

## **'WHEN THE WIND IS IN THE EAST...' ENVIRONMENTAL LAW AND CLIMATE CHANGE IN AUSTRALIA**

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The experience of teaching and practising in the vibrant field of environmental law is infused with a feeling of irrecoverable loss. This article is a brief reflection on why this may be, thinking in particular within a context of Australia's recent legislative responses to the problem of climate change.

Students, both local and international, arrive with a deep concern for Australia's ancient forests of East Gippsland and Tasmania, for the corals of the world heritage-listed Great Barrier Reef, for the Murray Darling Basin that is home to over 30,000 wetlands and irrigates over 40% of farms on this wide continent, and for the extraordinary wildlife including rare and exotic animals together with a vast array flora. They are worried about the droughts that parch the Australian landscape, the fires that sweep with increasing intensity each year through the bush and towns, the Murray Darling that is being dried out, cut up and auctioned off, the unbridled logging of our native forests, and the ongoing large-scale loss of biodiversity. They – we – are embarrassed by our status as the world's worst per capita emitters of CO<sub>2</sub>.<sup>1</sup> Students arrive wanting to learn how our Government's proposed legislation will deliver them from their anxiety, and as a lecturer, I have to tell them that it will not.

Australia's official position on climate change has shifted since a changing of the guard in 2007, from the largely climate change-sceptic Government headed by John Howard to a Government led by Kevin Rudd that ratified the Kyoto Protocol upon its ascension to power. While this new government has reengaged with the international community over climate change and introduced a series of legislative measures to address the issue, the outlook for effective carbon reduction in Australia is little improved. There are serious substantive problems with the proposed national *Carbon Pollution Reduction Scheme* ('CPRS'), an increasing fragmentation of environmental law and policy, and the systemic externalisation of the costs of climate change onto other species and other countries based on wilful blindness.

Following an extensive consultation process in 2008, the Australian Government introduced the CPRS Bill to the House of Representatives in

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<sup>1</sup> This has been found by different studies, reported recently on the ABC website: <http://www.abc.net.au/am/content/2009/s2745806.htm> (accessed 01/01/10)

May 2009. The Bill proposed the establishment of a national emissions trading scheme beginning in 2011 and sought to connect with other emissions reduction programs internationally.<sup>2</sup> It was passed by the House of Representatives in June 2009, and then rejected by the Senate in August of that year. The Rudd Government chose to negotiate with the conservative Opposition parties, rather than the Greens who wanted much stronger action. The Government eventually secured the Opposition's support with the promise of billions of dollars in compensation to the carbon-intensive (power generation and coal mining) sectors. However, they were surprised, last November, by the replacement of the then Liberal Party leader Malcolm Turnbull with a self-declared climate change-sceptic, Tony Abbott, who retracted all support for the Bill. In December 2009 the Senate rejected the proposed legislation a second time. Despite this event being reported for the most part by international news agencies as a sad triumph of radical right-wing conservatives over a responsible centrist Government, the environmental groups across the country have been no less relieved by the rejection of the Bill.<sup>3</sup>

There are several reasons for this. Firstly, the Australian Greens argue that the proposed emissions reduction targets of 5-25% below 2000 levels are far too low to be effective.<sup>4</sup> The CPRS provides:

'If Australia is a party to a 'comprehensive international agreement' that is capable of stabilising atmospheric concentrations of greenhouse gases around 450 ppm CO<sub>2</sub>-e or lower, the object of the Act is to take action to meet an emissions reduction target of 25%...If Australia is not a party to such an agreement, the object of the Act is to take action to reduce Australia's emissions by 5-15% below 2000 levels by 2020.'<sup>5</sup>

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<sup>2</sup> The CPRS Bill is structured in 26 parts and is proposed in conjunction with five related Bills, one to establish the Australian Climate Change Regulatory Authority (ACCRA) and four others to effect amendments to a variety of Acts and to impose charges and customs and excise duties. It follows Australia's recently enacted National Greenhouse and Energy Reporting Act 2007 (Cth), which sets up an accounting system for greenhouse gas emissions, energy use, and energy production in Australia. For an excellent analysis of Australia's legislative response to climate change, see David Leary, 'From Bali to Poznan: An Assessment of Australia's Response to Climate Change in 2008' (2009) 26 *Environmental Planning and Law Journal* 190

<sup>3</sup> Australia's 'Climate Action Summit', which represents 140 climate action groups nationwide, condemned the CPRS and campaigned to prevent it becoming law: <http://climatesummit.org.au/> (accessed 01/01/10)

<sup>4</sup> For a comprehensive overview of the Greens' policy on this issue see: <http://greens.org.au/node/764> (accessed 01/01/10)

<sup>5</sup> Carbon Pollution Reduction Scheme Bill 2009 (Cth) Objects

None of these proposed targets will avert catastrophic climate change.<sup>6</sup> Given that no serious international agreement was reached at the recent UN COP15 in Copenhagen, the Bill in its current form will have disastrous consequences for Australia's environment if it is returned for a third time to the Senate in February 2010.<sup>7</sup>

Aside from the issue of targets, the CPRS exempts emissions from agriculture (which currently produces around 17% of Australia's total emissions) until at least 2015, and also exempts emissions created by deforestation and degradation (native forest logging) while allowing CO2 removals by reforestation to be used as 'offsets' for fossil fuel pollution.<sup>8</sup> In addition, it provides major concessions to Australia's largest greenhouse gas emitters, offering billions of dollars worth of free pollution permits to the coal industry (the energy sector comprising nearly 70% of Australia's total emissions). These permits establish property rights that, in the likely event of future increases in emissions reduction targets, will have to be paid for by taxpayers thereby resulting in windfall gains for the industry.<sup>9</sup> If passed, there is no doubt, as the Australian Greens insist, that the legislation will 'lock in failure'<sup>10</sup> for Australia's capacity to establish a financially affordable emissions reduction scheme.

A second and related issue hindering the effective reduction of greenhouse gas emissions is the increasing fragmentation of environmental law in Australia. This is exemplified by the recognition of 'climate change as an organising principle' and the establishment of 'climate change law' as a

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<sup>6</sup> Ross Garnaut, *The Garnaut Climate Change Review: Final Report* Cambridge University Press, 2008

<sup>7</sup> This is the earliest possible time that the legislation can be re-introduced, after its rejection by the Senate in December 2009.

<sup>8</sup> While pushing for the reduction of emissions from deforestation and degradation in developing countries, Australia is one of the few developed countries that continues to permit wide-scale clearance of native forests (accounting for more than 7% of our total emissions) under the terms of 'Regional Forest Agreements', which are administered by State government forestry agencies. These agreements have a singular focus upon forests as a timber source and little effective recognition of the many other ecological services provided, such as biodiversity protection, water catchment protection and carbon sequestration. See for example Margaret Blakers, 'Native Forest Logging Getting Through a Kyoto Loophole' *The Sydney Morning Herald*, May 22 2008. Bushfires potentially constitute a large percentage of Australia's total emissions, with the January 2003 bushfires representing more than one-third of total emissions for that year:

<http://www.climatechange.gov.au/copenhagen/australias-position/land-sector.aspx> (accessed 01/01/10)

<sup>9</sup> According to legal advice provided to the Australian Greens by Melbourne senior counsel Brian Walters and prominent Sydney barrister Matthew Baird, as reported by Josh Gordon, 'Libs Warn Turnbull: Carbon Plan Risks Split' *The Age* (22 November 2009)

<sup>10</sup> As advertised by the Australian Greens in a television advertisement explaining the ramifications of the proposed legislation. It is viewable online at: <https://greens.org.au/civicrm/contribute/transact?reset=1&id=27> (accessed 01/01/10)

distinct discipline.<sup>11</sup> There is indeed a body of legislation around emissions trading as well as case law explicitly addressing climate change that have emerged in the past few years. The consolidation of ‘climate change’ as a singular phenomenon and object of regulation however, obscures the fact that it is the culmination of systemic and ongoing failures of environmental management mechanisms established over the previous half century.<sup>12</sup> While the development of environmental law in Australia (and indeed internationally) can in some senses be hailed as a dynamic success,<sup>13</sup> our drought-stricken, over-logged, heavily mined and over-farmed landscape – the historical legacy of powerful primary industries - provides stark evidence to the contrary. Despite the emergence of more holistic approaches to environmental management over the past few decades, the treatment of climate change as a distinct problem for governance once again threatens to shift the focus away from the material causes of climate change and to produce solutions limited to the narrow scope of a new regime.

This brings us to our third issue. The shift in focus is perpetuated, in part, through the sliding of discussion from one register (the ethical/political) to another (the economic). Once a right to damage the environment has been named and claimed for purchase and sale on the open market, moral obligations are easily traded and the role of legislation is conveniently relegated to providing an administrative framework that will guarantee their smooth transaction. The economics upon which this framework relies, moreover, excludes any calculation of risk that is difficult to identify or quantify.<sup>14</sup> Any formal calculus of cost that is presented as universal is also concerned primarily with the financial cost of climate change, and not only to our own species but to members of our species, who live in metropolitan Australia. The question of ‘how much?’ necessarily excludes the questions of ‘to whom?’ and ‘why?’.

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<sup>11</sup> See for example Jacqueline Peel, ‘Climate Change Law: The Emergence of a New Legal Discipline’ *Melbourne University Law Review* [2008] 29. It is also evidenced by recent offerings of ‘climate change’ and ‘climate change law’ subjects in universities throughout the country, the publication of numerous textbooks on the topic and the dominance of climate change rhetoric in the media.

<sup>12</sup> This is evinced in, for example, governments’ historic lack of effective engagement with Australia’s indigenous people on environmental issues; the extensive and ongoing deforestation of native forests; the unmitigated intensification of animal husbandry, and urban planning that allows heavy reliance upon motor vehicle transport.

<sup>13</sup> Just to name a few of the most significant developments, we have seen the establishment of a national environmental law (the Environment Protection and Biodiversity Conservation Act 1999 (Cth)); the integration of ‘environmentally sustainable development’ principles into Australian law and policy; an increase in the use of multi-disciplinary approaches to decision-making, and improvements in coordination between the State and Federal Governments.

<sup>14</sup> Leading environmental lawyer Chris McGrath notes, for example, that in attempting to model the impacts of climate mitigation the Australian Treasury has not included ‘the economic impacts of climate change itself, so does not assess the benefits of reducing climate change risks through mitigation.’ Chris McGrath, ‘Australia’s Draft Climate Laws’ (2009) 26 *Environmental and Planning Law Journal* 267

It is difficult to acknowledge the material realities and urgency of students' concerns about 'climate change' while warning them not to buy into the apocalyptic discourse of crisis that permeates everyday discussion on the issue. It is even more challenging to explain the danger of such a discourse, which substitutes the vast array of issues and lives at stake with that of the singular figure of humanity, the human. This figure, to be saved by the civilising powers of technology and trade and law, seems to me to close off the possibility of rethinking 'human', 'nature' and the relation between the two. It stubbornly refuses the possibility of imagining another ethics and another response to politics, gesturing instead to the same old solutions: the circulation of capital and the displacement of cost onto the bodies of those not in a position to negotiate. When I talk about environmental law, therefore, and more specifically when I talk about climate change, the small optimism I felt a few years ago when catastrophe was still on the horizon has been subsumed by a gradual disappointment. What opportunities have we environmental lawyers – in Australia and around the world – already lost, as we sit and wait for magic numbers in the order of dollars, dates and degrees Celsius to be handed down?

