

Re-greening rights – indigeneity, climate change and a timely re-confluence of human rights and the environment

2017 Environment and Planning Law Association (NSW) Annual Conference

Keynote Address

Benedict Coyne

1. INTRODUCTION

Thankyou President Lancaster QC, judicial officers, commissioners, tribunal members, distinguished guests, ladies and gentlemen. I am very grateful for the warm invitation to present at this exciting and important conference. Thank you, Professor Behrendt for the Acknowledgement of Country, which I reiterate and pay my respects to the Gadigal people of the Eora Nation upon whose ancestral lands we meet and pay my respects to all Indigenous Peoples across Australia their elders past and present. I would also like to acknowledge our future generations and hope that the thought of their welfare and fundamental human rights inspires us all as practitioners forging ahead for a sustainable future in all our multi-disciplinary might.

I am verily chuffed that the theme for this conference is “Sustainability in Action – across land, water and air”. In my pre-law life, at the barricades blockading Western Australia’s irreplaceable old growth Karri, Marri and Jarrah forests near Manjimup, out of frustration at being consistently misleadingly branded “anti-logging protestors” by media, a group of friends and I decided to get pro-active about our pro-sustainability pizzazz. We wanted the forestry industry to thrive, but through selective logging rather than clear-felling and through value-adding rather than wood-chipping. So, we founded an NGO called “Cycle for Sustainability”, we got “*On yer bike!*” as it were, and spent three months cycling over 3500kms from the Fremantle Port to Melbourne and Sydney in order to promote a proactive message of environmental awareness. Thus, I am well aware that the road to sustainability can be a very long one but also that it can give you strong legs, endurance, inspiring vistas and a healthy appetite for positive change.

Environmental issues for me invoke themes of interconnectivity and interdependency, whether thinking of the interrelationships within and between different species and ecosystems; between different areas of law and of course the

oft overlooked intrinsic interdependency of humanity on our environment.

Notwithstanding the traditional view of international human rights law (IHRL) that environmental issues should be seen as separate to or lesser than traditional human rights concerns, I believe that the right to a healthy environment is intrinsically important in the enjoyment of most other human rights. This is becoming increasingly evident with the amplifying punishing pronouncements of our global climate system such as Irma, Maria, Ophelia, heatwaves, hottest days/months/years on record, the list goes on... Recently, Human Rights Watch has noted examples of rising seas and extreme weather as directly linked to human rights such as:

- Kenya increased temperatures/ unpredictable rainy seasons threaten Indigenous people's food and water supplies;
- Bangladesh, natural disasters – such as flooding – fuel poverty, leading to more child brides as families try to marry off their daughters before losing land to rising rivers;
- Brazil, climate change may hasten the spread of mosquito-borne illnesses, like Zika virus, especially harmful to women and girls.¹

Climate change thus presents a perfect storm for the confluence of human rights and environmental issues especially when it comes to the adverse impacts of climate change, including mitigation and adaptation measures, on the rights of Indigenous Peoples.

Today I was asked to present on a broad array of issues “including the environment, human rights, Adani, and a topic of [my] choice with a touch of sustainability.” The title I arrived at was “Re-greening rights – indigeneity, climate change and a timely re-confluence of human rights and the environment”. So, what on God's green earth of appeasing goats² do I mean by “re-confluence”? Well in exercising a pinch of poetical licence, I want to briefly examine the intersectionality between environment and human rights law in the context of indigeneity. I also have a keen interest in the exciting emergent legal fields of Rights of Nature and Earth Jurisprudence which aim to create a more eco-centric rather than anthropocentric legal system. However, all

¹ See: M Orellana (Director, HRW Environment and Human Rights Division), “Hurricanes, Human Rights and Fiji” (12 September 2017) Human Rights Watch. Available: <https://www.hrw.org/news/2017/09/12/hurricanes-human-rights-and-fiji>

² A humorous reference to Tony Abbott's speech to Global Warming Policy Foundation in the United Kingdom entitled “Daring to Doubt” and delivered on 9 October 2017. Available: <https://www.thegwpf.org/tony-abbott-daring-to-doubt/> See also: <http://www.abc.net.au/news/2017-10-10/tony-abbott-says-action-on-climate-change-is-like-killing-goats/9033090>

of these budding eco-centric legal awakenings seem to me to be a repackaging of ancient indigenous wisdoms in a modern eco-friendly context.

Human beings' indispensable inter-reliance on the environment is an undeniable historical fact which unfortunately became significantly negated – or relegated to the realm of alternative fact – by non-indigenous peoples during the rise of industrial-techno civilisation. So, the re-confluence to which I refer is like a re-awakening, a revelation, a renaissance of this basic truth, yet it is a truth which has always been maintained in the cultural and spiritual knowledges and practices of many of the world's Indigenous Peoples and continues today.

In my attempt to marry this all together, three actionable items that I would like you to take away from my talk today are:

- (i) for the most effective strategies in climate change adaptation and mitigation Indigenous Peoples' cultural and spiritual knowledge and practices should be strongly embraced and powerfully promoted.
- (ii) human rights law is a useful tool to address and articulate issues of environmental protection and climate change (and therefore you should all become members of ALHR ☺)³;
- (iii) the right to a healthy environment and to a sustainable society should be a primary human right. The sooner our industrial-techno societies learn lessons from indigeneity and adopt into our legal systems a substantive acknowledgement of our dignity and identity as directly correlated to and dependent upon on a healthy environment, the better.

2. Indigenous Peoples and Climate Change

There is no better example of environmental sustainability in action than the cultural practices of many Indigenous Peoples around the world and certainly here in Australia. You may have seen in July this year, media reports of a ground-breaking archaeological discovery regarding artefacts in Kakadu dated between 65,000 and 80,000 years old, many thousands of times longer than industrial civilisation.⁴ The

³ Please got to

⁴ See: C Clarkson et al, "Human occupation of northern Australia by 65,000 years ago", *Nature* 547, 306–310 (20 July 2017). Published online 19 July 2017. Available: <https://www.nature.com/nature/journal/v547/n7663/full/nature22968.html>
:CW Marean, "Archaeology: Early signs of human presence in Australia", *Nature* 547, 285–287 (20 July 2017). Published

Declaration of the First International Forum of Indigenous Peoples on Climate Change, adopted by Indigenous Peoples from around the world in 2000 in Lyon France, states:

.... Long ago, our sciences foretold of the severe impacts of Western "development" models based on indiscriminate clear-cutting, oil exploitation, mining, carbon-emitting industries, permanent organic pollutants and the insatiable consumption of the industrialized countries...The scientists of Western society dismissed us as sentimental and superstitious and an obstacle to development. Paradoxically, those that previously turned deaf ears to our warnings, now are dismayed because their own model of "development" endangers our Mother Earth.⁵

More than 370 million people in over 70 different countries identify as 'Indigenous Peoples'.⁶ That is roughly 5% of the total global population and comprises approximately 5000 distinct groupings of people most of which are located in developing countries.⁷ Indigenous Peoples cultures, livelihoods and identities are often intimately connected to their traditional homelands and waters.

Impressively, through traditional and customary practices, Indigenous Peoples are estimated to customarily own, occupy or use somewhere between 22% and 65% of the world's land surface and manage approximately 11% of the world's forest lands.⁸ To quantify that in terms of carbon offsetting, it is estimated that protected areas and ecosystems around the world that have been created to safeguard rights to land, indigenous livelihoods, and biodiversity contain more than 312 billion tons of carbon so it is important that we keep it in the ground.⁹ In 2015 it was estimated that

online 19 July 2017. Available: <https://www.nature.com/nature/journal/v547/n7663/full/547285a.html> . See also: H Davidson and C Walquist, "Australian dig finds evidence of Aboriginal habitation up to 80,000 years ago", *The Guardian*. Published online 20 July 2017. Available: <https://www.theguardian.com/australia-news/2017/jul/19/dig-finds-evidence-of-aboriginal-habitation-up-to-80000-years-ago>

⁵ *Declaration of the First International Forum of Indigenous People on Climate Change*, Lyon, France, 4-6 September 2000, http://www.treatycouncil.org/new_page_5211.htm

⁶ Department of Economic and Social Affairs of the United Nations Secretariat, *Resource Kit on Indigenous Peoples*, (United Nations, New York, 2008). Available: http://www.un.org/esa/socdev/unpfii/documents/resource_kit_indigenous_2008.pdf

See also: S, Davis, "Indigenous Peoples and Climate Change", *The International Indigenous Policy Journal* (1)(1) (May 2010), 3.

⁷ *Ibid*

⁸ A Ramos-Castillo, EJ Castellanos, K Galloway McLean, "Indigenous Peoples, Local Communities and Climate Change Mitigation", *Climatic Change* Vol 140 (2017), 2.

⁹ *Ibid*.

indigenous territories in the Amazon Basin, the Mesoamerican region, the DRC and Indonesia alone comprise more than 20% of the carbon stored aboveground across the planet.¹⁰ At the very least, Indigenous Peoples have time-tested wisdoms and cultural practices to dispense regarding sustainability and mitigating and adapting to climate change. A powerful Australian example that is being exported to the world, is carbon farming through savannah burning, to which I will refer later.

However, Indigenous Peoples' homelands are becoming increasingly vulnerable to climate change and threatened by mitigation efforts in addition to the already multiple intersecting challenges of post-colonial-modernity that beset them. The latest State of the World's Indigenous Peoples report emphasises they face systemic discrimination and exclusion from political and economic power; are over-represented among the poorest, illiterate and destitute; are dispossessed of their ancestral lands and deprived of their resources for survival, and even robbed of their very right to life.¹¹ Incidentally, the terms "carbon violence" and "carbon colonialism" have emerged recently to refer to a diversity of structural, social, political, economic, and cultural harms caused by carbon market activities such as forced evictions from traditional lands to accommodate mega-forestry plantations for carbon offsetting, culminating in widespread violations of the rights to land, culture, religion, housing, family, political participation, the list goes on.¹²

3. CASE STUDY: Wangan & Jagalingou Peoples v Adani Mining Pty Ltd

The interconnections between human rights and the environment are potently crystallised at the confluence of indigenous rights and climate change, as powerfully captured in the Wangan & Jagalingou peoples struggle for self-determination against the Adani Carmichael mine. As you will be aware, the mine, if developed, is touted to be one of the largest coal mines in the world and the mining and burning of coal from it will generate an estimated 4.7 billion tonnes of greenhouse gas emissions. These

¹⁰ Ibid.

¹¹ Department of Economic and Social Affairs (DESA), Division of Social Policy and Development, Secretariat of the Permanent Forum on Indigenous Issues, *State of the World's Indigenous Peoples*, (United Nation, New York, 2009), 1. Available: http://www.un.org/esa/socdev/unpfii/documents/SOWIP/en/SOWIP_web.pdf

¹² See for example: Associate Professor Kristen Lyons, Dr. Carol Richards and Dr. Peter Westoby, *The Darker Side of Green: Plantation Forestry and Carbon Violence in Uganda: The Case of Green Resources' Forestry-Based Carbon Markets*, (The Oakland Institute, November 2014). Available: https://www.oaklandinstitute.org/sites/oaklandinstitute.org/files/Report_DarkerSideofGreen_hirez.pdf

emissions are over 0.5% of the remaining carbon budget to have a likely chance of limiting global temperature rises to two (2) degrees Celsius above pre-industrial levels.

Over the past two years, I have been privileged to represent Adrian Burragubba and members of the W&J Traditional Owners Family Council on various fronts. I have been further privileged to work on the Federal Court judicial review case and Full Court appeal with your brilliant colleague Craig Leggatt SC of Martin Place Chambers who deserves at least a few standing ovations and lifetimes of great surfing karma for his very generous pro bono contributions. David Yarrow of the Victorian Bar has been equally very generous and deserves the same high praise!

In October 2015, I collaborated with lawyers from Earth Justice in San Francisco to draft urgent communications for the Wangan & Jagalingou peoples to the UN Special Rapporteur on the Rights of Indigenous Peoples and the UNHRC Working Group on Business and Human Rights to request their urgent intervention in the Carmichael Coal Mine approval process. The submission included the following statement by Mr Burragubba:

*Our land and waters are our culture, and our special relationship with them tells us who we are. Our culture is inseparable from the condition of our traditional lands... We exist as people of our land and waters, and all things on and in them – plants and animals – have special meaning to us and tell us who we are. Our land and waters are our culture and our identity. If they are destroyed, we will become nothing.*¹³

In May 2015, Mr Burragubba filed an application for judicial review in the FCA claiming that, amongst more traditional JR grounds, the decision of the National Native Title Tribunal issuing two mining leases (70505 and 70506) for the Carmichael mine on 8 April 2015,¹⁴ was a decision induced by circumstances

¹³ Wangan Jagalingou Family Council, "Submission regarding Australia's failure to protect the Wangan and Jagalingou People's rights to culture and to be consulted in good faith about, and give or withhold consent to, the development of the destructive Carmichael Coal Mine on our traditional lands", (2 October 2015). Available: <http://wanganjagalingou.com.au/wp-content/uploads/2015/10/Submission-to-the-Special-Rapporteur-on-Indigenous-Peoples-by-the-Wangan-and-Jagalingou-People-2-Oct-2015.pdf>

¹⁴ *Adani Mining Pty Ltd and Another v Adrian Burragubba, Patrick Malone and Irene White on behalf of the Wangan and Jagalingou People* [2015] NNTTA 16 (8 April 2015).

analogous to fraud and that Adani had been dishonestly misleading in its conduct before the NNTT. The case relied upon evidence adduced in parallel proceedings in the Queensland Land Court brought by Land Services of Coast and Country Inc represented by Environmental Defenders Office Queensland (EDO Qld).¹⁵ During those proceedings, Adani's own economic expert, the Princeton educated Dr Jerome Fahrner, co-authored joint expert reports which stated that Adani's environmental impact statement (EIS) was deficient for a number of reasons including that it is likely to have overestimated the economic and employment benefits of the mine. For example, where the EIS estimated an employment increase of 4,093 full time equivalent jobs in the Mackay region, Fahrner found 483 full-time jobs and where the EIS asserted 6,789 full time equivalent jobs for Queensland, Fahrner found 1,206 full time equivalent jobs. The economic benefits in the EIS were also significantly inflated.¹⁶

Of course, in present company I must acknowledge the August 2015 victory by the Mackay Conservation Group as represented by the legends at Environmental Defenders Office EDO NSW in successfully challenging the Federal Environment Minister's initial *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) approval of the mine with the parties agreeing on consent orders that the Minister had failed to consider approved conservation advices for two listed threatened species, the Yakka Skink and the Ornamental Snake.¹⁷ As we know that decision was remade by the Minister in December 2015 and unsuccessfully challenged by the Australian Conservation Foundation represented by EDO Qld by

¹⁵ The Land Court proceedings arose because, under s 185 of the Environmental Protection Act 1994 (Qld) and s 265 of the Minerals Act 1989 (Qld), objections to an application for a mining lease must be referred to the Qld Land Court for a decision on those objections. See: *Adani Mining Pty Ltd v Land Services of Coast and Country Inc & Ors* [2015] QLC 48 (15 December 2015).

¹⁶ See: *Adani Mining Pty Ltd v Land Services of Coast and Country Inc & Ors* [2015] QLC 48 (15 December 2015). The Expert Reports recorded an estimated increase to economic output from the Carmichael Project as approximately \$1,617 million per annum in the Mackay region (based on \$51,749 million for the period 2015-2047) and as approximately \$1,876 million per annum in Queensland (based on \$60,024 million for the period 2015-2047),³³ whereas the EIS summary estimated the increase to gross regional product from the Carmichael Project at the point of full production, as \$3,795 million per annum for the Mackay region and \$4,170 million per annum for the State.

¹⁷ See: EDO NSW, "Court sets aside approval of Adani's Carmichael coal mine". Available:

http://www.edonsw.org.au/carmichael_case_win Read Court Orders here:

<https://www.comcourts.gov.au/file/Federal/P/NSD33/2015/3715277/event/28181487/document/607760>

way of judicial review before the Federal Court of Australia and then on appeal before the Full Court of the Federal Court of Australia.¹⁸

On 15 December 2015, the Qld Land Court found that Adani had indeed overstated certain elements of the financial and economic benefits in the EIS and in evidence before the Court but recommended to the relevant Minister the mining leases be nonetheless granted and the environmental authority be approved, subject to additional conditions for the protection of the endangered black-throated finch.¹⁹

In early 2016, the relevant Minister made media announcements that the mining leases would not necessarily be issued until Mr Burragubba's judicial review matter was finalised including by a High Court ruling.²⁰ However, on 3 April 2016 the leases were granted and further applications for judicial review in the Queensland Supreme Court and Queensland Court of Appeal filed by both Mr Burragubba and environmental groups against the Minister regarding the granting of the leases and environmental approval, ultimately failed.²¹

Then, on 19 August 2016, Justice Reeves found against Mr Burragubba on all grounds of judicial review.²² With regards to the "analogous to fraud" argument, Justice Reeves found Adani had not been dishonestly misleading in the NNTT ultimately because the EIS and expert data allegedly withheld by Adani were not "materially different" in that both sets of data found that the Carmichael project would have a significant economic benefit for Australia, Queensland and the Mackay region.²³ A year later on 25 August 2017, the Full Court of the Federal Court

¹⁸ For the Federal Court of Australia decision at first instance see: *Australian Conservation Foundation Incorporated v Minister for the Environment* [2016] FCA 1042 (29 August 2016). For the Full Federal Court of Australia decision on appeal see: *Australian Conservation Foundation Incorporated v Minister for the Environment and Energy* [2017] FCAFC 134 (25 August 2017).

¹⁹ *Adani Mining Pty Ltd v Land Services of Coast and Country Inc & Ors* [2015] QLC 48 (15 December 2015).

²⁰ Minister for State Development and Minister for Natural Resources and Mines

The Honourable Dr Anthony Lynham, "Ministerial Media Statement: Next steps for the Carmichael coal and rail project", (3 February 2017). Available: <http://statements.qld.gov.au/Statement/2016/2/3/next-steps-for-the-carmichael-coal-and-rail-project>

²¹ See: *Burragubba & Anor v Minister for Natural Resources and Mines & Anor* [2016] QSC 273 (25 November 2016); *Land Services of Coast and Country Inc v Chief Executive, Department of Environment and Heritage Protection & Anor* [2016] QSC 272 (25 November 2016); *Burragubba v Minister for Natural Resources and Mines* [2017] QCA 179 (22 August 2017)

²² *Burragubba v State of Queensland* [2016] FCA 984 (19 August 2016)

²³ *Ibid*, at [216] and [229], per Reeves J.

dismissed Mr Burragubba's further appeal, the same day that the ACF's further appeal against the Federal Environment Minister was also dismissed by the same court.²⁴ Following the Full Court's decision, a spokesperson for the W&J Traditional Owners Council, stated:

*"Adani and the State Government didn't 'negotiate' and achieve the free, prior, informed consent ... Instead Adani, backed by the State Government and past NNTT decisions, relied on the threat that they would compulsorily take our land. The meeting, that all these Adani supporters cite where the purported majority voted for the ILUA [Indigenous Land Use Agreement] 294 to 1, is not a true expression of the W&J Traditional Owners. Over 220 of that meeting's attendees are people that are not Wangan and Jagalingou people according to our law and custom... They were bussed in and paid for at Adani's considerable expense, while hundreds of the rightful W&J Traditional Owners refused to attend this sham meeting ... We will not stand by while a campaign is waged against us by the mining lobby to discredit our representatives, to compel us to accept a deal we don't want, and to take away our rights to our ancestral lands and waters by legal compulsion... We will continue to expose the unfair and underhanded way in which Aboriginal people are stripped of their rights in this country when they say no to mining. There is no greater battlefield for this than coal mining in Queensland."*²⁵

The battle of the competing ILUAs continues and is listed before Justice Reeves in the Federal Court in Brisbane in early 2018.

Another option further afield for the W&J Peoples may be to lodge a complaint to the UN Human Rights Committee pursuant to Article 27 ICCPR²⁶ and/or to the Committee on the Elimination of Racial Discrimination (**CERD**). Indeed, it was CERD whose March 1999 decision found that the Howard Government's 1998 amendments to the *Native Title Act 1993*, commonly referred to as "The 10-point Plan" are in

²⁴ *Burragubba v State of Queensland* [2017] FCAFC 133 (25 August 2017).

²⁵ Wangan & Jagalingou Family Council, "Fed Court decision: Adani leases issued despite Traditional Owners' express rejection" (25 August 2017). Available: <http://wanganjagalingou.com.au/fed-court-decision-adani-leases-issued-despite-traditional-owners-express-rejection/>

²⁶ ICCPR Article 27: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

breach of Australia's obligations under the *Convention on the Elimination of All Forms of Racial Discrimination* because they are discriminatory and were implemented without the informed consent of Indigenous people.²⁷ On those grounds, CERD called on Australia to urgently address their concerns, suspend implementation of the 1998 amendments and reopen discussions with the ATSI representatives to finding acceptable Convention-compliant solutions. It seems that even back then, Australia was not interested in being lectured to by the United Nations.²⁸

The situation of the Wangan & Jagalingou peoples campaign against the Adani Carmichael Mine is but a microcosm of the intersectionality between environmental degradation, climate change and human rights experienced by Indigenous Peoples the world over. It is an intersectionality that is gaining increasing currency.

4. THE RIGHT TO A HEALTHY ENVIRONMENT & THE INDIGENOUS RIGHTS AWAKENING

Historically, IHRL has considered the right to a healthy environment a “third generation right” below “primary generation” CPRs and “secondary generation” ESRs. Yet such dichotomies are false as realised by 171 UN member countries in the *1993 Vienna Declaration & Programme of Action* which states that “*All human rights are universal, indivisible, interdependent and interrelated.*” The traditional knowledge systems of many Indigenous Peoples incorporate a strong and central recognition of the interconnection of humanity and their environment as having a direct impact on health, social harmony, spirituality and identity. I think that there is

²⁷ CERD, *Findings on the [Native Title Amendment Act 1998](#)* (Cth), UN Doc ERD/C/54/Misc.40/Rev.2 (18 March 1999) at [7].

²⁸ See also: G, Triggs, "Australia's Indigenous Peoples and International Law: Validity of the Native Title Amendment Act 1988 (Cth)" [1999] *MelbULawRw* 16; (1999) 23(2) *Melbourne University Law Review* 372. Available: <http://www5.austlii.edu.au/au/journals/MelbULawRw/1999/16.html>

“Australia responded to this request in January 1999 by summarising the history and intention of the NTAA and comparing it with the original NTA. Australia argues that the amendments comply with four ‘fundamentals of the original Native Title Act’; that is, they establish a process for recognition of native title, ensure future protection of native title, provide certainty to land management activities in the past and future and provide a framework for dealing with native title.[23] This response is curious, but distorted, in that it assesses the amendments by reference to certain objectives of the original legislation, while failing to consider the compatibility of the amendments with the Racial Discrimination Convention. Nevertheless, the Committee found the amendments in violation of the Convention.”

no more potent expression of the right to a healthy environment as a **fundamental** human right than this.

Environmental degradation often interferes with a broad range of human rights from the most fundamental right to life to the rights to health, housing, culture, water and food as the residents of Katherine, Oakey, Williamstown are sadly now discovering with revelations of widespread polyfluoroalkyl substance (PFAS) contamination.²⁹ Yet, for a long time, environmental issues have been on the fringe of human rights law and vice-versa. However, this has been gradually changing especially in the advent of climate change. Promising signs of the recognition of a human right to a healthy environment include the following:³⁰

- More than 90 countries, with the notable exception of Australia, now include an express human right to a healthy environment in their constitutions in a wide variety of formulations;³¹
- Every regional human rights agreement (in Africa, Middle East, SE Asia, Europe) implemented since the early 1980s contains right to health environment;³²
- The jurisprudence of many court systems and regional human rights bodies are increasingly taking expansive views of traditional human rights as including the right to a health environment;
- Language is changing, and civil society organisations are increasingly using the language of human rights norms to address environmental issues and vice-versa. For example, Amnesty, Greenpeace, CIEL, Earth justice and Human Rights Watch;
- In 2012, the appointment of the first UN Independent Expert on human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable

²⁹ See for example: ABC Four Corners, "Contamination: The unfolding scandal of toxic water in Australian communities" (9 October 2017). Available: <http://www.abc.net.au/4corners/contamination/9032140>

³⁰ See generally: Special Rapporteur on human rights and the environment (former Independent Expert on human rights and the environment). Available: <http://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/SREnvironmentIndex.aspx>
J Knox, "Human Rights and Environment", Keynote Speech at 2014 UNITAR-Yale Conference. Available: <https://www.youtube.com/watch?v=3hdME9T8MsY>

³¹ See also: Legal Affairs and Community Safety Committee Report No. 30, 55th Parliament - Human Rights Inquiry, Submission 459 Environmental Defenders Office Qld, APPENDIX 2 – Submission of Earthjustice. Available: <https://www.parliament.qld.gov.au/documents/committees/LACSC/2015/14-HumanRights/submissions/459.pdf>

³² See <http://www.mfa.go.th/asean/contents/files/other-20121217-165728-100439.pdf> Even the 2012 ASEAN Human Rights Declaration contains "the right to a safe, clean and sustainable environment";

environment whose mandate was extended for another three years in March 2015 as a Special Rapporteur.³³

That Special Rapporteur has stated:

‘Without a healthy environment, we are unable to fulfil our aspirations or even live at a level commensurate with minimum standards of human dignity.’³⁴

Another promising sign is the rise in the articulation of the rights of Indigenous Peoples and their global organising to promote their rights. This is generally evident within the UN system for example the establishment of the UN Permanent Forum on Indigenous Issues (**UNPFII**) in 2000³⁵ and the adoption of the UNDRIP in 2007 (after over two decades of negotiating).³⁶ It is further evident with the increased activity of Indigenous Peoples’ energetic organising outside of the confines of the UN and UNFCCC.

In 2008, after experiencing systemic exclusion from the UNFCCC COP negotiations, the International Indigenous Peoples Forum on Climate Change (**IIPFCC**) was established as the Caucus for IPs participating in the UNFCCC processes. In 2009, Indigenous representatives from the Arctic, North America, Asia, Pacific, Latin America, Africa, Caribbean and Russia met in Anchorage, Alaska for the Indigenous Peoples’ Global Summit on Climate Change and adopted the *Anchorage Declaration*. Throughout all UNFCCC negotiations, the Indigenous Peoples’ lobby has consistently held that “*it is vital that [they] are able to participate effectively in the current negotiations*” and that the UNDRIP and the *ILO Convention 169 (Indigenous Peoples and Tribal Peoples Convention – 1989)* must guide the design and implementation of all climate change policies and mitigation programs at local, regional and national levels.³⁷

³³ See: United Nations Mandate on Human Rights and the Environment, John H. Knox, UN Special Rapporteur: <http://srenvironment.org/>

³⁴ John Knox, Special Rapporteur on human rights and the environment (former Independent Expert on human rights and the environment), United Nations Human Rights, Office of the High Commissioner. Available: <http://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/SREnvironmentIndex.aspx>

³⁵ United Nations, Division for Social Policy and Development: Indigenous Peoples. Available: <https://www.un.org/development/desa/indigenouspeoples/>

³⁶ See: <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>

³⁷ Tebtebba, Indigenous Peoples’ International Centre for Policy Research and Education, Guide on Climate Change and Indigenous Peoples (2nd Ed.) (Tebtebba Foundation, Philippines, 2009) 82-85. Available: <http://www.tebtebba.org/index.php/content/160-2nd-edition-of-guide-on-climate-change-and-indigenous-peoples-now-released>

In 2010, Bolivia hosted the World People's Conference on Climate Change and the Rights of Mother Earth in response to the failed talks at COP-15 in Copenhagen.³⁸ The World People's Conference was attended by around 30,000 people from over 150 countries including environmental justice and indigenous rights organizations, government representatives and several heads of state all of whom joined together in drafting the *Universal Declaration on the Rights of Mother Earth* which has been submitted to the UN General Assembly (**UNGA**) for adoption.³⁹ Incidentally, on 22 April 2009, the General Assembly proclaimed 22 April 'International Mother Earth Day' adopting by consensus Bolivia-led resolution (A/63/L.69).⁴⁰

At COP-21 in Paris, over 250 indigenous leaders from around the world were able to influence the talks⁴¹ such that the *2015 Paris Agreement* includes a number of references to Indigenous Peoples and human rights obligations both in the preamble and Article 7 clause 5 states that adaptation action should be guided by the best available science and "as appropriate, the traditional knowledge of Indigenous Peoples".⁴²

Although many criticised the Paris Agreement for not going far enough in protecting human rights and indigenous rights,⁴³ the references represent small but significant steps forward in inclusively expanding the just evolution of international law to adequately confront border-less, supra-national environmental challenges such as

³⁸ See: World People's Conference on Climate Change and the Rights of Mother Earth

Building the People's World Movement for Mother Earth. Available: <https://pwccc.wordpress.com/>

³⁹ See: World People's Conference on Climate Change and the Rights of Mother Earth, *Universal Declaration of Rights of Mother Earth*, 22 April 2010, Cochabamba, Bolivia. Available: <http://therightsofnature.org/universal-declaration/>; Pablo Solon and Cormac Cullinan, "We Must Support a Universal Declaration of the Rights of Mother Earth", *Huffington Post* (18 March 2010). Available: https://www.huffingtonpost.com/pablo-erick-solon-romero-oroza/why-even-a-successful-agr_b_406547.html On 22 April 2009 President Evo Morales of Bolivia called on the UN General Assembly to develop a Universal Declaration of the Rights of Mother Earth. His proposal has received backing from nine countries of the Bolivarian Alliance for the Peoples of Our America (ALBA). On 22 December, the UN General Assembly passed a resolution which put the issue of Mother Earth rights as an item on the UN agenda.

⁴⁰ See: <https://documents-dds-ny.un.org/doc/UNDOC/LTD/N09/304/19/PDF/N0930419.pdf?OpenElement> United Nations Press Release, "General Assembly Proclaims 22 April 'International Mother Earth Day' Adopting By Consensus Bolivia-Led Resolution" (22 April 2009). Available: <https://www.un.org/press/en/2009/ga10823.doc.htm>

⁴¹ See: T Fontaine, "Indigenous leaders, activists in Paris for climate change talks", *CBC News* (30 Nov 2015). Available: <http://www.cbc.ca/news/indigenous/indigenous-leaders-activist-paris-climate-talks-1.3343927>

⁴² See: http://unfccc.int/paris_agreement/items/9485.php and http://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf

⁴³ See for example: International Justice Resource Center, "Paris Climate Change Agreement Lauded, But Feared Not Strong Enough" (8 January 2016). Available: <http://www.ijrcenter.org/2016/01/08/paris-climate-change-agreement-lauded-but-feared-not-strong-enough/>; M Bergen, "Experts: Paris Agreement falls short on indigenous rights", *Conservation International Blog* (17 December 2015). Available: <https://blog.conservation.org/2015/12/expert-paris-agreement-falls-short-on-indigenous-rights/>

climate change. Indigenous Peoples' traditional knowledges have much to offer in terms of adapting to and mitigating the effects of climate change. Provided with land titles, human rights and adequate resources, indigenous groups may prove to be the best protectors of carbon sinks than anyone else. Former President of the UNGA Miguel d'Escoto Brockman stated at the opening of the 2009 *Indigenous Peoples' Global Summit on Climate Change*:

*Indigenous Peoples interpret and react to the impacts of climate change in creative ways, drawing on traditional knowledge and other technologies to find solutions that society at large can replicate to counter pending changes... Indigenous peoples have always adapted to a changing environment and have developed sophisticated and sustainable strategies to cope with environmental changes.*⁴⁴

Carbon Farming

In Australia, Indigenous Peoples have been involved in world-leading land management and carbon farming practices such as savannah burning programs which they are now exporting internationally, with a formal agreement signed in July this year to build a program in Canada. Carbon farming allows farmers and other land managers to earn carbon credits by storing carbon or reducing greenhouse gas emissions on the land.⁴⁵ Savanna fires release methane and nitrous oxide into the air, which are strong greenhouse gases.⁴⁶ Emissions from savanna fires can be reduced by shifting burning from late dry season towards the early dry season and reducing the area that is burnt each year.⁴⁷ Aboriginal Australians have traditionally used fire for land management purposes.⁴⁸ A chance meeting between the Aboriginal Carbon Fund and a Canadian carbon credit businessman at the 2015

⁴⁴ H.E. d'Escoto Brockman, President of the 63rd Session of the United Nations General Assembly, 'UN Welcome Opening Statement' (April 20 2009) Indigenous Global Summit 2009, Anchorage, Alaska, http://www.indigenoussummit.com/servlet/content/Proceedings_Articles.html

⁴⁵ See: Australian Government, Department of the Environment and Energy, "Carbon Farming Initiative (CFI) Savanna burning" (2014). Available: <http://www.environment.gov.au/climate-change/government/emissions-reduction-fund/cfi/publications/factsheet-savanna-burning>

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ D Bowman, "Aboriginal fire management – part of the solution to destructive bushfires", *The Conversation*, (UTAS 23 February 2016). Available: <https://theconversation.com/aboriginal-fire-management-part-of-the-solution-to-destructive-bushfires-55032>

COP-21 Paris Climate conference led to this agreement that will help Canadian First Nations peoples learn from the Australian Aboriginal carbon farming success.⁴⁹ The Aboriginal Carbon Fund is a national not-for-profit company building and nurturing a sustainable Aboriginal carbon industry and was set up in 2010 to help Indigenous organisations make money by managing land in such a way that it sequesters carbon in the soil.⁵⁰ Its website states that:

*The AbCF has a strong culture innovation and collaboration. It ... spends a lot of time on R&D developing carbon products and services that benefit Indigenous people and address climate change nationally and internationally... The AbCF operates on the cutting edge of ideas and community based solutions. It brings together people with fresh ideas, professional experience and a desire to achieve outcomes that tackle indigenous poverty and climate change through a strengths based approach*⁵¹

This is but one positive example of what is possible and there are many, many more. In his speech to the Paris Conference, Canadian Prime Minister Justin Trudeau stated: *'Indigenous Peoples have known for thousands of years how to care for our planet. The rest of us have a lot to learn and no time to waste.'*⁵²

5. CONCLUSION

We are gathered here today because we are active in our various fields of expertise in promoting sustainability in its variant forms. One theme of my talk today is interconnectivity. I hope it inspires some thought in continuing forward in our various fields with a more holistic, solidarity approach such that we continue to interact from

⁴⁹ M Slezak, "The idea is coming of age': Indigenous Australians take carbon farming to Canada", *The Guardian Online*, (23 July 2017). Available: <https://www.theguardian.com/australia-news/2017/jul/23/indigenous-australians-carbon-farming-canada>

⁵⁰ Ibid.

⁵¹ See: Aboriginal Carbon Fund website: <http://aboriginalcarbonfund.com.au/>

⁵² See: M Crow, "Canadian Prime Minister Justin Trudeau nails his speech at COP 21" (News.com.au 1 December 2015). Available: <http://www.news.com.au/finance/work/leaders/canadian-prime-minister-justin-trudeau-nails-his-speech-at-cop-21/news-story/d2ee74ef3885929ae90bf814fdb85698>; NITV Staff Writer, "Prime Minister Trudeau says Indigenous people key to stopping climate change", SBS Online (2 December 2015). Available: <http://www.sbs.com.au/nitv/article/2015/12/02/prime-minister-trudeau-says-indigenous-people-key-stopping-climate-change>

our respective disciplines with collaborative collegiate concordance in the quest for a sustainable society. Indeed, this is what the EPLA is all about.

Change the laws and society will generally follow and perhaps even vice versa. The law can provide stern guidance for our most benevolent and generous actions as caretakers of the environment for future generations. However, we need the political will to build a legal system fit for purpose that can deal with the urgent realities of supra-national anthropogenic catastrophic climate change whilst at the same time protecting and respecting human rights. I believe that Indigenous Peoples traditional knowledges provide a powerful blueprint for this, an outlook of sustainable eco-interdependency to be infused with existing and developing technologies. Indeed, I note that I note that the “Blueprint for the Next Generation of Australian Environmental Law” by Australian Panel of Experts on Environmental Law (**APEEL**) from August this year recommends that the interests and voices of Australia’s Indigenous Peoples should be included in the making and implementation of environmental policy, programs, plans and decisions.”⁵³

Before I wind up I would like to encourage you all to engage in connecting and confluencing on indigenous rights and the right to a healthy environment by demanding both in the formulation of a NSW Human Rights Act. ALHR has been co-leading campaigns for Human Rights Acts in Queensland, Tasmania, NSW, WA and federally. Australia remains the only western liberal democracy and common law legal systems bereft of a constitutional bill of rights or legislated Human Rights Act. In October 2007, the Tasmanian Law Reform Institute recommended the right to a healthy environment be included in a charter of rights for Tasmania. In 2016, the ACT *Human Rights Act 2004* was successfully amended to include Cultural and other rights of Aboriginal and Torres Strait Islander peoples under section 27 which represents a success of global significance in the domestic implementation of the principles espoused in *Declaration on the Rights of Indigenous Peoples* and the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*.⁵⁴

⁵³ The Australian Panel of Experts on Environmental Law, *Blueprint for the Next Generation of Australian Environmental Law*, (APEEL Melbourne, August 2017). Available: <https://static1.squarespace.com/static/56401dfde4b090fd5510d622/t/59bb6fe3f43b55b154728d29/1505456149104/APEEL+Blueprint+for+environmental+laws.pdf>

⁵⁴ *Human Rights Amendment Act 2016* (ACT). Available: <http://www.legislation.act.gov.au/a/2016-5/20160226-62903/pdf/2016-5.pdf>

As specialised practitioners in each of our fields, we are the holders of special knowledge to access the parlours of power and we hold a solemn duty to protect our delicate environment for our descendants. Or in the words of the famous Einsteinism: “Those who have the privilege to know have the duty to act”. I would further implore you all to use your skills to ensure that a right to a healthy and sustainable environment is contained a forthcoming NSW Human Rights Act.⁵⁵

“Sustainability in action” is the key!

I wish you all an insightful, inspiring and engaging conference.

Thank you.

⁵⁵ See: Human Rights for NSW website: <https://humanrightsforNSW.org/>