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WINE EQUALISATION TAX REBATE: RETHINKING THE LEGAL FRAMEWORK IN AN ECONOMIC, SOCIAL AND ENVIRONMENTAL CONTEXT

MEG VINE

It has been said the Wine Equalisation Tax ('WET') rebate exemplifies "the policy folly of encouraging the production of wine in tax legislation that has the purpose of discouraging its consumption."[1] This paper aims to demonstrate that it is this single objective attitude to policy that is preventing a holistic approach to reform of the area. The paper will begin by discussing the origins of the WET rebate and how various economic, social, environmental and philosophical factors impact on the public perspective of the WET rebates operation and opportunities for reform. It will then outline current proposals for reform and evaluate these against the various competing factors before providing some alternative recommendations that attempt to find a middle ground between the current proposals. What will be clear by the end is that a solution to the issue will require the consideration and weighing of various objectives if it is to be successful.

I HISTORY OF THE WET REBATE

Except for a briefly unpopular attempt to apply an excise tax on wine of 50c per gallon in 1970 wine,[2] unlike beer and spirits, was not consistently taxed until 1984 with the introduction of a 10 per cent Wholesale Sales Tax ('WST').[3] During 1985-88 the Commonwealth implemented a Vine Pull Scheme to offset the grape glut.[4] By 1996 the WST had increased to 26 per cent while State government franchise fees on wine sales at the wholesale level had also risen to 15 per cent.[5] In 1997 the High Court, in *Ha v State of New South Wales*,[6] held that the State franchise fees were unconstitutional leading to the collection of additional WST by the Federal Government. This raised the WST on wine to 41 per cent with 15 per cent being paid to State Governments via grants.[7] Wineries received a portion of these grants through State cellar door/liquor licensing subsidiary schemes.[8]

In July 2000 the WST was abolished and a 10 per cent goods and services tax ('GST') on all goods and services was introduced.[9] In order to ensure a tax neutral revenue position and keep wine prices stable a wine equalisation tax ('WET') of 29 per cent was also imposed on the last wholesale sale of wine.[10] Provisions dealing with WET are contained in *A New Tax System (Wine Equalisation Tax) Act 1999* ('WET Act'). The WET

[1] Glen Barton, Annette Morgan and Dale Pinto, 'The WET: Is It a Good Drop ?' [2014] *The Tax Specialist* 54, 57.
[2] Kym Anderson, 'Reforming Taxes on Wine and Other Alcoholic Beverage Consumption' (2010) 29 *Economic Papers: A journal f applied economics and policy* 197.
[3] Bills Digest No. 151 1998-99, A New Tax System (Wine Equalisation Tax) Bill 1999.
[44] Paul Kenny, 'Indirect Taxation of Wine: An International Comparison' (2009) 4 *Journal of the Australasian Tax Teachers Association* 155, 157.
[5] Bills Digest No. 151 1998-99, A New Tax System (Wine Equalisation Tax) Bill 1999.
[6] (1997) 189 CLR 465.
[7] Bills Digest No. 151 1998-99, A New Tax System (Wine Equalisation Tax) Bill 1999.
[8]Paul Kenny, 'Indirect Taxation of Wine: An International Comparison' (2009) 4 *Journal of the Australasian Tax Teachers Association* 155, 157.
[9] *A New Tax System (Goods And Services Tax) Act* 1999 ('GST Act').
[10] Bills Digest No. 151 1998-99, A New Tax System (Wine Equalisation Tax) Bill 1999.

applies to both Australian produced wine and imported wine. WET is payable on assessable dealings which can include selling wine, using wine, or making a local entry of imported wine at the customs barrier.[11] The WET is calculated on the selling price of the wine excluding WET and GST. Where a wine manufacturer sells their wine retail, for example at the cellar door, alternative values are used to calculate the tax payable.[12] Normally WET will be included in the price for which retailers purchase wine and they will generally not be entitled to any wine tax credits. The WET is then passed onto consumers by being built into a retailer's cost base.[13]

In conjunction with these reforms the *Indirect Tax Legislation Amendment Act* 2000 was introduced to provide a 14 per cent WET rebate from 1 July 2000 on cellar door and mail order sales up to a wholesale value of $300 000 per annum.[14] The rebate gradually reduced to zero for sales between $300 000 and $580 000 per annum.[15] The application of the WET rebate in conjunction with the existing 15 per cent cellar door rebate meant that cellar door and mail order sales up to $300 000 per annum were effectively WET-free. Eligibility of the WET rebate though was limited to those holding a wine producer's license under state liquor licensing laws.[16] The $300 000 threshold was designed to target assistance towards small and medium winemakers, the WET rebate as a whole was designed to promote tourism and industry in regional areas.[17]

In 2004 the requirement to hold a producer's licence was removed and the focus on cellar door sales expanded to all industry wholesales. The amount of WET rebate was extended to 29% of the wholesale value of wine available to any producer of rebatable wine that is registered or required to be registered for GST in Australia. The maximum rebate claimable by a producer was set at $290,000 with the tapering provisions removed, effectively offsetting wine tax on the first $1 million (wholesale value) of eligible sales and applications to own use per annum.[18] The new provisions also restricted claims by groups of associated producers to one claim per group.[19] In addition the definition of rebatable wine was extended to include cider, perry and sake, along with mead which was previously included, allowing producers of those products to access the WET rebate as well.[20] It was expected that around 90% of wine producers would be able to fully offset their WET liability by accessing the new rebate and 85% those claiming would be small producers in rural and regional Australia.[21] In 2005, in

[11] Australian Taxation Office, 'Wine Equalisation Tax Ruling WETR 2009/2 Wine Equalisation Tax Ruling - Wine Equalisation Tax: Operation of the Producer Rebate for Other than New Zealand Participants' ('WETR 2009/2') [6].
[12] Australian Taxation Office, 'WETR 2009/2 Wine Equalisation Tax Ruling - Wine Equalisation Tax: Operation of the Producer Rebate for Other than New Zealand Participants' [7].
[13] Australian Taxation Office, 'WETR 2009/2 Wine Equalisation Tax Ruling - Wine Equalisation Tax: Operation of the Producer Rebate for Other than New Zealand Participants' [8].
[14] Supplementary Explanatory Memorandum, Indirect Tax Legislation Amendment Bill 2000, [2.29].
[15] Supplementary Explanatory Memorandum, Indirect Tax Legislation Amendment Bill 2000, [2.29].
[16] Indirect Tax Legislation Amendment Act 2000 Schedule 9A, amendments to *A New Tax System (Wine Equalisation Tax) Act* 1999 ss 19-10 and 33-1.
[17] Supplementary Explanatory Memorandum, Indirect Tax Legislation Amendment Bill 2000, [2.38-2.39].
[18] Revised Explanatory Memorandum, Tax Laws Amendment (Wine Producer Rebate and Other Measures) Bill 2004, Comparison of key features of new law and current law.
[19] Revised Explanatory Memorandum, Tax Laws Amendment (Wine Producer Rebate and Other Measures) Bill 2004, Comparison of key features of new law and current law.
[20] Tax Laws Amendment (Wine Producer Rebate and Other Measures) Act 2004, Schedule 1, Item 6A.
[21] Revised Explanatory Memorandum, Tax Laws Amendment (Wine Producer Rebate and Other Measures) Bill 2004, [1.6].

accordance with obligations set out under article 7(2) of the Australia New Zealand Closer Economic Relations Trade Agreement 1983 which require that "[a] Member State shall not levy on goods, ingredients or components contained in those goods, originating in and imported from the territory of the other Member State, any internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic goods, ingredients or components," eligibility for the WET rebate was extended to New Zealand wine producers that have their wine exported to Australia. In 2006 the WET rebate was extended once again with the maximum claimable rising to $500 000 per annum resulting in an effective WET-free threshold of $1.7 million wholesale wine sales.[22] These changes at the federal level led to state cellar door subsidies only being available on sales above the first $1 million of total sales in 2004 and then $1.7 million in 2006.[23]

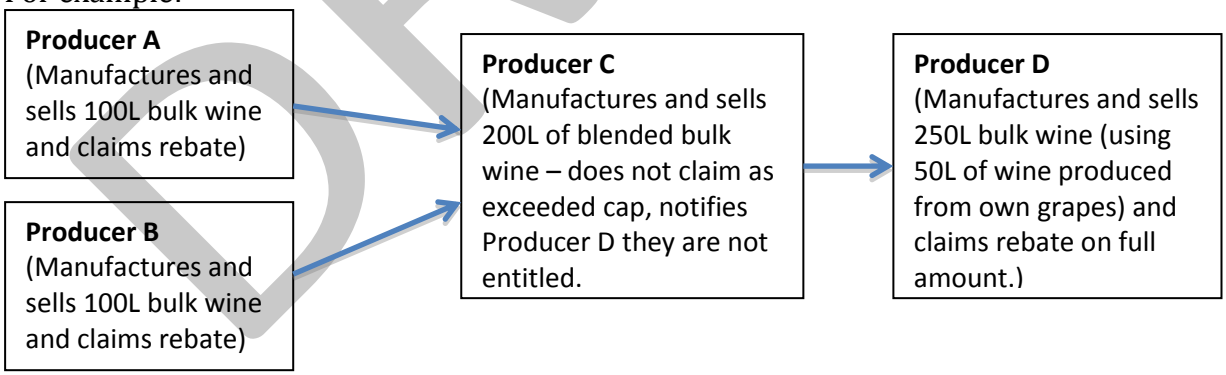
In June 2009 the Australian Taxation Office ('ATO') issued WETR 2009/2 outlining and clarifying the Commissioner's opinion about the way in which the relevant provisions apply. Producer in the WET Act is defined as 'an entity that manufactures the wine or supplies to another entity the grapes, other fruit, vegetable or honey from which the wine is manufactured."[24] WETR 2009/2 advises that this means an entity is a producer of rebatable wine, and therefore entitled to a WET rebate, if it manufactures the wine from the base constituents,[25] or provides grapes, fruit or vegetables or honey to another entity to make wine on their behalf, and subsequently has a dealing in the wine for which they are liable to WET, or would have been liable to WET had the purchaser not quoted for the sale.[26] WETR 2009/2 goes on to advise that the definition of 'manufacture' as provided in the WET Act[27] will be interpreted in accordance with previous sales tax cases which considered an identical meaning in the *Sales Tax Assessment Act (No. 1)* 1930.[28] An analysis of these cases results in the definition of manufacture being extended to include the blending of two or more different wines to produce a commercially distinct product.[29] The Commissioner further considers that an entity manufactures wine when it engages a contract wine maker who makes the wine on behalf of the entity, provided that the grapes, other fruit, vegetable or honey and the resulting wine remains the property of the entity.[30] The Commissioner extends this reasoning to an owner of grape wine that provides to a contract winemaker the grape wine and other materials and specifications to make a beverage that meets the definition of grape wine product.[31] The result of this interpretation is that the first limb of producer is essentially wider than the 2nd limb as it includes an entity, which not only supplies base constituents to another entity to make wine on their behalf but also one

[22] Tax Laws Amendment (2006 Measures No. 3) Act 2006, Schedule 14.
[23] Brittingham, Mathew 'History of the WET and WET Producer Rebate' (2014) 29(1) Wine and Viticulture Journal 66, 66.
[24] WET Act s 33-1.
[25] WETR 2009/2 [19].
[26] WETR 2009/2 [25].
[27] Manufacture is defined in s 16 of the WET Act to include:
(a) production;
(b) combining parts or ingredients so as to form an article or substance that is commercially distinct from the parts or ingredients; and
(c) applying treatment to foodstuffs as a process in preparing them for human consumption.
[28] WETR 2009/2 [28].
[29] WETR 2009/2 [29] – [40].
[30] WETR 2009/2 [48].
[31] WETR 2009/2 [50].

that provides grape wine product. This interpretation renders the second limb superfluous and supports an argument that it is counter to the original intention of the provision. Due to the taxpayer advantageous nature of the interpretation it has never been tested in court.

In December 2012 the legislature attempted to close a loop whole in the scheme, which allowed multiple producers to claim the WET rebate on the same wine. The law previously allowed producers to manufacture and sell bulk grape wine product to a non-associated entity for further blending where both entities could claim the WET rebate on the grape wine product produced. This new grape wine product could then be sold in bulk to another producer for further manufacture, allowing another claim, and so on. As all parties met the definition of producer and were not associated they could each claim up to the $500 000 cap on the new grape wine product produced and sold. Essentially the WET rebate could be claimed repeatedly on a portion of the same product so long a 'commercially distinct' product was created each time. *Tax Laws Amendment (2012 Measures No. 5) Act* 2012 amended the WET Act so that producers of wine manufactured using wine produced by another producer must reduce the amount of WET rebates claimed on that blended wine by the sum of the amounts of any WET rebate amounts attributable to the other producers wine. Administration of this involves a complicated notification and calculation system. A producer is only restricted in the WET rebate they can claim where the immediately previous producer was entitled to the rebate on that product. Where the previous producer has exceeded their cap for the year the next producer in the chain would not be required to reduce their WET rebate claim so long as that previous producer notified the next producer they were not entitled to claim the rebate. This would be the case even where the grape wine product used to produce the previous producer's blended product was made using bulk wine purchased from other producers who had previously claimed the WET rebate on their product.

For example:



In October 2013 the ATO issued Taxpayer Alert TA 2013/2. The Alert describes two arrangements the ATO believes are designed in a contrived manner to create additional WET rebates through non-commercial dealings between entities. The first arrangement involves a wine producer arranging for another non arms-length entity to manufacture some of its wine, generally where it has exceed the maximum WET rebate claimable for the year. The wine producer still partakes in the manufacturing process by providing contract winemaking services to the other entity. The other entity then sells the finished product back to the wine producer allowing it to claim the rebate as well. The extra

rebate is usually shared between the parties through manipulating prices for the grapes, wine or other services. The second arrangement involves a wine producer interposing other entities into a sale chain before the final buyer that further blend or manufacture the wine. The wine producer maintains control over the manufacture process at all times by providing contract winemaking services to each of the interposed entities. All entities are then able to claim the WET rebate.

In April 2014 the ATO issued WETR 2014/1[32] detailing the Commissioner's opinion about the possible application of Division 165 of the *GST Act* to the arrangements in *TA 2013/2*. Division 165 covers the general anti-avoidance provisions for GST, WET and luxury car tax. Where these provisions are found to apply they allow the Commissioner to deny a tax benefit an entity receives from a scheme where it is reasonable to conclude that the sole or dominant purpose of entering into or carrying out the scheme, or the principal effect of the scheme, is to get an entity such a benefit. The Commissioner is of the opinion that to the extent the entities described in the arrangements are not associated producers and s 19-20 does not operate to reduce the entities WET rebate amount due to blending then Division 165 is likely to apply.[33]

No further changes have occurred in respect of the WET rebate at this time however at a state level both New South Wales and Western Australia have abolished their cellar door sale subsidy schemes.[34] The South Australian Government significantly lowered the available subsidy in the last few years[35] and is currently proposing to abolish the Cellar Door Liquor Subsidy Scheme and create a wine industry fund instead.[36] Victoria after proposing to abolish its subsidy scheme in 2014 recommitted funding in 2014 and has now proposed a $1 million *Victorian Wine Tourism Strategy* to support initiatives that promote wine tourism and cellar door visitations.[37]

In March of this year the Senate announced there would be an inquiry into the Australian grape and wine industry by the Rural and Regional Affairs and Transport References Committee with a report due on 11 November 2015.[38] Following this on 5 May 2015 the Assistant Treasurer announced that the Government would ask the Treasury to prepare a discussion paper on the operation of the Wine Equalisation Tax (WET) rebate to help inform consideration of the issue as part of the Re:Think Tax Discussion process.[39] The discussion paper was due in July 2015 but is yet to be released. However the Discussion paper released by the Treasurer on 30 March 2015 did include a brief section on alcohol taxes and many public submissions were received

[32] Australian Taxation Office, 'Wine Equalisation Tax Ruling WETR 2014/1 Wine equalisation tax: arrangements of the kind described in Taxpayer Alert TA 2013/2 Wine equalisation tax (WET) producer rebate schemes' ('*WETR 2014/1*').
[33] WETR 2014/1 [16-17].
[34] http://www.olgr.nsw.gov.au/liquor_info_cellar_door.asp; http://static.ourstatebudget.wa.gov.au/15-16/factsheets/savings.pdf.
[35] http://www.treasury.sa.gov.au/__data/assets/pdf_file/0014/851/201011-bp1-budget-overview.pdf
[36] http://www.pir.sa.gov.au/top_menu/about_us/engagement/cellar_door_liquor_subsidy_scheme_engagement on 11/8/2015.
[37] http://www.premier.vic.gov.au/labor-government-to-grow-victorias-wine-industry-2
[38] http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Rural_and_Regional_Affairs_and_Transport/Australian_wine_industry on 11/8/2015.
[39] http://jaf.ministers.treasury.gov.au/media-release/022-2015/ on 11/08/2015.

on the issue of alcohol taxation generally and specifically on reform of WET and the WET rebate.

II FACTORS INFLUENCING REFORM

It's clear from the previous discussion that the WET rebate has never been a static beast. The effects of a producer rebate on wine are far reaching and can each significantly impact on the need for, and type of, reform. With calls for reform at their loudest and Government inquiries and discussions underway now is the time take a holistic view of these issues. It's important to begin with a brief analysis of the operation of the WET rebate as it stands before reflecting on the economic, social, environmental and philosophical factors which will influence the techniques used to reform this area.

A Operational issues

As the government amendments and tax rulings indicated the WET rebate as it currently stands is subject to significant rorting. ATO data has shown that between 2008 and 2012 the number of rebate claimants increased by 21% with refunds over the same period increasing from $211 million to $308 million.[40] However during this time domestic sales declined in value and production was flat.[41] Current Treasury figures also show that the cost of the WET will increase to $340 million in 2014-15, up from $320 million in 2013-14 and then up to around $390 million by 2017-18.[42] These figures include the claimable rebates paid for both for Australian and New Zealand producers. In 2010 in a report on the administration of the WET the Australian National Audit Office advised that:

> '[a] number of schemes have arisen in recent years where grape growers are attempting to improperly access the producer rebate, while some wholesalers and retailers have also been inventive in minimising the amount of wine tax paid. Some of these schemes are within the provision of current legislation but have the potential to erode revenue, contrary to the original intent of the tax. Other schemes and compliance issues can contravene wine tax legislation.'[43]

[recent reports suggest the white paper discussion will be focussed on rorting. Further info can be provided once this paper is published.]

The ATO's attempts to redress these issues of rorting have generally been through the use of Division 165 of the *GST Act*. As there is limited case law on the application of Division 165 in this context the ATO has taken a pre-emptive strike approach by issuing rulings presenting the Commissioner's position. It's unknown though how the courts might actually interpret these issues if they were presented with them. Division 165 then may not be the best vehicle to address these problems the majority of which stem from the broad interpretation that has been given to the term producer. As discussed

[40] http://www.wgcsa.com.au/current-projects/protecting-growers-interests/wet-rebate/
[41] http://www.wgcsa.com.au/current-projects/protecting-growers-interests/wet-rebate/
[42] Treasury, *Tax Expenditures Statement 2014* (2014), Chapter 2, 105.
[43] Australian National Audit Office *Administration of the Wine Equalisation Tax*, Audit Report No.20 (2010), 13.

above the current interpretation appears to be at odds with a plain English reading of the provision.

Connected to issues surrounding the definition of producer is the lack of clarity around the intention of the rebate. As discussed above according to the explanatory memorandum the original cellar door WET rebate was introduced target assistance towards small and medium winemakers and to promote tourism and industry in regional areas, when it was expanded in 2004 the expectation was still that the majority of benefits would be felt by small producers in rural and regional Australia. Many argue though that the intent of any alcohol taxation (and by extension any rebates connected to it) should be to address the spillover costs of excessive alcohol consumption.[44] While the current structure of the WET rebate does provide assistance by effectively allowing small producers to pay no WET, it is inconsistent with a policy targeting spillover costs.[45] In addition its ability to meet the objective of benefiting rural and regional producers is limited by allowing 'virtual'[46] and overseas producers to claim the WET rebate as well. This lack of impact in improving the position of small wineries within the market place is further exacerbated when you consider that 90 per cent of production is sourced from 24 major wine companies.[47] It has also been suggested that the cost of providing the rebate to New Zealand producers, in 2008-09 approximately $9 million, would have produced better value for money to the community if it were spent on targeted rural assistance.[48]

The utility of the WET rebate in an international context is also an important factor. Internationally wine is taxed in many different ways. Many supporters of the current WET argue that we should not move to a volumetric tax as Australian wine is already taxed at a high rate when compared internationally[49] and any change to a higher tax rate would adversely affect the ability for wine producers to compete in an international market.[50] However, comparisons of international tax rates do not appear to include provision for the producer rebate resulting in many small producers effectively paying no WET. While this may not affect the end consumer price it certainly affects the ability of smaller producers to afford to compete in the market. These comparisons also do not take account of different rates of GST/VAT that may be added at the retail level. While this is not relevant to issues of efficient corrective taxation (where it is not included on

[44] Barton, Morgan and Pinto.
[45] Ken Henry, 'Australia's Future Tax System - Report to the Treasurer - E5. Alcohol Taxation' (2009) 438 ('Henry Review'.
[46] Wine producer who do not have any substantial operations of their own. As defined in Mathew Brittingham, 'History of the WET and WET Producer Rebate' (2014) 29 *Wine and Viticulture Journal* 66.
[47] Foundation for Alcohol Research & Education, Submission to Treasury *Re:Think Tax*, 2015 1.
[48] Ken Henry, 'Australia's Future Tax System - Report to the Treasurer - E5. Alcohol Taxation', 438.
[49] See Kym Anderson 'Excise Taxes on Wines, Beers and Spirits: An Updated International Comparison' Working papers. The study compared Australia's wine tax rate to other significant wine exporting countries based on the wholesale tax equivalent comparing both the percentage by which the tax raises the wholesale price at particular price points and the number of cents by which the tax raises the wholesale price per standard drink. The study found for commercial premium wines (retail $12 a bottle) Australia's 29% tax rate is the highest while at higher price point only Korea and Norway are higher. When expressed in Australian cents per standard drink of alcohol, Australia's wholesale tax for commercial premium wines (22 cents) is again higher than the majority of countries, particularly those Old World wine-exporting countries which have a rate of 0 cents.
[50] Wine Grape Growers Australia, Submission to Treasury Re:Think Tax, 2015, 6. Wine Tasmania, Submission to Treasury Re:Think Tax, 2015, 5. Accolade Wines, Submission to Treasury Re:Think Tax, 2015, 11. Riverland Wine, Submission to Treasury Re:Think Tax, 2015, 7. Murray Valley River Winegorwers Inc, Submission to Treasury Re:Think Tax, 2015, 5.

both sides) it could possibly discourage wineries from producing super-premium wine, which could affect consumption patterns and export efficiency.[51]

An area that has received significant attention recently[52] and will need to be considered as part of any reform is the provision of the WET rebate to New Zealand. As mentioned above the WET rebate is provided to New Zealand producers because of obligations under the CER. Unless this agreement is amended Australia must comply with their obligations where a rebate is provided. In its submission to Treasury in respect of the Re:Think discussion paper the New Zealand government reiterated that it expects CER obligations will be included in the examination of the WET rebate and that the core obligation of equal treatment will be preserved in any changes.[53] However, at a recent Trade Policy Review by the World Trade Organisation (WTO) Australia was advised that it appeared the WET rebate is discriminatory, has a negative effect on trade and appears not to comply with either Most-favoured-nation ('MFN') or National Treatment principles.[54] Australia was asked to explain how he measures in the WET Act comply with MFN and National Treatment principles and comment on the factors that led it to maintain WET Act. Australia refrained from answering these questions and simply advised a review of alcohol taxation was currently underway.[55] The most-favoured-nation policy requires that under WTO agreements Australia cannot normally discriminate between their trading partners, for example by granting someone a special favour (such as a lower customs duty rate for one of their products).[56] In the event this occurs it is expected the same benefit would also be provided for all other WTO members.[57] The national treatment principles require imported and locally-produced goods to be treated equally once they have entered the market. This does not apply to charging customs duty on an import even if locally-produced products are not charged an equivalent tax.[58] There are of course some exceptions[59] to these principles and it would be necessary to determine if these applied when considering if the WET rebate should continue and if so in what form.

A recent evaluation and analysis of the WET against the hallmarks of sound tax legislation, policy that is simplistic, equitable, economically efficient and fiscally

[51] Peter Lloyd 'Reform of the Regulation of Liquor' (2010) 29(4) *Economic Papers: A journal of applied economics and policy* 397, 398.
[52] http://www.abc.net.au/news/2015-05-10/australian-winemakers-see-red-over-absurd-and-perverse-subsidy/6457906; http://www.smh.com.au/business/federal-budget/federal-budget-2015-winemakers-cranky-kiwis-will-keep-25m-wine-subsidy-for-now-20150505-gguk7p.html; http://www.news.com.au/finance/small-business/tax-dollars-going-sideways-new-zealand-wine-makers-taking-the-piss-with-perverse-rebate/story-fn9evb64-1227219430090.
[53] New Zealand *Re:Think Tax Discussion* Submission (2015), 4.
[54] Trade Policy Review Australia Minutes of the Meeting WT/TPR/M/312/Add.1
[55] Trade Policy Review Australia Minutes of the Meeting WT/TPR/M/312/Add.1
[56] https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm
[57] https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm
[58] https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm
[59] https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm "For example, countries can set up a free trade agreement that applies only to goods traded within the group — discriminating against goods from outside. Or they can give developing countries special access to their markets. Or a country can raise barriers against products that are considered to be traded unfairly from specific countries. And in services, countries are allowed, in limited circumstances, to discriminate. But the agreements only permit these exceptions under strict conditions. In general, MFN means that every time a country lowers a trade barrier or opens up a market, it has to do so for the same goods or services from all its trading partners — whether rich or poor, weak or strong."

adequate, identified that the WET is "clearly not a 'good tax'".[60] This analysis was based on the assumption that the purpose of the policy is to recoup the public costs of alcohol abuse and simultaneously reduce that abuse by reducing the consumption of price-sensitive would-be abusers.[61] In respect of the WET rebate in particular it was found that the WET rebate adds another layer of complexity to an already complex system which is redundant if the purpose is to reduce alcohol abuse. It is noted by the authors though that this assessment would be different if the purpose were to "be a general revenue impost on the wine industry in a manner that did not inhibit start-ups and boutique manufacture, increased competition from New Zealand and provided a product range to suit all pockets."[62] In regards to equity it's pointed out that the WET rebate is significantly more generous than that provided to beer producers, while spirit producers receive no rebate at all. This sense of unfairness is reflected in comments by the beer industry in submissions to the Treasury in response to the Re:Think tax discussion paper[63] and the spirit industry to the Henry Review.[64] The WET rebate is also inequitable in its application within the wine industry with smaller producers effectively paying no WET leaving large producers to raise over 90% of the revenue. On the matter of economic efficiency it's mentioned that as a general rule good tax legislation will not have a distortionary impact on business and the economy. The issues the producer rebate raises in this respect are discussed in more detail in the next section of this paper. In respect of fiscal adequacy the rebate is not specifically mentioned but the authors do summarise that the WET rebate exemplifies "the policy folly of encouraging the production of wine in tax legislation that has the purpose of discouraging its consumption."[65]

B Economic factors

Wine demand is considered more elastic than beer demand and more inelastic than spirits which explains why Australia varies taxation according to beverage.[66] The economic issues surrounding the current structure of the WET as an *ad valorem* tax have been extensively discussed with the majority of analysis focused on alternative methods of taxation such as volumetric. However, many commentators and industry stake holders have pointed to specific issues with the WET rebate as well. In 2008 the Henry Review found that the WET rebate encourages small-scale production and allows uneconomic producers to artificially remain in the industry.[67] These findings are supported by industry which has reported widespread oversupply of grapes and suggested in 2009 that at least 17 per cent of Australia's vineyard capacity is non-viable[68] and more recently that 70% or more of production is uneconomic with the majority of issues concentrated in lower grade grapes.[69] These findings it is suggested

[60] Barton, Morgan and Pinto, 57.
[61] Ibid, 55.
[62] Ibid, 56.
[63] Australian Real Craft Brewers Association, Submission to Treasury Re:Think Tax, 2015.
[64] Independent Distillers Australia, 'Henry Tax Review Submission' (2008), 4.
[65] Barton, Morgan and Pinto, 57.
[66] Global Wine Regulation.
[67] Henry.
[68] Winemakers' Federation of Australia; Wine Grape Growers' Australia; Australian Wine and Brandy Corporation & Australian Grape and Wine Research Development Corporation Joint Statement, *Wine Industry Must Confront the Reality of Oversupply* (November 2009).
[69] WFA, *Actions for Industry Profitability 2014 – 2016, Adelaide: Winemakers' Federation of Australia*, (2013) 23.

demonstrate an inefficient use of land, water and capital resources.[70] It's argued that the WET rebate may be discouraging mergers within the industry which would remove these uneconomic wineries and is increasing the costs of inputs to otherwise successful wineries.[71]

Further many industry stakeholders claim the grape oversupply (or glut) is directly contributing the devaluing of Australian wine brands on the international market.[72] It was stated that:

> Globally we have been forced to trade in the low-value/low-margin market to see excess wine, yet our costs are too high for us to be viable in that market in the long term – we cannot match the cost structures of some of our competitors… Just as damaging is the image being created that Australia is only a low-cost producer, making it difficult for our premium wines to gain recognition and market traction.[73]

This devaluing of 'Brand Australia' affects the legitimacy of Australia's premium wine producers. Consumers may not believe claims of superior quality when there is an abundance of good quality mid-range wine and hence may not be as willing to pay a premium. Exacerbating these issues is the practice of large retailers absorbing price increases by heavily discounting alcohol products to below cost prices, known as 'loss leading', therefore undermining the effect of alcohol taxation on consumers.[74] Retailers may also pass these costs back to the producer depending on the structure of their contract or the producer may choose to trade away their rebate through lower on-sell prices. Given retailers could continue these practices if there was a move to a volumetric tax these are serious factors to consider in whether a rebate should continue and who should be eligible for it.

C Social factors

As mentioned earlier many commentators have argued the objective of a tax on wine should be to address the spillover costs imposed on the community from alcohol abuse. Raising revenue should therefore be a by-product of this and not the goal.[75] There is a large volume of research showing that improper alcohol can have significant social and health impacts on both individuals and the larger community. Health risks associated with alcohol consumption include chronic cardiovascular and digestive diseases such as liver cirrhosis and pancreatitis,[76] several types of cancer,[77] mental illnesses and foetal

[70] Henry.
[71] Henry.
[72] Winemakers' Federation of Australia; Wine Grape Growers' Australia; Australian Wine and Brandy Corporation & Australian Grape and Wine Research Development Corporation Joint Statement, *Wine Industry Must Confront the Reality of Oversupply* (November 2009).
[73] Winemakers' Federation of Australia; Wine Grape Growers' Australia; Australian Wine and Brandy Corporation & Australian Grape and Wine Research Development Corporation Joint Statement, *Wine Industry Must Confront the Reality of Oversupply* (November 2009).
[74] Natacha Carragher & Jenny Chalmers, 'What are the options? Pricing and taxation policy reforms to redress excessive alcohol consumption and related harms in Australia' NSW Bureau of Crime Statistics and Research, 27.
[75] Henry, 431.
[76] Corrao G., Rubbiati L., Bagnardi V., Zambon A., Poikolainen K. 2000.
[77] Cancer Council 2011.

alcohol spectrum disorders. The related social harms identified with alcohol abuse have included domestic violence and family breakdown,[78] aggressive behaviour, lowered work productivity and job loss,[79] road-traffic accidents and alcohol related crime.[80]

The estimated costs to individuals for these harms have been placed at $1.9 billion for healthcare, $3.6 billion in lost productivity, $2.2 billion for road traffic accidents, $1.6 billion for criminal justice.[81] In addition costs to third parties for things such as health care, child protection, lost productivity, personal and property damage and professional counselling arising from another's drinking have been estimated at $14 billion.[82] Alternative analysis,[83] often commissioned by the alcohol industry, has placed these costs much lower although these reports have been met with scepticism by the Australian National Preventative Health Agency.[84]

While there are many policies which can be employed to address these harms raising prices continues to be considered one of the most effective ways of controlling alcohol consumption.[85] As taxation has the added benefit of raising revenue it is often a preferred tool. Studies have shown that higher alcohol taxation, when applied correctly, can be effective in combating alcohol abuse and misuse.[86] Research on alcohol related morbidity and mortality has also suggested a doubling of alcohol taxes could reduce alcohol related mortality by 35 per cent, traffic related deaths by 11 per cent, sexual transmitted diseases by 6 per cent, violence by 2 per cent and crime by approximately 1 per cent.[87] Further these harms often affect those from lower socio-economic backgrounds and Indigenous Australians and studies show a rise in price would affect consumption.[88] While a rebate to wine producers is not supposed to affect the WET imposed on the retail product industry have argued that wine oversupply and growing retail power mean that wine producers are willing to pass on the benefit of the rebate to consumers, through lower on-sell prices.[89]

As mentioned earlier while wine demand is considered more elastic than some other alcoholic beverages the general inelasticity of alcohol prices means that it can be difficult to predict how a change in price will affect it. In addition there are various other factors which can affect individual's preferences such as income and some studies have shown that light and heavy drinkers are much less price elastic than moderate

[78] Ministerial Council on Drug Strategy 2001
[79] Pidd K et al., 2006.
[80] Collins D., Lapsley H. 2008.
[81] Collins, D., & Lapsley, H. (2008). The costs of tobacco, alcohol and illicit drug abuse to Australian society in 2004/05. Canberra: Commonwealth Department of Health and Agein.
[82] Laslett, A-M., Catalano, P., Chikritzhs, T., Dale, C., Doran, C., Ferris, J., Jainullabudeen, T., Livingston, M., Matthews, S., Mugavin, J., Room, R., Schlotterlein, M. & Wilkinson, C. (2010). The range and magnitude of alcohol's harm to others. Fitzroy Victoria: Foundation for Alcohol Research and Education and Turning Point Alcohol and Drug Centre.
[83] "The costs of costs studies", Crampton and Burgess, 2011.
[84] Australian National Preventive Health Agency (2013). Exploring the public interest case for a minimum (floor) price for alcohol. Appendix six. Canberra: Commonwealth of Australia.
[85] Global Wine Regulation.
[86] Collins and Lapsley (2008).
[87] Wagenaar et al., 2010.
[88] Don Weatherburn, 'Arresting Incarceration'.
[89] Wine Grape Growers Australia, Submission to Treasury Re:Think Tax, 2015, 1, 8-9.

drinkers.[90] Members of the wine industry[91] have also pointed to research by Mueller and Umberger[92] which suggests the typical lower cost wine drinkers (including consumers of cask wine) are aged 55 years or older and consume two or less glasses per drinking session. They argue that these consumers are not those typically involved in anti-social or violent behaviour and therefore a punitive tax on wine would result in those consumers who drink modestly compensating for those causing the most harm. Further arguments have been put forward that increasing alcohol prices have driven up rates of illicit drug consumption.[93] These links have been rejected however by Drug Free Australia who argue that people choose to take illicit drugs because of risk-taking behaviour rather than price.[94] It has also been highlighted that raising taxes is not a popular vehicle for curbing alcohol abuse with the majority of Australians preferring targeted measures such as greater penalties for drink drivers and better enforcement of under-age purchasing and service to intoxicated customers.[95]

These factors are relevant to reforms of the WET rebate as provision of a rebate to producers will reduce the revenue available to the Government to implement targeted measures and address spillover costs to society. Further if the benefit of a rebate is passed on to consumers it will undermine attempts to decrease alcohol consumption through price increases.

D Environmental factors

While social externalities such as health and crime are referred to extensively in debates around WET reform little is said about the costs associated with environmental harm. Wine production, like many other agricultural activities, impacts heavily on the environment. Various activities throughout the wine production process have an impact. These include: water and soil contamination from fumigation and ongoing use of insecticides, pesticides and fungicides, use of chemical cleaning agents, waste disposal practices and extensive irrigation resulting in soil salinity issues; soil degradation and erosion from land clearing; degradation of air quality from use of heavy machinery and emission of odours and polluted air from degradation of raw materials; noise pollution from constant operation of pumps, refrigerators, crushers and vehicles; negative effects on biodiversity from land clearing causing habitat loss and other issues of water and soil contamination leading to loss of flora and fauna; and a large carbon footprint from a combination of the above activities and significantly from packaging and transportation of the finished product.[96]

[90] Manning et al, The demand for alcohol: The differential response to price, Vol 14, Issue 2, The Journal for Health. 1999 14.
[91] Riverland Wine, Submission to Treasury Re:Think Tax, 2015, 1.Murray Valley Winegrowers Inc, Submission to Treasury Re:Think Tax, 2015.'Accolade Wines, Submission to Treasury Re:Think Tax, 2015.'
[92] Mueller, S & Umberger, W, 2009, 'Myth busting: Who is the Australian Cask wine consumer?' The Australian and New Zealand Wine Industry Journal, January/February 2009. Vol 24 No 1
[93] Australian Liquor Stores Association, Submission to Treasury Re:Think Tax, 2015, 5.'
[94] Jo Baxter Drug Free Australia - "people choose to do it because of risk-taking behaviour" - http://www.smh.com.au/national/high-price-of-alcohol-drives-demand-for-illegal-drugs-20140810-102eo6.html
[95] Australian Institute of Health and Welfare (AIHW) 2014, NDSHS 2013, Table 9.11 as cited in ustralian Liquor Stores Association, Better Tax - Submission, 5.'
[96] Nicholas Antonas 'Wine and the Environment' in Matt Harvey and Vicki Waye (Eds), *Global Wine Regulation* (2014), 96-98.

A key issue of significance in Australia is the use of water. Grape-growing and wine-making rely heavily on access to good-quality water. Unfortunately there is often heavy competition for water resources as grape quality is generally better where rainfall is moderate.[97] This is a particular issue in South Australia which is the driest Australian state and produces the majority of Australia's wine.[98] Rainfall is supplemented in South Australia by pumping from the River Murray which unfortunately has been subject to over-allocation issues by upstream states.[99] Availability of water supply is then further strained during times of drought which will only be exacerbated by climate change.[100] Grape growing is particularly dependent upon and inherently interconnected to climate and weather; even small changes affecting grape production, wine quality and flavour.[101]

Australia's environmental laws are generally a government centred process of legislation combined with administrative function.[102] The majority of legislation and regulation impacting on the wine industry comes at the State level. At present there is no specific environmental legislation in respect of the wine industry with State regulators providing 'soft law' policies and guidelines to try and enforce state environmental laws. Although in South Australia there are strict processes which much be followed to obtain the necessary permits and authorisations for allocation of water resources.[103] Self –regulation of the industry occurs through the Wine Maker's Federation of Australia which administers the EntWine environmental accreditation scheme for Australian wine producers.[104] The scheme is voluntary and allows winemakers and wine grape growers to receive formal certification of their practices according to recognised standards.[105] In respect of managing climate change there are no compulsory measures in place to mitigate the effects of climate change. Instead land managers are encouraged to participate in the Emissions Reduction Fund through which the Government purchases lowest cost emissions reductions in order to provide an incentive to landowners to proactively reduce their emissions.[106] This can be compared to air emission and carbon dioxide regulation in the US which can require wineries to be subject to air permit requirements and CO2 emission caps.[107] The government does currently provide funding to deliver tools and strategies to help the wine industry adapt to a changing climate through the Australia's Farming Future, Climate Change Research Program.[108]

[97] Vicki Waye 'Water and Wine' in Matt Harvey and Vicki Waye (Eds), *Global Wine Regulation* (2014), 119.
[98] Vicki Waye 'Water and Wine' in Matt Harvey and Vicki Waye (Eds), *Global Wine Regulation* (2014), 119.
[99] MD Young and JC McColl, 'Robust Reform: The Case for a New Water Entitlement System in Australia' (2003) 36(2) *Australian Economic Review* 225 at 228 as cited in Vicki Waye 'Water and Wine' in Matt Harvey and Vicki Waye (Eds), *Global Wine Regulation* (2014), 121.
[100] Peter Cullen, 'Confronting Water Scarcity: Water Futures for South Australia' (Flinders Research Centre for Coastal and Catchment Environments, Schultz Oration, 16 November 2007) as cited in Vicki Waye 'Water and Wine' in Matt Harvey and Vicki Waye (Eds), *Global Wine Regulation* (2014), 121.
[101] Kym Anderson, Christopher Findlay, Sigfredo Fuentes and Stephen Tyerman, *Garnaut Climate Change Review Viticulture, wine and climate change*, (2008), 5-6.
[102] Nicholas Antonas 'Wine and the Environment' in Matt Harvey and Vicki Waye (Eds), *Global Wine Regulation* (2014), 100.
[103] Vicki Waye 'Water and Wine' in Matt Harvey and Vicki Waye (Eds), *Global Wine Regulation* (2014), 121.
[104] http://www.agriculture.gov.au/ag-farm-food/wine-policy
[105] http://www.agriculture.gov.au/ag-farm-food/wine-policy
[106] http://www.agriculture.gov.au/ag-farm-food/climatechange/cfi
[107] Nicholas Antonas 'Wine and the Environment' in Matt Harvey and Vicki Waye (Eds), *Global Wine Regulation* (2014), 114-5.
[108] http://www.agriculture.gov.au/ag-farm-food/wine-policy

These environmental factors are clearly an important consideration in the provision of any WET rebate. It has been argued that the Riverland (SA), Murray Valley (Vic/NSW) and Riverina (NSW) are responsible for producing the majority of grapes for low quality wines and that these inland region are using up to 1000 litres of water to produce one litre of wine that sells for less than the cost of one litre of bottled water.[109] As discussed previously it's argued the WET rebate is supporting many of these bulk wine producers who would otherwise be unprofitable. Therefore the continued existence of a WET rebate should be considered in the context of whether these behaviours should continue. This must be balanced with the additional support a rebate can provide to those legitimate small producers who are struggling with issues of climate change.

E Government philosophy

Finally and connected to many how many of the economic, social and environmental factors discussed above are treated is the political philosophies and ideologies of the current elected Government. At present the Liberal Party, led by Tony Abbott, hold the majority in the legislative council. The Abbott Government claims to be committed to minimum government intervention in order to maximise the choice, freedom and rights of individual Australians.[110] Policies reflecting this commitment to welfare state retrenchment can be seen in proposed reforms to Medicare, pension and unemployment payments and education. Further the Liberal party advises it believes in "government that nurtures and encourages its citizens through incentive, rather than putting limits on people through the punishing disincentives of burdensome taxes and the stifling structures of Labor's corporate state and bureaucratic red tape."[111] It is arguable that taxation of alcohol to prevent abuse is counter to this belief and imposes a burden on consumers. Further provision of rebates to producers has been described as corporate welfare,[112] as the government intervening in the private sector and preventing it from running efficiently. This would again contradict Liberal party beliefs as reflected in 2013 when the Prime Minister, the Hon Tony Abbott, advised:

> We don't want to see corporate welfare… we don't believe in corporate welfare… This government will be very loth to consider requests for subsidies, we will be very loth to do for businesses in trouble the sorts of things they should be doing for themselves.[113]

However, as many commentators have pointed out since this statement, many other government policies run counter to this philosophy.[114] The largest of these being the fuel tax credit scheme which was introduced during the Howard era and continues

[109] D Richardson and R Dennis, "The Australian wine tax regime: assessing industry claims" (2011) Technical Brief No. 10, The Australia Institute, 5.
[110] Tony Abbott, 'Battlelines' (2009) Melbourne: Melbourne University Press.
[111] https://www.liberal.org.au/our-beliefs
[112] Foundation for Alcohol Research & Education. Submission 1, 23.
[113] Taylor, L. (2013). Tony Abbott declares an end to 'corporate welfare'. The Guardian. 18 December 2013. Retrieved from: http://www.theguardian.com/world/2013/dec/18/tony-abbott-declares-an-end-to-corporate-welfare
[114] http://www.theguardian.com/environment/southern-crossroads/2014/feb/02/fossil-fuel-subsidies-tony-abbott-spc-ardmona-corporate-welfare; http://theconversation.com/the-great-global-warming-subsidy-the-truth-about-australian-corporate-welfare-23281

today and provides significant benefits to the mining industry; in 2011 the mining industry received $2 billion of the $5.2 billion total credits claimed.[115] This support is provided even though the mining industry is one of the most profitable industries in Australia and one of the first acts of the Abbott Government was to repeal the Mineral Resources Rent Tax, a tax on profits generated from the mining of non-renewable resources in Australia.

These actions though reflect the position of the Abbott Government on another major issue, climate change. Although the Prime Minister has stated he takes climate change 'very seriously', he has also repeatedly advised he does not believe climate change is a man made occurrence and therefore should not involve imposing substantial costs on the economy now to avoid unknown and perhaps even benign changes in the future.[116] Further the recent announcement of plans to reduce greenhouse gas pollution by 26-28% by 2030 compared to 2005 levels has been met with international criticism.[117] These targets are significantly below the below the 40-60% target recommended by the government's Climate Change Authority as a fair contribution to keeping warming below 2 degrees Celsius.[118] Any reform of the WET rebate will need to be considered in light of the prevailing government position.

C PROPOSALS FOR REFORM

In light of the above discussion it is understandable there have been many calls for reform over the last few year. As such many proposals have been put forward and most recently there have been various submissions made in response to the Treasury Re:Think Tax Discussion paper. One of the main proposals referenced by these submissions was that made by the Henry Review in 2009 to move to a common volumetric tax on alcohol (including wine). The report is quite scathing of the existing WET rebate although the final recommendation does not rule out subsidies for small producers under a new regime.[119] The report drew on a number of the debates discussed above in relation to the 'spillover' costs to society to support its position and pointed to the market distortion, biases between producers and poor targeting of the WET rebate as reasons for its reform.[120] Support for these recommendations (or a variation on them) comes from a variety of areas. Health industry stakeholders and research centres appear to support the abolishment of the WET rebate along with a move to volumetric taxation based on percentage of alcohol.[121] Unlike the Henry Review however many of these submissions have recommended maintaining a differentiated

[115] http://theconversation.com/the-great-global-warming-subsidy-the-truth-about-australian-corporate-welfare-23281
[116] http://www.theguardian.com/environment/planet-oz/2014/jun/16/what-does-australian-prime-minister-tony-abbott-really-think-about-climate-change
[117] http://insideclimatenews.org/carbon-copy/11082015/australia-weak-climate-pledge-draws-derision-tony-abbott
[118] https://theconversation.com/australias-post-2020-climate-target-not-enough-to-stop-2c-warming-experts-45879
[119] Henry, 442.
[120] Henry, 437-8.
[121] Foundation for Alcohol Research and Education, Submission to Treasury *Re:Think Tax*, 2015; Cancer Council Australia, Submission to Treasury Re:Think Tax, 2015; National Alliance for Action on Alcohol the Public Health Association of Australia and the McCusker Centre for Action on Alcohol and Youth, Submission to Treasury Re:Think Tax, 2015; Research Australia, Submission to Treasury Re:Think Tax, 2015; Gilbert + Tobin Centre of Public Law and the Indigenous Law Centre, Submission to Treasury Re:Think Tax, 2015.

volumetric taxation system where the rate of taxation is applied according to a number of factors including; category and volume of alcohol and potential to cause harm.[122] Some have also called for a minimum floor price for alcohol to avoid larger retailers 'loss leading'.[123] Two of the largest Australian wine producers are also calling for the removal of the WET and WET rebate however they recommend wine does not move to the excise system and is not taxed on alcohol content but instead suggest a single tax rate for all wine.[124]

A number of the submissions supporting the abolishment of the WET rebate recommend an independent industry package to facilitate these structural changes such as those used previously for the car and forestry industries.[125] These recommendations are supported by previous reports.[126] Where Government support for regional development and cellar door tourism is still a priority the large wine producers recommend support that is targeted directly to intended recipients rather than being connected to the tax system.[127] This would avoid the need to pay rebates to New Zealand producers.[128]

On the other side of the debate sit mainly wine industry representative bodies. The Winemaker's Federation of Australia in its Actions for Profitability 2014-2016 echoes the recommendations made by the Australian National Audit Office ('ANAO') in 2010. The ANAO recommended changes directed towards strengthening the ATO's compliance arrangements. The recommendations included that in order to resolve unintended outcomes regarding access to the WET rebate, the ATO should advise Treasury on options to clarify the definition of a wine producer for the purposes of the WET rebate in the WET Act.[129] This recommendation was made in light of the various schemes that had arisen where producers attempted to improperly access the producer rebate. The WFA state that they wish to work with the ATO to retain and apply the WET rebate in accordance with its original intent by removing access to the rebate from producers of unbranded and bulk wine.[130] It's discussed that this will include identifying any changes that can be made to the interpretation and application of the existing provisions so that implementation is in line with the original intent and ensure only those who make a contribution to regional communities are accessing the

[122] Foundation for Alcohol Research and Education, Submission to Treasury *Re:Think Tax*, 2015.
[123] Foundation for Alcohol Research and Education, Submission to Treasury *Re:Think Tax*, 2015; Cancer Council Australia, Submission to Treasury Re:Think Tax, 2015; National Alliance for Action on Alcohol the Public Health Association of Australia and the McCusker Centre for Action on Alcohol and Youth, Submission to Treasury Re:Think Tax, 2015; Research Australia, Submission to Treasury Re:Think Tax, 2015; Gilbert + Tobin Centre of Public Law and the Indigenous Law Centre, Submission to Treasury Re:Think Tax, 2015.
[124] Pernod Ricard, Submission to Treasury Re:Think Tax, 2015; Treasury Estate Wines, Submission to Treasury Re:Think Tax, 2015.
[125] Foundation for Alcohol Research and Education, Submission to Treasury *Re:Think Tax*, 2015; Pernod Ricard, Submission to Treasury Re:Think Tax, 2015; Treasury Estate Wines, Submission to Treasury Re:Think Tax, 2015.
[126] The Allen Consulting Group. (2011). Alcohol Taxation Reform – starting with the Wine Equalisation Tax. Canberra: Foundation for Alcohol Research and Education.
[127] Pernod Ricard, Submission to Treasury Re:Think Tax, 2015; Treasury Estate Wines, Submission to Treasury Re:Think Tax, 2015.
[128] Pernod Ricard, Submission to Treasury Re:Think Tax, 2015; Treasury Estate Wines, Submission to Treasury Re:Think Tax, 2015.
[129] Australian National Audit Office, "Administration of the wine equalisation tax", 2010.
[130] Winemaker's Federation of Australia in Actions for Profitability 2014-2016, 31-2.

rebate.[131] The submission by the WFA to the Re:Think discussion reflects this position although they have advised they will make a more extensive submission when the Treasury paper on the WET rebate is released.[132]

The submissions by other wine industry groups support the position taken by the WFA.[133] These groups predict that narrowing the definition of the WET rebate will yield higher wine grape prices 92 per cent of independent wine grape growers but note there is no hard evidence to support this.[134] Various of the issues mentioned above such as the higher tax rate attributed to wine when compared internationally, the lower social costs that wine consumption generates when compared to other forms of alcohol and that it is not the drink of choice for at risk consumers are raised in support of keeping the WET and not moving to a volumetric system.[135] A cider industry group also supports this position[136] while the Crafter Brewers Association supports the original intention of the WET rebate but requests an increase in excise relief by way of the independent brewers rebate.[137] It is worth noting that no submissions considered the possibility of a move to a volumetric tax while retaining some form of producer rebate that could operate in a similar fashion to the independent brewers rebate.

E EVALUATION AND RECOMMENDATION

From the above discussion it is clear the status quo cannot be maintained and indeed all stakeholders are calling for some change to occur the least of which is a change to the definition of producer. If the government were to refrain from making any legislative amendments to the current framework any changes to this definition would need to be made via internal ATO policy or by court interpretation. There are various issues with this approach including the unlikeness of a change occurring within ATO rulings and the limited opportunities for a court to hear or determine these issues. In addition if the problems identified with the interpretation of manufacture and producer in respect of contract-manufactured wine were addressed this would not impact on eligibility for producers of bulk or unbranded wine. Therefore were the WET to be retained it appears the proposals from much of the wine industry to remove eligibility to the producer rebate from bulk and unbranded wine would be a sensible move that would not be met with significant dispute. This would help to address some of the rorting issues and complexities brought in by attempts to close those loop holes.

It appears though there is strong support for the removal of WET and a move to a different method of taxation on wine with no less than nine government reviews

[131] Winemaker's Federation of Australia in Actions for Profitability 2014-2016, 31-2.
[132] Winemaker's Federation of Australia, Submission to Treasury *Re:Think Tax*, 2015.
[133] Wine Grape Growers Australia, Submission to Treasury Re:Think Tax, 2015, 6. Wine Tasmania, Submission to Treasury Re:Think Tax, 2015, 5. Accolade Wines, Submission to Treasury Re:Think Tax, 2015, 11. Riverland Wine, Submission to Treasury Re:Think Tax, 2015, 7. Murray Valley River Winegorwers Inc, Submission to Treasury Re:Think Tax, 2015, 5.
[134] Wine Grape Growers Australia, Submission to Treasury Re:Think Tax, 2015, 6.
[135] Wine Grape Growers Australia, Submission to Treasury Re:Think Tax, 2015, 6. Wine Tasmania, Submission to Treasury Re:Think Tax, 2015, 5. Accolade Wines, Submission to Treasury Re:Think Tax, 2015, 11. Riverland Wine, Submission to Treasury Re:Think Tax, 2015, 7. Murray Valley River Winegorwers Inc, Submission to Treasury Re:Think Tax, 2015, 5.
[136] Cider Australia, Submission to Treasury Re:Think Tax, 2015.
[137] Australian Real Craft Brewers Association, Submission to Treasury Re:Think Tax, 2015, 5.

recommending this approach.[138] While the many proponents of a volumetric tax recommend abolishing the WET rebate along with the WET this ignores the original intention for its introduction, mainly to support small wine producers in rural and regional Australian and promote tourism in these areas. Both the current Liberal Government and the Labour opposition party have indicated they are proponents of growth in rural and regional Australia.[139] In particular, the Liberal governments recently released Agricultural Competitiveness White Paper highlights the importance of accessing premium markets by improving international trade to grow farm businesses.[140] Studies have shown that a move to a volumetric tax on wine consumption would encourage the local production of finer wines and discourage the growing of non-premium winegrapes.[141] This move though would likely have a negative affect on grape growers in the hot irrigated regions of Australia that produce the majority of grapes for non-premium wines. This is due to their inability to shift their production to higher quality grapes as it would involve expensive adjustments.[142] Further it has been suggested that if a rebate were discontinued under a volumetric tax scheme smaller premium wineries and their associated growers may be worse off under reform rather than better.[143] Retention of a rebate for wine producers in a volumetric system may help alleviate some of these issues and support the previously discussed policy intentions where it is properly tailored. Suggestions from the wine industry that the definition should be narrowed would certainly help produce this outcome. Learning from past difficulties this definition would need to be clear and not open to interpretations that run counter to the intention. A rebate tailored in this way in conjunction with a volumetric tax could be reflective of the brewery refund scheme and the original cellar door scheme. At present the brewery refund scheme scheme provides a refund of 60% of the excise duty a producer pays on beer up to a maximum of $30,000 per year only where they are economically and legally independent of any other entity that runs a brewery.[144] A rebate structured in this way would ensure all wine producers are paying a portion of the tax on wine for all sales addressing some of the inequality previously identified by small producers paying no tax while large producers contribute 90% of all wine tax revenue. A complete restructure of the operation of a rebate would also allow for a re-evaluation of how Australia's tax on wine does compare to overseas

[138] 1995 Committee of Inquiry into the Wine Grape and Wine Industry; 2003 House of Representatives Standing Committee on Family and Community Affairs Inquiry into Substance Abuse; the 2006 Victorian Inquiry Into Strategies to Reduce Harmful Alcohol Consumption; the 2009 Australia's future tax system (Henry Review); the 2009 National Preventative Health Taskforce report on Preventing Alcohol Related Harms; the 2010 Victorian Inquiry into Strategies to Reduce Assaults in Public Places; the 2011 WA Education and Health Standing Committee Inquiry Into Alcohol; the 2012 Australian National Preventive Health Agency Exploring the public interest case for a minimum (floor) price for alcohol, draft report and the 2012 Australian National Preventive Health Agency Exploring the public interest case for a minimum (floor) price for alcohol, final report.

[139] http://agwhitepaper.agriculture.gov.au/; http://www.alp.org.au/regionalaustralia.

[140] http://agwhitepaper.agriculture.gov.au/white-paper/accessing-premium-markets

[141] Kym Anderson, Ernest Valenzuela; Glyn Wittwer 'Wine Export Shocks and Wine Tax Reform in Australia: Regional Consequences Using an Economy-wide Approach*' (2011) 30(3) *Economic Papers: A …* 386.

[142] Kym Anderson, Ernest Valenzuela; Glyn Wittwer 'Wine Export Shocks and Wine Tax Reform in Australia: Regional Consequences Using an Economy-wide Approach*' (2011) 30(3) *Economic Papers: A …* 386.

[143] Kym Anderson, Ernest Valenzuela; Glyn Wittwer 'Wine Export Shocks and Wine Tax Reform in Australia: Regional Consequences Using an Economy-wide Approach*' (2011) 30(3) *Economic Papers: A …* 386, 396.

[144] https://www.ato.gov.au/Business/Excise-and-excise-equivalent-goods/In-detail/Alcohol/Beer/Record-keeping-and-related-requirements-for-breweries/?page=23

competitors and how the size of a rebate would affect the competitiveness of our producers.

On the issue of externalities or spillover costs it's clear the purpose of a wine tax policy as a whole will be important. If the purpose of the tax were purely to address issues of abuse then a rebate policy encouraging production would seem counter-intuitive. This assumes though that any policy objective acts in a vacuum rather than being part of an ever-changing landscape of competing interests. A reform in this area, moving to a volumetric tax to improve social outcomes while maintaining a rebate to wine producers encouraging economic growth, is an opportunity for the government to reach a balance between these issues rather than treating them as either or. It also provides an opportunity to address environmental externalities within the same policy, which has not been attempted before. The recently released Agricultural Competiveness White Paper discusses the need to strengthen our approach to drought and risk management by introducing practical measures to manage drought and other risks facing farmers.[145] Further it states it's important to plan ahead and think innovatively about infrastructure, including securing water supplies.[146] As discussed earlier the wine industry is being severely affected by the effects of climate change whilst also being a major user of water in water scarce environments. A rebate to wine producers would provide relief but could also be a vehicle for ensuring certain behaviours. Attaching eligibility for the rebate to a requirement to demonstrate climate change adaptation techniques and/or compliance with water allocation requirements would incentivise and promote these key policies. Eligibility criteria such as this should not impose a heavy burden since these things should already be or are already occurring but it would provide an extra check and balance that the rebate was being utilised by worthwhile applicants. If the government do not wish to encourage the continued production of low quality wines a rebate could provide support to the hot irrigated regions in adjusting to a new system. If a structural readjustment package as proposed above was also introduced in conjunction with a smaller more targeted rebate it would allow those unprofitable producers that wished to leave the industry to do so. Without an oversupply of cheap low quality wines the economic legitimacy of Australia wine brand would improve both here and overseas.

All of these proposed changes though will be dependent on a whether there is a government prepared to make them as they will require legislative amendments. As mentioned any change would need to consider the impact on Australia's international relationships including the CER with New Zealand, whether a rebate is in contravention of WTO principles and if an exception would be available in the circumstances. The continued provision of a rebate will also require a government whose own philosophies align with supporting the policy objectives connected with such a rebate. Where a government holds itself out to be liberal capitalist and anti interventionist it makes little sense to provide such substantial tax relief to members of a particular industry particularly where provision of that rebate in the past has resulted in distortion of the market. Equally though this government has said they prefer to incentivise innovation.[147] A producer rebate tied to environmental objectives may present an avenue not to help industry when they should be helping themselves but instead to

[145] http://agwhitepaper.agriculture.gov.au/white-paper/strengthening-approach-to-drought
[146] http://agwhitepaper.agriculture.gov.au/white-paper/building-infrastructure
[147] https://www.liberal.org.au/our-beliefs

promote growth and good practice where eligibility for the rebate becomes a choice for the producer.

F CONCLUSION

This discussion demonstrates that the history of the WET rebate is one of piecemeal legislative reform based mainly on economic justifications. The situation now is quite dire. The evidence of rorting and misuse of the rebate by parts of the industry coupled with the role of the rebate in stymieing policy objectives to address spillover costs means the scheme as a whole is perceived as economically inefficient. The claim that the rebate is resulting in corporate welfare while the government states the 'age of entitlement' is over and the ongoing environmental impact of the industry creates additional problems as to the legitimacy of the scheme. It is clear that reform is needed in this area. The patchwork of legislation, tax rulings and limited case law that has emerged from attempting to administer the WET rebate is clearly inadequate and a change is needed. This may include a more targeted and transparent approach with less need for interpretation by third parties.

Economic perspectives are vital in informing how particular reforms may perform. Industry support for reforms and political will are equally important and necessary if reform is to be successful. The above analysis shows that the options for reform currently on offer do not consider the various competing factors (in particular environmental issues). The proposals often take an 'us vs. them' stance regarding competing economic and social perspectives. Rather than attempting to work together each side is concerned with showing why the others position is wrong. This paper has provided a middle ground by suggesting alternative recommendations that consider a move to alternative taxation strategies in conjunction with economic support to industry. This presents opportunities for further evaluation that may provide Australia with a legal framework for addressing this, and other policy issues, that straddle the economic, social and environmental spheres.

Common Matters: Rethinking Low Carbon Innovation

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Abstract

The premise of this paper is that climate policy has increasingly moved from the top, down, as other governing actors digest the targets and timetables for emissions reductions negotiated between nation-states. More often than not, the prospect of uniform emissions abatement by a party to the UNFCCC has been unattainable due to mismatches between prevailing social habits, economic and political forces (Kuch, 2015). Since the global financial crisis of 2008-9, 'bottom up' efforts at climate policy by smaller jurisdictions such as sub-national states and city councils have increasingly attracted the attention of entrepreneurs, climate policy practitioners, lawmakers and regulators. Some have even suggested a 'new politics' of climate change (Hale, 2010) is supplementing or even displacing publics engaging with governments over environmental targets.

This paper will draw from empirical work on the community energy sector to address two main gaps in our understanding of this cutting-edge of climate policy. The first relates to changing conceptions of the corporation that have occurred alongside the emergence of the new politics of climate change. The hegemony of shareholder-maximization has coincided with global warming emissions accelerating most rapidly from the mid-twentieth century onwards; furthermore, it contributed to risky demands on management that exacerbated the global financial crisis (Deakin, 2012). Large corporations are now being rethought as public-private hybrids (Davies, 2012); whilst legal forms such as the Benefit Corporation have been developed in many states to protect boards decision-making in the interests of suppliers, workers and other stakeholders. This paper will explore how diverse legal forms may affect initiatives' carbon emissions abatement potential and ability to create social and environmental value.

Secondly, the paper will rethink recent work on the commons (Weston and Bollier, 2013; Deakin, 2012); instead moving from understanding the commons through the lens of 'the sociology of the social' and instead as a sociology of associations (Latour, 2005). This shift towards understanding economic actors as 'socio-material' been developed in recent work markets (Pinch and Swedberg, 2008; Bumpus, 2010; MacKenzie, 2009); therefore this paper will address both the juridical dimensions of this understanding of materiality and the limitations in applying it to the concept of the commons. Overall, this paper aims to show how an experimental approach to social goals of equitable ownership and control of the energy system may aide entrepreneurs, lawmakers and industries in navigating the path to a cleaner, more sustainable and energized future.

Introduction

This paper sociologically considers the role of democratising ownership of energy infrastructure as part of the transition to a low-carbon economy. In Australia, the community energy sector comprises some 60 community groups pursuing projects such as wind farms and rooftop solar arrays on such sites as pubs and clubs[148]. Many of these groups are born directly from frustrations with current infrastructure planning and have moved from social mobilisation to developing innovative, locally owned and managed energy projects. Decisions by energy supply companies are often made on the basis of opaque calculations increasing of energy demand, and backed by legislation guaranteeing returns for such investment at the expense of energy users (Hill, 2014). Community energy groups face a range of competitive, social and regulatory barriers that have become more widely recognised by some state and federal agencies such as the Australian Renewable Energy Agency and various state Environment Departments. Grant funding of research and early stage expert support for groups has attempted to address some of these problems. Such measures go some way to aggregating interests in political coalitions that confront head on the impotence of individualist responses to the problem of climate change (c.f. Ayres and Braithwaite, 1992: 54-100).

The paper considers how contemporary overlapping paradigms of competition and low-carbon energy policy embody a set of relationships between environment, law and economy. The premise of this paper is that community energy provides an exit from a sanitised imaginary of the corporate form embedded in competition policy (Morgan and Kuch, 2014). It is beyond the scope of this paper to explore the many legal forms utilised in the sector and their limitations[149]. Rather, the concept of 'infrastructural inversion' is introduced explore the materiality of a commons-based justification for community energy support. Such a justification embeds rights in practices of assembling, assessing and contesting knowledge, rather than global norms of access alone. The paper sociologically considers two intersecting roles for law in empowering community energy groups to generate 'shared infrastructure' that could be an important plank of a paradigm of carbon-based energy regulation. It examines key challenges for the community energy sector to reach its potential through both aggregating support but retaining a socially embedded spirit; thus Erik Olin Wrights 'Real Utopias' frames a discussion of the ameliorative and emancipative potential of the sector. Overall, this paper aims to provoke discussion of the extent to which the environmental and social goals of equitable ownership and control of a low-carbon energy system require a combination of commons-based rights, devices and practices.

Three Paradigms of Buried Sunshine

Community energy intersects with a number of concerns, including the inadequacy of existing climate regulation. In Anglophone countries, the nascent field has emerged from both active government support and civil society criticism of states negotiating within the United Nations Framework Convention on one hand, and various business-led efforts to mitigate climate change on the other (Wiersma and Devine-Wright, 2014; Walker et al., 2007).

[148] See the National Community Energy Strategy http://c4ce.net.au/nces/

[149] For an overview of Australian Social Enterprise legal forms see http://www.employeeownership.com.au/social-enterprise-legal-models/

Reclaiming ownership from rationalist, corporatist discourse has also been a key concern; one that can be located in an emerging carbon-based paradigm of governing the transition away from the abundant coal that fuelled much of Western prosperity since the early twentieth century. In Australia, the reserves of brown and black 'buried sunshine' in the Latrobe and Hunter valleys were used to engineer new suburbs in Melbourne and Sydney. In the process, forms of life have been produced that may prove to be as comfortable as they are unsustainable (Healy and Kuch, 2008). As Wilkenfeld argues,

> Modern, capital-intensive energy systems change very slowly. One phase of change is the development of consensus within governing circles—the bureaucracy, business interests, engineers, governments—on whether to think about energy supply and use as a system at all or simply as a series of ad hoc decisions about investment, pollution, local development and the like. The next phase is the emergence of a pattern of investment in supply infrastructure, which is typically very long lived. A coal-fired power station can remain in use for 40 years or more, even as the mines supplying it change and individual generating units are replaced. The oldest generating units still in use at Hazelwood power station in Victoria (one of the nation's largest source of greenhouse gas emissions) date from the 1960s. (Wilkenfeld, 2007)

Wilkenfeld (2007) suggests three successive and overlapping paradigms of governing energy supply and corresponding demand: the publicly-minded modernising of the 1950s and 1960s; the corporatisation and marketization paradigm which emerged in the 1980s culminating in the east coast National Electricity Market (NEM); and, most recently an emergent carbon-based paradigm. Today, the NEM's regulators and participants faces many related challenges: falling demand, constant and incremental restructuring, the privatisation of supply and distribution, frequent partisan changes to climate policy and the decommissioning of much of the remaining coal-fired fleet in coming years. Many of these challenges exist at the intersection of the social and economic. That is, how to balance aggregate welfare with such considerations as legitimacy; or how to balance current and future intergenerational equity. Competition policy, the main plank of the second paradigm of energy policy, has been the main arena in which such policies have been pursued.

Energy Policy: Competition and Beyond

Competition policy has increasingly come to offer an appealing reductionism for policy-makers in the complex landscape of energy policy. Competition policy is reductive by derogating the social from the productive efficiency of the corporate form. Australia's National Competition Policy of the 1990s is one instance of the broader 'competition state' tendency for market-based perceptions of policy to replace the rule of law as the touchstone of legitimacy (Morgan, 2003). When pursued most vociferously, the corporate form and individual consumer operate as the sole horizon of regulation. Power stations should compete in markets solely as shareholder maximising corporations; a view that renders community concerns as either irrational or inefficient.

Neoliberal reformers seized on the inefficiency and ineptitude of state planners during the 1980s to pave the way for marketization (Kuch, 2015). Of particular note was the 1984 McDonell inquiry into the NSW State Electricity Commission planning to construct vast new power stations as speculation of an aluminium boom, thereby nearly

bankrupting the state. Such considerations established the 'conditions of felicity' for markets to be 'performed' to fit the economic theories underpinning competition policy (Callon, 2008; 2010). This was not only a socio-technical achievement of assembling the National Electricity Market through various trading devices and physical connectors, but also a bureaucratic and legal one. The privatisation of electricity supply and retail competition occurred in the mid-1990s as Treasury, rather than the Attorney-General's Department, became responsible for the implementation of corporations law reform:

> The physical location of the program shifted to Treasury, later to be slowly submerged into its inner labyrinth as a part of the Business Law Division. Economic theory was made available and other policy inputs were cut off. Cost/benefit analysis was deployed as the prime measure of the acceptability of reform proposals, the terminology of 'transaction costs' and 'barriers to entry', 'industry self-regulation' was configured as that against which government regulation was defined, and world competitiveness became a paramount concern. Corporations law reform thus became an instrument of on-going economic policy. In this context it is quite conceivable that the reform processes necessary to attain progressive reform wither away. (Wishart, 2012)

The calculability of economic value achieved through the family of concepts, measures and practices associated with the competition state has facilitated financialisation over recent decades alongside corporatisation. As Davies points out, "Concepts and instruments initially dreamt up at the University of Chicago, such as 'human capital', are crucial in this extension of investment logic beyond the realms of work and production, and into the crevices of everyday life" (Davies, 2010). Such conceptualisation frames the relationship between sharing and entrepreneurship as one of efficiently pricing consumption, rather than opening access (Morgan and Kuch, 2014). As Davies argues, the application of economic concepts to hitherto non-market domains does not necessarily require they be considered

> …identical to markets, nor … inferior to markets, nor that individual goals are ultimately all monetary; as Becker (1976) has argued, it is a flexible enough 'approach' to recognise that altruism or public service are genuinely valued and chosen by individuals on their own terms. But they seek to analyse and explain human behaviour as if it took place in a market, that is, they see social aspects of human behaviour as costs and benefits that accompany dyadic market exchange. The social is not ignored, denied or derided, but rendered economically calculable, thereby bringing it within the scope of the economic (Davies, 2012: 172).

Economic Sociology and Socio-legal Studies offer important resistance to this imperialist subsumption of sociality and agency into markets 'behind the backs' of actors. One approach is to argue that the intentionality and design in constructing the family of concepts that has sanitised our corporate imagination should not be overstated (Morgan and Kuch, 2014). Weber warned that the Iron Cage would descend upon us through unintended consequences as much as routinized, calculative planning. Greta Krippner's (2011) exemplary study of the financialisation of America in the 1970s emphasizes policy expediency, rather than power politics or ideological battles as typically conceived in much analysis of the role of neoliberalism. The point here is less to undertake detailed historical analysis of the corporate form (though see Vatter,

2013) than to ensure its unity and coherence is not overstated; despite its pre-eminence in managing contemporary energy policy.

Towards a Sociology and Normativity of Energy Policy

Ownership is a key to this economization of energy policy according to the nostrums of competition policy. Where sociologists have focused on markets, economists have built markets by first enforcing calculability through peculiar arrangements of ownership, especially property rights. Thus Environmental Economists typically distinguish between excludable and non-excludable, renewable and non-renewable resources when theorising how to impose rights and access efficiently. The sun and wind are examples of open-access, non-excludable resources – they cannot be diminished. However,

> Many non-renewable natural resources [such as forests or fisheries], which are in finite supply, have not become more scarce over time, and *none* has been exhausted; but renewable natural resources, which have the capacity to regenerate themselves, have in many cases become more scarce, and in some cases have indeed been exhausted, that is, become extinct. This irony can be explained by the fact that while most nonrenewable natural resources are characterized by well-defined, enforceable property rights, many renewable resources are held as common property or open access. (Stavins, 2010: 82).

Ownership, in the form of extending property rights, is thus considered key to efficiency managing resources through subsequent marketisation. This approach has no apparent limits, considering its application to carbon emissions trading (Kuch, 2015). However, electricity production illustrates better than most areas of the economy the limits of considering economic exchange as a purely dyadic relationship between buyer and seller that can be secured through property rights. Third party effects are pervasive such as the immediate and long-lived health effects of air pollution from coal and gas-fired generation; cross-subsidies between market participants; or climate-changing effects of carbon dioxide and methane pollution from coal mining, transportation and burning.

Competition policy provides a frame with which to govern these peculiar concerns, namely through 'externalities.' As Davies argues, "the category of externality elevates the public policy problematic of liberalism to the status of a methodological principle, delineating the appropriate limits of economics and sociology" (Davies, 2012: 171). Application of the concept of externalities to energy policy is thus a method for excluding sociological analysis of uncalculated or incalculable issues and social forms: groups are reduced to property owners, producers or consumers and the development of norms for living low-carbon lifestyles. Neoliberal economics merely registers changes in supply and demand.

Sociological analyses underscore that ownership of both the energy infrastructure and lands affected by energy policy decisions is key to the success or failure of energy policy in at least two ways. Firstly, analysis of ownership should precede an analysis of the successful or otherwise conditions of markets that comprise much recent sociology (Davies, 2012). Such analysis shows that energy markets are conditioned by broader contexts entirely external to their calculations. For example Hecht (2009) demonstrates that establishing post-war national pride following Nazi occupation was crucial to establishing the French nuclear industry. Such analysis implies that focusing

government and research efforts on price and efficient delivery alone will be necessary but insufficient to developing up distributed generation with democratic ownership. Justifications beyond economic efficiency are necessary for projects to proceed (Kuch and Morgan, 2015).

Secondly, as infrastructure privatisation rolls out, some governments and regulators are now concerned with understanding the extent to which tradeoffs exist between, on one hand, the economic efficiency of utility scale energy generation and, on the other, the legitimacy provided by distributed ownership and community partnerships. Joint ownership has emerged as a central consideration for some policy-makers addressing this tension. Distributed models of governing and owning energy supply have rapidly risen to prominence in Germany, the UK, and many industrialised countries. For example, the United Kingdom has a shared ownership taskforce[150] as part of its Community Energy Strategy. Medium and community-scale energy production has significant potential in Australia, though this lags in comparison to similar OECD countries and when compared to household and utility-scale generation. Much Australian energy generation planning remains mired in controversies that are less prominent in countries with distributed ownership and control over the planning process (relative to Australia's more technocratic governance style).

In these ways, divorcing contemporary discourses of ownership from competition policy justifications of privatisation is key to moving sociological analysis beyond the legacy of liberal policy problematics oriented around the character and ontology of the market (Davies, 2012). Such disentanglement revives some strains of sociological thinking: Durkheim and Veblen recognised that social norms of justice precondition the boundaries of markets, and enable ownership. Thus…

> …common or public ownership also possesses a moral character and authority, which is prior to its technical means of enforcement. A defining feature of common or public ownership is that it should not be restricted to certain users, and is exempt from private property rights. Any disagreement about ownership eventually runs into unmistakably moral principles regarding the justice or injustice of inclusion and exclusion per se (Davies, 2012).

Utopias of Inverted Infrastructure

Erik Olin Wright's (2010; 2015) work on transcending capitalism provides a productive framework for revitalising the moral character of common ownership, and thereby of considering how law can facilitate community energy projects. For Wright, the challenge of transcending harmful capitalism is 'to ameliorate and emancipate' (Wright, 2015). He addresses neither law nor energy policy directly; however, the logics of both 'Taming' and 'Eroding' capitalism (see Figure 1) require creative redeployment of law to redress the entrenched disadvantage of renewable energy in the energy market. Taming, refers broadly to the use of regulation; whilst 'eroding' encompasses a range of non-capitalist production, financing mechanisms, distribution and licensing systems, public participation and planning arrangements (Wright, 2015). Community energy

[150] https://www.gov.uk/government/groups/shared-ownership-taskforce (accessed 13 August 2015)

projects sit easily alongside his eclectic mixture of procedures (such as policy juries) and legal instruments (such as licenses)[151].

Figure 1: Strategic Logics of Anti-Capitalism : Taming, Smashing, Escaping and Eroding (Wright, 2015)

Regulation has been front and centre in taming the excesses of Australian capitalist energy policy. Efforts to redress the entrenched advantage gained by publicly owned coal-fired power stations during their 'first paradigm' phase mentioned above have included Feed-in Tariffs, Renewable Energy Targets. In Australia and elsewhere, such schemes have tended to governed through interest group jostling directed at various energy regulators and legislators, avoiding the forms of litigation that clarified environmental legislation such as the Environmental Biodiversity and Conservation Act (Kent and Mercer, 2006).

The ameliorating potential of these regulations intersects with the practicalities of community energy groups' attempts to erode capitalism through transactional law (Morgan and Kuch, 2014). Morgan and Kuch (2014) characterise the challenge of building 'shared infrastructure' as one of both 'institutional bricolage' and an "appreciation of infrastructure that moves well beyond 'mere' material forms to encompass the arrangement of the political rationalities, organisations, accounting ledgers, audit and other governmental practices that comprise infrastructure." Thus, the successful participation of community energy projects in energy markets is a deeply practical issue in many ways: entrepreneurs must navigate rules for connecting to the grid; capital must be raised within the bounds of Corporations Laws; engineers must assess host sites feasibility and so forth. In each of these areas compromises must be made. Steve Easterbrook's exegesis of the concept of 'infrastructural inversion' –

[151] Other examples include worker cooperatives, fablabs, crowdfunding, open access IP, policy juries and Transition Towns (Wright, 2015).

pioneered by Bowker and Starr (Bowker and Star, 2000) – is helpful for thinking through the overlapping legal and practical challenges of developing community energy projects (Easterbrook, 2010). The metaphor of 'inverting' is a useful concept in confronting the institutional and material challenges of building shared infrastructure.

Applying Easterbrook's analysis would begin with the observation that the intersecting processes of learning how to make use of energy infrastructure defines membership in Community Energy as a particular community of practice, rather than, for example merely association in a more loose field of action that may encompass direct action against coal mines. Just as QWERTY keyboards shapes much of our interaction with computers (even the design of office furniture!), once you can type, you cease to be aware of the keyboard itself, except when it breaks down. "This invisibility-in-use is similar to Heidegger's notion of tools that are ready-to-hand; the key difference is that tools are local to the user, while infrastructures have vast spatial and/or temporal extent" (Easterbrook, 2010)

Crucially for community energy groups, the vast majority of energy users seem to prefer that energy systems remain 'black boxed' – something whose inputs and outputs are not questioned. Thus, what is invisible infrastructure for one community might not be for another (Easterbrook, 2010). Paul Edwards describes such dynamics in 'A Vast Machine' (Edwards, 2010). He uses infrastructural inversion to describe meteorologists' attempts to create a system for collecting global weather data, and for sharing that data with the international weather forecasting community.

> "Climate scientists also come to rely on that same infrastructure, but that it doesn't serve their needs so well, and hence there is a difference between weather data and climate data. As an example, meteorologists tolerate changes in the nature and location of a particular surface temperature station over time, because they are only interested in forecasting over the short term (days or weeks). But to a climate scientist trying to study long-term trends in climate, such changes (known as inhomogeneities) are crucial. In this case, the infrastructure breaks down, as it fails to serve the needs of this particular community of scientists." (Easterbrook, 2010)

As Easterbrook suggests, those disputing the veracity of climate science predictions and their implications for energy policy also 'invert' infrastructure. Not only have weather monitoring systems been adapted for climate science, but the technique has been applied…

> "…increasingly in recent years in an attempt to slow down progress on enacting climate change mitigation policies, by sowing doubt and confusion about the validity of our knowledge about climate change. The technique is to dig down into the vast infrastructure that supports climate science, identify weaknesses in this infrastructure, and tout them as reasons to mistrust scientists' current understanding of the climate system. And it's an easy game to play, for two reasons: (1) all infrastructures are constructed through a series of compromises (e.g. standards are never followed exactly), and communities of practice develop workarounds that naturally correct for infrastructural weaknesses and (2) as described above, the data collection for weather forecasting frequently does fail to serve the needs of climate scientists." (Easterbrook, 2010)

Commoning Knowledge

This detour through climate science helps conceptualise the work of community energy groups fighting against the proprietary enclosure of various energy use and forecasting data that energy production, supply and distribution companies maintain a tight grip on to maintain centralised capitalist control over the energy system. There are many examples in each of these areas. The most egregious are in high voltage supply – responsible for such sharp rises in energy costs that Tony Abbott was able to successful get elected by, amongst other things, conflating carbon pricing impacts with network price increases (Hill, 2014). Hill tells the story of one farmer, Bruce Robertson, in the Manning Valley:

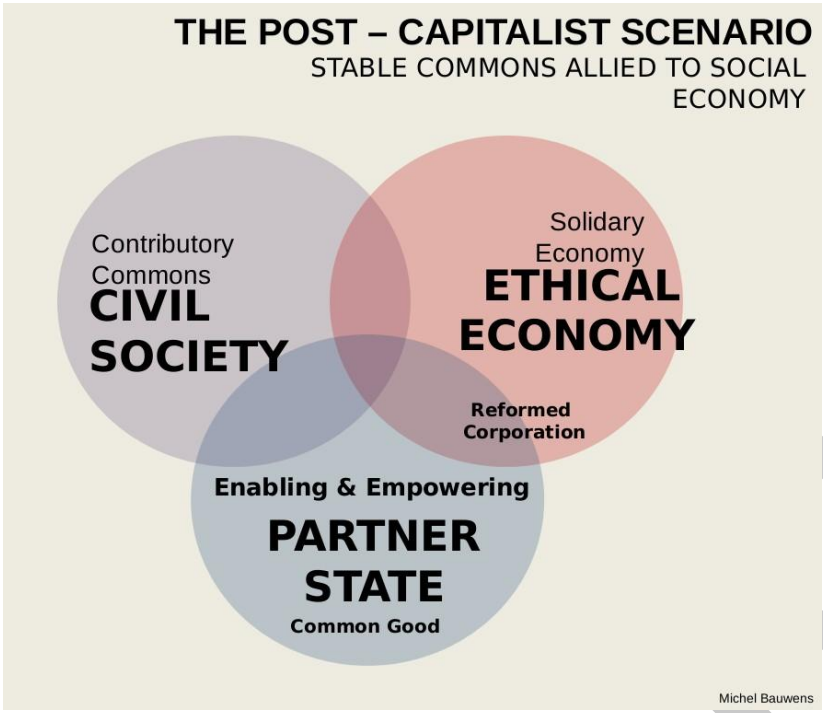
> TransGrid said the Manning Valley needed new transmission lines because energy demand was set to rise by 125% as the population grew over the next decade. Robertson smelt a rat. "They told us they were building these power lines to cater for this massive increase in demand, and we just simply couldn't see that increase," he says. "I asked a guy from TransGrid, 'I'm just wondering what went into your forecasts,' and he said, 'It's so complicated you wouldn't understand it.' When he said that, I just thought, 'This is crap. They're obviously hiding something.'" (Hill, 2014)

The Farmer's successful fight against the unnecessary and destructive 330kv power line through the Valley recounted by Hill is fascinating on its own terms, not least because such fights gave legitimacy to a nearby startup energy retailer with a not-for-profit arm[152]. However, for the present discussion it vividly illustrates the importance of knowledge, in this case knowledge about energy supply and demand used as the basis for prediction, in justifications for acquiring and governing resources. Furthermore, such contestation demonstrates that knowledge about patterns of energy use form the basis of planning applications for new energy infrastructure. A commons-based approach to providing and sharing such knowledge may not only increase accountability but facilitate solidarity between more groups affected by energy policy decisions.

Bauwens *et al* (2015) articulate a broad vision for a common-based transition from capitalism that extends key elements of Wright's 'real utopias' to the domain of knowledge. This represents a fourth commons in addition to the Polanyian triarchy of state, market and civil society. Bauwens post-capitalist scenario adds knowledge to the solidarity of 'eroding' enterprises such as community energy groups, whilst leaving room for a 'partner state' to ameloriate. Knowledge operates as an intermediary domain through which new relations can form across the other domains.

[152] For background on Enova, see eg. http://www.abc.net.au/radionational/programs/breakfast/making-renewable-energy-more-affordable/6701778

Figure 2: Bauwens Post-Capitalist Scenario



Bauwens rich work on infrastructure, incorporating communication, food and software, aims "to move from conceptualising commons to adapting transitions that can also produce global convergences for action, and to build the social and political movements that can make it happen." A key research question for exploration at the workshop is the extent to which this understanding of commons-in-action can harness the synthetic, rights-based proposals of Bollier and Weston:

> The paradigm we have in mind is commons- and rights-based ecological governance, operational from local to global and administered according to principles rooted in respect for nature and fellow human beings. The separate strands of discourse that we now designate "the State," "the economy," "the environment," and "human rights" usually in isolation from one another, beg to be reconstituted—remixed and reframed—into a new synthesis, a new integrated worldview and cultural ethic. (Weston and Bollier, 2013)

That is, what practices and devices from community energy sectors could help mediate between the local and global; economy and environment. Weston and Bollier's concepts are far removed from the practices of 'infrastructural inversion' explored in this paper. A key challenge to articulating their development of rights across different scales is that it is not individualised simply to 'human beings' according to abstract pluralist principles in ways that evacuate grievances from their political and structural causes[153]. A sociology of commoning devices to enable democratic decision-making in energy policy would also need to consider such issues: that is, how to facilitate access and ownership to energy resources in ways encourage flourishing sustainably.

[153] See Susan Silbey's criticism of liberal pluralist 'responsive regulation' practices that rely on individuals coming forward with grievances (Silbey, 1984)

Conclusion

This paper's ambition has been conceptual: to explore the commons as a potential foundation for an emergent low-carbon energy policy paradigm. It has aimed to provoke sociological thinking about ownership through the practices of contesting participation in and knowledge about energy infrastructure. The extent to which lower carbon lifestyles can become appealing more widely may ultimately determine the extent to which existing energy infrastructural may be 'inverted' by community energy groups. In this sense, the materiality of energy infrastructure is distributed in everyday practices in ways that may come to grate against rights-based arguments for both low-price energy access and a low-carbon earth commons. Sociological arguments for distributing ownership may be the best route out of this dilemma, through their capacity to both ameliorate and emancipate. They can achieve this by avoiding impotent individualism and providing a framework for justifying communal ownership.

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Environmental Water Transactions, Non-governmental Organisations, and Regulatory Enterprise

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1 INTRODUCTION

Water allocation frameworks in Colorado and Oregon were developed to achieve accelerated agricultural expansion, and have institutionally entrenched water rights for irrigation uses.[154] As a result, river systems in these jurisdictions, among others, are over-allocated, degraded and are being used unsustainably, with chronic dewatering of sensitive fish habitat. Efforts to rectify these problems have been mired in controversy, with the federal government and environmental interests frequently pitted against state governments and local irrigators.[155] In this context, non-governmental organisations, such as water trusts, have been central to environmental water recovery efforts through facilitating the purchase of consumptive water rights. In so doing, these organisations have demonstrated their talent for creating strategic partnerships and opportunities with both state agencies and irrigation organisations for environmental water recovery. Their activities have also demonstrated the potential of 'environmental entrepreneurship' to develop new and more innovative approaches to restoring environmental flows.[156] Multi-actor collaboration has a number of advantages under the frameworks, in ensuring that the regulatory enterprise brings into play all relevant knowledge and resources to develop a diverse range of environmental water transactions. The transactions also redistribute regulatory functions under the frameworks, with non-governmental organisations voluntarily assuming responsibility for traditionally public functions such as monitoring.

The Paper will argue that a range of opportunities can be created when government and non-governmental (non-profit) actors collaborate on environmental water transactions, and that effective governance in this context requires a flexible mix of competition and collaboration. The cooperation that already exists and that has the potential to emerge under the frameworks, suggests what Dan Farber has termed a degree of 'regulatory ecology', through which different species of regulators and other actors coexist in relationships that are sometimes competitive and at other times symbiotic.[157] These forms of interaction can lift actor performance and provide an environment in which appropriate institutional models and transactions can be developed.[158] However, the long-term ability of these approaches to tackle 'wicked' problems of overallocation is likely to turn on whether they can be applied at scale, and whether environmental NGOs are able to interact with the wider economy and attract conservation investment. In this context, serious consideration needs to be given to the role of law in both empowering the particular public and private actors under the regimes and facilitating regimes of risk sharing between all stakeholders in a water system.

Section Two will discuss the institutional, political and economic factors that led to the emergence of environmental water transactions in the two jurisdictions, and the role of

[154] Keith Brownsey, 'Enough for Everyone: Policy Fragmentation and Institutions in Alberta', in Mark Sproule Jones etal (eds), *Canadian Water Politics: Conflicts and Institutions* (McGill-Queens University Press 2008) 134, 142.

[155] See for example Holly Doremus and A Dan Tarlock, 'Fish, Farms and a Clash of Cultures in the Klamath Basin (2003) 30 *Ecology Law Quarterly* 279.

[156] Terry L. Anderson and Dominic P. Parker, 'Transaction Costs and Environmental Markets: The Role of

Entrepreneurs' (2013) *Review of Environmental Economics and Policy* 259.

[157] Daniel A. Farber, 'Triangulating the Future of Reinvention: Three Emerging Models of Environmental Protection' (2000) *University of Illinois Law Review* 61, 79.

[158] See Daniel C. Esty and Damien Geradin, 'Regulatory Co-opetition' (2000) *Journal of International Economic Law* 235, 247 and 253.

prior appropriation in necessitating environmental water recovery through private water rights. Section Three will then analyse how these background factors have given rise to a regulatory framework in which water is recovered for environmental purposes through a sophisticated set of contractual and market relationships between major stakeholders in overallocated water basins. Section Four will conclude by focusing on the explanatory powers of certain theoretical perspectives in New Governance, and the normative possibilities presented by Daniel Esty and Damien Geradin under their model of 'regulatory co-opetition'.[159] These theorists lend support to the Paper's argument that competition and collaboration can enhance the productivity of environmental water recovery efforts.

2 PRIOR APPROPRIATION AND INSTREAM FLOWS

[How are the origins of the issue you are researching related to ecological crisis, state retrenchment, and perceptions of a loss of economic legitimacy or efficacy?]

The environmental water requirements of water-dependent ecosystems are often considered *after* consumptive extraction and use has begun to cause ecological degradation. Accordingly, the satisfaction of environmental water needs often requires reallocation of water entitlements in overallocated basins.[160] Water rights in Oregon and Colorado, like many states in the western United States, are governed by the doctrine of prior appropriation, in which priority is based on the principle of 'first in time, first in right'.[161] Users with earlier adjudicated water use rights have priority over more recent 'junior' users, and the right to appropriate water cannot be withdrawn provided it continues to be put to beneficial use, as appropriative water rights are constitutionally protected.[162] When appropriative water rights are transferred, there are particular legal requirements to prevent or mitigate any 'injury' to other rights holders.[163] In relation to environmental water transactions, the potential injury in this context is to downstream water users who hold legal rights to the return flows no longer available when water is transferred to a new place of use and withheld for environmental purposes.[164] If it is found that a portion of the environmental flow

[159] Esty and Geradin, above n 158.

[160] Dustin Garrick et al, 'Institutional Innovations to Govern Environmental Water in the Western United States: Lessons for Australia's Murray-Darling Basin' (2011) 30(2) *Economic Papers* 167; Dustin Garrick et al, 'Water markets and freshwater ecosystem services: Policy reform and implementation in the Columbia and Murray-Darling Basins' (2009) 69 *Ecological Economics* 366.

[161] State Constitution of Colorado, Art XVI, ss 5-6.

[162] 235 State Constitution of Colorado, Art XVI, ss 5-6; AMEC Earth & Environmental, 'Comparison of the Water Allocation Process in Alberta to Other jurisdictions' (March 2008) ii; Thomas Garry, 'Water Markets and Water Rights in the United States: Lessons from Australia' (2007) *Macquarie Journal of International and Comparative Environmental Law* 23, 54. The Colorado Constitution prevents property from being taken for public use without compensation to the owner (Article II, s15), as the right to use water acquired by priority of appropriation is deemed to be a property right: *City of Denver v Bayer* (1833) 7 Colo 2 and *Sterling v Pawnee Ditch Extension Co* (1908) 42 Colo 421: see Michie's Legal Resources (LexisNexis 2011), Annotations to the Constitution of the State of Colorado.

[163] Dustin Garrick et al, Environmental Water Transactions: Lessons Learned and Future Prospects, Proceedings of a Workshop held on 2 September 2007, Brisbane, Australia (March 2008), 10 and 13, v.

[164] Garrick et al, above n 163, v.

proposed to pass their water diversions would have been return flows, then the state will reduce the environmental flow by that portion.[165] In this context, third-party objections to water transfers have 'slowed, limited, or blocked' environmental water transfers.[166] The system, therefore, tends to lock into place certain (often highly consumptive) land uses.[167] Moreover, if a prior appropriation water right in Colorado or Oregon is not used for a beneficial purpose, then the holder forfeits the right.[168] This acts as an incentive to use the maximum allocation available.[169]

The privileged position of senior appropriators has given rise to a range of water-use conflicts between those original agricultural users, and the new demands created by urbanisation and the need to provide for environmental water requirements. However, since the Reclamation Era, there have been a number of factors external to Oregon and Colorado's water allocation systems that have had the effect of softening the effects of, or undermining the relevance of, priority, including the ability to trade of water rights among a range of water users and uses.[170]

(a) A retreat from supply-driven approaches: dwindling government resources, an emerging environmental consciousness and water trading

Water trading emerged in the western United States primarily in response to the effects of state retrenchment in the area of water services, and overwhelming evidence regarding the economic inefficiency of large water supply projects. Originally, supply-side solutions to water scarcity and variability were financed and constructed by the state, in order to encourage settlement.[171] In particular, the *National Reclamation Act 1902* authorised the United States Federal Government (through the Bureau of Reclamation and its predecessors) to finance large irrigation projects in the western United States, on the proviso that the states developed a robust system of water rights and laws.[172] By the 1950s, however, social values and political and economic conditions were beginning to evolve,[173] and a variety of engineering, economic and environmental considerations have meant that these options may no longer be viable: 'Among the factors driving these changes were high costs of construction, tight budgets, deep environmental concerns, new technological advances, and the development of innovative alternative approaches to water management'.[174] The merits of government

[165] Garrick et al, above n 163, v.
[166] Garrick et al, above n 163, v.
[167] Oliver M Brandes, Linda Nowland and Katie Paris, *Going with the Flow? Evolving Water Allocations and the Potential and Limits of Water Markets in Canada* (December 2008) i; David R. Percy, 'Responding to Water Scarcity in Western Canada' (2005). 83 *Texas Law Review* 2091, 2104.
[168] Oregon Revised Statutes §540.610; Colorado Revised Statutes §37-92-402(11); Kwasniak, (2009-2010) 13 *University of Denver Water Law Review* 321, 330. 332
[169] Kwasniak, above n 168, 333.
[170] Dan Tarlock, 'Prior Appropriation: Rule, Principle or Rhetoric?' (2000) 76 *North Dakota Law Review* 881
[171] Peter H. Gleick, 'The Changing Water Paradigm: A Look at Twenty-first Century Water Resources Development' (2000) 25(1) *Water International* 127
[172] Rick Bastasch, The Oregon Water Handbook: A Guide to Water and Water Management (Oregon State University Press, 2006), 33 and 176.
[173] Gleick, above n 171, 128.
[174] Gleick, above n 171, 129.

support for water development were also increasingly scrutinised, given the considerable economic investment required by government in order to provide this infrastructure.[175] In the United States alone, 'total capital investment for water over the past century is estimated at $400 billion, most for large-scale engineering projects'.[176] With the introduction of cost-benefit analysis into governmental decision-making processes, obtaining access to government funding for water infrastructure became increasingly difficult.[177]

A 1986 report to the Western Governors' Association called for a change in approach:[178]

> Essentially the Bureau must make a transition from an agency whose workload has been constructing large water projects to an agency that assists the West to make better use of the waters the Bureau already provides. It can facilitate this transition by providing support for voluntary transfers of Bureau-provided water.

Water trading in the United States, therefore, emerged as a 'pragmatic and user-driven response to emerging circumstances'.[179] From the 1980s, water markets and water banks were used increasingly to correct the rigidities of prior appropriation and meet new societal demands, while upholding the principles of the prior appropriation system[180]. Indeed, the regimes in Colorado and Oregon rely very heavily on the administration of water rights to protect and restore environmental water.[181] Environmental water acquisitions tend to be applied to instream flows in order to support migratory fisheries, such as runs of wild salmon and steelhead and water quality.[182] The challenge for environmental water managers is to provide for instream needs during low streamflow periods in the summer, which is also the period of peak irrigation demand.[183] Significant efforts, particularly on the part of environmental non-governmental organisations, have been required in order to achieve recognition of instream flows under these frameworks, and in both Oregon and Colorado, water may now be appropriated for 'instream' uses.[184]

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[175] See, for example, *Bruce Davidson, Australia wet or dry? The physical and economic limits to the expansion of irrigation* (Melbourne University Press, 1969).

[176] Peter H. Gleick, above n 171, 128.

[177] National Water Commission, *Water markets in Australia: a short history* (December 2011), 34.

[178] Richard D. Lamm, foreword to Bruce Driver, *Western Water: Tuning the System* (Denver: Western Governors' Association, 1986) xi, cited in Terry L. Anderson and Donald R. Leal, 'Going with the Flow: Expanding the Water Markets' (Cato Policy Analysis No. 104, 26 April 1988), <http://www.cato.org/pubs/pas/pa104.html>

[179] National Water Commission, *Water markets in Australia: a short history* (December 2011), x.

[180] Tarlock, above n 170.

[181] Douglas E. Fisher, *The Law and Governance of Water Resources: The Challenge of Sustainability* (Edward Elgar, 2009) 286-287.

[182] Sarah Wheeler et al, 'Evaluating water market products to acquire water for the environment in Australia' (2013) 30 *Land Use Policy* 427, 430.

[183] Wheeler et al, above n 182, 430

[184] Lorraine Nicol, Irrigation Water Markets in Southern Alberta, 2005, Masters Thesis, University of Lethbridge 3. From the 1960s, Oregon and Colorado, began to categorise instream uses for recreation and fish and wildlife as a 'beneficial use' for the purposes of water allocation systems. A statutory Instream Flow Program was established in Colorado in 1973, which is administered by the Colorado Water Conservation Board.The objective of the program is to 'correlate the activities of mankind with some reasonable preservation of the natural environment' by sourcing water through appropriations, and creating new water rights. Prior to this enactment, all appropriations required a diversion, but the legislation removed the diversion requirement for instream flow uses and natural lake level rights. Only the CWCB is authorised to hold instream flow rights under the statute, and in order to appropriate new instream flow rights, the CWCB must make an assessment that the natural environment will be preserved to a 'reasonable degree' if the right is granted.

(b) Emergence of NGOs

A key provision that made instream flow legislation particularly effective, and encouraged the formation of water trusts and other non-profit organisations, was that it allowed for consumptive water rights to be converted to instream rights with the priority date of the original right.[185] This allowed rights held for the purposes of instream flows to obtain a degree of priority within existing allocation systems.[186] While ownership of instream rights is restricted to government agencies,[187] a number of innovative organisations and programs have evolved to carry out such environmental water transactions, in which water trusts and other non-profit organisations work with state agencies in a form of public-private partnership designed to overcome the constraints of the legislation and also enhance the implementation of instream flow legislation.[188]

State agencies have traditionally been reluctant to acquire rights for instream flow purposes given budgetary constraints, and the difficult political environment in which they were operating in which trade-offs are required between environmental watering needs and existing irrigation or industrial investments in a river system.[189] In Colorado, the semi-independent water policy agency that administers its ISF program, the Colorado Water Conservation Board, is constituted in such a way as to be required to make judgement calls on a range of objectives that are difficult to reconcile. The CWCB's mission is to 'conserve, develop, protect and manage Colorado's water for present and future generations' and in particular:[190]

> § To Conserve the waters of the State for beneficial use by working with partners;
>
> § To Develop the waters of the State in partnership with Colorado's water stakeholders in a manner that:
>
> o Fully utilizes the State's compact and U.S. Supreme Court decree entitlements;

[185] Janet Neuman et al, 'Sometimes a Great Notion: Oregon's Instream Flow Experiments' (2006) 36 *Environmental Law* 1125, 1151.

[186] Janet C. Neuman and Cheyenne Chapman, 'Wading in to the Water Market: The First Five Years of the Oregon Water Trust' (1999) 14 *Journal of Environmental Law and Litigation* 135, 138.

[187] The state agencies, however, are the only entities permitted to hold water rights. The legislative models in Oregon and Colorado have taken very different forms, however, with different rules as to the state bodies that can purchase rights, as well as public support and funding. In Oregon, under the Instream Water Rights Act, three state agencies - the Department of Environmental Quality, the Parks and Recreation Department, and the Department of Fish and Wildlife – may apply for water right appropriations, which then receive a junior priority date. The instream water rights program is administered within the Water Resources Department. Departmental staff review applications for new water rights and water transfers, and then the Department holds instream rights sold, leased, or donated by private actors on trust for the people of the state of Oregon. Flow restoration is achieved through these instream transfers and leases, as well as allocations from the conserved water program.

[188] Mary King, 'Getting our feet wet: an introduction to water trusts' (2004) 28 *Harvard Environmental Law Review* 495, 515-520

[189] Terry L. Anderson and Donald R. Leal, 'Going with the Flow: Expanding the Water Markets' (Cato Policy Analysis No. 104, 26 April 1988), <http://www.cato.org/pubs/pas/pa104.html>; see generally, David M. Gillilan and Thomas C. Brown, *Instream Flow Protection: Seeking a Balance in Western Water Use* (Island Press 1997), 298, 302.

[190] Colorado Water Conservation Board, *Strategic Framework* (28 January 2013); Colorado Revised Statutes, Title 37, Arts 60 and 92 and also Titles 24, 29, 30, 31, 36, and 39.

and

o Helps ensure that Colorado has an adequate water supply for non-consumptive and consumptive needs;

§ To Protect the waters of the State by:

o assuring maximum beneficial use of the State's water allocations; and

o preserving the natural environment;

§ To Manage the waters of the State by supporting planning efforts of state and local authorities to prepare for varying and extreme (e.g. floods and droughts) hydrologic conditions.

In addition to its instream flow protection obligations, therefore, the CWCB is required to maximise the use of Colorado's water, the availability of water for use down stream, and manage effects on interstate water use agreements. These conflicting objectives render the CWCB vulnerable to stakeholder pressure, particularly from the irrigation community, and render it more likely that the CWCB will pursue supply measures at the expense of conservation.[191] The Board's process has been described as 'uncertain',[192] and supply obligations have the potential to become, and indeed have become, political considerations that weigh in the Board's discretion in making decisions in relation to the instream flow program. In Oregon, the Department of Water Resources is not even provided with funding to acquire rights for transfer to environmental purposes[193] and, until 2008, the CWCB relied on donations in order to discharge its functions under the program.[194] The regimes have, therefore, relied to a greater or lesser extent on the relevant government agencies working directly with water right holders and conservation groups (which are coincidentally funded by government).[195]

These factors have created an environment that favours closer collaboration between NGOs and the state. The Colorado Water Trust and Trout Unlimited, for example, collaborate with the Colorado Water Conservation Board in relation to its water buyback program. These voluntary organisations share the mechanics (for example locating and negotiating with potential sellers) and costs of some acquisitions, and function effectively as a 'broker' of water rights for the states.[196] In Oregon, significant

[191] The CWCB's own Policy 19 Expenditures of Funds for Water Acquisitions for Instream Flow Use Pursuant to Section 37-60-123.7, C.R.S provides that:

> When considering recommendations from the CWCB staff for expenditures of funds for water acquisitions to improve the natural environment to a reasonable degree, the CWCB shall consider the balance between consumptive and nonconsumptive needs and uses of water on the subject stream. When considering the acquisition of irrigation water rights, the CWCB shall consider the potential impact to local agriculture of the proposed acquisition.

[192] Brent Gardner-Smith, 'County deal to protect water in two rivers is nearly complete', 24 June 2013, *The Aspen Daily News*, quoting Pitkin County Attorney John Ely <http://aspenjournalism.org/2013/06/24/county-deal-to-protectwater-in-two-rivers-is-nearly-complete/>.

[193] Mary King,'Getting our feet wet: an introduction to water trusts' (2004) 28 *Harvard Environmental Law Review* 495, 505

[194] Amy W. Beatie, 'RiverBank: Water Trusts in the Western United States', Paper Delivered at American Bar Association, 27th Annual Water Law Conference, 18-20 February 2009, San Diego, California

[195] In Oregon, the Department will then act as trustee in respect of completed transactions.

[196] Amy W. Beatie, 'RiverBank: Water Trusts in the Western United States', Paper Delivered at American Bar Association, 27th Annual Water Law Conference, 18-20 February 2009, San Diego, California, unpaginated paper.

volumes of water have been recovered for instream uses through collaborative partnerships between landowners and NGOs. The Oregon Water Trust and Oregon Trout have joined forces to create The Freshwater Trust, which works closely with landowners on a voluntary basis on habitat and flow restoration projects that involve, among other matters, compensation for temporary instream leases and permanent transfers.[197] The Deschutes River Conservancy is another unique entity, comprised of a multitude of stakeholders that work collaboratively on market-based solutions to restore the Deschutes River.[198] Of particular interest is the Deschutes River Conservancy's leasing program, in which the Deschutes River Conservancy works with districts and landowners to lease water rights that restore environmental flows within the Basin.

(c) Threats of Federal Government enforcement

The doctrine of prior appropriation at the state level has been trumped by certain federal environmental laws, which were introduced in the 1970s to protect fish habitats in large and small western rivers. Under the *Endangered Species Act 1973*, the federal government has the power to curtail state-created water rights in order to protect listed species, which has created de facto regulatory property rights.[199] Court decisions under the ESA have, for example, required hydroelectric dam operators to increase environmental flows as mitigation for disruptions to fish passage caused by dams, and irrigation activities have been curtailed in basins where low instream flows have threatened listed species.[200] These environmental laws raise the spectre of federal agencies exercising their authority under the ESA to limit water uses that would interfere with federal statutory objectives, and have played a particularly important role in incentivising environmental water protection at the state level in Colorado and Oregon. The threat of federal action under the ESA has stimulated innovation, and, as will be discussed in Section Three, particular initiatives to mitigate the effects of dam operations and hydropower production by federal agencies, such as the Bureau of Reclamation and the Bonneville Power Administration, on species listed under the ESA.[201]

3 EVOLUTION OF NEW TRANSACTIONAL APPROACHES

[What forms of legality, or regulatory or governance techniques emerge out of or evolve in interaction with such trends?]

[197] See The Freshwater Trust, 'Our work', <www.thefreshwatertrust.org/our-work/>.

[198] It makes decisions by consensus and is comprised of key public and private interests including farming, ranching, timber, development, hydropower, recreation, tribes and environment.

[199] David E. Filippi, 'The Impact of the Endangered Species Act on Water Rights and Water Use' (2002), Proceedings of the 48th Rocky Mountain Mineral Law Institute, 22-7, <http://www.stoel.com/files/filippi.pdf>.The ESA authorises two federal agencies – the National Oceanic and Atmospheric Administration Fisheries Service and the US Fish and Wildlife Service, to list species as threatened or endangered if they meet certain criteria. The listing process then triggers the operation of particular provisions of the ESA.220 Section 7 prohibits federal agences from taking actions 21 that are likely to jeopardise any listed species, and s 9 of the Act directly prohibits specific conduct by any party that affects listed species. The ESA has proved to be highly coercive.

[200] Ereney Hadjigeorgalis, 'A Place for Water Markets: Performance and Challenges'(2009) 31(1) *Review of Agricultural Economics* 50. During the 2001 drought, the Bureau of Reclamation closed the headgates of its Klamath Project during drought conditions, in response to biological opinions (issued in connection with the process under s 7 that concluded that irrigation releases would threaten certain local fish populations. This measure was challenged unsuccessfully by local irrigators, who had water supply contracts with the Bureau of Reclamation.

[201] The BPA is an office within the US Department of Energy, which markets and distributes electrical power produced by the federal hydroelectric projects on the Columbia River.

This institutional framework has had a significant impact on how the ecological values of water are protected in Colorado and Oregon. Under this approach, the states have enacted legislation that restructures the market in order to facilitate transactions of water rights for environmental purposes. Separate shares have not been established by other means such as statutory planning. Instead, instream flows have been designated as a 'beneficial use' and transfer processes have been authorised, through which water uses can be reallocated from their original purposes to instream flow.[202] The prior appropriation system in Oregon and Colorado also supports the equal treatment of instream and consumptive uses, and the ability of government agencies to acquire and hold such rights like any other user.[203] The result of this underlying framework of property rights, the threat of Federal government involvement and the ability of state governments to hold water for instream flow purposes, has been the emergence of environmental water recovery measures that are undertaken through a sophisticated set of contractual and market relationships between major stakeholders. Public-private partnerships are critical to the successful implementation of these measures, in which NGOs undertake a range of traditional public functions in identifying and implementing instream flows.[204] Commentators have observed in this context that:[205]

> NGOs have a comparative advantage in working with local agriculturists to identify lease opportunities and efficiency opportunities, whereas state agencies have an advantage in monitoring, data collection, research and planning activities which require some continuity and consistency over time.

[*Paper will isolate particular functions undertaken by NGOs and state agencies in tabular form*]

(a) Case studies in competition and cooperation

(i) Sharing arrangements McKinley Ditch

The CWCB and Colorado Water Trust finalised the McKinley transaction in April 2015, successfully negotiating for the first water sharing agreement under which a water right will be formally decreed for both agriculture and environmental purposes.[206] Government officials are hopeful that the agreement signals a change in mindset of the various basin stakeholders:[207]

> [I]f you're a farmer and a rancher, then you hate the instream flow program, and if you're a conservationist then maybe you're not a big fan of the water court process or the prior appropriation system, and right down the line everybody

[202] Edna. T. Loehman and Sasha Charney, 'Further down the road to sustainable environmental flows: funding, management activities and governance for six western US states' (2011) 36(7) *Water International* 873.
[203] King, above n 188, 106.
[204] Dustin Garrick et al, Environmental Water Transactions: Lessons Learned and Future Prospects, Proceedings of a Workshop held on 2 September 2007, Brisbane, Australia (March 2008) 16. For example, identifying priority streams, negotiating transactions, and protecting instream flow rights through monitoring and legal compliance.
[205] Loehman and Charney, above n 202, 890.
[206] CWCB, Staff Memorandum to Board, 2 July 2014, 16 – 17 July 2014 Board meeting, Proposed Acquistition of Interest in Water, Colorado Water Trust, 5, <http://cwcb.state.co.us/environment/instream-flowprogram/Pages/McKinleyDitchACQ.aspx>
[207] Brent Gardner-Smith, 'State agency into buying water to leave in rivers', Post Independent, 2 May 2015, quoting James Eklund, the director of the CWCB

has entrenched themselves in a couple of different philosophies….But now we've got this paradigm shift in the way that people think about these tools.

The parties to the agreement are the Western Rivers Conservancy, the Colorado Water Conservation Board and the Colorado Water Trust. The Western Rivers Conservancy purchased the irrigated ranch and its water rights from the Montrose Bank in 2012,[208] then sold the water rights to the Colorado Water Trust for $500,000.[209] The water rights were subsequently offered by the Trust to the CWCB in 2014, which agreed to purchase a permanent "grant of flow restoration use" from the Trust for $145,640,[210] based on an estimate of the loss of agricultural revenue associated with non-diversion in the late summer.[211] The effect of the agreement is to restore stream flows to the Little Cimarron River, while maintaining early summer irrigation via the McKinley Ditch. In particular, under the agreement, the CWT will convey to the CWCB a Grant of Flow Restoration Use (Grant) to use the CWT McKinley water rights for instream flow use in the Little Cimarron and Cimarron Rivers. In doing so, the CWT will retain ownership of particular water rights, and the CWCB will purchase a permanent contractual interest to use the CWT McKinley water rights for instream flow use, which represents a permanent split-season use of water between irrigation and ISF uses.[212] Up to five cubic feet per second of water that was traditionally diverted from the Little Cimarron River will now be left in the river starting in mid-summer when stream flows begin to dwindle. It is anticipated that the water right will also provide connectivity between two other existing instream flow rights already held by the Colorado State Government.[213]

The agreement provides for several scenarios under which the CWT McKinley Shares may be used for both ISF use and continued irrigation of the property:[214]

- **Partial Season Irrigation/ISF Use (split-season use)**: irrigation would occur only through either June or July, which would allow for both early agricultural use and later ISF use of the CWT McKinley Shares in one season. This is the preferred use of the CWT McKinley Shares.
- **Irrigation Use for a Full Season** may occur if:
    - 1) projected climatological conditions are such that there is no need to use the CWT McKinley Shares for instream flows; or
    - 2) there is a land management issue that requires Full Season Irrigation, such as revegetation of the historically irrigated land; or
    - 3) there is a pressing situation that requires Full Season Irrigation, including, but not limited to, establishing a new crop.
- **Instream Flow Use for a Full Season** may occur if:
    - 1) projected climatological conditions are such that there is a need for the use of the CWT McKinley Shares for Full Season Instream Flow Use; or

[208] Zach Smith, 'Colorado Water Trust looking to marry instream flow protection and ranch production on Little Cimarron River', 12 March 2015, < http://blog.yourwatercolorado.org/2015/03/12/colorado-water-trust-working-to-marry-instream-flow-protection-and-ranch-production-on-little-cimarron-river/>
[209] Ibid
[210] Ibid
[211] Brent Gardney-Smith, '"Split Season" Approach to Water Use Could Benefit States' Rivers, Including the Crystal', 27 April 2015, The Aspen Times
[212] CWCB Staff Memorandum, above n 206, 5.
[213] One stretches from just upstream of the McKinley headgate 16 miles up to the Little Cimarron's headwaters—a reach managed by Colorado Parks and Wildlife as Wild Trout Water. The other protects flows on the Cimarron River from its confluence with the Little Cimarron to the Gunnison River.
[214] CWCB Staff Memorandum, above n 206, 5.

- 2) circumstances make irrigation impractical, including unavailability of a lessee for irrigation; or
- 3) there is a pressing situation that requires Full Season Instream Flow Use, including, but not limited to, unusually low projected stream flows.

Under the agreement, the CWT will manage and coordinate all aspects of the irrigation use of the CWT McKinley Shares, including the switch from irrigation to ISF use.[215] It will also act as an agent for the CWCB in respect of the monitoring of the ISF use under the CWT McKinley Shares, and report on an annual basis to the CWCB regarding the use of the CWT McKinley Shares each year.[216] The CWT has therefore retained control over the ISF right and is essentially discharging the regulatory functions of the CWCB in the administration of that right.

The transaction, therefore, provides a very clear indication of how these transactional agreements are able to redistribute regulatory functions from the State to private entities, and enable those private entities and donors to exercise a degree of stewardship over the water right. However, achieving these institutional innovations at scale has presented a challenge for both governmental and non-governmental actors. Both the administrative success and programmatic accomplishments of the Columbia Basin Water Transactions Program (CBWTP) indicate an appropriate regional model, which could be scaled up to cover a broader geographic area in the western United States.

(ii) Columbia Basin Water Transactions Program

Dams and hydropower production activities can reduce instream flows and impede fish passage, particularly for salmon and other anadromous fish species.[217] In order to meet their obligations under the ESA to maintain instream flows for fish habitat, federal agencies purchase water from irrigators, usually through state water banks. A key example is the CBWTP, which is a regional framework that commenced in 2002 to support innovative local market-based methods to improve streamflows in tributaries at a regional scale in the Columbia River basin, including in Oregon, Washington, Idaho and Montana:[218]

> We provide financial and technical support for partnerships between nonprofit organizations, state water agencies and tribes. Together, we work with ranchers, farmers, municipalities and irrigation districts on voluntary, market-based approaches that bring water use into balance, so streams stay wet and working landscapes remain productive.[219]

It was established in response to the 2000 National Marine Fisheries Service Biological Opinion for the operation of dams on the Columbia River (BioOp), requiring Bonneville Power Authority (BPA) to offset the adverse impacts of their hydroelectric dams on

[215] CWCB Staff Memorandum, above n 206, 5.
[216] CWCB Staff Memorandum, above n 206, 5.
[217] Reed D. Benson, 'Public funding programs for environmental water acquisitions: origins, purposes, and revenue sources' (2012) 42 *Environmental Law* 265.
[218] Benson, above n 217, 290. Brandon Scarborough and Hertha L. Lund, *Saving Our Streams: Harnessing Water Markets: A Practical Guide* (2007) 6; Ereney Hadjigeorgalis, 'Incorporating the environment into the market: The case of water trusts and environmental transfers in the western United States' in Henning Bjornlund (ed), *Incentives and Instruments for Sustainable Irrigation* 107, 110
[219] CWBTP Annual Report 2014.

stream flows for endangered species.[220] The CBWTP is managed by the National Fish and Wildlife Foundation, a not-for-profit organisation.[221] However, the NFWF does not directly engage in individual water transactions. Rather, the Program funds 'qualified local entities', such as state water resource agencies, water trusts, and basin organisations to acquire water for the environment and met the CBWTP's basin-wide recovery objectives.[222] As the BiOp explains:[223]

> It is unclear whether and how solutions can be implemented through existing laws and administrative processes. To test new approaches to this problem, Bonneville will conduct experiments such as organizing a non-profit water brokerage to demonstrate transactional strategies for securing tributary flow . . . in streams with significant non-Federal diversions.

Funding for the proposals is provided by federal hydropower revenues: money for the CBWTP comes from the Bonneville Power Administration (Bonneville), which sells electricity from the Federal Columbia River Power System (FCRPS), generated at federal dams in the Columbia River Basin.[224] On receiving transaction proposals from the qualified local entities, the CBWTP then evaluates and ranks them across several criteria. According to CBWTP representatives, three major objectives of the program are to:[225]

> (1) [A]cquire water that is ecologically significant; (2) build the capacity of organizations and others to do this work and provide technical, emotional, and moral support to these organizations; and (3) increase awareness about this approach and the set of tools among Pacific Northwestern communities, water users, and others. These organizations get together twice a year to learn from each other and exchange ideas and explore options to replicate successes and learn from failures.

The CBWTP provides a successful example of a regional model in which collaborative partnerships have been developed between state agencies and non-governmental organisations. In 2014 alone, the programme restored over 38 524 105 cubic metres through new transactions.

4 THE FOUNDATIONS OF REGULATORY ENTERPRISE

[What kinds of intellectual work, institutional supports, and political-economic contexts make such forms or techniques possible?]

The primary driver for these new regulatory collaborations, novel transactions and institutional forms has been the underlying framework of property rights in water in Colorado and Oregon. The doctrine of prior appropriation, political environment, and

[220] 2000 FCRPS Biological Opinion 8-3, 8-5, 8-7, 8-13, 8-15, 8- 17, 8-23, 8-25 (2000), <http://www.nwd-wc.usace.army.mil/tmt/wqnew/biops/2000/combined_nmfs.pdf>. The BiOp is the product of the interagency consultation process under ESA section 7: see Benson, above n 217, 292.

[221] Loehman and Charney, above n 202, 879; Dustin Garrick, Chelsea Lane-Miller and Amy McCoy, 'Institutional Innovations to Govern Environmental Water in the Western United States: Lessons for Australia's Murray-Darling Basin' (2011) 30(2) *Economic Papers* 167.

[222] Loehman and Charney, above n 202, 879. See also Garrick, Lane-Miller and McCoy, above n 221.

[223] At 9-134; see Benson, above n 217.

[224] Benson, above n 217, 290.

[225] Dustin Garrick et al, Environmental Water Transactions: Lessons Learned and Future Prospects, Proceedings of a Workshop held on 2 September 2007, Brisbane, Australia (March 2008), 14.

requirement for state actors to hold instream flow rights has shaped the structure and objectives of these NGOs, and provided an impetus for new regulatory initiatives. The doctrine, along with a lack of public funding, has also required state and non-state actors to work together to enable transactions that achieve a measure of environmental water recovery. In this context, NGOs, or 'environmental entrepreneurs' have seen themselves as a 'missing link' and have taken the lead in reconciling a range of conflicting demands within watersheds. In many cases, these collaborations on environmental water transactions have enabled the identification of 'new solutions to environmental and other collective action problems'.[226]

NGOs have also demonstrated a range of *functional* strengths in the context of particular water transactions. As Michael Vandenbergh has remarked, 'Government may not always be the best actor, and public regulation may not always be the best type of intervention. The optimal response may be private governance or a mix of public and private governance.'[227] NGOs have, indeed, brought to the table commitment, and the capacity for experimentation. Government agencies have responded by collaborating with NGOs, and the agencies are now convening and overseeing a variety of complex processes for implementing environmental regulation and managing environmental resources.[228] This interaction also has the potential to lift governmental performance by allowing NGOs to act as 'intellectual competitors' in relation to these transactions.[229]

There are also a number of theories that can offer an explanation for these increasingly complex interactions between 'public' and 'private' actors in relation to environmental water recovery, such as the 'New Governance' literature. Theorists of the 'New Regulatory State'[230] or 'Regulatory Capitalism'[231] observe a new division of labour between state and society, in which the state adopts the role of 'steering', which is shorthand for 'leading, thinking, directing, guiding', and leaves the 'rowing', or enterprise and service provision, to business and society.[232] Under this approach, the state recognises that it can no longer rely on a 'taxing and spending' approach to the provision of state services, and that a bureaucratic approach is not sufficiently flexible and too centralized to respond to the complex societal and governance challenges faced.[233] The state therefore shifts its focus to 'rule making, ruling at a distance, and allowing other organisations to provide services',[234] and uses regulation to redefine

[226] Michael P. Vandenbergh, 'Private Environmental Governance' (2013) 99 *Cornell Law Review* 129, 139
[227] Vandenbergh, above n 226.
[228] Jody Freeman and Daniel A. Farber, 'Modular Environmental Regulation' (2005) 54(4) *Duke Law Journal* 795, 826
[229] Esty and Geradin, above n 158, 247 and 253.
[230] John Braithwaite, 'The New Regulatory State and the Transformation of Criminology' (2000) 40 *British Journal of Criminology* 222.

[231] David Levi-Faur, 'The Global Diffusion of Regulatory Capitalism' (2005) 598 *Annals of the American Academy of*

Political and Social Science 12; John Braithwaite, *Regulatory Capitalism: How it works, ideas for making it work*

better (Edward Elgar, 2008).
[232] Jacint Jordana and David Levi-Faur (eds), *The Politics of Regulation: Institutions and Regulatory Reforms for The*

Age of Governance (Edward Elgar, 2004) 11, citing David Osborne and Ted Gaebler, *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector* (Addison-Wesley, 1992); John S.F. Wright, 'Regulatory Capitalism and the UK Labour Government's Reregulation of Commissioning in the English National Health Service' (2011) 33(1) *Law & Policy* 27, 40.

[233] Osborne and Gaebler, above n 232, 34-35 and 282.
[234] John S.F. Wright, 'Regulatory Capitalism and the UK Labour Government's Reregulation of Commissioning in the

English National Health Service' (2011) 33(1) *Law & Policy* 27, 40, citing David Levi-Faur and Sharon Gilad, 'The

itself and assert the public interest.[235] An obvious example of the withdrawal of the state from the direct provision of services is privatisation of those services. However, Osborne and Gaebler observe that: '[p]erhaps the most powerful method of steering is structuring the marketplace: creating incentives that move people in the direction the community wants to go, while letting them make most of the decisions themselves'.[236] This provides an alternative to both public administration of these services and the adoption of a pure laissez-faire approach.[237] 'It is a way of using public leverage to shape private decisions to achieve collective goals'.[238]

Regulatory theory under the New Governance literature has powerful explanatory powers in this context, where governance involves nuanced and pluralistic regulatory solutions to combat 'wicked' problems of water scarcity and overallocation.[239] However, the Paper also seeks to make a normative argument that effective governance in this context requires a flexible mix of competition and collaboration between governmental and non-governmental actors. The case studies demonstrate how public and private actors in this context have formed symbiotic relationships, consisting of a number of complex regulatory interactions that are both competitive and collaborative, and these forms of regulatory enterprise are aptly described by Daniel Esty and Damien Geradin's notion of 'regulatory co-opetition'.[240] Under this model, the best regulatory systems require a mix of competition and cooperation across various levels of government, within the branches or departments of a government, and between regulators and non-governmental actors:[241]

> Regulatory co-opetition thus has three main dimensions: (1) inter-governmental (reflecting the dynamics of competition and cooperation among governments, both horizontally and vertically arrayed); (2) intra-governmental (arising from the give-and-take between departments and officials within governments); and (3) extra-governmental (driven by the simultaneously cooperative and competitive relations between governmental and non-governmental actors).
>
> Sometimes regulatory competition will prove to be advantageous; in other cases, some form of collaboration will produce superior results. More often, a combination of competition and cooperation will be optimal.

The focus of the paper is on forms of extra-governmental regulatory co-opetition in relation to environmental water transactions, and the theory is deployed in order to

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Rise of the British Regulatory State: Transcending the Privatization Debate' (2004) 37 *Comparative Politics* 105 and

John Braithwaite, 'The New Regulatory State and the Transformation of Criminology' (2000) 40 *British Journal of*

Criminology 222.

[235] David Levi-Faur, *Handbook on the Politics of Regulation* (Edward Elgar, 2011) 666; David Levi-Faur, 'Regulatory capitalism and the reassertion of the public interest' (2009) 27(3) *Policy and Society* 181.

[236] Osborne and Gaebler, above n 232, 282, citing the example of emissions trading under the Clean Air Act 1990, 283.

[237] Osborne and Gaebler, above n 232, 284.

[238] Osborne and Gaebler, above n 232, 284.

[239] Wicked problems are biophysically and dynamically 'complex, ill-structured' public problems, that are the subject of

widely different values and understandings, and for which there is 'no unique "correct" view': see Sandra Batie,

'Wicked Problems and Applied Economics' (2008) 90(5) *American Journal of Agricultural Economics* 1176.

[240] Esty and Geradin, above n 158.

[241] Esty and Geradin, above n 158, 238.

gain a deeper understanding of the circumstances in which regulatory competition and collaboration is likely to be advantageous. Regulatory co-opetition supports the view that the regulatory process 'will almost always benefit from a degree of cooperation among governmental actors and between government officials and non-governmental actors'.[242] In relation to environmental water recovery, it is argued that interactions between NGOs and state agencies in relation to environmental water recovery measures have resulted in experimentation and innovation, and that this is an approach is likely to produce optimal regulatory outcomes in the long term, provided these activities can achieve scale.[243] NGOs such as water trusts have also proven themselves to be entrepreneurial, and responsive to new circumstances[244], and operate, particularly in the western United States, in a 'fiercely competitive marketplace for media and public attention as well as fundraising sources'.[245] These pressures generate incentives to provide regulatory and technical solutions to water reallocation issues and to 'sell' their solutions to the public and the government.[246] Oregon's Freshwater Trust, for example, has developed tools for measuring and communicating the 'ecological uplift' of its restoration work and communicates with stakeholders, using this new framework, via an annual 'Uplift Report'.[247]

The cooperation that already exists and that has the potential to emerge under the frameworks, suggests what Dan Farber has termed a degree of 'regulatory ecology' through which different species of regulators and other actors coexist in relationships that are sometimes competitive and at other times symbiotic.[248] According to Dan Farber:[249]

> We should welcome experimentation with new techniques-and if the experiments are successful, we can expect them to multiply and thrive in a kind of 'survival of the fittest' competition among methods of environmental protection. Or, to change metaphors, it may be better to think in terms of a regulatory ecology in which different regulatory approaches both compete with and support each other-so that, for instance, conventional regulation may provide the starting point for bargains of various kinds.

In Oregon and Colorado, there is considerable flexibility to negotiate an agreement on a case-by-case basis, and in a legal form that is appropriate for each set of circumstances, and it appears to be acknowledged that a certain amount of devolution to private actors will be critical to the development of new approaches, and will make these regulatory frameworks more productive in their environmental water recovery efforts. The law's role in this context is to enable private actors to participate in the market, and to structure the interactions between regulatory participants so that efficient and mutually beneficial environmental water transactions may occur.[250] Commentators have already

[242] Esty and Geradin, above n 158, 247.
[243] Esty and Geradin, above n 158, 239.
[244] Esty and Geradin, above n 158, 253.
[245] Esty and Geradin, above n 158, 253.
[246] Esty and Geradin, above n 158, 253.
[247] The Freshwater Trust, Uplift Report 2013, available at http://www.thefreshwatertrust.org/main/wpcontent/uploads/2014/08/2013_Uplift-Report_FINAL-for-web_FINAL.pdf. Accessed on 18 January 2015.
[248] Esty and Geradin, above n 158, 255; Daniel A. Farber, 'Triangulating the Future of Reinvention: Three Emerging Models of Environmental Protection' (2000) *University of Illinois Law Review* 61, 79.
[249] Farber, above n 248, 79.
[250] The Paper's conclusions as to the most appropriate role for law in this context draw on the research of: Sol Picciotto, *Regulating Global Corporate Capitalism* (2011, Cambridge University Press), 463-7; Sol Picciotto, 'Law, Lawyers and Legitimacy in the Construction of Global

observed in the United States that, in order for environmental water transactions to achieve more substantial recovery, private actors should be able to appropriate water for instream flows, and at the very least non-governmental organisations should be authorised to participate more formally in the regime through the ability to hold water rights.[251] This would enable non-profit entities to provide additional levels of environmental water unconstrained by the political considerations and constraints that may be experienced by a state actor.[252] David Gillilan and Thomas Brown take this one step further and note that private individuals and groups may be better positioned than a government agency to determine the 'correct allocation', for example local fishermen and recreational users.[253]

The long-term sustainability of these innovations, and the ability to scale up the institutional models that already exist, is also likely to be contingent on capacity of NGOs to interact with the wider economy. Water trusts, such as The Freshwater Trust in Oregon, recognise that traditional sources of public funding and philanthropy have enabled progress but will not be sufficient to resolve the problem of overallocated river systems in the western United States.[254] To address this funding gap, the Freshwater Trust, as well as other organisations such as The Nature Conservancy, have invested considerable effort in developing methods to engage private capital and encourage new investment in conservation through water markets. Developing and scaling up these efforts will require the collaboration and competition of both government actors and NGOs. From an investor perspective, challenges involve: '[A] shortage of investment prospects with appropriate risk-return profiles and experienced management teams, and a lack of standardised impact metrics'.[255] In this context, state actors may be able to contribute to 'capital stacking', in which 'private capital is combined with more risk-tolerant or concessionary capital from government or philanthropic sources'.[256] A recent report by WWF and Credit Suisse also makes a number of astute observations about the functional advantages of NGOs in this context, in providing environmental experience and analysis to identify large-scale conservation opportunities, and providing certification of conservation investments by using 'pragmatic measurement

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Corporate Capitalism', undated, <http://www.ces.uc.pt/eventos/pdfs/Picciotto_Law_&_Construction_of_Corporate_Capitalism.pdf>; Bronwen Morgan

and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (Cambridge University Press, 2007), 6-

7, 26-7, 38, 42 and 76; and Elizabeth Fisher, 'Unpacking the toolbox, or why the public/private divide is important in

EC environmental law' (Public Law and Legal Theory Working Paper No 35, August 2001).

[251] Barton H. Thompson Jnr, 'Markets for Nature' (2000) 25(2) *William and Mary Environmental Law and Policy*

Review 261, 286-291; Barton H. Thompson Jnr, 'Legal issues in fisheries reform: Lessons from resource management', in The World Bank, *The Political Economy of Natural Resource Use: Lessons for Fisheries Reform* (April 2010), 66; David M. Gillilan and Thomas C. Brown, *Instream Flow Protection: Seeking a Balance in Western Water Use* (Island Press, 1997) 120 – 123.

[252] Barton H. Thompson Jnr, 'Markets for Nature' (2000) 25(2) *William and Mary Environmental Law and Policy*

Review 261, 286

[253] Gillilan and Brown, above n 251,124-5.

[254] See The Freshwater Trust, < http://www.thefreshwatertrust.org/fixing-rivers/water-quality-trading/>; Logan Yonavjak, 'Conservation Finance is Gearing Up for Wall Street' 25 March 2014, <http://conservationfinance.org/news.php?id=232>

[255] NatureVest, *Investing in Conservation: A landscape assessment of an emerging market* (November 2014), 9.

[256] NatureVest, above n 255, 16.

systems'.[257] In this context, NGOs must be given the space, the permission, and the flexibility to experiment with new approaches, in the knowledge that the most competent will succeed over time.[258]

[257] Credit Suisse and WWF, *Conservation Finance: Moving Beyond Donor Funding to an Investor-Driven Approach* (January 2014), 27.
[258] See generally Esty and Geradin, above n 158.

RETHINKING LAW, ECONOMY AND ENVIRONMENT

DRAFT ONLY

Co-operatives –a suitable business model for traditional Melanesian communities in a 'blue-green' economy?

Ann Apps

Abstract

Vanuatu and Solomon Islands are recognised by the United Nations as part of the Pacific group of Small Island Developing States (SIDS).The Pacific SIDS are well known for their abundant natural resources and island cultures that conjure up an iconic image of paradise. They also have fragile ecosystems that are particularly vulnerable to natural and environmental disasters. The United Nations Environment Programme (UNEP) has recommended a shift away from 'business as usual' economic models towards initiatives that promote a 'blue-green' economy prioritising renewable energy and sustainable marine and natural resource management.

The co-operative business model with its dual social and economic outputs would appear to be a suitable business vehicle to drive local enterprise initiatives in a 'blue-green' economy. The co-operative provides an alternative business model to the investor owned company for those who wish to pool resources to achieve an enterprise objective. Yet, despite its history as a vehicle that has helped communities adapt to disruption caused by social and technological change, the co-operative has an image problem in many developing countries. In Solomon Islands and Vanuatu the legal frameworks for co-operatives are still based on a transplanted model designed primarily as a post-colonial development tool. Current co-operative laws reflect a state- centric model which is inappropriate for the circumstances of these countries, where legal and social pluralism prevail. The model presumes a highly interventionist co-operatives' registry with sufficient resources to monitor, supervise and promote the business model. In practice these resources are lacking and the business model's reputation has been tarnished by corrupt and inefficient managers.

This paper considers whether co-operative law reform might improve the utility of the model by minimising tensions between state law and traditional or customary law which dominates at the local level. The paper explores options for reforms which accommodate a broader notion of 'co-operation' in the business model. Opportunities for a 'bottom up' approach to business regulation are explored in a search for natural synergies with local business initiatives in a 'blue-green' economy.

Introduction

Vanuatu and Solomon Islands are Melanesian countries that are recognised by the United Nations as part of the Pacific group of Small Island Developing States (SIDS).[259]The Pacific SIDS are well known for their abundant natural resources and island cultures. The tourism industry draws upon these resources to conjure iconic images of island paradise. However, in the wake of the devastation wreaked by Cyclone

[259] United Nations Department of Economic and Social Affairs, *Small Island Developing States(SIDS) – Member States* < https://sustainabledevelopment.un.org/topics/sids/memberstates>

Pam in Vanuatu in early 2015, we are once again reminded that these small island clusters are also particularly vulnerable to natural and environmental disasters.

In 1992, the member states of the United Nations met at the Conference on Environment and Development in Rio de Janeiro (the 'Rio Summit'). At this conference the adoption of the Rio Declaration on Environment and Development introduced the notion of "sustainable development" into international law.[260] Principle 27 of the Declaration described sustainable development as a 'balanced approach between … environmental protection and economic and social development.'[261] It also encouraged the expansion of a school of economic thought which proposed the use of economic instruments and the market to reduce environmental impacts including pollution and resource degradation.[262] In this new arena, an economy that effectively accounts for the present and future costs of environmental impact and seeks to mitigate environmental risks as a strategy for sustainable development, became known as a "green economy".[263]

The Rio Summit also recognised the small island developing states (SIDS) as a distinct group of developing countries requiring specialised expertise and support from the international community.[264] These low-lying island countries face significant sustainable development challenges due to shared characteristics including: remote locations; low populations; vulnerability to natural and environmental disasters; scarce freshwater resources; dependence on marine resources; out-migration of indigenous populations and in-migration of tourists; and the threat of rising sea-levels.[265]

Since the Rio Summit, there have been three global conferences to determine the program of action for sustainable development of SIDS.[266] The most recent conference was held in Samoa in September 2014. The conference outcome was the adoption by the United Nations General Assembly of the SIDS Accelerated Modalities of Action (SAMOA) Pathway—a blueprint for the sustainable development of SIDS.[267] The SAMOA Pathway resolution acknowledges the limited resource base of these island states and the need to engage in effective multi-stakeholder partnerships to achieve sustainable development.[268] Following the conference, the United Nations Environment Programme (UNEP) presented its Global Environment Outlook report on SIDS (GEO SIDS report) as part of its contribution to the development of the post-2015 Sustainable Development Goals (SDG's).[269] The report recommends that development initiatives in the SIDS should

[260] UN Report of the UN Conference on Environment and Development, Annex 1: Rio Declaration on Environment and Development, 12.8.1992, UN Doc A/Conf. 151/24 (Vol.I);
[261] Ibid.
[262] UNDESA Division for Sustainable Development, 'A Guidebook to the Green Economy' (United Nations, 2012)
[263] Ibid, 64.
[264] UN Report of the UN Conference on Environment and Development, Annex 11: Agenda 21, Article 17(g), 12.8.1992, UN Doc.A/Conf 151/26 (Vol 11)
[265] United Nations Environment Program (UNEP), 'GEO Small Islands Developing States Outlook' (United Nations 2014) <http://apps.unep.org/publications/pmtdocuments/-Global%20Environment%20Outlook:%20small%20island%20developing%20states-2014GEO_SIDS_final.pdf>, 3.
[266] The first was in Barbados in 1994 adopting the Barbados Plan of Action (BPoA); the second was in Mauritius in 2005 and adopted the Mauritius Strategy of Implementation(MSI).
[267] SIDS Accelerated Modalities of Action (SAMOA) Pathway, UN General Assembly, 69th Session, A/Res/69/15 (15 December 2014).
[268] SAMOA Pathway, above n 4, paragraph 101.
[269] (UNEP), above n

focus on strategies that prioritise renewable energy and sustainable marine and natural resource management.[270] The significance and centrality of the marine environment in this call for a rethink of economic development strategies in the SIDS is referred to as the "blue-green economy".

The importance of engaging stakeholders at all levels has been well recognised by those participating in global conversations on sustainable development.[271] The 2014 SIDS conference saw the registration of more than three hundred partnership projects on sustainable development initiatives in the SIDS and around half of these were connected to the Pacific region.[272] The SIDS Partnership Platform provides information about the registered projects including their targets, objectives and key stakeholders.[273] The Platform is evidence that there is no shortage of United Nations systems, Non-Government Organisations (NGO's), government departments and agencies that are willing to promote and/or engage in sustainable development initiatives in the SIDS.[274] The apparent shortfall is in the engagement of local communities and businesses as active partners at the outset of many of these initiatives. The concern is that if locals are not immediately involved in the design and implementation of strategies that are intended to impact on their lives; they may quickly become passive recipients of externally funded aid and transplanted schemes for development.

A significant issue for the Melanesian SIDS is that external partners, who wish to promote development through local enterprise initiatives, may have based their commitment on a number of assumptions which do not hold true in traditional communities. One assumption is that the legal system is 'state-centric' in the sense that customary law is subject to the law of the state. A second assumption is that there is a clear legal process to enable the alienation of property rights. The third assumption is that conventional measures of poverty provide an accurate indicator of the well-being of people living in traditional communities.[275]

Prior to European settlement, the Melanesian islands that are now known as Solomon Islands and Vanuatu, were not separate nation states but consisted of hundreds of separate and self-contained communities that were both linguistically and culturally diverse.[276] These communities also had micro-legal systems based on 'kastom' or customary law, each with their own distinct norms and processes to maintain social

[270] Ibid, UNEP above n2, 19.

[271] United Nations Department of Economic and Social Affairs (UNDESA), 'SD in Action - Special Report on Voluntary Multi-Stakeholder Partnerships and Commitments for Sustainable Development' (United Nations, 2015), 3.

[272] SIDS Action Platform, *Partnerships (*filtered for Pacific region*)* <http://www.sids2014.org/partnerships>

[273] Ibid.

[274] Ibid.

[275] The conventional measures of wealth are: per capita Gross Domestic Product (GDP) which measures the monetary value of all goods and services produced within a country in a given year and dividing it by the population number; and Human Development Index (HDI) which measures life expectancy, literacy and educational attainment, as well as GDP, see Francis R Hickey, 'Nearshore fisheries and human development in Vanuatu and other parts of Melanesia' (2008) (24) *Traditional Marine Resource management and Knowledge Information Bulletin* , 10.

[276] Jennifer Corrin, 'Moving Beyond the Hierarchical Approach to Legal Pluralism in the South Pacific' (2009) 59(29) *Journal of Legal Pluralism* , 30. In Solomon Islands there are more than 65 languages and dialects and in Vanuatu, around 108.

order.[277] The majority of the populations in both Solomon Islands and Vanuatu have continued to live in these small rural communities, dispersed over many islands and isolated from the urban capitals of Honiara (Solomon Islands) and Port Vila (Vanuatu).[278] In many of these communities, state law has little relevance to their subsistence lifestyles and kastom remains paramount.[279] Kastom governance systems in traditional communities have proven to be a source of resilience, providing food security and an environmental and social safety net for its members.[280] For example, in Vanuatu, the traditional economy has successfully absorbed a 90 percent increase in population since independence without food shortages.[281] It has been recognised that conventional indicators of economic well-being may provide a distorted view of poverty in these traditional communities and at the same time these indicators fail to account for the environmental cost of development that is measured in purely financial terms.[282]

In relation to the alienation of property rights, there is still a great deal of uncertainty surrounding the interaction between kastom and state legal systems. Land and natural resources are communally owned, and although the state legal systems in both countries officially recognise the concept of customary land tenure, arguably it has never been properly accommodated by its institutions.[283].

Although many communities desire improved access to transportation, communication and education, they are confronted by multiple barriers to participation in economic development which occur mainly in the empty space or 'no man's land' between the two legal systems (kastom and state).

This paper will explore the potential of the co-operative enterprise model as a legal vehicle which can traverse this 'no man's land' between state and kastom legal systems and assist traditional communities to engage with the state and external partners in multi-stakeholder partnerships. The co-operative business model with its dual social and economic motives is also more likely to achieve environmentally sustainable outputs in a 'blue-green' economy than purely profit driven models.

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[277] Geoffrey White, 'Indigenous Governance in Melanesia' (AusAID, 2006) <http://ips.cap.anu.edu.au/sites/default/files/SSGM_IndigenousCustomaryGovernance_ResearchPaper_06.pdf >, 5.

[278] Ibid, over 80% of the population in Solomon Islands live outside urban areas, see also Marcus Cox et al, 'The Unfinished State: Drivers of Change in Vanuatu' (AusAID, 2007) <http://aid.dfat.gov.au/Publications/Documents/vanuatu_change.pdf>, around 70% of the population live outside the main urban areas and their immediate surrounds.

[279] Corrin, above n , 32.

[280] Ralph Regenvanu, 'The traditional economy as a source of resilience in Vanuatu' in T Anderson and G Lee (ed), *In Defence of Melanesian Customary Land* (AIDWATCH, 2010) 30 , 32.

[281] Bazeley, P and Mullen, B 'Vanuatu*: Economic Opportunities Fact Finding Mission'*, (AusAID and NZAID), July 2006 quoted in Regenvanu, above n 22, 32.

[282] Regenvanu, above n , 32. This has led to a project to develop alternative indicators of well-being in Melanesia that take into account and measure the contribution of the traditional economy, see SIDS Action Platform at < http://www.sids2014.org/partnerships >.

[283] Corrin, above n , Corrin's article explores the unsatisfactory results that have resulted in Solomon Islands as a consequence of statute law attempting to provide legal mechanisms to resolve disputes relating to customary land ownership, 35 – 41. In 2013- 2014 Vanuatu began a major program of land law reform in a bid to reduce the power of the executive government and increase the role of custom institutions in making determinative decisions about the ownership of customary land. http://mol.gov.vu/index.php/en/events/474-preparing-the-first-set-of-amendments .

Unfortunately, the co-operative model still has an image problem in many developing countries. In Solomon Islands and Vanuatu the legal frameworks for co-operatives are still based on a transplanted model designed primarily as a post-colonial development tool. Current co-operative laws in both countries still reflect a transplanted state-centric model which is inappropriate where there is still considerable distance between the state and traditional communities and legal and social pluralism prevail.

This paper considers whether changes to the legal framework for co-operatives might improve the utility of the business model in local communities in Solomon Islands and Vanuatu. Opportunities for a 'grass roots' approach to business regulation are explored in a search for natural synergies between the co-operative principles and customary norms and traditional values in these communities.

Why status matters – The concept of separate legal entity

In an economic (rather than legal) sense, traditional communities are co-operative business entities. A co-operative can be defined as 'an association of persons [*united voluntarily*] to meet common economic, social and cultural needs and aspirations through a jointly owned and democratically controlled enterprise.'[284] In the purely subsistence market, the community owns the land and resources and its members contribute labour, skills and knowledge to grow and harvest produce. Kastom rules have been developed over time as a regulatory framework to determine how this produce is distributed among family, extended kin and clan networks, to support the livelihoods of its members. In a semi-subsistence market, the produce may be sold or exchanged between communities at a local market, extending the choice of products available for consumption. In a traditional market, the trading 'currency' may involve complex systems of mutual obligation, without an exchange of money.[285] While communities are able to meet the needs of their members without resorting to 'money' as currency, there is no imperative to interpose any artificial legal structure between the community and its economic transactions.

However, the state and outside actors are increasingly requiring communities to use money or cash as a measure of value and medium of exchange. The state requires the payment of fees for education and health,[286] the state and NGO's require communities to manage donated funds for projects to improve community infrastructure,[287] and foreign companies seeking to extract resources such as timber and gold, impose their own measurement of the value of these commodities in the form of cash payments.[288] From

[284] International Labour Organization (ILO) Recommendation 193 "Promotion of Cooperatives Recommendation", paragraph 2.

[285] Wesley Morgan, 'Overlapping Authorities: Governance, Leadership and Accountability in Contemporary Vanuatu' (2013) *Journal of South Pacific Law* , A-6.

[286] Cox et al, above n , 12 and also Tarcisius Tara Kabutaulaka, 'Global Capital and Local Ownership in Solomon Islands' Forestry Industry' in Stewart Firth (ed), *Globalisation and Governance in the Pacific Islands* (ANU E Press, 2006) 239, 251

[287] Cox et al, above n ,46 also see Clive Moore, 'External Intervention: the Solomon Islands Beyond RAMSI' in M. Anne Brown (ed), *Security and Development in the Pacific Islands: Social resilience in emerging states* (Lynne Rienner, 2007) 169 , 189.

[288] Kabutaulaka, above n ,253.

the perspective of community members, cash provides them with access to the global world of consumer goods that are otherwise tantalisingly out of reach.[289]

Once a community and its members accepts that cash will regularly be used as a medium of exchange and cash transactions are a necessary part of its economy, the relationship between community members and its kastom rules are changed and the case for an interposed 'legal entity' is much stronger.

The (western legal) rationale behind business vehicles, such as companies, incorporated associations and co-operatives, is to allow individuals to associate to pool their resources into a separate artificial entity for the purpose of enterprise. The primary purpose of the entity is to allow the pooled resources (particularly its finances) to be held separately from those of its individual members. The entity is recognised by law as a 'legal person'. The conferral by the state of legal identity makes the business entity a 'corporate' individual rather than simply a legal representation of the community that has created it. In other words, the entity as a whole is much greater than the sum of its parts.[290]

Corporate status means that the business is treated by law as a natural person. This means that it can hold property, enter into contracts, take legal action and be sued. Importantly, the corporation has perpetual succession. Once corporate status is conferred on the enterprise by law, it continues to exist separately from its members, who are free to exit at any time. If a member dies or withdraws from the corporation, their membership share can usually be transferred or absorbed without impacting on the corporation's activities.

There are obvious advantages for traditional communities in utilising a separate entity for commercial transactions that involve communally-owned property. The members of the corporation can participate in the creation and adaptation of its rules (constitution) to deal with issues such as eligibility for membership, distribution of income, appointment of business leaders, and participation in management decision making and internal governance. These rules can be tailored to suit the particular needs of the enterprise(s) and the community it serves. Most importantly, a corporate body provides a mechanism by which business and the abstract notion of finance can be kept separate from the community and its kastom governance, but at the same time it can be shaped and influenced by its moral standards and ethical values. The objective is to achieve a symbiotic relationship between the corporate enterprise(s) and the community, so that each supports and nurtures the other.

However, it needs to be acknowledged that even if the members of these communities are convinced that there may be economic advantages in utilising a legal entity to transact with outsiders, unless the community is able to recognise the significance of the separation between entity or association and their communal way of life, the efficacy of the entity (regardless of type) may be compromised.[291]

A brief legal history of the co-operative model in the Melanesian Pacific

[289] Ibid, 239.
[290] John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge University Press, 2000) 145.
[291] Hagen Henry, 'Guidelines for cooperative legislation' (International Labour Office, 2012) 44.

The co-operative vehicle was used by the British colonial administration throughout the British Empire as an economic development tool. Unlike many legal frameworks that were transplanted copies of the British legislative model (for example, company law), the law relating to the use of co-operatives as a development tool in the Empire, was based on the British Indian Pattern of Co-operation (BIPC).The BIPC proved to be a successful model for co-operatives in India, and was subsequently adapted for use in countries such as Malaysia, Myanmar (Burma) and Sri Lanka (Ceylon).

The BIPC model was a 'purpose built' rural economic development tool for colonial British-India. It involved providing financial incentives to registered co-operative societies in the form of tax breaks and government funding. The designers of the legal model presumed that the recipients of these 'benefits' required careful supervision and monitoring, so at the centre of the model was a highly bureaucratic and interventionist co-operatives registry.[292] After the second-world war, the state-assisted BIPC model was recommended by the British Colonial Office to the governments of all British dependencies including Fiji and Solomon Islands. [293] Legislation mirroring the BIPC model in Solomon Islands was later adopted in Vanuatu.[294]

Unfortunately, because the co-operative was a development tool, it was often the recipient of funding and benefits from the state and donor organisations. The business model proved to be susceptible to high-jacking by elites and suffered at the hands of inefficient and corrupt managers.[295] In the post-colonial period, the co-operative's image and reputation as a 'change agent' was seriously damaged.[296] Attention given to the failings of state-led co-operatives and its incompatibility with aspects of neo-liberal economics, led to a neglect of the model by development agencies during the 'Washington Consensus' period of law and development. [297] This has had two consequences for co-operative law in the Solomon Islands and Vanuatu. Firstly, the legislative model has been neglected in both countries since the early1980's and has not been subject to any substantial revision since it was originally transplanted.[298]

[292] Hans Hermann Munkner, 'One Hundred Years: Co-operative Credit Societies Act in India - A Unique Experience of Legal Social Engineering' (Paper presented at the 34th International Symposium of the European Faculty of Land Use and Development, Univeristy of Strasbourg, 2004), 16.

[293]. Model Co-operative Societies Ordinance, Enclosure 2 to Circular Despatch dated 20th March, 1946, from the Secretary of State for the Colonies to the Colonial Governments, Col. No. 199, London 1946, Hans-Hermann Munkner, 'Worldwide regulation of co-operative societies - an Overview' (2013) (n 53 l 13) *Euricse Working Paper* , 11 and Munkner, above n , 24.

[294] The *Co-operative Societies Act*, CAP 152 Vanuatu commenced in July 1987.

[295] See, Steven Ratuva, '"Proto Affirmative Action. Indigenous Fijian Development from cession to independence."' in *Politics of Preferential Development - Trans-global study of affirmative action and ethnic conflict in Fiji, Malaysia and South Africa,* (ANU EPress, 2013) ,47, for an analysis of the reasons for the failure of co-operatives to thrive in rural Fiji.

[296] Hans -H Munkner, 'Ensuring Supportive Legal Frameworks for Co-operative Growth' (Paper presented at the ICA 11th Regional Assembly, Nairobi, 2014), 4.

[297] D. Joseph Stiglitz, 'Moving Beyond Market Fundamentalism To A More Balanced Economy' (2009) 80(3) *Annals of Public and Cooperative Economics* 345, David Kennedy, 'The 'Rule of Law', Political Choices and Development Common Sense' in David M Trubek and Alvaro Santos (ed), *The New Law and Economic Development - A Critical Appraisal* (Cambridge University Press, 2006)

[298] The *Co-operative Societies Act* CAP 164 (Solomon Islands) was last amended in 1987 and the Co-operative Societies Act CAP 152 (Vanuatu) has not been amended since it was introduced in 1987. In comparison, Fiji undertook a revision of its BIPC model in 1996 in an attempt to encourage co-operative autonomy and to limit the registry's statutory powers, the *Co-operatives Societies Act* 1947 Cap 250 Fiji was replaced by the *Co-operatives Act* 1996 (Fiji).

Secondly, 'rule of law' programs in both countries have prioritised donor resource allocation and technical expertise to legislative reforms that preference the company model.[299]

While there are natural synergies between co-operative enterprises and communal societies, they are not the same thing and should not be confused. One of the mistakes made by colonial administrators, who introduced the 1947 co-operative model into the South Pacific, was the assumption that because of their "communal orientation [indigenous villagers] were naturally inclined to co-operative effort."[300] In practice, there are important differences between communalism and co-operativism. The utility of the co-operative as a vehicle for sustainable economic development relies on its ability to foster successful enterprise. Co-operative enterprise requires the accumulation of wealth through collective effort and thrift. These ideas are not always consistent with communal obligations and subsistence living arrangements.[301] They are also likely to come into conflict with community 'big men' who have acquired power through the control of the community's economic resources.[302] A failure to comprehend the significance of the concept of separate legal entity, so that the business enterprise is not treated separately from its members can be harmful to the fortunes of both the business and the community.[303]

Co-operatives as a vehicle for sustainable development in a "blue-green economy".

The GEO SIDS report describes the blue-green economic strategy as one that 'targets resource efficiency and clean technology, is carbon neutral and socially inclusive, [..] provides a clean and healthy environment and helps conserve resources.'[304] It will do this by 'focussing on balanced development and linkages between small scale fisheries and aquaculture, water, tourism, renewable energy and waste reduction.'[305]

The co-operative model itself can never be the solution to a social or environmental problem. It is a vehicle for solutions, and to achieve those solutions it requires skilled drivers who have a clear goal.[306] However the co-operative model has certain features that can be utilised to achieve sustainable economic development. These features do not necessarily inhere in the legal framework, but may be a consequence of the model's commitment to co-operative principles or its membership of an international or regional co-operative network.[307] An example is the co-operative principle of "concern

[299] Examples of 'rule of law' projects include the Priorities and Action Agenda (2006 – 2015) following the Comprehensive Reform Program (CRP) in Vanuatu sponsored by the Asian Development Bank and the 2007 Pacific Private Sector Development Initiative (PPSDI) jointly sponsored by the Asian Development Bank, Australian Aid and the NZ Aid Programme see http://www.adbpsdi.org/p/what-is-psdi.html. Both projects have prioritised legislative reforms that produce a favourable regulatory environment for companies.

[300] Ratuva, above n , 18.

[301] Cox et al, above n , 14.

[302] In Melanesia the "big men" are leaders who acquire the position through reputation based on contributions and exchange practices in the community, see White, above n , 1 and also see Kabutaulaka, above n , 253.

[303] Henry, above n , 44.

[304] (UNEP), above n , 19

[305] Ibid.

[306] Henry, above n ,2.

[307] The International Co-operative Alliance (ICA) is the one of the world's oldest and largest non-government organisations and is the peak body for co-operatives worldwide. It was established in 1895 and currently represents284 co-operative organisations and federations across 95 countries representing around 1 billion individual members, see http://ica.coop/en/international-co-operative-alliance.

for the community". This is a principle that might be adopted by many co-operatives as part of its internal governance, but is not typically mandated in the legal framework.[308]

The model adds to the economic security of local communities, because co-operative enterprise is tied to its membership and not financial capital. Usually member shares cannot be traded and a proportion of its reserve funds are indivisible.[309] This means that the business cannot be easily delocalised and is more likely to have a longer term commitment to community well-being and prosperity.[310] Members can come and go voluntarily, but when they leave they are only refunded the nominal value of membership.[311]This means that they do not have access to the equity in co-operative assets which may have appreciated over time. This supports the intergenerational aspect of co-operatives, as locked in reserves and assets are preserved for the benefit of both current and future generations.[312] It is also compatible with the conservation of any land or natural resources that are owned by the co-operative. [313]

Because the model is driven by maximising member value instead of profit, decision making is more likely to include a concern for a healthy environment and sustainable production practices. As production is demand-driven and the role of capital is neutralised, the pressure to exploit non-renewable and finite resources to maximise growth is reduced.[314] This end result is consistent with the blue-green economy which encourages shared services and sustainable consumer choices to avoid waste.[315]

The democratic control of the enterprise by its members is required by the co-operative principles and is usually enshrined in legal frameworks as the 'one-member/ one-vote' rule.[316] Participatory democracy is strengthened by the alignment of interests between members and management, as the objective of the organisation is to transact with its members as customers, producers or workers. These features together with the patronage rule (which means that surplus is redistributed to members in proportion to their transactions with the co-operative) promote egalitarian decision making and the equitable distribution of wealth to all members, including women and youth. These features are consistent with the achievement of social inclusiveness which is a key goal of the blue-green economy.[317]

[308] "Concern for Community" is the 7th Co-operative Principle in the International Co-operative Alliance, *Statement on the Co-operative Identity,* ICA Centennial Congress Manchester, (1995).

[309] The *Co-operative Societies Act* (Vanuatu) Cap 152, s.34 and *Co-operative Societies Act* (Solomon Islands) Cap 164, s.30, both mandate the allocation of at least one quarter of the co-operative's surplus to an indivisible reserve fund.

[310] Henry, above n , 24.

[311] *Co-operative Societies Rules* 1987 (Vanuatu) Reg. 8(5).

[312] Henry, above n ,24.

[313] The *Land and Titles Act* (Solomon Islands) Cap 133, s 112(4) provides that a company or co-operative society with at least 60% of its equity held on behalf of a Solomon Islander may own land that has been converted to a perpetual estate. Customary land in Vanuatu can usually only be alienated by leasehold and recent reforms have been introduced to strengthen customary land ownership and land management, *Land Reform Act*, 2013 (Vanuatu) also see http://mol.gov.vu/index.php/en/events.

[314] Henry, above n , 25.

[315] (UNEP), above n , 22.

[316] *Co-operative Societies Act* (Solomon Islands) Cap 164, s. 22 and *Co-operative Societies Act* (Vanuatu) Cap 154, s.26.

[317] (UNEP), above n ,18.

The democratic decision making structure differentiates the co-operative from the company model which tends to promotes hierarchical decision-making and enables the concentration of power in the hands of community "big men".[318] There is some evidence that the payment of resource rents for logging and mining and cash generated from exporting primary products including commodity fishing are mainly received by men.[319] There is further evidence that suggests that men are more likely to spend on consumables, especially alcohol, and are less likely than women to invest in health and education for their children.[320] Given that around 42 percent of the population in Solomon Islands is under the age of 15 years and that women and youth make up around 70 percent of the population, there is an imperative to develop governance structures which give them a greater say in community development.[321] The co-operative business model provides a potential training ground for women and youth who wish to actively participate in governance activities which extend beyond subsistence activities. This is also consistent with the recommendations of the GEO report which recommends investing in training and educating youth to 'encourage them to become change agents for sustainability within their own communities.'[322]

The co-operative is a 'self- help' business vehicle, which means that it should evolve organically where a group identifies a common objective or need which is not met by other providers (such as the state or external investors). The legislative framework protects the model from the influence of outside investors by restricting the value and transferability of shares.[323] Critics of the model suggest that its weakness is the difficulty it experiences in raising external capital, but this means that co-operative members must innovate with their own resources to solve problems. This contributes to the resilience of the model as it achieves autonomy and self-determination. This approach is consistent with the 'blue green' economy which seeks to promote resilience in island communities through a diversity of economic activities which take advantage of solutions 'embedded in community concepts'.[324] The approach also fosters innovation using traditional knowledge and resource management to create new business opportunities.[325]

[318] Kabutaulaka, above n , 252.

[319] Simon Foale, 'A preliminary exploration of relationships among fishery management, food security and the Millenium Development Goals in Melanesia' (2008) 24(December) *Traditional Marine Resource management and Knowledge Information Bulletin* 3 , 4; also Wairiu, M. (2007) 'History of the Forestry Industry in Solomon Islands' *Journal of Pacific History*, 42(2), pp 233–246 at p 237 cited in Rebecca Monson, 'Women, State Law and Land in Peri-Urban Settlements on Guadalcanal, Solomon Islands' (2010) 4(3) *Justice for the Poor, The World Bank* ,

[320] Foale, above n ,4, citing McMurray C, Foale S, Roberts P, Breen B and Cann-Evans S, People's Survey 2008, Canberra, AusAID, 13, see <http://www.ramsi.org/media/peoples-survey/>.

[321] Moore, above n , 192.

[322] (UNEP), above n , 28.

[323] *Co-operative Societies Act* (Solomon Islands)Cap 164, s 24; and, s.45, Rule 41; *Co-operative Societies Act* (Vanuatu) Cap 153, s.28 and *Co-operative Societies Rules* (Vanuatu), rule 37.

[324] (UNEP), above n , 29.

[325] An example is the creation of a consumer market for Lionfish in the Caribbean as a means to reduce the numbers of the species which is an invasive species which negatively impacts on the health of the reef, ibid, 25. Another example is pearl farming in the Cook Islands which provides an environmentally sustainable alternative industry reducing pressure on fish stocks, ibid, 20.

Co-operatives and the Informal (Cash) Economy

There is no doubt that co-operative effort occurs organically within communities to resolve both economic and social problems. In the absence of incentives or access to education and capital, these efforts will most commonly occur within the informal economy and within the bounds of communal governance structures.

Both Solomon Islands and Vanuatu have small but growing informal (cash) economies.[326] In both countries formal employment is still very low.[327] Recent policy developments in Vanuatu acknowledge the importance of the traditional subsistence economy in supporting the livelihoods of the majority of the population in a sustainable and effective way.[328] These developments aim to strengthen and support the traditional subsistence sector. But the growth of an unregulated informal cash economy also requires the attention of policy makers, particularly as it poses a threat to the positive aspects of the traditional economy. An example is the impact of the cash economy on women and youth. Women have been the mainstay of family and social well-being in the subsistence economy, however as pressure increases for them to find income to pay for school fees and other items, they have moved into cash cropping to support their families. This additional workload detracts from their ability to meet their commitments to family, church and community.[329] It also means that women have less time to learn about *kastom* and genealogies and this deprives the community of a valuable source of traditional knowledge.[330]. As rural populations in both Solomon Islands and Vanuatu are increasingly made up of unemployed youth, the cash economy also brings increased access to alcohol and drugs and as a corollary an increase in communicable diseases, crime and domestic violence.[331]. At the same time the lack of income opportunities has resulted in many men leaving the villages to go to urban areas in search of paid work.[332]

The International Labour Organisation (ILO) has long recognised the significant role of the co-operative vehicle in transitioning actors in the informal economy to the formal economy and recommends that 'governments should promote the important role of co-operatives in transforming what are often marginal survival activities [..] into legally protected work, fully integrated into mainstream economic life.'[333] However the formalisation of the informal sector should not be an aim in itself as 'in all societies informal activities and arrangements are indispensable for social and economic well-being.'[334] This is particularly so in countries like Vanuatu and Solomon Islands, who do not have strong state institutions, because in these countries the informal activity occurs, not to place their activities beyond the reach of the law (for example to avoid taxation), but because the "law" does not reach them at all.

[326] Cox et al, above n ,6 and Moore, above n , 191.
[327] Cox et al, above n , 6 and Economic Analytical Unit, 'Solomon Islands: Rebuilding an Island Economy' (Department of Foreign Affairs and Trade, 2004), 74.
[328] Regenvanu, above n , 32 and Miranda Forsyth, 'Alternative Development Paradigms in Vanuatu and Beyond' (ANU College of Asia and the Pacific, 2014) <ips.cap.anu.edu.au/ssgm>.
[329] Morgan Wairu, 'Governance and Livelihood Realities in Solomon Islands' in Stewart Firth (ed), *Globalisation and Governance in the Pacific Islands*, Studies in State and Society in the Pacific (ANU Press, 2006) , 413.
[330] Monson, above n .
[331] Wairu, above n , 414, also see Cox et al, above n ,6.
[332] Wairu, above n , 413.
[333] ILO R.193 at Paragraph 9, see also Henry, above n , 42.
[334] Ibid, 43.

The role of the regulatory framework for co-operative in these types of societies is more complex than in state-centric societies. In the latter, an adequate regulatory system which properly recognises the difference between taxing surplus and taxing profit, will entice informal economy actors into the mainstream by encouraging them to pool resources so that they can benefit from collective action.[335] In societies whose legal systems are diverse and pluralistic, the role of the regulatory framework for formal business models, including the co-operative, requires rethinking to better accommodate its social and cultural context.[336]

Savings Clubs as a transitioning business model

The "Traditional Money Banks Project" which began in 2004 in Vanuatu is an example of a 'grass roots' local community initiative which challenged what is usually seen as a 'divisive' relationship between economics and culture.[337] The project's objective was to facilitate the exchange of cash and traditional wealth items used for ceremonial activities including pigs, mats, shell money and yams.[338] The project led to a partnership between the Vanuatu Cultural Centre, the National Council of Chiefs and the government to promote the Year of Traditional Economy in 2007. [339] The latter project set about reviewing the impact of state development policy on local communities and supporting new initiatives to revitalize the traditional economy.

Co-operatives and credit unions were recognised by the project as having an important role to play in supporting initiatives that would encourage linkages between the kastom economy and the modern economy. One of these initiatives was setting up 'savings clubs' at village level[340] or at the level of clan or extended family.[341] A 'savings club' is an informal savings co-operative, where people agree to set aside a certain amount as savings each week. The group sets its own rules as to how often and how much of the savings can be accessed by group members. Other initiatives promoted by the Year of Traditional Economy included supporting the formation of credit unions once there are enough savings clubs in a geographical area.[342] These larger credit unions would also be encouraged to include in their governance structure representatives from the 'four legs' of the traditional community – chiefs, women, youth and churches.[343]

Another initiative supported by the Vanuatu Credit Union was the idea of using traditional wealth items as collateral for a loan.[344] The recognition of communal property as collateral has been a significant problem for communities seeking loans through commercial banks. However this is not only possible, but can be encouraged at the level of savings clubs and credit unions.

[335] Ibid, 43.
[336] Fiona Haines, 'Regulatory Reform in Light of Regulatory Character: Assessing Industrial Safety Change in the Aftermath of the Kader Toy Factory Fire in Bangkok, Thailand' (2003) 12(4) *Social & Legal Studies* 461 .
[337] Ralph Regenvanu and Haidy Geismar, 'Re-imagining the Economy in Vanuatu - An interview with Ralph Regenvanu and Haidy Geismar' in Edvard Hviding and Knut M.Rio (ed), *Made in Oceania - Social movements, cultural heritage and the state in the Pacific* (Sean Kingston Publishing, 2011) ,48.
[338] Ibid, 32.
[339] Ibid, 33. The Year of Traditional Economy was extended into a second year in 2008.
[340] Ibid, 37
[341] Ibid, 38.
[342] Ibid.
[343] Ibid.
[344] Ibid.

The idea of using savings clubs as a basic building block for co-operative development is well recognised.[345] The driving force of co-operatives must be the "self –help" cycle.[346] This can be described as a cycle where members associate because they have a i) a self-interest in achieving a goal (e.g. a savings goal), ii) they combine resources with others who have a mutual interest in achieving the same goal iii) collectively they are more likely to achieve the goal than individually iv) the association provides members with support and promotes the achievement of their individual goal v) others are attracted and join vi) the co-operative grows organically and autonomously.[347]

The idea of clan-based savings clubs is not only a building block for co-operative development it is also a useful stepping stone to participatory law- making. Individual savings clubs generate their own set of rules, tailored to the circumstances of their own clan. When they are ready to obtain the benefit of joining a larger collective at the village or area level, they will need to negotiate and agree to a new set of rules to encompass their broader membership. There are a number of preconditions to successful vertical integration of the savings clubs into credit unions. At the clan level, savings clubs can be informal and unregulated. At the village level, there may need to be degree of formality and regulation, although this may depend upon the size of the membership and the amount of savings capital held by the combined clubs. At this level there must be some education, training and promotion of member benefit. At the level of the credit union, formality including separate legal status and regulatory protection are required. However any legal framework imposed by the state must be flexible enough to allow plenty of room for participatory rule making and governance.

This is the type of transitional model that was promoted by the Year of the Traditional Economy in Vanuatu and envisaged that governance at this level would involve representatives of the 'four legs' of the community i.e. chiefs, women, youths and the church.[348] In this way, not only is a co-operative solution to the problem of enabling communities to realise the benefit of savings and wealth accumulation promoted from the 'bottom –up', but local communities can be involved in a type of participatory law making that can help them to begin to traverse the space between kastom and the state and formal and informal enterprise.[349]

<u>Rethinking the legal framework for co-operatives in Melanesia[350]</u>

A similar type of evolutionary process can be used to develop 'community – co-operatives' to represent traditional communities as a legal entity. A 'community co-operative' may begin as a village co-operative where community members come

[345] Richard Simmons and Johnston Birchall, 'The role of co-operatives in poverty reduction: network perspectives' (2008) 37 *The Journal of Socio- Economics* , 2133.
[346] Munkner, above n , 6.
[347] ???
[348] Geismar, above n , 38.
[349] The 'empty space' between kastom and commercial law was raised at the beginning of this report, see p.2
[350] NOTE: T*his is the really the core of the paper but I have not yet fleshed out some ideas I have here – I have just discovered Fiona Haines paper cited at fn 78 about 'regulatory character' as a potential theoretical framework to explore the relationship between social norms and the existing business model and potential reforms to the legal framework for co-operatives. These reforms would involve decentralizing the model, by encouraging the creation of internal governance rules by the members that resonate with their own social norms, rather than on the adoption (usually forced) of an imposed set of 'model rules' that have do not translate.*

together to improve the economic, social or ecological situation of their village.[351] To be effective such a co-operative requires clearly defined objectives which appeal to both the self- interest of individual members and their mutual interests as a community. For example, the community could use village savings clubs and cash cropping to provide seed funding for a community project e.g. the establishment of a school or medical centre. The idea is for the community to start out with small achievable projects and allow the co-operative to evolve. Along the way the members need to be educated about co-operative principles and governance. The legal framework for 'community co-operatives' does not need to be complex, but needs to involve incorporation as a separate entity. The 'four legs' model of representative governance at the committee level is likely to provide protection for members based on customary norms. Most importantly the legal frameworks need to ensure that these 'community co-operatives' are autonomous and allow room for participatory rule making at the local level.

The fundamental distinction between a 'community co-operative' and the 'community company' structure introduced in Solomon Islands is the requirement that the community co-operative members must mobilise their own resources (including labour, capital, goods etc.) to achieve the goal of community development. A community company may simply exist as an entity which is the passive recipient of external funding and support. If the community co-operative is not driven by self- help it is unlikely to remain autonomous and will not flourish.[352]

Using the same principles of horizontal integration as credit unions, 'community co-operatives' can federate to provide area co-operatives to support larger projects. At this level, they can provide a conduit between the state government and local communities for public/private projects e.g. the provision of roads and infrastructure. These larger projects should not be attempted until the governance structures for community co-operatives have matured and evolved to the point where community members and (particularly women and youth) have confidence and trust in the structure as a genuine representation of their individual and mutual interests. The role of the state is to create supportive legal frameworks to give co-operatives the autonomy to develop their potential as community self-help organisations. This will require a review of the existing co-operative law in both countries, and the formulation of broad policy on co-operative development. Any law review and policy formulation must include 'knowledge sharing' with the communities whose needs are to be met.[353]

[351] Munkner, above n , 10.
[352] Ibid, 13.
[353] Ibid, 5.

DRAFT Work-in-Progress Paper: Rethinking Law, Economy and Environment Workshop

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Introductory comments about this draft paper: At this stage, this paper is more practical, than theoretical. I've written some shorter pieces (with colleagues who are based in Western Australia – which is also my home state) that have fed into the reform debate, but these pieces have all been focussed on 'the law' (and analysing the legal implications of the reforms). Yet, it goes without saying, that there is so much beyond 'the law' that needs to be explored in relation to these reforms. I feel I've got a good grasp of the issues, but am looking forward to using the workshop to further flesh out the theoretical frame.

Aboriginal heritage laws in the West: Legislative reform in an interconnected regulatory space

Until recently, Western Australia (WA) was the economic powerhouse of Australia; the mining 'boom' state. With the crash of iron-ore prices, fears are growing that the boom is at an end. The State of Western Australia (the State) has been loudly voicing its economic need for a 'fairer share' of revenue from Commonwealth taxes.[354] Meanwhile, intra-state discussions about issues that in some way impact the mining industry are becoming more opaque. This has come to a head in the recent debates about reform of Aboriginal heritage legislation that was originally conceived in the 1970s: the *Aboriginal Heritage Act 1972* (WA) (the AH Act). Aboriginal heritage laws regulate the environment (broadly conceived to include the cultural environment) and represent values of 'society' in protecting heritage; though, the values of which society (or societies) is contestable. Clearly, such laws also have the potential to hinder, or make way for, economic development.

All the major stakeholders - Indigenous groups, developers and the State – openly acknowledge one thing: the Aboriginal heritage legislation is not effective as it currently stands. Why it is not effective depends on which perspective you are considering. From the perspective of Indigenous groups, their sacred places are not adequately protected. This is not simply mining versus Indigenous communities, rather it is a more nuanced argument relating to inadequate consultation. Developers (including mining companies) argue that even if they wish to 'do the right thing', the process is long and unnecessarily arduous – it is 'inefficient'. The State is trying to 'tread' a line in the middle, noting on the website of the responsible government Department (the Department of Aboriginal Affairs) that the 'pace of economic development…has highlighted inadequacies with the current legislation' and that changes are now required to 'ensure that our Aboriginal heritage can continue to be protected in an efficient and effective way'.[355] Even with such finely 'balanced' statements from the State, the issues have often been characterised as 'economy versus environment': the pro-mining ('wild west') State

[354] See, for example: 'Western Australia threatens to stop cooperation with Commonwealth over shrinking GST share', http://www.abc.net.au/news/2015-04-08/wa-threatens-to-stop-cooperation-with-commonwealth-over-gst/6378834.

[355] Department of Aboriginal Affairs, 'AHA Review': http://www.daa.wa.gov.au/heritage/aha-review/

government seeks to minimise anything that might prevent development. What has made this particular example even more interesting is that during the reform debate, a successful judicial review application, determined in April 2015 by the Supreme Court of WA, revealed 'behind-the-scenes' forms of regulation by the State. The State was using a specific interpretation of the legislation to determine that heritage sites no longer met the criteria. This interpretation was held by the Supreme Court to be invalid, which has caused the State to have to re-consider applications to damage certain Aboriginal heritage sites.

While there is undoubtedly some truth in the 'economy versus environment' arguments, there seems to be a much more complex debate here. If the debate did hinge on such a dichotomy it would seem that it would have been easier for the State to 'rush through' this legislation without much public scrutiny. Yet, the proposed reforms (the Aboriginal Heritage Bill 2014), have only proceeded to the Second Reading Speech stage and have been subject to much public debate and media attention. By suspending taken for granted dichotomies, we can more accurately map the debate by highlighting broader notions of ethics, rights and legitimacy; all considerations of Weber's treatise. It is clear that not only are we seeing shifting economic issues in terms of the mining downturn, but shifting legitimacy of (western, non-Indigenous) law and law reform processes. The regulation of Indigenous heritage through State legislation is now impacted by 'rights', that in turn have an impact on legitimacy and ethics. Since the 1970s, much has changed in this regulatory space, particularly in the increasing presence of Indigenous peoples at an international level and the potential for this to impact domestic legal systems.

This paper seeks to explore the notion that failure to conceptualise all issues in this debate – economic, environmental and socio-legal – as part of an interconnected regulatory space, seems to have led to a political-economic context that is not conducive to 'effective' law reform. Regulatory space first involves seeing the law in a much more expansive way: through a regulatory lens.[356] Second, but related, it involves considering the space in which law is made and operates: including the environment, the time and the place. In doing so, this paper acknowledges that there are many other helpful and important ways to explore this issue, including by critiquing the limitations of western cultural heritage laws more broadly (and their separation from Indigenous legal systems and other western laws relating to intellectual property, the environment and biodiversity).[357] Further, there is a bigger picture in WA that needs to be considered, with simultaneous debates about the closure of remote Indigenous communities as well as recognition of Aboriginal peoples in the State Constitution of WA.[358] However, this particular paper is focussing on the impacts of the regulatory space on western law relating to cultural heritage. It is clear that this is not only a theoretical exercise, as the process of reforming the legislation is ongoing.

[356] Christine Parker, Colin Scott, Nicola Lacey and John Braithewaite, 'Introduction' in Christine Parker, Colin Scott, Nicola Lacey and John Braithewaite (eds), *Regulating Law* (OUP, 2004) 1.
[357] See, for example, the work of: Terri Janke and Robynne Quiggan, Background Paper Number 12: Indigenous cultural and intellectual property and customary law, Law Reform Commission of Western Australia, Perth, 2005.
[358] Further, Aboriginal heritage is an interconnected part of a much bigger whole. For example, the Royal Commission into Aboriginal Deaths in Custody recommended that Aboriginal communities in WA be able to negotiate mechanisms so that Indigenous custodians could be in control of sites of significance to them.

We will first look into the historical context of the AH Act before getting an understanding of its current operation. Then we will consider the reform debates, initially considering 'the legal' and then broadening the regulatory space.

Context of the *Aboriginal Heritage Act 1972* (WA)

For the most part, legal 'protection' of Aboriginal and Torres Strait Islander heritage in Australia is the responsibility of the States and Territories. There is an overarching Commonwealth statute - the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) - however, the Commonwealth legislation is an 'Act of last resort' and is not intended to 'exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with this Act'.[359] Effectively, the Commonwealth legislation provides for a regime where the Commonwealth can step in where they consider that State or Territory laws do not adequately protect a particular area or object.[360] However, the operation of this Act, and the reluctance for the Commonwealth to take action, has been heavily criticised.[361] In one particular matter, where the Federal Minister had refused to step in, a Senator for WA had a conversation with the Federal Minister for Indigenous Affairs (then, Mr Robert Tickner) in which, according to her uncontested account (that was recorded in a Federal Court decision), she said to Mr Tickner:

> "Why can't you intervene and protect the brewery site?" Mr Tickner replied: "I can't act without the approval of Cabinet." Senator Chamarette said: "Yes, you can. You're the Minister" To which Mr Tickner replied: "You get 100 per cent for law and zero for politics." [362]

This particular case related to the development of the old Swan Brewery site along the Swan River foreshore in Perth (between the city and the University of Western Australia, at the foot of Kings Park). The site is associated with the Waugyl – a serpent that is part of a Dreaming Track of great significance.[363] As French J (as he was then) noted in his judgment, it was not in dispute that it was an Aboriginal site for the purposes of the AH Act.[364] In that case, the WA Government had gone so far as to attempt to suspend the operation of all relevant State planning and Aboriginal heritage legislation in relation to the site, although this order was later disallowed by the Legislative Council (upper house) of the WA Parliament.[365] Despite numerous challenges under both the State and Federal legislation, the old Swan Brewery was developed on the basis of Ministerial discretion to allow damage of Aboriginal heritage sites.

The AH Act commenced on 15 December 1972; before the ground-breaking *Aboriginal Lands Rights Act (Northern Territory) Act* 1976 (Cth) and well before the *Mabo* native title decision. This has led to a disjuncture, which continues to this day, between

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[359] *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), s 7(1).
[360] Elizabeth Evatt, 'Overview of State and Territory Aboriginal Heritage Legislation' [1998] IndigLawB 82 <http://www.austlii.edu.au/au/journals/ILB/1998/82.html>.
[361] See for example, Evatt Review.
[362] *Tickner v Bropho* (1993) 40 FCR 165
[363] *Tickner v Bropho* (1993) 40 FCR 165 [5] (Black CJ)
[364] *Tickner v Bropho* (1993) 40 FCR 165 [16] (French J)
[365] *Tickner v Bropho* (1993) 40 FCR 165 [12] (Black CJ)

cultural heritage and any other forms of Aboriginal rights. However, as noted in the Second Reading Speech in 1972, all 'other States with Aboriginal populations have already legislated in this field'.[366] The broad ideas behind the Aboriginal Heritage Bill 1972 were not viewed by the members of the WA Parliament as particularly controversial. A member in the Opposition, who rose to suggest amendments but support the Government's Bill, stated that:

> … I do not regard the Bill as a party political measure, because I am sure all members who are interested in matters Australian will desire to achieve the best possible results.[367]

The Second Reading Speech, and associated replies, identify both mining and agricultural development as the reason behind the Bill:

> In recent years it has become increasingly difficult in Western Australia to find means to ensure the safety of Aboriginal sites other than by giving them legal protection…. during the last decade the intensive mineral exploration of even the most remote parts of the State, and the more intensive agricultural and pastoral development, have revealed many sites which were formerly *unknown*.[368] [emphasis added]

Of course, 'unknown' is from the perspective of the non-Indigenous people. There is also particular mention of vandalism as a 'major problem'.[369]

The Second Reading Speech starts with a focus on the importance of the protection of these sites for Aboriginal people. The Honourable W. F. Willesee (member of the Labor party, that was then in Government) stated that preservation of sites and objects is 'now recognised throughout Australia as an important aspect of providing Aboriginal citizens with the social environment that they need when they still retain partly or wholly their traditional religious beliefs'.[370] Further, that sites and objects are 'also of great significance in religious practices' and that 'at this time of changing circumstances for the Aboriginal people, this religious system provides stability which is of great importance to them'.[371] The Second Reading Speech then shifts to acknowledge the importance to 'Australians of non-Aboriginal origin' of the 'very great historical and aesthetic importance to mankind' of such sites, even noting that their 'preservation is regarded as a matter of world concern'.[372] It is certainly this latter focus that came through in the AH Act as enacted; the use of the words 'on behalf of the community' in the long title signify this.

The main response to the Second Reading Speech came from the Opposition member the Honourable G. C. MacKinnon. Prior to the election of the Labor government in early

[366] Western Australia, Parliamentary Debates, Legislative Council, 11 April 1972, p. 472 (Hon. W. F. Willesee).
[367] Western Australia, Parliamentary Debates, Legislative Council, 20 April 1972, p. 834 (Hon G. C. MacKinnon).
[368] Western Australia, Parliamentary Debates, Legislative Council, 11 April 1972, p. 472 (Hon. W. F. Willesee).
[369] Ibid.
[370] Ibid, p. 471 (Hon. W. F. Willesee).
[371] Ibid and p. 472.
[372] Ibid.

1971, MacKinnon had been the first Minister for Environment in WA (appointed in 1970).[373] Yet, his comments did not link the contents of the Bill to broader issues of the environment. He stated the danger that the Act is 'in fact a Bill relating to the Museum and that the reference to Aborigines is, in the main, purely ancillary to the original purpose'.[374] This echoes some of the contemporary concerns about the 'museum mentality' of the current AH Act, to which we will soon return. However, these fears as voiced by MacKinnon had a different connotation. He went on to note that the people 'who collect, catalogue and collate material…maybe become overenthusiastic and feel that their cause justifies overriding the rights of other people'.[375] These 'other people' he referenced were non-Indigenous people, as he went on to emphasise the importance of ensuring that 'the general public will feel reassured about the protection of their property rights'.[376]

In his response, MacKinnon also notes that 'artefacts are, of course, of great interest to anthropologists and the like because the Australian Aboriginal was a primitive person technologically'[377] and that:

> Quite apart from this it forms a part of Australiana, as such, and this is of great interest to *us* and will be of increasing interest as the years go by to those who come after *us*.[378] [emphasis added]

Another member from the Opposition, the Honourable W. R. Withers, also speaking in support of the Bill, was held out by MacKinnon as somewhat of an 'expert' on this topic. Withers was the member of the 'North Province' which was the remote north of WA. Withers spoke of his private collection of native artefacts and his knowledge of religious pieces (carved in wood or stone) that relate only to men (he noted in relation to this that: 'I hope the followers of the Women's Lib will not be offended').[379] He also recounted a personal story where he had been informed of the discovery of a cave and how the 'natives did not want us to find that cave'.[380] Though, Withers did suggest that any authorisation for entry upon and excavation of a site would be 'pursuant to the permission of the Aboriginal consultative council for the area'. [381] At the time, this was a very progressive idea, but it was not incorporated into the legislation.

Clearly, the regulatory space in which this Bill was debated and passed was controlled by non-Indigenous people (and almost all men, there being only one women in WA Parliament at the time).[382] There was no obvious consultation undertaken with

[373] Parliamentary Library of WA, Environment Ministers of Western Australia <http://www.parliament.wa.gov.au/intranet/libpages.nsf/WebFiles/Publications+Ministers+-+Environment+2013+March+21/$FILE/Environment+Ministers+2013+March+21.pdf>
[374] Western Australia, Parliamentary Debates, Legislative Council, 20 April 1972, p. 831 (Hon G. C. MacKinnon).
[375] Ibid.
[376] Ibid.
[377] Ibid.
[378] Ibid.
[379] Western Australia, Parliamentary Debates, Legislative Council, 20 April 1972, pp. 837 and 839 (Hon W. R. Withers).
[380] Ibid, p. 839.
[381] Ibid, p. 838.
[382] The first Indigenous member of the WA Parliament was elected in 1980 in the seat of Kimberley (Ernie Bridge, Labor Party): Australian Electoral Commission, Electoral milestones for Indigenous Australians

Aboriginal people about how the legislation should operate, or how a heritage site should be defined, rather there was acknowledgement that heritage protection was important both to Aboriginal people and to the community as a whole, in different ways. Although there was acknowledgement of the environmental 'context' of the mining and pastoral industries as a catalyst, there was no further links made. Yet, the Bill in essence allowed for (and the AH Act in its current form still allows for) industry to apply for State sanctioned 'permission' to damage or destroy heritage sites. The pragmatic aspects of the Bill were acknowledged. During the Second Reading Speech, MacKinnon interjected and said: 'We will be dead unlucky if they find something when they dig up Hay Street [the main street in Perth's city centre]'. MacKinnon clarified in his response that this was the example given when this matter was discussed. He went on to note that:

> Obviously the trustees [of the WA Museum] should be informed in terms something like this, 'You have *one night* to collect the artefacts.' Under the provisions of this subclause the minister can ensure that this is done. [emphasis added]

This answer presumes that 'artefacts' can easily be removed from the environment, and that clearly the economic imperative of digging up the main street will be given swift ('one night') preference over further consultation or thought of protection.

The operation of the *Aboriginal Heritage Act 1972* (WA)

The long title of the AH Act as enacted in 1972 was (and still is):

> An Act to make provision for the preservation *on behalf of the community* of places and objects customarily used by or traditional to the original inhabitants of Australia or their descendants, or associated therewith, and for other purposes incidental thereto. [emphasis added]

A review of the Commonwealth legislation in 1996 revealed the differences across States and Territories and suggested that minimum standards should be established. Since that review, a number of States and Territories have reformed their heritage acts, in some cases substantially, but WA has not yet undertaken such reform.

The AH Act makes it the 'duty' of the responsible Minister (the Minister for Aboriginal Affairs) to ensure 'so far as is reasonably practical' that all places in WA that are of traditional or current sacred, ritual or ceremonial significance should be recorded 'on behalf of the community' and their relative importance evaluated.[383] The AH Act applies to certain 'objects' and 'places'. Objects can be natural or artificial but must be or have been 'of sacred, ritual or ceremonial significance to persons of Aboriginal descent…' or '…connected with the traditional cultural life of the Aboriginal people past or

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http://www.aec.gov.au/indigenous/milestones.htm. Also see: Parliamentary Library of WA, Women in Parliament <http://www.parliament.wa.gov.au/intranet/libpages.nsf/WebFiles/FACTSHEETS+SN+08+WOmen+in+Parliament+2013+May+updated+9+april/$FILE/FACTSHEETS+SN+8+Women+in+Parliament+2013+May+updated+9+april.pdf>.

[383] AH Act, s 10.

present'.[384] However, it does not apply to a collection of objects held by the WA Museum.[385] Places include any 'sacred, ritual or ceremonial site, which is of importance and special significance to persons of Aboriginal descent' or a place 'associated with the Aboriginal peoples and which is of historical, anthropological, archaeological or ethnographical interest and should be preserved because of its importance and significance to the cultural heritage of the State'.[386]

With respect to places, the key operational provisions of the AH Act are sections 17 and 18. Section 17 creates offences related to Aboriginal sites and prohibits (amongst other things) destroying or damaging an Aboriginal site or object. It should be noted that it is a defence for a person charged under the Act to prove that 'he did not know and could not reasonably be expected to have known' that the place or object was one 'to which this Act applies'.[387] Section 18 provides that the Minister can consent to uses of the land that would result in a breach of s 17.[388] Applications under section 18 are made to the Aboriginal Cultural Materials Committee (the Committee) which is established under the AH Act. The functions of the Committee include evaluating 'on behalf of the community the importance of places and objects alleged to be associated with Aboriginal persons' and recommending to the Minister places or objects which are of 'special significance to persons of Aboriginal descent and should be preserved, acquired or managed by the Minister'.[389] In relation to a s 18 application, the Committee then makes a recommendation to the Minister which the Minister 'shall' (as a matter of statutory interpretation, 'must') consider the recommendation but does not have to follow it.

The Committee is not required to have Aboriginal members, rather members appointed shall be selected based on having 'special knowledge, experience or responsibility' which in the opinion of the Minister is relevant.[390] Although:

> In practice, a section 18 application requires a heritage survey, which will include some consultation with Traditional Owners. However, non-Indigenous consultants are inevitably required to assess the significance of sites and/or objects, because the AH Act frames significance and importance in terms of anthropological and archaeological criteria.[391]

It should also be noted that the Act 'shall not be construed' to take away or restrict any right or interest in so far as it 'is exercised in a manner that has been approved by the Aboriginal possessor or custodian of that place or object' and is not contrary to usage sanctioned by Aboriginal tradition.[392]

[384] AH Act, s 6(1) and (2).
[385] AH Act, s 6(2a).
[386] AH Act, s 5(b) and (c).
[387] AH Act, s 62.
[388] AH Act, s 18(2).
[389] AH Act, s 39(1)(a) and (c).
[390] AH Act, s 28(4).
[391] Ambelin Kwaymullina, Blaze Kwaymullina and Lauren Butterly, 'Opportunity Lost: Changes to Aboriginal Heritage Law In Western Australia' (2015) 8(16) *Indigenous Law Bulletin* 25.
[392] AH Act, s 7(1).

There has been relatively little legal or academic commentary written on the AH Act, but what has been written has been highly critical.[393] In particular, questions have been raised about whose interests are primarily being served: 'community interests or Aboriginal interests'?[394] The use of phrases such as 'for the benefit of the community' has even impacted on standing provisions in litigation.[395] As noted by David Saylor:

> …whilst an association may gain standing on the grounds that proposed resource development affects that association's interests in land, Aboriginal plaintiffs are characterised as lacking any special interest in Aboriginal heritage because the *Aboriginal Heritage Act* is said to have been enacted for the benefit of the whole community![396]

Saylor further states that Aboriginal people 'have little or no trust in the Act'. David Ritter's more recent article in *Studies in Western Australian History* used a 'kind of interrogation of legal institutions and doctrines that is best associated with critical legal theory' to 'trash' the AH Act.[397] He notes that '[t]rashing is an exercise in deconstructing legal orthodoxies, aimed at exposing the ambiguities and ironies that are latent within liberal legal discourse'. Ritter draws attention to the limited role of Aboriginal people in the processes of the AH Act, the limited ability of Aboriginal people to enforce provisions of the Act and also the 'simplistic' position that all objects and places can be easily isolated (geographically and conceptually) so they can be mapped. In doing so he identifies where the power lies and suggests that the AH Act has the effect of legitimising destruction of Aboriginal heritage. Ritter also emphasises the scientific nature of the AH Act in terms of 'anthropological, archaeological and ethnographic interests' that create a museum mentality, and the use of 'value neutral' science to 'mark and legitimate' political agenda.[398] In his conclusion, Ritter also notes that 'merely attacking the inadequacy of the [Act] does not explore the power relationships that exist within and are perpetrated by the [Act]'.[399]

Ritter's article presents a valuable critique. However, even though it was only published in 2003, Ritter's article was written in a different regulatory space. The article pre-dates the economic downturn, the current round of debates about reform and the judicial review determination, as well as the expansion of Indigenous involvement in the international space. We are going to first consider these developments in turn, and then explore the emerging regulatory space in more detail, as the reforms bring out themes which demonstrate issues of legitimacy and rights.

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[393] David Saylor, 'Aboriginal Cultural Heritage Protection in Western Australia: the Urgent Need for Protection' [1995] Aboriginal LawB 51; (1995) 3(77) *Aboriginal Law Bulletin* 9 <http://www.austlii.edu.au/au/journals/AboriginalLawB/1995/51.html>; David Ritter, 'Dilemmas of rights and power in the operation of Western Australia's Aboriginal Heritage Legislation' (2003) 23 *Studies in Western Australian History* 195.
[394] Saylor, above n 40.
[395] For example, *WA v Bropho* (1991) 5 WAR 75.
[396] Saylor, above n 40.
[397] Ritter, above n 40.
[398] Ritter, above n 40, pp. 200 - 201.
[399] Ibid, p. 208.

Calls for Reform and the Recent Supreme Court Challenge

The initial consultation process for the current reforms began in 2012. A discussion paper was commissioned to be undertaken by a non-Indigenous policy expert and then submissions were received after key amendments were outlined. On the Department of Aboriginal Affairs' website it states that between 2012 – 2014, the Department 'actively engaged with those that work within the confines of the Act – including industry and relevant Aboriginal organisations – to ensure the proposed amendments were balanced and would be effective'.[400] Then in 2014, a draft 'Aboriginal Heritage Amendment Bill' was provided and there was a subsequent consultation period. As was noted by my colleagues Ambelin and Blaze Kwaymullina and I:

> The majority of the 150-plus submissions received on the Draft Bill were critical of aspects of the changes but these submissions have had little impact. When the comment period on the Draft Bill was closed in August 2014, the WA Government committed to further consultation, but when the final Bill was introduced into Parliament in November 2014, it was not substantially different to the Draft Bill.[401]

The media release from the responsible Minister which outlined this further consultation was ironically titled, 'Aboriginal people to guide heritage regulation'.[402]

When the Bill was introduced to Parliament on 27 November 2014, the Second Reading Speech stated that:

> The aim of this bill is to make a series of amendments to the act to improve its efficiency and effectiveness, while ensuring the continued and enhanced protection of Aboriginal heritage.[403]

It was noted in the media release that the changes were only 'modest', but also that the Act was 'outdated' and struggling under an 'antiquated approvals process'.[404] The key reforms included harsher penalties, improvements to enforcement mechanisms (such as an extension of the time to prosecute) and also a streamlining of approvals processes. The first two of these aims have largely drawn support from the Aboriginal community.[405] The third aim has been highly controversial. The amendments effectively put all the responsibility for evaluating significance of places and objects in the 'CEO of the Department', rather than having to go through the Committee. It also allows to CEO

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[400] Department of Aboriginal Affairs, 'Consultation' <http://www.daa.wa.gov.au/heritage/aha-review/consultation/>.
[401] Kwaymullina, above n 38.
[402] Media Release, 'Aboriginal people to guide heritage regulation' 11 August 2014 <https://www.mediastatements.wa.gov.au/Pages/Barnett/2014/08/Aboriginal-people-to-guide-heritage-regulation.aspx>.
[403] Western Australia, Parliamentary Debates, Legislative Assembly, 27 November 2014, pp 8995b-8997a (Hon Dr Kim Hames).
[404] Media Release, 27 November 2014, 'Changes coming to 40-year-old Aboriginal Heritage Act' <https://www.mediastatements.wa.gov.au/Pages/Barnett/2014/11/Changes-coming-to-40-year-old-Aboriginal-Heritage-Act.aspx>.
[405] Western Australia, Parliamentary Debates, Legislative Assembly, 27 November 2014, pp 8995b-8997a (Hon Dr Kim Hames).

to issue declarations that no sites exist in particular places. Both the media release and the Second Reading Speech detail that the CEO will have to take into account the views of Aboriginal people in making decisions, but it is not clear why this is so. It appears that important aspects of the reforms are going to be spelled out in Regulations that have yet to be drafted. Further, Regulations do not go through the same level of parliamentary scrutiny as a Bill.

While the reform debate was continuing, in April 2015, the Supreme Court of WA determined a judicial review application about a decision of the Committee under the current legislation. A heritage site in Port Hedland, a large mining town in the Pilbara (mid north-west) region of WA, had been placed on the Register of Aboriginal Sites in 2008; but a 2013 decision which was made on the basis of a report prepared by the State appeared to determine that it was 'not a site'.[406] In the lead up to that case it became apparent the other sites had also had their status changed to 'not a site'. This was on the basis of some legal advice received by the Committee from the State Solicitor's Office of WA.[407] This advice stated that:

> For a place to be considered a sacred site, it must be demonstrated that it is devoted to a religious use rather than just a place subject to mythological story, song or belief.[408]

On 17 March 2015, the WA Minister for Aboriginal Affairs stated in Parliament that since 2012, 22 Aboriginal sites have changed status to 'not a site'.[409] This number then rose as the Department uncovered additional sites that had changed status.[410] Further, sixteen sites that had been submitted as heritage places to the Committee had been assessed as not meeting the criteria.[411] These sites will all be resubmitted to the Committee for reassessment.[412] However, in the meantime, there is actual or proposed development on some of these sites and, according to the Minister, 'there is no power under the *Aboriginal Heritage Act 1972* to allow for the issue of a stop work or similar order'.[413]

The majority of questions in Parliament about this matter have come from the Honourable Robin Chapple MLC. Robin Chapple was the first Greens representative to be elected for the Mining and Pastoral Region.[414] If Chapple had not asked these

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[406] *Robinson v Fielding* [2015] WASC 108 [15].
[407] "The State Solicitor's Office is responsible for the provision of broad based, high quality legal services to the Government of Western Australia and to a wide range of state government client departments and agencies.": http://www.department.dotag.wa.gov.au/S/state_solicitors_office.aspx?uid=5095-2404-2051-6561
[408] Western Australia, *Parliamentary Debates*, Legislative Council, 17 March 2015, pp. 1277c-1278a (Hon Peter Collier).
[409] Ibid.
[410] Western Australia, *Parliamentary Debates*, Legislative Council, 16 June 2015, pp. 4259b-4259b (Hon Robin Chapple) and Western Australia, *Parliamentary Debates*, Legislative Council, 18 June 2015, pp. 4633c-4634a (Hon Peter Collier).
[411] Western Australia, *Parliamentary Debates*, Legislative Council, 13 May 2015, p3573d-3574a (Hon Peter Collier).
[412] Ibid.
[413] Western Australia, *Parliamentary Debates*, Legislative Council, 21 May 2015, p4143d-4145a (Hon Peter Collier).
[414] http://www.robinchapple.com/

questions in Parliament, the public would be 'none the wiser' about the number of sites, other than the one relating to the Supreme Court case, that had changed or been refused status. The judicial review case revealed a certain type of regulation going on by the State. The legal advice of the State Solicitor's Office was in the form of a set of printed Guidelines 'designed to assist in the interpretation of the Act'.[415] The Guidelines were at one point available on the Department's website, but after the Supreme Court decision, they were no longer available.[416]

Perhaps the most interesting aspect of the judicial review decision was that it revealed that the mining company involved acknowledged that the site was of 'deep cultural importance' and 'continued to urge' recognition of the deep cultural importance of the site.[417] It was the State's report that had effectively taken the site off the register. It seems that the economic downtown has caused State intervention, rather than State retrenchment.

The regulatory space of Aboriginal heritage in WA

Seeing law 'through a regulatory lens'[418] allows us to suspend taken for granted dichotomies. Regulation can broadly be defined as 'influencing the flow of events' and influencing may involve 'mechanisms of standard setting, information gathering and behaviour modification'.[419] Of course, there are many ways to apply a regulatory lens. Increasingly, the idea of regulatory space has become an important tool for legal academics in analysing law, regulation and governance.[420] Regulatory space can be said to be part of the 'family' of theories that focus on pluralism.[421] It involves considering the space in which law is made and operates: including the environment, the time and the place.

Since the Draft Aboriginal Heritage Bill was released, there has been much media commentary; a petition to Parliament with more than 1,600 signatures requesting further consultation with the WA Indigenous community; a rally on the steps of WA Parliament House with more than 60 Traditional Owners and elders representing each region of WA (some travelling vast distances to be present in Perth); and the issues were formally raised by a WA Indigenous land council at the United Nations Permanent Forum on Indigenous Issues (UN PFII) in New York.[422] This last event was reported in the mainstream media in Australia and coincided with the first Australian being elected as Chairperson of the UN PFII.[423]

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[415] 'Section 5 of the Aboriginal Heritage Act 1972 (WA)' (s 5 Guidelines).
[416] E-mail from DAA.
[417] *Robinson v Fielding* [2015] WASC 108 [38] and [138].
[418] Christine Parker, Colin Scott, Nicola Lacey and John Braithewaite, 'Introduction' in Christine Parker, Colin Scott, Nicola Lacey and John Braithewaite (eds), *Regulating Law* (OUP, 2004) 1.
[419] Ibid and Julia Black, 'Regulatory Conversations' (2002) 29(1) *Journal of Law and Society* 163, 170.
[420] Bettina Lange, 'Regulatory Spaces and Interactions: An Introduction' (2003) 12(4) *Social and Legal Studies* 411, 414.
[421] [421] Colin Scott, 'Analysing Regulatory Space: Fragmented Resources and Institutional Design' (Summer 2001) *Public Law* 329, 330.
[422] ABC News, 'Protesters in WA present petition against changes to Aboriginal Heritage Act' http://www.abc.net.au/news/2014-11-20/protest-against-changes-to-aboriginal-heritage-act/5906040
[423] The Guardian, 'UN forum backs fight against closure of remote Aboriginal communities in WA' <http://www.theguardian.com/australia-news/2015/apr/23/un-forum-backs-fight-against-closure-of-remote-aboriginal-communities-in-wa>.

Following on from this last point, this paper is going to focus on one change in the regulatory space that has become clear from the public debates: the emergence of the international Indigenous rights framework. As noted by Larson, 'Indigenous rights are associated with the creation of expansive agency and legitimacy that regulate international bodies, states and the indigenous rights movements itself'.[424] Further, that '[w]hen movements are unable to induce a government response domestically, they may seek additional support from international non-government organisations and social movements who may then activate international pressure on the otherwise non-responsive government'.[425] A number of the public submissions about the Aboriginal Heritage Bill identified that the Bill was not compliant with the *UN Declaration on the Rights of Indigenous Peoples* (2007) (UN DRIP) which Australia signed in 2009, including cl 12(1):

> Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

The Kimberley Land Council (KLC) noted in a press release that:

> Our calls in Australia for engagement, discussion and empowerment have fallen on deaf ears. We are being ignored by all levels of government. The United Nations provides an international platform for us to raise awareness about these racist and discriminatory actions.

In line with this, the KLC raised their concerns about the Aboriginal Heritage Bill at the UN PFII:

> The Aboriginal Heritage Act, in both its current state and proposed amended form, is contrary to international human rights norms and is an example of systemic racism legitimatised and institutionalised by legislative means. These laws entrench principles of colonial superiority and provide legal protection for systemic racism.[426]

Clearly, just because issues are raised at an international level does not mean there will be a domestic impact. There has been much academic commentary, with divergent opinions, about whether the UN DRIP in particular would lead to changes in domestic spaces.[427] This commentary goes well beyond arguing that because it is a Declaration (not a Convention) it is not binding at international law and extends into arguments

[424] Erik Larson, 'Regulatory Rights: Emergent Indigenous Peoples' Rights as a Locus of Global Regulation' in Bronwen Morgan (ed), *The Intersection of Rights and Regulation: New Direction in Sociolegal Scholarship* (Ashgate, 2007), 108.
[425] Ibid, 121.
[426] Kimberley Land Council, KLC condemns community closures at United Nations <http://www.klc.org.au/news-media/newsroom/news-detail/2015/04/21/klc-condemns-community-closures-at-united-nations>.
[427] See, for example, the articles (and references in): Megan Davis, 'Indigenous Struggles in Standard Setting: The United Nations Declaration on the rights of Indigenous Peoples (2008) 9 *Melbourne Journal of International Law* 439.

about whether use of a State-based mechanism such as the UN only perpetuate colonial discourses about Indigenous rights. This paper does not seek to explore these arguments, rather to look at how, in the words of Megan Davis, some Indigenous organisations are 'putting meat on the bones of the UN DRIP' in particular spaces.[428]

In this sense, it is important to think of WA as a space. In relation to another issue that is also currently being debated in WA – closure of some remote Aboriginal communities, which was also raised by the KLC at the UN PFII - the UN Special Rapporteur on the Rights of Indigenous Peoples made particular comments, noting that the policy 'smacks of racism'.[429] However, the Premier of WA responded by saying: 'Have they been to Aboriginal communities? Where does she live? New York, maybe? This is WA.'[430] This separation of WA from other places (and spaces) is commonly heard in Australian political debates and news cycles – WA is different and those from other places do not understand the vastness of the State and its economic circumstances. It has been particularly prevalent in debates about the 'carve up' of the Goods and Services Tax.

The movement of this debate into the international sphere has caused a shift away from the silos of law, economy or environment. In fact, the KLC in particular is an interesting example of this as they have previously, and prominently, supported development on their land in relation to the controversial James Price Point development.[431] The concerns that the KLC raised at the UN PFII were predominantly about inadequate consultation. Building on this, the majority of the submissions, and the media debate, has focussed on lack of consultation with the Indigenous community including that the comment period on the Draft Bill was too short, that the process as a whole failed to meaningfully involve Aboriginal people and that important aspects will be in the regulations which are not yet available for comment.[432] This is on top of the concerns about the lack of consultation requirements in the Bill itself going forward. The focus on consultation is not just a part of the formal requirements under the UN DRIP, but also about legitimacy.

Conclusion

The regulatory space has changed in WA in relation to cultural heritage. Although the international Indigenous rights element, and the Indigenous organisations and people involved in this, is just one part of this, it is having a profound influence. The reform debate is now squarely about consultation and its relationship to legitimacy and ethics. The WA Government is made up of a loose coalition between the Liberals (who proposed the reform legislation) and the National Party. However, National Party MPs have indicated that they will not support the current Aboriginal Heritage Bill due to

[428] Megan Davis, 'Community Control and the work of the National Aboriginal Community Controlled Health Organisation: Putting Meat on the Bones of the UN DRIP' (2013) 8(7) *Indigenous Law Bulletin* 11, 13.

[429] The Guardian, 'Colin Barnett shrugs off protests against WA's remote community policy' http://www.theguardian.com/australia-news/2015/may/01/colin-barnett-shrugs-off-protests-against-was-remote-community-policy

[430] Ibid.

[431] In relation to this, and also for a broader exploration of the theme of Indigenous peoples and the environment see: Lauren Butterly, 'Changing Tack: *Akiba* and the way Forward for Indigenous Governance of Sea Country' (2013) 17(1) *Australian Indigenous Law Review* 2, 5 – 6.

[432] Kwaymullina, above n 38, 5.

concerns that the traditional owners have not been adequately consulted.[433] On the basis of this, the Bill won't be able to pass if it goes to vote.

The turn to focus on consultation also takes power away from phrases such as the Premier's: 'This is WA'. The focus of that statement is on the economy and the environment – whereas consultation broadens the debate to be beyond Western Australian specific. It also has the effect of broadening this issue to be of relevance to any potential legal or policy reforms that impact Aboriginal peoples in WA going forward. As noted by one of the Nationals Party MPs, traditional owners have 'worked closely with the Government and industry to facilitate the biggest mining expansion of all time'[434], therefore any changes to the legislation must be done with their support

[433] ABC News, 'National MPs unlikely to support changes to the Aboriginal Heritage Act' http://www.abc.net.au/news/2015-05-25/aboriginal-heritage-act-changes-unlikely-to-be-supported/6496222
[434] Ibid.

Environmentalism and an Anarchist Research Method

Peter Burdon*

In thinking about the way that liberal theory and legal practices have run aground when it comes to issues of environmentalism, alternative methods and approaches are highly desirable. On the surface, one of those alternatives, an anarchist legal method—and a concomitant research agenda that it produces--seems quite oxymoronic. Anarchism, it would seem, is the antithesis of a method.[435] Anarchism seems given over to free form and spontaneity; it suggests that, particularly when it comes to the law, there is nothing for anarchists to say or do insofar as the law is all about order and predictability whereas anarchism is nothing of the kind.

Yet, to make such a point is to concede a very basic liberal critique of anarchism; it offers that anarchism is chaotic and unsystematic. Liberalism prides itself as the most organized and rational of systems whereas it often projects onto anarchism visions of Lord of the Flies, chaos and a total lack of organization. In fact, however, it is our argument that liberalism is an inherently chaotic system and that the arguments it makes about anarchist chaos are actually a projection and externalization of its own darker and disordered aspects.[436] Because liberalism is above all involved with the promulgation and protection of the market, it is, in fact in the service of an eminently chaotic system.[437] The market ascribes winners and losers willy-nilly and it largely escapes the controls of human politics thus wrecking havoc, quite literally, on the planet. Therefore to a liberal who might ask how it is possible to have an anarchist legal method at all--much less one that applies to questions of environmentalism--our retort would be to say that it is liberalism that has put the world in such dire jeopardy by subordinating politics to the exigencies of a market that disregards all values, including the value of a sustainable and healthy planet.

Anarchism, I argue, is not chaotic but represents a way of reasserting a human based politics. Its method—and therefore the method of conducting and engaging in research as well — is to submit every decision, every action to politics. By politics I am not referring to the contemporary—and archist—models of rule whereby people vote (if they are allowed) for representatives who then effectively take on all subsequent decision making. Instead I am referring to the anarchist model of politics that eschews this form of representation entirely. Under anarchism, there is no voting for someone else. People speak as themselves and decisions are made by processes that cannot bypass or elude collective models of decision-making.[438] Rather than separating law and

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[435] The classic reference is Paul Feyerabend, *Against Method* (Verso 2010).

[436] Domenico Losurdo, *Liberalism: A Counter-History* (Verso 2014) and Richard Seymour, *The Liberal Defence of Murder* (Verso 2008).

[437] Immanuel Wallerstein, *The Modern World-System IV: Centrist Liberalism Triumphant, 1789-1914* (University of California Press 2011).

[438] In some ways, there are already anarchist tendencies in the forms of law that predominate in the English-speaking world. For example, during the English Reformation, John Lilburne argued that jurors had the right to judge the law itself and not just the facts being presented. Although Lilburne was not himself an anarchist (insofar as he sought to submit popular judgment to Scripture), that idea is reflected in the practice of jury nullification wherein juries can decide that the law for which a person stands accused is itself invalid. In the United States, the right of jury nullification is established everywhere but in only one state (New Hampshire) are jurors actually informed of this power. In some states it is a crime to let jurors know about this right and so the

politics an anarchist legal method has law directly address and express political decisions. This does not collapse law into politics, making law a nonentity. Rather, law can be read as the harnessing of political decisions, a way to apply local and disparate decisions in a way that stems directly from the experiences and knowledge's of these communities. The "method" in this case then is a decidedly horizontal one; rather than a top down model (which imitates the top down nature of archism more generally) where an academic projects "knowledge" onto some object of study, an anarchist method serves to immerse the researcher into the community in question, not to stand above it but to join it. In what follows I set out an exploration of the ways anarchist academics can do research in the field of environmental law, a way to think about encouraging further dialogue on this deeply critical question of how to address the despoilment and ruination of the planet.

Before examining the implications of anarchist methods and politics for research, I provide a three-part critique of liberal environmental law. First, I highlight the ways liberalism rationalises itself to the market and promotes a shallow discourse that offers "rights-talk" in place of more radical projects that seek to undermine or displace key sights of power. Second, I argue that environmental law has become highly specialised, reductionist and abstracted from the natural world. Environmental law lacks, not only overarching commitments but also a process for establishing what such commitments might be or how they can inform environmental governance. Finally, I argue that environmental law is primarily solution focused and motivated by a teleology that suggests that it is possible to reach a desired future state or equilibrium where contest and struggle are not longer required. Each of these factors, I argue, impedes rather than promotes environmental goals.

Following this I describe anarchism and anarchist legal method. Alongside self-identified anarchist thinkers, I will draw more broadly from the cannon of leftist and socialist thought. By this I mean a range of thinking that extends from left-wing Marxists, radical feminist scholarship and other disciplinary apparatuses that promote "people's knowledge" while eschewing vanguard politics. The critical link uniting the authors I engage is a concern to harness and empower the knowledge that comes from a given community. This commitment is at the heart of anarchist politics, and is particularly vital when it comes to issues of environmentalism. In this case, even the best meaning liberal research method is incapable of identifying, let alone addressing, the fundamental chaotic and anti-life forces that lie at the heart of the liberal polity.

To describe anarchist research method I first outline a series of epistemological and methodological points. Following this, I examine the relationship between anarchist research and activist research, as well as ethnographic scholarship. In presenting this analysis, I highlight the importance of contingency in anarchist research and the role of the researcher in "accompanying" communities to reflect, rather than determine the

anarchist possibility of law is present but hidden from the people who might practice it. Examples of communities having taken the law into their own hands include the Black Panthers in Oakland, CA., the Zapatistas in Chiapas, Aymara communities in El Alto, Bolivia and various anarchist communities in many countries which seek alternatives to state run prison and court systems. In every case, questions of law go from being a disengaged body that floats over the community (and which they must submit to) to an active and engaged decision-making process coming from the community itself. See further James C. Scott, *The Art of Not Being Governed: An Anarchist History of Upland Southeast Asia* (Yale University Press 2010).

modes of inquiry and action in question. Further, working off of James Scott's notion that communities are always engaged in acts of resistance, always fully aware of their circumstances and how to change them (even if, on the surface, they might seem quiescent and placid), I argue that an anarchist methodology relies on local knowledge and practices.[439] Rather than assume that the expert and the academic "knows better" than the members of the community involved, anarchism assumes the opposite. Those individuals who are directly affected and involved in questions of environmental justice, among other issues, are, in effect the true "experts" and their experiences are the basis for any representations of anarchist positions.

Finally, I conclude by offering a series of critical questions that can guide researchers about to embark on research projects. These questions are designed to reveal the partisan nature of anarchist research and prompt the investigator to consider how epistemology informs method, power dynamics between the researcher and the community and how research results will be shared and distributed.

Liberal Legal Method

The orthodox method of analysis in environmental law disguises important political assumptions and ideological commitments. Here I briefly describe three critiques that are particularly relevant to my argument.

First, while environmental law purports to be apolitical and objective, it is heavily burdened by the constraints of liberal political ideology. As already noted, liberal law must rationalize itself in terms of the demands of the market, the very force that is busily destroying the environment that the law purportedly protects.[440] Morton Horowitz, the critical legal historian from Harvard University, contends that the coupling of law to the market began in earnest during the industrial revolution, as corporate powers played an increasingly activist role in shaping law to suit their class interests. Horowitz notes: 'Law once conceived of as protective, regulative, paternalistic and above all, a paramount expression of the moral sense of the community, had come to be thought of as facilitative of individual desires and as simply reflective of the existing organization of economic and political power.'[441]

The influence of the market on law has only increased under the neoliberal State, one which prefers governance by executive order and by judicial decision rather than through participatory decision-making.[442] The neoliberal State has placed an increased reliance on public-private partnerships and corporate leaders not only collaborate intimately with government representatives but also have acquired a role in writing

[439] James C Scott, *Domination and the Arts of Resistance: Hidden Transcripts* (Yale University Press 1992); and James C Scott, *Weapons of the Weak: Everyday Forms of Peasant Resistance* (Yale University Press 1987).
[440] Louis Althusser, 'The Law' in *On The Reproduction Of Capitalism: Ideology And Ideological State Apparatuses* (Verso 2014) 60.
[441] Morton Horowitz, *The Transformation of American Law, 1780–1860* (Harvard University Press 1977) 243.
[442] Raymond Plant, *The Neo-liberal State*, (Oxford University Press 2012) 3 and David Harvey, *A Brief History of Neoliberalism* (OUP 2007) 66. It is no wonder, for example, that assessments made under the federal *Environment Protection and Biodiversity Conservation Act 1999* (Cth) since its inception shows that 97.1% of projects – which include mining, ports and other infrastructure – have been given the green light, with conditions. See further Oliver Milman and Nick Evershed, 'Australia has denied environmental approval to just 18 projects since 2000' www.theguardian.com/environment/2015/aug/12/australia-has-denied-environmental-approval-to-just-11-projects-since-2000?CMP=share_btn_tw.

draft legislation, determining public policies, and setting regulatory frameworks.[443] In response, liberal legal scholarship offers a shallow, minimalistic alternative that is frequently couched in the language of rights-talk. Far from displacing dominant conceptions of power and value, rights-talk frequently 'colonizes' more radical political projects.[444] Moreover, to quote Judith Butler, the re-inscription of existing normative concepts such as rights, which are 'derived from liberalism are…inadequate to the task of grasping both new subject formations and new forms of social and political antagonism.'[445]

Second, environmental law has become highly specialised and reductionist to the point that it cannot see the forest for the trees.[446] This may be a reflection, in part, of the first problem; if liberal law cannot fundamentally address the crisis of the environment, it must put its focus somewhere (hence in minutiae and specialization). However, it has resulted in a patchwork of legislation that is compartmentalized and abstracted from the physical world it purports to protect.[447] Lawmakers do not comprehend the environment as a whole, but as discrete bundles of "natural resources". The *Natural Resources Management Act 2004* (SA), for example, seeks to facilitate the use and management of the environment, rather than safeguard its protection. To a degree, fragmentation is inevitable because law needs to be specific enough to be enforced in discrete situations. However, the lack of clearly articulated values about the environment – or even a process for articulating what such values might be – has severe consequences for the environment.

Finally, environmental lawyers have adopted a research method that is solution focused[448] and premised on the often-unacknowledged blackmail of 'the end of history,' that is to say to expressly teleological forms of thinking.[449] This method presumes that, with the right legal architecture, it is possible to reach a balance or equilibrium where further intervention or struggle is no longer required. Liberal law always occurs in the context of a larger sense of progress and a future that is always brighter than the past. While never stated so explicitly, this is evidenced by the volume of articles that suggest that "if only *x* law was in place everything would be ok" as well as by the general failure of environmental lawyers to think beyond the enforcement of a specific legislative enactment. Insofar as history itself seems to bear out solutions, there is no sense of contingency, no sense of a system that is out of control. If history will take care of the larger issues, then it only remains to worry about specific and isolated questions.

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[443] Steve Fraser, *The Age of Acquiescence: The Life and Death of American Resistance to Organized Wealth and Power* (Little, Brown and Company 2015) 331.

[444] See for example Wendy Brown, '"The Most We Can Hope For . . .": Human Rights and the Politics of Fatalism' (2004) 103 (2/3) The South Atlantic Quarterly 451, 461.

[445] Judith Butler, *Frames of War: When is Life Grievable?* (Verso 2009) 146.

[446] Klaus Bosselmann, 'Losing the Forest for the Trees: Environmental Reductionism in the Law' (2010) 2(8) Sustainability 2421, 2424.

[447] Klaus Bosselmann, 'From Reductionist Environmental Law to Sustainability Law' in Peter Burdon (ed), *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (Wakefield Press 2011) 204.

[448] Andreas Philippopoulos-Mihalopoulos, 'Looking for the Space Between Law and Ecology' in Andreas Philippopoulos-Mihalopoulos (ed) *Law And Ecology: New Environmental Foundations* (Routledge 2011) 1.

[449] Francis Fukuyama, 'The End of History' (The National Interest, 1989) <http://www.wesjones.com/eoh.htm> accessed 1 September 2013. What Fukuyama meant by this was that with the defeat of fascism and the collapse of the Soviet Union, the twentieth century had seen the 'total exhaustion of viable systematic alternatives to Western liberalism.' History has shown that liberal democracy was the end point of humankind's 'ideological evolution.' Politics would no longer involve a debate or struggle between fundamentally different political systems.

Seen in this light, liberal environmental law is a shallow project that seeks to mitigate (and at times facilitate) environmental impacts from within the co-ordinates of the current system. It says nothing about displacing dominant sites of power or democratising power in a way that empowers communities or builds resilience. In fact, the very pose of liberal environmentalism disables other, more radical approaches. It vests agency in "experts" whose imagination is limited to the status quo. The entire "green capitalist" movement is a case in point.[450] If a building or development is "green" (perhaps having solar energy panels on the roof or better insulation), no question of how this construction impacts the environment in a larger sense needs be raised. In its extraordinary ability to adapt to virtually any challenge, capitalists have found out a way to benefit from concerns about environmental destruction, how to actually make a profit from the crisis that it itself has brought into the world.[451] It is no wonder then that after forty years of environmental law, the environmental crisis continues to deepen[452] and communities are forced to defend even these flawed protections from being eroded.[453]

This paper offers a radical alternative to liberal environmental method by thinking further about how an anarchist legal method can harness local knowledges and decisions in ways that break out of the limitations imposed by liberal scholarship. Abandoning the pose of expert or one who knows better, the anarchist legal method adopts a posture of humility and works off the perspective that local communities are fully aware of the environmental problems they face and capable of making informed recommendations. For these reasons, the role of the academic researcher is to "accompany"[454] these communities and utilize their relative social power to amplify the voice of the community.

In adopting this approach, I am not arguing that every community will make a perfect environmental decision every time. However, it is surely conceivable, perhaps even likely, that collective-decision making processes will reflect community and ecological interests better than those made by corporate executives or members of parliament operating within the structure of State capitalism. It may also be preferable to the kinds of policies and "solutions" offered by the liberal academic approaches described above. Anarchist researchers can play a role in helping secure the conditions that make it possible for people to participate meaningfully in politics. Here, politics becomes a way of staking out and sharing in a common life and cultivating a deep respect and relationship with the environment.

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[450] Heather Rogers, *Green Gone Wrong: Dispatches from the Front Lines of Eco-Capitalism* (Verso 2013) and Guy Pearse, *The Greenwash Effect: Corporate Deception, Celebrity Environmentalists, and What Big Business Isn't Telling You about Their Green Products and Brands* (Skyhorse Publishing 2014).

[451] Philip Mirowski, *Never Let a Serious Crisis Go to Waste: How Neoliberalism Survived the Financial Meltdown* (Verso 2014).

[452] See The Worldwatch Institute, *State of the World 2014* (Island Press 2014).

[453] While many countries are developing climate legislation, others like Japan and Australia have "backslid" and started to reverse climate legislation. See Globe International, 'The Globe Climate Legislation Study A Review of Climate Change Legislation in 66 Countries' (London School of Economics, 2014) http://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2014/03/Globe2014.pdf.

[454] Staughton Lynd, *Accompanying: Pathways to Social Change* (PM Press 2012). See also Staughton Lynd and Andrej Grubacic, *Wobblies and Zapatistas: Conversations on Anarchism, Marxism and Radical History* (PM Press 2008).

Anarchism and Anarchist Method

There are so many interpretations of anarchism that it would be hopeless to try and capture them all in some unified theory or ideology. Even if one sought to extract from the archives of anarchism a living/evolving tradition[455], it remains difficult to formulate it's doctrines as a specific theory of society and social change. How for example, does one reconcile the writings of a 19th century Russian prince[456] with 21st century postmodern philosophers?[457] The anarcho-syndicalist historian Rudolf Rocker captured this tension, noting that anarchism is not "a fixed, self-enclosed social system but rather a definite trend in the historic development of mankind, which, in contrast with the intellectual guardianship of all clerical and governmental institutions, strives for the free unhindered unfolding of all the individual and social forces in life."[458] Saul Newman even speaks of "postanarchism," that is an anarchism that recognizes that the state is no longer the main actor to oppose and that the market has taken on a preeminent role via neoliberals.[459]

What can be said about this trend in historic development? Anarchism by its very nature defies a unified theory and any anarchist method is likewise resistant to overall and unifying themes. Nonetheless, there are a few general principles that can be stated that help, at the very least, to delimit a boundary within which anarchism –and any method that might result from it – occurs.

One idea recently offered by the North American Anarchist Studies Network seeks to lay out general anarchist principles: "We understand anarchism, in general terms, as the practice of equality and freedom in every sphere of life – life conceived and lived without domination in any form; we understand this practice to belong not only to a better future but to the here and now, where we strive to prefigure our ends in the means we choose to reach them." Anarchism, according to this vision, serves as an ethical compass for action in daily life—in part by allowing this life its own expression in ways that is not distorted by archism. It also offers a vision of a participatory democratic social order that progressive social movements should continuously strive to develop and move others toward, whether or not it can ever be reached in absolute terms.

Drawing on this general description, an anarchist research method can be broken down to the following (incomplete) epistemological principles[460]:

- First, research needs to consider and respond to the objective and subjective aspects of reality as it is understood and experienced by human actors. Here objective reality might refer to the material word and the various manifestations

[455] For such an attempt see Daniel Guerin, *No Gods No Masters: An Anthology of Anarchism* (AK Press 2005) and Peter Marshall, *Demanding the Impossible: A History of Anarchism* (PM Press 2010).
[456] Peter Kropotkin, *Fields, Factories and Workshops Tomorrow* (Freedom Press 1974) and Peter Kropotkin, *Anarchism: A Collection of Revolutionary Writings* (Dover Publications 2002).
[457] See Jacob Blumenfeld, Chiara Bottici and Simon Critchley (eds), *The Anarchist Turn* (Pluto Press 2013); Duane Rousselle and Sureyyya Evren (eds), *Post-Anarchism: A Reader* (Pluto Press 2011); Todd May, *The Political Philosophy of Poststructuralist Anarchism* (Penn State University Press 2005) and Saul Newman, *The Politics of Postanarchism* (Edinburgh University Press 2011).
[458] Rudolf Rocker, *Anarcho-Syndicalism: Theory and Practice* (AK Press 2004) 31.
[459] Newman (n 23) 79-80.
[460] On the relationship between ontology, epistemology and methodology see Max Haiven and Alex Khasnabish, *The Radical Imagination* (Zed Books 2014) 211-216.

of the environmental crisis i.e. the concentration of CO2 in the atmosphere. Subjective reality refers to our understanding and evaluation of the world and our response to it.

- Second, research must recognize the way that the objective and the subject are dialectically related and there is a didactic relationship between the two dimensions.
- Third, objective and subjective reality is interrelated and in a constant state of motion. As John Holst notes: "This change is quantitative (incremental) and becomes qualitative (fundamental) when something new is added or subtracted."[461] To comprehend these shifts, the anarchist research must explore how change manifests and the significance it has to their topic.

These epistemological principles have important methodological implications. John Gaventa provides a useful summary that engages the relationship between forms of research and the extent of control a researcher exercises over the research process.[462] Drawing on this typology, I describe anarchist research as concerned primarily with the "development of people's knowledge" – the insights that specific groups of people, impacted by an issue, possess. Further, anarchist research seeks to expand the "social production of knowledge" so that community members are directly involved in the dispersal and use of any knowledge produced. The goal of anarchist research for law is to contribute to the ever expanding understanding of people's own reality with the intent of resolving problems at the root of people's oppression (once again by facilitating their own decisions, communicating those decisions to others). The 'political' nature of the reality will emerge from a robust investigation of that reality in its totality and by investigating the interrelatedness of people's legal, social, economic and cultural realities.

With this noted, I turn now to consider the relationship between anarchism and activist research and ethnography as a particular method of activist research.

Activist Research

> If a writer on a political subject manages to preserve a detached attitude, it is nearly always because he doesn't know what he is talking about. To understand a political movement, one has got to be involved in it.[463]

It is commonplace for researchers to state that they produce knowledge to better understand the world or improve their society. This raises an important question – what are the changes that we think would make a better world and from where do we develop our list of changes?

Anarchist legal method situates human beings as embedded in the world and is fundamentally committed to praxis.[464] Drawing on these commitments, anarchist method is characterised by a high degree of commitment to the community or area

[461] John D. Holst, *Radicalizing Learning: Adult Education for a Just World* (Jossey-Bass 2011) 184.

[462] John Gaventa, 'Participatory Research in North America' in *An Approach to Education Presented Through a Collection of Writings* (Highlander Research and Education Center 1989).
[463] George Orwell, *The Collected Essays, Journalism and Letters of George Orwell* (Harcort, Brace and World 1968) 348.
[464] Cindy Milstein, *Anarchism and Its Aspirations* (AK Press 2010) 17.

being protected. The researcher is not a dispassionate observer and has no pretence to complete objectivity. There is indeed no 'view from nowhere' and an anarchist researcher should be an embedded participant who is 'empathetic and interactive, rather than extractive and objective.'[465] This does not mean that researches cannot take a critical or reflective stance. Rather, by situating oneself within a community, the researcher has the opportunity for personal engagement and richer research outcomes.

Researchers who adopt a situated perspective attain 'deeper and more thorough empirical knowledge of the problem at hand, as well as theoretical understanding that otherwise would be difficult to achieve.'[466] Peter Kropotkin captured the benefits of this approach in his 1898 book, *Fields, Factories and Workshops:* 'How much better the historian and the sociologist would understand humanity if they knew it, not in books only, not in a few of its representatives, but as a whole, in its daily life, daily work and daily affairs.'[467] In agreement, the Brazilian educator Paulo Freire argues that any group of outsiders who have grown up, lived and suited in a privileged situation (as university academics certainly have) must "die as a class" and learn to work "with" and not "on" the community.[468] In each expression, the method is not to stand above the community in question and pass down legal solutions in a hierarchical way. Rather, the method seeks to facilitate an exchange of information between the researcher and this community.

For these reasons, anarchist research method has a lot in common with activist research.[469] Activist research is not new and has been applied by feminist[470] and race[471] scholars for decades. This history is significantly longer if one looks outside of the academy to include movement research and peoples history more broadly.

Claire Nettle describes activist research as being characterised by a 'close collaboration between researchers and the people involved in the movement under study' and by 'hybrid activist/academic identities on the part of researchers.'[472] Staughton Lynd offers the term 'accompanying' to describe this kind of collaboration.[473]

Accompanying as a non-hierarchical practice that implicitly challenges individualisation and isolation. Lynd describes it as 'the idea of walking side by side with another on a

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[465] Paul Chatterton and Jenny Pickerill, 'Notes Toward Autonomous Geographies: Creation, Resistance and Self-Management as Survival Tactics' (2006) 30(6) Progress in Human Geography 730. See also Paulo Freire, *Pedagogy in Process: The Letters to Guinea Bissau* (Seabury Press 1978) 3: 'The education of an oppressed and struggling people…must, from the first, be both political and non-neutral – or it can never succeed.'

[466] Charles Hale, 'What is Activist Research' (2001) 2(1-2) Items and Issues 13.

[467] Peter Kropotkin, *Fields, Factories and Workshops Tomorrow* (Freedom Press 1974) 186.

[468] Freire (n 31) 24.

[469] For an introduction see Lisa Hunter, Elke Emerald and Gregory Martin, *Participatory Activist Research in the Globalised World: Social Change Through the Cultural Professions* (Springer 2012) and Bernd Reiter and Ulrich Oslender, *Bridging Scholarship and Activism: Reflections from the Frontlines of Collaborative Research* (Michigan State University Press 2014). Activist research is similar to Participatory Action Research (PAR). PAR is a form of qualitative research that is partisan, participatory and dedicated to the development of knowledge aimed at fuelling a struggle for a truly inclusive, democratic society. See for example Stephen D. Brookfield & John D. Holst, *Radicalising Learning: Adult Education for a Just World* (Jossey-Bass 2011).

[470] Nancy A. Naples, *Feminism and Method: Ethnography, Discourse Analysis, and Activist Research* (Routledge 2003).

[471] Charles R. Hale, *Engaging Contradictions: Theory, Politics, and Methods of Activist Scholarship* (University of California Press 2008).

[472] Claire Nettle, *Community Gardening as Social Action: The Australian Community Garden Movement and Repertoires for Changes* (PhD Thesis 2010) 58. Subsequently published as Claire Nettle, *Community Gardening As Social Action* (Ashgate 2014).

[473] For an exploration of this term and its historical application see Lynd (n20, 2008) 51–3.

common journey.'[474] It presumes not uncritical difference, but equality. Lund notes: 'if accompanier and accompanied are conceptualised, not as one person assisting another person in need, but as two experts, the intellectual universe is transformed.'[475] No longer do we have one kind of person helping a person of another kind. Rather we have two collaborators who are exploring a path forward together.[476] For Lynd, there is no privileged epistemic location or site to prioritise in anchoring the struggle.

Implicit in this approach is the idea that activist research is not pure-theory and instead explores issues of practical importance for a social movement or environmental campaign. It incorporates feedback from community activists and unlike the typical enclosure of knowledge that occurs inside universities[477], activist researchers typically publish their material in places and formats that are accessible to activists.[478] This might involve publishing in a variety of venues and reframing the work to speak directly to a target-audience.

Paulo Freire provides a striking example of activist research in his late work, *Pedagogy in Process*. In this book Freire describes the process through which he developed an adult literacy program in the Western African country Guinea-Bissau. From the outset Freire understood the importance of developing his method in direct consultation with the community that would be learning with him. He writes:

> Our own political choices, and our praxis which is coherent with these choices, have kept us from even thinking of preparing…a project for the literacy education of adults with all of its points worked out in fine detail, to be taken to Guinea-Bissau as a generous gift. This project, on the contrary, together with the basic plans for our own collaboration, would have to be borne there, thought through by the national educators in harmony with the social situation in the country.[479]

In *Pedagogy of the Oppressed* Freire provides broad notes on what practical steps researchers can undertake to initiate a genuine collaboration and understand the political economic context of a community.[480] I have distilled these notes into five research stages:

[474] Lynd (n 20, 2008) 176.
[475] Lynd (n 20, 2012) 4. See also Paul Farmer, 'Accompanying as Policy' (Office of the Special Envoy for Hairi 2011) 1: "There's an element of mystery, of openness, in accompaniment. I'll go with you and support you on your journey wherever it leads. I'll keep you company and share your fate for a while. And by "a while", I don't mean a little while. Accompaniment is much more about sticking with a task until it's deemed completed by the person or persons being accompanied, rather than by the accompagnateur."
[476] Lynd (n 20, 2012) 4.
[477] Haiven and Khasnabish (n 26) 13. The authors characterise some academic social movement research as about the 'generation of academic capital'. They not further that this sort of research 'represents an enclosure of common social movement research.' On the importance of activist research being useful and accountable to movements see Douglas Bevington and Chris Dixon, 'Movement-relevant Theory: Rethinking Social Movement Scholarship and Activism' (2003) 4(3) Social Movement Studies 185, 186.
[478] Douglas Bevington and Chris Dixon, 'Movement-relevant Theory: Rethinking Social Movement Scholarship and Activism' (2003) 4(3) Social Movement Studies 185, 186.
[479] Freire (n 31) 8.
[480] See generally, Paulo Freire, *Pedagogy of the Oppressed* (Bloomsbury Academic 2000). See also Brookfield and Holst (n 35) 177-178.

1. Context meeting with volunteers from the community and invited specialists: participants begin highlighting research through interviews, observation and field notes.
2. Evaluation meeting to discuss preliminary findings: research moves from the individual to a team – either co-researchers or support people – to distill themes and if relevant, code research.
3. Thematic investigation circles: researcher presents the themes and codes to groups in the community. The themes are discussed, challenged, and reflected upon to make sure they represent the issues of the community and elicit further dialogue.
4. Interdisciplinary analysis of findings from the third stage: researcher investigates findings from thematic investigation circles and seeks to locate a "hinged theme" that is used to connect other themes together.
5. Reproduction of themes: development of new didactic materials that codify the themes and communicate with the community – may be pictures, short documentary or whatever is appropriate.

A lesson here for anarchist researchers is that they too must start from a radical position and refuse to accept whatever "packed or prefabricated" solutions are being offered from those abstracted from the particulars of a situation. For Paulo Freire and his team, this meant becoming militants as part of an independence struggle. The stakes will not always be so high for researchers and they must retain their agency to determine the extent of their commitment. However, once committed, an activist researcher should valorize (not idealise) the knowledge and creativity of the community and understand the knowledge generated from their research as grounded in this source. Freire argues:

> What is implied is not the transmission to the people of a knowledge previously elaborated, a process that ignores what they already know, but the act of returning to them, in an organized form, what they themselves offered in a disorganized form. In other words, it is a process of knowing with the people how they know things and the level of knowledge.[481]

As indicated above, this is not a passive process. Rather, it involves challenging the information and seeking to understand how local knowledge relates to the personal experience of the speaker and the ends that may motivate them. Only through such critical reflection, can the information be organised in such a way as to offer an increasingly rigorous (though still contingent) understanding of the situation.

Ethnography as Activist Research

An alternative to action research approaches within activist research is ethnography. Anarchist anthropologist David Graeber has argued that ethnography provides a model for how a 'non-vanguardist' revolutionary intellectual practice might work.[482] He notes

[481] Freire (n 31) 25.

[482] David Graeber, *Fragments of an Anarchist Anthropology* (Prickly Paradigm, 2004) 11-12. See also David Graeber, *Possibilities: Essays on Hierarchy, Rebellion, and Desire* (AK Press 2007) 300. Here Graeber notes that ethnography could be a model for the 'would be non-vanguardist revolutionary intellectual' because it offers the possibility of 'teasing our the tacit logic or principles underlying certain forms of radical practice, and then, not only offering the analysis back to those communities, but using them to formulate new visions.' Jeffrey Juris has articulated a similar vision of 'militant' ethnographic practice which refuses the valorization of 'objective distance' and the

that through ethnographic methods, researchers observe a communities practice and tease out their underlying logics. Ethnography enables researchers to look at those experimenting with political repertoires, to consider the larger implications of what they are doing, and to offer those ideas back to the community, not as normative prescriptions, but as contributions that reveal future possibilities.[483]

Ethnographic research methods combine poststructuralist ethnographic research with measures to ensure 'mutually beneficial relations among scholars and those with whom knowledge is made.'[484] Fundamental to this is a critique of the power relations that form in traditional ethnographic inquiries. Nettle provides a sophisticated example of this in the context of her research into community gardens and anarchist prefigurative politics:

> Poststructuralist analyses often seek to reveal power – and resistance – as pervasive, diffuse and constituting. A focus on the multiplicity of force relations, the micro-level of power which exists everywhere and originates everywhere assist me in being able to recognise community gardeners ordinary resistances, the kinds of everyday social action…which Foucault terms 'mobile and transitory points of resistance'.[485]

As Max Haiven and Alex Khasnabish suggest, ethnography as a form of activist research needs to understood not only as a genre of scholarly writing but as a 'perspective committed to understanding and taking seriously people's lived realities.'[486] As a result, ethnographers must dwell in the terrain of 'immanence' – the lived realities which constitute the constitutive conditions of the community. Ethnographic activist research – including participant observation, long-term field work and in-depth interviews – are founded on the belief that the world does not comprise merely of 'objects to be analysed' but 'is acted and imagined' into being by dialogic subjects, including the researchers themselves.[487]

Feminist researchers have also developed approaches to ethnography by advocating for situated and embodied knowledge's.[488] Similar to activist research, this literature advocates abandoning pretences of value-neutrality and embracing a commitment to

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tendency within the academy to treat social life as an object to decode. Juris contends that in order to 'grasp the concrete logic generating specific practices, one has to become an active participant' and within the context of social movements this means participating in and contributing to the work of these movements themselves. See Jeffrey Juris, Networking Futures: The Movements against Corporate Globalization (Duke University Press Books 2008) 20.

[483] Ibid. For examples of ethnography in the study of recent political movements see Charles Tilly, 'Afterword: Political Ethnography as Art and Science' in Lauren Joseph, Matthew Mahler, Javier Auyero (eds), *New Perspective in Political Ethnography* (Springer 2007) and Edward Schatz (ed), *Political Ethnography: What Immersion Contributes to the Study of Power* (University of Chicago Press 2009). On militant ethnography see Jeffrey Juris, 'Practicing Militant Ethnography with the Movement for Global Resistance in Barcelona' in Stevphen Shukaitis and David Graeber (eds), *Constituent Imagination: Militant Investigations/Collective Theorization* (AK Press 2008).

[484] Ellen Cushmann, 'The Public Intellectual, Service Language and Activist Research' (1999) 61(3) *College English* 328, 332.

[485] Nettle (n 38) 61. On everyday resistance see also Judy Pinn and Debbie Horsfall, 'Doing Community Differently: Ordinary Resistances and New Alliances' in Jock Collins and Scott Poynting (eds), *The Other Sydney: Communities, Identities and Inequalities in Western Sydney* (Common Ground, 1999).

[486] Haiven and Khasnabish (n 26) 50.

[487] Ibid 51.

[488] Lorraine Code, *What Can She Know?: Feminist Theory and the Construction of Knowledge* (Cornell University Press 1991); Liz Stanley and Sue Wise, *Breaking Out Again: Feminist Ontology and Epistemology* (Routledge 1993); and Sasha Roseneil, 'Greenham Revisited: Researching Myself and My Sisters' in Dick Hobbs and Tim May (eds), *Interpreting the Field: Accounts of Ethnography* (Oxford University Press 1993).

research for as well as about social movements, often from a standpoint of being passionately and politically engaged in the issue under study. Donna Haraway, for example, describes 'unlocatable' knowledge claims as irresponsible.[489] In their place, she advocates:

> [P]olitics and epistemologies of location, positioning and situating, where partiality and not universality is the condition of being heard to make rational knowledge claims. These are claims on people's lives; the view from a body, always a complex, contradictory, structuring and structured body, versus the view from above, from nowhere, from simplicity.

All research is positioned and reflects particular value commitments. Gail Mason recognises this basic fact: '[T]he researcher (the knower) is directly implicated in the knowledge he or she produces. In other words, my own subjectivity fundamentally shapes the pictures…that I produce, according to the assumptions that I make, the questions that I ask, the concepts and excerpts I prioritise, the analysis I compose and the interpretations that I generate.'[490] Rather than seeking to cut off personal commitments from research, ethnography should make the writers politics explicit and put them in service of the analytical endeavor.[491]

Feminist scholars like Sasha Roseneil and Mary Heath have also argued that the inclusion of 'intellectual autobiography' is essential to ethnographic research because it enables the reader situate the author in his or her particular social and cultural context, and writers to acknowledge and draw upon their embodies subject positions.[492] This approach emphasises the importance of researcher's connections with the movements they study, the role or negotiating multiple subject positions in the production of 'movement relevant' research.[493] A critical benefit of this kind of avowedly passionate and involved position is that it allows the researcher to be immersed in the community share in its passions and desires.

Research Questions for Anarchist Research

I conclude this discussion by articulating a list of questions that anarchist researchers can use in the preliminary stages of their investigation. The questions are developed primarily with reference to the work of Stephen Brookfield and John Holst and also with regard to researchers working in the majority world, feminist movements and indigenous communities.[494] While each question is malleable to a specific context, they

[489] Donna Haraway, 'Situated Knowledge: The Science Question in Feminism and the Privilege of Partial Perspective' (1998) 14(3) Feminist Studies 195.

[490] Gail Mason, *The Spectacle of Violence: Homophobia, Gender and Knowledge* (Routledge 2002) 30. With regard to qualitative research, Mason notes : 'The dynamics of each and every interview, including the questions of personality and timing, will influence the things that interviewees tell me, how they tell me, the slant they put on a given event, what they leave out, what they forget and how they remember.'

[491] Charles Hale, 'What is Activist Research' (2001) 2(1-2) Items and Issues 13, 14.

[492] Roseneil (n 51) and Mary Heath, 'On Critical Thinking' (2012) 4 International Journal of Narrative Therapy and Community Work 11, 13.

[493] Robert Flacks, 'Knowledge For What? Thoughts on the State of Social Movements' in Jeff Goodwin and James Jasper (eds), *Rethinking Social Movements: Structure, Culture and Emotion* (Rowman and Littlefield 2004); Jon Anderson, 'Researching Environmental Resistance: Working Through Secondspace and Thirdspace Approaches' (2002) 2 Qualitative Research 301; Nancy Naples, *Feminism and Method: Ethnography, Discourse Analysis and Activist Research* (Routledge 2003).

[494] For further discussion of research questions see John D. Holst, *Radicalizing Learning: Adult Education for a Just World* (Jossey-Bass 2011); Yusuf Kassam and Kemal Mustafa (eds), *Participatory Research: An Emerging*

are designed to make explicit the partisan nature of anarchist research, its connection to community activism and its pedagogical nature.

1. Which party initiates the research project and do they control the research process?
    a. If power is shared, what processes are put in place for collective decision making and dispute resolution? Are constraints placed on some people's participation? If so, how is that determined and how will the constraints be addressed?
    b. Is the research supported by outside funding? What guards can be put in place to ensure that the outside entity does not direct the research?

2. What is the focus or contents of the research project?
    a. Do the research questions frame the issue to capture exactly how the community is being impacted?
    b. What are the parameters of the research? Who decides what issues are beyond the scope of the project and whether anyone is being left out?

3. To what degree "social location" considered in the collection/analysis of the research?
    a. How diverse are data collection methods? What is the most effective way to capture the multiple ways of knowing that inhere to specific social locations?
    b. What influence does social locations have on *who* conducts the research? What measures can be put in place to protect vulnerable people and involve them in the research process?
    c. Are the limits of each research method understood and addressed? Given that there will always be limits and imperfections, how is the contingent nature of knowledge captured by the researcher?

4. Describe the pedagogical nature of the research process?
    a. What steps are put in place to ensure that the research maximises collective learning?
    b. Does each participant have equal access to the learning process?

5. Is the research product accessible to the community and does it enable action?
    a. Are findings and conclusions distributed equally? In what format are results published and does the product take into account social location?
    b. Does the research product advance the interests of the community?

Researchers can amend these questions in accordance with the specific method they adopt. Properly considered, this list should prompt ways of thinking that highlights the realities of the community and elevates existing knowledge in a way that contributes to

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Methodology in Social Science Research (Society for Participatory Research 1982); Patricia Maguire, *Doing Participatory Research: A Feminist Approach* (University of Massachusetts 1987); and Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (Zed Books 1999).

the resolution of issues. The political nature of the research reveals itself through these questions and from a nuanced investigation into the social, economic and political realities that the people experience.

Conclusion

There is a kind of imagining – a way of interpreting and understanding reality that guides and undergirds liberal environmental law. This imagination is captured within the confines of neoliberal capitalism and has proven tremendously limited in its capacity to protect the environment and support people who yearn for sustainability, equality, empowerment and agency. A key challenge for researchers today is to imagine new methods that enable us to construct and reproduce ourselves as social beings that are not predatory to the environments we inhabit or with respect to one another.

An anarchist research method is a collective process that animates people and groups working for radical social change. It is driven by a radical imagination that "both emerges from and guides collective doing."[495] Drawing on a series of epistemological foundations, it positions the researcher as embedded within a sociality and whose task it is to accompany others engaged in political struggle. Unlike liberal environmentalism, the anarchist method has no pretense objectivity and is deliberately political in nature. Moreover, anarchist method upholds a way of thinking that is not bound by dictates of what "should be" (not bound by teleological thinking, notions of western progress and the like) but rather a heightened sense of what is as well as a sense of the diverse possibilities that stem from that recognition. While anarchist research can take inspiration from past projects, it cannot fetishize them. It has to seek possibility in the present, from collective encounters amongst people.

While anarchist researchers may have a vision for the future, they do not seek to impose a "blueprint" about the future upon the masses. Instead, anarchist research seeks to emphasize the immanent movement toward the future that is contained within the contours of the present. The research method described in this paper provides opportunities for groups of people to organize and work cooperatively to identify a tangible solution to a specific problem. This process can help ensure that whatever response emerges matches the community's unique experience of the problem, their history and social power. Moreover, a collaborative research provides people with experience in building networks of solidarity that are essential for enacting a politics that goes beyond liberal individualism and the narrow confines of legal rights.[496]

[495] Haiven and Khasnabish (n 26) 223.
[496] Marina Sitrin, *Everyday Revolutions: Horizontalism and Autonomy in Argentina* (Zed Books 2012) 20.

Up in Alms: Patterns of Poverty, Food Welfare, Public Health and Sustainability

Liesel Spencer*

Abstract

Human food consumption is implicated in ecological crisis, human and non-human. The global nutrition transition away from what is agreed as a sustainable and healthy diet, has resulted in degradation of environmental health and human health. Socioeconomically disadvantaged people have the lowest levels of compliance with internationally agreed guidelines for sustainable and healthy diet, are more vulnerable to food insecurity, and have high levels of obesity and associated chronic disease. The ecological dysfunction of the modern food system, and the failure of the welfare state safety net to deliver food security, impacts hardest upon the most vulnerable people with the least social power, often in concentrated spatial pockets or geographies of disadvantage. Under Australian law food security is delivered to the majority of welfare recipients via cash transfers, however a recent development is a geographically-limited trial of in-kind welfare (income management). The pilot scheme presages a shift in the orientation of Australian welfare law towards US-style in-kind welfare. Moves to in-kind food welfare should be informed by a rigorous critical comparative study of evidence from the US experience. In this paper I consider one aspect of US food welfare programs' alignment with guidelines for sustainable and healthy diet: fresh fruit and vegetable consumption.

Introduction

There is a complex relational web between poverty, human food consumption, environmental health, and human health. Socioeconomically disadvantaged people have relatively higher mortality and morbidity; a lot of that is caused by what they do and do not eat; and the pattern of food choices associated with poverty has particular environmental impacts. Law where present as an element in the complexity is contentious; the absence of law no less so.[497] This paper is about welfare state delivery of food security, and specifically what welfare law might have to do with the deceptively simple question of whether and why poor people eat enough fruit and vegetables.

Human diet is a significant contributor to adverse environmental impacts.[498] Consensus on what constitutes a sustainable human diet mirrors consensus on what constitutes a

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[497] John Coggon, *What Makes Health Public? A Critical Evaluation of Moral, Legal, and Political Claims in Public Health* (Cambridge University Press, 2012) 5–6.

[498] Tim Lang, David Barling and Martin Caraher, 'Food, Social Policy and the Environment: Towards a New Model' (2001) 35 *Social Policy and Administration* 538, 549; Peter Burdon, 'What Is Good Land Use? From Rights to Relationship' (2010) 34 *Melbourne Law Review* 708, 712; Peter Singer and Jim Mason, *The Ethics of What We Eat: Why Our Food Choices Matter* (Rodale, 2006) Ch 16; Anna Lappe, 'The Climate Crisis at the End of Our Fork' in Karl Weber (ed), *Food, Inc.: how industrial food is making us sicker, fatter and poorer -- and what you can do about it* (PublicAffairs, 1st ed, 2009) 105.

diet which promotes human health.[499] I focus here on one theme of dietary guidelines for a sustainable and healthy diet: increased consumption of fresh fruit and vegetables. In Australia, as is the case in other developed countries (and increasingly also in developing countries),[500] compliance with guidelines for a healthy and sustainable diet decreases along a social gradient, with the most socioeconomically disadvantaged people having the least sustainable and healthy diets, and correspondingly lower population health outcomes. Law both contributes to and fails to ameliorate this correlation of socioeconomic disadvantage with unhealthy and unsustainable diets.

The state is responsible in a welfare state system such as Australia,[501] for providing the basic 'safety net' needs of welfare dependent people, including food.[502] In the Australian system this is currently delivered to the majority of people via cash transfers.[503] The introduction of a geographically-limited trial of in-kind welfare in Australia,[504] portends a shift in state welfare orientation towards a style of welfare delivery more akin to the US system, in which welfare delivered solely as cash transfers is now largely reserved for income supplementation to working people, and in-kind transfers increasingly dominate the delivery of benefits to the non-working poor.[505]

The US system is a pertinent case study in the effect on fresh fruit and vegetable consumption, of various forms of in-kind welfare. Australian welfare governance appears to be heading in the direction of in-kind welfare as an alternative to cash transfers. Whether or not this is legitimately an object of the modern welfare state is a large and separate argument invoking the fierce debates in public health legal theory, over personal autonomy versus the nanny state.[506] Further, public health law is by definition targeted towards at-risk populations rather than individuals; implicit in this is the acknowledgment that whilst the intended outcome is a net health benefit at the population level, not all individuals within the target group will benefit from the intervention.[507] In the Australian and US contexts there are also issues of racial and gender disparity in both the correlation between socioeconomic disadvantage, diet, and

[499] With the exception of fish consumption, which is healthy for human consumption but unsustainable on current demand versus fish stocks: Gezondheizrad Health Council of the Netherlands, 'Guidelines for a Healthy Diet: The Ecological Perspective' (21 June 2011) 49 <http://www.gezondheidsraad.nl/sites/default/files/201108E.pdf>.

[500] David Tilman and Michael Clark, 'Global Diets Link Environmental Sustainability and Human Health' (2014) 515 *Nature* 518.

[501] Stephan Liebfried, 'Towards a European Welfare State?' in Christopher Pierson and Francis G Castles (eds), *The welfare state: a reader* (Polity Press, 2000) 190, 192.

[502] Nicholas Barr, *Economics of the Welfare State* (Oxford University Press, 4th ed, 2004) 216.

[503] Part 3, Divn 4 *Social Security Administration Act 1999* (Cth).

[504] Part 3B, *Social Security Administration Act 1999* (Cth).

[505] Janet Currie, 'Welfare and the Well-Being of Children: The Relative Effectiveness of Cash and In-Kind Transfers' NBER Working Paper Series, Working Paper No 4539, National Bureau of Economic Research, Cambridge Massachusetts, 1.

[506] Roger Magnusson, 'Case Studies in Nanny State Name-Calling: What Can We Learn?' *Public Health* <http://www.sciencedirect.com/science/article/pii/S0033350615001973>; Lawrence O Gostin, *Public Health Law: Power, Duty, Restraint* (University of California Press, Rev. and expanded 2nd ed, 2008) 497–500; Geof Rayner and Tim Lang, *Ecological Public Health: Reshaping the Conditions for Good Health* (Routledge, 2012) 264; Coggon, above n 1, 142–144.

[507] Gostin, above n 10, 16–17.

health outcomes;[508] and in the distribution and impact of food welfare. Tensions between the liberty of individuals and the wellbeing of populations,[509] are at the heart of public health law discourse and are within the scope of my broader research agenda but not within the scope of this short paper. I proceed here on the basis that Australian welfare governance is heading in a particular direction, towards expansion of in-kind welfare[510] and as this is happening, it would be best if reform proceeded in a reflective manner informed where possible by the mistakes and successes of others. The US experience with in-kind food welfare is long-established, and extensively documented and critiqued. Evidence of what has worked and what has failed in the US in terms of population health outcomes is of value to the Australian state in considering how to meet obligations to welfare recipients to deliver food security, and to do so in a way that is healthy and sustainable.

This is a highly interdisciplinary area of research. In this paper I attempt to traverse the relevant intersections between law and other disciplines in a logical order. I first consider global recommendations for sustainable diet, and the adverse environmental impacts of the food consumption patterns correlated with socioeconomic disadvantage. Next I set out a secondary correlation with adverse public health outcomes, possible explanations, and the economic and health costs of diet related public health problems. I then place the entire conundrum within a particular model of public health, 'ecological public health', drawing parallels with legal geography scholarship on entanglements between the biological and social realms. Finally I question the extent to which various current iterations of in-kind food welfare in the US succeed or fail in increasing consumption of fresh fruit and vegetables in at-risk welfare-dependent populations.

The incidence and cost of diet-related chronic disease in Australia

At a whole-of-population level, Australia has a high incidence of public health problems[511] causally related to the food system. Rates of obesity have more than

[508] Penny Gordon-Larsen, Linda Adair and Barry Popkin, 'The Relationship of Ethnicity, Socioeconomic Factors, and Overweight in U.S. Adolescents' (2003) 11 *Obesity Research* 121; Shelley Bielefeld, 'Income Management and Indigenous Peoples: Nudged Into a Stronger Future?' (2014) 23 *Griffith Law Review* 285.

[509] Coggon, above n 1, Ch 7.

[510] Oliver Milman and Daniel Hurst, 'Tony Abbott "Doesn"t Rule out' Expanding Income Management' *The Guardian*, 1 August 2014 <http://www.theguardian.com/world/2014/aug/01/tony-abbott-doesnt-rule-out-expanding-income-management>; Department of Human Services, *Budget 2014-15: Income Management – One Year Extension and Expansion to Ceduna, South Australia* <http://www.humanservices.gov.au/corporate/publications-and-resources/budget/1415/measures/welfare-payment-reform/19>; Australian Government Department of Social Services, *Income Management: 2015 Budget* (May 2015) <https://www.dss.gov.au/sites/default/files/documents/05_2015/2015_budget_fact_sheet_-_income_management_-_final_0_0.pdf>; Australian Government Department of Social Services, *Evaluation Framework for New Income Management (NIM)* (December 2010) <https://www.dss.gov.au/our-responsibilities/families-and-children/publications-articles/evaluation-framework-for-new-income-management-nim?HTML>; Luke Buckmaster and Carol Ey, 'Is Income Management Working?' (Parliament of Australia, 5 June 2012) <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2011-2012/IncomeManagement>.

[511] Australian Bureau of Statistics, 'Australian Health Survey - Biomedical Results for Chronic Diseases 2011-2012' (2013)

doubled in the last 20 years[512] and 63% of Australians are now overweight or obese.[513] Rates of obesity and associated chronic disease are now commonly referred to as epidemic or pandemic,[514] albeit not of the traditionally infectious type.[515] Two factors are the main contributors to obesity and associated chronic disease: diet and activity levels.[516] My research focuses on the contributing factor of diet, and in this paper on the positive health implications of consuming adequate intake of fresh fruit and vegetables;[517] fruit and vegetable consumption is 'strongly linked to the prevention of chronic disease'.[518]

Both health spending and welfare spending represent a sizeable chunk of total government spending in Australia. Projected Australian Federal Government expenditure for the 2015/2016 financial year is $434.47 billion. Of this, social security and welfare represents $154 billion, and health $69.38 billion.[519] The NSW State Government budget 2015-2016 projects record expenditure on health of $19.6 billion (out of a projected total expenditure of $67 billion).[520] Welfare spending and health spending have a logical nexus of interdisciplinary concern in considering how State delivery of food welfare impacts upon poverty- and diet-related incidences of obesity and associated chronic disease. When the environmental implications of the decreasing alignment with healthy dietary guidelines along the social gradient are also considered, it is apparent that how the State delivers food security via the welfare system matters for health, welfare and environment budgets.

The first problematic correlation: environmental impacts of unhealthy food consumption (what is a sustainable diet?)

The composition of modern human diet has particular negative environmental impacts, and current Australian dietary guidelines[521] have been criticised for largely ignoring

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<http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/01ECE269AAE6E736CA257C0700114DBA/$File/AHS%20-%20Biomedical%20Results%20for%20Chronic%20Diseases.pdf>.

[512] National Health and Medical Research Council Australian Government, *Obesity and Overweight | National Health and Medical Research Council* <https://www.nhmrc.gov.au/health-topics/obesity-and-overweight>.

[513] Australian Bureau of Statistics, 'Australian Health Survey: Biomedical Results 2011-2013' <http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/34C87A0815527D5DCA257BBB00121DF9/$File/brochure%2030.7.2013.pdf>.

[514] Gary Egger and Boyd Swinburn, 'An "Ecological" Approach to the Obesity Pandemic' (1997) 315 *British Medical Journal* 477.

[515] David Raubenheimer et al, 'Nutritional Ecology of Obesity: From Humans to Companion Animals' [2014] *British Journal of Nutrition* 1.

[516] Garry Egger, *Planet Obesity: How We're Eating Ourselves and the Planet to Death* (Allen & Unwin, 2010) 10.

[517] Australian Bureau of Statistics, *1301.0 - Year Book Australia, 2012* Fruit and Vegetable Consumption in Australia <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/1301.0Main+Features2362012>.

[518] Australian Institute of Health and Welfare, 'Australia's Food & Nutrition 2012' (2012) 195 <http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=10737422837>.

[519] Simon Elvery and Ben Spraggon, 'Budget Sliced and Diced: Where Every Dollar Comes From, and How It's Spent' *ABC News*, 12 May 2015 <http://www.abc.net.au/news/2015-05-12/budget-2015-sliced-diced-interactive/6460102>.

[520] NSW Government, 'Budget 2015-16 Overview' 8 <http://www.budget.nsw.gov.au/__data/assets/pdf_file/0007/126376/Budget_2015-16_Overview.pdf>; Peta Lange, *NSW State Budget 2015* Ogilvy PR <http://www.ogilvypr.com.au/news/nsw-state-budget-2015/>.

[521] National Health and Medical Research Council, *Australian Dietary Guidelines (2013)* <https://www.nhmrc.gov.au/guidelines-publications/n55>.

the environmental impact of food.[522] Failing to make connections between the health of humans (including food security), human food consumption, and environmental health is a significant omission.[523] This failure is out of step with international thinking on what constitutes a sustainable diet: the Food and Agriculture Organisation of the United Nations (FAO) definition acknowledges 'the interdependencies of food production and consumption with food requirements and nutrient recommendations, and at the same time, reaffirm[s] the notion that the health of humans cannot be isolated from the health of ecosystems'.[524] An example of national dietary guidelines which seek to reconcile human health and ecological sustainability, are those of the Netherlands, concluding that a diet which is both healthy and sustainable 'would not differ greatly from current recommendations for a healthy diet[525] [but would emphasise] eating smaller amounts of meat and dairy produce, and more vegetable products', and would 'reduce energy intake and snacks' including reducing consumption of 'products with a high energy density and sweet drinks'.[526] A Danish study of guidelines for sustainable diet also concluded that reducing meat intake and excluding most long distance imported foods (and encouraging 'buy local') improved dietary sustainability.[527] Three other omnivorous human diets recommended on sustainability grounds (the Mediterranean, pescetarian and vegetarian diets) all have in common a higher consumption of fruits, vegetables, nuts and pulses and a lower consumption of empty calories and meat; all three diets reduce risk of type II diabetes, cancer and heart disease, and all three diets reduce greenhouse gas emissions and cropland use.[528] There is no agreed universal consensus on precisely what a 'sustainable diet' looks like, however there is consensus that it features less animal protein and less energy-rich refined carbohydrates and fats, and more fresh fruit and vegetables.[529] Further, food waste is a significant contributor to food-industry-related greenhouse gas emissions[530] and increasing consumption of 'more locally produced and seasonally available food' is a recommended strategy to prevent food waste.[531] The focus of this paper is on a particular aspect of what is thus a

[522] Linda A Selvey and Marion G Carey, 'Australia's Dietary Guidelines and the Environmental Impact of Food "from Paddock to Plate"' (2013) 198 *Medical Journal of Australia* <https://www.mja.com.au/journal/2013/198/1/australia-s-dietary-guidelines-and-environmental-impact-food-paddock-plate>; Jane Daly, *Update Australia's Dietary Guidelines to Consider Sustainability* (28 February 2012) The Conversation <http://theconversation.com/update-australias-dietary-guidelines-to-consider-sustainability-5439>.

[523] Selvey and Carey, above n 26; Daly, above n 26.

[524] Food and Agriculture Organisation of the United Nations, 'Sustainable Diets and Biodiversity - Directions and Solutions for Policy, Research and Action' (5 November 2010) 7 <http://www.fao.org/docrep/016/i3004e/i3004e.pdf>.

[525] With the exception of fish, which is healthy for human consumption but unsustainable on current demand versus fish stocks: Gezondheizrad Health Council of the Netherlands, above n 3, 7.

[526] Ibid 45–47.

[527] Henrik Saxe, 'The New Nordic Diet Is an Effective Tool in Environmental Protection: It Reduces the Associated Socioeconomic Cost of Diets' (2014) 99 *American Journal of Clinical Nutrition* 1117. (NB there were equivocal conclusions regarding organic produce in this study, which drew distinctions between the environmental impact of different categories of organic produce and the differential short and long term impacts of organic produce in developed and developing countries.)

[528] Tilman and Clark, above n 4.

[529] Food and Agriculture Organisation of the United Nations, above n 28, 14–15.

[530] David Baker, Josh Fear and Richard Denniss, 'What a Waste: An Analysis of Household Expenditure on Food' (Policy Brief No.6, The Australia Institute, 5 November 2009) 6 <http://www.tai.org.au/node/1580>.

[531] Australian Institute of Health and Welfare, above n 22, 30.

universally agreed feature of a sustainable and healthy diet: increasing fresh fruit and vegetable consumption.

The second problematic correlation: poverty, diet and public health outcomes

With some variation in detail, Australian and most international dietary guidelines for a health-promoting diet are in agreement.[532] A healthy diet includes a high proportion of fresh vegetables and fruit, an adequate amount of healthy protein such as meat, fish, eggs, dairy, nuts or legumes, an adequate amount of wholegrains, a small amount of healthy fats, and a restricted amount of unhealthy fats and refined carbohydrates.[533] Nutrition is a major 'modifiable determinant' of chronic disease, or a risk factor that can be controlled.[534] Globally, the 'nutrition transition' – a dietary shift to eating more of the foods at the restricted end of the dietary guidelines and not enough of the foods of which a high proportion is required,[535] together with increasingly sedentary lifestyles – is causally correlated with an increase in the population burden of non-communicable diseases.[536]

Australians on the whole do not meet the recommended 2 serves of fruit and 5 serves of vegetables per day (only 5.5% of Australians over 18 years old meet this recommended intake on the best available national survey data).[537] Living in the least socioeconomically disadvantaged areas and having a higher income is predictive of an Australian adult having greater compliance with recommended dietary guidelines.[538] Conversely socioeconomic disadvantage is predictive of food purchasing choices which are not consistent with dietary guidelines; household income is the socioeconomic disadvantage factor which is most strongly associated with this behaviour, however education and occupation are also relevant factors.[539] Socioeconomic disadvantage is correlated with purchasing and consuming excessive quantities of unhealthy foods, and insufficient quantities of healthy foods.[540]

[532] World Health Organisation and the Food and Agriculture Organisation of the United Nations, *World Health Organisation Technical Report Series: Diet, Nutrition and the Prevention of Chronic Diseases* 56 <http://whqlibdoc.who.int/trs/who_trs_916.pdf>; National Health and Medical Research Council, above n 25.
[533] World Health Organisation and the Food and Agriculture Organisation of the United Nations, above n 36, 56.
[534] Ibid 6.
[535] Adam Drewnowski, 'Nutrition Transition and Global Dietary Trends' (2000) 16 *Nutrition* 486.
[536] World Health Organisation and the Food and Agriculture Organisation of the United Nations, above n 36, 13.
[537] Australian Bureau of Statistics, *Profiles of Health: Australia 2011-2013 – Daily Intake of Fruit and Vegetables* <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4338.0~2011-13~Main%20Features~Daily%20intake%20of%20fruit%20and%20vegetables~10009>.
[538] Sarah McNaughton et al, 'An Index of Diet and Eating Patterns Is a Valid Measure of Diet Quality in an Australian Population' 138 *The Journal of Nutrition* 86, 89.
[539] Gavin Turrell et al, 'Socioeconomic Differences in Food Purchasing Behaviour and Suggested Implications for Diet-Related Health Promotion' (2002) 15 *Journal of Human Nutrition and Dietetics* 355, 359.
[540] McNaughton et al, above n 42, 360–361; K Giskes et al, 'Socioeconomic Differences among Australian Adults in Consumption of Fruit and Vegetables and Intakes of Vitamins A, C and Folate' (2002) 15 *Journal of Human Nutrition and Dietetics* 375.

One explanation put forward for nutritional disparity being dependent upon a person's position on the social gradient, is the 'economics of obesity'.[541] Healthier diets cost more: calories from energy-dense fats and refined carbohydrates are cheaper[542] than calories from more energy-dilute vegetables, fruit and protein foods.[543] Energy-dense foods are also more prevalent and available than ever before.[544] The public health effect of nutritional disparity along the social gradient is a higher incidence of diet-related chronic disease amongst poorer people.[545] This is illustrated by the paradoxical modern correlation between poverty, food insecurity and obesity and associated chronic disease: food insecurity,[546] poverty and welfare dependence[547] are all associated with increased risk. This paradox can be explained by the economics of obesity – a cheaper diet is now also a more unhealthy diet, and the cost of a diet complying with healthy-eating guidelines is a price barrier to poorer people eating well.[548] Other explanations put forward for the link between food insecurity, poverty and obesity and associated chronic disease include the welfare cycle, the anthropological hypothesis, and the built environment.

The welfare cycle explanation is that as people approach the end of a cycle of receiving pension or food relief, they are more likely to experience food insecurity and deprivation followed by a period of bingeing at the start of the next cycle.[549] The anthropological hypothesis is that 'bad behaviours' such as 'poor diet, poor exercise and weight control are the product of cultural differences between poor or food insecure people and the middle or upper class'.[550] The socioeconomic environment of a neighbourhood, the individual characteristics of people in that neighbourhood (such as educational status[551]) and cultural beliefs about food and exercise[552] are all associated with 'self-reported poor health and poor health behaviours'.[553]

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[541] Adam Drewnowski and Nicole Darmon, 'The Economics of Obesity: Dietary Energy Density and Energy Cost' (2005) 82 *American Journal of Clinical Nutrition* 2655.

[542] Shin-Yi Chou, Michael Grossman and Henry Saffer, 'An Economic Analysis of Adult Obesity: Results from the Behavioural Risk Factor Surveillance System' (2004) 23 *Journal of Health Economics* 565, 568; Michael McCarthy, 'The Economics of Obesity' (2004) 364 *The Lancet* 2169.

[543] Drewnowski and Darmon, above n 45, 266.

[544] World Health Organisation and the Food and Agriculture Organisation of the United Nations, above n 36, 64.

[545] Gostin, above n 10, 502.

[546] Cate Burns, 'A Review of the Literature Describing the Link between Poverty, Food Insecurity and Obesity with Specific Reference to Australia' 15 <http://secondbite.org/sites/default/files/A_review_of_the_literature_describing_the_link_between_poverty_food_insecurity_and_obesity_w.pdf>.

[547] Kylie Ball, Gita Mishra and David Crawford, 'Social Factors and Obesity: An Investigation of the Role of Health Behaviours' 27 *International Journal of Obesity* 394, 398–401.

[548] C Innes-Hughes et al, 'Food Security: - Food-Security-Discussion-Paper-2010.pdf' (PANORG, Heart Foundation NSW and Cancer Council NSW, 2010) 9 <http://www.heartfoundation.org.au/SiteCollectionDocuments/Food-Security-Discussion-Paper-2010.pdf>; McCarthy, above n 46.

[549] Marilyn S Townsend et al, 'Food Insecurity Is Positively Related to Overweight in Women' (2001) 131 *The Journal of Nutrition* 1738.

[550] Burns, above n 50, 21.

[551] M Malmström, J Sundquist and SE Johansson, 'Neighborhood Environment and Self-Reported Health Status: A Multilevel Analysis.' (1999) 89 *American Journal of Public Health* 1181.

[552] Amy Baughcum et al, 'Maternal Perceptions of Overweight in Preschool Children' 106 *Pediatrics* 1380.

[553] Burns, above n 50, 17.

Characteristics in the built environment which vary according to the socioeconomic status of an area may also help to explain nutritional disparity along the social gradient. The density of fast food outlets is greater in low-income areas.[554] Fast food outlets, aside from offering foods which are predominantly at the unhealthy end of the dietary guidelines, offer 'supersizing' of food portions whereby substantially larger serves are available for only a small increase in price compared to the increase in calories.[555] Although the fast food industry has responded to negative publicity by introducing 'healthy options' to menus, purchases of these options constitute only a tiny fraction of total meal purchases.[556] Fast food venues are a meeting point for both the 'economics of obesity' and the built environment; they might also be the site of a post-deprivation binge on highly palatable but energy-dense foods at the beginning of a welfare cycle; and might also reflect nutrition education and sociocultural norms in a particular neighbourhood. Fast food outlets and patronage thus provide a concrete example of the complex interactions which produce food consumption patterns correlating with socioeconomic status. The location of fast food outlets and relative dearth of healthy food outlets in areas of socioeconomic disadvantage[557] reflects a geography of disadvantage, wherein concentrations of poverty, food insecurity and chronic disease occur.

Further, economic disadvantage and the correlation with nutritional disparity and inequitable health outcomes may be exacerbated by increasing inequality. The central thesis of Piketty's *Capital in the Twenty-First Century* is that the relatively even distribution of capital in the period 1910-1980 is historically anomalous, and that capital distribution is on a course to return to historical norms of relative inequality.[558] If Piketty is correct in predicting growing inequality of capital distribution, then an increase in poverty will also lead to an increased incidence of the diet-related health (and other) problems correlated with poverty.[559]

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[554] Daniel D Reidpath et al, 'An Ecological Study of the Relationship between Social and Environmental Determinants of Obesity' (2002) 8 *Health & Place* 141; Innes-Hughes et al, above n 52, 8; Burns, above n 50, 17–18.

[555] David Cameron-Smith, Shane A Bilsborough and TC Crowe, 'Upsizing Australia's Waistline: The Dangers of "Meal Deals"' (2002) 177 *Medical journal of Australia* 686; Boyd Swinburn, 'Obesity Prevention: The Role of Policies, Laws and Regulations' (2008) 5 *Australia and New Zealand Health Policy* 1.

[556] Less than 1% in a study undertaken by the Cancer Council of NSW: Cancer Council of NSW, 'Fast Food Exposing the Truth' (22 February 2013) 18 <http://www.cancercouncil.com.au/wp-content/uploads/2013/02/Fast-Food-Exposing-the-Truth-22-February-2013.pdf>.

[557] Kylie Ball, Anna Timperio and David Crawford, 'Neighbourhood Socioeconomic Inequalities in Food Access and Affordability' (2009) 15 *Health and place* 578.

[558] Thomas Piketty and Arthur Goldhammer, *Capital in the Twenty-First Century* (The Belknap Press of Harvard University Press, 2014) 8, 15, 20.

[559] A lengthier discussion of the application of various economic theories to this problem is beyond the scope of this short paper, and is part of my broader research agenda questioning the proper role of government in public health interventions. This topic encompasses health economics and public health theory, contrasting the 'rational actor' assumptions of classical economic theory whereby people generally make decisions maximising their own benefit (utility), with public health scholarship on the extent to which people do not make health choices (e.g. impulsive diet choices) which maximise their own long-term utility. This broader research agenda also considers the legitimacy of regulatory intervention in the free market as applied to food choice, and whether in some respects the health outcomes of the free market in food constitute 'market failure', see eg. Rob Moodie et al, 'Childhood Obesity – a Sign of Commercial Success, but a Market Failure' (2006) 1 *International Journal of Pediatric Obesity* 133.

Ecological public health: situating humans as a species in an ecosystem, reframing unhealthy and unsustainable diets as 'ecological crisis'; parallels with legal geography

The dysfunction engendered by free market economic management of food supply, can also be conceptualised within a particular model of public health, 'ecological public health'. Economy, the management of home, should logically rest on ecology, the knowledge of home;[560] 'home' here being society at various scales from the global to the household and individual. Ecological crisis caused by human food systems might be understood in a narrow sense to encompass environmental damage to the non-human, via food consumption patterns contraindicated by the sustainable diet guidelines outlined above. A broader understanding of both ecology and ecological crisis, however, places humans as a species within an ecosystem, vulnerable to environmental degradation and imbalances in that system.

The ecological model of public health uses notions of 'interaction and interdependence' between 'human beings, their health and their physical and social environments'.[561] Drawing on understandings from the ecological sciences of 'humanity's relationship with other species as well as the inorganic substrate of the biotic environment',[562] the ecological public health model 'sees ill-health as the result of mismanaging relationships'.[563] Rayner and Lang describe the 'intransigence of some new public health problems such as obesity and so-called lifestyle diseases' as an example of a relational crisis with such enormous implications that 'policy-makers seem frozen and unable to chart a future'. [564]

There are parallels between ecological public health as an explanatory model for the correlations between poverty, food, health and environmental damage, and the discipline of legal geography (the study of the relationships between law, land and people). Legal geography provides an accurate framework for seeing how interactions between the biological and the social play out in human ecosystems, including impoverished urban/suburban Australian ecosystems. Law is entangled with the social and biological realms – food law (and specifically food welfare law) explicitly and visibly so in the material effects of food consumption patterns on human health and broader ecosystem health. My broader research agenda rests on legal geography as a methodology; for the purposes of this paper the work of Blomley on opportunities to change entrenched but dysfunctional practices, or forms of 'frozen politics' is pertinent to the discussion. Blomley points to 'crisis or failure' in a prevailing practice as an opportunity to initiate new 'possibilities for political learning and experimentation'.[565] Taken in entirety, reform of the dysfunctions of whole-of-society Australian dietary

[560] Nicole Graham, *Lawscape: Property, Environment, Law* (Routledge, 2011) 6.
[561] Ilona Kickbusch, 'Approaches to an Ecological Base for Public Health' (1989) 4 *Health Promotion* 265, 265.
[562] Rayner and Lang, above n 10, 96.; see also Nancy Milio, 'Making Healthy Public Policy; Developing the Science by Learning the Art: An Ecological Framework for Policy Studies' (1987) 2 *Health Promotion International* 263, 263; Trevor Hancock, 'Health, Human Development and the Community Ecosystem: Three Ecological Models' (1993) 8 *Health Promotion International* 41.
[563] Rayner and Lang, above n 10, 92–93.
[564] Ibid 71.
[565] Nicholas Blomley, 'Performing Property, Making the World' (2013) 26 *Canadian Journal of Law and Jurisprudence* 23.

practices and regulation are an impossibly large and utopian project to contemplate.[566] Food welfare is an accessible leverage point[567] for change to improve nutritional equality for the most vulnerable segment of the population with the least social power, and the least healthy and sustainable consumption patterns; the state is already the conduit for the provision of food (via cash welfare).

The ecology of communities includes networks of food provisioning relationships. Overlaid on the ecology of all human settlements in a free market economy, but having particularly heavy impact in disadvantaged spaces, are particular effects of consumer autonomy. There is indisputably a link between socioeconomic status, food consumption patterns, and health outcomes. The complex causality underpinning food choices is explicable by reference to economy, ecology and geography – and explanatory paradigms from health economics, ecological public health, and legal geography, (as applied to this problem) indicate a need for law reform to address crisis and failure in welfare state provision of food security to disadvantaged people.

State delivery of healthy and sustainable diet via the welfare system in Australia

For the vast majority of poor and welfare-dependent people in Australia, State provision of food welfare is delivered as cash payments which are not separate from general income support.[568] The exception to this is the income management program applied selectively to particular regions ('BasicsCard')[569] which is a form of paternalistic in-kind welfare.[570] The selective application of the BasicsCard income management scheme by geographic region has been justified by reference to the concentrations of socioeconomic disadvantage in particular areas.[571] Evidence as to the success of income management in relation to dietary and health outcomes is sparse. According to the Australian Government, there is some evidence from the Northern Territory 'that income management has resulted in an increase in the purchase of healthy food items such as fruit and vegetables, however, these items continue to represent only a small fraction of total store sales'.[572] As the BasicsCard income management scheme

[566] Rayner and Lang, above n 10, 97. Refers to action being 'daunted' by the immensity of 'systemic approaches' to thinking about public health problems.
[567] Daniel Stokols, 'Establishing and Maintaining Healthy Environments: Toward a Social Ecology of Health Promotion' (1992) 47 *American Psychologist* 6, 7.
[568] Part 3, Divn 4 *Social Security Administration Act 1999* (Cth).
[569] Part 3B, *Social Security Administration Act 1999* (Cth).
[570] Bielefeld, above n 12.
[571] Ian Byron, 'Placed-Based Approaches to Addressing Disadvantage: Linking Science and Policy' (2010) 84 *Family Matters: Journal of the Australian Institute of Family Studies* 20; T Vinson, Margot Rawsthorne and Brian Adrien Cooper, *Dropping off the Edge: The Distribution of Disadvantage in Australia* (Jesuit Social Services ; Catholic Social Services Australia, 2007); Luke Buckmaster, Carol Ey and Michael Klapdor, *Income Management: An Overview - Place Based Policies* (21 June 2012) <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2011-2012/IncomeManagementOverview#_Toc328056506>.
[572] Buckmaster and Ey, above n 14. (Citing Senate Community Affairs Legislation Committee, Answers to Questions on notice, Cross Portfolio Indigenous Matters, Budget Estimates 2010–11, 21 October 2010, Question XT1.) See also Kathryn Roediger, 'Northern Territory Emergency Response Evaluation Report 2011' (Australian Government Department of Families, Housing, Community Services and Indigenous Affairs, 1 January 2011) <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22library%2Flcatalog%2F00307398%22>.

represents a small minority of total State delivery of food as a component of welfare in Australia, and evidence as to its effectiveness in addressing socioeconomic health disparity is thus far insufficient to draw firm conclusions, it is not a satisfactory case study in using food welfare policy to address public health problems arising from the correlation between poverty/welfare dependence, food insecurity, and obesity and associated chronic disease.[573] It is also clear from the strong evidence of that correlation that the way Australian welfare law delivers the food needs of poor and welfare dependent people has failed to address health disparities. As human culture, including law, created this problem (by positive steps and by omissions)[574] how can law as an element of human culture be an ameliorating or mitigating factor? What alternative legal structures are possible? The following case study contemplates alternatives employed in US food welfare programs, and the extent to which these programs increase consumption by welfare recipients, of fresh fruit and vegetables and in particular, local produce.

State delivery of food welfare in the US, a patchwork of overlapping programs: SNAP, WIC, FMNP and SFMNP, NSLP and SBP

In contrast to Australia's predominantly cash-based provision of the food needs of welfare recipients, the US makes extensive use of in-kind welfare via various programs. The US Food and Nutrition Service, a federal agency, delivers in-kind food welfare via delegation to state agencies.

The main US food welfare programs are the Supplemental Nutrition Assistance Program (SNAP), the Women, Infants and Children Nutrition Program (WIC) (which also includes the Farmers' Market Nutrition Program (FMNP) and the Senior Farmers' Market Nutrition Program, SFMNP)), the National School Lunch Progam (NSLP) and the School Breakfast Program (SBP). These programs are on a spectrum of welfare type classification from vouchers/electronic benefits transfer to direct provision of meals;[575] evidence of the differential effect on increasing fruit and vegetable consumption is discussed under the specific program headings below. Components of these programs have either been directly targeted at (FMNP and SFMNP) or adapted to encourage and accommodate (SNAP, NSLP and SBP) increased consumption by welfare recipients of fresh fruit and vegetables. A study of these initiatives reveals possibilities for working creatively within Australian food assistance welfare programs to support local agriculture and improve local nutrition.

As legal interventions, various aspects of the US programs are subject to the critique of interfering with individuals' autonomy and constituting 'nanny state' laws. This is a broad topic and as previously discussed beyond the scope of this short paper, however I note that the US programs have a spectrum of effects from 'nudging' welfare recipients'

[573] There is also a strong critique of the BasicsCard/income management program as a racially discriminatory regulatory intervention. My broader research agenda will encompass this critique, and for example consider whether place has been used as a proxy for race in the design of this in-kind welfare program, and whether this was masked by 'underinclusiveness': Gostin, above n 10, 69.

[574] Coggon, above n 1, 5–6.John Coggon, *What Makes Health Public? A Critical Evaluation of Moral, Legal and Political Claims in Public Health* (2012, Cambridge University Press, Cambridge and New York) 5-6.

[575] Hilary W Hoynes and Diane Whitmore Schanzenbach, 'U.S. Food and Nutrition Programs' (Working Paper 21057, National Bureau of Economic Research, March 2015) 21–22 <http://www.nber.org/papers/w21057>.

consumer choices (such as restrictions on what SNAP benefits can be used to purchase, e.g. food but not cigarettes) through to outright hard paternalism (such as directly providing a pre-determined basket of food goods in some states' iterations of the WIC program).[576] The practical effects of these programs on increasing participant consumption of fresh fruit and vegetables are set out in this paper; the implications in public health law and governance theory are a separate topic for my broader research agenda.

Supplemental Nutrition Assistance Program (SNAP)

SNAP, formerly known as the Food Stamps Program, is the largest food assistance program in the US, and is also the most universal in its eligibility criteria which are based on income and assets.[577] SNAP benefits are delivered to both the unemployed and the working poor.[578] In 2014, 46.5 million people received SNAP benefits, or 1 in 7 people in the US.[579]

The SNAP program is the subject of ongoing and highly politicised debate as there are few constraints on food choice other than prohibitions on alcohol, tobacco and pre-prepared hot foods.[580] Progressive political forces oppose changing SNAP to compel healthier food choices on grounds of objections to paternalism; conservatives allegedly oppose changes to SNAP because the powerful industrial food lobby stands to lose a lot of money.[581] The US has similar diet-related public health problems to those being experienced in Australia, with a similarly unequal distribution of obesity and associated chronic disease concentrated in socioeconomically disadvantaged populations.[582] Critics of unrestrained food choice in how SNAP recipients expend benefits argue that SNAP should only be able to be used for healthy foods and should not be able to be used for unhealthy foods such as sugar-sweetened beverages.[583] Suggested reforms fall into several camps: increasing overall SNAP benefit levels to indiscriminately increase overall food spending, subsidising healthy food purchases and taxing unhealthy food

[576] Richard H Thaler and Cass R Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (Yale University Press, 2008) 7; Coggon, above n 1, 127; Gostin, above n 10, 50–54; Rayner and Lang, above n 10, 272–275.
[577] Hoynes and Schanzenbach, above n 79, 2–3.
[578] Ibid 4.
[579] Ibid 15.
[580] Neeraj Kaushal and Qin Gao, 'Food Stamp Program and Consumption Choices' (Working Paper 14988, National Bureau of Economic Research, May 2009) 6 <http://www.nber.org/papers/w14988>.
[581] Michelle Obama, 'The Campaign for Junk Food: Attempts to Roll Back Healthy Reforms' *New York Times*, 28 May 2014 <http://www.nytimes.com/2014/05/29/opinion/michelle-obama-on-attempts-to-roll-back-healthy-reforms.html?_r=0>; Michele Simon, 'Food Stamps: Follow the Money - Are Corporations Profiting from Hungry Americans?' (June 2012) <http://www.eatdrinkpolitics.com/wp-content/uploads/FoodStampsFollowtheMoneySimon.pdf>; see also Roger Magnusson, 'Case Studies in Nanny State Name-Calling: What Can We Learn?' *Public Health* <http://www.sciencedirect.com/science/article/pii/S0033350615001973>.
[582] United States Department of Agriculture Food and Nutrition Service, *Healthy Incentives Pilot (HIP) - Basic Facts | Food and Nutrition Service* <http://www.fns.usda.gov/hip/healthy-incentives-pilot-hip-basic-facts>.
[583] Anne Barnhill, 'Impact and Ethics of Excluding Sweetened Beverages From the SNAP Program' (2011) 101 *American Journal of Public Health* 2037.

purchases;[584] or using financial incentives for healthy food purchases plus 'nudge' merchandising strategies in-store.[585]

The regulatory response to this critique of SNAP has been the piloting of incentive programs to encourage SNAP benefits being used to purchase fruit and vegetables. The pilot scheme which has been subjected to the most rigorous mixed-method evaluation is the Healthy Incentives Pilot (HIP).[586] Under this scheme participants who used SNAP benefits to purchase fruits and vegetables on a targeted list[587] immediately had 30 cents per dollar thus expended, credited back to their electronic benefits transfer card (the 30 cents could then be spent on any item eligible under the SNAP benefits scheme).[588] The outcomes of HIP included participants increasing consumption of targeted fruit and vegetables by 26 per cent compared to nonparticipants, HIP households spending 11 per cent more of SNAP benefits on targeted fruit and vegetables and having higher total household spending on fruit and vegetables, and HIP participants being more likely to have fruit and vegetables available at home.[589] Retailers for the most part did not find the program difficult to implement.[590]

Identified barriers to SNAP participants choosing to spend a higher proportion of benefits on healthy foods such as fruit and vegetables include price sensitivity. This reflects the 'economics of obesity' explanation for the correlation between poverty, food insecurity and obesity and associated chronic disease discussed above, and is illustrated by factors identified as influencing the take-up of capacity to use SNAP benefits at farmers' markets in the US. Whilst an increasing number of farmers' markets accept SNAP benefits and SNAP electronic benefit transfer transactions, there has not been a corresponding increase in SNAP recipients' patronage of farmers' markets. Price and budget, perceptions of quality and freshness, lack of awareness that farmers' markets accepted SNAP EBT cards and worries about stigma, as well as convenience (including single-destination shopping), were all relevant factors in SNAP recipients' decisions about whether to shop at a local farmers' market.[591]

Some farmers' markets offer incentive schemes to SNAP participants using EBT cards at the markets, and these schemes strongly influenced shopping decisions and increased

[584] Biing-Hwan Lin et al, 'Economic Incentives for Dietary Improvement Among Food Stamp Recipients' (2010) 28 *Contemporary Economic Policy* 524, 4. This economic study predicted that a price subsidy on fruit and vegetables would cost less and be more effective in narrowing consumption deficiencies than a non-targeted increase in overall food stamp benefits (17).

[585] Erika Gordon et al, 'Approaches for Promoting Healthy Food Purchases by SNAP Participants' (ICF International for the US Department of Agriculture, Food and Nutrition Service, July 2014) <http://www.fns.usda.gov/sites/default/files/ICF-IHC-Final-Report-0714.pdf>.

[586] United States Department of Agriculture Food and Nutrition Service, *Evaluation of the Healthy Incentives Pilot (HIP) Final Report - Summary* <http://www.fns.usda.gov/sites/default/files/HIP-Final-Summary.pdf>. Other incentive programs at a lesser scale but in a similar vein, although not yet subject to rigorous evaluation, include Philly Food Bucks, Wholesome Wave NFP, and Food Insecurity Nutrition Incentive program.

[587] The list excluded white potatoes, fruit juice, and items with added sugars, fats, oils and salt.

[588] United States Department of Agriculture Food and Nutrition Service, above n 89.

[589] Ibid.

[590] Ibid.

[591] United States Department of Agriculture Food and Nutrition Service, *Nutrition Assistance in Farmers' Markets: Understanding the Shopping Patterns of SNAP Participants (Final Report)* 122 <http://www.fns.usda.gov/sites/default/files/FarmersMarkets-Shopping-Patterns.pdf>.

fruit and vegetable consumption; lack of awareness of incentive schemes was a reason for nonparticipation.[592]

Farmers' markets have something of a reputation both in the US[593] and in Australia[594] as elitist or trendy, selling gourmet and/or organic produce at prices which make them financially inaccessible food venues for people on low incomes. Whilst ostensibly public spaces, open to all, there is a perception that at least some farmers' markets are stocked with artisanal cheeses and of-the-moment produce, beyond the reach of a low-income food budget. This perception may be true of some markets but not all, and the aura of the private and culturally exclusive[595] is intimidating and deters access by low-income people.[596] The US in-kind welfare programs which allow food welfare credits to be exchanged for produce at farmers' markets are a possibility worth investigating to encourage Australian low-income earners to increase consumption of local produce; however management of perceptions around accessibility are an important consideration. Further, incentive schemes (and awareness of same) are demonstrably successful in increasing uptake of benefit expenditure by welfare recipients at farmers' markets and thus increasing fruit and vegetable consumption.

Women, Infants and Children Nutrition Program (WIC) (including Farmers' Market Nutrition Program (FMNP) and the Senior Farmers' Market Nutrition Program, (SFMNP))

The Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) is a system of Federal grants to States 'for supplemental foods, health care referrals, and nutrition education for low-income pregnant, breastfeeding, and non-breastfeeding postpartum women, and to infants and children up to age five who are found to be at nutritional risk'.[597]

WIC is distinct from SNAP in several ways: it is targeted at a specific subset of welfare recipients; benefits are not reduced with income (it is 'all or nothing'); the benefit is a specific 'WIC bundle' of foodstuffs rather than being open to personal choice; and the benefits are quantity-based rather than price-based scheme, and thus WIC recipients' benefits are not sensitive to price.[598] The exception to price sensitivity is the recent

[592] Ibid Ch 5; Yuki Kato and Laura Mckinney, 'Bringing Food Desert Residents to an Alternative Food Market: A Semi-Experimental Study of Impediments to Food Access' (2015) 32 *Agriculture and Human Values* 215, 224.
[593] Laura B Delind, 'Are Local Food and the Local Food Movement Taking Us Where We Want to Go? Or Are We Hitching Our Wagons to the Wrong Stars?' (2011) 28 *Agriculture and Human Values* 273, 276–277; Lisa Hamilton, 'The American Farmers Market' 2 *Gastronomica* 73.
[594] Anna Vidot, *Farmers Markets Must Retain Authenticity, Accessibility* Tasmanian Country Hour - ABC Rural Australian Broadcasting Corporation) <http://www.abc.net.au/site-archive/rural/tas/content/2012/01/s3418738.htm>; Jane Wilson, *Market Power* The Sydney Morning Herald <http://www.smh.com.au/small-business/managing/market-power-20100629-zgi1.html>; Sue Booth and John Coveney, *Food Democracy: From Consumer to Food Citizen* (Springer Berlin Heidelberg, 2015).
[595] Rachel Slocum, 'Whiteness, Space and Alternative Food Practice' (2007) 38 *Post Communist Transformation* 520, 524; Kato and Mckinney, above n 95, 216.
[596] Shannon Esrich, *Gone to Market: Perceptions, Motivations, and Values of Farmers Market Participants in Burlington, Vermont* 82 <http://scholarworks.uvm.edu/cgi/viewcontent.cgi?article=1004&context=castheses>.
[597] United States Department of Agriculture Food and Nutrition Service, *Women, Infants, and Children (WIC)* <http://www.fns.usda.gov/wic/women-infants-and-children-wic>.
[598] Hoynes and Schanzenbach, above n 79, 8.

introduction of a supplementary fruit and vegetable 'cash value voucher' or CVV.[599] As price is a powerful determinant of food choices[600] and barrier to healthy eating (as per the economics of obesity paradigm discussed above), food welfare which is not price-sensitive is an idea Australia might consider. This is especially so, given the high price of food generally but particularly of fresh produce, in Australia's remote and rural areas.[601]

In the WIC program, the US federal government authorises food package lists with set minimum criteria justified by nutritional content. The States, via State agencies administering the program to WIC recipients then have some discretion to vary the list, for example by varying the federal requirement that at least half the cereals on a State agency's authorised food list be wholegrain, to authorising only wholegrain cereals.[602] The US Department of Agriculture agency, the Food and Nutrition Service (FNS) arrives at the periodically-reviewed list of authorised foods for distribution under the WIC program by consulting with the US National Academies' Institute of Medicine.[603] The list of authorised foods aligns with significant aspects of the global definition of food security,[604] for example by incorporating some flexibility to allow for culturally diverse populations – tortillas and brown rice are on the list of authorised cereal options,[605] not just brown bread.[606] Accommodating cultural diversity is similarly an issue for food security initiatives in Australia,[607] and particularly if in-kind food welfare is, as is the case with WIC, highly prescriptive.

WIC was expanded from 1992 to include the FMNP and SFMNP programs, with the stated aim of providing to WIC recipients (FMNP) and low-income seniors (SFMNP) 'fresh, unprepared, locally grown fruits and vegetables to WIC participants, and to

[599] Ibid.
[600] Simone A French, 'Pricing Effects on Food Choices' (2003) 133 *The Journal of Nutrition* 841S.
[601] Karen Webb and Lesley King, 'Food, Nutrition and the Built Environment': (2007) 4 *Public Health Bulletin South Australia* 12; Julie K Brimblecombe et al, 'Characteristics of the Community-Level Diet of Aboriginal People in Remote Northern Australia' (2013) 198 *Medical Journal of Australia* <https://www.mja.com.au/journal/2013/198/7/characteristics-community-level-diet-aboriginal-people-remote-northern-australia>; Council of Australian Governments, 'National Strategy for Food Security in Remote Indigenous Communities' (December 2009) 3 <https://www.coag.gov.au/sites/default/files/nat_strat_food_security.pdf>.
[602] United States Department of Agriculture Food and Nutrition Service, *WIC Food Packages: Questions and Answers* <http://www.fns.usda.gov/sites/default/files/wic/20140508-WICFoodPkg-QuestionsAnswers.pdf>.
[603] US National Academies Institute of Medicine, *Review of WIC Food Packages* Institute of Medicine <http://iom.nationalacademies.org/Activities/Nutrition/ReviewWICFoodPackages.aspx>.
[604] Committee on World Food Security, 'Principles for Responsible Investment in Agriculture and Food Systems' 6 <http://www.fao.org/fileadmin/templates/cfs/Docs1314/rai/Endorsement/CFS_RAI_Principles_For_Endorsement_Ver_11_Aug_EN.pdf>.
[605] United States Department of Agriculture Food and Nutrition Service, *WIC Food Packages - Regulatory Requirements for WIC-Eligible Foods | Food and Nutrition Service* <http://www.fns.usda.gov/wic/wic-food-packages-regulatory-requirements-wic-eligible-foods>.
[606] The food-rationing programs of the past, such as that implemented in Britain in WWII, did not have to accommodate multicultural food preferences as the societal context was more homogenous, at least in dietary norms, and every household could be issued with a set ration of brown bread without considering whether bread consumption was a normal part of food culture in that household.
[607] Kate Rosier and Australian Institute of Family Studies, *Food Insecurity in Australia: What Is It, Who Experiences It and How Can Child and Family Services Support Families Experiencing It?* <https://aifs.gov.au/cfca/publications/food-insecurity-australia-what-it-who-experiences-it>.

expand the awareness, use of, and sales at farmers' markets'.[608] WIC participants receive coupons in addition to their WIC benefits, which can be redeemed for fruit and vegetables, honey and fresh herbs at authorised farmers' markets, farms, roadside farm stalls, and community supported agriculture programs (CSAs).[609] Interestingly, states can limit authorised produce to that which is locally grown, thus supporting local farmers.[610] The FMNP and SFMNP increase patronage of local farm produce by welfare recipients because of the prescriptive nature of what the in-kind benefits can be exchanged for, the familiarisation effect of normalising farmers' market patronage, and the concurrent redemption of other forms of food welfare such as SNAP benefits which increased overall fresh produce consumption; non-availability of point of sale devices to process EBT transactions are a barrier to participation.[611]

National School Lunch Progam (NSLP) and School Breakfast Program (SBP)

Finally, US schools (across a mix of public and private educational institutions) provide food to a specific population segment, school-age children, as both full-fee paid meals or as subsidised direct in-kind welfare via reduced-price or free meals for children in families eligible for SNAP benefits.[612] Reforms to this program introduced under the *Healthy, Hunger-Free Kids Act 2010* (US)[613] altered nutrient standards for meals able to be served under both the NSLP and the SBP. These reforms include mandates that (among other things) school meals contain more fruits and vegetables.[614]

There are data gaps in the evaluative literature on changes to dietary intake for participants in NSLP and SBP, specifically in the lack of research on post- *Healthy, Hunger-Free Kids Act* changes to nutrition standards.[615] The data covering the period before these changes indicates mixed results, but an overall pattern of improved diet quality (nutrient density and diversity) however no impact on diet quantity (total calories).[616] Gundersen points to two possible unintended consequences of the well-intentioned improvements to nutrition standards for school meals: higher costs decreasing schools' participation, and increased plate-waste associated with healthier

[608] United States Department of Agriculture Food and Nutrition Service, *Farmers' Market Nutrition Program: Overview* <http://www.fns.usda.gov/fmnp/overview>.

[609] Ibid. Resellers such as wholesale distributors selling produce grown by someone else are not authorised vendors under these schemes. SFMNP benefits are only available during harvest season, a relevant point of geographic distinction when considering potential application to Australia which does not have a non-productive cold season because of climate differences.

[610] Ibid.

[611] Mary Kunkel, Barbara Luccia and Archie Moore, 'Evaluation of the South Carolina Seniors Farmers' Market Nutrition Education Program' (2003) 103 *Journal of the American Dietetic Association* 880; Jean Ann Anliker, Mark Winne and Linda Drake, 'An Evaluation of the Connecticut Farmers' Market Coupon Program' (1992) 24 *Journal of Nutrition Education* 185; Steven Garrett et al, 'Sound Food Report: Enhancing Seattle's Food System, A Report to the City of Seattle' <http://coloradofarmtoschool.org/wp-content/uploads/downloads/2013/02/Sound-food-report-Enhancing-Seattles-food-system.pdf>.

[612] Hoynes and Schanzenbach, above n 79, 11 and 13. Michelle Obama was the initiating force behind these reforms.

[613] (check AGLC citation style for US statutes)

[614] Chad D Meyerhoefer and Muzhe Yang, 'The Relationship between Food Assistance and Health: A Review of the Literature and Empirical Strategies for Identifying Program Effects' [2011] *Applied Economic Perspectives and Policy* ppr023, 8.

[615] Hoynes and Schanzenbach, above n 79, 34.

[616] Ibid 34–35; Meyerhoefer and Yang, above n 117.

meals.[617] These observations remain speculative and untested in the available research data.

The school meal programs improvements to nutritional standards have been critiqued for being exploited by powerful interests in the industrial food sector – for example, tomato paste on pizzas was notoriously included as a 'vegetable' serving.[618] Any move to provide in-school welfare to children in Australia would, it can be surmised, have to be protected against vested interests derailing implementation of dietary guidelines.

Conclusion

State responsibility for the food security of welfare recipients, when delivered via in-kind food welfare, does not inevitably result in improved alignment with dietary guidelines, including guidelines for consumption of fresh fruit and vegetables. Fruit and vegetable consumption is significant for both public health and environmental health, welfare-dependent populations have the lowest consumption levels. The move towards in-kind rather than cash welfare in Australia should be informed by available evidence, such as that from the US, as to which forms of food welfare improve recipients' capacity for alignment with recommended dietary guidelines and specifically increased consumption of fresh produce. The evidence from the US suggests that in-kind food welfare can be deployed against the correlations between poverty, dietary sustainability, food insecurity, and obesity and associated chronic disease. Food welfare can be quarantined from price-sensitivity and delivered as an evidence-based bundle of healthy foodstuffs; food welfare credits can articulate with the 'alternative' food industry including farmers' markets; and direct food welfare to disadvantaged school children can improve the nutrient density of their diets. The evidence from the US also indicates caveats – in-kind food welfare which is sensitive to price is subject to the economics of obesity and may fail to deliver a healthy diet; some healthy food spaces may operate to exclude disadvantaged people; and food welfare programs are vulnerable to commandeering by the processed food industry.

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[617] Craig Gundersen, 'Food Assistance Programs and Child Health' (2015) 25 *Policies to Promote Child Health* 91, 102–103.

[618] Stephanie Mercier, 'Review of US Nutrition Assistance Policy: Programs and Issues' (AGree, June 2012) 1, 22 <http://www.foodandagpolicy.org/sites/default/files/AGree%20Review%20of%20US%20Nutrition%20Assistance%20Policy_1_0.pdf>.

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An Uneasy Interplay: Administrative Action, Regulatory Techniques and Legal Rules in the Montreal Compliance System

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1. Introduction

Scientific warnings about the accelerating destruction of the earth's stratospheric ozone layer catalysed negotiations for a global agreement to protect the ozone layer in 1981. The resultant The Montreal Protocol[619] to the Ozone Convention,[620] which provides for the progressive elimination of ozone-depleting substances, came into force in 1989, and a non-compliance procedure was adopted in 1992. Over time, a network of institutions and procedures developed to complement the aims of this formal non-compliance procedure,[621] which I refer to collectively as the Montreal compliance system. This system encompasses state reporting, the non-compliance procedure administered by the Implementation Committee, oversight by the Meeting of the Parties, and conditional funding to support developing and transition country compliance.

Global administrative law (GAL) is an intellectual framework which valuably illuminates processes within the Montreal compliance system. GAL is a developing field of international legal scholarship, which posits that much of contemporary global governance can be conceptualised and analysed as 'administrative action'.[622] Global administrative action includes elements of rule making, adjudication and other decision making that fall short of formal treaty making and adjudicative dispute settlement between Parties.[623] This paper argues that administrative action is an apt descriptor of the processes and decision making occurring within the Montreal compliance system. This is part of a broader trend in which global environmental governance increasingly reflects administrative law traits, rather than state-consent based paradigms of international law.[624]

Numerous GAL scholars claim that promoting the rule of law is a normative aspiration of the GAL project.[625] Although definitions of the rule of law and the international rule of

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[619] *Montreal Protocol on Substances that Deplete the Ozone Layer 1987*, opened for signature 16 September 1987, 1989 UNTS 28 (entered into force 1 January 1989) ('Montreal Protocol').

[620] *Vienna Convention for the Protection of the Ozone Layer*, opened for signature 22 March 1985, 1513 UNTS 293 (entered into force 22 September 1988).

[621] O Greene, 'The System for Implementation Review in the Ozone System' in D G Victor, K Raustiala and E B Skolnikoff (eds), *The Implementation and Effectiveness of International Environmental Commitments* (MIT Press, 1998) 89, at 89. See also G de Burca, R O Keohane and C F Sabel, 'Global Experimentalist Governance' (2014) 44(3) *British Journal of Political Science* 477.

[622] B Kingsbury, N Krisch and R B Stewart, 'The Emergence of Global Administrative Law' (2005) 68 *Law and Contemporary Problems* 15, at 17; N Krisch, 'Global Administrative Law and the Constitutional Ambition' in P Dobner and M Loughlin (eds), *The Twilight of Constitutionalism* (Oxford University Press, 2010) 245, at 255; E MacDonald, 'The Emergence of Global Administrative Law?' (Paper presented at the 4th Global Administrative Law Seminar, Viterbo, 13-14 June 2008) at 4 <http://www.iilj.org/gal/documents/MacDonald.pdf>.

[623] Kingsbury, Krisch and Stewart, 'The Emergence of Global Administrative Law', above n 4, at 17.

[624] E Hey, 'International Institutions' in D Bodansky, J Brunnee and E Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2007) 749, at 768.

[625] R B Stewart, 'Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness' (2014) 108 *American Journal of International Law* 211, at 220; R B Stewart, 'Part I Courts, Institutions, and Access to Justice: Legitimacy and Accountability in Global Regulatory Governance: Global Administrative Law and Developing Countries' (2009) 1 *Jindal Global Law Review* 41, at 59; E Benvenisti, *The*

law are contested,[626] core procedural tenets of these concepts typically include that regulators act within legal bounds, adhere to due process requirements in decision making, do not act arbitrarily, and that those affected by such decisions are afforded quality access to the courts and other avenues for review.[627] This understanding of the rule of law provides a normative backdrop for the issues examined in this paper, and in particular the interplay between administrative action, regulatory techniques and legal rules.

I contend that there are two key ways in which administrative action is reconfiguring the relationship between international law, politics and regulation in the Montreal compliance system. First, over time, there has been a tendency for decision making to become more administrative in character, evidenced by an increasingly formulaic and consistent approach to compliance decisions, and a proceduralised framework for supporting non-compliant Parties' return to compliance. This represents a departure from a traditionally flexible and political approach to compliance decision making.[628] To this extent, there is support for Cardesa-Salzmann's claim that the non-compliance procedure is 'functioning more as a technical and administrative, rather than politicised mechanism'.[629]

Secondly and significantly, the use of regulatory techniques for conditional funding within this global administrative space may actively undermine, and dilute the force of, legal rules, although other environmental and political purposes may well be achieved. The procedural accountability arrangements that have developed within the Montreal compliance system conditionally link financial and technological assistance incentives to developing and transition countries' adherence to selected compliance benchmarks agreed between the Party concerned and the Implementation Committee. The use of conditional funding as a regulatory technique facilitates the achievement of

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Law of Global Governance (Hague Academy of International Law, 2014) at 89-99; M-S Kuo, 'The Concept of "Law" in Global Administrative Law: A Reply to Benedict Kingsbury' (2009) 20(4) *European Journal of International Law* 997, at 997. For example, Stewart argues that a 'modest but viable role for global administrative law would be to develop the tools of transparency, participation, reason giving, and review to promote greater consideration by decision makers to disregarded interests *and promote the rule of law* over regimes of power and bargain': Stewart, 'Part I Courts, Institutions, and Access to Justice', at 59 (emphasis added). More broadly, promoting the rule of law is a normative aspiration for international organisations, as reflected in the UN Secretary-General's 2012 'program of action to strengthen the rule of law at the national and international levels': UN Secretary-General, Delivering Justice: Programme of Action to Strengthen the Rule of Law at the National and International Levels: Report to the Secretary-General, A/66/749, 16 Mar 2012.

[626] The literature on these topics is voluminous. On the topic of the international rule of law, which provides a normative backdrop for the issues explored in this paper, important scholarly works include: J Waldron, 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?' (2011) 22 *European Journal of International Law* 315; J Waldron, 'The Rule of International Law' (2006) 30 *Harvard Journal of Law and Public Policy* 15; and J Crawford, 'International Rule and the Rule of Law' (2003) 24 *Adelaide Law Review* 3.

[627] Benvenisti, *The Law of Global Governance*, above n 7, at 90.

[628] See the discussion in section 4.

[629] A Cardesa-Salzmann, 'Constitutionalising Secondary Rules in Global Environmental Regimes: Non-Compliance Procedures and the Enforcement of Multilateral Environmental Agreements' (2011) 24(1) *Journal of Environmental Law* 103, at 132. In a similar vein, Gillespie claims that '[i]n most instances, compliance is dealt with a strict and uniform manner': A Gillespie, *Climate Change, Ozone Depletion, and Air Pollution: Legal Commentaries with Policy and Scientific Considerations* (Martinus Nijhoff Publishers, 2006) at 221. Likewise, Ehrmann observes that the non-compliance procedure 'can deal with individual cases of non-compliance in a routine and administrative manner': M Ehrmann, 'Procedures of Compliance Control in International Environmental Treaties' (2002) 13(2) *Colorado Journal of International Environmental Law & Policy* 377, at 439.

environmental objectives, as it addresses the capacity limitations which frequently hamper weaker states' compliance with their international environmental obligations. However, these accountability arrangements for the return to compliance of developing countries and countries with economies in transition (CEITs) in a way which allows circumvention of the rules of international law for breach of treaty.[630] This represents a significant departure from domestic administrative governance, in which legal rules provide the parameters for administrative action. I contend that this phenomenon has implications for the extent to which GAL can be said to be promoting the international rule of law.

This paper proceeds as follows. First, in section 2, an introduction to administrative action as a fundamental concept of global administrative law, and its pertinence to compliance systems in multilateral environmental agreements (MEAs), is provided. The distinctive elements of the Montreal Protocol and its compliance system that have contributed to its unprecedented successes are canvassed in section 3. Section 4 argues that the compliance processes and decisions in the Montreal compliance system are accurately conceptualised as administrative action. In section 5, I demonstrate how one regulatory technique – conditional funding arrangements – employed within this administrative space accommodates departure from binding treaty commitments, highlighting a tension between administrative action and the international rule of law. Concluding remarks are offered in section 6.

2. Administrative Action in Global Governance

In the context of the attenuation of the traditional legitimating paradigm of state consent,[631] new justifications for the exercise of power in international institutions are required. As Hey notes, an implication of this changing landscape in international environmental law is that:

> …[F]ormal state consent no longer suffices to legitimize the rules and standards developed or the decisions taken in individual situations. … [O]ne potential source of legitimacy is to be found in the formalization of the processes and procedures employed, both in normative development and decision-making.[632]

Hey proposes that the 'emergent common interest pattern' in the 'normative development and decision-making' in international [environmental] law aligns more closely with 'traits of public and, in particular, administrative law' than 'interstate

[630] M Koskenniemi, 'Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol' (1992) 3(1) *Yearbook of International Environmental Law* 123, at 162; J Klabbers, 'Compliance Procedures' in D Bodansky, J Brunnee and E Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2007) 995, at 996-8, 1007-9; G M Bankobeza, *Ozone Protection: The International Legal Regime* (Eleven International Publishing, 2005) at 300.

[631] J Brunnee, 'Common Areas, Common Heritage, and Common Concern' in D Bodansky, J Brunnee and E Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2007) 550, at 569; A Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' (2006) 19 *Leiden Journal of International Law* 579, at 587-9. Additionally, the growing participation of non-state actors adds to the strain on the traditional account of international law: J Brunnee and E Hey, 'Transparency and International Environmental Institutions' in A Bianchi and A Peters (eds), *Transparency in International Law* (Cambridge University Press, 2013) 23, at 28.

[632] Hey, 'International Institutions', above n 6, at 767. See also J Brunnee, 'COPing with Consent: Law-Making Under Multilateral Environment Agreements' (2002) 15(1) *Leiden Journal of International Law* 1, at 33.

patterns of international law'.[633] This underscores the pertinence of analysing the processes and decisions within the Montreal compliance system through an administrative lens.

Global administrative law provides a valuable intellectual framework for conceptualising and analysing what Hey describes as the 'emergent common interest pattern' in international law that reflects traits of administrative law.[634] As scholars of GAL observe,[635] incorporating 'new mechanisms of administrative law at the global level to address decisions and rules made within intergovernmental regimes'[636] is one response to addressing the legitimacy and accountability concerns confronting global governance.[637] According to the leading proponents of this developing field, GAL can be defined as:

> [C]omprising the mechanisms, principles and practices, and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring they meet adequate standards of transparency, participation, reasoned decision, and legality, and by providing effective review of the rules and decisions they make.[638]

One of the two central concerns of GAL[639] is the adoption of domestic administrative law mechanisms in the 'global administrative space',[640] which is consonant with the focus of this paper on administrative action in a global regulatory compliance body. As previously noted, global administrative action includes elements of rule making, adjudication and other decision making that fall short of formal treaty making and adjudicative dispute settlement between Parties.[641] This can be seen as the global

[633] Hey, 'International Institutions', above n 6, at 768.

[634] ***Id.*** **Jessup and Rubenstein note that 'The Global Administrative Law Project has enriched an engagement with the complex ways in which the international and the public intersect, by recording public principles within the international arena': B Jessup and K Rubenstein, 'Using Discourse Theory to Untangle Public and International Environmental Law' in B Jessup and K Rubenstein (eds),** ***Environmental Discourses in Public and International Law*** **(Cambridge University Press, 2012) 1, at 5-6.**

[635] Seminal works in this burgeoning field include Kingsbury, Krisch and Stewart, 'The Emergence of Global Administrative Law', above n 4; N Krisch and B Kingsbury, 'Introduction: Global Governance and Global Administrative Law in the International Legal Order' (2006) 17(1) *The European Journal of International Law* 1, and the other articles in this Symposium issue of the *European Journal of International Law* at 1-278. Writing in 2012, Kingsbury and Stewart noted that there are more than 200 papers mapping and analysing global administration under the auspices of the GAL project; this figure is likely to be significantly greater by 2015: B Kingsbury and R B Stewart, 'Administrative Tribunals of International Organizations from the Perspective of the Emerging Global Administrative Law' in E Olufemi (ed), *The Development and Effectiveness of International Administrative Law: On the Occasion of the Thirtieth Anniversary of the World Bank Administrative Tribunal* (Martinus Nijhoff Publishers, 2012) 69, at 70.

[636] Kingbury, Krisch and Stewart, 'The Emergence of Global Administrative Law', above n 4, at 16.

[637] GAL allows legitimacy questions to be revisited in a more 'specific and focused way': *ibid*, at 27; see also E MacDonald and E Shamir-Borer, 'Meeting the Challenges of Global Governance: Administrative and Constitutional Approaches' NYU Hauser Globalization Colloquium (2008) at 3 <http://iilj.org/courses/documents/MacDonald.Shamir-Borer.92508.pdf>.

[638] Kingsbury, Krisch and Stewart, 'The Emergence of Global Administrative Law', above n 4, at 17.

[639] The other primary strand of inquiry concerns attempts by domestic administrative systems to constrain intergovernmental regulatory decisions that have national implications: Kingsbury, Krisch and Stewart, 'The Emergence of Global Administrative Law', above n 4, at 16, 18.

[640] *Id*.

[641] *Ibid*, at 17.

governance equivalent of the distinction in domestic administrative law between decisions of an administrative character, and decisions of a legislative or judicial character.[642] This is an apt distinction for MEA compliance systems as the rules and decisions within these systems depart from state-consent based notions of treaty making,[643] and these systems were consciously designed as an alternative to formal dispute settlement.[644]

GAL provides a salient lens for analysing the Montreal compliance system in particular, and MEA compliance systems generally. Tanzi and Pitea, for example, note that MEA compliance procedures are increasingly analogous to administrative procedures.[645] Scott observes that 'surprisingly, leading international administrative lawyers have paid little attention to the institutions established by international environmental agreements in the development of their sub-discipline to date', notwithstanding that the aptness of GAL observations to MEA compliance processes is 'undeniable'.[646] More broadly, Hey describes global environmental governance as 'administrative law in the making'.[647] Indeed, in their highly influential 2005 article on the emergence of GAL, Kingsbury, Krisch and Stewart identify 'the compliance mechanisms of the Montreal Protocol under which subsidiary bodies of an administrative character deal with non-compliance by Parties to the Protocol' as exemplifying administrative action within a formal inter-governmental organisation.[648] In section 4, I will elaborate upon the ways in which subsidiary bodies in the Montreal compliance system engage in administrative action.

3. Contributing Factors to the Successes of the Montreal Protocol and its Compliance System

This section provides a brief overview of the successes of the Montreal Protocol and its compliance system to contextualise the following analysis. One distinctive aspect of the regime's success is the conditional funding arrangements designed to facilitate developing and transition countries' compliance.[649] As shall be shown in section 5, these

[642] *Id*.
[643] T Gehring, 'Treaty-Making and Treaty Evolution' in D Bodansky, J Brunnee and E Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2007) 467, at 492-5.
[644] See, eg, Cardesa-Salzmann, 'Constitutionalising Secondary Rules in Global Environmental Regimes', above n 11, at 111-3; M A Fitzmaurice and C Redgwell, 'Environmental Non-Compliance Procedures and International Law' (2000) 31 *Netherlands Yearbook of International Law* 35; Ehrmann, 'Procedures of Compliance Control in International Environmental Treaties', above n 11, at 379-81.
[645] A Tanzi and C Pitea, 'Non-Compliance Mechanisms: Lessons Learned and the Way Forward' in T Treves et al (eds), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (TMC Asser Press, 2009) 569, at 580. In a related vein, Marauhn outlines the emergence of a procedural law of compliance in IEL: T Marauhn, 'Towards a Procedural Law of Compliance Control in International Environmental Relations' (1996) 56(3) *Zeitschrift fur Auslandisches Recht und Volkerrecht* 696, at 722-30.
[646] K N Scott, 'Non-Compliance Procedures and the Resolution of Disputes under International Environmental Agreements' in D French, M Saul and N D White (eds), *International Law and Dispute Settlement: New Problems and Techniques* (Hart, 2010) 225, at 230.
[647] Hey, 'International Institutions', above n 6, at 767.
[648] Kingsbury, Krisch and Stewart, 'The Emergence of Global Administrative Law', above n 4, at 21.
[649] F Romanin Jacur, 'The Non-Compliance Procedure of the 1987 Montreal Protocol to the 1985 Vienna Convention on Substances that Deplete the Ozone Layer' in T Treves et al, *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (TMC Asser Press, 2009) 11, at 12.

arrangements go to the heart of the tension between administrative and regulatory action, and the international rule of law, in the Montreal compliance system.

The Montreal Protocol is arguably the most effective and successful of the global MEAs,[650] although it has faced some notable challenges.[651] Upon Timor-Leste's ratification on 16 September 2009, the Montreal Protocol became the first global MEA to achieve universal participation with 196 Parties.[652] A 2012 document enumerating the Montreal Protocol's achievements in its first twenty-five years states:

> By 2010 virtually all Parties had reported compliance with their phase out obligations in respect of CFCs, halons, carbon tetrachloride, methyl chloroform, n-propyl bromide and chlorobromomethane. As a consequence, the Protocol has now led to the phase-out of 98 per cent of the historic levels of production and consumption of ozone-depleting substances.[653]

It is predicted that with ongoing, comprehensive implementation of the Protocol's provisions, the ozone layer will continue to recover and 'should return to pre-1980 levels' by mid-century.[654]

The Montreal compliance system has been a significant contributing factor to the success of the Montreal Protocol. Article 8 of the Protocol made provision for the future development of 'procedures and institutional mechanisms' for 'seeking amicable solution[s]' to non-compliance 'on the basis of respect for the provisions of the Protocol', paving the way for the adoption of a non-compliance procedure in 1992. Article 8 provides:

> The Parties, at their first meeting, shall consider and approve procedures and institutional mechanisms for determining non-compliance with the provisions of this Protocol and for treatment of Parties found to be in non-compliance.

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[650] In 2003, former UN Secretary-General Kofi Annan described the Montreal Protocol as 'perhaps the single most successful international environmental agreement to date': United Nations Environment Programme (UNEP) Ozone Secretariat, 'Key Achievements of the Montreal Protocol to Date' (2012) <http://ozone.unep.org/new_site/en/Information/Information_Kit/Key_achievements_of_the_Montreal_Protocol_2012.pdf>. See also E F Hans, 'The Montreal Protocol in U.S. Domestic Law: A "Bottom Up" Approach to the Development of Global Administrative Law' (2012-2013) 45 *New York University Journal of International Law and Politics* 827, at 857; O R Young, 'Effectiveness of International Environmental Regimes: Existing Knowledge, Cutting-Edge Themes, and Research Strategies' (2011) 108 (50) *Proceedings of the National Academy of Sciences* 19853, at 19853.

[651] Despite its remarkable successes, the Montreal Protocol has faced historical challenges regarding the black market in ozone-depleting substances, particularly in CFCs during the 1990s. Further, there are current debates regarding the phasing down of hydrofluorocarbons (HFCs), which were widely used as substitutes for hydrochlorofluorocarbons (HCFCs) as their phasing out process under the Protocol accelerated, and are highly potent greenhouse gases. Although no agreement on this issue was reached at the November 2014 MOP in Paris, international momentum for action under the Montreal Protocol continues to build with the support of, inter alia, the US and Europe: UNEP, Report of the Tenth Meeting of the Conference of the Parties to the Vienna Convention for the Protection of the Ozone Layer and the Twenty-Sixth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, UNEP/OzL.Conv.10/7, 10 Dec 2014, at paras 100, 105.

[652] U Beyerlin and T Marauhn, *International Environmental Law* (Hart Publishing, 2011) at 155.

[653] UNEP Ozone Secretariat, 'Key Achievements of the Montreal Protocol to Date', above n 32.

[654] *Id*. A 2014 UN study indicated that the ozone layer is beginning to show signs of thickening after decades of dangerous depletion: 'Ozone Layers Shows Signs of Thickening, Reflecting Ban on CFCs, UN Says' (2014) <http://www.abc.net.au/news/2014-09-11/ozone-layer-shows-signs-of-thickening-un-says/5735550>.

The Protocol's non-compliance procedure was adopted by Decision IV/5 of the fourth MOP in 1992,[655] and subsequently amended in 1998.[656] The non-compliance procedure consists of only 16 paragraphs, and thus the practice of the Implementation Committee 'relies to a considerable extent on custom and precedent'.[657] The apparatus that has built up around this non-compliance procedure is significantly more elaborate than these 16 paragraphs would suggest.

Like the Montreal Protocol itself, the non-compliance procedure established under Article 8 has been credited as a 'remarkable success', with numerous other MEAs attempting to emulate its effective formula.[658] However, I concur with Greene's observation that the success of the Montreal compliance system is not attributable to the formal reporting system and non-compliance procedure alone – these processes have been buttressed by a broader system of international institutions and procedures.[659] In particular, I contend that the Multilateral Fund and the Global Environment Facility have contributed to the compliance system's success by creating financial incentives for developing and transition countries to cooperate with the formal non-compliance procedure. The creation of the Multilateral Fund financial mechanism, which was established to defray 'incremental'[660] compliance costs and provide technical assistance for Article 5 developing countries in meeting their obligations under the Protocol, has played a pivotal role in the regime's success.[661] In 2012 it was reported that, since 1991, the Multilateral Fund has disbursed over US $2.9 billion in support of approximately 6,800 projects and activities, which have contributed to the phasing out of more than 460,000 ODP[662] tonnes of consumption and production of ozone-depleting substances in developing countries.[663] Similarly, the Global Environment Facility, which was established to support action on four global environmental issues including ozone layer depletion, utilises a 'Trust Fund' administered by the World Bank and provides financial assistance to CEITs. These countries are ineligible for funding support from the

[655] UNEP, Decision IV/5: Non-Compliance Procedure, UNEP/OzL.Pro.4/1, 25 Nov 1992 ('Non-compliance procedure').
[656] UNEP, Decision X/10: Review of the Non-Compliance Procedure, UNEP/OzL.Pro.10/9, 3 Dec 1998.
[657] Ozone Secretariat, *Implementation Committee under the Non-Compliance Procedure of the Montreal Protocol on Substances that Deplete the Ozone Layer: Primer for Members* (October 2007) at 4 <http://ozone.unep.org/new_site/en/resources.php>.
[658] Cardesa-Salzmann, 'Constitutionalising Secondary Rules in Global Environmental Regimes', above n 11, at 103.
[659] Greene, 'The System for Implementation Review in the Ozone System', above n 3. See also de Burca, Keohane and Sabel, 'Global Experimentalist Governance', above n 3.
[660] The 'incremental costs' are 'the extra costs between the costs of the alternative case and the baseline case': Bankobeza, *Ozone Protection*, above n 12, at 228 at fn 39; see also UNEP, Indicative List of Categories of Incremental Costs, Report of the Fourth Meeting of the Parties to the Montreal Protocol, UNEP/OzL.Pro.5/15, 25 Nov 1992, Annex VIII.
[661] K Raustiala, 'Reporting and Review Institutions in 10 Multilateral Environmental Agreements' (UNEP, 2001) at 33 <http://www.peacepalacelibrary.nl/ebooks/files/C08-0025-Raustiala-Reporting.pdf>; Romanin Jacur, 'The Non-Compliance Procedure of the 1987 Montreal Protocol', above n 31, at 31; J Bulmer, 'Compliance Regimes in Multilateral Environmental Agreements' in J Brunnee, M Doelle and L Rajamani (eds), *Promoting Compliance in an Evolving Climate Regime* (Cambridge University Press, 2012) 55, at 71.
[662] Ozone-depleting potential (ODP) is a measure for the amount of ozone depletion caused by a chemical substance, calculated as a ratio of the impact on ozone of the substance compared to the impact of a similar mass of CFC-11.
[663] Multilateral Fund for the Implementation of the Montreal Protocol, 'Funding Success – the Multilateral Fund Celebrates 25 years of the Montreal Protocol on Substances the Deplete the Ozone Layer' (17 September 2012) <http://www.multilateralfund.org/InformationandMedia/default.aspx>.

Multilateral Fund as they are not developing countries,[664] yet may still face difficulties in meeting developed countries' phase-out schedules under the Protocol.[665] Accordingly, the following analysis of the Montreal compliance system includes the roles of the Secretariat, the Implementation Committee, the MOP, the Multilateral Fund and the Global Environment Facility. To use Kingsbury, Krisch and Stewart's terminology, these bodies can be conceptualised as 'subsidiary bodies of an administrative character',[666] which are responsible for identifying and responding to non-compliance with the Montreal Protocol.

4. Administrative Action within the Montreal Compliance System

This section argues that the non-compliance apparatus in the Montreal compliance system facilitates global administrative action. Broadly speaking, the processes within the system promote the implementation of, and compliance with, the Montreal Protocol, which is consistent with action of an administrative character. More specifically, a consistent pattern of accountability arrangements to facilitate non-compliant Parties' return to compliance has emerged.[667] This has resulted in a greater prioritising of the equitable treatment of Parties in like circumstances alongside regard for the individual circumstances of each country,[668] which aligns with an administrative style of decision making that is consistent yet considers the merits of individual cases. This section focuses in particular on the ways in which the Secretariat, Implementation Committee and MOP engage in administrative action, and the following section elaborates on the valuable assistance provided by the Multilateral Fund and the Global Environment Facility.

The Secretariat plays a key role in facilitating Parties' accountability for their commitments under the Montreal Protocol, and lays the groundwork for balancing individually tailored non-compliance responses with the like treatment of analogous cases. On an annual basis, Parties to the Protocol are required to provide statistical data pertaining to the production, consumption, import and export of controlled ozone-depleting substances relative to the baseline year and the year since the Party ratified the Protocol, including under the Protocol's essential-use exemption.[669] When the Secretariat becomes aware of a possible instance of non-compliance, significant effort is made to understand and report upon its causes. The Secretariat is required to report to the Implementation Committee, orally and in writing, on the apparent deviation of the Party concerned, any response the Secretariat has received from that Party providing an explanation of the deviation, and any other information regarding the Party's situation

[664] As Article 5 of the Montreal Protocol defines eligibility in terms of per capita consumption of ozone-depleting substances, a small number of CEITs are eligible for Multilateral Fund assistance: Bankobeza, *Ozone Protection*, above n 12, at 235.
[665] O Yoshida, 'Soft Enforcement of Treaties: The Montreal Protocol's Noncompliance Procedure and the Functions of Internal International Institutions' (1999) 10(1) *Colorado Journal of International Environmental Law and Policy* 95, at 100.
[666] Kingsbury, Krisch and Stewart, 'The Emergence of Global Administrative Law', above n 4, at 21.
[667] Y Shigeta, *International Judicial Control of Environmental Protection: Standard Setting, Compliance Control and the Development of International Environmental Law by the International Judiciary* (Wolters Kluwer, 2010) at 120.
[668] Cardesa-Salzmann, 'Constitutionalising Secondary Rules in Global Environmental Regimes', above n 11, at 131-2. See generally, Ozone Secretariat, *Primer for Members*, above n 39.
[669] Montreal Protocol, above n 1, at art 7; Raustiala, 'Reporting and Review Institutions', above n 43, at 34.

that the Secretariat deems useful for the Committee's deliberations.[670] The latter types of 'other information' may include, inter alia, the nature and status of assistance received from the Multilateral Fund or Global Environment Facility, and any extraneous circumstances, such as civil unrest or natural disasters, that may be affecting the Party's capacity to comply.[671] The Secretariat's reason giving, supplemented by other relevant information from the Party concerned, and the Multilateral Fund or the Global Environment Facility, form the basis for the Implementation Committee's deliberations, which aim to ensure that the 'individual circumstances of each Party subject to the non-compliance procedure are taken into full consideration'.[672] Thus, extensive reason giving in the Secretariat's non-compliance referral process facilitates the Implementation Committee's regard for the country-specific interests of non-compliant Parties, which are frequently developing countries and CEITs.[673] This is consistent with a proceduralised approach which allows for particular Parties' compliance interests to be factored into compliance decision making.

The Implementation Committee, which is composed of 10 Party representatives elected for two-year terms, meets twice annually. It is an advisory and conciliatory body, the responsibilities of which include managing the Protocol's non-compliance procedure. Once a Party is referred to the Implementation Committee, it is requested to attend the next Committee meeting to explain its situation. Parties' explanations to the Committee underpin a 'non-confrontational but frank' discussion characterised by pragmatism and flexibility, rather than legal argumentation.[674] Some elements of accountability are satisfied in the Implementation Committee – namely, states are required to justify their conduct, and are answerable to the Committee for deficient performance.[675] It is at this stage of the non-compliance process that the Multilateral Fund and Global Environment Facility may be invited to advise both the Implementation Committee and the Party concerned in relation to financial and technical assistance available to support the Party's return to compliance.[676]

The 'basic posture'[677] of recent practices in the Implementation Committee reflects a consistent, administrative style of decision making that has regard for the merits of individual cases. This approach is reinforced in the *Primer for Members* produced by the Ozone Secretariat for Implementation Committee members in 2007, which lists 16 'routine procedural non-compliance matters' and a set of standardised recommendations that the Committee has agreed should apply for these types of matters. In such cases, the draft recommendations prepared by the Secretariat for the consideration of the Committee are based on text approved by the Committee at previous meetings to deal with similar cases, and can therefore be approved without

[670] Ozone Secretariat, *Primer for Members*, above n 39, at 14.
[671] *Id*.
[672] *Ibid*, at 31, 44.
[673] Cardesa-Salzmann, 'Constitutionalising Secondary Rules in Global Environmental Regimes', above n 11, at 115; Klabbers, 'Compliance Procedures', above n 12, at 996-7.
[674] Raustiala, 'Reporting and Review Institutions', above n 43, at 36; Klabbers, 'Compliance Procedures', above n 12, at 996-7.
[675] Stewart, 'Remedying Disregard in Global Regulatory Governance', above n 7, at 253.
[676] See section 4.
[677] P Nonet and P Selznick, *Toward Responsive Law: Law & Society in Transition* (Transaction Publishers, 2001) at 17.

extended deliberation or fact-finding.[678] Recent practice evidences a mixed approach: in some instances, the Implementation Committee undertakes individual review to obtain an in-depth understanding of the particular circumstances of the non-compliant Party, and in other instances a 'blanket approval' process based on previous precedents is used, promoting the like treatment of analogous cases.[679] This signals a gradual shift from privileging an approach tailored to the individual circumstances of each country,[680] to one that balances this imperative with the equitable treatment of Parties in like circumstances according to pre-determined standards. This balancing act reflects a predominantly administrative decision-making mode that preserves some discretionary leeway for decision makers.

The non-compliance measures recommended by the MOP also reflect administrative and regulatory logics. The Implementation Committee's preliminary decisions on compliance matters are forwarded to the MOP for adoption and approval as interim or final decisions.[681] The non-compliance procedure provides for escalating response measures that the MOP can utilise, typically upon the advice of the Implementation Committee. Decision IV/5 contains the following Indicative List of Measures that may be taken in relation to Parties' non-compliance:

a) appropriate assistance, including assistance for the collection and reporting of data, technical assistance, technology transfer and financial assistance, information transfer and training;
b) issuing cautions;
c) suspension, in accordance with the applicable rules of international law concerning suspension of the operation of the treaty, of specific rights and privileges under the Protocol, whether or not subject to time limits, including those concerned with industrial rationalization, production, consumption, trade, transfer of technology and institutional arrangements.[682]

This may be seen as a type of 'flexible pyramid', with regulatory responses reflecting a graduated scale of increasingly strong measures.[683] The Ozone Secretariat reports that options (a) and (b) have been utilised by the MOP, acting on the Implementation Committee's recommendations, and that option (c) has 'not been implemented to date, but has been referred to in a cautionary context'.[684] The MOP, which is a political body composed of representatives of the Parties to the Montreal Protocol, almost always

[678] Ozone Secretariat, *Primer for Members*, above n 39, at 45-58.
[679] *Ibid*, at 14.
[680] During the 1998 review of the non-compliance procedure, a proposal for guidance to be provided to assist the Implementation Committee in matching non-compliance responses to particular types of non-compliance was considered, but rejected in favour of a continued reliance on 'discretion to adapt their response to the particular case': UNEP, Report on the Work of the Ad Hoc Working Group of Legal and Technical Experts on Non-compliance with the Montreal Protocol, UNEP/OzL.Pro/WG.4/1/3, 18 Nov 1998, at para 40. During its non-compliance proceedings in the mid-1990s, Russia proposed the need for clearer criteria to facilitate the Implementation Committee's exercise of objective judgment regarding whether the cause of non-compliance was a result of willful breach or factors beyond the control of the Party concerned. See further section 5.
[681] Romanin Jacur, 'The Non-Compliance Procedure of the 1987 Montreal Protocol', above n 31, at 26.
[682] UNEP, Decision IV/5, above n 37, Annex V.
[683] B Kingsbury, 'The Concept of Compliance as a Function of Competing Conceptions of International Law' (1998) 19 *Michigan Journal of International Law* 345, at 364, citing I Ayres and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992) at 35-40.
[684] Ozone Secretariat, *Primer for Members*, above n 39, at 45.

follows the advice of the Implementation Committee,[685] underscoring the significance of this Committee's recommendations for the operation of the compliance system as a whole. Thus, the compliance work of the Secretariat, Implementation Committee and the MOP is consistent with global regulatory action of an administrative character.

5. Financial Incentives as Regulatory Techniques, and the Implications for the International Rule of Law

Within the administrative space provided by the Montreal compliance system, financial incentives have been employed as regulatory techniques to facilitate non-compliant states' return to compliance. This section argues that accountability arrangements negotiated between the Implementation Committee and non-compliant Parties, and reinforced by conditional funding arrangements supported by the Multilateral Fund and the Global Environment Facility, have proven to be environmentally and politically effective. However, these arrangements circumvent the rules of international law by requiring compliance with self-imposed targets rather than treaty obligations. This reveals a tension between administrative action, regulatory techniques and international law in the Montreal compliance system.

The conditional funding arrangements utilised within the Montreal compliance system reflect elements of both administrative and politically-negotiable decision making.[686] These procedures, forged with the help of the Implementation Committee, were developed to increase developing countries' accountability for the financial assistance they received to facilitate their implementation of, and compliance with, the Montreal Protocol.[687] The Montreal Protocol's financial mechanism, by which developed countries' donations are disbursed to support developing countries to meet their reporting and phase-out requirements, was introduced in 1991.[688] Ongoing concerns about some Parties' failure to meet their reporting requirements prompted the Implementation Committee to agree in 1998 on a process for extending conditional funding arrangements to Parties that are found to be in non-compliance.[689] This means that a non-compliant Party's continuing receipt of funding assistance from either the Multilateral Fund or the Global Environment Facility hinges upon meeting benchmarks the Implementation Committee selects from the Party's compliance action plan.[690] Parties that meet these agreed commitments are treated as remaining 'in good standing' and receive favourable consideration when applying for financial assistance, whilst Parties that deviate from these commitments are threatened with punitive measures

[685] *Ibid*, at 18.
[686] This statement is informed by Dubash and Morgan's proposal of a spectrum between 'rules and deals' in the context of theorising the regulatory State in the global South: N Dubash and B Morgan, 'The Embedded Regulatory State: Between Rules and Deals' in N Dubash and B Morgan, *The Rise of the Regulatory State of the South: Infrastructure and Development in Emerging Economies* (Oxford University Press, 2013) 279, at 279-83.
[687] Shigeta, *International Judicial Control of Environmental Protection*, above n 49, at 131-2; Bankobeza, *Ozone Protection*, above n 12, at 234-6; D G Victor, 'The Early Operation and Effectiveness of the Montreal Protocol's Non-Compliance Procedure' (1996) at 12 <http://irps.ucsd.edu/dgvictor/publications/Victor_Article_1996_Early%20Operation%20and%20Effectiveness.pdf>.
[688] J A Bove, 'A Study of the Financial Mechanism of the Montreal Protocol on Substances that Deplete the Ozone Layer' (2002-2003) 9(2) *The Environmental Lawyer* 399, at 405.
[689] UNEP, Report of the Implementation Committee under the Non-Compliance Procedure for the Montreal Protocol on the Work of its Twentieth Meeting, UNEP/OzL.Pro/ImpCom/20/4, 9 Jul 1998, at paras 24-33.
[690] *Ibid*, at para 32.

such as deprivation of funding assistance and export restrictions.[691] These accountability arrangements based on individually-tailored compliance action plans support Klabbers' observation that compliance is at times 'subject to negotiations',[692] rather than being based on accountability for pre-agreed and standardised commitments.

Despite these politically-negotiable elements of non-compliance proceedings, a proceduralised approach for supporting non-compliant Parties' return to compliance has emerged, which is consistent with the administrative style of decision making that characterises the Montreal compliance system. As noted above, a common practice of making the continued receipt of financial assistance contingent upon reaching time-bound benchmarks specified in compliance action plans emerged for developing countries in the early 1990s. Then, in the mid-1990s, the non-compliance proceedings against Belarus, Bulgaria, Poland, Russia and Ukraine extended a variation of this archetypal response to CEITs, creating a clear precedent for subsequent proceedings against CEITs in 1998 and 1999.[693] The process adopted in these cases involved four elements: (1) a detailed acknowledgement and explanation of the non-compliance; (2) a statement that a Party in non-compliance with its ozone-depleting substances obligations under the Protocol will remain a 'member in good standing' that is eligible for international financial assistance so long as compliance benchmarks are met; and (3) a warning regarding the potential punitive measures that may be applied in cases of persistent non-compliance.[694] This type of precedent-based approach, which has applied to both developing countries and CEITs, aligns with administrative decision-making ideals of consistency, fairness and predictability. The conditional funding arrangements also take into account the capacity constraints experienced by these states, which is politically desirable and pragmatic.

The regulatory, political and environmental efficacy of these arrangements is in tension with the implications from a state-consent based international law perspective.
According to this latter paradigm, it may be assumed that the Implementation Committee's primary function is to ensure compliance with, inter alia, the binding emissions reductions commitments in Article 2 of the Montreal Protocol, which are legitimised by state consent, rather than the more lenient targets or benchmarks that a

[691] *Ibid*, at para 33.
[692] Klabbers, 'Compliance Procedures', above n 12, at 1001; see also Koskenniemi, 'Breach of Treaty or Non-Compliance?', above n 12, at 147.
[693] Specifically, Azerbaijan, Belarus, the Czech Republic, Estonia, Latvia, Lithuania, the Russian Federation, Ukraine and Uzbekistan in 1998, and Bulgaria and Turkmenistan in 1999: UNEP, Decision X/20: Compliance with the Montreal Protocol by Azerbaijan, UNEP/OzL.Pro.10/9, 3 Dec 1998; UNEP, Decision X/21: Compliance with the Montreal Protocol by Belarus, UNEP/OzL.Pro.10/9, 3 Dec 1998; UNEP, Decision X/22: Compliance with the Montreal Protocol by the Czech Republic, UNEP/OzL.Pro.10/9, 3 Dec 1998; UNEP, Decision X/23: Compliance with the Montreal Protocol by Estonia, UNEP/OzL.Pro.10/9, 3 Dec 1998; UNEP, Decision X/24: Compliance with the Montreal Protocol by Latvia, UNEP/OzL.Pro.10/9, 3 Dec 1998; UNEP, Decision X/25: Compliance with the Montreal Protocol by Lithuania, UNEP/OzL.Pro.10/9, 3 Dec 1998; UNEP, Decision X/26: Compliance with the Montreal Protocol by the Russian Federation, UNEP/OzL.Pro.10/9, 3 Dec 1998; UNEP, Decision X/27: Compliance with the Montreal Protocol by Ukraine, UNEP/OzL.Pro.10/9, 3 Dec 1998; UNEP, Decision X/28: Compliance with the Montreal Protocol by Uzbekistan, UNEP/OzL.Pro.10/9, 3 Dec 1998; UNEP, Decision XI/24: Compliance with the Montreal Protocol by Bulgaria, UNEP/OzL.Pro.11/10, 17 Dec 1999; UNEP, Decision XI/25: Compliance with the Montreal Protocol by Turkmenistan, UNEP/OzL.Pro.11/10, 17 Dec 1999.
[694] *Id*; Gillespie, *Climate Change, Ozone Depletion, and Air Pollution*, above n 11, at 221-6.

non-compliant Party specifies in its plan to return to compliance.[695] Indeed, when viewed through this lens, the Montreal compliance system's accountability arrangements for conditional funding actively facilitate temporary circumvention of binding commitments, as funds are paid to countries that are not in substantive compliance but still remain 'in good standing'. For example, the Russian Federation remained in non-compliance with various provisions of the Montreal Protocol from 1996-2000, and was also in non-compliance with the benchmarks specified in its own compliance action plan in 1999 and 2000.[696] It was not until 2002 that the MOP confirmed that the Russian Federation had returned to compliance with its obligations.[697] Nevertheless, between 1995 and 2002, Russia continued to be treated as a 'country in good standing' and to receive financial assistance from the GEF.[698] This arrangement stands in stark contrast to the traditional rules of state responsibility for breach of an international obligation under general international law.[699] Whilst the political effectiveness and appeal of these arrangements is acknowledged, the circumvention of rules of international law raises serious legitimacy concerns from a state-consent vantage point.

This raises the question of whether, in this instance, global administrative action is undermining the international rule of law. Other scholars such as Bodansky[700] and Klabbers[701] have previously noted that processes within MEA compliance systems may be in tension with the rule of law. However, the significance of *administrative* action facilitating this phenomenon, and the contrast this poses with the role of administrative mechanisms in domestic administrative law systems, deserves further analysis.

To the extent that administrative action in global governance allows the exercise of administrative discretion for non-lawful purposes from a state-consent vantage point,[702] this represents a notable departure from the traditional roles played by

[695] UNEP, Report of the Implementation Committee on its Twentieth Meeting, above n 71, at para 26.
[696] UNEP, Decision XIII/17: Compliance with the Montreal Protocol by the Russian Federation, UNEP/OzL.Pro.13/10, 26 Oct 2001, at para 2.
[697] UNEP, Report of the Fourteenth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, UNEP/OzL.Pro.14/9, 5 Dec 2002, at para 133.
[698] See UNEP, Decision VIII/25: Compliance with the Montreal Protocol by Russian Federation, UNEP/OzL.Pro.8/12, 19 Dec 1996; UNEP, Decision IX/31: Compliance with the Montreal Protocol by the Russian Federation, UNEP/OzL.Pro.9/12, 25 Sept 1997; UNEP, Decision X/26: Compliance with the Montreal Protocol by the Russian Federation, UNEP/OzL.Pro.10/9, 3 Dec 1998; UNEP, Decision XIII/17: Compliance with the Montreal Protocol by the Russian Federation, UNEP/OzL.Pro.13/10, 26 Oct 2001.
[699] Koskenniemi, 'Breach of Treaty or Non-Compliance?', above n 12, at 134.
[700] Bodansky argues that 'some prominent features of international environmental law, such as the use of politically-oriented non-compliance procedures, cut strongly against the concept of constitutionalism': D Bodansky, 'Is There an International Environmental Constitution?' (2009) 16(2) *Indiana Journal of Global Legal Studies* 565, at 579.
[701] Klabbers expresses concern that non-compliance procedures secure any of their environmental successes at a 'systemic cost – the cost of giving up the rule of law in favour of a specific set of goals': Klabbers, 'Compliance Procedures', above n 12, at 1007. Cf Benvenisti, who argues that there is not necessarily a trade-off between the obligation to respect the rule of law and the effectiveness of international institutions, as the achievement of the latter requires adherence to the former: Benvenisti, *The Law of Global Governance*, above n 7, at 144.
[702] It is recognised that alternative models of legality may well have traction where state-consent based logics do not. For example, Kingsbury proposes a 'social fact' conception of law, premised on requirements of 'publicness', which provides a new frame for assessing the legality of global administrative law that departs from the traditional inter-state, consent-based model: B Kingsbury, 'The Concept of "Law" in Global Administrative Law' (2009) 20(1) *European Journal of International Law* 23. For critiques of this approach, and the difficulties it creates in distinguishing between law and non-law, see A Somek, 'The Concept of "Law"

administrative mechanisms in both reflecting and reinforcing the principle of legality in domestic settings. It is widely accepted that a core function of domestic administrative law systems is ensuring that public power is exercised according to law,[703] which is a fundamental tenet of the principle of legality.[704] An aspect of this principle is that there are certain purposes pre-defined by law, and that administrative discretion must be exercised within these bounds.[705] The foregoing analysis of administrative action in the Montreal compliance system indicates that it should not be assumed that the role of legal rules in pre-defining and circumscribing administrative discretion transposes neatly from the domestic to the global realm.[706] This suggests that caution should be exercised in asserting that GAL necessarily promotes the rule of law, at least in terms of adherence to international legal rules. However, as noted in section 1, the rule of law is a multi-faceted concept, and the administrative and regulatory arrangements within the Montreal compliance system are nonetheless contributing to other desirable aims associated with the rule of law, such as promoting adherence to due process in decision making, reducing arbitrary decision making, and affording countries affected by compliance decisions the right to be heard. Accordingly, nuanced and context-specific analysis of GAL's relationship with the international rule of law is required.

6. Conclusion

This paper has argued that compliance processes and decisions within the Montreal compliance system reflect global administrative action. The design of the compliance apparatus facilitates understanding of the reasons for Parties' non-compliance, and supporting their return to compliance, through flexible yet procedurally standardised approaches. Over time, a shift towards an administrative style of decision making, evidenced through consistent and formulaic approaches to addressing non-compliance for developing countries and CEITs, is discernible. Attempts to balance the aspiration of individualised treatment of non-compliance against the aim of similar treatment for comparable cases reflects a predominantly administrative decision-making mode that preserves some discretionary leeway for decision makers. In particular, the accountability arrangements for conditional financial assistance from the Multilateral

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in Global Administrative Law: A Reply to Benedict Kingsbury' (2009) 20(4) *European Journal of International Law* 985, at 994; Kuo, 'A Reply to Benedict Kingsbury', above n 7, at 997; M-S Kuo, 'Inter-Public Legality or Post-Public Legitimacy? Global Governance and the Curious Case of Global Administrative Law as a New Paradigm of Law' (2012) 10(4) *International Journal of Constitutional Law* 1050, at 1060.

[703] For example, the leading Australian administrative law text states that administrative law is 'a legal system which addresses the ideals of good government according to law': M Aronson and M Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 5th ed, 2013) at 1. In a similar vein, Hey notes that most domestic legal systems are predicated on the premise that 'power exercised by public institutions is to be controlled by way of law': Hey, 'International Institutions' above n 5, at 768.

[704] It is acknowledged that the interpretations of the principle of legality differ: see, eg, the diverse definitions of this principle in the chapters of L Besselink, F Pennings, and S Prechal (eds), *The Eclipse of the Legality Principle in the European Union* (Kluwer, 2011). Nonetheless, it is commonly accepted that decisions of domestic public authorities have to conform to the law, and cannot operate beyond lawful bounds: see above n 85.

[705] A Alemanno and A Spina, 'Nudging Legally: On the Checks and Balances of Behavioral Regulation' (2014) *International Journal of Constitutional Law* 429, at 449.

[706] Other scholars have previously noted that the reproduction of the principle of legality in transnational contexts is under stress from, inter alia, trends in expertise-driven governance, and the increasing use of soft law, both of which are evident in MEA compliance systems: see, eg, Besselink, Pennings and Prechal (eds), *The Eclipse of the Legality Principle in the European Union*, above n 86; A T Guzman and T L Meyer, 'International Soft Law' (2010) 2(1) *Journal of Legal Analysis* 171.

Fund and the Global Environment Facility have contributed to standardised responses to substantive compliance issues for developing countries and CEITs, which are reflected in a formulaic approach to reason giving in compliance decisions.

However, from a traditional international law perspective, there are concerning legitimacy deficits in relation to some aspects of the Montreal compliance system's practices. This is evident in the work of the Montreal Protocol's Implementation Committee, which has developed accountability arrangements for the return to compliance of developing countries and countries with economies in transition in a way which allows circumvention of the rules of international law for breach of treaty. Whilst there may be significant political utility attached to such departures from binding legal rules in global environmental governance, if administrative procedures accommodate the exercise of discretion beyond the bounds of legal rules pre-defined by state-consent based processes, they are arguably undermining, rather than promoting, the international rule of law. In other words, to the extent that administrative procedures in global governance allow the exercise of administrative discretion for non-lawful purposes from a state-consent vantage point, this represents a notable departure from the traditional roles played by administrative mechanisms in both reflecting and reinforcing the principle of legality in domestic settings. This suggests that claims about GAL's role in promoting the rule of law need to be nuanced, and reflect analytical clarity about the aspects of the rule of law which are in fact promoted in context-specific instances of global administrative action.

Do Plants Feel Pain? Packet InterNet Groper "From Little Things Big Things Grow"

Cobi Smith

Abstract

What are the implications of state censorship policies on human rights defenders and advocates of sharing economies? The timing of this paper allows for reflective analysis of the author's experience returning to live in Australia in a time of changing laws related to technology and human rights. Changes to laws have implications for medical, media and digital activism ethics. Legal conflicts with ethical frameworks impact the intellectual work and institutional supports involved in safeguarding the mental health and well-being of human rights defenders, particularly in regards to norms about what a "reasonable person" does in response to limits on freedom of expression. This is relevant to negotiations about safeguards of the rights of local communities in climate governance. Australian political inaction about ongoing ecological crises, including climate change, is a threat to the mental health and wellbeing of human rights defenders who are concerned with the rights of peoples dependent on natural ecosystems and whose land rights are violated. Resilience may depend on interdependence and communication across non-state and intra-state networks, however this communication is challenged by media laws and convergence. Increasingly nonsensical and satirical methods of communication may be a coping mechanism in response to such breakdowns of trust in traditional state and economic structures.

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Background

From February 2013 to 2014 I volunteered through an Australian Aid program then called Australian Youth Ambassadors for Development. I worked in new media and communications development with the Asia Indigenous Peoples Pact, supporting indigenous peoples' environment, gender, human rights and capacity building programs, working closely with counterparts from Myanmar and Bangladesh, as well as with other people from Nepal, Thailand, the Philippines and other Asian countries. I helped to interpret previous research by the United Nations Development Programme and UNESCO about indigenous peoples' rights to media and to document workshop outcomes to inform a strategy for indigenous peoples.

During my time in Asia I visited regions of Myanmar recently opened for tourism. I also spend time in Cambodia with people from Building Community Voices, the Cambodian Indigenous Youth Association and Open Development Cambodia. Through my participation in Wikimedia Foundation projects I worked with a fellow Australian to facilitate sessions at a technology conference at a university in Kampong Cham province. We also partnered with locals in a workshop about Creative Commons licensing and Wikipedia at Building Community Voices in Phnom Penh. These volunteer activities in Cambodia were during holidays from my role supported by AusAID based in Chiang Mai with the Asian Indigenous Peoples Pact. Both roles meant that I became the subject of hacking and phishing attempts as part of a network of human rights defenders, some examples of which will be detailed later.

Upon returning to Australia I because a Visiting Scholar at Melbourne Law School where I researched relationships between international environmental law and human rights law in science and technology policy, in particular its relation to forestry governance. This emerged as related to an Australian Research Council project called Climate Change Law and Mitigation: Forest Carbon Sequestration and Indigenous and Local Community Rights. As a result of this in 2015 I worked with Lee Godden, Margaret Young and Brad Jessup from Melbourne Law School on indigenous human rights issues, particularly in Malaysia and Indonesia. During my time in Melbourne in 2014 I also trained as a Climate Reality Leader with Al Gore (Baer 2015), through my involvement with the Melbourne Sustainable Society Institute. Upon finishing my three months as a visiting scholar I took a contract with the United Nations Institute for Training and Research in Geneva, specifically UNOSAT based within CERN, to lead the GeoTag-X project, part of Citizen Cyberlab, an EU ICT project funded under the 7th Framework Programme, covering a fellow Australian's maternity leave. That experience led me to explore ethical issues associated with digital volunteer disaster management and humanitarian responses through self-experimentation as well as discussion with others.

> *...value of guiding volunteers through step-by-step analyses was discussed during a GeoTag-X workshop during a conference on science communication and social inclusion,*
> *focused on young people. A primary discussion in this workshop is whether a 'walled garden' or closed platform should be developed, allowing levels of participation, in contrast to the entirely open platform now. This would support for example restricting potentially gory disaster modules to people of a certain age. While participants in the workshop were not in consensus about whether this*

> *should happen as the next stage of development or following more pilot projects, there was consensus it would be a useful future development for GeoTag-X to build teacher confidence in using it for learning with young people.*
> *(Cervigni and Smith 2014)*

I had already made commitments in Australia for late September and early October so I returned to perform a comedy show in the Melbourne Fringe Festival, as well as to co-host The Privacy Workshop, a forum on Australian technology privacy laws and practices at Deakin Edge in Federation Square, coordinated by a coworking space and B Corp called The Electron Workshop, with whom I'd had some previous involvement. This gave me exposure to details of the changing landscape of Australian laws around telecommunications and internet privacy and put me in a position of being a public advocate for discussion about such human rights issues in Australian contexts.

Having returned from Geneva to Australia to live at the start of 2015, I participated as a volunteer at Science Meets Parliament 2015 in Canberra. This timing meant I witnessed the resignation of Kate Lundy and passing of data retention legislation through the Australian Senate. This was a shocking and disempowering experience, given the dismal state of the Australian Parliament in terms of social justice for women and indigenous peoples, among others.

Distressed with what was happening in national government, I immersed myself in life in Melbourne. I participated in some Open Knowledge Australia activities and volunteered for Progress 2015. I live-tweeted Edward Snowden's video presentation about technology and surveillance laws and practices in Australia. I took on enough work at the University of Melbourne to pay my bills and keep me busy, including giving me some emotional and mental distance from my ANU PhD which had been about participatory governance in science and technology policy, which under the new government felt to me increasingly like Orwellian fiction.

I was aware of the links between my work in Asia and international migration flows, including asylum seekers. My work with people related to communities along the Myanmar-Thai border, particularly Karen people, helped me feel aware of dynamics about what kind of people were being offered asylum in Australia and in contrast who had little to no chance. I was conscious reports of human rights abuses in Australian offshore detention centres and was appalled by proposed changes to media laws in Australia to restrict the rights of people, including journalists and doctors, to meet their professional responsibilities to their professions. Given my own career and training, laws impacting journalists and doctors felt close to home psychologically for myself. Thus when the Border Force Act, among others, came to pass in the new financial year in July 2015, I took it personally.

I was one of many Australians who suffered trauma (Thormar 2014) triggered by these new laws, particularly given risk-taking edgework (Roth 2015) as a humanitarian worker and human rights defender in the year prior. Given my recent experience embedded with indigenous peoples in Asia watching acts of bravery in which people spoke out and acted against those driving violence and oppression, I felt a responsibility to act in solidarity (Eriksson et al. 2015). I felt I was put in a position I'd encouraged other women to be in who were from places with established oppressive regimes. I

witnessed and felt changes in my experience of living in Australia as what felt for me to be a more oppressive era begun.

This had three unexpected outcomes. One of these was experiencing stronger solidarity with indigenous peoples, including a much deeper appreciation that for First Australian women this was not a new era of oppression, rather continuation of cycles of abuse and oppression (Fredericks 2014), which was now being compounded by climate change impacts (Forino, von Meding & Brewer 2015). The second was leveraging my experiences and training as a comedian to unleash a sometimes nonsensical but therapeutic wave of satire and comedic expression as a coping mechanism for new laws limiting freedom of speech and expression, mostly via Twitter. The title of this working paper is an example that may come across as nonsensical depending on one's existing knowledge base. Thirdly, I embraced my previous safety and security training, including physical security and psychological first aid training I'd completed through the United Nations, as well as computer security training I'd done while based within CERN IT and earlier in Asia with with the support of a Tactical Tech trainer who I met through Engage Media.

Comedy on the internet

Page (2014) studied links between comedy and impersonation on the internet. This may have a stress-relieving ludic sense of friends pranking friends, but can also creep into more insidious forms of cyberbullying (Erdur-Baker 2010). Internet anonymity can provide masks through which people can play and change and perform alternate identities; this traditionally emerged in text-based dialogues (Henderson & Gilding 2004). Ludic wordplay can be a delightful aspect of work in environmental humanities, however it is difficult to know how this impacts issues of systemic bias in places ranging from academia to Wikipedia, given in convergent systems it is increasingly tricky to tell who is in on which jokes.

> *The constant question when considering systemic phenomena has to be, when do changes in degree become changes in kind, and what are the effects of bioculturally, biotechnically, biopolitically, historically situated people (not Man) relative to, and combined with, the effects of other species assemblages and other biotic/abiotic forces? No species, not even our own arrogant one pretending to be good individuals in so-called modern Western scripts, acts alone; assemblages of organic species and of abiotic actors make history, the evolutionary kind and the other kinds too.* (Haraway 2015, p159)

Links between online activism and environmental humanities are evidenced in my personal possession of the commercial internet domain doplantsfeelpain.com since I developed intention to research this topic several years previously, linked to my work in plant genomics. Those with privileged access or understanding of domain registration privacy could predict my interest in sentience beyond homo sapiens, given my commercial possession of the domain. This relates domain registration privacy issues with my work as a woman online and as a human rights defender (Heron, Belford & Goker 2014; Leontiadis & Christin 2014). Domain registration issues also impact national digital property laws, studied for example in Eastern European states (Anisimov, Ryzhenkov, & Kozhemyakin 2015). One might suggest continued

perseverance with digital activism and agency in the face of new Australian laws is reckless and foolhardy - perhaps toxic.

> *Those who have used the discourse of toxicity in the environmental movement — largely grassroots environmental activists whose leaders include women and minorities who have experienced toxic threats in their towns — position it as a challenge to environmentalists to "make concerns for human and social health more central and salient than it traditionally has if it is to thrive, perhaps even to survive". The toxic, therefore, is marshaled as the flip side of the healthy, the well. Buell suggests that toxicity in its discursive formations — the act of naming a toxic threat — has not been taken as seriously as material forms of toxicity (Buell 2001). After all, when health, land, or something else is threatened, discourse may seem low-stakes.* (Risam 2015)

My own experiences with comedy have converged with my work in environmental communication, as research suggests it may help overcome fatigue associate with thinking about climate change (Bore & Reid 2014). Satirical news reports can motivate people to engage in understanding environmental issues (Feldman 2013; Brewer & McKnight 2015) so there are incentives to support media economies evolving beyond regional digital rights management (Belk 2014) to support greater environmental awareness and action. However as long as new methods for digital rights management are incentivised as part of economics valuings innovations based on closed patents (eg. Gangotri & Gurzhi 2013) this seems an uphill struggle. Open innovation research provides hope for change (Chien 2015).

My confidence in participating in comedy on the internet has been supported by my training in improvisational theatre, which echoes research associating free expression via social networks with innovation (Zhong, Hardin & Sun 2011). Research about using social media for health promotion (arguably a more positive form of social engineering) suggests those being researched have concerns about consent and respect (Monks et al. 2015). Issues about impersonation and authenticity are contested aspects of social media network policies (Page 2014), being "myself" on Twitter, both in the sense of my "legitimate" real life Australian identity and in the sense of freely expressing my personality, makes comedic and satirical expression relatively straightforward but potentially more risky given implications for real life. Satire has long been recognised as an outlet for creative expression in times of censorship; the internet age is no exception (Tang & Bhattacharya 2011). In contemporary Australia this has relevance in copyright law reform, particularly in regards to transformative works (Suzor and Tushnet 2014).

Trust in online and offline networks

During my time in Melbourne in 2014 I volunteered to be a speaker about human rights for Amnesty International in Victoria. This resulted in me receiving a phishing attempt in August 2015 that included links and attachments purporting to be from the Amnesty International Victoria volunteers email. Given my trust in Amnesty International, I found this security violation to be particularly distressing for my sense of reality and wellbeing. To respond to this threat to my mental health as well as Amnesty's operations and networks, I called for help. I texted a friend who works as a developer for a social justice magazine and asked for them to call me when available to talk through how I should respond to this. When they called me, it was clear that I was

distressed, so they invested time and energy in talking me through the problem from the perspective of my own mental health as a first responder until I was in a calm enough state to relax and eventually start laughing about the situation. Relaxing allowed us to start planning my response the next morning. Our respective past experiences we'd discussed that threatened our respective mental health, as well as past technology projects we'd worked on together, meant that I trusted them in such a situation. Having the confidence and trust to rely on people in my network when I'm feeling vulnerable or distressed allow me to continue being a human rights defender for others. Having trusted people within my networks to call upon if I feel the need is part of my strategy for self-care.

A potentially adverse consequence of relying on trusted networks to make positive change is that it makes it difficult for newcomers or people with different backgrounds to participate with legitimacy. This has exclusionary impacts, as evidenced in documentation of my experience with a UNESCO project about women in media. Being excluded from initiatives such as this can have cumulative impacts on people's self-confidence and can compound feelings of impostor syndrome. When one experiences self-doubt linked to issues associated with identity and representation, exclusion can have a cumulative effect in alienating people from organizations and others. Projects to amplify voice or support redistribution of power can backfire, leaving people excluded after having their hopes raised. This is true for science and technology initiatives beyond those specifically related to media and gender.

> *"a barriers approach may perpetuate social exclusion. By locating the cause of exclusion with structural issues science communication institutions and practitioners can do little about, such as location or poverty, or with participants' attitudes and behaviours, questions about whether science communication practices are themselves problematic can be deftly side-stepped... "* (Dawson 2014, p3)

Figure 1: Screenshot from a UNESCO survey link

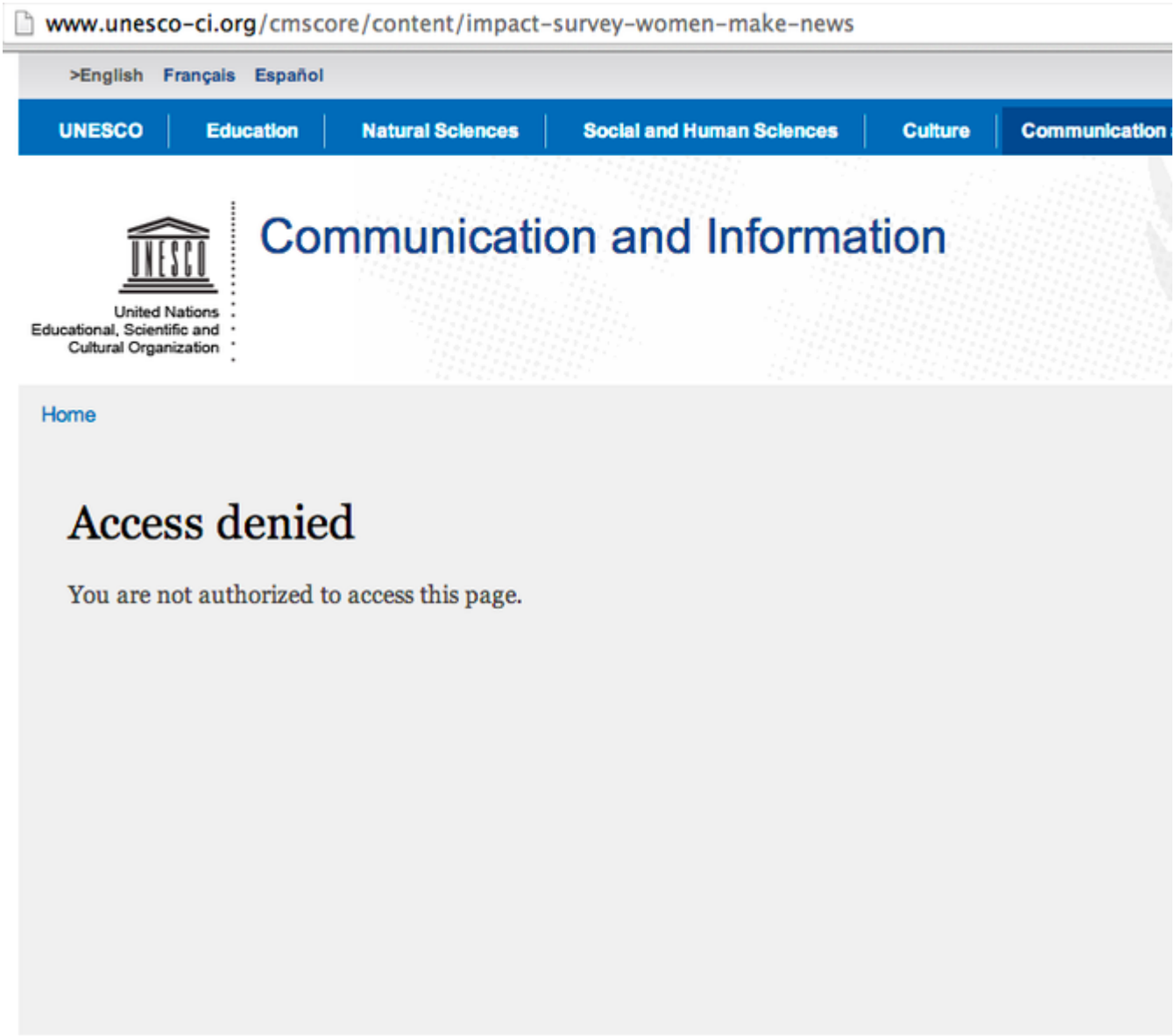


Table 1: Descriptive information about the UNESCO survey link in Figure 1

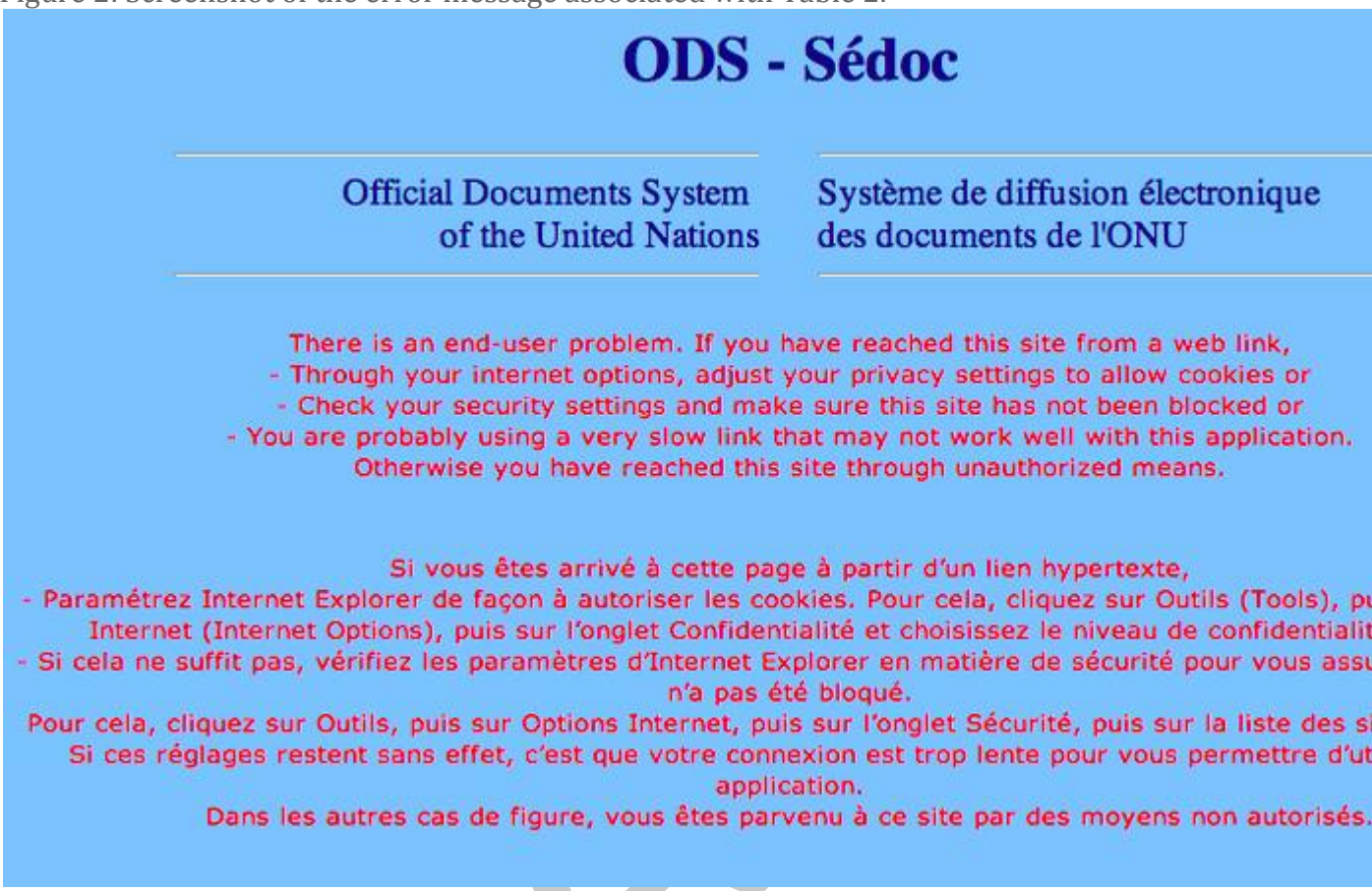
Description	**English:** This is a screenshot of the page I was taken to when I followed a link inviting people to complete a survey for strategic planning regarding the Women Make the News initiative from the link: http://www.unesco.org/new/en/communication-and-information/crosscutting-priorities/gender-and-media/women-make-the-news/ I found this sufficiently ironic to be worthy of addition to Wikimedia Commons.
Date	11 October 2013, 15:22:14
Source	UNESCO

Framing and language about who is at fault can be problematic for inclusion. Another example from the United Nations came from my attempts to reach a report about human rights defenders whilst working as a human rights defender in northern Thailand. Language used in the error message appears in Figure 5. My description of the figure shared with the file is replicated in table below. As well as access being difficult, the language used in the error message about access to the document timing out can be perceived as an example of victim blaming.

Table 2: Description of website accessibility issues associated with Figure 2

Description	**English:** I was following a link sent to me in an email to http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N13/418/11/PDF/N1341811.pdf?OpenElement. Despite having the level of internet access shown below (1), I was unable to access the report for ten minutes. It's only because this is related to my PhD research that I've taken the time to follow this up and document it. For the thousands of human rights defenders in the developing world who have less internet access, the report would be far more inaccessible and they would likely have far less time to spend getting access to it. I think the UN could increase impact if it put effort into sharing information in more accessible formats, to complement PDF files on the UN Official Document System. (1) --- google.com ping statistics --- 20 packets transmitted, 20 packets received, 0.0% packet loss round-trip min/avg/max/stddev = 39.188/40.181/42.217/0.669 ms
Date	1 November 2013, 11:13:59
Source	Official Documents System of the United Nations
Author	United Nations

Figure 2: Screenshot of the error message associated with Table 2.



The language used in Figure 2 framed problems with access as that of the document recipient, in this case a human rights defender working a developing country context. The messages are different depending on whether it is read in English or French. In either case, the focus is not on empowering those receiving the information to make use of it, but rather giving them the burden of establishing why the file could not be accessed. Given the different power and resource dynamics between human rights defenders working with non-governmental organizations versus IT professionals in United Nations centres, more effort should have been invested in accessibility.

How do we decide what information to trust? For example, in the course of researching this article and deciding on its title I researched the history of the use of the term "ping", given I had queried the speed of the network through which I was accessing a file hosted in the UN document system to determine whether the problem was solely in our network in Thailand or whether it was also related to UN accessibility. I found two alternative suggestions for what "ping" was an acronym for. The extension of the acronym "Packet InterNet Groper" appealed to me personally more than it solely being an onomatopoeia of sonar echolocation methods. Consulting the internet, upon finding "Packet InterNet Groper" listed as a definition within Symantec's security response glossary, I decided to include it in the title of this paper. In reality, I found the phrase on Wikipedia, but since Wikipedia is considered too unreliable for academic referencing I sought somewhere with more perceived legitimacy and authority. This is ironic for me given that I have used Wikimedia Commons to store documentation of primary research

records and have advocated human rights and environmental activists do so. Are these primary sources now more academically legitimate due to their presence in this paper?

Social engineering and phishing

Like many internet users I have been exposed to phishing attempts. I actively communicate with the University of Melbourne IT security team about more advanced forms of such attempts given my experiences in this field. Some users may simply label them as junk or spam then ignore them. This description of a social engineering lifecycle is adapted from researchers at Charles Sturt University (Wilcox, Bhattacharya & Islam 2014).

1. Fact finding

The aggressor to gathers information to build a relationship with either the target or someone important to the success of the attack.

2. Entrustment

The aggressor exploits the target's willingness to trust to develop rapport and to establish a position of trust.

3. Manipulation

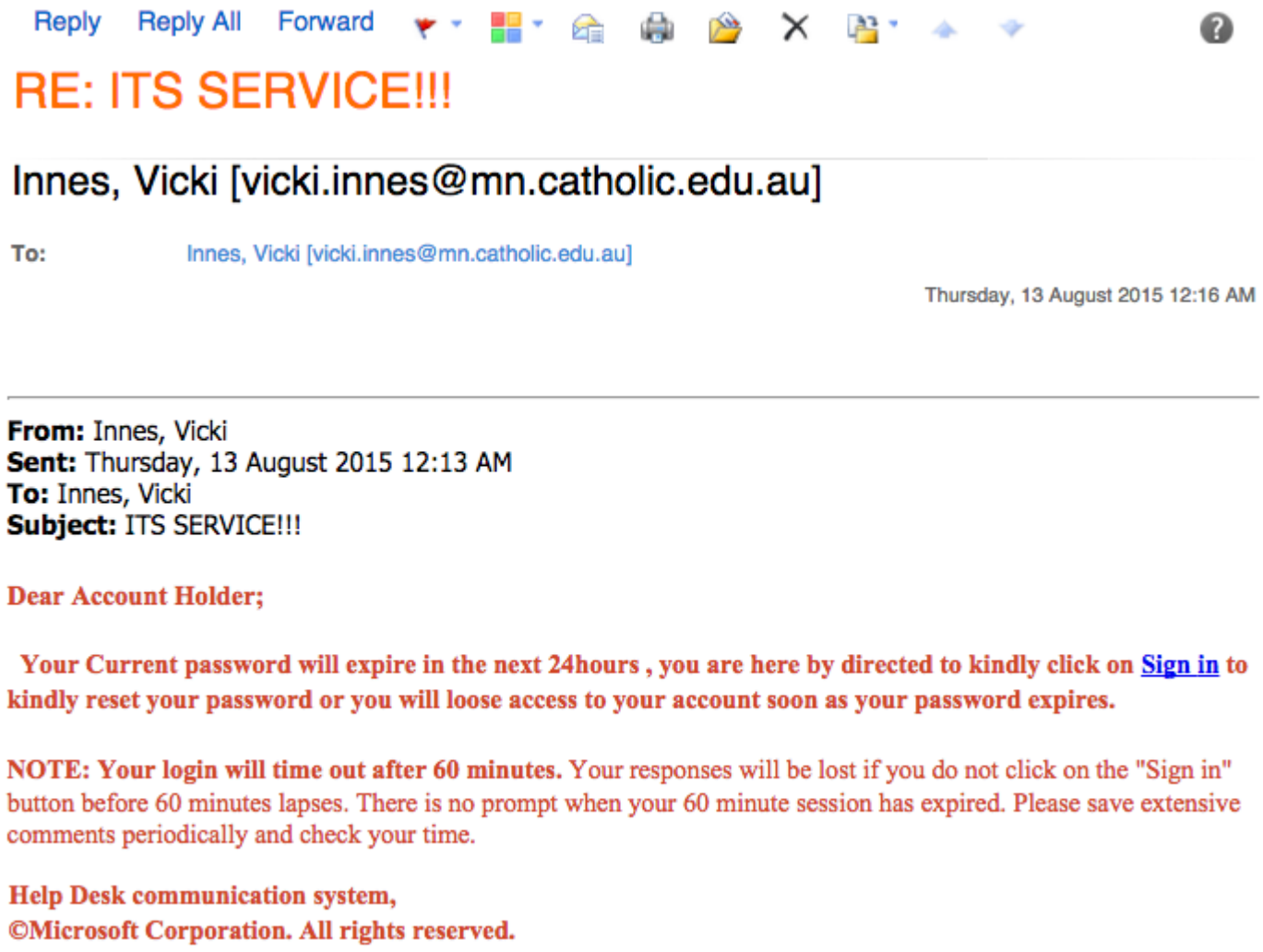
The target may then be manipulated into revealing information such as a password or to act, for example by creating an account. This action could be the end of the attack or the beginning of a new stage.

4. Execution

Once the target has completed the task requested by the aggressor, the cycle is complete.

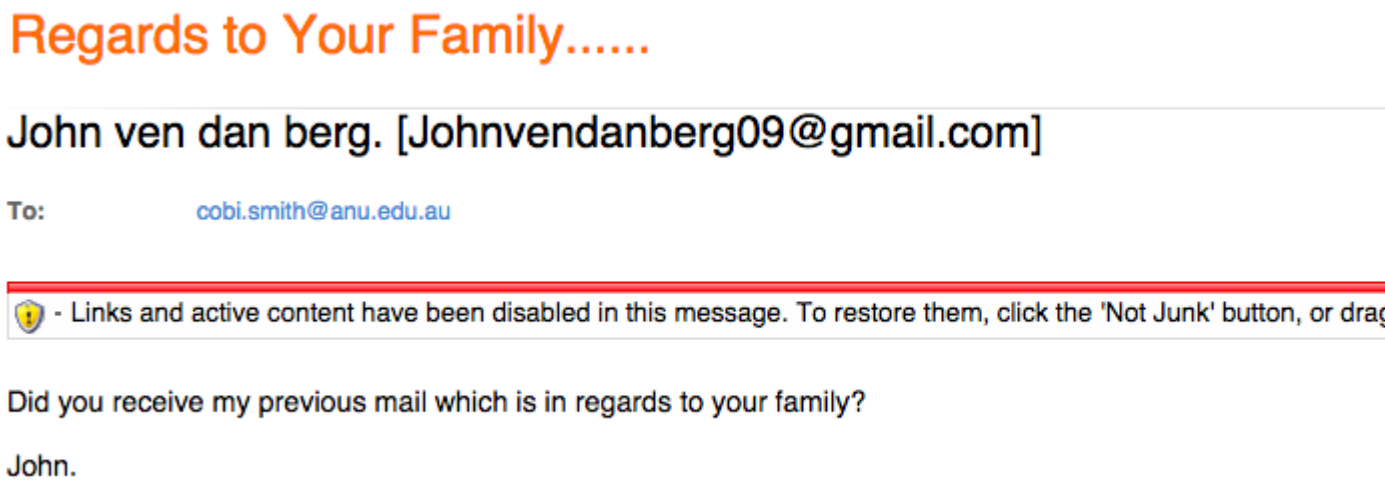
Some attempts at phishing are relatively simple and obviously fake and depend on the recipient clicking on links, such as the example shared in Figure 3.

Figure 3: screenshot of an email phishing attempt including a link



Some are more sophisticated, drawing on knowledge of the target's social networks and experiences to engage in social engineering, as evidenced in Figure 4. This was a social engineering attempt at impersonating a fellow Australian with whom I ran open technology workshops in Cambodia, John Vandenberg, possibly linked to related Indonesian human rights work, given his family. John consented to being included in documentation for this working paper. This demonstrates some of the risks of being open and transparent as an activist and change agent on the internet as well as in real life (Teo & Loosemore 2014). This has different costs for different types of people, as noted for example in reports about extra risks for women human rights defenders (Sekaggya 2010).

Figure 4: screenshot of a second social engineering attempt impersonating a fellow Australian with whom I led open technology workshops in Cambodia



Research about Australian communities opposing construction and engineering projects suggested that increased perceptions of external threats promote group cohesion and continuity, while building open and trusting relationships aids project problem solving (Teo & Loosemore 2014). Such social engineering attempts that undermine trust within communities supporting sharing knowledge may benefit major construction and engineering projects for whom sharing economy principles undermine core business and profit. However awareness that such attempted attacks are taking place promote activist group cohesion and continuity, such as when I contact people within my networks letting them know such social engineering attempts associated with their identity have been happening. Research about cantons in Switzerland found that in certain configurations, climates of social trust may be linked to more restricted forms of solidarity and the persistence of inequality (Glaeser 2015).

Such phishing and social engineering attempts have consequences for the project with which this working paper is associated. Figure 5 shows a targeted phishing attempt to my University of Melbourne email, based on knowledge of my past experiences.

Figure 5: Screenshot from a targeted phishing attempt on the University of Melbourne network via my email

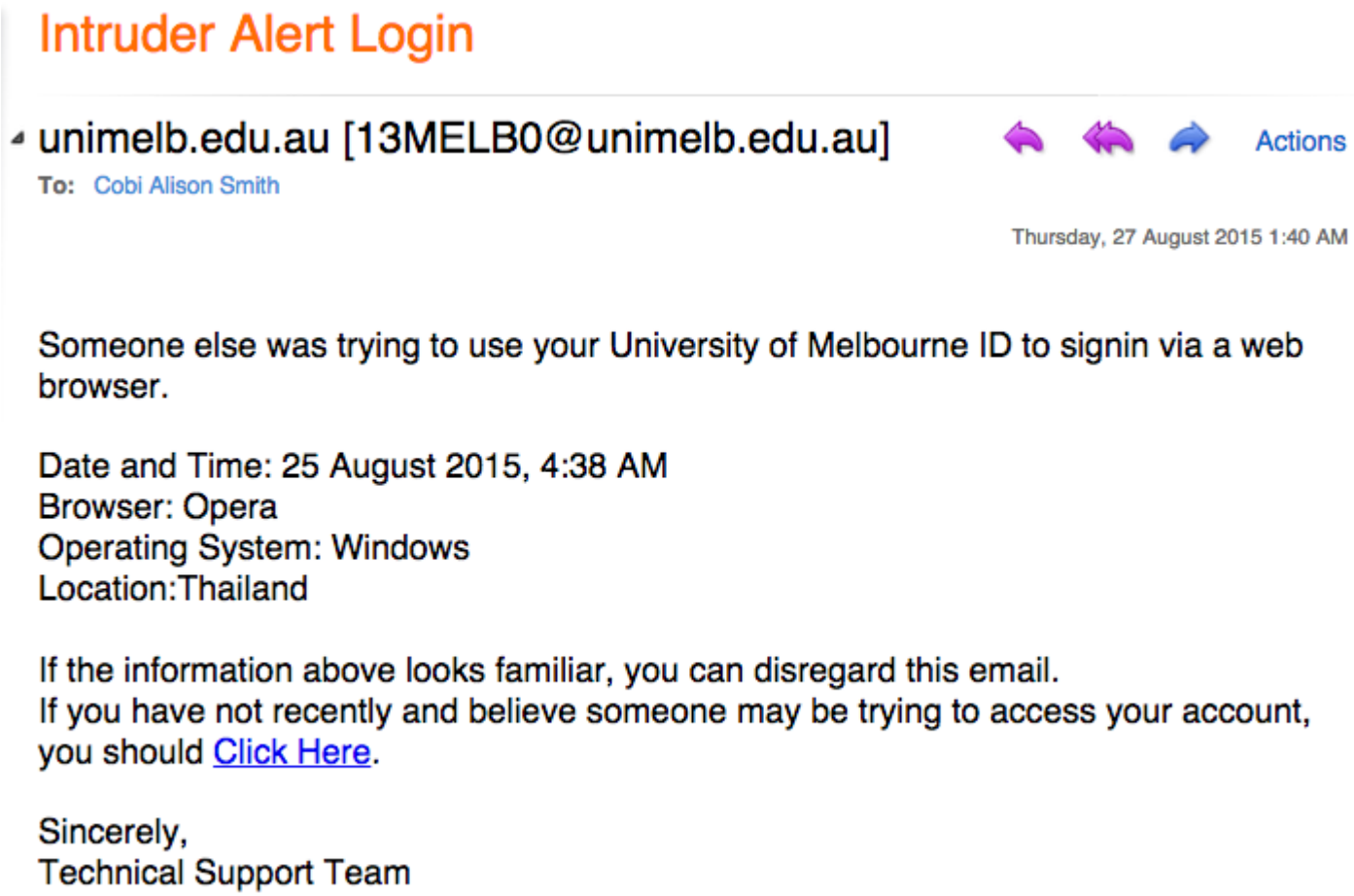
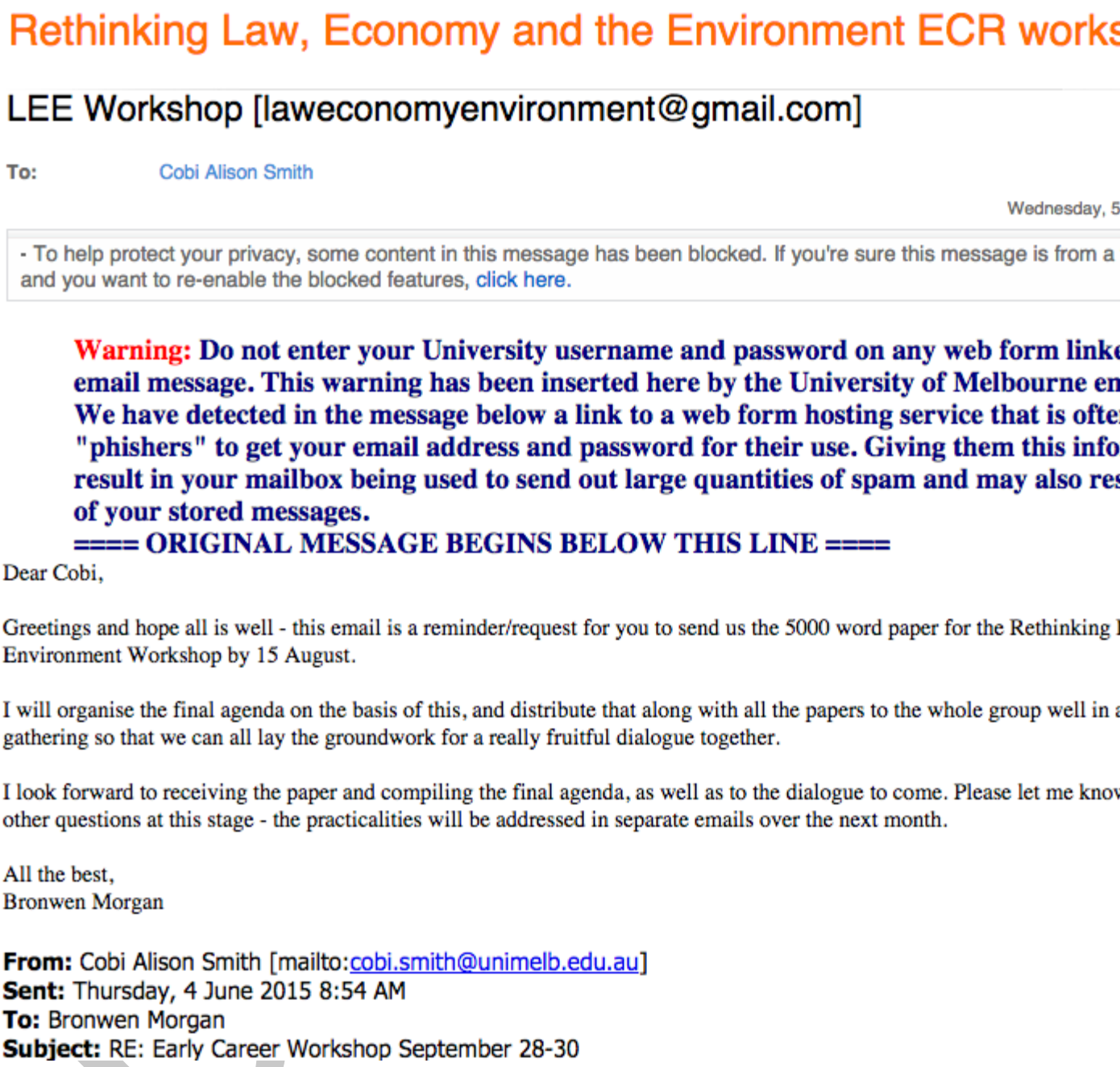


Figure 6 shows a security warning in an email about this workshop. If I had not been vigilant about social engineering attempts associated with my email accounts, I may have not responded to an invitation to participate in this workshop. Given my past experiences, I contacted Bronwen Morgan and associated researchers I knew promptly in response to her initial email about the conference, though it was associated with security warnings. These warnings have been ongoing. The credibility and legitimacy of such projects relies upon hosting institutions (such as the University of New South Wales) as well as individual researchers involved. For outsiders, however - including those involved in enterprises that small-scale sharing economy initiatives may undermine - this project about rethinking law, economy and environment may be regarded as a threat.

Figure 6: Screenshot from a security warning in an email associated with this workshop



Rethinking Law, Economy and the Environment ECR works

LEE Workshop [laweconomyenvironment@gmail.com]

To: Cobi Alison Smith

Wednesday, 5

- To help protect your privacy, some content in this message has been blocked. If you're sure this message is from a and you want to re-enable the blocked features, click here.

Warning: Do not enter your University username and password on any web form linke email message. This warning has been inserted here by the University of Melbourne en We have detected in the message below a link to a web form hosting service that is ofte "phishers" to get your email address and password for their use. Giving them this info result in your mailbox being used to send out large quantities of spam and may also res of your stored messages.

==== ORIGINAL MESSAGE BEGINS BELOW THIS LINE ====

Dear Cobi,

Greetings and hope all is well - this email is a reminder/request for you to send us the 5000 word paper for the Rethinking Environment Workshop by 15 August.

I will organise the final agenda on the basis of this, and distribute that along with all the papers to the whole group well in a gathering so that we can all lay the groundwork for a really fruitful dialogue together.

I look forward to receiving the paper and compiling the final agenda, as well as to the dialogue to come. Please let me know other questions at this stage - the practicalities will be addressed in separate emails over the next month.

All the best,
Bronwen Morgan

From: Cobi Alison Smith [mailto:cobi.smith@unimelb.edu.au]
Sent: Thursday, 4 June 2015 8:54 AM
To: Bronwen Morgan
Subject: RE: Early Career Workshop September 28-30

Australia's new political and legal landscape involves restricted communications among medical staff (Berger 2015) and digital activists (Daly 2015), with profound implications for trust and freedom of expression. The abrupt conclusion of discussion about these topics can be considered an example of the chilling effect of such laws.

Instead, let us revisit copyright law reform and consider rights of academics and artists to use prior works in new comedic, academic or satirical works, as well as controversies about the use of Wikipedia as a source in academia.

"From Little Things Big Things Grow" is a protest song recorded by Australian artists Paul Kelly & The Messengers on their 1991 album *Comedy*, and by Kev Carmody (with Kelly) on his 1993 album *Bloodlines*. It was released as a CD single by Carmody and

Kelly in 1993 but failed to chart. The song was co-written by Kelly and Carmody,[1] and is based on the story of the Gurindji strike and Vincent Lingiari as part of the Indigenous Australian struggle for land rights and reconciliation.[2][3] Kelly and Carmody performed the song together on 5 November 2014 at the public memorial service for former Prime Minister Gough Whitlam, who is the "tall stranger" referred to in the song.
On 2008-05-04, a cover version by The GetUp Mob, part of theGetUp! advocacy group, peaked at #4 on the Australian Recording Industry Association (ARIA) singles charts.[4] This version included samples from speeches by Prime Ministers Paul Keating in 1992, andKevin Rudd in 2008;[5] it featured vocals by both Carmody and Kelly, as well as other Australian artists.

"This contemporised version of the song transforms us from a negative concept of the past to the positive possibilities of the future."[18]

—Kev Carmody, 2008

The above contributions by others to Wikipedia could be considered alongside this work on Wikipedia, which was created and referenced by the author of this paper.

Naomi Mayers is a leader in Australian health and was lead singer of the music group The Sapphires on which a popular Australian film was based.[1]

Mayers is a leader in Aboriginal health services. She joined the Aboriginal Medical Service (AMS) in 1972.[1][2][2][3][4]

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- ^ Jump up to:*a* *b* "The Sapphires: where are they now?". Australian Geographic. September 5, 2012.
- ^ Jump up to:*a* *b* "Redfern Oral History".
- **Jump up^** "Mayers, Naomi Ruth (1941-)". National Library of Australia.
- **Jump up^** "Mayers, Naomi Ruth (1941 -)". Australian Women's Archives Project. 9 June 2009.

This Australian biography article is a stub. You can help Wikipedia by expanding it.

Conclusion
This working paper is intended to stimulate discussion about what kinds of intellectual work, institutional supports and political-economic contexts support the mental health and well-being of human rights defenders, particularly in regards to norms about what a "reasonable person" does in response to limits on freedom of expression. Australian political inaction about ongoing ecological crises, particularly climate change, is a threat to the mental health and wellbeing of human rights defenders who are concerned with the rights of peoples dependent on natural ecosystems and whose land rights are violated. Increasingly nonsensical and satirical methods of communication may be a coping mechanism in response to a system lacking economic legitimacy and democratic accountability.

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A New Paradigm of International Cooperation for Climate Change Mitigation

Elena de Lemos Pinto Aydos*

I Introduction

The Intergovernmental Panel on Climate Change (IPCC)[707] Fifth Assessment Report (AR5) on the physical science basis of climate change concluded with unprecedented levels of certainty that atmosphere and oceans are warming at increasing rates.[708] Each of the past three decades has been warmer than all the previous decades in the instrumental record, and the decade of the 2000s has been the warmest.[709]

Already observed consequences of global warming include a change in intensity and frequency of extreme weather and climate events,[710] lessening of snow and ice from glaciers all around the world,[711] an increasing rate of sea level rise since the mid-19th

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[707] 'Intergovernmental Panel on Climate Change (IPCC)' (2013) <http://www.ipcc.ch/>. The IPCC is a scientific body established in 1988 under the auspices of the United Nations (UN) with the aim of providing 'a clear scientific view on the current state of knowledge in climate change and its potential environmental and socio-economic impacts.' While the IPCC reviews and assesses scientific, technical and socio-economic information produced worldwide, it does not conduct any direct research and/or monitor climate related data or parameters. The IPCC work is conducted by three Working Groups (WGI, WGII and WGIII), coordinated and administrated by a Technical Support Unit (TSU). The WGI assesses the physical scientific aspects of the climate system and climate change. The WGII assesses the vulnerability of socio-economic and natural systems to climate change, consequences of climate change and adaptation options. The WG III assesses mitigation options, including emissions reductions and removals, adopting a solution-oriented approach. Between 1988 and 2015 the IPCC released five Assessment Reports (AR) of the state of knowledge on climate change.

[708] Intergovernmental Panel on Climate Change, 'Climate Change 2013: The Physical Science Basis - Technical Summary' (2013) <www.ipcc.ch>.

[709] Ibid.

[710] Intergovernmental Panel on Climate Change, 'Climate Change 2013: The Physical Science Basis - Summary for Policymakers' (2013) <http://www.ipcc.ch/>4, 5. See also The World Bank, 'Turn Down the Heat: Why a 4°C Warmer World Must Be Avoided' (2012) <http://climatechange.worldbank.org/sites/default/files/Turn_Down_the_heat_Why_a_4_degree_centrigrade_warmer_world_must_be_avoided.pdf> xiv. The World Bank report demonstrates that the Russian heat wave of 2010

> had very significant adverse consequences. Preliminary estimates for the 2010 heat wave in Russia put the death toll at 55,000, annual crop failure at about 25 percent, burned areas at more than 1 million hectares, and economic losses at about US$15 billion (1 percent gross domestic product (GDP)) and the 2012 drought in the United States, which 'impacted about 80 percent of agricultural land, making it the most severe drought since the 1950s.

[711] Intergovernmental Panel on Climate Change, above n 4, 3.

century,[712] and increasing ocean acidification endangering marine species and entire ecosystems.[713]

Continued release of GHG into the atmosphere will lead to further warming.[714] Without further mitigation action, an increase in long-term temperature of 2.8°C to 4.5°C can be expected, with a large part of the increase to happen during the current century.[715] Physical changes by the end of the 21st Century include:

i. More frequent hot and fewer cold temperature extremes over most land areas, with occasional cold winter extremes;
ii. Changes in the water cycle, with increasing contrast between wet and dry regions and between wet and dry seasons;
iii. Continuous warming of the global ocean, affecting ocean circulation and acidification;
iv. Continuous reduction of the Global glacier volume; and
v. Continuous rise of sea level.[716]

A growing body of scientific evidence demonstrates that cumulative concentrations of human-induced greenhouse gas (GHG)[717] emissions are the primary

[712] Ibid 6. The rate of sea level rise is now larger than observed during the previous two millennia.

[713] Intergovernmental Panel on Climate Change, above n 2, 57. The WGI reports that 'it is *virtually certain* that the increased storage of carbon by the ocean will increase acidification in the future, continuing the observed trends of the past decades. Ocean acidification in the surface ocean will follow atmospheric CO2 and it will also increase in the deep ocean as CO2 continues to penetrate the abyss'. See also Australian Government, *Impacts of Ocean Acidification on the Reef* Great Barrier Reef Marine Park Authority <http://www.gbrmpa.gov.au/outlook-for-the-reef/climate-change/how-climate-change-can-affect-the-reef/ocean-acidification>. Ocean acidification threatens marine life and ecosystems, such as the Great Barrier Reef ecosystem in Queensland, Australia.

[714] The IPCC assessment selected four different Representative Concentration Pathways (RCP) scenarios from the published literature to base its projections. Under such different scenarios, the warming of global surface temperature may range between least 1.5°C – 4°C above pre-industrial levels by the end of the 21st Century. Intergovernmental Panel on Climate Change, above n 2, 60. Also see Intergovernmental Panel on Climate Change, 'Climate Change 2014: Synthesis Report. Summary for Policymakers.' (2015) 8. The IPCC concludes that 'Continued emission of greenhouse gases will cause further warming and long-lasting changes in all components of the climate system, increasing the likelihood of severe, pervasive and irreversible impacts for people and ecosystems. Limiting climate change would require substantial and sustained reductions in greenhouse gas emissions which, together with adaptation, can limit climate change risks'.

[715] International Energy Agency, 'Redrawing the Energy-Climate Map: World Energy Outlook Special Report' (IEA, OECD, 2013)9, 12. Also see Intergovernmental Panel on Climate Change, above n 2; The World Bank, above n 10, 5. The IPCC's worst case scenario estimates that global temperature could rise by up to 5.4°C by 2100 and the World Bank estimates about 4°C warming within this century and a 6°C warming in the long term, under a business-as-usual scenario

[716] Intergovernmental Panel on Climate Change, above n ; Intergovernmental Panel on Climate Change, above n 4.

[717] There are seven main Greenhouse gases (GHGs) in the atmosphere: Carbon dioxide (CO2), Methane (CH4), Nitrous oxide (N2O), Hydrofluorocarbons (HFCs), Perfluorocarbons (PFCs), Sulphur hexafluoride (SF_6) and Nitrogen trifluoride (NF3). The first three GHGs occur naturally in the atmosphere, while the others are synthetic. Natural (non-anthropogenic) GHGs are essential to life in this planet. They absorb solar radiation and keep the earth warm enough to support life. However, human activities such as energy production, land clearing and agriculture have increased the volume and variety of GHGs present in the atmosphere, with severe impacts to the climate system.

cause of the changes to the climatic system described above.[718] About half of anthropogenic GHG emissions are generated by energy use and production, with land-use changes such as deforestation and industrial activities also playing an important role.[719]

A near-universal assembly of countries under the auspices of the United Nations Framework Convention on Climate Change (UNFCCC) recognise that the increasing concentration of GHG in the atmosphere from anthropogenic sources is causing climate change and its adverse effects are a common concern for humankind. Parties agreed for the first time in 2009 that the increase in global temperature should be below 2°C above pre-industrial temperature.[720] Yet, negotiations for a legally binding, comprehensive multilateral agreement for global emission reductions has been unsuccessful to this date.[721]

This paper argues that a new paradigm of international cooperation is emerging, which combines the multilateral framework that has been pursued under the UNFCCC with bilateral and multilateral approaches that can increase ambition and adherence to mitigation action. In fact, there is a correlation between the quest for meaningful global emission reductions – which intuitively denote a multilateral process – and the benefits of adopting regional approaches, such as linking independent emission trading schemes, carbon taxes and offset markets in order to achieve a global carbon price.

II Countries Key Concerns

The history of international negotiations under the auspices of the UNFCCC reveals the complexities of top-bottom systems for international cooperation.[722] Indeed, it has been repeatedly stated that incentives to 'free-ride' exceed incentives for countries to enter into a comprehensive legally binding agreement for global emission reductions.[723]

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[718] Intergovernmental Panel on Climate Change, above n 3, 12. Present concentrations of CO_2, CH_4 and N_2O are the highest recorded in ice cores in the last 800,000 years. CO2 concentrations have increased from 280 parts per million (ppm) in pre-industrial times to over 400 ppm in 2013.

[719] International Energy Agency, above n 15; Rosemary Lyster and Adrian Bradbrook, *Energy Law and the Environment* (Cambridge University Press, 2006) 51.

[720] Conference of the Parties, United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on Its Fifteenth Session, Held in Copenhagen from 7 to 19 December 2009 – Addendum – Part Two: Action taken by the Conference of the Parties at Its Fifteenth Session*, UN Doc FCCC/CP/2009/11/Add.1 (30 March 2010) para 1. Despite the agreement around 2°C above pre-industrial level, there are Parties that disagree with this limit, such as small islands. Others believe that the 2°C limit is too costly and a next best option would be the stabilisation of greenhouse gases at 550 ppm CO_2-e, which is likely to lead to a global temperature increase of 3°C above pre-industrial levels, a scenario that presents higher risks of dangerous climate change.

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

[722] See eg, Rosemary Lyster et al, *Environmental and planning law in New South Wales* (The Federation Press, 3rd ed, 2012) 244.

[723] Intergovernmental Panel on Climate Change, above n 18, 8; Scott Barret, 'Self-enforcing international environmental agreements' (1994) 46 *Oxford Economic Papers* 878; Robert Stavins, 'The problem of the commons: Still unsettled after 100 Years' (2011) 101 *American Economic Review* 81 4; OECD, *The Economics of Climate Change Mitigation: Policies and Options for Global Action Beyond 2012* (2009) 56; Ross Garnaut,

For instance, the OECD states that '[s]ince a country benefits as much from emission reductions by others as from domestic emission reductions that they have to pay for, all countries have an incentive to let most of the reductions be carried out by others.'[724] Garnaut also comments that 'without agreement, each country is tempted in its own narrow interests to contribute little, with the result that global effort is inadequate.'[725] The IPCC AR5 reports:

> These public good characteristics of climate protection (non-excludability and non- rivalry) create incentives for actors to 'free ride' on other actors' investments in mitigation. Therefore, lack of ambition in mitigation and overuse of the atmosphere as a receptor of GHGs are likely.[726]

Strategies adopted by a few key Parties' at negotiations under the auspices of the UNFCCC in the past decade seem to be guided by the understanding that 'unilateral action to address climate change is thus irrational, and an actor's best option is to shirk, doing nothing while others address the problem'.[727] Two basic concerns have been a constant at the negotiation rounds:[728]

i. 'Why should I commit to legally binding emission reductions, when my action alone will not be sufficient to achieve meaningful global emission reductions?'
ii. 'Why should I commit to legally binding emission reductions, when others will not?'

The following sections demonstrate that regional cooperation could have provided an effective answer to both concerns.

1 Why should I commit to legally binding emission reductions, when my action alone will not be sufficient to achieve meaningful global emission reductions?

The climate system is characterised as a common pool resource or a common[729] and as such, it often pointed out that, unless all countries take action meaningful emission reductions may not be achieved. Strictly, this is not the case.

'Climate Change Review Update: Progress Towards Effective Global Action on Climate Change' (Commonwealth of Australia, 2011)3, 8.

[724] OECD, above n 56.

[725] Garnaut, above n 3, 8.

[726] Intergovernmental Panel on Climate Change, above n 18, 8.

[727] Kathryn Hochstetler and Eduardo Viola, 'Brazil and the politics of climate change: beyond the global commons' (2012) 21(5) *Environmental Politics* 75337, 754.

[728] This list is not exhaustive. Other concerns commonly expressed by Countries include, for instance, '*Why should I bear most of mitigation costs than others, when I will not be benefited correspondingly?*' Economics studies have answered such concerns, with modelling demonstrating that there is sound economic support for early action towards a green economy. See Nicholas Stern, *The Economics of Climate Change: The Stern Review* (Cambridge, 2006); Ross Garnaut, *The Garnaut Climate Change Review: Final Report* (Cambridge University Press, 2008); 'The New Climate Economy: Better Growth, Better Climate' (2014); 'Pathways to Deep Decarbonization' (Sustainable Development Solutions Network & Institute for Sustainable Development and International Relations, 2014).

[729] In his notorious 'Tragedy of the Commons', Hardin argued that in circumstances of unregulated or unmanaged use of commons, the inexorable outcome is ruin or overuse.

When it comes to climate change, a few polluters can impact the volume of global greenhouse gas emissions on their own or in small groupings.[730] Indeed, the behaviour of a few developed and industrialised developing countries – major GHG emitters such as China, US and the EU (as a single entity) responsible together for 55 per cent of total global CO2 in 2012[731] – could be effective in achieving meaningful global greenhouse gas emission reduction.

In fact, strong agreements between China, the US, the EU (as a single entity), India, the Russian Federation and Japan – either as a block or a fragmented approach – would cover approximately 70 per cent of global CO_2 emissions from fossil fuel use and cement.[732] Next in line would be remaining high per capita emitting countries, such as Australia, Saudi Arabia, Canada and South Korea.[733]

While limiting temperature increase to 2°C is no longer conceivable without emission reductions commitments from a few heavily industrialised developing countries, the other 180 or so developing countries who are Parties to the UNFCCC contribute very little to global GHG emissions. Rather than regulating all Parties to the UNFCCC through a comprehensive, strict, legally binding agreement sound results could have been achieved via bilateral and/or plurilateral agreements amongst top emitters.

2 'Why should I commit to legally binding emission reductions, when others will not?'

The refusal from the United States (US) to sign the Kyoto Protocol well illustrates this concern. In July 1997, just before COP3 in Kyoto, the Senate resolved – with 95-0 votes – that the US 'should not be a signatory to any protocol to, or other agreement regarding, the United Nations Framework Convention on Climate Change of 1992, at negotiations in Kyoto in December 1997' as long as such an agreement 'specifically exempts all Developing Country Parties from any new commitments in such negotiation process for the post-2000 period'.[734]

The concern is relevant only in relation to those industrialised countries mentioned above who have not yet committed to legally binding reduction targets, rather than the whole group of developing countries. The fears expressed by the US Senate were particularly confirmed by the exponential increase in emissions from China in the past decade.

Still, Hochstetler and Viola point out at the failure of the strategy, stating that the US 'has tried to insist on legal obligations for the emerging powers, making that a condition of its own participation as early as 1997, but has not been willing or able to compel them to join'.[735] A much more sensitive strategy has been recently put in place by the US Government, who has taken to its hands to directly negotiate with China an unprecedented bilateral agreement for cooperation on emission reductions. Details of this agreement are discussed below.

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[730] Hochstetler and Viola, above n 37, 754.

[731] Jos G. J. Olivier et al, 'Trends in Global CO2 Emissions' (2013).

[732] Ibid.

[733] Ibid 18.

[734] Byrd-Hagel Resolution, Sponsored by Senator Robert Byrd (D-WV) and Senator Chuck Hagel (R-NE), 105th Congress 1st Session S. Res. 98 (Passed by the Senate 95-0).

[735] Hochstetler and Viola, above n 37, 756.

A different approach to the same issue was the adoption of conditional commitments[736] by a few Governments in order to push others to participate or increase emission reduction targets.[737] The EU, Australia and New Zealand (NZ) as well as developing countries such as China and India are amongst the list of countries pursuing this approach.[738]

History shows that conditional targets have failed to incentivise a universal multilateral agreement and in some cases led to a reverse situation, of a country deciding no longer to pursue legally binding targets, as was the case of NZ. In August 2009 the Government announced emission reductions between 10 per cent and 20 per cent below 1990 levels by 2020, conditional on the existence of a comprehensive legally binding global agreement that would limit the temperature rise to not more than 2°C, in which developed countries would make comparable efforts to those of NZ and major emitting developing countries would take action according to their respective capabilities.

As a comprehensive legally binding agreement for the post-2012 was not negotiated by COP 18, the NZ Government announced that it would not participate in the second commitment period under the Kyoto Protocol.[739] It notified a voluntary commitment to reduce its net greenhouse gas emissions by 50 per cent from 1990 levels by 2050 under the UNFCCC framework.[740]

Concerns with free riding behaviour framed the NZ policy, which was not effective in increasing international collaboration. As Neuhoff points out, the strategy 'does not seem to be very useful, and does not reflect the moral values of our societies [...] other approaches to framing and focusing national and international discussions about climate change are needed.'[741]

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[736] That is, the commitment to a range of emission reduction targets, where the highest level of abatement would be applicable as long as a similar level of mitigation is adopted by other countries.

[737] Karsten Neuhoff, *Climate policy after Copenhagen : the role of carbon pricing* (Cambridge University 2011) 137.

[738] Conference of the Parties, United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol on Its Eighth Session, Held in Doha from 26 November to 8 December 2012 – Addendum – Part Two: Action Taken by the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol at its Eighth Session,* UN Doc FCCC/KP/CMP/2012/13/Add 1 (28 February 2013) annex I art 1; [738] Council of the European Union, 'Presidency Conclusions of the Brussels European Council of 8–9 March 2007' (Presidency Conclusions 7224/1/07, 2 May 2007 2007) [31]; *Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 Establishing a Scheme for Greenhouse Gas Emission Allowance Trading within the Community and Amending Council Directive 96/61/EC* [2003] OJ L 275/32. For instance, the Australian Government declared that it would increase its GHG reduction target of 5 per cent below 2000 levels by 2020 to up to 15 or 25 per cent compared to 2000 levels, depending on the scale of global action.

[739] New Zealand Government Ministry for the Environment, 'Statement Made by New Zealand Ambassador for Climate Change, Dr Adrian Macey, to the United Nations Climate Change Negotiating Session on 10 August 2009 in Bonn, Germany ' (2009) <http://www.mfe.govt.nz/issues/climate/emissions-target-2020/statement-nz-ambassador.html>.

[740] Minister for Climate Change, New Zealand Government, 'The Climate Change Response (2050 Emissions Target) Notice 2011', *New Zealand Gazette,* No 2067, 31 March 2011, 987; Climate Change Minister Nick Smith, 'Govt sets -50% by 2050 emissions reduction target' (Press Release, 31 March 2011).

[741] Neuhoff, above n 31, 117, 137. Neuhoff explains that negotiations under the auspices of the UNFCCC reveal the assumption that 'reducing damage' (in this case, abating GHG emissions) is equal to 'benefitting' other countries at the expense of its own financial health: at 136.

III Multilateral Agreement vs Regional Cooperation: a real Paradox?

The previous section argues that regional collaboration amongst a few high polluters could assist with answering some of the main concerns that countries have expressed over the decade long negotiations to adopt a post-Kyoto framework for deep decarbonisation. At a first glance, this may seem to be conflicting with the assumptions of this research and the objectives of the UNFCCC in achieving a multilateral agreement for climate change mitigation.

Yet, the apparent partiality towards regionalism over multilateralism only exists at a superficial level. In terms of the expectations for COP21, a successful multilateral process would mean that developed and developing countries – excluding the least developed countries – agreed to commit and contribute towards global emission reductions. Application of the agreement by Parties is not expected to be uniform, which means that regional cooperation has a central role to play in further increasing key industrialised countries' ambitions.

Indeed, the relevance of regional processes persists despite the success or not in reaching a legal instrument at the 2015 Conference of the Parties to be held in Paris (COP21), to enter into force from 2020. At this point[742] it seems unlikely that COP21 will fail to achieve a near-universal multilateral agreement. The IPCC AR5 has brought unprecedented levels of certainty regarding the existence and causes of climate change and countries seem to be increasingly aware of the necessity of reframing the common but differentiated responsibility principle in a way that ensures universal participation while respecting local differences.

Still, multilateral negotiation processes can be complex and the final result will not be clear until the conclusion of COP21. In the undesirable event that negotiations at COP21 fail, there will be an obvious urgency in developing regional cooperation in order to bind heavy polluters to strict mitigation goals.

To date there has been only one example of a multilateral (universal) agreement in which countries successfully committed to limit levels of certain air pollutants, namely the Montreal Protocol.[743] Under the Montreal Protocol on Substances that Deplete the Ozone Layer[744] (Montreal Protocol) 197 developed and developing countries agreed to phase out the production and consumption of ozone-depleting substances in order to protect the stratospheric ozone layer.[745]

[742] At the time of writing, February 2015.

[743] As famously stated by former United Nations Secretary-General Kofi Annan 'perhaps the single most successful international agreement to date has been the Montreal Protocol'. United Nations, 'International Day for the Preservation of the Ozone Layer: 16 September' (2014) <http://www.un.org/en/events/ozoneday/background.shtml>.

[744] Montreal Protocol on Substances that Deplete the Ozone Layer, 1522 UNTS 3; 26 ILM 1550 (1987).

[745] World Meteorological Organization, 'Assessment for Decision-Makers: Scientific Assessment of Ozone Depletion' (World Meteorological Organization

The Montreal Protocol was opened for signature in 1987 and entered into force in 1989. Three years later the UNFCCC text was concluded. The post-second World War II momentum for international cooperation was not only experienced in international environmental law. Multilateral cooperation prospered also in other spheres.

A useful comparison is the international trade regime, one of the most important regimes of international law and closely connected to the sustainable development agenda. Unprecedented trade liberalisation was negotiated under the auspices of the General Agreement on Tariffs and Trade (GATT).[746] The Uruguay Round negotiations took place between 1986 and 1994, culminating in the creation of the World Trade Organization (WTO).[747]

Leal-Arcas explains the evolution of international economic law as follows:

> At first, international trade agreements were bilateral. Then came the GATT 1947, which multilateralized bilateral agreements. Years later, international trade law saw the collapse of multilateralism in 1979, which broke down during the Tokyo Round of multilateral trade negotiations. A series of new plurilateral (or selectively multilateral) agreements were adopted during the Tokyo Round, which caused the fragmentation of the multilateral trading system. In 1994, international trade law was again multilateralized with the WTO Agreement.[748]

The Montreal Protocol and the Uruguay Round as successful examples have not been repeated since. The implementation of the Kyoto Protocol followed a testing negotiation process and failed to secure the participation of all major emitters.[749] Similarly, in international trade, while the number of Regional Trade Agreements (RTAs)[750]

United Nations Environment Programme, 2014). The Montreal Protocol has achieved a reduction in the rate of increase of the stratospheric ozone layer. By 2025 the ozone layer is expected to start reducing, with a recovery towards its 1980 level by 2050 or slightly later for Antarctica.

[746] General Agreement on Tariffs and Trade (GATT), entered into force 1 January 1948.

[747] *Marrakesh Agreement Establishing the World Trade Organization,* opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995). The WTO is a multilateral trading system counting a total of 160 members in 2014.

[748] Rafael Leal-Arcas, *Climate Change and International Trade* (Edward Elgar, 2013)6, 291, 292.

[749] Despite being adopted by the Partied to the UNFCCC in 1997, the Kyoto Protocol did not enter into force until 16 February 2005. Due to the US withdrawal from the Kyoto Protocol, implementation only became possible after the ratification of the Protocol by Russia, a major fossil fuel exporter, who agreed to ratify the Protocol in exchange for the European Union support for the country to join the World Trade Organisation (WTO) negotiated at the EU-Russia Summit of 21 May 2004. for further details on the Russia / EU negotiation See Wybe Douma, 'The European Union, Russia and the Kyoto Protocol' in Marjan Peeters and K. Deketelaere (eds), *EU Climate Change Policy: The Challenge of New Regulatory Initiatives* (Edward Elgar, 2006) 51 .

[750] World Trade Organization, 'Regional Trade Agreements' (2014) <http://www.wto.org/english/tratop_e/region_e/region_e.htm>; World Trade Organization, 'Regional Trade Agreements: Facts and Figures' (2014) <http://www.wto.org/english/tratop_e/region_e/regfac_e.htm>. RTAs are reciprocal trade agreements between two or more partners. According to the WTO Secretariat, from 1948 until 1994 the GATT received 124 notifications of RTAs relating to trade in goods, while 'since the creation of the WTO in 1995, over 400 additional arrangements covering trade in goods or services have been notified'. On 15 June 2014, approximately 585 notifications of RTAs had been received by the GATT/WTO, counting goods, services and accessions separately. Also see World Trade Organization, 'Preferential Trade Agreements: List of PTAs' (2014) <http://ptadb.wto.org/ptaList.aspx>.

multiplied, multilateral negotiations under the Doha Round (Doha Development Agenda) reached a deadlock.[751]

Thus, impasse in past negotiations for a comprehensive legally binding multilateral agreement for global emission reductions is partly due to the fragmented way in which international law generally operates.[752] This development has been observed in more detail by literature on trade blocs but not as often related to climate change negotiations.[753]

Multilateralism is still the preferred approach to achieve goals such as trade liberalisation[754] and climate change mitigation. The main point of this section is to validate that multilateralism and regionalism are not necessarily mutually exclusive instruments.[755] As pointed out by Leal-Arcas, 'the trend of using bilateral or plurilateral trade agreements to build towards eventual trade multilateralization may be worth emulating for the case of climate change law'.[756]

The EU support for Russia's WTO accession in 2004 was an early example of the role that bilateral agreements can play in facilitating cooperation for climate change mitigation.[757] The recent bilateral agreement between the US and China, historical antagonists in the negotiations for global GHG reductions, sets another valuable precedent. On 11 November 2014 the US and China announced a bilateral agreement to

[751] World Trade Organization, 'General Council supports suspension of trade talks, Task Force submits "Aid for Trade" recommendations' (2006) *Doha Development Agenda* <http://www.wto.org/english/news_e/news06_e/gc_27july06_e.htm>. Also see World Trade Organization, 'Director-General Azevedo urges rapid action on Bali Issues' (2014) <http://www.wto.org/english/news_e/news14_e/dgra_16nov14_e.htm>.

[752] Leal-Arcas, above n 6, 291.

[753] Petros Mavroidis, 'WTO and PTAs: A Preference for Multilateralism? (*or, the Dog That Tried to Stop the Bus)*' (2010) 44(5) *Journal of World Trade* 1145 ; Pascal Lamy, 'Stepping Stones or Stumbling Blocks? The EU's Approach Towards the Problem of Multilateralism vs Regionalism in Trade Policy' (2002) 25(10) *The World Economy* 1399 ; Kamal Saggi and Halis Murat Yildiz, 'Bilateralism, multilateralism, and the quest for global free trade' (2010) 81 *Journal of International Economics* 26 ; Maurice W. Schiff and L. Alan Winters, *Regional Integration and Development* (The World Bank and Oxford University Press, 2003). On the fragmentation of international climate change law see Leal-Arcas, above n 5.

[754] Lamy, above n 58, 1401. Lamy observes that

> 'At the most basic theoretical level, and beginning by strictly limiting our discussion to the issue of trade *liberalisation per se*, there appears to be no disagreement between economists that *if* we *have* to choose, multilateral liberalism is best, in terms of maximising the welfare gains. The principle of Most Favoured Nation (MFN) liberalisation in the WTO is that a tariff cut offered to one member must be offered to all. In conditions of perfect competition, this will always produce a welfare gain'.

[755] Ibid. Iza Lejárraga, 'Deep Provisions in Regional Trade Agreements: How Multilateral-friendly?: An Overview of OECD Findings' (OECD Publishing, 2014).

[756] Leal-Arcas, above n 6, 292.

[757] See FN 23.

cooperate for the development of clean energy and to achieve emission reductions beyond current voluntary commitments.[758]

The two largest polluters in the world (around 40 per cent of global GHG emissions) demonstrate that bilateral agreements can assist with deepening commitments from major emitters, while mitigating concerns with 'free rider' behaviour. As part of the agreement, the US announced a new reduction target of 26 to 28 per cent below 2005 levels by 2025 and China committed to peak CO_2 emissions by 2030 or earlier and to increase the non-fossil fuel share of all energy to around 20 per cent by 2030.[759]

An increasing number of trade agreements have been integrating the topic of sustainable development.[760] The proliferation of regional agreements between major polluters can ease the way towards increasing cooperation in the multilateral sphere.

Trade liberalization can facilitate the implementation of sustainable development objectives such as the transition to a green economy, by fostering the exchange of environmentally friendly goods and services, increasing resource efficiency, and generating economic opportunities and employment, thus contributing to poverty eradication.[761] Converging interests within a regional trade bloc will assist with negotiations for the development of clean energy, technology transfer and linking of independent carbon pricing schemes.

There may be economic advantages to major emitters who agree, for instance, to invest in renewable energy, pushing down the cost of technology innovation as a result of the scale of investment.[762] Where major emitters agreed to reduce GHG emissions, it would provide leverage for other Parties to present individual mitigation plans based on local differences, historical, present and future responsibilities and current economic capacity.

The trade-offs go both ways, with the multilateral process also being key to the development of regional initiatives such as the linking of independent emissions trading schemes. For instance, a multilateral agreement can deliver a framework for the accounting, recording and tracking of international units, facilitating future links between domestic schemes adopted by major emitters (minimizing free riding concerns) and between major emitters and least developed countries (providing

[758] The White House, 'Fact Sheet: US-China Joint Announcement on Climate Change and Clean Energy Cooperation' (2014) <http://www.whitehouse.gov/the-press-office/2014/11/11/fact-sheet-us-china-joint-announcement-climate-change-and-clean-energy-c>.

[759] Ibid.

[760] Markus W. Gehring et al, 'Climate Change and Sustainable Energy Measures in Regional Trade Agreements (RTAs): An Overview' (ICTSD, 2013)

[761] Fabiano de Andrade Correa, 'The Integration of Sustainable Development in Trade Agreements of the European Union' in David Kleimann (ed), *EU Preferential Trade Agreements: Commerce, Foreign Policy, and Development Aspects* (European University Institute, 2013) 143.

[762] For instance, the cost of solar technology fell substantially in the past ten years as a result from the scale of investment. For further information, see Thomas B. Johansson et al, 'Global Energy Assessment: Toward a Sustainable Future' (International Institute for Applied Systems Analysis, 2012).

financial assistance). This structure would provide the system with a vital balance between centralisation and flexibility.[763]

IV Economic Incentives for Cooperation between Developed and Developing Countries: The Case for Market-Based Instruments

The development and linking of independent market-instruments – such as emissions trading schemes, carbon offset markets and carbon taxes – can provide new trading opportunities for major emitters, including developed and developing countries, thus increasing the political viability and intensity of international cooperation for emission reductions.[764] An international carbon price via regional agreements (bottom-up approach) is better implemented where combined with the establishment of universal rules enforcing environmental integrity of new market-based mechanisms (top-to-bottom approach).

De Sepibus comments that for developed countries 'an important part of the financial support needed by developing countries could and should be delivered through the carbon market'.[765] The relevance of market-based instruments to promote cooperation between developed and developing countries can be illustrated by Brazil's participation in the negotiations for the first commitment period of the Kyoto Protocol.

Brazil was the first country to sign the UNFCCC and succeeded in ratifying it in 1994. During negotiations for the Kyoto Protocol, Brazil initially proposed the creation of a Clean Development Fund to assist developing countries, based on the rationale of historic responsibility. The fund would be composed by fines paid by developed countries that failed to comply with reduction commitments. The proposal was rejected by developed countries.[766]

It was through collaboration with the US in 1997 that the Clean Development Fund was transformed into what became the Clean Development Mechanism (CDM)

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[763] The comparison with international trading system is, once again, pertinent. Lamy, above n 58, 1411 suggests that 'for regional agreements to operate effectively and fairly within the overall multilateral framework, it is extremely important that the multilateral system be given certain powers to police agreements'. Also see Mavroidis, above n … (PTAs), 1152. Mavroidis demonstrates that 'pursuance of multilateral agenda (continuing tariff liberalization, introduction of new multilateral rules on say rules of origin and other areas) will unavoidably reduce size of problems that PTAs pose to the multilateral system'. See, also *Marrakesh Agreement Establishing the World Trade Organization,* opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995). The WTO agreement Art III.1 provides:

> The WTO shall facilitate the implementation, administration and operation, and further the objectives, of this Agreement and of the Multilateral Trade Agreements, and shall also provide the framework for the implementation, administration and operation of the Plurilateral Trade Agreements.

[764] For an introduction to theory of market-based instruments see OECD, above n ; Janet E. Milne and Mikael Skou Andersen, 'Introduction to Environmental Taxation Concepts and Research' in Janet E. Milne and Mikael Skou Andersen (eds), *Handbook of Research on Environmental Taxation* (Edward Elgar, 2012) 15

[765] Joëlle de Sépibus, Wolfgang Sterk and Andreas Tuerk, 'Top-down, Bottom-up or In-between: How Can a UNFCCC Framework for Market-Based Approaches Ensure Environmental Integrity and Market Coherence?' (2012) 6.

[766] Eduardo Viola, 'A Evolução do Papel do Brasil no Regime Internacional de Mudança Climática e na Governabilidade Global' (2004) 6(1) *Cena Internacional: Revista de Análise em Política Internacional* 82 22 97.

under the Kyoto Protocol,[767] a market-based instrument capable of attracting investment from developed to developing countries.

Hochstetler and Viola suggest that after the United States withdrew from the Kyoto Protocol in 2001 'Brazil helped pull together the alliance between the European Union, Japan, and emerging countries that made the final agreements possible',[768] attributing it to the successful negotiation of the CDM.[769] Brazil ratified the Kyoto Protocol in 2002.

Brazil's resistance to including the forestry sector in CDM is also explained by Hochstetler and Viola:

> As long as Brazilian deforestation was high, the Brazilian Foreign Ministry resisted extending the CDM to carbon sinks and forests. In doing so, it allied with the European Union against other forest countries, blocking an important potential line of development of the international agreements. Despite having some of the most important biodiversity and carbon stocks in forest in the world, Brazilian negotiators worried that making them part of global agreements would eventually open Brazil to international liability for the high rates of deforestation in the Amazon that the Brazilian government evidently could not control. This position was strongly supported by rural agricultural and timber elites, dominant in state-level politics in the Amazon and with a strong bloc in the National Congress.[770]

Once the CDM was adopted, investment flows were directed to China and India, while Brazil benefited from fewer opportunities.[771] Local governments in the Amazon area heavily criticised the Brazilian Government for blocking a market-based mechanism that would bring investment in the forest conservation sector.[772] From this point, the Brazilian Government became engaged in the development of a new market instrument to promote abatement in the forestry sector, the REDD+ (Reducing Emissions from Deforestation and Forest Degradation), endorsed by the Cancun Agreement. [773]

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[767] Ibid 97; Hochstetler and Viola, above n 37, 759; *Kyoto Protocol to the United Nations Framework Convention on Climate Change,* opened for signature 11 December 1997, 2303 UNTS 148 (entered into force 16 February 2005) art 12. The Clean Development Mechanisms (CDM) allows developed countries to implement emission-reduction projects in developing countries generating Certified Emission Reduction (CER) credits. Also see Rosemary Lyster, 'International Legal Framework for REDD+: Ensuring Legitimacy' in Rosemary Lyster, Catherine Mackenzie and Constance McDermott (eds), *Law, Tropical Forests and Carbon: The Case of REDD+* (Cambridge University Press 2014) 3 15.

[768] Hochstetler and Viola, above n 37, 759.

[769] Ibid 761.

[770] Ibid 761.

[771] Wolfgang Sterk, 'New Mechanisms for the Carbon Market? Sectoral Crediting, Sectoral Trading, and Crediting Nationally Appropriate Mitigation Actions' (Wuppertal Institute for Climate, Environment and Energy, 2010)65, 3. Other regions have had even less representation in CDM projects, such as Africa.

[772] Hochstetler and Viola, above n 37, 762.

[773] Conference of the Parties, United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on Its Sixteenth Session, Held in Cancun from 29 November to*

The project-based focus of CDM has been criticised[774] and new market mechanisms are currently being negotiated under the auspices of the ADP. Two main proposals are currently 'on the table': a 'new market-based mechanism' (NMM) will be established and operated under the guidance and authority of the COP to enhance cost-effectiveness of mitigation[775] and a 'framework for various approaches' (FVA) aimed at defining standards to ensure the environmental integrity of mitigation action.[776]

The FVA will define standards applicable to different mitigation action, in order to ensure the environmental integrity of the various approaches.[777] The FVA framework must be applicable to market and non-market approaches, and should be sensitive to different circumstances of developed and developing countries.[778]

This includes, but is not limited to, the development of an accounting framework for internationally traded units. As Garnaut points out, 'international trade in emissions require firm and internationally credible targets and reliable emissions accounting in selling countries.'[779]

A number of Governments expressed interest in the establishment of common accounting standards to ensure the environmental integrity of carbon markets, facilitating the robust functioning of international carbon markets. For instance, the Australian Government suggests that:

> The purposes of the Framework should be to facilitate the development and implementation of, and coordinate the interaction among, existing and emerging MBAs [market based mechanisms] in a transparent manner that provides assurance of environmental integrity and promotes the robust functioning of the global carbon market […]The Framework should also serve the important role of

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10 December 2010 – Addendum – Part Two: Action Taken by the Conference of the Parties at Its Sixteenth Session, UN Doc FCCC/CP/2010/7/Add.1 (15 March 2011), paras 68–79, apps I–II. In 2013 deforestation rates in the Amazon forest increased for the first time since 2005, with trend most likely to be confirmed in 2014. Interestingly, in 2014 Brazil refused to sign the New York Declaration on Forests at the UN Secretary-General's Climate Summit in New York. The Declaration on Forests is a non-legally binding declaration endorsing a global timeline to cut natural forest loss in half by 2020 and end it by 2030. The Declaration was endorsed by dozens of governments – including Indonesia and the Brazilian states of Acre, Amapá and Amazonas – civil society, businesses and indigenous communities. See 'Forests: Action Statements and Action Plans' (UNFCCC, 2014) <http://www.un.org/climatechange/summit/wp-content/uploads/sites/2/2014/07/FORESTS-Action-Statement_revised.pdf>.

[774] On the issues of CDM projects and its ineffectiveness in incentivising a broader transition towards a low carbon economy in developing countries see Sterk, above n 65.

[775] Conference of the Parties, United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on Its Seventeenth Session, Held in Durban from 28 November to 11 December 2011 – Addendum – Part Two: Action Taken by the Conference of the Parties at Its Seventeenth Session,* UN Doc FCCC/CP/2011/9/Add.1 (15 March 2012) para 83.

[776] Conference of the Parties, United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on Its Eighteenth Session*, *Held in Doha from 26 November to 8 December 2012 – Addendum – Part Two: Action Taken by the Conference of the Parties at Its Eighteenth Session*, UN Doc FCCC/CP/2012/8/Add1 (28 February 2013) 1/CP18 paras 41–49.

[777] Ibid 1/CP18 paras 41–49.

[778] Ibid para 41.

[779] Garnaut, above n 38, 32.

> helping to coordinate MBAs and promote a robust global carbon market by providing guidance and supporting infrastructure (centralised or decentralised) to record and track international units [...] The full potential of the global carbon market must be harnessed to achieve the global goal of holding average temperature increase below two degrees Celsius.[780]

The EU's submission recommends that discussions under the FVA should address 'the international aspects of those initiatives, including the implications of linking trading systems of different Parties, [and] the use of carbon credits crossing the boundaries of national and regional schemes for a Party's implementation of its international commitment.'[781] The US and Japan's Governments also include the linking of ETSs in the scope of approaches to be included under the FVA.[782]

Linking between independent tradable permit systems could play an important role in the new climate change regime, to be negotiated under the auspices of the ADP by 2015. Ranson and Stavins point out that, by including developing countries in the FVA framework, the chances of future linkages between ETSs in developed and developing countries are improved.

Linking would provide an 'institutional framework of coordination among different systems' and a 'pathway to a robust, long-term, post-Durban international climate policy architecture.'[783] In terms of political acceptability, the OECD argues that 'at the international level, any income transfers required to encourage large developing countries to join in may be more acceptable to the electorates of developed countries if they take place indirectly, through permit allocation, rather than through direct income transfers.[784]

The linking of ETSs facilitates the setting of an international carbon price and, where certain conditions are met, produces the effect of reducing global emissions at reduced cost. The success of such approach would hinge on the adoption of internationally acceptable rules for measurement, reporting and verification, the agreement amongst countries participating in the bilateral or regional arrangements on targets for emissions, and 'openness to economically and environmentally sound trade by member countries with external countries.'[785]

Parties have not yet agreed on whether new market mechanisms should comply with a common set of internationally agreed rules under the UNFCCC or be bound by

[780] Goverment of Australia, 'Submission to the SBSTA: Views on the Elaboration of a Framework for Various Approaches' (2013) <http://unfccc.int> 2–6.

[781] Irish Presidency of the Council of the European Union, 'Submissions by Ireland and the European Commission on Behalf of the European Union and Its Member States' (2013) <http://unfccc.int> 2.

[782] The United States Government, 'US Submission on the Framework for Various Approaches to UNFCCC' (2013) <http://unfccc.int>; Japan, 'Submission by Japan on Various Approaches, Including Opportunities for Using Markets, to Enhance the Cost-Effectiveness of, and to Promote, Mitigation Actions' (2013) <http://unfccc.int>.

[783] Matthew Ranson and Robert N. Stavins, 'Linkage as a Foundation for Post-Durban Climate Policy Architecture' (2012) 15(3) *Ethics, Policy & Environment* 272, 273.

[784] OECD, above n 78, 62.

[785] Garnaut, above n 38.

domestic requirements only.[786] The position adopted herein is that harmonised rules for accountability of carbon credits and offsets should be pursued as they have the potential to considerably reduce transaction costs and ensure environmental effectiveness of independent schemes, enabling linking.

V Conclusions

The urgency in achieving global GHG emission reductions has been expressed with near unanimity by the international scientific community and accepted by a near universality of countries under the UNFCCC. Paradoxically, the same nations have failed to achieve a comprehensive legally binding agreement to effectively reduce global GHG emissions.

This paper suggests that an alternative model of international cooperation is being formed, based on the complementarity of regional (bottom-top approach) and multilateral agreements (top-to-bottom approach). Within this structure, the multilateral platform would focus on the setting of harmonised rules for monitoring, reporting and verification standards amongst others, ensuring environmental integrity to the system.

Regional agreements can incentivise major emitters to collaborate with each other. Financial assistance for transition towards low carbon economy in developing countries is likely to be better accepted by developed countries where economic interests converge, for instance through the implementation and linking of market-based instruments. While a multilateral framework facilitates regional integration, bilateral / plurilateral agreements may provide the levels of trust and legitimacy necessary to further deepen multilateral commitments.

[786] Sépibus, Sterk and Tuerk, above n 6, 5. The authors explain that 'on the other hand, the group of countries, notably the EU and the Alliance of Small Island States (AOSIS), supporting the continuation of the KP and a more centralised oversight for new market-based mechanisms, fear that a fragmented, more "bottom-up" approach for the establishment of internationally recognised units might progressively erode the credibility of the climate change regime'.

The Difference Principle and Food Security: An Institutional Framework for Change

Katie Woolaston, Hope Johnson and Felicity Deane*

Malnutrition and obesity are both human conditions demonstrative of a catastrophic market failure within the food industry. Globally, there is a '*grotesque misallocation of resources and priorities*',[787] as 870 million people are chronically malnourished in a world that produces enough food for far more than the current population.[788] Food security has become one of many pressing international concerns, and it is one that is accompanied by predictions that the problem will worsen over time. For this reason it seems the theory of the invisible hand that guides the free market cannot be relied upon to ensure fair and just outcomes.[789] Indeed, when we consider the current state of the food industry it is not difficult to see evidence of problems in need of a regulatory strategy including externalities, information inadequacies and scarcity and rationing.[790]

With this in mind, within this paper we consider a different strategy to address the issue of food market failure. We suggest that the failure to properly address this problem has occurred through the inability to consider it as a global problem. Rather regulatory strategies are almost always based in domestic regulations rather than on an international scale. In this regard we note that any global problem – which is what the current state of the food market demonstrates - requires a global solution. [791]

The cause of the failure of the food industry market is a complicated matter with many associated symptoms. However, it has been argued that at the heart of the matter is a problem with distribution and profit motivation.[792] Certainly when the matter is considered globally, and the human race viewed as a community, distribution of nutrition does appear to be a concern in need of redress. Consequently, within this paper we propose that this distributive problem can be addressed through rationales provided by particular theories of distributive justice. Although there is difficulty in finding a theory relevant for global problems we suggest here that 'Rawls' difference principle' and associated governance structure can be applied in an international context.

The purpose of this paper is to demonstrate how the difference principle may assist in the alleviation of the global food market failure. In order to do this we first

* Of the three authors, Felicity and Hope are both attending

[787] Nicholas Rose and Claire Parfitt, *Food Fight: The Battle for Justice from Paddock to Plate* The Conversation <http://theconversation.com/food-fight-the-battle-for-justice-from-paddock-to-plate-5935>.

[788] 'The State of Food Insecurity in the World 2012: Economic Growth Is Necessary but Not Sufficient to Accelerate Reduction of Hunger and Malnutrition' (Food and Agriculture Organisation; The International Fund for Agricultural Development; World Food Programme, 2012) 4 <http://www.fao.org/docrep/016/i3027e/i3027e.pdf>.

[789] The virtues of the market were first advocated by Adam Smith who suggested individual self-interest would lead to an efficient economy. It was Smith's claim that a market left unregulated would lead to general well being as if guided by an invisible hand. See J. Stiglitz, 'Guided by an invisible hand' (2008) 137(4919) *New Statesman* 18.

[790] Robert Baldwin and Martin Cave, Understanding Regulation: Theory, Strategy and Practice (Oxford University Press, Oxford 1999) 11 – 15.

[791] is now recognised that many governance problems have arisen because of globalisation and can only be addressed by global solutions (Stiglitz 2008) Charles Sampford, 'Re-Conceiving the Good Life: The Key to Sustainable Globalisation' (2010) 45(1) *Australian Journal of Social Issues* 13, 15.

[792] Stuffed and Starved Reference.

identify the food market failure problems and consider some of the predominant root causes of this failure. This is a complicated matter however it is our argument that the solutions at least need not be complicated. Following this, we consider distributive justice and more specifically provide an overview of Rawls' difference principle. It follows from the application of this principle that the markets must remain free but redistribution can occur through proper taxation and a corresponding reallocation of resources to address the inherent market failures. Within our analysis we identify the institutions that may aid in the governance of this global regulation. Although the solutions we propose are not complicated, they may be considered radical. In this regard we argue that the extreme market failures we currently face will not be corrected without change, purpose and commitment. It is a correction however that may result in greater realization of human dignity across the globe.

Food Security and Access to a Healthy Diet

The 'stuffed and starved' phenomenon demonstrates a problem of resource distribution that impacts on both developed and developing countries globally.[793] It has been reported that the number of overweight people in the world now exceeds the number malnourished by 200 million.[794] The growth in obesity is not only a problem in developed countries, rather, the growth in obesity has also occurred in developing countries, with corresponding rises in diet related diseases.[795] One explanation of this is that disadvantaged groups are increasingly relying on nutritionally poor, seemingly cheap food. Because of this, the cause of obesity is not necessarily only a result of eating too much food, rather eating too much food that is nutritionally inadequate along with a host of complex environmental factors. In low-income and middle-income countries there are high rates of undernutrition and obesity. Further, undernutrition and overnutrition are sometimes occurring within the same households.[796] The FAO refers to this as a 'double burden of malnutrition', whereby diet-related chronic diseases co-exist with malnutrition and micronutrient deficiencies.[797] Patel notes that this paradox is an example of the '*...perversity of the way our food comes to us is that it's now possible for people who can't afford to eat to be obese*'.[798]

Current understandings of food security

The generally accepted definition of food security, and the most refined to date, is provided by the FAO's report 'The State of Food Insecurity 2001'. According to this report, food security exists "*...when all people, at all times, have physical and economic access to sufficient, safe, and nutritious food to meet their dietary needs and food*

[793] **Stuffed and starved reference Raj Patel**
[794] Steinfeld et al, 'Livestock's Long Shadow: Environmental Issues and Options' (FAO Report, Rome 2006) page 10
[795] Ibid.
[796] Ibid.
[797] Ibid.
[798] Rajeev Charles Patel, *Stuffed & Starved: Markets, Power & the Hidden Battle for the World Food System* (Black Inc., 2009).

preferences for an active and healthy life".[799] This definition is commonly understood to have four limbs: food availability, food access, food utilisation and stability.

The first limb requires food availability in terms of the "…*availability of sufficient quantities of food of appropriate quality, supplied through domestic production or imports*".[800]. The three sub-elements of this limb are: production, distribution and exchange. Levels of livestock and grain production, stock levels and trade imports and exports are all relevant indicators of food availability. Clearly the availability of food is dependent on the environmental and resource base to either produce or distribute food; yet, in regards to this limb of food security, sustainable management of resources is not linked with availability. Currently, more food is being produced than is needed to feed the world population, yet it is the distribution of the food that is imbalanced.[801] Consequently, availability of food alone does not equate to food security.

The second limb concerns an individual's access to "…*adequate resources for acquiring appropriate foods for a nutritious diet*".[802] Access reflects the close connections between food security, poverty and unequal distribution. In addition, the sub-elements of this limb are: affordability of food, allocation of mechanisms for governing access to food and preference of consumers in terms of social and cultural values.[803] Access to food is vulnerable to, for example, market fluctuations, rises in unemployment and degradation to or loss of assets relied upon for livelihood.[804] Inability to access food is commonly accepted as the main cause of food insecurity in general.[805]

The third limb, food utilisation emphasises nutritional well-being through clean water and access to a healthy diet. Accordingly, food utilization concerns "…*the appropriate use of food, based on knowledge of basic nutrition, to maintain sufficient energy and nutrient intake. Utilisation also includes knowledge of food preparation, cooking and storage, and the ability to make appropriate food choices*".[806] Food utilization incorporates analysis of food safety and waste, as well as malnutrition, micro-nutrient deficiencies and obesity. As a result, food utilization is considered to have three sub-elements: the nutritional value of food; the social value in terms of food as part of social and cultural gatherings and food safety (Erickson 2008).

The fourth limb, stability, requires that the above three limbs of food security can be maintained regardless of economic, social and environmental concerns. In this context, stability requires a population, household or individual to have access to adequate food at all times. Subsequently, a range of factors may affect the stability of food, such as climate change, natural disasters and changes in legal, political, economic and social arrangements. As a result, the food security status of a group can fluctuate between existence and non-existence depending on external factors.[807]

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[799] 'Rome Declaration on World Food Security' (United Nations, 1996) <http://www.fao.org/docrep/003/w3613e/w3613e00.HTM>.
[800] 'Food Security' (Policy Brief Issue 2, Food and Agriculture Organization of the United Nations, June 2006) <ftp://ftp.fao.org/es/ESA/policybriefs/pb_02.pdf>.
[801] Tim Lang, 'How New Is the World Food Crisis? Thoughts on the Long Dynamic of Food Democracy, Food Control & Food Policy in the 21st Century' , *Background paper to Conference* (2009).
[802] 'Food Security', above n 19.
[803] (Erickson 2008).
[804] Christopher B Barrett, 'Measuring Food Insecurity' (2010) 327 *Science* 825.
[805] John Ingram, 'A Food Systems Approach to Researching Food Security and Its Interactions with Global Environmental Change' (2011) 3 *Food Security* 417.
[806] 'National Food Plan: Green Paper' (Policy document, Australian Government: Department of Agriculture, Fisheries and Forestry, July 2012) 284.
[807] Mark Gibson, *The Feeding of Nations : Re-Defining Food Security for the 21st Century* (CRC Press, 1st ed, 2012).

Food Insecurity

Put simply, food insecurity exists when people are not meeting the accepted definition of food security. Accordingly, the FAO defines food insecurity as 'when people do not have adequate physical social or economic access to food', [808] and this reference to 'food' refers to the understandings of food in the definition of food security.[809] While food insecurity is experienced by individuals and can exist regardless of national food supplies, States can also be considered food insecure when they are not domestically producing enough food or importing sufficient food to meet demand.[810] Food insecurity, experienced by individuals, households and groups, can be acute, chronic or hidden. Commonly, food insecurity manifests as energy deficiencies, nutrient deficiencies and excessive net energy intake.[811]

Acute or transitory food insecurity is generally sudden and temporary such as starvation that occurs during famines or disasters.[812] In contrast to this, 'hidden' food insecurity, also called 'hidden hunger', is an inadequate intake of micronutrients and, in particular, iodine, vitamin A and iron.[813] 'Hidden hunger' illustrates that food insecurity leads to not only undernutrition and persistent hunger, but also overnutrition that can cause, obesity and chronic diseases. In relation to the latter, Tanumihardjo et al explains 'This paradoxical condition exists because many of the diets of people living in poverty have adequate kilocalories to meet or exceed their energy requirements, but lack the dietary quality needed to promote optimal health and prevent chronic disease'.[814]

The link between food insecurity, in the sense of a lack of stable access to food, and the problem of obesity is well-established in the literature and within international institutional reports.[815] Today, in low-income and middle-income countries or even within the same house, high rates of undernutrition and overweight and obesity co-occur.[816] The FAO refers to this as a 'double burden of malnutrition' whereby diet-related chronic diseases co-exist with malnutrition and micronutrient deficiencies.[817]

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[808] 'Trade Reforms and Food Security: Conceptualizing the Linkages' (Commodity Policy and Projections Service, Economic and Social Development Department of the Food and Agriculture Organisation, 2003) 313, 29 <http://www.fao.org/docrep/005/y4671e/y4671e06.htm#fnB27>.

[809] 'Food' means food that is 'sufficient, safe, nutritious' and meets 'dietary needs and food preferences for an active and healthy life' (FAO, Food Security 2001 Report)

[810] Rayfuse and Weisfelt, above n 16, 49.

[811] Per Pinstrup-Andersen, 'Agricultural Research and Policy for Better Health and Nutrition in Developing Countries: A Food Systems Approach' (2007) 37 *Agricultural Economics* 187, 189.

[812] Reimund P Roetter and Herman Van Keulen, 'Food Security' in Reimund P Roetter et al (eds), *Science for Agriculture and Rural Development in Low-income Countries* (Springer Netherlands, 2007) 27, 28 <http://link.springer.com.ezp01.library.qut.edu.au/chapter/10.1007/978-1-4020-6617-7_3>.

[813] GF Maberly et al, 'Programs Against Micronutrient Malnutrition: Ending Hidden Hunger' (1994) 15 *Annual Review of Public Health* 277, 277.

[814] Sherry A Tanumihardjo et al, 'Poverty, Obesity, and Malnutrition: An International Perspective Recognizing the Paradox' (2007) 107 *Journal of the American Dietetic Association* 1966, 1966.

[815] See, e.g., Adam Drewnowski, 'Obesity, Diets, and Social Inequalities' (2009) 67 *Nutrition Reviews* S36; Nicole I Larson and Mary T Story, 'Food Insecurity and Weight Status Among U.S. Children and Families: A Review of the Literature' (2011) 40 *American Journal of Preventive Medicine* 166; Brandi Franklin et al, 'EXPLORING MEDIATORS OF FOOD INSECURITY AND OBESITY: A REVIEW OF RECENT LITERATURE' (2012) 37 *Journal of Community Health* 253; Jigna M Dharod, Jamar E Croom and Christine G Sady, 'Food Insecurity: Its Relationship to Dietary Intake and Body Weight among Somali Refugee Women in the United States' (2013) 45 *Journal of Nutrition Education and Behavior* 47; 'The State of Food Insecurity in the World 2012: Economic Growth Is Necessary but Not Sufficient to Accelerate Reduction of Hunger and Malnutrition', above n 2.

[816] 'The State of Food Insecurity in the World 2012: Economic Growth Is Necessary but Not Sufficient to Accelerate Reduction of Hunger and Malnutrition', above n 14, 25.

[817] Ibid.

This form of insecurity also highlights the prevalence of food insecurity issues experienced within developed countries. For example, Burns concluded that the risk of obesity is 20 to 40% higher in women who are food insecure and noted that this link is observed consistently across US, Europe and in Australia.[818] Consequently, overweight and obesity are seen as different dimensions of food insecurity.

Food Safety and Food Culture

A report commissioned by the UK government in 2009 highlighted the synergies in reducing consumption of processed foods with low nutritional value.[819] The report found benefits to environmental sustainability through reduction in GHG emissions and reduction in land use, as well as public health benefits including diet related ill-health. Importantly, it stated, '*[e]vidence also suggests that the health of low-income groups would be expected to improve more significantly as the proportion of these [processed] foods in their diet is higher compared to the general population*'.

It is generally accepted that a sustainable diet should be characterised by synergies between human and environmental health on the one hand, with those of the social, emotional and cultural needs on the other.[820] At the same time, there is a critical connection between nature and culture and a causal link between enhanced social cohesion and sustainable food systems.[821] The social aspects of food system involvement are key drivers of consumer choices and this is reflected in how culture shapes food demand.[822] To that end, Finkelstein explains 'Eating is never a simple matter of fuelling the physical body; eating habits are reflective of interpersonal conduct, the pursuit of pleasure and a variety of social expectations'.[823]

Food safety relates to the potential for food to cause physical harm to a person who consumes it.[824] We argue here that a sustainable diet is one that fosters sustainable food cultures. Western food culture may be said to corrupt traditional food culture and healthy diets, which in turn can be attributed to the problems of food safety, food security and obesity. Beginning in the eighteenth century, the Western-type diet started in England and was influenced by European cuisines such as French and Dutch.[825] Drivers such as immigration, disposable income, the green revolution and other technological advances shaped the Western diet in America and other affluent

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[818] See, e.g., Cate Burns, 'A Review of the Literature Describing the Link between Poverty, Food Insecurity and Obesity with Specific Reference to Australia' (Literature Review, VicHealth, 2004) 1 <http://secondbite.org/sites/default/files/A_review_of_the_literature_describing_the_link_between_poverty_food_insecurity_and_obesity_w.pdf> where it was found that the risk of obesity is 20 to 40% higher in individuals who are food insecure. This is true for women only and is regardless of income, lifestyle behaviours or education and is observed consistently across US, Europe and in Australia.

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[820] Inspired by Audrey Richards 1932 *Hunger and Work in a Savage Tribe: A Functional Study of Nutrition among the Southern Bantu*, London: Routledge; The social aspects of food and nutrition- in Zotero.

[821] See, e.g., Patricia Klindienst, *The Earth Knows My Name: Food, Culture, and Sustainability in the Gardens of Ethnic Americans* (Beacon Press, 2006). This book examines ethnic Americans cultural meanings associated with growing food.

[822] Scarpello T., Poland F., Lambert, N. & Wakeman, T. (2009) A qualitative study of the food-related experiences of rural village shop customers. Journal of Human Nutrition and Diet 22 108-116.

[823] Joanne Finkelstein, 'The Taste of Boredom: McDonaldization and Australian Food Culture' (2003) 47 *The American Behavioral Scientist* 187.

[824] Food Act 2006 (Qld) s 20(1).

[825] Linda Civitello, *Cuisine and Culture: A History of Food and People* (John Wiley & Sons, 2011).

countries.[826] Currently, Western food culture is characterised by "…*a high consumption of fried food, processed and red meat, pies, sweetened desserts, chocolates, refined grains, high-fat dairy products and condiments*".[827] It is also associated with degradation in the environment, and human health and well-being.[828]

Food security, food safety and the problems of human health and wellbeing reach all corners of the globe, and impacts on many people in different ways. In this regard, we can see that where some people suffer from obesity and subsequent malnutrition through unhealthy food choices, others face the same health problems but without the ability to make choices or changes to their diets. This is not to suggest that all those in the latter category are in developing countries. Indeed, food security as it is commonly understood is significant problem in both developed and developing economies. However, in this paper we argue it is a problem of distribution and one that can be addressed when it is considered through the lens of appropriate theory. As such, we turn to that now.

Background for Distributive Justice

Distributive justice is a broad concept that concerns ensuring a socially just distribution of goods and benefits within a society. What is considered 'just', and how the concept of justice is administered, results in different distributions of goods and benefits across members of society. The moral guidance surrounding different frameworks for administering justice and distributing economic and other benefits, all come under the banner of distributive justice.

Distributive justice arose as a matter of academic and social interest when it became clear that a central institution - most often a Government - could affect the economic benefits and burdens of individuals within a society. Prior to this, it seemed that individuals were arbitrarily born into a fixed economic and societal status, and apart from a lucky or unlucky few, stayed within that status for their entire lives.

Philosophers and academics have formulated many different frameworks for distributive justice over time. Although early incarnations of the concept were theorised by Immanuel Kant and his 'League of Peace',[829] and John Mill's 'liberal nationalism',[830] the modern day language surrounding distributive justice was initiated by the philosophy of John Rawls, and his 'alternative distributive principle'.[831] Rawls' theory, incorporating the difference principle, can be considered alongside other significant philosophies such as egalitarianism, utilitarianism, prioritarianism and libertarianism. While all theories have major differences, they all argue that a certain moral idea should guide distribution of goods and benefits within a society. However, within this paper we

[826] Ibid.
[827] Tasnime Akbaraly et al, 'Does Overall Diet in Midlife Predict Future Aging Phenotypes? A Cohort Study' (2013) 126 *The American Journal of Medicine* 411.
[828] See, for example, Michelle G Rooks and Wendy S Garrett, 'Sharing the Bounty' (2011) 25 *The Scientist* 38; Leo Horrigan, Robert S Lawrence and Polly Walker, 'How Sustainable Agriculture Can Address the Environmental and Human Health Harms of Industrial Agriculture.' (2002) 110 *Environmental Health Perspectives* 445; Richard J Jackson et al, 'Agriculture Policy Is Health Policy' (2009) 4 *Journal of Hunger & Environmental Nutrition* 393.
[829] See Immanuel Kant, *Perpetual Peace: A Philosophical Sketch,* 1795.
[830] See John Stuart Mill, 'Considerations on Representative Government' in *The Collected Works of John Stuart Mill Vol XIX,* ed. John M Robson (1977, University of Toronto Press & Routledge, Toronto).
[831] John Rawls, *A Theory of Justice* (1971, Harvard University Press, Cambridge MA).

focus on Rawls, as this is the theory we suggest can be most beneficial to the alleviation of the food security and malnutrition problems identified above.

The Difference Principle

Although there are many types of justice, the focus of Rawls theory was on what he considered to be the 'primary subject of justice'. Justice, according to Rawls, is reliant on balance within the basic *structure* of society, which includes the major social, political, legal and economic institutions.[832] Correspondingly Rawls' Theory of Justice is centered on two principles.[833] The first governs the distribution of liberties and in its most basic form states that each person has an equal claim to all necessary basic rights and liberties (the 'Principle of Greatest Equal Liberty').[834] The second states that social and economic inequalities are to satisfy two conditions; any inequality must not be a result of inequality of opportunity (the 'Principle of Fair Equality of Opportunity'), and; inequality is justified if it is to benefit the least advantaged members of society. It is the second condition that has been dubbed the 'Difference Principle', and forms the basis of Rawls' distributive justice theory.

The Difference Principle requires that the basic structure of institutions be arranged in such a way that any inequalities in prospects of obtaining goods and welfare must work to the greatest benefit of those who are least advantaged with respect to those primary goods, or their ability to obtain them.[835] Allen Buchanan provides an example of how inequality would lead to an increase in the ability of the least advantaged to obtain primary goods.[836] He asks us to first consider the prospect of large-scale capital investment in an industry that is required to raise employment and to produce new goods and services. Second, to contemplate that although investment will increase employment, and the income of the least advantaged, the investment will not be provided unless those individuals investing the capital also have the opportunity to reap a profit. Buchanan suggests that in this case, the Difference Principle would require tax concessions, to provide the necessary incentive to the investors, so that the capital can be raised, employment increased, and ultimately, a benefit provided to the least-advantaged. Whilst the investor would obtain a larger share of wealth, the inequality is justified as it raises the position of the least advantaged at the same time. That is to say, the basis for allowing inequality incentivises the advantaged, which in turn increases productivity, this increases the total wealth of the economy, including those that are disadvantaged. However the principle only allows inequality to the point where the absolute position of the least advantaged can no longer be raised.

In order to effectively implement the principle, Rawls argued that there are four branches of government (or institutions) required: an allocation branch based on private ownership of capital and resources that is traded in the free market; a stabilization branch which endeavours to bring about full employment; a transfer branch that is effectively a welfare system and ensure minimum entitlements to all, and;

[832] Allan Buchanan, 'A Critical Introduction to Rawls' Theory of Justice' in Julian Lamont (ed), *Distributive Justice* (Ashgate Publishing, 2012) 175, 177. DJ book p 177.
[833] John Rawls, *A Theory of Justice* (1971, Harvard University Press, Cambridge MA), book p 250-303.?
[834] John Rawls, *Political Liberalism* (1993, Columbia University Press, New York), 5-6. 1993 pp5-6
[835] Allan Buchanan, 'A Critical Introduction to Rawls' Theory of Justice' in Julian Lamont (ed), *Distributive Justice* (Ashgate Publishing, 2012) 175, 180. DJ book p 180.
[836] Ibid.

a distribution branch to promote distributive justice by implementing a taxation system and re-allocation of property.[837] Overall it seems that Rawls theory and his institutions work simply by redistributing income and wealth through taxing the most advantaged and redistributing it to the least advantaged.

Criticisms of the difference principle and Rawls' theory of justice have led to the development of other philosophical principles in this sphere, and there are some key criticisms that are relevant. Buchanan argues that the principle exceeds the demands of justice as 'even perfect equality would not be enough for distributive justice', if it does not raise the welfare of the least advantaged as compared to the most advantaged.[838] Egalitarians argue that it is the *relative* position of the least advantaged that should be the desired outcome, not the *absolute* position as proposed by Rawls. The relative position takes into account the affect of disadvantage on things other than pure economic terms. For example those with higher material wealth may use it to exercise power over those with lower material wealth, and accordingly increase the disadvantage. Libertarians offer another critique and suggest that the difference principle involves unacceptable infringements on liberty, property rights and self-ownership. Buchanan argues that the principle in particular would place several restrictions on the individual's freedom to chose an occupation, and engage in 'experiments of living'.[839] This is because Rawls assumes that the use of incentives in a society in the form of larger shares will always be adequate to fill all the needed roles and positions constituting the arrangement which maximizes the prospects of the least advantaged. Desert theorists argue that the Difference Principle does not take into account the fact that different people deserve higher rewards than others. Finally, the obvious problem with this theory is that there are no minimum standards and therefore there will always be a least advantaged.

Although we acknowledge the criticisms of other theories we also emphasise that Rawls was searching for a distributive justice theory specifically with the least advantaged people in mind. Rawls purpose was to find principles superior to Utilitarianism.[840] He argues that his theory provides a better account of our most basic considered judgments about justice and his principles provide a *systematic foundation* for these judgments. He also considers that the least-advantaged will be better off under his theory, as theories like utilitarianism are generally concerned with the average welfare of society, whilst Rawls advocates for the absolute least-advantaged. Thus, if the average is considered, the worst possible outcome would be worse than the worst possible outcome under the difference principle.[841] For example the application of Utilitarianism may cause sacrifice to the interests of a minority to produce greater aggregate utility. Rawls suggests it is immoral to make some people suffer for the benefit of a net gain. This is indeed what the problem associated with food security requires. There are however, some limitations with this theory in the context we propose. We consider this in the next section of this paper.

[837] Ibid,DJ page 195.
[838] Buchanan, above n 48,DJ p 202.
[839] Buchanan, above n 48,DJ p 203.
[840] Buchanan, above n 48, 176. p176.
[841] Buchanan, above n 48, 191. P191

The difference PRinciple in an international context

The theories described so far have a very important limitation – they were developed in a national context, not in an international one. That is to say, they are referable to the domestic state, and its institutions. They do not consider international distributive justice, whilst some, and even Rawls himself, expressly state that they do not apply to an international regime. Rather simply, Rawls states all that is needed for a just international regime is an agreement between states to treat one another fairly.[842] There are many criticisms to this approach, not the least of which is that membership to a particular state is of itself, mostly arbitrary.[843] Therefore, if the difference principle is based on the fact that inequalities are 'born into', then it cannot ignore the arbitrary nature of state membership, and the inequalities between states.

Such criticisms led to the development of the theory of 'Cosmopolitanism', which is an adaption of Rawls theory to suit the international society and growing globalization. It considers the least advantaged members of the international society, instead of the domestic state, and as a result argues that there should be global distributive justice, not just international relations between domestic states.

There are two key debates surrounding Cosmopolitanism.[844] The first is the philosophical rationalisation of the theory, or the 'moral' argument. Essentially, this debate centers on the argument that individuals within states do/do not hold a moral obligation to increase the utility of individuals within other states with which they have no direct contact. From a moral perspective, we do not wish to engage in such a debate and instead assume the position that there is clear and convincing reasoning as to why individuals in separate states, and states themselves, owe each other moral obligations, given the ongoing role that international power politics plays in the ongoing inequality (a clear example being the impacts of colonialism on previously occupied states). To borrow from Thomas Pogge, we believe that 'every human being has a global stature as the ultimate unit of moral concern'.[845] The more compelling discussion in our mind centers on the second limb of the debate, being the practical feasibility of ensuring distributive justice at an international level. It is this 'institutional' debate that we will focus on.

The task of the Cosmopolitan is to analyse and define the international institution that is equivalent in its ability to distribute resources at the same level as the state institution can, and to show how those international institutions can be arranged to maximize the position of the least-advantaged, or overall utility. Those who question the ability of international institutions to effect distributive justice, do make a number of compelling arguments. To understand these arguments one must understand the totality of the principle of 'distributive justice' as elicited by Rawls, and his 'difference principle'Difference Principle' noted above.

[842] John Rawls, *A Theory of Justice* (1971, Harvard University Press, Cambridge MA), 378.
[843] See for example Thomas Pogge, *Realizing Rawls* (1989, Cornell University Press, U.K.) 247.
[844] For a full discussion of the main objections see Nagel, T., 'The Problem of Global Justice', (2005) 33 *Philosophy & Public Affairs* 3, 195.
[845] Thomas Pogge, *World Poverty and Human Rights* (2002, Polity Press, Cambridge U.K.) 169.

As noted, the 'difference principle' was only one principle in a greater philosophical theory. You will recall that Rawls' theory also entailed the Principle of Greatest Equal Liberty, and the Principle of Fair Equality of Opportunity. Rawls argued that the former was to be used to design the political constitution, and allowed all individuals within a state basic rights and liberties, including the right to vote, freedom of speech, the right to be treated in accordance with the rule of law, liberty of conscience, and other basic democratic rights.[846] In addition, this principle was to take priority over the Principle of Fair Equality of Opportunity and the Difference Principle, for without the first the others could not be obtained. Therefore, in effect, international distributive justice as described by the Cosmopolitan theory takes only one aspect of Rawls' theory (the Difference Principle), and applies it at an international level, whilst ignoring the other two principles. Ultimately, the difference principle cannot be extracted from the overall theory and distributive justice cannot be achieved without those democratic institutions to ensure basic liberties at the first instance.

Similar to this argument is that the international political arena simply does not have the necessary institutions to affect the Difference Principle. As noted by Charles Beitz, there is 'no sovereign executive power, no legislature and no effective policy capacity'.[847] Put more simply, state based politics is based on a central decision-making authority with real power, whilst international politics are based on co-operation.[848]

As a result, an analysis of international institutions and the role they can play in distributive justice is central to Cosmopolitan theory. Philosophers such as Pogge and Beitz argue that there does not need to be a 'world government' in order to effect the Difference Principle at an international level.[849] Pogge in particular argues that current international institutions can be used to decrease the poverty of the globally least advantaged, and it is his arguments that we will now turn to.[850]

Thomas Pogge's 'Global Resources Dividend' theory is his attempt to incorporate into our global institutional order the moral claim that the least advantaged have to some share of benefits that arise from the use and sale of natural resources.[851] His moral argument is centred on the concept of a 'negative duty' held by the most advantaged nations to 'not uphold injustice, not to contribute to or profit from the unjust impoverishment of others'.[852] The thesis argues that global poverty is an ongoing injustice that we, the most advantaged members of global society, help maintain via our use of the global institutional order. At a ground level, such things as our investments, loans, trade, bribes, military aid, sex tourism and culture exports all contribute to

[846] John Rawls, *A Theory of Justice* (1971, Harvard University Press, Cambridge MA).
[847] Charles R. Beitz, 'Cosmopolitanism and Global Justice' (2005) 9 *The Journal of Ethics* 11, 24.
[848] For a more detailed account of this distinction see Kenneth Waltz, *A Theory of International Politics* (1979, McGraw-Hill, New York), 88.
[849] See for example Thomas Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (2002, Polity, Cambridge) and Charles R. Beitz, *Political Theory and International Relations* (1999, Princeton University Press). See for example
[850] Pogge's paper.
[851] Thomas W Pogge, 'Eradicating Systemic Poverty: Brief for a global resources dividend' (2001) 2(1) *Journal of Human Development* 59, 69.
[852] Thomas W Pogge, 'Eradicating Systemic Poverty: Brief for a global resources dividend' (2001) 2(1) *Journal of Human Development* 59, 60.

ongoing systemic poverty.[853] Given this inequality that we perpetuate at a global level, the global institutional order needs to change, or at least shift according to Pogge.

Perhaps optimistically, Pogge posits that something like world hunger could be eradicated within a few years by raising sufficient revenue on the global economy, without major changes to the global economic order.[854] In it most simple formulation, this would involve a dividend (or tax) on the value of resources that they use or sell, where those resources originate in their own state borders. This dividend is an acknowledgement of his moral premise that the poor have an inalienable stake in all limited natural resources, due to the constraints that we have imposed on them.

Putting aside the moral validity of the GRD, Pogge himself acknowledges that there are a number of issues that would arise from the introduction of such a scheme.[855] These include the amount of the dividend required, the mechanics of calculating that dividend, distributing the funds, enforcing compliance and perhaps most fundamentally, the global politics surrounding an agreement to commit to such a scheme. He attempts to deal with each of these issues.

First, he concedes that the system would need to stay as close to the current world order as possible. As a result, additional global institutions would not be necessary. Second, he suggests that a massive GRD would not be necessary. He recommends what he calls a 'modest' 1% of global product, to commence.[856] Measuring this contribution though might prove difficult. Whilst Pogge does suggest that only resources and pollution that are easily measurable be 'taxed', he does not acknowledge the difficulties associated with this measurement, even at a basic level. Next, he acknowledges that the funds would need to be well targeted and effectively spent (For example, those familiar with the literature surrounding responsibility for GHG emissions, or the 'polluter pays principle' understand the difficulty in measuring such intangible assets).

Further, Pogge identifies issues that arise with distribution of the funds and notes that money needs to be well targeted and effectively spent,[857] but gives little guidance on how to do this. He considers there will only be extreme cases where GRD funds cannot be used effectively in a given state (for example due to extreme corruption), and in those circumstances there is effectively nothing that can be done and the money should not go there. That said, he considers the overall effect of the dividend would still deliver a benefit; 'even if the incentives provided by the GRD disbursement rules do not always prevail, they will shift the political balance of forces in the right direction… with the GRD in place, reforms will be pursued more vigorously and in more countries, and will succeed more often and sooner, than would otherwise be the case'.[858]

[853] Thomas W Pogge, 'Eradicating Systemic Poverty: Brief for a global resources dividend' (2001) 2(1) *Journal of Human Development* 59, 61.
[854] Thomas W Pogge, 'Eradicating Systemic Poverty: Brief for a global resources dividend' (2001) 2(1) *Journal of Human Development* 59, 61.
[855] Thomas W Pogge, 'Eradicating Systemic Poverty: Brief for a global resources dividend' (2001) 2(1) *Journal of Human Development* 59, 68.
[856] Thomas W Pogge, 'Eradicating Systemic Poverty: Brief for a global resources dividend' (2001) 2(1) *Journal of Human Development* 59, 67.
[857] Thomas W Pogge, 'Eradicating Systemic Poverty: Brief for a global resources dividend' (2001) 2(1) *Journal of Human Development* 59, 67.
[858] Thomas W Pogge, 'Eradicating Systemic Poverty: Brief for a global resources dividend' (2001) 2(1) *Journal of Human Development* 59, 68.

Finally, it is considered that the current global order would be an effective 'enforcement agency', via use of economic sanctions. Again though, such system would only be effective if the 'major players' were on behind the redistribution policies. Therefore, the United States and European Union would necessarily need to be supportive,[859] as would the developing countries where redistribution would also take place.When all this is considered one may be able to identify where distributive justice, specifically the difference principle and cosmopolitanism may indeed be used as the basis for redistribution within society. We will consider the most important aspect of this redistribution below. That is, the institutions that must effect the redistribution of resources, in this case, to reduce or eliminate the problem of food safety and corresponding detrimental human health.

Distributive Justice and Food Security

Social and economic inequities are associated with the ability of a person to obtain the primary goods of wealth, income, power and authority.[860] When we consider this for food security we may question whether Rawl's intended that basic human needs, such as food and water were considered to be part of the category labelled primary goods. It is possible to dismiss this question quickly with the response that in all circumstances, when justice in the allocation of resources is the issue, then resources associated with human needs would require greater consideration than any of those that one would consider primary goods of wealth, income, power or authority. Indeed, the distribution of food and water is one that we cannot suggest could be left to the invisible hand, as the current state of food security internationally demonstrates a catastrophic market failure. It is with this in mind that we consider whether the difference principle and Rawl's theory of justice would aid in this significant international concern.

The Difference Principle requires that the basic structure of institutions be arranged in such a way that any inequalities in prospects of obtaining goods and welfare must work to the greatest benefit of those who are least advantaged with respect to those primary goods, or their ability to obtain them.[861] As noted above, in order to effectively implement the principle, Rawls believed there are four branches of government (or institutions) that are required; An allocation branch based on private ownership of capital and resources that is traded in the free market; A stabilization branch which endeavours to bring about full employment; A transfer branch that is effectively a welfare system and ensure minimum entitlements to all, and; a distribution branch which provides distributive justice by implementing a taxation system and re-allocation of property.[862] Overall it seems that Rawls theory and his institutions work simply by redistributing income and wealth through taxing the most advantaged and redistributing it to the least advantaged. However, in order for this simple measure to be effective there must be these four categories of institutions, each with the specific purpose aligned with the objective of access to a healthy and safe food supply for all people.

[859] Thomas W Pogge, 'Eradicating Systemic Poverty: Brief for a global resources dividend' (2001) 2(1) *Journal of Human Development* 59, 69.
[860] Buchanan, page 10
[861] Allan Buchanan, 'A Critical Introduction to Rawls' Theory of Justice' in Julian Lamont (ed), *Distributive Justice* (Ashgate Publishing, 2012) 175, 180. DJ book p 180.
[862] Ibid,DJ page 195.

Current food systems produce and reinforce distributive injustices. When we consider subsidies and production methods it seems that the governance, and corresponding business, of food production does not prioritise human health and food security. Patel suggests that failures have occurred through lack of biodiversity in food production, and the proliferation of cash crops throughout the world.[863] Indeed, the concurrent problems of hunger and obesity are considered by some not as a shortage or abundance of food but that both can be attributed to poverty. Some argue that this is the reason marginalised groups are unable to obtain access to healthy, culturally appropriate, safe food is a result of poverty rather than food availability. With this in mind we consider the most important aspect of the Difference Principle at an international level. That is, the existing institutions that may indeed ensure the redistribution of resources in such a way as to achieve food justice globally.

The Institutional Framework

Rawls difference principle, and the corresponding cosmopolitan theory allow inequality so long as the least disadvantaged person is benefited. As noted above, Rawls suggests that the difference principle simply requires redistribution through taxation and transfer of proceeds.[864] However, it is crucial to this seemingly simple concept that there exists the proper institutional framework. Recall that the difference principle includes four institutional branches; an allocation branch; a stabilization branch; a transfer branch, and; a distribution branch.[865] We could suggest that this framework may be the barrier to the application of the principle at an international level. Rawls himself claims this principle is not meant to apply internationally because there are no appropriate international institutions. However, we argue here that the appropriate institutions do in fact already exist,but that for them to be effective they must maintain strict integrity.[866] Integrity in this regard means that the actions of these institutions and those of their members must align with their public institutional justifications, with common goals and objectives, and of course with the other institutions in the framework.[867]

We begin with the requirement that there exist an allocation branch. For Rawl's allocation branch to be effective in the application of the difference principle it is necessary that this branch maintain the free market system through private ownership of capital and natural resources.[868] Since 1995, the World Trade Organization (the WTO) has operated with the objective to maintain stability and non-discrimination in international trade. The WTO preamble contains both the justification for the organization and the values with which this justification must align. It is suggested that the justification incorporates the requirements to raise standards of living, expand production and allow for the sustainable use of the world's resources. Also stated in the preamble are the values that must underpin these objectives. These include sustainable development, protecting and preserving the environment, and consistency with

[863] Raj Patel – stuffed and starved – the problem with Soy?
[864] Miller – DJ Book Page?
[865] Allan Buchanan, 'A Critical Introduction to Rawls' Theory of Justice' in Julian Lamont (ed), *Distributive Justice* (Ashgate Publishing, 2012) 175, 195. DJ page 195.
[866] See forthcoming publication 'Ethical Values and the Integrity of the Climate change Regime'
[867] Ibid.
[868] Allan Buchanan, 'A Critical Introduction to Rawls' Theory of Justice' in Julian Lamont (ed), *Distributive Justice* (Ashgate Publishing, 2012) 175, 195.

different economic needs. It is clear from these objectives that it is certainly not outside the scope of the WTO's objectives to maintain private ownership and integrity in the free market. In fact, this is clearly already one of the roles of the WTO. It follows that our allocation branch already exists, but as noted above, it is essential that this branch maintain integrity in the objective of food security.

The second branch required in this institutional framework is a stabilization branch. This branch is perhaps charged with the more difficult task, to bring about and maintain reasonable full employment measures.[869] In the context of this paper, of course the employment would necessarily be within the food industry, but with a particular focus on industries where production results in greater availability of safe and healthy food products. The International Labour Organization (ILO) aims amongst other things to promote rights at work and encourage employment opportunities. Of course the ILO would necessarily need expertise within the food and agricultural sector, as such, within this institutional branch a second organisation may be necessary. In this respect, the Food and Agriculture Organization of the United Nations (FAO) will be integral in the stabilization branch of our international framework. Indeed the FAO, with an organisational goal to achieve food security for all,[870] may be an organisation whose roll transgresses the branches.

The third branch required in the Rawls' difference principle is the transfer branch. This branch is intended to ensure there are minimum entitlements to all.[871] Again we must consider this for our specific issue of international food security. This organization would necessarily be required to determine what is needed for food security on an individual basis and then work with other agencies to ensure that the predetermined minimum requirement can be achieved on an individual level. The World Health Organisation, as a specialized branch of the United Nations would be well placed to oversee the role of the transfer branch in this proposed institutional framework.[872]

This role would extend current concerns of this organization from minimum standards for food safety, to minimum standards for food safety and nutritional content. Further, where food insecurity exists, this organization would need to work to ensure domestic policies and objectives in this sector align with promotion of minimum standards. The WHO already do this in a more limited capacity, as noted, '[f]ood safety policies and actions need to cover the entire food chain, from production to consumption'.[873] In relation to access to a healthy diet, consideration of the production and consumption would extend to the nutritional content of the food. Having said this, we acknowledge that the role of the transfer branch in this institutional framework is somewhat more complicated that overseeing policies.

The WHO's role, as the transfer branch in this model, would necessarily need to promote food security in a way that aligns with the taxation framework established to encourage access to a healthy diet. Buchanan provides examples of how this branch would need to operate and argues for entitlements on an individual basis. In this regard,

[869] Allan Buchanan, 'A Critical Introduction to Rawls' Theory of Justice' in Julian Lamont (ed), *Distributive Justice* (Ashgate Publishing, 2012) 175, 195.
[870] Food and Agriculture Organization of the United Nations, *About FAO* (2015) <http://www.fao.org/about/en/>
[871] Allan Buchanan, 'A Critical Introduction to Rawls' Theory of Justice' in Julian Lamont (ed), *Distributive Justice* (Ashgate Publishing, 2012) 175, 195.
[872] World Health Organization, *Food Safety* < http://www.who.int/topics/food_safety/en/> (2015)
[873] World Health Organization, *Food Safety* < http://www.who.int/topics/food_safety/en/> (2015)

the management of such income supplements, or negative tax as he so describes, from an international level would not be administratively efficient nor realistic. It is beyond the scope of this current paper to discuss intricacies of a proposed taxation framework to promote food security, however it is a proposal we will return to in forthcoming research. Suffice to say that we envisage that any such taxation regime would need to consider problems in domestic governance of states, where food insecurity exists,[874] and balance this with the need to delegate some of the transfer branch responsibilities to more local or at least regional bodies. Again, this may be a role where the FAO would be required to work with the primary institution to ensure fair and just outcomes.

The final branch we consider in this framework is crucial. The distribution branch would not only implement the taxation system, but would also ensure a re-allocation of property to promote access to a healthy diet for those currently experiencing food insecurity (not just a re-distribution of the food itself). The distribution branch would necessarily need to work closely with the transfer branch as both these institutions would be working with allocation of the same resources, just a slightly different manner. However, where the transfer branch of this institutional framework may be working more on the outcomes of the reallocation, the distribution branch would necessarily need to implement the policy that would enable the pursuit of the outcomes. Put differently, where the transfer branch must decide how the resources are to be allocated to achieve food security, the distribution branch must determine how best the resources are to be collected.

In the pursuit of this purpose we suggest that the World Bank may be an appropriate institution. Before dismissing this suggestion, through claims of inherent institutional political unfairness and inherent imbalances, it is important that we consider the international institutions for not only their practical outcomes but their overriding policies and values that justify their existence. It is for the international community to insist on integrity of institutions in this respect, rather than accept unjust outcomes on the basis of inevitability.

NEED TO FINALISE THIS SECTION WITH A CONCLUSION THAT INSTITUTIONS EXISTS BUT THAT THEY NEED TO MAINTAIN INTEGRITY TO BE USEFUL IN THE PURSUIT OF DISTRIBUTIVE JUSTICE AND ALLEVIATE WORLD PROBLEMS SUCH AS FOOD MARKET FAILURE.

Conclusion

- Food market failure has lead to problems of obesity and malnutrition
- Distributive justice can be used to consider this problem and modify the invisible hand
- Rawls difference principle is considered here to be one that could be most useful to this problem
- This needs to be applied in an international context
- The barrier to this is the institutions
- We argue that they already exist but that they must maintain institutional integrity

[874] Pogge.

Abstract – 'Rethinking Law, Economy and Environment' workshop.

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Title: "Whose pigs are these anyway?" Reframing 'the commons' as a strategy for increasing collective action and more effective control of invasive species in mixed use landscapes.[875]

Invasive species in Australia have economic, environmental and agricultural impacts. Invasive species take hold in landscapes that are segmented by land tenure boundaries, fragmented governance regimes and short-term planning cycles. Management and control approaches are informed by technical expertise in species ecology, however successful implementation also requires sustained and coordinated collective community action.

This paper emerges from a current multi-disciplinary research program that integrates behavioural science, institutional analysis and community engagement scholarship to build more effective and equitable strategies for invasive species governance. The program seeks to augment technical and scientific knowledge of invasive species with applied research about the legal and institutional dimensions of invasive species management.

Specific pest vertebrate species such as feral pigs and wild dogs are highly mobile in the landscape, creating disputes over where responsibility for control should lie. Early results from narrative data suggest that landholders are reluctant to accept responsibility for invasive species control when the source of the population is unclear. As a result, landholder commitment to collective action is diminished and costs of control fall disproportionally on those who bear the greatest agricultural impact. Current legislation and policy fail to address the possible inequity of this approach. This paper considers the difference between legal and economic theories of the commons, and how these could be applied to reframing the issue of ineffective and inequitable feral species control in Australia.

[875] The complete paper will be distributed separately due to the author's late inclusion to the workshop.