

REBALANCING RIGHTS

**Communities,
corporations
& nature**

Contents

Rebalancing Rights <i>Tim Hollo</i>	1
Rights of Nature, Earth democracy and the future of environmental governance <i>Michelle Maloney</i>	11
Property Rights, Corporate Personhood and Nature <i>John Quiggin</i>	25
Suppression of the right to protest <i>Nicola Paris</i>	35
The right to advocate and protest is at the core of our democracy <i>Joan Staples</i>	49
Re-imagining the future of corporate governance in Australia <i>Warren Staples and Andrew Linden</i>	57
The divine right of capital in Australia today –corporations, community interests, the body politic and the natural environment <i>Howard Pender</i>	66
Emancipation in the Anthropocene <i>Peter Burdon</i>	76
Balginjirr “A Special Place on our Home River Country”! <i>Anne Poelina</i>	85

Rebalancing rights: Communities, corporations and nature

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Rebalancing Rights

Article 1.

- (1) Mother Earth is an indivisible, self-regulating community of interrelated beings each of whom is defined by its relationships within this community...
- (2) These fundamental rights, freedoms and duties are inherent to all beings, consequently they are inalienable, cannot be abolished by law...
- (5) The rights of each being are limited by the rights of other beings to the extent necessary to maintain the integrity, balance and health of the communities within which it exists.

Article 3.

Every being has:

- (a) the right to exist;
- (b) the right to habitat or a place to be;
- (e) the right to be free from pollution...; and
- (f) the freedom to relate to other beings and to participate in communities of beings in accordance with its nature.

These words are from the Draft Universal Declaration of the Rights of Mother Earth,¹ a draft which emerged from the Cochabamba World Conference on Climate Change and the Rights of Mother Earth, in 2010. They are closely associated with Bolivian President Evo Morales and the powerful blend of socialist, environmental and indigenous politics known as *buen vivir*, which he is a key figure in.

¹ *Draft Universal Declaration of the Rights of Nature*, published by the International Union for the Conservation of Nature, 24 May 2010, <https://www.iucn.org/content/draft-universal-declaration-rights-mother-earth>



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The Guardian, ABC Online, Crikey, The Huffington Post and elsewhere.

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The Draft Declaration takes the ecological view, which understands humans as part of nature, and therefore the rights are intertwined and self-reinforcing rather than competing.

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At the heart of this vision of the world is the recognition is that our world has been pushed utterly out of balance. And it is balance—and rebalancing—that is the subject of this collection.

This collection began its life as exploration of the concept of Rights of Nature. In early research and conversations it swiftly became clear that it would be worthwhile setting this concept into the broader context of the suppression of human rights and civil and political rights. As it was frequently put to me, there is little point establishing a new set of rights if existing rights are not being honoured. Worse, given ongoing anti-environmental framing, it could set up a counterproductive contest, with the new rights for nature being portrayed as subjugating human rights even further. The Draft Declaration takes the ecological view, which understands humans as part of nature, and therefore the rights are intertwined and self-reinforcing rather than competing. However, existing systems and structures of power will need to be re-imagined in order to make this ecological view a reality.

That is how the collection became “Rebalancing Rights: communities, corporations and nature.”

The Draft Declaration did not, of course, spring from nowhere. It is a key element of a global push that has been going on for some decades now, to enshrine in law and in our institutions, rights for nature.

I first came across the concept of Rights of Nature in my legal studies in the 1990s, through a 1972 article by Professor Christopher Stone called “Should Trees Have Standing?”² The paper challenged the idea that the natural world, that trees, should be treated as objects only in the eyes of the law—as property. Stone’s

² Christopher Stone, “Should Trees Have Standing? Towards Legal Rights For Natural Objects”, (1972) 45 *Southern California Law Review* 450.

work did not explicitly draw on indigenous legal systems, but that is the ancient tradition that his ideas form part of. And it's in that space where much of the progress in the decades since has taken place. You can find it in the adoption of new constitutions by Bolivia and Ecuador which, in institutionalising *buen vivir*-based states, enshrine rights for the natural world. You can see it in the granting of legal rights to river systems in New Zealand and India, to be implemented through the voices of Indigenous peoples.³

This progress is inspiring and fascinating. It prefigures a new and better way of governing in common, for the common good—the common good of all people, of course, but also of the natural world which we are part of, and indivisible from.

But how much would change if we adopted a Rights of Nature framework right now? What would be different if the Draft Declaration became international law and was reflected in domestic laws?

Let me start to answer that question by quoting from one of the most famous United Nations Declarations of all—the Universal Declaration of Human Rights,⁴ adopted in 1948:

- Article 1. All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.
- Article 2. Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
- Article 5. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
- Article 7. All are equal before the law and are entitled without any discrimination to equal protection of the law.
- Article 14. (1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.
- Article 20. (1) Everyone has the right to freedom of peaceful assembly and association.
- Article 21. (1) Everyone has the right to take part in the government of his or her country, directly or through freely chosen representatives.

³ See, for example, Eleanor Ainge Roy, "New Zealand river granted same legal rights as human being", *The Guardian*, 16 March 2017.

⁴ The declaration can be found in full at <http://www.un.org/en/universal-declaration-human-rights/>

These rights exist. They have been written into law, internationally 70 years ago, and, through large parts of the world, domestically. But are they honoured?

Australia's abrogation of the right to seek asylum, and our effective torture of asylum seekers in the prison camps on Manus and Nauru, are among the most blatant ways in which we breach this most fundamental declaration of rights. What about equality before the law and non-discrimination based on race, colour, sex, property? Freedom of assembly? Taking part in government? Access to justice?

Let me simply mention:

- racial profiling of Indigenous people, or people of Middle Eastern appearance, by police forces;
- the ongoing gender pay gap, effectively supported by government policy from tax to super and beyond;
- governments chasing Centrelink debt with far greater gusto than they chase corporate tax avoidance;
- a court system which gives far greater access to those with financial resources than those without, aided and abetted by cut after cut to Legal Aid and Aboriginal Legal Services;
- the access corporations and their lobbyists have to politicians which massively outweighs access by citizens and constituents;
- the negotiation of major international trade deals such as the Trans Pacific Partnership, by corporations for corporations, behind closed doors, and including in them such provisions as Investor State Dispute Resolution, which allows corporations to sue governments when citizens can't;
- threats to deregister unions for small misdemeanours while backing corporate regulators with no teeth and clearly no interest in calling corporations to account; and
- the whittling away of the right to dissent, delegitimising and criminalising protest, by governments Labor and Liberal, state and federal.

I'm sure every reader can add to this list with examples of your own.

How and why is this the case, when human rights are enshrined in international law?

There are many reasons, proximate and distant, but the heart of it is because our system is utterly out of balance. Because we are living in the age of the divine right of corporations.

And it is worth being very clear about the fact that this is directly connected not just to those examples where corporate interest trumps public interest, but also to those examples we might characterise as prejudice. Prejudice always exists, yes. But those in power always use it to their benefit. Divide and conquer is central to the way they maintain their dominance, misdirecting community anger by encouraging people to punch down instead of up.

In our unbalanced system, the rights of corporations trump all others. The right to make a profit outweighs human rights and civil and political rights, and nature has no rights at all.

This, as it became clear in the early conversations towards this collection, is the crux of the argument for Rights of Nature—an argument which is very exciting and positive. Simply legislating those rights is insufficient. We need to change the system that has led them to be ignored, otherwise they will continue to be sidelined or end up being pitted against human and civil and political rights.

This is what I conceptualise as “Rebalancing Rights”.

The collection takes this question and examines it from several directions, with contributions from some of Australia’s leading thinkers and practitioners in their fields. We have three contributions examining the question of Rights of Nature itself, two setting out the recent suppression of civil and political rights, and three examining ways in which corporations have come to dominate our society and politics and how to pull back their power. This is by no means a comprehensive examination of either the extent of the problems or the range of solutions, but it is by way of a challenge to our political discourse—that we must seek to build a system where human rights and Rights of Nature are the prime directives, if you will, and corporations exist to support those, not in competition with them.

Central to this task is to pull back the power of corporations in order to create space for rights for humans and nature. Let’s look at some ideas.

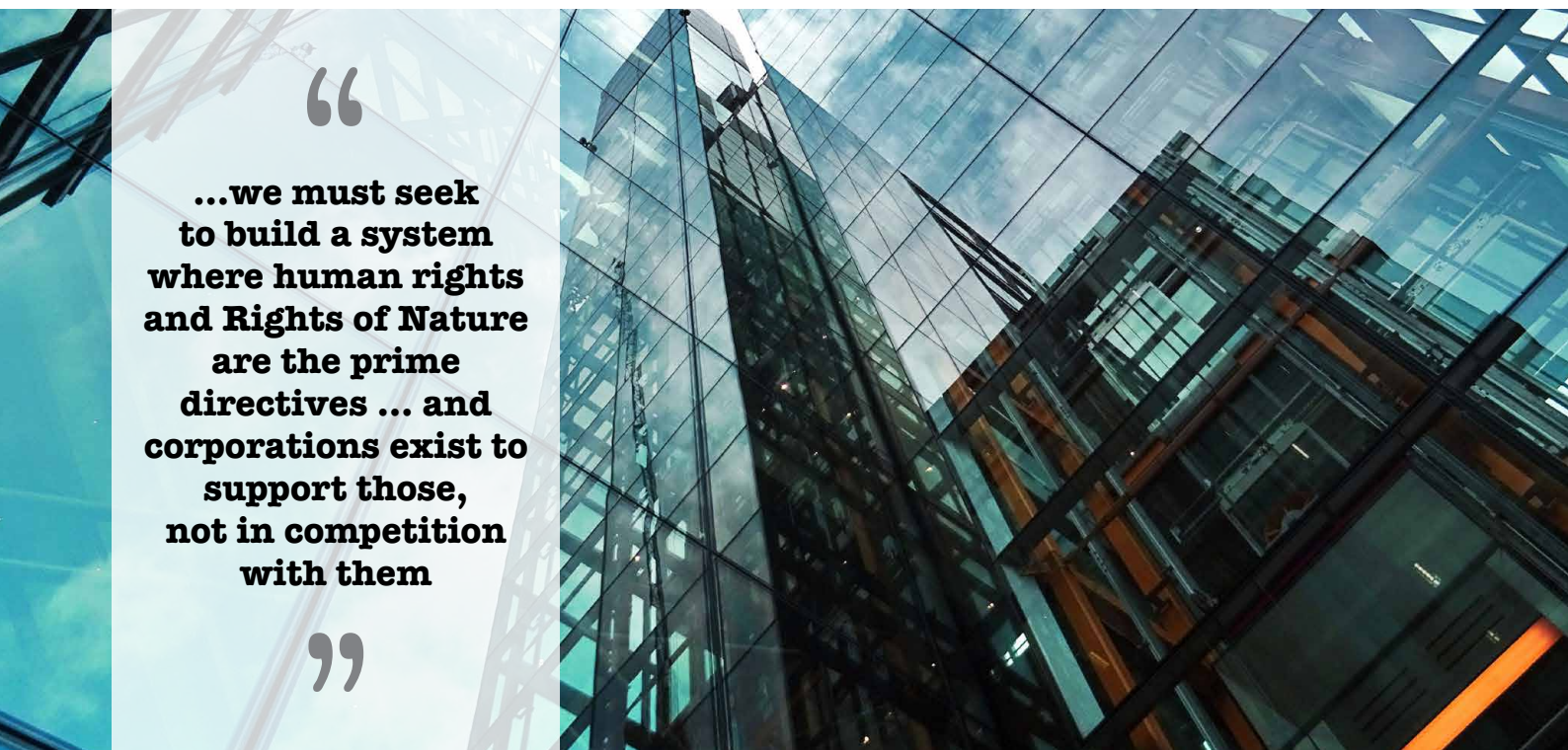


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**Declarations now
are required for
donations over**

The obvious ones are donations reform, lobbyist reform, and a federal anti-corruption commission with real teeth. These are all mechanisms to challenge and hopefully at least loosen the explicit stranglehold of corporations over government decision-making. Corporate donations to political parties, representatives and campaigns should simply be illegal, individual donations should be capped at a low level, and the revolving door between politicians, senior advisers and lobbyists needs to be firmly closed. Any system which allows those with more money to pay for greater access to decision-makers, or is based on who you know, is fundamentally corrupting.

The human rights principles of access to justice, to decision-makers and to public service, and of equality before the law, the need for balance, demand that we act on these.

Next, brought into the forefront of Australia's political debate by the banking royal commission, is the fact that corporate regulation in this country is mostly a gentle slap with a piece of wet lettuce or, at worst, a wink and a nod and a quiet handshake. ASIC, which consistently fails to prosecute corporations for wrongdoing, needs to have its regulatory powers handed to the ACCC. But we need a root and branch review of how corporations are regulated, and what is to be done when they breach their legal obligations. Again, human rights principles require equality before the law. When corporations and the rich can breach the law and get away with it, while the poor, the Indigenous people of this land, those with less deep pockets, get the book thrown at them, we are hugely out of balance.

Another idea which is building a new political head of steam, thanks to the collapse of faith in trickle down economics, is to tax corporations fairly. Hugely profitable corporations should pay more tax, and we must close the massive loopholes that enable one in three of the largest corporations operating in Australia to pay no tax at all.⁵ Corporations rely on the community, on a healthy environment, and on government, for their existence, let alone their profit. Balance requires that they contribute their fair share.

A proposal which is starting to be discussed is to not just stop, but begin to reverse, privatisation of government services. Privatisation is unpopular and lines private pockets instead of servicing public needs, but it can be argued that it is also in breach of the human rights principle of the right of all citizens to take part in government. Government—or community, cooperative—delivery of public services enables citizens to take active part, while privatisation shuts them out. By definition.

Employment and social services, schools, electricity, water, transport, hospitals and primary health care: these are public goods and should not be provided for profit. An important differentiation I've made between standard socialism and ecological democracy⁶ is that they don't necessarily need to be provided by centralised government, either. They can be effectively delivered by community or cooperative ownership and management. These are equally viable, and in some cases, more effective, ways of meeting

5 Nassim Khadem, Jackson Gothe-Snape and Peter Ryan, "One-third of large Australian companies paid no tax, ATO data show", *ABC News*, 14 December 2018. <https://www.abc.net.au/news/2018-12-13/one-third-of-australian-companies-paid-no-tax-ato/10614916>

6 Tim Hollo, "Towards Ecological Democracy", *Green Agenda*, 28 April 2018. <https://greenagenda.org.au/2018/04/towards-ecological-democracy/>

that obligation to enable citizens to take part, and can and should be encouraged and supported by government policy.

A related area which is starting to be seriously considered is to hand the community and employees a stake in ownership and control of major corporations. When a board is made up entirely of business people, usually rich white men, focussed entirely on increasing shareholder returns, and when the shareholders are there only to seek profit, it's no surprise that social and environmental obligations are sidelined or deliberately circumvented. The UK's Shadow Chancellor, John McDonnell, has recently announced a policy to require all corporations that employ more than 250 people to gradually transfer 10% of their shares into an "inclusive ownership fund", managed by employees cooperatively.⁷ This effectively makes all large corporations at least 10% cooperative, gives workers dividends for their work, and makes employee groups effectively institutional shareholders able to drive change in governance in the companies they work for. McDonnell has also raised requiring worker representation on boards, as has the ACTU here in Australia,⁸ and US Senator Elizabeth Warren.⁹

These big ideas aren't silver bullets, and they may not be perfect. But democratising corporate ownership and control must be part of rebalancing rights. These ideas, among others, are explored in this collection in the excellent contributions from Warren Staples and Andrew Linden, and Howard Pender.

An idea currently at the margins is divestiture, harking back to the anti-trust laws of the late 19th and early 20th centuries—actively breaking up corporations that are too big. "Too big to fail" means too big to operate independently of the political system. It effectively guarantees the privatising of profit and socialising of risk. It guarantees inappropriate power concentrated in too few hands. The Greens have raised this in the context of banks¹⁰ and media companies, both areas where recent governments have undone long-standing regulation limiting size and market reach. Enabling private profit to trump the public interest in this way is fundamentally unbalanced.

Now the corker—the central challenge. Corporations are given the privilege of limited liability and legal personhood and there must be a quid pro quo for those privileges. Combining them with a single-minded focus on the profit motive is the complete opposite of quid pro quo—it is a recipe for disaster. It rewards selfishness, punishes sharing and cooperation, and dismisses any stewardship responsibilities—to other humans and to the natural world. It is fundamentally at odds with any conception of human rights, civil and political rights, and rights of nature.

7 Rajeev Syal, "Employees to be handed stake in firms under Labour plan", *The Guardian*, 24 September 2018. <https://www.theguardian.com/politics/2018/sep/23/labour-private-sector-employee-ownership-plan-john-mcdonnell>

8 David Marin-Guzman, "ACTU to pressure Labor for worker representatives on private boards", *Australian Financial Review*, 18 July 2018. <https://www.afr.com/news/policy/industrial-relations/actu-to-pressure-labor-for-worker-representatives-on-private-boards-20180718-h12udh>

9 Matthew Yglesias, "Elizabeth Warren has a plan to save capitalism", *Vox*, 15 August 2018. <https://www.vox.com/2018/8/15/17683022/elizabeth-warren-accountable-capitalism-corporations>

10 Australian Greens, *Break Up The Banks*, policy summary, <https://greens.org.au/banks>

Vox's Matthew Yglesias explores the depth of this neoliberal capitalist system in summarising the Milton Friedman's thoughts from a 1970 article, "The Social Responsibility of Business is to Increase its Profits":

[F]or executives to set aside shareholder profits in pursuit of some other goal like environmental protection, racial justice, community stability, or simple common decency would be a form of theft. If reformulating your product to be more addictive or less healthy increases sales, then it's not only permissible but actually required to do so. If closing a profitable plant and outsourcing the work to a low-wage country could make your company even more profitable, then it's the right thing to do. Friedman allows that executives are obligated to follow the law—an important caveat—establishing a conceptual framework in which policy goals should be pursued by the government, while businesses pursue the prime business directive of profitability. One important real-world complication that Friedman's article largely neglects is that business lobbying does a great deal to determine what the laws are. It's all well and good, in other words, to say that businesses should follow the rules and leave worrying about environmental externalities up to the regulators. But in reality, polluting companies invest heavily in making sure that regulators underregulate—and it seems to follow from the doctrine of shareholder supremacy that if lobbying to create bad laws is profitable for shareholders, corporate executives are required to do it.¹¹

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... If reformulating your product to be more addictive or less healthy increases sales, then it's not only permissible but actually required to do so...

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Photo: Irina Iriser, Belarus [CC BY 0] via Pexels

11 Matthew Yglesias, "Elizabeth Warren has a plan to save capitalism", Vox, 15 August 2018. <https://www.vox.com/2018/8/15/17683022/elizabeth-warren-accountable-capitalism-corporations>

If corporations are to be treated as legal persons, then they must be required to act more fully as persons, rather than purely selfish sociopaths. This concept is explored in the contributions in this collection from Warren and Staples, Pender, and John Quiggin.

While there have long been alternative models available, such as not-for-profits, B corps, and cooperatives, the problem lies not with those who want to behave appropriately, but with those who don't. Elizabeth Warren's *Accountable Capitalism Bill*¹² is the first major proposal I have ever seen to regulate this in a generation or more, based on the principle that the right to legal personhood carries the moral obligations of personhood. The centrepiece of Warren's bill would require any corporation with annual revenue over \$1 billion or over to "obtain a federal charter of corporate citizenship". This charter requires them, at law, to act in the interests not just of shareholders but of all relevant stakeholders, including customers, employees and the communities in which they operate. There's a lot of detail still to be put on these bones, but the fact that this has been raised by a serious US Presidential candidate is very promising. By ensuring that corporations, by design, serve the community and the natural world, we can balance the system.

Rebalancing, of course, will require not simply reining in corporations, but actively supporting civil and political rights, as well as building Rights of Nature.

It is stark that Australia was one of the leading countries in the development and adoption of the Universal Declaration of Human Rights, yet we have no domestic Bill of Rights of our own at the national level. Our High Court has read implied rights into our constitution, and various states and territories have human rights acts, but Australia is the only OECD nation not to have a national Bill of Rights. In that context, it is astonishing that we aren't in a worse situation than we are.

My view is that we should develop a Bill of Rights through a national participatory, deliberative process, involving all Australians. Taking part in government is a fundamental human right, and participatory democracy is the deepest way of doing so. Rebalancing rights is not just getting corporations out of government decision-making, but also bringing the people back in. What better space to practice that than in developing a Bill of Rights?

Of course, direct participatory democratic practices aren't the only way to take part in decision-making. The right to dissent, advocacy and protest is also vital. As part of rebalancing rights, we need not only to stop the crushing of civil society by governments but actively work to support it. Joan Staples and Nicola Paris in this collection explore the suppression of civil society, NGOs, advocacy and protest by a series of governments, and set out critical paths to re-establishing the right of citizens to take part in and influence political debate.

12 Matthew Yglesias, "Elizabeth Warren has a plan to save capitalism", *Vox*, 15 August 2018. <https://www.vox.com/2018/8/15/17683022/elizabeth-warren-accountable-capitalism-corporations>

The development of a Bill of Rights provides an exciting opportunity to enshrine Rights of Nature in Australian law. What those rights should be, and how they are to be implemented will be critical questions for any democratic process tasked with drafting the bill.

For instance, who will be the Lorax who will speak for the trees? Indigenous leadership in this will be vital, of course, but it can't and shouldn't be solely their responsibility to shoulder. We need to learn from Indigenous wisdom and governance, and bring it into our system in new ways. Should natural systems be granted legal personhood? Would that mean they had obligations as well as rights? How would different natural systems legally interact with each other? Who decides how to balance their rights, and weigh them against human rights?

This collection includes contributions from three of the leading voices in this field in Australia, if not the world. Dr Michelle Maloney, founder of the Australian Earth Laws Alliance, takes us through the fundamentals of Rights of Nature: what the laws might look like, where they have been adopted, and what issues they have confronted in development and implementation. Dr Peter Burdon challenges us to consider deeper philosophical questions of governance in the anthropocene, acknowledging the way humans have already irrevocably altered the natural world we are part of. And Dr Anne Poelina, Chair of the Martuwarra Fitzroy River Council and a Nyikina Warrwa Traditional Custodian, has contributed a prose poem which takes us through the concepts from an Indigenous perspective.

Together, these eight contributions present a clear picture of a world out of balance, an outline of how it became so, and a range of recommendations for how to rebalance it by ensuring that corporations serve the interests of human society and the natural world we are part of, and that we humans come to recognise and cherish our place as part of the wonderful, diverse, interconnected natural world.

A final observation on Rebalancing Rights: there has long been a critique of rights frameworks that they are a problematically individualistic way of seeing the world, but it is my contention that a Rights of Nature approach can challenge that view. Our adversarial system allows us only to see how rights and rights-holders compete with each other. But in the natural world, healthy competition is intertwined with healthy cooperation. One of the great co-benefits of rebalancing our rights would be the recognition that rights can, in fact, be held and exercised in common, for the common good, rather than simplistically as competitive individuals.

And that would be balance.

Rights of Nature, Earth democracy and the future of environmental governance

Around the world, people are working hard to protect their local communities and local ecosystems from the destructive impacts of excessive industrial developments. One strategy that is receiving growing attention is changing the legal status of nature from being human property or, at best, a protected 'object', to being recognised as a living entity with its own legal rights—a subject of the law. But can this approach make any difference to the legal protection of nature?

In this essay, I'll outline criticisms of traditional environmental law that are used to argue that a paradigm shift is needed in western industrial legal systems and trace the origins of the Rights of Nature movement and the developments around the world that have now seen the Rights of Nature shift from being a "fringe" legal issue, to one that is capturing the imagination of courts, lawyers and communities around the world. While the concept is potentially open to many of the same problems faced by 'traditional' environmental law, it also represents an exciting and optimistic development in legal theory and practice that is being embraced by a range of communities, and can offer an effective way to advocate for Earth democracy.



Dr Michelle Maloney has a Bachelor of Arts and Law (Hons) from the Australian National University and a PhD in Law from Griffith University, Australia. She has more than 25 years' experience creating and managing social justice, community development and ecological justice programs, including ten years working with First Nations Peoples in Queensland, on social justice and cultural heritage projects. As Co-Founder and National Convenor of the Australian Earth Laws Alliance (AELA), Michelle manages the strategic direction and governance of AELA, including the extensive partnerships and networks that AELA has with the legal, academic, indigenous and environmental advocacy communities. Michelle also designs and manages AELA programs and events, including AELA's Rights of Nature Tribunals.

Michelle has written a dozen articles and edited two books about Earth jurisprudence and wild law—*"Wild Law in Practice"* (2014) and *"Law as if Earth Really Mattered: The Wild Law Judgments Project"* (2017), both with Routledge. She teaches an annual Earth Laws subject at Griffith University Law School.

Michelle is the Australian representative on the Executive Committee of the [Global Alliance for the Rights of Nature](#), a member of the Steering Group of ELGA, the [Ecological Law and Governance Association](#) and is co-founder and Steering Group member of the [New Economy Network Australia \(NENA\)](#).

Criticisms of traditional environmental law

Despite the important gains won by modern environmental law, the current system has been criticised by both ‘traditional’ environmental lawyers and commentators and those who identify as ‘Earth jurists’. Thomas Linzey, Founder of the Community Environmental Legal Defense Fund (CELDF) notes that: “environmental laws simply ‘permit’ environmental pollution” and the only thing ‘managed’ by environmental law, are environmentalists, as governments and corporations collude to control the use of the environment and public resources to perpetuate benefits for vested interests.¹ Legal writers like Joseph Guth have provided comprehensive critiques of environmental law, claiming it is incapable of calculating or ‘managing’ the cumulative impacts of human activities and the reality of ecological limits.²

From an Earth jurisprudence perspective, the inadequacies of modern environmental law run much deeper than just the legal tools and frameworks that are commonly used. The problems stem from the dominant cultural world views that shape the legal system in the first place. Despite the scientifically-based, observable patterns of an evolutionary process creating a complex and interrelated universe, the themes of alienation, separation and mechanisation resulting from the 17th century Renaissance writings of René Descartes, Francis Bacon, and Isaac Newton continue to be the basis for the dominant Western worldview within most academic, economic, legal and religious institutions.³ This linear, dualistic world view places humanity outside the natural functioning of the Earth community, and often teaches an anthropocentrism that ignores the intrinsic value of other beings. Humanity is perceived as somehow “outside” of nature, and not accountable to nature’s laws and functions. Even though humanity’s wellbeing is utterly dependent on the healthy functioning of Earth’s basic systems such as a clean atmosphere and dynamic microbes in the soil, major Western institutions seldom consider these Earth dynamics as a primary source and maintainer of life forces. Legal structures and governance are equally inadequate in recognizing that the primary law giver is Earth itself.⁴

Situating the Rights of Nature within the Earth jurisprudence movement

Earth jurisprudence

Deep ecologist, ‘geologist’ and Earth scholar, Thomas Berry⁵ (1914–2009) proposed in 1999, in his book *The Great Work: Our Way Into the Future*, that the challenge for humanity is to understand the underlying, systemic reasons for the ecological crisis, and to transform our relationship with the natural world from one of destruction, to one of mutually beneficial support.⁶ He suggests that acting ethically and living within

1 Thomas Linzey, www.celdf.org or his paper to the Schumacher Society, 2004.

2 Joseph H. Guth, ‘Law for the Ecological Age’ (2008) 9 *Vermont Journal of Environmental Law* 431.

3 Cormac Cullinan, *Wild Law: A Manifesto for Earth Justice*, Chelsea Green, 2011, 44–46.

4 Thomas Berry, *Evening thoughts: Reflecting on Earth as sacred community*, University of California Press, 2006, 110.

5 Berry often described himself as a “Geologist” as he studied the Earth rather than theology. See Cormac Cullinan, above n 3, 21.

6 Thomas Berry, *The Great Work: Our Way into the Future*, Harmony/Bell Tower, 1999, 7.



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Earth’s natural capacities requires that we look to a new jurisprudence, a new way of governing ourselves for the challenges and possibilities of the 21st century so as to protect the integrity of Earth systems
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Photo: Mali Maeder, Freiburg, Germany, www.nacasa.de [CC BY 0]

Earth’s natural capacities requires that we look to a new jurisprudence, a new way of governing ourselves for the challenges and possibilities of the 21st century so as to protect the integrity of Earth systems.⁷

Berry proposes that the primary cause of the ecological crisis is anthropocentrism—a belief by people in the industrialised world that we are somehow separate from, and more important than, the rest of the natural world.⁸ Berry argues that this anthropocentric world view underpins all the governance structures of contemporary industrial society—economics, education, religion, law—and has fostered the belief that the natural world is merely a collection of objects for human use.⁹ He elaborated that the “Great Work before us, the task of moving modern industrial civilization from its present devastating influence on the Earth to a more benign mode of presence”¹⁰ requires current governance structures and laws to recognise the cosmological origins of the human species and its interdependent, interconnected place within the single, comprehensive Earth community.¹¹ The lack of respect for the health of the Earth is interrupting the vital evolutionary processes that the Earth community is actively engaged in.¹² He noted

7 Ibid, 161.

8 Ibid, 182.

9 Ibid, 4.

10 Berry, above n 6, 7.

11 Ibid, 163; 4–5.

12 Ibid, 5.

that despite extensive scientific knowledge, industrial societies continued to live within a false dualism that teaches us that humanity is separate and apart from the rest of the natural world.¹³ This dualism has enabled the creation of environmental laws that do not adequately protect nature nor prohibit significant environmental harm being done.

Berry laid the foundation for an Earth jurisprudence at a conference held in Arlie, Virginia in 2001, which was attended by deep ecologists, lawyers and Earth advocates. Berry said that “Earth needs a new jurisprudence” and the term ‘Earth jurisprudence’ was coined.¹⁴ He also presented his original paper on “The Origin, Differentiation and Role of Rights.”¹⁵ That paper built upon the land ethic articulated by Aldo Leopold,¹⁶ the deep ecology writings of George Sessions and Arne Naess,¹⁷ and the legal pioneering work of Christopher Stone who asked the provocative question in 1975, “Should trees have (legal) standing?”¹⁸

Berry stated that: “(E)very component of the Earth Community has three rights: the right to be, the right to habitat, and the right to fulfil its role in the ever-renewing processes of the Earth Community.”¹⁹ He stated that these rights “originate where existence originates. That which determines existence determines rights.”²⁰ Thus existence and the laws of the emerging universe, of Earth’s functions, are the highest laws, and human-made laws need to be in alignment with them. Not only governance but all human institutions need to operate in coherence with the laws and relationships already embedded within the natural world.

Berry wrote “The Great Work” after already completing an important foundational building block for the field of Earth jurisprudence. In 1992 he published a book called ‘The Universe Story’²¹ with mathematical cosmologist Brian Swimme. In this book, Swimme and Berry created a new, science-based cosmology, that used current scientific understandings of the emergence and functioning of the universe and planet Earth to remind humanity about Earth’s wider, interconnected system of life and our humble place in it. They proposed that the Universe Story should be a source of inspiration and guidance for humanity in the 21st century and beyond.

Earth jurisprudence then, is an emerging theory of law and governance that requires a radical rethinking of humanity’s place in the world, to acknowledge the history and origins of the universe as a guide to

13 Ibid, 137.

14 Cullinan, above n 3, 11.

15 Cullinan, above n 3, 103.

16 Aldo Leopold, *A Sand County Almanac*, Oxford University Press, 1949, 201.

17 Arne Naess and George Sessions, Foundation for Deep Ecology, <http://www.deepecology.org/>

18 Christopher Stone, *Should trees have standing? Law, Morality, and the Environment*, Oxford University Press, 3rd Ed. 2010.

19 Cullinan, above n 3, 103.

20 Ibid.

21 Brian Swimme and Thomas Berry, *The Universe Story: From the primordial flaring forth to the Ecozoic Era—A celebration of the unfolding cosmos*, HarperOne, 1992.

humanity and to see our place as one of many interconnected members of the Earth community.²² By ‘Earth community’ Berry refers to all human and ‘other than human’ life forms and components of the planet—animals, plants, rivers, mountains, rocks, the atmosphere—our entire Earth.²³ Berry and the broader Earth jurisprudence movement acknowledge the inspiration and guidance that Indigenous cultures and Indigenous wisdom can provide to industrialised societies and the development of Earth jurisprudence.²⁴

As noted, Berry built on the work of many great writers and thinkers. Indeed, many of the key elements of Earth jurisprudence and eco-centrism have long been debated in environmental philosophy and human ecology, and eco-centrism in the law has been explored by many writers, including Christopher Stone,²⁵ Roderick Nash²⁶ and Klaus Bosselmann.²⁷ However the 21st century has seen Berry’s work—and the work of many people inspired by him, including Cormac Cullinan, Peter Burdon, and many others—translated into action, through law reform and community based, Earth democracy campaigns.



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Photo: Mali Maeder, Freiburg, Germany, www.nacasa.de [CC BY 0]

²² Ibid.

²³ Berry, above n 6, 125

²⁴ Ibid.

²⁵ Christopher Stone, above n 18.

²⁶ Roderick Frazier Nash, *The Rights of Nature: A History of Environmental Ethics*, University of Wisconsin Press, 1989.

²⁷ Klaus Bosselmann, *Governing the global commons: The ecocentric approach to International Environmental Law*, in *Droit De L’Environnement Et Développement Durable*, Limoge, 1994.

Rights of Nature as one element of Earth jurisprudence

Earth jurisprudence offers a rich body of literature, but for the sake of this essay, and for brevity, it can be described as having four key elements:

First, Earth jurisprudence acknowledges that the universe is the primary lawgiver. In contrast to the current western legal system which sees human laws as the highest authority for human society (and implicitly, for all other life forms and ecological systems), Earth jurisprudence sees the laws of the universe, the 'Great Jurisprudence' or 'Great Law', as providing the fundamental parameters of the Earth Community, including human societies.²⁸ This then sees Earth jurisprudence as explicitly advocating for an idea of human societies living within the 'rules' or limits of the natural world.

Second, Earth jurisprudence sees the Earth as an interconnected community and argues for a relationship-based existence between humanity and the rest of the Earth Community. This contrasts with the current western legal view that creates relationships between people, and between people and corporations, through constructs like property law, but commodifies and exploits all other aspects of the natural world.²⁹ By framing the natural world as a community, Earth jurisprudence imposes greater constraints on humanity's actions than our current legal system does. By claiming that 'the primary concern of the human community must be the preservation of the comprehensive community', Berry argued for a human world that works to ensure that all members of the Earth Community can thrive and continue their evolutionary journey.³⁰

Third, many advocates of Earth jurisprudence have argued that the Earth Community and all the beings that constitute it have 'rights', including the right to exist, to habitat or a place to be, and to participate in the evolution of the Earth Community.³¹ Berry argued that "nature's rights should be the central issue in any ... discussion of the legal context of our society".³² This view contrasts with the current western legal system, which grants rights only to humans and selected human constructs such as corporations. Granting rights to nature is a radical rethinking of the role of our anthropocentric legal system, and yet the idea appears to be taking hold in many jurisdictions, as outlined below.

Berry distinguishes these Rights of Nature from other legal rights by saying they are "analogous": that is, these rights are already existent; they are not created by human law but rather are created by the very act of the universe bringing forth its evolutionary processes. These rights of nature come from the same source as human rights: the universe itself. Therefore it is the work of Earth jurisprudence to develop and

28 Peter Burdon, The Great Jurisprudence, in P Burdon (Ed), *Exploring Wild Law: The Philosophy Of Earth Jurisprudence*, Wakefield Press, 2011.

29 Nicole Graham, 'Landscape: Property, Environment And Law' (2011) 23(1) *Journal of Environmental Law* 160; Cullinan, above n 3.

30 Berry, above n 6, 580.

31 Thomas Berry, 'Rights of the Earth: We need a new legal framework which recognises the rights of all living beings' (2002) (214) *Resurgence* <http://www.resurgence.org/> Footnote 24.

32 Berry, above n 6, 80.

advocate for cultural, legal—and even spiritual—change that recognises these already existing “rights”, and to provide legal consideration and protection of those rights.

Following this notion of rights emerging from existence is a fourth and critical element of Earth jurisprudence: the idea of Earth Democracy. Many advocates for the Rights of Nature embed these rights within a framework of ‘Earth Democracy’. Earth Democracy has been defined as an attempt to fuse ecocentric ethics with deeper forms of human democracy and public participation.³³ It promotes the idea that all human and non-human life forms are borne of Earth, and as evolutionary companions, we all have a right to exist, thrive and evolve. In terms of *human* relationships, Earth Democracy is a concept that examines power, privilege and inequity, and rejects them in favour of the idea that all people have the right to their own self-determination, particularly when it comes to Earth stewardship within their local communities. It is important to recognise that, under an Earth jurisprudence approach, human rights are an interdependent and correlative subset of Earth rights; humanity cannot be healthy and our rights as humans cannot be secure if Earth is veering towards depletion and over-extraction.

But how do we change the current system and move towards an Earth jurisprudence of human governance? Fortunately there is a multitude of people, community organisations and Indigenous leaders who are doing their Great Work and leading by example. The Earth laws and Earth democracy movement is being embraced by people from all cultures, countries and professions, and this multi-cultural and multi-disciplinary response to Earth jurisprudence is one of its most powerful strengths. We need people from all walks of life to engage in the work of creating new, Earth-centred laws and governance systems. And as Cormac Cullinan suggests, for lawyers in particular, in order to take on the challenges that we face, we ‘must bring our whole selves to the party’, going beyond our rational legal skills to also embracing and channelling our compassion, spirit and love for the Earth that exists within us all.³⁴

Rights of Nature laws around the world

The implementation of Rights of Nature laws came to international attention in 2008, when Ecuador became the first country in the world to recognise the legal Rights of Nature in its national constitution. In 2010, Bolivia passed a national law, called the Law of the Rights of Mother Earth, which defines Mother Earth as “a collective subject of public interest” and as a title holder of inherent rights specified in the law. Provision was also made in the legislation to create a special ombudsman’s office for the rights of Mother Earth, similar that which exists for human rights.³⁵

33 Peter Burdon, Wild Law and the Project of Earth Democracy, in M Maloney and P Burdon (Eds), *Wild Law in practice*, Law, Justice and Ecology, Routledge Press, 2014.

34 Cullinan, above n 3.

35 Law of the Rights of Mother Earth, Bolivia 2010 <http://www.worldfuturefund.org/projects/indicators/motherearthbolivia.html>

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Photo: Norsk Folkehjelp Norwegian People's Aid [CC BY 2.0]

The Ecuadorian and Bolivian approaches have two important elements: they grant positive rights to nature—including the right to exist, to restoration and regeneration. They also grant broad legal standing, enabling anyone to speak on behalf of nature and defend nature's rights. For example, in Ecuador, all persons, communities, peoples and nations can demand that Ecuadorian authorities enforce the Rights of Nature.

While Bolivia has had little traction with its Rights of Nature laws, Ecuador has had several dozen cases based on the Rights of Nature provisions in the constitution, and around half have been successful.

With respect to Rights of Nature laws, it's often less well known that two years before Ecuador's Constitutional provisions were in the news, local communities in the USA passed the first rights of nature ordinances in the world, and today there are more than 30 local ordinances in place that recognise the legal Rights of Nature and local communities. All of these ordinances assert the positive Rights of Nature to exist, flourish and evolve, and assert the rights of local communities within the relevant jurisdiction to speak for and defend the Rights of Nature.

The innovative approach of using local municipal law-making to pass Rights of Nature and community rights laws has been led by the Community Environmental Legal Defense Fund (CELDF), a public interest law firm founded by Thomas Linzey and Mari Margil. Their local community rights ordinances have built networks of advocates in a number of states, and there are now State-wide networks advocating for community and nature's rights at the State level.³⁶

³⁶ For example, see the Oregon Community Rights Network—<http://orcrn.org/>

CELDf's work can now be described as a 'legal movement', as their ground breaking work to redefine community and nature's rights has directly influenced the laws developed in Ecuador, Bolivia and the emerging grass roots campaigns around the world, including in Australia.

In contrast to the Rights of Nature laws in Ecuador, Bolivia and USA, legal developments in New Zealand, India, Colombia and Bangladesh represent a different approach to changing the legal status of nature.

Legal developments in New Zealand in 2017 captured the world's imagination, as the Whanganui River, Urewera Forest and, later that year, Mount Taranaki, were all recognised as having "legal personhood". While these developments have been referred to as Rights of Nature laws, they have very different origins and potentially different outcomes from the Rights of Nature laws in other jurisdictions, as they have emerged from New Zealand's specific colonial legal structures.

Each of the three legal personhood laws emerged from settlement agreements under the Treaty of Waitangi, which involved years (and in the case of the Whanganui River, decades) of negotiations between the New Zealand Government and the relevant Maori tribes. In each instance, when agreement was reached, a Record of Understanding documented the agreement, and legislation was enacted that articulated the new legal status and management arrangements for each separate ecosystem.

In contrast to the broad standing allowed under the Rights of Nature laws in Ecuador, Bolivia and the USA, the arrangements in New Zealand are narrower, as each of the ecosystems with 'legal personhood' have explicitly defined guardians who are allowed to speak (and stand) for the ecosystem. Each of the new Acts also recognise the cultural connection and responsibility the Maori tribes have to those ecosystems.

While emerging from the unique cultural context of New Zealand, what's remarkable is that in countries such as India, Colombia and Bangladesh which do not have any legislation enabling recognition of the Rights of Nature, courts have made decisions that draw on the New Zealand approaches, and legally recognise that particular ecosystems must be recognised as 'living beings' and must have their own legal rights.

In March 2017, the High Court of the State of Uttarakhand, located on the northern border of India and including the headwaters of the Ganges River, as well as part of the Himalayas, declared that:

... the Rivers Ganga and Yamuna, all their tributaries, streams, every natural water flowing with flow continuously or intermittently of these rivers, are declared as juristic/legal persons/living entities having the status of a legal person with all corresponding rights, duties and liabilities of a living person in order to preserve and conserve river Ganga and Yamuna.

The court decision was quite contentious in India and was appealed on several grounds, in an effort to clarify the ramifications of the decision, including the reference to the 'liabilities' of the ecosystems. Rights

of Nature laws in other jurisdictions have not suggested nature has 'liabilities'; it's a problematic issue that has now stimulated research and analysis from academics interested in Rights of Nature.³⁷

In 2017, the Atrato River, together with its basin and tributaries, was declared to be an 'entity sujeto de derechos' (legal entity) by the Colombian Constitutional Court. What was interesting is that local communities and the river were acknowledged as having rights. The river's rights (distinct from the communities' rights), are to protection, conservation, maintenance and restoration by the state and local communities. The Court made a number of orders to implement its decision, including that the rights of the river be represented by a guardian—with one representative from Government and one from the claimant communities, and it explicitly referenced the Te Awa Tupua (Whanganui River) model from New Zealand. Earlier this year, legal rights were also recognized for the entire Amazon region in Colombia.³⁸

While the Atrato River case refers to the Whanganui River legal model, it is more like a 'blend' of the New Zealand approach and the Rights of Nature approaches in Ecuador and Bolivia. The Atrato River's 'biocultural rights' include the river's protection, conservation, maintenance and restoration—which is language similar to Rights of Nature laws. And it demands that local people be empowered to manage their river properly, which is a powerful reinforcement of the role that rights can play in supporting Earth Democracy.³⁹

International initiatives and statements

In addition to country-specific initiatives, more than 80 organisations from around the world are now working in partnership as the Global Alliance for the Rights of Nature (the Global Alliance), to advocate for legal rights for the Earth community.⁴⁰ This growing network of lawyers and Earth advocates is made up of groups and organisations around the world, that use Earth centred frameworks such as the Rights of Nature and ecocide, to challenge the destruction of the Earth community by mining, fracking, logging, unsustainable water extraction, factory farming and pollution.

At the international level, the movement has created two important initiatives that are challenging the anthropocentrism of existing international law and governance. The first is the Universal Declaration for the Rights of Mother Earth (UDRME)⁴¹, which is a declaration that asserts the rights of all of the Earth community to exist, thrive and evolve. This Declaration is not presently recognised in the legal system created by nation states, but it represents the agreed values of thousands of members of civil society. It has

37 Discussions at the recent AELA Symposium (25–26 October 2018) by Chief Justice Preston and others.

38 Nicholas Bryner, Colombian court recognises rights of the Amazon River ecosystem, <https://www.iucn.org/News/World-Commission-Environmental-Law/201804/Colombian-Supreme-Court-Recognizes-Rights-Amazon-River-Ecosystem>

39 Colombian river gains legal rights <https://www.Internationalrivers.org/Blogs/433/Colombian-River-Gains-Legal-Rights>

40 For more information about the Global Alliance, please visit their website—<http://Theightsofnature.org/> and for more details about the work of individual members of the Alliance, see Michelle Maloney and Patricia Siemen, 'Responding to The Great Work: The role of Earth jurisprudence and wild law in the 21st Century', *Environmental and Earth Laws Journal*, 2014, Volume 5, Issue 1.

41 Universal Declaration of the Rights of Mother Earth (2010), <https://pwccc.wordpress.com/programa/>

been estimated that over 35,000 people from 100 countries attended the People's Congress that created the Declaration. The second initiative of the Global Alliance is the creation of the International Rights of Nature Tribunal. The objective of the Tribunal is to hear cases regarding alleged violations of the Rights of Nature and make recommendations about appropriate remedies and restoration. The Tribunal was created to respond to concerns by members of the Global Alliance that State-sanctioned laws are facilitating atrocities being inflicted on the natural world. The Tribunal has held hearings that have drawn attention to the violations of the Rights of Nature around the world.

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Photo: James Lee AELA

Rights of Nature and Earth Democracy—Recent developments in Australia and the Pacific

In November 2018 a group of researchers, lawyers and regional environmental and First Nations groups in the Pacific, met at the University of Auckland, to discuss a possible process to create a Regional Convention for the Rights of the Pacific Ocean. A ‘Statement of Principles’⁴² has been created, as a way of capturing the cultural and legal thinking that’s progressing the project, and as a way of inviting interested people to become involved in the movement. This project represents the convergence of a number of different approaches to recognising the Rights of Nature. It advocates for recognising the Pacific Ocean as a living entity with rights to exist, thrive and evolve, and also recognises the cultural traditions of people around the Pacific who have deep cultural and spiritual connections to the Pacific Ocean. It places priority on

42 See the Statement of Principles here: <https://rightsofnature.org.au/wp-content/uploads/2019/01/Statement-on-the-Rights-of-the-Pacific-Ocean.pdf>. See the media release here: <https://rightsofnature.org.au/wp-content/uploads/2019/01/Rights-of-the-Pacific-Ocean-Press-release-Dec-29-2018.pdf>

implementing Rights of Nature at all scales of law and governance, including local communities, which is another reflection of how Earth Democracy is being connected to Rights of Nature campaigns.

In Australia, the Australian Earth Laws Alliance (AELA) is engaged in a range of projects and conversations exploring the potential of the Rights of Nature in Australia. AELA's view is that changing the legal status of nature in Western laws—whether through asserting positive rights of nature in a jurisdiction, or by using 'legal personhood' approaches for specific ecosystems—can offer legal and strategic benefits for strengthening environmental protection, and can help to transform Western attitudes towards the living world. However a critical priority is to work in partnership with First Nations colleagues, to explore how a 'Rights of Nature' approach might be adapted in Australia so that it supports—and doesn't undermine—the existing ancient first laws of First Nations People across this continent.

A number of First Nations initiatives, statements and documents already include reference to the Rights of Nature. In 2016, First Nations Peoples in the region now known as the Kimberley created an historic declaration—the Fitzroy River Declaration—which sets out their intention to protect and manage the River, and it also recognises that 'the River is a living ancestral being and has a right to life'⁴³

In 2017, sixteen Aboriginal nations from across the northern Murray Darling Basin signed a treaty to work together, and have a united voice, on issues of importance to them.⁴⁴ The treaty, known as the Union of Sovereign First Nations of the Northern Murray-Darling Basin, also pledges to uphold the "rights of Mother Earth", as follows:

"the rights of Mother Earth are upheld by all Nations And we pledge our commitment to ensuring 'respect' and preservation of her inalienable rights and all things natural. We acknowledge that these guarantees are the absolute inherent rights to the human condition"⁴⁵

Also in 2017, the Victorian government passed the Yarra River Protection (Wilip-gin Birrarung Murrong) Act, which enables the identification of the Yarra River and the many hundreds of parcels of public land it flows through as one living, integrated natural entity for protection and improvement. While this legislation does not change the legal status of the river, or explicitly refer to the Rights of Nature, it's acknowledgement of the river as a living entity is important in Australian law, and it's the first time in Australia that Aboriginal language and custodial responsibilities are recognised in connection to and responsibility for this important waterway.⁴⁶

43 See <https://d3n8a8pro7vmtx.cloudfront.net/environskimberley/pages/303/attachments/original/1512653115/fitzroy-river-declaration.pdf?1512653115>

44 See <https://www.abc.net.au/news/2017-05-11/murray-darling-aboriginal-nations-sign-treaty/8518228>

45 See <http://nban.org.au/treaty/> For the relevant paragraph of the Treaty, see: <http://nban.org.au/wp-content/uploads/2017/05/page-4.pdf>

46 Katie O'Bryan, "New law finally gives voice to the Yarra River's traditional owners", *The Conversation*, 25 September 2017.

The Rights of Nature concept is receiving increasing attention from non-Indigenous communities in Australia. After several years of workshops and discussions by AELA, with communities around Australia, early 2018 saw a number of community driven initiatives that reflect how Rights of Nature can capture peoples' imagination in a way that traditional environmental law does not, and how Rights of Nature framing and strategies can be embraced by people seeking to support Earth Democracy.

In March 2018, more than 100 local people rallied in support of the Margaret River, in Western Australia.⁴⁷ Their signs, banners and strategy focused on giving the river its own voice and its own legal rights. One of the local advocates for rights of the river said that people 'understood the idea of recognising the river as a living entity, because we all know it's more than just a resource, it's alive and it has a right to exist.'⁴⁸

In the Blue Mountains, community members concerned about threats to the Blue Mountains World Heritage Area have worked with AELA to draft a Local Council statement which they hope to gain support for, and to advocate for local recognition of the Rights of Nature in the Blue Mountains local council area.



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The Rights of Nature concept is receiving increasing attention from non-Indigenous communities in Australia.
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Photo: James Lee AELA

47 Jacqueline Lynch, "Calls to give legal rights to nature flow to WA's South West", *ABC Online*, 23 March 2018.

48 Personal discussion, 24 March 2018.

AELA has also started a new conversation about how to increase protection and custodianship of the world's largest coral reef community, the Great Barrier Reef (GBR). AELA has drafted laws for all three levels of Australian government—a model law for Local Councils in the GBR Catchment, a State law recognising the Rights of the GBR and a proposed amendment for the Federal Constitution. These model laws are to demonstrate what's possible in Australia, and how Rights of Nature laws might be crafted to embrace Earth democracy and recognition of First Nations Peoples' rights and obligations to care for land and sea country.⁴⁹

Conclusions

At its essence, a "Rights of Nature" approach states that "where life exists, rights exist." This has the potential to be a powerful way to push back at a legal system that treats the living world as merely human property, and which privileges government control and corporate rights.

We must transform our environmental governance to nurture rather than destroy the natural world, or we will perish along with much of our precious Earth community. Earth jurisprudence and the Rights of Nature can make an important contribution to this transformation. The practical implementation of Earth jurisprudence is building a very different approach to environmental governance from that of traditional environmental law. Rather than treating the health of the earth as just one of the many variables humans need to 'weigh up' in their anthropocentric decision making processes, Earth jurisprudence advocates putting the Earth first. Earth jurisprudence requires humans to see the non-human world as sacred, non-negotiable and irreplaceable. This approach is fundamentally challenging to the dominant pro-growth human culture but it is critical if we are to save what's left of our precious Earth community and rebuild and restore our world for future generations.

49 See <https://rightsofnature.org.au/rightsofhereef/>

Property Rights, Corporate Personhood and Nature

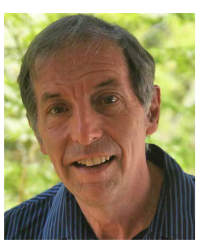
Property rights are a social construction, embodied in law and enforced by the coercive power of the state, represented by police, courts and prisons. This fact is so obvious that it ought to go without saying, but it is routinely denied by many on the right of politics and some on the left.

Nothing illustrates the spurious nature of claims about natural property rights more clearly than the set of rights central to modern business enterprise, centred on the concepts of bankruptcy and limited liability. These rights are not natural in any sense, although two centuries of experience has made them seem so to many. They were created following fierce political debate over the course of the 18th and 19th centuries.

Over the course of the 20th century, the rights of corporations have been expanded and the status of the corporation as a 'legal person' has come to be taken for granted by many. Among the most notable expansions of corporate rights are the Investor State Dispute Settlement procedures routinely included in international agreements on trade and investment, and the expansion of 'intellectual property' rights such as patents and copyrights.

In the United States, the Supreme Court ruled in the *Citizens United* case that corporations are entitled to the same rights of free speech as those guaranteed to all Americans under the First Amendment to the Constitution. The result was to remove most limits on corporate funding of political campaigns, and further enhance the political power of corporations.

With expanded rights and power have come increases in profits. The wage share of national income has fallen. Most of the growth in US income over recent decades has gone to those in the top 1% of the income distribution, dominated by business owners, senior managers and the finance professionals who



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help them protect their wealth. As Piketty¹ shows, the same tendencies are present in other countries, though not to the same degree.

The rise of corporate personhood and corporate power more generally, has been in marked tension with the increased regulation of pollution and environmental damage which began in earnest with the UK Clean Air Act of 1956, a response to the catastrophic Great Smog of 1952. Increasingly stringent laws have been implemented to prohibit or control the release of pollutants into air and water, the destruction of wildlife habitats and loss of natural amenity.

The effectiveness of these laws has regularly been challenged by the protean nature of the corporation. Corporations can easily shift their operations from one jurisdiction to another with looser environmental restrictions. They can sub-contract smaller firms to undertake polluting or exploitative activities, and thereby avoid responsibility for those activities. If the costs of cleaning up the results of pollution become too great, they can declare bankruptcy, discharge their debts and re-emerge in a new form.

One way to mitigate the tension between regulatory policies would be to grant property rights, and the associated legal standing, to nature. Like corporations, nature is not a natural person and would need to be represented by advocates. These advocates could defend nature's property rights under tort law, act as creditors in the event of a corporate liquidation, and act to ensure that governments enforced regulations properly.

The central theme of this chapter is that property rights are a social construction, and that creating property rights for nature is a potential approach to constraining the misuse of corporate property rights. The chapter is organised as follows. Section 1 is a critique of the claim that property rights exist naturally, independent of the states that define and enforce them. Section 2 describes the creation of special property rights for business, including bankruptcy law and the limited liability corporation. Section 3 outlines approaches to the creation of property rights for nature, and the potential benefits.

1. Property rights and natural law

There have been many attempts to ground property rights, particularly rights in land, in so-called 'natural law', independent of government. The most famous is that of the English philosopher John Locke, who took the view that ownership of land was originally acquired by "mixing one's labour with the land"; that is, by cultivation.

Locke's doctrine was self-serving, to put it mildly. Locke's personal wealth derived largely from investments in England's American colonies, including the slave trade. The viability of these investments depended, in the end, on the capacity of the colonists to dispossess the indigenous inhabitants who were mostly

1 Piketty, T. (2014) *Capital in the Twenty-First Century*, Harvard University Press, Cambridge, MA.

hunters and gatherers rather than farmers. By making agricultural labor the crucial factor in the original acquisition, Locke could justify the expropriation that made colonisation feasible, while still presenting a case for natural rights in property, independent of the state.

In a series of articles in *Jacobin*^{2,3,4} I've made the case that the failure of Locke's argument goes beyond the personal hypocrisy it involved. The credibility of any Lockean theory defending established property rights as natural rather than state-created depends on the existence of a frontier, beyond which lies boundless usable land. This in turn requires the erasure (mentally and usually in brutal reality) of the people already living beyond the frontier and drawing their sustenance from the land in question. The idea that boundless land beyond the frontier is open for exploitation supports a spurious origin story in which existing property rights were naturally acquired in the same way, rather than being created and enforced by state power.

The Lockean myth of property as the product of natural law raises the obvious question: where does nature fit into this natural law? The answer is that land beyond the frontier is 'waste' land, of no value until is appropriated and exploited. As Allred⁵ observes, the unexploited land of America before European settlement

serves Locke as a crucial site of waste, both in the eighteenth-century technical sense of unclaimed or untilled land and in the metaphorical sense of a spillover valve that the system he envisions can't do without.

Allred argues that Locke's thinking about America represents a crucial point of departure for the Anthropocene era.

Property and self-ownership

Locke and his followers attempt to derive property rights over land and goods from the notion of 'self-ownership', that is, the claim that we own bodies and minds and therefore own whatever we produce. This is nothing more than a linguistic confusion. Our relationship to our bodies and thoughts, to our friends and family, and even to the objects we use in our daily life, is fundamentally distinct from the property rights we may or may not derive from, and have enforced by, states.

That's true even though the same grammatical structures (genitives and clitics) are used for both. This is most obvious from the fact that most (if not all) actually existing property rights in the world today can be traced back to systems which encompassed some form of slavery.

2 Quiggin, J. (2015)a, 'John Locke Against Freedom', *Jacobin*, <https://www.jacobinmag.com/2015/06/locke-treatise-slavery-private-property/>

3 *ibid.*

4 Quiggin, J. (2016), 'Locke's Folly', *Jacobin*, <https://www.jacobinmag.com/2016/08/locke-property-manifest-destiny-jefferson-slavery-indigenous/>

5 Allred, N. (2018), 'Locke's American Wasteland', <https://www.18thcenturycommon.org/lockes-american-wasteland//>

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Photo: rawpixel.com, byrawpixel, www.rawpixel.com [CC BY 0]

Systems of property that do recognise self-ownership must necessarily allow some form of slavery. Ownership implies alienability, so that freemen can sell themselves and (potentially) their families into slavery, peonage or indentured servitude.

This brings us to the idea, shared by Marx and Calhoun (among many others) that wage employment is inherently a form of slavery. This erroneous conclusion reflects the fact that self-ownership is the wrong starting point for thinking about these issues.

Most employment relationships involve some degree of exploitation of the worker by virtue of fact that employers are mostly richer and more powerful than workers. A change in the formal relationship doesn't change the facts and is often associated with intensified exploitation. An example is the conversion of workers into nominally independent contractors, often used in Australia as a method of union-busting.

To sum up, the whole idea of basing a theory of social justice on self-ownership, or any kind of natural right to property derived from self-ownership, is inherently self-contradictory. State-created and enforced property rights, including the associated taxation systems, are social institutions which may or may not contribute to socially just outcomes, but have no moral standing in themselves.

2. Corporations and bankruptcy

Without legal structures designed specifically to protect businesses from the risks of failure, profits would be far less secure, and the difficulty of establishing and running a business much greater. Corporate profits are not a natural outcome of a market society; they are the product of specific structures of property rights introduced to promote corporate enterprise.

Until well into the 19th century, the costs of business failure were substantial and personal. There was no such thing as bankruptcy: a business failure meant being sent to debtors' prison, where debtors could be held until they had worked off their debt through labor, or had secured outside funds to pay the balance.

These same rules applied in Britain's American colonies and continued to prevail in the United States until the middle of the 19th century. The introduction of personal bankruptcy laws put an end to debtors' prison, greatly reducing the risks of running a business.

An even more radical curtailment of creditors' rights was introduced with the limited liability corporation. No matter how large the debts of such a corporation, individual shareholders were only liable to the extent of their shares. The insolvency of a corporation might ruin its creditors, but investors with a diversified portfolio were safe from substantial loss.

After the brief and disastrous experiment in the early years of the 18th century (the South Sea Bubble), corporations were viewed with grave suspicion until well into the 19th century. In general, limited liability companies were not permitted in Britain or most other countries. The partners in a business were jointly liable for all its debts. Exceptions were made only for specially authorised quasi-governmental ventures like the East India Company, which focused on foreign trade.

The prevailing view was summed up by the aphorism 'Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked'. Adam Smith⁶ was also critical of corporations, saying

The directors of such [joint-stock] companies, however, being the managers rather of other people's money than of their own, it cannot well be expected, that they should watch over it with the same anxious vigilance with which the partners in a private co-partnery frequently watch over their own... Negligence and profusion, therefore, must always prevail, more or less, in the management of the affairs of such a company.

The introduction of bankruptcy and limited liability faced vigorous resistance from advocates of the free market. David Moss⁷, in *When All Else Fails*, his brilliant history of government as the ultimate risk manager,

6 Smith, A. (1776) *Wealth of Nations* (1976 Ed.), Hayes Barton Press, Raleigh NC.

7 Moss, D. (2002) *When All Else Fails: Government as the Ultimate Risk Manager*, Harvard University Press, Cambridge, Massachusetts.

describes how the advocates of unlimited personal responsibility for debt were overwhelmed by the needs of business in an industrial economy. The introduction of bankruptcy and limited liability laws took much of the risk out of starting and operating a business. Theoretically inclined proprietarians have continued to debate the legitimacy of bankruptcy and limited liability laws, without reaching a conclusion.

This debate over whether bankruptcy and corporation laws are consistent with freedom of contract is really beside the point. The distribution of income and wealth is radically changed both by the existence of these institutions and by the details of their design. In particular, the massive accumulations of personal wealth made possible by capital gains from share ownership would simply not exist. Perhaps there would be comparable accumulations of wealth derived in some other way, but the owners of that wealth would be different people.

A crucial policy question, therefore, is whether current laws and policies relating to corporate bankruptcy and limited liability have promoted the growth of inequality and contributed to the weak and crisis-ridden economy that has characterised the 20th century. The combination of these factors has produced absolute stagnation or decline in living standards for much of the US population and relative decline for all but the top few percent.

There can be little doubt that this is the case. As recently as the 1970s, a corporate bankruptcy was the last resort for insolvent companies, typically leading to the liquidation of the company in question. As well as being a financial disaster, bankruptcy was a source of shame for all those involved. For this reason, nearly all major companies sought to maintain an investment-grade credit rating, indicating a judgement by ratings agencies that bankruptcy was, at most, a fairly remote possibility.

Since that time, bankruptcy has become a routine financial operation, used to avoid inconvenient liabilities like pension obligations to workers and the costs of cleaning up mine sites, among many others. The crucial innovation was 'Chapter 11', introduced in the Bankruptcy Reform Act of 1978.

The intended effect of Chapter 11 was that companies could reorganise themselves while going through bankruptcy, and re-emerge as going concerns. The (presumably) unintended effect was that corporate managers ceased to be scared of bankruptcy. This was reflected in the spectacular growth of the market for 'junk bonds' (more politely called 'high-yield'); that is, securities with a high rate of interest reflecting a substantial probability of default. Once the preserve of fly-by-night operations, junk bonds became a standard source of finance even for companies in the S&P 500.

At the same time, legislative changes and the growth of global capital markets greatly enhanced the benefits of corporate structures, while eliminating many of the associated costs and limitations. At the bottom end of the scale, the 'close corporation' with only a handful of shareholders, became the standard method of organising a small business. This process was aided by a long-series of pro-corporate legislative changes and court decisions. At the top end, the rise of global financial markets from the 1970s onwards

allowed the creation of corporate structures of vast complexity, headquartered in tax havens and organised to resist scrutiny of any kind.

At the behest of these corporations, governments have negotiated agreements supposedly designed to ensure that corporate profits are not taxed twice in different jurisdictions. In reality, using a combination of complex corporate structures and governments eager to facilitate tax avoidance in return for a small slice of the proceeds (notably including those of Ireland and Luxembourg), the effect has been to ensure that most global corporate profits are not taxed even once in the countries where they are earned.

Redressing the balance

What can be done to redress the balance that has been tipped so blatantly in favor of corporations? The obvious starting point is transparency. Havens of corporate secrecy, from Caribbean islands to US states like Delaware must be made to reveal the true ownership of corporations, in the same way that tax havens like Switzerland, used mostly by wealthy individuals, have been forced to disclose the ownership of previously secret accounts.

The use of complex corporate structures to avoid tax is a much more difficult problem to tackle. Some measures are being taken to attack what is called “Base Erosion and Profit Shifting”, but past experience suggests that slow-moving processes of this kind will at best keep pace with the development of new forms of avoidance and evasion. It’s necessary to re-examine the whole structure of global taxation agreements. Instead of focusing on the need to avoid taxing corporate profits twice, the central objective should be to ensure that they are taxed at least once, in the place where they are actually generated.

More generally, though, the idea that corporations are a natural part of the economic order, with all the human rights of individuals, and none of the obligations, needs to be challenged. Limited liability corporations are creations of public policy, useful to the extent that they promote the efficient use of capital but dangerous to the extent that they facilitate gross inequalities of income and opportunity.

Corporate personhood and branding

The climate of thought in which corporations can be thought of as persons is, in part, the product of exercises in branding. In their original form, discussed in Chandler’s⁸ magisterial history of the rise of the corporation, brands served as commitments to quality, drawing on the existing reputation of the producer. A food product branded with the name of a reputable supplier could reasonably be counted on not to be tainted or otherwise unsatisfactory. In the absence of significant consumer protection legislation, the same assumption could not be made about unbranded goods.

8 Chandler, A. (1990) *Scale and Scope: The Dynamics of Industrial Capitalism*, Harvard University Press, Cambridge, MA.

Over time, however, the relationship has been reversed. Whereas once the brand derived its credibility from the corporation that used it, corporations now spend vast amounts to build up brands, in the hope that their own credibility will be enhanced thereby.

As Naomi Klein⁹ has observed, branding has its vulnerabilities. Having spent heavily to associate positive images with a brand such as Nike or Starbucks, corporations can be held to account if they are shown to behave badly, by exploiting workers or damaging the environment.

However, such accountability has its limits because corporations can reorganise themselves in ways that natural persons cannot. Rather than underpaying workers, for example, a corporation can contract out low-paid work through a chain of intermediaries that is difficult, if not impossible, to follow.

Where the corporate brand cannot be salvaged, the protean nature of the corporation comes to the rescue once again. Natural persons are stuck, to a large extent, with the name they are born with, or acquire by marriage. By contrast, a corporation with a bad name can simply change it. The Phillip Morris corporation, discredited both by the deadly nature of its products and the criminal tactics it used to defend them, has recently adopted the new name Altria (doubtless tested extensively on focus groups who may have liked the vague association with words like altruism).



“
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Photo: Mnz, MnzOutfits [CC BY 0]

9 Klein, N. (2000) *No Logo: Taking Aim At the Brand Bullies*, Picador, New York.

3. Property rights and Nature

If property rights are social constructions, what implications can we draw in relation to rights for nature. On the one hand, we can rule out essentialist objections, along the lines that the concept of property rights cannot encompass rights for nature.

There are, of course, practical issues that must be resolved. Neither nature in general, nor particular species and ecosystems have the kind of agency required to exercise and defend property rights. Rather these property rights must be exercised by humans, bound by obligations to act in line with the interests of nature, and these interests must also be defined by humans. There is nothing particularly unusual here. Our current system assigns property rights to infants, who are in exactly the same position.

The same is true of property rights assigned to more-or-less abstract collectivities such as BHP or 'the people of Australia'. While the people represented by these collectivities may have a role in choosing their representatives, they must rely most of the time on the fiduciary and constitutional responsibilities that bind these representatives.

On the other hand, having rejected the idea of 'natural' property rights for people, we must reject this idea for nature also. Whether or not people (individually or collectively) have moral obligations to nature, these obligations do not translate directly into property rights.

Rather, any assessment of property rights for nature must ultimately be pragmatic. Would the creation of property rights for nature serve to promote the achievement of fairer and more sustainable outcomes (bearing in mind that these terms will themselves be contested)? Alternatively, would these goals be better served by an expansion of the current system in which the protection of the natural environment is part of the responsibility of governments, operated primarily through legislative and regulatory constraints on environmentally damaging activities?

The case of bankruptcy law provides an instance where there would appear to be at least a *prima facie* case for assigning property rights to nature. There have been numerous instances where mining companies have done substantial environmental damage before declaring bankruptcy and passing the responsibility for any cleanup on to the public in general. In a few cases, such as that of Linc Energy, the damage has been such as to lead to criminal charges.

However, the protections of corporate and bankruptcy law mean that, even in cases like this, the costs fall on the public rather than on the directors and shareholders of the company. Linc was fined \$4.5 million and the cleanup costs estimated at \$72 million¹⁰. The CEO and main shareholder, Peter Bond, dismissed

10 Smee, B. (2018), Linc energy fined \$4.5m for pollution amounting to 'ecological vandalism', *The Guardian*, <https://www.theguardian.com/environment/2018/may/11/linc-energy-fined-45m-for-pollution-amounting-to-ecological-vandalism>

the fine as meaningless and stated that the company would not have to pay anything¹¹. As always under limited liability, Bond's own liabilities were confined to the value of his shareholding, which was lost when the company went bankrupt.

An explicit assignment of property rights to nature might have changed this. If environmental damage were regarded as constituting an unpaid debt to nature, it might be possible to force a company like Linc into insolvency well before it ran out of cash. Moreover, the offence of trading while insolvent is more clearly established as a basis for prosecution than are the laws under which Linc and its directors are currently being pursued.

Similar problems have arisen in the United States, where mining companies have been permitted to engage in 'self-bonding' to cover the costs of reclaiming abandoned mine sites. That is, rather than posting a bond, the companies were allowed to promise to pay the costs of reclamation out of their own assets. As more and more companies (particularly coal miners) have gone bankrupt, governments have been left to pick up the bill. In West Virginia, more than 60% of the future cleanup bill is associated with bankrupt companies.¹²

The problem is made worse by the inadequate level at which bonds are set. In Kentucky, for example, forfeited bonds covered only half the estimated cost of reclamation.¹³

The practice of self-bonding has come under increasing attack. In Wyoming, which has the largest open-cut mines in the United States, proposals are being put forward to limit self-bonding to firms with a strong credit rating and significant remaining production. In practice, very few coal companies are likely to meet the criteria.

This shift is welcome. However, the outcome is a long way from that which would arise if nature had explicit property rights. In that case, the normal outcome would be that mine owners were required to pay compensation for damage to natural assets as that damage occurred, or even in advance, as is typically the case when mining activities impinge on the value of privately owned land and other assets.

5. Conclusion

Neoliberalism and the corporation go hand in hand. The ideology of neoliberalism makes social constructions like corporations and the associated financial assets seem like natural and permanent realities. In reality, the terms on which corporations operate should be determined by whether they are socially useful, and not by any notion of natural rights. One possible response to the excessive growth of corporate rights is the creation of countervailing rights for nature.

11 McKenna, M. (2018), Linc energy guilty verdict meaningless: Peter bond, *The Australian*, <https://www.theaustralian.com.au/business/mining-energy/linc-energy-guilty-verdict-meaningless-peter-bond/news-story/43dde816c2672b56f5f8b85f73cfd3ea> Apr 9.

12 West Virginia Department of Environmental Protection (2017), 'Annual Evaluation Report', reported by Climate Home News, <http://www.climatechangenews.com/2018/03/15/us-coal-mines-clean-up-bonds-database/>

13 Kentucky Office Of Surface Mining Reclamation And Enforcement (2017), 'Annual Evaluation Report' reported by Climate Home News, <http://www.climatechangenews.com/2018/03/15/us-coal-mines-clean-up-bonds-database/>

Suppression of the right to protest

Twenty-five years jail for peaceful protest. That is the potential outcome from the *Espionage and Foreign Interference Bill* (EFI) that was introduced by the Liberals and rubber stamped by Labor in 2018. It was slammed through with such speed that the cross-benches had one hour to examine what was described as the most serious overhaul to national security in 40 years.

Introduced alongside the *Electoral Funding and Disclosure Reform Bill* (EFDR) and the *Foreign Influence Transparency Scheme Bill* (FITS) it even troubled the Institute of Public Affairs, which called for the withdrawal of the legislation, stating “The IPA is inherently concerned about any proposal that seeks to ‘manage’ political debate by limiting freedom of speech.”¹

Whilst these bills were pitched as managing emerging threats of foreign interference in elections and political decision-making, they are instead a Trojan Horse of breaches of civil liberties and human rights, wildly over the top and sloppily articulated, that had civil society up in arms. Amnesty International stated, “By joining regimes around the world in passing new, restrictive laws attempting to suffocate civil society under pretexts of “treason” and “security”, the opposition and government are lurching towards authoritarianism.”²

Whilst the work of the Hands Off Our Charities alliance was commendable and saw some of the seriously problematic aspects of the bills wound back, it was generally considered a lost cause to attempt to lobby the ALP to block the bills, or attempt much reform of the EFI legislation, in particular, given the lock step approach the Labor party has to voting in support of even the most destructive of policies relating to national security.

1 *Electoral Law Recommendations a Welcome First Step*, Institute of Public Affairs media release, April 9, 2018. <https://ipa.org.au/ipa-today/electoral-law-recommendations-a-welcome-first-step>

2 Claire O'Rourke, “Security Bill will muzzle human rights activists”, *Sydney Morning Herald*, June 11, 2018. <https://www.smh.com.au/national/security-bill-will-muzzle-human-rights-activists-20180609-p4zjk4.html>



Nicola Paris established CounterAct in 2012 and has trained 1000s of people in civil resistance and grassroots campaign skills. She has nearly 20 years' experience working across the progressive spectrum on a range of issues, from blockades to boardrooms, from federal parliament, to tiny NGO's, to frontline action in Antarctica.

She has helped defend the Kimberley from industrialisation, supported direct action to protect the Beeliiar Wetlands near Perth—helped coordinate Break Free, involving 2000 people blockading the coal port of Newcastle, and worked on a range of social justice campaigns.

Consequently, legislation was passed that reframed “espionage” as working to act against “economic interests”, putting corporate dominance over civil and political rights into law. It was described by a range of NGO leaders as a “sick joke”, with GetUp’s Paul Oosting stating “Protesters who temporarily blockaded a railway to an export coal mine could face 20 years behind bars for ‘sabotage.’” In this instance, sabotage is changed from an act of physical destruction to simply “limiting access to public infrastructure”—and not even critical infrastructure. This dramatic re-framing of national security legislation was only briefly highlighted in the tsunami of issues with the package of legislation.³ Despite concerned callers to ALP offices told the ALP had “fixed” the problematic aspects of the legislation, ironically this Act could see workers from ALP affiliated unions charged with terrorist offences should they engage in certain wildcat (unsanctioned) strikes.

This is just the latest in a pattern of legislation and practice at state and federal level that, when pieced together, makes up for quite the horror show: corporations prioritised, civil liberties tossed, dissent criminalised, hard-fought human rights relegated to paper promises, a surveillance state growing, and government architecture built by both Labor and Liberal governments that is incredibly dangerous, and yet to be deployed in full force.

Peaceful protest has been instrumental in battles for workers’ rights, stopping the Jabiluka uranium mine near Kakadu, stopping the mighty Franklin River from being dammed, for Aboriginal people and women having rights to vote, for forests we enjoy now as national parks, for areas of country that are now protected from fracking and unconventional gas, and so much more.

With the de-funding of critical support services, increasing regulation and administrative time required, and broad-reaching attacks on charities, non-profits, legal and support services, we are seeing the successful de-fanging of organisations that should be resourcing and leading a powerful pushback. Some of the large environmental NGO’s are so timid in their approach to supporting civil resistance they will rarely even share content or reports from the frontlines. Activists at the grassroots are facing increasing penalties, hostile magistrates, bureaucratic red tape over “designated protest zones”, and a student movement that has been thinned by the huge stressors in their lives—too busy trying to cover rent and food, working and studying with precious few hours for civic engagement.

This paper examines some of the challenges to protest in Australia, from being branded as terrorists to increased penalties, violence and intimidation to surveillance and infiltration.

3 Australian Lawyers for Human Rights, *Problems Remaining with the Esp FI Bill*, <https://alhr.org.au/problems-esp-fi-bill/>

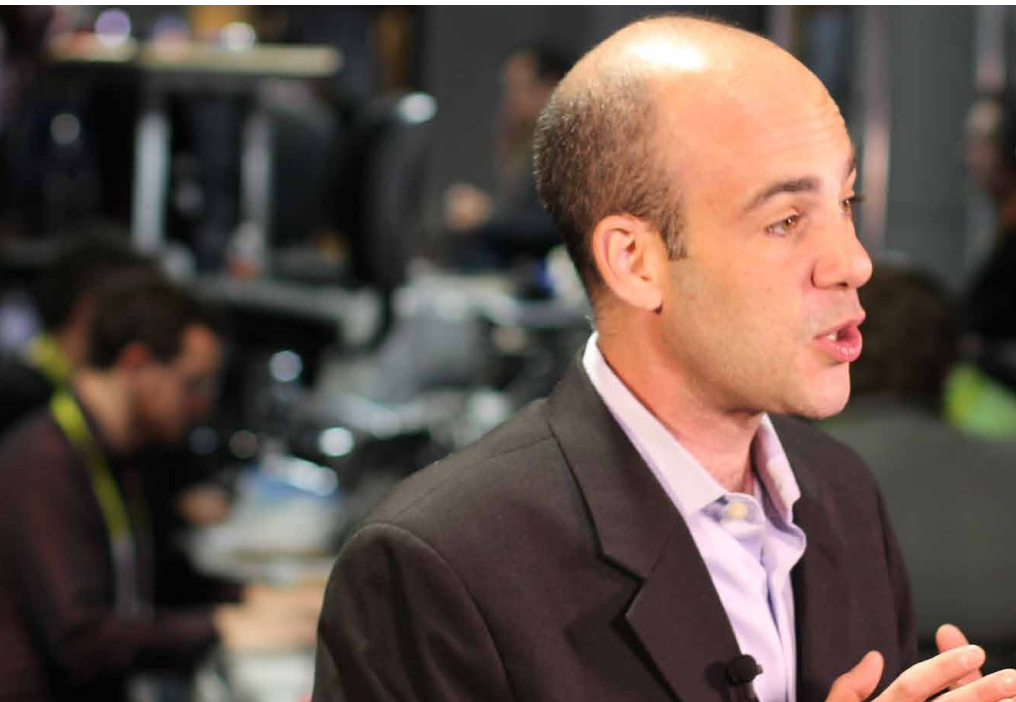
Protest as terrorism

As Rebecca Ananian-Welsh and George Williams outline:

Prior to 9/11 Australia had no national laws dealing specifically with terrorism. Since then, the Australian government has enacted more than 60 such laws, an approach Kent Roach aptly described as one of 'hyper-legislation'. Australia's national anti-terror laws are striking not just in their volume, but also in their scope. They include provisions for warrantless searches, the banning of organisations, preventive detention, and the secret detention and interrogation of non-suspect citizens by the Australian Security Intelligence Organisation ('ASIO'). The passage of these laws was eased by Australia's lack of a national bill or charter of rights.⁴

None of the significant changes to terrorism and security legislation introduced post 9/11 have been overturned. They must be seen as an increasing risk to peaceful protest.

Conservative commentators are aware of the power of framing peaceful protest and civil disobedience as terrorism, and this rhetoric is used to marginalise and scare people away from being involved. This is particularly jarring for people in regional areas. Caring for climate and country has been weaponised and politicised in this way. Anyone can be tarred with this brush; simply having opinions that don't support



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Photo: Pixabay [CCBY 0]

4 Rebecca Ananian-Welsh and George Williams, "The New Terrorists: The Normalisation and Spread of Anti-Terror Laws in Australia", *University of Melbourne Law Review*, vol.38, p362 https://law.unimelb.edu.au/__data/assets/pdf_file/0008/1586987/382Ananian-WelshandWilliams2.pdf

mining development can be enough, according to Queensland MP, George Christensen: “The eco-terrorists butchered the international tourism market for our greatest tourism attraction, not for the reef but for political ideology”.⁵

In contrast, a handout from the government’s own National Security website states, “a terrorist act does not cover engaging in advocacy, protest, dissent or industrial action where a person does not have the intention to urge force or violence or cause harm to others.”⁶

In the full report from his 2016 visit, United Nations Special Rapporteur for Human Rights, Michel Forst, was scathing of these rhetorical attacks (as well as other legislative attacks):

I was astounded to observe what has become frequent public vilification of rights defenders by senior government officials, in a seeming attempt to discredit, intimidate and discourage them from their legitimate work. The media and business actors have contributed to stigmatization. Environmentalists, trade unionists, whistle-blowers and individuals like doctors, teachers, and lawyers protecting the rights of refugees have borne the brunt of the verbal attacks.⁷

The oft-repeated phrase “professional protestors” touted by conservatives gives a view into their thinking. It is anathema for them to consider why people might act in the greater good. It confuses them. Yet, despite the cheques from George Soros continuing not to turn up, everyday people in their tens of thousands are resisting the agenda that is set for us, despite the challenges set out in this paper.

Increasing penalties for civil disobedience

There has been an escalation in protest relating to climate change and coal infrastructure in recent years, with increasing numbers of “ordinary” people taking extraordinary action and placing themselves in the way of the fossil fuel industry. Although ultimately unsuccessful, the campaign to stop the expansion of Whitehaven coal in New South Wales created a “new normal” in terms of civil resistance to new coal projects, with more than 300 people arrested in an attempt to block coal expansion and clearing of important habitat for at risk species.⁸

5 Latika Bourke, “Nationals MP George Christensen calls Green activists ‘terrorists’”, *Sydney Morning Herald*, September 25, 2014. <https://www.smh.com.au/politics/federal/nationals-mp-george-christensen-calls-green-activists-terrorists-20140925-10lt5a.html>

6 Australian Government, Attorney General’s Department, Australia’s Counter-terrorism Laws; Questions and Answers, <https://www.ag.gov.au/NationalSecurity/Counterterrorismlaw/Documents/Australias%20counter%20terrorism%20laws.pdf>

7 United Nations Information Centre, Canberra, Australian Government Must Rebuild Trust of Civil Society, October 18, 2016, Canberra/ Geneva. <http://un.org.au/2016/10/18/australian-government-must-re-build-trust-of-civil-society-un-human-rights-expert/>

8 No author given, “Dozers locked down by Bat Attack”, *Northern Daily Leader*, February 16, 2015. <https://www.northerndailyleader.com.au/story/2884575/dozers-locked-down-by-bat-attack/>

Over this period, we have seen increasing penalties and numerous new pieces of legislation designed to deter protest. In NSW, 2016 legislation increased penalties for certain protests up to a maximum penalty a seven-year jail term. In addition, the recently introduced *Crown Land Management Regulation Act* creates new powers to disperse protests, including the ability for public officials to “direct a person” to stop “taking part in any gathering, meeting or assembly”.⁹

Even without legislative change, penalties are being increased. In 2018 a group that trespassed and entered the Adani owned coal export facility were collectively charged \$72,000. The group included a veteran, young students and a single mum. Many of them were first time offenders. They locked themselves to a conveyer belt and disturbed the operation of the port facility, interrupting coal exports for a number of hours. Whilst it was a dramatic protest, it was done with safety in mind, and is hardly a new tactic. Multiple similar actions have occurred over the last ten years at Newcastle and other NSW coal port facilities, elsewhere in Queensland and at the very same facility at Abbott Point.

For comparison, in 2010, a Greenpeace team occupied the Abbott Point terminal, also delaying export facilities. This included fifteen activists, twenty-three charges and resulted in fines totalling \$6000.¹⁰ The total is less than one single charge of \$8000 handed out to first offenders last year.

The subsequent publicity saw an offer of pro bono legal assistance for appeal by Queensland-based barristers and a community legal service. In March 2019 the welcome news was received that the penalties were mainly cut by 75%—dropped down to between \$2000 and \$3000—in what can only be seen as a significant rebuke to the original sentence. Even these reduced fines still appear stark compared to the penalty Adani received for polluting the Caley Valley Wetlands adjacent to their facility—a mere \$12,000—which they are still challenging, with another discharge reported in early February 2019.

Similarly high charges were often seen during the long running campaign at the Whitehaven coal expansion near Maules Creek, as well as nearby where people were challenging unconventional gas operations in the Pilliga forest. Local magistrates had given a series of very high penalties, which were overturned and significantly reduced when challenged.¹¹

Penalties for non-violent direct actions that result in arrest can vary significantly, depending on the magistrate, the political context and surrounding circumstances. A volunteer legal group that supports people taking direct action on coal and climate concerns has been recording outcomes, and noting patterns of higher penalties for similar offences when handed down in Central Queensland In Queensland

9 No author given, “Fall of Democracy: Australia’s growing anti-protest regulations, *TOTT News*, January 10, 2019. <https://tottnews.com/2019/01/10/fall-of-democracy-protest-regulations/?fbclid=IwAR1l6aZN0LkqL66aZPyA2bxH9WoCggM6gfx58NQVCVkvSX0T30-cZbUFz8E>

10 Sigrid Brown, “15 Greenpeace activists fined over coal port protest”, *ABC News*, April 27, 2010. <https://www.abc.net.au/news/2010-04-27/15-greenpeace-activists-fined-over-coal-port/411806>

11 Ross Tyson, “Court overturns CSG protesters’ convictions, *Northern Daily Leader*, November 25, 2014. <https://www.northerndailyleader.com.au/story/2719364/court-overturns-csg-protesters-convictions/>

it is very rare for people to receive a recorded conviction for low level non-violent protest, but the fines are incredibly varied, and seem to increase as people travel north, apparently breaching the legal concept of parity—that people doing similar things in similar circumstances should be treated relatively evenly.

In 2018, one young woman involved in an action stopping a coal train on a railway received a \$200 fine while another person arrested on the same charge received a \$2400 fine.¹² Both were first time defendants with clean records. The main difference? One magistrate was based in Brisbane and the other based in Bowen—the town nearest to where actions have taken place on Adani rail infrastructure. Bowen locals have been part of a strong opposition to anyone challenging the Adani project. In this politically charged environment, even people involved peripherally with anti-coal activists can be targeted. In 2017, a local small business owner was contacted and berated by the police, the local Mayor and the local state Member of Parliament and had multiple visits from council, all for the simple act of accepting business from peaceful protectors who were visiting Bowen.

In what appears to be an escalation in sanctions against specifically at frontline climate activists, at an event in Newcastle in 2018, two senior citizens, including Bill Ryan, 96 year old Kokoda veteran and numerous other activists were charged with “armed with intent”—in relation to the possession of “lock on devices”, others with “aiding and abetting” simply for filming on public land—charges the police directly admitted they were “trying on”. Also, in Melbourne in early 2019 a number of houses were raided, computers and phones seized and people received rare riot related charges—some months after a relatively innocuous office occupation at BHP, which had followed a well-worn path and saw no charges laid on the day.

The uneven application of the law applies even more blatantly to Indigenous people, who are more likely to be jailed for non-violent offences, and face a significant chance of death or injury in custody.¹³ With levels of incarceration at shameful levels, the risk for Aboriginal people in participating in peaceful protest is markedly higher. Simply being black and mildly angry in public can risk police attention.

At the Commonwealth games in 2018, Aboriginal people from many different nations gathered in resistance as they had previously for “Stolenwealth games”. They negotiated with police in good faith regarding a sanctioned camp site. They were misled about bail conditions, had bright lights shone into their camp and overt surveillance, some would argue, to the point of harassment. A number of activists were seemingly targeted for arrest, with tactics that were misleading.¹⁴ There has also been a pattern of increasingly obstructive policing tactics in Melbourne where, in 2018, the police attempted to block a

12 No author given, “Coal protesters block rail line near Bowen”, *Echo Net Daily*, January 9, 2018. <https://www.echo.net.au/2018/01/coal-protesters-block-rail-line-near-bowen/>

13 Gisele Wakatama, “Indigenous man says he feared for his life during alleged police bashing on Australia Day 2018”, *ABC News*, February 2, 2019. <https://www.abc.net.au/news/2019-02-01/indigenous-man-fears-for-his-life-during-alleged-police-bashing/10771870>

14 Jack Latimore, “The fight never left’: Stolenwealth games protesters draw on a long tradition”, *Guardian Australia*, April 9, 2018. <https://www.theguardian.com/australia-news/2018/apr/09/the-fight-never-left-stolenwealth-games-protesters-draw-on-long-tradition>

massive march organised by Warriors of the Aboriginal Resistance at the Flinders Street intersection, and this year refused to let the authorised vehicle accompany the protest march in its final stages,¹⁵ thereby endangering the massive crowd who were unable to hear updates and instructions from organisers.

The constant over-policing of Aboriginal protest events is a pattern that has been noted by Melbourne Activist Legal Support and repeats all over the country. Not only can this be traumatic for Aboriginal people, who are many times more likely to have had a negative experience of police, it serves to imply that they are dangerous and in need of policing, thus attempting to deter mainstream participation in their protests.

Violence and intimidation tactics

Whilst people engaging in civil disobedience sometimes can expect to be arrested in certain situations, they should not be assaulted in doing so.

People who engage in civil disobedience are very often painted as deserving of violence, surveillance or harassment. Some people who otherwise would not consider it reasonable to assault people in the street seem to think that if people are committing acts of civil disobedience, that they are somehow “asking for it” and a bit of “roughing up” is to be expected.

It shouldn't be expected, it shouldn't be normalised, and assault is against the law, even if you are wearing a uniform. That doesn't stop it happening. And it doesn't stop it happening more to Aboriginal people, who may have committed no offence at all.

In early 2017, a campaign to save the Beeliiar wetlands in Perth, Western Australia was subject to appalling tactics from police. In a community survey undertaken with more than one hundred respondents involved in the protests, the community trust in police was significantly eroded across the board. Of the more than two hundred people that were arrested, the vast majority of them had never been involved in peaceful protest, with a significant number never even having participated in sanctioned rallies.

And it was a rude awakening for these “mum and dad” protestors, as they saw their precious local natural places bulldozed and destroyed. One participant told me: “As a Coolbellup resident, I feel like my relation to the police has fundamentally changed. While police were lining our streets to allow bulldozers to destroy our urban bush there was a distinct lack of engagement with locals and their concerns.”

The complaints included people who were trampled by horses, strip searched without reason, assaulted, threatened with pepper spray and tasers. The police commissioner completely dismissed the notion of any type of independent inquiry, despite comprehensive evidence gathered, insisting instead that individual police complaints be made. Given that making individual police complaints had resulted in additional

15 MALS Admin, *Statement of concern: Policing of Invasion Day March 2019*, Melbourne Activist Legal Support, February 1, 2019. <https://melbourneactivistlegalsupport.org/2019/02/01/invasion-day-march-2019/>



“
Riot police are now used as quasi corporate mercenaries, coming into regional towns to escort the gas companies onto country against community wishes...
 ”

100 riot police were brought into escort Woodside's machinery onto country near Walmadan/James Price Point, Broome for their proposed gas refinery
 Photo: Damian Kelly

charges for numerous people, it is understandable there was some hesitancy to take this option. WA suffers from the same systemic problem with policing complaints across the country—police investigate police. It is no wonder that action on inappropriate behaviour is rarely taken, nor are police being seriously disciplined.

Strip searching peaceful protestors on spurious grounds has a long history of being used in a punitive manner. Christian activists and clergy were strip searched in 2014¹⁶ and another woman, Sydney based Rachel Evans, spoke about being strip searched recently.¹⁷ A review into the practice in NSW had seen a 50% increase in the last year with children as young as 11 being searched.

Numerous assaults were documented at the Sydney Westconnex road protests, and similarly in the East West tunnel protests in Melbourne, where women repeatedly reported patterns of being grabbed by the breasts and targeted by male cops. The Occupy protests in 2012 documented over 80 injuries. These are just a handful of examples.

16 Calla Wahlquist, "Christians strip off in Perth court protest at detention of asylum seeker children", *Guardian Australia*, January 28, 2015. <https://www.theguardian.com/australia-news/2015/jan/28/christians-strip-off-perth-court-protest-detention-asylum-seeker-children>

17 Hagar Cohen, "Number of strip searches in NSW doubles in a year, triggering Law Commission inquiry", *ABC News*, November 14, 2019. <https://www.abc.net.au/news/2018-11-13/nsw-police-strip-search-rise-triggers-law-commission-inquiry/10491032>

And then there is the low level ongoing harassment: constantly being pulled over by police; searches on spurious grounds; random breath test road blocks somehow regularly appearing near protest sites where they have rarely, if ever appeared before; the use of police powers to target well-known local protestor vehicles with infringement notices, finding such outrageously dangerous instances as a loose clamp on a battery, or a single thread loose on a seatbelt, to ensure that the cars are considered unroadworthy, and subject the owners to the expense and time of having to rectify non-issues. Roadblocks have been put in place in the lead up to major events, such as the gathering known as "Lizards Revenge", a "protestival" against uranium mining in South Australia, where a proposed police roadblock meant a 12-hour alternative route would need to be traversed to gain access to the encampment.

At the other end of the spectrum, increasingly militarised state police forces, using high impact pepper spray balls,¹⁸ tasers and rubber bullets, add to the threat facing protesters. Police are increasingly indistinguishable from storm troopers in their body armour, or patrolling Parliament House with machine guns. Riot police are now used as quasi corporate mercenaries, coming into regional towns to escort the gas companies onto country against community wishes.

Being labelled as terrorists, being followed by police, being violently arrested, strip searched and receiving huge penalties are factors that are designed to deter civic action in defending our natural places. And yet we are seeing brave people step up in ever greater numbers.

Right to protest vs right to profit

Whilst protesters have long been penalised for getting in the way of business, there has been a growing trend of legislation that is specifically written to prioritise business interests over that of individuals. However, if big corporations do damage to the environment, they are subject to paltry fines and penalties. Like the previously mentioned minor fine to Adani, Santos Limited was fined \$1500 in March 2014 by the Environment Protection Agency after a leak which resulted in increased levels of lead, aluminium and arsenic, being found in the aquifer, as well as uranium at 20 times the safe drinking water guidelines. Eastern Star Gas was fined \$3000 for discharging polluted water into Bohena Creek in the Pilliga, in North West NSW. Meanwhile community members who peacefully resisted the expansion of unconventional gas projects were fined up to \$6000.

Jonathan Moylan was the first climate activist in Australia to face the very real possibility of a jail term for daring to touch the market. Having written a hoax press release, ostensibly from the ANZ bank, announcing them pulling out of the contentious Whitehaven coal project,¹⁹ he was charged under ASIC

18 MALS Admin, *#NotWithYou: Why more weapons for Victoria Police is a Very Bad Idea*, Melbourne Activist Law Centre, March 24, 2018. <https://melbourneactivistlegalsupport.org/2018/03/24/notwithyou-why-more-repressive-weapons-for-victoria-police-is-a-very-bad-idea/>

19 Thea Ormerod, "The truth about Jonathan Moylan", *Eureka Street*, July 30, 2014. <https://www.eurekastreet.com.au/article/the-truth-about-jonathan-moylan>

legislation that is intended for corporate fraud. Whilst it is difficult to determine what factors went into the judge's non-custodial sentence, the solidarity campaign was large scale, with support pouring out across the nation and internationally.

Southern Cross University Lecturer Aiden Ricketts talks about the suite of new legislation in NSW introduced in 2016: "There's a tenfold increase in the fine for trespass (from \$550 to \$5500) but only if it's a business premises, such as a mine. This is a continuation of the approach taken in WA, and Tasmania where the newly invented 'right to do business' is given precedence over recognised civil and political rights."²⁰

In Tasmania the fractious relationship between forest activists and the logging industry has been going on for decades now, and the politics remain fraught. In 2016, the 'Workplaces (Protection from Protesters) Act' was introduced, with a particular focus on penalising interruptions to business. Hannah Ryan & Emily Howie write that:

The government argued that it needed to protect businesses operating in Tasmania's forests from the inconvenience visited on them by protesters. Importantly, the laws did not only target protesters—they only applied to protesters. The restrictions on movement the law provided for applied only to people engaged in any activity that promoted "awareness of or support for ... an opinion, or belief, in respect of a political, environmental, social, cultural or economic issue" taking place on business premises.²¹

The laws had maximum penalties of ten thousand dollars and five years jail and were deemed unconstitutional in October 2017 in a landmark ruling in a case brought by Bob Brown, with a finding that they interfered with the implied right of political communication.²²

At the time of writing, the Tasmanian Liberal government is seeking to reintroduce an adapted bill, with Building and Construction Minister Sarah Courtney stating that "protection of the rights of Tasmanian businesses and their workers to earn a living free from disruption is one step closer."²³

In WA in 2015, there was legislation due to be introduced which was admirably kept at bay by the Peaceful Protest Alliance—a diverse grouping of farmers, conservationists, unionists and the legal fraternity.²⁴ The law would have made it an offence to physically block a lawful activity and to make or possess any device

20 Aidan Ricketts, *For sale: your right to protest*, March 23, 2016. <http://aidanricketts.com/for-sale-your-right-to-protest/>

21 Hannah Ryan and Emily Howie, "Tasmania's anti-protest laws", *Open Democracy*, <https://www.opendemocracy.net/protest/tasmania-anti-protest-laws>

22 Danya Jacobs, "Bob Brown's win in the High Court", *Environmental Justice Australia*, <https://www.envirojustice.org.au/projects/bob-browns-win-in-the-high-court/>

23 Matt Dennien, "Tasmanian anti-protest law update released for consultation", *Launceston Examiner*, January 28, 2019. <https://www.examiner.com.au/story/5871793/anti-protest-law-update-released-for-consultation/>

24 Andrew O'Connor, "Attorney-General dismisses concerns over anti-protest laws despite rally outside Parliament", *ABC News*, March 18, 2015. <https://www.abc.net.au/news/2015-03-18/attorney-general-dismisses-concerns-over-protest-laws/6330504>

intended to be used to carry out that offence. It also reversed the onus of proof—with police being able to charge people based on suspicion and individuals then required to prove they had no intention to trespass or commit an offence. The strong community opposition saw this languish at the bottom of the government’s agenda for months, and then be abandoned as the ALP came into government.

Surveillance and infiltration

One of the more insidious impacts is subjecting community organisation to surveillance with all the incredible sophistication of the tools currently available to a range of government agencies such as ASIO, ASIS and others. For example, the National Open Source Information Centre sign up to email lists and Facebook pages to monitor the public-facing events of “Issue Motivated Groups”, as state police refer to environmentalists or animal rights activists. Then there is the collusion between government and corporations such as Google and Facebook, or the surveillance agreements and the 5 eyes program, where governments mutually agree to spy on each other domestically to avoid pesky laws about monitoring their own citizens who aren’t suspected of crimes.



Photo: Renee Schipp

“
... [The proposed WA legislation] ... reversed the onus of proof—with police being able to charge people based on suspicion and individuals then required to prove they had no intention to trespass or commit an offence...
 ”

The Leard blockade, established in response to the expansion of the Whitehaven coal project in regional NSW, was subject to a large-scale infiltration, with at least six different people identified by activists as undercover corporate operatives.²⁵ Some activists involved theorise that there may have been collusion with police in relation to some actions being exposed and de-railed, and this is certainly a pattern that has been seen overseas.

The concepts of inclusion and acceptance of people in grassroots radical politics can work to the detriment of groups by enabling infiltration. People who may not “fit in” in other places can be welcomed with open arms by activist groups with ideals of living in a more inclusive community. This was one reason why some of the more unusual suspects involved in the Leard blockade infiltration were not outed sooner. It is a cost that often people are willing to bear, but the most destructive aspect of infiltration is the distrust and paranoia that it leaves in its wake, in this case doing serious damage to group dynamics, and impacting on the mental health of activists.

This is not an isolated incident—police have been outed in other groups, and another public disclosure was made in 2008 when activists involved in animal rights and peace protest groups discovered undercover police in their midst.²⁶ Even this is just scraping the surface. Not only has the government made it legal to essentially spy on the activities of millions of Australians with metadata laws, with some sixty agencies or more allowed access,²⁷ but we can only theorise about the level of digital intrusion, infiltration and surveillance that remains uncovered.

Thankfully we do not seem to have seen the level of infiltration as seen in the United Kingdom which saw lives ruined as police conducted long term relationships with multiple women, in one case even fathering a child with an activist. There has been excellent resistance work in the UK to hold these people to account.²⁸

Dissent = Democracy

Terania Creek in NSW was the site of the first forest blockade in the world. Members of that protest group were recently awarded community recognition of their service to the environment, and the Premier of the time, Neville Wran, noted the subsequent legislation that protected the northern rainforests as his proudest achievement. In a letter in support of the protesters, Wran wrote:

25 Tom Allard, “Coal spies: The secret world of black ops”, *Sydney Morning Herald*, June 7, 2014. <https://www.smh.com.au/national/nsw/coal-spies-the-secret-world-of-black-ops-20140606-39ofv.html>

26 Richard Baker and Nick McKenzie, “Police spying on activists revealed”, *Sydney Morning Herald*, October 16, 2008. <https://www.smh.com.au/national/police-spying-on-activists-revealed-20081015-51k0.html>

27 First Dog On The Moon (Andrew Marlton), “Your metadata. What even is it? Have we got a handy guide for you”, *Guardian Australia*, January 20, 2016. <https://www.theguardian.com/commentisfree/picture/2016/jan/20/your-metadata-what-even-is-it-have-we-got-a-handy-guide-for-you>

28 Rob Evans and Paul Lewis, “Revealed: how energy firms spy on environmental activists”, *The Guardian*, February 15, 2011. <https://www.theguardian.com/environment/2011/feb/14/energy-firms-activists-intelligence-gathering>

Terania Creek and the men and women who fought for it, played a critical role in shaping my views and the views of the Government of the day in relation to conservation. Indeed, there is no doubt that Terania Creek was a milestone in the history of conservation in Australia.²⁹

Peaceful protest and civil disobedience are vital and legitimate tools in creating positive social change. Contrary to conservative rhetoric, they are broadly supported across Australian society. The right to strike is being vigorously defended by ACTU head Sally McManus who has resonated across the country with union audiences ardently supporting her bold positioning. Internal polling of key members in leading activist organisations has indicated a high level of support for strategic civil disobedience; international NGO, Avaaz recorded historically high support for civil disobedience in member surveys; and the Australian Institute polled high levels of support for protection of farmland and water systems using these tactics.³⁰



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 disobedience are
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 positive social
 change**
 ”

Protestors during Beelihar wetlands campaign to Stop Roe 8. Photo: Renee Schipp

²⁹ Neville Wran, Letter to Terania Creek Protesters, *Rainforest Information Centre*. http://www.rainforestinfo.org.au/terania_forest_blockade.htm

³⁰ The Australia Institute, *Baird backs the frackers, people back the farmers*, March 10, 2016. <http://tai.org.au/content/baird-backs-frackers-people-back-farmers>

Despite the various challenges to peaceful protest outlined here, the majority in this country still have the privilege of being able to participate in civil disobedience with relatively little impact on their lives, unlikely to be killed in a jail cell or while protesting. This is a privilege to be used before it is taken away. And it is worth it, not only for achieving its direct goals, but also for the sense of community that it builds, the lifelong friendships, the bonds between mob and whitefullas working together, the resilience and practical skills that are learned, all factors that will be vital for moving forward in a climate changed world.

We are already seeing the stirrings of new waves of activity—record breaking turn outs for Invasion Day bringing city streets to a standstill, tens of thousands of students “striking for climate”, the rapid growth of Extinction Rebellion,³¹ #MeToo and movements against gendered violence, and Indigenous communities rising up world-wide.

Peaceful, bold protest and civil disobedience is critical to balance the scales. The only way they will tip is if more people stand up to support those on the frontlines—getting involved, sharing stories, calling on NGOs to step up, funding grassroots movements and capacity building, supporting Indigenous led resistance, or doing the slow and necessary community building work. If more people actually put their weight on those scales, we can start to tip the balance.

The greatest challenge we face is people not believing they have power, because together we do.

31 Ellie Shechet, “The ‘Extinction Rebellion’ Wants You to Wake Up”, *Rolling Stone Magazine*, January 28, 2019. <https://www.rollingstone.com/politics/politics-news/what-is-extinction-rebellion-785569/>

The right to advocate and protest is at the core of our democracy

As an Australian, I am proud that my country was central to both the writing and the adoption of the Universal Declaration of Human Rights in 1948. The head of the Australian delegation and later President of the UN General Assembly was Australia's Dr H. V. Evatt, an unstoppable force who tirelessly negotiated the final document. We were proud of our human rights contributions during the 19th and early 20th centuries, but for the past 30 years the 'liberalism' of neoliberalism has not supported a rights agenda. Instead, 'free market' neoliberalism has decided our public policy and Australia's democracy is weakened as a result.

Until recently, the tenets of neoliberalism—deregulation, smaller government, competition policy, privatisation, 'trickle down' economics and attacks on the advocacy role of civil society—have played out without being named as a coordinated theory. George Monbiot points out that if we were living under communism, it would have been named, but he argues that neoliberalism's proponents deliberately chose not to promote it by name.¹ Today, neoliberalism is being called out and named. Its extremes have unmasked its favouring of big business over the wellbeing of all the community. Yet, power still resides in forces that are not sympathetic to the rights of the community as whole. The right to advocate and protest is at the core of our democracy, but Coalition (and too often Labor) governments continue to limit this right.

Why is the NGO Sector Important for Democracy?

Traditionally our system of representative government has the NGO sector playing a mediating role between the state and the individual. It is a flexible, variable and effective way for individuals to relate to the political system. Political rights, such as free speech in the Universal Declaration and in the various conventions and declarations that have flowed from it, are a necessary part of relating to the political system.

1 Monbiot, G. 2016, *The Zombie Doctrine*, <https://www.monbiot.com/2016/04/15/the-zombie-doctrine/>



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The following diagram is a model often used by social scientists to describe society and the relationship of its three democratic elements—government/state, corporations/market, and community/NGOs. Each sector is important in its own right, yet each depends on and complements the other. The diagram demonstrates the uniqueness of each sector, and that the boundaries between them sometimes merge. Importantly, each should play an **equal** part in the functioning of a modern democratic society.



Yet today the circles are no longer equal in size. The balance in our democracy is out of whack. The market/corporations circle is huge, while the government/state circle is smaller, and the community/NGO sector is greatly diminished. Thirty years of neoliberalism have shrunk the size of both government and community and today we have a bloated 'market' sector where corporations call the tune for governments. The economic theory of neoliberalism has become an ideology, promoted by those who have found a way to profit from it. The neoliberal mantra of 'smaller government' has seen the public service shrunk and its services outsourced to the market. At the same time, the 'deregulation' or 'cutting red tape' mantra has seen corporations given free rein in situations where previously government oversight or regulatory bodies balanced the right of the public with the right of the corporation to make money.

We can identify seven positive contributions NGOs make in their unique role. Our public discourse should celebrate and value these contributions. They are:

1. Proposing policy and commenting on policy is vital to good policy-making by both government and business. People on the ground can see and predict the result of policies more effectively and so make improved outcomes possible for all. The relationship need not be a confrontational one and earlier Australian governments, such the Hawke government, actually went out of their way to set up advisory committees of NGO representatives to glean good ideas and refine policy.

2. Importantly, NGOs are uniquely placed to support policy that looks to long term goals, or policy that affects the future. Governments react to the short electoral cycle, asking 'how will it affect our chance of re-election?'. Corporations have a legal responsibility to ask 'how will it affect our bottom line?'. It is a special quality of the NGO sector that it has the flexibility to include the long-term in its policy interests and in its desired outcomes. What better issue than climate change to demonstrate this point?
3. The sector also provides a check against the views of powerful, organised, economic interests. There is a large imbalance between the power of vested interests and that of the individual. A well-functioning society needs a balance between the power of government, economic interests and the community. There is inevitably a healthy tension between the three sectors, but keeping the balance of power between the sectors is the challenge faced by a democracy.
4. NGOs have an accountability function. They inform the community about the behaviour of governments and businesses and call them to account. NGOs can claim legitimacy for this role if their roots are in the community and they are informed by the practical impact of policy on themselves or their members. When this is the case, NGOs are uniquely placed to respond to (a) the impact of government and business policies, (b) the impact of **lack** of policy, (c) failure to implement promises, (d) the unintended consequences of policy and (e) the existence of unethical or corrupt behaviour in business or government.
5. NGOs are better than individuals trying to act on issues alone, because by pooling financial and intellectual resources they improve the quality of community input to public debate. *'Two heads are better than one'* and *'many hands make light work'*.
6. They improve equity in our society by providing a 'voice' (a) for minority groups and (b) for different geographical areas. Special interest groups such as the disabled, women and LGBT groups can be heard in public debate. Regional and country NGOs can provide information to make policy specifically relevant to different geographical areas. Input by these special interest groups helps refine public policy to benefit the common good.
7. In contrast to government or large businesses, the NGO sector has flexibility to respond quickly to new political situations. That response can be in service delivery or policy. This flexibility can be seen as part of the variety, dynamism and vitality of the community from which NGOs come. The flexibility can also reflect different political and cultural ways of talking about the same issue and can tap into different parts of society. The richer the variety of NGOs in a society, the healthier is that society. An active community, engaged and debating creative proposals about public life, is to be desired, while at the other extreme, a society bereft of NGOs will veer dangerously towards totalitarianism or a dictatorship.

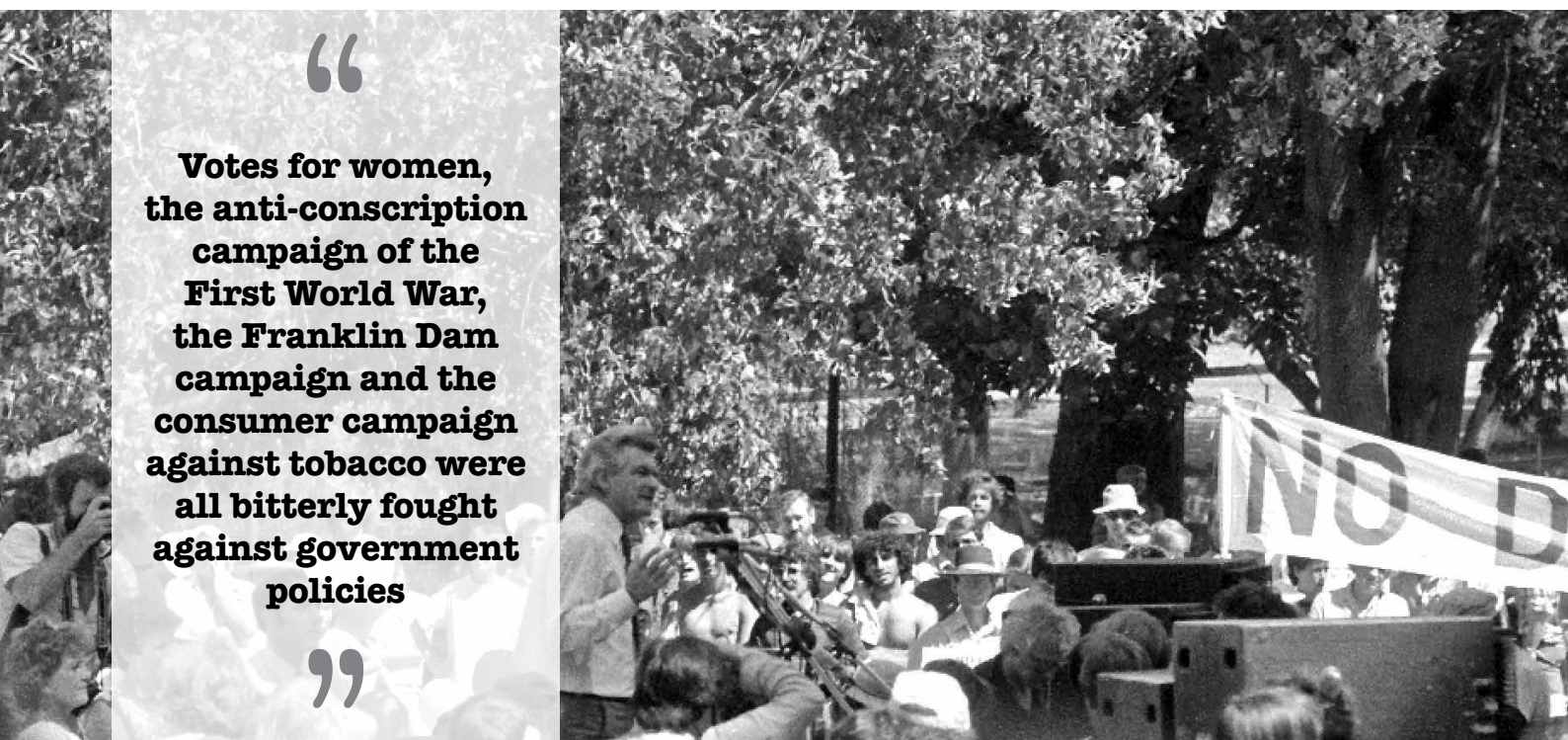
Traditional Role of NGOs

The political model of government, corporations and NGOs has always involved tensions. Votes for women, the anti-conscription campaign of the First World War, the Franklin Dam campaign and the consumer campaign against tobacco were all bitterly fought against government policies, with economic entities, such as the Tasmanian Hydro Electric Commission and tobacco companies being part of the mix. However, there was a social compact, or commonly held view of how our society functioned, that understood it was right for citizen organisations to speak for groups within society. NGOs were accepted as having an essential place in Australian society, despite many bitterly fought policy battles.

The acceptance of NGOs' advocacy role was stated clearly in a 1991 statement by the House of Representatives Standing Committee on Community Affairs.

An integral part of the consultative and lobbying role of these organisations is to disagree with government policy where this is necessary in order to represent the interests of their constituencies.²

In 1991, MPs believed public advocacy and criticism of government policy by NGOs was an essential activity.



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Photo: Bob Hawke Speaks At Franklin Dam Protest Rally. pszz. [CC BY-NC-SA 2.0]

² House of Representatives Standing Committee on Community Affairs, 1991, *You have your moments: Report on Funding of Peak Health and Community Organisations*, AGPS, Canberra, p. 17–18.

Why has the role of the NGO sector been diminished?

During the 1980s, neoliberalism, or economic rationalism as we called it, influenced the economic policies of the Hawke government. By the mid 1990s, its influence had moved outside the normal economic sphere. New language emerged, in which human motivation was changed to an economic imperative. Individuals became 'consumers' and were described as behaving mainly in response to or in expectation of economic advantage or disadvantage to themselves. This was instead of human motivation being discussed in a holistic manner within the disciplines of psychology and sociology where there was a rich history on motivation that was inclusive of an individual's social, intellectual, sexual and spiritual needs. Economic interpretations invaded other disciplines and, increasingly, the 'market' or economic motivation became the framework for much of our public discourse.

It is now almost a quarter of a century since John Howard first introduced a new language on the role of NGOs in Australian society based on this neoliberal or 'market' view. In so doing, he moved away from the idea of NGOs being the 'third sector' with equal importance to government and corporations. In two speeches associated with the Menzies Institute, Howard first suggested in 1995 that 'mainstream' Australia felt unable to be heard because of vested interest groups and that, if elected, he would change this and measure policy against the interests of 'mainstream' Australia.³ The following year, after his election, he began speaking of 'single-issue groups', 'special interests', 'elites' and 'accountability'.⁴ These were all words used by neoliberal economists believing that NGO advocacy would interfere with the efficient operation of the economy. Instead of the sector being of equal importance to government and corporations, it was described as 'unaccountable' because it was not elected. A process of undermining its legitimacy had begun.

Throughout the Howard Government, the theory of NGOs interfering with the market because of their advocacy was reflected in the Coalition's language. It was also behind the initiatives they took to silence the sector. NGOs were commended for practical work such as feeding the homeless or planting trees, but advocacy was condemned. Organisations that disagreed with government policy experienced repercussions. This was the reverse of the House of Representatives Committee statement in 1991 that 'an integral part' of NGOs 'lobbying role' was to 'disagree with government policy where this is necessary in order to represent the interests of their constituencies'.

Governments, including state governments, since Howard have continued attacks on the advocacy role of NGOs with many different initiatives aimed at silencing the sector. Over a quarter of a century, each step has whittled away the right of the sector to advocate.⁵

3 Howard, J. 1995, *The role of government: A modern liberal approach*, Menzies Research Centre 1995 National Lecture Series, 6 June, Menzies Research Centre, <http://australianpolitics.com/1995/06/06/john-howard-headland-speech-role-of-govt.html>

4 Howard, J., 1996, 'The Liberal Tradition: The Beliefs and Values Which Guide the Federal Government', *1996 Menzies Lecture*, Sir Robert Menzies Lecture Trust, www.menzieslecture.org/1996 p. 2.

5 Staples, J. 2012, *Non-government organisations and the Australian government: a dual strategy of public advocacy for NGOs*, PhD Research thesis, UNSW, <https://joanstaples.org/publications/>



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The ability to claim tax deductibility as a charity has been under attack in one form or another since 2003 in attempts to restrict the incomes of NGOs.
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Photo: QuinceMedia Varvarin/Serbia [CCBY 0] via Pexels

‘Confidentiality clauses’, which prevent organisations speaking to the media if they receive any government funding, have been one of the most effective silencing methods. Purchaser/provider contracts have skewed the work of many social service groups, who are now required to deliver specific ‘outcomes’ directly related to Government policy and objectives. At the same time, commercial providers, often the big corporate consultancy firms, have moved into the space previously occupied by social service and international development NGOs. The ability to claim tax deductibility as a charity has been under attack in one form or another since 2003 in attempts to restrict the incomes of NGOs. Coalition state governments have enacted laws aimed at the right of assembly. The list is long. It has been a quarter of a century of relentless attacks aimed at restricting the right to advocacy and protest.

Two New Attacks on NGOs

In December 2017, two new fronts were opened in Coalition government attacks. Firstly, the appointment of Gary Johns in December 2017 as director of the NGO regulator, the Australian Charities and Not-for-profits Commission (ACNC) created incredulous disbelief and concern amongst NGO leaders. For decades, Johns has been proactive in criticising the public advocacy of NGOs and even their very existence. From 1997 to 2006 he headed the Institute of Public Affairs (IPA) NGO Watch, which ran vigorous campaigns attacking NGOs. His language was neither measured nor temperate. In a 2001 IPA publication, he even questioned the need for NGOs in a democracy saying, *‘In democratic societies with accountable governments, strong regulation of the corporate sector and an absence of endemic corruption in business-government dealing, the role of NGOs is problematic.’* In 2014, Johns was quoted as saying: *‘The Abbott government promised to abolish the Charities Act 2013, which includes advocacy as a charitable purpose. It must make good that promise*

in a way that makes it clear to the High Court that advocacy is not a charitable purpose. Some of Johns' more controversial comments in recent years included calling Indigenous women on welfare 'cash cows' and arguing for mandatory contraception for welfare recipients.⁶

The Australian Charities and Not-for-profits Commission (ACNC), which Johns now heads, was created with the support of the NGO sector in 2012 to ensure accountability and transparency, to support good governance and innovation in the sector and to promote the reduction of unnecessary red tape. As far back as 1995, the sector was looking for these outcomes in submissions to an Industry Commission Report, *Charitable Organisations in Australia*. The UK Charities Commission was seen as a model in the way it not only regulated NGOs, but also supported the sector with programs to develop best practice. Soon after his appointment, petitions calling for Johns' removal appeared. However, his appointment is for a number of years. In the interim, the regulator of the NGO sector is headed by someone who for 30 years has called for the removal of the right of the sector to advocate.

Secondly, another front was opened attacking the sector in December 2017. Three 'foreign interference' bills were introduced, which treated NGOs as similar to political parties. The bills ignored the fundamental difference between political parties and civil society. Politicians and their parties form governments, and governments have the executive power to enact legislation that materially advantages or disadvantages organisations and individuals. In contrast, civil society cannot pass legislation. It can only advocate. The bills significantly affected international development NGOs, which work with many overseas governments to better the welfare of citizens in developing countries. Importantly, provisions threaded throughout the bills impacted the work of all NGOs.

A significant outcome has been the formation of a strong coalition of NGOs across all sectors calling itself, Hands Off Our Charities, which has lobbied strongly to amend the bills. It is likely that this strong coalition will continue after the bills are enacted. Over 40 major NGOs including a number of peak groups have decided that enough is enough and they need to jointly defend our democracy on a permanent basis. If this coalition stays together, it will be an important development in Australian NGO history.

Where do we go from here?

John Howard said he would change the country. His project has been successful in embedding neoliberalism within every aspect of our society—our way of talking, thinking and evaluating. Understanding the 'unnamed' theory under which we have laboured is the first step in rebalancing our rights.

Some older groups in the sector need to question whether their organisation needs renewal. Although neoliberal government policy has impacted heavily on NGO governance, neoliberal-inspired management has often been taken up by NGOs themselves, without regard to the implications. There was much criticism from neoliberal quarters during the Howard government that NGOs were 'not accountable'.

⁶ Williams, W. 2017, *Who is Gary Johns?*, Pro Bono Australia, <https://probonoaustralia.com.au/news/2017/12/who-is-gary-johns/>

This was a reflection of the neoliberal world view that NGOs were not elected like governments and interfered with the 'market'. Many in the sector misinterpreted this criticism as a need for better governance in the sector. It is true that better governance was often needed. Unfortunately many NGOs responded by introducing governance arrangements that echoed business boards dominated by professionals—fundraisers, risk management experts, accountants, communication experts—with little or no representation of those steeped in the sector's democratic place. Many of those who did so lost an understanding of the important advocacy role of the sector—a factor that has led to its weakening. NGOs need good governance arrangements, but these need to be both appropriate for the size and nature of the organisation, and bureaucratic arrangements should not swamp or interfere with the advocacy aims of the organisation. Unfortunately we have seen too much of this managerialism weakening NGO action.

New dynamic groups led by young people need our support. The existential threat of climate change has created new organisations, particularly in the environment sector. Examples are organisations such as Tipping Point, which provides support to Stop Adani groups, Climate for Change, which reaches out to people who have not been involved in community advocacy on climate change, and the Australian Youth Climate Coalition, which is providing an entry point for people as young as school age. This renewal is not restricted to only the environment movement. For example, Democracy in Colour is a new NGO expressing the value of a multicultural society, and Young is an NGO dedicated to the welfare of young people. It is a new breed of young activists that has led this renaissance. They are determined, organised, open to new ways of organising and filled with energy and talent. 'Community organising' is a strong refrain, meaning they recognise the need to mobilise many people. They stand on the shoulders of older campaigners, such as those who, by mobilising large numbers, ensured the Franklin River still runs free. They have sometimes taken inspiration from the US, where the 2008 Obama presidential campaign is cited by many as providing inspiration on how to organise. The Occupy movement has focussed their attention on inequality—an important motivating factor for them. They also see the need for institutional change, such as reform of political party donation laws, and measures to address the 'revolving' door whereby industry, particularly the mining industry, has infiltrated government and regulators. These young campaigners are developing a vision of a better society and they need our support.

Strong bonds of trust have developed amongst NGOs while opposing the 'foreign interference' bills. This new coalition across many different parts of the sector could be significant. A voice providing proactive recognition of the value of NGOs and the value of our democracy is sorely needed.

So, rebalancing our rights entails not just removing restrictions on NGO advocacy. It means NGOs need regular renewal. It means supporting the energy of new effective groups led by young leaders, and it means speaking in celebration of our democracy. The seven values of NGOs described earlier should be honoured and valued at every turn. Public discourse must celebrate the dynamism, vitality and fresh approaches which NGOs can offer to enrich our society. Australia should once again become proud that we have the rights of advocacy and protest.

Re-imagining the future of corporate governance in Australia

Introduction

The events of the Financial Services (Banking) Royal Commission (FSRC) have brought the corporate governance practices of some of Australia's largest public companies into plain view. The insights revealed have been shocking, and shown that directors have not listened to internal whistle-blowers exposing misconduct, not asked the hard questions internally to fulfil their directors' duties, nor acted in public interest. At the same time, these directors have been remunerated well, and yet rarely recommended to reduce each others' remuneration in the light of scandal and poor performance. Where they have, it has been retrospectively, as if to send the right signals and manage appearances externally.

The systemic misconduct and governance failures revealed throughout the FSRC hearings presents an opportunity upon which to reflect and re-imagine the future of corporate governance in Australia. It has seen many scholars and commentators question the assumptions that underpin corporate governance in Australia, whilst those from the business sector have jockeyed to influence any proposed changes. It appears that those within the system would prefer to maintain a system built on the self-governance 'comply or explain' corporate governance codes and light touch regulation, and they can only envisage minor tweaks to the status quo of the unitary board system.



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In this chapter, we present some historical background on corporate governance, and critique some of the major features of the dominant Anglo-American inspired model of corporate governance—the unitary board. We then present its fatal flaw, that it mixes executive and non-executive directors on that same board. Finally, we discuss a range of possible solutions to these problems being discussed in Australia and abroad, to propose some tangible ways forward, such as mandated two-tiered board structures, increased worker representation on boards, and rewriting governance codes of practice.

Dispersed ownership and its implications

The birth of corporate governance in Australia can be traced to the enactment of corporations legislation influenced and inspired by the *Joint Stock Companies Act 1856* (UK) and its key principles of limited liability, and *laissez faire* capitalism.¹ Limited liability enabled investors to buy a stake/share/security in a venture knowing that the only loss they would incur if the entrepreneurial venture was unsuccessful was the money they had invested to buy that stake. *Laissez faire* capitalism inspired a sense that businesses should be somewhat unencumbered by regulation, and would therefore govern, and to a degree regulate, themselves.

The dispersed joint-stock ownership structure created the separation of ownership and control, where those who managed the firm (agents), did not own the firm (principals). Further, it meant that no single shareholder possessed the power to control management. Adam Smith famously highlighted the governance challenge implied herein, in overseeing managers appointed to run publicly-listed companies:

The directors of such companies, however, being the managers rather of other people's money than of their own, it cannot well be expected that they should watch over it with the same anxious vigilance with which the partners in a private copartnery frequently watch over their own.²

Berle and Means³ penned a withering critique of the direction, in their opinion, of the dispersed ownership structure in which no single shareholder has the power to control management. They viewed it as leading to the creation of an elite class of executives or managers who owners would find difficult to hold accountable, and who managed largely for their own interests. More recently, Bloom and Rhodes⁴ have perhaps advanced similar critiques as to whether this has spread further than just the corporate sphere. In their final chapter, Berle and Means⁵ recommend the public chartering of corporations because they viewed the shareholder (agency theory monitoring) or managerial stewardship as sub-optimal and anti-democratic.

1 McQueen, R. (1991) Limited Liability Company Legislation—The Australian Experience. *Australian Journal of Corporate Law*, 1(1), 22–54.

2 Smith, A. (1776) *Wealth of Nations* (1976 Ed.), Hayes Barton Press, Raleigh NC.

3 Berle, A., & Means, G. (1932). *Private property and the modern corporation*. New York: Macmillan.

4 Bloom, P., & Rhodes, C. (2018). *The CEO Society*. University of Chicago Press.

5 Berle, A., & Means, G. (1932). *Private property and the modern corporation*. New York: Macmillan.

The agency problem (also known as the principal-agent problem) created by the separation of ownership and control has been central to corporate governance thinking and practice. Jensen and Meckling⁶ proposed agency theory where managers are rational, self-interested agents (*homo economicus*) motivated to maximise their own financial lot in life and not necessarily to serve the interests of shareholders. In other words, managers, who were not owners, did not serve the interests of owners, and managed the firm largely in their own interests. At the same time, there is an information asymmetry in this principal-agent relationship where those who managed the firm know far more about the operations of the firm than those who oversee them. Resolving this agency problem, that managers are self-interested and have more operational knowledge of the firm, than principals, has been central to theorising in the field of corporate governance. Further, this thinking positions the owners (shareholders) as the central actors for whom the firm should be run, and somewhat ignores the public nature of publicly listed companies, and the duties of directors to the corporation itself and the broader public.

Feature of Modern Corporate Governance

To address this agency problem, the Anglo-American Business Model's primary governance model, the unitary board, contains several features. These include prominent roles for board committees (auditing, nomination and remuneration), Independent Non-Executive Directors (INEDs) and Institutional Investors (IIs) in the governance of firms.



ASX stock holders

“
... rational, self-interested agents (*homo economicus*) [are] motivated to maximise their own financial lot in life and not necessarily to serve the interests of shareholders.
 ”

Photo: pixabay: pixabay.com [CC BY 0]

6 Jensen, M. C., & Meckling, W. H. (1976). Theory of the firm: Managerial behavior, agency costs and ownership structure. *Journal of Financial Economics*, 3(4), 305–360.

Independent non-executive directors

Under the unitary board, independent non-executive directors (INEDs), non-executive directors, and executive directors are all members of the board of directors. Corporate governance codes usually require a strong presence of independent (outside) directors on a unitary board. Directors are viewed as independent when there are no relationships or circumstances which could affect the director's judgement. They are seen as playing the most important role on a board, to monitor management activities, reduce managers' opportunistic behaviour and drive better firm financial performance. Directors of public companies have specific responsibilities and duties, to govern in the corporation's best interests and ensure that corporations do not impose costs on the wider community. The downside is that independent directors may lack in-depth knowledge of company operations; may be busy with multiple directorships; and may not be truly independent. All of these downsides can undermine their ability to be effective as directors, and can be exploited by executive directors who are in the position to set the agenda and gate-keep what information gets to the board.

Board committees

Building on the assumptions of agency theory, a key practical responsibility of the directors is the selection of a CEO and the overseeing of that CEO and other senior managers of the corporation on a day-to-day basis. In the unitary board system, the board delegates vital oversight functions to its sub-committees. These committees perform an important function in terms of cordoning off certain aspects of the work of the board from the executive (agent) members. In corporate governance codes and best practice guidance, including the Australian Stock Exchange (ASX) *Corporate Governance Principles and Recommendations*, it is advocated that committees have at least three members, a majority of whom are independent directors, and are chaired by INEDs (ASX Corporate Governance Council 2014). Boards generally contain a number of sub-committees that have an important role in monitoring senior management with the *audit, nomination and remuneration* committees being historically the most common with the presence of *risk* and or *corporate governance* committees being a more recent development.

The role of the audit committee is crucial in determining whether the accounts of the firm do indeed represent an accurate picture of the company's finance. It is chaired by INEDs, where the engagement of an independent auditor is a requirement for listing on a stock exchange. It is a concerning sign for a company to be constantly changing auditor and suggests something is not quite right.

The nomination committee's role is to nominate new board members and prospective executives to the firm and like all committees should have an INED as chair and be majority composed of INEDs. CEOs, in practice, often help select directors and exert substantial power over the board as a function of their operational expertise. Directors often recommend the nomination of directors that are known to them through their networks.⁷

⁷ Smith, S (2018) 'Company boards are stacked with friends of friends so how can we expect change?'; <https://theconversation.com/company-boards-are-stacked-with-friends-of-friends-so-how-can-we-expect-change-95790> [Accessed 28 November 2018]

The remuneration committee is responsible for determining the remuneration packages of the senior executives and directors. It stands to reason that we would not ask a room full of executives to decide their own level of remuneration or bonuses. Under an agency theory view of the world, one way we deal with executives is to incentivise them to do what we want. In other words, we reward them in such a way that they focus on what the owners want them to do. In this way, remuneration packages of executives have grown ever more complicated in Annual Report disclosures, to seemingly justify an ever-rising tide of higher remuneration for senior executives and directors. A key component of the modern remuneration package is stock options and grants—where we transfer ownership rights to the executives, making them owners of firm stock. This is an attempt to align the interests of executives with that of the shareholders, although potentially bringing them into conflict with broader societal or environmental interests.

Martin⁸ proposes that stock based remuneration for executives and directors is tantamount to allowing professional sports people to gamble on the outcomes of the games, and should be outlawed. It leads to a short term thinking and manipulation of performance metrics and stock prices for their rewards. In other words, Martin argues that it exacerbates the agency problem, and advocates keeping the people involved in the ‘real game’ of running the company or sitting on the board separate from the expectations game of the stock market.

Remuneration is one corporate governance mechanism viewed as being able to address the agency problem where ownership is viewed as conferring divine rights to the owner.

Ownership conflated with control

Modern corporate governance makes executives (agents) owners in order to incentivise them and align their interests with that of owners (principals). In the past, corporations have sought to make workers owners through Employee Share Ownership Plans (ESOPs), in the hope of extracting more commitment and productivity by also aligning their financial interests with that of the firm. In Australia, the now well-developed system of industry super funds has made workers participants in the financial system as a source of capital. All of these mechanisms have strengthened the logic that firms should be governed for their owners, even though legally they are not proprietary owners of the corporation.

Shareholders—Institutional Investors

The logic of the unitary board is that the owners’ (shareholders’) interests are those who should be served, with directors monitoring managers on their behalf. Increasingly, share ownership is held by institutional investors (IIs) where pension/superannuation, banks, insurance and other investment firms hold shares on behalf of others. The corporate governance codes and best practice guidelines advocate for these IIs to engage with the firms they own shares in, vote, and use their voice to affect positive changes to the governance of the firm. However, research shows that institutional investors do not engage and attempt to improve the corporate governance

8 Martin, R (2011). *Fixing the Game: Bubbles, Crashes, and What Capitalism Can Learn from the NFL*, Harvard Business Press, USA.

of the firms in which they are invested, and instead focus on return on investment.^{9,10} If a stock performs poorly, the institutional investors exit and take their money elsewhere, instead of engaging and attempting to improve corporate governance of the companies in which they invest in.

Fatal flaws

The fatal flaw inherent in the unitary board is that it mixes executive and non-executive directors. The problem has always been that executive directors have been able to capture boards and, whilst the features outlined attempt to fix this problem, using committees has not been effective. All of these committees are dominated by INEDs but their decisions continue to perpetuate problems with executive remuneration, lack of board diversity, and reluctance to challenge executive directors. And that's exactly the problem that was revealed in Australian Prudential Regulation Authority's review of Commonwealth Bank of Australia (CBA).¹¹

Similar to the arguments of John Quiggin on legislating property rights for nature in this issue, boards should be re-structured and much more diverse. It is open to Parliament to change how boards are structured and who sits on them. We also argue that consumer and other voices should be prominent in the regulatory oversight of particular industry sectors like banking and finance.

In light of recent governance failures in Australia and elsewhere, there have been a number of movements globally to reform the nature of shareholder capitalism and its associated corporate governance practices.

International ideas

In the USA, Elizabeth Warren has proposed the Accountable Capitalism Act to de-emphasise the idea that the mission is to pursue shareholder value above all else, and emphasise that corporations "consider the ramifications of their actions on others, including their families, neighbours, communities, and broader society". The Act attempts to hold corporations accountable for their actions, and to confer a legal obligation to a broader set of stakeholders.

The legislation relies on the assumption that managers are accountable to the directors of the firms, and this is not always the case as executives often dominate the boardroom landscape. It advocates that firm governance become more democratic with 40% of the board elected by the employees. It also contains rules constraining executives from engaging in short-term share trading and requires a supermajority agreement (3/4) of the board and shareholders to vote before the company uses funds for political purposes.

9 Tilba, A., & McNulty, T. (2013). Engaged versus disengaged ownership: The case of pension funds in the UK. *Corporate Governance: An International Review*, 21(2), 165–182.

10 McNulty, T., & Nordberg, D. (2016). Ownership, activism and engagement: Institutional investors as active owners. *Corporate Governance: An International Review*, 24(3), 346–358.

11 APRA (2018) Prudential Inquiry into the Commonwealth Bank of Australia (CBA) Final Report Accessed at: https://www.apra.gov.au/sites/default/files/CBA-Prudential-Inquiry_Final-Report_30042018.pdf [Accessed 30 June 2018]

In the UK in 2016, whilst campaigning to be Prime Minister, Theresa May suggested there would be changes to the way corporations were run under her leadership, and raised the idea of mandating worker directors. After May's victory, the Financial Reporting Council (FRC) undertook consultation on the proposal of worker directors. The May Conservative government then watered down its position from initially mandating worker directors to providing a range of options to firms including 1) assigning a non-executive director to represent employees, 2) creating an employee advisory council or 3) nominating a director from the workforce. This enabled companies to choose how they intend to heed the views of employees.

In September 2018, British Labour Shadow Chancellor John McDonnell outlined his party's vision for worker directors and employee ownership. It proposed that all companies with over 250 employees would be required to have one third of their board composed of employee representatives. Additionally, McDonnell proposed that "all UK listed companies with more than 250 staff would be legally required to transfer 1% of their ownership into an "inclusive ownership fund" of collectively held shares".

In the UK, even if the Conservative party has weakened its position on the matter, it would seem that the worker director is an idea whose time has almost come. However, in Australia few of the proposals being discussed incorporate worker directors, and indeed many commentators in the wake of the #BankingRC have rallied against ideas of worker directors and German-style corporate governance. Instead, promises have been made to do better, weak regulators have been blamed, but structural change is being resisted.

How to fix corporate governance in Australia

Research into European banks suggests having employee and union representation on supervisory boards, combined with introduction of employee-elected works councils to deal with management over day-to-day issues, reduces systemic risk and holds executives accountable.^{12,13}

To address the confusion created by mixing executive and non-executive directors on one board, Australia should mandate a two-tiered board structure for corporations and large companies. This is similar to the largely successful German system of co-determination. This would separate non-executive from executive directors and create clear, legally separate roles for both groups.

On the upper, supervisory boards' non-executive directors would be legally tasked with monitoring and control. This includes approving strategy and appointing auditors.

A lower, management board made up of executive directors would be responsible for implementing the approved strategy and day-to-day management.

12 Anginer, D., Demircug-Kunt, A., Huizinga, H., & Ma, K. (2014). *Corporate governance and bank insolvency risk: international evidence*. The World Bank.

13 Ferri, G., Kalmi, P., & Kerola, E. (2015). Organizational structure and performance in European Banks: A reassessment. In *Advances in the economic analysis of participatory & labor-managed firms* (pp.109–141). Emerald Group Publishing Limited, UK.

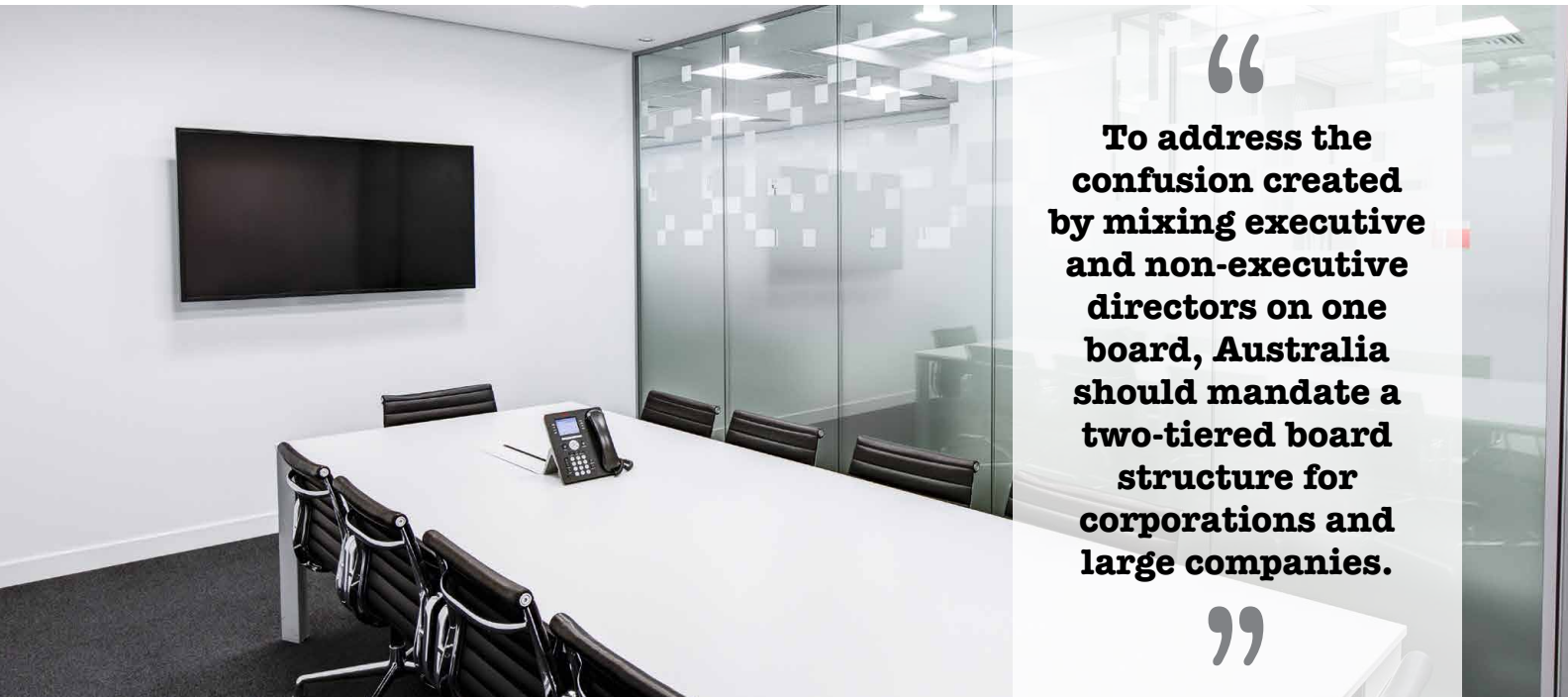


Photo: pixabay: pixabay.com [CC BY 0]

This is important given the findings of an Australian Prudential Regulatory Authority report into culture at the Commonwealth Bank.¹⁴ It found a board in awe of the CEO and executive committees unwilling to challenge him, not to mention their lack of detailed operational and regulatory knowledge.

It's noteworthy that it was operational-level employees who acted as whistleblowers and brought on the banking royal commission. Employee-elected directors would systemise this process. Employees often have a much better understanding of what is happening inside large corporations than any independent non-executive director could.

And by electing employee directors, boards become more democratic and better proxies of the public interest—not just the interest of shareholders.

The ASX code is bad and ineffective.¹⁵ It is written by corporate insiders for corporate insiders, under the aegis of a listed corporation (the Australian Stock Exchange).¹⁶

14 APRA (2018) Prudential Inquiry into the Commonwealth Bank of Australia (CBA) Final Report Accessed at: https://www.apra.gov.au/sites/default/files/CBA-Prudential-Inquiry_Final-Report_30042018.pdf [Accessed 30 June 2018]

15 Linden, A. (2017). 'The CPA saga demonstrates why Australia's corporate governance code needs replacing' *The Conversation* <https://theconversation.com/the-cpa-saga-demonstrates-why-australias-corporate-governance-code-needs-replacing-79200> [Accessed 7 October 2018]

16 ASX Corporate Governance Council (2014) *Corporate Governance Principles and Recommendations (3rd Ed.)* <https://www.asx.com.au/documents/asx-compliance/cgc-principles-and-recommendations-3rd-edn.pdf> [Accessed 30 June 2018]

This is why responsibility for writing and amplifying governance practice should fall to a regulatory (APRA, Australian Securities and Investments Commission and the Australian Competition and Consumer Commission) convened panel comprised of community and consumer advocates.

These reforms are important but they are just the start. They need to be complemented by wide-ranging initiatives in prudential regulation, corporate law, competition law, electoral law¹⁷ and industrial relations.¹⁸ All of this is necessary to constrain inappropriate corporate influence over regulators, politicians and wider public discourse.

The laundry list of necessary reforms includes breaking up the big four accounting firms, capping executive remuneration and banning variable incentives, banning corporate political donations and heavily restricting lobbying,¹⁹ better resourcing regulators and working to prevent regulatory capture,²⁰ and closing loopholes in the corporate law.

Finally, intensifying proactive surveillance would increase the number of criminal prosecutions of directors and senior executives.

Further reading

Linden, A. and Staples, W. (2018). 'Solving deep problems with corporate governance requires more than rearranging deck chairs' *The Conversation* <https://theconversation.com/solving-deep-problems-with-corporate-governance-requires-more-than-rearranging-deck-chairs-99297> [Accessed 7 October 2018]

Sitaraman G (2018) 'We must hold capitalism accountable. Elizabeth Warren shows how' <https://www.theguardian.com/commentisfree/2018/aug/18/capitalism-accountable-elizabeth-warren-ganesh-sitaraman> [Accessed 28 November 2018]

Staples, W & Linden A (2019) Word games and virtue signalling as the stock exchange reworks its corporate governance code <https://theconversation.com/word-games-and-virtue-signalling-as-the-stock-exchange-reworks-its-corporate-governance-code-112768> [Accessed March 26 2019]

Word games and virtue signalling as the stock exchange reworks its corporate governance code <https://theconversation.com/word-games-and-virtue-signalling-as-the-stock-exchange-reworks-its-corporate-governance-code-112768>

17 Goss, R. (2014). Votes for corporations and extra votes for property owners: why local council elections are undemocratic, *The Conversation* <https://theconversation.com/votes-for-corporations-and-extra-votes-for-property-owners-why-local-council-elections-are-undemocratic-83791> [Accessed 30 November 2018]

18 Klikauer, T. (2005). Forcing German managers to focus on productivity. *Employee relations*, 27(5), 459–477.

19 Chin, M. K., Hambrick, D. C., & Treviño, L. K. (2013). Political ideologies of CEOs: The influence of executives' values on corporate social responsibility. *Administrative Science Quarterly*, 58(2), 197–232.

20 Potter, M. R., Olejarski, A. M., & Pfister, S. M. (2014). Capture theory and the public interest: Balancing competing values to ensure regulatory effectiveness. *International Journal of Public Administration*, 37(10), 638–645.

The divine right of capital in Australia today —corporations, community interests, the body politic and the natural environment

There is a long and distinguished list of academic contributors to a large body of literature which addresses the question—what makes capitalist democracies work better/best/optimally? Some of the preconditions established in that literature are: that taxes/subsidies address externalities¹; that property rights are respected, contracts are well understood and cheaply, honestly and easily enforced; and that ‘stewards’ (for example, elected politicians, trustees and company directors) seek to act in the genuine interests of their principals (respectively—voters, beneficiaries and shareholders).

This essay focusses on the last issue in the context of large listed public companies. It deals with the impact their operation has on the preconditions above—particularly the first and the third.² That impact is twofold. Firstly, there is a direct impact; if, say, taxes inadequately incorporate environmental costs, corporate conduct may cause environmental damage. Secondly, there is an indirect impact which arises if companies are extended political rights; corporate political influence may seek to thwart good stewardship by elected politicians so as to ensure the profits flowing from that environmental damage are prolonged.³

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- 1 The term externality is construed broadly in this essay. Failing to price a negative environmental externality like carbon emissions will result in too many emissions. Similarly, failing to price the negative social externalities caused by urban vehicle use will result in too much traffic congestion and too many car accidents. But, of course, not all citizens will exploit the common good and pricing and law aren't the sole means of addressing externalities. In particular, companies will often have an interest in being seen as good corporate citizens.
 - 2 It doesn't deal with asymmetry of legal resources and attempts to frustrate the legal process—for example, bribery and intimidation of the judiciary.
 - 3 Here is important to distinguish between benefit to shareholders and management. Firstly, the use of company funds for political purposes is, often, little more than a fringe benefit for directors and senior management justified by dubious claims it is of value to shareholders. Secondly, shareholders will generally be more concerned than senior management to ensure the company avoids a reputation for poor environmental performance.



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Following a glossary, the first section of this essay describes Anglophone corporate governance design and the functioning of Anglophone corporate democracy. It deals with the stewardship of directors, and, in particular, one important facet of influence over that stewardship—shareholder resolutions. The second section deals with corporate political influence. It contrasts arrangements in the US, the UK and Australia and, in this context, describes the use of shareholder resolutions—mandatory in the UK, commonplace in the US but virtually unknown in Australia. The conclusion contains a list of proposals to amend Australian law and the practice of public institutions to better support corporate democracy and to ensure rights of corporate political speech better support parliamentary democracy.

A. Glossary

Australasian Centre for Corporate Responsibility (ACCR) is an Australian not-for-profit which aims to further Australian corporate democracy.⁴

Direct political expenditure refers to donations to, and other payments for the benefit of, politicians, parties, candidates, their associates or party/campaign support organisations and ‘own account’ expenditure (perhaps made independently of candidates or parties) but spent intending to influence public, bureaucratic or elite attitudes to candidates, parties or issues. It includes provision of ‘in-kind’ benefits.

ESG stands for Environmental, Social and Governance issues. They are issues of corporate conduct often not captured in a set of accounts. Motivations for understanding such issues vary. A shareholder might want to impose an ethical screen on their portfolio or want advice about how best to vote on at a company AGM or they might be concerned about the future price impact of government action which might, for example, price or regulate an environmental externality relevant to the company.

Indirect political expenditure refers to expenditure channelled through a third party, for example, a think tank, trade association, hired lobbyist or “astroturf” group to influence public, bureaucratic or elite support for politicians, candidates or parties or public, bureaucratic or elite attitudes to, or the outcome of, a political issue or an election.⁵

Private ordering refers to social order that emerges without formal law.

Private Engagement refers to private, informal dialogue between investors and companies, with the aim of influencing their practices. *Shareholder advocacy* aka *Active Ownership* is private engagement plus filing and public support for resolutions with a view to improving returns and/or improving performance on ESG

4 It seeks to improve Australian listed companies’ performance on environmental, social and governance (ESG) risk indicators. See <https://accr.org.au/what-we-do/>

5 For those familiar with US political expenditure—Super PACs and c4s generally fall into this category though some c4s are more akin to Australian party associates.

issues. *Engagement* is also sometimes used as an umbrella term covering private engagement plus voting on board initiated resolutions and the remuneration report plus filing/supporting shareholder resolutions.

Universal Owner is an investor with a highly diversified portfolio managed with a focus on long-term risk and return. Such portfolios are exposed to environmental and social costs caused by any one investee company which affect other investees. Universal owners don't benefit when one company exploits an environmental or social externality at the expense of another company or manipulates the political system to the benefit of one company at the expense of another. Universal owners are also often described as institutional investors with large, passively managed portfolios. However, neither scale nor passive management is essential to the concept.⁶

B. Anglophone corporate democracy and shareholder ESG resolutions

The corporate law of any one country has to address a number of basic questions.

Firstly, what do corporations owe society and the state in exchange for their right to exist? It is important to understand that corporations have no inherent right to exist—they are creatures of the state. The state bestows companies with the right of limited liability; listed public companies also get to raise monies

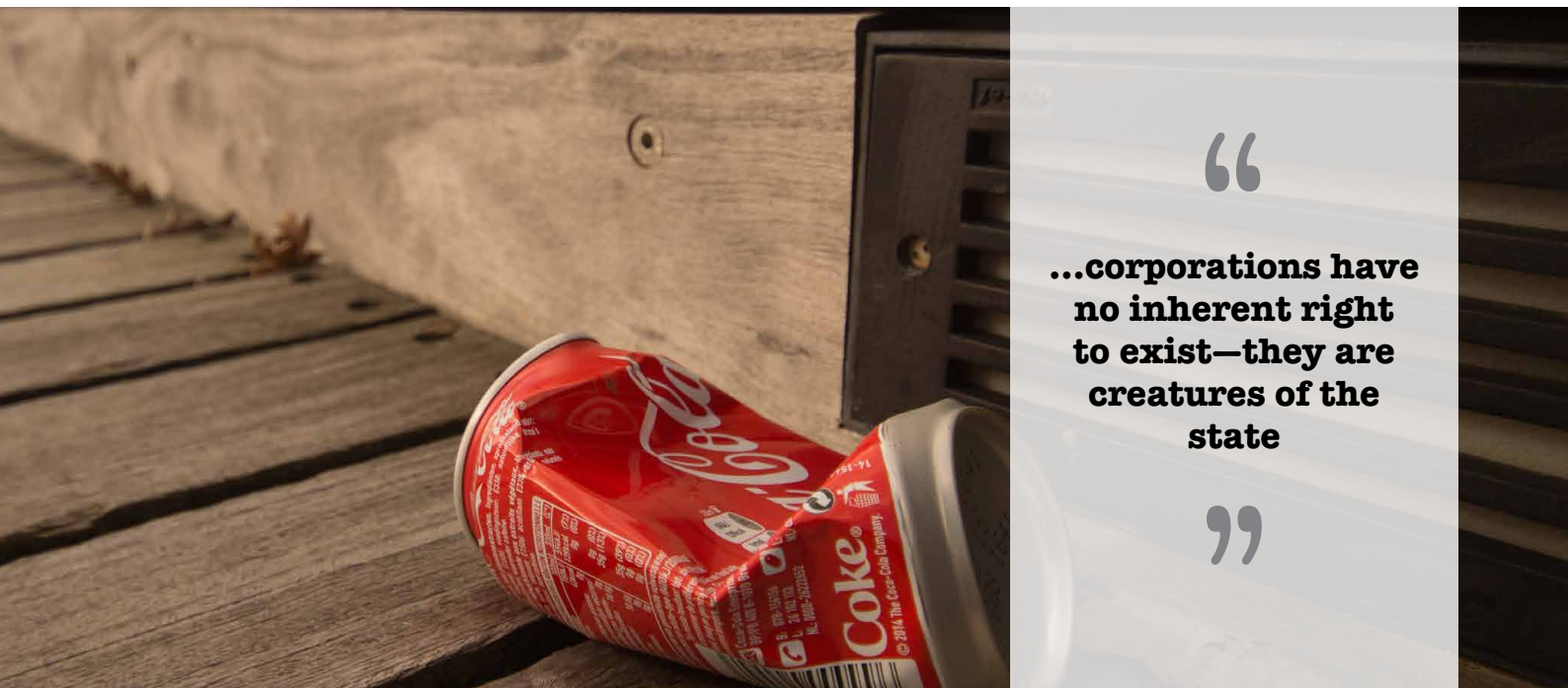


Photo: Skitterphoto skitterphoto.com/ [CC BY 0]

⁶ There is a large body of literature on the implications of Universal Ownership. For a guide, see *UNEP Finance Initiative Universal Ownership Why environmental externalities matter to institutional investors 2011* at http://www.unepfi.org/fileadmin/documents/universal_ownership_full.pdf

from the general public. This is a substantial gift of rights from the state to private entities. What is the quid pro quo that should be expected in return? In Australia today, the current answer is—not much. But that is not a universal answer. Historically, in Australia companies had a ‘mission’ they had to stick to. In China today, shareholders have to accept a representative of the Communist Party will have a strong influence on corporate conduct. In the US, each state has a procedure to revoke the charter of a corporation that violates the law and it happens.

Secondly, how might corporate democracy work? Australian parliamentary democracy is primarily representative—elected politicians take decisions for all Australians.⁷

Anglophone corporate democracy is also primarily representative. Mostly, shareholders elect directors and directors take decisions about the company. But it’s also participative, a lot more participative than Australian parliamentary democracy. In the UK shareholders can and do lodge and vote on both directive and advisory resolutions, in the US and Canada they are mostly advisory. In both cases, these practices are common. Until quite recently they have been unusual in Australia.⁸

Thirdly, what political rights will be extended to corporations? Australia, the US and the UK have answered this design issue very differently. This issue is discussed further in section C below.

Figure 1 sets out some of the ‘players’ involved in the corporate governance of a listed company: shareholders, directors and proxy advisers. In aggregate, the shareholders’ relationship with a board is one of ‘principal’ and ‘agent’. Though the board has an overriding obligation to act in the interests of shareholders, the interests of the board will often diverge from those of shareholders. Shareholder resolutions are just one of the many ‘principal monitoring’ mechanisms commonly included in company law to check the extent to which the agent, in this case the board, can act in pursuit of its own interests rather than the interests of the principal, in this case the shareholders.

One group Australians are often unfamiliar with, who play an important role in the US and the UK, are those institutional shareholders who engage on ESG issues and sponsor ESG resolutions. They are most commonly church funds, specialist ethical or responsible fund managers or public sector pension funds.⁹

Proxy advisers engaged by institutional shareholders form an attitude to all the resolutions and advise their clients how to vote.

7 But it’s also infrequently participative—we occasionally have referenda to change the constitution or advisory plebiscites like those used in WWI in regards conscription or the recent marriage equality survey.

8 Primarily because the common law here has frustrated the statutory intent.

9 For various cultural, legal and historical economic and financial reasons such groups never emerged in Australia the way they did in the UK and the US. They play an important initiating role in the process. They are often described as being ‘prepared to put their head above the parapet’ and risk antagonising powerful board, individual director and/or management interests in pursuit of long-term shareholder interests.

Figure 1: Corporate Governance—Dramatis Personae—Anglophone countries

Board of Directors:	organ of the company responsible for supervising its management. The board is responsible to the shareholders in accord with arrangements set out in the Corporations Act, the company's own constitution and the common law
Institutional share owners:	such as superannuation funds, can vote at the AGMs of companies in which they hold shares to elect/re-elect Directors, approve the remuneration report, vote on shareholder-initiated resolutions. They generally base their vote on the advice of proxy advisors
Proxy advisors:	consulting firms engaged by institutional share owners to assess how they should vote, for example should they support the board's remuneration report or the re-election of particular directors
Shareholders in general meeting:	organ of the company responsible for electing/removing board directors and voting on board, shareholder and automatically initiated resolutions. The vast bulk of voting is done by proxy; most shareholders don't attend the meeting—they instruct a proxy how to vote

The legal depiction above doesn't illuminate the balance of power between the players, which varies across companies, countries and, importantly, time. Economic historians distinguish three stages of capitalism—entrepreneurial, managerial and fiduciary. Entrepreneurial capitalism is characterised by a situation where founding individuals or families dominate corporate activity. They held most of the shares. Managerial capitalism is characterised by a situation where managers are the central agents of corporate power. Fiduciary capitalism is characterised by a situation where 'universal owners'¹⁰ (for example, super funds with broad portfolio holdings) exercise effective control over company boards and management. They ensure corporate focus reflects the long-term interests of the beneficiaries of the funds managed by the universal owners.¹¹

For many companies, Australia is in the slow process of change from managerial to fiduciary capitalism. This transition is happening in Australia for both domestic and international reasons. The international reason is that the transition is more advanced in the US and the UK and those countries are substantial sources of portfolio investment in Australia¹² so US and UK shareholders and their proxy advisers often

10 Institutional investors with highly diversified and long-term portfolios. See Glossary.

11 Robert Monks, co-founder of the proxy advisory business Institutional Shareholder Services (ISS), envisaged fiduciary capitalism would see shareholders become an "effective, informed, competent counter force to whom management must be accountable". He envisaged much of what citizens might otherwise seek through the political process would be available to them as shareholders and that fiduciary capitalism would "restore ancient values of ownership that preceded the corporate form". See p 145 of Bakan, J *The Corporation: The Pathological Pursuit of Profit and Power*, 2005 at http://new_words.enacademic.com/1278/fiduciary_capitalism

12 Together, the UK and the US accounted for 53% of portfolio investment in Australia in equities as at end December 2017. See Table 13 ABS, *International Investment Position, Australia: Supplementary Statistics 2017* at <http://www.abs.gov.au/ausstats/abs@.nsf/mf/5352.0>

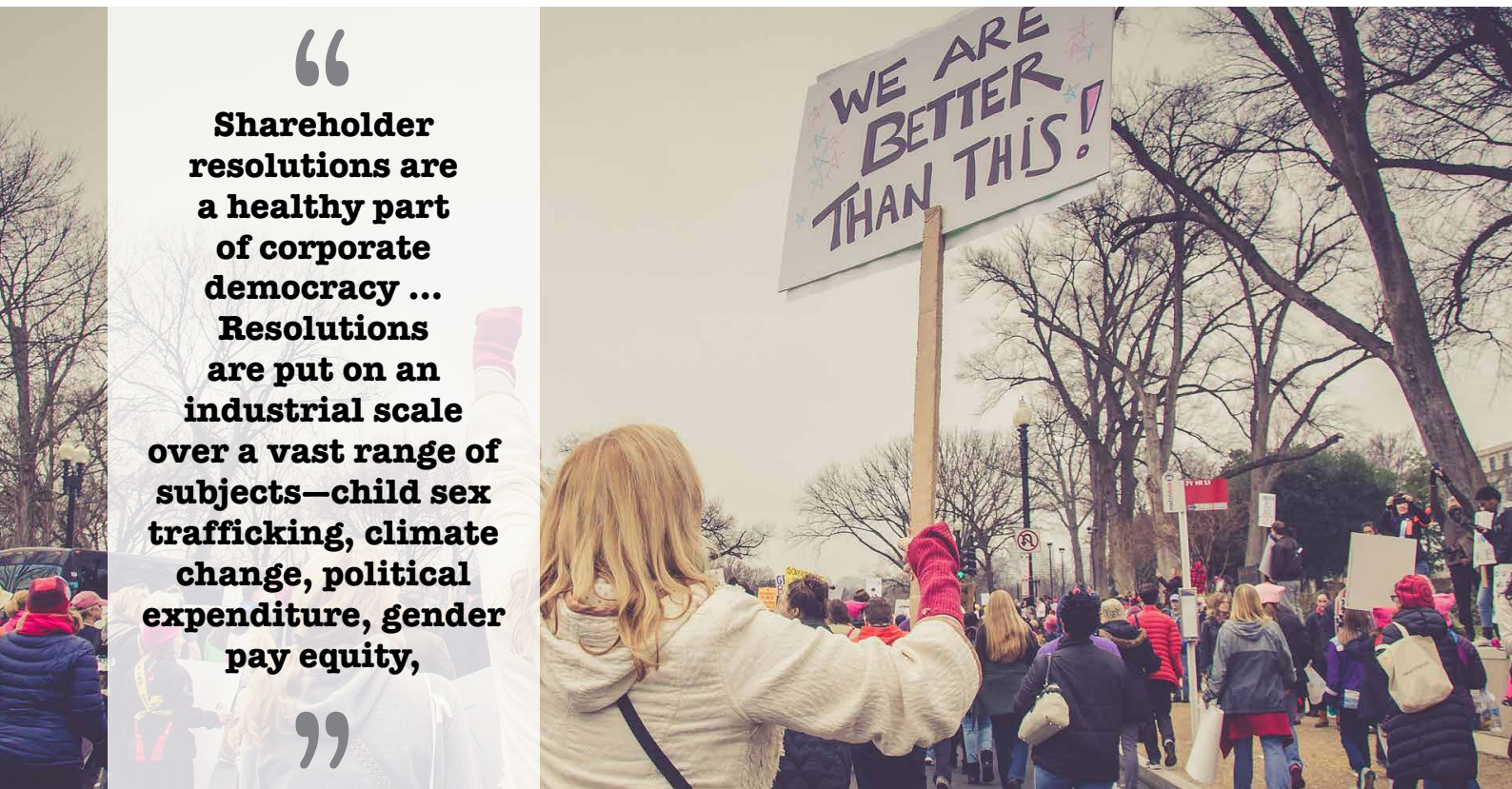


Photo: StockSnap [CC BY 0]

bring a fiduciary capitalism perspective to their dealings with Australian investee companies. The domestic reason is the very large pool of superannuation assets and the slow but steady expansion of an expectation by Australian superannuation funds that Australian boards will focus on the long-term interests of the beneficiaries of those super funds.

The change has potential public policy advantages because shareholders, particularly those with a 'universal owner' perspective, have a strong long-term interest in ensuring their companies are good citizens. Governments can support or frustrate this transition. To date the Australian government has done little positive or negative in this regard.

Shareholder resolutions are a healthy part of corporate democracy in both the US and the UK and have been for many years.¹³ They allow shareholders (ie the principals) to express a view or direct the board (ie the steward) on an issue without escalating the dispute to a personality focus on re-election of particular directors. In the US similar or identical resolutions are often put many years in a row, slowly gaining support. In the first year a resolution needs to attract 3% of the vote to be put again. Support of

13 The text describes the situation in the US, for a reader interested in a comparative description of the UK see the reports available at <https://accr.org.au/shareholder-resolutions/>

around 15–25% will generally result in the board agreeing to accommodate the proponent’s suggestions. Resolutions are put on an industrial scale over a vast range of subjects—child sex trafficking, climate change, political expenditure, gender pay equity, etc—every year. For every resolution actually considered at an AGM, a rule of thumb is that 2 to 3 will have been lodged but withdrawn following the company’s agreement to comply with the proponent’s suggestion. The following section focuses on one subject area—corporate political expenditure.

Corporate political expenditure¹⁴

This section deals with public and shareholder scrutiny and oversight of corporate political expenditure in Australia. Two classes of political expenditure are distinguished—‘direct’ and ‘indirect’. For definitions see the Glossary.¹⁵

Donation practice in the UK at listed public companies changed significantly with the introduction in 2000 of law requiring majority shareholder consent by prior shareholder resolution to approve direct political expenditure. Many companies stopped making political donations.¹⁶ A study in 2015 found that 25 of the top 40 companies in the FTSE 100 had some ban on political contributions.¹⁷ The average donation ceiling for which approval was sought in the period 2001 to 2010 was £100k¹⁸ but actual expenditure averaged only one eighth of that.¹⁹

In the US, at the federal level, direct donations to political parties or candidates are banned and disclosure to shareholders of other direct political expenditure is commonplace.

Since the 2004 proxy season, shareholder resolutions seeking disclosure of political contributions and lobbying expenditure have been common in the US. For example, in 2014 there were 103 lodged with an average vote in support of around 20%. Seven received support in excess of 40%.²⁰ The effort was initiated by the Center for Political Accountability, a non-partisan, non-profit advocacy organization.²¹ Many of the resolutions have been filed by the New York State Common Retirement Fund,²² Since 2012, the breadth and quality of disclosure has improved. Voluntarily assumed ‘good corporate citizenship’ restrictions on political spending have significantly

14 This section draws on the paper *Corporate political expenditure in Australia*, Howard Pender, 2016 see <https://accr.org.au/politics/>

15 Together, indirect and direct expenditures are referred to as ‘political contributions’ or ‘political expenditure’.

16 See Torres-Spelliscy, C & Fogel, K *Shareholder—Authorised Corporate Political Spending in the United Kingdom*, 2011 University of San Francisco Law review, v 46. p 558.

17 Note though those bans don’t always apply to donations in any jurisdiction. See Transparency International <http://www.transparency.org.uk/publications/corporate-political-engagement-index-2015/> p 3 and 12.

18 See Torres-Spelliscy, C & Fogel, K *ibid* p 565.

19 *Ibid* p 569.

20 See <http://corpgov.law.harvard.edu/2015/01/30/responding-to-corporate-political-disclosure-initiatives/>

21 The CPA is an independent organization that works closely with the Zicklin Center for Ethics Research at The Wharton School at the University of Pennsylvania

22 Analogous to an Australian public sector super fund for State government employees.

increased since 2004. The Center for Political Accountability has published since 2011 an annual survey scoring companies on an index which benchmarks companies on their political spending disclosure, decision-making and board oversight policies and practices. In 2015, 25% of companies covered by the index had some restriction on political spending. In 2004, few such restrictions were in effect.²³

Australian boards are free to spend company funds directly on political causes, should they so choose, substantially free of shareholder scrutiny let alone oversight.²⁴

Expenditure on federal level lobbying is subject to mandatory disclosure obligations in the US. In the UK it has become commonplace for companies to report in detail on their lobbying activities. By contrast, in Australia, there is no mandatory and minimal voluntary disclosure of lobbying expenditure.

In the US, as described above, companies are moving to disclose to shareholders (often as part of more general political expenditure disclosure) their payments to trade associations used for political purposes. By contrast, usage of trade associations is still an opaque area in the UK.

In Australia, three particular trade associations²⁵ have been used as channels for political expenditure by boards of ASX companies seeking to dissuade Australian governments from implementing policies to address climate change. Australia's current 'laggard' status on climate change response reflects the success of these trade associations and this strategy. Disclosure by ASX companies of the quantum of, or rationale for, the use of shareholders' funds for this purpose is virtually unknown.

In conclusion, in Australia, unlike in the UK and the US, for substantial sums of money across many companies it is impossible to tell the full amount of political expenditure or the extent to which the expenditure reflects the personal whim or short-term interests of boards or genuinely advances long-term shareholder interests. It is also impossible to tell how much these contributions actually influence Australian politics.

There have been a few recent attempts by shareholders to curtail misuse by boards of shareholders' money for political purposes.

In early 2016, the ACCR identified NAB as a target for a resolution aimed at expenditure on political lobbying. NAB's policy on political donations stated: "Our donations are not to express support for one side over another". The Australian Electoral Commission's (AEC) records showed that NAB paid \$553,000 to Australian political parties in the three preceding financial years. Of this, three quarters went to the Liberal party and the remaining

23 These developments are often depicted as a victory for private ordering. See, for example, Yablon, *R Campaign Finance Reform without Law*, University of Wisconsin Law School, 2017.

24 Though there is some donation capping and mandatory disclosure of direct political donations, compared to other Commonwealth countries the regulation of political finance in Australia has been described as "laissez-faire, to the point of being lackadaisical". See Orr, *G The Law of Politics*, 2010 p 239.

25 The Minerals Council of Australia (MCA), the Australian Petroleum Production and Exploration Association (APPEA) and the Australian Industry Greenhouse Network (AIGN).

quarter to the ALP. NAB did not disclose any payments to smaller parties or independents. In the US, NAB's conduct would have been illegal; in the UK it would have required shareholder approval. ACCR commenced the process of putting forward a resolution seeking a review of policy and practice for consideration at the NAB AGM. On 20 September 2016, NAB announced a new policy of not making any more political donations. ACCR welcomed the decision made by the NAB board and the resolution didn't proceed.

In 2017 and 2018, ACCR lead-filed resolutions dealing with trade association membership at BHP and Rio Tinto.²⁶ Both BHP and Rio had policies advocating the Australian government take constructive steps to respond to climate change. By contrast, these two companies were significant contributors to trade associations actively seeking to delay or obstruct climate change response in Australia. ACCR filed resolutions known in the US under the category-heading—'board our company needs to stop walking both sides of the street'. The resolutions resulted attracted significant support (10% at BHP, 18% at Rio²⁷) and significant change. For example, at BHP, the board agreed to conduct and publish a review of trade Association membership; the CEO of the Minerals Council of Australia resigned; and BHP exited the World Coal Association.²⁸

Conclusion

Capitalist democracies work better when taxes/subsidies address externalities, politicians seek to act in the best interests of electors and boards seek to act in the best interests of shareholders. Attention to the quality of our corporate democracy has been lacking in Australia and this inattention has compromised the functioning of our parliamentary democracy.

In the public policy context, I propose that:

- the Australian *Corporations Act 2001* is reviewed to enhance shareholder primacy, to facilitate shareholder voting and to improve disclosure by asset owners of their voting record;
- in particular, the law is changed to facilitate shareholders putting both directive and advisory resolutions including resolutions which comment on the exercise of management function;
- Australian state and federal governments adopt a model asset owner (like a model litigant) approach to their own portfolio holdings, for example, through the Future Fund. At present, in general, disclosure of voting record by public authorities is worse than that by private sector entities;²⁹

26 See <https://accr.org.au/politics/bhp/> and <https://accr.org.au/politics/rio/>

27 Note that because of the common law in Australia the resolutions were not formally put to the meeting, however they were included on the notice of meeting, all shareholders had the chance to instruct their proxy how to vote on the resolution, and the level of support had it formally been put to the meeting becomes known to shareholders. The vast bulk of votes on a resolution at an ASX listed company AGM are usually lodged before the meeting via proxy. ACCR's co-filers for the Rio resolution were Australian Local Government Super, the Church of England Pensions Board and the Seventh Swedish National Pension Fund (AP7).

28 For links to press coverage of this resolution see <https://accr.org.au/politics/bhp/>

29 See Jones, R and Pender, H Survey of the responsible investment policies and related voting transparency of selected Australian asset owners and fund managers, 2018 at <https://accr.org.au/wp-content/uploads/ACCR-RI-Survey-Report-2018.pdf> especially p 10.

- ASIC is resourced and required to enforce the current law in regard private sector voting record disclosure obligations. The current situation is that ASIC notes substantial non-compliance with the law but refrains from taking any action.³⁰ There is little point having a regulator like this;
- the *Commonwealth Electoral Act 1918* is amended to ban any direct payment by companies to parties or politicians;
- the Corporations Act is amended to ban any other political expenditure by a public company without an explicit authorising resolution of shareholders;
- tax deductibility for corporate lobbying expenditure is removed and all political expenditure by private companies is treated and taxed as a fringe benefit accruing to board members.

Note that there is nothing novel or unusual about any of these suggestions—each one of them reflects either or both US and UK law and practice.

Improved corporate democracy is no substitute for taxes and regulation which focus corporate decision-makers on the externalities they benefit from/exploit. However, improved corporate democracy as it relates to corporate political expenditure has a highly leveraged public policy benefit because it enhances the chances taxes and regulation will reflect voter rather than short-term profit driven concerns about social and environmental issues.

³⁰ Ibid p 3, see in particular fn 27.

Emancipation in the Anthropocene

In 1958 Hannah Arendt published, *The Human Condition*.¹ At the beginning of this wide-ranging work, Arendt proposes “a reconsideration of the human condition from the vantage point of our newest experiences and our most recent fears.”² The major historical event which motivated this study was the launch of Sputnik I by the Soviet Union and the prospect this technological advance engendered for humankind breaking its earthly bonds and traveling “in the proximity of the heavenly bodies.”³ However, while Arendt was writing at a time when scientific achievements threatened to “[cut] the last tie through which even man belongs among the children of nature,”⁴ today the Anthropocene sends us hurtling back to Earth. There has never been a time when human history and the history of the Earth were so intertwined. Attempts to grapple with this insight cannot be resolved through scientific questioning alone and ought to give rise to an appreciation of the uniqueness and integrity of each component of the Earth system (humans included) and the world as a relational whole.

In this essay, I argue that the insights provided by Earth systems science are so great as to constitute a ‘paradigm shift’ in our assumptions and patterns of thought.⁵ While Arendt was inspired to think about those elementary activities that are “within the range of every human being” (labour, work and action) the Anthropocene compels us to re-think our separability from the Earth system and to doubt conceptual frameworks inherited from the past. As Clive Hamilton writes, “we are faced with the discomfiting choice between groping unsteadily toward new conceptions that attempt to build on a new real, or clinging to

1 Hannah Arendt, *The Human Condition* (University of Chicago Press, 1998).

2 Ibid 5.

3 Ibid 1.

4 Ibid.

5 Ian Angus, *Facing the Anthropocene: Fossil Capitalism and the Crisis of the Earth System* (Monthly Review Press, 2016) 27. Thomas Kuhn, *The Structure of Scientific Revolutions* (University of Chicago Press, 1996) 43 defined a paradigm as: ‘A constellation of achievements—concepts, values, techniques, etc.—shared by a scientific community and used by that community to define legitimate problems and solutions.’



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old conceptions rooted in a world that has been left behind.”⁶ Nothing should be beyond suspicion but the power of our work will be amplified if we can follow J. Ron Engel’s example and proceed in the “spirit of self-reflective criticism” and with a “critical loyalty” to our comrades in the environment movement.⁷

This essay proceeds in three sections. In Part 1, I provide a summary of the latest literature on the Anthropocene and Earth systems science. Following this, Part 2 considers how this literature might challenge orthodox thinking in environmental philosophy and politics. Finally, in Part 3 I look to past justice movements for clues on how to frame environmental demands in the language of liberation. As part of this discussion I argue that Australia ought to think about its own Green New Deal as a way of reshaping the economy to advance the common good.

The Anthropocene: An Overview

The Anthropocene is fundamentally an insight from Earth system science.⁸ Perhaps the best overview of the current literature can be found in Ian Angus’s recent book, *Facing the Anthropocene*.⁹ Despite a wide variety of interpretations, the Anthropocene generally refers to a ‘crisis of the earth system’¹⁰ caused by human activity between the 18th century to 1945. While aspects of the Earth have been studied in biology, geology, ecology and physics, the Earth system only fully emerged as an object of analysis during the 1980s and 1990s.¹¹ As Angus explains: “Studying Earth as a system became possible. . . when new scientific instruments became available—in particular, satellites designed to gather data about the state of the entire Earth and computer systems capable of collecting, transmitting, and analyzing vast quantities of scientific data.”¹²

Earth system thinking refers to the “integrative meta-science of the whole planet understood as a unified, complex, evolving system beyond the sum of its parts.”¹³ Its method is transdisciplinary and brings together the “earth sciences and life sciences as well as the “industrial metabolism” of humankind.”¹⁴ Because of its focus on the Earth system as a whole, earth systems thinking “transcends and encompasses”¹⁵ the ecological sciences which have informed much of the literature in environmental

6 Clive Hamilton, *Defiant Earth: The Fate of Humans in the Anthropocene* (Allen and Unwin, 2017).

7 J. Ronald Engel, ‘Summons to a New Axial Age: The Promise, Limits, and Future of the Earth Charter’ in Laura Westra and Mirian Vilela (eds), *Ecological Integrity, and Social Movements* (Earthscan, 2014) xv.

8 Hamilton, above n 6, 9.

9 Angus, above n 5, 25–106. For an excellent overview of other seminal books on the Anthropocene see Benjamin Kunkel, ‘The Capitalocene’, 39(5) *London Review of Books* 2 March 2017, pp. 22–28.

10 Hamilton, above n 6, 20. In this context, the Earth system means ‘the suite of interacting physical, chemical and biological global-scale cycles (often called biogeochemical cycles) and energy fluxes which provide the conditions necessary for life on the planet.’ See further Will Steffen et al, *Global Change and the Earth System: A Planet Under Pressure* (Springer, 2004) 8.

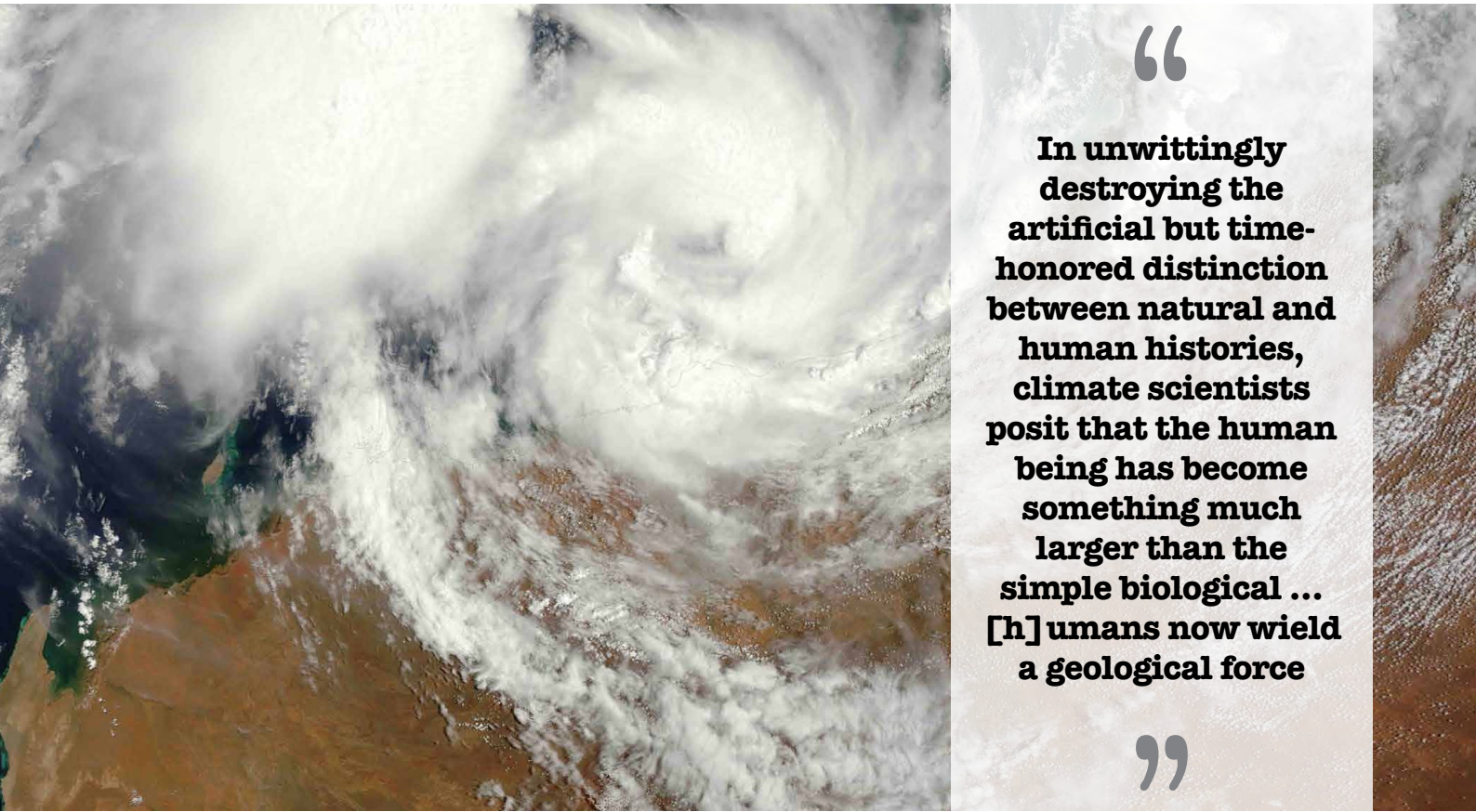
11 Hamilton, above n 6, 11.

12 Angus, above n 5, 29.

13 Hamilton, above n 6, 11.

14 Ibid 12.

15 Ibid.



“
In unwittingly destroying the artificial but time-honored distinction between natural and human histories, climate scientists posit that the human being has become something much larger than the simple biological ... [h]umans now wield a geological force
 ”

Photo: Tropical Cyclone Bianca 2011. NASA Goddard Space Flight Center from Greenbelt, MD, USA [CC BY 2.0]

ethics and environmental law. Earth systems science is making a much deeper and far reaching claim than that humans are interconnected and mutually dependant on the environment and non-human animals.

One important insight comes from Dipesh Chakrabarty who argues that the Anthropocene calls into question the traditional separation between human history and natural history.¹⁶ Jacob Burckhardt described this separation in 1868, arguing (correctly, I think) that “history is not the same thing as nature” and that history “is the breach with nature caused by the awakening of human consciousness.”¹⁷ Writers such as Fernand Braudel¹⁸ and Aldo Leopold¹⁹ added some nuance to this argument by bringing our

16 Dipesh Chakrabarty, ‘The Climate of History: Four Theses’ (2009) 35(2) *Critical Inquiry* 197: 201.

17 Jacob Burckhardt, *Reflections on History* (Liberty Fund, 1979 [1868]) 31.

18 Fernand Braudel, *The Mediterranean and the Mediterranean World in the Age of Philip II* (University of California Press, 1996) 26: “I could not... be satisfied with the traditional geographical introduction to history that often figures to little purpose at the beginning of so many books, with its descriptions of the mineral deposits, types of agriculture, and typical flora, briefly listed and never mentioned again, as if the flowers did not come back every spring, the flocks of sheep migrate every year or the ships sail on a real sea that changes with the seasons.”

19 Aldo Leopold, *A Sand County Almanac* (Ballantine Books, 1986) 241: “Many historical events, hitherto explained solely in terms of human enterprise, were actually biotic interactions between people and the land. The characteristics of the land determined the facts quite as potently as the characteristics of the men who lived on it.”

attention to the ways the environment itself shaped the development of human society. Further to this material, scholars writing about the Anthropocene have begun to say something quite new. Chakrabarty writes: “In unwittingly destroying the artificial but time-honored distinction between natural and human histories, climate scientists posit that the human being has become something much larger than the simple biological ... [h]umans now wield a geological force.”²⁰

The transformation of humankind into geological agents²¹ represents the convergence of human history with geological history.²² Human history will forever be tied to the fate of the planet. As Isabella Stengers suggests:

[N]o human future ‘can be foreseen in which [Gaia] will give back to us the liberty of ignoring her. It is not a matter of a “bad moment that will pass,” followed by any kind of happy ending—in the shoddy sense of a “problem solved.” We are no longer authorized to forget her. We will have to go on answering for what we are undertaking in the face of an implacable being who is deaf to our justifications.’²³

2. Implications of the Anthropocene

Facing the environmental crisis, the dominant response from environmental philosophers and lawyers has been to advocate a shift from anthropocentrism to ecocentrism. In this conversation, anthropocentrism is usually interpreted to mean not just a human centred perspective, but a presupposition whereby the environment is thought to exist for human use and exploitation.²⁴ It might also mean that human beings alone have more standing and that we are separate, unique and more important than anything else in nature. Ecocentrism, by contrast, seeks to position humankind in relationship with non-human animals and ecosystems and is commonly associated with notions of mutual dependence, intrinsic value, the rights of nature, ecological integrity and human responsibility. A version of ecocentrism is explicit in most covenantal approaches to global ethics, such as the Earth Charter.²⁵

However, how many of these principles still make sense once we have grappled with the implications of the Anthropocene? Or to put the question another way—in what ways has the Anthropocene altered the human conditions?

20 Chakrabarty, above n 16, 206.

21 Ibid.

22 Hamilton, above n 6, 8.

23 Isabella Stengers, *In Catastrophic Times: Resisting the Coming Barbarism* (Open Humanities Press, 2015) 47.

24 For a gratuitous example, see comments made by Rush Limbaugh in the context of debates surrounding the preservation of the spotted owl in America’s Northwest: “If the owl can’t adapt to the superiority of humans, screw it... if a spotted owl can’t adapt, does the Earth really need that particular species so much that hardship to human beings is worth enduring in the process of saving it?” Rush Limbaugh, quoted in Dale Jamieson, *Ethics and the Environment: An Introduction* (Cambridge University Press, 2008) 181–82.

25 For example, see principle 1(a) which recognises “that all beings are interdependent and every form of life has value regardless of its worth to human beings.”

To begin, we might argue that the Earth system no longer has its own independent integrity and some of the impacts human activity has had on the Earth system are irreversible.²⁶ The idea that the Earth will return to some pristine state if human beings withdraw and minimise our impact on the Earth is 'Holocene thinking.' It is too late for humans to withdraw or relinquish our capacity to change the future of the Earth. We may not have chosen this condition but the Anthropocene casts us as geological agents.²⁷ Human beings are (in this specific sense) undeniably unique. Hamilton makes a similar point: "there is no going back to the Holocene" and to pretend otherwise or deny our responsibility for the earth system would be grossly irresponsible.²⁸

Further to these points, the human proffered by the Anthropocene is one in which the strict separation between subject (human beings) and object (nature) no longer makes sense. Earth systems science offers an alternative description of reality to Kant's argument that human action is free while objects act from necessity or in accordance with natural laws.²⁹ Today human freedom is exercised not on a compliant object but on an Earth that is self-organising, spontaneous and increasingly unpredictable. This is a more profound reality than descriptions of interconnectedness or mutual dependence offered by the ecological sciences. While much of the private sector continues to assume that humans can enforce our will on a passive Earth, the Anthropocene has rendered that vision of redundant. Today, human freedom and action cannot operate outside of the realm of necessity. Human freedom, in other words, is embedded and woven into nature.³⁰ In one sense, this is a less anthropocentric description of the human than was offered by modernity. However, it is also more anthropocentric in the sense that the influence of human beings to the future of the Earth system has increased.³¹

Toward a Politics of Freedom

The above argument is ripe for misinterpretation. To be very clear, I am just trying to think through the implications of Earth systems science for environmental thinking. That is not the same thing as advocating anthropocentrism as a normative claim or welcoming our present condition as an opportunity for humankind to "shape the planetary environment."³² Rather, humankind's accession to a "force of nature"³³

26 Joby Warrick and Chris Mooney, 'Effects of Climate Change 'Irreversible,' U.N. Panel Warns in Report', *The Washington Post*, November 2, 2014 https://www.washingtonpost.com/national/health-science/effects-of-climate-change-irreversible-un-panel-warns-in-report/2014/11/01/2d49aeec-6142-11e4-8b9e-2ccdac31a031_story.html?utm_term=.c82f8b37c1b9

27 In saying this I am deeply conscious of critiques of the Anthropocene which correctly point out that human beings are not equally responsible and that the term risks casting the victims of environmental harm as equally culpable.

28 Hamilton, above n 6, 43.

29 Ibid 139. See also Immanuel Kant, *Critique of Pure Reason* (Penguin Classics, 2008) and Chris Naticchia, 'Kant on the Third Antinomy: Is Freedom Possible in a World of Natural Necessity?' (1994) 11(4) *History of Philosophy Quarterly* 393–403.

30 Ibid 141.

31 Ibid.

32 David Keith, *A Case for Climate Engineering* (MIT Press, 2013) 172.

33 David Suzuki, *The Legacy: An Elder's Vision for Our Sustainable Future* (Gravestone Books, 2010) 17.

suggests a version of anthropocentrism as a scientific fact.³⁴ That we have arrived at this situation is the greatest tragedy in human history. And yet it is folly to deny the increased power and responsibility that human beings have going into the future. Equally, we ought to be uneasy about ideas which place the Earth system above human beings and so simply invert the hierarchy of anthropocentrism. If Earth systems science is accurate, the only interesting question is—how do we respond?

I would like to preface these comments by reaffirming the importance of democratic principles to this discussion. This means committing to defending democratic principles beyond elections³⁵ and frameworks for allowing first nations peoples a substantive voice as recognised in the Uluru statement. With this in mind, any ideas are really “proposals” which ought to be refined in discourse and owned by the community implementing them. Further, the hollowing out of major political parties and the rise of independent candidates in Australian politics (and in other countries³⁶) attest to the fact that people are weary of centre politics. As Jeff Sparrow has argued, in the face of overwhelming problems such as climate change, people increasingly feel that leaders who are not offering radical solutions are not serious.³⁷ That the right have successfully framed demands such as “no new coal mines” as radical is a problem which we tend to avoid but we must confront.

With this noted, I have increasingly sought to push environmental thinking into conversation with the international justice movements of the 1960s and 70s.³⁸ This might be surprising given the revised human condition that I have outlined above. However, as Sparrow recently noted:

The great social movements of the sixties and seventies still shape the terrain of radical politics. It’s not simply that anyone who wants to fight for climate justice today must look at lessons from the Vietnam struggle, women’s liberation, black liberation, gay liberation and (of course) the early environmental movement. It’s also that many people either inspired by or directly involved in those campaigns are still fighting for social change, including in respect to the climate.³⁹

This approach has the virtue of adding a historical dimension to our thinking and affirms that the past has lessons to teach us going forward. We need not reinvent the wheel. Further, past movements expressed legitimate concerns for human communities (particularly those in the majority world) which some

34 Hamilton, above n 6, 43.

35 Here I wholeheartedly endorse the role of participatory democracy. See Sally Whyte, ‘Greens try and win back trust with ‘participatory democracy’ project’ 10 December 2018 <https://www.canberratimes.com.au/politics/act/greens-try-and-win-back-trust-with-participatory-democracy-project-20181208-p50l2n.html> See also Peter Burdon, ‘Realizing Earth Democracy: Governance from Below’ in L. Westra, & M. Vilela (Eds.), *The Earth Charter, Ecological Integrity and Social Movements* (Routledge, 2014).

36 Peter Mair, *Ruling the Void* (Verso, 2013).

37 Jeff Sparrow, *Trigger Warnings: Political Correctness and the Rise of the Right* (Scribe 2018).

38 See Peter Burdon, ‘Earth jurisprudence and the Project of Earth Democracy’ in Michelle Maloney and Peter Burdon (eds), *Wild Law—In Practice* (Routledge, 2015).

39 Jeff Sparrow, ‘Many Generations in Flames’ 6 February 2019 *Overland Journal* <https://overland.org.au/2019/02/many-generations-in-flames/>

environmental thinking ignores and which I think are fundamental to grappling with the Anthropocene and planning for a just transition.

Some readers will recall that, during the 1970s, justice movements articulated their demands using the language of liberation. Today, I suspect most people would not understand what liberation means. In part, this is because we have forgotten a critical distinction between political emancipation and full emancipation. Briefly—political emancipation refers to demands for equality before the law and equal rights. While a crucial improvement, liberation movements understood that political emancipation represented a very narrow form of freedom and did not necessarily challenge sites of power. This is a simple point and one can find plenty of examples in Australian legal history, e.g. the introduction of the *Racial Discrimination Act* in 1975 and the *Sex Discrimination Act* in 1984. While both reforms ushered in crucial improvements for women and Aboriginal and Torres Strait Islander people, nobody could claim that they have emancipated either group or stamped out the powers of racism and sexism that course through civil society and the economy, and foreclose certain kinds of access (a fact which the #Blacklivesmatter and #Metoo movements powerfully attest).

In contrast, full emancipation is much deeper and is premised on the view that positive reform can generate substantive freedoms in law and in civil society. We are not practised in talking like this. Politicians tend to talk in an economised way such as “we should protect the great barrier reef for tourism”. A different example of the same logic is Bill Shorten’s refusal to positively oppose the Adani coal mine and instead to rely on market forces to defeat the project.⁴⁰ Full emancipation is quite different and the demands tend to emerge through a movement (rather than given in a top-down structure). To be more concrete, a campaign to protect the Great Barrier Reef might articulate the value of the ecosystem for its own sake and because it contributes to public happiness and wonder. Campaign goals might include demands to share decision-making power over the ecosystem, the placement of concrete responsibilities on landowners, or positive interventions in the market to ban new coal mines. Whatever the specific demands, the goal is to close the gap between political society and civil society, to have our legal status reflect our actual experience and do away with laws that make abstract proclamations of our status or experience.

More broadly, the path to liberation might be assisted through programs such as the Green New Deal (GND) which is currently being promoted in the United States⁴¹ (a version was also promoted by the Australian Greens in 2009). A lot could be said here, but as Jedediah Britton-Purdy has argued—the GND is what realistic environmental policy looks like: “In the 21st century, environmental policy is economic policy. Keeping the two separate isn’t a feat of intellectual discipline. It’s an anachronism.”⁴² Part of the shock of

40 This explains why the strongest commitment Labor will give about the mind is: “I don’t want to give a dollar to Adani.” See David Uren, ‘No Adani Ban on my Watch: Chris Bowen’ 5 February 2019 *The Australian* <https://www.theaustralian.com.au/business/mining-energy/no-adani-ban-on-my-watch-chris-bowen/news-story/48bb7df7d794675d9d4379c729c91b30>

41 For details see <https://www.dataforprogress.org/green-new-deal/>

42 Jedediah Britton-Purdy, ‘The Green New Deal Is What Realistic Environmental Policy Looks Like’ 14 February 2019, *The New York Times*, <https://www.nytimes.com/2019/02/14/opinion/green-new-deal-ocasio-cortez.html>

this approach is that such a far-reaching spending program would come from the public purse—many of us have bought into the idea that such a large spending program could only be provided by the private sector. But the ambitions of the GND mark out the ground where future climate fights will take place and dovetail into other projects for a just transition that are being rolled out in countries like Spain.⁴³

Moreover, the GND is explicitly talking in the language of freedom—territory which has long been ceded to the right. What kinds of freedom? Drawing on Franklin Delano Roosevelt,⁴⁴ proponents of the GND are promoting five freedoms: freedom from fear, freedom from toil, freedom to move, freedom from domination, and the freedom to live.⁴⁵ Proponents have expanded on each of these ideas, but the important point for now is that they are talking about freedom in a way that is far more expansive than legal rights or the economised version whereby we have freedom to invest and freedom to purchase (so long as we can afford it).

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Photo: Australian Marine Conservation Society. <https://www.marineconservation.org.au/coral-bleaching/>

43 Leslie Hook, 'Spain unveils ambitious green energy plan' 4 December 2018, *The Financial Times* <https://www.ft.com/content/b31f99b8-ce31-11e8-8d0b-a6539b949662>

44 Roosevelt's four freedoms were employment, medical care, housing, education, and social security.

45 For more detail see Kate Aronoff, Alyssa Battistoni, Daniel Aldana Cohen & Thea Riofrancos, 'The Green New Deal's Five Freedoms' 14 February 2019 *Jacobin Magazine* <https://jacobinmag.com/2019/02/green-new-deal-four-freedoms-fdr>

Of course, the GND is only one of many proposals for advancing the goal of liberation. Like other policy ideas being debated within the Green movement (such as Universal Basic Income) it understands the necessity of re-working our economy to advance environmental goals. The broad parameters of the GND can also be pushed in various directions—to the right we can expect to see calls for projects to come under the control of the private sector. And to the left there will be debates about whether to nationalise Australia's energy grid, for example. Whatever the exact parameters, it is useful to think about the GND as a massive system upgrade for the economy which will reverberate into the social and environmental spheres. Of course, such a program will be expensive, but as the Financial Times reported:

The problems the Green New Deal addresses require solutions where bigger is better, imperative and, paradoxically, more affordable... When you are fighting for your very survival, you do not pinch pennies. That would be false economy. In this case it would also be suicide.⁴⁶

46 Robert Hockett, 'Pay for Green New Deal Now or Spend Even More Later' 3 February 2019, *The Financial Times* <https://www.ft.com/content/046e7c30-23c8-11e9-b20d-5376ca5216eb>

Balginjirr

“A Special Place on our Home River Country”!

I came home to our river country, our place... our space... today.

I stood at your grave site and recall the first night when I came back to my mother's land, and now I ask you... Do you know what is coming our way?

I heard your many lived stories... those who had stood before, through the collective wisdom as elders, now see some of their children's children start to sway.

Is country for sale, is country for keeps, who will work with country to watch over the people who sleep.

Some dream, dreams of money and some talk of gold, lead, mineral sands, intensive agriculture, pastoralism, harvesting water into licences and allocation flows.

The nightmare for people like me, is to be buried alive from the constant demands on a sacred river and kinship system, not found anywhere else on the planet, but to us known, inter-generationally as the River of Life.

Can we learn from the Murray Darling ... hey, what about the oldest river in the world... the Finke... let these rivers share with us what the humans have done! We need to know this to let the Mardoowarra, Martuwarra... Fitzroy River run.



Dr Anne Poelina is Chair of Martuwarra Fitzroy River Council, and a Nyikina Warrwa Traditional Custodian from the Mardoowarra/Martuwarra, Lower Fitzroy River in the Kimberley region of WA. A Peter Cullen Fellow (2011) awarded Laureate Women's World Summit Foundation (Geneva) (2017) and recent Board and Councillor with the Australian Conservation Foundation (ACF), Adjunct Senior Research Fellow with Notre Dame University Broome. Her current work promotes entrepreneurial 'New Economy' opportunities for Indigenous people in relation to green collar jobs in diverse, science, culture, heritage and conservation economies. Dr Poelina promotes the need to include traditional ecological knowledge, First Law and the rights of nature to the solutions for planetary health and wellbeing.

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ANNE POELINA: Balginjirr—“A Special Place on our Home River Country”!

Do we cover it with intensive cotton, coal mine, scar up the country... drawing from aquifers, seismic lines ... fracking hydro-geology... or do we take a breathe and keep the living waters living free?

Can we listen to the ancient song lines, singing the creation stories of geo-heritage, astronomy... astrology and ancient boab trees?

Our bloodlines singing our songline roamed this country wise and free.

Five times ten years plus five since I first walked with this big spirit country, who still knows and will forever hold me.

Country knows you, country watches you and country is alive... waiting for you to see.



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**Country knows you,
country watches
you and country is
alive... waiting for
you to see.**
”

Photo: Magali McDuffie

What is coming will change our world forever, if we don't stand with one mind and one voice, in solidarity.

Our fellow Australians are learning of this river country, they too recognise the Mardoowarra, Martuwarra, Fitzroy River is National Heritage Listed and to be shared by you and me.

Do we call them our friends, do we call them our foe, do we work together to understand what must be done to give all of us fair go?

2019 can it really be, that Indigenous Australians, the original First Peoples still stand...

Do we call on earth justice, earth centred governance, First law of this land! We must all work together...lead and govern for our commons good for this wide brown land, country.

We have seen how the Crown Law has taken and we ask what will be left? We cannot forget that this land we come from and still hold on to... was taken by theft.

We have a new dream, a dream for oneness, values, ethics... need not confess, but unless we stand together, with collective wisdom, it will be nothing we dreamed the dreams from, it will quickly turn to nightmares, poison and sweat.

We all want the same things, for our children and their children's children before we are laid to rest.

In good faith, free informed consent, science, industry with traditional owners its time to build collaboration and welcome all projects to the table in good spirit to understand the cumulative impact test.

Can the government keep its pre-election promises and demonstrate good governance for citizens of this state, whilst in power... now they are gst blessed?

Climate Change, Climate Chaos, quickly spiralling out of control, but despite 90 IPCC Scientist "Warning...Warning quickly approaching 2.5 degrees", some number from Paris in which the world agreed, No More Coal, our Federal Minister for the Environment does not believe what she has been told.

If this truly was about shifting from the old economies—fossil fools sorry, fuels transitioning to an abundance or renewable, wind, wave, solar in abundance, which we can globally lead.

Tell the companies, renewables are gold. They can make forever profits if they transform from the old.

Come on country men, fellow Australians, global citizens, one mind, one voice, one river country. Let's make a River peace park before there's nothing left. Let's hold to humanity, one planet, Mother Earth she's the best!

I know we can do this, and we must if we are to stay blessed. I know our ancestors are watching and waiting to make sure we pass this test. Past, Present, Future held in this moment of time, let's hold to the dreaming and hold our blood and songlines.

Sleep well my family along this river time, and I am sure we will keep talking as you watch over us in this modern Dreamtime. Circular storytelling, we know time moves in circles and not in a straight line.

Run free forever, Mardoowarra, Martuwarra, Fitzroy River... ask the humans to be kind, they think they are the top of the tree but if they are not careful, we will all be left behind.

River, bird, animals, fed by living waters shallow, and deep, cradled in the coolness of country once surrounded by sheep. Years of pastoralism, agriculture and now plans for grid lines, licenses, permits, ask the humans to consider more than themselves, think of the bio-diversity, water quality, and creative ways to maintain their keep.

I close my eyes, but not my head and heart as my liyan, my moral compass keeps my watch... tick... tick... ticking... my brain shrieks... no more alarm clocks... just the sharing of this river country, for the Friends of the Mardoowarra, Martuwarra, Fitzroy River Country...

Hello hello do you hear me, don't desert or leave me, can we stand together for all time as the River of Life with the Right to Life, is someone listening, is someone standing for all of us, what about the Crown, What about the Queen, before she passes on, should we go to her and ask her only one time, now time, let the people and the river country be finally set free.

An ancient river with the right to life, this is the First Law which we know, Law of the Land, not Law of Man, values, ethics, civil society, social cohesion, words of consensus, not conflict, multiple world views, trans-discipline knowledges and practice post development, post colonisation, post oppression, not just for the blackfellows but all who have made this land their home.

ANNE POELINA: Balginjirr—“A Special Place on our Home River Country”!

Come to know us, know country and redefine who we are, it's a new time can we seize it can we hold this wide brown land, we can advance Australia fair, fair go, for its citizens not corporate welfare in the millions.

Rather a fair go for the Aussie black, white, brown and green and some other multi-colours and multiple world views, lets be a lot more open, others can teach us some of their unspoken... with this Coalition of Hope... we can Advance Australia Lucky Country and give the Mardoowarra River Country and People a Fair Go!

This poem was first published in *Westerly Magazine*, 64(1), with an audio recording at <https://westerlymag.com.au/balginjirr-a-special-place-on-our-home-river-country/>



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Photo: Magali McDuffie

...in the natural world, healthy competition is intertwined with healthy cooperation. One of the great co-benefits of rebalancing our rights would be the recognition that rights can, in fact, be held and exercised in common, for the common good, rather than simplistically as competitive individuals.

This collection takes the question of rebalancing rights and examines it from several directions—with contributions from some of Australia's leading thinkers and practitioners in their fields.

 the green institute


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