RETURN TO GREEN FOUNDATIONS: LIBERATION AND SURVIVAL

Kieran Trant

This article argues that Australian environmental law scholarship needs to rediscover its origins in the environmental crisis. Through a content analysis of the flagship forum for environmental law in Australia, the Environmental Planning and Law Journal, it is revealed that environmental law scholarship has become preoccupied with mundane technical management issues and fails to discuss the fundamental issues of law and the environmental crisis. It is suggested that ecopolitics offers the possibility for rearticulating the environmental crisis within legal scholarship. The article concludes with a brief demonstration of an ecopolitical critique of the Environmental Protection Act 1994 (Qld).

The planet our mother, grandmother earth is a physical and therefore a spiritual mental, a emotional being ... Believing that our mother, the beloved earth, is inert matter is destructive to yourself. 1

Most environmental lawyers ... do not talk about the philosophical foundations of their field. The reigning philosophy is that of the conventional legal model. 2

Introduction

Environmental law scholarship must be liberated from the banality of technocracy. If we are to continue as a culture and people we must begin to fully address the ecological crisis. How can an institution which claims as its origins the popular awareness of the ecological crisis actually ignore it? Current technocratic complacency must be challenged by legal analysis which firmly links environmental law to the ecological crisis.

This will be argued in four sections. First, environmental law will be introduced as an institution. It will be shown that the origin myth told by environmental lawyers clearly links environmental law to the ecological crisis. It will be suggested that the possibly revolutionary implications of this story have become silenced through development of a respectable scholastic

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enterprise which privileges technocratic discourse. Second, the results of a content analysis of the *Environmental and Planning Law Journal* will be discussed. It will be suggested that Australian environmental law scholarship confirms the suspicion that fundamental ecological questions have been subsumed by the technocratic desire for management. The third section introduces ecopolitics as a liberator for environmental law scholarship. By offering concrete awareness and analysis of the ecological crisis, ecopolitics offers a way to revitalise environmental law scholarship. The fourth section demonstrates one form that liberated environmental law scholarship might take through offering an ecopolitical critique of the Queensland *Environmental Protection Act* 1994.

**The Institution of Environmental Law**

Environmental law is an institution; it has an origin myth, it occupies a place in public life and has a space within the academy. Its origin myth tells a radical story of social change and rebellion, but the institutionalisation of environmental law suggests a counter story of respectability and conformity with the existing power constellations.

Environmental lawyers tell a story explaining the origins of environmental law. They utilise it as a myth, to legitimise, justify and sanctify their discipline. Briefly stated, the myth begins with an unenlightened barbaric past (pre-1970), where the legal order facilitated the wholesale destruction and pollution of the environment. This barbarity was challenged by prophets like Rachel Carson who preached starvation, death and the ecological end of the world. The prophets scared and empowered people. The political pressure resulted in legislatures enacting environmental law. The popular awareness was such that even the High Court prevented the damming

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5 ‘The most alarming of all man’s assaults upon the environment is the contamination of air, earth, rivers and the sea with dangerous and even lethal materials. This pollution is for the most part irrecoverable; the chain of evil it initiates not only in the world that must support life but in living tissues is for the most part irreversible.’ (Rachel Carson, *Silent Spring*, Penguin, 1962, p 23)
of a river. The central point made in this origin myth is the essential link between environmental law and the ecological crisis.

The link between environmental law and the ecological crisis was reflected in early writings on environmental law. In 1973, the Public Interest Research Group at The University of Queensland published a report into Queensland’s pollution control laws. It declared itself subversive. It began with the fact that ‘pollution kills’ and finished by arguing not only for ‘comprehensive and coherent legislation’, but for changes to Queensland’s political and economic culture.

Much has changed in 26 years. Within each Australian jurisdiction, there is arguably now ‘comprehensive and coherent legislation’. Politically, environmental concerns have moved from the unwashed fringes of society into the mainstream. Many law schools offer more than one course on environmental law. Law firms have environmental sections. Counsels now specialise in environmental litigation. There are specialist environmental courts focused on de novo appeals on town planning and pollution control matters. There are Departments of the Environment at both state and federal levels. In short, environmental law has become a respectable institutional feature of Australian life.

This respectability is reflected in how lawyers write about environmental law. The urgency of 1973 seems to have dissipated. Where is the death? Where is the agitation for political and social change? Scanning through the ever increasing volume of material on Australian environmental law reveals a respectable literary tradition that aims to inform a growing number of environmental law professionals — lawyers, planners, scientists and administrators — on how the environmental law regime works. However, this increasing respectability has come at a price. The alarm of the ecological crisis has become muted by a cacophony of voices discussing mundane points of managing. In becoming an institution, environmental law’s origin myth of an ecological crisis has become a creed. It has been reduced to a formalised incantation whereby environmental professionals can identify fellow disciples, speak a shared language and get on with the real business of managing.

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6 Commonwealth v Tasmania (Tasmanian Dams case) (1983) 1 158 CLR 1.
7 Public Interest Research Group (1973) Legalized Pollution, University of Queensland Press.
8 As members of the Public Interest Research Group felt in 1973: ibid., p 169.
9 ibid., pp 168–69.

This suspicion that the ecological crisis has become marginalised in Australian environmental law scholarship is supported by a detailed analysis of the contributions to the Environment Planning and Law Journal. The vast bulk of articles on Australian environmental law are descriptive in nature. They pander to the needs of the environmental technocracy, which requires technical knowledge to maintain the system. A smaller amount of material goes beyond description through offering some form of analysis. This can be broken down into four categories: articles that adopt a generic public law analysis; articles that compare international law or foreign law with domestic environmental law; articles that are aware of the foundational issue of an ecological crisis but uncritically adopt ESD; and a bundle of articles that analyse environmental law from a legislative theory, political science or anthropological perspective. Within this last group are several articles which directly link analysis of environmental law to the ecological crisis.

Sample and Method

Making broad claims of a unifiable scholastic project, such as Australian environmental law scholarship, is problematic. Many critical writers tend to avoid this difficulty by either focusing on a specific prominent texts like Blackstone’s Commentaries, or operating at a level of extreme generality such as ‘legal scholarship’. Part of the institutionalisation of environmental law is that there is now a volume of exegesis appearing in a diverse range of forums. Environmental law scholarship regularly appears in university and professional journals, there are several jurisdictional or professional focused journals, and there is a developing library of environmental law texts.

14 For example, the National Environmental Law Association’s Australian Environmental Law News and the Queensland-based Queensland Environmental Law Reporter.
Notwithstanding these diverse sources, the ‘flagship’ site for environmental law scholarship has become the Environmental Planning and Law Journal. Given its pre-eminence, it is this journal from volume 1 (1984) to volume 14 (1997) which forms the sample of Australian environmental law scholarship for this research. The sample was further limited to referred articles. The expectation was that the length and genre of articles, as opposed to comments, editorials, casenotes or book reviews, would allow consideration of the ecological crisis.

Having identified the sample, the next difficulty was methodology. Many critical writers fail to address issues of method when they ‘trash’ legal scholarship. For many, a reaction against empirical social science seems to be responsible. The outcome is that critical analysis often loses its political and prescriptive impact in a vague deconstruction of an identifiable text or institution. A topical example is Geoffrey Leane’s recent conclusion that environmental law ‘fails’ because it ‘conforms to the underlying deep structure of liberal political ideology.’ Leane argues that the ‘meta-narrative of liberalism’ that ‘presently informs our political, economic and legal institutions in Western industrialised democracies’ is fundamentally antagonistic to environmental concerns. Drawing on Unger, he then demonstrates that the law — and especially contract and property law — legalises liberalism. He concludes that ‘environmental law has been constructed not as an alternative, but within that paradigm’ and ‘environmental law is not a bright light shone on the environment, but a shadow of development law’. While I am highly sympathetic with Leane’s argument, he fails to prove or at least argue the essential linking point that in environmental law, the modern legislative regimes are the shadows he claims. He does not demonstrate how the deep structure of liberalism is also reflected directly by environmental law. As a consequence of not moving clearly from

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19 ibid., p 5.


22 ibid., p 27.

23 ibid., p 29.
'deep structure' to existing law, Leane's critique of environmental law loses its rhetorical and political edge.24

This paper attempts to address this limitation of critical approaches to law by undertaking a more formalised content analysis of the sample. Content analysis is regularly utilised in the social sciences as a research method to draw meaning from written sources25 and is beginning to be used by legal scholars in the socio-legal and criminal justice fields to analyse court decisions or media reporting.26 The difficulty with content analysis as a research method is its focus on 'latent meaning' — or requiring the researcher to form a judgment as to the genre of scholarship to which a sample article belongs.27 Two strategies were employed to address this difficulty. First, many articles were repeat-coded three weeks after the initial codings. This repetition addressed problems of consistency. The second strategy was the development of clear models for different genres of legal scholarship. This aimed to counter subjectivity through clarifying of the coding process.

A central distinction was made between scholarship that only described the law and scholarship which offered analysis of the law. Descriptive scholarship (Coding D) claimed to solely describe the law. Often these articles were detailed descriptions of recent legislative changes or ways in which new cases fitted into a background matrix of existing legal materials.28 The

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28 Random examples are: Anthony Moore (1984) 'South Australian Planning Control of Outdoor Advertising' 1 Environmental Planning and Law Journal 50; Michael Stokes (1990) 'Unit Development in Hobart' 7 Environmental Planning
essential characteristic of descriptive scholarship was that it lacked analysis, criticism or conclusions.

An article was coded analytical if it analysed, criticised or drew a conclusion. Analytical articles were often highly descriptive, but offered some analysis either as a conclusion or in a section headed ‘analysis.’ Within the analytical category, there were four sub-categories. The first was scholarship which espoused a generic analysis of regulatory systems (Coding G). This generic analysis focuses on the public/private divide. Government was seen as regulating the ‘private’ sphere. The issue is whether it is doing so effectively. It is generic because the points of reference, uncertainty of regulation (G(U)), inappropriate restriction on the private sphere (G(R)), enforcement powers of the regulatory agency (G(T)), and review and accountability mechanisms (G(A)) are common concerns that lawyers have when they write about government regulation.

The remaining three analytical sub-categories were titled ‘Foundational’ (Coding F). As a unifying characteristic, all these sub-categories grounded analysis on a specific foundation. The second analytical sub-category drew upon either international law (F(IL)) or comparative environmental law from


a foreign jurisdiction (F(CL)), as a benchmark in criticising domestic environmental law. This genre was often a developed descriptive piece which, after describing the benchmark and the domestic law, compared the two. The third analytical sub-category comprised articles which recognised the ecological crisis as a foundation for environmental law but avoided direct engagement by adopting ESD as the approved ‘solution’ to the crisis (F(ESD)). The fourth sub-category drew upon diverse legal, political and social theories to criticise law (F(O)). Within this category were a small number of articles that actually based analysis on the ecological crisis.

The final categories were Other (Not Australia), Other (Not Law) and Other (Other). These were articles that were not Australian environmental law scholarship. They either did not address Australian law, did not address law or were not concerned with either Australia or law.


See footnote 54 for list of ESD articles.


A feature of the coding process was the recognition that a single article could exhibit elements from a variety of different genres. Many articles were given both a primary coding and a secondary coding. The most general coding was descriptive (D). If an article included a degree of analysis, then it took its primary coding from the analysis. This involved ranking the analytical codings. If an article included criticism from a generic perspective (G(U), G(R), G(T), G(A)) and from a foundational perspective (F(IL), F(CL), F(ESD), F(O)), its primary coding was the foundational code. Further, if an article was coded Foundation(International) (F(IL)) or Foundational (Comparative) (F(CL)), and either Foundational (ESD) or Foundation (Other), it took the Foundational (ESD) or Foundational (Other) code. Finally, if an article was coded Foundational (ESD) and Foundational (Other), Foundation (Other) became the primary coding. The other categories O(Not Aus), O(Not Law) and O(Other) were stand-alone categories and were not secondary coded. The overall results are set out in Table 1.

Table 1: Overall Results

<table>
<thead>
<tr>
<th>Category</th>
<th>Symbol</th>
<th>Total</th>
<th>Prim.</th>
<th>Sec.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Descriptive</td>
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<td>150</td>
<td>80</td>
<td>70</td>
</tr>
<tr>
<td>Description</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Generic analysis</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Uncertain</td>
<td>G(U)</td>
<td>16</td>
<td>14</td>
<td>2</td>
</tr>
<tr>
<td>Restriction</td>
<td>G(R)</td>
<td>13</td>
<td>13</td>
<td>0</td>
</tr>
<tr>
<td>Power/teeth</td>
<td>G(T)</td>
<td>8</td>
<td>7</td>
<td>1</td>
</tr>
<tr>
<td>Review/appeals</td>
<td>G(A)</td>
<td>22</td>
<td>20</td>
<td>2</td>
</tr>
<tr>
<td>Combination of two or more G codes</td>
<td>G(X) + G(Y)</td>
<td>6</td>
<td>4</td>
<td>2</td>
</tr>
<tr>
<td>Foundational</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>International law</td>
<td>F(IL)</td>
<td>13</td>
<td>13</td>
<td>0</td>
</tr>
<tr>
<td>Comparative law</td>
<td>F(CL)</td>
<td>13</td>
<td>13</td>
<td>0</td>
</tr>
<tr>
<td>ESD</td>
<td>F(ESD)</td>
<td>11</td>
<td>10</td>
<td>1</td>
</tr>
<tr>
<td>Other</td>
<td>F(Other)</td>
<td>21</td>
<td>21</td>
<td>–</td>
</tr>
<tr>
<td>Other</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Not Australian</td>
<td>O(Not Aust)</td>
<td>38</td>
<td>38</td>
<td>–</td>
</tr>
<tr>
<td>Not law</td>
<td>O(Not law)</td>
<td>36</td>
<td>36</td>
<td>–</td>
</tr>
<tr>
<td>Other</td>
<td>O(Other)</td>
<td>2</td>
<td>2</td>
<td>–</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td>349</td>
<td>271</td>
<td>78</td>
</tr>
</tbody>
</table>

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Results

There are two strong conclusions to be drawn from the table. The first is that just under one-third of articles (80/271) are solely descriptive. The second is that much of the material that was primarily ascribed an analytical code was also secondarily coded descriptive (70/115). This conclusion is further revealed by Table 2, which focuses on articles that were given an analytical coding.

Table 2: Description as a Secondary Coding

<table>
<thead>
<tr>
<th>Category</th>
<th>Primary coding</th>
<th>With D as secondary coding</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Generic analysis</strong></td>
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<td></td>
</tr>
<tr>
<td>Uncertain</td>
<td>14</td>
<td>14</td>
</tr>
<tr>
<td>Restriction</td>
<td>13</td>
<td>7</td>
</tr>
<tr>
<td>Power/teeth</td>
<td>7</td>
<td>5</td>
</tr>
<tr>
<td>Review/appeals</td>
<td>20</td>
<td>11</td>
</tr>
<tr>
<td>Combination of two or more G codes</td>
<td>4</td>
<td>4</td>
</tr>
<tr>
<td><strong>Foundational</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>International law</td>
<td>13</td>
<td>11</td>
</tr>
<tr>
<td>Comparative law</td>
<td>13</td>
<td>9</td>
</tr>
<tr>
<td>ESD</td>
<td>10</td>
<td>3</td>
</tr>
<tr>
<td>Other</td>
<td>21</td>
<td>6</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>115</td>
<td>70</td>
</tr>
</tbody>
</table>

What can be seen is that most of the articles that attracted an analytical code also had a significant descriptive dimension. As a conclusion, the overwhelming number of articles in the Environmental Planning and Law Journal are descriptive in nature. This leads to the second conclusion: that only a small number of articles actually make the link between the ecological crisis and environmental law. Table 3 breaks down the number of articles which were assigned the coding Foundation (Other).
Table 3: Breakdown of Foundation (Other) Coding

<table>
<thead>
<tr>
<th>Foundation (Other)</th>
<th>439</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legislative theory</td>
<td></td>
</tr>
<tr>
<td>Political science/</td>
<td>440</td>
</tr>
<tr>
<td>political theory</td>
<td></td>
</tr>
<tr>
<td>Indigenous land management</td>
<td>341</td>
</tr>
<tr>
<td>(anthropology)</td>
<td></td>
</tr>
<tr>
<td>Epistemology/</td>
<td>142</td>
</tr>
<tr>
<td>postmodernism</td>
<td></td>
</tr>
<tr>
<td>Environmental crisis</td>
<td>643</td>
</tr>
<tr>
<td>Other</td>
<td>344</td>
</tr>
</tbody>
</table>


Therefore, out of the 21 articles which grounded a critique of environmental law within a foundational context, only six articles actually made the link between implications of the ecological crisis and environmental law. When combined with the 10 ESD articles, there are only 16 from 271 articles in the *Australian Environmental Planning Law Journal* which actually ground legal analysis on the ecological crisis.

**Implications: Imperial Technocrats**

The central conclusion that can be drawn from the data is that Australian environmental law scholarship has been colonised by the environmental technocracy. The spectre of technocracy haunts both the legal profession and environmental studies. It describes the rise of an identifiable ‘new class’, and also represents a conflagration of the traditional public/private divide because ‘there appears no basis for distinguishing public service and private sector management and both types of activity can be embraced by the single metaphor: management’.

The key thesis is that the culture of governing in contemporary society has become a technical, fragmented and specialised exercise. In disorientating traditional power elites, this new culture legitimates the existence of a community of appropriately trained experts who exercise power within a specific narrow range. This desire for technical legitimacy has meant that previously independent professionals — the lawyer, doctor, accountant and scientist — have become coopted into the direct exercise of power. This is an accelerating process: specialisation and cooption in turn

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50 ibid., p 25.
spawn a plethora of new disciplines and disciples, fuelling an ongoing spiral of specialisation, exclusion and training.

This emergence of a technical new class — or the 'technocrats' — as the ultra-powerful within the culture of government has had a reflection on the form and substance of knowledge. The technocrats' power lies not in quasi-aristocratic qualities, but a mandate to rule subject to remaining competent with up-to-date technical knowledge. This contingent mandate is expressed as the technocrats' insatiable desire for discrete, comprehensible and 'new' information. It is at this level that the descriptive dimension of the Environmental Planning and Law Journal may be understood. By ontological predicament, technocrats demand legitimacy only through current technical knowledge. They must know how the system works and how to operate the levers and buttons. The 'should' and 'why' are relegated to a secondary status — the primary desire is for detailed technical knowledge. Therefore, the overwhelming descriptive nature of contributions to the Environmental Planning and Law Journal evidences a domination of the technocratic craving for technical information. In this light, the Environmental Planning and Law Journal is an essential element within the changed culture of governing. It is the forum whereby environmental technocrats communicate and learn the latest technical details.

Recognition that Australian environmental law scholarship has been colonised by the technocrats also explains many of the articles which prima facie recognised the link between the ecological crisis and environmental law. There are 10 articles which utilise ESD as the their analytical foundation. This is unsurprising. ESD has been globally authorised as the 'environmental mandate for the world,' and Gerry Bates claims that it is 'fast becoming the

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53 ibid.

central pivot around which all [Australian] environmental law will ultimately revolve'.\textsuperscript{55} Indeed, much Australian environmental legislation now expressly states as its object the implementation of ESD.\textsuperscript{56} However, the articles which adopt ESD do just that. They adopt it uncritically, summarising ESD in the opening paragraphs, parading the icons of Brundtland and Agenda 21 as persuasive authority, and then analyse the law.\textsuperscript{57} But the ESD approach fails to ask critical questions of ESD. Is ESD a plausible response to the ecological crisis? Is the ecology in ESD appropriate?\textsuperscript{58} Is the development appropriate?\textsuperscript{59} Is it sustainable?\textsuperscript{60} Is it a platitude, often mouthed but incapable of

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\textsuperscript{56} For example, see \textit{Environmental Protection Act} 1994 (Qld) section 3 \textit{Nature Conservation Act} 1992 (Qld) sections 4, 5(e) and 11, \textit{Environmental Management and Pollution Control Act} 1994 (Tas) Schedule 1, \textit{Development Act} 1993 (SA) section 3(c), \textit{Environmental Protection Act} 1993 (SA) section 10, \textit{Protection of the Environment Administration Act} 1991 (NSW) section 6, \textit{Environmental Planning and Assessment Regulation} 1994 (NSW) clause 18.


\textsuperscript{59} John Gowdy (1994) ‘Progress and Environmental Sustainability’ 16 \textit{Environmental Ethics} 41.

programatic expression? In failing to ask these questions, the ESD approach does not engage with the ecological crisis. Instead, the global mandate is approved. However, the ESD approach goes one step further. The central characteristic of the formulation of ESD adopted is the technocrat’s desire for ‘management’. In this light, ESD is revealed as a technocratic ideology:

'What is Sustainable Development?' It is a New Class version of resource managerialism that functionally serves to globalize and perpetuate the techno-managerial elites control over everyday life.

Therefore, the ESD approach evidences very good technocratic scholarship because it brings the analysis of a small system into the context of the larger techno-managerial system and perpetuates the ruling mandate of the technocrats.

The implication from the analysis of the Environmental and Planning Law Journal is that Australian environmental law scholarship has become colonised by technocrats. This imperialism is revealed in the highly descriptive nature of much of the material and in the uncritical adoption of ESD. Colonisation by the technocrats has also marginalised scholarship which places environmental law in the context of the ecological crisis. Although, environmental lawyers claim the ecological crisis as their institutional origin, it does not inform their legal analysis. Instead, this fundamental issue has become silenced by the technocrats’ craving for knowledge and power.

Liberation and Survival: An Ecopolitical Critique of Environmental Law

This marginalisation of the ecological crisis within environmental law scholarship must not continue. Analysis of environmental law must be predicated on the ecological crisis. It is with trepidation that a ‘must’ is claimed. To play upon Hunt’s phrase, there is a ‘fear’ in confronting the concrete. Prescriptions for Australian legal scholarship tend to reject ‘musts’ — particularly ‘musts’ which advocate a privileged discourse. In criticising the historical elitism and exclusion of the traditional ‘black letter/professional

Evans and D Yencken (eds), Restoring the Land: Environmental Values, Knowledge and Action Melbourne University Press, p 13.


focused/common law' scholastic tradition, prescriptions generally approve of a Foucauldian-inspired heterogeneity:65

to entertain the claims to attention of local, discontinuous, disqualified, illegitimate knowledges against the claims of unitary body of theory which would filter, hierarchise and order them in the name of some true knowledge.66

There is room for heterogenous voices on environmental law. Perhaps there is even a pragmatic need for technocratic inspired description. However, there are two strong justifications for environmental law scholarship to be based on the ecological crisis. The first justification is a claim to be taken seriously. Directly in the origin myth lies the popular political justification for environmental law. Scholarship which ignores this origin does so at the risk of illegitimacy and irrelevance, as it isolates the institution from its legitimating foundations. As the reflective dimension of an institution, environmental law scholarship must take the origin myth of the ecological crisis seriously. This first justification is analogous to David Fraser’s valley girl-like desire of a non-boring and relevant legal literary tradition.67 However, the second justification goes further: it takes the ecological crisis itself seriously. The ecological crisis is real. In the words of Carolyn Merchant:

Yet I also believe that despite the relativity of environmental endism, that the environmental crisis is real — that the vanishing frogs, fish and songbirds are telling us a truth.68

Without a creative environmental law scholarship to criticise, probe, reform and revolutionise environmental law, there might not be any future. At a jurisprudential level this second justification restates the natural law


tradition. It claims there is something outside not only the legal order, but also the human order to which the legal order must adhere. For environmental law, the ‘higher moral order’ is ecology. The mountains of paper currently devoted to environmental law and environmental law scholarship might simply be in vain. Regardless, of the prima facie good intentions of the technocrats, current environmental law might just be insufficient to meet the challenges of the ecological crisis. The papers of law, along with the frogs, fish and songbirds, are all equally likely to become traces and fossils on a dead, sterile planet.

We must reorientate environmental law scholarship so it engages with the ecological crisis. The starting point in this reorientation must be a vision of the ecological crisis — its causes and the possible avenues for salvation. Ecopolitics, the emerging study of the ecological crisis and its causes and ramification for human society, appears an ideal discipline which can reorientate environmental law scholarship by providing coherent accounts of the ecological crisis and its causes. The remaining sections will overview ecopolitics and sketch the elements of an ecopolitical critique of environmental law.

Ecopolitics: Investigations on Survival

Ecopolitics is a hybrid of ecological thought and political philosophy and its crudest manifestation is in the assertion that the laws of ecology must be applied to human society. Three ‘strands’ of ecopolitical thought have been isolated. The first strand was a proto-strand. While it anticipated many of the key themes of the other strands, its foundations were the critique of modernity, dissent within the scientific community over the wisdom of


71 ibid., p 24.


postwar scientific development,75 and enlightened Marxism.76 Because of these foundations, Eckersley, claims that the 'proto-strand' was flawed, as it fails to directly engage with the ecological. This leaves two 'true' strands of ecopolitical thought: the survivalist strand and the emancipative strand.77 In summarising five identifiable movements with ecopolitics (two survivalist and three emancipative), the intellectual dimension of a liberated environmental law scholarship can be glimpsed.

Survivalist theorists attract their nomenclature because they regard the ecological crisis as a crisis for human survival. To these theorists, the future holds degradation, death and violence. Garrett Hardin and William Ophuls are usually regarded as leading survivalists.78

Central to Hardin's ecopolitics is the metaphor of the tragedy of the commons.79 Hardin uses the tragedy to demonstrate that humans as individuals are:

irresponsible, anarchistic and disrespectful of the organic laws of nature ... [and] are lacking a sense of moderation as they pursue a model of action ... in which they attempt to maximise their share of resources in partial or full ignorance of the absolute finitude of these resources.80

Therefore, in a finite world, ‘freedom in the commons brings ruin to all’.81 For Hardin, like his seventeenth century predecessor Hobbs, the only visible solution is a coercive overlord ensuring the welfare of all, by limiting individuals' freedom.82 While Hardin attempts to play down his authoritarianism, couching his call for coercion within the phrase ‘mutual coercion, mutually agreed’, he regards mutuality as majority, and justice and equity as distractions,83 and in his later formulation of the ‘life boat ethic’, he

77 I have borrowed these labels from Robyn Eckersley (1992) Environmentalism and Political Theory: Towards an Ecocentric Approach State University of New York Press, Ch 1.
78 However, also in the survivalist camp is Edward Goldsmith et al. (1972) Blueprint for Survival, Penguin, and D Meadows et al. (1972) Limits to Growth: A Report for the Club of Rome’s Project on the Predicament of Mankind, Universe.
83 ibid., p 1247
only confers suffrage on to the strong and wealthy.\textsuperscript{84} Therefore, as the key element of Hardin's ecopolitics is the coercion of the individual to respect the commons, it is no surprise that he is often labelled an eco-fascist.\textsuperscript{85}

Ophuls elaborates and expands on Hardin's thesis, expressing a personal preference for small-scale communities and steady-state economies as the ideal elements of an ecological society.\textsuperscript{86} However, the unbridled individualism of contemporary society coupled with the ecological fact of scarcity will necessarily entail restrictions on human freedom.\textsuperscript{87} The issue becomes a choice:

> the only alternative to self-coercion is the coercion of nature [i.e. the ecological crisis and mass starvation], or perhaps of an iron regime that will compel our consent to living life with less.\textsuperscript{88}

While Ophuls retains the possibility for self-coercion,\textsuperscript{89} the general tenor of his writings is the inevitability of a choice between 'Leviathan or Oblivion'.\textsuperscript{90} Ophuls proposes that, because of:

> the staggering problems of managing the response to ecological scarcity ... it ... will require us to depend on a special class of experts in charge of our survival and well-being — a 'Priesthood of responsible technologists'.\textsuperscript{91}

Furthermore, he proposes that these technocrats should have at their disposal 'a world government with enough coercive power over fractious states'.\textsuperscript{92} Therefore, the key elements of Ophuls' ecopolitics are a general pessimism surrounding the effectiveness of self-restraint and a morbid inevitability of an international Leviathan enforcing the will of the technocrats.

In contrast to the pessimism of the survivalists, the emancipation theorists regard the ecological crisis as a crisis of culture and character which represents an opportunity for human emancipation. To them, the future offers

\textsuperscript{84} Garrett Hardin (1980) Promethean Ethics: Living with Death, Competition and Triage University of Washington Press.

\textsuperscript{85} Murray Bookchin (1980) Toward an Ecological Society, Black Rose, p 277.


\textsuperscript{87} Ophuls (1977), Ch 4.

\textsuperscript{88} ibid., p 156.


\textsuperscript{90} William Ophuls (1973) 'Leviathan or Oblivion?' in H Daly, Toward a Steady State Economy, Freeman, p 215.

\textsuperscript{91} Ophuls (1977), p 159.

\textsuperscript{92} ibid., p 219.
a better human existence. Unlike the survivalists, who are unified by an underlying social contract theory, the emancipation theorists draw upon diverse traditions. This paper will focus on three branches within the emancipative strand: the social ecology of Murray Bookchin; the deep ecology of Arne Naess; and ecofeminism.

Bookchin begins with a search for the roots of the ecological crisis. He rejects the interpretations of the ecological crisis offered by the survivalists. Instead, he perceives the roots of the ecological crisis are at 'the dawn of civilisation'.

The basic conception that humanity must dominate and exploit nature stems from the domination and exploitation of man over man ... the hierarchies, classes, property forms and statist institutions that emerged with social domination were carried over conceptually into humanities relationship with nature.

Therefore, the ecological crisis has arisen because hierarchy and domination pervade all aspects of society. Bookchin’s response is to offer social ecology. Firstly, he argues that hierarchy is unknown to the ecological world:

for ecology knows no 'king of beasts'; all life forms have their place in a biosphere that becomes more and more diversified in the course of biological evolution.

Therefore, social ecology has the role of 'transposing the non-hierarchical character of ecosystems to society.' This, Bookchin believes, can only occur though the establishment of anarchist communities. Consequently,

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96 ibid., p 40.
97 ibid.
98 ibid., p 39.
99 ibid., p 271.
101 Murray Bookchin (1980) Toward an Ecological Society, Black Rose, pp 68–69. Bookchin strongly approves of the Hellenic polis, a point on which Heider observes that Bookchin’s anarchism merges dangerously with right-wing libertarianism. See Ulrike Heider (1994) Anarchism: Left, Right and Green, City Light, pp 84–91. Eckersley observes that there are three weakness in the ecopolitical dimensions of social ecology. The first is the need for political expediency — do we have time for the slow usurping of hierarchy? The second is the historical evidence of seeming ecological sustainability of hierarchical
the central concept of Bookchin's ecopolitics is hierarchy, for it is responsible for the ecological crisis and it must be expelled from society through the establishment of human-scaled anarchistic communities.

Naess's deep ecology is predicated on the perception that humans are merely members of the ecological community. Therefore, the ecological crisis is the product of our cultural and institutional blindness to this reality — our anthropocentrism. The solution lies in the reconception of personal identity away from anthropocentrism and towards the reality of 'biospherical egalitarianism.' Naess argues that the movement away from anthropocentrism occurs via the process of self-realisation through identification. This is a psychological process whereby individuals identify with external others and create bonds of respect, caring and love. Deep ecologists argue that the process of identification occurs like a pond ripple: it begins with the individual and extends to embrace other humans, animals, plants, rocks and finally the biosphere and cosmos. Therefore what begins with the narrow egotistical self of Western society, evolves into the deep and comprehensive ecological self.

By identifying with the greater wholes, we partake in the creation and maintenance of this whole. We thereby share in its greatness. The ego develops into selves of greater dimensions, proportional to the extent and depth of our process of identification.

societies such as kin-based societies. And thirdly, he has not fully investigated how the rising of hierarchy from society will necessarily rid domination from our interaction with the natural world. Eckersley, Ch 7.

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107 Naess (1985), p 175.

Consequently, deep ecology is fundamentally an ethical theory focused on the individual human.\textsuperscript{109} It does, however, have a political dimension, for it provides the ethical justification for individuals to radically alter their lifestyles.\textsuperscript{110} Therefore, deep ecology is concerned with facilitating individuals' self-realisation, through the abandonment of the anthropocentric assumption of humans' dominance over nature.

Unlike the other ecopolitical theories considered, ecofeminism is not directly synonymous with a 'founding father.'\textsuperscript{111} Instead, it has been explored by many theorists stimulated by the realisation that 'ecology is a feminist issue.'\textsuperscript{112} Nevertheless, there are some defining characteristics of ecofeminism. Firstly, ecofeminists perceive the origin of the ecological crisis as patriarchy; patriarchy enshrines together the hatred of women and the hatred of nature.\textsuperscript{113} Indeed:

most feminists would agree that a major source of contemporary social and environmental ills is the fact that patriarchal culture has … repressed and devalued women's experience and … both absolutized and universalised male experience.\textsuperscript{114}

This introduces the second characteristic of ecofeminist thought: the exposing of the 'universal male experience' or androcentricism within the conceptual framework of society, that has supported and legitimised patriarchy.\textsuperscript{115} In particular, ecofeminists focus on the androcentric values of

\begin{itemize}
\item ibid., Ch 7.
\item Ynestra King (1983) 'The Eco-feminist Imperative' in Leonie Caldecott and Stephanie Leland (eds), \textit{Reclaim the Earth: Women Speak out for Life on Earth Women's Press}, p 11.
\item Warren (1987), p 7; Janis Birkeland (1993) 'Some Pitfalls of “Mainstream” Environmental Theory and Practice' \textit{13 The Environmentalist} 263, p 267. It is this search which has led directly to the most significant dispute within ecofeminist — is ecofeminism compatible with deep ecology or is deep ecology
\end{itemize}
hierarchy, domination, autonomy and abstraction.\textsuperscript{116} This leads to the third characteristic of ecofeminist thought, the advocating for the replacement of androcentric values with values predicated on the feminine life experience of interconnectedness, responsibility, caring and nurturing.\textsuperscript{117} Therefore, ecofeminism links ecological destruction with the oppression of women by regarding the androcentric values, such as hierarchy and domination, as the cause of both, and advocates the replacement of those values with personal values originating from women's experiences.

**Sketches of an Ecopolitical Critique of Environmental Law**

From these multifarious visions of the ecological crisis, there appears little on which an ecopolitical critique of law can be structured. Fundamentally, the authoritarianism of the survivalists is antagonistic to the anarchism of the emancipationists.\textsuperscript{118} However, from the discussion, it is clear that as a discourse ecopolitics revolves around three themes.

The first is the grand, sweeping critiques offered of contemporary experiences and institutions. The causes of the ecological crisis are isolated as fundamental foundations which were either laid in the prehistoric past or are an essential feature of the human condition. Ecopolitics tears the fabric of contemporary existence exposing the eco-cide at its core. It offers brave critiques rejecting not only current structures but historic forms, and


enthusiastically embraces radical and novel social and political change. For example, in constructing an environmental law regime on social ecology, Ben Boer is concerned that it:

would seem to require a highly developed form of citizen participation which would run counter to the forms of representation found in contemporary Western societies.\footnote{119}

However, it is Boer’s baulking between the realms of the seemingly practical and the revolutionary that ecopolitics urges us to cross:

Be practical! Do the impossible! To this demand the generation that faces the next century can add the more solemn injunction: ‘If we don’t do the impossible, we shall be faced with the unthinkable.’\footnote{120}

The seemingly practical would keep us welded to the ecological crisis. It is only through doing the impossible, dreaming the radical, re-imaging social relations that the ecological crisis can be averted. Therefore, the first theme of ecopolitics is its grand criticism of the foundation of contemporary society.

The second and third themes relate to the substantive elements of the grand critique. Both strands of ecopolitics isolate the organisational principles of hierarchy and domination as connected with the ecological crisis. Survivalists regard hierarchy and domination as necessary for coercion. This is in direct contrast to the emancipationists, who regard hierarchy and domination, — either naked or as the defining elements of anthropocentrism or androcentrism — as being at the root of the ecological crisis. This theme of the problematic nature of hierarchy and domination is reflected in a similar joint concern with individualism. The survivalists regard the selfish and greedy individual as the cause of the ecological crisis. This contrasts with the emancipationists who view the individual, freed from hierarchy and domination, as the basis for an ecologically sound society. Together, these three themes provide the framework for an ecopolitical critique of environmental law. The first theme — that of grand foundations — gives an insight into the type of scholarship anticipated. It anticipates a fundamental deconstruction of the law, an excavation of its foundations and questioning of its existence. In this matter, an ecopolitical critique follows in the footsteps of the Critical Legal Studies Movement (CLS). The CLS popularised the notion that law cannot be isolated into an unique sphere of social practice, but ‘legal interpretation takes place in a field of pain and death’.\footnote{121} In expressly recognising the law as another manifestation of cultural and political practices

and structures, the CLS conceived a new method to legal scholarship. The law can be read many ways. Its silences can be questioned as well as its (ir)relevance to a wider political, social and cultural contexts.\textsuperscript{122} An ecopolitical critique does not hold environmental law removed from its social and political context but regards it as an obvious site where the foundational cause of the ecological crisis can be revealed, reaffirmed or combatted.

The other two themes provide the substantive focus of an ecological critique of environmental law. In excavating environmental law, the key issues are whether it perpetuates or challenges hierarchy and domination and whether it encourages or discourages individualism. Law perpetuates hierarchy and domination through the way it structures the exercise of power; it perpetuates individualism through privileging the individual and individual interests. The question to be asked is whether individuals are conceived as recalcitrant who need to be coerced, or whether the law empowers individuals to be ecologically responsible.

Therefore, in offering a vision of the ecological crisis, ecopolitics offers a way to liberate environmental law scholarship through reorientation towards eco-centric analyses of environmental law. Within this ecopolitical critique, the focus is on whether environmental law is a reflection, enforcer or challenger of the deep foundational values of hierarchy and domination and individualism. To demonstrate the effectiveness of an ecopolitical critique as a way of reorienting environmental law scholarship, a brief ecopolitical critique of the \textit{Environmental Protection Act} 1994 (Qld) will be undertaken.

**Individualism and Hierarchy in the \textit{Environmental Protection Act} 1994 (Qld)**

A technocratic description of the \textit{Environmental Protection Act} 1994 (Qld) (EPA) is brief. The aim of the act is to:

> protect Queensland’s environment while allowing for development that improves the total quality of life, both now and in the future in a way that maintains the ecological processes on which life depends.\textsuperscript{123}

The EPA establishes a pollution control regime by criminalising environmental harm\textsuperscript{124} and authorising parallel licensing,\textsuperscript{125} managing,\textsuperscript{126} and

\begin{itemize}
  \item \textsuperscript{122} Robin West (1993) \textit{Narrative, Authority and Law} 5. The CLS is portrayed a Janus with a benevolent face; they are celebrated as the openers of the legal academic door for emerging feminist, race and postmodern theorists. This is their benevolent face, for they are often portrayed as Janus. Their other, set with harsh lines of masculine, elitist authority is criticised as slamming the same door in emerging theorists’ faces: Richard Delgado (1987) ‘The Ethereal Scholar: Does the Critical Legal Studies Have What Minorities Want? 22 \textit{Harvard Civil Rights Civil Liberties Law Review} 301.
  \item \textsuperscript{123} \textit{Environmental Protection Act} 1994 (Qld) s 3.
  \item \textsuperscript{124} \textit{Environmental Protection Act} 1994 (Qld) Ch 3 Pt 10.
  \item \textsuperscript{125} \textit{Environmental Protection Act} 1994 (Qld) Ch 3 Pt 4.
\end{itemize}
investigatory\textsuperscript{127} schemes. The levels of allowable harm are either prescribed\textsuperscript{128} or expressed in environmental protection policies.\textsuperscript{129} The EPA also incorporates a mechanism for the registration and management of contaminated land.\textsuperscript{130} Not only is the EPA comprehensible to technocratic description, but it anticipates and legalises technocratic management. Section 4 of the EPA dictates that:

\begin{enumerate}
\item The protection of Queensland’s environment is to be achieved by an integrated management program that is consistent with ecologically sustainable development.
\item The program is cyclical and involves the following phases—
\begin{enumerate}
\item phase 1 — establishing the state of the environment and defining environmental objectives;
\item phase 2 — developing effective environmental strategies;
\item phase 3 — implementing environmental strategies and integrating them into efficient resource management;
\item phase 4 — ensuring accountability of environmental strategies.
\end{enumerate}
\end{enumerate}

However, an ecopolitical critique reads through this surface texture of the EPA. The concern is not with how it works, or whether it could be more efficient, or whether it stacks up against an international norm, but how the EPA deals with the cultural heritage of hierarchy and domination and individualism.

\textit{Hierarchy and Domination}

The central organising principle of the EPA is its hierarchy of commands. Substantive details of the Act are paramount.\textsuperscript{131} Next the EPA authorises environmental protection policies\textsuperscript{132} which form the substantive basis for environmental authorities.\textsuperscript{133} Together, both these criteria inform the

\begin{footnotesize}
\textsuperscript{126} \textit{Environmental Protection Act} 1994 (Qld) Ch 3 Pt 6.
\textsuperscript{127} \textit{Environmental Protection Act} 1994 (Qld) Ch 3 Pt 5, Ch 4.
\textsuperscript{128} \textit{Environmental Protection Act} 1994 (Qld) s 38.
\textsuperscript{129} \textit{Environmental Protection Act} 1994 (Qld) Ch 2.
\textsuperscript{130} \textit{Environmental Protection Act} 1994 (Qld) Ch 3 Part 9B.
\textsuperscript{132} \textit{Environmental Protection Act} 1994 (Qld) ss 24 and 25.
\textsuperscript{133} The regional basis rests in the intention of the \textit{Environmental Protection Act} 1994 (Qld) to devolve administration of many environmental authorities to local government. See \textit{Environmental Protection Act} 1994 (Qld) Ch 3 Pt 4 subdiv 1
\end{footnotesize}
negotiation for environmental management programs. This macro-hierarchy is reflected in the hierarchy of environmental harm. According to the degree of adverse affect, harm can be classified as environmental nuisance, material environmental harm and serious environmental harm. This hierarchy becomes reflected in a hierarchical organisation of environmental offences, with environmental nuisance as the minor offence and serious environmental harm as the extreme offence. It is also reflected in the different categories of environmental authorities. Level one activities require more-detailed application procedures for a licence, while level two activities require less-detailed procedures for approvals. The standing requirements for restraining orders are also organised hierarchically according to the level of 'interest'. At the top is the minister or the administering authority. Next are people whose interests are affected. Finally there are persons without an affected interest, but who, because of the seriousness of the breach and the public interest are given leave to appear.

The siamese twin of hierarchy is domination. At a macro-level, the EPA structures the enforcement by centralised decision-makers of environmental codes and standards. The environmental harm offences operate to rationalise the domination by the decision-makers of the lifeworld. This is further identified in the tools at the disposal of decision-makers. Decision-makers can issue Environmental Protection Orders, demand financial assurances to ensure compliance, prosecute persons committing unlawful environmental harm, or obtain restraining orders. Additionally, avenues for domination are provided by the wide spectrum of investigative powers, including a general entry and seizure power and the power to demand answers and summons documents. Furthermore, the EPA allows the state government to dominate local authorities. While significant scope exists for devolution, the minister, through the overriding ability to set environmental

and s 196 for the devolving of powers and the definition of administrative authority in Schedule 4.

134 Environmental Protection Act 1994 (Qld) ss 80 and 82.
135 Environmental Protection Act 1994 (Qld) ss 15, 16 and 17.
136 Environmental Protection Act 1994 (Qld) ss 120, 121 and 123.
137 Environmental Protection Act 1994 (Qld) s 38. This is central to Ch 3 Pt 4.
138 Environmental Protection Act 1994 (Qld) s 194(1).
139 Environmental Protection Act 1994 (Qld) ss 194(1) and 194(2).
140 Environmental Protection Act 1994 (Qld) ss 3 and 4.
141 Environmental Protection Orders under the Environmental Protection Act 1994 (Qld) ss 109 and 112.
142 Environmental Protection Act 1994 (Qld) Ch 3, Pt 9.
143 Environmental Protection Act 1994 (Qld) Ch 3, Pt 10.
144 Environmental Protection Act 1994 (Qld) ss 194(1) and 194(2).
145 Environmental Protection Act 1994 (Qld) ss 140 and 141.
146 Environmental Protection Act 1994 (Qld) ss 144 and 145.
147 Environmental Protection Act 1994 (Qld) s 196.
protection policies, significantly dictates the way local authorities administer the EPA.\textsuperscript{148}

Its hierarchical structure and the available mechanisms for domination thus indicate that, from an emancipatory perspective, the EPA reinforces the very cultural structures that are the cause of the environmental crisis. Hierarchy and domination are essential elements in the survivalist vision of an ecological future; however, the EPA does not structure the survivalists' priesthood of responsible technologists. While environmental protection policies give a legislative basis for technical standards,\textsuperscript{149} the EPA does not stamp these values onto the lifeworld. There is too much discretion,\textsuperscript{150} too many avenues of review and appeal\textsuperscript{151} and too many gaps in the structure which might allow individual interests to affect good ecological decision making.\textsuperscript{152} Therefore, the EPA reaffirms hierarchy and domination as organisational principles, but does not fully harness them towards the survivalist vision of centralised authoritarian decision-making.

\textit{Individualism}

The EPA expresses a problematic conception of the individual. The emphasis on hierarchy and domination of the lifeworld suggests a suspicion of individuals. At a moral level, individuals are exalted to obey the general environmental duty:\textsuperscript{153}

\begin{quote}
A person must not carry out any activity that causes, or is likely to cause, environmental harm unless the person takes all reasonable and practicable measures to prevent or minimise the harm ("general environmental duty").\textsuperscript{154}
\end{quote}

However, if it were expected that people would take such action, the rest of the EPA would become superfluous; the environmental authorities' regime and the many offences would be irrelevant.\textsuperscript{155} However, the image of the

\textsuperscript{148} \textit{Environmental Protection Act} 1994 (Qld) Ch 2, s 31.

\textsuperscript{149} Another example is the limiting of persons to do site management plans for contaminated land to members of prescribed bodies with 'qualification and experience relevant to the preparation of site management plans': s 118ZR.

\textsuperscript{150} For example, in the conduct and acting on environmental audits: ss 71, 72 and 76.

\textsuperscript{151} \textit{Environmental Protection Act} 1994 (Qld) Ch 6 Pt 3.

\textsuperscript{152} For example, public submissions in the drafting of environmental protection policies and in the granting of licences. \textit{Environmental Protection Act} 1994 (Qld) ss 26, 27, 42 and 43.

\textsuperscript{153} \textit{Environmental Protection Act} 1994 (Qld) s 21(3): 'In addition, a breach of the general environmental duty does not, of itself, give rise to a civil right or remedy.'

\textsuperscript{154} \textit{Environmental Protection Act} 1994 (Qld) s 36(1).

\textsuperscript{155} In addition to the environmental offence in Ch 3 Pt 10, there are specific regulatory offences in Ch 4 Pt 6.
individual which emerges from the EPA is problematic. At many levels a conception of a free and responsible individual is reinforced.

The paradigm of the free and responsible individual is reflected at a variety of levels. First, the propertied individual is given a privileged status. They are awarded rights to compensation for injurious inflection,\textsuperscript{156} rights of participation,\textsuperscript{157} superior rights of review\textsuperscript{158} and stronger standing to bring restraining orders.\textsuperscript{159} However, property does not limit the conception of the individual in the EPA. A stated objective is that the administration of the EPA should:

as practicable, in consultation with, and having regard to the views and interests of, industry, Aborigines and Torres Strait Islanders under Aboriginal tradition and Island custom, interested groups and persons and the community generally.\textsuperscript{160}

This desire for participation is substantively expressed in the provisions for public submissions in development of environmental protection plans,\textsuperscript{161} before granting or amending licences,\textsuperscript{162} and before approval of environmental management plans.\textsuperscript{163} ‘Interested parties’ have rights to apply for review of licensing approvals, licensing renewals and environmental management plans for three years or more,\textsuperscript{164} and strangers with the leave of the court can commence an action for restraining orders.\textsuperscript{165} Together, these glimpses delineate a construction of the individual as free and responsible, whose property is to be respected and whose contribution is to be valued in the protection of the environment.

This construction of individuals is deeply antagonistic to a survivalist sensibility. The individual, greedy and owning property, is the virus infecting the planet. In affirming the individual, the EPA is handicapped as a strategy for coercion. In contrast, the emphasis on participation and the general environmental duty reflects the emancipationists’ goal of aware individuals taking responsibility for the ecological dimensions to their actions. However, full communion is prevented by the EPA’s perpetuation of the organisational

\textsuperscript{156} Section 178 of the \textit{Environmental Protection Act 1994 (Qld)} provides for compensation for expenses incurred during investigations and enforcement.

\textsuperscript{157} This is particularly with respect to the contaminated land regime. For example, the owner has submissions rights. \textit{Environmental Protection Act 1994 (Qld)} ss 118H(1)) and notice of remedial work s 118X(1).

\textsuperscript{158} \textit{Environmental Protection Act 1994 (Qld)} s 200.

\textsuperscript{159} \textit{Environmental Protection Act 1994 (Qld)} ss 194(1)(c) and 200.

\textsuperscript{160} \textit{Environmental Protection Act 1994 (Qld)} s 6.

\textsuperscript{161} \textit{Environmental Protection Act 1994 (Qld)} ss 26 and 27.

\textsuperscript{162} \textit{Environmental Protection Act 1994 (Qld)} ss 42 and 49.

\textsuperscript{163} \textit{Environmental Protection Act 1994 (Qld)} s 85. See also criteria (f) in the definition of ‘standard criteria’ in Schedule 4.

\textsuperscript{164} \textit{Environmental Protection Act 1994 (Qld)} s 200(2).

\textsuperscript{165} \textit{Environmental Protection Act 1994 (Qld)} ss 194(1)(d), 194(2).
disease of hierarchy and through its avenues for domination. At a strategic level, an ecopolitical critique reveals that the EPA as fundamentally flawed. It neither constructs a legal regime which the survivalists nor emancipationists can accept nor actively perpetuates the foundational values of hierarchy and domination and individualism. It falls in no man's land, cut down by its own contradictions. The naked political implication from this ecopolitical critique is that Environmental Protection Act 1994 (Qld) cannot protect the environment. In refusing to grapple with the ecological crisis, it is revealed as illusionary, impotent and cynical.

Conclusion: Doing the Impossible

The stark conclusion from an ecopolitical critique of the EPA can be contrasted with Australian environmental law scholarship which complacently suggests that EPA has the broad elements in place, with only management issues needing to be resolved.\textsuperscript{166} In an ecopolitical critique, description, effectiveness, international law and ESD are relegated to secondary status by a primacy given to the fundamental question: ‘does this address the ecological crisis?’ Ecopolitical critiques challenge environmental law scholarship to ‘do the impossible’. It must ask unpleasant but essential questions about environmental law and the ecological crisis. In doing so, environmental law scholarship will be liberated from the technocrats. For without an intelligent, creative scholarship, which is doing the impossible — going beyond what the technocrats consider practical — we face the ecological crisis unprotected and unprepared. According to James Lovelock's Gaia Hypothesis, it is incorrect to speak of ends and conclusions at a planetary level. Gaia goes on to say, however, that the Gaia of Muttaburrasaurus is different to Gaia of today and will be different to Gaia in the future. The current ecological crisis is one of many that Gaia has survived. While Gaia might survive, it is our survival

which is at issue. The process is one of transformations — progressive transformations through evolution and radical transformations through crises.

Similarly, this paper does not wish an extinction of environmental law scholarship, but a transformation. By arguing for a reorientation away from technocratism back to the ecological crisis, it hopes to stimulate a crisis within environmental law scholarship. Environmental law must reflect on its foundations. The Gaia Hypothesis also presents an ultimatum: Gaia might continue, but if we do not address the ecological crisis, we might not.

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