre-empted the consultation process by implicitly supporting the strategy in the media and other materials fuelled community concerns.⁴⁷

The weaknesses in this process were reflected in the consultation report that stemmed from it. None of the identified 'key themes' arising from the consultation process addressed community or environmental matters.⁴⁸ The only issue identified that resembled an environmental or community one was a concern about 'pressures on scarce port land from encroaching urban development, and the management of neighbourhood issues'⁴⁹. The key

⁴⁶ Maunsell McIntyre, above n 44, A5.

⁴⁷ Cuming, above n 45.

⁴⁸ Victoria, *Victorian Ports Strategic Study – Consultation* (2001).

⁴⁹ Victoria, *Victorian Ports Strategic Study Consultation Summary – Port of Melbourne* (2001).

concerns did not include any of the many fears and effects raised in the ensuing longwinded assessment. The full consultation report⁵⁰ reveals concerns among environmental groups about dredging in the bay and at Port Phillip Heads, but also confirmed government support for the proposed deepening of shipping channels as recommended in the strategic study. Regardless, by the time the full consultation report was published, feasibility studies were already under way for the Channel Deepening Project;⁵¹ the bounds of the project were set before there was an appreciation of the degree of potential environmental harm and concern of the communities that dotted the shore of Port Phillip.

During the feasibility study for the project, a consultation process was initiated; however, it was one-sided. 'Consultation' was limited to briefings and forums held for local government, peak bodies, and community and environment groups.⁵² The shipping industry was involved in identifying 'issues', but the same opportunity was not afforded to those holding environmental concerns. When the initial feasibility study recommending that the project proceed was released in December 2001, the government accepted the recommendation conditional on the project undergoing an environmental assessment process.⁵³ Ministers expressed their support for the deepening as being 'subject to environmental clearance'.⁵⁴ By this time, however, no consultation on environmental matters had occurred on the strategy underpinning the project. The initial consultation process was largely deployed in order to establish a community consultation database so that further consultation could occur at a later date.⁵⁵

By adopting this approach to participation, the government and the proponent, the Port of Melbourne Corporation, ensured that there was entrenched opposition to the project

⁵⁰ Victoria, n 48.

⁵¹ Port of Melbourne Corporation, *First EES*, above n 6.

⁵² Ibid; Victoria, *Parliamentary Debates*, Legislative Council, 19 March 2002, 245 (Andrea Coote).

⁵³ Coote, n 52, 246.

⁵⁴ See Victoria, *Parliamentary Debates*, Legislative Assembly, 21 April 2004, 631–44 (John Brumby, Peter Batchelor); Victorian Government Office of the Treasurer, *Port of Great Value to Victoria's Future* (Media Release, 21 March 2007).

⁵⁵ Port of Melbourne Corporation, *First EES*, above n 6.

before the legal process of environmental assessment had even started. It also denied the community the opportunity to learn about and identify all of its concerns or to help frame the matters for inquiry or to discuss alternative options to achieve the goals of the project. As a result, throughout the Environmental Effects Statement process the proponent's science was not able to keep up with the evolving concerns of the community, leading the then CEO of the Port of Melbourne Corporation to concede that his organisation prematurely triggered the process under the *Environment Effects Act 1978* (Vic).⁵⁶

The Environment Effects Act

Victoria's environmental impact assessment process is outlined in the brief *Environment Effects Act 1978* (Vic). The process is explained and elaborated in a set of ministerial guidelines.⁵⁷ It is within these guidelines, and not the Act or any regulations, that criteria for assessment, commitments to public processes and community deliberation, and timelines and requirements for open and accountable steps within the process are all found. Because they are guidelines, they can be amended without parliamentary or cabinet approval or oversight. They contain malleable language, which provides opportunities for manipulation. Because they are not enforceable, they are often not complied with.⁵⁸ Consequently, today Victoria's laws fail to meet the most important purposes of environmental impact assessment. The laws do not mandate thorough and transparent inquiries into proposed developments,⁵⁹ and they do not guarantee opportunities for community members to deliberate and contribute to the process. The laws do not create a binding regime for comparing alternatives and options, weighing up environmental effects and other social

⁵⁶ Stephen Bradford, *Transcript of Evidence to the Victorian Parliament Environment and Natural Resources Committee Inquiry into the Environment Effects Statement Process* (Melbourne, 24 May 2010). This view was shared by former Minister for Planning John Thwaites, who noted that the environmental assessment of the project was one that highlighted the need for further and better evidence by the proponent: John Thwaites, former minister, interview, 1 April 2009.

⁵⁷ Victorian Government Department of Sustainability and Environment, above n 32.

⁵⁸ Elizabeth McKinnon, Environmental Justice Australia, interview, 18 February 2009 described the system as 'lacking a legal framework' and one, owing to the guidelines being the primary regulatory tool, that allows for 'anything goes'.

⁵⁹ Though Mandy Elliott, EIA expert, interview, 16 February 2009 notes that, because of the convention to hold public inquires, there is often more exposure of projects to critique.

and economic consequences, meaning that the issues of interest to community groups are often sidelined.

Significantly, and unlike some regimes elsewhere,⁶⁰ the Environment Effects Statement process in Victoria is not an approval process. The aim of the process is to investigate and assess projects.⁶¹ The outcome of the process is a recommendation by the Minister for Planning to those decision-makers required by law to approve or reject a proposal. That recommendation can be inconsistent with the view of the body inquiring into the effects of the project.⁶² The minister's recommendation usually addresses whether the project should proceed and on what conditions any approval should be granted. Ultimately, the decision-maker must make up their own mind. It is possible for a decision-maker to ignore a recommendation from the Minister for Planning, although to do so would almost certainly lead to administrative law review.

When enacted, the *Environment Effects Act 1978* (Vic) was intended to apply only to 'public works' – projects by state agencies having significant effects – such as freeways, dams and electricity utilities. These types of projects are now ordinarily done by the private sector. Despite the amendments made to the Act since the 1990s and the rise of private commercial involvement in large-scale projects, the concept of 'public works' is still entrenched in the Act and, with it, comes an expectation of open and public process.⁶³

Once the Act is triggered – the Minister for Planning forming the view that a project

⁶⁰ Victorian Auditor General, *Effectiveness of the Environmental Effects Statement Process*. Report 18, 2016–17 (2017) compares the Victorian regime with its Commonwealth and Western Australian equivalents.

⁶¹ Mandy Elliott, EIA expert, interview, 16 February 2009 explains that a misunderstanding by the community that the *Environment Effects Act 1978* (Vic) triggers an approval raises expectations in the process that are invariably not met by the government of the day. John Thwaites, former minister, interview, 1 April 2009 attributes this misunderstanding in part to the presence of lawyers in the process making the Environment Effects Statement regime 'more legal than it is'.

⁶² *Friends of Mallacoota Inc v Minister for Planning* (2010) 28 VR 257.

⁶³ Interview with Brendan Sydes, Environmental Justice Australia, 18 February 2009 who described the process as being distant from law and the public, despite communities wanting a process grounded in law and exposed to public scrutiny. He especially highlighted the assessments of the north–south pipelines and the Norwongi waste project, which was the 'exception that proves the rule'. In that process, the assessment led to a decision not to proceed with the project; however, in that project, unlike the Channel Deepening Project, there was a planning scheme amendment requirement that the state's Legislative Council would have likely rejected.

requiring an approval under another law is determined to likely have a significant effect on the environment⁶⁴ – the minister must make an order setting out the procedures and requirements for the assessment,⁶⁵ and then the assessment begins and is largely driven by the minister’s guidelines⁶⁶ under the directive of the minister’s department. Community members have moments of access to the law and the process: for instance, the Environment Effects Statement is usually scoped with input from the proponent and the community, though scoping guidelines change little from draft to final versions.⁶⁷ The proponent then prepares the statement with the assistance of a technical reference group established by the minister, but those groups are typically populated by experts not community members.⁶⁸

Following submission of the statement to the minister,⁶⁹ the minister may elect to publicly exhibit the statement, invite comment on the statement and the project, and convene a

⁶⁴ *Environment Effects Act 1978* (Vic), ss 6, 8(1), 8(3) and 8(4); and ss 8(2) and 10(1)(a). For the Channel Deepening Project, the approval requirement was in the *Coastal Management Act 1995* (Vic) s 40, and the approval of the Commonwealth Minister for the Environment and Heritage was required under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) owing to the likely environmental impacts on threatened and migratory species, Ramsar wetlands and the Commonwealth marine area. The Commonwealth Minister for the Environment and Heritage accredited the Environment Effects Statement process under section 87 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) so that only one environmental assessment process, that of Victoria, would be undertaken for the project.

⁶⁵ *Environment Effects Act 1978* (Vic), ss 3(3) or 8B(5).

⁶⁶ *Environment Effects Act 1978* (Vic), s 10 provides that guidelines may be made about content of statements, procedures and public consultation.

⁶⁷ For the Mordialloc Bypass Environment Effects Statement, for instance, the only notable change was to add a requirement to the scoping guidelines that the Environment Effects Statement address ‘transport efficiency, capacity and safety’ – matters of no concern to the opponents of the project: see Victorian Department of Environment, Land, Water and Planning, *Scoping Requirements for Mordialloc Bypass Environment Effects Statement* (May 2018); and Victorian Department of Environment, Land, Water and Planning, *Impact Assessment Unit, Draft Scoping Requirements for Mordialloc Bypass Environment Effects Statement* (February 2018).

⁶⁸ One of the more recent additions to the *Environment Effects Act 1978* (Vic) is section 8G, which clarifies the minister’s power to acquire technical assistance for an Environment Effects Statement. It has become common practice for the technical reference group to advise the proponent on when the Environment Effects Statement is ready to be published and presented to the minister. This part of the process, like most other parts, is not regulated by the Act.

⁶⁹ *Environment Effects Act 1978* (Vic), s 4(2).

public inquiry.⁷⁰ While each step is ordinarily done, any appointed panel is constrained by its terms of reference over which all control resides in the government.⁷¹ In the context of the Channel Deepening Project, Blue Wedges Coalition member, Patsy Crotty, explained that the terms of reference are 'used as a justification for ignoring anything which the powers that be don't want raised'. The minister is under no compulsion to release the ensuing panel report or their own recommendation about the project to decision-makers under other enactments to the proponent or the public.⁷²

Relatedly, Kellow critiques the operation of the *Environment Effects Act 1978* (Vic) in the context of the Coode Island relocation proposal as a law that facilitates a 'decide, announce, defend'⁷³ approach to environmental assessment. In that case he noted that:⁷⁴

The Panel neither endorsed nor rejected the project [to relocate Victoria's principal chemical storage facility to Port Lillias, an area that was to be excised from the Westernshore Ramsar wetland], but made a number of recommendations for further investigations and other actions prior to approval being considered by the government. The Minister rejected this advice and, noting that the Panel had not identified "substantive impacts" arising from the proposed development ... proceeded to approve the project ... The [decide, announce, defend] character of the process was thus further reinforced.

The disconnect between the government's selective approach to panel inquiries into environmental effects, and the community's bewildering experience of the process not culminating in clear views about projects, were similarly observed in the assessment process for the Channel Deepening Project. Members of the community who had attended months of hearings were left with no clear sense about what the project's credentials and impacts should mean about whether it would proceed. Rather, all that was clear to them

⁷⁰ *Environment Effects Act 1978* (Vic), ss 9(1) and 9(2).

⁷¹ The limited terms of reference for the Supplementary Environment Effects Statement for the Channel Deepening Project and the Wonthaggi desalination plant constrained subject matter and procedural aspects of the assessment, to the criticism of many involved: see, eg, Patsy Crotty, Blue Wedges Coalition, interview, 3 February 2009; Stephen Cannon, *Watershed Victoria*, above n 17.

⁷² *Environment Effects Act 1978* (Vic), s 6(3) merely provides that the minister will provide the assessment as soon as reasonably practicable in the circumstances.

⁷³ Aynsley Kellow, 'Balancing risks to nature and risks to people: The Coode Island/Point Lillias Project in Australia' in S Hayden Lesbirel and Daigee Shaw (eds), *Managing Conflict in Facility Siting: An International Comparison* (Edward Elgar, 2005) 179, 183.

⁷⁴ *Ibid* 185.

was that the process would lead to a decision based on an assessment of the politics of the project not its environmental impacts.⁷⁵

The promise of and retreat from reform of the Environment Effects Act

For a law so frequently and widely criticised, the *Environment Effects Act 1978* (Vic) has been a resilient law. Despite its flaws, it has barely changed in more than 30 years, even as promised and attempted efforts at reform have been made. In 1985, the Cain Government undertook a review that led to no notable or lasting changes to the Act. Then, in 1994, the Kennett Government amended the Act to limit the public works requiring an Environment Effects Statement to those specified by the minister and to allow for joint inquiries that satisfy assessment requirements under the *Environment Protection Act 1970* (Vic).⁷⁶ Because these amendments were introduced at a time when one of the then government's pet projects, the Grand Prix, was exempted from the environmental laws of the state,⁷⁷ the legislative changes were treated with suspicion and were accompanied by claims that the government was diluting an already pared back legal process.⁷⁸ The claim that the Kennett Government was in charge of an environmental assessment regime that excluded the community and was generally outdated became a theme of the then opposition, culminating in Labor's promise to overhaul the system: for example, Dimitri Dollis argued in parliament in 1995 that the *Environment Effects Act 1978* (Vic):

[G]ives ascendancy to political rather than environmental concerns. ... There is no uniform methodology for the assessment of impacts, no period of mandatory monitoring of any effects of development, no process for any results of monitoring to make significant changes to a development, and no consideration of the incremental impact of small

⁷⁵ Patsy Crotty, Blue Wedges Coalition, interview, 3 February 2009 explained her view was that the government was 'prepared to do anything to get what they wanted' out of the project and its assessment. See also interview with Frank Hart, retired sea captain, 4 February 2009; interview with Jenny Warfe, Blue Wedges Coalition, 29 December 2008.

⁷⁶ Second reading speech for the Environment Effects (Amendment) Bill: see Victoria, *Parliamentary Debates*, Legislative Council, 9 November 1994, 784 (Robert Knowles).

⁷⁷ *Australian Grand Prix Act 1994* (Vic), s 48(1) exempts the application of the *Environment Effects Act 1978* (Vic).

⁷⁸ Victoria, *Parliamentary Debates*, Legislative Council, 29 November 1994, 974 (Barry Pullen).

developments.⁷⁹

When Labor surprisingly came to power in 1999, it duly promised to reform the Act.⁸⁰ Early in its first term, the Bracks Government foreshadowed legal changes that would empower communities and councils in the environmental assessment process and protect the community from the 'ad hoc ministerial intervention that characterised the previous government'.⁸¹ In launching the review of the *Environment Effects Act 1978* (Vic) in November 2000, the then Minister for Planning, John Thwaites, commented that:

With only minor changes made to the Environment Effects Act since it was introduced in 1978, in many respects it no longer reflects leading practice.

One of the key objectives of this review is to ensure that the environment assessment process provides the opportunity for affected stakeholders to have their concerns considered in a transparent and accountable manner.⁸²

Following the launch of the Environmental Assessment Review, an *Issues and Options Paper* was published by the Department of Infrastructure in April 2002.⁸³ An advisory committee was also set up to receive community views on the paper and to recommend a reform strategy to the government. The advisory committee provided its report to the Minister for Planning in December 2002.⁸⁴ The report, like so many environmental reports produced by 'independent' panels and inquiries in Victoria, was kept secret. Because of this, many presumed the government had recoiled from its promise of reform so as not to subject major projects, most notably the Channel Deepening Project, to more scrutiny.⁸⁵

⁷⁹ Victoria, *Parliamentary Debates*, Legislative Assembly, 8 March 1995, 398 (Dimitri Dollis).

⁸⁰ Brendan Sydes, Environmental Justice Australia, interview, 18 February 2009 noted that the unexpected result caught the Labor party off guard. It committed to reform in opposition that it did not think it would have to produce.

⁸¹ John Thwaites, *Policy Launch of the State Planning Agenda: A Sensible Balance* (Transcript, 13 December 1999).

⁸² Thwaites, above n 42.

⁸³ Tim Power, 'Review of Victoria's environmental assessment procedures', *Find Law Australia* (2002) <<http://au.findlaw.com/article/5200.htm>>.

⁸⁴ Richard Seddon, Bronwyn Ridgway, Trevor Budge and Peter Davies, *Report of the Environment Assessment Review Advisory Committee* (2002).

⁸⁵ 'Environmentally unfriendly act' (editorial), *The Age* (8 March 2005).

The government's refusal to release the report became the subject of considerable controversy in late 2004 and early 2005. It was condemned in parliament:

[F]or its lack of commitment to a comprehensive, transparent, accountable and up-to-date environment effects statement process in that it has failed to release the final report and recommendations of the environment assessment review committee for over two years ... ⁸⁶

The Age tried unsuccessfully to acquire a copy of it through freedom of information laws but then, through leaks, was able to expose certain aspects of the advisory committee's recommendations.⁸⁷ Under mounting political pressure – even the Victorian Competition and Efficiency Commission called for the release of the report⁸⁸ – the government did so in June 2005.

The suppression of this report was all the more remarkable because the recommendations of the advisory committee were largely predictable and unadventurous. The bulk of the proposed reforms reiterated the earlier Department of Infrastructure *Issues and Options Paper*. In most respects the proposals were to mimic parts of legislation from other jurisdictions and to revitalise what was generally regarded as an outmoded and undemocratic form of environmental assessment in the state.

The advisory committee also restated many of the accepted problems with the Act, including that it 'favour[ed] ... development over the environment'. This should not have been controversial. The *Environment Effects Act 1978* (Vic) was introduced in times when the concept of ecologically sustainable development was still formative,⁸⁹ and when there was a firm belief internationally that economic development could be pursued simultaneously with conservation.⁹⁰ The committee's finding, however, laid bare the unsuitability of the Act

⁸⁶ Victoria, *Parliamentary Debates*, Legislative Assembly, 8 December 2004, 2105 (Phillip Honeywood).

⁸⁷ Royce Millar and Melissa Fyfe, 'State suppresses vital environment report', *The Age* (7 March 2005).

⁸⁸ Victorian Competition and Efficiency Commission, *Regulation and Regional Victoria: Challenges and Opportunities – Final Report* (June 2005).

⁸⁹ Many academics have traced the concept of sustainable development and its predecessor concepts like 'wise use' to well before 1987, when the Brundtland Commission report of 1987 popularised the term 'sustainable development': see, eg, William Adams, *Green Development: Environment and Sustainability in the Third World* (Routledge, 2nd ed, 2001) and John Dryzek, *The Politics of the Earth: Environmental Discourses* (Oxford University Press, 1997).

⁹⁰ John McCormick, *The Global Environment Movement: Reclaiming Paradise* (Belhaven Press, 1989).

for its current circumstances.

5.3 The Channel Deepening Project and its first assessment

The project goals and feared impacts

The port of Melbourne is Australia's largest and busiest container port.⁹¹ In the decade before the project, the port oversaw a doubling of its container traffic.⁹² Faced with sustained increases in traffic and cargo, and wanting to promote more, the Port of Melbourne Corporation and the Victorian government viewed the depth of the shipping channels that run to the port of Melbourne as a barrier to growth and economic efficiency. The Channel Deepening Project was conceived as the solution to this perceived problem and was quickly nominated as the most important infrastructure initiative for Victoria.⁹³ The target was to allow 14-metre draft ships into the port.⁹⁴ The concern in not deepening the channels was that Melbourne's competitiveness as a trading port, especially for the container trade, would be hampered.⁹⁵

The project involved the dredging of tens of millions of cubic metres and many depths of metres of silt, sand, clay and rock from the principal shipping channels in Port Phillip – from the very narrow and treacherous entrance of the large bay to the lower estuary of the Yarra River on which Melbourne sits. These channels have been dredged many times before; however, the volume of dredging proposed for the Channel Deepening Project far exceeded

McCormick commented that a guiding principle of the 1972 Stockholm Convention on Human Development was the 'development and environment should go together'. See also John G Clark, 'Economic development vs sustainable societies: Reflections of the players in a crucial contest' (1995) 26 *Annual Review of Ecology and Systematics* 225.

⁹¹ Port of Melbourne Corporation, *Quick Facts* <<http://www.portofmelbourne.com/about-us/quick-facts/>>.

⁹² Bureau of Infrastructure, Transport and Regional Economics, *Australian Transport Statistics* (Commonwealth of Australia, June 2008).

⁹³ Victorian Government, *Victoria: Leading the Way – Economic Statement April 2004* (2004). Action 1 of the statement is 'Deepening the channel to the Port of Melbourne'.

⁹⁴ Victorian Government, Department of Sustainability and Environment, *2002 Assessment Guidelines*, above n 13, 4.

⁹⁵ A goal that was seemingly never realised: see Port of Melbourne Corporation, *Victorian Notice to Mariners – Tidal Stream Limits for Vessels Transiting Port Phillip Heads* (20 July 2011), which imposed conditions on the movement of tankers with draughts of more than 11.6 metres.

past dredging effort. Previous dredging had occurred over periods of months rather than years, as was proposed for this project. It was also the first time that significant deepening works were required in the relatively deep parts in the south of the bay where channels are close to seaside village populations. In addition, the project involved dumping dredged material within the bay, including contaminated sediments dredged from the mouth of the Yarra River.⁹⁶

The feared and perceived environmental effects of the project were manifold.⁹⁷ They principally related to the removal of rocks at the Port Phillip Heads – the entrance to the bay and an area that abuts the Port Phillip Heads Marine National Park; the disturbance of toxic sediments in the Yarra River; and the disposal of those sediments in the middle of the bay. There were predictions that the turbid plumes created by the project would disturb the nutrient cycle of the bay and permanently harm important seagrass communities by smothering them.

Concerns about the project were not surprising given the bay's ecological and social importance. Port Phillip is locally cherished and ecologically significant. It is a wide expanse of water that is relatively shallow and has a very narrow entrance to the sea. The bay is located in a catchment of more than four million people, and it contains the largest Australian port catering to the container trade. Closer to the port, the dredging was in the vicinity of Melbourne's colony of little penguins,⁹⁸ and proximate to the coolant water intake valves of the city's gas-fired power station. Much of the western shoreline and the Bellarine Peninsula to its west are included on the list of wetlands of international importance under the Ramsar Convention, and there are various notable seagrass, sponge and seaweed communities, reefs and sandy beaches. The eastern shoreline, including the Mornington Peninsula, is highly urbanised and depends on recreational and tourism activities. It is a highly popular beach holiday locale for many Melburnians and the bay is

⁹⁶ More details about the project can be found at Port of Melbourne Corporation, *Channel Deepening Project Supplementary Environment Effects Statement – Summary* (2007).

⁹⁷ Port of Melbourne Corporation, *First EES*, above n 6; Port of Melbourne Corporation, *Supplementary EES*, above n 6. Smith et al, above n 7; Hawke, Mitchell and Lisle-Williams, above n 7.

⁹⁸ The species *Eudyptula minor*.

used for recreational and commercial fishing.⁹⁹

Despite the many environmental and 'land-use' planning concerns, the project was not subject to approval requirements under planning or pollution control laws. The only parts of the project subject to planning controls were undertaken within the bounds of the antiquated *Port of Melbourne Planning Scheme* of 1988. This is significant, because in Victoria, much like elsewhere in Australia, it is the contemporary planning system that provides policy direction for land use and particularly seeks to give meaning to the principle of ecologically sustainable development.¹⁰⁰ For the Channel Deepening Project, however, detailed planning provisions relating to environmental conservation, including undersea native vegetation removal, did not apply, nor did the many social considerations that accompany any planning decision on land. If the planning regime had applied, the decision-makers would have been bound to consider all public submissions received about the project by virtue of the operation of the *Planning and Environment Act 1987* (Vic).¹⁰¹ Moreover, the disposal of material, contaminated or otherwise, did not require approval or oversight¹⁰² under the *Environment Protection Act 1970* (Vic) or its associated regulations,¹⁰³ meaning that the limited avenues for review of decision under that Act¹⁰⁴ were not available to any community with interests in the project.

The Environment Effects Statement

The first Environment Effects Statement for the project was published in July 2004,

⁹⁹ Port of Melbourne Corporation, *First EES*, above n 6; Smith et al, above n 7; Port of Melbourne Corporation, *Supplementary EES*, above n 6; Hawke, Mitchell and Lisle-Williams, above n 7.

¹⁰⁰ See, eg, Leslie Stein, *Principles of Planning Law*, (Oxford University Press, 2008) 1–5, 23–30.

¹⁰¹ See *Planning and Environment Act 1987* (Vic) s 60. *Australian Conservation Foundation v Latrobe City Council* (2004) 140 LGERA 100 highlighted the legal significance of the project subject to the *Environment Effects Act 1978* (Vic) also requiring approval under the *Planning and Environment Act 1987* (Vic). In that case, the Minister for Planning excluded any consideration of greenhouse gas matters from the terms of reference for an environmental assessment relating to the expansion of the since-closed Hazelwood coal mine. However, by virtue of the operation of the *Planning and Environment Act 1987* (Vic), those matters when raised in submissions had to be considered.

¹⁰² EPA Victoria, *Response to Channel Deepening Project EES Panel Issues Paper 2* (2004).

¹⁰³ At the time: *Environment Protection (Scheduled Premises and Exemptions) Regulations 1996* (Vic).

¹⁰⁴ *Dual Gas Pty Ltd v Environment Protection Authority* [2012] VCAT 308.

following its approval by the government's technical reference group, which comprised bureaucrats and disciplinary experts, but no community representatives.¹⁰⁵ Its role was to evaluate whether the report addressed all aspects set out in the assessment guidelines for the project,¹⁰⁶ yet the course of the inquiry that followed demonstrated that the technical reference group had signed off on a deficient risk assessment and management approach.¹⁰⁷ The inquiry also highlighted disagreements within the membership of the committee,¹⁰⁸ with a number of the agencies from within the group making public submissions highlighting procedural or substantive concerns with the project – thus undermining the Environment Effects Statement and the process. Their approval of the statement was exposed as a political manoeuvre rather than a rational decision,¹⁰⁹ and politics overriding reason would become a trend throughout the assessment process, especially at the end of the first assessment inquiry, by which time the state government had come to accept that it would ground its decision about the project on politics rather than the uncertainty of the environmental science;¹¹⁰ and view the project through a lens of economics not engineering.¹¹¹

The Minister for Planning established a panel inquiry to investigate the environmental effects of the project. Rynd Smith, Planning Panels Victoria senior planner, who was known for his forensic approach to project assessment, was joined by three ad hoc appointees with

¹⁰⁵ Port of Melbourne Corporation, *First EES*, above n 6.

¹⁰⁶ Victorian Government, Department of Sustainability and Environment, *2002 Assessment Guidelines*, above n 13.

¹⁰⁷ Smith et al, above n 7. See Victorian Competition and Efficiency Commission, n 30, where Bendigo Mining Limited relays a similar experience with a technical reference group.

¹⁰⁸ This was recalled by Mary Rimington, Mordialloc Beaumaris Conservation League, interview, 4 February 2009 in the context of the extent of scientific sampling.

¹⁰⁹ Chris James, Victorian Chamber of Commerce and Industry, interview 5 July 2011 spoke about the government agencies wanting to divest all responsibility for the project to the port during the first EES. He also noted that there were different degrees of support for the project across ministerial portfolios. The conflicting views about the project, especially from departments dealing with the environment and infrastructure as well as the EPA, expressed throughout the first panel inquiry suggested that the politics of the project were not straightforward.

¹¹⁰ Interview with Llew Russell, Shipping Australia Limited, 26 March 2010.

¹¹¹ Interview with Chris James, Victorian Chamber of Commerce and Industry, 5 July 2011.

expertise in risk assessment, chemistry, and coastal planning and management¹¹² to consider the Environment Effects Statement and submissions arising from the six-week public comment period. Community groups, businesses, overlooked service providers and local councils positioned their opposition in the months before and after the publication of the Environment Effects Statement, aware from the assessment guidelines that directed the preparation of the statement of the hefty scientific task that was given to the port.

The Association of Bayside Municipalities engaged a former CSIRO¹¹³ scientist who challenged what he interpreted as unfinished science, and a failure on the part of the consultants who prepared the Environment Effects Statement to attend to the systems analysis that was a prescribed requirement for the statement, and calculate the economic benefit of the ecosystem services provided by an ecologically functioning bay.¹¹⁴ Newport Power Station engaged lawyers and a trio of marine experts who would present evidence on the effects of turbid estuarine waters on its commercial operation.¹¹⁵

The shipping industry questioned why the river needed to be dredged at all when an alternative dock was available for large ships in the bay.¹¹⁶ OMC International, a company that specialised in undersea technology,¹¹⁷ pursued a narrative of the project being too costly and founded on a deficient design as a result of its proprietary tools being excluded from consideration for the project.¹¹⁸ It made clear its view that the Port of Melbourne

¹¹² Bronwyn Ridgway, David Smith and Nick Wimbush, respectively. See Smith et al, above n 7, 15. Chris James, Victorian Chamber of Commerce and Industry, interview, 5 July 2011 was critical of the composition of the first panel for having no economic expertise.

¹¹³ The Commonwealth Scientific and Industrial Research Organisation.

¹¹⁴ Graham Harris, *Report to the Association of Bayside Municipalities on the Port Phillip Bay Channel Deepening Project Environment Effects Statement* (15 April 2004).

¹¹⁵ Simon Molesworth QC, *Channel Deepening Project Environmental Effects Study Submission on Behalf of Ecogen Energy Pty Ltd* (3 December 2004).

¹¹⁶ Llew Russell, Shipping Australia Limited, interview, 26 March 2010 spoke of the Webb Dock alternative and relayed the views of shipowners that dredging the Yarra River was unnecessary and avoiding it was sensible.

¹¹⁷ Dynamic Under-keel Clearance technology: see OMC International, *The DUKC® Story* <<https://omcinternational.com/about/the-dukc-story/>>.

¹¹⁸ OMC International, *Submission to the EES Panel's Channel Deepening Recommendations and the Minister for Planning's Provisional Response* (21 April 2005); Adrian Finanzio, *In the Matter of the Port Phillip Channel Deepening Project EES. Submission No 242. Submission on Behalf of OMC International Pty Ltd* (3 December

Corporation refused to listen and was fixed in its position about the project and its consequences.

Given that the proponent could not get its sectoral peers agreeing with it, industry members were not surprised to see the Port of Melbourne Corporation ill-equipped to deal with the controversy that it had stoked by publishing its Environment Effects Statement prematurely. Industry members reflected on how surprised they were that the Port of Melbourne Corporation had got itself muddled in a number of environmental problems that were not directed to determining how to do the project. Science and environmental investigations for the sake of knowing or of eliminating uncertainty were considered irrelevant to the legal process – that kind of knowledge would not or could not be factored into a sustainability assessment that required a weighing up of economic benefits against actual environmental impacts of the project.¹¹⁹

The assessment process provided the space for growing opposition to the project to ferment. It brought community opponents together to share strategies of opposition, in part because of the overwhelming size of the task to attend to all aspects of the multivolume Environment Effects Statement.¹²⁰ More than 60 community and environment groups and businesses, mostly situated on the Mornington Peninsula, formed the Blue Wedges Inc (the 'Blue Wedges Coalition') and rallied collectively in a way that was not anticipated in the original strategic investigations into the project,¹²¹ when the port had foreshadowed the major social impact likely to cause opposition as being land-based traffic increases and congestion in the vicinity of the port. The community coalition joined those well-funded commercial enterprises from the energy, channel engineering, fishing and tourism sectors in opposing the project and found their views aligned with experts who expressed their reservations with the project. The collective interests of people and

2004).

¹¹⁹ Interview with Llew Russell, Shipping Australia Limited, 26 March 2010.

¹²⁰ Interview with Mary Rimington, Mordialloc Beaumaris Conservation League, interview, 4 February 2009.

¹²¹ In particular, the discussion on the *Victorian Ports Strategic Study*, which failed to anticipate the breadth of objections to the project largely in part because the consultation for the study was deficient.

corporations in this body of opposition to the project had been overlooked by the corporation in its early assessment. It was only at the first public hearing into the project that these interests were raised, acknowledged and specifically addressed.¹²²

From those observing the panel inquiry closely, the Port of Melbourne Corporation was caught off guard¹²³ and its response was to dig its heels in.¹²⁴ It had barely any support in the room from any other organisation. Chris James, from the Victorian Chamber of Commerce and Industry, described the port as being '1 up against 300'.¹²⁵ On reflection, the port would have preferred the inquiry be halted, the statement be 'thrown out' and restarted, rather than continuing with 45 days of an inquiry with the knowledge that the project would not be supported by the scientific evidence that its consultants had built up.¹²⁶ There was an unwillingness on the part of the port to concede matters,¹²⁷ including to the diving industry and the established community environment groups that rallied under the banner of the Blue Wedges Coalition.

The inquiry panel was the first time that community groups, opponents and supporters alike got their chance to have their say on the policy support for, and strategic underpinnings of, the project.¹²⁸ The panel allowed community members to raise concerns about strategic

¹²² Freehills, *Submission to the Port Phillip Channel Deepening Project EES Panel Inquiry* (2004) Part E, Annexures E3 and E5.

¹²³ Jenny Warfe, Blue Wedges Coalition, interview, 29 December 2008 described the port as being 'rattled' during the inquiry; Llew Russell, Shipping Australia Limited, interview, 26 March 2010 described the port as being 'unsettled' and 'targeted'. Chris James, Victorian Chamber of Commerce and Industry, interview 5 July 2011 described the port as being 'woefully underequipped to deal with opposition'.

¹²⁴ The port's approach was described by Frank Hart, retired sea captain, interview, 4 February 2009 as one of 'discrediting and dismissing'.

¹²⁵ Interview with Chris James, Victorian Chamber of Commerce and Industry, 5 July 2011.

¹²⁶ Bradford, above n 56. Michelle Quigley, barrister, interview, 31 March 2009 noted that it was clear from the start that the panel members were dissatisfied with the scientific evaluation of the project. Rather than halt the project, the panel issued series of requests for more information throughout the hearing.

¹²⁷ Interview with Chris James, Victorian Chamber of Commerce and Industry, 5 July 2011.

¹²⁸ Port Phillip Conservation Council Inc, *Submission on the July 2004 Port Phillip Channel Deepening Environment Effects Statement* (15 August 2004) noted that the process leading up to the publication of the statement was more akin to a "public awareness campaign" than a consultative process. There was no debate or dialogue. They asserted that there was no opportunity to engage in discussions about the strategic policy underpinning the project nor alternatives to it.

policy instead of halting such submissions that were excluded from the panel's terms of reference. Although frustrating to, and challenged by, the port's lawyers,¹²⁹ the decision of the panel to entertain argument beyond its terms stemmed from the flaws in the *Victorian Ports Strategic Study* process where the community was not given adequate opportunity to deliberate about the state's policy direction. Michelle Quigley QC explained that the panel wanted to allow people to have their say because the process had not otherwise provided it.¹³⁰

Reflecting on the pre-panel participation, the port thought it should have liaised more, provided better and more tailored information to the various stakeholders for the project. It did not suggest, however, that interested parties should have had a greater say over the project design, its impacts or the process of assessment – all of which were demonstrably what stakeholders in support or opposing the project wanted, and as an agency inclined to meaningful participation might have promoted.¹³¹

There was also a very noticeable attempt by the port to confront its opponents and doubters, especially those from the community, with a strategy to diminish their credibility, and in doing so treat them disrespectfully, denying them recognition, and thus limiting their participatory capacity.¹³² Monash University chemist Dr Simon Roberts, who had concerns about the quality and extent of the scientific assessments of the effects that disturbing sediments associated with the project would have on the bay's health, was treated as a partisan objector rather than a concerned scientist. Most stunningly to opponents who watched the panel inquiry in full was the treatment afforded to retired harbour master, Frank Hart. The port and its lawyers insisted on referring to 'Mr Hart' rather than his preferred title 'Captain Hart', and sought to portray him as a 'mischief making maverick'.¹³³

¹²⁹ Smith et al, above n 7.

¹³⁰ Interview with Michelle Quigley, barrister, 31 March 2009.

¹³¹ Nick Easy, *Transcript of Evidence to the Victorian Parliament Environment and Natural Resources Committee Inquiry into the Environment Effects Statement Process* (Melbourne, 24 May 2010).

¹³² Cole and Foster, above n 33, 105.

¹³³ Interview with Frank Hart, retired sea captain, 4 February 2009.

By casting him as the outlier – no other sea pilots gave evidence – the port distanced him from his community of shipmasters and former professional peers; all because he did not fall into line to support the project.¹³⁴ His treatment by the port was described as 'denigrating' by others,¹³⁵ with the port bringing a team of current pilots to sit in the front row of the gallery to stare him down as he gave his evidence.

Despite the 'nastiness' that they experienced, the community groups opposing the project identified many positives with the process. These were captured in later submissions made by Victorian Greens parliamentarian Sue Pennicuik¹³⁶ and the Blue Wedges Coalition.¹³⁷ They understood their disadvantage by having limited access to funds and expertise;¹³⁸ but had the opportunity to ask questions of experts and have their own expertise presented and challenged.¹³⁹ They were not afraid to raise questions, found the panel interested in their views, and were given an equality of time to impress the panel about their concerns.¹⁴⁰ Retiree Mary Rimington, of the Mordialloc Beaumaris Conservation League Inc, described the first panel inquiry as 'like a university education':¹⁴¹ an experience that built knowledge about the bay she cherished and had spent more than three decades advocating for its preservation.

After the lengthy and testing inquiry process, the report of the panel was greatly anticipated. It was completed in February 2005 and contained a scathing assessment of the

¹³⁴ Interview with Frank Hart, retired sea captain, 4 February 2009.

¹³⁵ Interview with Mary Rimington, Mordialloc Beaumaris Conservation League, interview, 4 February 2009; Interview with Barry Robinson, Blue Wedges Coalition, 29 December 2008.

¹³⁶ Victoria, *Parliamentary Debates*, Legislative Council, 2 May 2007, 1063 (Sue Pennicuik).

¹³⁷ Blue Wedges Coalition, *Submission to the Channel Deepening Supplementary Environment Effects Statement* (7 May 2007).

¹³⁸ Mary Rimington, Mordialloc Beaumaris Conservation League, interview, 4 February 2009.

¹³⁹ Sue Pennicuik MLC, *Submission to the Independent Panel on the Supplementary Environment Effects Statement for the Proposal to Deepen the Shipping Channels in Port Phillip Bay* (May 2007).

¹⁴⁰ Interview with Barry Robinson, Blue Wedges Coalition, 29 December 2008; Jenny Warfe, Blue Wedges Coalition, *Transcript of Evidence to Environment and Natural Resources Committee Inquiry into the Environment Effects Statement Process* (Melbourne, 17 May 2010).

¹⁴¹ Interview with Mary Rimington, Mordialloc Beaumaris Conservation League, interview, 4 February 2009.

project and the Environment Effects Statement. In addition to the many stylistic, procedural and methodological flaws the panel found with the assessment, the panel identified many substantive deficiencies with the project. It considered the project fell short of 'best practice' environmental standards and that it failed to satisfy fundamental environmental and decision-making principles embodied in legislation, including the integration of economic, social and environmental concerns, the precautionary principle, intergenerational equity and ecological integrity. Highlighted as being of particular concern was the proposed treatment of contaminated material and turbidity risks, which the panel believed had not been adequately addressed and science not appropriately exhibited.¹⁴²

The panel's findings came as no surprise to those who had sat through the hearings. During the hearings, the panel made it clear that more work was required. However, it was not until the inquiry panel issued its report that the decisive matters on which decisions about whether the project should proceed or be prevented were articulated.¹⁴³ In its report, the panel identified a number of areas that required more investigation and assessment, including modelling of turbidity plumes, toxicity testing of Yarra River sediments, and evidence of dredging and disposal techniques. All these were matters raised by members of the community and objectors to the project. In its report, the panel also recommended a trial of the dredging works to provide data on possible impacts and management responses to inform a revised assessment of the project.

The first round of court cases

The Victorian government's response to the panel report was to reaffirm its commitment to its own project,¹⁴⁴ surprising community group members by offering 'in principle support' despite the environmental concerns raised about the project.¹⁴⁵ The government twice

¹⁴² Smith et al, above n 7, 359.

¹⁴³ Ibid.

¹⁴⁴ The Victorian government, under new premier and former treasurer John Brumby, became more vocal in its support for the project based on its economic benefits: see, eg, Richard Baker, 'Dredging's costs and benefits unknown', *The Age* (29 August 2005).

¹⁴⁵ Mary Rimington, *Submission to the Channel Deepening Project Supplementary Environment Effects Statement* (26 April 2007).

proposed 'fast-track' legislation to facilitate its approval and to remove any possibility for disruption to the dredging.¹⁴⁶ The project became a symbol for the government, which pointed to it as an example of its ability to deliver a large-scale and controversial project in the face of accusations that it was a 'do-nothing' government.¹⁴⁷

It then initiated a Supplementary Environment Effects Statement process¹⁴⁸ – a process never before undertaken in the state.¹⁴⁹ To help advance this supplementary process, the Port of Melbourne Corporation referred a trial dredging program to the Commonwealth under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) and asked the Victorian Minister for Planning whether the test works required their own assessment under the *Environment Effects Act 1978* (Vic). On both fronts, the port was spared the requirement to undertake an environmental impact assessment, and it was also granted consent under Victoria's *Coastal Management Act 1995* to do the trial dredging.

The Blue Wedges Coalition initiated court proceedings in the Supreme Court three days before the scheduled commencement of the trial dredging, seeking an injunction to restrain the works and a declaration that trial dredging test works contravened the *Environment Effects Act 1978* (Vic). The basis for this claim was that the broader Channel Deepening Project was still subject to an Environment Effects Statement and the trial dredging was a component of that dredging.¹⁵⁰ The key provision was section 6(2) of *the Environment*

¹⁴⁶ See, eg, 'Questions on Channel Deepening must be answered' (editorial), *The Age* (18 December 2004); and the Channel Deepening (Facilitation) Bill 2004 (Vic) and Channel Deepening (Facilitation) Bill 2006 (Vic). Neither Bill was enacted. Fran Henke, 'Anglers case angry line', *Hastings Independent* (15 March 2005) 12 published claims by the Fishing Party of Victoria that the Bill, which would empower the relevant minister to create exclusion zones around the dredging activity, 'puts the minister above the law. It appears to ensure that protestors, community groups, councils or others with a vested interest can't disrupt or delay the works'. See also 'Channel Bill is a charade' *Hastings Independent* (15 March) quoting member of parliament Robin Cooper, who highlighted the broad power over the whole bay proposed to be given to the minister.

¹⁴⁷ Scott Bennet, *Victorian Election 2006* (Research Note No 16 2006–7) (Parliamentary Library, Parliament of Australia, 2007).

¹⁴⁸ Rob Hulls, *Channel Deepening Project Subject to Further Investigation* (Media Release, 31 March 2005); Rob Hulls, *Statement of Minister into the Channel Deepening Project Environment Effects Statement* (March 2005); Melissa Fyfe, 'Shock of the bay: Channel report fails', *The Age* (1 April 2005).

¹⁴⁹ The passage of the *Environment Effects (Amendment) Act 2005* (Vic) would remove doubt about the legality of a supplementary process.

¹⁵⁰ Statement of Claim of Blue Wedges Inc in the matter of the *Blue Wedges Trial Dredging* case [2005] VSC

Effects Act 1978 (Vic), which stated that:

In any case where a statement has been submitted to the Minister no works referred to therein shall be commenced or proceeded with until the assessment of the Minister with regard to the environmental effects has been considered by the relevant Minister.

Justice Mandie conceded that there was an arguable case, though ‘not an open and shut case by any means’.¹⁵¹ However, the question of law did not get decided by the Supreme Court. The likely claims about the Blue Wedges’ lack of standing – given that the group had incorporated just two months earlier¹⁵² and with no broadened standing rules for environmental associations available in Victorian laws – were also not raised. Justice Mandie¹⁵³ refused to grant the injunction on the balance of convenience, concluding that the financial losses to the port would be severe while ‘there was no evidence that any irremediable harm would be caused by the Trial Dredging works’.¹⁵⁴ Critically, the Blue Wedges Coalition was unable and unwilling to provide an undertaking as to damages, and this fact overwhelmed its public interest arguments for granting an injunction. An inability to make arguments because of a lack of financial capacity was the limit on participation and restricted the future capacity of the Blue Wedges Coalition to have a more influential role in the unchartered process that the project was entering. According to Mandie J, the ‘exceptional circumstances’¹⁵⁵ that would warrant a party being excused from giving an undertaking were not present. To establish those exceptional circumstances, the Blue Wedges Coalition needed to show a threat of a ‘manifest breach of the law’ or ‘a proven danger of irremediable harm or serious damage’¹⁵⁶ – matters highly unlikely to be provable about a project for which the science was still uncertain. Justice Mandie did not engage with

305.

¹⁵¹ *Blue Wedges Trial Dredging* case [2005] VSC 305, para [12].

¹⁵² Affidavit of Jennifer Rhonda Warfe in relation to the matter of the *Blue Wedges Project Description* case (2008) 165 FCR 211.

¹⁵³ *Blue Wedges Trial Dredging* case [2005] VSC 305.

¹⁵⁴ *Ibid*, para [10].

¹⁵⁵ *Ibid*, para [11].

¹⁵⁶ *Ibid*.

ideas of precaution in explaining what might be an 'irremediable harm', nor did he reference the different perspective about harm to the environment that would be framed by how the environment is used, the proximity someone has to it, and by the scale of the environment that might be understood as being at threat – ideas explored in environmental justice scholarship.¹⁵⁷

The court's refusal to grant an injunction made the case fruitless, leaving the scope of section 6(2) of the *Environment Effects Act 1978* (Vic) unclear, and highlighting the lack of access for community members to seek review under the Act to an affordable and more conciliatory environment, such as the Victorian Civil and Administrative Tribunal.¹⁵⁸ At the same time, three individual opponents of the project initiated another case before the Supreme Court, which highlighted the deep mistrust in government and a sense of not being able to influence the process of assessment or decision-making about the project. Their claim was based on an unrecognisable cause of action. They argued that the Channel Deepening Project could not proceed¹⁵⁹ because it was contrary to a 'People's Mandate' – a super petition signed by more than 40,000 people¹⁶⁰ – and any approval of the project by the state would, among other things, be 'an act of treachery against the people under section 76 ss (iii)¹⁶¹ of the Commonwealth Constitution Act of Australia 1900'.¹⁶² Justice Mandie dismissed the case and awarded costs against the applicants amounting to \$17,000, swiftly silencing the small group of agitators. However, the port and the state did not pursue costs against the Blue Wedges Coalition at this time. Rather than silencing that

¹⁵⁷ Gordon Walker, 'Beyond distribution and proximity: Exploring the multiple spatialities of environmental justice' (2009) 41 *Antipode* 614.

¹⁵⁸ Interview with Jenny Warfe, Blue Wedges Coalition, 29 December 2008.

¹⁵⁹ Statement of Claim and Affidavit of Susan Beveridge in the matter of *Stephen Ross Douglas v State of Victoria* (Unreported, Mandie J, 8 August 2005).

¹⁶⁰ The threat of a 'people's mandate' overturning a Victorian government decision was earlier raised as a means of opposition to the proposed Nowingi waste disposal site: see 'People's mandate could halt dump plan', *Sunraysia Daily* (Mildura) (6 December 2004).

¹⁶¹ Section 76(iii) of the *Constitution of Australia* gives the Commonwealth Parliament the power to make laws conferring original jurisdiction on the High Court 'of Admiralty and maritime jurisdiction'.

¹⁶² Affidavit of Susan Beveridge in the matter of *Stephen Ross Douglas v State of Victoria* (Unreported, Mandie J, 8 August 2005) (Supreme Court of Victoria matter 7314 of 2005), para [3].

group through bankrupting it, the state crafted rules for the next assessment and inquiry that limited its capacity to influence the project, delay or stop it.

5.4 Trialling and supplementing

The ‘unjust’ supplementary assessment process

The government limited the assessment matters for the Supplementary Environment Effects Statement process to those key matters that the first inquiry panel identified as being of most importance.¹⁶³ Initially, this seemed compelling; however, as publication of the Supplementary Environment Effects Statement neared, it became clear the process was not an adjunct to the first with limited foci, but was a second, discrete inquiry and assessment that would fast track an approval.¹⁶⁴ Under the terms of reference for the inquiry panel that would be appointed to evaluate and make recommendations about the statement and project, the minister limited the scope to four, albeit broad, matters specifically relating to the design of the project, the likely environmental effects of the project, implementation and considerations for approvals.¹⁶⁵ Like the Orange Waste Project, this subsequent process saw a shift in opposition. It was the process, not the project, that saw a building of a narrative of environmental injustice. This narrative took hold when it was announced that the assessment would occur without the oversight of any of the original panel members¹⁶⁶ or any person with expertise on the matters of contention. The minister chose an outsider to lead the second panel appointing federal bureaucrat Allan Hawke, who would be supported by permanent panel member and town planner Kathryn Mitchell and ad hoc appointee Mike Lisle-Williams, a management consultant.¹⁶⁷ The sense

¹⁶³ Victorian Government, Department of Sustainability and Environment, *2005 Assessment Guidelines*, above n 13.

¹⁶⁴ This was always the approach and understanding of the port: see Bradford, above n 56.

¹⁶⁵ Hawke, Mitchell and Lisle-Williams, above n 7, 7.

¹⁶⁶ Interview with Len Warfe, Port Phillip Conservation Council, 29 December 2008. Frank Hart, retired sea captain, interview, 4 February 2009 interpreted this move as an attempt ‘to whitewash what the first panel recommended’. The Blue Wedges Coalition wrote to then Minister for Planning Rob Hulls requesting consideration be given to the reappointment of panel members.

¹⁶⁷ Royce Millar and Clay Lucas, ‘Doubts cast over bay dredge panel’, *The Age* (10 April 2007) noted that at least two of the original members had not been asked to return to their roles. By this time, the chair of the first panel, Rynd Smith, was no longer in his role at Planning Panels Victoria; Royce Millar and Clay Lucas, ‘Madden

of injustice was inflamed when the minister revealed that limited the inquiry panel hearing time to four weeks, and for the first time in the life of the Act he had prohibited cross-examination – an action that caused leading legal figures in the state to criticise the government and to boycott the panel inquiry.¹⁶⁸ One of the port's appointed experts later explained how that decision diminished the process, as well as the capacity and interests of the community:

third party involvement in cross examination is invaluable in ensuring information is appropriately tested and all important information comes to light. No panel member can be expected to be across all issues every minute of the hearing and other interested parties add substantial resources to the EES process.¹⁶⁹

The supplementary assessment process was rejected by members of the community. It would be 'unjust',¹⁷⁰ a 'tick the box exercise'¹⁷¹ and 'rights would be taken away'.¹⁷² It was claimed that 'proper analysis by the public, independent experts, and the panel is not given any chance'¹⁷³ owing to the abbreviated time frame and matters for inquiry and the banning of cross-examination. At the time, Queenscliffe Community Association Inc noted that the change in panel personnel and the prohibition on cross-examination in the supplementary process 'sends a signal to the public that government does not want a proper process to be undertaken and that they are going on regardless of the consequences'.¹⁷⁴

dredges up new experts', *The Age* (5 April 2007); Royce Millar, 'Channel dredging expert queries review panel', *The Age* (16 April 2007).

¹⁶⁸ Royce Millar, 'Alarm bells ring loud', *The Age* (23 April 2007) notes that Chris Canavan refused to appear at the panel on the 'grounds of a lack of procedural fairness' and editorialised 'if Chris Canavan [a leading barrister for developers] thinks the Government has been unfair, then a great many more Victorians will conclude much worse if this project goes wrong'. See also Royce Millar, 'Outrage at dredging probe ban', *The Age* (23 April 2007).

¹⁶⁹ Matthew Edmunds, cited in Parliament of Victoria, Environment and Natural Resources Committee, above n 3, 162.

¹⁷⁰ O'Gorman, above n 41; Interview with Frank Hart, retired sea captain, interview 4 February 2009.

¹⁷¹ Interview with Jenny Warfe, Blue Wedges Coalition, 29 December 2008.

¹⁷² Interview with Patsy Crotty, Blue Wedges Coalition, 3 February 2009.

¹⁷³ O'Gorman, above n 41.

¹⁷⁴ Queenscliffe Community Association Inc, above n 41.

Meanwhile, unlike in response to the first assessment, individual government agencies that were unsure about the project did not make submissions to the inquiry. The position of the bureaucracy was represented by the Department of Treasury and Finance, which provided a whole-of-government submission that emphasised the strategic support for the project, its need and the economic case for the project.¹⁷⁵ There was a silencing within government as well as by government.

The prohibition on cross-examination was not well received by the inquiry panel, which cautioned the minister in its report from adopting a similar practice in future assessments.¹⁷⁶ To work around the restriction, panel members invited written questions of witnesses to be submitted the day before a witness would give evidence.¹⁷⁷ Frank Hart explained that despite writing many questions, only one of his questions was ever asked.¹⁷⁸ Equally, the inquiry panel had 'some sympathy with the view that there was insufficient time to review the ... material'.¹⁷⁹ Defending elements of the terms of reference, including a shorter period of review for the Supplementary Environment Effects Statement than the Environment Effects Statement, Minister for Planning Justin Madden stated that: 'I am very mindful of getting the balance right and giving people every opportunity to advocate for their positions. ... We believe we have the balance right ... I believe this process will do justice to the project'.¹⁸⁰ A reading of the inquiry panel's report, however, does not support this view.

The inquiry panel trod a careful line. It did not accord objectors the usual generosity and flexibility in its strict adherence to its terms of reference. Community members no longer had the freedom to make their cases as they had in the first inquiry panel hearing and as is typical in environmental law processes in Victoria. The panel's final report was tightly

¹⁷⁵ Hawke, Mitchell and Lisle-Williams, above n 7, Appendix, 12, 23, 31, 32, 35 and 192.

¹⁷⁶ Ibid.

¹⁷⁷ Interview with Patsy Crotty, Blue Wedges Coalition, 3 February 2009.

¹⁷⁸ Interview with Frank Hart, retired sea captain, 4 February 2009.

¹⁷⁹ Hawke, Mitchell and Lisle-Williams, above n 7, Appendix, 40.

¹⁸⁰ Victoria, *Parliamentary Debates*, Legislative Council, 2 May 2007, 1063 (Justin Madden).

constrained. Adverse comments about the project or the process were excluded from the short main report, instead included in the long appendix. The panel neither recommended nor rejected the project; rather, it presented an evaluation of the effects of the project, confirmed the safety and practicability of the design, suggested some changes to design, and recommended more rigorous management protocols and monitoring. It was an assessment barely in name. The panel offered the mild conclusion that: 'The Inquiry supports the ... case that the Port Phillip Bay Channel Deepening Project ... can be delivered with low to medium risk, and moderate impact'.¹⁸¹ Armed with a report that did not reject the project, the Minister for Planning recommended the project proceed¹⁸² – an outcome that had long seemed inevitable. The Victorian Minister for the Environment granted the necessary consent in accordance with his broad discretion under the *Coastal Management Act 1995* (Vic) in December 2007.¹⁸³

Abandoned reform, lost capacity

The legal reforms proposed to the *Environment Effects Act 1978* (Vic) in 2002 came to little. Minor alterations were made in 2005 to accompany those changes that supported the government creating a supplementary assessment process for the Channel Deepening Project. Collectively, the changes offered little by way of improvement to the law, and certainly contributed no reforms that might have prevented the interference in processes by the government in the second panel inquiry hearing. One change was to introduce a mechanism for proponents to refer projects to the minister directly. However, it was already commonplace for proponents to write to the minister to request he or she make a decision on whether an Environment Effects Statement was required. The other notable changes were to give the minister the power to make conditional rejections and the ability to make multiple guidelines for assessments. The Nationals' Peter Hall summed up the feeling of those wanting or expecting more from the earlier reform process when he said:

We have the outcome of five years work, and it is a very miserable outcome: an amendment

¹⁸¹ Hawke, Mitchell and Lisle-Williams, above n 7, Appendix, 7.

¹⁸² Justin Madden, *Port Phillip Bay Channel Deepening Project Assessment under Environment Effects Act 1978* (November 2007).

¹⁸³ Victorian Auditor General, *The Channel Deepening Project*. Report 21, 2008–09 (2009), 13.

bill of just 10 pages and 10 clauses that I do not think improves the EES process in any way at all.¹⁸⁴

In announcing the amendments, the Minister for Planning, Rob Hulls, recognised the need for environmental impact assessment processes to be transparent, systematic and accountable. He claimed that the 'system provides important environmental safeguards and a process for engaging with the community and interested stakeholders, who are able to submit views and information that then must be considered'.¹⁸⁵ But none of these features was introduced into the legislation. What the changes did was to invest more explicit discretion in the office of the minister. Minister Hulls also claimed that 'new ministerial guidelines that establish the operational details of the system ... will enshrine the best practice approaches currently being applied in Victoria'.¹⁸⁶ But nothing was enshrined by updating ministerial guidelines.

Predictably, the opposition claimed that the government had failed to meet its own 'great expectations'.¹⁸⁷ The government responded by defending the Act, which it had previously described as no longer reflecting leading practice.¹⁸⁸ Labor parliamentarian Don Nardella asserted that:

The EES process is not flawed. It is the same process under the same legislation that existed under the seven long dark years of the Kennett government. ... It has been in place during the six years of the Bracks Labor government. The process is open and provides people in those communities with opportunities to have their say. It also means that they have access to the documentation.¹⁸⁹

The Act remained a skeleton and the process was still detailed in non-binding guidelines. This allowed the second assessment of the Channel Deepening Project to be manipulated to achieve a desired outcome, a disruption to accepted practice that was repeated in high-

¹⁸⁴ Victoria, *Parliamentary Debates*, Legislative Council, 22 November 2005, 2108 (Peter Hall).

¹⁸⁵ Second Reading Speech for the Environment Effects (Amendment) Bill: see Victoria, *Parliamentary Debates*, Legislative Assembly, 6 October 2005, 1355 (Rob Hulls).

¹⁸⁶ Ibid.

¹⁸⁷ Victoria, *Parliamentary Debates*, Legislative Assembly, 27 October 2005, 1918 (Phillip Honeywood).

¹⁸⁸ Thwaites, above n 42.

¹⁸⁹ Victoria, *Parliamentary Debates*, Legislative Assembly, 19 October 2005, 1492 (Don Nardella).

profile projects advanced shortly afterwards: the North–South Pipeline and the Wonthaggi Desalination Project,¹⁹⁰ both of which were proposed and built by the Labor government in response to a claimed water shortage crisis in Victoria.¹⁹¹ In the desalination project, the Minister for Planning, who originally decided that the project would not require a public environmental assessment,¹⁹² imposed a three-week limit on the inquiry panel and excluded significant matters from the assessment, including the effect of the use of fossil fuels to power the plant.¹⁹³ Trial works were exempt from assessment¹⁹⁴ and the policy support and need for the plant were specifically excluded from deliberation in the Environment Effects Statement process. The Gippsland community described the process as a ‘sham’, an ‘undemocratic’ process ‘out of place in Victoria’, ‘and an EES in name only’.¹⁹⁵ For the pipeline project, the government made an extraordinary decision that demonstrated its own distrust with the law and its unwillingness to even comply with the guidelines set for the environmental assessment in the state by choosing not to assess the project under the *Environment Effects Act 1978* (Cth), but rather to use powers to set up ad hoc advisory panels under the *Planning and Environment Act 1987* (Vic). Brendan Sydes of Environmental Justice Australia described the assessment of the pipeline as a ‘process unknown to law’, and, reflecting on his own experience explained that, despite the existence of guidelines outlining when and why an Environment Effect Statement ought be

¹⁹⁰ King and Murphy, above n 40, detail the local community’s sense of having no influence over the process or decision to approve the desalination project.

¹⁹¹ Victorian Government Department of Sustainability and Environment, *Our Water Our Future: The Next Stage of the Government’s Water Plan* (2007) 4.

¹⁹² Elizabeth McKinnon, *Transcript of Evidence to Environment and Natural Resources Committee Inquiry into the Environment Effects Statement Process* (Melbourne, 3 May 2010) noted: ‘the desalination plant, arguably a project with one of the highest impacts on the environment ever to come into Victoria, almost did not get assessed under this act. It was very clear that the minister did not think assessment was desirable for this plant’.

¹⁹³ Samitha Rao, ‘Reforming the environment assessment process in Victoria’ [2010](1) *National Environmental Law Review* 34. Rao also records that the Victorian Minister for Planning originally decided that an Environment Effects Statement for the project was not required, and only required a statement after the Commonwealth Minister determined that the project would require assessment under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

¹⁹⁴ *Your Water Your Say Inc v Minister for the Environment, Heritage and the Arts* [2008] FCA 670.

¹⁹⁵ Stephen Cannon, *Watershed Victoria*, above n 17.

required, he can never advise clients with confidence about whether a statement will be mandated by the minister.¹⁹⁶ By keeping communities guessing they are not building capacity to contribute to assessments and they have no way to know how to harness their efforts to expose the concerns with the projects.

What became the norm throughout these government-sponsored projects was for extensive volumes of scientific reports to be produced, limited time for the public to digest them, and abbreviated inquiries in terms of the matters for debate and the time offered to adequately assess the projects. Projects were being assessed within and outside the law through fast-tracked and partial processes. Transparency, participation and accountability were all reduced in order for the government to speed up processes and appease political interests.

Yet it was the sense that the assessment process for the Channel Deepening Project took too long and was too costly, not that it failed to meet best-practice standards for environmental impact assessment, that caused the opposition, in tandem with minor parties in the Victorian Legislative Council¹⁹⁷ to initiate another reform inquiry into the Act.¹⁹⁸ Of key importance to the Victorian Greens party¹⁹⁹ supporting another study into the effectiveness of the *Environment Effects Act 1978* (Vic), and therefore ensuring a non-government majority would agree to the inquiry, was the inclusion in the terms of reference for the inquiry to report on the independence of environmental assessment process where the state is both administrator and proponent.²⁰⁰ The parliamentary investigation confirmed the views of past evaluations in Victoria and the Commonwealth²⁰¹ that there is

¹⁹⁶ Interview with Brendan Sydes, Environmental Justice Australia, 18 February 2009.

¹⁹⁷ Victoria, *Parliamentary Debates*, Legislative Council, 29 July 2009, 3608 (Sue Pennicuik).

¹⁹⁸ Victoria, *Parliamentary Debates*, Legislative Council, 24 June 2009, 3271 (David Davis). Davis noted '[w]hatever one might think of the whole thing, it was drawn out and is still in some respects inadequate. ... The first one was a shambles'.

¹⁹⁹ Victoria, *Parliamentary Debates*, Legislative Council, 29 July 2009, 3609 (Greg Barber).

²⁰⁰ Parliament of Victoria, Environment and Natural Resources Committee, above n 3, ix.

²⁰¹ See Allan Hawke, *The Australian Environment Act – Independent Review of the Environment Protection and Biodiversity Conservation Act 1999 – Final Report* (October 2009) 66.

at least a perceived bias where the government has dual roles in the environmental assessment. Consultants and lawyers were more forthright: they said there is a clear conflict of interest in such cases.²⁰² While the federal review of environmental impact assessment laws recommended independence of assessment in these cases,²⁰³ the Victorian review instead focused on greater rigour, mandating 'checks and balances' in the law,²⁰⁴ and also removing some of the discretion that the government has over the process. The committee emphasised the significance of public participation in holding government to account, and dedicated a chapter on making participation more meaningful, proposing engagement with communities earlier and instituting participatory rights. The Blue Wedges Coalition and its member organisations, in their evidence and submissions, however, did not focus on participation in the narrow sense of being able to be a part of a process; rather, it argued that the law should improve the capacity of community groups, through funding and time, to adequately and fairly participate.

Len Warfe, of coalition member group Port Phillip Conservation Council Inc, submitted that:

I think certainly there should be equal costing for the community participation side of any inquiry. At the moment on our committee whenever any issue comes up, the big debate we have is: can we afford to get involved, unfortunately. ... Certainly I think that we should be equally funded on our side of the table.²⁰⁵

When asked if community legal centres would be able to assist community groups, he noted that 'they are limited in the capabilities and capacities they have got at their disposal. I think it is a government responsibility that there should be this fund there providing whatever resources are needed to investigate these issues that keep coming up'.²⁰⁶

²⁰² Parliament of Victoria, Environment and Natural Resources Committee, above n 3, 43, citing the views of Coffey Environments and the Environment Defenders Office (Victoria).

²⁰³ Hawke, above n 201, 66.

²⁰⁴ Parliament of Victoria, Environment and Natural Resources Committee, above n 3, 43, which recommended a community right to refer, clear legislative triggers, statutory time frames, and peer review and monitoring and enforcement obligations on proponents.

²⁰⁵ Len Warfe, Port Phillip Conservation Council, *Transcript of Evidence to Environment and Natural Resources Committee Inquiry into the Environment Effects Statement Process* (Melbourne, 3 May 2010).

²⁰⁶ *Ibid.*

Jenny Warfe, on behalf of the Blue Wedges Coalition, was more direct, demanding equivalent amounts of funding and time for proponents and objectors. This would allow both sides to mount their cases with equal capacity.²⁰⁷ In its written submission, the coalition argued that 'when government is the proponent, it should fund third parties. Private sector projects subject to an EES should also fund third party submitters, perhaps via a levy on private sector EES projects'.²⁰⁸ In oral testimony, Jenny Warfe expanded:

I really do not see why the proponent should spend two years doing the research that they want to do and purchasing the science that they want and then the community has six weeks to read and assimilate all that and produce a case against it, or suggest any modifications to it without some equity.²⁰⁹

A far less costly, much more compelling alternative was raised by the port's lead barrister from the first inquiry panel and two of the experts appointed by the port for the first Environment Effects Statement. They believed that capacity and fairness, but also efficiencies, would be realised by experts being appointed independent of all parties, or drawn by the inquiry panel from a pool of independent experts.²¹⁰ All parties would then have an equal opportunity to examine scientific expertise – in the way that one expert was called in the Wielangta Forest conflict trial. The Mordialloc Beaumaris Conservation League wanted to see a cultural shift by governments and proponents so that experts presented by all parties are treated with the same due regard for their expertise.²¹¹ It argued that it was

²⁰⁷ Warfe, above n 140.

²⁰⁸ Blue Wedges Coalition, *Inquiry into the Environmental Effects Statement Process in Victoria*. Submission 31 (12 April 2010).

²⁰⁹ Warfe, above n 140.

²¹⁰ David Provis, Cardno Lawson Treloar, *Submission to the Inquiry into the Environment Effects Statement Process in Victoria*. Submission 18 (31 March 2010). Matthew Edmunds, *Inquiry into the Environmental Effects Statement Process in Victoria Submission on Marine Ecology*. Submission 29 (March 2010) 23 wrote that environment assessment work by done by an 'independent statutory body, with studies commissioned by that body rather than the proponent' should be adopted. The Swan Bay Environment Association, with experience through the supplementary process wrote to the committee: 'We would like to suggest that developers not be allowed to choose the consultants to undertake the EES process, and that prior to the EES process, initial community consultation take place so that a set of questions can be formulated which must be addressed through the process': Swan Bay Environment Association, *Submission to the Inquiry into the Environment Effects Statement Process in Victoria*. Submission 21 (30 March 2010).

²¹¹ Mordialloc Beaumaris Conservation League Inc, *Submission to the Inquiry into the Environment Effects Statement Process in Victoria*. Submission 11 (26 March 2010).

unfair that the experts presented by the Blue Wedges Coalition, often at no charge, were undermined, and not recognised for their contribution, because they were called by a community group rather than the proponent.

All the ideas produced and deliberated over many months came to nothing.²¹² Reform continues to be elusive in Victoria and, as a result, the *Environment Effects Act 1978* (Vic) perpetuates participatory injustices. The process of the parliamentary committee, however, was a landmark and an appropriate end for the Channel Deepening Project. It brought together community groups, the proponents and impartial experts and advisors to reflect on the process that they had all experienced. It put the law to the test in the way that has been encouraged by Lazarus, who has argued that within environmental law:

fairness matters and requires significant reform. Environmentalists should be willing to defend environmental protection laws on fairness grounds. They should be prepared to acknowledge and redress instances of unfairness. It would be a serious blunder not to do so.²¹³

It was through an analytic framework of environmental justice that he claimed 'revealed the need to re-examine existing environmental law to ensure its basic fairness ... and reform them accordingly'.²¹⁴ Failure to reform, as is the case here, denies capacity in society, not simply in discrete communities. A failure to reform the law means that there is no trigger or need to change patterns of administrative behaviours.²¹⁵ We simply return to where we start.

5.5 The Commonwealth dimension and the second tranche of cases

The limited capacity and the limiting of capacity of the EPBC Act

Because of all the politicking that surrounded the Channel Deepening Project in Victoria, it

²¹² Victorian Auditor General, above n 60, ix noted that 'the government agreed to the policy reforms but in late 2013 decided not to proceed with the proposed reforms. It did not provide reasons to the public or the department for discontinuing reform efforts. There is currently no more work under way to reform the EE Act or EES process'.

²¹³ Richard J Lazarus, 'Fairness in environmental law' (1997) 27 *Environmental Law* 705, 711.

²¹⁴ *Ibid* 722.

²¹⁵ Joel F Handler, *Social Movements and the Legal System: A Theory of Law Reform and Social Change* (Academic Press, 1979).

is easy to forget the federal government's involvement in the process. The project was declared a controlled action under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) by virtue of its likely significant impact on migratory species, threatened species and communities, Ramsar wetlands, and the environment of Commonwealth land on Swan Island. The Victorian assessment process was then accredited for the purposes of the federal regime.

The environmental issues that triggered the federal approval requirement proved to be of only minor relevance. Both statements dealt with Commonwealth matters only briefly, indicating that the assessment of these matters were not broad or systematic concerns. Just eight pages of the Supplementary Environment Effects Statement inquiry panel report were dedicated to Commonwealth matters.²¹⁶ The process highlighted a substantial limitation of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), namely its inability to thoroughly evaluate and regulate the environmental impacts of projects of national importance. It also exemplified the ineffectiveness of, and the lack of influence the Commonwealth has in, the processes it accredits.

In the end, given the relative unimportance of impacts on matters of national environmental significance in the assessment process, the port probably did not need to refer the project to the Commonwealth at all.²¹⁷ That it did refer and require approval opened up the possibility of Federal Court challenges to the Blue Wedges Coalition.

The first case the Blue Wedges brought preceded the approval of the project by the Commonwealth minister – which was granted in early 2008. The court case was based on an argument that the project could not be approved by the Commonwealth minister for the Environment, Heritage and the Arts because the project in its final form no longer resembled the project referred to the minister in 2002. The Blue Wedges Coalition, in its submissions to the Federal Court, compiled a long list of evidence and examples of changes between the referred project and the project presented for approval. These changes related

²¹⁶ Hawke, Mitchell and Lisle-Williams, above n 7, 245-252.

²¹⁷ Referral is only required where there is a likely significant impact on a matter of national environmental significance: see *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 68.

to the depth, location and scale of the project. They missed, however, a crucial report by Maunsell that described the project in more general terms than the succinct referral document.

Justice Heerey summarised his findings as follows:

I accept that there are differences in the Project the subject of the Approval Decision as compared with the Project in the Referral (including the Maunsell report). For the reasons already mentioned, in a project of this magnitude it would be surprising if there were not. Whether those differences can be characterised as 'significant' or 'substantial' or by some other adjective suggesting importance is not to the point. The 'action' was described in the Referral in these terms:

To deepen the shipping channels at Port Phillip Heads, in Port Phillip Bay and the Yarra River and its approaching channels.²¹⁸

The port and the Commonwealth succeeded because Heerey J concluded that an action should be construed widely and the proposal remained as referred. It was a reminder that the scope of the project is set by the proponent, and because a project is defined before any community involvement, it means the community will never have a say over, or capacity to influence, the outer bounds of the project.

Notwithstanding the Blue Wedge Coalition's legal failure in this first Federal Court challenge, its efforts produced an outcome that, in the light of the overall dampened state of public interest litigation in Australia, advanced the state of environmental law and justice. In rejecting an application for an award of costs against the Blue Wedges Coalition, Heerey J revived the flagging *Oshlack*²¹⁹ principle, finding that the case was one of 'high public concern' that raised 'novel' legal questions about the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).²²⁰ He therefore concluded that costs should not be awarded against a public-interest litigant,²²¹ facilitating its ongoing role in the project.

²¹⁸ *Blue Wedges Project Description case* (2008) 165 FCR 211, para [59].

²¹⁹ *Oshlack v Richmond River Council* (1998) 193 CLR 72.

²²⁰ Chris McGrath, 'Flying foxes, dams and whales: Using federal environmental laws in the public interest' (2008) 25 *Environmental and Planning Law Journal* 324.

²²¹ *Ibid.* See also Rachel Baird, 'Public interest litigation and the Environment Protection and Biodiversity Conservation Act' (2008) 25 *Environmental and Planning Law Journal* 410.

Having been shielded from a costs order, the Blue Wedges Coalition initiated further litigation to stop the project. It lodged a second Federal Court challenge, this time a judicial review of the approval of the project by the federal Minister for the Environment, Heritage and the Arts.²²² This case confounded community members opposed to the project. At the end of the court case, the conclusion to the environmental assessment process, they could not tell if the project was meritorious. They did not know whether their efforts over many years at highlighting concerns and flaws with the project and producing evidence of risks and harms meant that the project *should* or not be approved under laws designed to protect the environment.

This case saw the Blue Wedges Inc handed a costs order, rendering it incompetent to take any further action with respect to the project.²²³ The coalition led arguments that a costs award against it would amount to a punishment against an organisation that for six years has voluntarily participated in an assessment process.²²⁴ Justice North was fully aware of the objective of the Commonwealth government. It wanted to shut down an opponent. Lawyers for the Blue Wedges offered to pay part costs, expending more than half of the assets of the Blue Wedge Inc. Justice North wondered:

It might be thought that the making of such an offer would be the end of the argument and that pursuing the matter beyond that point might be akin to seeking to squeeze blood out of a stone. However, that was not the position of the respondents, who pressed for orders. That was their entitlement. Their policy reasons for doing so must lie with them. The Court is not in a position to say whether the policy reasons are good or bad. Nonetheless, it should be observed that there is some curiosity about the strenuous persistence with which the orders continued to be sought.²²⁵

He clearly distinguished between matters of rights and what is right or just in law. It was others who filled the gaps, highlighting the unfairness of a cost award and the stifling of

²²² *Blue Wedges ESD case* (2008) 167 FCR 463.

²²³ *Blue Wedges Costs case* [2008] FCA 1106. See also Jeff Turnbull, 'Melbourne dredging opponents lose case', *The Age* (28 March 2008); Peter Gregory, 'Big legal bill may sink bay dredging opponents', *The Age* (15 July 2008).

²²⁴ Blue Wedges Inc's Submissions on the matter of Blue Wedges Inc in *Blue Wedges Costs case* [2008] FCA 1106, item 6.

²²⁵ *Ibid*, para [14].

participation and democracy as a result.²²⁶ The case also contributed to the narrative in Australian federal environmental law that it is costs,²²⁷ and no longer standing, that is the primary barrier to participation in the law.²²⁸ The challenge set is to abolish costs orders in cases brought under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). Ironically, it has been the research done about public interest litigation under that Act since the threat made by the Abbott Government to remove the relaxed standing rules that have been in the law since its enactment,²²⁹ that supports a further opening of the courts and capacity building in communities through the removal of costs. McGrath,²³⁰ for instance has shown that fewer than one percent of referrals are challenged and there exists in place processes to ensure that only claims with legitimate chances of legal success are initiated. The need to find pro bono barristers exists as a cap on potential litigation, while the limited capacity to influence decisions using judicial review²³¹ is a constraint worth reconsidering. There is also no evidence that citizen suits have magnified costs or created delays to almost every project assessed under the Act.²³² Rather, Macintosh et al argue that there is presently *insufficient* litigation brought under the Act to satisfy goals of judicial scrutiny and

²²⁶ Kallies and Godden, above n 11.

²²⁷ The Commonwealth led submissions that the relaxed standing rules 'do not amend the rules relating to the payment of costs' and that the standing provisions have no effect in converting a case into one in the public interest where costs should not follow the event: see Submissions on the matter of costs of the Minister for Environment and Heritage in *Blue Wedges Costs* case [2008] FCA 1106, item 6.

²²⁸ Hawke, above n 201, 261ff. On a detailed explanation of standing in the Act: see Andrew Edgar, 'Extended standing — Enhanced accountability? Judicial review of Commonwealth environmental decisions' (2011) 39 *Federal Law Review* 435. Scholarship on costs as a key barrier to environmental law in Australia include Kirsty Ruddock, 'Protective costs orders and access to justice: The Cocks River case [2010] *National Environmental Law Review* 41 and Felicity Millner, 'Access to environmental justice' (2011) 16 *Deakin Law Review* 189, both written from the perspective of community environmental lawyers.

²²⁹ The proposed, and since lapsed, Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015 (Cth).

²³⁰ Chris McGrath, 'Myth drives Australian government attack on standing and environmental "lawfare"' (2016) 33 *Environmental and Planning Law Journal* 3.

²³¹ Nicola Silbert, 'Challenging decisions: Environmental non-government organisations' use of judicial review under the Environment Protection and Biodiversity Conservation Act 1999 (Cth)' (2018) 35 *Environmental and Planning Law Journal* 714.

²³² Andrew Macintosh, Heather Roberts and Amy Constable, 'An empirical evaluation of environmental citizen suits under the Environment Protection and Biodiversity Conservation Act 1999 (Cth)' (2017) 39(1) *Sydney Law Review* 85.

the attainment of the environmental rule of law.²³³

The limitations of the concept of ecologically sustainable development

In his primary decision,²³⁴ North J dismissed an ambitious legal challenge based on an attempt to clarify the principle of ecologically sustainable development as a concept for the environment and the communities advancing environmental protection in Australian law – as a concept directed towards environmental protection rather than as a principle that merely requires a weighing up of interests and effects associated with a development. The Blue Wedges argued that the minister had not adequately considered the effects of the Channel Deepening Project on the matters of national environmental significance that comprised the controlling provisions for the project nor the social impacts that the project would produce. As identified above, however, these matters were not the contentious issues for the inquiries in either the first or second assessment processes.

In arguments not adopted by the judge and ultimately abandoned by the applicant's legal team, the lawyers for the Blue Wedges Coalition said that the Act must be interpreted as an environmental protection regime, and the starting point for an inquiry for a decision under the Act should be a question of whether, accounting for all the impacts of the project, it should be refused or approved. Counsel for the Blue Wedges argued that the approach taken in this case, purportedly in fulfilment of the principle of ecologically sustainable development, was to ask if there is anything that should stop the project being approved, any harms so great that it could not be attended to in a condition to an approval.²³⁵ Such an approach²³⁶ is to diminish the contributions of those arguing against a project, and to position a proponent at an advantage in influencing the ultimate decision. Yet environmental law should not simply be used as a mechanism for project permission;²³⁷

²³³ Ibid 112.

²³⁴ *Blue Wedges ESD case* (2008) 167 FCR 463.

²³⁵ *Lawyers for Forests Inc v Minister for the Environment, Heritage and the Arts* (2008) 165 LGERA 203 upheld the approach of a minister dealing with uncertain impacts to the environment in project approval conditions.

²³⁶ In oral arguments, Justice North was satisfied that the language used in sections 133 and 134 allows the minister to decide to approve or reject a project and what conditions should attach to the project approval simultaneously.

²³⁷ Andrew H Kelly and David Farrier, 'Local government and biodiversity conservation in New South Wales'

rather, good environmental governance in environmental law means that decision-makers should be open to rejecting projects.²³⁸ An open-mindedness to rejection is a form of recognition of opponent voices. It gives those voices more dignity,²³⁹ and means they are more likely to be equally considered in the mind of the decision maker.

These justice ideas, however, remain beyond the sustainability framework for assessment of projects under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). The Blue Wedges Coalition also argued that there must be an objective standard of evaluation adopted by the minister in considering the manifold impacts of a project, and that a cursory inquiry into social impacts is not sufficient to fulfil the goals of sustainability.²⁴⁰ In circumstances where there is a 'vast volume of negative impacts'²⁴¹ – in this case concerning health, recreation, tourism and commercial fishing – the Blue Wedges argued that the minister should be obliged to attend to them rather than dismiss them as being considered but outweighed by the economic potential of a project. Justice North, during argument, was insistent that the law as drafted gives full capacity to the minister to decide for themselves in the weighing up of social, environmental and economic impacts and factors what is most important. All that the minister is required to do is to turn their attention to the impacts, and the reasons for decision of the approval of the project highlighted that the minister did just that.²⁴²

(1996) 13 *Environmental and Planning Law Journal* 374 write of the 'culture of consent' in environmental law.

²³⁸ This was a lesson from *Hub Action Group v Minister for Planning* (2008) 161 LGERA 136. See also Brad Jessup and Yaokang Wong, 'Getting to *Bulga*: A critical and natural language analysis of the sustainability jurisprudence of Chief Justice Preston' (Speech delivered at Frontiers of Environmental Law Colloquium, University of Tasmania, 6 February 2018).

²³⁹ Justice Ronald Sackville, 'Some thoughts on access to justice' (Speech delivered at First Annual Conference on the Primary Functions of Government Courts, Victoria University of Wellington, 28 and 29 November 2003).

²⁴⁰ *Blue Wedges ESD case* (2008) 167 FCR 463, para [75] captured the crux of the oral argument presented.

²⁴¹ These were the oral submissions of Fiona McLeod on behalf of Blue Wedges Inc that I recorded during the hearing.

²⁴² *Blue Wedges ESD case* (2008) 167 FCR 463, paras [85]–[86]; Commonwealth Minister for the Environment, Heritage and the Arts, Peter Garrett, *Statement of Reasons for Grant of Approval under the Environment Protection and Biodiversity Conservation Act 1999* (18 January 2008) [60]–[61].

The two cases heard by North J combined to deny a future for the Blue Wedges Coalition: a costs order was a burden it would carry, and the principle of ecologically sustainable development at federal law would deny community groups influence in the law. The principle in its current form is the domain of the minister. They alone decide what is important and how impacts are considered, or not, within the social, economic and environmental rubric.²⁴³ The minister may consider impacts collectively and holistically across these spheres such that the economic benefits of a project (the Channel Deepening Project viewed as an 'economic necessity')²⁴⁴ may overwhelm significant and uncertain environmental impacts.²⁴⁵

5.6 Conclusion

The Blue Wedges Coalition, an organisation created specifically to organise opposition to the Port of Melbourne Corporation's dredging project, proved itself a socially influential, resilient organisation. It built social capital quickly while remaining adaptable to the changes in policy and the emergence of new knowledge about Port Phillip and the environmental risks to the bay associated with the dredging project. It persisted in opposing the project, and highlighted the procedural flaws of its assessment, throughout much of the 2000s. There was nothing about the law, however, that built its resilience, saw it achieve social capital or develop local respect;²⁴⁶ rather, it was the networks it created,²⁴⁷ the narrative of environmental protection for all that it told,²⁴⁸ and the plurality of voices and skills it invited into its fold²⁴⁹ that were most effectual.

²⁴³ *Blue Wedges ESD case* (2008) 167 FCR 463, para [76].

²⁴⁴ Bradford, above n 56.

²⁴⁵ *Blue Wedges ESD case* (2008) 167 FCR 463, para [78].

²⁴⁶ Jeffrey C Bridger and A E Luloff, 'Building the sustainable community: Is social capital the answer?' (2001) 74 *Sociological Inquiry* 458.

²⁴⁷ *Ibid* 465.

²⁴⁸ Warfe, above n 140, summed up simply and powerfully what the organisation stood for: 'We are part of the environment and we can swim in clean water or we can swim in polluted water; it is our choice'.

²⁴⁹ Interview with Patsy Crotty, Blue Wedges Coalition, 3 February 2009.

The law was the battle as much as the project it was fighting. At the beginning and at the end of the project, there was and remains widespread acceptance across politics, practice and scholarship that the *Environment Effects Act 1978* (Vic) is a failing statute and the process created to evaluate projects requiring assessment under the Act are open to ministerial manipulation inconsistent with best-practice approaches for environmental impact assessment.²⁵⁰ One of the Blue Wedges Coalition's legacies is that it exposed the weaknesses in Victoria's environmental assessment laws.²⁵¹ In the absence of an adequate legislative structure, the process was tightly controlled and modified for political purposes. The result was a disjointed and unsatisfactory assessment that cost millions and left many with concerns about the project and its potential impacts on the environment and human health. While the dredging was done, the long-term impacts on the health of the bay remain unknown. Incidents of coastal erosion continue to be attributed to the project.²⁵²

The deficiency with the law was, and continues to be, in its failure to provide procedural justice. Invariably, community members are invited into a process – that was the experience even for the north–south pipeline, which was purposefully designed not to be an Environment Effects Statement process so to shield that project from the expectation of good governance – but they are not treated well in the process. There is participation, sometimes tokenistic, as was the case in the Supplementary Environment Effects Statement; at other times engaged, as was the case with the first assessment for the Channel Deepening Project. But there is no justice. Participation is always limited, starting too late and offering less influence over decision-makers to community groups than project proponents.

Pathways towards justice have been charted in reviews of the Act, most comprehensively by the Parliamentary Committee on Environment and Natural Resources²⁵³ in terms of

²⁵⁰ Mandy Elliott, *Environmental Impact Assessment in Australia: Theory and Practice* (Federation Press, 6th ed, 2014).

²⁵¹ Barber, above n 199.

²⁵² Hast, above n 18.

²⁵³ Parliament of Victoria, Environment and Natural Resources Committee, above n 3.

mandatory requirements on proponents and decision-makers, fixed timelines and guaranteed moments of consultation. But more is needed. The Blue Wedges Coalition was at a disadvantage the moment it entered the law because it lacked the capacity acquired through experience, expertise and money, and respect by virtue of its outsider status to impress on the proponent and the state its many concerns.²⁵⁴ In this chapter, proposals for community funding and a shift to a model of independent expertise would add to local community capacity, enabling more meaningful participation in environmental assessment laws. Moreover, an instituted expectation and culture of law reform is needed to ameliorate the unfairness that environmental law creates and that its processes highlight.

Greater access to the law would also be attained through a removal of costs barriers and the embrace of merits review. This is the lesson from the Federal Court and the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) dimension of this case study. The Blue Wedges Coalition was channelled into the judicial review jurisdiction of the Federal Court because it had no other forum where the decisions that they saw as unfair could be independently reviewed. The consequence was that the Federal Court did not deliver them a victory; rather, disenchantment with the law, an incapacity to further be involved in the project, and confirmation to us all that the concept of sustainability under Australian environmental law is stacked against community and environmental interests.

²⁵⁴ Maria Adebawale, above n 31 writes that the experience of groups is one of lack of quality of environmental expertise as well as lack of access to legal expertise. The Blue Wedges position within the assessment process can be contrasted with Newport Power Station, which had a small team of lawyers and experts funded to advance its case.

Chapter 6

The Wielangta Forest conflict – Seeing recognition in the trees*

6.1 Introduction

The goals of the chapter

This third case study of the thesis could, on one hand, be understood as an exploration of ecological justice¹ – the notion explained and positioned within a framework of justice for the environment, in chapter 2. On the other hand, it is an example of the further blending, hybridising or pluralising of concepts of justice for the environment. Those scholars who prefer to see a division between ecological justice concepts and a principle of environmental justice deployed by and for human communities may observe through the chapter an ecological injustice in the discussion of the inability of Australian law to achieve species protection. It is an injustice brought to bear on endangered species by virtue of the exemption that forestry activities have from the most important provisions of Australia's primary environmental law: the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). There is unfairness to the ecosphere through the unfulfillment of a commitment to protect those most vulnerable – the endangered – parts of it. There is a rejection of responsibility and a departure from care by those with the power to uphold and ensure it. A status afforded to species within the law is ignored in the translation of the environment into a resource for exploitation.

I hope, however, that readers glean more than that lesson from the story of the Wielangta Forest conflict. By focusing on the third and fourth aspects of the concept of environmental justice defined by Schlosberg and explained in chapter 2 – recognition and capabilities or capacity – this chapter will show a coherence between ecological and environmental justice ideas. Whichever theoretical or principled starting point is chosen, a common position can be reached. Both justice ideas depend on a recognition and respect of values about the environment. In the Wielangta Forest conflict, there were multiple values in play. The legal

* Parts of this chapter have been published as: Brad Jessup, 'Justice, recognition and environmental law: The Wielangta Forest conflict, Tasmania, Australia' (2015) 34 *University of Tasmania Law Review* 5.

¹ Klaus Bosselmann, 'Ecological justice and law' in Benjamin J Richardson and Stepan Wood (eds), *Environmental Law for Sustainability: A Reader* (Hart, 2006) 129.

system only achieved environmental justice, including for species, when it engaged with competing environmental values and prioritised those values that are directed to the environmental protection objectives of the law. Those values can be variously explained as being human centred or ecologically centred, traversing realms of values,² indicating that justice within the environment need not be conceived either anthropocentrically or ecocentrically;³ instead simply environmentally. As argued in chapter 2, an ethical position for the protection of the environment, whatever its philosophical underpinning, is the crux of environmental justice.

This case study is about more than the protection of species. In this case study it was not just the species at the centre of the controversy that required recognition in law for their protection, but also the scientists, who shared a common purpose of species protection but who felt disrespected, not listened to or not acknowledged across stages of the development and implementation of environmental law. Although it is unconventional to present arguments of historically powerful and privileged community members in a thesis about environmental justice, I have done so here. Their stories tell of the institutions of environmental law being closed to challenging or alternative views, of entrenching and preferring particular voices in law, and the adversarial nature of law and lawyering – of there being clear winners and obvious losers – of the law being unsuited to advancing the best decisions for the environment based on science. A remarkable lesson from this case study is that the experience of the opponents to the Channel Deepening Project, as discussed in chapter 5, is not confined to the vocal opponents to developments of environmental law. Hurt by the legal process that they went through in order to explain their views about the ways to best preserve species, many scientists articulated a reluctance to be involved in the law again. Collectively these perspectives point to a structural deficit in the law. There was a denial of existing capabilities and a limiting of future capacity to be involved in the law.

Finally, this case study highlights the gap between the promise and words of sustainability

² Sarah Fleisher Trainor, 'Realms of value: Conflicting natural resource values and incommensurability' (2006) 15 *Environmental Values* 3.

³ Robyn Eckersley, *Environmentalism and Political Theory: Toward an Ecocentric Approach* (SUNY Press, 1992).

and the realisation of the environmental conservation.⁴ The species at the centre of the conflict were all supposed to be protected through the operation of the Regional Forest Agreement that applied to the state of Tasmania – an executive instrument agreed in the 1990s⁵ that purports to achieve 'ecologically sustainable forest management' and 'the sustainable management and conservation of Australia's native forests'.⁶ The agreement is supported by controversial legislation – the *Regional Forest Agreement Act 2002* (Cth) – which was only passed by the Commonwealth Parliament on a fourth attempt by the then Howard Government.⁷ At the conclusion of this case study, the combined operation of the agreement and Act meant that forestry activities in Tasmania were not subject to Australia's species protection laws,⁸ and the fate of species was ultimately determined by an agreement between the political leaders of the state of Tasmania and the Commonwealth.⁹ That agreement, a variation to the Tasmania Regional Forest Agreement, was settled after the high-profile court case featuring then Australian Green Senator Bob Brown. It was ignorant of findings based on science and disrespectful of community knowledge,¹⁰ and it rendered the legal system futile,¹¹ disempowering the various agents within the law. This was the most notable environmental injustice in this case study – one produced while executive governments continued to proclaim the ecological sustainability of forestry activities in Tasmania¹² and, in doing so, escalating

⁴ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3A explains that one of the principles of ecologically sustainable development is the principle of 'the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making'.

⁵ Australian Government, Department of Agriculture and Water Resources, *Tasmanian Regional Forest Agreement* (16 January 2019) <<http://www.agriculture.gov.au/forestry/policies/rfa/regions/tasmania>>.

⁶ Australian Government, Department of Agriculture and Water Resources, *Regional Forest Agreements* (18 July 2017) <<http://www.agriculture.gov.au/forestry/policies/rfa>>.

⁷ Judith Ajani, *The Forest Wars* (Melbourne University Press, 2007) 218.

⁸ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 38(1) and *Regional Forest Agreement Act 2002* (Cth) s 6(4).

⁹ *Variation to the Tasmanian Regional Forest Agreement* (23 February 2007).

¹⁰ Tom Baxter, *Submission to the Independent Review of the EPBC Act 1999* (30 January 2009).

¹¹ *Brown v Forestry Tasmania* [2008] HCATrans 202.

¹² In 2005, the same Premier and Prime Minister negotiated the *Tasmanian Community Forest Agreement* (13

rather than attending to the ongoing conflict over the use of native forests in the state.

Environmental conflicts, values and justice

The dilemma of divergent values in environmental conflicts is summed up by Hardin, who ponders 'what is good? To one person it is wilderness, to another it is ski lodges'.¹³ Places of environmental contestation are invariably a contest over values.¹⁴ This is apparent from the previous two chapters. The controversy over the Orange Waste Project can be understood as arising from a preference for values at particular scales and divergent values about governing institutions. The preferencing of the economic values of Port Phillip over environmental and social ones was the key concern of opponents to the Channel Deepening Project. Because of the preferencing of certain values over others, meaningful deliberation is difficult to achieve, consultative cross-purposes are common¹⁵ and environmental injustice a consequence. With one set of values not fully recognised within decision-making processes, there is a feeling by those whose values were absent of not having an equal voice. In the Wielangta Forest conflict, claims were made by a variety of actors of being dismissed or disregarded by government agencies, the court and politicians, because of the prism of values through which Forestry Tasmania, Justice Marshall of the Federal Court, Premier Lennon and Prime Minister Howard saw forestry activities and

May 2005), which saw the re-creation of reserves alongside guarantees of wood supply for a proposed new pulp mill. In 2007, the two governments produced a document: Australian Government and Tasmanian Government, *Australia: Sustainable Forest Management* (2007), which insisted that 'in 2005 the Australian Government and Tasmanian Government finalised a landmark accord—the Tasmanian Community Forest Agreement—a major investment in further enhancing Tasmania's sustainable forest management' (p 9).

¹³ Garrett Hardin, 'The tragedy of the commons' in Herman E Daly and Kenneth N Townsend (eds), *Valuing the Earth: Economics, Ecology, Ethics* (MIT Press, 1993) 127, 130.

¹⁴ Melanie G Wiber, 'The spatial and temporal role of law in natural resource management: The impact of state regulation of fishing species' in Franz von Benda-Beckmann, Keebet von Benda-Beckmann and Anne Griffiths (eds), *Spatializing Law: An Anthropological Geography of Law in Society* (Ashgate, 2009) 75. As Marcia C Campbell and Donald W Floyd, 'Thinking critically about environmental mediation' (1996) 10 *Journal of Planning Literature* 235, 237 note, 'while there is much about the environment that can be quantified and studied empirically, many issues that give rise to environmental disputes are subjective ... and reflect a deeper underlying moral concern about how the environment should be treated'. The alternative view, often preferred by bureaucrats, is that conflicts arise from disagreements over facts: see, eg, Graham Bennett, *Dilemmas: Coping with Environmental Problems* (Earthscan, 1992); Alan Irwin, *Citizen Science: A Study of People, Expertise and Sustainable Development* (Routledge, 1995); and James Radcliffe, *Green Politics: Dictatorship or Democracy?* (Palgrave, 2000).

¹⁵ Wiber, above n 14.

species protection. Feelings of being frustrated in efforts to achieve environmental goals, and of being unwilling to continue to take part in environmental legal processes, abounded.

As well as arising from the disjunct in values, conflicts are also manufactured to assert or challenge values.¹⁶ This has been the history of forestry conflicts in Tasmania, including the Wielangta Forest conflict, which was structured and pursued strategically¹⁷ to disrupt the status quo – the power wielded by Forestry Tasmania over the planning for and regulation of forestry activities in Tasmania, and the federal *Environment Protection and Biodiversity Act 1999* (Cth), a law criticised for its failures¹⁸ yet resilient in the face of regular challenge by community groups. The Wielangta Forest conflict was unlike the controversies studied in the previous two chapters. It did not involve a community group opting into a public participatory process that sought to test and evaluate a project, with the community group under the impression that it may be able to halt or influence the approval of the project in question. Instead, in the matter addressed in this chapter, Bob Brown's team triggered the legal controversy in a way that gave it the upper hand in curating the values for the conflict and in ensuring an equality of voice in the dispute.¹⁹

The initiation of court proceedings in the Wielangta Forest conflict was a confirmation of the view with respect to forestry regulation in Tasmania that accordism – a concept now missing from forestry debates in Tasmania, but once the asserted goal of environmental policy debates – was not attainable,²⁰ but rather, that there existed between the parties deeply held incomparable values,²¹ and identity shaped by different connections with the

¹⁶ Jenny Stewart and Grant Jones, *Renegotiating the Environment: The Power of Politics* (Federation Press, 2003) 9.

¹⁷ Interview with Margaret Blakers, campaigner, 16 August 2011.

¹⁸ Contemporaneously with the start of the conflict: see Andrew Macintosh, *Environment Protection and Biodiversity Conservation Act: An Ongoing Failure* (The Australia Institute, July 2006).

¹⁹ Tom R Tyler, 'Justice and power in civil dispute processing' in Bryant G Garth and Austin Sarat (eds), *Justice and Power in Sociolegal Studies* (Northwestern University Press, 1998) 309, 332 explains the hope for legitimacy of views and values through endorsement by the courts.

²⁰ Nicholas M Economou, 'Accordism and the environment: The Resource Assessment Commission and national environmental policy-making' (1993) 28 *Australian Journal of Political Science* 399; Campbell and Floyd, above n 14.

²¹ Robert E Goodin, *Green Political Theory* (Polity, 1992) writes of a moral position with respect to the

environment,²² disparate levels of power, a commitment to a political or societal struggle, and a resistance to compromise.²³ In the words of Krien, the Wielangta Forest conflict was yet another instalment of the 'eternal argument' in Tasmania over forests, forestry and the truth.²⁴

Chapter overview

This chapter begins with a brief overview of the history of Australian forests legal conflicts, noting the rise in opposition in Tasmania to forestry activities from the late 1980s into the 1990s,²⁵ as the earlier environmental concern over the industrial electrification of the state that peaked in the early 1980s and led to the *Tasmanian Dam* case²⁶ dissipated. It will introduce the Regional Forest Agreements that were presented as offering a breakthrough in forest conflicts around the country, but did little more than entrench animosity between parties in Tasmania. Much of that animosity held by supporters of native forest logging in Tasmania was, and remains, directed towards Dr Robert (Bob) Brown, the former leader of the Australian Greens, and now figurehead of the Bob Brown Foundation. Bob Brown, who was supported and directed by long-term forests campaigner Margaret Blakers,²⁷ was the applicant in the first of the series of court cases about the Wielangta Forest. The chapter

environment leading to an irresolvable inconsistency in protection and economic growth.

²² Julia M Wondolleck, Barbara Gray and Todd Bryan, 'Us versus them: How identities and characterizations influence conflict' (2003) 5 *Environmental Practice* 207, 208.

²³ Economou, above n 20; Campbell and Floyd, above n 14; Susan Owens and Richard Cowell, *Land and Limits: Interpreting Sustainability in the Planning Process* (Routledge, 2002).

²⁴ Anna Krien, *Into the Woods: The Battle for Tasmania's Forests* (Black Inc, 2010) 7.

²⁵ Greg Buckman, *Tasmania's Wilderness Battles: A History* (Jacana Books, 2008) records forest conflicts in Tasmania dating to the 1910s but notes that the forests took a 'backseat' during the 1970s and 1980s in Tasmania owing to the Lake Pedder and Franklin dam conflicts (p 81). From a constitutional law perspective, a shift back to forests as the sites of environmental controversy in Tasmania can be marked in the case of *Richardson v Forestry Commission* (1988) 164 CLR 261. This was a decision of the High Court upholding the validity of *Lemonthyme and Southern Forests (Commission of Inquiry) Act 1987* (Cth), which prevented logging occurring in the southern forests of Tasmania while an inquiry was under way to determine whether those forests should be nominated as a World Heritage Area under the *Convention Concerning the Protection of the World Cultural and Natural Heritage* (opened for signature: 16 November 1972; entered into force: 17 December 1975).

²⁶ *Commonwealth v Tasmania* (1983) 158 CLR 1 ('*Tasmanian Dam*').

²⁷ Australian Women's Archive Project, 'Blakers, Margaret' *The Encyclopaedia of Women and Leadership in Twentieth-Century Australia* (2014).

will introduce Brown, before exploring the bases for the Wielangta Forest conflict and analysing the notable court cases that arose from the forest conflict. The chapter will then turn to explore the threads of justice within the dispute – framed around the species at issue in the controversy, the parties to the conflict and the scientists who provided expert opinion about the environmental effects of logging in the Wielangta Forest.

6.2 A recent history of legal conflict in Australian forests

From the 1970s through to the 1990s

Throughout the 1970s, as native forests on state land throughout Australia were being felled for woodchips and replaced with pine plantations,²⁸ conflict brewed. Environmental philosophers wrote of a 'fight for the forests'²⁹ – a taking back of native forests from the industrial users of the landscape.³⁰ This soon led to public debates about the economics, ecology and politics of forestry activities.³¹ Foresters were challenged about their belief that they were achieving conservation and wood protection concurrently.³² Blockades in New South Wales captured media attention³³ and concern spread throughout communities and across environmental groups,³⁴ including in the early 1980s to Victoria, where debates were ongoing about the plans to increase timber production in East Gippsland,³⁵ and to

²⁸ William Lines, *Patriots: Defending Australia's Natural Heritage* (University of Queensland Press, 2006) 143 notes that in 1972 Tasmania's second woodchip processing mill to service Japanese demand for pulp was opened. Thanks to Vivien Holmes who shared this book with me.

²⁹ Richard Routley and Val Routley, *The Fight for the Forests: The Takeover of Australian Forests for Pines, Wood Chips and Intensive Forestry* (ANU RSCS, 1973).

³⁰ Graham R Wilkinson, Mick Schofield and Peter Kanowski, 'Regulating forestry — Experience with compliance and enforcement over the 25 years of Tasmania's forest practices system' (2014) 40 *Forest Policy and Economics* 1 note that at this time the conflicts over forests became 'environmental' ones.

³¹ Ajani, above n 7, 83–6.

³² Lines, above n 28, 144–5. By contrast, Krien, above n 24, 123 writes of loggers fighting wood chippers in the 1970s over their own claims to access timber.

³³ Ajani, above n 7, 93.

³⁴ *Ibid* 105.

³⁵ Lines, above n 28, 236 notes the role of Margaret Blakers, writing with Peter Christoff, about transitional economies at the time. Bob Brown, *Optimism: Reflections on a Life of Action* (Hardie Grant, 2014) 104 notes the role of Margaret Blakers in alerting him to unlawful logging in Gippsland in 1998.

Tasmania.

Forests began to be the topic of high-profile, strategic environmental litigation in Australia in early 1980s,³⁶ with a key focus of applicant claims being the failure of forestry agencies to consider the environmental harm of their activities.³⁷ This litigation showed the weaknesses of environmental impact assessment laws and processes. In *Prineas*, a dispute over the rainforests in the north of New South Wales, for instance, the New South Wales Land and Environment Court articulated a pragmatic view that environmental impact assessments are imperfect and rarely complete. They are instruments to advise on a limited set of matters and will only be invalidated where they are superficial, subjective and non-informative.³⁸ The failure to attend to a satisfactory environmental assessment was the central point of the legal conflict surrounding the forests proximate to the Eden woodchip mill³⁹ in the south of the state throughout the 1980s, which culminated in the *Jarasius* case of 1988.⁴⁰ In *Jarasius*, the New South Wales Land and Environment Court found that logging activities are likely to have a long-term and significant impact on the environment at both a regional and local scale⁴¹ – for which an environmental assessment under the laws of New South Wales was required.⁴² Absent such an assessment, Hemmings J noted that there existed a dearth of accurate information on flora and fauna and a lack of detail about

³⁶ *Prineas v Forestry Commission (NSW)* (1983) 49 LGRA 402 ('*Prineas*').

³⁷ Similar arguments continue to be made: see, eg, the case concerning forests in Victoria: *Friends of Leadbeater's Possum Inc v VicForests* [2018] FCA 178.

³⁸ In *Prineas* (1983) 49 LGRA 402, 417, Cripps J noted: 'The fact that the environmental impact statement does not cover every topic and explore every avenue advocated by experts does not necessarily invalidate it or require a finding that it does not substantially comply with the statute and the regulations. In matters of scientific assessment it must be doubtful whether an environmental impact statement, as a matter of practical reality, would ever address every aspect of the problem'.

³⁹ Bill McCormick, *The Woodchip Licensing Issue*. Current Issues Brief 31 of 1994/95 (Australian Parliamentary Research Service, 8 February 1995) 4.

⁴⁰ *Jarasius v Forestry Commission of NSW (No 1)* (1988) 71 LGRA 79 ('*Jarasius*').

⁴¹ *Ibid* 91. Justice Hemmings said: 'In my opinion, by its very nature the integrated logging activity, whether on a local or regional viewpoint, has inevitably a significant effect of converting the environment from that of an old forest to that of a different and regenerated forest. The forest must be fragmented and flora is likely to be reduced in species and diversity. The full extent of the likely impact on flora in this environment is difficult to assess because there has been no comprehensive survey or research on impacts on non-commercial species'.

⁴² *Environmental Planning and Assessment Act 1979* (NSW).

impacts beyond the regional scale, even accounting for the assessment materials prepared for the federal government under the predecessor Act to the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).⁴³ According to Bonyhady, the New South Wales case law highlighted the disregard that the Forestry Commission of that state had for its statutory obligations, and its resistance to conduct impact assessments over at least a decade.⁴⁴ The case law⁴⁵ presented the New South Wales Forestry Commission as obstinate, obstructionist and arrogant; a branch of the government unable to preserve places and species, including acting inconsistently with the provisions of the law that sought to protect threatened species from harm.⁴⁶ A similar narrative would be raised by opponents of forestry activities in Tasmania decades thereafter.

In Tasmania, after the legal and political successes of the Franklin campaign, conservation attention turned once again to the forests⁴⁷ to leverage the rising nationwide concern about logging of native species⁴⁸ – concern stoked by the disputes in New South Wales and

⁴³ That is, the *Environment Protection (Impact of Proposals) Act 1974* (Cth): see *Jararius* (1988) 71 LGRA 79, 97–100.

⁴⁴ Tim Bonyhady, *Places Worth Keeping: Conservationists, Politics and Law* (Allen & Unwin, 1993) 83.

⁴⁵ Bonyhady, *ibid*, highlights *Corkill v Forestry Commission of NSW* (1991) 73 LGRA 126.

⁴⁶ In *Corkill v Forestry Commission of NSW* (1991) 73 LGRA 126, the New South Wales Land and Environment Court confirmed that the New South Wales Forestry Commission was bound to comply with the provisions of the *National Parks and Wildlife Act 1974* (NSW), including those parts of the Act that prohibited the killing or taking of endangered fauna species, that would be breached by the undertaking of logging activities. Brian Preston, 'Jurisprudence on ecologically sustainable development: Paul Stein's contribution' (2012) 29 *Environmental and Planning Law Journal* 3 notes that the response of the government to the case was to secure passage through the New South Wales Parliament of the *Endangered Fauna (Interim Protection) Act 1991* (NSW). That Act, among other things, introduced a requirement for fauna impact statements to be done before any licence to kill or take species would be licenced; and exempted obligations to protect species where activities, including forestry activities, were undertaken in accordance with a development approval. This foreshadowed the kind of provisions that would be at issue in the Wielangta Forest conflict.

⁴⁷ Buckman, above n 25, 89 quotes Bob Brown:

I came out of the Franklin campaign in 1983 with forests blinkering all around the place ... Everywhere you went the wilderness forests under threat around the state. So into the forests we went.

⁴⁸ Amanda Lohrey, 'Groundswell: The rise of the Greens' (2002) 8 *Quarterly Essay* 1, 45 notes that by the early 2000s, forests conservation had become a national political issue. Forests in New South Wales, Tasmania, Victoria and Western Australia had all risen to national attention for being under threat from logging activities sanctioned by state governments.

rising levels of protest in Western Australia.⁴⁹

The Tasmanian forests conflict, simmering since the 1970s,⁵⁰ had entered the general consciousness of the Australian public by the start of the 1990s.⁵¹ At this time, there was an attempt to broker a political agreement over the use and protection of Tasmania's forests. The Salamanca Agreement,⁵² which provided for an expansion of the state's World Heritage Areas while logging continued elsewhere in the state,⁵³ withered within two years, environmentalists refusing to acknowledge the central tenet of the agreement that forestry activities would continue unabated in Tasmania.⁵⁴ The forestry industry and its impact on the environment were raised in the international realm at the Rio Earth Summit in 1992, where stridently opposing views on the value of forestry activities and their need for regulation hampered efforts for an international accord on forests.⁵⁵ In Australia, the

⁴⁹ Ron Chapman, *Fighting for the Forests: A History of the Western Australian Forest Protect Movement 1895–2001* (PhD Thesis, Murdoch University, 2008) charts the rise of protests, especially related to logging in the south-west of the state, from the 1970s and mobilising and infiltrating nationally through the late 1980s to 1990s.

⁵⁰ Gary Musselwhite and Gamini Herath, (2005) 'Australia's Regional Forest Agreement process: Analysis of the potential and problems' (2005) 7 *Forest Policy and Economics* 579; Marcus B Lane, 'Regional Forest Agreements: Resolving resource conflicts or managing resource politics?' (1999) 37 *Australian Geographical Studies* 142. Matthew Gray and John A J Wolfenden, 'A Canadian 'model forest' approach: A way forward for Tasmania?' (2004) 11 *Australian Journal of Environmental Management* 55 note a longer period of post-war conflict while forestry was regulated in Tasmania under the *Forestry Act 1920* (Tas) and then the *Forest Practices Act 1985* (Tas).

⁵¹ Bill Slee, 'Resolving production–environment conflicts: the case of the Regional Forest Agreement process in Australia' (2001) 17 *Forest Policy and Economics* 3. The inquiry into the Lemonthyme and Southern Forests in the late 1980s captured national attention.

⁵² Bill McCormick, '*Tasmanian Forests: Future Agreement?*' (Parliament of Australia Library, 2010).

⁵³ Lines, above n 28, 266, including in the Tarkine area, which is the subject of community proposals for World Heritage listing. The Australian Heritage Council recommended the Tarkine be included on the National Heritage List of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth): Australian Heritage Council, *National Heritage Assessment – The Tarkine – Final Report* (2012), a recommendation largely rejected by the then Minister for the Environment Tony Burke. See also Lyn McGaurr, Bruce Tranter and Libby Lester, 'Wilderness and the media politics of place branding' (2015) 9 *Environmental Communication* 269, 277.

⁵⁴ The implication being that they had ostracised themselves because of the failure of that earlier process. Reflecting on the decision of the environmental movement to reject the Salamanca Agreement, Stewart and Jones, above n 16, 59 note that 'The decision not to support the Salamanca Agreement certainly caused the green movement to lose credibility with the other stakeholders, and arguably strengthened the resolve of those in government' to maintain a preference for the industrial use of the forests. This was a preference borne out through the later Regional Forest Agreement process.

⁵⁵ Pratap Chatterjee and Matthias Finger, *The Earth Brokers: Power Politics and World Development*

development of a National Forest Policy Statement⁵⁶ at around the same time, purportedly consistent with the international principles, was presented as a mechanism to seek a compromise, rather than realise species protection.⁵⁷ There would be ongoing logging, with an awareness owing to the inquiry of the Resource Assessment Commission that clear-felling and woodchipping has adverse impacts on the ecosystem,⁵⁸ but with alternative avenues to economise the forests complemented by a system of reserves.⁵⁹ The Australian policy position did not prioritise environmental protection over logging interests nor increase governance around and transparency over logging activities; however, this was what the international community was considering.⁶⁰ The *Rio Forest Principles* highlighted the need for public access to 'reliable and accurate information',⁶¹ actions towards an increase in forest cover through conservation, rehabilitation and reforestation,⁶² and the use of wider landscape management and environmental impact assessment to achieve an ecological balance and to evaluate the significant impacts of forestry activities.⁶³

The Tasmanian government was the only government that did not immediately sign on to the National Forest Statement Policy,⁶⁴ because it was concerned that the policy would

(Routledge, 1994).

⁵⁶ Driven in part by the short-lived Resource Assessment Commission: Nicholas Economou, 'Australian environmental policy making in transition: the rise and fall of the Resource Assessment Commission' (1996) 55 *Australian Journal of Public Administration* 12.

⁵⁷ Daniel Lunney, 'The Resource Assessment Commission loses its nerve: The Forest and Timber Industry Inquiry sidesteps an evaluation of the impact of forestry operations on forest fauna' (1992) 28(1-4) *Australian Zoologist* 23 expresses disappointment that the inquiry into forestry operations did not prioritise species interests, instead entrenched forestry ones.

⁵⁸ McCormick, above n 39.

⁵⁹ McCormick, *ibid* 1, explains that the effect of the National Forest Policy Statement was to create a moratorium on logging in forests reserved for protection (the scope of the protection was unclear: the terminology of 'old growth forests' that was used was undefined) while logging could continue elsewhere.

⁶⁰ *Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests* (14 August 1992) ('*Rio Forest Principles*').

⁶¹ *Rio Forest Principles*, Principle 2(c).

⁶² *Rio Forest Principles*, Principles 8(a) and 8(b).

⁶³ *Rio Forest Principles*, Principles 8(e) and 8(h).

⁶⁴ John Dargavel, 'Politics, policy and process in the forests' (1998) 5 *Australian Journal of Environmental*

reduce the forested area available for timber production and woodchipping, and that it would constitute an intrusion by the federal government into its forestry strategy.⁶⁵ When it did, there was an unrealised expectation that its approach to forestry management would change, leading to a lesser focus on clear-felling and more rigorous management protocols to protect species.⁶⁶

Meanwhile, the environmental movement in Tasmania took to the courts to challenge the granting of woodchip export licences by the federal government.⁶⁷ The Tasmanian Conservation Trust⁶⁸ successfully argued that the environmental assessment of forestry activities were deficient. The state, on behalf of commercial forestry company Gunns Limited, had presented the federal Environment Minister under the *Environment Protection (Impact of Proposals) Act 1974 (Cth)* with an environmental impact assessment eight years old and not specifically referable to or evaluative of the environmental effects of the particular proposed logging project.⁶⁹ The conclusion from the case, supported by advice from a trio of independent bodies no longer in existence – the Commonwealth Environment Protection Agency, the Australian Heritage Commission and the Australian Nature Conservation Agency – was that forestry activities, even undertaken purportedly sustainably, have adverse impacts on the environment,⁷⁰ and those projects necessarily require individualised assessments of their impacts, cumulative impacts associated with them, as well as impacts on surrounding environs.⁷¹

It was a moment in time when the federal government found itself confronting views and

Management 25 notes that Tasmania signed the statement in 1995.

⁶⁵ Frank N McKinnell, 'Australia's new National Forests Policy' (1993) 44(175) *Unasylva – An International Journal of Forestry and Forest Industries* <<http://www.fao.org/3/v1500e/v1500e09.htm>>.

⁶⁶ Gray and Wolfenden, above n 50, 56–8.

⁶⁷ J B Kirkpatrick, 'Nature conservation and the Regional Forest Agreement process' (1998) 5(1) *Australian Journal of Environmental Management* 31.

⁶⁸ *Tasmanian Conservation Trust Inc v Minister of Resources and Gunns Ltd* (1995) 55 FCR 516.

⁶⁹ *Ibid*, para [85].

⁷⁰ *Ibid*, para [32].

⁷¹ *Ibid*, paras [91]–[93].

legal positions about forest regulation from opposing sides of the Tasmanian forest conflict. The government's response was to excuse itself⁷² from the regulation of the forests that had been so contentious over the preceding decades. It would dismantle the legal regime for the assessment of environmental impacts from forestry. It would do so using agreements made between the executive branches of federal and state governments – that is, Regional Forest Agreements.

The Regional Forest Agreements

A series of Regional Forest Agreements were negotiated between state governments and the federal government – first with Victoria and Tasmania (in 1997) and later with Western Australia and New South Wales (in 1999). These 20-year agreements were developed after a period of scientific assessment of the forests and following consultation with communities about how they valued the forests.⁷³ The agreements were intended to strike a balance between forest production uses and conservation,⁷⁴ and were purportedly drafted to achieve the 11, partly conflicting, goals of the National Forest Policy Statement.⁷⁵ Like previous attempts to overcome the entrenched conflict over forest use and protection, the agreements were based on arbitrary decisions about divisions of the national estate. Some land would be allocated for logging, and some land for reserves.

The policy goal of conservation would be met primarily through the creation of a system of 'CAR' – comprehensive, adequate and representative – reserves.⁷⁶ The idea was that environmental values could be respected in confined places of highest ecological value or

⁷² David Mercer, *A Question of Balance: Natural Resource Conflict Issues in Australia* (Federation Press, 3rd ed, 2000) 49 notes that the Commonwealth government made threats of financial penalties to the Western Australian and Queensland governments, which were not enthused by the agreements. Queensland did not enter into any Regional Forest Agreements.

⁷³ Commonwealth of Australia, Department of Agriculture, *Regional Forest Agreements: An Overview and History* (2015).

⁷⁴ Slee, above n 51; Lane, above n 50. This was framed as 'providing long-term stability of forests and forest industries': see *Tasmanian Regional Forest Agreement* (1997) cl 5.

⁷⁵ Commonwealth of Australia, Department of Agriculture, above n 73, 3. Those goals included achieving multiple uses of forests, wood protection and forestry employment, conservation and forestry research.

⁷⁶ *Tasmanian Regional Forest Agreement* (1997) cl 24 and cl 48–59. The CAR system also includes the application of prescriptions in forests available for logging.

poor wood-production value. Decisions about forest management would be controlled by state forestry agencies,⁷⁷ which would be committed to employing 'ecologically sustainable forest management'.⁷⁸ This was an easier approach than the alternative of 'more holistic management solutions' that would involve reconceiving forestry practices, and confining those practices within an overarching mission of conservation.⁷⁹

The agreements did not calm the conflict over the forests. Instead, they increased the division between environmentalists, who considered that the timber industry was unfairly advantaged by the policy and the laws that supported the Regional Forest Agreements,⁸⁰ and foresters, who became frustrated by complaints and actions by environmentalists when they were merely following the law. John Gay, chairperson of Gunns Limited, once Tasmania's largest corporate entity and forest company, said in the years leading up to the Wielangta Forest conflict: 'In the Regional Forestry Agreement we are operating under, we are not breaking any issues [sic] at all. Obviously, the greens [sic] believe that we are'.⁸¹

Reflecting on the Regional Forest Agreement process in Tasmania, Stewart and Jones described it as 'an industry win'.⁸² Within the agreement there was a preference for the retention of forest-based industries over conservation in the state.⁸³ In part, this was a consequence of the state resisting compromise after it had been spurned by earlier efforts

⁷⁷ In the *Tasmanian Regional Forest Agreement* (1997), the Commonwealth undertook to exempt forestry activities from export control laws and environmental laws – the very laws that had triggered litigation over the preceding decades: see clause 22.

⁷⁸ *Tasmanian Regional Forest Agreement* (1997) cl 62–4. This term was poorly defined as 'forest management and use in accordance with the specific objectives and policies for ecologically sustainable development as detailed in the [National Forest Policy Statement]', that statement itself asserting the attainment of incompatible goals.

⁷⁹ Mercer, above n 72, 45.

⁸⁰ Musselwhite and Herath, above n 50.

⁸¹ Gwyn Topham, 'Rumble in the jungle', *The Guardian* (28 June 2006) <<https://www.theguardian.com/society/2006/jun/28/guardiansocietysupplement5>>.

⁸² Stewart and Jones, above n 16.

⁸³ Allan Hawke, *Independent Review of the Environment Protection and Biodiversity Conservation Act 1999 – Interim Report* (June 2009) 113 notes that these claims were not made about the process for the development of other state Regional Forest Agreements – just Tasmania.

at political settlement.⁸⁴ The state controlled the consultation for, and the terms of reference of, the inquiry that preceded the settlement of the agreement. The state had a clear goal of preserving forest industry jobs above all others, and it offered minimal opportunities to those with an interest in the conservation of the state's forests to influence the terms of the agreement.⁸⁵ The accepted wisdom is that the framework for the Regional Forest Agreement can never realise conservation, because the focus of attention is always on forestry activities and what is being done by foresters, rather than evaluating the conservation outcomes of the creation of reserves.⁸⁶

The operation of the Regional Forest Agreement has produced conflicting views, experiences and interpretations. In an independent review of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) headed by Allan Hawke, conducted a decade after their commencement, the role of Regional Forest Agreements within the Australian legal system was identified as 'one of the most contentious issues arising from consultations', with concern that environmental outcomes were not being realised.⁸⁷ Reserves and protected areas have demonstrably increased as a result of the agreements – in Tasmania it has more than doubled⁸⁸ – yet species protection, especially of endangered or threatened species outside the reserves, is not being achieved nor appropriately monitored, through the forest management practices employed by forestry agencies.⁸⁹ Forest plans that direct forest activities are almost always approved and rarely reviewed

⁸⁴ Stewart and Jones, above n 16, 100.

⁸⁵ Interview with Peter McQuillan, scientist, University of Tasmania, 8 September 2009. McQuillan described the science supporting the environmental assessment that preceded the preparation of the Tasmanian Regional Forest Agreement as having been 'cherry picked'. He was especially critical of the failure of the agreement to respond to the eight bioregions in the state. Jan McDonald, 'Regional Forest (Dis)Agreements: The RFA process and sustainable forest management' (1999) 11 *Bond Law Review* 295 notes the criticism of the consolidation of consultation in places distant from the forests the subject of the agreements.

⁸⁶ Interview with Steve Read, scientist, Forestry Tasmania, 20 November 2009.

⁸⁷ Allan Hawke, *The Australian Environment Act – Independent Review of the Environment Protection and Biodiversity Conservation Act 1999 – Final Report* (October 2009) 22.

⁸⁸ Ajani, above n 7, 287.

⁸⁹ Hawke, above n 87, 196–8.

independently.⁹⁰ Hawke and his fellow reviewers accepted that the agreements provided 'considerable certainty for forest industries through reduced Commonwealth regulation and the establishment of long-term frameworks for forest management'.⁹¹ In Tasmania, while this has meant the area of timber production has dropped, logging activity has increased.⁹² This suggested to the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) review panel that the next stages of renewal of the agreements, which have widespread political support, ought to revisit the evaluation of environmental values underpinning them and focus on ensuring and evidencing conservation outcomes.⁹³ Other changes it recommended included more rigorous reviews, greater auditing, enforcement and oversight by the Commonwealth government, and greater transparency and accountability to instil public confidence in the agreements.⁹⁴

In the lead-up to the 2004 federal election, thousands of Tasmanians protested for the further protection of Tasmanian forests⁹⁵ and, with renewed concern nationwide about the state of Tasmania's forests and a strategy to escalate logging as a federal election issue,⁹⁶ the then opposition Labor party promised to halt logging of old-growth forests if it was

⁹⁰ Interview with Peter McQuillan, scientist, University of Tasmania, 8 September 2009.

⁹¹ Hawke, above n 87, 196.

⁹² Ajani, above n 7, 287.

⁹³ Hawke, above n 83, 120–1. In 2017, Commonwealth and Tasmanian governments revised the assessment underpinning the Regional Forest Agreement to support an extension to that agreement. That assessment similarly concluded that there was a lack of monitoring to determine the effect of forestry activities on species and the effectiveness of the sustainable forest management practices deployed by the forestry agency to protect species: see Australian Government and Tasmanian Government, *Further Assessment of Matters Under the Regional Forest Agreements Act 2002 (Cth) Relating to the 2017 Variation of the Tasmanian Regional Forest Agreement* (Commonwealth of Australia, 2017) 55–6.

⁹⁴ Hawke, above n 83. Tasmania, of note, is the only state that has regularly reviewed its agreement (p 119). The Victorian forestry agency, VicForests, is facing a legal challenge to its forestry activities on the grounds that it has failed to review agreements in place in that state: SBS, 'Tiny Victorian possum's future still in limbo', *SBS News* (3 March 2018) <<https://www.sbs.com.au/news/tiny-victorian-possum-s-future-still-in-limbo>>.

⁹⁵ ABC, 'Thousands march to protest Tas Govt forestry policies', *ABC News* (13 March 2004) <<https://www.abc.net.au/news/2004-03-13/thousands-march-to-protest-tas-govt-forestry/150896>>.

⁹⁶ Julia Affolderbach, 'Environmental bargains: Power struggles and decision making over British Columbia's and Tasmania's old-growth forests' (2011) 82 *Economic Geography* 181.

elected.⁹⁷ The conservative federal government romped to an easy victory with emphatic support for a job-friendly forests policy in Tasmania, and the opportunity for environmental groups to influence forest policy evaporated, with both major political parties afterwards lining up to support forest workers over the environment.⁹⁸

It was with a renewed confidence that environmental groups lacked the political power over forests that the Tasmanian Regional Forest Agreement was secretly amended⁹⁹ by the returned federal Howard Government with the Tasmanian Government in 2005.¹⁰⁰ The supplementary agreement was intended to 'build a firm foundation for the Tasmanian forestry industry going forward and underpin resource security for the proposed new pulp mill at Bell Bay'.¹⁰¹ While containing new reserves in iconic and biodiverse landscapes, the Tasmanian Community Forests Agreement that accompanied the amendment to the Regional Forest Agreement also sought to entrench forestry industries in Tasmania by providing financial support for the diversification of, and to new entrants into, wood-product businesses in the state.¹⁰²

6.3 The Wielangta Forest conflict

The values and strategies of Bob Brown

The 2005 amendments to the Tasmanian Regional Forest Agreement included new reserves in the Tarkine and the Styx Valley: places of contest and protest of the time, but not to the extent that had been demanded by environmental campaigners, including Bob

⁹⁷ Richard Flanagan, 'Out of control: The tragedy of Tasmania's forests' (May 2007) 23 *The Monthly* 20.

⁹⁸ Andrew Darby, 'Rudd shuts out green groups on Tasmanian forest plans', *The Age* (19 December 2006) <<https://www.theage.com.au/national/rudd-shuts-out-green-groups-on-tasmanian-forest-plans-20061219-ge3tsv.html>>.

⁹⁹ Affolderbach, above n 96, 201 explains that the governments did not consult with any stakeholders about the amendment to the Agreement.

¹⁰⁰ Buckman, above n 25, 127.

¹⁰¹ Commonwealth Government and Tasmanian Government, *The Tasmanian Community Forest Agreement Fact Sheet No 1 Overview of the Tasmanian Community Forest Agreement* (2015). See also *Supplementary Tasmanian Regional Forest Agreement* (2015) cl 60–2.

¹⁰² Australian Government and Tasmanian Government, *A Way Forward for Tasmania's Forests – The Tasmanian Community Forest Agreement* (2015).

Brown.¹⁰³ A small new reserve was also proposed for the Wielangta State Forest.¹⁰⁴ The outcome was seen as insufficient to the environmental campaigners, especially given that the promise lost was a ban on logging old-growth forests. For Brown, the Tasmanian Regional Forest Agreement was a threat to the forests, not a means to their conservation.¹⁰⁵ The iterations of amendments that had gone before maintained the view within governments of forests as places of production not preservation.¹⁰⁶ Environmental protection was only ever offered to entrench the position of forestry operations.¹⁰⁷ Sustainability and security were offered to human users not species within the forests.

Brown and his supporters had tried direct action, they had tried parliamentary manoeuvres and they attempted to seek change through political campaigning. According to Margaret Blakers, Brown's co-campaigner, co-founder of the Victorian Greens and strategist with experience in Victorian forestry litigation, the courtroom was their next obvious step.¹⁰⁸ Wielangta was the target – as a place with rare species, a reserve smaller than expected and at imminent threat from logging – and the *Environment Protection and Biodiversity Act 1999* (Cth) would be methodologically challenged. Blakers had been waiting, preparing, for a case to test that federal law in a way that environment groups beforehand limited to bringing judicial review causes of action had been unable to do.¹⁰⁹ Scientists had just located the highly endangered and endemic stag beetle that would become an emblem for the court case.¹¹⁰ As Brown wrote in a media release at the time:¹¹¹

¹⁰³ Buckman, above n 25, 127.

¹⁰⁴ Brown, above n 35, 103 described the Wielangta reserve as 'only a fraction' of the forest; 'the loggers wanted all the rest'.

¹⁰⁵ Bob Brown, *Memo for a Saner World* (Penguin, 2004).

¹⁰⁶ Ibid.

¹⁰⁷ Lines, above n 28, 272; Ajani, above n 7, 296 notes that the Tasmanian forestry agencies hold on public office meant that conservation could not be achieved in the eyes of environmentalists.

¹⁰⁸ Interview with Margaret Blakers, campaigner, 16 August 2011.

¹⁰⁹ Interview with Margaret Blakers, campaigner, 16 August 2011.

¹¹⁰ Interview with Margaret Blakers, campaigner, 16 August 2011.

¹¹¹ Bob Brown, *Immediate Halt to Wielangta Logging Sought in Federal Court* (Media Release, 30 May 2005).

I began preparing court action in 2003 when locals brought to my attention that the Wielangta refuge was slated for logging. Now that Prime Minister Howard has decided to open much of Wielangta's high conservation value forest to logging, there is no choice.

The Wielangta Forest is located on the east coast of Tasmania, approximately 50 kilometres north-east of the progressive capital Hobart, and close to the now abandoned Triabunna woodchip mill. The forest is a mix of dry and wet sclerophyll eucalypt. Unlike the ancient forests that have acted as rallying points for conservationists, Wielangta has a long history of forestry, dating from the mid- to late 1800s and formalised in the early 1900s,¹¹² and only being gradually displaced by the systematic creation of 'forest reserves' in the late 1980s.¹¹³ Today, Wielangta comprises distinct pockets of never-logged forest, an abundance of old-growth forest, ongoing logging coupes and vast areas of cleared land.

Part of Brown and Blakers's strategy was to valorise the Wielangta Forest. Brown had been instrumental in the naming of the Tarkine.¹¹⁴ He believed that the naming of a place, giving it recognition, produced a responsibility to protect it.¹¹⁵ While Wielangta had a long-standing name – meaning 'tall forest' in an Aboriginal language,¹¹⁶ and indeed one associated with historic logging¹¹⁷ – Brown and Blakers sought to redefine it as a 'refuge' for species.¹¹⁸ It would be presented to the national public as an important habitat with a

Attached as Annexure A to the Affidavit of John McDonald in the matter of *Brown v Forestry Tasmania (No 4)* (2006) 157 FCR 1 (10 October 2005). Interviewees indicated that planning commenced earlier – in 2002.

¹¹² Ketelaar and Kostoglou, above n 116. Tasmania, *Tasmanian Government Gazette*, Vol CXIV No 7233, 14 June 1910.

¹¹³ Affidavit of Simon Grove, Forestry Tasmania, in the matter of in the matter of *Brown v Forestry Tasmania (No 4)* (2006) 157 FCR 1 (21 November 2005). Tasmania, *Tasmanian Government Gazette*, Vol CCLXXII No 19080, 86, 25 January 1989, 86. The current Wielangta Forest Reserve was mostly created by Tasmania, *Tasmanian Government Gazette*, Vol CCCVII No 20679, 12 July 2006, 1150.

¹¹⁴ Lines, above n 28, 297.

¹¹⁵ *Ibid* 302.

¹¹⁶ Brown, above n 35, 103; Astrid Ketelaar and Parry Kostoglou, *A Short History of the Timber Industry in the Wielangta State Forest* (Forestry Tasmania, 1993) 3 note that the word that gave the forest its name was probably 'wulungta'.

¹¹⁷ Ketelaar and Kostoglou, above n 116, 3 note that the first mill was named 'Wielangta'. The children's book by Celia Lendis, *Postcards from the Town that Disappeared* (Forest Education Foundation Inc, 2nd ed, 2005), tells the story of the two-decade life of the settlement of Wielangta. Moreover, a team of respected Forestry Tasmania scientists were working in the Wielangta: Interview with Nick Mooney, scientist, 9 September 2009.

¹¹⁸ Interview with Margaret Blakers, campaigner, 16 August 2011; Bob Brown, *Wielangta Forest Landmark Trial*

unique landscape dating to the ice age, on which threatened species and biodiversity values currently depended.¹¹⁹ On his website for supporters,¹²⁰ Brown explained:

Why am I doing this?

Wielangta is the world. This beautiful forested hill country near Maria Island on Tasmania's East Coast is a refuge of some of Australia's most rare and endangered species. Wielangta is a fascinating weather-shed; it snows in winter, it is dry for long spells in summer, it is a place where rainforest in the gullies can be a stone's throw from open eucalypt woodland like that on much of Australia's high plains.

...

My action is not just for Tasmania's creatures, it carries the same argument we should apply to protecting all of Australia's native forests and woodlands that harbour rare wildlife or ecosystems.

Blakers and Brown's imagining of the forest countered the narrative adopted by Forestry Tasmania and private forestry companies that Wielangta has a cultural heritage grounded in its logging past, with a long experience and affinity with timber production;¹²¹ that it is a place of humans and labour, of regeneration, as much as a place for species and restoration.¹²²

Presenting Wielangta as habitat rather than as a production forest was consistent with the values Brown had for the environment and the principled reasons he offered for protecting the environment. His biographies explain his closeness to 'nature' and his desire to protect 'wild places'; his interest in environmentalism triggered by his concern about the loss of species and fascination by rare species in Tasmania.¹²³ The swift parrot, in particular, was of

(2005) <<https://web.archive.org/web/20131126071555/http://www.on-trial.info/>>. Brown also successfully 'rebranded' the endangered beetle the 'Wielangta beetle': Chris Gunson, barrister, interview, 11 September 2009.

¹¹⁹ Interview with Margaret Blakers, campaigner, 16 August 2011.

¹²⁰ Brown, above n 118.

¹²¹ Ketelaar and Kostoglou, above n 116. Lendis, above n 117. Lendis's book was financed by the sale of illustrations to timber company Gunns Limited (p 4).

¹²² Around the Wielangta Forest, Forestry Tasmania signs tell visitors that the forest is regrowth and a workplace.

¹²³ James Norman, *Bob Brown: Gentle Revolutionary* (Allen and Unwin, 2004) 7, 15, 44–5; Christine Williams, *Green Power: Environmentalists Who Have Changed Australia* (Lothian, 2006). See chapter 'Bob Brown: Tassie tiger' (pp 25–9): see also Brown, above n 35, 104.

especial interest to Brown; he was excited to run a court case that sought greater protection for a species that he admired for its uniqueness, resilience and stamina.¹²⁴ On humans, Brown considers them outside but dependent on the environment,¹²⁵ with interactions bringing a sense of solace and inspiration.¹²⁶ They bear a responsibility to the environment:¹²⁷ to protect, to maintain, to ensure longevity of the variety and diversity of unmodified landscapes and species.

Framing the Wielangta Forest conflict

While most of the forest conflicts in Tasmania centred around the so-called ancient forest landscapes in the Florentine, Tarkine, Styx and Weld, Brown would use the Wielangta Forest to challenge the Tasmanian Regional Forest Agreement and to test the exemption afforded to forestry activities in Tasmania to the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).¹²⁸

Brown's immediate goal when initiating the court case was to halt the logging of two coupes within the wider forest area by using Australia's national endangered species protection law, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). That Act makes it an offence to take an action that is likely to have a significant impact on Commonwealth-listed endangered species without Commonwealth government approval.¹²⁹ Brown argued that the logging would have a significant impact on three species¹³⁰ listed as threatened under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth):

¹²⁴ Interview with Margaret Blakers, campaigner, 16 August 2011.

¹²⁵ He described tourism as 'the lesser of evils in wild places': see Brown, above n 105, 149; Bob Brown, *Earth* (New Print, 2009) 23.

¹²⁶ Norman, above n 123, 34.

¹²⁷ Brown, above n 125, 19.

¹²⁸ Brown, above n 35, 104–5. Interview with Roland Browne, lawyer for Brown, 14 September 2009.

¹²⁹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 18(3).

¹³⁰ At the first interlocutory hearing, Brown's legal team raised just one species – the stag-toothed beetle: Interview with John McDonald, lawyer, Forestry Tasmania, 11 September 2009.

- the migratory swift parrot, which uses the Wielangta area's hollowed trees as a preferred nesting and breeding habitat
- the endemic Tasmanian wedge-tailed eagle, which is very low in number and particularly threatened by human activities, such as shooting and trapping, and by tall-tree habitat clearance or isolation
- the rare broad-toothed stag beetle, endemic only to the local area and the nearby Maria Island reserve.

Brown emphasised that the dispute over Tasmania's old-growth forests was founded in a conflict over values. The options were to 'destroy' by logging or burning, or to 'enhance the habitat of Australia's wildlife'.¹³¹ Brown left no room for a middle ground.

A challenge to the Tasmanian Regional Forest Agreement

The legal issue centred on section 38 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). That section exempts some forestry operations, when taken in accordance with a Regional Forest Agreement, from the offence and approval provisions within the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), including the offence to take an action that is likely to have a significant impact on Commonwealth-listed endangered species without Commonwealth government approval.

Although framed as an exemption, section 38 has been understood and explained as being 'akin to a licence'.¹³² This is because ongoing protection of the environment is assumed in the same way an approval holder is required to ensure. Because the exemption is predicated on ongoing review of the agreements, it is not absolute and comes with an implicit duty to protect the environment. The so-called 'exemption' exists because, and in recognition that, forestry activities, management and conservation in Tasmania, and parts of New South Wales, Western Australia and Victoria, were subject to scientific and environmental assessments before the creation of the Regional Forest Agreements. These

¹³¹ Bob Brown, 'Failing our wildlife', *The Age* (15 January 2007) <<https://www.theage.com.au/national/failing-our-wildlife-20070115-ge3zn7.html>>.

¹³² Hawke, above n 87, 197, para [10.12].

assessments are treated equivalently to an environmental impact assessment, the typical process required under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) as a precondition to project approvals.

The section 38 exemption in the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) is seemingly limited in application. It only applies to those forestry operations 'taken in accordance with a Regional Forest Agreement'. Yet, the statewide Tasmanian Regional Forest Agreement¹³³ sets up a process and locations for forestry activities, so the exemption has widespread relevance. Moreover, it was assumed that all forestry activities contemplated by the Regional Forest Agreement benefitted from the exemption. This interpretation means all federal environmental legal oversight would be removed across the state's forestry reserve for its largest industrial activity – creating a largescale geography beyond environmental law. By contrast, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) would only apply to specified geographies, including Commonwealth-protected areas, where forestry activities are not permitted, such as the vast Tasmanian Wilderness World Heritage Area¹³⁴ and the Ramsar Convention-nominated wetlands of international importance,¹³⁵ which are dotted mostly along the Tasmanian east coast.

Key provisions of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), as noted, apply to listed protected species wherever they are located.¹³⁶ It was these provisions that the exemption for Regional Forest Agreement forestry activities curtailed. Blakers and Brown's broader, long-term objective in bringing the court case was to require compliance with the provisions of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) dealing with listed protected species wherever species were located, including in Tasmania's forests, so that forestry operations likely to have a significant

¹³³ *Tasmanian Regional Forest Agreement* (1997) cl 4.

¹³⁴ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 12–15A.

¹³⁵ *Ibid* ss 16–17B.

¹³⁶ See, eg, *ibid* ss 18–20B.

impact on the environment could no longer occur without particular project approval.¹³⁷

Brown's argument¹³⁸ was that forestry activities in the Wielangta Forest, and by implication elsewhere where threatened species were located in forests, were further threatening species, leading to their decline. This was inconsistent with the Regional Forest Agreements that had one of their core objectives to protect and conserve species, and specifically inconsistent with clauses in the agreements that committed states to protect threatened and endangered species. According to Brown, when species are not being protected by forestry activities, the forestry activities are not 'in accordance with the Regional Forest Agreement' and the exemption from the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) should no longer apply.¹³⁹

In the court case instituted by Brown, the most relevant clause of the Tasmanian Regional Forest Agreement was clause 68. That clause specified how Tasmania would protect designated species in the state, species that included the swift parrot, the Tasmanian wedge-tailed eagle and the broad-toothed stag beetle. In its original form, and the form it was in for the trial, the clause stated in effect that: Tasmania agrees to protect the three species of relevance through its system of CAR reserves or by applying management prescriptions.¹⁴⁰

6.4 The court cases

A straightforward case

The case looked straightforward from a legal perspective.¹⁴¹ It ought to have been a

¹³⁷ Outline of Submissions for Robert Brown in the matter of *Brown v Forestry Tasmania (No 4)* (2006) 157 FCR 1 (23 November 2005), para [1].

¹³⁸ Ibid.

¹³⁹ A similar argument is being led in Victoria: *Friends of Leadbeater's Possum Inc v VicForests* [2018] FCA 178. The argument in this case is that forestry activities are not in accordance with the Regional Forest Agreement because the agreement is invalid because it has not been reviewed as required under its terms.

¹⁴⁰ The full wording of clause 68 was: 'The State agrees to protect the Priority Species listed in Attachment 2 (Part A) through the CAR Reserve System or by applying relevant management prescriptions'.

¹⁴¹ For a case note: see Imran Church, 'Fauna v forestry: The Wielangta Forest litigation' (2009) 28 *University of Tasmania Law Review* 125.

statutory interpretation question of what is meant by section 38 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) read together with clause 68 of the Tasmanian Regional Forest Agreement. The case was brought against Forestry Tasmania, the state's forestry agency, to hold it to account¹⁴² – although that agency felt that it was forced to defend the state's laws because of the hesitance of the Tasmanian government to involve itself.¹⁴³ At the invitation of the parties through the evidence they produced and the submissions they made, however, the case became more than a dispute over the words in two legal instruments.¹⁴⁴ The case became a battle over whether the three threatened species were being irreparably harmed by forestry activities. Brown argued that the exemption in the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) did not apply to the logging of the two coupes because the forestry operations and the management plans would not protect the species, and protection of species was required. The legal argument offered by Brown centred on recognition of species. The premise of the argument was that the exemption did not exist unless and until species were protected, prioritised and seen to recover.¹⁴⁵

By contrast, Forestry Tasmania, and the Commonwealth as an intervening party,¹⁴⁶ argued that all forestry operations in Tasmania were exempt from the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) because the state had created reserves and management protocols with the purpose of protecting species, and that was enough to render the forestry activities accordant with the Regional Forest Agreement. Forestry

¹⁴² Interview with Margaret Blakers, campaigner, 16 August 2011; Interview with Peter McQuillan, scientist, University of Tasmania, 8 September 2009 who noted that there are minimal opportunities to test the approach of that agency in the state.

¹⁴³ Interview with John McDonald, lawyer, Forestry Tasmania, 11 September 2009.

¹⁴⁴ Interview with Jim McKenna, former associate to Justice Marshall, 25 November 2009. McKenna explained that the 'parties made the case bigger and bigger again' with 'no one really knowing what was going to happen'. It was only the intervention of the Commonwealth as a party that brought discipline to the legal arguments. Interview with John McDonald, lawyer, Forestry Tasmania, 11 September 2009. McDonald reflected that Forestry Tasmania felt the case was being used for the purpose of extracting documents through discovery, with pleadings narrowly cast but discovery requests widely framed.

¹⁴⁵ Outline of Submissions for Robert Brown in the matter of Robert Brown ats Forestry Tasmania, 23 November 2005, para [64], citing the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), pt 13.

¹⁴⁶ The state of Tasmania also intervened: *Brown v Forestry Tasmania* [2005] FCA 1210.

Tasmania produced evidence to reject the accusation that it was further threatening the species protected under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). This position did not afford recognition to the species; rather, primacy was given to the institutional system designed by the state and federal governments regardless of its effect on the environment. The Commonwealth, for instance, argued that the Tasmanian Regional Forest Agreement 'does not impose an unqualified obligation to protect [the species] ... the obligation to protect is only an obligation to protect *through or by means of* the [system of reserves] or by applying relevant management principles'.¹⁴⁷ The Commonwealth's arguments demonstrated the distance between the law as practised in Australia and the *Rio Forest Principles*, which proceed on an expectation that sustainable forestry practices contribute to species conservation.

Brown's legal team adopted a narrative rather than legalistic or clinical approach to the presentation of their case.¹⁴⁸ They said the case offered a choice between 'real, practical protection to threatened species or ... fulsome policies and procedures but not enabling anything to be done to stop conduct which has a significant impact on listed threatened species'.¹⁴⁹ On this point, among others, Marshall J of the Federal Court opted for the argument of protection – and with it, recognition – concluding that '[a]n agreement to "protect" means exactly what it says. It is not an agreement to attempt to protect, or to consider the possibility of protecting, a threatened species ... To construe cl 68 otherwise would be to turn it into an empty promise'.¹⁵⁰ Justice Marshall held that the three species were not being protected and would not be protected by the proposed logging. Hence, the logging would not be consistent with the obligation in the Tasmanian Regional Forest

¹⁴⁷ Outline of Submissions for the Commonwealth in the matter of *Brown v Forestry Tasmania (No 4)* (2006) 157 FCR 1 (1 December 2005).

Robert Brown ats Forestry Tasmania, 1 December 2005, paras [32]–[33]. Emphasis in original.

¹⁴⁸ Interview with John McDonald, lawyer, Forestry Tasmania, 11 September 2009. Unconventionally, the witness statements prepared by Brown's legal team were posed as questions connected with the legal questions at issue and brief answers. Forestry Tasmania's witness statements were long, dense and scientific.

¹⁴⁹ Outline of Submissions for Robert Brown in the matter of *Brown v Forestry Tasmania (No 4)* (2006) 157 FCR 1 (23 November 2005), para [1].

¹⁵⁰ *Brown v Forestry Tasmania (No 4)* (2006) 157 FCR 1 ('*Brown (No 4)*'), paras [240]–[241].

Agreement and so the exemption – the thing akin to a licence – in the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) could not apply. In reaching his conclusion, Marshall J largely eschewed a conventional and doctrinal analysis of the law.¹⁵¹ It was a decision more reflective of his industrial-relations pedigree: focused on facts and fairness. Justice Marshall was appointed to the Federal Court by Paul Keating from the Industrial Relations Court of Australia. Within the court, in part because of his unconventional path to it, his working-class background and his responsibility for the Hobart court, he was somewhat an outsider,¹⁵² less constrained by the orthodoxy that marks the overwhelming majority of decisions of the court when interpreting the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). Marshall J's judgment does not dwell on rules of statutory construction; rather, his analysis is based on logic, findings that were self-evident to him,¹⁵³ and an acceptance that environmental laws, directed towards the objectives of ecologically sustainable development and the conservation of biological diversity, would and should prevail to protect the very parts of the environment that the laws specify warrant protection.

A valorising case

Although the bulk of the judgment can be considered ecocentric in tone and approach, recognising and valorising species for their intrinsic value, Marshall J's start supposes human domination over 'nature', rather than recognition of it. Justice Marshall began his judgment asserting that 'Tasmania is an island of unparalleled beauty. It contains wild and picturesque landscapes. Among those landscapes is the Wielangta forest'.¹⁵⁴ Justice Marshall's position as outlined in his opening stanza corresponded with the conventional

¹⁵¹ This was also observed by John McDonald, lawyer, Forestry Tasmania, interview, 11 September 2009 who recalled being 'stunned' by the reasons that he described as a series of conclusions with discursive explanations. Chris Gunson, barrister, interview, 11 September 2009 noted the absence of detailed analysis in the judgment of Marshall J.

¹⁵² Ceremonial Sitting of the Full Court to Farewell the Honourable Justice Marshall (20 November 2015); Di Martin, 'Background briefing: Caught in the stigma trap: The cost of mental illness in the workplace' *ABC Radio National* (22 February 2015).

¹⁵³ As Brendan Wintle, scientist, University of Melbourne, interview, 12 January 2010 explained, the logic was that species should not be driven to extinction; that they were told Marshall J that the Regional Forest Agreement's reserves and management measures were not realising sustainable forest management.

¹⁵⁴ *Brown v Forestry Tasmania (No 4)* (2006) 157 FCR 1, para [1].

approach of judges to environmental recognition: that is, Marshall J separated the environment from the law, characterised it through his human perspective, and defined the environment by what it meant to him.¹⁵⁵ In Plumwood's words, he 'colonised' the environment.¹⁵⁶ His description of two of the three species also highlighted their peculiarity and interest to humans – the appearance of the swift parrot and the iconic status of the Tasmanian wedge-tailed eagle.¹⁵⁷ Opening sentences of judgments such as this are written to serve a purpose.¹⁵⁸ Here, Marshall J wanted to persuade readers about the importance of his decision to them, to convince them to read on, to see how he has protected this place worthy of value to humans. This opening, positioning humans as having a priority interest and concern, did not accord with the remainder of his judgment, which is best described as a judgment that prioritises species for their own sake, not ours.

The valorisation and consequent recognition afforded to the species by Marshall J is demonstrated through his acknowledgement of the longevity, role and function of the stag beetle¹⁵⁹ and the interdependence of the three species with their Tasmanian habitat.¹⁶⁰ In his judgment, Marshall J returned over and over again to the conservation status of the three species as the primary material for his reasoning rather than offering long expositions of precedent, including the line of Federal Court cases about the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), which provide a variable view of the state and place of contemporary environmental protection law in Australia.¹⁶¹ In each instance, when

¹⁵⁵ Delaney, above n 195.

¹⁵⁶ Val Plumwood, 'Nature as agency and the prospects for a progressive naturalism' (2001) 12(4) *Capitalism, Nature, Socialism* 3, 7.

¹⁵⁷ *Brown (No 4)* (2006) 157 FCR 1, paras [11] and [15].

¹⁵⁸ A powerful opening is in *Hub Action Group v Minister for Planning* (2008) 161 LGERA 136, where Preston CJ makes plain the need to demonstrate rather than make promises about ecologically sustainable development.

¹⁵⁹ *Brown (No 4)* (2006) 157 FCR 1, paras [13]–[14].

¹⁶⁰ *Ibid*, paras [11]–[16].

¹⁶¹ Lee Godden and Jacqueline Peel, 'The Environment Protection and Biodiversity Conservation Act 1999 (Cth): Dark sides of virtue' (2007) 31 *Melbourne University Law Review* 106; Andrew Macintosh, 'Why the Environment Protection and Biodiversity Conservation Act's referral, assessment and approval process is failing to achieve its environmental objectives' (2004) 21 *Environmental and Planning Law Journal* 288.

presented with a choice of evidence he preferred the scientific evidence that prioritised the interests of the species. He found this evidence from expert witnesses of both parties and the court-appointed expert, Nick Mooney, on the Tasmanian wedge-tailed eagle. He accepted the view that the broad-toothed stag beetle was present in the dry and wet components of the forest when there was doubt,¹⁶² and that the swift parrot has an ongoing and regular presence within and dependence on the blue gum trees in the Wielangta Forest when there was a suggestion that the birds did not frequent the forest.¹⁶³ He concluded that any impact that might reduce the population of a very rare species would be significant.¹⁶⁴ Justice Marshall reframed the perspective of impact by repositioning the non-human into the centre of his deliberations. He did this by his focus on cumulative impacts:¹⁶⁵ opting not to assess the significance of impact on species narrowly in the view of, attributable to, or directly caused by Forestry Tasmania,¹⁶⁶ but by perceiving how the additional impact caused by Forestry Tasmania would be experienced by the species.¹⁶⁷ Because he appointed an independent scientist to give evidence about the eagle, that expert had no responsibility to a client, allowing the expert to speak with agency on behalf of the species. He did not give humans the benefit of the doubt that they could change management regimes or modify reserve systems to better protect species, resting his analysis on a view that 'the best indicator of future [human] behaviour is past [human] behaviour'.¹⁶⁸

¹⁶² *Brown (No 4)* (2006) 157 FCR 1, para [71].

¹⁶³ *Ibid*, paras [79]–[81].

¹⁶⁴ *Ibid*, paras [97] and [101]. Brendan Wintle, scientist, University of Melbourne, interview 12 January 2010 noted that doing forest management without having a significant impact on species is 'unrealistic'.

¹⁶⁵ This focus is also acknowledged as having importance to Marshall J's reasoning by Church, above n 141, 129–130. On appeal, Stephen Gageler QC (as he then was) argued that the 'cumulative or aggregated approach' advanced by Marshall J was not intended by Parliament: see Transcript of Proceedings in the matter of *Forestry Tasmania v Brown* (2007) 167 FCR 34 (15 August 2007) 181, line 43.

¹⁶⁶ *Brown (No 4)* (2006) 157 FCR 1, para [230].

¹⁶⁷ *Ibid*, paras [91], [95], [102], [111] and [146]. This approach was strongly resisted by Forestry Tasmania in oral argument. Its view was that it was impossible to determine what activities in the surrounding environment are impacting on species in the first place. The baseline of impact is indeterminable: Interview with Chris Gunson, barrister, 11 September 2009.

¹⁶⁸ *Ibid*, para [271].

When determining the meaning of the requirement to protect species under clause 68 of the Tasmanian Regional Forest Agreement, Marshall J went further than other Australian judges by asserting that ‘protection is not delivered if one merely assists a species to survive. Protection is only effective if it not only helps a species to survive, but aids in its recovery to a level at which it may no longer be considered to be threatened’.¹⁶⁹ His views are clearly compatible with a position supporting ecological integrity of the species (if not the whole ecosystem), and reflect scholarly portraits of what ecological justice might mean in practice.¹⁷⁰ Yet there was little appreciation in his judgment to what protection might mean or look like across ecosystems, time and scales;¹⁷¹ and was described by Forestry Tasmania scientist Steve Read as ‘utopian’ if one considers the vastness of disturbed landscapes in Australia.¹⁷²

Justice Marshall’s ideas have been subsequently adopted, and tentatively form part of the test for what significant impact on species means in Australian law.¹⁷³ His ideas are also informing the jurisprudence of Preston CJ. In *Bentley v BGP Properties Pty Ltd*,¹⁷⁴ Preston CJ positioned ecological integrity within the sphere of the concept of ecologically sustainable development, arguing that a requirement to achieve sustainable development incorporates subordinate requirements to preserve biological diversity and protect ecological integrity by ‘maintaining ecosystem health’¹⁷⁵ and ‘maintaining ecosystem functioning and

¹⁶⁹ Ibid, para [264]. For Forestry Tasmania, this was a novel and unconventional explanation of what protection might mean in scientific terms: see Interview with Steve Read, scientist, Forestry Tasmania, 20 November 2009.

¹⁷⁰ See, eg, Laura Westra, *An Environmental Proposal for Ethics: The Principle of Integrity* (Rowman & Littlefield, 1994); Peter Burdon, ‘Wild law and the project of Earth democracy’ in Peter Burdon and Michelle Maloney and Peter Burdon (eds), *Wild Law – In Practice* (Routledge, 2014) 19.

¹⁷¹ Interview with Brendan Wintle, scientist, University of Melbourne, 12 January 2010; Interview with Simon Grove, scientist, Forestry Tasmania, 20 November 2009.

¹⁷² Interview with Steve Read, scientist, Forestry Tasmania, 20 November 2009.

¹⁷³ *Bat Advocacy NSW Inc v Minister for Environment Protection, Heritage and the Arts* (2011) 179 LGERA 458, para [109].

¹⁷⁴ (2006) 145 LGERA 234 (‘*Bentley*’).

¹⁷⁵ Ibid, para [61].

ecosystem services'.¹⁷⁶ Then later, in *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure*,¹⁷⁷ Preston CJ returned to the notion of integrity, asserting that ecological integrity should be respected at the ecosystem level and that threatened species diversity and survival offers ecological and ecosystem value.¹⁷⁸ In *Newcastle & Hunter Valley Speleological Society Inc v Upper Hunter Shire Council*,¹⁷⁹ Preston CJ has explained that ecological integrity on a species and community level means a connected – not fragmented or isolated – functioning, viable species and community.

Justice Marshall argued further than Preston CJ has subsequently reached in his thinking about the law, by claiming that there was a human 'duty ... to restore the species' already endangered.¹⁸⁰ In the case of the Tasmanian wedge-tailed eagle – of which there were just six breeding pairs in the Wielangta region – this duty extended to restoring the species to its carry capacity and in no way restricting its ability to successfully breed and replenish.¹⁸¹ This included not removing any trees that might reduce the breeding territory of the species.¹⁸² While this analysis was directed to the Tasmanian Regional Forest Agreement, Marshall J also made a final comment on the function of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) that reiterated a view that the central objective of that law, particularly interpreted through the international treaties to which it gives effect, is to recognise non-human species through population restoration. In so doing, the interests of species, their justice and their integrity become the starting point for

¹⁷⁶ Ibid, para [62]. Preston CJ also commented on the relevance and importance of prior assessment and approval of activities prone to damage threatened species as a means of ensuring long-term ecological integrity accordant with principles of precaution and informed environmental management (paras [65] and [68]).

¹⁷⁷ (2013) 194 LGERA 347 ('*Bulga*'), paras [60] and [472].

¹⁷⁸ Ibid, para [472] and [480].

¹⁷⁹ (2010) 210 LGERA 126, para [105].

¹⁸⁰ *Brown (No 4)* (2006) 157 FCR 1, para [94].

¹⁸¹ In *SJ Connelly CPP Pty Ltd v Byron Bay Council* [2010] NSWLEC 1182 (16 July 2010), Commissioner Hussey did not engage with the Byron Local Environment Plan, which provided that the principle of ecological integrity 'aims to protect, restore and conserve the native biological diversity and enhance or repair ecological processes and systems'.

¹⁸² *Brown (No 4)* (2006) 157 FCR 1, particularly para [96] endorsing the evidence of Nick Mooney.

understanding the purpose of the law. He advanced a restorative justice-based conception of ecologically sustainable development. Justice Marshall said that he 'favour[ed] a construction of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), which views protection of the environment as an act of not merely keeping threatened species alive, but actually restoring their populations so that they cease to be threatened'.¹⁸³

An unexpected case

Justice Marshall's construction of the law and the conclusion that he reached was unexpected to those who had not closely watched the case and who had not observed firsthand the fragility of the evidence produced by Forestry Tasmania in the trial; but for those watching the case closely the outcome was not a surprise.¹⁸⁴ The outcome did not accord with the wants or demands of the powerful and political elite in Tasmania. It triggered in the Tasmanian government a desire to see the previously understood status quo reinstated. The state of Tasmania therefore became a much more active participant in the appeal launched by Forestry Tasmania and, as discussed below, promptly negotiated with the federal government an amendment to the Tasmanian Regional Forest Agreement to neutralise Marshall J's decision, such that Forestry Tasmania could engage in forestry actions that threatened protected species within the intrusion of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

The Full Federal Court, comprising commercial equity lawyers Sundberg, Finkelstein JJ and Dowsett JJ – a more responsive bench for Forestry Tasmania¹⁸⁵ – upheld an appeal by Forestry Tasmania, rejecting Marshall J's interpretation of the Act and Agreement. The foundation reasons for Forestry Tasmania's appeal were to challenge Marshall J's findings

¹⁸³ Ibid, para [300].

¹⁸⁴ Interview with Margaret Blakers, campaigner, 16 August 2011. Justice Marshall was displeased by the examples of Forestry Tasmania's experts modifying their written evidence after it was reviewed by other scientists within the Forestry Tasmania organisation: see *Brown (No 4)* (2006) 157 FCR 1, para [117]ff. Scientists called by Forestry Tasmania found it disappointing that their evidence was discarded because of the deployment of a conventional scientific process of peer review: see Interview with Steve Read, scientist, Forestry Tasmania, 20 November 2009.

¹⁸⁵ Interview with Chris Gunson, barrister, 11 September 2009.

that gave rise to species recognition – his findings that protection of species requires their recovery and restoration.¹⁸⁶ The state of Tasmania, intervening, argued that Marshall J's analysis overlooked the objects of the 'orderly harvesting' of timber and the 'the expressed purpose [in the law] of "*providing long-term stability of forests and forest industries*".¹⁸⁷ Collectively, Forestry Tasmania and the intervening parties sought a return to the re-establishment of the dominant perspective of law, with the environment subjugated to human interests.

The Full Federal Court avoided addressing these arguments directly. Instead, it endorsed the arguments of the Commonwealth at trial. The three-judge bench concluded that an analysis of clause 68 of the Regional Forest Agreement, which required Tasmania to create a series of reserves or adopt management measures for the purpose of protecting the threatened species, did not require an 'enquiry into whether [the system of reserves] effectively protects the species. Rather it is the establishment and maintenance of the ... reserves that constitute the protection'.¹⁸⁸ Relying on the explanatory memorandum to the Bill that became the *Environment Protection and Biodiversity Conservation Act 1999* (Cth),¹⁸⁹ the Full Court concluded that protection of species was not required or expected from the Regional Forest Agreement, notwithstanding that the objects of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) are directed to species protection.¹⁹⁰ Church found 'remarkable' the lack of engagement by the Full Court in its reasoning and interpretation of the law with the purposes of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) – notably those purposes to protect and conserve species.¹⁹¹ At

¹⁸⁶ Notice of Appeal of Forestry Tasmania in the matter of *Forestry Tasmania v Brown* (2007) 167 FCR 34 (9 February 2007) 3–4. Forestry Tasmania scientists explained that their goal in the appeal was to set the record straight – that they do not endanger species: see Interview with Steve Read, scientist, Forestry Tasmania, 20 November 2009.

¹⁸⁷ Outline of Submissions for Tasmania in the matter of *Forestry Tasmania v Brown* (2007) 167 FCR 34 (7 August 2007), para [10]. Emphasis in original.

¹⁸⁸ *Forestry Tasmania v Brown* (2007) 167 FCR 34, para [59].

¹⁸⁹ *Ibid*, para [61].

¹⁹⁰ See Thomas Baxter, *A Law unto Themselves? Australian Regulation of Forestry Operations* (PhD Thesis, University of Tasmania, 2014), 294 for a detailed discussion on this point.

¹⁹¹ Church, above n 141, 134.

the May 2008 hearing for special leave to appeal the case to the High Court brought by Brown, an application for leave that was ultimately rejected by a margin of two judges to one, principally on the ground that the case had become moot in light of the amendment to the Tasmanian Regional Forest Agreement, Kirby J also highlighted the need to take a purposive approach to the legislation, indicating perhaps his view that the Full Court was mistaken in its approach to interpreting the law.¹⁹² The Full Court's only concern was whether an administrative decision – the creation of a system of reserves – had occurred.

The Full Court made no comments about the meaning of protection or the findings of fact of significant impact on the species.¹⁹³ It did concede, however, that the laws in question were not directed to species recognition. The court asserted that within the Regional Forest Agreement 'there were some limits imposed on forest operations, but operations would continue, and to that extent there was no guarantee that the environment, including the species, would not suffer as a result'.¹⁹⁴ Given that both the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) and the Regional Forest Agreement are designed to achieve ecologically sustainable development, this statement was a reminder of what that concept currently fails to attain.

6.5 Species prioritisation as recognition

Across the two judgments, there were starkly different views about the law and consequently two different views about the relationship between the law and 'nature'.¹⁹⁵ The primary function of the law directed to achieve ecologically sustainable development was contrastingly used to respect and recognise either the human-created administrative structures designed to manage the environment or the environment itself. In the period between the trial case and the appeal case, though not having any bearing on the outcome

¹⁹² See *Brown v Forestry Tasmania* [2008] HCATrans 202. Following this case, Dr Brown was pursued for the costs incurred by Forestry Tasmania in the appeal case: see Alexandra de Blas, 'Can a parrot get justice under a Regional Forest Agreement?' (2009) 150 *ECOS Magazine* 9.

¹⁹³ Some interviewees and some sections of the forestry industry community erroneously believed or asserted that the Full Court had rejected Marshall J's findings of fact: see, eg, Hawke, above n 83, 112.

¹⁹⁴ *Forestry Tasmania v Brown* (2007) 167 FCR 34, para [64].

¹⁹⁵ David Delaney, *Law and Nature* (Cambridge University Press, 2003).

of the appeal court,¹⁹⁶ the governments amended the Tasmanian Regional Forest Agreement, including clause 68. Clause 68 was altered to assert that the reserve system put in place by the Tasmanian government did protect the species that the state of Tasmania was obliged to protect – including the broad-toothed stag beetle, the Tasmanian wedge-tailed eagle and the swift parrot.¹⁹⁷ It was at this point that the species were made invisible, their integrity discarded, their prospect for flourishing threatened. It was, according to Brown's lawyer, a reassertion of the values of resource use in environmental policy in the state.¹⁹⁸

The effect was that the species were arguably in a worse legal position as a result of the legal conflict.¹⁹⁹ The reserves created for their benefit no longer needed to protect them. Environmental justice as recognition was denied; the law took justice further away from species.²⁰⁰ The logging of Wielangta never preceded, with delays and politics intervening to stop the two coupes at the centre of the legal conflict being cleared,²⁰¹ but logging activities continued elsewhere under the modified legal regime.

The Full Federal Court delivered the final legal word in the case.²⁰² In its judgment the environment was out of view. The court interpreted the law in a confined and conventional way.²⁰³ It literally dwelled on words within the legal instruments – provisions and clauses –

¹⁹⁶ *Forestry Tasmania v Brown* (2007) 167 FCR 34, para [92].

¹⁹⁷ Baxter, above n 190, 322 argues that this was to confirm a legal fiction and (at p 347) was a challenge to the rule of the law: see Variation to the Tasmanian Regional Forest Agreement dated 23 February 2007.

¹⁹⁸ Interview with Roland Browne, lawyer for Brown, 14 September 2009.

¹⁹⁹ See also Church, above n 141, 137. Politically, logging of the Wielangta Forest would become problematic because of the conclusion in the trial, unaddressed by later cases, that the logging would significantly adversely affect the three species.

²⁰⁰ Interview with Sarah Bekessy, scientist, RMIT University, 23 November 2009.

²⁰¹ Interview with Margaret Blakers, campaigner, 16 August 2011.

²⁰² The legal case was considered moot by the High Court at the hearing of the application for special leave to appeal. Hayne and Crennan JJ declined to revisit the case, and potentially attempt to make sense of the two diverse approaches to the law in the earlier cases, because of the change made to the Regional Forest Agreement by the Commonwealth and Tasmanian governments: see *Brown v Forestry Tasmania* [2008] HCATrans 202.

²⁰³ *Forestry Tasmania v Brown* (2007) 167 FCR 34.

and, in doing so, figuratively ignored the wide spaces of the forests that the laws are concerned with. It asserted and favoured a view that obligations and expectations of species protection would be satisfied simply through the dedication of places as reserves. It did so by applying a strict interpretation of the law, eschewing a purposive approach to statutory construction, and not dealing with the intention evident in the objectives of the law that the law should achieve a purpose of environmental conservation and protection. It offered no views about what seemed to matter most to the two protagonists: whether logging of the Wielangta Forest could occur consistently with the protection of threatened species. The judgment failed the species, not just because they were not prioritised. They were not even considered.

As explained above, Marshall J did prioritise and valorise the species. He grappled with environmental values of protection and species resilience. He favoured scientific opinions that he thought corresponded best with the interests of species even if this meant he overprotected or overstated the importance of the two small coupes of forest that were proposed to be logged. Whether or not he reached the correct decision – on the law or the science – is debateable.²⁰⁴ He could have prioritised species in an alternative way if he had been swayed by other expert opinions that species protection is best achieved at alternative scales, through more adaptive responses, or a through more whole-of-ecosystem approach.²⁰⁵ What is without question, however, is that Marshall J did recognise the species in the way that Scholsberg, Fraser, Young and Westra all propose. While not framed as being directed towards justice,²⁰⁶ that was the consequence. Moreover, in finding that humans had an obligation to those species to ensure they recover, Marshall J

²⁰⁴ Simon Grove, scientist, Forestry Tasmania, interview, 20 November 2009 expressed the opinion that Marshall J formed the view that everywhere is of equal and utmost value to species, and the implications of his findings includes that these three species in the particular location of Wielangta were overprotected relative to other species and to elsewhere. Sarah Bekessy, scientist, RMIT University, interview, 23 November 2009 noted the incompatibility between the law's interest on small populations and specific locations as opposed to science's interest in protection across landscapes.

²⁰⁵ Approaches raised by Brendan Wintle, scientist, University of Melbourne, interview, 12 January 2010 and Simon Grove, scientist, Forestry Tasmania, interview, 20 November 2009.

²⁰⁶ Alison Hope Alkon, Marisol Cortez and Julie Sze, 'What's in a name? Language, framing and environmental justice activism in California's Central Valley' (2013) 18 *Local Environment: The Journal of Justice and Sustainability* 1167.

flipped the hierarchy of concern – species interests would sit above human interests. He reached a judgment about species value in an unconventional way. He started his analysis with the environment, the species, and he understood and framed the law as serving them more than us in a similar manner to how Brown views his relationship with the environment and its species. Justice Marshall’s judgment is very much a counterpoint to judicial orthodoxy and judicial understandings of the environment²⁰⁷ and ecologically sustainable development;²⁰⁸ it is also contrastable with the approach of detailed, complex and integrated reasoning of the nation’s leading environmental jurist – Preston CJ of the New South Wales Land and Environment Court. Yet, like the approach of Preston CJ, it invites us to consider jurisprudential approaches to secure ecological and environmental justice for the benefit of the vulnerable, traditionally oppressed or silenced.

6.6 The stakeholders of environmental justice

The sides and sidelines of justice

The law as practised in Australia’s adversarial system is often forced into binary positions and conclusions, with the disparity between options and arguments explicit. Justice Marshall blurred those positions in the trial by appointing a court expert on the Tasmanian wedge-tailed eagle and, through his attention to evidence that was about protecting species rather than about the position of the parties, his views about what constituted protection, for instance, were not simply an endorsement of one party’s view over another.²⁰⁹

Yet there is typically little opportunity to inquire into the middle ground to uncover what the players and technicians in the legal game think, and this position was the common one in this conflict. Barristers or parliamentarians line up alongside each other and present stridently opposed arguments in an attempt at persuasion. Their own versions of the truth

²⁰⁷ *Friends of Mallecoota Inc v Minister of Planning* (2010) 28 VR 257.

²⁰⁸ *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts* (2008) 167 FCR 463.

²⁰⁹ As noted elsewhere, Forestry Tasmania was criticised for its preparation and presentation of its expert witnesses. Roland Browne, lawyer for Brown, interview, 14 September 2009 noted that Forestry Tasmania mostly presented as witnesses internal personnel who had been involved in strategising a defence to the case. John McDonald, lawyer, Forestry Tasmania, interview, 11 September 2009 explained that Forestry Tasmania had difficulty finding witnesses from outside the organisation willing to give evidence on its behalf.

– of what is just – are often disguised by the process and place within which they ply their craft.

In researching this case study for this thesis, however, many interviewees wanted to talk about what they personally felt and experienced – as individuals and professionals – in greater depth than the interviewees for the other case studies, when the focus was much more on the legal process and the outcome. For the Wielangta Forest conflict interviewees, the interview seemed therapeutic.²¹⁰ Because of the partisanship involved in the case, the long-standing tensions between forest conservation researchers, and the gruelling trial that turned into an assessment of the merits of logging and forest science rather than the meaning of laws,²¹¹ the interviewees wanted to reflect on and discuss the effect of the conflict on them.

My interest in the Wielangta Forest conflict was to use it to examine ecological justice perspectives in Australian law, to offer empirical insights into ideas of recognition as environmental justice for the ecosystem. My interview discussions touched on this issue – on the way the forest was treated, respected and protected through the regimes of protection overseen by Forestry Tasmania and that envisioned by Marshall J. These perspectives, which I had expected and with which hoped to draw out a narrative of justice of the forest through its human agents in the case, are analysed below. However, much of the discussion I had with the interviewees focused on the degree to which they as individuals, scientists, protagonists and lawyers were recognised or not during the court case; and about the degree to which the experience developed or challenged an interest in them being involved in environmental law in the future. I did not expect these perspectives to be so present, though I did anticipate discussion about the role of science and scientists in legal disputes because of the controversy about the manner in which some of the scientific expert evidence was produced in the case.²¹² Nevertheless, these discussions

²¹⁰ Harry H Hiller and Linda Di Luzio, 'The interviewee and the research interview: Analysing a neglected dimension in research' (2004) 41 *Canadian Review of Sociology* 1, 4.

²¹¹ Interview with Jim McKenna, former associate to Justice Marshall, 25 November 2009; Interview with John McDonald, lawyer, Forestry Tasmania, 11 September 2009; Interview with Roland Browne, lawyer for Brown, 14 September 2009; Interview with Brendan Wintle, scientist, University of Melbourne, 12 January 2010.

²¹² See especially the criticisms of the evidence of Jeffrey Meggs. *Brown (No 4)* (2006) 157 FCR 1, para [117]ff.

brought my analysis back within a human-centred frame, reinforcing to me the predominance of human justice in environmental disputes; they also highlighted another bridge – through aspects of recognition and capacity – to bring together environmental justice concepts for the human and non-human environment. If legal agents of the environment, as the parties and the scientists involved the case were, do not experience recognition, then what hope is there for non-humans to receive full recognition in the law, rather than, as occurred in this case, transitory and fragmented recognition? Alternatively, does attention on the human experience, and their values of respect, decorum and expertise lessen the ecosystem-based values so important to the finding of Marshall J in the trial judgment, or merely reiterate that in the process of shifting to a legal framework where an environmental ethic is at its core that human ego is one cost?

Justice as recognition for the forest species

In a context where locals are sceptical of scientific pronouncements about the endangerment or extinction of species (famously, the Tasmanian tiger), independent eagle expert Nick Mooney thought that the trial case was significant because it publicly confirmed for the Tasmanian public that the three endangered Wielangta Forest species are important components of the ecosystem and were, and continue to be, at risk from human activity. Through Marshall J's decision, the record of the status of the species was set straight – and it was made explicit to the observing public that humans had a duty to modify their behaviour in order to see them flourish.²¹³ This duty applied to a landscape that many Tasmanians may not have previously understood as having ecological value.

The decision meant that a landscape that is not spectacular or iconic would be protected, be known and popularised. Under the law, the 'shrubby little hills' of Wielangta, a place chosen strategically for the purpose of the court case, would be seen as beautiful, and an obscure beetle species would receive the same emblematic status as charismatic bird

Meggs presented his evidence as a witness for Forestry Tasmania interspersed with the evidence called by Bob Brown. Meggs gave his evidence sick and jetlagged: see Interview with Jim McKenna, former associate to Justice Marshall, 25 November 2009.

²¹³ Interview with Nick Mooney, scientist, 9 September 2009.

species.²¹⁴ Entomologist, Peter McQuillan, observed that the scientific process involved in the conflict saw the broad-toothed stag beetle become recognised for its listing as an endangered species under Australian law,²¹⁵ providing it with a popular status and a widespread recognition, rarely afforded to invertebrate species.²¹⁶

Without this case, a shift in conservation effort and outcomes would have been unlikely, leaving the three species in a state of decline.²¹⁷ It, therefore, redressed past harm and acknowledged the need of the environment for human involvement in its recovery. Inaction – not logging – was insufficient to protect species. Forestry Tasmania, among other users of the landscape, would need to do something to redress the ongoing decline in species as a result of the court decision. This represented a justice to the species.²¹⁸ In the view of Brown's lawyer, Roland Browne, the case was also a 'major shift' in the law. The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) would stand for something; it would mean something for non-human species; it would affect human behaviour. Species and their diversity would prevail over the desires of the forestry industry, which had long directed government policy on biodiversity protection in Tasmania. The case triggered more research into understanding the species at risk, thus advancing their prospects of resilience,²¹⁹ and with it a capacity to respond to stresses and adapt to change.²²⁰ These were explanations of justice that resonate with the literature on environmental justice: of the law in an environmental justice system functioning to restore

²¹⁴ Interview with Margaret Blakers, campaigner, 16 August 2011.

²¹⁵ Australian Government, Department of the Environment and Energy, *Species Profile and Threats Database*, 'Lissotes latidens — Broad-toothed stag beetle, Wielangta stag beetle' (2019) notes that the species was listed as endangered in December 2002, shortly before the raising in public of the potential of the court action being run.

²¹⁶ Interview with Peter McQuillan, scientist, University of Tasmania, 8 September 2009.

²¹⁷ Interview with Sarah Bekessy, scientist, RMIT University, 23 November 2009.

²¹⁸ Interview with Sarah Bekessy, scientist, RMIT University, 23 November 2009.

²¹⁹ Interview with Roland Browne, lawyer for Brown, 14 September 2009.

²²⁰ Lena Dominelli, *Green Social Work: From Environmental Crises to Environmental Justice* (Polity Press, 2012) 64–6 links resilience and capacity in this way for humans facing vulnerabilities.

or remediate harms,²²¹ and of the position of vulnerable parts of society being prioritised and the risks to them subject to inquiry.²²²

Leading to and arising from the conflict, Wielangta Forest was recognised as a separate region, instead of being treated as a compartment of the forest estate of the whole state.²²³ The Regional Forest Agreement had combined the eight bioregions of Tasmania, whereas Marshall J recognised the importance of preservation locally, refusing to treat the logging of coupes as a minor disturbance to the statewide forest system. This was the most 'convenient' approach to protecting species under the law while alternative models and approaches to maintain function, connection and systems within ecosystems.²²⁴

It was on this point, however, that brought a competing viewpoint of non-human environmental recognition and justice. Forestry Tasmania scientist, Steve Read, thought that Marshall J had created a test that ensured no more than persistence for the species.²²⁵ Species may survive but there was little detail about how the human duty to aid the recovery and to replenish the species would occur. Reflected in Marshall J's introductory words, Read claimed there had been an over-recognition of the Wielangta Forest and its species because of the human, not scientific, value placed on them. In the view of others, a system of protection based on reserves, a form of protection favoured by and for humans, at the expense of one based on management, would not achieve protection for other species dependent on habitat beyond the Wielangta Forest because not all landscapes,

²²¹ Brad Jessup, 'Investing the law with an environmental ethic: Using environmental justice theory for change' in Erika Techera (ed), *Environmental Law, Ethics and Governance* (Inter-Disciplinary Press, 2010) 21; Mick Hillman, 'Justice in river management: Community perceptions from the Hunter Valley, New South Wales, Australia' (2005) 43 *Geographical Research* 152.

²²² Klaus Bosselmann, 'Environmental justice v deregulation? Themes on an environmental law conference in Auckland' (1998) 2 *New Zealand Journal of Environmental Law* 209 notes the need to regulate for vulnerability rather than employ market approaches. On risk, power and assessment: see also Gordon Walker, 'Environmental justice, impact assessment and the politics of knowledge: The implications of assessing the social distribution of environmental outcomes' (2010) 30 *Environmental Impact Assessment Review* 312.

²²³ Interview with Peter McQuillan, scientist, University of Tasmania, 8 September 2009.

²²⁴ Interview with Brendan Wintle, scientist, University of Melbourne, 12 January 2010.

²²⁵ Interview with Steve Read, scientist, Forestry Tasmania, 20 November 2009.

including those on private land, can be incorporated into reserves.²²⁶ So whereas the wedge-tailed eagle, swift parrot and stag beetle might have been recognised by the decision of Marshall J, the case did little for the maintenance of resilience of other species in Tasmania.²²⁷ It instead created icons out of three species to the potential detriment of others. And because the Regional Forest Agreements remain in place, and they are directed towards ecosystem, rather than species, integrity and recognition, the court case did little to advance the operation of those agreements.²²⁸

The legal recognition through protection grounded in the decision of Marshall J was short-lived. The response of the Tasmanian and Commonwealth governments after the case was swift. The action to change the Regional Forest Agreement to assert that the reserves did protect species, which was a fiction based on the conclusions of fact in the court case, diminished the recognition of species and meant that the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) would not protect any species from forestry activities in Tasmania.²²⁹ This administrative step was to deny other species the same form of protection and respect in the principal national species law.²³⁰ The parallels here with the ideas advanced by Kaswan²³¹ – that environmental injustice to human communities arises because of powerlessness, and is entrenched by virtue of politics – is plain.

The residue of the case study, however, was an acknowledgment that significant impacts and irreversible harms were being wrought on species within Australia's environmental legal system and that this was now in the public eye. This was a justice for the species that

²²⁶ Interview with Simon Grove, scientist, Forestry Tasmania, 20 November 2009.

²²⁷ Interview with Simon Grove, scientist, Forestry Tasmania, 20 November 2009.

²²⁸ Interview with Steve Read, scientist, Forestry Tasmania, 20 November 2009. For Margaret Blakers, campaigner, interview 16 August 2011, however, the purpose of the litigation was to show that the Regional Forest Agreements, operative for a decade, were threatening species while advancing the logging of native forests. In her view, they are an inappropriate model to achieve species recognition and justice.

²²⁹ Outline of Submissions for Robert Brown in the matter of *Brown v Forestry Tasmania (No 4)* (2006) 157 FCR 1 (23 November 2005), para [1].

²³⁰ Interview with Sarah Bekessy, 23 November 2009; Interview with Margaret Blakers, campaigner, 16 August 2011.

²³¹ Laurel Firestone, Alice Kaswan and Sadra Meraz, 'Environmental justice: Access to clean drinking water' (2006) 57 *Hastings Law Journal* 1367.

is too uncommon because of a reluctance on the part of the judiciary to value the environment for what it is, rather than for what it provides. Their valorisation, the awareness of the place of Wielangta, has meant that the forests in dispute have not been logged,²³² and this is an especially important outcome for the broad-toothed stag beetle whose habitat is linked with the forests.

Justice as recognition for the human participants

The voices and views of scientists involved in court cases as experts often dominate the experiences and lay opinions of community members opposing potentially harmful activities. Far from suggesting that they constitute a community of justice for the purpose of environmental justice, I am including their perspectives on their experiences with the law to emphasise two points. First, even those humans whose professional role is to promote interest and understanding in the non-human world position themselves within the centre of concern in an environmental dispute. In such cases, this brings into question whether the environment can be preferred, upwardly valued and prioritised, its value raised above other dominant interests. Second, even if the dismissal of evidence is to amplify the condition of species, it is a challenge to environmental law. If the supposed rational actors within the law struggle to be heard,²³³ feel that their knowledge is disregarded²³⁴ or their professional integrity undermined,²³⁵ then something about environmental law needs to change.²³⁶

Scientists appearing at the trial described being 'toys' in a lawyers' 'game', especially through cross-examination; a game where it was easier to attack personalities and careers

²³² There is a moratorium in place that may soon be lifted.

²³³ Steven Yearley, 'Green ambivalence about science: Legal-rational authority and the scientific legitimization of a social movement' (1992) 42 *The British Journal of Sociology* 511 discusses the paradox of environmental communities depending on scientific expertise while also questioning its predominance in decision-making.

²³⁴ Interview with Steve Read, scientist, Forestry Tasmania, 20 November 2009.

²³⁵ Interview with Sarah Bekessy, scientist, RMIT University, 23 November 2009; Interview with Simon Grove, scientist, Forestry Tasmania, 20 November 2009.

²³⁶ This was not a view that was accepted by some interviewees, the lawyers primarily, who saw ongoing value in litigation as an avenue to realise justice in environmental law. Interview with John McDonald, lawyer, Forestry Tasmania, 11 September 2009; Interview with Chris Gunson, barrister, 11 September 2009.

than to grasp science.²³⁷ This impression of scientists was not unique. Writing in 1992, ornithologist, Recher, drawing on his own experience as an expert witness, noted that 'most ecologists probably enter the courtroom in the sincere opinion that their knowledge and opinions are of value and interest', but 'the adversarial system largely destroys this trust and leads to a more cynical and distorted presentation of "the facts" than might otherwise occur'.²³⁸

A central frustration of scientists with the court case was that there was minimal acknowledgment of the similarity in the overarching objective of both parties to achieve species protection.²³⁹ Forestry Tasmania scientist, Simon Grove, was frustrated that those scientists who presented evidence that was 'grey and uncertain' were overlooked in favour of those scientists who presented evidence as though the science was 'black and white' – even though they all were directed to the same goal, had very similar views about the science and had undertaken much the same inquiries. There were common points, connections that Marshall J did not draw out. Although Marshall J did prefer evidence that advantaged or gave the benefit of the doubt to species, for Grove, Marshall J did not make that judgment appreciative of the qualities of conservatism, complex thinking and restraint in science and scientists.²⁴⁰ He did not weigh up what the competing scientific views meant, instead taking the easy path by simply choosing one view over another, and invariably the evidence he did choose was framed through environmental views and values and not necessarily conservation views and values.²⁴¹

Justice Marshall's approach was confronting to the scientists involved in the case because it represented a departure from contemporary convention in dealing with or viewing science in decisions and the courts. In *Anvil Hill Project Watch Association v Minister for the*

²³⁷ Interview with Steve Read, scientist, Forestry Tasmania, 20 November 2009.

²³⁸ Harry Recher, 'Ecology on trial' in Daniel Lunney (ed), *Zoology in Court* (Royal Zoological Society of NSW, 1992), ch 3, 27.

²³⁹ Interview with John McDonald, lawyer, Forestry Tasmania, 11 September 2009.

²⁴⁰ Interview with Simon Grove, scientist, Forestry Tasmania, 20 November 2009.

²⁴¹ Interview with Simon Grove, scientist, Forestry Tasmania, 20 November 2009.

Environment,²⁴² for instance, Stone J conceived climate science as being technical and precise, and not readily translated into common understandings and sense. In *Lawyers for Forests Inc v Minister for the Environment, Heritage and the Arts*,²⁴³ Tracey J upheld the trend of the federal minister to delegate legal responsibility to scientists through the use of approval conditions. In *Telstra Corporation Ltd v Hornsby Shire Council*,²⁴⁴ Preston CJ created a test for the precautionary principle that defers to scientists to determine if there is an environmental concern, or a threat of environmental harm.²⁴⁵

Justice Marshall was influenced by what he saw as a lack of impartiality and neutrality of the Forestry Tasmania expert scientists, which was caused by misunderstandings about the way expert evidence is elicited.²⁴⁶ Most experts called by Forestry Tasmania were identified as being too close to the business, although Jeffrey Meggs – who was not an employee and whose research had been important in the listing of the stag beetle as endangered – in particular, was heavily criticised by Marshall J as being a ‘partisan polemic’ and a ‘so-called independent expert’²⁴⁷ for ‘alter[ing] his affidavit evidence based on “suggestions” by senior employees of Forestry Tasmania’,²⁴⁸ which caused him to ‘change matters of substance He excised parts of his draft affidavit which were helpful to the case of the applicant but unhelpful to Forestry Tasmania’.²⁴⁹

It was not only the Forestry Tasmania scientists who struggled with their lack recognition in the dispute. Sarah Bekessy was disturbed by the challenge to personal integrity, of the depth and manner of disagreement about expertise and not the science. She recalled ‘a

²⁴² (2007) 159 LGERA 8, para [32].

²⁴³ (2009) 178 FCR 385.

²⁴⁴ (2006) 67 NSWLR 256.

²⁴⁵ A similar critique is offered by Jacqueline Peel, ‘When (scientific) rationality rules: (Mis)application of the precautionary principle in Australian mobile phone tower cases: Telstra Corporation Limited v Hornsby Shire Council’ (2007) 19 *Journal of Environmental Law* 103.

²⁴⁶ Interview with Steve Read, scientist, Forestry Tasmania, 20 November 2009.

²⁴⁷ *Brown (No 4)* (2006) 157 FCR 1, para [117].

²⁴⁸ *Ibid*, para [118].

²⁴⁹ *Ibid*, para [120].

whole row of Forestry Tasmania people sitting with arms crossed, staring, intimidating, sniggering'.²⁵⁰ She attributed this to the fact that she was open to suggesting scientific conclusions and estimations for the benefit of the court, and thus the environment, based on her research, rather than, as other scientists did, remain steadfast in the uncertainty of the case.

University-based entomologist, past member of the scientific advisory committee to the minister under the *Threatened Species Protection Act 1995* (Tas) and expert on the stag beetle, Peter McQuillan,²⁵¹ explained that before this conflict arose forestry science in Tasmania was a 'closed shop'. Those who disagreed with Forestry Tasmania were 'dismissed as greenies'. Their work was not sought out; it was not respected. In McQuillan's view, Forestry Tasmania had captured forest science in the state. Even if their science was of a lesser standard or detail, it was used to head off criticism.²⁵² It was such an important employer of scientists in Tasmania that scientists understood the repercussions of publishing science contrary to its interests.

The trial meant that Forestry Tasmania's science had to be presented to an impartial judge,²⁵³ and that it would have to prove its assertions of sustainable forestry practice and demonstrate how it is acceptable for sustainable forestry practices to drive species towards extinction. McQuillan had previously found it difficult to present research, which had contributed to the listing of the Wielangta protected species, to the community and decision-makers, owing to Forestry Tasmania's dominant position in driving the discourse of forestry science in the state. In this case, McQuillan's evidence was evaluated and was accepted. Similarly, others²⁵⁴ were keen to take part in the case in order to have years of expert knowledge about the species presented to the court. The courtroom appeared a safe place for these scientists: an apolitical context where exaggeration, hyperbole and

²⁵⁰ Interview with Sarah Bekessy, scientist, RMIT University, 23 November 2009.

²⁵¹ Interview with Peter McQuillan, scientist, University of Tasmania, 8 September 2009.

²⁵² Interview with Roland Browne, lawyer for Brown, 14 September 2009.

²⁵³ Interview with Peter McQuillan, scientist, University of Tasmania, 8 September 2009.

²⁵⁴ Interview with Nick Mooney, scientist, 9 September 2009.

overreggging evidence would not be tolerated.²⁵⁵ There was vindication from the case; a sense of justification of years pursuing Forestry Tasmania over its forestry practices.²⁵⁶

6.7 Conclusion

Conflicts often become intractable and intense when those values are deeply held and divergent, drawn from value orientations at different ends of the spectrum. That has been the history of the conflict over the forests of Australia and Tasmania, energised by the advent of the Regional Forest Agreement process. Classically, the dilemma is presented as a battle between nature and human livelihood. These divergent values, more so than disagreements over science, economics or fair process, best explain the intensity of environmental conflicts. Listening to the parties in the case after the courtroom battle had ended, it was apparent that species conservation objectives and views on the role of science were all shared. What should be done in light of the concern about species loss in a particular setting – the forest – was where the division existed. That division was grounded in values: about the place and role of science for species, and the place and role of humans in the environment. The division existed because the law is either silent on these matters or often contradictory on them. Environmental conflicts are primarily over morals or ethics that are deeply held and rarely pacified, so the law must respond with an ethical standard to attend to those conflicts.²⁵⁷ Resolution should not be marked by lack of disagreement; rather, a fulfilment of that standard. Australian environmental law, because of its embrace of the principle of ecologically sustainable development, lacks that standard. Justice, as recognition and as respect to build capacity – both livelihood and political – are concepts that can inform a new standard for environmental law.

Respect and recognition, and matters of power and priority, are evident in the process and decisions in the Wielangta Forest conflict cases. The Federal Court, the Full Federal Court and the arrangement between the executive branches of the Commonwealth and Tasmanian governments variously treated species with respect, ignorance or disrespect.

²⁵⁵ Interview with Nick Mooney, scientist, 9 September 2009.

²⁵⁶ Interview with Margaret Blakers, campaigner, 16 August 2011.

²⁵⁷ Douglas E Booth, 'Preserving old-growth forest ecosystems: valuation and policy' (1997) 6(1) *Environmental Values* 31.

The legacy of the words of Marshall J, and his interpretation of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), is that through respect, the valorisation of species, and a compatriot duty on humans to protect species, capacity – either to persist, have resilience or flourish – is afforded to non-human species. This was so, even demanded, where the process of realising that position for a beetle, a bird and an eagle reduces the capacity of scientists or diminishes the role of the agency responsible for forestry regulation and practice.

Justice Marshall's decision, though capable of a critique for its superficial conventional legal analysis, is an example of the law and human interest being devalued compared with the interests of the three species protected under the *Environment Protection and Biodiversity Act 1999* (Cth) because of their threatened status. Unlike Sundberg, Finkelstein and Dowsett JJ of the Full Federal Court, Marshall J did not allow the technicalities of the rules of statutory interpretation to result in a conclusion that a species conservation law, with an explicit purpose directed towards conservation and protection, could oversee the loss and harm of species in a way that the application of the principle of ecologically sustainable development has.²⁵⁸ Whether this was an appropriate approach to the law within our common law system of reasoning is a valid question. If it was inappropriate, then the other question must be: why would or do we allow the strictures of our legal system to abandon species? Moreover, by requiring three species to be protected by the taking of measures to ensure a flourishing of the species, to oversee their recovery and to be led by international legal obligations,²⁵⁹ Marshall J went further in recognising the species than other federal judges faced with giving meaning to the *Environment Protection and Biodiversity Act 1999* (Cth) had previously, and he reminded us of the limited scope and force of the principle of ecologically sustainable development, particularly within Australia. He has offered a path, not yet widely adopted, towards justice in environmental jurisprudence and has displayed a

²⁵⁸ See, eg, *Tarkine National Coalition Inc v Minister for the Environment* (2014) 202 LGERA 244 where Tracey J found that there was no requirement in that case for the Minister to consider the cumulative impacts of projects in the region on the endangered Tasmanian devil. Chief Justice Brian Preston, 'Internalizing ecocentrism in environmental law' in Michelle Maloney and Peter Burdon (eds), *Wild Law – In Practice* (Routledge, 2014) 75 describes ways judges can integrate ecocentric and recognition positions in their decisions.

²⁵⁹ *Brown (No 4)* (2006) 157 FCR 1, para [301].

new attentiveness to the non-dominant components enmeshed in the concept of ecologically sustainable development in much the same manner that Preston CJ did with respect to the human community in the *Bulga* case.²⁶⁰ The justice in this case is less fixated on access and distribution but on transformative recognition – of the otherwise hidden, background or silenced community of environmental law. The threads of recognition in the decision offer an empirical foundation for recognition as justice across environmental and ecological justice, and an understanding of ecologically sustainable development that gives priority to the vulnerable community warranting, needing or demanding protection.²⁶¹ For those scholars who seek to make sense of ecological and environmental justice through shared concepts, the case also helps to facilitate those connections.

As for the three species at the centre of this case study, while the forests coupes in Wielangta have not been logged, they remain endangered, protected in name only under Commonwealth laws, their habitat and livelihoods under threat from human activities.

²⁶⁰ (2013) 194 LGERA 347.

²⁶¹ Tim Bonyhady, 'Putting the environment first' (2012) 29 *Environmental and Planning Law Journal* 316.

Chapter 7

Conclusion

7.1 A thesis about law and justice. A thesis about power.

Overview

This thesis is about whether environmental justice exists and should be further entrenched in Australian law. The preceding chapters have argued that environmental justice does have a presence in Australia, led by the endeavours of scholars, the judiciary and – most significantly – environmental communities of disadvantage and opposition. But environmental justice should have a clearer and more powerful policy presence in Australia. Local communities expect that; they struggle to understand why it does not. When speaking about their experiences, they articulate a concern for how decisions about the environment are made, who is heard and what is valued, and about fairness in the outcome of decisions. Communities anticipate becoming stronger and more powerful from their engagement with the law and its processes. Communities may not talk of ‘environmental justice’, but they discuss it – not sustainability – when reflecting on their experiences with environmental law.

The overarching conclusion from these experiences is that law must take a leading role incorporating environmental justice in the way that communities, scholars and judges imagine it, especially because governments have not. While an environmental justice initiative in Australia will depend on parliamentarians and government policymakers, leadership will likely come from elsewhere. Legal actors – groups like Environmental Justice Australia, scholars, practitioners and jurists – can help move the law. Through their position in the law, by speaking about justice when they do not see it or when opportunities arise to raise it as a principled position about the law,¹ a movement for justice can be led, sought and achieved, whether publicly in partnership with clients, activists or campaigners² or

¹ John W Kingdon, *Agendas, Alternatives and Public Policies* (Longman, 2nd ed, 2011) famously writes about policy windows.

² Austin Sarat and Stuart A Scheingold, ‘What cause lawyers do *for*, and *to*, social movements: An introduction’ in Austin Sarat and Stuart A Scheingold (eds), *Cause Lawyers and Social Movements* (Stanford University Press, 2006) 1 write of converting a cause into a social movement, noting that lawyers have roles in

through the incremental process of legal change with which lawyers are so familiar.

This chapter summarises the journey of environmental justice for this thesis: from idea, through to experience, and to a future. It starts with a reflection on the state of law, justice and power in Australia before summarising the findings from the empirical data for the thesis: the three Australian case studies, located in Orange, New South Wales; the shipping channels leading to Melbourne, Victoria; and the Wielangta Forest, Tasmania. The case-study approach to the thesis highlights distinct experiences and, collectively, the cases offer a perspective on the state of, and hopes for, environmental justice in Australia.

This chapter then attempts to step back from the jurisdictional and geographic focus on Australia and situate the lessons from the thesis within the scholarship and academic movements to advance a more deeply and robustly theorised environmental law. This broader agenda is intended to jolt the status quo, acknowledging that existing principles and frameworks for environmental law have been incapable of achieving the environmental protection purposes of environmental law. An environmental justice concept is one environmental theory that brings with it suggestions for change to the law; change that does not require an upheaval or overturning of environmental laws as we know them, but a new approach to them.

About law

This thesis has been about the experience of the law and the limits of Australia's law as it is applied and has been observed. Unlike other legal scholarship, it has not sought to exclusively analyse the law as it develops incrementally through doctrine³ or make judgments about the law's effectiveness through an evaluation of large quantities of data;⁴ instead, it has taken a more holistic view of environmental law. By stepping back from the particular details of statutes and cases and inquiring into the capacity of the law to meet a

both wider social movements or in movements with a legal membership.

³ Elizabeth Fisher, "Jurisdictional" facts and "hot" facts: Legal formalism, legal pluralism, and the nature of Australian administrative law' (2015) 38 *Melbourne University Law Review* 968.

⁴ Andrew Macintosh, Heather Roberts and Amy Constable, 'An empirical evaluation of environmental citizen suits under the Environment Protection and Biodiversity Conservation Act 1999 (Cth)' (2017) 39 *Sydney Law Review* 85.

qualitative standard, this thesis has detected stagnancy in environmental law in Australia.

Although the history of environmental law in Australia, at least since the 1900s, has been one of extensive development and evolution, it has more recently lost course, with milestone laws on matters such as interstate water protection⁵ and climate change⁶ proven to be corruptible⁷ and incapable of influence over policy or government action.⁸

Nevertheless, the environmental legal enterprise has been and remains responsive to social circumstances, political movements and experiences.⁹ It has responded to conceptual developments and perceptions of harms and of real threats.¹⁰ This thesis holds hope that the evidence and recommendations it offers about the need and type of change to the law produce a response in the law so that harms, entrenched vulnerability and disempowerment through the law can be redressed.

About justice

The thesis has shown that justice is at the conceptual fringes of Australian environmental law. This is despite environmental justice having a legacy in Australia, and having a particular and adapted understanding and nuance in the Australian legal context. Yet the concept of environmental justice has not been taken up by decision-makers, and rarely influenced the judiciary. From the viewpoint of the communities engaged with

⁵ *Water Act 2007* (Cth).

⁶ *Climate Change Act 2017* (Vic).

⁷ Helen Vivian, 'Cry me a river: Mismanagement and corruption have left the Darling dry', *Sydney Morning Herald* (9 March 2018) <<https://www.smh.com.au/environment/sustainability/cry-me-a-river-mismanagement-and-corruption-have-left-the-darling-dry-20180226-p4z1uc.html>>.

⁸ Martijn Wilder, Anna Skarbek and Rosemary Lyster, *Independent Review of the Climate Change Act 2010* (Victorian Government, 2015) 74ff.

⁹ Consider, for instance, the actions of Environmental Justice Australia litigating against on the Commonwealth Bank and the superannuation industry: Gareth Hutchens, 'Commonwealth Bank shareholders drop suit over nondisclosure of climate risks' *The Guardian* (21 September 2017) <<https://www.theguardian.com/australia-news/2017/sep/21/commonwealth-bank-shareholders-drop-suit-over-non-disclosure-of-climate-risks>>. David Barnden, Ron Merkel QC and Craig Lenehan, Concise Statement in Case: NSD1333/2018 Mark McVeigh v Retail Employees Superannuation Pty Ltd ACN 001 987 739 (23 July 2018).

¹⁰ Justice Brian Preston, 'Environmental law 1927–2007: Retrospect and prospect' (2007) 81 *Australian Law Journal* 616.

environmental law, environmental justice is absent. Participation is corralled and confined, outcomes are orchestrated and are blind to distributive effects, and communities are ignored for the value they can offer to an evaluation of environmental and social impacts.

Nevertheless, environmental justice is the cause and goal of groups, even if it is not expressed in such language, and the engagement with the law does not offer them political enfranchisement. They want fair treatment; they want to be heard; they want to be acknowledged for what they know and have experienced. Generally, though not universally, community members see political value from their engagement with the law. A longer-term gaze helps community members see how using the law can trigger future changes or build in them power and credentials.¹¹ The notable exception drawn from the empirical research undertaken for this thesis are those people who misunderstand how environmental law operates, especially as a form of administrative law, or who overestimate their capacity to influence decisions made under laws that offer them minimal avenues to influence decisions through the law. These community members felt disempowered through the law, outcast by a legal and political system designed for and by the political and social elite.

About power

In this sense, the thesis is about 'environmental power' – the intersection between justice, law and politics. Nietzsche has been influential in arguing that power and justice are linked – with justice only being possible if people are equally powerful.¹² As a critical legal inquiry, in the law and society tradition, understanding the allocation of power drawn from the law was pivotal to the thesis research.¹³ Garth and Sarat explain in this sub-field of legal inquiry that the 'law is always and necessarily to be engaged in a discourse about both justice and power. Law's relationship to justice is everywhere contingent and uncertain, yet law

¹¹ Luke W Cole, 'Environmental justice litigation: Another stone in David's sling' (1993–4) 21 *Fordham Urban Law Journal* 523, 527. Jacqueline Peel and Hari M Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge University Press, 2015).

¹² Loretta Capeheart and Dragan Milovanovic, *Social Justice: Theories, Issues and Movements* (Rutgers University Press, 2007) 27.

¹³ Bryant G Garth and Austin Sarat, 'Justice and power in law and society research: On the contested careers of core concepts' in Bryant G Garth and Austin Sarat (eds), *Justice and Power in Sociolegal Studies* (Northwestern University Press, 1988) 1, 2.

completely divorced from power is unthinkable'.¹⁴ For those scholars reluctant to discuss notions of environmental justice, 'social power' viewed in a social and regulatory context¹⁵ can be used to explain the community view of their experience and offer a critique of the performance of the law.

Finally, this thesis has been about control as power, especially control over space and places, and as the case studies returned to matters of executive function, a reconsolidation of control away from communities and even the judiciary. Whoever controls spaces is seen as having the greatest power in each conflict.¹⁶ The conflicts, inquired into fully and deeply, at the centre of the thesis can therefore be seen from a legal–geographic perspective¹⁷ as about who should have control over or tells the future for forests, farmland and shared waterbodies.

7.2 Thesis summary

Overview

This thesis began with a dilemma. The current framework for environmental law has created divisions in law, policy and the administration of the environment. At times, the agreed principles of environmental protection have advanced an environmental goal; yet at other times, concepts like sustainable development have rendered environmental matters inferior to the promotion of developmental objectives. Through its jurisprudence, led by Chief Justice Preston, the New South Wales Land and Environment Court has directed a sophisticated, complex and plural understanding of ecologically sustainable development – the stated objective of environmental laws in Australia. Some judges of that court have

¹⁴ Ibid 1.

¹⁵ Nancy Reichman, 'Power and justice in sociolegal studies of regulation' in Bryant G Garth and Austin Sarat (eds), *Justice and Power in Sociolegal Studies* (Northwestern University Press, 1988) 233, 233.

¹⁶ See Franz von Benda-Beckmann, Keebet von Benda-Beckmann and Anne Griffiths, 'Space and legal pluralism: An introduction' in Franz von Benda-Beckmann, Keebet von Benda-Beckmann and Anne Griffiths (eds), *Spatializing Law: An Anthropological Geography of Law in Society* (Ashgate, 2009) 1, 3.

¹⁷ Robyn Bartel, 'Place-thinking: The hidden geography of environmental law' in Andreas Philippopoulos-Mihalopoulos and Victoria Brooks (eds), *Research Methods in Environmental Law* (Edward Elgar, 2017) 159.

used the concept to valorise the interests of future generations,¹⁸ to realise policy goals to reduce greenhouse gas emissions¹⁹ and avoid the localised consequences of climate change.²⁰ At the same time, those judges have demonstrated that economic models for evaluating potentially harmful developments must be adjusted²¹ to have regard to the experience and needs of communities of humans and non-humans.²² These decisions embody a starting point for an environmental justice in and for Australia.

Elsewhere in the legal system, however, environmental law has not similarly developed to promote an environmental objective. Rather, the Australian principle of ecologically sustainable development has not influenced dominant views about the primacy of property over conservation, including in the minds of the judiciary,²³ nor reshaped administrative law to direct decision-makers to integrate the community in processes of deliberation. The law has not confronted environmental predicaments with an environmental ethic or morality: for instance, common interests of communities are not widely acknowledged,²⁴ potential environmental impacts are not always treated with caution,²⁵ future generations are seldom considered even when the law is dealing with matters of evident intergenerational concern,²⁶ and environmental health is seen as a secondary concern to process within the

¹⁸ *Hub Action Group v Minister for Planning* (2008) 161 LGERA 136.

¹⁹ *Gray v Minister for Planning* (2006) 152 LGERA 258.

²⁰ *Walker v Minister for Planning* (2007) 157 LGERA 124.

²¹ *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Ltd* (2013) 194 LGERA 347.

²² *Gerroa Environment Protection Society Inc v Minister for Planning and Cleary Bros (Bombo) Pty Ltd* [2008] NSWLEC 173.

²³ *Chang v Laidley Shire Council* (2007) 234 CLR 1 (Callinan J and Kirby J).

²⁴ *Dual Gas Pty Ltd v Environment Protection Authority* [2012] VCAT 308 where Dwyer DP explained the various 'interests' that give rise to standing or relevant considerations under the *Environment Protection Act 1970* (Vic).

²⁵ *Lawyers for Forests Inc v Minister for the Environment, Heritage and the Arts* (2008) 165 LGERA 203 and *Lawyers for Forests Inc v Minister for the Environment, Heritage and the Arts* (2009) 178 FCR 385 concerning the proposed Bell Bay pulp mill approval.

²⁶ *Australian Conservation Foundation Incorporated v Minister for the Environment* (2016) 251 FCR 308 where, in the context of a new and very large coal mining development, the applicant nor the court addressed international concerns, despite the relevant provision – article 4 – of the *World Heritage Convention* (*Convention Concerning the Protection of the World Cultural and Natural Heritage* (opened for signature: 16 November 1972; entered into force: 17 December 1975)) being directed towards environmental protection for

broader legal system.²⁷

In light of these 'two tracks' to environmental law in Australia, this thesis asks whether environmental law would be different if the notion of sustainability – or, in Australia, 'ecologically sustainable development' – was no longer the paradigmatic concept for contemporary environmental law; or if it was modified or reconsidered by reference to the concept and philosophy of environmental justice. Would the law generate meaningful improvements in the environmental condition, would concerned communities or species have a stronger presence in the law, and would environmental law be clearer about who and for what the law serves if it was framed by a notion of environmental justice?

In exploring this topic, I asked the following research questions:

First, what theories and principles of environmental justice, drawn from across the disciplines of the social sciences and in the experiences of environmental opponents, provide a theoretical foundation for environmental laws?

Second, has the law been aware of and attuned to environmental justice argument and ideas, such that it could incorporate environmental justice principles?

Third, whether in practice and outcome, are Australian laws seen by those communities engaged with the law to be environmentally just?

Fourth, how would environmental laws operate, what would they look like, and how might cases be treated and concluded, if there existed an institutionalised pursuit of environmental justice ideals?

Responding to the first two questions, in chapters 1 and 2 of the thesis, I showed that strands of environmental justice do exist in Australian politics and law, contrary to the claims of some scholars that there is a limited history or interest in environmental justice in

the benefit of future generations.

²⁷ The saga concerning the stockpiling of tyres in northern Victoria is one high-profile example: see Rhiannon Tuffield, 'Decade-long tyre feud results in jail time for company director, but hazard remains' *ABC News* (3 October 2018) <<https://www.abc.net.au/news/2018-10-03/numurkah-tyre-stockpile-still-poses-risk-to-community/10332108>>.

this country. Within the law, principles of environmental justice have been highlighted and argued with respect to participation in environmental decision-making and access to specialised environmental courts and tribunals. Environmental justice and demands for fairness in the distribution of environmentally harmful activities have been expressed in response to the development of polluting industry and the reluctance of governments to redress community exposure to pollutants. In this respect, the experience in Australia partly reflects the history of the environmental justice movement in the United States, and provides a foundation to further evolve the concept within Australia and its laws. Yet the Australian experience is also unique and responds to the particular history of environmental conflict, notably those conflicts arising in suburban industrial hotspots and in remote landscapes, where affected communities have been connected by class, rurality, Aboriginality and ecology. Moreover, Australian scholars have been at the forefront of connecting environmental justice theories and philosophies, and ecological justice ideas. The ideas of ecological justice are especially pertinent to a modern Australian legal system that has been structured to give effect to international law obligations to conserve biodiversity,²⁸ and domestic objectives to protect species with threatened status.²⁹ Ecological justice ideas of species respect and flourishing of species help to challenge interpretations of the law that view in situ protection of species as too difficult to accomplish while simultaneously facilitating resource extraction.³⁰

A focus of chapter 2 was on how environmental justice has been defined, globalised and transposed, and what the concept is now understood to comprise for an Australian legal setting. I argued that environmental justice is not only about fairness or equity for people in the deliberations and decisions made about harmful projects. It also comprises a morality towards non-human parts of the ecosphere and a concern for the respect, wellbeing and

²⁸ *Convention on Biological Diversity* (opened for signature 5 June 1992; entered into force 29 December 1993); *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 139.

²⁹ See, eg, the *Threatened Species Protection Act 1995* (Tas).

³⁰ *Tarkine National Coalition Incorporated v Minister for Sustainability, Environment, Water, Population and Communities* (2013) 214 FCR 233, paras [70]–[74]. In this case, Marshall J considered that species can be protected through relocation from their ‘wild’ habitats; *Tarkine National Coalition v Minister for the Environment* (2015) 233 FCR 254, paras [66]–[68].

empowerment of communities of relative disadvantage. Environmental justice is not simply an argument; rather, it is a discourse³¹ around which communities of concern – ‘justice communities’, as I refer to them – can coalesce. It is the discourse of environmental justice outside the academy that has determined its meaning, as much as the scholars who have written about it. Hence, I distilled an environmental justice framework using the scholarship of Schlosberg,³² and sought to augment that definition with the experience of the three communities that featured in this thesis.

From these positions, and responding to the fourth question I posed for the research, an environmentally just environmental law requires non-property and communal rights and interests to be treated comparably with individualised property-based interests, and it must recognise the value of non-human species in non-economic terms, using the law to afford protection that species cannot secure themselves. It must distribute environmental benefits or restore or compensate unavoidable or legacy harms. It must be responsive to the need or preferences of hosting communities. It must be presented with and avoid the cumulative impacts of harms directed towards already burdened communities. Planning law must no longer sacrifice communities so as to privilege others. I argued that the public interest must be the driving concept behind court access with all legal, structural and financial constraints to participation in planning and environmental assessment processes removed. Within those processes, there must also be shared power through the use of impartial experts and independent decision-makers.

A case-study approach

To determine the presence, meaning and expectations of environmental justice in Australian law, and to evaluate the function and possibility of the law to continue to realise environmental justice, I used three case-study examples. I supplemented data drawn from archives, media and legal and political processes with interviews from actors involved in

³¹ Brad Jessup, ‘The journey of environmental justice through public and international law’ in Brad Jessup and Kim Rubenstein (eds), *Environmental Discourses in Public and International Law* (Cambridge University Press, 2012) 47.

³² David Schlosberg, *Defining Environmental Justice: Theories, Movements, and Nature* (Oxford University Press, 2007).

advancing, opposing or investigating contentious projects with asserted environmental harms. This data sought to situate an analysis in place,³³ and to valorise place and connections with landscapes. The research itself responded to the participatory and recognition aspects of environmental justice explored in the thesis.

The studies of Orange, Port Phillip and Wielangta were also used to learn more about the legal places and legally engaged characters of environmental conflicts, and, significantly for a thesis that argues that environmental law should be more mindful and respectful of the people who engage with it, the cases were used to present the stories of the protagonists within the disputes over the use and protection of the environment. The method allowed them to narrate their experiences of environmental law. They told me their views of fairness or justice arising from their encounters with the law, something that my third research question sought to elicit.

The case studies were used to identify trends and occurrences in Australian environmental law, to distil similarities and differences in the law and experience of the law in Australia, and to illustrate, reflect or modify a theory – in this instance of environmental justice. The lessons from the cases studies were discrete and contextual as well as being shared and general.

Lessons from the Orange Waste Project

The Orange Waste Project, a waste and recycling facility proposed by the provincial New South Wales City of Orange and since built on the outskirts of the rural township of Molong, was the conflict analysed in chapter 4. The New South Wales Land and Environment Court decided that the project was not supported by local planning policy, would threaten agricultural land uses in an agricultural community, was proposed on an inappropriate site, and represented a threat to intergenerational equity.³⁴ Equity in this instance was described as future generations being able to farm productive landscapes. The court highlighted the unaddressed concerns to bee farming – an ignorance of the local interests and rejection of

³³ Bartel, above n 17.

³⁴ *Hub Action Group v Minister for Planning* (2008) 161 LGERA 136.

place-based knowledge of the project proponents. This chapter featured the voices of the mayor and administrators of the city and key organisers of the opponent group, the Hub Action Group. It is a story of a small community that was able to build opposition to the project only after initial legal success, and whose interests were vocally defended when it appeared to the wider community that a kind of fairness that most people expect – respect of a decision of a judge – was undermined. The invocation of widely loathed fast-track approval legislation³⁵ was seen by a disgruntled community as power being unscrupulously shifted to and consolidated within the office of the Minister for Planning, and a demonstration of an ignorance of principles of good environmental governance. It was an experience that questions whether environmental assessment laws designed for special projects can be environmentally just. When broad discretion is afforded to a government about when such laws can be used, justice to the community and the environment is not prioritised. The subsequent repeal of the New South Wales law³⁶ – an election promise of an incoming government that recognised statewide anger at the inequity of the laws³⁷ – signified an attempt to rebalance fairness in the environmental legal system of that state.

The chapter showed how the antagonists in the dispute differently conceived the scale for the project – as a project having *local* and severe impacts as opposed to a project with the prospect of providing a *regional* waste solution. This meant the project conflict became intractable and the preference of one scale and the diminishment of concern for the other facilitated a distributional environmental injustice. It illustrated a need for the law to accord fairness at multiple scales; not simply for the law to attend to one scale of assessment.

³⁵ *Environmental Planning and Assessment Act 1979* (NSW) pt 3A (since repealed); Second Reading Speech of the Environmental Planning and Assessment Amendment (Part 3A Repeal) Bill 2011: New South Wales, *Parliamentary Debates*, Legislative Assembly, 16 June 2011 (Brad Hazzard, Jonathan O'Dea, Ray Williams, Gareth Ward, Jamie Parker, Greg Piper, Clover Moore, Rob Stokes); Elizabeth Farrelly, 'By accident or design, Labor's legacy of bad planning lives on', *Sydney Morning Herald* (24 May 2012) <<https://www.smh.com.au/politics/federal/by-accident-or-design-labors-legacy-of-bad-planning-lives-on-20120523-1z580.html>> and Amelia Thorpe and Melissa Hart, 'Changing climates, changing cities? Planning reform and urban sustainability in New South Wales' (2013) 16 *Australasian Journal of Natural Resources Law and Policy* 133 especially fn 7.

³⁶ *Environmental Planning and Assessment Amendment (Part 3A Repeal) Act 2011* (NSW).

³⁷ Josephine Tovey, 'Mayors boo NSW premier over takeover of planning laws' *Domain* (25 October 2010) <<https://www.domain.com.au/news/mayors-boo-nsw-premier-over-takeover-of-planning-laws-20101026-171qg/>>.

Finally, the chapter showed the different applications of sustainability and environmental justice to the project. In its first iteration, the project was considered to be lacking in its sustainability credentials because there was no guarantee that the project would include waste recovery or lead to a reduction in landfilling.³⁸ The landfill and associated recycling facilities were later described and defended as being a form of sustainable development. This was because the final design of the project would reduce waste going to landfill, the treatment of waste would represent best practice, and the technology to be used would lessen the environmental harm of the project. Sustainability was presented as being technocentric; whereas environmental justice was shown as an alternative environmental principle that was community-centred. Unaddressed in the defence of the sustainability of the landfill, however, were questions about the selection process for the site that the community found opaque; the appropriate level of power the local council should have had over decision-making; and any justification for opponents to the project having appeal and review rights constrained, despite very real questions existing about the use of the law to approve the project by the Minister for Planning.

Lessons from the Port Phillip Channel Deepening Project

The Channel Deepening Project was the conflict analysed in chapter 5. That project involved the dredging of the bay of Port Phillip and the lower reaches of the Yarra River – from the port of Melbourne in the north, along the principal shipping route to the Port Phillip Heads at the entrance to the bay – and the disposal of that dredged material within the bay. The project was pursued by the Victorian government, as one of its projects of strategic importance. The project was most vocally and publicly opposed by the Blue Wedges Inc, a community group created by a collection of community, business and tourism organisations with the objective of being the community voice of the opposition to the project.

Throughout the assessment of the project, it was the legal process, and not the evaluation of environmental impacts, that led to concerns about environmental justice. The law created an unwieldy, time-consuming, fragmented and disrespectful process that

³⁸ *Hub Action Group v Minister for Planning* (2008) 161 LGERA 136. Chief Justice Preston wrote about the illusion of sustainability, from para [2].

community members found exhausting, expensive and dispiriting. Despite the project being presented as sustainable – using a triple-bottom-line assessment³⁹ – an independent inquiry panel did not endorse it. Yet this did not stop the project; rather, it caused the government to begin to publicly advocate for the project whereas previously it had framed its support for the project conditional on a positive environmental evaluation. The government also altered the process and the terms of reference for a subsequent inquiry that further disempowered an already frustrated community. Administrative law, a public law avenue for justice,⁴⁰ proved unhelpful to the project opponents.⁴¹ The effect of administrative law on the environment was again to oversee the deterioration of the environmental condition and only a limited opportunity for community members to vent their objections. No one within the legal system could tell the community if the outcome was a good one, or a fair and just one.

Law reform inquiries that followed the assessment and commencement of the project confirmed that environmental assessments cannot be fair where the proponent, assessor and approver are all emanations of the state.⁴² The community saw the law as futile, and the saga was a reminder that environmental assessment laws that do not have an independent approval process integrated within them are justifiably viewed as unfair and unjust.

Lessons from the Wielangta Forest conflict

The Wielangta Forest conflict was analysed in chapter 6. This conflict concerned plans by the state enterprise, Forestry Tasmania, to log two coupes of state forest. The forest

³⁹ Freehills, *In the matter of the Port Phillip Channel Deepening Project EES Panel Inquiry: Submissions on Behalf of the Proponent: Port of Melbourne Corporation: Part G – Objectives Based Assessment and Interim Conclusions* (12 November 2004).

⁴⁰ Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook, 3rd ed, 2004) 429.

⁴¹ *Blue Wedges Inc v Minister for Environment Heritage and the Arts* (2008) 165 FCR 211; *Blue Wedges Inc v Port of Melbourne Corporation* [2005] VSC 305; and *Blue Wedges v Minister for Environment Heritage and the Arts (No 2)* (2008) 167 FCR 463.

⁴² Parliament of Victoria, Environment and Natural Resources Committee, *Inquiry into the Environment Effects Statement Process in Victoria* (September 2011) 38–44.

contained declared timber reserves that were also long-existing native forests, providing habitat for at least three engaged species: the Tasmanian wedge-tailed eagle, the swift parrot and the Wielangta broad-toothed stag beetle. Each species was protected by the provisions of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) and Tasmanian law.⁴³ However, the forestry activities were permissible under the Regional Forest Agreement negotiated between the Tasmanian and federal governments.⁴⁴ That agreement, said to embody the principles of 'ecologically sustainable forest management',⁴⁵ provided that species such as the eagle, parrot and beetle would be protected through the creation of reserves.⁴⁶

Bob Brown, supported by a team of concerned conservationists and the evidence of several scientists, argued that those species were not being protected and the continued logging of coupes in the Wielangta Forest would further endanger them, threatening their capacity to survive and replenish as a species. Implicit within the arguments made was that the law ought to provide justice to species in the form of immediate protection and a long-term maintenance of the species. They were driven by a sense of morality towards the environment, led by values of protection and conservation. The opponents to the logging argued that some justice was achieved, even though the case was ultimately lost on appeal, because they forced an agency cocooned from public oversight to front up to an impartial public forum and defend its activities that endangered species. Moreover, the primary judgment⁴⁷ stands as a record of how to approach species protection under laws directed to the goal of biodiversity conservation. Justice Marshall – in one of the very few impressive judgments of the Federal Court about environmental law – held that an obligation in law to protect species extended to include a duty not to diminish their number, and to support the

⁴³ *Threatened Species Protection Act 1995* (Tas).

⁴⁴ *Tasmanian Regional Forest Agreement* (1997).

⁴⁵ Australian Government Department of Agriculture and Water Resources, *Ecologically Sustainable Forest Management* (2015) <<http://www.agriculture.gov.au/forestry/policies/rfa/about/esfm>>.

⁴⁶ *Tasmanian Regional Forest Agreement* (1997) cl 68.

⁴⁷ *Brown v Forestry Tasmania (No 4)* (2006) 157 FCR 1.

re-establishment of their population.⁴⁸ It was an approach that prioritised vulnerable populations of species; it recognised them, affording them justice.

The logging did not proceed, yet the laws were changed to immunise forestry activities from attack. Further legal change that has criminalised legitimate protest⁴⁹ has reinforced the agenda of the Tasmanian government and parliament to disempower communities of opposition, and therefore render an environmental injustice on those people and the landscapes they seek to protect from harms. The High Court case that concerned these anti-protest laws – again brought by Bob Brown – highlighted the gap between environmental justice and constitutional justice. The latter is concerned only with the limits laws may impose on democracy; the former is directed towards the empowerment of the citizenry.

What the conflict over the logging also showed was a misunderstanding of the law by scientists, and frustration with how scientific evidence and opinion is used in the law. The law was viewed as being unfair, highly critical and demeaning by the scientists engaged with the dispute, irrespective of by which party they were engaged to provide evidence. A more environmentally just approach to the presentation of evidence before an environmental court would use judge-appointed, demonstrably impartial, expertise.

The chapter also presents a cleavage in environmental values. It was these quite different, incommensurable values that meant that the parties would never be able to agree on what would be environmentally just for non-human species. It reinforced the need for the law to have an explicit statement of environmental values that underpin a system of environmental laws, so that all parties that enter into an environmental law process know what it is for.

Collective lessons

The cases also tell us something about the process of the law and the dynamics of power and control over environmental law. In each case, after the opponents experienced success,

⁴⁸ *Ibid*, para [94].

⁴⁹ *Brown v Tasmania* (2017) 261 CLR 328.

their position and concern about the project endorsed by independent bodies, the executive branch of government implemented changes to facilitate the approval of the project. This involved a second environmental assessment panel in the Channel Deepening Project, a different assessment process for the Orange Waste Project, and a change to intergovernmental agreements for the Wielangta Forest conflict. On one view, this makes the cases appear extraordinary, yet those familiar with the operation of environmental law know such changes are common.⁵⁰ Governments have reserved powers, they intervene to alter the law to nullify community success. Environmental justice, therefore, cannot only be a principle for environmental law. It must extend to be a principle for environmental governance; a socially mandated fetter on the use of ministerial discretion. Such a formulation of environmental justice, leading to a resistance of governments to disrupt findings made through law, would offer communities greater control over the space and places they value; it would reorder the legal geography of sites of conflict.⁵¹

7.3 An environmental theory for environmental law

A starting theory

One starting position for this thesis was a view that the environmental legal system needs to be recast, that the current structures and theories for environmental law are deficient, and that a new theory of environmental justice is needed for environmental law in Australia.

That starting point – a search for a new theory – was a fulfilment of the ‘mantra’ Kysar observes within the sphere of environmental law and policy in the US.⁵² There is a belief that law reform depends on new and disruptive ideas, not just on highlighting current deficiencies and the possibilities within the existing theoretical and policy settings.⁵³ He

⁵⁰ One recent example is: Joe Hinchliffe, ‘Planning Minister overturns ban on horse training on ‘unspoilt’ Victorian beach’, *The Age* (10 January 2019) <<https://www.theage.com.au/national/victoria/planning-minister-overturns-ban-on-horse-training-on-unspoilt-victorian-beach-20190110-p50qj2.html>>.

⁵¹ von Benda-Beckmann, von Benda-Beckmann and Griffiths, above n 16.

⁵² Douglas A Kysar, *Regulating from Nowhere: Environmental Law and the Search for Objectivity* (Yale University Press, 2010) 2. He explains that ‘a widely invoked but rarely examined mantra asserts that “it takes a theory to beat a theory”’.

⁵³ *Ibid* 232.

thinks that within the existing environmental law framework 'promise yet unrealized' to improve the law can be found.⁵⁴ This thesis searched for that promise. When exploring the three case studies, the sustainability credentials and claims were tested; principles found within the concept of ecologically sustainable development contributed to the critiques within the thesis; and the concept was found wanting but not so flawed to be worth abandoning.

This step in the research established that environmental law has an abundance of concepts, principles and theories to direct decision-makers in their evaluation and adjudication of policies and projects. Other Australian scholars, such as Holley, Gunningham and Shearing, have sought to refashion and prioritise these concepts in a 'new' approach to environmental governance,⁵⁵ which argues through pre-existing theories of collaboration and deliberation that local expertise and experience, including communities historically marginalised, be central to decision-making about the environment.⁵⁶

This thesis is not about governance as Holley et al approach it; rather, it is about the principles that underpin governance. By changing what the law is about and what or who it is for, the administration will have to change. There are extensive objectives for the application of environmental law that do inform environmental decisions.⁵⁷ As this thesis has explained, environmental justice is another still emergent objective of Australian environmental law, and the time is right to articulate it in statute or have the whole judiciary embrace it.

The Australian Panel of Experts on Environmental Law, in its recommendations to modernise environmental law, accepted the concept of ecologically sustainable

⁵⁴ Ibid.

⁵⁵ Cameron Holley, 'Public participation, environmental law and new governance: Lessons for designing inclusive and representative participatory processes' (2010) 27 *Environmental and Planning Law Journal* 360; Cameron Holley, Neil Gunningham and Clifford Shearing, *The New Environmental Governance* (Earthscan, 2012).

⁵⁶ Holley et al, *ibid*, 4.

⁵⁷ See *Environment Protection Amendment Act 2018* (Vic) s 7, which restates the principles of environmental protection for Victoria.

development as the core purpose of environmental law. The panel then focused on reconsidering what that principle prioritises, and searching for an overarching social mission to 'enhance' its environmental function.⁵⁸ The message from the expert group is that sustainability might be worth salvaging, but it has not fulfilled its promise for environmental law to protect and conserve the environment. The cases studies in this thesis prove that.

Australian policymakers lack any interest in inquiring about a new meaning and purpose of sustainability.⁵⁹ The country's key strategic document, the National Strategy for Ecologically Sustainable Development, was prepared in 1992 and has not been revised. The government references that document and the definition of ecologically sustainable development from the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) in its own guidelines for reporting its sustainability performance.⁶⁰ Howes notes that during the late 1990s and 2000s, the policy and ideal of sustainability was left to languish by governments as the national environmental priorities turned first to community-led conservation through the National Heritage Trust and then a demarcation of environmental responsibility between the states and the Commonwealth through the enactment of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). More recently, successive federal governments have been unmoved by the review of that Act,⁶¹ and more focused on diminishing rather than enhancing environmental regulatory oversight.⁶² They

⁵⁸ Australian Panel of Experts on Environmental Law, *The Next Generation of Australia's Environmental Laws: Introductory Paper* (2015) Recommendation 1.

⁵⁹ Michael Howes, *Politics and the Environment: Risk and the Role of Government and Industry* (Allen & Unwin, 2005) 124.

⁶⁰ Australian Government, Department of the Environment, Water, Heritage and the Arts, *Guidelines for Section 516A reporting – Environment Protection and Biodiversity Conservation Act 1999* (2010).

⁶¹ See Australian Government, Department of Sustainability, Environment, Water, Population and Communities, *Australian Government Response to the Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (2011). In the lead-up to the election campaign of 2019, opposition leader Bill Shorten promised to reform federal environmental laws if elected in a manner consistent with the reform recommendations the past Labor government rejected: see Nick Thomas and Cloe Jolly, 'Labor to overhaul federal environmental law if elected', *Clayton Utz* (7 February 2019) <<https://www.claytonutz.com/knowledge/2019/february/labor-to-overhaul-federal-environmental-law-if-elected>>.

⁶² Lisa Cox, 'Abbott government's crackdown on environmental "lawfare" hits hurdle', *Sydney Morning Herald* (11 September 2015) <<https://www.smh.com.au/politics/federal/abbott-governments-crackdown-on-environmental-lawfare-hits-hurdle-20150911-gjk360.html>>.

have also overseen the 'economification'⁶³ of environmental laws through an embrace of a triple-bottom-line conception of sustainability,⁶⁴ thus feeding an economic discourse of the environment and encouraging the use of economic tools – such as cost benefit analysis – as a basis for decision-making under law,⁶⁵ and so shifting responsibility for environmental protection from the state to markets.⁶⁶

Ideas around sustainable development have moved. Globally, the most notable recent shift has been the development of the Sustainable Development Goals⁶⁷ – goals that have been endorsed by the Australian government but not triggered the reevaluation of the meaning or purpose of the principle for Australia.⁶⁸ Scholars have challenged the focus on growth within sustainable development,⁶⁹ critiqued its neoliberal orientation,⁷⁰ grappled with human and non-human aspects of sustainable development⁷¹ and sought to alter our understanding for the need and purpose of sustainable development by advancing the concept of the Anthropocene.⁷² It has been put that, within this current human-influenced

⁶³ See Terrell Carver, 'Civil society and class: Centrality and occlusion in discourse and practice' in Terrell Carver and Jens Bartelson (eds), *Globality, Democracy and Civil Society* (Routledge, 2011) 13, 14 who referred to the 'economification' of civil society through political discourse.

⁶⁴ Commonwealth of Australia, *Triple Bottom Line Reporting in Australia – A Guide to Reporting Against Environmental Indicators* (Department of the Environment and Heritage, 2003).

⁶⁵ Kysar, above n 52.

⁶⁶ Daniel A Farber, 'Taking responsibility for the planet' (2010) 89 *Texas Law Review* 147.

⁶⁷ United Nations General Assembly, *Transforming Our World: The 2030 Agenda for Sustainable Development* (21 October 2015).

⁶⁸ Commonwealth of Australia, *Report on the Implementation of the Sustainable Development Goals 2018* (2018). The government does, however, note (p 10) that it takes a human-rights-based approach to sustainable development – an approach that has not been translated into definitions of sustainable development used in environmental law, however.

⁶⁹ Michael Cuthill, 'Strengthening the "social" in sustainable development: Developing a conceptual framework for social sustainability in a rapid urban growth region in Australia' (2010) 18 *Sustainable Development* 362.

⁷⁰ Chukwumerije Okereke, *Global Justice and Neoliberal Environmental Governance: Ethics, Sustainable Development and International Co-operation* (Routledge, 2007).

⁷¹ James Radcliffe, *Green Politics: Dictatorship or Democracy?* (Palgrave Macmillan, revised ed): see especially ch 4 'The need for an environmental ethic'.

⁷² Will Steffen, Paul J Crutzen and John R McNeill, 'The Anthropocene: Are humans now overwhelming the

epoch, we must rebalance the interests of economy, the community and the environment.⁷³ As this thesis has argued, environmental justice is one concept to drive that rebalancing because it specifically prioritises the human experience and the environmental condition in environmental law.

Whereas others have tried to blend sustainable development with environmental justice⁷⁴ or argued that sustainability must be principally 'environmental',⁷⁵ the position ultimately taken in this thesis was a pragmatic one. Ecologically sustainable development is entrenched in Australian environmental law and policy. Others will attempt to tinker with it as an overarching theory for environmental law. They will undoubtedly draw on justice notions as they undertake that exercise. This thesis is about environmental justice. Whether or not sustainable development is a part of the law, this thesis argues that environmental justice must be. It achieves different purposes to the concept of sustainable development, even though there are obvious crossovers in dealing with principles around equity, precaution, participation and species values. An environmentally just legal system would raise those principles above other sustainability goals. The triple bottom line, which enables a devaluing of the environment in the law,⁷⁶ would be discarded. Environmental justice would become the bottom line – but it would do more. It would be a constant expression of who and what environmental laws are for: for the environment and those communities relatively disadvantaged by the historic operation of the law and the political system that continues to control the law.

great forces of nature?' (2007) 36 *AMBIO: A Journal of the Human Environment* 614.

⁷³ Raymond Cléménçon, 'Welcome to the Anthropocene: Rio+20 and the meaning of sustainable development' (2012) 21 *The Journal of Environment and Development* 311. Note especially the view of those nations expected to be most severely affected by the impacts of climate change.

⁷⁴ Julian Agyeman, *Introducing Just Sustainabilities: Policy, Planning, and Practice* (Zed Books, 2013).

⁷⁵ Andrew Dobson, 'Social justice and environmental sustainability: Ne'er the twain shall meet?' in Julian Agyeman, Robert D Bullard and Bob Evans (eds), *Just Sustainabilities: Development in an Unequal World* (MIT Press, 2003) 83. See also Brad Jessup, 'Investing the law with an environmental ethic: Using an environmental justice theory for change' in Erika Techera (ed), *Environmental Law, Ethics and Governance* (Inter-Disciplinary Press, 2010) 21 noting the contest of ideas about 'sustainability' between Andrew Dobson and Julian Agyeman.

⁷⁶ *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts* (2008) 167 FCR 463.

An environmental ethic

The critique of sustainable development includes a view that the concept does not achieve an environmental ethic⁷⁷ – and, therefore, that environmental law itself is poorly aligned with a virtuous and environmentally ethical position. An environmental ethic is an understanding that actions that are taken have consequences on the ecosystem.⁷⁸ It is a governing relationship with the environment that is founded on and expects an environmental morality and care. An environmental ethic is more than an acknowledgement that environmental values exist within law;⁷⁹ rather, an ethic is a systematic, institutional or framework adoption of those values. Goldstein makes the point⁸⁰ that constitutions and local laws guided by the philosophical positions of Aldo Leopold better accord with an environmental ethic than those laws that depend on the concept of sustainability. What is distinctive about ethically informed laws are both human and ecologically centred environmental rights and values. There are clear statements about who and what environmental laws are for and the outcomes that those laws should achieve.

Despite, and perhaps owing to,⁸¹ the embrace of sustainability in Australia, there is no systematic or institutional set of environmental values. There are no rights about or for the environment that signal an unambiguous mission of environmental protection.⁸² Rather, the many laws that collectively make up Australia's environmental protection, biodiversity conservation and land-use planning laws are diverse in scope, origin and source, and underpinning objective. Despite the adoption of the concept of ecologically sustainable development, and the embrace of its various component principles, there is no universal

⁷⁷ Alyson C Flournoy, 'Building an environmental ethic from the ground up' (2003) *UC Davis Law Review* 53.

⁷⁸ Robert J Goldstein, 'Environmental ethics and positive law' in Robert J Goldstein (ed), *Environmental Ethics and Law* (Ashgate, 2004) 1.

⁷⁹ *Ibid* 8.

⁸⁰ *Ibid*.

⁸¹ Flournoy, above n 77, 72 notes that sustainability is inherently human-centred.

⁸² Brad Jessup and Annette Jones, 'In one ear and out the other: Human rights consultations and environmental discourses for human rights in Australasia' in Anna Grear and Louis J Kotzé (eds), *Research Handbook on Human Rights and the Environment* (Edward Elgar, 2015) 249.

objective in Australian environmental law;⁸³ rather, there are manifold objectives for environmental law that cannot be achieved concurrently. While owing much to international legal developments, Australia's environmental laws and their objectives are still drawn from historic principles of tort and fundamental constitutional principles of responsible government, and are framed by anthropocentric concepts of property.⁸⁴ Due to these foundations,⁸⁵ human and proprietary interests are afforded protection and access to the courts while ecological interests do not in themselves have recognition or a voice within the law.⁸⁶

Graham⁸⁷ foreshadows what might become of environmental law that continues without an ethic: rights holders engaging in a social and political battle to further diminish the purpose, meaning and usefulness of environmental laws to protect the environment in order to advance their own private positions. Indeed, there is already a cleavage between public environmental law, or those environmental laws that regulate public lands and public decisions; and private environmental law, with the latter increasingly being refashioned to make them simpler and less burdensome on users and developers of land,⁸⁸ and then being reconceived as rights-creating rather than regulatory in character.⁸⁹

⁸³ Radcliffe, above n 71.

⁸⁴ Sean Coyle and Karen Morrow, *The Philosophical Foundations of Environmental Law: Property, Rights and Nature* (Hart, 2004).

⁸⁵ Nicole Graham, *Lawscape: Property, Environment, Law* (Routledge, 2011), 159–70 writes of the exclusion of the environment from property and property rights protecting human interests, not the thing over which humans have an interest.

⁸⁶ This is despite the passage of nearly 40 years since Christopher Stone advocated that non-human aspects of nature should have standing before the courts through the agency of concerned individuals and groups, a position not endorsed in this thesis. Christopher D Stone, 'Should trees have standing? Toward legal rights for natural objects' (1972) 45 *Southern California Law Review* 450.

⁸⁷ Graham, above n 85.

⁸⁸ Neil Perry, 'The NSW government is choosing to undermine native vegetation and biodiversity', *The Conversation* (9 May 2016) <<https://theconversation.com/the-nsw-government-is-choosing-to-undermine-native-vegetation-and-biodiversity-59066>>.

⁸⁹ The sense of entitlement and view of interests as property was the foundation of the cases of: *Arnold v Minister Administering the Water Management Act 2000* (2010) 240 CLR 242 and *ICM Agriculture Pty Ltd v Commonwealth of Australia* (2009) 240 CLR 140.

Likewise, Preston⁹⁰ has argued that Australian environmental laws have either imposed affirmative obligations to protect the environment or entrenched Anglo–Australian property rights to facilitate resource or agricultural exploitation.⁹¹ This division of approaches to environmental laws persists despite the goal of ‘integrating’ environmental principles in environmental laws.⁹² The unwillingness to bridge this division has also been a trigger of the ‘earth jurisprudence’ or ‘wild law’ movement in Australia, which seeks to revisit the moral foundations and purposes of environmental law in this country, to find an ethic for environmental law.⁹³

Environmental justice as an ethical jolt to the status quo

It is the neoliberal agenda of environmental laws – supported by the tripartite conceptualisation of sustainability favoured by business and endorsed by the Australian government⁹⁴ – that has led to a forgetting of the meaning or value of environmental governance. Kysar described the consequence as ‘regulating from nowhere’ in environmental law,⁹⁵ but it could also be explained as regulating for the sake of regulating.⁹⁶ The downplaying of the environmental in environmental law also represents a loss of sight of the urgency and importance of environmental protection – other species, other places and other generations have been overlooked, displaced or discounted. To attend to this displacement of regulation, Kysar urges a reinvestment of law with humility and self-awareness, with regulatory actions being guided by morality and mindful of the

⁹⁰ Hon Justice Brian J Preston, ‘The environment and its influence on the law’ (2008) 82 *Australian Law Journal* 180, 180.

⁹¹ *Ibid* 181.

⁹² Commonwealth of Australia, *National Strategy on Ecologically Sustainable Development* (1992). Lee Godden and Jacqueline Peel, *Environmental law: Scientific, Policy and Regulatory Dimensions* (Oxford University Press, 2010) identify integration as a key theme of contemporary environmental law.

⁹³ Peter D Burdon, ‘A theory of Earth jurisprudence’ (2012) 37 *Australian Journal of Legal Philosophy* 28; Peter Burdon, ‘Wild law and the project of Earth democracy’ in Peter Burdon and Michelle Maloney and Peter Burdon (eds), *Wild Law – In Practice* (Routledge, 2014) 19.

⁹⁴ Commonwealth of Australia, *Corporate Responsibility: Managing Risk and Creating Value* (21 June 2006) ch 6.

⁹⁵ Kysar, above n 52.

⁹⁶ Leslie A Stein, *Principles of Planning Law* (Oxford University Press, 2007) 2 writes of the trend for planning law to be implemented as a set of rules directed towards compliance without consideration of their objective.

consequences for the environment of human actions. There needs to be a 'jolt' to the status quo.⁹⁷ It is an urging not simply about ideas for environmental law but of power and process within environmental law; a blending that draws on notions of environmental justice.⁹⁸

In the introduction to this thesis, I noted that there are strands of new beginnings for environmental law emanating from the New South Wales Land and Environment Court. In notable cases, its judges have demonstrated how to infuse environmental concepts with an environmental awareness. There are similarities in approaches to purpose and position of environmental law principles between New South Wales cases like *Walker*⁹⁹ and *Gray*¹⁰⁰ and that of Judge Weeramantry, who distilled an ethical and moral foundation for law that predated the concept of sustainable development.¹⁰¹ Chief Justice Preston has demonstrated that environmental law cannot be used in the service of economic growth mindless of the long-term effects of development. His judgment in *Bulga*¹⁰² highlights the dilemma within and across the principles of environmental law. His reasoning rested on an understanding of environmental law as being directed to achieve a 'balance'¹⁰³ between oftentimes competing interests, benefits and harms – a goal unattainable and dismissive of the environmental objectives of law. His grappling with concepts of justice¹⁰⁴ was more cogent, and suggested a way forward.

The status quo is clearly illustrated in the legal saga surrounding the Wielangta Forest in Tasmania. In that case, a legal obligation to create a system of reserves to protect

⁹⁷ Kysar, above n 52, 233 directs environmental legal scholars to develop an agenda for change to environmental law – a 'powerful jolt' to the status quo.

⁹⁸ Garth and Sarat, above n 13, 1. Capeheart and Milovanovic, above n 12, 27. Reichman, above n 15, 233.

⁹⁹ *Walker v Minister for Planning* (2007) 157 LGERA 124.

¹⁰⁰ *Gray v Minister for Planning* (2006) 152 LGERA 258.

¹⁰¹ *Gabčíkovo–Nagyymaros Project (Hungary/Slovakia)* [1997] ICJ Rep 7 (Separate Opinion of Vice-President Weeramantry) 98–9.

¹⁰² *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Ltd* (2013) 194 LGERA 347.

¹⁰³ *Ibid*, including in the conclusion at part 7 of the judgment.

¹⁰⁴ *Ibid*, paras [485]–[495].

nominated threatened species to further a principle of ecologically sustainable forest management was interpreted, and later confirmed, by the Australian and Tasmanian governments as not requiring the protection of species at all.¹⁰⁵ The existence of ineffective reserves was enough to fulfil the legal obligation, and such an interpretation allowed the continuation of logging activities that endangered already threatened species.

Bosselmann claims that 'eco-justice ... best expresses the ethics of ecological sustainability';¹⁰⁶ and, elsewhere,¹⁰⁷ that environmental justice is the 'ethical and legal commitment' to environmental protection. Viewing environmental law through an environmental justice prism challenges the neoliberal ideology that has taken hold within the law.¹⁰⁸ It also reinstates limits in environmental law – environmental boundaries and acceptable harms – but also constraints on environmental governance. Using environmental justice as an evaluative goal for environmental law also restricts how sustainable development concepts can be used as an argumentative device to advance developments that may adversely affect the environment or communities dependent on or that value environments. Their interests are not tradeable. They cannot be balanced. Human and non-human interests must be respected, acknowledged and guaranteed health and persistence.

Environmental justice would also be instructive when approaching the boundaries of knowledge, consensus or scientific expertise.¹⁰⁹ Environmental justice, through its ethical position of protection, fairness and respect, would prioritise protection over risk-taking; prevention of foreseeable harm over proceeding in the hope of the discovery of knowledge.

¹⁰⁵ *Forestry Tasmania v Brown* (2007) 167 FCR 34, especially paras [80] onwards, where the variation to the *Tasmanian Forest Agreement* of 23 February 2007 is discussed.

¹⁰⁶ Klaus Bosselmann, 'Ecological justice and law' in Benjamin J Richardson and Stepan Wood (eds), *Environmental Law for Sustainability: A Reader* (Hart, 2006) 129, 131.

¹⁰⁷ Klaus Bosselmann, 'Environmental justice v deregulation? Themes on an environmental law conference in Auckland' (1998) 2 *New Zealand Journal of Environmental Law* 209, 214.

¹⁰⁸ Ted Benton, 'Ecology, community and justice: The meaning of being green' in Piers Beirne and Nigel South (eds), *Issues in Green Criminology: Confronting Harms Against Environments, Humanity and Other Animals* (William Publishing, 2007) 1, 9–10.

¹⁰⁹ Stephen Connelly and Tim Richardson, 'Value-driven SEA: Time for an environmental justice perspective?' (2005) 25 *Environmental Impact Assessment Review* 391.

It would guide decisions towards fairness – procedurally, distributionally and respectfully – not allowing business acquiescence whenever there is disagreement about regulatory decisions for projects, programs or policies.

Bringing environmental justice into environmental law may also alter the sustainability discourse, returning it closer to its original position and away from the technocentric version that development agencies and governments have adopted across the globe. The original position is to advance the welfare of the environment and its inhabitants, to focus on notions of intragenerational equity and intergenerational equity¹¹⁰ – ethical components that direct our attention to the effects of activities on often-forgotten stakeholders,¹¹¹ and the intrinsic value of the environment.

7.4 Conceptualising environmental justice for Australian environmental law

Incorporating multiple justice facets into environmental law

The discipline and institution of law is fundamentally concerned with the maintenance and delivery of justice. Despite discourses of environmental justice being readily detectable in environmental law,¹¹² and strongly so in the context of global climate lawmaking,¹¹³ the concept of environmental justice is largely absent from global and domestic legal systems and jurisprudence. The law and its profession have recognised and categorised those laws that promote fair environmental processes and that can be used to avert disproportionate environmental damage on human communities.¹¹⁴ There have also been efforts to advance change – especially to enhance access to justice – and in chapter 2 I situated and critiqued

¹¹⁰ Bosselmann, above n 106.

¹¹¹ Gordon Walker and Harriet Bulkeley, 'Geographies of environmental justice' (2006) 37 *Geoforum* 655, 658 explain how the incorporation of environmental justice into the UK policy landscape rendered a more participatory, community-minded and inclusive understanding of environmental sustainability.

¹¹² Jessup, above n 31.

¹¹³ David Schlosberg and Lisette B Collins, 'From environmental to climate justice: Climate change and the discourse of environmental justice' (2014) 5 *Wiley Interdisciplinary Reviews: Climate Change* 359.

¹¹⁴ See, eg, Michael B Gerrard and Sheila R Foster (eds), *The Law of Environmental Justice: Theories and Procedures to Address Disproportionate Risks* (American Bar Association, 2nd ed, 2008).

some reform proposals typically raised within an environmental justice framework. However, attempts to retrofit the law through discrete proposals for change, such as the introduction of greater merits review rights in environmental law represent, to me, an 'old' view of environmental justice: that the law can be used in its current form to redress and avoid unfair harms, and that avenues exist to seek that redress or to articulate threatened harms¹¹⁵ without revisiting the institutional and conceptual barriers of the law.

This view of finding environmental justice in the existing legal framework has always been marginal. Kaswan, for instance, makes the point that there are limits to what environmental law can achieve for the environmental justice movement with its current framework of principles advancing an at-times-destructive agenda, and using its aging statutes. Moreover, environmental law can limit the achievement of environmental justice.¹¹⁶ Environmental law is often deliberately ignorant of where pollution occurs, and it serves those with capacity, time and wealth to involve themselves in it, leaving those communities with existing relative economic and geographic disadvantage at an even greater disadvantage.¹¹⁷

This use-what-you-have approach to environmental justice has been supported by government policy and bureaucracy, most notably in the US. Strategies can make explicit that environmental justice is a core goal of the implementation of the law – but they do not change the law. The current experience in the US, with the environmental justice agenda destined to be sidelined by the goal of facilitating industry during the Trump administration,¹¹⁸ demonstrates the failings of a system dependant on political goodwill and reliant on the voices and efforts of scholars and community members to maintain a

¹¹⁵ See, eg, American Bar Association 'Environmental justice' (2016) *GPSolo* <https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2016/may-june/environmental_justice/>.

¹¹⁶ Alice Kaswan, 'Environmental justice: Bridging the gap between environmental laws and "justice"' (1997) 47 *American University Law Review* 8.

¹¹⁷ *Ibid.*

¹¹⁸ Chris Sellers, Lindsey Dillon and Phil Brown, 'EPA staff say the Trump administration is changing their mission from protecting human health and the environment to protecting industry', *The Conversation* (6 June 2018) <<http://theconversation.com/epa-staff-say-the-trump-administration-is-changing-their-mission-from-protecting-human-health-and-the-environment-to-protecting-industry-96256>>.

discourse of justice in environmental governance in the face of environmental maleficence.

This realisation has led to an interest in the field of environmental constitutionalism.¹¹⁹

Kotzé has argued that environmental constitutionalism is about resituating the status of environmental care in a legal system.¹²⁰ Its ambitious goal is to see environmental justice analogue principles like a duty of care for the environment and a right to environmental health shifted up the hierarchy of the legal system – from policy or statute into founding documents of nations – with the intended goal of adjusting the set of values or morals held by the citizens of a nation. As Kotzé notes, it is about ‘deeply entrenching within the political, social and juridical spheres environmental care as a common ideology and moral/ethical obligation’.¹²¹

In introducing this thesis, I suggested a number of reasons why environmental justice – a concept that has been the subject and object of a vanguard of activists and researchers – has had minimal reaction in the formalised legal system, and is therefore an unlikely principle to be converted anytime soon in Australia into a constitutional protection. It has rarely informed constitutional change; instead, changes to constitutions are sometimes described as enhancing avenues to environmental justice.¹²² This is so for environmental justice because of its historically narrow focus on distributive harms in the US, because it challenges recently accepted norms about sustainability, in particular the idea that environmental law is a tool to balance interests and not protect environmental interests, and because of the political disempowerment of those people confronting an incident of environmental injustice.¹²³

¹¹⁹ James R May and Erin Daly, *Global Environmental Constitutionalism* (Cambridge University Press, 2015) 18 note that ‘[e]nvironmental constitutionalism offers one way to engage environmental challenges that fall beyond the grasp of other legal constructs ... [it] offers a way forward when other legal mechanisms fall short’.

¹²⁰ Louis J Kotzé, *Global Environmental Constitutionalism in the Anthropocene* (Hart Publishing, 2016) 13.

¹²¹ *Ibid* 153.

¹²² Louis J Kotzé and Anel du Plessis, ‘Some brief observations on fifteen years of environmental rights jurisprudence in South Africa’ (2010) 3 *Journal of Court Innovation* 157, 162, 168; Jacklyn Cock, ‘How the environmental justice movement is gathering momentum in South Africa’, *The Conversation* (2 November 2015) <<https://theconversation.com/how-the-environmental-justice-movement-is-gathering-momentum-in-south-africa-49819>>.

¹²³ Alice Kaswan, ‘Environmental justice and environmental Law’ (2013) 24 *Fordham Environmental Law Review*

However, the recent endeavour of the Victorian government to convert an election commitment to introduce a whole-of-government strategy on environmental justice¹²⁴ – a promise still to realised five years on – indicates another possible explanation for the slow take-up of environmental justice as an overarching objective for environmental law. Environmental justice is multiplied and it multiplies. It is celebrated as being multifaceted, and has been defined and summarised into a quartet of clearly understood aspects: distribution, participation, recognition and capacity building;¹²⁵ and, it has a simple and powerful core message for the law: that the law should serve the community and the environment primarily; it should treat them fairly and respectfully. But, it has manifold implications for a legal system that has never sought to prioritise non-economic and non-proprietary interests.

I have been involved in discussions with the Victorian government about what environmental justice might look like in the state's pollution control laws, for laws to rejuvenate cities, for laws to green urban infrastructure, and for laws that regulate and policies that promote access to national parks. Each discussion has focused on different aspects of environmental justice and diverse laws. Its clarion features and expectations mean that the concept cannot be offered to the law tokenistically; law makers cannot bluff environmental justice. They can instead ignore it or diminish it.¹²⁶ Kennedy's inquiry into mineral and gas development in Australia,¹²⁷ and her attention to the capabilities aspect of environmental justice,¹²⁸ shows the transformation required of laws for one industry sector,

149.

¹²⁴ Brad Jessup, 'Trajectories of environmental justice – From histories to futures and the Victorian environmental justice agenda' (2017) 7 *Victoria University Law and Justice Journal* 48.

¹²⁵ Schlosberg, above n 32.

¹²⁶ The Victorian first attempt at a policy on environmental justice was instead changed to be an Environmental Citizenship strategy as a way to avoid all that environmental justice stands for, and rather to pursue a neoliberal goal of reduced regulatory responsibility in the environmental agency. The Environmental Citizenship Strategy sought to divest environmental conflict resolution to industry and community: see EPA Victoria, *Environmental Citizenship Strategy*. Publication No 1519 (2013).

¹²⁷ Amanda Kennedy, *Environmental Justice and Land Use Conflict: The Governance of Mineral and Gas Resource Development* (Earthscan, 2017).

¹²⁸ *Ibid* 172.

which is regulated generally under specific laws with exemptions to a suite of state environmental and planning laws. So, although the prospect of achieving an environmental constitutionalism in Australia is remote, it is worth reimagining what features of a constitutional approach could be translated into Australia's legal systems.

These perspectives lead me to the view that instead of starting with an overarching strategy that charts the contours of environmental justice for a legal system and sets out policy or program priorities for transforming environmental governance, Australian parliaments should instead articulate a clear statutory intent that environmental justice is a goal of environmental law, used as an interpretive tool by judges and the bureaucracy, in the manner that the *Climate Change Act 2017* (Vic) approaches doing.¹²⁹ During the review of that Act, Environmental Justice Australia advanced an idea of a climate charter in our laws – a quasi-constitutional device that could similarly be advanced to promote environmental justice with statutory laws.¹³⁰ Kennedy advances the idea of a 'meta governance' framework for environmental laws that normatively guides decision-makers.¹³¹

Following its reform, the *Climate Change Act 2017* (Vic) now prescribes mandatory considerations concerning climate change – including requiring consideration of potential cumulative climate-related impacts of a development – for decision-makers under a limited number of prescribed laws: environment protection laws,¹³² but not resource development, project assessment or planning laws.¹³³ In section 20, the government is directed to endeavour, when developing policies or programs or making decisions, to take account of climate change and the guiding principles of¹³⁴ informed decision-making, integrated decision-making, risk management, equity, community engagement and compatibility. The minister has the discretion to incorporate these principles in any decision-making guidelines

¹²⁹ See especially pt 4.

¹³⁰ Environmental Justice Australia, *Proposal for a Victorian Climate Charter* (2015).

¹³¹ Kennedy, above n 127, 183–4.

¹³² *Environment Protection Act 1970* (Vic).

¹³³ *Climate Change Act 2017* (Vic) s 17 and sch 1.

¹³⁴ *Ibid* ss 23–8.

that they have power to make under the Act.¹³⁵ As explained by the panel of legal experts reviewing the previous iteration of the Act, these provisions need wider application, especially to those laws under which decisions are made about developments – roads, skyscrapers, mines and logging among them – that will have long and permanent impacts.¹³⁶ The translation of environmental justice into a legal principle would similarly require a consideration across multiple laws of general and industry specific character. The effect would be to entrench environmental justice in the legal discourses of dissent and objection. It would become instrumentally important for communities involved in decision-making processes under the law.

The benefit in defining environmental justice lightly in such a scenario, is that law drafters do not omit the fullness of the multifaceted conception of environmental justice. The *Climate Change Act 2017* (Vic), for instance, attends only to issues of participatory environmental justice,¹³⁷ while distributional justice concerns are limited to cross-generations, and capacity-based justice is limited to climate adaptation.¹³⁸ The danger in framing or defining environmental justice by government is to lessen its scope, its breadth and its power. An unbounded definition of environmental justice is warranted, feasible and possible because the meaning of environmental justice is built by the community, and it is presently sufficiently robust and its core values unambiguous.

Additionally, governments should commit to incrementally integrate environmental justice in the reform of all laws concerning the environment – something that the Victorian government did not do in the aftermath of the Channel Deepening Project.¹³⁹ This was a

¹³⁵ Ibid ss 18 and 19.

¹³⁶ Wilder et al, above n 8, 76.

¹³⁷ Section 27 provides that 'community involvement in decisions, policies, programs or processes relating to climate change that may affect members of the community or members of the community in future generations, especially members of vulnerable or marginalised communities, should be facilitated...'

¹³⁸ Section 26, which describes the guiding principle of 'equity', provides that 'the present generation should consider the opportunities to increase the capacities to adapt to climate change of those people most vulnerable to the potential impacts of climate change'.

¹³⁹ Victorian Auditor General, *Effectiveness of the Environmental Effects Statement Process*. Report 18, 2016–17 (2017).

task started, though certainly not completed, through the major amendments to the *Environment Protection Act 1970* (Vic). Through that process, the independent inquiry panel was tasked with reporting on the how 'the principle of environmental justice is adhered to, the environment is protected for the benefit of the community, and members of the community can be meaningfully involved in, and access fair treatment through, environmental regulation'.¹⁴⁰ The minister wrote to the panel chair reiterating and clarifying her expectations of the matters that ought to be deliberated.¹⁴¹ That reform process has introduced environmental duties into the Victorian statutory regime for environmental protection for the first time¹⁴² – and, in doing so, articulated the clear and statutorily enforceable protection of human health;¹⁴³ mandated reporting of pollution incidents, therefore increasing the transparency of industrial activity;¹⁴⁴ and relaxed previously limited standing laws for communities.¹⁴⁵ Yet it did not address the problem of pollution hotspots, the assessment of cumulative impacts¹⁴⁶ on vulnerable communities, nor twin the duties it devised with respect to environmental harm with rights to environmental protection. The inquiry noted that the government would be required to make changes to the statutory regime beyond the environment protection regulatory system to fulfil a goal of environmental justice for the state.¹⁴⁷

¹⁴⁰ See Victorian Government EPA Inquiry, *Independent Inquiry into the Environment Protection Authority* (2016).

¹⁴¹ Letter from Lisa Neville, Minister for Environment, Climate Change and Water to Penny Armitage, 'Incorporating Environmental Justice Principles in the EPA' (4 December 2016) included in Victorian Government EPA Inquiry, above n 140, 392.

¹⁴² *Environment Protection Amendment Act 2018* (Vic), s 7, new pt 3.

¹⁴³ *Environment Protection Amendment Act 2018* (Vic), s 7, new ss 5(f) and (g).

¹⁴⁴ *Environment Protection Amendment Act 2018* (Vic), s 7, new s 32.

¹⁴⁵ *Environment Protection Amendment Act 2018* (Vic), s 7, new ss 308 and 309. Victorian Government EPA Inquiry, above n 140, 140–4 focused particularly on the environmental justice improvements through third-party rights.

¹⁴⁶ The definition of environmental harm, constituting a breach of the environmental duty, does however include cumulative harms: see *Environment Protection Amendment Act 2018* (Vic), s 7, new s 4(2).

¹⁴⁷ Victorian Government EPA Inquiry, above n 140, 139.

By contrast with this approach in Victoria, the ACT government has twice refused¹⁴⁸ to integrate environmental justice within its legal system when it has reviewed its *Human Rights Act 2004* (ACT). That Act is regularly reviewed to explore the possibility of inclusion of economic, social and cultural rights within its statutory charter of rights,¹⁴⁹ of which a right to a healthy environment is considered one.¹⁵⁰ In 2012, it claimed that 'the potential scope of this right makes it unsuitable for initial inclusion. ... Potentially this could bind the Government to consider wide ranging factors such as air and soil quality levels'.¹⁵¹ It rejected a right to a clean and healthy environment because it would function as it should: because it would keep governments accountable for the enforcement of the environmental laws that they are responsible to administer; and because it would aid the realisation of environmental justice in its society.

The Commonwealth government's rejection¹⁵² of the bulk of the reform proposals to the *Environment Protection and Biodiversity Conservation Act 1999* (Cth),¹⁵³ especially those ideas accordant with the concept of environmental justice as recognition and capacity building – such as prioritising environmental concerns in environmental decision-making¹⁵⁴ and the institution of National Environmental Commissioner and National Environment Commission¹⁵⁵ to impart expert opinion, provide monitoring and audit functions and

¹⁴⁸ ACT Government, *ACT Government Response: Australian Capital Territory Economic Social and Cultural Rights Project Report* (March 2012) ('Response'); ACT Government, *Economic, Social and Cultural Rights in the Human Rights Act 2004 – Section 43 Review* (November 2014).

¹⁴⁹ ACT Government, '2014 Review of the Human Rights Act 2004' (2014) *Justice and Community Safety Directorate* <<https://justice.act.gov.au/review/view/32/title/2014-review-of-the-human>>.

¹⁵⁰ Hilary Charlesworth Andrew Byrnes, Renuka Thilagaratnam and Katharine Young, *Australian Capital Territory Economic, Social and Cultural Rights Research Project – Report* (September 2010).

¹⁵¹ ACT Government, *Response*, above n 148, 8–9.

¹⁵² Australian Government, Department of Sustainability, Environment, Water, Population and Communities Australian, above n 61.

¹⁵³ Allan Hawke, *The Australian Environment Act – Independent Review of the Environment Protection and Biodiversity Conservation Act 1999 – Final Report* (October 2009).

¹⁵⁴ Australian Government, Department of Sustainability, Environment, Water, Population and Communities Australian, above n 61, 9.

¹⁵⁵ *Ibid* 114.

increase transparency around decisions¹⁵⁶ – similarly should not occur in an environmental governance system that is directed towards achieving environmental justice.

Finally, and most unconventionally, governments must consider ways to be reflective on environmental injustice and embrace responsiveness in reforming environmental law for the environment rather than work against it.¹⁵⁷ The lessons from the case studies in this thesis is that governments are quick to alter a legal process or the law itself when it suits a development agenda, but it is slow and resistant to changes to rectify unfairness in the law that these cases also highlighted. The Victorian government secured the passage of laws to facilitate trial dredging for the Channel Deepening Project,¹⁵⁸ but never progressed with reforming the *Environment Effects Act 1978* (Vic) after the Channel Deepening Project highlighted the perceptions of injustice from a project that is pursued, assessed and approved by the state. The Tasmanian and Commonwealth governments changed the Tasmanian Regional Forest Agreement to neutralise the trial decision in the Wielangta Forest conflict. However, when presented with a recommendation about the treatment of Regional Forest Agreements and the exemption from assessment for logging activities approved under those agreements included in the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)¹⁵⁹ – that the exemption lapse in the absence or failure of reviews of their success in achieving environmental outcomes¹⁶⁰ – the Commonwealth was steadfast in rejecting the idea.¹⁶¹ It took a change of government in New South Wales to repeal the fast-track, state-significant project assessment laws that prompted community alarm about the lack of fairness when they were controversially, and arguably erroneously,

¹⁵⁶ Hawke, above n 153, 329–35.

¹⁵⁷ The focus in the literature on reflexive environmental law to date has been on the operation and implementation of regulation, and less on reflecting on how the law should change to incidents that might trigger reflection on the fairness or appropriateness of the outcome or process of decision-making in the law: see, eg, Eric W Orts, 'A reflexive model of environmental regulation' (1995) 5 *Business Ethics Quarterly* 779.

¹⁵⁸ *Environment Effects (Amendment) Act 2005* (Vic), s 6, introducing a new s 5 into the principal Act.

¹⁵⁹ Section 38.

¹⁶⁰ Hawke, above n 153, 36 (Recommendation 38).

¹⁶¹ Australian Government, Department of Sustainability, Environment, Water, Population and Communities, above n 61, 70–1.

activated for the benefit of the Orange Waste Project. While the replacement laws preserved state-significant development approval processes offering the minister under the *Environmental Planning and Assessment Act 1979* (NSW) immense environmental law power, there are incremental changes of note – about the kinds of developments that can be approved and greater avenues for communities to influence decisions or bring court proceedings.

Governments should look for immediate fixes that enhance environmental justice where injustices are widely accepted and acknowledged: for instance, this would have meant the New South Wales Labor government abandoning its state-significant planning and assessment laws when the overwhelming weight of community opinion and the statistics on their use demonstrated their unfairness, and certainly on direction from the state's anti-corruption commission, which highlighted corruption concerns and the need for legal change.¹⁶² It would have meant that the Victorian government reacted through law to protect communities and increase responsibilities on lax regulators in the Hazelwood and Brookland Greens incidents,¹⁶³ for instance by requiring regulators to improve and undertake additional monitoring of pollution, by mandating greater transparency and accessibility of pollution data in pollution hot spots, and by guaranteeing to affected residents meaningful financial and support assistance triggered by a declaration of an environmental pollution incident, rather than awaiting the outcomes of inquiries.

While such a task could be aided by a government body, such as a commission or commissioner with functions of advice to relevant ministers, for environmental justice a more appropriate intermediary would be a community-constituted¹⁶⁴ and research-supported body with open access for the community and direct access to ministers to highlight incidents of environmental justice and community-driven and evidence-based

¹⁶² Independent Commission Against Corruption, *The Exercise of Discretion Under Part 3A of the Environmental Planning and Assessment Act 1979 and the State Environmental Planning Policy (Major Development) 2005* (2010).

¹⁶³ Jessup, above n 124.

¹⁶⁴ Kennedy, above n 127, 182 notes the need to prioritise place-based knowledge and the use of social-impact assessments in project evaluations.

legal change.¹⁶⁵ As I introduced this thesis, I explained that people outside the government system, including lawyers, academics and activists, will be required to take a role to entrench environmental justice in law. That is not simply a statement of pragmatics but an acknowledgment of the fact that environmental justice is a concept that offers power because it is not a concept of the state, but a tool to be used for the improvement of the state.

Environmental justice for Australia: From 'old' to 'new' justice

This thesis has explained how environmental justice is conceptually and academically present in Australia.¹⁶⁶ There are, beyond the law, multiple dimensions to environmental justice, and demands and expectation for changes to improve the condition of the environment and human health throughout society dependant on the concept. Within Australian law¹⁶⁷ and its literature, however, most discussions of justice in environmental law have leveraged the public interest law and civil justice ideal of access to justice, and focused on the sustainability objective of public participation in environmental matters.¹⁶⁸

Even in California, where there has been immense campaign effort and there is a state action plan to promote environmental justice, and where environmental justice laws have been in place since the late 1990s, old ways of doing environmental justice remains the benchmark. There, scholars have described the program as one of 'environmental justice-

¹⁶⁵ With roles similar to advisory councils, community reference groups and commissioners for the environment, sustainability and future generations. A model may be the Indigenous Advisory Committee constituted under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 505A. The federal Minister for the Environment could create such a committee using existing powers in s 511 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

¹⁶⁶ Maureen G Reed and Colleen George, 'Where in the world is environmental justice' (2011) 35 *Progress in Human Geography* 835 explain that Australian scholarship on environmental justice has been constant since 2000.

¹⁶⁷ Deirdre Pirro, 'Access to environmental justice: A national perspective' (2008) 38 *Environmental Policy and Law* 272; Brian Preston 'The effectiveness of the law in providing access to environmental justice: An introduction' in Paul Martin et al (eds), *The Search for Environmental Justice* (2015, Edward Elgar) 23. Also, in New Zealand: Justice Peter Salmon, 'Access to environmental justice' (1998) 2 *New Zealand Journal of Environmental Law* 1; and in the UK: Lord Harry Woolf, 'The courts' role in achieving environmental justice' (2002) 4 *Environmental Law Review* 79.

¹⁶⁸ Michael I Jeffrey, 'Environmental governance: A comparative analysis of public participation and access to justice' (2005) 9(2) *Journal of South Pacific Law* 1.

as-participation',¹⁶⁹ but noted that 'participation alone does not make structural changes in social, economic and political systems that effect distribution of environmental inequalities by race, class, gender, location and other factors'.¹⁷⁰

Where there is a transition from theory and concept to practical matters, the attention of the legal scholarship and activism is on matters related to standing, the availability of merits review in environmental matters, costs orders and the availability of specialised courts. Justice is seen as pursued when the community is invited into the law or offered a position within it; and then able to influence the outcome of the law.¹⁷¹ These are noble objectives, and should not be discarded or dismissed as being contrary to the concept and goals of environmental justice. However, I view these as an old view of what environmental justice is and should achieve for the law. As Preston¹⁷² notes, the law is currently confined, such that even with access or rights of participation the law does not direct an environmentally just outcome. It does not realise what communities expect: change, to the value put on their lives and the environment they want to see protected, and to law.¹⁷³

A 'new'¹⁷⁴ view of environmental justice in law must focus on altering the shape and the power of the law. It must attend to matters of accountability, participation, distribution, respect, recognition and capacity building – not simply sustainability. Throughout this thesis, I have raised proposals and highlighted lessons from the experience or positions of others to transform Australian environmental law. In earlier chapters, that has included bringing independence and removing discretion and influence over our laws, enacting

¹⁶⁹ Jonathan K London, Julie Sze and Raoul S Lievanos, 'Problems, promise, progress, and perils: Critical reflections on environmental justice policy implementation in California' (2008) 26 *UCLA Journal of Environmental Policy* (2008) 255.

¹⁷⁰ Ibid 258.

¹⁷¹ Elisa Arcioni and Glenn Mitchell, 'Environmental justice in Australia: When the RATS Became IRATE' (2005) 14 *Environmental Politics* 363, 366.

¹⁷² Preston above n 167, 25.

¹⁷³ London et al, above n 169, 276.

¹⁷⁴ Harriet Bulkeley and Gordon Walker, 'Environmental justice: A new agenda for the UK' (2005) 10 *Local Environment: The International Journal of Justice and Sustainability* 329 note that what is 'new' is partly the mainstreaming of environmental justice and, as I have advanced in this thesis, a revisioning of sustainability.

environmental rights and making access to courts more open, giving communities confronting land-use changes influence over the scales of assessment of projects, and using evidence in environmental laws in a protective, not necessarily preventative, way. In this chapter, that has included giving communities power to speak directly to lawmakers about changing the law, an overarching charter for environmental justice in statute, and a commitment to legal reform. Some ideas remain just ideas; others are proposals that are waiting – ready to be adopted more broadly into the law.

The need for instigating the change is not difficult to see. The three community groups featured in this thesis all recognised it. By looking closely at the law, and through the process of transitioning from practitioner to scholar, taking time to observe the law as an outsider, I also saw it. It was straightforward. In a legal system that fetishises human proprietary interests and rights, and consolidates control within government, we need to rediscover why we want environmental laws and to remind ourselves about who and what that law should serve. Environmental laws are failing because they are failing the environment.

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A new justice for Australian environmental law

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