



Workshop Report



Hosted by

**Melbourne Law School's Centre for Resources, Energy and
Environmental Law**

and

UNSW Sydney Faculty of Law & Justice

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Report on the 2021 Environmental Law Doctoral Researchers' Workshop

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We acknowledge the traditional custodians of the land from which we all participated in the inaugural Environmental Law Doctoral Researchers' Workshop. In particular, we acknowledge the Wurundjeri people of the Kulin Nation, on whose lands the University of Melbourne stands; and the Bedegal people who are the traditional custodians of the land on which the UNSW Faculty of Law and Justice stands.

By acknowledging the Traditional custodians of the land, Australians recognise a brutal history of dispossession by colonial settlers, and the ongoing legacy of that dispossession still experienced by Aboriginal people today. We also acknowledge that Aboriginal people have cared for and lived in harmony with the Country for 60,000 years, and that there is much we can learn from the oldest continuous culture in the world, particularly as we face the destruction of our precious planet. This acknowledgement helps us to rethink the way Western society sees the Earth, and transform our perspective to an ethic of mutual respect and care - a critical consideration for emerging scholars of environmental law today.

Workshop Overview

The Environmental Law Doctoral Researchers' Workshop 2021 was developed with the intention of offering a focussed, supportive space for PhD candidates working in the field of environmental law to present their research, receive constructive feedback from peers, and develop skills in presenting, giving feedback and engaging in academic debate. The workshop focused specifically on environmental law, to allow participants to engage deeply in each other's work while learning about a diverse range of topics in the field. The Workshop was designed specifically for PhD candidates, with the option for Masters students to observe, with a view to creating a supportive environment for participants to test ideas, seek feedback, try out new approaches to presenting, and actively participate in an equal, safe and inclusive space.

Over the course of the workshop, we heard from 24 PhD candidates from universities in Australia, Brazil, Canada, the Netherlands, New Zealand, South Africa and the United Kingdom about their research in environmental law. Participants also heard from and engaged with four established environmental law scholars about skills that are central to their craft: publishing widely and in different formats; and remaining optimistic and focussed notwithstanding the pressing environmental challenges we face.

This report captures a brief overview of the rigorous, wide-ranging, cutting edge and highly impactful research shared at the workshop which is being undertaken by emerging scholars in environmental law. Providing participants with a reference for the workshop, and sharing the outcomes of the Workshop with a wider network of colleagues and friends will, we hope, further the objectives of the Workshop, helping to build a strong, well-equipped and mutually supportive network of emerging environmental law scholars across the world.

Conceptual Overview

Across a rich array of presentations, several themes emerged that reflect central preoccupations of environmental law. Firstly, there was a strong current of ambition for significant change in environmental law running throughout the sessions. The presentations and discussion clearly reflected that progress in environmental law is not what it should be. Emerging scholars have high expectations about how law could help change the status quo, and help protect and restore our Earth. This was particularly clear in the structural dynamism many of the presentations expressed – engaging with the fabric and underlying norms of environmental law and exploring how they could evolve into something better. This included discussion of the constitutionalisation of environmental norms; the normative and procedural roles of ecological integrity; adaptive governance; evolution of a regime complex; interactional international law, smart regulation and resilience thinking; and encouragement to use emotions and even engage with fiction to extend the imagination of environmental law.

While some of the issues we are working on may be old problems, it's clear that emerging environmental law scholars are committed to looking at them in new ways – this is truly cause for hope!

Further to this unusual level of ambition, there was also a great diversity of methods in the legal research presented. Analysis of a challenging case in South Africa reminded us of the importance of doctrinal analysis, and understanding how legal drafting and socio-legal factors play out in the courts. Several participants discussed empirical studies, illustrating how important they are for understanding environmental law and problems in practice. Other methodologies discussed included dialectical method; the theory and method of reflexive law; and theoretical reasoning and argumentation across a diverse range of theories.

A potential driver, and also a product, of this methodological diversity is interdisciplinarity, another theme that emerged strongly across the workshop. Even the line-up of participants reflected how important this is to our collective scholarship, with PhD candidates from outside the field of environmental law presenting work that traversed the domain and connected with the concerns of environmental law scholars. And amidst the environmental lawyers there was a wealth of evidence of interdisciplinary work – from green criminology, to intersections with social policy and urban planning, to the interface of science and law. Expert advice in the guest panel session on publishing also encouraged participants to do interdisciplinary work and publish with interdisciplinary authorial teams and journals, to increase our impact as scholars in the real world.

The presentations also underscored the fact that environmental law is rapidly evolving, presenting new needs, new opportunities and new theories. Discussions canvassed new, cutting edge and unregulated technologies like solar geoengineering; contemporary policy proposals such as the Global Green New Deal; emerging theories responding to planetary environmental crises and evolving science; and alternative approaches to sustainable development, such as regenerative development. The discussions demonstrated that there are many legal responses and legal implications of these developments, and that emerging scholars are engaged with the rapidly changing landscape of environmental law that will shape and be shaped by the Anthropocene.

And finally, across a broad range of presentations we had the opportunity to discuss and explore the different constituencies of environmental law. On the one hand, several presenters spoke of how environmental harms damage communities, and discussed how law can be used to protect those communities – considering, for example, dispute resolution in West Africa, the pursuit of climate justice through human rights mechanisms, and the impact of climate change on civil legal needs. On the other hand, we also talked about decentring the human and unpacking law’s assumptions about human dominance, whether it relates to animals, or a shift to see all of nature differently in law and policy development. Discussing these two tracks of environmental law showed that there is enormous overlap; they aren’t mutually exclusive approaches. There is much we can learn from each approach – because, fundamentally, humans, and our human system of law, are inextricably embedded in nature.

Presentations and discussion by PhD Candidates

The first session for the Workshop was titled ‘Capitalism, exploitation and extractive industries’. We heard from Amanda Ferraz de Silveria of Pontificia Universidade Catolica do Parana about her paper: *Reconfiguration of Capital, Commodification of Nature and Socio Biodiversity Rights in Latin America*. With reference to the Amazon and the Pantanal as case studies, Amanda, who was born in the Amazon, explained how global systems of capitalism have been materially supported by the exploitation of natural landscapes that are significant to Indigenous peoples, and argued that such systems violate rights to socio-biodiversity. In a presentation on *Emerging Issues in Investment-Environment Dispute Resolution- Directions for West Africa*, Adekontunbo Alase of WSU analysed the impunity of multinational corporations for damage to the environment sustained in the context of resource extraction; Adekontunbo also discussed how dispute resolution forums and mechanisms might be reimagined in the region to improve accountability for environmental harm, and scrutinised how remedies might be targeted towards those most affected by it. Philippa Higgins of UNSW discussed a paper titled *Monitoring the Monitor: an assessment of the McArthur River Mine*, which probed failures by an Independent Monitor appointed to regulate environmental impacts associated with the operation of McArthur River lead-zinc-silver mine to arrest harm and abate adverse impacts to the Traditional Owners of the region. Common to all of these rich presentations was a reflective consideration of social values. They each interrogated pertinent and complex questions concerning

the extent to which we value the environment for its own sake, the ways in which we quantify and cost environmental harm, and the impacts of environmental degradation on our health, heritage and culture.

In the session 'Challenges and innovation in environmental regulatory approaches', we heard about four diverse environmental issues that are all the focal point of rapidly emerging and evolving legal responses. Manon Simon (University of Tasmania) discussed solar geoengineering technology, and proposed that an analysis of the legal regime developed around a comparative technology (weather modification by cloud seeding), viewed through an adaptive governance lens, could provide a useful analogue for the urgently needed development of a legal framework to regulate this emerging and as yet unregulated technology. Melissa Strydom (University of the Witwatersrand) discussed the South African case of *Uzani Environmental Advocacy CC v BP Southern Africa (Pty) Ltd*, examining the unusual circumstances of a private prosecution in an environmental matter and exploring various features of the statutory framework that facilitated a decision which, she argued, is deeply flawed. Chris McElwain (UNSW) described the frightening scale of food waste in Australia and internationally, arguing that although it will be difficult for government actors to step in to save food that is wasted, there is significant scope with a range of regulatory tools and the principles of Smart Regulation to improve the way we manage food waste. Kristyn Glanville (UNSW) outlined the serious problem of water theft, arguing that although it has received little attention to date in a criminology context, the time is ripe for a green criminological approach to investigating this problem, through empirical research. The diversity of methods and regulatory issues discussed in this session demonstrated the breadth of the challenges faced by environmental law, as well as the scope for innovation in understanding and responding to them. All four presentations touched on a range of socio-legal factors that influence the success or otherwise of environmental regulation, emphasising the importance of understanding law in context, and law in practice, to address pressing environmental problems.

The next session, 'Norm development and contestation in environmental law', consisted of four presentations with Caterina Guidi (UNSW) as a general discussant. Jamie Matthews (QUT) highlighted the great potential of the emerging concept of regenerative development which arises from the failure of the well-known concept of sustainable development to achieve green development. She thus analysed the governance of urban planning in the city of Brisbane to support her thesis. Carley Bartlett (UNSW) discussed the role that uncertainty plays in the relationship between law and environmental knowledge in the context of environmental issues. In particular, she presented her very first findings from her field work, which has involved interviewing a variety of actors involved in responding to per- and polyfluoroalkyl substances (PFAS) contamination in Australia. Mara Wendebourg (KCL) investigated a new perspective on how global constitutionalism may contribute to the regulation of the issue of fisheries overexploitation through scientific expertise and subsidies regulation. Genevieve Quirk (University of Wollongong) argued that the Oceania region provides the conceptual and empirical foundations to support the contention that regional complexes can play a transformative diplomatic role in combating ocean change. All four presentations of the sessions thus focused on the development of environmental law in the face of ongoing pressing environmental challenges; together, they emphasise that detailed analytical investigation of underlying and evolving norms, conceptual frameworks and institutional structures can provide crucial insight into the search for more effective legal responses to these challenges.

The final session for the first day of the Workshop explored 'Investment as a tool of environmental law'. First we heard from Injy Johnstone from Victoria University of Wellington about a paper titled *The Global Green New Deal: The New Norm?*. In this paper, Injy applied the theory of interactional law to the Global Green New Deal -- an investment strategy that eschews reliance on carbon-emitting industries, which has garnered support and become increasingly influential during the COVID-19 pandemic -- to interrogate the instrument's legal status and, in particular, the extent to which it might

might be a source of new norms of international law. In presenting a paper on *Sustainability Reporting and Investor Engagement: The Case of Singapore*, Samantha Tang of the University of Melbourne analysed the implications of mandating that listed companies engage in sustainability reporting; using Singapore as a case study, which introduced compulsory sustainability reporting in 2016, Samantha examined how the practice - and the capacity for investor organisations to put questions to companies about their reports at annual general meetings - has shaped the dynamics of corporate accountability for and transparency in relation to ESG risks in the country. Finally, Eleftheria Asimakopoulou of Queen Mary University London discussed a paper on the *Integration of climate change objectives in EU international investment agreements: A constitutional analysis*; in this presentation, Eleftheria examined the extent to which EU law -- conceptualised as a kind of 'constitutional constraint' -- circumscribes the ability of EU Member States to incorporate climate-related considerations and provisions in their international investment agreements with other countries. In this engaging suite of presentations, participants incisively critiqued and creatively reimagined the relationship between finance and investment, on the one hand, and global environmental outcomes, on the other.

The second day of the workshop began with a session on 'Contemplating the non-human subject of environmental law.' Leo Bromberg (University of Melbourne) applied a multi-species lens to critique Beetham's theory of legitimacy, arguing that it needs to be rethought to account for animals' interests and the impacts on animals of human actions. Duncan Wallace (Monash University) offered a stirring defence of the corporation, arguing that if understood on the basis of organismic theory, corporations should be given more rights and freedom to act without being shackled to the profit imperative of shareholder-owners. Via a paper-swap, Ashleigh Best (University of Melbourne) and Alice Bleby (UNSW) discussed Ashleigh's theoretical exposition of the way animals' legal status as property makes them vulnerable in disasters, by failing to account for relationality and animal's embodiment, by rendering them legally inferior to people, and by failing to acknowledge that their property status is contingent and socially constructed. They then discussed Alice's argument that rights of nature manifests qualities of the emerging theory of Earth system law, and that this theory could be further developed through the normative framework of rights of nature, including interrogating the concept of the Anthropocene. The diverse issues and perspectives elaborated in this session illustrated the expansive potential of law and legal concepts if viewed from a different perspective – for example, a perspective that acknowledges the interests of non-human beings. The presentations were also a strong reminder of the complex challenges involved in engaging law with non-human interests, and even non-human legal subjects – these scholars argued that this task, although difficult, is increasingly important to address law's inadequacies in regulating, preventing and repairing environmental harm and the degradation of non-human beings including animals.

In the session 'Theories of environmental governance', Emille Boulot (McGill University), Violet Ross (Wageningen University) and Ayse Didem Sezgin (KCL) swapped their papers. Emille presented Violet's study on the role of reflexivity and informational governance in EU law to facilitate a circular economy for plastics. Emille highlighted that those are two innovative concepts for establishing a novel approach in EU law for plastic where key arguments are communication and collaboration. Violet then discussed Didem's research on the recognition of ecological integrity as an 'ecological' character of environmental law. Violet particularly commented on the relevance of defining the concept of ecological integrity, because there are many definitions in the literature. Finally, Didem commented on Emille's project on adaptive governance in the context of ecological restoration by drawing on extensive fieldwork in Australia. In particular, Didem focused on the challenge of how to incorporate multiple values into adaptive governance. All three papers focused on new features of environmental governance, i.e. informational, ecological and adaptive, to cover multiple values at national, regional and international levels.

The final session of the workshop addressed ‘Legal responses to climate change impacts.’ Monica Taylor (QUT) described anticipated impacts of climate change on civil legal needs, and suggested that considering these issues through an environmental justice lens could help develop a conception of legal need that takes climate change into account. Nicky van Dijk (University of Tasmania) outlined two processes currently underway that will test the capacity of the international human rights system to respond to the threat of climate change to ‘future people’ – children and future generations – and analysed the fairness of this type of legal procedure to current and future generations affected by climate change. Caterina Guidi (UNSW) discussed the method and findings of her empirical study analysing the extent to which sustainable forest management practices build resilience to climate change in Australia, drawing on the principles of resilience thinking, and outlined several recommendations arising from her findings. Climate change is a fundamental preoccupation and concern of environmental law scholars, and these presentations illustrated the diverse impacts of climate change on legal frameworks, a range of applied contexts in which law must grapple with climate change, and the versatility and capability of legal responses to engage with this wicked problem. They provided examples of practical legal approaches to pursue climate justice and ecological resilience in a rapidly evolving planetary and legal context, and provided much food for thought to conclude the workshop.

Guest presentations

In *Skills Session I: Publishing in Environmental Law*, we heard from Professor Lee Godden from the University of Melbourne as chair of the session, Professor Fiona Haines from the University of Melbourne and Dr Aline Jaeckel from UNSW. The session provided indispensable advice to participants about navigating the complex area of publishing in environmental law. Concerning how a PhD Candidate might set about publishing their work, the speakers offered some helpful, practical considerations: thinking about ‘gaps’ in existing scholarship, taking an interdisciplinary approach and balancing opportunities to publish. The panel also explained how multidisciplinary publications and publishing for policy impact can strengthen an academic profile; this might involve publishing in cross-disciplinary journals or in non-traditional genres, such as policy submissions and opinion pieces. Additionally, the panel noted that a strong publication record can enhance competitiveness on the academic job market, especially in respect of post-doc positions. However, they acknowledged that there is no one path nor a fixed template. The speakers went on to offer some vital pearls of wisdom for remaining motivated throughout the publication process, and in particular, for dealing with rejections and negative peer review comments. They also outlined some tips and strategies for co-authoring and underscored the importance of understanding institutional rules for publishing during the PhD. The Skills Session afforded participants a rare and valuable insight into the complex world of academic publishing, as the speakers offered generous guidance to participants about how they might secure publications throughout the PhD and begin to develop their careers in academic research.

In a moving and cathartic presentation titled *The role of emotions in shaping desirable environmental law futures*, Dr Michelle Lim of Macquarie University explored how participants might apply themselves to the complex and challenging task of undertaking environmental law scholarship in the Anthropocene. Michelle encouraged members of the audience to reflect on their purpose, what originally drew them to their area of scholarship and why they deemed it worthy of their time. Rather than marginalising emotions or considering them immaterial to sound scholarly practice, Michelle called upon Workshop attendees to engage with a range of emotional responses, but cautioned participants against losing hope. Michelle shared that for her, the 2019-2020 Australian Bushfires were a visceral, painful representation of the fact that she was living in a rapidly changing world. Acknowledging that the Anthropocene is not simply an intellectual construct but a reality we must confront, Michelle explored how future approaches and narrative might be invoked to sketch a picture of the risks and threats attending the world we are creating. In particular, Michelle told compelling

stories about fictional “endlings”: the last of certain plant and animal species. The stories conjured feelings of grief and loss, but also engendered a desire to protect and preserve our precious, unique species for posterity. Michelle’s presentation was a poignant reminder to Workshop attendees that, in the Anthropocene, not only is it possible for us to bring our whole selves - our dedication and our care - to our scholarly work: it’s also a pressing imperative that we do so.

Next steps and contact

At the conclusion of the Workshop, participants expressed a willingness to stay in touch and continue to build an international network of emerging scholars in environmental law, facilitated by a mailing list and a WhatsApp group. There was also wide interest in the workshop running again in 2022. The 2021 organising team will continue to follow up on opportunities to pass the baton for 2022, working with Melbourne Law School’s CREEL and UNSW’s Faculty of Law & Justice to continue to provide an opportunity for PhD candidates in Environmental Law to share their work and receive feedback from peers in a supportive and inclusive space.

For more information about the Environmental Law Doctoral Workshop, please contact envirolaw.docworkshop@gmail.com.

Thank you

The 2021 organising team would like to thank all the PhD candidates who participated in and shared their work during the inaugural Workshop, and contributed to making it a great success. We would also like to thank our guest speakers, Professor Lee Godden, Professor Fiona Haines, Dr Aline Jaeckel and Dr Michelle Lim, for generously sharing their wisdom and insight with us. Thank you to colleagues who spread the word about the Workshop and helped us generate interest and a fascinating collection of abstracts and presentations. Finally, we would also like to thank our supervisors for their support, in particular Professor Lee Godden and Professor Cameron Holley for their support of the Workshop from its inception.