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## A Word from the Editors

This issue of the eJournal sees some further changes to the team responsible for its production. We welcomed Professor Louis Kotzé (North-West University, South Africa) to the Editorial Board, and Clarissa Ferriera (University of Cape Town, South Africa) to our group of Assistant Editors. Both Louis and Clarissa are fantastic additions to the eJournal team, and we trust their expertise and assistance will continue to broaden and strengthen the content of the eJournal.

In this issue, we present a range of insightful contributions from around the globe on a wide array of environmental law matters.

This issue begins with two articles that highlight similar issues with strategic planning in the USA and EU looking at climate change adaptation and renewable energy regulation.

In the first article, Pérez de las Heras discusses EU actions to promote adaptation to climate change. As Pérez de las Heras indicates, although the EU does not appear to have taken terribly effective steps in relation to multi-level governance of adaptation, there is hope for more positive action in this direction. The EU has taken adaptation measures in other areas of competence and some individual cities within the EU have been more pro-active in taking measures. In addition, the EU has supported adaptation measures in developing States. These activities point to the possibility of effective EU legislation on adaptation in the future. Powers' article on renewable energy production in the USA highlights similar tensions between action and inaction. While on the one hand the *ad hoc* regulatory approach to renewables has up until this point created sufficient space for a significant growth in the production of renewable energy it may, if it continues, hinder future growth. In her detailed analysis, Powers illustrates both the ways in which individual regulatory tools operate and the gaps that are left when regulation lacks strategic planning. Having begun her article by demonstrating the potential for renewable generation in the USA, Powers concludes by presenting suggestions for a more strategic regulatory approach to harnessing this power.

In the third article, “Re-Imagining Mining: The *Earth Charter* as a Guide for Ecological Mining Reform”, Sbert conducts a thought experiment as to how we might regulate the mining of minerals. In this she tackles the difficult questions of how we make choices about where, when and how much to mine. Sbert then explores the possibilities of moving from treating minerals as commodities to leasing minerals as a potential solution to the challenge of how we minimise the impact of mining on the earth.

The substantive articles are followed by three insights papers beginning with the thought-provoking piece by Richardson and Butterly on how we treat, or rather fail to treat (or take account of) time in environmental regulation. As Richardson and Butterly argue, the focus of environmental law has tended to be on the present or ‘future present’ with little account taken of, for example, the historical condition of an area, or the damage to an area caused prior to regulation. Their arguments are illustrated by reference to Australian marine planning.

Butti’s piece on contaminated land takes us back to Europe and examines the interplay between requirements under the Industrial Emissions Directive and the Contaminated Land Regimes of member States. This is followed by Dominte’s paper on the use of protected designations of origin as environmental protection tools. As Dominte argues, these designations, applying to products such as Bordeaux wine and Jaffa oranges are associated with environmental management practices, which, in giving rise to the particular characteristics of the growing environment, necessarily imply protection of particular environmental characteristics. There is, therefore, a possibility that these designations could be more consciously used as tools to protect the environment than they currently are.

These contributions are followed by 38 Country Reports from some 33 countries – the largest number of Country Reports included in the eJournal to date. This includes first time reports from Japan, Costa Rica, Ivory Coast, Poland, and Taiwan. From these reports, a number of broad issues are common to several jurisdictions. Briefly, we summarise these below.

As with the previous issue of this eJournal, issues concerning energy generation remain firmly on the environmental law agenda for many countries. This includes in some cases the management of conflict over land use. The reports from Costa Rica, the Democratic Republic of Congo, France, Japan, Kenya, Poland, Ukraine and the United States each highlight ongoing challenges with respect to the governance of energy development,

particularly new sources of energy (such as unconventional gas extraction), and alternative energy. Several of these reports point to the tensions between economic and environmental interests in energy development.

Some Country Reports document the passage of regressive environmental laws in certain jurisdictions. In Australia, Riley reports of a continued 'winding back' of environmental legislation, especially regarding climate change. In India, recent elections saw discussions regarding the relaxation of environmental regulations to promote economic growth, though ultimately this did not materialise. Cloutier de Repentigny reports on the implementation of a new environmental assessment regime in Canada which has witnessed a number of regressive changes. As he notes, it is incumbent upon us to be aware of how quickly progress in environmental law can be displaced by the changing whims of government, particularly in times of economic downturn. This recalls Michel Prieur's important work on non-regression in environmental law, where he ponders whether we have entered an 'era of law that refuses established rights in the name of sovereignty of laws and Parliaments — "what a law can do can be undone by another law"?'[1]

The need to improve access to public participation is also covered in several other reports, including Armenia, Columbia, Costa Rica, Czech Republic, the Democratic Republic of Congo, Ivory Coast, Papua New Guinea, and Thailand. Countries continue to grapple with the incorporation of meaningful public participation in environmental decision making. The report from the Bahamas discusses two cases which concerned a lack of public participation in EIA procedures, highlighting the need to improved consultation at a minimum. Cliquet and Schoukens' report on Belgium considers the gap between the law and practice of public participation through a discussion of a current case study, finding that there was indeed disparity between legislative aspiration and reality.

As in the substantive articles, so too in the country reports, the news is not all dire. Elsewhere, contributors report on new regulatory protections for the environment. In France,

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[1] Michel Prieur, 'Non-regression in environmental law', *S.A.P.I.EN.S* [Online], 5.2 | 2012, Online since 12 August 2012, accessed 2 April 2015. URL : http://sapiens.revues.org/1405. See also Michel Prieur, 'De L'urgente Nécessité De Reconnaître Le Principe De "Non Régression" En Droit De L'Environnement' ('Urgently Acknowledging the Principle of "Non-Regression" in Environmental Rights [summary in English]), 2011 (1) IUCN Academy of Environmental Law eJournal, online at: http://www.iucnael.org/en/e-journal/previous-issues/86-journal/issue/157-issue-20111#sthash.d0cHaRO1.dpuf.

for example, innovative new legislation was tabled concerning biodiversity protection, whilst in Kenya and Malta more serious attention turned to developing law and policy approaches to climate change. In Singapore, an ambitious regulatory regime to combat transboundary haze pollution was also implemented. Case law developments and the issue of new sentencing guidelines in the United Kingdom have seen environmental crime treated more seriously, particularly in cases involving corporate offenders. Finally, three separate contributions report on various aspects of China's new Environmental Protection Law, including the broader scope for citizen participation and public interest environmental litigation. Whilst the various authors of these reports acknowledge that challenges remain, the new legislation offers hope for improved access to environmental justice in these jurisdictions.

Proposals for new environmental regulatory regimes were also released in Scotland and the Netherlands. As Hendry notes in the Scotland report, these are "challenging times for environmental regulation in many countries, with multiple pressures to reduce the 'red tape' burden, cut costs and achieve multiple policy outcomes, not all consistent". The end-result for these regimes remains to be seen, and we look forward to updates in future Country Reports.

Finally this issue concludes with a series of book reviews, ranging from Paloniitty's review of the Academy's own "Global Environmental Law at a Crossroads", to Brown Weiss's review of "Common Heritage of Mankind: A Bibliography of Legal Writing" and Kibugi's review of "The Canadian Law of Toxic Torts".

Overall, we trust that you find the contributions in this issue as thought-provoking as we did, and we look forward to your contributions to the next issue.

Amanda Kennedy and Elizabeth Kirk

# TEMPORALITIES OF ENVIRONMENTAL GOVERNANCE:
## Insights from Australia's Marine Reserves Review

Benjamin J. Richardson* and Lauren Butterly**

As the biosphere perches on the precipice of irreparable collapse, many explanations have been offered for our weak environmental laws. But one that lacks currency is how environmental law deals with time. The emphasis is on spatial dimensions (for example, property interests, jurisdiction and the physicality of ecological problems).[1] To the extent that it considers time, environmental law dwells narrowly on the 'present future',[2] namely, how our present actions may have future effects such as global warming.[3] The mantra of sustainable development, environmental governance's preeminent norm and temporal ballast, underpins this future bias.

There are other important temporal dimensions to environmental governance that warrant attention, such as the past, timing and the 'pace' of time. Without apparent essence, time's significance is primarily as a marker of changes in phenomena, including environmental changes and those wrought by society. We need both a deeper understanding of how environmental governance in practice deals with these temporalities and elaboration of the normative principles about how it should address time. The ensuing brief remarks illustrate these issues by reference to Australia's recently initiated Marine Reserves Review. It's a pertinent example of the partiality in governance to space over time, and the value of using temporal concepts to critique an environmental initiative.

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[1] Jane Holder and Carolyn Harrison (eds), *Law and Geography: Current Legal Issues* (OUP, Oxford 2003).

[2] Lisa Heinzerling, 'Environmental Law and the Present Future' (1999) 87 Georgetown Law Journal 2025; Daniel Farber, 'From Here to Eternity: Environmental Law and Future Generations' (2003) University of Illinois Law Review 289.

[3] Edith Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (Transnational Publishers, New York 1989).

Commonwealth (or federal) marine reserves can be declared pursuant to *the Environment Protection and Biodiversity Conservation Act (EPBCA) 1999 (Cth)*,[4] Australia's principal federal environmental legislation.[5] The federal government (in partnership with state and territory governments) committed to establishing a national representative system of marine protected areas by 2012.[6] Marine protected areas have been gradually established, but in November 2012 a significant expansion occurred with an additional 2.3 million square kilometres of ocean being protected.[7] These reserves were established with much fanfare. The then Federal Environment Minister declared: 'Australia's most precious ocean environments will be protected by the world's largest network of marine reserves'.[8] Management plans were developed and were due to come into effect in July 2014.

A change of government in late 2013, to a politically conservative regime under Prime Minister Tony Abbott, saw these management plans discarded, but the boundaries of the reserves remained.[9] As described by an Australian Senator for the Greens Party, the marine reserves are now 'little more than lines on a map'.[10] Given this, even the idea of 'space' is

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[4] Act no. 91 of 1999.

[5] For an overview of the relevant legislation, see: Department of the Environment, 'Commonwealth Marine Reserves - Legal framework', <http://www.environment.gov.au/topics/marine/marine-reserves/overview/legal-framework> accessed 30 September 2014.

[6] Department of the Environment, 'Goals and principles for the establishment of the National Representative System of Marine Protected Areas in Commonwealth waters', <http://www.environment.gov.au/resource/goals-and-principles-establishment-national-representative-system-marine-protected-areas> accessed 30 September 2014.

[7] The Hon. Tony Burke MP, 'Gillard Government Creates the World's Biggest Marine Reserves Network' (Press release, 14 June 2012) <http://www.environment.gov.au/minister/archive/burke/2012/mr20120614.html> accessed 25 September 2014.

[8] Ibid. This press release noted that: 'The new marine reserves take the overall size of the Commonwealth marine reserves network to 3.1 million square kilometres, by far the largest representative network of marine protected areas in the world….Together the Great Barrier Reef Marine Park and the Coral Sea Commonwealth marine reserve will become the largest adjoining marine protected area in the world, covering 1.3 million square kilometres'.

[9] The Hon. Greg Hunt MP and Senator the Hon. Richard Colbeck, 'Supporting Recreational Fishing while Protecting our Marine Parks' (Press release, 14 December 2013) <http://www.environment.gov.au/minister/hunt/2013/mr20131214.html> accessed 26 September 2014.

[10] Senator the Hon. Rachel Siewert, 'Protecting our Marine Future', <http://rachel-siewert.greensmps.org.au/marine> accessed 30 September 2014.

currently of limited value. The new government initiated a so-called Marine Reserves Review (MRR), the agenda for which is to rebalance the management of marine reserves towards greater economic opportunities, especially fishing.[11] The reports of the MRR will be considered by the government and inform development of new marine management plans.

The first temporal dilemma about the MRR is its *timing*. The review was delayed for about one year, and further setbacks are likely because of the public consultation planned by the Abbott government in order to enhance the legitimacy its agenda.[12] In the meantime, economic access to the marine areas continues under the pre-2012 regime; there are no changes 'on the water' for 'users'.[13] Such an unhurried approach to modernizing environmental management contrasts to the lightening speed with which this government abolished Australia's carbon 'tax'.[14] Authorities like to fast-track economic development or remove hindrances to it,[15] but typically procrastinate in legislating pro-environmental controls. Ironically, the current Australian government justifies its leisurely approach to the MRR because the previous marine management arrangements were supposedly 'rushed' by its predecessor.[16]

Another interesting temporal dimension of the MRR relates to the lack of treatment of the *past*. The review focuses, according to the terms of reference of the expert scientific panel,

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[11] Department of the Environment, 'About the Commonwealth Marine Reserves Review', <http://www.environment.gov.au/marinereservesreview/about> accessed 30 September 2014. Also, Oliver Milman, 'Marine Reserves Review: Coalition Says Recreational Fishers Have Been Left Out' *Guardian* (London 12 September 2014) <http://www.theguardian.com/environment/2014/sep/12/marine-reserves-review-coalition-says-recreational-fishers-have-been-left-out> accessed 30 September 2014.

[12] Further, as noted on the MRR website, the 'development of new management plans will be a separate statutory process, involving two periods of public consultation' under the EPBCA: Department of the Environment, 'About the Commonwealth Marine Reserves Review' <http://www.environment.gov.au/marinereservesreview/about> accessed 30 September 2014.

[13] Ibid.

[14] Emma Griffiths, 'Carbon Tax Scrapped: PM Tony Abbott Sees Key Election Promise Fulfilled After Senate Votes to Repeal' ABC News (18 July 2014) <http://www.abc.net.au/news/2014-07-17/carbon-tax-repealed-by-senate/5604246> accessed 30 September 2014.

[15] Another example is the state of Victoria's Major Transport Projects Facilitation Act 2009 (Vic), Act no. 56.

[16] The Hon. Greg Hunt MP, 'Review of Commonwealth Marine Reserves Begins' (Press release, 11 September 2014).

on 'future priorities' and 'understanding of threats to marine biodiversity'.[17] Further, the bioregional advisory panels are directed in the terms of reference to provide advice on 'areas of contention' (which one can assume means *current* contention). This temporal orientation thus downplays historic losses to marine life. The prevailing environmental baseline – current fisheries populations – becomes the 'normal' benchmark for management, rather than healing past damage. Furthermore, until the MRR is completed, past fisheries practices are grandfathered[18] – a measure to protect the seafood industry, which has enthusiastically welcomed the Review.[19] Effective environmental governance sometimes requires tilting our gaze to the past in order to restore and 'rewild' damaged ecosystems whose present condition is not sustainable. An example is the need for bush regeneration in Australia to restore habitat for viable populations of threatened mammals.[20] The MRR lacks attention to the goals of environmental restoration and regeneration.

Thirdly, a spatial management bias is strongly evident in the MRR and the government's 'Goals and Principles for the Establishment of the National Representative System of Marine Protected Areas in Commonwealth Waters'.[21] Zoning is the principal means by which management units are designated to demarcate allowable activities. Zoning can certainly be very useful for governing competing uses for natural resources, but it can be problematic when zones foster a 'static' view of nature that emphasizes relative stability over flux in ecosystems.[22] Climate change will likely intensify such flux. Because nature is thus difficult to predict, we should not assume that marking boundaries in the oceans (or land) and leaving nature alone would achieve our environmental goals. Instead, we need management

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[17] Department of the Environment, 'Marine Reserves Review – Terms of Reference' (2014).

[18] Department of the Environment, 'Commonwealth Marine Reserves – Management' (see section on 'Transitional management arrangements', <http://www.environment.gov.au/topics/marine/marine-reserves/overview/management> accessed 30 September 2014.

[19] 'Fisheries Association Welcomes Commitment to Marine Reserves Review' (16 September 2014), <http://www.thefishsite.com/fishnews/24094/fisheries-association-welcomes-commitment-to-marine-reserves-review> accessed 30 September 2014.

[20] Robin A Buchanan, *Bush Regeneration: Recovering Australian Landscapes* (TAFE Student Learning Publications, Sydney 1989).

[21] Department of the Environment, <http://www.environment.gov.au/resource/goals-and-principles-establishment-national-representative-system-marine-protected-areas> accessed 30 September 2014.

[22] On addressing the dynamism of nature, see Bryan Norton, 'Change, Constancy, and Creativity: The New Ecology and Some Old Problems' (1996) 7 Duke Environmental Law and Policy Forum 49.

policies that are designed to be flexible and adjustable in an iterative, learning process.[23] The philosophy of 'adaptive management' speaks most directly to this challenge, but it does not appear to be prioritized in the MRR other than a broad reference to making 'suggestions' about continued engagement with regional stakeholders in the terms of reference.[24]

The problems with Australia's marine management planning process are indicative of the malaise in much environmental law worldwide. Its guiding philosophy of sustainability focuses on prospective actions. In downplaying other relevant temporalities, especially healing past losses, we don't have enough temporal depth to understand and resolve anthropogenic ecological changes. Cultural and psychological filters heavily modulate our understandings of time and the changes it signifies, and reformers must be more attentive to how law influences and distorts our temporal perception in ways that may harm the environment. As a starting point, our challenge to the MRR is for the expert scientific panel to think of governance approaches other than 'static' zoning and for the bioregional panels to investigate historical fisheries in their respective areas (including engaging with Indigenous communities and Indigenous knowledge).

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[23] Holly Doremus, 'Precaution, Science, and Learning while Doing in Natural Resource Management' (2007) 82 Washington Law Review 547.

[24] Adaptive management is listed among the cluster of management principles in Australia's administrative framework for marine reserves, but the concept is not found in the governing legislation of the EPBCA: <http://www.environment.gov.au/topics/marine/marine-reserves/overview/legal-framework> accessed 30 September 2014.