

Justice, Recognition and Environmental Law: The Wielangta Forest Conflict Tasmania, Australia

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Abstract

This article introduces lawyers to a broad concept of justice appropriate and relevant to critique Australian environmental laws. Building upon David Schlosberg's definition of environmental justice, specifically his conception of recognition as justice, the article argues that environmental or ecological injustices are seen to occur when participants, subjects or features of environmental disputes are ignored, are overlooked, or their interests are downplayed. This conceptual understanding and attention to recognition as justice has the capacity to widen the legal community of justice to include all aspects of Australian society and 'nature' threatened or silenced in environmental decision-making across the wide array of environmental laws.

The value of the concept of recognition as justice is illustrated by an analysis of the dispute over the proposed logging of Tasmania's Wielangta Forest that resulted in the case of *Brown v Forestry Tasmania [No 4]*.¹ Through a critique of the trial and appeal decisions, this article shows how, when and why the forest ecosystem and the law in the court cases between Brown and Forestry Tasmania were recognised, valorised and prioritised. This critique leads to conclusions about the position of justice within Australian environmental law and offers justice as recognition as an alternative or moderating legal concept to sustainable development.

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¹ (2006) 157 FCR 1.

I INTRODUCTION

Environmental justice is no longer a foreign concept to Australian scholars and jurists. In 2014, Australian environmental justice research was published about environmental decision-making,² including in the context of environmental land use conflicts,³ pollution⁴ and climate change.⁵ Evolving from its deep recent history in the United States, the concept has been translated and transplanted to other parts of the world,⁶ and this process is also happening in Australia.

‘Environmental Justice Australia’ has emerged as an activist voice arguing for environmental justice for indigenous and polluted communities,⁷ while maintaining its strong focus on the conservation of non-human parts of the environment, and there has been a relatively long history of activist scholarship on access to justice within the environmental realm.⁸

In the 2013 Land and Environment Court of New South Wales decision of *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure*,⁹ Preston CJ applied a limited distributive framework for environmental justice within a narrow context of benefits and costs of a proposed mine expansion. Bringing together ideas of environmental and ecological justice, Preston CJ asserted that the concept of justice in environmental law borrows from and reflects the more familiar ecologically sustainable development principles of intra- and inter-

² Catherine Gross, *Fairness and Justice in Environmental Decision Making: Water Under the Bridge* (Routledge, 2014).

³ Brad Jessup, ‘Environmental Justice as Spatial and Scalar Justice: A Regional Waste Facility or a Local Rubbish Dump Out of Place?’ (2014) 9(2) *McGill International Journal of Sustainable Development Law and Policy* 69 (‘Spatial and Scalar Justice’).

⁴ Jayajit Chakraborty and Donna Green, ‘Australia’s First National Quantitative Environmental Justice Assessment of Industrial Air Pollution’ (2014) 9(4) *Environmental Research Letters* 044010.

⁵ Diana MacCallum, Jason Byrne and Wendy Steele, ‘Whither Justice? An Analysis of Local Climate Change Responses from South East Queensland, Australia’ (2014) 32(1) *Environment and Planning C: Government and Policy* 70.

⁶ Julian Agyeman and Bob Evans, “‘Just sustainability’: The Emerging Discourse of Environmental Justice in Britain?” (2004) 170(2) *Geographical Journal* 155; Julian Agyeman et al (eds), *Speaking for Ourselves: Environmental Justice in Canada* (University of British Columbia Press, 2009); David A McDonald (ed), *Environmental Justice in South Africa* (Ohio University Press, 2002).

⁷ In its previous incarnation it published: Environment Defenders Office (Victoria), *Environmental Justice Project: Final Report* (Environment Defenders Office (Victoria), 2012). In 2014 it published: Environmental Justice Australia, *Clearing the Air: Why Australia Urgently Needs Effective National Air Pollution Laws* (Environmental Justice Australia, 2014).

⁸ See recently for example: Felicity Millner, ‘Access to Environmental Justice’ (2011) 16(1) *Deakin Law Review* 189.

⁹ (2013) 194 LGERA 347, 449 [486] (‘Bulga’).

generational equity.¹⁰ Preston CJ also acknowledged that the communities of justice¹¹ within the law were broad and included ‘natural persons, corporations, groups of persons, and non-human living organisms or ecological communities’.¹²

Writing from an Australian perspective during the 1990s, Nicholas Low and Brendan Gleeson argued that (particularly ecological) justice within the environment had been neglected in the pursuit of sustainability.¹³ Preston CJ’s comments on justice, however, suggest that there might be opportunities for integration, comparability or co-operation between the principles of environmental justice, ecological justice¹⁴ and sustainable development within the law in Australia through new terminology or by distilling politically or socially powerful common concepts.

Monitoring the conflict about the Wielangta Forest and its protected species, and then reading the appeal decision between Dr Brown and Forestry Tasmania,¹⁵ it became clear to me that our current environmental laws developed and applied within Australia’s framework for ecologically sustainable development are lacking.¹⁶ I was left with the sense that the law had failed species despite the purpose of the relevant environmental laws including objectives to conserve and protect them.

In this conflict and case, bird and beetle species identified as being at significant risk by one judge were ignored by a subsequent panel of judges. Moreover, it was startling and telling that the executive branch of the government could exert bold power to render invisible from the law any requirement to protect these vulnerable species. It was the silence and the invisibility that struck me as being unacceptable in a legal system that purports to protect species and that claims to give effect to the principles of ecologically sustainable development.¹⁷ As a student of environmental

¹⁰ Ibid 450-1 [492]-[495].

¹¹ The idea of communities of justice is examined in Brian Baxter, *A Theory of Ecological Justice* (Routledge, 2005) (*‘Theory of Ecological Justice’*).

¹² Bulga (2013) 194 LGERA 347, 449 [486].

¹³ Nicholas Low and Brendan Gleeson, *Justice, Society and Nature: An Exploration of Political Ecology* (Routledge, 1998) 20-1.

¹⁴ For explanations of ‘environmental justice’ and ‘ecological justice’ see Sage, *Encyclopaedia of Geography*, Barney Warf (ed), ‘Ecological Justice’ (Jason Byrne, 2010) and ‘Environmental Justice’ (Jason Byrne, 2010).

¹⁵ *Forestry Tasmania v Brown* (2007) 167 FCR 34.

¹⁶ The reviewers of the *Environment Protection and Biodiversity Act 1999* (Cth) reached the view that amendments were required with respect to the laws insofar as they interacted with forestry regulations. See: Allan Hawke, *The Australian Environment Act: Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999: Final Report* (Commonwealth of Australia, October 2009). One of the members of the expert panel for the review subsequently argued for a reprioritised of objectives within the law. See: Tim Bonyhady, ‘Putting the Environment First’ (2012) 29(4) *Environmental and Planning Law Journal* 316.

¹⁷ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3.

justice, I could not find the justice in this case. However it was not access or participation, or indeed distribution, which stood out as a gap in the laws in this instance, rather there was another unfairness evident in the case: unfairness at not even contemplating the interests of the non-human species at the centre of the dispute.

My research on the Wielangta Forest legal conflict that is the subject of this article adopts the position that recognition was deficient in the case and is more generally lacking in Australian environmental law. The analysis of this conflict attempts to make an empirical case in support of the position that recognition – recognition of non-human species or non-traditional knowledge or non-privileged or powerful perspectives – might be a suitable broad and overarching conceptual understanding for environmental and ecological justice in Australia and might act to integrate multiple notions of justice and principles of ecologically sustainable development for the purpose of advancing the cause of environmental law. My efforts are comparable to those of Brian Baxter in his work exploring the applicability of the concept of impartiality across the various realms of justice,¹⁸ and his attempts to develop a theory of ecological justice based on distributive concerns.¹⁹

I begin this article by introducing the notion of recognition within multi-faceted and contemporary understandings of environmental and ecological justice. Using the scholarship of David Schlosberg and others at the complex edge of ‘justice in environment’ research, I position this article within the scope of justice that they have opened up: a kind of environmental and ecological justice that demands more than distributional equality, protection and participatory power.

I seek to connect ideas of recognition and integrity as justice across human and non-human species for the purpose of identifying a common theory or meta-principle within the law that might challenge the predominance of the concept of sustainability, or temper its use in support of potentially harmful activities. In doing so I am searching for an agreeable and common notion that has relevance and pertinence across the gamut of environmental laws in Australia.

I next turn to comment on the law and its historical and present inability to integrate law and ‘nature’, let alone to recognise non-human species and to prioritise them over human and proprietary interests, despite the sustainability objective of laws. These sections represent the theoretical framework for the analysis of the case study that follows.

¹⁸ Brian H Baxter, ‘Ecological Justice and Justice as Impartiality’ (2000) 9(3) *Environmental Politics* 43 (‘*Justice as Impartiality*’).

¹⁹ Baxter, *Theory of Ecological Justice*, above n 11.

The case study is the Wielangta Forest conflict, a conflict that was created around a court case initiated strategically by the leader of the Australian Greens political party, Dr Brown, against the Tasmanian state forestry agency, Forestry Tasmania, to frustrate its logging activities in the habitats of threatened species. It was a case designed to test the meaning of two legal instruments that purport to conserve biological diversity and preserve and protect threatened species: the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('EPBC Act') and the *Tasmanian Regional Forest Agreement* ('RFA').

I argue that the case, because of the way the parties framed their arguments to the Federal Court of Australia, offered a clear choice between recognising non-human species within the law, and hence delivering justice, or prioritising and maintaining legal structures and so denying justice to the environment. I show that as the dispute progressed through trial and appeal cases, the conflict offered both perspectives.

However, it was only Marshall J, in the trial judgment, who approached the case from a position that environmental laws ought to deliver on their promise of protection and conservation, who offered recognition and therefore justice to the threatened species. I finally argue that some approaches to judging taken by Marshall J, albeit unconventional, could be considered a new way to seek just resolutions to environmental legal problems.

II ENVIRONMENTAL JUSTICE AND RECOGNITION

David Schlosberg²⁰ has provided one of the most holistic explorations of environmental justice, and has offered an explanation of environmental justice that has gone some way to offering a broad and reflexive conceptual definition of the term. Relying on environmental and philosophical theories to explain changes in discourses of environmental justice, and what is often commonly categorised as 'ecological justice',²¹ and by looking closely at the discourses and activities of social movements, Schlosberg defines environmental justice as having four aspects: the fair distribution of environmental goods and harm; the recognition of human and non-human interests in decision-making and distribution; the existence of deliberative and democratic participation;

²⁰ David Schlosberg, *Environmental Justice and the New Pluralism* (Oxford, 1999) ('*New Pluralism*'); David Schlosberg, *Defining Environmental Justice: Theories, Movements, and Nature* (Oxford University Press, 2007) ('*Theories, Movements and Nature*'); David Schlosberg, 'Reconceiving Environmental Justice: Global Movements and Political Theories' (2004) 13(3) *Environmental Politics* 517. The significance of Schlosberg's contribution in shifting scholarship on environmental justice is recognised in: Ryan Holifield, Michael Porter and Gordon Walker, 'Introduction: Spaces of Environmental Justice: Frameworks for Critical Engagement' (2009) 41(4) *Antipode* 591.

²¹ Schlosberg, *Theories, Movements and Nature*, above n 20.

and the building of capabilities among individuals, groups and non-human parts of nature.²²

Schlosberg's recent contribution to the meaning of environmental justice²³ is especially important for those of us researching environmental controversies beyond the United States, where – historically and still today – environmental justice is understood often within a restricted distributive, racialised, and class frame. There it was only in the decades that followed the emergence of the civil rights-inspired environmental justice movement²⁴ that it was understood and embraced as requiring participatory or political elements.²⁵

The idea of environmental justice sourced from the United States is particularly a result of the influential work of Robert Bullard, who was at the forefront of identifying and tracing the movement during the many decades before now as it rose from a notion of environmental racism.²⁶ This particular, significant and meaningful view of environmental justice in the United States can also be explained by the divisions that have long existed there between the environmental justice movement and the more mainstream environmental movement. The latter group was absent during the earliest struggles against the unequal distribution of environmental burdens on poor and non-white communities²⁷ and continues to maintain its distance. 'Environmental justice' during these early struggles became a term of 'rhetorical power' for grassroots groups through which people harmed by the activities or land uses in their surrounding environments had a vocabulary of dissent.²⁸ It was a notion that connected otherwise disparate and disempowered communities.

²² Robyn Eckersley adds precaution and compensation as elements of environmental justice. See Robyn Eckersley, *The State and Access to Environmental Justice: From Liberal State to Ecological Democracy* (address given at the Access to Environmental Justice, Environmental Defenders Office (Western Australia) Conference, 20 February 2004).

²³ In particular Schlosberg, *Theories, Movements and Nature*, above n 20.

²⁴ For details on the rise of the environmental justice movement in the United States, including the role of the law in framing a discourse of environmental justice, see Brad Jessup, 'The Journey of Environmental Justice through Public and International Law' in Brad Jessup and Kim Rubenstein (eds), *Environmental Discourses in Public and International Law* (Cambridge University Press, 2012) ('Journey').

²⁵ See for example the scholarship of Alice Kaswan, particularly beginning with 'Environmental Justice: Bridging the Gap Between Environmental Laws and "Justice"' (1997) 47 *American University Law Review* 221.

²⁶ See for instance Robert Bullard, *Dumping in Dixie: Race, Class, and Environmental Quality* (Westview Press, 1990).

²⁷ Jessup, *Journey*, above n 24, 54.

²⁸ Ryan Holifield, 'Defining Environmental Justice and Environmental Racism' (2001) 22(1) *Urban Geography* 78, 82.

The scope of environmental justice in the United States is limiting for an expansive Australian environmental legal context, which has not shared the same pathways to the concept.²⁹ This is evident in the bureaucratic form of environmental justice in the United States. In this respect, for example, the United States Environmental Protection Agency (EPA), building upon the 1994 Clinton administration executive order on environmental justice,³⁰ defines environmental justice as:³¹

the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.

Fair treatment is defined distributionally, especially framed by race and class, while meaningful involvement, despite an effort to suggest that members of the public can have influence over regulatory decisions, is framed in a restricted way as being anthropocentric, individualistic and aspirational.³² Schlosberg considers that the United States EPA has long overlooked recognition within the scope of environmental justice,³³ and argues that the term is in fact 'quite broad, integrated, expansive and inclusive, embodying a variety of understandings of justice itself.'³⁴ Further, the meaning of environmental justice is not confined to a particular location or a specific cultural, social or historical context. Researchers have demonstrated this with a wide and diverse scholarship emerging over recent years.³⁵ It has been further argued that the concept of environmental justice is plural and multiple.³⁶ It is not a term with a closed definition.

Moreover, environmental justice is not simply a term of identification. The work of Alison Alkon et al in the United States,³⁷ and Catherine

²⁹ Ryan Holifield has argued that the meaning of environmental justice will differ and should be responsive to context: Ibid 78. Holifield also cites (at 81) literature critical of the legal definitions of environmental justice as being too narrow to capture the breadth of the environmental justice movement in the United States.

³⁰ *Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, 59 FR 7629 (1994).

³¹ United States Environmental Protection Agency, 'Environmental Justice: Basic Information' (2011) <www.epa.gov/environmentaljustice/basics/index.html>.

³² Ibid.

³³ Schlosberg, *New Pluralism*, above n 20, 12.

³⁴ Schlosberg, *Theories, Movements and Nature*, above n 20, 54.

³⁵ Maureen G Reed and Colleen George, 'Where in the World is Environmental Justice?' (2011) 35(6) *Progress in Human Geography* 835.

³⁶ Gordon Walker and Harriet Bulkeley, 'Geographies of Environmental Justice' (2006) 37(5) *Geoforum* 655, 657; Gordon Walker, 'Beyond Distribution and Proximity: Exploring the Multiple Spatialities of Environmental Justice' (2009) 41(4) *Antipode* 614.

³⁷ Alison Hope Alkon, Marisol Cortez and Julie Sze, 'What's in a Name? Language, Framing and Environmental Justice Activism in California's Central Valley' (2013) 18 *Local Environment: The Journal of Justice and Sustainability* 1167.

Gross in Australia,³⁸ demonstrate that many grassroots groups do not identify as environmental justice groups or within an environmental justice movement despite the manner and basis of their objection being classified by advocates and scholars as corresponding within an environmental justice tradition. Consequently, Alkon et al argue that our understanding of the concept of environmental justice should not be confined by the experiences of those who assert a position within the movement. Implicitly, then, it is for researchers to draw connections and push the boundaries of environmental justice.³⁹

In this article, I focus on recognition as an aspect of environmental justice to push the boundaries of the concept, particularly to push it into the view of law in Australia, and also to challenge the dominance and character of the notion of ecologically sustainable development within Australian environment law. I do so because it is through recognition that I see the meaning and community of justice in the environment being opened up and differently connected as foreshadowed by Preston CJ in the *Bulga* case.⁴⁰ I also see a possibility of recognition as justice being understood by those Australian lawyers and jurists who are familiar with the terminology in human rights laws and at the intersection between indigenous Australians and the law.⁴¹

Schlosberg was not the first or only scholar to identify recognition as being a component of justice. Justice Ronald Sackville cited Dworkin as authority for the view that justice depends on recognition by the state of human dignity and political equality.⁴² David Harvey asserted that a central tenet of environmental justice is ‘a struggle for recognition, respect and empowerment’.⁴³ In this regard recognition is political and described this way it can be understood as universal among environmental disputants.

³⁸ Catherine Gross, ‘A Measure of Fairness: An Investigative Framework to Explore Perceptions of Fairness and Justice in a Real-life Social Conflict’ (2008) 15(2) *Human Ecology Review* 130. See also Gross, above n 2.

³⁹ Reed and George, above n 35, argue for more research on and creative application of environmental justice.

⁴⁰ (2013) 194 LGERA 347.

⁴¹ Recognition is an obvious frame to connect environmental justice and human rights. See, for example: Lyla Mehta et al, ‘Global Environmental Justice and the Right to Water: The Case of Peri-urban Cochabamba and Delhi’ (2014) 54 *Geoforum* 158.

⁴² Justice Ronald Sackville, ‘Some Thoughts on Access to Justice’ (Speech delivered at First Annual Conference on the Primary Functions of Government Courts, Victoria University of Wellington, NZ, 28-29 November 2003).

⁴³ David Harvey, ‘The Environment of Justice’ in Frank Fischer and Maarten Hajer (eds), *Living with Nature: Environmental Politics as Cultural Discourse* (Oxford University Press, 1999) 153, 182.

According to Schlosberg, when the arguments made and frames adopted by communities are distilled and analysed, it is recognition that communities want, which is seen as a precursor or pre-requisite to a fairer distribution of environmental risks.⁴⁴ In a contemporary context, for example, within the debates about action on climate change, and within the discourses swirling around climate justice, recognition of the plight of vulnerable people and indigenous group interests is the central and primary goal.⁴⁵

This is because recognition is the linkage between distributional outcomes and participatory inclusion.⁴⁶ Jonathan London et al also make this point in their work that calls for a different conceptualisation of participation. They argue that environmental communities of opposition want to be listened to, to be empowered, and for their participatory contribution not to be ignored. They do not want to be dismissed as ignorant or misunderstood⁴⁷ as often happens when they are afforded little more than a chance to make an oral submission or write a letter of objection to a proposal to a government body or panel of experts.

Similarly, Luke Cole and Sheila Foster argue that participation is an insufficient ideal for environmental justice because public participation processes typically 'leave in place the underlying social relationships of its participants'.⁴⁸ They do not change the power distribution and they do not compel decision-makers to treat equally the viewpoints of the various interested parties in an environmental conflict. They resemble a mainstream, 'white' and privileged way of community interaction; with other ways of 'knowing and doing' disregarded.⁴⁹ Cole and Foster claim that too often public participants eager to engage in environmental decisions encounter a 'wall of indifference, disinformation and lack of respect'⁵⁰ from proponents and government agencies. Governments often engage in a subtly different process – of managing, defusing and co-opting the community.⁵¹

⁴⁴ Schlosberg, *New Pluralism*, above n 20, 13.

⁴⁵ Bertie Russell, Andrew Pusey and Leon Sealey-Huggins, 'Movements and Moments for Climate Justice: From Copenhagen to Cancun via Cochabamba' (2012) 11(1) *ACME: An International E-Journal for Critical Geographies* 15.

⁴⁶ Eckersley, above n 2222.

⁴⁷ Jonathan K London, Julie Sze and Raoul S Lievanos, 'Problems, Promise, Progress, and Perils: Critical Reflections on Environmental Justice Policy Implementation in California' (2008) 26(2) *UCLA Journal of Environmental Policy* 255, 276.

⁴⁸ Luke Cole and Sheila Foster, *From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement* (New York University Press, 2001) 104.

⁴⁹ Hilary Gibson-Wood and Sarah Wakefield, '"Participation", White Privilege and Environmental Justice: Understanding Environmentalism among Hispanics in Toronto' (2013) 45(3) *Antipode* 641, 652, 654, 656.

⁵⁰ Cole and Foster, above n 48, 105.

⁵¹ *Ibid* 111.

Schlosberg's idea of recognition as justice builds on the more theoretical and philosophical academic contributions of Nancy Fraser and Iris Young. His work has also been further advanced by geographer, Gordon Walker.⁵² Schlosberg supports Fraser's view of the bivalent, indeed multi-valent, nature of justice,⁵³ and sees misrecognition as being a cause for mal-distribution. Walker further makes the point that the misrecognition and stigmatisation of places can trigger and entrench geographic disadvantage.⁵⁴ Like Harvey, Fraser sees recognition as the new 'paradigmatic form of political struggle', a reaction to cultural domination and power.⁵⁵ Schlosberg claims that 'injustice is not solely based on inadequate distribution or, more to the point, there are key reasons why some people get more than others'.⁵⁶ Fraser argues that this is because of the invisibility, stereotyping and disrespect that dominated cultures experience. Mick Hillman illustrates this point in his analysis of historical river management in the Hunter Valley in Australia.⁵⁷

Hillman argues that dispossession, alienation and exclusion of indigenous Australians from place and decision-making functions led to their interests being unrecognised in water law and policy. Rather, the decision-making and power was consolidated in a group that 'was exclusively white, male and dominated by riparian landholders and state government agencies – in particular water resources engineers'.⁵⁸ The privilege afforded to this group in decision-making 'has in turn been naturalised to become the common sense view of who has a stake'.⁵⁹

With a comparable context in mind, Fraser defines recognition as:

upwardly revaluing disrespected identities and the cultural products of maligned groups. It could also involve recognising and positively valorising cultural diversity ... of calling attention to, if not performatively creating, the putative specificity of some group, and then of affirming the value of that specificity'.⁶⁰

For Schlosberg, recognition is removing oppression or displacing dominant perspectives and politics, validating identity and interests, acknowledging and prioritising experiences and subjective knowledge, offering dignity and respect, and appreciating and providing for

⁵² Walker, above n 36.

⁵³ Nancy Fraser, 'From Redistribution to Recognition? Dilemmas of Justice in a "post-Socialist" Age' (1995) 212 *New Left Review* 68, 93.

⁵⁴ Walker, above n 36, 627.

⁵⁵ Fraser, above n 53, 68.

⁵⁶ Schlosberg, *Theories, Movements and Nature*, above n 20, 15.

⁵⁷ Mick Hillman, 'Situated Justice in Environmental Decision-Making: Lessons from River Management in South-Eastern Australia' (2006) 37(5) *Geoforum* 695.

⁵⁸ *Ibid* 698.

⁵⁹ *Ibid* 704.

⁶⁰ Fraser, above n 53, 73-74.

community and cultural wellbeing and survival.⁶¹ Moreover, citing Young,⁶² Schlosberg identifies the role of institutions – like the law – to achieve recognition through the acknowledgement of group difference particularly among those groups in society historically oppressed or dominated.

For Ryan Holifield,⁶³ like Young, a focus on recognition is an affirmation of difference and identity. To strive to recognise will therefore mean to confront and displace historical and geographical disadvantage – to prioritise society's interests over institutional uniformity. In Holifield's work it is apparent that a focus on recognition in environmental justice is particularly advantageous to historically colonised indigenous groups, whose claims of territory, sovereignty, knowledge and legality have been denied.⁶⁴

III RECOGNITION AND ECOLOGICAL JUSTICE

Recognition is broadly defined by Schlosberg, with generalised reference to notions of respect, dignity, interest, and survival, because of his acknowledgment of the importance of recognition as justice to both humans and non-humans. For Schlosberg, a recognition approach to justice traverses multiple levels of recognition – from the individual to the community or nation-state or even for species. This reinforces his view that justice is multi-valent and that justice as recognition transcends the more refined ideas and ideals of environmental justice and ecological justice. Walker's attention to the recognition of places⁶⁵ also invites an investigation of recognition across scales and landscapes.

This is a departure from the historical, individual and contractual model of environmental justice advanced by early modern scholars, and it assists in arguing that justice in environmental law is not only about human wellbeing, but may be deployed to impose duties on humans to protect, be compassionate to, do no harm to, and recognise, various multi-layered groups of humans and non-humans.⁶⁶

⁶¹ Schlosberg, *Theories, Movements and Nature*, above n 20, 59-64, 87.

⁶² Iris Young, *Justice and the Politics of Difference* (Princeton University Press, 1990).

⁶³ Ryan Holifield, 'Environmental Justice as Recognition and Participation in Risk Assessment: Negotiating and Translating Health Risk at a Superfund site in Indian Country' (2012) 102(3) *Annals of the Association of American Geographers* 591 ('*Negotiating and Translating*').

⁶⁴ Ibid.

⁶⁵ Walker, above n 36. Walker's focus is particularly human inhabited landscapes.

⁶⁶ Mary Midgley, 'Duties Concerning Islands' in Robert Elliot and Arran Gare (eds), *Environmental Philosophy: A Collection of Readings* (University of Queensland Press, 1983) 166.

According to Baxter, one of the purposes of articulating a theory of ecological justice is to represent non-human interests in the community of justice.⁶⁷ A search for common theoretical concepts across notions of justice is not intended to displace or conflate or dilute the justice claims of the most vulnerable members of society. Rather, in this article the goal is to locate a common concept that could be applied to both the human and non-human experience, especially to counter or moderate the current universal concept of ecologically sustainable development in Australian environmental law. There exists, as exposed above, empirical literature to test the value of the human-centred recognition as justice concept. There is less empirical literature, however, exploring recognition as justice for non-human species.

One significant and deliberate consequence for this article of the attention to and support for recognition within notions of justice is that any future justice discourse in Australian environmental law is more likely to be expansive (not simply limited to distributive or participatory claims) in its application to grassroots community groups,⁶⁸ and also more capable of 'bringing in', considering and prioritising newer or different perspectives, including indigenous⁶⁹ and ecological ones.⁷⁰ Additionally, recognition as justice is a notion that begins to share theoretical or conceptual foundations with other justice ideals that have a heritage within the law – including human rights, administrative law and criminal justice. As well as ensuring that all human interests – particularly indigenous interests – are recognised within decision-making and environmental distributions, rather than being dominated or oppressed by institutions like the law, this focus of justice means that non-human aspects of the environment can be recognised as having interests, of being connected with human identity,⁷¹ and of requiring preservation actions to maintain ecological integrity.

Recent scholarship, particularly beyond the United States, and notably within Australia, has begun exploring the complexities and interactions of justice for indigenous communities and their cultural integrity, separately, non-human parts of the environment. In large part this latter scholarship emerges from the concept of ecological justice and the emergent critical scholarship on earth jurisprudence,⁷² but not exclusively. Saskia Vermeylen and Gordon Walker, for instance, explore these issues at play in a 'corporatised' world – where 'nature' has an economic (patentable

⁶⁷ Baxter, *Theory of Ecological Justice*, above n 11, 9.

⁶⁸ Jessup, *Spatial and Scalar Justice*, above n 3.

⁶⁹ Holifield, *Negotiating and Translating*, above n 633; Laura Westra, *Environmental Justice and the Rights of Indigenous Peoples* (Earthscan, 2008).

⁷⁰ Julie Sze and Jonathan K London, 'Environmental Justice at the Crossroads' (2008) 2(4) *Sociology Compass* 1331.

⁷¹ Walker, above n 36, 627.

⁷² Jamie Murray, 'Earth Jurisprudence, Wild Law, Emergent Law: The Emerging Field of Ecology and Law— Part 1' (2014) 35 *Liverpool Law Review* 215.

medicine) value potentially incompatible with other community and conservation values.⁷³ Their work continues the move away from distribution as the dominant aspect⁷⁴ of justice for the environment. Val Plumwood uses ‘eco-feminism’ as grounding for her work to argue that the universal categorisation of non-human parts of the environment as ‘nature’ is oppressive, dominating and a denial of recognition, a form of othering and colonising with an implicit prioritisation of ‘Western’ human culture.⁷⁵ Plumwood’s argument is that non-human parts of the environment require its agency to be recognised, particularly through acknowledging value to the functioning of the ecosphere.⁷⁶ Other scholars have made similar arguments about animal subjectivity, identification and recognition.⁷⁷

Although some of the new ‘earth jurisprudence’ literature is developed around the imperative for human activism for the benefit of the environment,⁷⁸ its foundation includes the view that there is one ‘Earth community’ with non-humans particularly interconnected, sustaining and not subservient to humans.⁷⁹ It is underpinned by ecological science, ‘measured with respect to ... concepts such as ecological integrity’.⁸⁰

In this regard Peter Burdon endorses the exploratory work of Laura Westra on integrity,⁸¹ particularly how a human morality of care and trust for community can extend to affording non-humans ‘integrity’, a form of recognition. Westra’s ‘integrity’ entails creating a state of existence where non-humans are able to withstand outside pressures and stresses and be capable of life, regeneration and ongoing change and development unconstrained by human interruption.⁸² This explanation shares ideals

⁷³ Saskia Vermeulen and Gordon Walker, ‘Environmental Justice, Values and Biological Diversity: The San and the Hoodia Benefit Sharing Agreement’ in JoAnn Carmin and Julian Agyeman (eds), *Environmental Inequalities Beyond Borders: Local Perspectives on Global Injustices* (Massachusetts Institute of Technology Press, 2011) 105.

⁷⁴ Walker, above n 36, 618.

⁷⁵ Val Plumwood, ‘Nature as Agency and the Prospects for a Progressive Naturalism’ (2001) 12(4) *Capitalism, Nature, Socialism* 3, 7.

⁷⁶ Ibid 19.

⁷⁷ Jody Emel, Chris Wilbert and Jennifer Wolch, ‘Animal Geographies’ (2002) 10(4) *Society & Animals* 407. I thank one of the anonymous reviewers for introducing me to this work.

⁷⁸ Peter Burdon, ‘The Great Jurisprudence’ in Peter Burdon (ed), *Exploring Wild Law: A Philosophy of Earth Jurisprudence* (Wakefield Press, 2011) 59, 71.

⁷⁹ Peter Burdon, *Earth Jurisprudence: Private Property and the Environment* (Routledge, 2015) (‘*Private Property*’) See especially ch 3.

⁸⁰ Ibid 87.

⁸¹ Laura Westra, *An Environmental Proposal for Ethics: The Principle of Integrity* (Rowan & Littlefield, 1994) (‘*Principle of Integrity*’). See further, for an international law context, Peter Miller and Laura Westra, ‘The Earth Charter’ in Peter Miller and Laura Westra (eds), *Just Ecological Integrity: The Ethics of Maintaining Planetary Life* (Rowan and Littlefield, 2002) 1.

⁸² Westra, *Principle of Integrity*, above n 81, 24-25.

with Schlosberg's recognition ideals of dignity, interest, and survival. More broadly, Burdon explains that the recognition inherent in ecological integrity of the Earth community and acceptance of the interconnectedness of the environment is a precursor to sustainability.⁸³

Parallels can also be drawn between the theorised version of recognition by scholars like Fraser, whose work was developed in a context of researching disadvantaged and vulnerable social groups, with the scholarship around the theory of ecological justice.⁸⁴ What underpins the concept of ecological justice is a form of ecosystem recognition matched by a human obligation towards the ecosphere.⁸⁵ Low and Gleeson were at the forefront of exploring ecological justice in the 1990s, arguing for environmental justice ideas to be applied to non-humans. They began their book noting that the task of doing justice 'is continually expanding as new actors enter the struggle, new perspectives are inscribed into the debates, new problems are defined for society'.⁸⁶ Moreover, Low and Gleeson argued that justice within the environment had been neglected in the pursuit of sustainability.⁸⁷

According to Low and Gleeson, justice to the environment – like environmental justice for human communities – could be grounded on principles care and respect,⁸⁸ but also need, especially need for flourishing, a fullness of existence and respect: ideas shared by those political theorists attuned to recognition.⁸⁹ They argued that the relational aspects of justice that give rise to harm or disadvantage are comparable between humans and between humans and non-humans.⁹⁰ While human rights would be a basis for human justice, human morality would be the basis for ecological justice.

What could link the human and the non-human imperatives for justice would be an acknowledgment of communal and community interests, multiple ways of knowing and defining the environment,⁹¹ and a changed understanding of human positioning and interdependence within the

⁸³ Peter D Burdon, 'Earth Jurisprudence and the Project of Earth Democracy' in Peter Burdon, Michelle Maloney and Peter Burdon (eds), *Wild Law – In Practice* (Routledge, 2014) 19, 24-5. See further Burdon, *Private Property*, above n 79.

⁸⁴ Low and Gleeson, above n 13; Klaus Bosselman, 'Ecological Justice and Law', in Benjamin Richardson and Stepan Wood (eds), *Environmental Law for Sustainability* (Hart Publishing, 2006).

⁸⁵ See for instance Douglas A Kysar, *Regulating From Nowhere: Environmental Law and the Search for Objectivity* (Yale University Press, 2010) who focuses on obligation, respect and recognition as a different frame for regulation.

⁸⁶ Low and Gleeson, above n 13, 1.

⁸⁷ *Ibid* 20-1.

⁸⁸ *Ibid* 137.

⁸⁹ *Ibid* especially 152 ff.

⁹⁰ *Ibid* 2. This is an idea adopted by Baxter, *Justice as Impartiality*, above n 18, 45.

⁹¹ Hillman, above n 57, 696.

ecosphere: and thus an added layer of identity and recognition. The notion of nature as community and shared goals of integrity were presented by Schlosberg as conceptual bridges between human environmental justice and non-human ecological justice. Once the connection is made, ‘recognising sentience, needs, agency, or integrity in nature gives us avenues to expand our understanding of the community of justice’.⁹²

Like Low and Gleeson before him, Baxter introduces his vision of ecological justice by first referencing the line of scholarship that has argued on the grounds of human morality that non-human parts of the environment are entitled to ‘due respect’, and the global legal attempts to convert this moral position into a form of institutional protection.⁹³ He isolates these attempts as being deficient and notes that they have triggered in his mind a need for a ‘moral vocabulary that other species have rights ... to survive, flourish and perpetuate’.⁹⁴ He argues that global and local laws are central to achieving ecological justice and recognition, to instil the necessary vocabulary, asserting that ‘the ecologically just society’ will develop legal regimes that ‘ensure that welfare interests of non-humans are articulated and taken full account of in the business of legislation and policy-making’.⁹⁵

IV RECOGNITION, NON-HUMANS AND ENVIRONMENTAL LAW

I am not alone amongst my environmental law peers in making the argument that recognition is a valuable concept to analyse environmental law, and moreover that the law must continuously grapple with the relationship between the law, people and the environment. Douglas Kysar has written that recognition has been central to legal scholars efforts to: ‘promote legal standing for trees,⁹⁶ [argue for the] revival and expansion of the ancient public-trust doctrine, [and impose] guardianship obligations on behalf of future generations.’⁹⁷

However, the common law remains deeply instrumental and anthropocentric – with individuals, corporations or groups having to show a proprietary or personal and specific interest,⁹⁸ as distinct from an intellectual or emotional interest, before the court will entertain their

⁹² Schlosberg, *Theories, Movements and Nature*, above n 20, 138.

⁹³ Baxter, *Theory of Ecological Justice*, above n 11, 2.

⁹⁴ *Ibid* 8.

⁹⁵ *Ibid* 156.

⁹⁶ This was the common law doctrine the focus of Christopher Stone, *Should Trees Have Standing? And Other Essays on Law, Morals and the Environment* (Oceana Publications, 25th Anniversary Edition, 1996).

⁹⁷ Kysar, above n 85, 230.

⁹⁸ Most recently clarified by the High Court in *Argos Pty Ltd v Minister for the Environment and Sustainable Development* (2014) 206 LGERA 96.

application.⁹⁹ In Australia the public trust doctrine remains unembraced,¹⁰⁰ and notions of intergenerational equity are still formative.¹⁰¹

It is therefore unsurprising that the ‘earth jurisprudence’ movement remains concerned with standing issues as a barrier to the reordering of common law legal systems so that ecological interests become central to the development and implementation of laws.¹⁰² Adopting a scalar and political conception of justice, Bickerstaff and Agyeman (particularly relying on the work of Castree) have similarly argued that non-human recognition must no longer depend on human agency and subjugation, common starting points for sustainability, but on non-human identity in social-legal structures:¹⁰³ something that the law has not yet embraced.

David Delaney explores connections between ‘nature’, ‘wilderness’ and law, reaching a view that the law has so far only been able to recognise a human construct of wilderness. That is, those areas where human influence and laws are absent and remain so.¹⁰⁴ The law, including laws developed with the objective of sustainable development, has been able to identify endangered species but not fully recognise them – in the sense of achieving ecological integrity, regeneration, and affirming their essential value. The listing of such species is traditionally too late to achieve their recognition, representing only an effort at offering limited redress for past human ignorance of the value and needs of those species.

Fundamentally, however, Delaney argues that humans have separated law from ‘nature’ for their purposes. He illustrates this point through an analysis of so-called ‘acts of nature’ in tort law, noting that the law has only been capable of recognising nature in that context where it is under the control of human forces.¹⁰⁵

⁹⁹ Matthew Groves and H P Lee, *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007). See also the case of *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493.

¹⁰⁰ Tim Bonyhady, ‘A Usable Past: The Public Trust in Australia’ (1995) 12 *Environmental and Planning Law Journal* 329 argues for its broader application, though noting the rarity of its use. More recently, Bruce Thom, ‘Climate Change, Coastal Hazards and the Public Trust Doctrine’ (2012) 8(2) *Macquarie Journal of International and Comparative Environmental Law* 21 reiterates its potential.

¹⁰¹ See *Hub Action Group Inc v Minister for Planning* (2008) 161 LGERA 136 as one case where intergenerational equity was identified as having relevance to the judgment.

¹⁰² See, for example, Peter Boulot, ‘A New Legal Paradigm: Towards a Jurisprudence Based on Ecological Sovereignty’ (2012) 8(1) *Macquarie Journal of International and Comparative Environmental Law* 1.

¹⁰³ Karen Bickerstaff and Julian Agyeman, ‘Assembling Justice Spaces: The Scalar Politics of Environmental Justice in North-East England’ (2009) 41(4) *Antipode* 781, 785, 799.

¹⁰⁴ David Delaney, *Law and Nature* (Cambridge University Press, 2003) 166-71.

¹⁰⁵ *Ibid* 150 ff.

V THE WEILANGTA FOREST CONFLICT

In this article I am using understandings of justice as recognition to make sense of the incompatible court decisions concerning the Wielangta Forest and also to use the Wielangta Forest conflict as an example of how concepts of recognition are evident, or could be evident, within the law and can advance our understanding of justice and ecologically sustainable development. The Wielangta Forest conflict is one of three case studies through which I am investigating justice concepts in environmental law. In figure 1, the locations of the three cases are shown. The other two cases represent more ‘conventional’ environmental justice battles over waste, in rural New South Wales, and pollution, in Melbourne’s Port Phillip Bay.

In many respects the Wielangta Forest conflict and this analysis represents a small window into a larger political and legal battle. Tasmanian forestry has been the subject of politicisation and conflict for decades,¹⁰⁶ especially since the mid-1980s after the Australian High Court’s *Tasmanian Dam* decision¹⁰⁷ disrupted the hydroelectric industrialisation of the state. From then there was a discernible change of conservation attention from rivers to forests.¹⁰⁸

Nationally, Tasmanian forestry was contentious throughout the 1990s and the 2000s. While most conflict centred around the so-called ‘ancient forests’ in the Florentine, Tarkine, Styx, and Weld, it was only recently, and particularly through the vehicle of the court cases I discuss in this article, that Wielangta was introduced into the national discourse.

Wielangta is located on the east coast of Tasmania, approximately 50 kilometres north-east of Hobart, close to the now abandoned Triabunna woodchip mill (see figures 1 and 2, below). The forest is accessed from Sorell in the south and Orford in the north. The forest is a mix of dry and wet sclerophyll eucalypt.

¹⁰⁶ Anna Krien, *Into the Woods: The Battle for Tasmania's Forests* (Black Inc, 2010).

¹⁰⁷ *Commonwealth v Tasmania* (1983) 158 CLR 1.

¹⁰⁸ William Lines, *Patriots: Defending Australia's Natural Heritage* (University of Queensland Press, 2006) particularly traces Dr Bob Brown’s involvement with the anti-dams then anti-forestry campaigns in Tasmania.

Fig. 1: Location of Research Field Sites, South-East Australia**Fig. 2: Detailed Location of Wielangta Forest, South-East Tasmania**

Unlike the ancient forests that have acted as rallying points for conservationists, Wielangta has a long history of forestry, dating from the mid to late 1800s, formalised in the early 1900s,¹⁰⁹ and only being gradually displaced by the systematic creation of ‘forest reserves’ in the late 1980s.¹¹⁰

¹⁰⁹ Astrid Ketelaar and Parry Kostoglou, *A Short History of the Timber Industry in the Wielangta State Forest* (Forestry Tasmania, 1993). Tasmania, ‘The Crown Lands Act 1903: A Proclamation’, *Tasmanian Government Gazette*, No 7233, 14 June 1910, 657-8.

¹¹⁰ ‘Affidavit of Simon Grove, Forestry Tasmania’, *Brown v Forestry Tasmania*, 21 November 2005. Tasmania, ‘The Forestry Act 1920: A Proclamation’, *Tasmanian Government Gazette*, No 19080, 25 January 1989, 86. The current Wielangta Forest

Today, Wielangta comprises distinct pockets of never logged forest, an abundance of old-regrowth forest, ongoing logging coupes and vast areas of cleared land. As a conservation concern, Wielangta only rose to attention because of the court cases brought by Dr Robert ('Bob') Brown, then Federal Senator for the state of Tasmania and leader of the Australian Greens party, against the state owned forestry enterprise, Forestry Tasmania. In this article I analyse the trial decision: *Brown v Forestry Tasmania [No 4]*,¹¹¹ referring in less detail to the appeal decision.¹¹²

Dr Brown sought to halt the logging of two coupes within the wider forest area by using Australia's national endangered species protection law, the *EPBC Act*. That Act makes it an offence to take an action that is likely to have a significant impact on Commonwealth listed endangered species without Commonwealth government approval.¹¹³ Dr Brown argued that the logging would have a significant impact on three species:

- the migratory swift parrot, which uses the Wielangta area's hollowed trees as a preferred nesting and breeding habitat.
- the endemic Tasmanian wedge-tailed eagle, which is very low in number and particularly threatened by human activities, like shooting and trapping, and by tall-tree habitat clearance or isolation; and
- the incredibly rare broad toothed stag beetle, endemic only to the local area and a nearby island reserve.

Each species is listed as threatened under the *EPBC Act*. The trial decision went some way to informing us about the effect of the listing of species under the *EPBC Act*: about the extent to which the species were not only protected,¹¹⁴ but are recognised by the law.

The legal issue centred on section 38 of the *EPBC Act*. That section purports to exempt some forestry operations, like logging, where they are taken in accordance with a Regional Forest Agreement (RFA), from the offence and approval provisions within the *EPBC Act*. Although framed as an exemption the provisions have alternatively been understood as being 'akin to a licence'.¹¹⁵ Consequently, such forestry operations may

Reserve was mostly created by Tasmania, 'Proclamation under the *Forestry Act 1920*', *Tasmanian Government Gazette*, No 20679, 12 July 2006, 1150.

¹¹¹ (2006) 157 FCR 1.

¹¹² *Forestry Tasmania v Brown* (2007) 167 FCR 34.

¹¹³ *EPBC Act* s 18(3).

¹¹⁴ Thomas Baxter, *A Law Unto Themselves? Australian Regulation of Forestry Operations* (PhD Thesis, University of Tasmania, 2014) ch 6 explores in detail the question of protection of species in this case.

¹¹⁵ Hawke, above n 16, 197 [10.12].

proceed beyond the reach of the criminal offences in the law even if the forestry operations are likely to have a significant impact on listed, protected species, including the three species of concern in this case.

The so-called 'exemption' exists because forestry activities, management and conservation in a number of Australian states are subject to agreements between the Commonwealth and the Australian states. These RFAs¹¹⁶ specify Commonwealth pre-conditions to it forgoing its regulatory involvement in state-approved forestry. The RFAs seek to balance the objects of surety of forest supply, regulatory simplicity, sustainable use of the forest resource, and conservation of species.¹¹⁷ The section 38 exemption in the *EPBC Act* applies to those forestry operations 'taken in accordance with a Regional Forest Agreement'.

The Tasmanian RFA applies to the entire state.¹¹⁸ It treats the state as one large forest region within which conservation occurs simultaneously with forestry. By contrast, the *EPBC Act* only applies to Commonwealth protected areas, like the vast Tasmanian Wilderness World Heritage Area¹¹⁹ and the *Ramsar Convention* nominated wetlands of international importance,¹²⁰ which are dotted mostly along the Tasmanian east coast. The *EPBC Act*, as noted, also applies to listed protected species wherever they are located.¹²¹ While the Wielangta Forest was not, and is not, a protected area, it was identified as being a habitat for the three listed protected species.

In this case, the most relevant clause of the Tasmanian RFA was clause 68. That clause specified how Tasmania would protect designated species in the state, species that included the swift parrot, the Tasmanian wedge-tailed eagle and the broad-toothed stag beetle. In its original form, and the form it was in for the trial, the clause stated in effect that Tasmania agrees to protect the three species of relevance through a system of reserves or by applying management prescriptions.¹²²

The case was straightforward from a legal perspective.¹²³ It ought to have been a statutory interpretation question of what is meant by section 38 of the *EPBC Act* read together with clause 68 of the Tasmanian RFA. At the

¹¹⁶ Regulated under the *Regional Forest Agreements Act 2002* (Cth).

¹¹⁷ See for instance the recitals to the *Tasmanian Regional Forest Agreement* (November 1997).

¹¹⁸ *Tasmanian Regional Forest Agreement* (November 1997) cl 4.

¹¹⁹ *EPBC Act* ss 12-15A.

¹²⁰ *EPBC Act* ss 16-17B.

¹²¹ For instance: *EPBC Act* ss 18-20B.

¹²² The full wording of clause 68 was: 'The State agrees to protect the Priority Species listed in Attachment 2 (Part A) through the CAR Reserve System or by applying relevant management prescriptions.'

¹²³ For a case note see Imran Church, 'Fauna v Forestry: The Wielangta Forest Litigation' (2009) 28(1) *University of Tasmania Law Review* 125.

invitation of the parties through the evidence they produced and the submissions they made, however, the case became more than a battle over the words in two laws. The case became a battle over whether the three threatened species were being irreparably harmed by forestry activities.

Dr Brown argued that the exemption in the *EPBC Act* did not apply to the logging of the two coupes because the forestry operations and the management plans would not protect the species, and protection of species was required by clause 68 in the RFA. Dr Brown argued that any forestry operation that did not protect species was not in accordance with the Tasmanian RFA. The exemption in the *EPBC Act*, he pointed out, only applied to forestry activities taken in accordance with an RFA. The legal argument offered by Dr Brown centred on recognition of species. The premise of the argument was that the exemption did not exist unless and until species were protected, prioritised and seen to recover.¹²⁴

By contrast, Forestry Tasmania, and the Commonwealth as an intervening party,¹²⁵ argued that all forestry operations in Tasmania were exempt from the *EPBC Act* because the state had created reserves and management protocols with the purpose of protecting species, and that was enough to render the forestry activities accordant with the RFA. Forestry Tasmania produced evidence to reject the accusation that it was further threatening the species protected under the *EPBC Act*. This position did not afford recognition to the species. Rather, primacy was given to the institutional system designed by them, within their power, regardless of its effect on the environment. The Commonwealth, for instance, argued that the RFA ‘does not impose an unqualified obligation to protect [the species] ... the obligation to protect is only an obligation to protect *through or by means of* the [system of reserves] or by applying relevant management principles’.¹²⁶

VI RECOGNISING SPECIES OR A LEGAL INSTRUMENT?

Dr Brown’s legal team presented the case as offering a choice between ‘real, practical protection to threatened species or ... fulsome policies and procedures but not enabling anything to be done to stop conduct which has a significant impact on listed threatened species’.¹²⁷ On this point,

¹²⁴ ‘Outline of Submissions of Robert Brown’, *Brown ats Forestry Tasmania*, 23 November 2005, [64], citing *EPBC Act* pt 13.

¹²⁵ The State of Tasmania also intervened: *Brown v Forestry Tasmania* [2005] FCA 1210 (5 September 2005).

¹²⁶ ‘Outline of Submissions for the Commonwealth’, *Brown ats Forestry Tasmania*, 1 December 2005, [32]-[33] (emphasis in original).

¹²⁷ ‘Outline of Submissions of Robert Brown’, *Brown ats Forestry Tasmania*, 23 November 2005, [1].

among others, Marshall J opted for the argument of protection – and with it recognition – concluding that:

‘[a]n agreement to “protect” means exactly what it says. It is not an agreement to attempt to protect, or to consider the possibility of protecting, a threatened species.... To construe cl 68 otherwise would be to turn it into an empty promise.’¹²⁸

Marshall J held that the three species were not being protected and would not be protected by the proposed logging. Hence, the logging would not be consistent with the obligation in the Tasmanian RFA, so the exemption in the *EPBC Act* could not apply. In reaching his conclusion, Marshall J largely eschewed a conventional and doctrinal analysis of the law. His judgment does not dwell on rules of statutory construction. Rather his analysis is based on logic, findings that were self-evident to him, and an acceptance that environmental laws would and should prevail to protect the very parts of the environment that the laws specify warrant protection.

The recognition afforded to the species by Marshall J is demonstrated through his acknowledgement of the longevity, role and function of the stag beetle¹²⁹ and the interdependence of the species with their Tasmanian habitat.¹³⁰ Marshall J also valorised the species. In his judgment Marshall J returned over and over again to the conservation status of the species as the primary material for his reasoning rather than offering long expositions of precedent, including the line of Federal Court cases about the *EPBC Act* which provide a variable view of the state and place of contemporary biodiversity and environmental protection law in Australia.¹³¹

In each instance, when presented with a choice between evidence, he preferred the scientific evidence that prioritised the interests of the species. He found this evidence from expert witnesses of both parties and the court appointed expert. He accepted the view that the stag beetle was present in the dry and wet components of the forest when there was doubt,¹³² that the swift parrot has an ongoing and regular presence within, and dependence upon, the blue gum trees in the Wielangta Forest when there was a suggestion that the birds did not frequent the forest.¹³³ He

¹²⁸ *Brown v Forestry Tasmania [No 4]* (2006) 157 FCR 1, 35 [240]-[241].

¹²⁹ *Ibid* 4-5 [13]-[14].

¹³⁰ *Ibid* 4-5 [11]-[16].

¹³¹ Lee Godden and Jacqueline Peel, ‘The *Environment Protection and Biodiversity Conservation Act 1999* (Cth): Dark Sides of Virtue’ (2007) 31(1) *Melbourne University Law Review* 106; Andrew Macintosh, ‘Why the *Environment Protection and Biodiversity Conservation Act*’s Referral, Assessment and Approval process is Failing to Achieve its Environmental Objectives’ (2004) 21(4) *Environmental and Planning Law Journal* 288.

¹³² *Brown v Forestry Tasmania [No 4]* (2006) 157 FCR 1, 11 [71].

¹³³ *Ibid* 12-13 [79]-[81].

concluded that any impact that might reduce the population of a very rare species, like the Tasmanian wedge-tailed eagle, would be significant.¹³⁴

Marshall J reframed the perspective of impact by repositioning the non-human into the centre of his deliberations. He did this by his focus on cumulative impacts¹³⁵ – opting not to assess the significance of impact on species narrowly in the view of, attributable to, or directly caused by Forestry Tasmania,¹³⁶ but by perceiving how the additive impact caused by Forestry Tasmania would be experienced by the species.¹³⁷ He did not give humans the benefit of the doubt that they could change management regimes or modify reserve systems to better protect species, resting his analysis on a view that ‘the best indicator of future [human] behaviour is past [human] behaviour’.¹³⁸

When determining the meaning of the requirement to protect species under clause 68 of the Tasmanian RFA, Marshall J went further than other Australian judges by asserting that:

‘[p]rotection is not delivered if one merely assists a species to survive. Protection is only effective if it not only helps a species to survive, but aids in its recovery to a level at which it may no longer be considered to be threatened’.¹³⁹

His views are clearly compatible with a position supporting ecological integrity of the species (if not the whole ecosystem). He argued that there was a human ‘duty ... to restore the species’ already endangered,¹⁴⁰ and in the case of the Tasmanian wedge-tailed eagle – of which there were just six breeding pairs in the state – this duty extended to restoring the species to its carry capacity and in no way restricting its ability to successfully breed and replenish. This included not removing any trees that might reduce the breeding territory of the species.¹⁴¹

While this analysis was directed to the RFA, Marshall J also made a final comment on the function of the *EPBC Act* that reiterated a view that the central objective of that law, particularly interpreted through the international treaties to which it gives effect, is to recognise non-human

¹³⁴ Ibid 15 [97], 16 [101].

¹³⁵ This focus is also acknowledged as having importance to Marshall J’s reasoning by Church, above n 123, 129-130. On appeal, Stephen Gageler QC (as he then was) argued that the ‘cumulative or aggregated approach’ advanced by Marshall J was not intended by Parliament (see: Transcript of Proceedings, *Forestry Tasmania v Brown* (Federal Court of Australia, Sundberg, Finkelstein and Dowsett JJ, TAD4/2007, 15 August 2007)) 181, line 43.

¹³⁶ *Brown v Forestry Tasmania [No 4]* (2006) 157 FCR 1, 33 [230].

¹³⁷ Ibid 14 [91], 15 [95], 16 [102], 17 [111] and 22 [146].

¹³⁸ Ibid 39 [271].

¹³⁹ Ibid 38 [264].

¹⁴⁰ Ibid 15 [94].

¹⁴¹ Ibid 15 particularly [96] endorsing the evidence of Nick Mooney.

species through population restoration. In so doing the interests of species, their justice, and their integrity, become the starting point for understanding the purpose of the law. Marshall J said that he ‘favour[ed] a construction of the *EPBC Act* which views protection of the environment as an act of not merely keeping threatened species alive, but actually restoring their populations so that they cease to be threatened’.¹⁴²

Marshall J’s construction, and the conclusion he reached, was unexpected to those who had not closely watched the case and who had not observed firsthand the fragility of the evidence produced by Forestry Tasmania in the trial.¹⁴³ The outcome did not accord with the desires or demands of the powerful and political elite in Tasmania. It triggered in the Tasmanian government a desire to see the previously understood status quo reinstated. The State of Tasmania therefore became a much more active participant in the appeal launched by Forestry Tasmania and, as discussed below, promptly negotiated with the federal government an amendment to the Tasmanian RFA to neutralise Marshall J’s decision such that Forestry Tasmania could engage in forestry actions that threatened protected species.

The Full Federal Court upheld an appeal by Forestry Tasmania, rejecting Marshall J’s interpretation of the *EPBC Act* and the RFA: the interpretation that recognised the endangered species as being entitled to prioritisation, recovery, restoration and habitat. The foundation reasons for Forestry Tasmania’s appeal were to challenge Marshall J’s findings that gave rise to species recognition – his findings that protection of species requires their recovery and restoration.¹⁴⁴

The State of Tasmania, intervening, argued that Marshall J’s analysis overlooked the objects of the ‘orderly harvesting’ of timber and the ‘the expressed purpose [in the law] of “providing long-term stability of forests and forest industries”’.¹⁴⁵ Collectively, Forestry Tasmania and the intervening parties sought a return to the re-establishment of the dominant perspective of law, with the environment subjugated to human interests.

The Full Federal Court avoided addressing these arguments directly. Instead it endorsed the arguments of the Commonwealth at trial. The three judge bench concluded that an analysis of clause 68 of the RFA, which required Tasmania to create a series of reserves or adopt

¹⁴² Ibid 44 [300].

¹⁴³ Marshall J was displeased by Forestry Tasmania’s experts modifying their written evidence after it being reviewed by other scientists within the Forestry Tasmania organisation. See *ibid*, 18 [117] ff.

¹⁴⁴ ‘Notice of Appeal of Forestry Tasmania’, *Forestry Tasmania v Brown*, Federal Court of Australia, 9 February 2007, 3–4.

¹⁴⁵ ‘Second Intervener’s Outline of Submissions’, *Forestry Tasmania v Brown*, Federal Court of Australia, 7 August 2007, [10] (emphasis in original).

management measures for the purpose of protecting the threatened species, did not require an ‘enquiry into whether [the system of reserves] effectively protects the species. Rather it is the establishment and maintenance of the ... reserves that constitute the protection’.¹⁴⁶ Relying on the explanatory memorandum to the bill that became the *EPBC Act*,¹⁴⁷ the Full Court concluded that protection of species was not required or expected from the RFA, notwithstanding that the objects of the *EPBC Act* are directed to species protection.¹⁴⁸ Church found ‘remarkable’ the lack of engagement by the Full Court in its reasoning and interpretation of the law with the purposes of the *EPBC Act*; notably those purposes to protect and conserve species.¹⁴⁹ At the May 2008 hearing for special leave to appeal the case to the High Court brought by Dr Brown, an application for leave that was ultimately rejected, Kirby J also highlighted the need to take a purposive approach to the legislation, indicating perhaps his view that the Full Court was mistaken in its approach to interpreting the law.¹⁵⁰

The Full Court’s only concern was whether an administrative decision – the creation of a system of reserves – had occurred. The Full Court made no comments about the meaning of protection or the findings of fact of significant impact on the species. It did concede, however, that the laws in question – the *EPBC Act* and the RFA – were not directed to species recognition. The court asserted that within the RFA: ‘there were some limits imposed on forest operations, but operations would continue, and to that extent there was no guarantee that the environment, including the species, would not suffer as a result.’¹⁵¹ Given that both the *EPBC Act* and the RFA are designed to achieve ecologically sustainable development, this statement was a reminder of what that concept currently fails to attain.

VII WHERE’S THE JUSTICE?

Across the two judgments there were two starkly different views about the law and consequently two different views about the relationship between the law and ‘nature’,¹⁵² and the function of the law to respect and recognise either the human-created administrative structures designed to

¹⁴⁶ *Forestry Tasmania v Brown* (2007) 167 FCR 34, 50 [59].

¹⁴⁷ *Ibid* 50-1 [61].

¹⁴⁸ See Thomas Baxter, above n 114, 294 for a detailed discussion on this point.

¹⁴⁹ Church, above n 123, 134.

¹⁵⁰ See *Brown v Forestry Tasmania* [2008] HCATrans 202 (23 May 2008). Following this case Dr Brown was pursued for the costs incurred by Forestry Tasmania in the appeal case. See Alexandra de Blas, ‘Can a Parrot Get Justice under a Regional Forest Agreement?’ (2009) 150 *ECOS Magazine* 9.

¹⁵¹ *Forestry Tasmania v Brown* (2007) 167 FCR 34, 51 [64].

¹⁵² After Delaney, above n 104.

manage the environment, or to respect and recognise the environment itself.

Ultimately the legal case was considered moot by the High Court at the hearing of the application for special leave to appeal.¹⁵³ Hayne and Crennan JJ, Kirby J not agreeing, declined to revisit the case, and potentially attempt to make sense of the two diverse approaches to the law in the earlier cases, because of a change made by the two governments of the Commonwealth and Tasmania.

In the period between the trial case and the appeal case the governments amended the Tasmanian RFA, including clause 68. Clause 68 was altered to assert that the reserve system put in place by the Tasmanian government did protect the species that the state of Tasmania was obliged to protect – including the stag beetle, the Tasmanian wedge-tailed eagle and the swift parrot.¹⁵⁴ It was at this point that the species were made invisible, their integrity discarded, their prospect for flourishing threatened. The effect was that the species were arguably in a worse legal position as a result of the legal conflict.¹⁵⁵ The reserves created for their benefit no longer needed to protect them. Ecological justice as recognition was denied.

The Full Federal Court delivered the final legal word in the case. In its judgment, the environment was out of view. The court, arguably erroneously, interpreted the law in a confined and conventional way. It asserted and favoured a view that parliamentarians, our most powerful legal citizens, intended that obligations and expectations of species protection would be satisfied simply through the dedication of places as reserves.

It did so notwithstanding the existence of a competing intention evident in the objectives of the law that the law should achieve a purpose of environmental conservation and protection. It offered no views about what seemed to matter most to the two protagonists: whether logging of the Wielangta Forest could occur consistently with the protection of threatened species. The judgment failed the species, not because of its outcome, but because they were not prioritised. They were not even considered.

¹⁵³ *Brown v Forestry Tasmania* [2008] HCATrans 202 (23 May 2008).

¹⁵⁴ Thomas Baxter, above n 114, 322 argues that this was to confirm a legal fiction and (at 347) was a challenge to the rule of the law. See *Variation to the Tasmanian Regional Forest Agreement* (23 February 2007).

¹⁵⁵ See also Church, above n 123, 137. Politically, logging of the Wielangta Forest would become problematic because of the conclusion in the trial, unaddressed by later cases, that the logging would significantly adversely affect the three species.

As explained above, Marshall J did prioritise and valorise the species. He favoured views of the environment that corresponded with the interests of species even if this meant he overprotected or overstated the importance of the two small coupes of forest that were proposed to be logged. Whether or not he reached the correct decision – on the law or the science – is debateable.¹⁵⁶ What is without question, however, is that Marshall J did recognise the species in the way that Scholsberg, Fraser, Young and Westra all propose. While not framed as being directed towards justice,¹⁵⁷ that was the accomplishment.

Moreover, in finding that humans had an obligation to those species to ensure they recover, Marshall J flipped the hierarchy of concern. He reached a judgment about species value in an unconventional way. He started his analysis with the environment, the species, and he understood and framed the law as serving them more than us. Marshall J's judgment is very much a counterpoint to judicial orthodoxy and judicial understandings of the environment¹⁵⁸ and ecologically sustainable development,¹⁵⁹ and it therefore should invite us to challenge such orthodoxy in order to secure ecological and environmental justice for the benefit of the vulnerable, traditionally oppressed or silenced.

There is one part of Marshall J's judgment that is worth noting: his opening words. Although the bulk of the judgment can be considered 'eco-centric' in tone and approach, his start supposes human domination over 'nature' rather than recognition. Marshall J began his judgment asserting that 'Tasmania is an island of unparalleled beauty. It contains wild and picturesque landscapes. Among those landscapes is the Wielangta forest'.¹⁶⁰

Delaney might argue that Marshall J's position as outlined in his opening stanza corresponded with the conventional approach of judges to environmental recognition.¹⁶¹ That is, Marshall J separated the environment from the law, characterised it through his human perspective, and defined the environment by what it meant to him. In Plumwood's words he 'colonised' the environment.¹⁶² His description of the three species also highlighted their peculiarity and interest to humans

¹⁵⁶ In my wider research inquiry the view expressed to me by some scientists involved in the case was that Marshall J formed the view that everywhere is of equal and utmost value to species, and the implications of his findings includes that these three species in the particular location of Wielangta were overprotected relative to other species and to elsewhere.

¹⁵⁷ Alkon et al, above n 37.

¹⁵⁸ *Friends of Mollacoote Inc v Minister of Planning* (2010) 28 VR 257.

¹⁵⁹ *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts* (2008) 167 FCR 463.

¹⁶⁰ *Brown v Forestry Tasmania [No 4]* (2006) 157 FCR 1,[1].

¹⁶¹ Delaney, above n 104. See the discussion on page 20 of this article.

¹⁶² Plumwood, above n 75.

– particularly the appearance of the swift parrot and the iconic status of the Tasmanian wedge-tailed eagle.¹⁶³

Opening sentences of judgments like this are written to serve a purpose.¹⁶⁴ It is likely that the purpose intended here by Marshall J was to persuade readers about the importance of his decision to them, to convince them to read on, to see how he has protected this place worthy of value to humans. If he intended to frame the discussion that would follow he failed with his first sentences. The need for Marshall J to introduce his judgment in the way he did, positioning humans as having a priority interest and concern, despite the way he reshaped environmental law judging in the full judgment, tells me that the realisation of recognition and justice in environmental law for all species, or indeed an earth jurisprudence approach to law, is still some way off.

VIII CONCLUSION

Respect and recognition and matters of power and priority are evident in the process and decisions in the Wielangta Forest conflict cases. Marshall J's decision, though capable of a critique for its superficial conventional legal analysis, is an example of the law and human interest being devalued compared to the interests of the three species protected under the *EPBC Act* because of their threatened status.

Marshall J did not allow the intricacies of the rules of statutory interpretation to result in a conclusion that a species conservation law, with an explicit purpose directed towards conservation and protection, could oversee the loss and harm of species in a way akin to the application of the principle of ecologically sustainable development.¹⁶⁵ Moreover, by requiring those three species to be protected by the taking of measures to ensure a flourishing of the species, to oversee their recovery, and to be led by international legal obligations,¹⁶⁶ Marshall J went further in recognising the species than other federal judges faced with giving meaning to the *EPBC Act* had previously, and he reminded us of the limited scope and force of the principle of ecologically sustainable

¹⁶³ *Brown v Forestry Tasmania [No 4]* (2006) 157 FCR 1, 4 [11], 5 [15].

¹⁶⁴ A powerful opening is in *Hub Action Group Inc v Minister for Planning* (2008) 161 LGERA 136, where Preston CJ makes plain the need to demonstrate rather than make promises about ecologically sustainable development.

¹⁶⁵ For example: *Tarkine National Coalition Inc v Minister for the Environment* (2014) 202 LGERA 244, where Tracey J found that there was no requirement in that case for the Minister to consider the cumulative impacts of projects in the region on the endangered Tasmanian devil. Justice Brian Preston, 'Internalizing Ecocentricism in Environmental Law' in Michelle Maloney and Peter Burdon (eds), *Wild Law – In Practice* (Routledge, 2014) 75 describes ways judges can integrate ecocentric and recognition positions in their decisions.

¹⁶⁶ *Brown v Forestry Tasmania [No 4]* (2006) 157 FCR 1, 44 [301].

development within Australia. He has chartered a path towards justice in environmental jurisprudence and has displayed a new attentiveness to the non-dominant components enmeshed in the concept of ecologically sustainable development in much the same manner that Preston CJ did with respect to the human community in the *Bulga* case.¹⁶⁷ He has caused us to reconsider what ecologically sustainable development should achieve.

The justice in this case is less fixated on access and distribution but on transformative recognition of the otherwise hidden, background, or silenced community of environmental law. The threads of recognition in the decision offer an empirical foundation for recognition as justice across environmental and ecological justice and an understanding of ecologically sustainable development that gives priority to the vulnerable community warranting, needing or demanding protection.¹⁶⁸ For scholars, including myself, who seek to make sense of ecological and environmental justice through shared concepts, the case also helps to facilitate those connections.

¹⁶⁷ (2013) 194 LGERA 347.

¹⁶⁸ Bonyhady, above n 16.