

# CLIMATE CHANGE AND LAW: A GLOBAL CHALLENGE FOR LEGAL EDUCATION

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*Climate change is a global problem. This characterisation has major consequences for international law, domestic law and legal education. Drawing on legal developments, scholarship and pedagogy, this article has three main claims. First, it argues that lawyers dealing with climate change require proficiency across different areas of law, not just the law that seeks to limit greenhouse gas emissions. Secondly, to better understand how these areas of law fit together, and how they should fit together, the article points to relevant theories, including ideas relating to fragmentation and regime interaction within international law. Thirdly, the article examines ways in which legal education can encourage ethical and moral evaluations as well as strategic awareness, especially to ensure that legal action to address climate change does not perpetuate inequalities and injustice within the community of states. Legal education and law have important roles in mitigating climate change and in fostering a sensibility that recognises the unequal burdens between and within countries. In training the arbiters of global destiny, today's law schools must continue to critique the law's relationship with modern production and consumption patterns.*

## I INTRODUCTION

It is timely to consider the subject of climate change, law and legal education. We do so at a moment of heightened popular, intellectual and academic engagement. Youth are striking from their schools and filing legal challenges.<sup>1</sup> Scientists have been leaving their laboratories to join protest movements.<sup>2</sup> Writers 'wonder

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<sup>1</sup> Three cases are of particular note: (1) *Sharma v Minister for the Environment* (2021) 391 ALR 1 (see also *Sharma v Minister for the Environment* [No 2] [2021] FCA 774) ('Sharma'); (2) *O'Donnell v Commonwealth* [2021] FCA 1223; (3) *Waratah Coal Pty Ltd v Youth Verdict Ltd* [2020] QLC 33 ('Waratah Coal'). See also *Waratah Coal Pty Ltd v Youth Verdict Ltd* [No 2] [2021] QLC 4. These cases follow international leads such as *Juliana v United States of America*, 339 F Supp 3d 1062 (D Or, 2018). Cf *Juliana v United States of America* (9<sup>th</sup> Cir, No 18-36082, 17 January 2020). See also Laura Schuijers and Margaret A Young, 'Climate Change Litigation in Australia: Law and Practice in the Sunburnt Country' in Ivano Alogna, Christine Bakker and Jean-Pierre Gauci (eds), *Climate Change Litigation: Global Perspectives* (Brill, 2021) 47.

<sup>2</sup> Charlie J Gardner and Claire F R Wordley, 'Scientists Must Act on Our Own Warnings to Humanity' (2019) 3(9) *Nature Ecology & Evolution* 1271.

whether books are still an appropriate medium to convey the frightening speed of environmental upheaval'.<sup>3</sup> Medical professionals acknowledge climate change is a health emergency.<sup>4</sup> Eminent judges call for 'climate conscious lawyering' as part of daily professional and ethical duties.<sup>5</sup> Diplomats affirm the importance of education, training and public awareness in the global response to climate change.<sup>6</sup> Legal academics, responsible for shaping research, societal outreach, curriculum and epistemic priorities, must consider our disciplinary responsibilities.

Law is defined by, and operates within, a social and political context. It is one of the most rudimentary goals of legal education to show that this is so. As Australian jurist W Jethro Brown discussed in 1902, law schools should guide the student to pay attention 'to the ends which law serves, the ideas and wants out of which law develops, the economic relations from which it draws its chief meaning. ... [The student] will seek to gain, moreover, some intelligible idea of the evolution of legal systems.'<sup>7</sup> Over a century later, when the structure and excesses of modern-day production and consumption have led to an average temperature rise in Australia of 1.44 degrees,<sup>8</sup> it is imperative to understand how law might support climate change mitigation and adaptation or, conversely, how it might impede it.

Education has a special role for law and society, as Brown was well aware. Noting the general responsibilities of teachers, he called attention to their enhanced responsibilities in the modern state: 'the teacher in a democratic community is not merely training citizens', he wrote '[the teacher] is training the arbiters of the national destiny.'<sup>9</sup> While many of the problems Brown was confronting resonate with our times (from the challenge of monopolies to the welfare of children), others are out-dated.<sup>10</sup> And even as many of the problems Brown identified were the result of global pressures, the focus for him (and the academy at that time) was domestic law and the nation-state. Nowadays, as climate change causes temperature rises around the world, and collective

<sup>3</sup> Alan Weisman, 'Burning Down the House' (2019) 66(13) *New York Review of Books* 2.

<sup>4</sup> Australian Medical Association, 'Climate Change is a Health Emergency' (Media Release, 3 September 2019) <<https://ama.com.au/media/climate-change-health-emergency>>.

<sup>5</sup> Justice Brian J Preston, 'Climate Conscious Lawyering' (2021) 95(1) *Australian Law Journal* 51, 62.

<sup>6</sup> *Paris Agreement*, opened for signature 22 April 2016, [2016] ATS 24 (entered into force 4 November 2016) Preamble ('*Paris Agreement*').

<sup>7</sup> O M Roe, 'Jethro Brown: The First Teacher of Law and History in the University of Tasmania' (1977) 5 *University of Tasmania Law Review* 209, 221, citing W Jethro Brown, *The Study of the Law* (1902) 36.

<sup>8</sup> Australia's climate has warmed on average by 1.44 ± 0.24. See Commonwealth Scientific and Industrial Research Organisation and Bureau of Meteorology, *State of the Climate 2020* (Report, 2020) <<https://www.csiro.au/-/media/OnA/Files/State-of-the-Climate-2020.pdf>> ('2020 CSIRO Report').

<sup>9</sup> W Jethro Brown, 'The Underlying Principles of Modern Legislation' (John Murray, 1912) 307.

<sup>10</sup> See, eg, the framing of racial issues, *ibid* 283–329, which does not fit comfortably with modern Australia.

responses have taken the form of international law, transnational law and practice, national law and subnational law, how should legal education respond?

This article confronts the dilemma for law and legal education posed by the ‘global’ nature of climate change. In Part I of the article, I draw on my decade-long experience in teaching a legal subject on ‘Climate Change Law’ at the University of Melbourne Law School, together with broader research, scholarship and pedagogical trends.<sup>11</sup> I describe the global nature of the problem, and the tendency for responses to flow from different legal orders: domestic, international, transnational, national and subnational. Climate change mitigation alone involves a dizzying mix of treaties, private directives from transnational task forces, legislation and declarations from local councils, as well as case law from international tribunals and domestic courts. In Part II, I make three claims. First, I offer an argument about substantive law. Lawyers dealing with climate change — either in teaching, research, practice or broader advocacy — require proficiency across different areas of law, not just law seeking to limit greenhouse gas emissions. Secondly, to better understand how these areas of law fit together, and how they *should* fit together, there is a need to engage with theory — including but not limited to theories of fragmentation and regime interaction in international law.<sup>12</sup> Students should be encouraged to ask fundamental questions about the functions of legal rules, institutions and constitutional orders. Thirdly, legal education must incorporate a critical perspective, which encourages ethical and moral evaluations as well as strategic awareness. Engaging with critical perspectives also enables us to ensure that legal action to address climate change does not perpetuate structures within the international legal system that have historically marginalised and disadvantaged some members of the international community.

## II THE GLOBAL PROBLEM OF CLIMATE CHANGE

On the first day of the subject Climate Change Law, which I have taught as an elective for over 10 years at the Melbourne Law School, I situate our studies in the context of scientific developments — including the latest reports of the

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<sup>11</sup> For a survey of offerings in climate law in law schools, see Michael Mehling et al, ‘Teaching Climate Law: Trends, Methods and Outlook’ (2020) 32(3) *Journal of Environmental Law* 417. See also Amanda Kennedy et al (eds) *Teaching and Learning in Environmental Law: Pedagogy, Methodology and Best Practice* (Edward Elgar, 2021).

<sup>12</sup> See generally Margaret A Young (ed), *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press, 2012) (‘*Regime Interaction in International Law*’).

Intergovernmental Panel on Climate Change ('IPCC')<sup>13</sup> — and I inevitably include an arresting set of images of the latest climate-related disaster. In fact, I have a growing 'powerpoint slide pack' of bushfires (though a picture cannot show three billion animals that died or were displaced by the Australian fires last year),<sup>14</sup> floods (Queensland's experiences of 2017 will be replaced by New South Wales in 2021)<sup>15</sup> or mass coral bleaching in the Great Barrier Reef.<sup>16</sup> The visual display of catastrophic loss is not limited to Australia, of course. Although Australia is particularly vulnerable to climate change,<sup>17</sup> such impacts are occurring everywhere. This year, I will probably include the Texan deep freeze that led to deaths and billions of dollars of damage in the United States.<sup>18</sup> A ubiquitous image is of the polar bear, a species most Australians will never see, but whose plight is representative of biodiversity loss and individual suffering in faraway places.<sup>19</sup> Climate change is happening around the globe. The problem results from many ongoing activities which we think of as 'sectors': energy, agriculture, transport, building, and so on,<sup>20</sup> that occur in many places, especially the most industrialized nations with their massive legacy of fossil fuel use.<sup>21</sup> Climate change is a global problem. But what does this mean for *legal* solutions?

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<sup>13</sup> Intergovernmental Panel on Climate Change, *Climate Change 2014: Synthesis Report* (Report, 2015) Summary for Policy Makers ('2014 IPCC Special Report'); Intergovernmental Panel on Climate Change, *Global Warming of 1.5°C: An IPCC Special Report on the Impacts of Global Warming of 1.5°C Above Pre-Industrial Levels and Related Global Greenhouse Gas Emission Pathways, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, and Efforts to Eradicate Poverty* (Report, 2019); Intergovernmental Panel on Climate Change, *The Ocean and Cryosphere in a Changing Climate: A Special Report of the Intergovernmental Panel on Climate Change* (IPCC, 2019) Summary for Policy Makers ('2019 IPCC Special Report').

<sup>14</sup> World Wide Fund for Nature Australia, *Australia's 2019–2020 Bushfires: The Wildlife Toll* (Interim Report, 2020).

<sup>15</sup> Climate Council, *Intense Rainfall and Flooding: The Influence of Climate Change*, (Fact Sheet, 2017) <<https://www.climatecouncil.org.au/uploads/5d4fe61d7b3f68d156abd97603d67075.pdf>>. See, eg, Climate Council, 'Climate Change Opens Up the Gate to Historic NSW Floods', *Climate Council* (Article, 23 March 2021) <<https://www.climatecouncil.org.au/climate-change-nsw-floods/>>.

<sup>16</sup> See, eg, Andreas Dietzel et al, 'Long-Term Shifts in the Colony Size Structure of Coral Populations Along the Great Barrier Reef' (2020) 287(1936) *The Royal Society of Publishing Proceedings B* 20201432: 1–9.

<sup>17</sup> See, eg, 2020 CSIRO Report (n 8). See generally Peter Christoff (ed), *Four Degrees of Global Warming: Australia in a Hot World* (Taylor & Francis Group, 2013).

<sup>18</sup> Chris Sweeney, 'Texas Storm Offers Glimpse of How Climate Change Threatens Public Health', *Harvard T H Chan School of Public Health* (Article, 23 February 2021) <<https://www.hsph.harvard.edu/news/features/texas-storm-offers-glimpse-of-how-climate-change-threatens-public-health/>>; Justin Worland, 'The Texas Power Grid Failure is a Climate Change Cautionary Tale' *TIME Magazine* (online, 18 February 2021) <<https://time.com/5940491/texas-power-outage-climate/>>.

<sup>19</sup> See Cristina Mittermeier, 'Starving Polar Bear Photographer Explains Why She Couldn't Help', *National Geographic* (online, 11 February 2017) <<https://www.nationalgeographic.com/photography/article/mittermeyer-polar-bear-starving-climate-change>>.

<sup>20</sup> Climate Council, 'What Is Climate Change and What Can We Do About It?', *Climate Council* (Article, 16 October 2019) <<https://www.climatecouncil.org.au/resources/what-is-climate-change-what-can-we-do/#unique-identifier-2>>.

<sup>21</sup> 2014 IPCC Special Report (n 13) 5, 46.

The closest we have to global law in the contemporary moment is public international law, or the law of nations. As all law students know, international law governs the relations between states, who are in turn expected to represent the needs and welfare of their citizens and those in their territory.<sup>22</sup> It is to be found primarily in treaties and custom. And indeed, both treaties and custom include obligations of states to mitigate and adapt to climate change. The 1992 *United Nations Framework Convention on Climate Change* ('UNFCCC')<sup>23</sup> and the 2015 *Paris Agreement*<sup>24</sup> contain express obligations of states, including a collective obligation to hold the increase in global warming to 1.5 or 2 degrees Celsius above pre-industrial levels,<sup>25</sup> and the achievement of a net zero of greenhouse gas emissions by the second half of this century.<sup>26</sup> Customary international law, such as the obligation to prevent transboundary environmental harm, has long been confirmed by international courts and tribunals,<sup>27</sup> and a range of other international norms and institutions are climate-focussed or climate-related,<sup>28</sup> as will be discussed later in this article.

Does this mean climate change law operates solely within the international realm? That a legal subject on climate change is confined to public international law and the narrow set of laws and institutions we know as the climate regime? That domestic litigation on climate change — now compiled in Australian<sup>29</sup> and international databases<sup>30</sup> — is misplaced? Was Alsup J of the United States District Court for the Northern District of California correct when he dismissed a lawsuit against BP, Chevron, Exxon Mobil and others for their historic complicity in climate change?<sup>31</sup> He reasoned that '[e]veryone has contributed to the problem of

<sup>22</sup> For an important historic overview of Australian legal education and public international law (which begins with the British acquisition of Australia and its implications), see James Crawford, 'Teaching and Research in International Law in Australia' (1981–3) 10 *Australian Year Book of International Law* 176.

<sup>23</sup> *United Nations Framework Convention on Climate Change*, opened for signature 9 May 1992, 1771 UNTS 107 (entered into force 21 March 1994).

<sup>24</sup> *Paris Agreement* (n 6).

<sup>25</sup> *Ibid* art 2(1)(a).

<sup>26</sup> *Ibid* art 4: '[S]o as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century'.

<sup>27</sup> *Trail Smelter Arbitration (United States v Canada)* (Award, Charles Warren, Robert A E Greenshields and Jans Frans Hostie, March 11 1941) 3 *Report of International Arbitration Awards* 1905, 1965. See generally Rebecca M Bratspies and Russell A Miller (eds), *Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration* (Cambridge University Press, 2006).

<sup>28</sup> United Nations Secretary-General, *Gaps in International Environmental Law and Environment-Related Instruments: Towards a Global Pact for the Environment*, UN GAOR, 73<sup>rd</sup> sess, Agenda Item 14, UN Doc A/73/419 (30 November 2018).

<sup>29</sup> The University of Melbourne, *Australian Climate Change Litigation* (Database, 20 July 2021) <<https://law.app.unimelb.edu.au/climate-change/index.php>>.

<sup>30</sup> Joana Setzer and Rebecca Byrnes, *Global Trends in Climate Litigation: 2020 Snapshot* (Policy Report, 3 July 2020); Joana Setzer and Rebecca Byrnes, *Global Trends in Climate Litigation: 2019 Snapshot* (Policy Report, 4 July 2019); Sabin Center, *Climate Change Litigation Databases* (Database, 20 July 2021) <<http://climatecasechart.com/>>.

<sup>31</sup> *City of Oakland v BP PLC* (ND Cal, Nos C WHA, No C 17-06012 WHA, February 27 2018) ('City of Oakland').

global warming and everyone will suffer the consequences — the classic scenario for a legislative or international solution'.<sup>32</sup> The dangers raised in the plaintiffs' complaints, he found, were 'very real', but he concluded that as 'those dangers are worldwide ... [t]heir causes are worldwide ... [and] [t]he benefits of fossil fuels are worldwide ... [T]he problem deserves a solution on a more vast scale than can be supplied by a district judge or jury in a public nuisance case.'<sup>33</sup> It is my contention, by contrast, that law addressing the global problem of climate change operates not only at the national and international level, but also at the subnational and transnational one. What is more, it is developed by courts, lawmakers and administrators at each of those levels. These issues have profound implications for legal research, practice and education.

### III LEGAL RESEARCH, PRACTICE AND EDUCATION

The question for law and legal education cannot be answered through the example of one single (elective) law subject. It is imperative to consider the structure and conditions of legal education as a whole,<sup>34</sup> as well as broader societal conditions (as I learned when delivering a series of international law lectures at the State University of Saint Petersburg, Russia, in 2017). Yet, it is also instructive to consider what is taught when one seeks to teach 'Climate Change Law'.<sup>35</sup> In this Part, I make three arguments relating to the substance, theoretical context and critical engagement relevant to climate change law. By addressing these areas, scholars and practitioners will have tools to evaluate whether the framing of a climate problem as a question for another forum, as was done by Alsup J, is judicious deferral or audacious deflection.

#### A We Are All Climate Lawyers Now

A decade ago, my syllabus for Climate Change Law featured international and domestic climate-focussed legal developments. The *UNFCCC*, the *Kyoto Protocol*<sup>36</sup>

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<sup>32</sup> Ibid 12.

<sup>33</sup> Ibid 15.

<sup>34</sup> W Jethro Brown, for example, advocated full-time legal study and appropriate resources for staff to undertake legal research in his goals for legal education (the fulfilment of which seems less settled now since the COVID-19 pandemic): W Jethro Brown, 'The Purpose and Method of a Law School — Part I' (1902) 18(1) *Law Quarterly Review* 78; W Jethro Brown, 'The Purpose and Method of a Law School — Part II' (1902) 18(2) *Law Quarterly Review* 192, cited in Mark Lunney, 'Legal Émigrés and the Development of Australian Tort Law' (2012) 36(2) *Melbourne University Law Review* 494, 497.

<sup>35</sup> For a current survey of courses, degree programmes, teaching material, teaching methods and interdisciplinary approaches, see Mehling et al (n 11).

<sup>36</sup> *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 16 March 1998, 2303 UNTS 162 (entered into force 16 February 2005).

and its associated market mechanisms, including the ‘clean development mechanism’, occupied the first few sessions. As for any topic of international law, the relevant set of international legal obligations is not limited to treaties, and we considered custom as well as emerging principles.<sup>37</sup> Theoretical assumptions about sovereignty and collective action problems have been a constant point of debate.<sup>38</sup> How to translate scientific conceptions of a carbon budget (which globalise the question of how much carbon is left to burn)<sup>39</sup> with legal conceptions of territorial emissions and permanent sovereignty over natural resources is another. The learning would then move to a comparative analysis of domestic responses, which included carbon trading and carbon taxes.<sup>40</sup> The integrity of carbon markets has been an important focus of study for lawyers, as we referred to fraud and the risk of double-counting of credits.<sup>41</sup> We have spent a good deal of time studying the leading jurisdictions — British Columbia’s revenue-neutral carbon tax,<sup>42</sup> the European Union’s carbon trading scheme<sup>43</sup> — before circling back to Australia’s response. The yearly updates of lecture notes to record the fits and starts of Australia’s clean energy package has been a grim but necessary task.<sup>44</sup>

Over time, the syllabus has been revised to include laws outside the conceptual framework of climate-focussed greenhouse gas emission reduction

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<sup>37</sup> Expert Group on Global Climate Change Obligations, *Oslo Principles on Climate Change Obligations* (Eleven International Publishing, 2015); Global Network for the Study of Human Rights and the Environment, *Declaration on Human Rights and Climate Change* (Declaration, 2016) <<http://gnhre.org/declaration-human-rights-climate-change/>> (*‘Declaration on Human Rights and Climate Change’*).

<sup>38</sup> Whether the atmosphere is a ‘commons’ has been an important question that I have enjoyed discussing with Damien Lockie, with whom I co-taught between 2013 and 2017. See further Margaret A Young, ‘International Adjudication and the Commons’ (2019) 41(2) *University of Hawai’i Law Review* 353 (*‘International Adjudication and the Commons’*). On theory, see below Part III(B).

<sup>39</sup> Scientists have modelled the carbon budget in terms of planetary capacity, showing how much oil, coal and gas can be burned until the limit of two degrees Celsius. See, Yann Robiou du Pont and Malte Meinshausen, ‘Warming Assessment of the Bottom-up Paris Agreement Emissions Pledges’ (2018) 9(1) *Nature Communications* 4810.

<sup>40</sup> A useful resource from the World Bank Group provides an overview of domestic responses, in table form. See World Bank Group, *State and Trends of Carbon Pricing* (Report, May 2020) <<https://openknowledge.worldbank.org/bitstream/handle/10986/33809/9781464815867.pdf?sequence=4&isAllowed=y>>.

<sup>41</sup> Damien Lockie’s work remains the leader in the field. See, eg, *Clean Energy Law in Australia* (LexisNexis, 2012).

<sup>42</sup> See Brian Murray and Nicholas Rivers, ‘British Columbia’s Revenue-Neutral Carbon Tax: A Review of the Latest “Grand Experiment” in Environmental Policy’ (2015) 86 *Energy Policy* 674.

<sup>43</sup> See A Denny Ellerman, *Pricing Carbon: The European Union Emissions Trading Scheme* (Cambridge University Press, 2010).

<sup>44</sup> As captured yearly in the *Yearbook of International Environmental Law*. See, eg, Emma Jukić and Margaret A Young, ‘Australia’ (2013) 23(1) *Yearbook of International Environmental Law* 512. Seeing law graduates achieve their dream to work for Australia’s Department of Climate Change, only to have the Department disbanded by Tony Abbott, was another sombre experience.

and carbon trading.<sup>45</sup> Climate change is legally disruptive, forcing legal doctrines to respond and evolve.<sup>46</sup> The current situation can be summed up by the title of a roundtable at the 2021 Annual Meeting of the American Society of International Law: 'We Are All Climate Lawyers Now'.<sup>47</sup> Legal developments in *just the last few months* demonstrate the point, and I will list just eight:

1. Human rights lawyers are climate lawyers. The current and former United Nations Special Rapporteurs on Human Rights and the Environment have reportedly filed an amicus brief<sup>48</sup> in support of the group of Torres Strait Islanders who have challenged Australia at the Human Rights Committee for its failures to address climate change, submitting that these amount to violations of the International Covenant on Civil and Political Rights.<sup>49</sup> This follows an earlier Human Rights Committee ruling on climate displacement in 2020, brought by a national of Kiribati against New Zealand.<sup>50</sup>
2. Trade lawyers are climate lawyers. Notwithstanding ongoing efforts by Australia to reach a free trade agreement with the United Kingdom and the European Union, both of which have made net-zero commitments, Australia is facing the prospect of increased tariffs being applied to its exports if it fails to improve its climate response.<sup>51</sup> So-called 'border

<sup>45</sup> For a helpful survey of the body of legal rules and principles organised around the central problems of mitigating and adapting to climate change, see Jacqueline Peel, 'Climate Change Law: The Emergence of a New Legal Discipline' (2008) 32(3) *Melbourne University Law Review* 922.

<sup>46</sup> Elizabeth Fisher, Eloise Scotford and Emily Barritt, 'The Legally Disruptive Nature of Climate Change' (2017) 80(2) *Modern Law Review* 173.

<sup>47</sup> Panel with Carmen Gonzalez, Sailesh Mehta, Nilufer Oral, Hermann Ott, Margaret A Young and Rob Verchick (American Society of International Law, Online Panel, 25 March 2021). See also Margaret A Young, 'We Are All Climate Change Lawyers Now' (2021) 115 *American Society of International Law Proceedings*, doi:10.1017/amp.2021.123 (forthcoming).

<sup>48</sup> Marian Faa, 'Torres Strait Islander Complaint Against Climate Change Inaction Wins Backing of UN Legal Experts' *ABC News* (online, 11 December 2020) <<https://www.abc.net.au/news/2020-12-11/torres-strait-islander-complaint-against-climate-change-inaction/12972926>>.

<sup>49</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR'). For useful background on the relevance of ICCPR rights to life, freedom of movement, culture of minorities and privacy, including arts 6(1), 12, 17(1) and 27, see generally Owen Cordes-Holland, 'The Sinking of the Strait: The Implications of Climate Change for Torres Strait Islanders' Human Rights Protected by the ICCPR' (2008) 9(2) *Melbourne Journal of International Law* 405.

<sup>50</sup> Human Rights Committee, *Views: Communication No 2728/2016*, 127<sup>th</sup> sess, UN Doc CCPR/C/127/D/2728/2016 (7 January 2020) ('*Teitiota v New Zealand*'). The Kiribati national, who had had his asylum claim rejected by New Zealand, alleged New Zealand had violated his right to life because sea level rise and other effects of climate change made Kiribati increasingly uninhabitable.

<sup>51</sup> Hans van Leeuwen, 'Australia Out of the "Climate Club" as EU Advances Carbon Border Tax', *Australian Financial Review* (online, 7 February 2021) <<https://www.afr.com/world/europe/australia-out-of-the-climate-club-as-eu-advances-carbon-border-tax-20210205-p5703j>>. See also Committee on the Environment, Public Health and Food Safety, 'Carbon Border



carbon adjustments', which could be imposed by the European Union as early as next year, are discussed at a time when the United Nations Secretary-General, together with President Biden, has called for new disciplines on fossil fuel subsidies,<sup>52</sup> which, like fisheries subsidy reform, can address the perverse incentives that make the production of oil, gas and coal far cheaper than it should be.<sup>53</sup>

3. Environmental lawyers are climate lawyers. Proposals for a new environmental treaty are gaining momentum, with the Coalition for the Global Pact for the Environment, supported by Laurent Fabius, Chair of the Paris Climate Conference, seeking a stronger and broader set of international protections.<sup>54</sup> I note also that a move towards 'rights for nature' is recognised in the legal orders of countries such as New Zealand and Colombia, which have granted legal personhood to rivers and mountains.<sup>55</sup> We may ask whether the preambular reference to 'Mother Earth'<sup>56</sup> in the Paris Agreement aligns sufficiently with the laws and customs of indigenous peoples, whose traditional knowledge and cultures are far removed from the extractive, emissions-intensive modern economies, and whose sacred reserves might provide a model for ecological restoration.<sup>57</sup>

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Adjustment Mechanism', *European Parliament Committees* (Web Page) <<https://www.europarl.europa.eu/committees/en/carbon-border-adjustment-mechanism/product-details/20201009CDT04181>>. On border carbon adjustments, see Michael A Mehling et al, 'Designing Border Carbon Adjustments for Enhanced Climate Action' (2019) 113(3) *American Journal of International Law* 433.

<sup>52</sup> United Nation Secretary-General, 'End Fossil Fuel Subsidies, Bolster Funding for Renewable Energy Particularly in Africa, Secretary-General Tell Round Table on Clean Power Transition' (Press Release, 11 January 2021) <<https://www.un.org/press/en/2021/sgsm20530.doc.htm>>; Exec Order No 14,008, 86 FR 7619 (27 January 2021) <<https://www.federalregister.gov/documents/2021/02/01/2021-02177/tackling-the-climate-crisis-at-home-and-abroad>>. See especially s 209.

<sup>53</sup> Margaret A Young, 'Energy Transitions and Trade Law: Lessons from the Reform of Fisheries Subsidies' (2017) 17(3) *International Environmental Agreements: Politics, Law and Economics* 371.

<sup>54</sup> Le Club des Juristes, 'Toward a Global Pact for the Environment' (White Paper, September 2017) <<https://globalpactenvironment.org/uploads/White-paper-Global-pact-for-the-environment.pdf>> ('2017 White Paper'). See also Yann Aguila and Jorge E Viñuales, 'A Global Pact for the Environment: Conceptual Foundations' (2019) 28(1) *Review of European, Comparative and International Environmental Law* 3, 7.

<sup>55</sup> See, eg, David R Boyd, *The Rights of Nature: A Legal Revolution That Could Save the World* (ECW Press, 2017). See also Katherine Sanders, "'Beyond Human Ownership"? Property, Power and Legal Personality for Nature in Aotearoa New Zealand' (2017) 30(2) *Journal of Environmental Law* 207, 208. See generally Erin O'Donnell, *Legal Rights for Rivers: Competition, Collaboration and Water Governance* (Routledge, 2019).

<sup>56</sup> *Paris Agreement* (n 6) Preamble.

<sup>57</sup> *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, UN Doc A/HRC/37/59 (24 January 2018) 16–20. I note too that indigenous practices such as traditional fire burning techniques are demonstrated

4. Tort lawyers are climate lawyers. Eight young Australians have alleged that the Federal Minister for the Environment has breached a duty of care in approving the Whitehaven coal extension in northern New South Wales.<sup>58</sup> The case forces a legal appraisal of the relationship between the Minister and the teenagers, who will be strongly impacted by climate change but who have no voting rights.<sup>59</sup> This litigation operates alongside the claim brought by Bushfire survivors alleging breaches of duty by the NSW Environment Protection Authority.<sup>60</sup> The NSW Land and Environment Court has recently ruled that the applicants are permitted to adduce evidence on global warming and the Paris Agreement target from Australia's former Chief Scientist in their claim.
5. Corporate lawyers are climate lawyers. The challenge to superannuation fund Rest brought by Mark McVeigh has settled, with the fund agreeing to make changes toward a net-zero portfolio and report in line with the transnational Taskforce on Climate and Financial Disclosures.<sup>61</sup> Other recent developments in corporate law and climate change include the increasing use of shareholder resolutions to hold major companies to account for the climate impacts of their activities,<sup>62</sup> and the 2021 update of a series of legal opinions authored by Noel Hutley SC and Sebastian Hartford Davis on the implications of climate change for Australian company directors' duties.<sup>63</sup>

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to mitigate climate change and are now used as partial fulfilment of Australia's international climate pledges while also benefiting cultural rights. See Maureen F Tehan et al, *The Impact of Climate Change Mitigation on Indigenous and Forest Communities: International, National and Local Law Perspectives on REDD+* (Cambridge University Press, 2017) 31. For other examples of traditional knowledge, see, eg, David M Forman, 'Applying Indigenous Ecological Knowledge for the Protection of Environmental Commons: Case Studies from Hawai'i for the Benefit of "Island Earth"' (2019) 41(2) *University of Hawai'i Law Review* 300.

<sup>58</sup> Sharma (n 1); Schuijers and Young (n 1) 63–4.

<sup>59</sup> Laura Schuijers, 'These Aussie Teens Have Launched a Landmark Climate Case Against the Government. Win or Lose, It'll Make a Difference', *The Conversation* (online, 10 September 2020) <<https://theconversation.com/these-aussie-teens-have-launched-a-landmark-climate-case-against-the-government-win-or-lose-itll-make-a-difference-145830>>.

<sup>60</sup> *Bushfires Survivors for Climate Action Inc v Environment Protection Authority* [2020] NSWLEC 152.

<sup>61</sup> Rest, 'Statement from Retail Employees Superannuation Trust' (Media Release, 2 November 2020) <<https://equitygenerationlawyers.com/wp/wp-content/uploads/2020/11/Statement-from-Rest-2-November-2020.pdf>>.

<sup>62</sup> Australasian Centre for Corporate Responsibility, 'Australian ESG Shareholder Resolutions', *Shareholder Hub* (Web Page, 20 July 2021) <<https://www.accr.org.au/research/australian-esg-resolution-voting-history/>>. This database shows the 2020 year-on-year increase in shareholder resolutions dealing with environmental and social issues, including climate-related lobbying, Paris Agreement goals and targets, and coal closure dates, put to the ASX 200.

<sup>63</sup> Noel Hutley and Sebastian H Davis, *Climate Change and Directors Duties* (Further Supplementary Memorandum of Opinion, 23 April 2021) <<https://cpd.org.au/wp-content/uploads/2021/04/Further-Supplementary-Opinion-2021-3.pdf>>. The original memorandum of opinion was provided in 2016, with the first supplement issued in 2019. Sarah Barker instructed on the brief.

6. Government lawyers are climate lawyers. Policy responses to build back better after COVID-19, as suggested by domestic bodies,<sup>64</sup> as well as the Organisation for Economic Co-operation and Development, the World Bank, and others,<sup>65</sup> seek to align long-term emission reduction goals, resilience to climate impacts and a halt to biodiversity loss. In Australia, it is State governments that have often led the way on climate policy — for example, in September 2020 the Victorian government announced a market sounding process as part of its second Victorian Renewable Energy Target (‘VRET’) auction. The first VRET auction in 2018 supported 928 megawatts of new renewable energy projects in Victoria while aiming to contribute to capital investment and job creation.<sup>66</sup>
7. Local government lawyers are climate lawyers. A recent ranking of declarations of climate emergencies by Melbourne City Council and other local councils in Australia estimates over 35% coverage of such declarations by population.<sup>67</sup> Binding declarations now number over two thousand around the world.<sup>68</sup> With physical climate adaptation responses including protection (including through engineered structures such as seawalls), accommodation (including through building codes) and retreat,<sup>69</sup> local councils have recognised the need to be front-footed in planning and community engagement.
8. Law of the sea specialists are climate lawyers. The International Law Commission has released an issues paper on the legal and jurisdictional implications of sea-level rise, which has advanced over 15 cm during the

<sup>64</sup> Gabriella Marchant, ‘Could a “Green Army” Save Not Just the Environment, but Economy from COVID-19?’ *ABC News* (online, 26 May 2020) <<https://www.abc.net.au/news/2020-05-27/farmers-and-environmentalists-push-for-a-green-army/12278290>>.

<sup>65</sup> Organisation for Economic Co-operation and Development, *Building Back Better: A Sustainable Resilient Recovery after COVID-19* (Report, 5 June 2020) <<http://www.oecd.org/coronavirus/policy-responses/building-back-better-a-sustainable-resilient-recovery-after-covid-19-52b869f5/>>.

<sup>66</sup> Department of Environment, Land, Water and Planning (Vic), *Second VRET Auction* (Consultation Paper, September 2020).

<sup>67</sup> ‘Climate Emergency Declarations in 2,307 Jurisdictions and Local Governments Cover 1 Billion Citizens’ *Climate Emergency Declaration* (Web Page, 30 October 2021) <https://climateemergencydeclaration.org/climate-emergency-declarations-cover-15-million-citizens/>. Note that the exact figure cited on the spreadsheet is 37.53%.

<sup>68</sup> *Ibid*: the figure is given as 2,307 local governments. See, eg, City of Melbourne, ‘Future Melbourne Committee Minutes’, *City of Melbourne* (Meeting Number 60, 16 July 2019) <<https://www.melbourne.vic.gov.au/about-council/committees-meetings/meeting-archive/MeetingAgendaItemAttachments/864/JUL19%20FMC%20CONFIRMED%20MINUTES.PDF>>. Note that the City of Melbourne declared, inter alia, that ‘climate change and mass species extinction pose serious risks to the people of Melbourne and Australia, and should be treated as an emergency’: at 5.

<sup>69</sup> 2019 *IPCC Special Report* (n 13).

20th century.<sup>70</sup> The IPCC has demonstrated that the ocean is already ‘warmer, more acidic and less productive’.<sup>71</sup> A ruling on the obligations of states and organisations for the protection of the oceans could be meaningfully pursued at the International Tribunal for the Law of the Sea (‘ITLOS’).<sup>72</sup> Meanwhile, nature-based solutions, including ‘blue carbon’ sequestration, promise mitigation opportunities,<sup>73</sup> merging aspirations for the blue economy and climate mitigation.

These rapid developments are just a sample. I could also have mentioned the expansion of refugee law, disaster responses, practices of central banks, and national security arrangements, but I know that this dizzying array is fatiguing for my students and overwhelming for non-lawyers. We cannot hope to cover all of this in one legal career, let alone one law degree! Yet it is also clear that legal education must retain an agility to operate in international, comparative, domestic and subnational domains, across diverse areas of public and private law.<sup>74</sup>

## B Theory about Law and Legal Orders

The need for agility and proficiency takes me to my second claim, which might be presented in contrast as a need for slow engagement with theory. It is not enough to keep track of these developments — a true engagement requires a deeper understanding of the pluralities of legal orders and their underlying foundations, which helps develop normative approaches.

There are many examples of different areas clashing, deferring, cooperating or becoming co-opted on climate change issues. This phenomenon can be thought through in terms of legal pluralism, polycentric governance, systems theory, earth-systems jurisprudence, theoretical and historical accounts of the

<sup>70</sup> International Law Commission, *Sea-Level Rise in Relation to International Law: First Issues Paper* by Bogdan Aurescu and Nilüfer Oral, *Co-Chairs of the Study Group on Sea Level Rise in Relation to International Law*, UN Doc A/CN.4/740 (28 February 2020). See also David Freestone and Millicent McCreath, ‘Climate Change, the Anthropocene and Ocean Law: Mapping the Issues’ in Jan McDonald, Jeffrey McGee and Richard Barnes (eds), *Research Handbook on Climate Change, Oceans and Coasts* (Edward Elgar, 2020) 49.

<sup>71</sup> *2019 IPCC Special Report* (n 13); see also United Nations Secretary-General, *Oceans and the Law of the Sea*, UN GAOR, 72<sup>nd</sup> sess, Preliminary List Item 78(a), UN Doc A/72/70 (6 March 2017).

<sup>72</sup> Philippe Sands, ‘Climate Change and the Rule of Law: Adjudicating the Future in International Law’ (2016) 28(1) *Journal of Environmental Law* 19, 33.

<sup>73</sup> Ove Hoegh-Guldberg et al, ‘The Ocean as a Solution to Climate Change: Five Opportunities for Action’, *Resources* (Institute Report, 2019) <<http://www.oceanpanel.org/climate>>. See also Justine Bell-James, ‘“Blue Carbon” and the Need to Integrate Mitigation, Adaptation, and Conservation Goals within the International Climate Law Framework’ in Neil Craik et al (eds), *Global Environmental Change and Innovation in International Law* (Cambridge University Press, 2018) 81.

<sup>74</sup> A separate point also notes that this is just *within* the law — there is a need to work across disciplines such as science and economics, as sought by the just-launched Melbourne Climate Futures, headed by my Melbourne Law School colleague, Professor Jacqueline Peel.

commons and common-pool resources,<sup>75</sup> and many other contributions, but let me focus specifically on theories relating to the fragmentation and diversification of international law.<sup>76</sup> We understand that law and institutions tend to isolate around functional objectives such as trade liberalisation, human rights, the law of the sea, and so on. At times, there is a sense of ‘all hands on deck’.<sup>77</sup> Yet, the regimes are sometimes quite astoundingly divergent: witness the United States’ challenge to India’s solar cell program at the World Trade Organization (‘WTO’),<sup>78</sup> launched at a time when countries were trying to convince India to join the *Paris Agreement*. There have been deferrals, such as the World Heritage Committee’s aversion to imposing mitigation obligations on states parties to the *World Heritage Convention*<sup>79</sup> after climate petitions on behalf of the heritage-listed Great Barrier Reef.<sup>80</sup> There have also been avoidances, negotiated by powerful states, such as the decision to exclude fossil fuel subsidy reform from the *Paris Agreement*.<sup>81</sup> Methodological and conceptual problems may emerge when human rights treaties designed to protect individuals within a party’s territory or jurisdiction are invoked to ground generalized mitigation obligations.<sup>82</sup>

Theoretical engagement with fragmentation and regime interaction demonstrates that collisions between norms are inevitable within the international legal system. As Martti Koskenniemi has shown, regimes are often hegemonic, in the sense that they are both operationally closed, and expansively imposing their particular outlook and epistemic preferences on the world.<sup>83</sup> The trade regime, for example, with its compulsory dispute settlement and strong institutions, is more powerful than the multilateral environment agreements seeking to conserve biodiversity or safeguard migratory species.<sup>84</sup> (The historic reasons for this, such as the hope and belief that free trade will lead to perpetual

<sup>75</sup> See further Young, ‘International Adjudication and the Commons’ (n 38).

<sup>76</sup> See generally Young (ed), *Regime Interaction in International Law* (n 12).

<sup>77</sup> See generally Remi Moncel and Harro van Asselt, ‘All Hands on Deck! Mobilizing Climate Change Action beyond the UNFCCC’ (2012) 21(3) *Review of European, Comparative & International Environmental Law* 163.

<sup>78</sup> *India — Certain Measures Relating to Solar Cells and Modules*, WTO Doc WT/DS456/AB/R (16 September 2016) (Appellate Body Report).

<sup>79</sup> *Convention for the Protection of the World Cultural and Natural Heritage*, opened for signature 16 November 1972, 1037 UNTS 151 (entered into force 17 December 1975).

<sup>80</sup> Erica J Thorson, ‘The World Heritage Convention and Climate Change: The Case for a Climate-Change Mitigation Strategy beyond the Kyoto Protocol’ in William C G Burns and Hari M Osofsky (eds), *Adjudicating Climate Change: State, National and International Approaches* (Cambridge University Press, 2009) 255. See also Margaret A Young, ‘Climate Change Law and Regime Interaction’ (2011) 5(2) *Carbon & Climate Law Review* 147.

<sup>81</sup> Meinhard Doelle, ‘The Paris Agreement: Historic Breakthrough or High Stakes Experiment?’ (2016) 6(1–2) *Climate Law* 1, 14.

<sup>82</sup> Benoit Mayer, ‘Climate Change Mitigation as an Obligation Under Human Rights Treaties?’ (2021) 115(3) *American Journal of International Law* 409.

<sup>83</sup> Martti Koskenniemi, ‘Hegemonic Regimes’ in Margaret A Young (ed), *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press, 2012) 305, 318.

<sup>84</sup> Margaret A Young, ‘Fragmentation’ in Lavanya Rajamani and Jacqueline Peel (eds), *Oxford Handbook of International Environmental Law* (Oxford University Press, 2021) 85.

peace, need to be understood, especially at a time when sanctions on Australian coal by our powerful trading partners might be perceived as either threateningly nationalistic or environmentally enlightened). Understanding these dynamics is important for understanding processes of regime interaction and whether regime encounters are likely to lead to integration, or whether such integration will be resisted, and the competing norms unresolved.

Theoretical engagement demonstrates that international regimes are ill-equipped to allocate priority between norms, because they are limited to a functional orientation that often leads to ‘tunnel vision’ (in the words of Gunther Teubner)<sup>85</sup> and environmental blindspots.<sup>86</sup> This is one reason to support the *Global Pact for the Environment* (*Global Pact*).<sup>87</sup> Its proposed right of every person ‘to live in an ecologically sound environment adequate for their health, well-being, dignity, culture and fulfilment’<sup>88</sup> supports enhanced implementation and enforcement in domestic settings. Moreover, by centralising fundamental principles of international environmental law in a single instrument, the *Global Pact* is intended to counteract the proliferation of environmental law that has led to its fragmentation and a lack of coherence in competing environmental commitments.<sup>89</sup> While a sectoral approach to environmental law allows for some flexibility and efficiency in dealing with environmental issues, the existing approach to environmental regulation has led to a lack of clarity with respect to overlapping and inconsistent legal obligations. This is exacerbated by bilateral, regional and multilateral bases of regulation. The *Global Pact* represents an attempt to address these issues of fragmentation, by consolidating key principles of international environmental law in a binding, unitary instrument.<sup>90</sup>

More generally, the phenomenon of fragmentation invites us to think critically about the role and function of international law. How do we reconcile our participation as consumers and concerned citizens in a global economy with the foundations of international law, which are so often disconnected from direct citizen engagement? How do we – as Australians – account for the carbon

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<sup>85</sup> Gunther Teubner and Peter Korth, ‘Two Kinds of Legal Pluralism: Collision of Transnational Regimes in the Double Fragmentation of World Society’ in Margaret A Young (ed), *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press, 2012) 23; Gunther Teubner, ‘Societal Constitutionalism without Politics? A Rejoinder’ (2011) 20(2) *Social & Legal Studies* 248.

<sup>86</sup> See generally Oren Perez, ‘Ecological Sensitivity and Global Legal Pluralism: Rethinking the Trade and Environment Conflict’ (Hart Publishing, 2004).

<sup>87</sup> ‘Where Are We Now?’, *Global Pact for the Environment* (Web Page, 2021) <<https://globalpactenvironment.org/en/the-pact/where-are-we-now/>>. I note that I have been contributing as a member of the expert working group since 2017. See also above Aguila and Viñuales (n 54).

<sup>88</sup> *Towards a Global Pact for the Environment*, GA Res 72/277, UN GAOR, 72<sup>nd</sup> sess, Agenda Item 14, UN Doc A/RES/72/277 (14 May 2018).

<sup>89</sup> Le Club des Juristes, ‘2017 White Paper’ (n 54) 26.

<sup>90</sup> See Margaret A Young, ‘Global Pact for the Environment: Defragging International Law?’ *EJIL:Talk!* (Blog Post, 29 August 2018) <<https://www.ejiltalk.org/global-pact-for-the-environment-defragging-international-law/>>.

footprint of the goods and services that we import and consume, and the fossil fuels that we export and profit from? Could we justify seeking a territorial extension — in the sense used provocatively by Joanne Scott — to our regulatory power?<sup>91</sup> Can trade measures to address climate change be made consistently with the rules on jurisdiction and extraterritoriality that have been developed to placate sovereign states and preserve peace?<sup>92</sup> The ongoing search for global constitutionalism — for a polity and morality that guides global relations — remains fundamental to climate change.

For the domestic constitutional context, too, climate change demands close theoretical engagement with established theories of sovereignty and public law, as well as new ideas around ecocentric governance, wild law, rights for nature (including non-humans), and so on. To take one concept grappled with in the very first semester of a law degree: what does *federalism* mean for climate change law? Understanding the federal responsibilities for our 2020 calamitous bushfires, as investigated by the Royal Commission into National Natural Disaster Arrangements,<sup>93</sup> may require an historic understanding of the functional orientations — or ‘tunnel vision’ — of the Australian colonies, which behaved perhaps more like modern day WTO members in their interstate commerce and relations. The Commission concluded that ‘Australia needs a national approach to natural disasters’, in the form of a “whole-of nation”, “whole-of government” and “whole of society” cooperation and effort’.<sup>94</sup> While the states should retain their primary responsibility for disaster response, a national response, coordinated by the federal government, would mean enhanced cooperation, resource sharing, and availability of skills, technology, data and information. Understanding the respective roles and competencies of the Australian federal and state governments is particularly relevant to climate change in the light of the disjunct between the approaches of the federal government and state governments on the issue, as state governments adopt more ambitious emissions reduction targets without the backing of federal government policy.

What of the *separation of powers*? That concept has underpinned many of the dismissals of climate claims by Australian and other courts in the past. For instance, in dismissing the plaintiffs’ claim in *City of Oakland v BP PLC*, Alsup J held that ‘courts must also respect and defer to the other co-equal branches of government when the problem at hand clearly deserves a solution best addressed

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<sup>91</sup> Joanne Scott, ‘Extraterritoriality and Territorial Extension in EU Law’ (2014) 62(1) *American Journal of Comparative Law* 87, 89.

<sup>92</sup> Margaret A Young, ‘Trade Measures to Address Climate Change: Territory and Extraterritoriality’ in Panagiotis Delimatsis (ed), *Research Handbook on Climate Change and Trade Law* (Edward Elgar, 2016) 329.

<sup>93</sup> *Royal Commission into National Natural Disaster Arrangements* (Report, October 2020).

<sup>94</sup> *Ibid* 23 [30].

by those branches'.<sup>95</sup> However, it may be that the efficacy of this fundamental tenet needs renewed attention.<sup>96</sup> An assumption that courts lack the democratic legitimacy that necessarily supports the law-making functions of other branches of governments may not be strictly correct.<sup>97</sup> 'International lobbying law' is an area of study that documents, for example, the two-prong approach of the World Coal Association in targeting domestic and international law-making.<sup>98</sup> Factoring in the voice and access of fossil fuel lobbyists within the executive branch<sup>99</sup> may well displace the theoretical assumptions behind the separation of powers and alter a judicial sensibility whose due reticence can legitimately be replaced by due responsiveness.

### C Critical Engagement

This brings me to my third claim: that climate change demands critical engagement in legal education. Recognising that law functions as a system of beliefs that make certain inequalities seem natural has been a key contribution of feminist legal studies by scholars such as Hilary Charlesworth.<sup>100</sup> In the climate context, expecting that climate change mitigation should be advanced without regard to underlying inequalities and impacts would be a misstep that critical engagement can expose. In our work on 'reducing emissions from deforestation and forest degradation', or REDD+, my Melbourne Law School colleagues Maureen Tehan, Lee Godden, Kirsty Gover and I found that climate change mitigation has disparate impacts on indigenous and forest communities.<sup>101</sup> REDD+ policies promoting carbon sequestration risk displacing the very people who have made the least contribution to the problem of climate change. We show how the risk differs depending on the local context of REDD+ implementation, the quality of free prior and informed consent, the protection of rights, the access to

<sup>95</sup> *City of Oakland* (n 31) 16.

<sup>96</sup> Schuijers and Young (n 1) 56. To be clear, I do not mean to support any erosion of the independence of the judiciary. Such erosion is occurring through other means, as depicted by Stephen Gardbaum, 'The Counter-Playbook: Resisting the Populist Assault on the Separation of Powers' (2020) 59(1) *Columbia Journal of Transnational Law* 1. Rather, my focus here is on the ability of an independent judiciary to act within law, based on evidence, in the context of a lack of legislative and executive climate policy.

<sup>97</sup> Laura Burgers, 'Should Judges Make Climate Change Law?' (2020) 9(1) *Transnational Environmental Law* 55, 60.

<sup>98</sup> Melissa J Durkee, 'International Lobbying Law' (2018) 127(7) *Yale Law Journal* 1742, 1747.

<sup>99</sup> See the joint letter by former Australian Prime Ministers Kevin Rudd and Malcolm Turnbull, 'Australia's Ambition on Climate Change is Held Back by a Toxic Mix of Rightwing Politics, Media and Vested Impacts', *The Guardian* (online, 21 April 2021) <<https://www.theguardian.com/commentisfree/2021/apr/21/australias-ambition-on-climate-change-is-held-back-by-a-toxic-mix-of-rightwing-politics-media-and-vested-interests>>.

<sup>100</sup> See, eg, Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85(4) *American Journal of International Law* 613.

<sup>101</sup> Tehan et al (n 57). See also Julia Dehm, *Reconsidering REDD+: Authority, Power and Law in the Green Economy* (Cambridge University Press, 2021).



benefits and the practices of the international funding institutions. From an international perspective, we also show that a recipient state's membership of a regime, such as the *Convention on Biological Diversity*,<sup>102</sup> the *Nagoya Protocol*<sup>103</sup> or the International Labour Organisation's *Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries*,<sup>104</sup> alters that state's legal obligations and protections, and thus tempers any overarching evaluation of REDD+.

Critical engagement can also maintain pressure for the implementation of principles that are often forgotten by states, such as the principle of 'common but differentiated responsibilities and respective capabilities, in the light of different national circumstances', and the principle of 'intergenerational equity'.<sup>105</sup> These principles may well find articulation in Australian cases such as *Sharma v Minister for Environment* and the Youth Verdict challenge to Waratah Coal's Galilee Coal Project.<sup>106</sup> A motion by Waratah Coal to strike out the challenge has been dismissed by the Queensland Land Court.<sup>107</sup> The members of 'Youth Verdict' call attention to the fact that they will be the most impacted by climate change. In line with my comments on theoretical engagement, the plight of young people demands a critical and philosophical assessment of the beneficiaries of our law and legal system. The Youth Verdict case is also seeking to protect the Bimblebox Nature Refuge. In this way, it can be said to resonate with the NGO-led global 'Declaration on Human Rights and Climate Change', which aims to protect the rights of 'all human beings, animals and living systems'.<sup>108</sup>

The Youth Verdict case will play out differently from others around the world, such as the Dutch *Urgenda Foundation v Netherlands* litigation,<sup>109</sup> but could mark an important turning point in the development of rights-based approaches to climate change in Australia. Although the Australian constitution includes only weak protections, the extension of human rights in Australian jurisdictions by the development of human rights charters in Victoria, the Australian Capital Territory, and, most recently, Queensland,<sup>110</sup> marks this case as particularly

<sup>102</sup> *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993).

<sup>103</sup> *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity*, opened for signature 29 October 2010, UN Doc UNEP/CBD/COP/10/L.43/Rev.1 (entered into force 12 October 2014).

<sup>104</sup> *Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries*, opened for signature 27 June 1989, 1650 UNTS 383 (entered into force 5 September 1991).

<sup>105</sup> *Paris Agreement* (n 6) Preamble. See also art 2(2).

<sup>106</sup> *Sharma* (n 1); *Waratah Coal* (n 1).

<sup>107</sup> *Waratah Coal* (n 1).

<sup>108</sup> *Declaration on Human Rights and Climate Change* (n 37). See generally, Kirsten Davies et al, 'The Declaration on Human Rights and Climate Change: A New Legal Tool for Global Policy Change' (2017) 8(2) *Journal of Human Rights and the Environment* 217.

<sup>109</sup> *Stichting Urgenda v Government of the Netherlands (Ministry of Infrastructure and Environment)*, *Rechtbank Den Haag* [Hague District Court], C/09/456689/HA ZA 13-1396 (24 June 2015).

<sup>110</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2004* (ACT); *Human Rights Act 2019* (Qld).

important.<sup>111</sup> The Youth Verdict case is the first in which a state human rights instrument (in this case, Queensland's *Human Rights Act*) has been used as a basis for climate objections to a mining application. The Queensland *Human Rights Act* came into effect on 1 January 2020. If the claim is successful, it could lead to a broader trend of human-rights-based climate claims in other Australian jurisdictions.<sup>112</sup> Rights-based approaches to climate change can help reframe the issue as a human one, with human, not just environmental, ramifications.<sup>113</sup> This reflects global and international trends towards recognising human-rights dimensions of climate change, and ideas of 'climate justice'.<sup>114</sup>

Aside from honing in on rights, critical perspectives acknowledge all environmental problems to be human ones, 'from the planet to the parish', as historian Tom Griffiths emphasises.<sup>115</sup> The proliferation of the term 'Anthropocene' in science and the humanities shows that the academy acknowledges this point.<sup>116</sup> Tim Stephens has argued that the Anthropocene has made clear that a distinction between the human and natural worlds can no longer be maintained, and that this interdependence and integration requires 'a wholesale re-examination and re-imagination of international environmental law's objectives', drawing on other disciplines such as Earth system science and Earth systems governance literature.<sup>117</sup> A critical perspective of climate law here in Australia recognises that our legal and political foundations have contributed to the global problem of climate change. The displacement of indigenous lore and culture, and the logging by settlers that saw drastic removal of carbon sinks, are examples from Australian history that are often hidden from legal practice. Maintaining our interrogation into the source and origin of our law is as important as our ongoing quest for future legal solutions.

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<sup>111</sup> Justine Bell-James and Briana Collins, 'Queensland's Human Rights Act: A New Frontier for Australian Climate Change Litigation?' (2020) 43(1) *University of New South Wales Law Journal* 3.

<sup>112</sup> Justine Bell-James, 'Comment: These Young Queenslanders Are Taking On Clive Palmer's Coal Company and Making History for Human Rights', *SBS* (online, 19 May 2020) <<https://www.sbs.com.au/news/the-feed/comment-these-young-queenslanders-are-taking-on-clive-palmer-s-coal-company-and-making-history-for-human-rights>>.

<sup>113</sup> Bell-James and Collins (n 111) 9.

<sup>114</sup> See, eg, Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights*, 10th sess, Agenda Item 2, UN Doc A/HRC/10/61 (15 January 2009); *Paris Agreement* (n 6) Preamble.

<sup>115</sup> See, eg, Tom Griffiths, 'The Planet is Alive: Radical Histories for Uncanny Times' (2019) 63 *Griffith Review*.

<sup>116</sup> See, eg, Tim Stephens, 'Reimagining International Environmental Law in the Anthropocene' in Louis J Kotzé (ed), *Environmental Law and Governance for the Anthropocene* (Hart Publishing, 2017) 31. See also Rakhyun E Kim and Klaus Bosselmann, 'International Environmental Law in the Anthropocene: Towards a Purposive System of Multilateral Environmental Agreements' (2013) 2(2) *Transnational Environmental Law* 285.

<sup>117</sup> Tim Stephens, 'What Is the Point of International Environmental Law Scholarship in the Anthropocene?' in Ole W Pedersen (ed), *Perspectives on Environmental Law Scholarship: Essays on Purpose, Shape and Direction* (Cambridge University Press, 2018) 121, 138.

## IV CONCLUSION

Climate change is a global problem but solutions must not be limited to international law. There are no immediate answers to the question of which form of authority can provide a solution to the global problem of climate change. Nor are there clear boundaries around what is appropriate and just in addressing climate change at the local, national and international level. I have identified three areas of focus for legal education. First, we must embrace the relevance of different areas of legal specialisation to legal solutions and work hard in understanding how different norms and legal orders fit together. It is not enough, alas, to identify climate law from a five-word proximity search of the acronym 'GHGs'. Secondly, we must revisit theoretical foundations of our legal orders, while recognising that these were laid during a time when climate change was unknown and other injustices were wilfully ignored. When working within a system to find solutions to the problem, we cannot lose sight of the fact that the system may be structured in a way that privileges certain views and approaches. Thirdly, we must maintain a critical perspective that allows us to decide where limited resources and energies are best-directed, and offers different ways of thinking through the appropriateness of proposed responses.

Critical perspectives also help us identify the use and misuse of jurisdictional conflicts. Mandate creep of international organisations can often be justified due to the urgency of the conditions I outlined at the beginning of this article. Yet, the globalising impulse may need to be checked if it obscures highly localised sources of the problem and the solution. Attention must be also given to the risk of derailing legal responses, not only the hoped-for cooperative steps that will be taken as states ratchet up their commitments under the *Paris Agreement*, but also the domestic litigation that is seeking to bring state and non-state actors to account. Recognising that many different actors, at many different levels, have a role to play in addressing climate change is a key contribution of scholarship. By way of example, I welcomed the reasoning of Preston CJ of the NSW Land and Environment Court in *Gloucester Resources Ltd v Minister for Planning*,<sup>118</sup> when his Honour ruled against arguments that his refusal to approve a coal mine would mean it would be built elsewhere, the so-called 'market substitution defence'. With deftness and integrity, Preston CJ called for evidence of this substitution. None was forthcoming, and the order of the Court was to refuse the coal mine licence, inter alia because of its potential contribution to climate change.<sup>119</sup>

Is there not a defensible approach in deferring to a different legal regime or rule *only if* that other regime — such as the *Paris Agreement* — is proving effective in mitigating climate change? Even if each country's 'nationally determined

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<sup>118</sup> (2019) 234 LGERA 257.

<sup>119</sup> Ibid 403 [699].

contribution' under the *Paris Agreement* was fully complied with, the world would still be on track for a warming of at least 3 degrees Celsius.<sup>120</sup> Though we need to continue to support the ratcheting-up approach, we should not unwittingly tie our hands if other legal solutions are available. I like to think our lawyers, when confronting arguments about the interaction of legal regimes, or the priority of conflicting norms, can demand evidence, engage in rigorous analysis, and identify the best approach.

Today's lawyers, educated in substance, theory and critical engagement, should be able to evoke, understand and rank legal developments. In so doing, we help mitigate the global problem of climate change, but also help promote a safe and just society within and across national polities. Climate change is the imperative to start to train the arbiters of global destiny.

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<sup>120</sup> United Nations Framework Convention on Climate Change Conference of the Parties, *Aggregate Effect of the Intended National Determined Contributions: An Update*, 22<sup>nd</sup> sess, Provisional Agenda Item X, UN Doc FCCC/CP/2016/2 (2 May 2016) 12 (Figure 2). At the time this article was going to press, parties to the Paris Agreement were meeting at COP 26 in Glasgow to improve upon their nationally determined contributions after considering, inter alia, *Nationally Determined Contributions under the Paris Agreement. Synthesis Report by the Secretariat*, UN Doc FCCC/PA/CMA/2021/8 (17 September 2021).