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HORIZONS OF NATIONAL RESPONSIBILITY: LAW AND THE PROTECTION OF LIFE ON A FOSSIL-RICH CONTINENT

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Horizons of national responsibility: law and the protection of life on a fossil-rich continent

In 2026, an event is due to take place 375km off the Pilbara coast of Western Australia that will be causally entangled with the exile of millions of people from their homes. In that year, Woodside, with the permission of the Federal and State governments, will deliberately puncture the seabed that is currently safely enclosing 11.1 trillion cubic feet of carbon tetrahydride (also known as methane or marsh gas). They will process it in floating production units, dehydrate and compress it, and transport it to Asia, where it will be combusted and become atmospheric carbon dioxide.

When we think of the impact of climate change on homes, it is the scenes of outright abandonment, inundation and ruin that are perhaps the easiest to conjure. Lonely structures on dusty streets too arid to support life. Buildings teetering on clifftops or immersed by floodwater. It is harder to picture the dwellings that waver, unnervingly, in status between being structures of sanctuary and danger. The intact iron rooves that proffer shelter from wind and rain, but also catch burning embers from bushfires in their eaves. The living room floors that accommodate the family couch, but that also carry smells from fetid floodwater. The walls with blooms of mould behind the children's art. The bedrooms that cannot be reliably kept below wetbulb 35 degrees: Places of rest where sleepers may not rise in the morning. There is, and will be, a mundanity to the unravelling of life in these homes; an unpredictability and unsteadiness to their conversion from symbols of order, status, longing and security, into sites of desperation, fear and necessity.

These quiet catastrophes are unlike those the law readily recognises as environmental. They are not like oil spills in the Arctic, or bleached coral on the Barrier Reef or the plight of the Eastern Curlew, on the brink of extinction. Nor do they easily fit into the category of loss we associate with threatened 'heritage'. They are not like Notre Dame Cathedral aflame or the 40 000-year-old petroglyphs on the Burrup Peninsula eroding from nitrate emissions. They shrink the spaces available for human sanctuary, and with them the preconditions for human

physical, mental and spiritual enlargement. They are generally non-spectacular, appearing as monumental only when viewed at scale.

The primary law governing what is known as Woodside's Scarborough project is the *Environmental Protection and Biodiversity Conservation Act 1999* (EPBC Act). It is a law which makes reference to the principle of 'intergenerational equity.'[1] Its objects concern the protection of matters of 'national environmental significance', the 'conservation of biodiversity' and the 'conservation of heritage', among others. As the Federal Court has recently confirmed, it is not concerned '*generally* with the protection of the environment nor with any response to global warming and climate change'. Nor do its objects include 'the protection of the interests and safety of human beings in the environment', on either an express or implied basis.[2]

There are no world heritage properties, national heritage places or wetlands of international importance 375km off the Pilbara coast and 1-1.5km kilometres down. It is cold, dark and heavy down there. The seabed that is currently safely encasing carbon tetrahydride is in the aphotic zone, a place too dark for photosynthesis. Deepwater sponge gardens and octocorals grow at that depth, nourished by the plant and animal matter falling from above. The Philips Australian Oil Company geologists who first drilled the site in the 1970s named it 'Jupiter', and a smaller, adjacent gasfield 'Thebe', after the planet's moon. These names have proved prescient in more ways than one. Not only is Jupiter a 'gas giant', it is also currently framed, under Australian law, as something like a place from outer space, conceptually apart from the lives and dwellings it has the power to unravel on the land.

The proponents of the Scarborough Project are not heeding the International Energy Agency's plea that 'no new oil and gas fields [can be] approved for development from 2021'.[3] However, they have received initial regulatory approval under the requirements of the EPBC Act from NOPSEMA, National Offshore Petroleum Safety and Environmental Management Authority with delegated decision-making power over the project.[4] They have provided plans to deal with noise interference, vessel disturbance, light pollution, acute chemical discharge and

[1] EPBC Act, s3A

[2] *Minister for the Environment v Sharma* [2022] FCAFC 35, 2022, at [101]. Ss 130, 133 EPBC Act

[3] https://iea.blob.core.windows.net/assets/deebef5d-0c34-4539-9d0c-10b13d840027/NetZeroby2050-ARoadmapfortheGlobalEnergySector_CORR.pdf , p.152

[4] https://docs.nopsema.gov.au/A721603

the potential degradation to the habitats of the humpback whales, whale sharks and turtle species that migrate and forage in the waters above Jupiter.[5] They have satisfied the authority that the emissions they create will be 'managed to an acceptable level' on the basis that they will 'displac[e] more carbon intensive power generation'.[6] In the balancing of 'long-term and short-term economic, environmental, social and equitable considerations' mandated by the Act, the project of breaking open the Jupiter seabed has been weighed and found acceptable.[7]

In my lecture tonight, I will argue that our current environmental laws offer an aperture for the recognition of lives threatened by climate change that is fundamentally misshapen. They are laws that take in and index the social and ecological world with a gaze that is too narrow and a temporal span that is too short to hear or give weight to the voices of the human lives made more precarious by climate instability. Nor do they attend to the rich webs of matter and meaning, time and species of which they are a part. They entrench a dangerous fantasy of heroic reason: the conceit that that is possible and desirable for one generation to weigh ontologically incommensurate concepts such as 'the economy' on one hand, and the 'environmental, social and equitable considerations' on the other, and do so justly at one moment in time, when the most grave consequences of their decisions are born by future generations. In an Australia increasingly rich with ideas and political energy for decarbonising the economy, this narrow aperture of law holds us back, and constrains the possibilities for how we might define and exercise climate responsibility on this wealthy and fossil-rich continent.

In grappling with how we might widen the aperture of environmental law, I will argue that we are aided by a sense of historical imagination. In particular, I wish to recall that the Australian state has been capable of radically widening the categories of life it legally recognises and protects in the past. I will explore three such moments tonight: the first in the early twentieth century, where a minimum wage was protected as an entitlement that was understood to be necessary for the secure reproduction of working-class life (albeit in a highly racialized and gendered context). The second is in the early 1990s, when the traditional laws and customs of indigenous titleholders were recognised by the Australian common law.

[5] https://docs.nopsema.gov.au/A721603, p.12
[6] https://docs.nopsema.gov.au/A721603 , at [63], p.22 and [57], p.21
[7] EPBC Act, s3A(a)

In tracing the preconditions for these moments of expanded recognition, my approach is necessarily an anthropocentric one, guided by the symbols and markers of value that were prized by legal actors in the past. We will spend some time lingering, in particular, on the role of houses, fences and gardens as icons of an ordered world. I will then contrast these with a third judicial encounter, the recent failed attempt of a group of Australian school children to seek legal recognition of a novel duty of care owed to them by the Minister for the Environment when making approvals for a coal mine extension under the EPBC Act. Each recognition moment I will describe was flawed, partial and impermanent. I do not offer them as blueprints. However, I will argue that their logic has relevance for us today, in their preparedness to *recognise* human communities under threat from development (to hear and see their social, political, and physical dimensions) rather than merely *manage* extraction.

In making this argument, I invite you to put to one side ideas of Australia as a 'quarry nation', inevitably condemned by its geography to extraction. It is easy enough to find evidence to support this thesis, in a polity where elected MPs have open declared 'We're in the coal business'[8]. I will instead follow Stuart Macintyre's analytic perspective on the Australian democratic state, as an entity with a twin face, 'an instrument of coercion and control that simultaneously responded to demands for social justice, expanding in responsibility with them.'[9] I speak tonight in recognition, too, of the astonishing span and prescience of the historian in whose name I give this lecture, W.K. Hancock. Throughout his long and diverse career, Hancock was consistently attuned to both the variability in senses of environmental responsibility exhibited by Australian colonists, and the high stakes of indifference to ecological limits. In 1930, he would write of Australia as a site of 'invasion', where pastoralists would 'preach, with the fervour of a tyrannical patriotism, their strange gospel of 'Australia Unlimited' as they drained the artesian waters, those 'spreading water-beds protected from the sun, more precious than rivers'.[10] His portrait of Monaro published in 1972 was introduced in terms that (gendered language aside) are not out of place in 2022: with reference to 'the anxious concern' felt by 'all thoughtful people' about

[8] 'Queensland wedded to coal and proud: Campbell Newman' *Brisbane Times*, 24 September 2014, https://www.brisbanetimes.com.au/national/queensland/queensland-wedded-to-coal-and-proud-campbell-newman-20140923-10l39c.html

[9] Stuart Macintyre, *Winners and Losers* (Oxford: Allen & Unwin, 1985). X-xi.

[10] W.K. Hancock, *Australia*, 1930, p.17.

'misuse of the land' and the fact that 'those thin envelopes of air, water and soil, without which neither men nor animals nor plants nor insects could survive, have become painfully vulnerable to the massive powers possessed by modern man'.[11] Hancock was a master of the scholarly evocation of encounter; my narrative tonight is indebted to him.

Encounter 1: a cottage in Broken Hill, 1909

When Justice Henry Bournes Higgins visited workers dwellings at Broken Hill to gather evidence for a case concerning the limits of Arbitration Court's power in settling industrial disputes, he spent some time thinking about fences and gardens. Or rather, their absence. Workers at the BHP mine, he explained in his judgment, 'have to face unbroken desert on all sides, and dun, dreary, desolate and grassless and treeless plains, with all-pervading dust and grime, with water scarce and dear and impure'.[12] The workers' houses were 'generally of galvanised iron, lined with hessian and wood – without garden or fence – without bath – hot as ovens in summer, cold in the extreme in winter.' Within these homes (he sometimes slipped into the terminology of 'iron sheds'), there was a troubling preponderance of 'tinned milk' rather than fresh; a cause, Higgins J asserted in his judgement, of 'an abnormally great infant mortality'. Of dire concern, too, was the evidence that women in these households had occasionally take in laundry work or do nursing to make ends meet; a 'pathetic fact', according to Higgins, that pointed to the fragility of the gendered division of labour, and with it the secure reproduction of the white race. Just one witness's name for the workers was recorded in the BHP judgement, a 'Mrs Mann, wife of a labourer', whose unusually high household expenditure list was, together with the uninsulated walls, tinned milk, the nursing work and absent fences and gardens, woven into a portrait of domestic, industrial and societal precarity. 'Unless great multitudes of people are to be irretrievably injured in themselves and in their families, unless society is to be perpetually in industrial unrest' a living wage was required to be paid to the male breadwinner, as 'as a thing sacrosanct, beyond the reach of bargaining', and payable 'whether an employers' profits were large or small.[13] The workers' dwelling in Broken Hill

[11] W.K. Hancock, *Discovering Monaro: A Study of Man's Impact on His Environment* (Cambridge: Cambridge University Press, 1972), p. 14.
[12] *The Barrier Branch of the Amalgamated Miners' Association of Broken Hill v The Broken Hill Proprietary Company Limited*, 1909 3 CAR 32, p.27 ('*Broken Hill')*
[13] *Broken Hill* 1909 3 CAR 32

thus stood as a kind of synecdoche for a young nation, its absent fences and gardens a troubling reminder that its future status as 'civilised', productive and prosperous was not assured.

The 'fair and reasonable' living wage had not, of course, been Higgins' idea. It had been a longstanding demand of 'monster demonstrations' since the 1890s,[14] an element of the 1891 Papal Encyclical Rerum Novarum, it had been enshrined in NZ and colonial legislatures, as well as, crucially, the Commonwealth *Tariff Act*, which required employers to pay a 'fair and reasonable wage' as condition for receiving subsidies. Essential to Higgins' judgments was not only the entrenched legal and social status of the concept, it was also a philosophical orientation the law and state power as crucial instruments for human and national progress. 'The Court was', as he would famously write, 'an attempt to substitute the use of reason for the use of economic force in disputes as to the conditions of labour, just as the private wars of Barons were in past centuries stopped under the supremacy of law, and as the duel has been stopped.'[15] This was the deliberate subordination of private power to public interest, a compliment and enhancement to the legislative measures already in place, in the *Arbitration and Conciliation Act* 1904, that wired in the recognition of collective worker voice into the machinery of wage determination and dispute resolution in the Federation.

Higgins was not an environmentalist by any modern definition. He was deeply committed to competitive industry and the 'productive' use of land through agriculture and mining. He saw the prospect of the closure of mines and mills at Broken Hill as a 'catastrophe'. However, he wrote, 'if it is a calamity that this historic mine should close down, it would be still a greater calamity that men should be underfed or degraded.' [16] BHP operations were interrupted for two years because the company wished to avoid having to pay the prescribed rate.[17] Higgins later defended the living wage against the pressure to extract coal from political authorities as high as the Prime Minister,[18] and popular commitment to the idea that the owners of coal mine should be subject to the same industrial rules that

[14] P. G. Macarthy, 'Labor and the Living Wage 1890–1910', *Australian Journal of Politics & History*, 13.1 (1967), 67–89, p. 82

[15] H.B. Higgins, 'Industrial Arbitration', *Australian Bulletin of Labour*, 27.3 (2001), 177–91 (p. 190).

[16] *Broken Hill*, p. 34.

[17] Graeme Osborne, 'Town and Company', *Labour History*, 24 (1973), 26–50 (p. 46).

[18] Marilyn Lake, '"This Great America": H. B. Higgins and Transnational Progressivism', *Australian Historical Studies*, 44.2 (2013), 172–88, p. 186

applied to unions contributed to the toppling of the Bruce government in 1929.[19] In 1930, this sense of the subordination of fossil interests to social principle was so widely held that W.K. Hancock described Australia as a place where 'manufacturers must … make economic facts conform to the idea of justice. If an industry is unable to achieve this, it must die.' [20] The living wage principle was understood as 'part of the social fabric' into the mid-century, exercising, in the assessment of a young ANU doctoral student, R. J. Hawke in 1956, an 'almost divine authority in the eyes of the Court'.[21]

Of course, it could not last, and the terms of the unravelling of the living wage principle are as instructive for us as the terms of its recognition. While political and legal opposition to the principle from employer groups was fierce and sustained (they sought a return to a 'clear, open, economic ring' in employment matters[22]), the crucial dynamic in its weakening arguably did not come from direct attack, but rather from *supplementation* of the principle with another: employer capacity to pay. In the 1930s, Industrial Courts were required to consider 'sound economic doctrine' and balance 'the favourable and adverse effects of higher wages' in calculating the minimum wage.[23] Where the working-class household had once stood as both symbol and source of societal wellbeing, it was now, a 'stakeholder', whose interests were to be calculated relative to those of others including 'the economy' itself. Something of the ontological dislocation of this shift is captured by an account of wage determination hearings following the change cited by the historian Laura Bennett:

> 'the trade union representatives were way out of their depths. They were not economists. Most of them had come out of the workshops. They had been accustomed to arguing about such items as the cost of worker's clothing, the time needed to complete a certain job, and the amount of experience required before a man became skilled in a certain industrial operation. But they could not discuss international trade balances, the incidence of tariffs,

[19] Laura Bennett, *Making Labour Law in Australia: Industrial Relations, Politics and Law* (Sydney: The Law Book Company, 1994), p. 24.
[20] Hancock, *Australia*, 1930, p. 72.
[21] R.J. Hawke, 'The Commonwealth Arbitration Court - Legal Tribunal or Economic Legislature?', *UWA Law Review*, 1956, 422–78, p. 458.
[22] David Plowman, 'Forced March: The Employers and Arbitration', in *Foundations of Arbitration: The Origins and Effects of State Compulsory Arbitration 1890-1914 (Ed. S. Macintyre and R. Mitchell)* (Oxford: Oxford University Press, 1989), pp. 135–55 (p. 251).
[23] Keith Hancock and Sue Richardson, 'Economic and Social Effects', in *A New Province for Law and Order (Ed. J. Isaac and S. Macintyre)* (Cambridge University Press, 2004), pp. 139–206 (p. 152).

> fluctuations in the stock exchange quotations or talk in terms of index figures.'[24]

This demotion of 'worker need' from sacrosanct concern to mere 'factor' persists in employment legislation today. The Fair Work Act 2009, despite its title, does not take as its object the rebalancing of power inherent to employment relationships. It rather aims to 'provide a balanced framework for cooperative and productive workplace relations', with reference to a range of ideas that are ostensibly at odds with worker recognition: 'flexibility, productivity, economic growth;.[25] A crucial shift, as we will see, that has not been unique to labour law.

Encounter 2: Garden plots in Mer, 1989.

When Justice Moynihan took evidence on the island of Mer, in the Torres Strait, in 1989, gardens and fences were also on his mind. Unlike Justice Higgins, whose declaration of the 'fair and reasonable' standard had been brought by the employer, H.V. McKay, Justice Moynihan found himself examining dwellings on Mer by virtue of an application set in motion to the High Court by the inhabitants of those structures, Eddie Koiki Mabo, James Rice, James Passi and others, who sought common law recognition of native title. Justice Moynihan was a Queensland Supreme Court judge, tasked by the High Court with hearing the evidence and determining the facts. On the 5km long and 3 km wide island he observed 'tidy house plots' and garden areas, fish traps and boundary markers, comprised of rocks and wooden fences.

Unlike the evidence taken by Higgins' at Broken Hill, the connections linking together the fences, gardens, dwellings and the intergenerational transmission of life were not the product of judicial inference. They were, rather, the subject of direct evidence provided by the people that lived there. Over 67 hearing days (on both the island and the mainland), 44 witnesses gave detailed evidence of the interrelationship of culture, belief, practice, land and work that sustained community life. Father Dave Passi, for instance, explained how the Bomai-Malo cult and laws of Malo and Christianity brought by missionaries on Darnley Island in 1871 fitted together into an integrated philosophy of being and creation.[26] The

[24] Bennett, *Making Labour Law,* p. 27.
[25] *Fair Work Act*, s3.
[26] B.A. Keon-Cohen, 'The Mabo Litigation: A Personal and Procedural Account', *Melbourne University Law Review*, 35.24 (2000)

testimony of the claimants was accompanied by parallel evidence given by an 'expert', anthropologist Jeremy Beckett. Despite some equivocations, Moynihan J's findings of fact were adequate for High Court to conclude, in Deane J's words, there was 'the clear inference ... that there was a native system under which ... all land was recognized as being in the possession of a particular individual or family group.' Brennan J recognised the 'entwinement of 'religious, cultural and economic subsistence' which 'the land provides', observing that gardening practices, in particular were a focus point for rituals and other aspects of the social fabric that was passed between generations.

As in *Harvester*, a standard that was simultaneously socially accepted and legally enshrined in Commonwealth law was crucial. In this case, the idea of racial equality entrenched by the *Racial Discrimination Act 1975*, and 'just terms' protection entrenched in the constitution. As with the recognition and protection of the 'fair and reasonable standard', the recognition of native title had long antecedents. Global struggles for decolonization and anti-segregation had predated the proposed reforms by the Bjelke-Petersen Government to repeal the *Torres Strait Islanders Act 1971* (Qld) that were the immediate impetus for the claim. Crucial, too, were memories of the 1966 Wave Hill strike, 1967 referendum and bark petition, a variety of international precedents for the recognition of native title and, critically, the 1971 Gove Land Rights case. In that decision, Blackburn J had recognised a system of customary laws, and held that the proposed Nabalco Bauxite mine would 'destroy plants, animal life, the culture of the people'. The case had only failed because he had also held that the system did not contain rights in land that could be recognised by the Australian common law.

A metanarrative of the role of law as an instrument of progress was apparent in *Mabo*, as it had been in *Harvester*. The common law was not, the High Court held, 'frozen in an age of racial discrimination…The peace and order of Australian society is built on the legal system. It can be modified to bring it into conformity with contemporary notions of justice and human rights, but it cannot be destroyed.' A notion of civility was apparent too: 'Deprivation of religious, cultural and economic substance which the land provides… made the indigenous inhabitants intruders in their own homes and mendicants for a place to live… judged by a *civilised* standard, such a law is unjust'[27].

[27] *Mabo v Queensland (No. 2)* [1992] HCA 23, [29-30], [28]

As in *Harvester*, the decision met heavy direct opposition from employer associations and companies, who mobilised aggressive political campaigns and legal appeals to attempt to overturn the decision and staunch its potency. As with the living wage, we must attend not only to such direct attacks, but also to what happened when common law recognition was translated into legislation. Section 223 of the *Native Title Act* 1993 presented a space of recognition (or, in Shaunnagh Dorsett and Shaun McVeigh's resonant phrase, a 'meeting place of laws')[28] for the communal, group [and] individual rights and interests of Aboriginal and Torres Strait Islander people in relation to land and waters.

However, at the same time, the Act entrenched an apparatus for 'managing' native title, and for rendering 'certain' its capacity to interrupt capital and processes of extraction. Potential clashes between native title rights and future developments were and are managed through what was termed, with dystopian poignancy, a 'future act' regime, that grants time-constrained and highly conditional rights to registered claimants to *negotiate* rather than veto developers' plans. The weighing and balancing of ontologically incommensurate values is central to the process. The National Native Title Tribunal must perform a calculation: to consider 'the effects of the act on registered native title rights' on the one hand, and 'the economic or other significance of the act to Australia, the State or Territory concerned' (including 'the public interest' in doing the act) on the other'.[29]

Few native title holders or applicants have attempted to use these provisions to stop developments on their traditional land and waters unconditionally. In the many thousands of Future Acts approved through the NTA between 1992 and 2009, legal scholars have found only three applications asked that developments be refused *per se*, and only one successfully:[30] a mining lease for potash over places that included sites of exceptional cultural significance to the Martu people, in a case run by highly experienced Counsel with extensive and detailed evidence.[31] In that instance, the Tribunal held that the benefits offered to the claimants – the upgrading of a road and the possibility of employment and business opportunities – were not sufficient to outweigh the substantial interference with traditional sites.

[28] Shaunnagh Dorsett and Shaun McVeigh, 'Conduct of Laws: Native Title, Responsibility, and Some Limits of Jurisdictional Thinking', *Melbourne University Law Review*, 36.2 (2012), 470–93.
[29] s39(1)(c) NTA
[30] Christopher J Sumner and Lisa Wright, 'The National Native Title Tribunal's Application of the Native Title Act in Future Act Inquiries', 2009, 37 (p. 218).
[31] Sumner and Wright, pp. 119–220.

What began, then, in *Mabo*, as an effort to recognise and protect traditional laws and customs from unjust extinguishment (in all of their routine, everyday manifestations) ended in a managerial regime. One that, like the task of industrial courts in the 1930s, was predicated on the capacity of executive decision makers to balance and weigh highly incommensurate concepts, in manner than, in practice, resulted in subordinating extraction in only the most exceptional of circumstances.

Encounter 3: Statistical life, Melbourne, 2021

There were no physical gardens, fences or dwellings inspected in the evidence provided to Bromberg J in the class action brought by Anjali Sharma and seven other school children, for the recognition of a novel duty of care owed to them (and to children who ordinarily reside in Australia) by the Minister for the Environment when making approvals under the EPBC. They were there, implicitly, in the voluminous evidence given by experts of destabilizing impacts of rising atmospheric carbon on presently inhabitable spaces, but they did not appear by name.

The children themselves were not witnesses in the case, a logical necessity given their indeterminate number and the fact that only a tiny fraction of their class are presently alive. Instead, experts in climate and Earth System science, energy and emissions modelling, epidemiology population health and actuarial accounting painted portrait after dire portrait of the destruction of life and its material preconditions in *numbers*, none of which was contested in evidence by the Minister. One million Australian children, the court was told, were expected to suffer at least one heat-stress episode serious enough to require acute care in a hospital between 2060 and 2080.[32] Excess mortality from heat was projected to be 12% in persons aged over 65 years. Bromberg J draws these and myriad other data points into a declension narrative of the nation:

> As Australian adults know their country, Australia will be lost and the world as we know it gone as well. The physical environment will be harsher, far more extreme and devastatingly brutal when angry. As for the human experience – quality of life, opportunities to partake in nature's treasures, the capacity to grow and prosper – all will be greatly diminished. Lives will be cut short. Trauma will be far more common and good health harder to hold

[32] *Sharma and others v Minister for the Environment* [2021] FCA 560 at 291

> and maintain. None of this will be the fault of nature itself. It will largely be inflicted by the inaction of this generation of adults, in what might fairly be described as the greatest inter-generational injustice ever inflicted by one generation of humans upon the next.'[33]

The claimants' reliance on the tort of negligence meant that no equivalent to the public 'fair and reasonable' standard of *Harvester* or the prohibition of racial discrimination in *Mabo* was invoked in the *Sharma* case. Bromberg's task rather, was to consider whether a duty of care in tort was to be imported into the structure of the lawful exercise of the Minister's powers under the EPBC Act. This required him to evaluate whether the posited duty was coherent, compatible, and harmonious with the structure and purpose of the statute. He found that a duty of care did arise, a finding that was overturned by the Full Bench in March this year on the basis that, among other things, the EPBC Act 'is not concerned generally with the protection of the environment. Nor is there any part of the EPBC Act that is expressly concerned with greenhouse gases, global warming or climate change'.[34]

Shifting horizons of recognition

The WA government has granted permission for the extraction of carbon tetrahydride from the Jupiter gas field in a State Agreement that runs until 2059.[35] That is nine years after the entire earth needs to be at net zero carbon emissions, and 38 years after the last date by which the IEA has said that new fossil fuel infrastructure must cease. Decommissioning of the 30 000-tonne platform and the 430 kilometres of pipeline, is not expected to commence until 2055.[36]

In that time, there will almost certainly be improvements in the capacity of regulators to reject applications for new fossil fuel projects. Decisions such as the New South Wales Land and Environment Court finding in *Gloucester Resources*

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[33] *Sharma and others v Minister for the Environment* [2021] FCA 560 at 293

[34] *Minister for the Environment v Sharma* [2022] FCAFC 35 at [101]. ss 130, 133 EPBC Act [216]-[217]

[35] *North West Gas Development (Woodside) Agreement Amendment Act 2020* (WA) (State Agreement) ratifies an agreement between the State Premier and the North West Shelf Joint Venture Parties which extends the term of the State Agreement until 31 December 2059. *North West Gas Development (Woodside) Agreement Amendment Act 2020* (WA), Clause 2(8) https://www.legislation.wa.gov.au/legislation/prod/filestore.nsf/FileURL/mrdoc_42632.htm/$FILE/North%20West%20Gas%20Development%20(Woodside)%20Agreement%20Amendment%20Act%202020%20-%20%5B00-00-00%5D.html?OpenElement

[36] https://docs.nopsema.gov.au/A721603, p.11

Ltd v Minister for Planning, which confirmed that decision-makers in NSW must consider downstream, scope 3 emissions, and reject 'market substitution' arguments, show that change is underway.

Many improvements will probably be made to the EPBC Act to improve its effectiveness in protecting nationally important environmental matters, including the implementation of the 12 key reforms recommended in the 2020 Samuel independent statutory review.[37]

Politics, at local and federal levels, will continue to shift. As well as the election of new MPs and governments, new configurations of ideology and alliance, we will also see a continuation and escalation of struggles against fossil extraction on the ground, as local communities, traditional owners, unions, environmentalists, farmers, youth organisations and others assert their right to strive toward alternative versions of prosperity that are decarbonized, decommodified and more democratic. We will be likely to see new (and familiar) political frameworks and ideas for re-embedding the economy, such as foundational economies, just transitions, co-operative and environmental justice movements continue to expand in their sophistication and reach.

Through these changes, we should continue to hold in view the narrow shape of the aperture of environmental law, for as long as it carries the shape I have sketched tonight, and think about how it structures and constrains these developments. We should remember how strange it is that our primary federal legislation protecting the environment purports to enshrine 'principles of ecologically sustainable development' and 'inter-generational equity' but does not take into account the safety of human beings and the structures and systems that offer them daily sanctuary. And that it vests power in a tiny number of people, at one moment in time, to permit major climate destabilizing events to occur on the basis of weighing and calculating considerations that are narrow and ontologically incommensurate. That accords virtually no provision for giving weight to the voices of the mass of

[37] https://epbcactreview.environment.gov.au/sites/default/files/2021-01/EPBC%20Act%20Review%20Final%20Report%20October%202020.pdf . The Samuels review rejected proposals to broaden the environmental matters the EPBC Act deals with, 'to do so would result in a muddling of responsibilities, leading to poor accountability, duplication and inefficiency… climate change is a significant and increasing threat … however, successive Cth Governments have elected to adopt specific mechanisms and laws to implement their commitments to reduce GHG emissions. The EPBC Act should not duplicate the Cth's framework for regulating emissions.' (pp.4-5).

people whose lives will be truncated by climate change, in the present or the future.

In situating such laws within a longer history of reconfigured responsibility in Australia, I have tried to convey three things.

Firstly, that Australian law, for all the resource abundance of this continent, has the capacity for self-interruption. It can and has held back mines on the basis of principles oriented to protect life in the past.

Secondly, in the encounters I've described tonight, neither *information* about the interdependence of life systems, nor *threats* of imminent destruction, nor *good ideas* for taming capital nor *social pressure* for change were enough, on their own, to restrain fossil capitalist extraction. The recognition moments that took place in *Harvester*, *Mabo* and *Sharma* were rather expressions of historical conjunctures. That is, periods, to use Stuart Hall's definition, 'during which the different social, political, economic and ideological contradictions that are at work in society come together to give it a specific and distinctive shape … any given conjuncture is never entirely stable, only more or less stable, whether due to social and political antagonisms, structural contradictions and/or present or impending crisis.'[38]

The conjunctures that made *Harvester* and *Mabo* possible included legally-enshrined public principles that were widely shared by a significant portion of society: the norm of 'a fair and reasonable wage' that was encoded in the *Tariff Act* in *Harvester*; and the unlawfulness of radical discrimination and requirement for just terms compensation in *Racial Discrimination Act* and the Constitution in *Mabo*. These laws, in turn, existed because of decades of demands and struggle by social movements. They also included a narrative of Australian law itself, as an instrument of social progress, civility and Enlightenment. It is hard to detect obvious counterparts, in terms of either public principle or narrative of the role of the law, in the *Sharma* case.

To be very clear, I am not making an argument for heroic judicial activism in the past or future. All of the judges I have mentioned here were performing a prescribed role, hearing the carefully crafted arguments of the litigants before them and adjudicating outcomes based on the interpretation of the laws passed by parliaments and the common law. What they determined, the possibilities they

[38] Hall and Massey, 'Interpreting the crisis: Doreen Massey and Stuart hall discuss ways of understanding the current crisis', *Soundings*, 44, 2010, 37-46.

perceived for the common law, was a *reflection* of the conjunctures of their times. The widening of legal frameworks in response to climate change must be the work of parliaments, not judges, responding to the demands of us, as citizens.

Thirdly, I have tried to emphasise the importance of disentangling the legal efforts at *recognition* of intergenerational obligation, and the *management* of competing interests on the other. I've tried to show that these processes may coexist and, where they do, may see acts of recognition functionally undermined and rendered politically sterile in practice. *Harvester* and *Mabo* both recognised webs of relationality that were dynamic and extended through time without limit. In *Mabo*, this span of recognition accorded weight to laws and customs relating to human relationships with non-human entities, to fish and banana trees. The potency of that recognition was palpably diminished once its subjects were reduced to 'stakeholder' status, with interests to be 'balanced' against ontologically expansive notions such as 'the national interest' and 'productivity'. This shift, from protective laws that were premised on *recognition* to processes concerned with interest *management* happened over decades in the case of *Harvester*. It happened quickly, between 1992 and 1993 in the case of *Mabo*. The EPBC, by contrast, may be understood as an Act 'born managerial', containing no element of recognition from the beginning.

So what alternatives exist?

There are no ready-to-hand prescriptions for widening the shape of the aperture of environmental law to fit a climate changed age. It is worth observing, here, that Australia has no right to a liveable or healthy environment enshrined in its Constitution, although we need only glance toward the acrimonious contests over constitutionally embedded 'rights to life' in North America to be cautious about the idea that that might provide a simple fix.

It is certain that an ensemble of legislative and potentially constitutional changes will be necessary, that include and go beyond what we presently think of as environmental law, to enable us to exercise climate responsibility commensurate with the power our fossil endowment has enabled.

What might this widened horizon aim to achieve, if not the mere management of extraction? And what should guide its shape?

Answering this question requires, foundationally, a realism about the shape of the climate catastrophe, and its profound non-similarity with the forms of

environmental destruction that loomed large in the 1970s, when the notion of 'intergenerational justice', premised on balancing different pillars of 'sustainable development' in a non-prescriptive way, that first came to global prominence in the Stockholm Convention.

It requires a preparedness to lay aside our mental habits of privileging the 'exceptional' – whether defined scientifically, historically, aesthetically – and the spatially proximate as delimiting categories for what the law should protect and recognise from environmental harm. For climate change does not cleave to these categories (nor do the other planetary boundaries being surpassed), and it will be the non-spectacular events that will be determinative in shortening and narrowing lives in this century as much as iconic ones. Instead, we must consider how our law might instead give expression to the IPCC's call to deliberately 'weaken high carbon systems' and 'encourage low carbon systems' in a deliberate and rapid way[39].

It requires laws that can hear, as well as see, the social and political dimensions of climate destruction, and allow that destruction to be registered in direct human speech, and not merely in statistics or technical measures recounted by experts. It is only through such means that the law can bridge, as the legal theorist Alain Supiot has put it, 'the world of sense and the world of the senses.'[40]

It requires us to reconsider how we classify loss and threat in terms of their quality as 'private problems' or 'public issues'. Private law instruments of tort, contract and property are and will surely prove to be inadequate tools for dealing with what will be a vast, collective (and highly unequal) experiences of de-homing and exile in an age of climate breakdown. The legal and policy instruments we choose for ordering our society in such conditions, and the extent we permit them to have a public and universal character, will have a significant bearing on our capacity to meet these challenges with co-operation, care and creativity.

Laws are required which are accessible, clear and capable of decisively prohibiting new fossil capital projects from being commenced and winding down existing ones in a timely, principled and just manner. They should be attuned to the true temporal dimensions of new fossil extractive projects and the path dependencies

[39] Pathak, Minal et al, *IPCC Intergovernmental Panel on Climate Change: Working Group III contribution to the IPCC Sixth Assessment Report (AR6): Technical Summary*, 2022, https://report.ipcc.ch/ar6wg3/pdf/IPCC_AR6_WGIII_FinalDraft_TechnicalSummary.pdf

[40] Alain Supiot, *Homo Juridicus: On the Anthropological Function of the Law,* 2017, Bloomsbury.

they set in train. Histories of technology, such as David Egerton's outstanding book *The Shock of the Old*, are invariably histories of co-existence, that reveal 'the old' (whether it be the prevalence of coal as an energy source in 2022 or the record number of horses used for military purposes in the second world war) tends to stick around for much longer than we think. [41] Projects such as Scarborough are not 'bridge fuel' initiatives, that politely span neat historical eras between coal and renewables, willingly dismantling themselves at some anointed moment of green energy 'arrival'. They are long-term, heavy infrastructures of extraction. That are designed, constructed and financed to extract carbon tetrahydride from the seabed for profit until there is none left. They are indifferent to the presence or absence of solar panels on the shore.

A widened horizon of law, appropriately framed, would foster and strengthen grassroots movements of all kinds seeking to subordinate the economy to society, and potentially ease some of the impossible burdens of expectation currently placed on the shoulders of traditional owner groups and workers in different industries who, as well as trying to build power and struggle for their own communities, are currently expected to save the planet as well. While many members of these groups willingly embrace these aims, it is unfair and unrealistic to expect groups to do so with perfect political unanimity, or as agents of people they have never met.

To quote children's statement of claim in the *Sharma* case, 'today's adults have gained both previously unimaginable power to harm tomorrow's adults, and the ability to control that harm. The applicants seek the aid of the Court to impose a correlative responsibility to protect them from what they say is a serious threat of irreversible future harm.' This demand is surely sound. However, courts cannot assist them for as long as our legal frameworks are not equipped to recognise and protect the conditions of life. It is up to us to use it to insist on laws, made by parliaments, that ensure that the Jupiter gasfield is regulated as a place that is on Earth.

The logic underpinning *Harvester* and *Mabo*, the conscious subordination of the interests of industry to the protection of life through law, has much to offer us in widening our imagination for our current predicament. The lives the law recognises should not have to meet anything like the prescriptive, racist and patriarchal standards imposed by Higgins J. Nor could they possibly conform to the traditional laws and customs of the Meriam people. Homes need not have

[41] David Edgerton, *The Shock of the Old: Technology and Global History Since 1900*, Oxford University Press, 2007.

fences and private gardens to merit protection. But it is within our reach to craft laws that recognise the imperative that humans have of spaces of sanctuary, where minds and bodies may be renewed and selves developed and nurtured within a common social world. Australian law has shown the capability of recognizing such claims as entitlements in the past, and it may do so again.