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## RE-STUMPING AUSTRALIA'S CONSTITUTION – A CASE FOR ENVIRONMENTAL RECOGNITION

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*Human beings dominate and severely influence the earth to the extent that its dynamics and functioning are being changed.<sup>1</sup> In the current era of the Anthropocene, nation states must respond in a concerted, global effort to mitigate the unprecedented affect humans are having on the planet. Because laws guide and moderate individual and collective human behaviour, nation states will need to, within the parameters of the current international legal system, pass domestic laws to ensure coherent and meaningful responses. It is through a nation's constitution that the law finds its highest expression.*

*Consequently, this article looks at constitutional recognition of environmental rights and protections globally, exploring the manner and form that these take. It examines some of the critical philosophical assumptions upon which many nation states are established, and suggests how environmental reforms may be reconciled within the parameters of the Australian Constitution.*

*Given that Australia is the only country that is at once both a sovereign nation and an entire continent, it is uniquely placed to affect meaningful national, regional and global change. It is the key values espoused in a nation's constitution that provide the foundation for all other laws. The Australian Constitution is in need of restumping, and in an era of anthropogenically induced climate change, one of its foundational stumps must be recognition of environmental rights and protections.*

### I INTRODUCTION

Many Australians recognise that the anthropogenically induced climate change and the resultant ecological crisis is a pressing national and global issue. As national and global citizens, Australians have a responsibility to ensure the ethical stewardship of the natural world for ourselves, for other species and for generations to come. Realisation of the unprecedented effect humankind is having on the natural world has been so profound as to warrant the consideration of a new geological epoch. We are now taken to be in the Anthropocene.

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<sup>1</sup> Jan Zalasiewicz et al, 'The Anthropocene: A New Epoch of Geological Time?' (2011) 369 *Philosophical Transactions of the Royal Society* 835, 841.

The word 'Anthropocene' was coined by the ecologist Eugene Stoermer in the 1980s and brought to public attention in 2000 by the Nobel Prize-winning atmospheric scientist Paul Crutzen. Notwithstanding that the term remains officially under consideration by the Stratigraphy Commission of the Geological Society of London, it is a term widely used to denote the present time interval in which many geologically significant conditions and processes have been, and continue to be, profoundly altered by human activities. As Crutzen and Stoermer stated back in 2000:

'Mankind will remain a major geological force for many millennia, maybe millions of years to come. To develop a world-wide accepted strategy leading to sustainability of ecosystems against human-induced stresses will be one of the great future tasks of mankind...'<sup>2</sup>

Although anthropocentric conditions are the subject of scientific determination, their shape and meaning are questions for law and politics.<sup>3</sup> This is, unavoidably, a collective human project. Human beings are now 'geological' agents, as opposed to solely biological agents, capable of disturbing the parametric conditions needed to sustain our own existence.<sup>4</sup>

Given the forces that have shaped this new global epoch, Faunce suggests a more focussed terminological revision, that of the Corporatocene.<sup>5</sup> Such a revision focuses awareness more precisely on multinational corporations, the key political and social actors responsible for the hallmarks dominating debate concerning the Anthropocene; population, poverty, war, profits and pollution.<sup>6</sup> Irrespective of preferred characterisations, these corporate entities that are created and empowered through human agency, significantly erode the sovereignty of the State.

Absent a reconceptualisation of the entire international legal paradigm, the most powerful and immediate legal responses available to nation states are changes to domestic law. This is imperative, because laws are the instruments through which individual and collective human behaviour are guided, moderated, circumscribed and curtailed. As a constitution is 'the highest possible level and means in law to demonstrate the shared values and guiding principles of a social order to which most people consent'<sup>7</sup> it is at this level that effective change must be sought and made. It is for these reason that the environment must be constitutionally protected to facilitate more robust forms of democratic governance and environmental sustainability.

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<sup>2</sup> Paul Crutzen and Eugene Stoermer, 'The Anthropocene' International Geosphere-Biosphere Programme (IGBP) Newsletter 41 (2000) 17, 18.

<sup>3</sup> Jedediah Purdy, *The New Nature* (11 January 2016) Boston Review <<http://bostonreview.net/forum/jedediah-purdy-new-nature>>.

<sup>4</sup> Dipesh Chakrabarty, 'The Climate of History: Four Theses' (2009) 35 *Critical Inquiry* 197, 218.

<sup>5</sup> Thomas Faunce, 'Global artificial photosynthesis: transition from Corporatocene to Sustainocene' (2016) 44 *Photochemistry* 261, 265.

<sup>6</sup> *Ibid.*

<sup>7</sup> Louis Kotze, 'Arguing Global Environmental Constitutionalism' (2012) *Transnational Environmental Law* 199, 206.

Environmental rights and protections at the constitutional level would also facilitate a reimagining of ‘the boundaries between nature and society and the political space for government intervention’.<sup>8</sup> Chakrabarty has stated that:

‘...whatever our socioeconomic and technological choices, whatever rights we wish to celebrate as our freedoms, we cannot afford to destabilise conditions (such as the temperature zone in which the planet exists) that work like boundary parameters of human existence.’<sup>9</sup>

Environmental rights and protections underpin and secure all other rights and freedoms. The discourses of law and politics must meaningfully prioritise responses to the seriousness of the deleterious effects of anthropogenically induced climate change as their major consideration, as they affect all spheres of life, both human and non-human, across this planet.<sup>10</sup>

## II ENVIRONMENTAL CONSTITUTIONALISM

The idea of environmental constitutionalism is not new, with a general move towards the ‘greening’ of constitutions globally since the 1990s.<sup>11</sup> It is necessary for legal systems to be reflexive in responding effectively to global environmental issues, as well as to conceive of new responses to new problems. Australia must now consider how environmental rights and protections may be appropriately incorporated into its own constitution to keep step with global standards and expectations.

Firstly, in assessing Australia’s potential constitutional response it is essential to consider the particular issues and considerations that have historically come within the purview of constitutions, and of law more generally. How societies and legal systems have broadened these conceptions over the course of the twentieth century, including through recognition of national and international human rights and fundamental freedoms, is promising. Viewing environmental issues as a collective global and human rights issue contributes to an ‘understanding of nature and society as a governable domain’ and necessitates that it be brought squarely within the domain of every nation state’s legal system.<sup>12</sup>

Secondly, an exploration of constitutionalism and of the jurisprudential underpinnings of Australia’s system of government is required. It may be that the boundaries that frame the current legal paradigm must be reimagined to be able to meaningfully reconcile and integrate more *ecocentric* reforms, as opposed to simply *anthropocentric* (human-based) conceptions of law. As philosopher Arthur Schopenhauer stated, ‘every man takes the limits of his own field of vision for the limits of the world’.<sup>13</sup> The limits of contemporary (western) legal paradigms must be expanded to consider what many other disciplines are also concluding; the interconnectedness and inseparability of human social systems from the ecosystems of

<sup>8</sup> Eva Lövbrand et al, ‘Earth System Governmentality: Reflections on Science in the Anthropocene’ (2009) 19 *Global Environmental Change* 7, 8.

<sup>9</sup> Chakrabarty, above n 4, 218.

<sup>10</sup> Ibid 215.

<sup>11</sup> Klaus Bosselmann, ‘Eco-constitutionalism: a new area of legal research and advocacy’ (Speech delivered at 3<sup>rd</sup> Wild Law Conference, Griffith University, 16 September 2011) <[https://www.griffith.edu.au/\\_\\_data/assets/pdf\\_file/0007/363850/Bosselmann,-K.-Eco-Constitutionalism-A-new-area-of-legal-research-and-advocacy.pdf](https://www.griffith.edu.au/__data/assets/pdf_file/0007/363850/Bosselmann,-K.-Eco-Constitutionalism-A-new-area-of-legal-research-and-advocacy.pdf)>.

<sup>12</sup> Lövbrand, above n 6, 8.

<sup>13</sup> Arthur Schopenhauer, *The Essays of Arthur Schopenhauer; Studies in Pessimism* (T Bailey Saunders trans, 2004) 20.

the natural world. How this understanding is articulated within the parameters of constitutionalism, and within law more broadly are fascinating to consider, and outlined in many contemporary examples of constitutions globally.

Many of the following examples illustrate how both anthropocentric and ecocentric considerations may be reconciled within the same legal instrument. They are instructive in demonstrating how Australia may articulate and integrate environmental rights and protections into its own constitution. It has been forty five years since the Declaration of the United Nations Conference on the Human Environment (*Stockholm Declaration*),<sup>14</sup> which sought at international law to recognise the right to a healthy environment.<sup>15</sup> Although considered a non-binding agreement, concepts contained in the Declaration may arguably have crystallised into customary international law where such concepts have influenced state practice. In the decades following, notions of environmental constitutionalism have found expression resulting in environmental rights and protections largely being constitutionalised.

### A Contemporary Examples

At present, approximately three-quarters of nation states incorporate environmental matters into their constitutions in some way.<sup>16</sup> Of the 196 countries at present 193 are members of the United Nations (UN), with the exception of Taiwan (replaced by People's Republic of China in 1971) and the Vatican City. Kosovo is not yet a member of the UN, but it too, makes reference to environmental rights and protections.<sup>17</sup> As at May 2017 at the time of writing, 150 of the world's nations recognised the protection of environment through their constitutions.<sup>18</sup>

Many of these constitutions impose reciprocal duties toward the environment, commit to environmental stewardship or policies, or guarantee rights to information, participation, and justice in environmental matters.<sup>19</sup> Indeed, most people on earth now live under constitutions that protect environmental rights in some way,<sup>20</sup> and as Boyd has commented, constitutional environmental care is now commonplace.<sup>21</sup>

Following the Stockholm Declaration, Portugal<sup>22</sup> and Spain<sup>23</sup> were the first countries to include the right to a healthy environment. Unsurprisingly, articulating and embedding

<sup>14</sup> *Declaration of the United Nations Conference on the Human Environment* 11 ILM 1416 (1972).

<sup>15</sup> *Ibid*, Principle 1.

<sup>16</sup> Comparative Constitutions Project, *Constitute: The World's Constitutions to Read, Search and Compare* (2017) <[www.constituteproject.org/search?lang=en&key=env](http://www.constituteproject.org/search?lang=en&key=env)>

<sup>17</sup> *Constitution of Kosovo 2008* (Kosovo) arts 7, 52 & 119.

<sup>18</sup> Comparative Constitutions Project, above n 14.

<sup>19</sup> See generally, David R Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (University of British Columbia Press, 2012); Binrod P Sharma, *Constitutional Provisions Related to Environment Conservation: A Study* (September 2010) ICUN Nepal <[https://cmsdata.iucn.org/downloads/constitutional\\_provisions\\_related\\_to\\_environment\\_conservation\\_\\_\\_final.pdf](https://cmsdata.iucn.org/downloads/constitutional_provisions_related_to_environment_conservation___final.pdf)>.

<sup>20</sup> Erin Daly and James Ray, 'Comparative Environmental Constitutionalism' (2015) 6(1) *Jindal Global Law Review* 9, 10.

<sup>21</sup> Boyd, above n 17.

<sup>22</sup> *Constitution of the Republic of Portugal 1976* (Portugal) art 66, 'Everyone has the right to a healthy and ecologically balanced environment and the duty to defend it.'

<sup>23</sup> *Constitution of Spain 1978* (Spain) s 45, 'Everyone has the right to enjoy an environment suitable for the development of the person, as well as the duty to preserve it.'

constitutional values are done in a variety of different ways.<sup>24</sup> Kotze has suggested common means by which environmental rights and protections are constitutionally expressed and implemented at the domestic level across many nation states. These may include one or more of the following:

- (i) entrenching one or more environmental or related rights as justiciable political or socio-economic fundamental rights (of a substantive and/or procedural nature) within a constitution;
- (ii) providing for and safeguarding ‘sustainable development’ and its associated principles in a constitution as guiding principles, peremptory obligations of ideals; and/or
- (iii) by delineating specific state and non-state functions and duties with respect to environmental protection...<sup>25</sup>

Notwithstanding the various modes of constitutional expression, Venezuela<sup>26</sup> Ecuador<sup>27</sup> and Bolivia<sup>28</sup> demonstrate a significant paradigm shift as to how environmental rights and protections are, and can be, entrenched. Notably, Ecuador’s constitution actually confers a legal right upon nature, wherein it states:

‘Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes.’<sup>29</sup>

This provides a unique example of such a right, and for Sharma represents, ‘a new experiment for the world’.<sup>30</sup> This type of recognition vests positive rights in nature, according it status as a legal subject apart and aside from the utility it provides to human beings. Similarly in 2010, Bolivian president Evo Morales hosted the World People’s Conference on Climate Change and the Rights of Mother Earth,<sup>31</sup> signifying a departure from an anthropocentric worldview to an ecocentric worldview, explicitly recognising the intrinsic value of the environment.<sup>32</sup>

Columbia’s constitution also provides a poignant example of how environmental rights may still be advanced and protected where a constitutional provision is articulated in anthropocentric language. Article 79 states that:

‘Every individual has the right to enjoy a healthy environment. An Act shall guarantee the community’s participation in the decisions that may affect it. It is the duty of the State to protect the diversity and integrity of the environment, to conserve the areas of special ecological importance, and to foster education for the achievement of these ends.’<sup>33</sup>

<sup>24</sup> Douglas Fisher, *Australian Environmental Law: Norms, Principles and Rules* (Thomson Reuters, 3<sup>rd</sup> ed, 2014), 100.

<sup>25</sup> Kotze, above n 5, 208.

<sup>26</sup> *Constitution of the Bolivarian Republic of Venezuela 1999* (Venezuela) arts 15, 127, 129, 156(23), 178(4), 184(1), 299, 326.

<sup>27</sup> *Constitution of Ecuador 2008* (Ecuador), ch 2 s 1(3); ch 2, s2; ch 2, s 5, art 27; ch 2, s 5, art 29; ch 3, s 5, art 44; ch 4, art 57(8); ch 6, art 66(8)(27); ch 7, art 74; ch 9, art 83(6); ch 3, art 258; ch 4, art 267(4); ch 1, art 276(4), ch 6, s 2, art 323; ch 1, s 1, art 347(4); ch 1, s 8, art 387(4); ch 1, s 10, art 391.

<sup>28</sup> *Constitutional of Plurinational State of Bolivia 2009* (Bolivia); ch 1(2)(3); ch 2, Art 9(6); ch 4, art 13(10); ch 5, s 1, arts 33 & 34; ch 5, s 9, art 74; ch 6, s 1, art 80; pt 1, title 3, art 108(16); ch 2, s 6, art 135; pt 3, title 1, ch 8, art 298(20)(6).

<sup>29</sup> *Constitution of Ecuador 2008* (Ecuador) art 71.

<sup>30</sup> Sharma, above n 17, 15.

<sup>31</sup> World People's Conference on Climate Change and the Rights of Mother Earth, *Building the People’s World Movement for Mother Earth* (2011) <<https://pwccc.wordpress.com/>>.

<sup>32</sup> John Dryzek, *Foundations and Frontiers of Deliberative Governance* (Oxford University Press, 2010).

<sup>33</sup> *Constitution of Columbia 1991* (Columbia) art 79.

Although this reposes the right in the individual, it also confers positive obligations upon the state to engage in consultative community engagement in environmental decision making, to protect the environment, and to establish educative frameworks. It is an example of a positively dynamic approach to constitutional entrenchment.

Outside of South America, France has also been progressive in its recognition of environmental rights and protections. The Preamble to its Constitution states:

‘The French people solemnly proclaim their attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of 1789, confirmed and complemented by the Preamble to the Constitution of 1946, and to the rights and duties as defined in the Charter for the Environment of 2004.’<sup>34</sup>

Prior to the inception of the Charter for the Environment, former President Jacques Chirac announced that what is required is, ‘an alliance that will lead...countries to embark on the ecological revolution, the revolution of production and consumption models’ and toward a model of, ‘global governance to humanise and control globalisation’.<sup>35</sup> This desire to reconceive and reconceptualise human institutions sustainably and within ecological limits is reflective of environmental values that are resonating globally. These values are finding expression, in their most robust form, as positive constitutional rights conferred on nature itself, as evidenced by Ecuador.<sup>36</sup>

Brazil, the world’s fifth largest country in area<sup>37</sup> and with a land mass larger than Australia, has also sought to constitutionalise environmental protection. Brazil recognises individuals’ rights to an ‘ecologically balanced environment’ and creates a positive obligation upon its government and citizens alike to ‘defend and preserve it for present and future generations’.<sup>38</sup> Furthermore, it acknowledges environmental rights as an economic consideration<sup>39</sup> as well as recognising the value of ecosystem services.<sup>40</sup> Although framed in terms of human utility and necessity, these environmental values find expression in Brazil’s highest legal document.

Although New Zealand’s constitution does not contain environmental rights and protections in its constitution, it is informed in the exercise of statutory interpretation by indigenous Maori concepts that consider humans as part of, and descended from, the (personified) natural world. The concept of ‘kaitiakitanga’ (guardianship) and the ethic of stewardship, influences the making of administrative decisions under certain Acts.<sup>41</sup> Implicit in this stewardship is recognition that humans have a duty towards the environment and natural world.<sup>42</sup> As a state based on Westminster parliamentary traditions, New Zealand’s statutory requirement provides an interesting example of the intersection of two seemingly incongruent worldviews and ideologies within a western legal framework.

<sup>34</sup> *Constitution of France 1958* (France) preamble.

<sup>35</sup> Jacques Chirac, ‘Statement by His Excellency Mr. Jacques Chirac, President of The French Republic at the World Summit on Sustainable Development’ (Speech delivered at the World Summit on Sustainable Development, Johannesburg, South Africa, 2 September 2002) <<http://www.un.org/events/wssd/statements/franceE.htm>>

<sup>36</sup> *Constitution of Ecuador 2008* (Ecuador).

<sup>37</sup> Behind Russia, Canada the US and China, respectively.

<sup>38</sup> *Constitution of Brazil 1998* (Brazil) art 225.

<sup>39</sup> *Ibid* art 170.

<sup>40</sup> *Ibid* art 186.

<sup>41</sup> *Resource Management Act 1991* (NZ), ss 2(1), 7.

<sup>42</sup> Daly, above n 18, 26.

The global movement towards environmental constitutionalism and the enunciation of environmental rights and protections represents an important development in changing worldviews.

Various international instruments<sup>43</sup> seeking to enshrine environmental rights and protections are necessitating a closer examination of the legal paradigms that have given rise to many national constitutions.

### B *Justiciability of Environmental Rights and Protections*

Nevertheless, the experiences of various nations around the world demonstrate that environmental protection, whether constitutional or legislative in character, are wholly reliant and contingent upon the means of securing and protecting such rights. It is both the availability and effectiveness of enforcement that inevitably determines how successful environmental protections will be, and whether these translate to enforceability on the ground.

Necessarily, power is reposed in the judiciary to interpret constitutional protections and to determine the nature, scope and effect of such provisions. Therefore the effective realisation of such rights is twofold; enforceability, as well as the justiciability of the provision. Sometimes the issue may arise from the constitutional provision itself, and rather than creating a justiciable right it instructs the legislature to take action without prescribing a remedy in the event of inactivity. India's constitution demonstrates such an example, and is particularly noteworthy given India is the second most populous nation in the world with approximately 18% of the global population. Article 48A of the Indian Constitution requires that, 'The State shall endeavour to protect and improve the environment and to safe guard the forests and wild life of the country'.<sup>44</sup> This provision however, must be read in light of Article 37 which renders the Article 48A non-justiciable, by stating that, 'The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws'.<sup>45</sup> Consequently, Article 48A is rendered little more than a non-justiciable policy directive, and it was left to the Supreme Court of India in 1985 to interpret and derive a constitutional right to a healthy environment from another provision, the constitutional right to life under Article 21.<sup>46</sup>

This is but one example that demonstrates the importance of ensuring that constitutional provisions seeking to protect the environment, whilst lofty in ambition, are at once clear, justiciable and enforceable. As highlighted, there is compelling global precedent towards the inclusion of environmental rights and protections within national constitutions, and Australia should consider an appropriate constitutional response to accord with contemporary international standards. Significantly, Australia is the only country in the world that is at once both a sovereign state *and* an entire continent, and is therefore uniquely placed to affect meaningful national, regional and global change.

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<sup>43</sup> See, eg, World Conservation Strategy; UN World Charter for Nature; Caring for the Earth; UN Millennium Declaration; Earth Charter; Draft Universal Declaration of the Rights of Mother Earth, and many others.

<sup>44</sup> *Constitution of India 1949* (India) art 48.

<sup>45</sup> *Ibid*, art 37.

<sup>46</sup> *Rural Litigation and Entitlement, Dehradun v. State of Uttar Pradesh*, 1985 AIR 652.

## III THE IMPORTANCE OF CONSTITUTIONS IN THE ANTHROPOCENE

The concept of a geological epoch characterised by the influence of human beings as geological agents capable of inducing climate change on a planetary scale is, conceptually, incredibly difficult to grasp. What an individual, or even a nation state, finds hard to grasp and rationalise is unlikely to elicit any meaningful behavioural change at either the individual or state level.

Considering the position from a behavioural psychology perspective, Ariely has suggested that, 'if you were starting from scratch, and you said, 'Let me create a problem that people would not care about,' it would look very much like global warming'.<sup>47</sup> The reason for this, Chatfield proposes, is that the, 'most serious consequences of climate change are distant from their causes in time and space; they are surrounded by uncertainty and dissent; they are both a tremendously big deal and a wickedly complex problem to address, let alone redress.'<sup>48</sup> Given such a proclivity for cognitive dissonance in contemplating climate change and ecological catastrophe on a geological scale, what value do phrases such as 'anthropogenically induced climate' change really accomplish?

Given language is the medium through which law finds expression, words and their precise meaning are crucial.<sup>49</sup> As Fisher notes, 'environmental law is replete with words that are easy to state, fascinating to discuss, difficult to interpret but critical to apply'.<sup>50</sup> The power of a concept such as the Anthropocene, then, lies in its value as an idea. This was posed by Arendt in relation to the importance of 'human rights' as a concept.<sup>51</sup> Purdy states, while:

'mere ideas are in fact sorry comforts in an unmanageable situation, they can be the beginning of demands, projects, even utopias, that enable people to organise in new ways to pursue them. The idea of human rights has gained much of its force this way, as a prism through which many efforts are focused and/or refracted.'<sup>52</sup>

Although the semantics of language are critically important to the exposition and application of the law, words like 'environment' or 'Anthropocene' cannot be dismissed for being too vague or imprecise. Interpretation and application of language is necessary in identifying, defining and applying any class of rights or duties at law. This is a core function, and challenge, of any legal system.

Consequently, constitutions are critical. Constitutions espouse the guiding principles and values of a society. They are quintessentially intergenerational compacts that one generation makes to both to bind and benefit future generations.<sup>53</sup> As Allot states, 'the legal constitution of a society carries society's structure from its past into its future. Law is the self-directed

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<sup>47</sup> Dan Ariely, *Predictably Irrational* <<https://beta.prx.org/stories/165667>>.

<sup>48</sup> Tom Chatfield, 'The New Human Era' 14 *The New Philosopher* 41.

<sup>49</sup> Fisher, above n 22, 100.

<sup>50</sup> *Ibid.*

<sup>51</sup> See generally, Peg Birmingham, *Hannah Arendt and Human Rights: The Predicament of Common Responsibility* (Indiana University Press, 2006).

<sup>52</sup> Jedediah Purdy, 'Surviving the Anthropocene: What's Next for Humanity' (1 March 2016) ABC Religion and Ethics <<http://www.abc.net.au/religion/articles/2016/03/01/4416386.htm>>

<sup>53</sup> Daly, above n 18, 25.



becoming of society, the order of the self-ordering of society.’<sup>54</sup> Constitutions, therefore, ascribe codes of norms and regulate the allocation and division of powers between a nation state and its citizenry.<sup>55</sup>

Constitutions are also somewhat paradoxical, in the sense that whilst typically a product of the dominant political majority at a particular historical moment, rights provisions within these instruments often contain ‘anti-majoritarian features designed to protect certain individual rights against the tyranny of the majority’.<sup>56</sup> For this reason, and as per the contemporary constitutional examples given in this article, a nation’s constitution is the most appropriate place for the articulation of robust environmental rights and protections and their definitions.

The legal philosophy of many nations and, subsequently, of their constitutions are largely grounded in a post-industrialised, Newtonian and anthropocentric worldviews.<sup>57</sup> Simply put, they are grounded in a worldview that places human beings at the apex of their environment, positing that issues or challenges can be solved by compartmentalising them aside and apart from the informing whole. As Cullinan states, this legal theory is predicated on a number of fallacies; chiefly that humanity’s collective wellbeing is not derived directly from the environment and natural world as a whole.<sup>58</sup> This is also coupled with a dangerous arrogance that ‘technology will provide a solution to any of the problems that we create in the course of destroying natural systems.’<sup>59</sup> Hamilton has stated, ‘nature, we are learning, has its own grand narrative, a narrative against all (human) narratives... So we now must find ways to navigate it, to accommodate it whatever it throws at us, to work out how to live, on a planet less liveable.’<sup>60</sup>

The importance of constitutions, particularly in the context of the Anthropocene, is that a society’s constitution commands great influence simply because of its status. In this sense, it ‘represents a set of principles and even ideologies, whether stated directly or implied, that are seen to sustain and permeate the rest of the legal system...’.<sup>61</sup> Citizens engage more readily with a constitution than they ordinarily would with individual pieces of legislation. The potential of global environmental constitutionalism, properly conceived, would allow nation states to render environmental rights and protections normative in a culturally appropriate and adaptive way.

#### A *Jurisprudence and Legal Recognition*

As constitutions are legal instruments that bind generations of citizens in an intergenerational compact, legal philosophers have naturally pondered their origins and utility and furthermore, what they presuppose about human nature.

<sup>54</sup> Phillip Allot, *Eunomia: New Order for a New World* (Oxford University Press, 2<sup>nd</sup> ed, 2001) 297.

<sup>55</sup> Samuel Finer et al, *Comparing Constitutions* (Oxford University Press, 1995).

<sup>56</sup> *Ibid.*

<sup>57</sup> Cormac Cullinan, *Wild Law: Governing People for Earth* (Chelsea Green Publishing, 2<sup>nd</sup> ed, 2011) 59.

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*

<sup>60</sup> Clive Hamilton, ‘Crimes Against Nature: The Banality of Ethics in the Anthropocene’ (14 July 2015) ABC Religion and Ethics < <http://www.abc.net.au/religion/articles/2015/07/14/4273352.htm>>.

<sup>61</sup> Fisher, above n 22, 88.

One underlying assumption made by Aristotle is that human beings are inexorably political and require political institutions for the realisation of the 'good life', which he thought to be 'intrinsically social, capable of full expression only within the bounds of common existence rather than something capable of pursuit by individuals in isolation'.<sup>62</sup> Within this picture, law formed part of the nexus of institutions which foster and pursue the common good, including through the creation of the state.<sup>63</sup>

In contrast, the Hobbesian theory of the origins of the state is predicated on the notion of a social contract. As Coetzee explains:

*'In the myth of the founding of the state...our descent into powerlessness was voluntary: in order to escape the violence of internecine warfare without end (reprisal upon reprisal, vengeance upon vengeance, the vendetta), we individually and severally yielded up to the state the right to use physical force...thereby entering the realm (the protection) of the law'.<sup>64</sup>*

It is a society's constitution that at once both legitimises the existence of the state, and sets out the relationship between it, its various arms of government, and its citizens. The state derives its legitimacy from this 'social contract' entered into with its individuals (the collective 'we'). Arguments of this type posit that individuals have consented, either explicitly or tacitly, to surrender some of their freedoms to the authority of the state in exchange for the protection of their remaining rights.<sup>65</sup>

Given the status and importance of such an instrument, it seems only logical that a society be afforded the ability to modify or change its constitution – that is, to periodically renegotiate the terms of such a social contract should it see fit. Thomas Jefferson, principal author of the American Declaration of Independence, was of the view that 'every constitution...and every law, naturally expires at the end of nineteen years. If it be enforced longer, it is an act of force, and not of right.'<sup>66</sup> Notwithstanding that this reference was predicated on life expectancy and generational considerations, the rationale underpinning this statement is not lost. With this in mind, there is no temporal trigger contained in the Australian Constitution to facilitate a process of change, renegotiation or reaffirmation. Rather, there is a detailed process of referendum to effect constitutional change if certain preconditions are met.<sup>67</sup>

Constitutions express the relationship between citizen and state, where citizens are both the subjects of, and subject to, certain arrangements. The semantics of this statement are instructive, as the term 'subject' has a specific meaning at law. An important distinction is that only legal 'subjects' (as distinct from legal 'objects') are conferred legal rights. Reconceptualising constitutions to recognise nature and the environment as indispensable to, and inextricably linked with, human flourishing is a necessary legal response to the Anthropocene. Extending the purview of law and legal systems to render nature and the environment legal 'subjects' worthy of rights and protections in and of itself, would recognise intrinsic value aside and apart from its value to human beings. The rights, duties and obligations that arise from such recognition would change the way humans interact with

<sup>62</sup> Sean Coyle, *Modern Jurisprudence: A Philosophical Guide* (Oxford Hart Publishing, 2014), 38.

<sup>63</sup> *Ibid.*

<sup>64</sup> J M Coetzee, *Diary of a Bad Year* (Viking Penguin Inc., 2007) 3.

<sup>65</sup> Mark Goldie and Robert Wolker, *The Cambridge History of Eighteenth-Century Political Thought* (Cambridge University Press, 2006), 347-76.

<sup>66</sup> Constitutional Law Foundations, *Intergenerational Justice in the United States Constitution, The Stewardship Doctrine* <<http://www.conlaw.org/Intergenerational-II-2-9.htm>>.

<sup>67</sup> *Australian Constitution* s 128.

the natural world. Recognition of this sort is critical in responding to many environmental challenges of the present day.

According legal personality to some-‘thing’ other than human is not such a radical leap in legal reasoning for a society that accords legal status to the corporation, essentially a legal fiction. Reimagining legal parameters to meet contemporary environmental issues is not dissimilar to that of the abstract reimagining that resulted in conferral of legal rights upon corporations to meet contemporary economic and merchant trade considerations of the 17<sup>th</sup> century. By way of example, New Zealand’s third largest river, the Whanganui River has been afforded a class of legal rights,<sup>68</sup> and India has recognised dolphins and whales as having legal personhood.<sup>69</sup> Further to the examples provided regarding Ecuador and Bolivia above, recognition of environment in national constitutions demonstrates how recognition might be articulated and realised.

Reconceiving the current legal paradigm in such a way is not revelatory. It is, though, necessary. It would require that any instrument that purports to legitimise the existence of the state (such as a constitution) extend certain fundamental rights and protection to the environment and the natural world that supports its very existence.

As one commentator has suggested, ‘society is made and imagined...it is a human artefact rather than expression of underlying natural order’, and as such is ‘contingent’, rather than fixed.<sup>70</sup> Coetzee also asserts that, ‘if we accept the premise that we or our forebears created the state, then we must accept its entailment: that we or our forebears could have created the state in some other form, if we had chosen; perhaps, too, that we could change it if we collectively so decided.’<sup>71</sup> It must be the current climate that mobilises society to now collectively decide.

#### IV THE AUSTRALIAN CONSTITUTION

##### A *Legislative Power and Environmental Rights*

Reconciling environmental rights and protections within the Australian Constitution requires a consideration of some of the key philosophical underpinnings that gave expression to its existence in the first place. Coming into force in 1901, Australia’s constitution is a particular product of a political and historical climate. Suggestive of the informing influences of Australia’s founding document, the phrase ‘Washminster mutation’ has been utilised to describe the hybrid amalgamation of elements borrowed from both the American and British legal systems.<sup>72</sup>

<sup>68</sup> Jennifer Archer, ‘Rivers, Rights & Reconciliation in British Columbia: Lessons Learned from New Zealand’s Whanganui River Agreement’ (3 January 2014). <[https://www.academia.edu/5741939/Rivers\\_Rights\\_and\\_Reconciliation\\_in\\_British\\_Columbia\\_Lessons\\_Learned\\_from\\_New\\_Zealands\\_Whanganui\\_River\\_Agreement](https://www.academia.edu/5741939/Rivers_Rights_and_Reconciliation_in_British_Columbia_Lessons_Learned_from_New_Zealands_Whanganui_River_Agreement)>.

<sup>69</sup> Saroja Coelho, ‘India Recognises Dolphins as “Non-Human Persons”’ (24 May 2013) <[www.afd.org.au/news-articles/india-recognises-dolphins-as-non-human-persons](http://www.afd.org.au/news-articles/india-recognises-dolphins-as-non-human-persons)>.

<sup>70</sup> Ivan Petrella, *The Future of Liberation Theology: An Argument and Manifesto* (Ashgate, 2004) 95-97.

<sup>71</sup> Coetzee, above 59, 5.

<sup>72</sup> Elaine Thompson, ‘The Constitution and the Australian System of Limited Government, Responsible Government and Representative Democracy: Revisiting the Washminster Mutation’ (2001) 24 *University of New South Wales Law Journal* 657.

Australia's federal arrangement leaves responsibility for the management of the environment and natural resources to its regional State bodies and to self-governing territories. Unsurprisingly given its origins, the Australian Constitution does not contain any environmental rights or duties. Nevertheless, the absence of any reference to the environment or natural resource management has not prevented the Commonwealth Parliament from enacting valid laws that impact upon the Australian environment.<sup>73</sup>

Within Australia's federal system of government, the division of legislative powers between the Commonwealth Parliament and various State Parliaments can be categorised as exclusive, concurrent or residual powers. This has resulted in ongoing political struggles between the two constitutionally recognised tiers of government, where each level has attempted to assert regulatory competence over environmental matters. As the Constitution does not explicitly provide clarity on matters concerning the environment, this subject area is deemed to be an area of residual legislative power vesting in the regional State Parliaments. The omission of an express Commonwealth environmental power, together with the control over natural resource and land management historically exercised by the Colonies (later the States),<sup>74</sup> supported the traditional view that States retained chief responsibility for environmental laws.<sup>75</sup> This view began to change with the increase in environmental awareness during the 1970s, and the recognition that the interconnected nature of ecosystems often necessitates a national, if not international, approach to environmental matters.<sup>76</sup>

During the national debates preceding the Australian Constitution, water conservation in shared river systems emerged briefly as an issue in the 1890s.<sup>77</sup> The word 'conservation' was not framed in its contemporary usage, but rather in respect of conserving the rights of States to use water for irrigation. The prospect of ceding this power to the Commonwealth Government was thought to be too great an interference with the powers of the States to deal with matters relating to property.<sup>78</sup> Environmental management and protection was not within the contemplation of the framers of the Constitution.<sup>79</sup>

One such example of the perils of negotiated federalism and environmental management continues to be the Murray-Darling Basin, a basin that covers five State and territory governments. One hundred and sixteen years after federation, achieving consensus across a myriad of stakeholders and the competing interests as to best management practice remains a critical national issue.

### 1 *Environmental Protection and the 'External Affairs' Power*

While the States in theory retain the principal role in the legal regulation of environmental matters, in practice the Commonwealth has become more directly involved, through

<sup>73</sup> Fisher, above n 22, 121; *Australian Constitution*, ss61 & 51(xxix).

<sup>74</sup> James Crawford, 'The Constitution and the Environment' (1991) 13 *Sydney Law Review* 11, 13.

<sup>75</sup> Heydon Opie, 'Commonwealth Power to Regulate Industrial Pollution' (1976) 10 *Melbourne University Law Review* 577, 578.

<sup>76</sup> Jacqueline Peel and Lee Godden, 'Australia Environmental Management: A 'Dams' Story' (2005) 28(3) *University of New South Wales Law Journal* 668.

<sup>77</sup> *Official Report of the National Australasian Convention Debates*, Sydney, 3 April 1891, 689–92.

<sup>78</sup> See generally, Paul Kildea and George Williams, 'The Constitution and the management of water in Australia's rivers' (2010) 32 *Sydney Law Review* 595.

<sup>79</sup> Parliament of Australia, *Commonwealth Environmental Powers and Australian Federalism* <[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Environment\\_and\\_Communications/Completed\\_inquiries/1999-02/enviropowers/report/c06](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Completed_inquiries/1999-02/enviropowers/report/c06)>.

interventionist legislation, as well as indirectly involved, through the control of funding. Furthermore, the High Court's interpretive approach of 'multiple characterisation' as a way to assess (and subsequently expand) the validity of Commonwealth legislative power over subject matter 'sufficiently connected'<sup>80</sup> to enumerated heads of power, has tipped the federal balance in favour of the Commonwealth where important matters of environmental regulation are concerned.

The major constitutional head of power that has been interpreted broadly so as to expand the legislative scope of the Commonwealth Parliament is the 'external affairs' power under s51(xxix) of the Australian Constitution.<sup>81</sup> In the case of *Commonwealth v Tasmania*<sup>82</sup> ('Tasmanian Dam Case'), the most famous and influential environmental law case in Australian constitutional history, the High Court upheld the validity of the *World Heritage Properties Conservation Act 1983* (Cth) as falling within the scope of the external affairs power. The Act sought to legislatively incorporate the international Convention concerning the Protection of World Cultural and Natural Heritage.<sup>83</sup> Of the external affairs power, Gibbs CJ noted that although all of the Constitution is open to interpretation, it 'differs from the other powers...in its capacity for almost unlimited expansion.'<sup>84</sup> Further cases considered the scope of s51 (xxix), subsequently reaffirming its wide construction and it is now firmly established that the Australian Government has the power to enact legislation to fulfil Australia's international legal obligations. Where the executive Government has ratified a *bona fide* international treaty, this power enables it to give effect to its international obligations under that treaty.<sup>85</sup> Thereafter, it is the prerogative of the legislature to articulate those obligations, with the modest precondition that the resultant legislation must be 'reasonably capable of being considered appropriate and adapted to that end'.<sup>86</sup>

As such, the Australian Government has very wide constitutional powers to make laws on many subjects, including protecting the environment. Nevertheless, the absence of a discrete constitutional head of power explicitly recognising the subject matter of 'environment' as an exclusive or concurrent legislative power, obfuscates the capacity for the Commonwealth to provide directed and specific environmental management absent an international obligation under a *bona fide* treaty. Constitutional recognition would do more than just enliven Commonwealth environmental legislative power. Conferring legislative power to ensure it is exercised within the normative concept of environmental sustainability, would constrain such power to ensure legislation was demonstrably sustainable, whilst at the same time embedding the concept as a guiding value and principle of contemporary Australian society.

## 2 Constitutional Amendment

The Australian Constitution has proved highly resistant to formal change. As one former Justice of the High Court has observed, 'the meaning that the Constitution has for the present generation is not necessarily the same meaning that it had for the earlier generations or those

<sup>80</sup> *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 223, ¶ 68, per Toohey J.

<sup>81</sup> *Australian Constitution*, s 51(xxix).

<sup>82</sup> *Commonwealth v Tasmania* (1983) 158 CLR 1

<sup>83</sup> Convention Concerning the Protection of the World Cultural and Natural Heritage, opened for signature on 16 November 1972, 1037 UNTS 151 (entered into force 17 December 1975).

<sup>84</sup> *Commonwealth v Tasmania* (1983) 158 CLR 1 at 100, per Gibbs CJ.

<sup>85</sup> *Ibid*, 130–131, 172, 232, 259.

<sup>86</sup> *Victoria v Commonwealth* (1996) 187 CLR 416, 487 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

who drafted or enacted the Constitution.<sup>87</sup> If we accept the premise that we have consented, either explicitly or tacitly, individually or collectively, to our Constitution, then it must be for Australian society to reaffirm those norms and principles contained within its most important legal instrument.

Section 128 of the Australian Constitution sets out the procedure for its formal amendment. A bill must first be passed by the Parliament and then presented to the people in a referendum. To become law, the referendum must obtain the support of an overall majority of voters and a majority in a majority of states, which in practice means four out of six states.<sup>88</sup> Utilising this process, there have been forty four referenda to amend the Constitution and of those, only eight have been successful.

This resistance to formal change is not unique to the Australian condition. Globally, many countries face extreme difficulty in amending their constitutions. For example, Denmark has not changed its constitution since 1953. Canada's constitution is also notoriously hard to amend. In countries whose constitutions are silent on the environment, options for moving forward include legislative recognition of the right to a healthy environment, litigation that seeks to establish that right as implicit in another constitutional right, or recognition at the subnational level.<sup>89</sup>

For the majority of Australian society, any understanding of and identification with our nation's most important legal document is unlikely to extend beyond a certain pop-culture reference to its 'vibe'.<sup>90</sup> Engagement with the broader Australian society would require invigorating the silent majority into meaningful and deliberative engagement on how environmental rights and protections should be incorporated in the Australian context.

## V GREENING AUSTRALIA'S CONSTITUTION

### A *Towards Environmental Recognition*

If meaningful and coherent institutional change is to take root in Australia, constitutional recognition of environmental rights and protections is imperative. Amending the Constitution will help to recast notions of value attribution, resulting in outcomes where the natural world would possess intrinsic value irrespective of its value to humans.<sup>91</sup> In 2012, the State of the Planet Declaration,<sup>92</sup> called for a 'fundamental reorientation and restructuring of national and international institutions.'<sup>93</sup> It is fundamental, the Declaration continues:

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<sup>87</sup> Michael Kirby, 'Deakin – Popular Sovereignty and the True Foundation of the Australian Constitution' (Speech delivered at the Deakin Law School Public Oration, Deakin University, 22 August 1997) <[http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj\\_deakin2.htm](http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_deakin2.htm)>.

<sup>88</sup> *Australian Constitution*, s 128.

<sup>89</sup> Boyd, above n 17.

<sup>90</sup> *The Castle* (Village Roadshow Entertainment, 1997).

<sup>91</sup> Jan Laitos, *The Right of Nonuse* (Oxford University Press, 2012) 201.

<sup>92</sup> Lidia Brito and Mark Stafford Smith, 'State of the Planet Declaration' Planet Under Pressure: New Knowledge Towards Solutions conference, London, 26-29 March 2012. <<http://www.igbp.net/publications/stateoftheplanetdeclaration.4.6b007aff13cb59eff6411baa.html>>.

<sup>93</sup> *Ibid*, 8.

‘to overcome barriers to progress and move to effective Earth-system governance. Governments must take action to support institutions and mechanisms that will improve coherence, as well as bring about integrated policy and action across the social, economic and environmental pillars’.<sup>94</sup>

The concept is not confined to states and governments as sole actors, but is marked by a participation of myriad public and private non-state actors at all levels of decision making.<sup>95</sup> As Biermann says, this concept is about the societal steering of human activities with regard to the long term stability of geo-bio-physical systems.<sup>96</sup> Bosselman also contends that, ‘the main limitations of discourse ethics are its own anthropocentric roots. If this tradition behind the rational discourse goes unquestioned we will not be able to move beyond Kantian and contractualist frameworks.’<sup>97</sup> It is precisely this recasting that is required, and which is gaining traction on a global scale. What should matter, it is argued, is that humans not only have the capacity to act for themselves, but also for those who cannot act for themselves. In this way, potentially all beings effected by environmental decisions, but not actively participating in the moral dialogue, would be in a position to have their ‘voices’ heard.<sup>98</sup>

### B *An Indigenous Perspective*

Globally, ancient wisdom traditions of indigenous cultures and First Peoples are informing key environmental concepts of constitutions around the world. The Ecuadorian Constitution, with its seminal reference to the rights of Pacha Mama is but one example. In the Australian context, recognising and valuing the knowledge traditions of Australia’s First Peoples, the world’s longest continuing culture, would provide a meaningful way to encourage dialogue around reconciliation whilst at the same time providing important impetus for the required paradigm shift towards meaningful environmental rights and protection.

Environmental rights and responsibilities have been the cornerstone of indigenous legal systems for millennia,<sup>99</sup> and for tens of thousands of years, the lives and sense of cultural identity of Indigenous Australians have been inextricably linked to the land, its forms, flora and fauna.<sup>100</sup> As Grieves explains of Australia’s first peoples:

“These ancestors created order out of chaos, form out of formlessness, life out of lifelessness, and, as they did so, they established the ways in which all things should live in interconnectedness so as to maintain order and sustainability. The creation ancestors thus laid down not only the foundations of all life, but also what people had to do to maintain their part of this interdependence—the Law. The Law ensures that each person knows his or her connectedness and responsibilities for other people (their kin), for country (including watercourses, landforms, the species and the universe), and for their ongoing relationship with the ancestor spirits themselves.”<sup>101</sup>

<sup>94</sup> Philipp Pattberg and Fariborz Zelli, *Environmental Politics and Governance in the Anthropocene: Institutions and Legitimacy in a Complex World* (Routledge, 2016) 25.

<sup>95</sup> Biermann et al, ‘Earth System Governance: A Research Framework’, 10 *International Environmental Agreements: Politics, Law and Economics* 277, 279.

<sup>96</sup> Pattberg, above n 82, 25.

<sup>97</sup> Klaus Bosselmann, *The Principle of Sustainability: Transforming Law and Governance* (Routledge, 2<sup>nd</sup> ed, 2016) 96.

<sup>98</sup> Ibid.

<sup>99</sup> John Burrows, *Canada’s Indigenous Constitution* (University of Toronto Press, 2010).

<sup>100</sup> Australian Government, *Our Natural Environment* <<http://www.australia.gov.au/about-australia/our-country/our-natural-environment>>.

<sup>101</sup> Vicki Grieves, ‘Aboriginal Spirituality: Aboriginal Philosophy, The Basis of Aboriginal Social and Emotional Wellbeing’ (2009) Discussion Paper No. 9, *Cooperative Research Centre for Aboriginal Health*, 7 <<http://www.australianstogether.org.au/stories/detail/indigenous-spirituality>>.

This indigenous worldview of interconnectedness is seemingly recurrent across many ancient wisdom traditions. Furthermore, it resonates with more contemporary expositions of these principles contained in the doctrines of earth jurisprudence, which recognises notions of intra-generational, inter-generational and inter-species equity and justice.<sup>102</sup>

Where there are limitations of the English language in conveying key environmental concepts that resonate an ecocentric worldview, it may be that indigenous language better captures and articulates such concepts. As highlighted, the Maori notion of 'kaitiakitanga' informs statutory interpretation with respect to certain Acts of New Zealand Parliament.<sup>103</sup>

Within the current legal paradigm of public international law, environmental constitutionalism offers complex and multilayered solutions to anthropogenic induced climate change and other global challenges. It is necessary for constitutional drafters to choose appropriate language by which to protect the environment, as the nearly limitless application of human and environmental rights may pose challenges for the Courts in determining and delimiting the nature, scope and effect of such rights.<sup>104</sup> It is noted that Courts have confronted, and have been successful in, the challenges inherent in interpreting words and phrases such as 'human rights' and 'freedoms'. Any perceived difficulties around interpretation should not operate as a bulwark for the constitutional inclusion of key environmental rights and protections.

## VI CONCLUSION

It is no longer possible to think of human life in isolation from the ecological context in which humans are situated. All humans exist in social structures that influence their understanding of what humanity means, and are conditioned by where and when they live. As former Justice Kirby has said, 'the diversity of humanity demands diversification of our responses to the opportunities and perils of the time.'<sup>105</sup> As humans being, we do not acutely experience ourselves as geological agents capable of changing the functioning of our shared planet. Nevertheless, a plethora of scientific evidence confirms that as a species, this is in fact the case.<sup>106</sup>

The current perils of the Anthropocene are characterised by an instability of ecological systems that is unprecedented in human history, and as such Dryzek contends the first virtue of social institutions such as law, may now be something akin to ecological reflexivity and responsiveness.<sup>107</sup> This would necessitate the capacity of legal systems and institutions to respond in light of the trajectory of social-ecological systems.<sup>108</sup>

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See also, Elizabeth Grant, 'Unseen, Unheard, Unspoken: Exploring the Relationship between Aboriginal Spirituality & Community Development' (2004) Thesis, *University of South Australia*.

<sup>102</sup> Fisher, above n 22, 45.

<sup>103</sup> Daly, above n 18, 26.

<sup>104</sup> Ibid, 10-11.

<sup>105</sup> Michael Kirby, 'International Law-The Impact on National Constitutions' (2006) 21 *American University International Law Review* 327, 362-63.

<sup>106</sup> See generally, Intergovernmental Panel on Climate Change, 'Publications and Data' <[https://www.ipcc.ch/publications\\_and\\_data/publications\\_and\\_data\\_reports.shtml](https://www.ipcc.ch/publications_and_data/publications_and_data_reports.shtml)>.

<sup>107</sup> Dryzek, above n 30.

<sup>108</sup> Ibid.



As one commentator has put it, ‘the dominant institutions of contemporary societies...have lost their capacity to govern the spheres of human activity for which they are deemed responsible in such a way as to maintain the common good’.<sup>109</sup> Perhaps then, maintenance of the common good requires a different type of vision and system. Faunce suggests that such a system will be one that, ‘reverences all life on earth and in which the major players in political power seek to consistently apply universally applicable principles.’<sup>110</sup> Such a vision, he and others contend, is that of the ‘Sustainocene’.<sup>111</sup>

So then how, as the Commonwealth of Australian, are we to protect our common wealth and remake our legal system? This article contends that constitutional change is imperative. We are living at a Grotian moment in world history, and we cannot adequately address key environmental issues unless we broaden the foundations from which our societal structures draw inspiration.<sup>112</sup>

Current legal paradigms must critically assess and question underlying anthropocentric foundations of law and justice and embrace broader conceptions of the purview, and subsequently the function, of the law. Today more than ever before, we have available and at our disposal the immensity of cross-cultural and interdisciplinary reservoirs of knowledge.<sup>113</sup> The Australian Constitution is in need of restumping, and one of its key foundations must be environmental rights and protection.

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<sup>109</sup> Kotze, above n 5, 202. See also, Klaus Bosselmann et al, *Democracy, Ecological Integrity and International Law* (Cambridge Scholars Publishing, 2010) 2.

<sup>110</sup> Faunce, above n 5, 266.

<sup>111</sup> Ibid. See also, Bryan Furnass, ‘From Anthropocene to Sustainocene. Challenges and Opportunities’ (2012) Public Lecture. *Australian National University* 21 March 2012.

<sup>112</sup> See, Richard Falk, ‘On the Recent Further Decline of International Law’ (1983) *Legal Change: Essays in honour of Julius Stone* (Butterworths, 1983) 264, 272.

<sup>113</sup> Christopher Weeramantry, ‘The Grotius Lecture Series’ (1999) 14 *American University International Law Review* 1515, 1569.