

THE SOCIO-LEGAL IMPLICATIONS OF THE NEW POLITICS OF CLIMATE CHANGE

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I INTRODUCTION

As 2016 lengthened its stride, the ‘ambivalent euphoria’ of the 2015 Paris Agreement on climate change gave way to a sense of ‘where to from here?’ As one of us commented at the time, ‘[w]hile the technicalities of the Kyoto Protocol were never easy fodder for inspiring collective action, the [post-Paris] terrain is arguably even more forbidding on that score’.¹ Each country will submit Nationally Determined Contributions, a welter of sector-specific plans and measures which will be assessed, monitored, analysed and reviewed by carbon management professionals via procedures still being fought over. This is, from the perspective of global climate treaty processes, a ‘bottom-up’ approach to responding to climate change.

From the perspective of the citizens of diverse countries, however, most of these measures will still emerge as embedded in, enabled by and shaped by government policies such as carbon pricing regulations – after all, the ‘bottom-up’ nature of this approach can only be understood as such when compared to ‘top-down’ legally binding treaty targets. Just as important, and central to the concerns of this article, are the multiple and diverse forms of ‘bottom-up’ action in response to climate change that are not generated directly by, or even embedded in, state-driven climate-specific policy initiatives. These diverse forms of ‘bottom-up’ action are part of a new politics of climate change, which Stephen Hale writing for the Green Alliance, a United Kingdom (‘UK’) think tank on environmental issues, pointed to as early as 2010.²

The novelty of this new politics of climate change was, he argued, threefold. First, advocacy focused on government is increasingly supplemented by social mobilisation focused on communities. Secondly, an emphasis on social goals is augmenting the narrower focus on environmental goals. Thirdly, a largely instrumental preoccupation with institutional design is increasingly supplemented

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1 Bronwen Morgan, ‘Climate Change and the New Economy’ (2016) 13 *Stir to Action* 1, 1.

2 Stephen Hale, ‘The New Politics of Climate Change: Why We Are Failing and How We Will Succeed’ (2010) 19 *Environmental Politics* 255.

by an insistence on the importance of values and identity.³ Some of the most vivid sites where we see the new politics of climate change playing out relate to energy. Social mobilisation in communities has occurred as values and identity have been sharpened by the arrival of onshore oil and gas exploration in Australia, the UK and the United States ('US') especially. The 'fracking boom' has brought environmental and agricultural identities together with other diverse social movement actors in such places as the Northern Tablelands of New South Wales ('NSW'), Gloucester and Lismore. These are framed as much by a desire to prevent further carbon emissions as by an assertion of the worthiness of local identity. Climate change, embedded in an increasingly expansive set of socio-ecological concerns, galvanises new local social and economic forms through resisting the discourses and practices of mainstream economic growth especially through the extraction of fossil fuels. We use the term 'extractivism' as shorthand for these discourses and practices.

But this new politics of climate change flags new intersections between social mobilisation, economic action and law that range more broadly, well beyond the more obviously climate-sensitive area of energy policy. We would argue it encompasses multiple forms of sustainable grassroots innovation,⁴ processes that could be cumulatively building a new economy as a response to climate change. This is not the new economy of the tech start-up world, itself an extension of arguably over-optimistic hopes that the economy-as-usual can, with the help of science and technology, provide products or processes that will decouple growth and carbon emissions. 'New' in this context is intended more to signal ways in which 'economy', 'market' and 'exchange' can be re-imagined so that they move away from extractive processes that cause ecological damage and deepen social inequality. In other words, the innovation is socio-ecological more than technological, internalising a more generative relationship to the resource base upon which production and consumption depend: a relationship that is 'aimed at creating a world where all living beings can flourish for generations to come'.⁵

The new economy from this perspective is captured by the sprawling and energetic webs of the 'real economy' depicted by the Real Economy Lab project.⁶ This project, as with much other work in this area, captures the diversity of relevant experiments in the new economy with an inclusive and open-ended list of trends,⁷ such as 'the caring economy, the sharing economy, the

3 Tom Crompton and Tim Kasser, *Meeting Environmental Challenges: The Role of Human Identity* (WWF-UK, 2009).

4 Gill Seyfang and Alex Haxeltine, 'Growing Grassroots Innovations: Exploring the Role of Community-Based Initiatives in Governing Sustainable Energy Transitions' (2012) 30 *Environment and Planning C: Government and Policy* 381; Gill Seyfang and Adrian Smith, 'Grassroots Innovations for Sustainable Development: Towards a New Research and Policy Agenda' (2007) 16 *Environmental Politics* 584.

5 Marjorie Kelly, *Owning Our Future: The Emerging Ownership Revolution* (Berrett-Koehler, 2012) 14.

6 Jules Peck, 'The Next Economy Needs You!' on *Real Economy Lab* (4 February 2016) <<http://realeconomylab.org/the-next-economy-needs-you/>>.

7 Taylor C Nelms, "'The Problem of Delimitation": Parataxis, Bureaucracy, and Ecuador's Popular and Solidarity Economy' (2015) 21 *Journal of the Royal Anthropological Institute* 106. Nelms describes this as parataxis: at 108.

provisioning economy, the restorative economy, the regenerative economy, the sustaining economy, the collaborative economy, the solidarity economy, the steady-state economy, the gift economy, the resilient economy [and] the participatory economy'.⁸ Early commentary on this explosion of small-scale initiatives, such as Paul Hawken's passionate chronicle *Blessed Unrest*, tended to focus on their sheer diversity and their political and social contours.⁹ Increasingly, however, scholars are linking this explosion explicitly to green and sustainability outcomes.¹⁰

It is therefore an opportune time to explore what the specifically socio-legal dimensions of this new politics of climate change might be. Put differently, this is about the shift from a focus on engagement with top-down policy processes, particularly the international framework for emissions trading leading up to the Paris Agreement, to the pursuit of a dual community organising strategy that combines resistance and proactive institution-building at more local levels. Thus, protagonists who may once have focused on submissions to government to shape the Paris Agreement may shift their energy to obstructing pipelines or fracking drills and creating new legal entities to build sustainable enterprises to take forward a clean energy agenda. This particular kind of shift embeds the social networks in new economy initiatives in ways which open directly onto a range of legal implications that are not usually considered to be part of 'climate change law' – especially insofar as it is considered a 'global–global' problem.¹¹

Moreover, new economy initiatives are best understood from a *socio*-legal angle insofar as their formal legal implications are often still embryonic at this stage, but generative of far-reaching impact when understood from a more pluralistic perspective of what is encompassed by law. Indeed, if we ask what the traits are of this kind of new economy that are distinctively relevant to the climate change challenge, those which stand out are typically more socio-legal than legal.¹² In particular, the focus on mutuality and reciprocity in many of the new economy initiatives we are signalling are more relational than rule-based. From commons-based conceptions of governance, to cooperative forms of enterprise, to the idea of solidarity economies sewn into the fabric of many new economy initiatives, interdependence takes priority over extractive dominance. And this helps to temper the pace of extraction, creating a focus on 'slowing

8 Peck, above n 6.

9 See, eg. Paul Hawken, *Blessed Unrest: How the Largest Social Movement in History Is Restoring Grace, Justice, and Beauty to the World* (Penguin Books, 2007).

10 Burns H Weston and David Bollier, *Green Governance: Ecological Survival, Human Rights, and the Law of the Commons* (Cambridge University Press, 2013); Julian Agyeman, Robert D Bullard and Bob Evans (eds), *Just Sustainabilities: Development in an Unequal World* (Earthscan, 2003).

11 Zahar, Peel and Godden's distinction of climate change from other environmental issues is exemplary of the field here: climate transcends typical 'global–local' environmental problems whose causes ... are purely local, or at most cross-border ... similarly experienced everywhere, but because they have local causes, are amenable to local solutions. Anthropogenic climate change is of a different order because it is an indivisible problem with global causes and effects. Its causes are everywhere.

Alexander Zahar, Jacqueline Peel and Lee Godden, *Australian Climate Law in Global Context* (Cambridge University Press, 2013) 13 (emphasis in original).

12 Morgan, 'Climate Change and the New Economy' above n 1.

down' that stresses forms of exchange and production that focus on relational outcomes, including a heightened sensitivity to our relation to the non-human world.

In this article, we point to four axes we view as crucial for a process of architectural reform that builds mutuality and 'slowing down' into the architecture of formal rules and flows of money that shape economic life. Those axes are organisational, regulatory, place-based and people-focused. In the body of the article, we use these four socio-legal axes as entry points for re-imagining the legal contours of economy–environment relations in ways that recognise the importance of both structure and agency. We begin with a focus on the legal models for corporate entities, the organisational actors that are the key site of economic agency in our contemporary economy. Our second axis, the public regulatory dimensions of economic activity, provides the structural context for economic activity. As will emerge from this article, one of the key regulatory challenges distinctive to the new politics of climate change is the difficulty of crafting place-sensitive legal frameworks, which we explore as a third socio-legal axis. In the context of a modern legal system committed conceptually to generality and place-neutrality, one of the more fertile sites to develop a sense of agency that responds to place-sensitivity is through the trajectory of individual biography. Professional identities of lawyers therefore comprise our fourth and final socio-legal axis.

This article aims to illustrate a range of ways in which this four-pronged approach to the socio-legal dimensions of the new politics of climate change has the potential to alter *systemically* the relationship between economy and environment. The overall perspective provided from the viewpoint of these four axes aims to move away from analyses which conceptually oppose the dynamics of economic growth to efforts to temper its worst ecological effects using regulation, science and risk management. Conceptually, the new politics of climate change necessitates a move away from a zero-sum game that pits 'state' against 'market'. Moving away from images of restrictive state regulation on the one hand and economic growth on the other, this article aims to chart the emerging socio-legal dimensions of a reconfiguration of provisioning and exchange, weaving social and ecological values into the *heart* of exchange, rather than bolting them on as a protective afterthought. Such 'bolting on' is exemplified by attempts to create global carbon offset markets that have become increasingly difficult to envisage following the Paris Agreement.¹³

In light of this aim, the article seeks to evoke a diverse set of emergent examples and experiments in order to flesh out a positive vision of a more socially and ecologically responsive economy built from the ground up, linking multiple small-scale initiatives across many different sectors. We approach this as an analytical and imaginative exercise rather than as a report on a defined slice

13 One carbon trader recently quipped on Twitter that 'booking a couple of tables at a London pub' would be a sufficient inheritor of the pre-eminent carbon market trade show, following dwindling attendance after the Paris Agreement: Climate Trader on *Twitter* (31 May 2016) <<https://twitter.com/ClimateTrader/status/737557007503228928>>. On the history of carbon emissions trading, see Declan Kuch, *The Rise and Fall of Carbon Emissions Trading* (Palgrave Macmillan, 2015).

of empirical research. We have carried out such research,¹⁴ but in this article, we do not directly report on that research but rather draw on relevant secondary literature¹⁵ or matters of public knowledge. We use examples in order to animate possibility rather than to systematically present ‘findings’. For this reason, the empirical referents of this article are episodic and diverse, although we have given priority to examples from energy and food contexts as new economy initiatives most directly related to responding to climate change challenges. Food and energy represent two vital cross-cutting sectors that sustain, even constitute, contemporary societies. The emergent examples thus aim to support two overlapping lines of argument. First, new kinds of organisations, place-sensitive approaches to regulatory ambiguity and new kinds of commercial lawyers help support, albeit with tensions, the spread of new economy initiatives that embody the new politics of climate change. Secondly (and reflecting both the inherent tensions underlying the first argument, as well as the roots of this new politics in more longstanding traditions of environmental activism), the work of environmental activist lawyers and litigation remains vital for keeping physical and political spaces sufficiently open so that the work of the first line of argument can take place.

II ORGANISATION

The importance of organisational actors in the landscape of climate change relevant legal contours is core to what we have elsewhere described as ‘radical transactionalism’.¹⁶ Radical transactionalism is

the creative redeployment of legal techniques and practices relating to risk management, organisational form and the allocation of contractual and property rights in order to further the purpose of internalising social and ecological values into the heart of economic exchange.¹⁷

Radical transactionalism is in many ways a sociological term for describing what is explored in this article as a contextual reframing of certain key aspects of

14 See Australian Future Fellowship Award FT110100483 ‘Between Social Enterprise and Social Movement: Responses to Climate Change at the Intersection of Rights and Regulation’. The support of the Australian Research Council for this work is gratefully acknowledged.

15 Including two pieces authored by ourselves: Bronwen Morgan and Declan Kuch, ‘Radical Transactionalism: Legal Consciousness, Diverse Economies, and the Sharing Economy’ (2015) 42 *Journal of Law and Society* 556; Bronwen Morgan and Declan Kuch, ‘Sharing Subjects and Legality: Ambiguities in Moving beyond Neoliberalism’ in Vaughan Higgins and Wendy Larner (eds), *Assembling Neoliberalism* (Palgrave MacMillan, forthcoming, 2017); but mostly on other work: see, eg, Peter North and Noel Longhurst, ‘Grassroots Localisation? The Scalar Potential of and Limits of the “Transition” Approach to Climate Change and Resource Constraint’ (2013) 50 *Urban Studies* 1423; Seyfang and Haxeltine, above n 4; Gill Seyfang, Adrian Smith and Jung Jin Park, ‘The UK Community Energy Sector: Findings from the 2011 UK Survey’ (Research Briefing No 16, Grassroots Innovations, November 2012); Gill Seyfang, Jung Jin Park and Adrian Smith, ‘Community Energy in the UK’ (Working Paper No 11, 3S: Science, Society & Sustainability, 2012); Christopher Wright and Daniel Nyberg, ‘Creative Self-destruction: Corporate Responses to Climate Change as Political Myths’ (2014) 23 *Environmental Politics* 205.

16 Morgan and Kuch, ‘Sharing Subjects and Legality’, above n 15.

17 Ibid 565.

private law. What is important is the organisational and institutionally-located nature of private economic activity: the fact that economic ‘transactions’ in a modern economy mostly occur not between individuals but between socially and politically constituted organisations. This provides space to rework both practices and the political valence of patterns of private economic transactions. This is in a sense what Will Davies frames as a project of ‘taking the liberating, dynamic properties of capitalism and channeling them into the social realm’.¹⁸ Davies’ discussion of this project notes it will require a new breed of public interest lawyers, ones who are more adept at designing diverse distributions of equity than at prosecuting human rights or judicial review applications. Yet, as he elaborates, no matter how creative or visionary the political and social vision of experiments in this vein, the ‘regulatory and legal tramlines that have already been laid down’ will need to be re-imagined.¹⁹

Christopher Wright and Daniel Nyberg’s detailed research on corporate responses to climate change underscores the depth of this necessity.²⁰ Wright and Nyberg interviewed a variety of staff including managers and climate-specific personnel in energy, media and finance companies faced with dilemmas ranging from designing company processes to deal with cost implications of a government mandated carbon emissions price to enacting wider cultural changes regarding greenhouse gas emissions associated with business travel. Wright and Nyberg’s interviewees demonstrated a belief in intersecting myths of corporate environmentalism, corporate citizenship and corporate omnipotence. Production and consumption of ‘green products’, corporate lobbying of policymakers and political parties, and the unquestioned authority of markets were mutually reinforcing discourses amongst corporate staffers.²¹

Nyberg and Wright’s interviews from deep inside the homogenised corporation of neoliberal competition policy show a sanitised imaginary of organisational form.²² The depth of mythology about corporations – their history and seemingly boundless scope – reflected in their interview data underscores the challenge of remaking organisational form to transcend extractivism. Organisational form, particularly legal forms for carrying out economic activities, is a paradigmatic socio-legal container of commerce, one that shapes ‘regulatory and legal tramlines’.²³

This shapes the potential contributions that radical transactionalism could make to the contours of the new politics of climate change. The specific dimension of organisational creativity that is of interest in this article is the effort to craft a legal form for economic activity that enables a reorientation of the role

18 William Davies, ‘Recovering the Future: The Reinvention of “Social Law”’ (2013) 20 *Juncture* 216, 219 (emphasis altered).

19 William Davies, ‘“Recovering the Future” – New Article Published’ on William Davis, *Potlatch* (2 December 2013) <<http://potlatch.typepad.com/weblog/2013/12/recovering-the-future-new-article-published.html>>.

20 See Christopher Wright and Daniel Nyberg, *Climate Change, Capitalism, and Corporations: Processes of Creative Self-destruction* (Cambridge University Press, 2015).

21 *Ibid.*

22 Morgan and Kuch, ‘Radical Transactionalism’, above n 15.

23 *Ibid.*

of shareholder profit. Organisational form understood from this perspective may provide an opportunity for the relatively free play of diverse forms of collective agency to operate *through* the economy, rather than in parallel to it.

Recent developments in experiments with legal organisational forms are injecting diversity into the relative monoculture of the corporate form.²⁴ ‘Creative self-destruction’²⁵ is not a necessary outcome of *all* corporate forms, even if it is a likely outcome of the existing corporation. ‘Creative self-destruction’, for Wright and Nyberg, involves the continued expansive exploitation of natural resources as if economic growth opportunities were boundless. This mythology of limitless growth is perpetuated by environmental critique being incorporated into the internal workings of corporations through various forms of hard and soft regulation, enabling carbon markets and other new commodities to perpetuate extractive practices.²⁶ Nicholas Stern’s call for climate finance is thus exemplary creative self-destruction. Just as Schumpeter observed the precarious basis of its own destruction of feudalism,²⁷ so too may existing swathes of capitalist expansion be threatened by climate regulations and the ‘carbon bubble’.²⁸

Two lines of development are of particular importance to Wright and Nyberg’s critique of capitalist extraction of nature: the creation of hybrid legal structures for ‘social enterprise’, and a revival of interest in cooperative structures, particularly in tandem with the digital economy. We review them briefly here, primarily to point to ways of opening the black box of company law from a perspective outside that domain. Our central contention is that hybrid social enterprise and cooperative structures may foster caring and nurturing relationships to people and the natural assets that are exploited through the mythology of creative self-destruction. They help illuminate the constitutive dimension of corporate law and corporate organisation. This constitutive dimension has been of interest to scholars of both private and public law for some time. For example, Stephen Bottomley has argued that applying the lens of constitutionalism to corporate law draws attention to the importance of dual decision-making, deliberation, and the separation of powers over and above profit-maximisation.²⁹ From the public law side, Oren Perez has responded to

24 Bronwen Morgan, ‘Transcending the Corporation: Social Enterprise, Cooperatives and Commons-Based Governance’ in Thomas Clarke and Justin O’Brien (eds), *Handbook on the Corporation* (Oxford University Press, forthcoming, 2017).

25 Wright and Nyberg, above n 20.

26 Ibid 28–46.

27 ‘In breaking down the pre-capitalist framework of society, capitalism thus broke not only barriers that impeded its progress but also flying buttresses that prevented its collapse. ... [T]he capitalist process in much the same way in which it destroyed the institutional framework of feudal society also undermines its own’: Joseph A Schumpeter, *Capitalism, Socialism and Democracy* (Routledge, first published 1942, 2003 ed) 139, quoted in *ibid* 32.

28 James Leaton, ‘Unburnable Carbon – Are the World’s Financial Markets Carrying a Carbon Bubble?’ (Report, Carbon Tracker Initiative, November 2011) <<https://www.carbontracker.org/wp-content/uploads/2014/09/Unburnable-Carbon-Full-rev2-1.pdf>>.

29 Bottomley’s work does not extend beyond traditional constituents (primarily shareholders) in this revision of company law theory, but he suggests it would be easy to extend the theory in this way: Stephen Bottomley, *The Constitutional Corporation: Rethinking Corporate Governance* (Ashgate Publishing, 2007).

ecological indifference in standard international construction contracts by advocating a political–constitutional construction of these contracts.³⁰

While these complementary perspectives from both public and private law reassess the conceptual underpinnings of traditional corporate structures, more recent trends point to organisational innovation as a more openly political constitutive moment. Nina Boeger sees:

the emergence of these new corporate forms as a social counter-movement to global shareholder capitalism, at a time when traditional democratic structures suffer from systemic blockages (linkages between formal political process and global economic power organised in the shareholder corporate model).³¹

This new corporate movement complements activism of the divestment movement, providing an avenue for constructive organisational creation that complements the ‘exit’ option of withdrawing shareholding.³²

A Social Enterprise Hybrid Forms

Hybrid legal structures that accommodate social enterprise move away from separating the economic and the social within corporate governance. As a US professional trade journal notes:

These forms were created in response to growing frustrations in the entrepreneurial community with corporate law’s binary distinction between for-profit corporations, which are organized to maximize shareholder wealth, and nonprofit organizations, which are organized exclusively for charitable purposes.³³

Different jurisdictions have chosen distinct pathways to achieve this. Broadly speaking, the UK and Canada have chosen to enact substantive constraints on internal corporate governance, while the US model is based on externally-focused reporting, transparency and disclosure. Moreover, the UK monitors its new model with a newly created government regulator, while the US uses contestable third party auditors.

The UK introduced the Community Interest Company (‘CIC’) structure in 2004, under the Companies (Audit, Investigations and Community Enterprise) Act 2004 (UK). The legislation provides for the possibility of combining a company limited by shares that can issue dividends and be governed by paid directors, with the explicit pursuit of ‘community interest’. There are two main mechanisms that operate to balance ‘profit and purpose’ in this structure. First, there are legislative constraints on key internal corporate governance decisions, namely caps on distribution of dividends and mandated ‘asset locks’ in the constitution of the company. Secondly, the content of ‘community interest’ is

30 Oren Perez, ‘Using Private-Public Linkages to Regulate Environmental Conflicts: The Case of International Construction Contracts’ (2002) 29 *Journal of Law and Society* 77.

31 Nina Boeger, ‘The New Corporate Movement’ (2016) (unpublished, copy on file with authors).

32 Exit, in this sense of withdrawal of shareholding, also operates as a form of ‘voice’ insofar as it operates alongside the efforts of social movements to publicly shame organisations: see Anat R Admati and Paul Pfleiderer, ‘The “Wall Street Walk” and Shareholder Activism: Exit as a Form of Voice’ (2009) 22 *Review of Financial Studies* 2645; Albert O Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (Harvard University Press, 1970).

33 Rene Kathawala and Tal Hacohen, ‘The Case for Pro Bono Support of Social Enterprises’ (2015) 254(48) *New York Law Journal* 6.

overseen by a dedicated government regulator distinct from the regulator of ordinary corporations. The Canadian Province of British Columbia has a broadly similar entity structure, called a ‘community contributions company’ under reforms made to the *Business Corporations Act*, SBC 2002, c 57 in 2012.³⁴

In the US, the ‘benefit corporation’ is the most popular legal entity structure for fusing profit and purpose.³⁵ Available since 2010 and mandating a legal duty to create general public benefit in addition to financial return, it is currently available in 30 US states and Washington DC, and was recently introduced in the influential Delaware jurisdiction.³⁶ Benefit corporations are shaped by externally-focused reporting, disclosure and transparency obligations rather than internal governance constraints. In contrast to the UK CIC format, where a government regulator supervises the content of ‘community interest’, benefit corporations in the US retain enterprise discretion to fill the content of the benefit they provide – as long as they report on it. There is a requirement for accredited third parties to validate, through certification, the reporting obligations of benefit corporations. However, there is a competitive market for such third party certifiers, so the potential for discretionary interpretive power still exists, particularly relative to the UK CIC model.³⁷

Increasingly, in countries where specific legal entity structures for social enterprise are not available, pressure is growing to adopt such models. An ongoing international comparative research project³⁸ is currently compiling a worldwide database to support further research on emerging or already well-established social enterprise models across 40 different countries. Thus far, Australia has not adopted any specific hybrid legal entity form, although B-Lab, a voluntary certification scheme based on the benefit corporation approach, has made some traction,³⁹ even to the recent point of inclusion in the Australian Greens’ electoral strategy for the July 2016 elections.⁴⁰ A sub-committee on hybrid legal models has recently been created under the auspices of the Prime Minister’s Community Business Partnership⁴¹ working group on impact investing

34 Susan Manwaring and Andrew Valentine, ‘Social Enterprise in Canada’ (Article, Lexpert, 2012) <http://www.millerthomson.com/assets/files/article_attachments2/S-Manwaring_A-Valentine_Social-Enterprise-in-Canada_Miller-Thomson.pdf>.

35 There are several other structures available, vividly documented at Social Enterprise Law Tracker, *Social Enterprise Law Tracker* (6 January 2016) <<http://socentlawtracker.org/>>.

36 Claire Achermann et al, ‘Benefit Corporations – A Case Study of the US and Lessons for Australia’ (Report, Social Impact Hub, October 2014) <<http://www.socialimpacthub.org/wp-content/uploads/2015/01/2014-B-Lab-Report.pdf>>.

37 Indeed, enforcement of the third party certification for US benefit corporation reporting may be very patchy: Sara Burgess, ‘Ten Years if the Community Interest Company: Anniversary Celebration’ (Speech delivered at the CIC 10th Anniversary Celebration, Bristol University Centre for Law and Enterprise, 16 July 2015) <https://www.youtube.com/watch?v=kt_me_MCwbU>.

38 International Comparative Social Enterprise Models, *ICSEM Project*, Social Enterprise <<http://www.iap-socent.be/icsem-project>>.

39 Lina Caneva, ‘Australian B Corps on Top of the World’, *Pro Bono Australia* (online), 22 April 2015 <<http://probonoaustralia.com.au/news/2015/04/australian-b-corps-on-top-of-the-world/>>.

40 The Australian Greens, ‘Innovation Nation: The Bridge to the New Economy’ (Policy Statement, 21 May 2016) <http://greens.org.au/sites/greens.org.au/files/20160521_Innovation%20Nation%20Final.pdf>.

41 Australian Government, *Prime Minister’s Community Business Partnership* (2016) Prime Minister’s Community Business Partnership <<http://www.communitybusinesspartnership.gov.au/>>.

and partnerships, which is exploring, inter alia, the different options identified in a 2013 report on legal models carried out on behalf of a now-dissolved alliance of social enterprise intermediaries.⁴² Taken together, these developments can redirect flows of funds in socially and environmentally constructive ways that are complementary to the divestment movement.

B Commons and Cooperatives

The new corporate movement has one dimension that is decidedly old: cooperatives are a longstanding example of a legal entity that builds social, democratic and egalitarian objectives directly into the internal structure of a corporate entity. But there has been a recent revival of interest in and use of the form, embodied in the United Nations designating 2012 as the International Year of Cooperatives.⁴³ New secondary cooperative and representative bodies have evolved in relation to worker-owned cooperatives generally in the US (US Federation of Worker Cooperatives) and the UK (Cooperative Enterprise Hub). This can also be seen at the European Union level⁴⁴ in relation specifically to community-owned renewable energy cooperatives, and in Australia in relation broadly to the cooperative sector as a whole at both national⁴⁵ and local⁴⁶ levels. A recent Senate inquiry in Australia has issued a raft of recommendations aimed at expanding the support for the cooperative model, including building education about cooperative legal forms into both university training and professional accreditation processes.⁴⁷

Marcelo Vieta has described this revival as a ‘new cooperativism’, which differs from ‘old cooperativism’ primarily in its emphasis on multiple stakeholders, solidarity between them, and a shared return for all.⁴⁸ Instead of singling out a particular constituency such as workers or consumers, and designing corporate form around that stakeholder, new cooperativism draws on responses by working people and grassroots groups to the crisis of neoliberalism to incorporate new approaches to wealth distribution that observe sustainable development constraints, more horizontal labour relations, more egalitarian schemes for allocating surpluses and a stronger community orientation, with social objectives and community development goals.

The new cooperativism is particularly evident at the intersection of the digital economy and cooperative traditions. Digital platforms open up the possibility of

42 The Legal Models Working Group, *The Legal Models Working Group Final Report* (Social Innovation, Enterprise and Entrepreneurship Alliance, 2014) <<http://www.employeeownership.com.au/wp-content/uploads/2015/02/Legal-Models-Working-Group-Draft-Final-Report.pdf>>.

43 See United Nation, *International Year of Cooperatives 2012* <<http://social.un.org/coopsyear/>>.

44 REScoop.eu, *European Federation for Renewable Energy Cooperatives* <<https://rescoop.eu/>>.

45 For example, the Business Council of Cooperatives and Mutuals is the national peak body for credit unions, cooperatives and other mutual and cooperative businesses.

46 For example, the Cooperative Development Network of Western Sydney.

47 Senate Economics Reference Committee, Parliament of Australia, *Cooperative, Mutual and Member-Owned Firms* (2016) 37 [3.80]–[3.82].

48 Marcelo Vieta, ‘Editorial: The New Cooperativism’ (2010) 4(1) *Affinities: A Journal of Radical Theory, Culture and Action* 1 <<http://ojs.library.queensu.ca/index.php/affinities/article/view/6145/5827>>. See also Rory Ridley-Duff, ‘FairShares and the New Co-operativism’ (2014) (7) *Stir to Action* 12.

mass collaborative internal governance, even across distances: for example, Som Energia is a Spanish renewable energy cooperative that both produces and sells green energy and keeps its more than 17 000 members informed entirely through online platforms.⁴⁹ Contemporary business settings which operate online as much as offline also create opportunities for creative ways of tracking contributions and inputs (for example via digital currencies or virtual tokens). This has led to growing enthusiasm for the idea of ‘open cooperatives’ that would institutionalise multi-stakeholder accountability on a perpetually responsive basis.⁵⁰

The influence of the cooperative tradition is also present in ways that affect the shape and structure of corporations without actually introducing a distinct legal entity. For example, the history of the globally influential model of Fair Trade is intertwined with that of cooperativism.⁵¹ Developments in what Rory Ridley-Duff calls the ‘FairShares Model’ approach to corporate governance in the UK⁵² also illustrate this. The FairShares Model provides model articles of association, as well as associated legal and technical support, to enable modification of a range of standard legal corporate structures from associations to cooperatives to companies. This approach of using internal constitutional innovation within the corporation draws on the values of multi-stakeholder cooperativism. The modifications institutionalise membership, voice and decision-making power not just for investors but also for workers/labour, customers/users and founders. Like cooperatives, the FairShares Model decouples voice from financial power, and in tandem with the new cooperativism, it carefully allocates power, in the form of shares underpinned by ‘one-person, one-vote’, to multiple stakeholder groups, namely workers, consumers and investors, and founders. Perhaps distinctively, it also designs procedures for worker and consumer shareholders to acquire investor shares either directly or indirectly through mutualisation, thus keeping the boundaries fluid between different share classes in ways that promote the creation of assets held in common. Its use in Australia is very embryonic, but, as with benefit corporations, interest is growing.⁵³

49 Sören Becker and Conrad Kunze, ‘Transcending Community Energy: Collective and Politically Motivated Projects in Renewable Energy (CPE) across Europe’ (2014) 8 *People, Place and Policy* 180, 186.

50 Michel Bauwens, *A Commons Transition Plan* (2015) Commons Transition <<http://commonstransition.org/a-commons-transition-plan/>>.

51 Alex Nicholls and Charlotte Opal, *Fair Trade: Market-Driven Ethical Consumption* (Sage Publications, 2004).

52 Ridley-Duff, above n 48.

53 See, eg, the adoption of customised FairShares Model’s rules by Mass Mosaic (now AnyShare): Anna Bergren Miller, ‘Interviewed: Mass Mosaic’s Eric Doriean on the FairShares Alternative’ on *Shareable* (27 July 2015) <<http://www.shareable.net/blog/interviewed-mass-mosaics-eric-doriean-on-the-fairshares-alternative>>.

III REGULATION

Although individual organisational economic actors are important, the wider regulatory ecosystem that frames the everyday practices of new economy organisations is also vital to their potentially transformative role in relation to climate change. In other words, regulation, understood from a state-centred perspective as the amalgam of rules and policies enacted by states and clarified by courts,⁵⁴ is a critical supplement to the positive work of institution-building that supports sustainable new economy initiatives. Regulation can also bolster the negative work of ‘creative self-destruction’. As Nina Boeger remarks in relation to the UK:

Political blockages continue to affect social, cooperative and commons-oriented enterprises where they weaken the regulatory and political ‘eco-system’ that these organisations depend on, which only the formal democratic process can provide. As a result of these blockages, laws and regulations may become less accommodating of alternative enterprises’ needs, and public debate around radical entrepreneurship may be hollowed-out by market liberal policies.⁵⁵

Experimentation in relation to enterprise activity produced by the new politics of climate change generates considerable regulatory ambiguities. These flow from the way in which new economy initiatives rearrange taken-for-granted relationships between producers and consumers in a range of different settings, and in so doing confounds expectations of the scope of ‘regulated entities’ across a diverse range of work practices, flows of money, risk management strategies and ways of occupying space.⁵⁶ Battles over energy futures exemplify this diversity of settings and rearrangement of relationships, and provide a useful illustration of the ways in which new forms of harm emerge and are contested in a variety of regulatory settings. The example also illustrates the way in which the regulatory ecosystem is shaped by the interaction of policymaking and litigation.

Attempts to develop onshore unconventional gas projects in geologically suitable basins have in recent years proceeded with a very narrow lens of value: world gas prices. Excluded from this valuation by gas companies and their regulators has been place-based assessments of whether the character of an area will be changed by gas developments, the value of water used to pump fracturing chemicals underground and a range of other concerns. For example, a number of cases have been brought before the Land and Environment Court against both small and large gas companies. Most notably, the Barrington-Gloucester-Stroud Preservation Alliance⁵⁷ and Gasfield-Free Northern Rivers⁵⁸ fought coal-seam gas

54 We acknowledge that regulatory scholarship, including our own, has moved well beyond such a state-centred approach: Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (Cambridge University Press, 2007). But given the expansive analytical terrain of this article, we prefer a state-centred approach here. For a similar approach, see Navroz K Dubash and Bronwen Morgan, ‘The Rise of the Regulatory State of the South’ in Navroz K Dubash and Bronwen Morgan (eds), *The Rise of the Regulatory State of the South* (Oxford University Press, 2013) 1.

55 Boeger, above n 31.

56 Morgan and Kuch, ‘Radical Transactionalism’, above n 15.

57 See especially *Barrington-Gloucester-Stroud Preservation Alliance Inc v Minister for Planning and Infrastructure* [2012] NSWLEC 197, wherein the Court heard that the Planning and Assessment Commission had failed to properly apply the precautionary principle in approving up to 330 coal seam

developments with assistance from a range of experts in geology, groundwater hydrology and law. This resistance was networked through organisations such as the Environmental Defenders Office ('EDO') and the 'Protect Our Land and Water' campaign.⁵⁹ Although the litigation was not initially successful, the eventual cancellation of the project in the broader context has provided fertile ground for social innovation. One Northern Rivers publication enthusiastically narrated this transition from activism to enterprise:

Approximately 95% of residents in Clunes & surrounding areas a couple of years ago said they did not want to entertain the CSG industry here. It goes without saying then that they also do not want to invest in a company which invests in or directly mines Coal Seam Gas. However many of us do just that when we pay our electricity bill. Most of the big retailers of electricity in our region (Origin, AGL to name two) are directly involved in the CSG industry as most of us know. Up until recently there was no other option, that has changed though.

Enova, Australia's first community owned renewable energy retailing & installation business are [sic] a local company currently entering the market & invite us to be part of them. Their stated aims are to supply 100% renewable energy (wind or solar – not forest waste) to us, the consumers, from local sources using local employees, financed by local shareholders. 'Local' being residents living from the Tweed to the Clarence. Their constitution states that they must be at least 51% locally owned, they hope for much more.⁶⁰

This desire for local autonomy is reflected in Enova's inventive organisational structure:

The Enova Energy holding company at present consists of two separate arms: the energy trading arm and a not-for-profit arm. The company is structured such that if the energy-trading arm is in profit, then profits flow back to the holding company and 50% of the profits will flow through to the not-for-profit arm. This

gas wells in the vicinity of Gloucester. The complaint centred on the contention that approving the development on the basis of only preliminary groundwater investigations and the imposition of certain conditions in relation to groundwater and wastewater left open the possibility of a significantly different development from that for which approval was sought and therefore created uncertainty. The project was caught up in wide-ranging disputes until early 2016 when AGL cancelled the project, citing losses in the hundreds of millions of dollars.

- 58 Metgasco and Dart Energy both met strong local opposition when trying to exploit high gas prices to explore for potential unconventional energy sources. Metgasco ended up surrendering their licence in exchange for compensation: see Anne Davies, 'Metgasco Accepts \$25m Compensation to End CSG at Bentley in NSW Northern Rivers', *The Sydney Morning Herald* (online), 16 December 2015 <<http://www.smh.com.au/nsw/metgasco-accepts-25m-compensation-to-end-csg-at-bentley-in-nsw-northern-rivers-20151215-glolpi.html>>.
- 59 On the precursor to this campaign, which revolved around the 'Protect our Land and Water' slogan, see Declan Kuch and Asha Titus, 'Emerging Dimensions of Networked Energy Citizenship: The Case of Coal Seam Gas Mobilisation in Australia' (2014) 47(2) *Communication, Politics & Culture* 35. The EDO has acted for several parties affected by Coal Seam Gas licenses, such as *Barrington-Gloucester-Stroud Preservation Alliance Inc v Minister for Planning and Infrastructure* [2012] NSWLEC 197.
- 60 Jim Edwards, 'Enova – A New Way to Think about Energy', *The Village Journal* (online), 7 September 2015 <<http://villagejournal.org.au/news-2/item/enova-a-new-way-to-think-about-energy>>. The full prospectus is available at: Enova Community Energy Ltd, 'Meet Your New Energy Supplier: YOU!' (Investor Prospectus, 18 August 2015) <www.enovaenergy.com.au/download-attachment/380>.

basically means that for every kWh of electricity you buy from them, you're investing in the local community.⁶¹

Enova is just one example of a number of innovative community energy initiatives that have capitalised on disquiet about government inaction on climate change, albeit through direct confrontation with continued fossil fuel expansion.⁶² The transition to complete renewable energy powered electricity raises a plethora of technical challenges which spill into the organisational and regulatory domains. Significant uncertainties remain about the locus of responsibility for harm generated by shared or autonomous electric vehicles, or the uncertainties of insurance coverage and obligations.

One line of fertile future enquiry at the regulatory level, then, is to explore the extent to which negotiating these ambiguities contributes towards a reinvention of the economic and energy system or merely rearranges its winners and losers for a period, without systemic disruption. In the energy sector, the work of the NSW Renewable Energy Advocate could be examined in detail; for example, reviews into how the Advocate manages to remove barriers to investment and encourage connection of renewable energy projects. The interactions between competition policy and its desire for both efficiency and 'technology neutrality' provide significant regulatory challenges that deserve careful attention here.

Broader strategies can be detected in the energy sector and beyond. While diverse modalities of negotiating regulatory ambiguity can be perceived, new economy initiatives often make a claim for regulatory autonomy. In part, this arises as a result of the regulatory grey areas produced by reconfigured relationships between producers and consumers in the new climate economy. It is often unclear whether existing regulatory regimes apply at all. One response to this has been for entrepreneurs to skirt the applicability of such regulation. Such strategies might be evaluated normatively quite differently depending on the ethos and organisational structure of the actor claiming regulatory autonomy.

Compare, for example, claims to regulatory autonomy made by a company like Uber (with its aggressive strategies of openly flouting local government laws, paying fines on behalf of its drivers, and courting consumers wanting cheaper taxi fares to lobby local government to change those regulations) versus a small-scale community food initiative that is uncertain about the legalities of using residential houses as distribution bases. These examples each have a very different general ethos. From an Uber-like perspective, claims for regulatory autonomy can constitute essentially a new version of a familiar private interest regulatory game, albeit with a neoliberal technogloss. Actors argue vociferously for autonomy from state-based urban governance and for the autonomy to self-regulate. Where these actors control powerful platforms, as is often the case with

61 Jelmer van Rooij, 'How Robin Hood Brings Community Energy to the Seven Shires', *One Step Off the Grid* (online), 25 May 2016 <<http://onestepoffthegrid.com.au/how-robin-hood-brings-community-energy-to-the-7-shires/>>.

62 For an overview of current Australian community energy projects, see Coalition for Community Energy, *National Community Energy Strategy* (2015) <http://c4ce.net.au/nces/wp-content/uploads/2015/04/NCES_2015_Final01.pdf>.

internet-enabled initiatives in the sharing economy, many worry that they will privatise self-serving regulation in the form of platform protocols. Moreover the scale and anonymity of the web-based interface enables such rapid mass abstraction, scaling-up and standardisation of exchange (with compensatory customisation via algorithms) that new market entrants rapidly wield (with the backing of capital) the kind of power traditionally held by incumbents.

Yet there is another facet of claiming regulatory autonomy which is important to recognise. From this perspective, sidestepping existing regulatory regimes is a form of activism, part of a wider pattern of social mobilisation against a broken economic model. While some rejections of existing applicable laws may be quite overt, small-scale organisations structured as social enterprises or cooperatives may be seeking mainly to preserve a space for experimenting with novel means of reconfiguring work practices, money flows or risk management. As we have argued elsewhere, this could be viewed as:

holding back, at least for a while, the relatively rigid process of congealing these innovations into formal law, in order to give room for new modes of social coordination and relational interdependence to breathe, or for distinct local (non-essentialized and contingent) communities of place or interest to flourish.⁶³

From this perspective, formal regulatory concessions can support multiple local self-determination initiatives, even when operating at limited scale, to exert collective economic power through networking and coalitions sufficient to enact systemic economic change. However, real tensions between the potential for micro-entrepreneurship and place-based collective self-sufficiency must be recognised. Self-regulatory strategies can constrain surplus creation and limit scale in ways that restrain the economic power of local self-determination, confining it to an inevitably ‘fringe’ position while continuing to privatise important areas of social relations on a broader scale. In other words, one trajectory of regulatory battles would be to entrench the old economy in part by confining small-scale sustainable economy initiatives to a very peripheral position on the fringe. This would constrict the political and entrepreneurial space available for building a new economy, undermining the second line of argument that connects our four socio-legal axes.

Two directions of inquiry can promote productive debate about mainstreaming climate-sensitive examples of new economy initiatives in ways that keep open that space. The first is to explore the potential of governance approaches that harness the regulatory capacity of social spheres.⁶⁴ The second is to draw on historical patterns of legal thought that give special salience to size and scale, drawing on instances from the early 20th century where

reformers ... deployed arguments about the size of market enterprise and the scale of economic exchange in order to advocate for decentralized, democratic, and

63 Morgan and Kuch, ‘Sharing Subjects and Legality’, above n 15, 583–4.

64 Bettina Lange, Fiona Haines and Dania Thomas (eds), *Regulatory Transformations: Rethinking Economy–Society Interactions* (Hart Publishing, 2015).

small-scale socioeconomic relations ... [a]nd ... actively recruited law to advance their particular political-economic visions.⁶⁵

The combination of these two directions is to shine a light on the constitutive legal power of the everyday routines and evolving custom of new economy initiatives that operationalise the new politics of climate change. Often operating in the interstices of existing – and inadequate – positive legal forms, Burns Weston and David Bollier have described this as ‘vernacular law’;⁶⁶ put differently, we have in earlier work referred to ‘emergent forms of lawful life that try to redefine or rearticulate customs around exchange’, with as little reference as possible to an existing formal legal system which throws up numerous barriers and which ‘treat[s] “grey areas” as disabling risk’.⁶⁷ These forms of lawful life allow space for ambiguity, slowing down, and a greater centrality of social relations and collective dialogue. They embody a sense of care, a dimension of ethical interpersonal relations – a cumulative effect that is more allied with a sense of specific place than with the generalities and formalities of positive law. In short, a key implication for regulation of moving away from the strategy of responding to climate change through formal–rational expertise applied via bureaucratic siloes is the significance of place. Indeed, in the hoary phrase beloved of campaigners that what is needed is an economy ‘fit for people and planet’, place and people constitute the third and fourth socio-legal dimensions of the new politics of climate change.

IV PLACE

The significance of place⁶⁸ in the new politics of climate change is related closely to the third of the key characteristics of those new politics: the shift from a more instrumental approach to environmental arguments, to one more embedded in constitutive notions of identity.⁶⁹ The recent formation of the Places You Love Alliance⁷⁰ in Australia is an example of this shift. The Alliance works in tandem with an expert panel⁷¹ seeking to reconstruct the foundations of environmental law from a number of diverse doctrinal and sectoral angles.⁷²

65 Amy J Cohen, ‘The Law and Political Economy of Contemporary Food: Some Reflections on the Local and the Small’ (2015) 78 *Law and Contemporary Problems* 101, 101.

66 Weston and Bollier, above n 10, 104.

67 Morgan and Kuch, ‘Radical Transactionalism’ above n 15, 572.

68 There is extensive literature on the significance of place, and some literature on the relevance of place in law, particularly in legal geography: see Nicole Graham, ‘This is Not a Thing: Land, Sustainability and Legal Education’ (2014) 26 *Journal of Environmental Law* 395. This article, however, confines its commentary to some foundational conceptual implications for the structure of law rather than reviewing the detailed literature.

69 Crompton and Kasser, above n 3.

70 See Places You Love, *Places You Love* <www.placesyoulove.org>.

71 Australian Panel of Experts on Environmental Law, *A New Generation of Environmental Laws* (2015) <<http://apeel.org.au/>>.

72 Fowler et al, ‘The Next Generation of Australia’s Environmental Laws’ (Introductory Paper, Australian Panel of Experts on Environmental Law, 2015) <<http://static1.squarespace.com/static/56401dfde4>>.

Although in part an effort to engage with the public along traditional lines of environmental conservation, the work of the Alliance goes further than this, contributing an emergent response to what Nicole Graham and Kathy Bowrey have argued is the ‘placelessness’ of property law. As they elaborate, law

divides entitlement to land and natural resources and responsibility for them into different doctrinal sub-bodies of thought, with former usually taking priority (private/public; hard/soft; precise/fuzzy).⁷³ The equations and language of property law, as rights, produces a necessarily ‘dephysicalised’ relation between humans and the environment.⁷⁴

Placeless property law is the conceptual underpinning of the myriad abstractions of commercial law and the framework of economic exchange more generally. As Graham and Bowrey continue:

Dephysicalised property conceals the real, material consequences of its operation. ... [It] makes a space for commodification where ‘things’ are dematerialised and denatured to facilitate the process of exchange. Australian property law refers to itself, rather than to the (experiences of the) physical places it protects, shapes and destroys. The adverse environmental effects of the absence of place from law are in part addressed by a separate subordinate body of law, environmental law. But for the most part, the effects of a placeless or atopic property law are, citing Alain Pottage, ‘eclipsed by a fetishism of its technicalities’.⁷⁵

Conventional climate jurisprudence has reinforced this view of property by presenting the science of climate change as dematerialised and denatured. For example, Zahar, Peel and Godden describe ‘globally dispersed human contributions to the “greenhouse effect” ... [as] produc[ing] the singular phenomenon of climate change with observable physical effects everywhere in the world’.⁷⁶ Undoubtedly, decades of painstaking work have built a coherent scientific picture of the movement of carbon between ground and atmosphere, as Paul N Edwards’ masterful work *A Vast Machine*⁷⁷ has shown. A considerable amount of literature has contested the transcendence of place claimed by climate change science by drawing attention to the social construction and interpretive flexibility of key concepts such as climate sensitivity.⁷⁸ Moreover, the unequal

b090fd5510d622/t/564be3fce4b0fea2b3596229/1447814140153/APEEL-NextGenAustraliaEnviroLaws-IntroPaper.pdf>.

73 See Graham, above n 68.

74 Nicole Graham and Katherine Bowrey, ‘The Placelessness of Property, Intellectual Property and Cultural Heritage Law in the Australian Legal Landscape: Engaging Cultural Landscapes’ (2016) (unpublished, copy on file with author) 5.

75 Ibid. See also Alain Pottage, ‘Foreword’ in Nicole Graham, *Landscape: Property, Environment, Law* (Routledge, 2011) ix, x.

76 Zahar, Peel and Godden, above n 11, 13.

77 Paul N Edwards, *A Vast Machine: Computer Models, Climate Data, and the Politics of Global Warming* (MIT Press, 2010).

78 Brian Wynne, ‘Risk and Environment as Legitimatory Discourses of Technology: Reflexivity Inside Out?’ (2002) 50 *Current Sociology* 459; Simon Shackley and Bryan Wynne, ‘Representing Uncertainty in Global Climate Change Science and Policy: Boundary-Ordering Devices and Authority’ (1996) 21 *Science, Technology, & Human Values* 275.

consequences of equalising responsibility between all people through a scientific frame has been criticised for glossing over historical power imbalances.⁷⁹

‘Climate’ litigation has built upon and shifted emphasis from abstract disputes about governing distant power station emissions⁸⁰ to much scrappier local battles encompassing multiple jurisdictions at multiple scales. Cases in Gloucester and the Northern Rivers of NSW are not isolated in drawing together instrumental scientific argument (encapsulating specific geology), groundwater, local identity, tourism and place. Back Balcombe, south of London, faced similar issues and responded with a plan for 100 per cent renewable energy power for the town.⁸¹ ‘Old’ legal questions such as who has standing in litigation have been given new life as citizens sue governments over American Liquefied Natural Gas (‘LNG’) export terminals and other specific pieces of infrastructure,⁸² or legislation such as the *Environment Protection and Biodiversity Conservation Amendment (Standing) Act 2015* seeks to narrow definitions of interest to ‘local’ communities.

There is a paradox present in seeking to maintain a universalistic sense of expanded standing. On the one hand, this preserves a widened array of possibilities to challenge ecologically damaging initiatives. As a judicial defence of the importance of liberal standing rules argues, this is consistent with the rule of law:

[T]here may ... be cases in which any individual, simply as a citizen, will have sufficient interest to bring a public authority’s violation of the law to the attention of the court, without having to demonstrate any greater impact upon himself than upon other members of the public. *The rule of law would not be maintained if, because everyone was equally affected by an unlawful act, no-one was able to bring proceedings to challenge it.*⁸³

However, this widened array of the possibilities for challenge runs against the logic of considering the specificities of place. This tension between universal and particular points to an important paradox in the process of invoking law to protect place-specific values and practices. In the context of the first two socio-legal axes we have explored in this article – the organisational and regulatory innovation necessary for sustainable economy initiatives to flourish – place-specific nuance and context is crucial. But as we adverted to in the introduction, a supplementary line of argument is also important; namely that a less commercially-inflected form of climate change activism, and associated litigation, is essential for keeping open the physical and political spaces for the

79 Symposium, ‘Carbon Trading: A Critical Conversation on Climate Change, Privatisation and Power’ (2006) 48 *Development Dialogue*. David Demeritt, ‘Science Studies, Climate Change and the Prospects for Constructivist Critique’ (2006) 35 *Economy and Society* 453.

80 See especially the overview provided in Brian J Preston, ‘Climate Change Litigation (Part 1)’ [2011] *Carbon & Climate Law Review* 3; Brian J Preston, ‘Climate Change Litigation (Part 2)’ [2011] *Carbon & Climate Law Review* 244.

81 See Emma Howard, ‘Balcombe “Fracking Village” Gets Green Light to Build Solar Farm’, *The Guardian* (online), 2 October 2015 <<http://www.theguardian.com/environment/2015/oct/01/balcombe-fracking-village-gets-green-light-to-go-100-solar>>.

82 See Our Children’s Trust, *Landmark U.S. Federal Climate Lawsuit* (12 September 2016) <<http://ourchildrenstrust.org/us/federal-lawsuit>>.

83 *Walton v Scottish Ministers* [2012] UKSC 44, [44] (Lord Reed) (emphasis added).

first kind of work to take place. The paradox lies in the fact that in order to achieve that kind of ‘clear-cutting work’, so to speak, law typically detaches from place, making more universalising arguments. Such a universalising argument is implicit in the response to the standing issue summarised above.

It may well be that the tendency of legal logic to detach from space and place is embedded not just in litigation but in broader patterns of regulation and organisational preferences. Amy Cohen argues, using food production in the US as an example, that ‘political fights about smallness and bigness – and with them normative arguments about smallholder production as a means to the ends of community, autonomy, and economic self-governance’ do not easily penetrate elite legal sites of argument and practice.⁸⁴ Rather, what do penetrate are typically consumer-focused procedural rights along with the monitoring of scientific ways of assessing and balancing risks to environmental and human health – a mix very familiar to climate change settings, as the Gloucester case alluded to above demonstrates.

Cohen effectively suggests that small-scale, localised and place-sensitive visions of economic life are difficult to mobilise in contemporary legal form. In part, this flows from her observation that a preference for a generalised, abstract and ‘placeless’ law that in practice favours the large-scale is a feature of not only neoliberalism and its policies of concentrated private wealth, but also of strategies allied to Keynesian politics, particularly the post-war mix of a regulated market economy and a welfare state fuelled by state interventions to support mass consumption.⁸⁵ Nonetheless, she argues that contemporary political currents – of which we would suggest the new politics of climate change are an example – are much more hospitable to ‘debates about whether size and scale are legitimate categories to articulate a social and economic, if not yet legal, vision of the good’.⁸⁶

These contemporary political currents do continue to invest in linkages to place-sensitive, localised conceptions of legal strategies. For example, the Transition Movement is increasingly embedded in a broad coalition of ‘new economy’ and ‘local economy’ actors who are committed to economic democracy. And a strong strand of thinking in Europe draws on hacker culture, the principles of open-source software, as well as its architecture, and peer production.⁸⁷ Peer-to-peer approaches fuse with local economic democracy commitments in the innovative Ecuadorian project FLOK⁸⁸ based on a collaboration between P2P (a Chiang Mai-based foundation led by Belgian Michel Bauwens), Ecuador’s Institute of Higher Education and the Ecuadorian government. The FLOK project aspired to produce a commons-based policy framework to support Ecuador’s transition to a shared and free knowledge

84 Cohen, above n 65, 119.

85 Ibid 114.

86 Ibid 143.

87 A new journal has recently appeared in this context: *Journal of Peer Production*.

88 Nina Misuraca Ignaczak, ‘FLOK Maps Ecuador’s Transition to a Commons-Based Society’ on *Shareable* (2 June 2014) <<http://www.shareable.net/blog/flok-maps-ecuadors-transition-to-a-commons-based-society>>.

society for industry, education, scientific research, public institutions and infrastructure, working through an alliance of hackers and indigenous communities. This project was initiated by a political administration that sought to establish distinctive left-leaning alternatives to engaging with the international economy and climate change.⁸⁹ The aspiration was to foster a place-specific trajectory that was attuned to the ecological and social needs of the region, rather than embedding the national legal framework in a system of universal free trade.

In short, development of place-sensitive strategies of organisational innovation and scale-shifting negotiations around regulatory ambiguity can sow the seeds for re-imagining legal interventions and regulatory frameworks along lines crafted by the contours of local place and the vernacular dialects of social space. But the conceptual underpinnings of a formal rational legal system committed to general, universal rules constitute a barrier to this. In light of this, specifically what kind of lawyers would be professionally attuned to stitching together these threads into the shared infrastructure of a new economy?

V PEOPLE

Climate publics form around issues such as fossil fuel extraction and distribution facilities, their planning and creation.⁹⁰ These publics form fertile grounds of mutuality from which new sustainable enterprises can sprout. We locate the people who end up ‘stitching together’ new economy initiatives at the intersection of history and biography, to use C Wright Mills’ classic sociological injunction.⁹¹ Publicly-minded radical transactionalism in this new economy therefore means tracing intersecting trajectories of biography and issues: the former embeds individual life courses in institutional contexts of family, education and labour; the latter in the pragmatic formation of publics.⁹² We found that a variety of biographical trajectories characterise the paths forged by new economy advocates.

Two examples from related research we have carried out⁹³ in the energy and food sectors can provide a sense of this. One respondent moved from a comfortable job managing large IT projects for law firms to start a cooperative dedicated to the localisation of energy production, phasing out of fossil fuels and democratisation of energy planning. Another respondent described moving from forestry campaigning during the height of conflicts over Tasmanian old-

89 See especially the discussion of the Ecuador government’s approach to environmental protection in Todd Moss, Caroline Lambert and Stephanie Majerowicz, *Oil to Cash: Fighting the Resource Curse through Cash Transfers* (Centre for Global Development, 2015).

90 Kristin Asdal, ‘From Climate Issue to Oil Issue: Offices of Public Administration, Versions of Economics, and the Ordinary Technologies of Politics’ (2014) 46 *Environment and Planning A* 2110.

91 C Wright Mills, *The Sociological Imagination* (Oxford University Press, 1959) 9.

92 Noortje Marres, ‘Issues Spark a Public into Being: A Key but Often Forgotten Point of the Lippmann-Dewey Debate’ in Bruno Latour and Peter Weibel (eds), *Making Things Public: Atmospheres of Democracy* (MIT Press, 2005) 208.

93 Morgan and Kuch, ‘Sharing Subjects and Legality’, above n 15.

growth forest logging,⁹⁴ to managing a food box enterprise for a not-for-profit foundation. The trajectories of both embodied a view that social enterprise plays a complementary role in relation to direct action and social activism, with one respondent likening them to, respectively, going to war and running a farm; insisting that both are absolutely necessary.

A Lawyers for a Small-Scale Sustainable Economy

Strikingly, there is a relative paucity of lawyers in the sites where new economy initiatives relevant to climate change flourish. As we have argued elsewhere, ‘the constraints of neoliberalism-as-usual seem to press more heavily on those trained to deploy expert legal knowledge than those immersed in engineering, communications, sustainable development or even finance’.⁹⁵ In the research reported on in the chapter just cited, many small-scale sustainable economy initiatives were created with either no or highly episodic legal assistance. Where episodic legal assistance was deployed, it was usually via one-off grant-funded assistance from government or through personal networks. Pro bono schemes of large law firms catalysed legal support much less often than might be expected. This is because most pro bono schemes’ eligibility criteria restricted assistance to pure not-for-profit or charitable endeavours, but the initiatives founded by those we researched typically existed in the interstices of for-profit and not-for-profit forms, adopting hybrid practices from both.

A recent discussion on the legal professional support for ‘small-scale sustainable economy initiatives’ in Australia found three main sources of existing support, each with significant limitations.⁹⁶ Some law firms provide advice to social enterprises but most focus on not-for-profit and limited pro bono advice.⁹⁷ Social enterprise capacity building programs broker select initiatives to access legal advice, sometimes at ‘low-bono’ fee levels, when needed, but only for projects that have been admitted to their overall programs. A few specific hybrid initiatives have recently emerged to service social enterprise specifically (eg, Expert Exchange Advice in the NSW government) and sustainable economy initiatives in particular (eg, Melbourne University Sustainable Business Clinic) but these are very embryonic and limited in scope and resources. Overall, while pro bono legal practitioners have access to well-developed networks to help them identify each other and to share knowledge, there is much less capacity to share

94 For an enthralling account of the history and significance of this conflict, see Anna Krien, *Into the Woods: The Battle for Tasmania’s Forests* (Black Inc, 2010).

95 Morgan and Kuch, ‘Sharing Subjects and Legality’, above n 15.

96 Bronwen Morgan, Joanne McNeill and Isobel Blomfield, ‘The Legal Roots of a Sustainable and Resilient Economy: New Kinds of Legal Entities, New Kinds of Lawyers?’ in Ron Levy et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (ANU Press, forthcoming, 2017); see also Bronwen Morgan, Joanne McNeill and Isobel Blomfield, ‘Where Are the Community Enterprise Lawyers? Towards an Effective Ecosystem of Legal Support for Small-Scale Sustainable Economy Initiatives in Australia’ (Discussion Paper No 50, UNSW Law, 14 August 2016) 3 <<http://ssrn.com/abstract=2833818>>.

97 Morgan, McNeill and Blomfield, ‘Where Are the Community Enterprise Lawyers?’, above n 96, 8–10. Some recent smaller firms are emerging with more of a creative and hybrid focus: see, eg, Clearpoint Counsel, *Legal Services. Reimagined Simply*. (29 August 2016) <www.clearpointcounsel.com>.

knowledge and expertise amongst lawyers seeking to work with small scale sustainable economy initiatives or even with social enterprises generally.⁹⁸

Interestingly, a partial exception to the relative dearth of legal biographies in the field of small-scale sustainable economy initiatives is the recent development of what might be called ‘social enterprise legal expertise’ in the UK and US relating specifically to the development of novel hybrid legal forms. Since 2005, a small number of lawyers have significantly shaped developments around legal entity structures for social enterprise, notably the two forms discussed above. Interestingly, the UK lawyers⁹⁹ who developed the community interest company form previously specialised in non-profit and charities law, while the US lawyers who developed benefit corporations were general commercial lawyers.¹⁰⁰ This demonstrates that even the creation of hybrid legal forms are still shaped by the dependence of legal advice and legal career trajectories on the border between for-profit and non-profit organisational structures.

Notwithstanding the stickiness of this border, it is possible to identify an existing, albeit extremely small, minority of lawyers seeking to fashion a distinctive career path around advising sustainable economy initiatives. Janelle Orsi, co-founder of the Sustainable Economies Law Centre (‘SELC’) in Oakland, US is one such lawyer, who calls for ‘transactional lawyers ... en masse, to aid in an epic reinvention of our economic system’.¹⁰¹ SELC creates new legal training pathways using apprenticeship structures combined with immersion in the social economy, and runs ‘resilient economy legal cafes’ that provide affordable legal advice in a public collective setting that becomes part professional support but also part living classroom and community organising site. SELC also partners with other new economy actors to sponsor successful legislative and regulatory change across a range of topics such as home food businesses, worker cooperative structures and peer-to-peer car sharing.

As an example of biographies intersecting fruitfully with climate change issues, SELC has recently expanded its community energy program, taking on a director to spearhead both direct legal advice and advocating for supportive energy policies. This new director, Subin Varghese, received his Juris Doctor from the University of California Berkeley School of Law, ‘where he was involved in promoting sustainability, environmental justice, and mindfulness’.¹⁰² He later worked for Tahirih Justice Centre and then M+R Strategic Services. This mix of corporate and social activist experience will be funnelled into developing

98 Morgan, McNeill and Blomfield, ‘Where are the Community Enterprise Lawyers?’, above n 96, 9–10.

99 Primarily Stephen Lloyd from Bates Wells Braithwaite: Bates Wells Braithwaite, *Remembering Stephen Lloyd* (2016) <<http://www.bwblp.com/in-memory-of-stephen-lloyd>>; with significant contributions from David Hunter, also of Bates Wells Braithwaite: Bates Wells Braithwaite, *David Hunter* (2016) <<http://www.bwblp.com/people/david-hunter>>.

100 Primarily William H Clark Jr from Drinker Biddle: Drinker Biddle, *William H Clark, Jr* (14 July 2016) <<http://www.drinkerbiddle.com/people/attorneys/clark-william-h>>; Benefit Corporation, *The Model Legislation* (2016) <<http://benefitcorp.net/attorneys/model-legislation>>.

101 Janelle Orsi, *Practicing Law in the Sharing Economy: Helping People Build Cooperatives, Social Enterprise, and Local Sustainable Economies* (American Bar Association, 2012) 1.

102 See Eunice Kwon, *SELC Is Expanding Its Community Energy Program!* (16 October 2016) Sustainable Economies Law Centre <http://www.theselc.org/oct_newsletter>.

legal guidance materials and giving direct legal advice to renewable energy cooperatives, as well as building political coalitions ‘to further community-benefiting electricity generation, and ... [advocate] for policies that remove barriers and implement solutions to catalyze the broad deployment of non-extractively financed, local, community-owned renewable projects’.¹⁰³

A legal career path such as the one SELC provides is one that mirrors the small number of lawyers identified in related research we have carried out¹⁰⁴ who consciously seek to forge a distinctive ethos of legal practice that provides much greater affordability than big firm comprehensive advice but is more socially and environmentally attuned than legal support for ‘tech start-ups’; and that is also more holistic and experientially informed than the kind of cheap ‘discrete task support’ services that some ‘new law’ providers offer online and/or by franchise models. These lawyers seek to provide legal advice tinged with values prominent in small-scale sustainable economy initiatives – a ‘contextual sensitivity’ or, as described by one interviewee, ‘the touch’.¹⁰⁵ ‘The touch’ is grounded in a mix of shared values, especially commitments to economic democracy, community development, a holistic worldview and an understanding of how to meld social relationality with practical governance. It is partly experiential, embedded in tacit craft knowledge, and partly normative, linked to a set of ethical and political commitments, though not to any particular ideology. The relative paucity of lawyers with ‘the touch’ indicates the sense of a demand felt for a more extensive and effective ecosystem of professional legal support for small-scale initiatives that confound traditional distinctions between for-profit and not-for-profit economic activity.¹⁰⁶ That professional legal support includes, importantly, new kinds of business and commercial lawyers to help build new economy initiatives, as well as more traditional environmental activist lawyers who can help to pry open the spaces – both physical and jurisdictional – where such initiatives can take root.

VI CONCLUSION

Climate change confronts public policymaking and private enterprise with the prospect of ‘creative self-destruction’ – a variety of mechanisms to perpetuate a mythology of natural resource extraction, thereby fuelling a mythology of endless growth. But in this article, we have argued that the corporate form is not inherently extractive. Nurturing organisations which retool the economy’s organisational basis, regulatory environment and relationship to place and people can be reimaged at scale, building on the experiments we have outlined here. We should not underestimate the fragility of this promise. It is important to

103 Ibid.

104 Morgan and Kuch, ‘Sharing Subjects and Legality’, above n 15.

105 Morgan, McNeill and Blomfield, ‘Legal Roots’, above n 96; Morgan, McNeill and Blomfield ‘Where Are The Community Enterprise Lawyers?’, above n 96, 11–12.

106 Morgan, McNeill and Blomfield, ‘Legal Roots’, above n 96; Morgan, McNeill and Blomfield ‘Where Are The Community Enterprise Lawyers?’, above n 96, 19.

acknowledge that the trends identified in this article are potentially subject to critiques stressing their cumulative ineffectiveness on the grounds of fragmentation, small scale, slow pace of development or capacity to be co-opted. The concept of ‘creative self-destruction’ embodies this capacity. The strong critical edge of a particular body of literature on social enterprise¹⁰⁷ is one example of such a critique.

While these concerns are important, we think that the most important – the capacity for co-option – is perhaps paradoxically best addressed by multiple localised bottom-up experiments, as arguably only these can embody, embed and perform the necessary cultural shifts that will be crucial to lasting change.¹⁰⁸ Moreover, there are emergent responses to the other challenges of fragmentation, small scale and slow pace, such as the platform cooperativism movement that seeks to harness the institutional and technological innovations of the sharing economy to a more redistributive and ecologically focused set of values.¹⁰⁹ Accumulating successful decentralised projects around cooperatively-owned and managed platforms can help to ‘scale out’ rather than ‘scale up’, which is way of helping to create scale and power without attendant patterns of gigantism and centralisation. Rather than focusing on scale and power, however, the weight of this article has been more inclined to emphasise what Harlan Morehouse has called ‘strategic hesitation in ... political commitments’: a stance that ‘asks for careful contemplation rather than blind commitment. It emphasizes attentiveness over urgency. And, it asks that we consider learning how to walk again, rather than rush headlong into the future’.¹¹⁰

What if we were to ‘walk’ by making a creative interpretation of one of the recommendations of the report recently handed down by the House of Representatives Standing Committee on the Environment Parliamentary Inquiry into the Register of Environmental Organisations?¹¹¹ Recommendation 5 of that report proposes that environmental organisations who hold ‘deductible gift recipient’ (‘DGR’) status should be required to spend a minimum of 25 per cent of their annual budget on ‘environmental remediation’. Creative exegesis of what is encompassed by environmental remediation could extend to the kinds of emergent experiments alluded to in this article. Even though such experiments run against the grain of the political history of DGR politics (which typically seek to exclude forms of political environmentalism associated with protest or

107 Pascal Dey and Chris Steyaert, ‘The Politics of Narrating Social Entrepreneurship’ (2010) 4 *Journal of Enterprising Communities: People and Places in the Global Economy* 85; Graham Smith and Simon Teasdale, ‘Associative Democracy and the Social Economy: Exploring the Regulatory Challenge’ (2012) 41 *Economy and Society* 151; David A Westbrook, *Between Citizen and State: An Introduction to the Corporation* (Paradigm Publishers, 2007).

108 Gerda Roelvink, Kevin St Martin and J K Gibson-Graham (eds), *Making Other Worlds Possible: Performing Diverse Economies* (University of Minnesota Press, 2015).

109 Trebor Scholz, *Platform Cooperativism: Challenging the Corporate Sharing Economy* (Rosa Luxemburg Stiftung, 2016).

110 Harlan Morehouse, ‘Review of Katherine Gibson, Deborah Bird Rose and Ruth Fincher (eds), *Manifesto for Living in the Anthropocene*, New York: Punctum Books, 2015’ (Review, Antipode, June 2016) <https://radicalantipode.files.wordpress.com/2016/06/book-review_morehouse-on-gibson-et-al.pdf>.

111 House of Representatives Standing Committee on the Environment, Parliament of Australia, *Inquiry into the Register of Environmental Organisations* (2016).

macro-political systemic change) their promotion as complementary to the Committee's examples of 'planting trees and removing pest plants' is consistent with 'practical action to both improve skills and outcomes for biodiversity and natural resource management'.¹¹²

This is a form of socio-legal imagination: if we move away from environmental sector-specific thinking to broad imaginaries of a new economy, the 'practical action' of 'environmental remediation' could range much more widely than planting trees. Indeed, planting trees has itself become an important regulatory buttress of the extractive fossil fuel industries through the Carbon Farming Initiative.¹¹³ Instead, 'practical action' such as that called for by the Committee could encompass a range of experiments to create a new economy around innovations such as peer-to-peer initiatives, commoning, maker movements, sharing, collaborative economies, solidarity economies, localisation and cooperative movements. Such creativity has an important potential to weave social and ecological values into the heart of exchange, and thus to address environmental law goals 'from the inside out': in short, environmental remediation.

Our ambition in this article has been less about answering such questions as providing a framework for rethinking the place of law in a more modest, nurturing economy. If the developments we have traced along these four socio-legal axes of the new politics of climate change were to bear fruit, they could cumulatively foster a community of radical transactional lawyers who, in dialogue with committed regulatory civil servants, develop place-sensitive strategies of organisational innovation and negotiations around regulatory ambiguity. The economic and livelihood experiments inspired by these politics could, if supported by such socio-legal efforts, multiply and mushroom. If the proliferating networks and coalitions around alternative economic trajectories¹¹⁴ were to include more overtly legal ones, they could sow seeds that reimagine legal interventions and regulatory frameworks along lines crafted by the contours of local place and the vernacular dialects of social space. Stitched together into shared infrastructure for a new economy, these lines could put business lawyers at the centre of a transformative public-spiritedness.

As the grammar of our penultimate paragraph stressed, these are possibilities with tensions and uncertainties built into them. They are neither predictions, nor yet systematically observed patterns. But our aim has been to show the contours of the ways in which the new economy provides space for such processes. It is a

112 Ibid 34 [4.11].

113 *Carbon Farming Initiative Amendment Act 2014* (Cth).

114 See, eg. New Economics Foundation, *NEF: Economics as if People and the Planet Mattered* (16 September 2016) <www.neweconomics.org>; New Economy Organisers Network, *The New Economy Organisers Network Is an Independent Network of Activists Working for an Economy Based on Social and Environmental Justice* (2016) <<http://www.neweconomyorganisers.org>>; Democracy Collaborative, *Community-Wealth.org*, Community-Wealth.org <community-wealth.org>; New Economy Coalition, *Another World Is Possible. There Are Many Alternatives – It's Time for a New Economy* (2016) <www.neweconomy.net>; REconomy Project, *REconomy Project: Community-Led Economic Change* (17 September 2016) <www.reconomy.org>; Commons Transition, *Commons Transition: Policy Proposals and Ideas to Implement a Social Knowledge Economy* <www.commonstransition.org>.

fertile, even if sometimes fragile, site for building bridges between its emerging experiments, the global climate change architecture, and efforts to keep clear the political and physical space for the experiments to flourish. Those bridges, built on the foundations of the four socio-legal axes we have identified, are well worth our collective energy, attention and imagination.