

TRAJECTORIES OF ENVIRONMENTAL JUSTICE: FROM HISTORIES TO FUTURES AND THE VICTORIAN ENVIRONMENTAL JUSTICE AGENDA

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Before the last state election, the current Victorian government promised from opposition to develop an Environmental Justice Plan if elected. It acknowledged international best practice as a benchmark for such a plan, though it did not recognise the legacy of environmental justice activism and scholarship locally. With the plan still in progress, this article considers the global histories and future directions of environmental justice and a literature-based framework for curating a Victorian plan. It breaks with the common understanding, including that held by government bureaucrats in Victoria, of environmental justice emerging from the United States in the 1980s. The article situates Victoria within that past, the current and future of the concept of environmental justice. Two notable recent legal events affirm the need for, and suggest the shape of, a Victorian environmental justice approach – the housing estate gas leak in outer suburban Melbourne and the Hazelwood coal mine fire in regional Victoria.

I INTRODUCTION

Environmental justice is a concept difficult to pin down. Definitions of the term prioritise certain features or communities and exclude others. One narrative of environmental justice is that it is traced to and characterised by the 1980s in the United States ('US') and a period of African American rejection of unfair distributional environmental harms. If that narrative of environmental justice is adopted, then the community of environmental justice becomes narrow: excluding communities whose justice concern is not distributional or whose vulnerability is not grounded in race, ethnicity or class. A narrow view of environmental justice linked to one history of the concept also means that the experience of environmental justice becomes limited and difficult to perceive, and there is less scope for the concept to have relevance and resonance elsewhere in the world, including in Victoria, as well as in the non-human realm.

I argue in this article that environmental justice is more, is wider, and is more geographically diffuse, contextually adapted and objectively plural than that one history.¹ There are compatriot events throughout Australia and internationally that date to and precede one supposed starting point for environmental justice. Moreover, within the literature and the law in Australia there is a refined understanding of environmental justice as rights to environmental participation. In aggregate, environmental justice can be summarised as rights or capacity of the relatively disadvantaged, vulnerable or disempowered to shape environmental decisions that affect them and to not be disproportionately affected, disregarded or diminished by environmental decisions.

Collectively, the threads, pathways and trajectories of environmental justice invite a translation of environmental justice ideals wherever there is policy support for the concept. Now, Victoria is such a place. The Victorian government has promised to develop an Environmental Justice Plan; yet the government remains unsure about what environmental justice means, where it has come from, and what it can achieve for Victorians.² One of the purposes of this article is to lay out for the Victorian government the breadth of

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¹ I offer this perspective in response to the queries from my peers in California about how environmental justice is different in Australia to there.

² Zac Power, *Victorian Labor Fringe Event: What is Environmental Justice?* (13 November 2016) Facebook <<https://www.facebook.com/events/1740107589385669>>. The author has also been involved in roundtable discussions with government representatives and officials about the meaning and purpose of environmental justice for Victoria.

understandings and literatures on environmental justice. In developing its plan, it must grapple with a plurality of histories, experiences, milestones and theories of the concept. Within Victoria, there were two notable environmental justice events that have triggered a policy interest in the concept – a gas leak in the outer Melbourne suburban housing estate of Brookland Greens and the Hazelwood coal mine fire in Morwell in regional Victoria. They will help mould a Victorian meaning of and future for environmental justice. They were events that must be acknowledged, referenced and responded to in any plan for environmental justice in the state.

This article begins by setting out the contemporary interest and trigger for a Victorian Environmental Justice Plan before introducing the purpose and goals of the article and offering an in-depth, critical and contextualised interpretation of environmental justice literature, which, I argue, the Victorian environmental justice strategy should address.

II OVERVIEW – A PLATFORM FOR AN ENVIRONMENTAL JUSTICE AGENDA IN VICTORIA

In the lead-up to the 2014 Victorian state election, the then opposition Labor party released its policy platform on ‘Liveable and Inclusive Communities’. The policy program offered the Victorian electorate an Environmental Justice Plan to be developed during the first four-year term of an elected Labor Government:

Environmental Justice Plan

Labor acknowledges that the community needs to have access to all relevant information about the potential health impacts of pollution or contamination of the local environment by nearby industrial facilities. Communities also require appropriate access to the legal system to pursue environmental justice.

Labor will:

- Develop and implement Australia’s first Environmental Justice Action Plan, modeled on international best practice, which requires DSE [the Department of Sustainability and Environment] and the EPA [Environment Protection Authority] to support environmental justice research, public education and enforcement.
- Enact Australia’s first ‘environmental right to know’ law, which would require reporting of information to local communities about issues such as significant contamination, including the mandatory disclosure of contaminated sites on property titles.
- Investigate the most appropriate mechanism to resource the cleanup of contaminated sites.
- Where necessary, amend relevant legislation to ensure that members of the community have legal standing to seek enforcement of the reviews in law and review of Government decisions, including the public interest.³

The policy platform references ‘international best practice’ without further explanation. It also fails to acknowledge two recent local moments that triggered an interest in and community demand for an environmental justice strategy in Victoria.⁴ First, the Brookland Greens Estate gas leak,⁵ which highlighted government agencies acting wilfully over many years in disregarding the interests of a community potentially

³ Australian Labor Party, Victorian Branch, *Platform2014* <<https://www.viclabor.com.au/wp-content/uploads/2014/05/Victorian-Labor-Platform-2014.pdf>>.

⁴ Stan Krpan, *Compliance and Enforcement Review: A Review of EPA Victoria’s Approach* (EPA Victoria, 2011), notes that the Brookland Greens Estate inquiry was a trigger for the review of the Environment Protection Authority (EPA). That review recommended Victoria consider an environmental justice policy: at 304; Sustainability Victoria, Premier’s Sustainability Awards: *Voices of the Valley* (2017) <<http://www.sustainabilityawards.vic.gov.au/voices-of-the-valley>>. The leading community voice taking an environmental justice campaign in response to the Hazelwood mine fire was a finalist in the Premier’s Sustainability Awards inaugural Environmental Justice Award in 2015, and it won the award in 2016.

⁵ Leading to the case of *Wheelahlan v City of Casey* [2011] VSC 215 (23 May 2011). See in summary: Casenote, ‘Settlement Approved for Brookland Greens Estate Group Members’ [2011] (2) *National Environmental Law Review* 36.

at risk of environmental harm,⁶ and second, the Hazelwood coal mine fire,⁷ which illustrated the long-term environmental exposure that one of Victoria's least advantaged communities has experienced.⁸

The Brookland Greens Estate is a residential housing estate in Cranbourne, in the high-growth south-eastern suburbs of Melbourne.⁹ In 2005 and 2006, the Environment Protection Authority ('EPA') and the City of Casey became aware of methane gas leaking into the neighbourhood of the estate. Both agencies knew that the gas came laterally underground from the recently closed landfill – the Stevensons Road landfill – alongside and not an appropriate distance from,¹⁰ the estate.¹¹ Despite the EPA directing the City take remedial works in its capacity as the owner of the former landfill, 'the City of Casey was reluctant to monitor the landfill gas, determine the impact of the landfill gas migration and communicate the impact to the community'.¹² The Council, despite its knowledge of the gas leak, exercised its planning law powers to approve further subdivision and development on the site.¹³ The EPA did not intervene. Residents recorded not knowing about gas leaks or the purpose of monitoring for methane until early 2008 when they were requested to install methane monitors inside their homes.¹⁴ Residents did not understand the severity of risk until they were evacuated from their homes in September 2008 when, following elevated methane level readings of up to 63% of the air in parts of one home, the EPA advised the fire service of the imminent threat of explosion in the estate.¹⁵

The inquiry into the incident concluded that the community living beside the former landfill should have been viewed as vulnerable to risks. But the risks of harm were not adequately considered. The landfill had been managed deficiently by the Council throughout its construction and life, and laxly monitored by the state environmental regulator.¹⁶ The EPA was seen to have been passive and conflicted in its use of management and enforcement tools, and was perceived to have failed to enforce the law contrary to the community benefit.¹⁷ The saga was an illustration of a local government that did not take adequate or appropriate management measures to protect its community from avoidable environmental harm, and poor regulatory oversight by a state agency that had overlooked the interests of a powerless community group, who all the time were kept uninformed and unadvised about the risks that they faced.

Morwell is in Victoria's Latrobe Valley, the region covering Victoria's brown coal supplies, and home to the state's coal mines and generators. It is also among Australia's most disadvantaged towns, in the lowest 10% on the Australian government's index of socioeconomic disadvantage.¹⁸ Immediately south of the township is the now abandoned Hazelwood coal mine and electricity generator.¹⁹ In February 2014, a fire in the coal pit burned for over a month, creating a plume of smoke and a threat to the health of the community which lacked the capacity to cope or the finances to relocate. The inquiry into the fire found a gap in the regulation of the mine and its risks, concluding that '[t]he risk of fires like the Hazelwood mine fire that

⁶ Ombudsman (Vic), *Brookland Greens Estate Investigation into Methane Gas Leaks* (2009).

⁷ Bernard Teague, John Catford and Anita Roper, *Hazelwood Mine Inquiry Report* (2014).

⁸ Nicola Rivers, *Hazelwood Mine Fire: One Year on, Community Still Waits for Answers* (10 February 2015) Environmental Justice Australia <<https://envirojustice.org.au/blog/hazelwood-mine-fire-one-year-on-community-still-waits-for-answers>>.

⁹ Australian Bureau of Statistics, *Regional Population Growth, Australia, 2014–15* (2016).

¹⁰ Ombudsman (Vic), above n 6. The developer of the site was permitted to reduce buffers set out in policy and the planning permit for the site by the Victorian Civil and Administrative Tribunal. This caused the Ombudsman inquiring into the gas leak to find that '[i]n my view, the EPA was neglectful in not seeking to be joined as a party to the VCAT hearing when it knew of the environmental problems at the landfill and it understood that its recommended landfill buffer of 200 metres was under challenge': at 20.

¹¹ Ibid 208–9.

¹² Ibid 211.

¹³ Ibid 213.

¹⁴ Ibid 225.

¹⁵ Ibid 233.

¹⁶ Ibid.

¹⁷ Krpan, above n 4.

¹⁸ Lynda McRae, 'Most Disadvantaged', *Latrobe Valley Express* (online), 11 April 2013 <<http://www.latrobevalleyexpress.com.au/story/1422985/most-disadvantaged/>>.

¹⁹ The mine and plant closed in March 2017. See EPA (Vic), *Closure of Hazelwood Mine and Power Station* <<http://www.epa.vic.gov.au/our-work/monitoring-the-environment/hazelwood-closure>>. The facility had an extended expected life to 2030. See Melissa Fyfe and Farrah Tomazin, 'Hazelwood Extension Gets the "Green" Light', *The Age* (online), 7 September 2005 <<http://www.theage.com.au/news/national/hazelwood-extension-gets-the-green-light/2005/09/06/1125772522506.html>>.

occurred in February and March 2014 slipped through the cracks between regulatory agencies'.²⁰ Monitoring of the impacts of fires was too late and inadequate,²¹ and the state was found to be underprepared to communicate risks, harms and responses to the community.²² The community fended for itself, and that self-support spawned a local movement for community resilience and justice.²³

The community movement demanded the government reopen the inquiry and study the long-term health impacts of the mine fire.²⁴ Community groups felt sacrificed and that their concerns and their detailed evidence of health impacts were disregarded.²⁵ The response of the government, including providing access to vacuum cleaners, free buckets and sponges, and carwash and laundry vouchers, was tokenistic in the absence of greater support and communication.²⁶ The environmental regulator and health department were dismissive of their concerns and knowledge drawn from their lived experience:²⁷ an experience that had been recorded and acknowledged previously.²⁸

This article attempts to offer reference points for Victoria's forthcoming Environmental Justice Plan. It will argue that there has been a longer history of environmental justice in Victoria than is typically appreciated²⁹ and that has been focussed upon by government officials.³⁰ That history accords with, and contributes to, the evolution and evolving understanding of the concept of environmental justice in Victoria. Moreover, it will demonstrate that the international reference points for environmental justice are complex and still taking shape. The history or narratives of environmental justice in the US are not as straightforward as is often portrayed,³¹ and did not operate in isolation from elsewhere in the world, including in Victoria and Australia. The article also argues that international definitions of environmental justice³² do not capture the varied histories and futures of environmental justice and the scholarly advancements in understanding the concept. What this means for the Victorian government as it nears the culmination of planning its environmental justice policy program is that there is much pondering required about what a strategy might look like in Victoria, but also great scope to draw together a plan relevant for the state.

²⁰ Teague, Catford and Roper, above n 7, pt 3 (Discussion and Conclusions). The gap lied between mining regulations and workplace safety regulations. Neither prioritise the interests of the community.

²¹ Ibid pt 4, 145–7 (Discussion and Conclusions).

²² Ibid pt 5, 399–404 (Discussion and Conclusions).

²³ Ibid; Sue Whyte, *'They go into Bat for Me': Morwell Neighbourhood House, the Hazelwood Mine Fire and Recovery* (Centre of Research for Resilient Communities, 2017).

²⁴ Lily D'Ambrosio, *Hazelwood Mine Fire Inquiry Reopened* (Media Release, 26 May 2015) <<https://www.premier.vic.gov.au/wp-content/uploads/2015/05/150526-Hazelwood-Mine-Fire-Inquiry-Reopened.pdf>>; Hazelwood Health Study, *Website* (2016) <<http://hazelwoodhealthstudy.org.au/>>.

²⁵ Climate and Health Alliance, Submission to Hazelwood Mine Fire Board of Inquiry, Parliament of Victoria, *Hazelwood Mine Fire Inquiry*, August 2015.

²⁶ Victorian Council of Social Service, Submission to Hazelwood Mine Fire Board of Inquiry, Parliament of Victoria, *Hazelwood Mine Fire Inquiry*, May 2014, 16–7.

²⁷ Voices of the Valley Inc, Submission to the Ministerial Advisory Committee, Parliament of Victoria, *Independent Inquiry into the EPA* (2015); Whyte, above n, 23, 8, notes '[t]he most significant effects on the community were not on material infrastructure and the associated personal and financial impacts; rather this was about loss of trust in government and authorities; feeling abandoned and unsupported as a community; and as to how the community sees itself and its future'.

²⁸ S F Lee et al, 'A Very Public Death: Dying of Mesothelioma and Asbestos-related Lung Cancer (M/ARLC) in the Latrobe Valley, Victoria, Australia' (2009) 9 *Rural and Remote Health* 1183; Hannah H Walker and Anthony D LaMontagne, *Work and Health in the Latrobe Valley: Community Perspectives on Asbestos Issues – Final Report* (Centre for the Study of Health and Society, University of Melbourne, 2004).

²⁹ Environment Defenders Office (Vic), *Environmental Justice Project: Final Report* (2012)

<https://envirojustice.org.au/sites/default/files/files/Submissions%20and%20reports/environmental_justice_report.pdf>.

³⁰ For instance, the report of the Independent Inquiry into the EPA acknowledges only that environmental justice is 'the notion that the burdens of environmental pollution should be fairly distributed, and that all citizens should have access to the public health benefits of a clean environment'. See EPA Inquiry Ministerial Advisory Committee (Vic), *Independent Inquiry into the Environment Protection Authority* (2016) vi. The report identifies two sources for environmental justice – emerging from the US and the *Aarhus Convention*: at 136 [Box 7.3].

³¹ Gordon Walker and Harriet Bulkeley, 'Geographies of Environmental Justice' (2006) 37 *Geoforum* 655.

³² *Treaty on the Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, open for signature 25 June 1998, 2161 UNTS 447 (entered into force 30 October 2001).

III FROM AN ENVIRONMENTAL JUSTICE MOVEMENT IN THE US TO CONTEXTUAL AND GLOBAL UNDERSTANDINGS OF ENVIRONMENTAL JUSTICE

Most authors writing about environmental justice in the US begin their commentaries recounting the events of Warren County, North Carolina in the late 1970s and early 1980s when a marginalised black community was confronted with a poisonous waste dump.³³ This controversy is commonly identified and analysed,³⁴ along with the Love Canal³⁵ residential and community development on toxic land³⁶ in New York State³⁷ and Cancer Alley in Louisiana,³⁸ as a key trigger moment for the environmental justice movement born from resistance.³⁹ The way environmental justice has been framed in the report of the Inquiry into the EPA indicates that this historical narrative has influenced the understanding of environmental justice by Victorian policy thinkers.⁴⁰ Yet, the decision and fierce opposition to relocate illegally dumped industrial waste into a poor black neighbourhood in North Carolina did not mark the beginning, or restrict the future definition, of the concept of environmental justice. It does not limit, direct or affect a Victorian conceptualisation of the term.

The concern articulated by the Warren County community – of unequal distribution of pollution – has existed since the late 1880s and early 1900s when the age of industrialisation confronted the emergence of urban metropolises and the growth of the affluent class.⁴¹ Other local environmental conflicts have been recognised as resulting from an imbalance in power between the state, the community, and business.⁴² Within the US, for instance, Plater⁴³ recalls the contamination of James River in the state of Virginia and the poisoning of the air by corporate manufacturers of Kepone pesticide from the mid-1960s. Particularly pertinent to an historical account of environmental justice were the three limbs of objection – human health, environmental protection and economic security. It is an example of congruence between human and

³³ For just one illustrative example see Stephen Sandweiss, 'The Social Construction of Environmental Justice' in David E Camacho (ed), *Environmental Injustices, Political Struggles: Race, Class, and the Environment* (Duke University Press, 1998) 35.

³⁴ See, eg, Robert D Bullard, *Dumping in Dixie: Race, Class, and Environmental Quality* (Westview Press, 3rd ed, 2000) 14.

³⁵ Kristin Shrader-Frechette, *Environmental Justice: Creating Equity, Reclaiming Democracy* (Oxford University Press, 2002) 6. Indeed, Linda McKeever Bullard represented Margaret Bean in a court case using the US *Civil Rights Act* to oppose a landfill development in Houston. Bullard's husband assisted in that case with a social study from which he would advance the concept of environmental racism and justice. See Second National People of Color Environmental Leadership Summit, *Celebrating Our Victories, Strengthening Our Roots: Environmental Justice Timeline – Milestones* (October 2002).

³⁶ This conflict was led by a group also considered part of a discrete anti-toxics movement. See Luke W Cole and Sheila R Foster, *From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement* (NYU Press, 2001) 22. They argue that this movement coalesced with others (the civil rights movement, the labor movement, the academy, and some Native American and environmental activists) to champion environmental justice.

³⁷ Andrew Dobson, *Justice and the Environment: Conceptions of Environmental Sustainability and Theories of Distributive Justice* (Oxford University Press, 1998) 19; John S Dryzek, *The Politics of the Earth: Environmental Discourses* (Oxford University Press, 2nd ed, 2005) 210. For a detailed account of the history and politics of the Love Canal controversy see Judith A Layzer, *The Environmental Case: Translating Values into Policy* (CQ Press, 2nd ed, 2006) ch 3.

³⁸ Robert D Bullard and Beverly Wright, 'Race, Place, and the Environment in Post-Katrina New Orleans' in Robert D Bullard and Beverly Wright (eds), *Race, Place and Environmental Justice After Hurricane Katrina: Struggles to Reclaim, Rebuild, and Revitalize New Orleans and the Gulf Coast* (Westview Press, 2009) 23.

³⁹ John Byrne, Cecilia Martinez and Leigh Glover, 'A Brief on Environmental Justice' in John Byrne, Leigh Glover and Cecilia Martinez (eds), *Environmental Justice: Discourses in International Political Economy, Energy and Environmental Policy* (Transaction Publishers, 2002) 3.

⁴⁰ See fn 30.

⁴¹ David H Getches and David N Pellow, 'Beyond "Traditional" Environmental Justice' in Kathryn M Mutz, Gary C Bryner and Douglas S Kenney (eds), *Justice and Natural Resources: Concepts, Strategies, and Applications* (Island Press, 2002) 6, citing Martin Melosi, *Garbage in the Cities: Refuse, Reform and the Environment* (University of Pittsburgh Press, revised ed, 2005). Melosi notes about the industrial era '[t]he major physical consequence of the Industrial Revolution was the tremendous environmental change in cities. As never before, urbanites were forced to confront massive pollution in many forms. In this context, the refuse problem emerged as a major blight': at 6. While commenting that 'even the quarters of the ruling classes were befouled and overcrowded': at 7, Melosi notes that the 'the crush of people and the concentration of industry in and around cities produced living and working conditions of incredible deprivation, especially for the poor and working class': at 8. Julian Agyeman, *Sustainable Communities and the Challenge of Environmental Justice* (NYU Press, 2005), notes that environmental justice concerns date to the late 1400s.

⁴² Bullard, *Dumping in Dixie*, above n 34, notes that '[t]he problem of polluted black communities is not a new phenomenon. Historically, toxic dumping and the location of locally unwanted land uses (LULUs) have followed the "path of least resistance"': at 3. He recalls black resistance to the siting and operation of Texan landfills in the 1960s. See Robert D Bullard, 'Neighbourhoods Zoned for Garbage' in Robert D Bullard (ed), *The Quest for Environmental Justice: Human Rights and the Politics of Pollution* (Sierra Club Books, 2005) 43.

⁴³ Zygmunt J B Plater, 'Facing a Time of Counter-Revolution: The Kepone Incident and a Review of First Principles' (1995) 29 *University of Richmond Law Review* 657, 667.

ecological environmental justices even before the conventional starting point for environmental justice, a congruence not readily picked up in Victorian policy documents about environmental justice to date.

IV UNPACKING ENVIRONMENTAL RACISM

The consequence of environmental justice being framed by the Warren County saga instead of taking a wider contextual historical inquiry, is that the concept becomes blurred with the notion of environmental racism.⁴⁴ Leading environmental justice scholar, Bullard, has especially been at the forefront of charting the intersections between environmental racism and environmental justice.⁴⁵ His conception of environmental justice was one that originated in black America and for decades, particularly as it was overwhelmingly asserted in the US, was an issue of race.⁴⁶

A more nuanced view, however, is that environmental justice and environmental racism are conceptually intersected. The initial focus on race by the environmental justice movement was an acknowledgment that mainstream environmentalism had ignored race.⁴⁷ Similarly, race can be seen as a trigger of the environmental justice movement, just as it was for the civil rights movement. After all, the perceptions of segregation in the early environmental justice movement had all the hallmarks of the civil rights experiences.⁴⁸ The movements rallied around social justice ideals⁴⁹ and legal rights principles.⁵⁰ In fact, the language of human rights law⁵¹ has been common to the US environmental justice and civil rights movements.⁵²

The most prominent environmental justice activists during this formative time for the concept of environmental justice were women, making environmental justice at least as gendered as it was racial,⁵³ and entrenching it as an alternative to the mainstream environmental movement.⁵⁴

V OTHER STARTING POINTS

While the concept of environmental racism had resonance with people of colour it limited its application and the communities that could employ it.⁵⁵ Some communities in the US are still not thought to be within the community of environmental justice.⁵⁶ A focus on race became an ‘obstacle to the development of a

⁴⁴ Lynn E Blais, ‘Environmental Racism Reconsidered’ (1996) 75 *North Carolina Law Review* 75, 89; Richard J Lazarus, ‘Pursuing “Environmental Justice”: The Distributional Effects of Environmental Protection’ (1993) 87 *Northwestern University Law Review* 787, 790–1.

⁴⁵ Bullard, *Dumping in Dixie*, above n 34, 14.

⁴⁶ Bullard (ed), *The Quest for Environmental Justice*, above n 42, 1.

⁴⁷ Daniel Faber, *Capitalizing on Environmental Injustice: The Polluter-Industrial Complex in the Age of Globalization* (Rowman & Littlefield Publishers, 2008) 240.

⁴⁸ Cole and Foster, above n 36, 7. They note that church-affiliated activists were involved in both movements: at 20, and that both campaigns used protest and sit-ins as political methods: at 21.

⁴⁹ Bullard, *Dumping in Dixie*, above n 34.

⁵⁰ See, eg, Richard Glick, ‘Environmental Justice in the United States: Implications of the International Covenant on Civil and Political Rights’ (1995) 19 *Harvard Environmental Law Review* 69.

⁵¹ Alice Kaswan, ‘Environmental Justice: Bridging the Gap Between Environmental Laws and “Justice”’ (1997) 47 *American University Law Review* 221, 257, notes that the movement’s ‘rhetoric, perceptions, and preferred modes of action were shaped by the civil rights movement’; Maxine Burkett, ‘Just Solutions to Climate Change: A Climate Justice Proposal for a Domestic Clean Development Mechanism’ (2008) 56 *Buffalo Law Review* 169, 191, argues that environmental justice has been framed in rights terms.

⁵² Veronica Eady, ‘Warren County and the Birth of a Movement: The Troubled Marriage Between Environmentalism and Civil Rights’ (2007) 1 *Golden Gate University Environmental Law Journal* 41 (‘Warren County’); Discussed further in Brad Jessup, ‘The Journey of Environmental Justice through Public and International Law’ in Brad Jessup and Kim Rubenstein (eds), *Environmental Discourses in Public and International Law* (Cambridge University Press, 2012) 55–9.

⁵³ Shrader-Frechette, above n 35, 6.

⁵⁴ *Ibid* 13.

⁵⁵ Mary M Timney, ‘Environmental Injustices: Examples from Ohio’ in David E Camacho (ed), *Environmental Injustices, Political Struggles: Race, Class, and the Environment* (Duke University Press, 1998) 179, explains that the term ‘environmental racism’ was inappropriate to describe injustices where poor white people in Ohio were suffering from disproportionately high levels of environmental harm; David Naguib Pellow and Robert J Brulle, ‘Power, Justice, and the Environment: Toward Critical Environmental Justice Studies’ in David Naguib Pellow and Robert J Brulle (eds), *Power, Justice, and the Environment: A Critical Appraisal of the Environmental Justice Movement* (MIT Press, 2005) 13, explain that the ideology and the framing of environmental justice focussed on race because of the need to claim the discourse but in doing it was ‘to exclude considerations of environmental inequality by class [even] within communities of color’ even when race was unable to explain environmental inequalities in a community.

⁵⁶ Lisa R Pruitt and Linda T Sobczynski, ‘Protecting People, Protecting Places: What Environmental Litigation Conceals and Reveals about Rurality’ (2016) 47 *Journal of Rural Studies* 53, record how the US EPA failed to apply its environmental justice policy to a mostly white rural community.

transnational movement'.⁵⁷ It made the concept particularised to the US⁵⁸ and its scholars,⁵⁹ and was seen as not having relevance in a place like Victoria,⁶⁰ and of having had limited application in Australia only to indigenous environmental causes.⁶¹ Yet, environmental justice as a frame for conflict is more general, less radical, more positive and proactive.⁶² It is about championing the underdog,⁶³ those experiencing financial disadvantage and a lack of political power,⁶⁴ including that experienced by ethnic and immigrant groups,⁶⁵ the working and lower classes.⁶⁶ Or indeed a community like the Brookland Greens Estate residents, who could best be described as the aspirational middle and working class, but who were demonstrably politically powerless, and who were vulnerable because of their informationless geography.

Others have noted the parallels between the modern environmental justice movement and the earlier social justice and urban improvement movements that date decades and centuries.⁶⁷ This intersection is particularly pronounced in Australian policy and political debate.⁶⁸ By the 2000s, the Australian Conservation Foundation and the Australian Council of Social Service were collaborating on a policy of 'liveable communities' drawing in social and environmental justice.⁶⁹ Indeed, Australian research linking social justice ideals with environmental policy is now two decades mature.⁷⁰

Many of the ideas, theories, values and beliefs comprising environmental justice, particularly as it has been further theorised and extrapolated, had earlier and plural origins. They include now well-recognised arguments about stewardship (and consequent legal recognition) for the environment, and the harm done by chemical use and the need for greater access to environmental information in the age of corporate power.⁷¹ The 'limits' discourse of the 1970s also implicitly raised justice questions for future generations, in bridging ideas around an ecological ethic and the principle of intergenerational equity.⁷²

The environmental justice movement in the US also came to adopt approaches and strategies of other movements, including the organising approaches of the mainstream environmental movement.⁷³ Environmental justice has been positioned within the discourse of toxicity and the anti-toxics movement.⁷⁴ Buell, for instance, argues that in the period from the 1970s to 1990s there was a convergence of justice

⁵⁷ Faber, above n 47, 240.

⁵⁸ David V Carruthers, 'Environmental Justice and the Politics on Energy on the US-Mexico Border' (2007) 16 *Environmental Politics* 394, 396.

⁵⁹ Maureen G Reed and Colleen George, 'Where in the World is Environmental Justice' (2011) 35 *Progress in Human Geography* 835, note that in the decade of the 2000s 50% of all environmental justice scholarship was by academics from the US.

⁶⁰ Elisa Arcioni and Glenn Mitchell, 'Environmental Justice in Australia: When the RATS Became IRATE' (2005) 14 *Environmental Politics* 363.

⁶¹ Cam Walker, 'Environmental Racism in Australia' (2006) 96 *Chain Reaction* 9, 10 (dot points).

⁶² Robert Benford, 'The Half-Life of the Environmental Justice Frame: Innovation, Diffusion, and Stagnation' in Pellow and Brulle (eds), *Power, Justice, and the Environment*, above n 55, 41; Hilary Gibson-Wood and Sarah Wakefield, ' "Participation", White Privilege and Environmental Justice: Understanding Environmentalism among Hispanics in Toronto' (2013) 45 *Antipode* 641, 644, also employ the terminology of the 'master frame'.

⁶³ Benford, above n 62, 42.

⁶⁴ James T Hamilton, 'Testing for Environmental Racism: Prejudice, Profits, Political Power?' (1995) 14 *Journal of Policy Analysis and Management* 107.

⁶⁵ See, eg, Vicki Been, 'What's Fairness Got to Do with it? Environmental Justice and the Siting of Locally Undesirable Land Uses' (1993) 78 *Cornell Law Review* 1001; Sandweiss, above n 33, 35.

⁶⁶ Been, above n 65; Vicki Been and Francis Gupta, 'Coming to the Nuisance or Going to the Barrios? A Longitudinal Analysis of Environmental Justice Claims' (1997) 24 *Ecology Law Quarterly* 1.

⁶⁷ Mark J Smith and Piya Pangsapa, *Environment and Citizenship: Integrating Justice, Responsibility and Civic Engagement* (Zed Books, 2008) 244.

⁶⁸ Clive Hamilton, 'Generational Justice: The Marriage of Sustainability and Social Equity' (1996) 3 *Australian Journal of Environmental Management* 163, 163; Nicholas Low and Brendan Gleeson, *One Earth: Social and Environmental Justice* (Australian Conservation Foundation, 1999).

⁶⁹ Mick Hillman, 'Environmental Justice: A Crucial Link Between Environmentalism and Community Development?' (2002) 37(4) *Community Development Journal* 349.

⁷⁰ Catherine Gross, 'Community Perspectives of Wind Energy in Australia: The Application of a Justice and Community Fairness Framework to Increase Social Acceptance' (2007) 35 *Energy Policy* 2727, 2729.

⁷¹ See, eg, Christopher D Stone, 'Should Trees Have Standing?: Toward Legal Rights for Natural Objects' (1972) 45 *Southern California Law Review* 450; Rachel Carson, *Silent Spring* (Houghton Mifflin, 40th anniversary ed, 2002).

⁷² James Radcliffe, *Green Politics: Dictatorship or Democracy?* (Palgrave Macmillan, revised ed, 2002) 78.

⁷³ Clifford Rechtschaffen, Eileen Gauna and Catherine O'Neill, *Environmental Justice: Law, Policy, and Regulation* (Carolina Academic Press, 2nd ed, 2009).

⁷⁴ Lawrence Buell, 'Toxic Discourse' (1998) 24 *Critical Inquiry* 639.

activism and ‘traditional environmentalist causes’⁷⁵ through a revived concern about toxicity and its impact on both people and habitat. A similar development was occurring in Australia and in Victoria at the same time as communities activated against so-called toxic industry.⁷⁶

There has also been a shift away from purely distributional and human understandings of environmental justice.⁷⁷ Schlosberg’s scholarship has been especially influential in this regard. He defines environmental justice as having four interlinked⁷⁸ aspects or realms. Not simply the fair distribution of environmental opportunities and harm, which was where early environmental justice scholars and the Victorian government in its early articulations have rested their focus. Rather, additionally: the recognition of human and non-human interests in decision-making and distribution; the existence of deliberative and democratic participation; and the building of capabilities among individuals, groups and non-human parts of nature.⁷⁹ With this shift, and more complex and plural interpretations of environmental justice, vulnerability has become the marker of environmental injustice – expanding to educational, income or occupational disadvantage,⁸⁰ as well as geographic disadvantage⁸¹ and species disadvantage.⁸² The location and distribution of harm is also far more complex than one attribute of disadvantage,⁸³ and typically requires a deeply contextual understanding of places.⁸⁴

VI AUSTRALIAN ORIGINS AND IMAGINATIONS OF ENVIRONMENTAL JUSTICE

History is overlooked in much environmental justice scholarship.⁸⁵ This has also been the case in Australia. Here, scholars⁸⁶ and policy and legal advocates⁸⁷ have searched within literature and social movements for a similar pathway for environmental justice to that experienced in the previous decades in the US.⁸⁸ One concern with the recent government engagement with environmental justice is that the Victorian Environmental Justice Plan might also ignore local histories and experience. The Environment Defenders Office, for instance, asserts that the environmental justice frame in Australia ‘fails to appreciate the rich context of the US’⁸⁹ without contemplating that the Australian experience of environmental justice is differently rich, deep and long. Those who have formed the view that environmental justice is a novel idea for Australia have looked for quantitative data of distributional harms,⁹⁰ the terminology of environmental

⁷⁵ Ibid 643.

⁷⁶ See, eg, Aynsley Kellow, ‘Balancing Risks to Nature and Risks to People: The Coode Island/Point Lillias Project in Australia’ in S Hayden Lesbirel and Daigee Shaw (eds), *Managing Conflict in Facility Siting: An International Comparison* (Edward Elgar, 2005)179.

⁷⁷ David Schlosberg, *Defining Environmental Justice: Theories, Movements, and Nature* (Oxford University Press, 2007) 12.

⁷⁸ David Schlosberg, ‘Reconceiving Environmental Justice: Global Movements and Political Theories’ (2004) 13 *Environmental Politics* 517, 521.

⁷⁹ Robyn Eckersley adds precaution and compensation as elements of environmental justice. See Robyn Eckersley, *The State and Access to Environmental Justice* (Speech delivered at the Access to Environmental Justice Conference, Perth, 20 February 2004).

⁸⁰ Shrader-Frechette, above n 35, 6.

⁸¹ Pruitt and Sobczynski, above n 56, frame rurality as an attribute for environmental injustice. In an Australian context see also Helen Masterman-Smith et al, ‘The Emerging Field of Rural Environmental Justice Studies in Australia: Reflections from an Environmental Community Engagement Program’ (2016) 47 *Journal of Rural Studies* 359.

⁸² Brian Baxter, *A Theory of Ecological Justice* (Routledge, 2005).

⁸³ Debra Lyn Bassett, ‘The Overlooked Significance of Place in Law and Policy: Lessons from Hurricane Katrina’ in Bullard and Wright (eds), *Race, Place and Environmental Justice After Hurricane Katrina*, above n 38, 49.

⁸⁴ Cole and Foster, above n 36.

⁸⁵ David Naguib Pellow and Lisa Sun-Hee Park, *The Silicon Valley of Dreams: Environmental Injustice, Immigrant Workers, and the High-Tech Global Economy* (New York University Press, 2002) 18. In taking a more historical perspective of environmental justice, from the 1700s in the area around modern Silicon Valley, Pellow and Park open up the historical trajectories into environmental justice.

⁸⁶ Masterman-Smith et al, above n 81.

⁸⁷ Environment Defenders Office (Vic), above n 29.

⁸⁸ Gordon Walker, ‘Globalizing Environmental Justice: The Geography and Politics of Frame Contextualization and Evolution’ (2009) 9 *Global Social Policy* 368.

⁸⁹ Environment Defenders Office (Vic), above n 29, 8.

⁹⁰ Jayajit Chakraborty and Donna Green, ‘Australia’s First National Level Quantitative Environmental Justice Assessment of Industrial Air Pollution’ (2014) 9(4) *Environmental Research Letters* 1.

justice,⁹¹ and government policy on ‘environmental justice’.⁹² Those proclaiming novelty miss that environmental justice movements do not necessarily share a common vocabulary.⁹³ They do not grapple with a long history of resistance – including Aboriginal opposition – to nuclear experiments and the fuel cycles in Australia dating from at least the late 1970s upon the realisation of the use of Aboriginal land in Maralinga for atomic testing.⁹⁴ They do not see environmental justice in the rise of an anti-toxics movement throughout the 1980s⁹⁵ or in the fierce battles over landfills in Victoria especially throughout the 1990s.⁹⁶ They miss a clearly articulated justice narrative in opposition to uranium mining in the Northern Territory during the 1990s.⁹⁷ Yet, for a longer period, fundamental questions of fairness and equity have charged Australian environmental conflicts over waste and pollution.

Those scholars who do not see a long history of environmental justice in Australia overlook the histories of environmental conflict that were marked between vulnerable workers and their employers in the western suburbs of Melbourne, and between the unfranchised working classes and the property owning, franchised, classes with mining ambition in Sydney. Both demonstrate environmental justice controversies in Australia dating from the late 1800s.⁹⁸

During the 1990s there was an unmistakable articulation of environmental justice concerns in Australia. Alviano and Mercer wrote about ‘concentrations of toxic chemical industries in such places as on the shores of Botany Bay and at Bankstown and Parramatta. In Victoria, as a consequence of historical accretion, inner-metropolitan Yarraville and Footscray are similarly burdened with [hazardous] industries’.⁹⁹ The burden was and remains an historical legacy of inequitable wealth and the presence of working-class and migrant populations in these geographies.¹⁰⁰ They were communities with little engagement in environmental matters beyond the local, and dependent on regulators who delegitimised alternative voices on science and risk. McPhillips’ book, *Local Heroes* is a record of Australian community battles against industrial pollution, contamination and toxicity.¹⁰¹ The book is about how in the 1980s and 1990s activists around Australia had insufficient access to information and avenues to express opposition, were not taken seriously and treated by government agencies in a paternalistic and insincere manner leading to a ‘travesty of justice’.¹⁰² Their concern was geographic and cumulative – communities already receiving more than their share of harmful emissions were expected to accommodate more.¹⁰³ They had no access to legal aid, and confronted long and costly legal processes that were defended by vested interests.¹⁰⁴

⁹¹ Masterman-Smith et al, above n 81, 360 simply did a literature search for the term ‘environmental justice’ as a foundation for claiming that environmental justice lacks a presence in Australia; Jason Byrne and Diana MacCallum, ‘Bordering on Neglect: “Environmental Justice” in Australian Planning’ (2013) 50 *Australian Planner* 164, 167. These authors make the similar point to this article that elements of environmental justice have existed in literature about pollution.

⁹² Environment Defenders Office (Vict), above n 29, 11; Byrne and MacCallum, above n 91.

⁹³ Alison Hope Alkon, Marisol Cortez and Julie Sze, ‘What’s in a Name?: Language, Framing and Environmental Justice Activism in California’s Central Valley’ (2013) 18 *Local Environment* 116; Catherine Gross, ‘A Measure of Fairness: An Investigative Framework to Explore Perceptions of Fairness and Justice in Real-Life Social Conflict’ (2008) 15 *Human Ecology Review* 130.

⁹⁴ Elizabeth Tynan, *Atomic Thunder: The Maralinga Story* (NewSouth Publishing, 2016). See also Cobi Calyx and Brad Jessup, ‘The Nuclear Citizens Jury: From Local Deliberations to Transboundary and Transgenerational Legal Dilemmas’ (2017) 11 *Environmental Communication* (forthcoming).

⁹⁵ Kathleen McPhillips (ed), *Local Heroes: Australian Crusades from the Environmental Frontline* (Pluto Press, 2002). Cole and Foster, above n 36, 22 note the contribution of the US anti-toxics movement to the development of environmental justice at the same time. Buell, above n 74, similarly sees environmental justice as accordant with the anti-toxics discourse of the 1980s.

⁹⁶ Paul Strangio, *No Toxic Dump! A Triumph for Grassroots Democracy and Environmental Justice* (Pluto Press, 2001) 11 describes the scholarship as ‘a study of one community’s fight for environmental justice and the integrity of its local environment’.

⁹⁷ Low and Gleeson, *One Earth*, above n 68.

⁹⁸ Tim Bonyhady, *The Colonial Earth* (Melbourne University Press, 1998).

⁹⁹ Philip Alviano and David Mercer, ‘The Dandenong Offensive Industry Zone: A Case Study in Environmental Conflict’ (1996) 27 *Australian Geographer* 101, 102. Other environmental justice writing connected with the anti-toxics movement in this period includes: G J Smith, *Toxic Cities* (New South Wales University Press, 1990); Lauren Costello and Kevin Dunn, ‘Resident Action Groups in Sydney: People Power or Rat-Bags?’ (1994) 35(1) *Australian Geographer* 61; Stephen Darley ‘But the Working Class don’t Care about the Environment ... do they?’ (1994) 13(2) *Social Alternatives* 37; Neil Gunningham and Amanda Cornwall, ‘Legislating the Right to Know’ (1994) 11(4) *Environmental and Planning Law Journal* 274.

¹⁰⁰ Alviano and Mercer, above n 99. For further perspectives see Mariann E Lloyd-Smith and Lee Bell, ‘Toxic Disputes and the Rise of Environmental Justice in Australia’ (2003) 9 *International Journal of Occupational and Environmental Health* 14.

¹⁰¹ McPhillips (ed), above n 95.

¹⁰² *Ibid* xii.

¹⁰³ James Whelan, ‘Smogbusters in Queensland’ in McPhillips (ed), above n 95, 25.

¹⁰⁴ Mariann Lloyd-Smith, ‘Not Just a City Problem: The Saga of Contaminated Cattle Tick Dip Sites on the NSW North Coast’ in McPhillips (ed), above n 95, 99.

Within Victoria, environmental health concerns were articulated by people in Melbourne's inner west proximate to the Coode Island chemical complex. They identified as being within a community of working class and migrant citizens, and were plainly aware that middle and upper class communities in other geographies were not confronting similar risks.¹⁰⁵ Justice narratives of information being difficult to access,¹⁰⁶ of demanding government responsibility,¹⁰⁷ feelings of 'betrayal' and of being ignored,¹⁰⁸ and an expectation of a 'basic right of all communities to live in safety'¹⁰⁹ were all evident in their opposition. The Coode Island fire marked a milestone in Victorian environmental justice history. It was a moment that did not depend on race, quantitative data gathering, or the term 'environmental justice'.

The Coode Island experience demonstrated the community expectation of environmental justice providing power, capacity and recognition: a presence in law and decision-making. These were expectations repeated by the community of Morwell. During and after the Hazelwood coal mine fire, the Morwell community felt it was not receiving information, had been abandoned by the government, and that the health guidance it was receiving did not accord with what they were feeling.¹¹⁰ Though the saga could be easily explained as presenting an environmental injustice on distributional grounds – Morwell is a relatively disadvantaged community facing a disproportionate impact from environmental harms – the justice narrative was instead about power, recognition and participation.¹¹¹

One notable way that the Australian trajectory of environmental justice is long and particular has been the focus on participation and the role of the law and lawyers to limit and open up access to justice respectively.¹¹² Arguments for greater participation abound within the expression of dissent by environment groups and within the literature. Stories of experiencing 'co-option and control' forms of participation where governments direct consultation rather than communities contributing to decision making on their terms,¹¹³ of being denied access to information,¹¹⁴ of unequal access to resources and expertise,¹¹⁵ of being ridiculed for taking a stand,¹¹⁶ of being demonstrably powerless¹¹⁷ in a system serving 'corporate and state power' have been recorded.¹¹⁸

Writing extracurricularly, Australian judges¹¹⁹ have engaged with these participation based notions of equity and fairness, and attempted to broaden them to the environmental law field using the principle of sustainability. Similarly, Anton claims that 'the strongest argument linking the environment and human rights focuses not on environmental quality, but on procedural rights, including participation in environmental decision-making and access to environmental justice'.¹²⁰ It has been argued that the New South Wales Land

¹⁰⁵ Colleen Hartland, 'The Coode Island Disaster and HAZMAG' in McPhillips (ed), above n 95, 174.

¹⁰⁶ Ibid 175–6.

¹⁰⁷ Ibid 178.

¹⁰⁸ Ibid 179.

¹⁰⁹ Ibid 181.

¹¹⁰ Whyte, above n 23, 12.

¹¹¹ This narrative reflects the aspects of environmental justice identified in the early 2000 in conflicts in Western Australia. See Lloyd-Smith and Bell, above n 100.

¹¹² Felicity Millner, 'Access to Environmental Justice' (2011) 16 *Deakin Law Review* 189.

¹¹³ Hillman, above n 69.

¹¹⁴ Mariann Lloyd-Smith, 'Rights and Wrongs of Knowing in Chemical Conflict' (2002) 2(3) *The Drawing Board: An Australian Review of Public Affairs* 131.

¹¹⁵ Helen Hamilton, 'Port Kembla and the Fight Against the State' in McPhillips (ed), above n 95, 81.

¹¹⁶ Ibid 83.

¹¹⁷ Strangio, above n 96, 13

¹¹⁸ Ibid 9.

¹¹⁹ See in particular the contribution of former Federal Court judge, Justice Ronald Sackville, who would include environmental standing issues within the access to justice rubric. See, eg, Ronald Sackville, 'Access To Justice: Towards An Integrated Approach' (2011) 10(2) *Judicial Review: Selected Conference Papers: Journal of the Judicial Commission of New South Wales* 221; Justice Ronald Sackville, 'Some Thoughts on Access to Justice' (Speech delivered at the First Annual Conference on the Primary Functions of Government: Courts, Victoria University of Wellington, 28–29 November 2003); See also Justice Peter McClellan, 'Access to Justice in Environmental Law: An Australian Perspective' (Speech delivered at Commonwealth Law Conference, London, 11–15 September 2005) who explicitly positions environmental law standing dilemmas within an access to justice frame. Most recently, Justice Brian Preston, 'What's Equity Got To Do With the Environment?' (Speech delivered at the 2017 Sir Frank Kitto Lecture, University of New England, 1 September 2017), who engaged with ideas of participation, equity and capabilities.

¹²⁰ Donald Anton, 'Reforming the Law of Environmental Standing and Third Party Appeal Rights in Victoria' (Occasional Paper, Australian Centre for Environmental Law, Australian National University, 2000) 3.

and Environment Court, a unique Australian forum for justice,¹²¹ supported by legislation to relax standing rules and give community members rights of enforcement, has removed one of the barriers to access to justice, though others – especially technical, costs and time – remain.¹²²

The Australian environmental justice trajectory is seen through the prism of class and economic disadvantage.¹²³ It has also been framed through international developments, particularly Australia's enthusiastic adoption of internationally defined notions of sustainable development. Public participation and intergenerational equity have been articulated as guiding justice principles,¹²⁴ with legal minds responsible for advancing this particular dimension. Where there is an especial indigenous aspect to an Australian environmental justice it has extended environmental justice into the human-environment realm.¹²⁵ Justice dialogues around uranium mining and forestry, for instance, present human and non-human perspectives of fairness and concerns about presence and resilience. They are concerns about equity across species and generations.¹²⁶

This retelling of the Australian experience with environmental justice concepts and principles is one of the multiple histories, pathways and futures of the concepts of justice in environmental thought. The key message for the Victorian government is to not be hamstrung by one historical, dominant or narrow view of the meaning of the term environmental justice.

There is also an existing and developing Australian scholarship that is connected with and exploring the aspects of environmental justice proposed by Schlosberg, both before and after the advent of the publication of his monograph on environmental justice in 2007.¹²⁷ The starting point for this scholarship is that environmental justice in Australia is plural, multiple, relevant, and existent. Scholars offer data and ideas that have and are shaping a future of environmental justice understanding in Australia alongside the attempts of the nation's leading environmental judge to integrate environmental principles with a multifaceted definition of environmental justice.¹²⁸ This body of work brings into Australia scholarship critical perspectives and voices drawn from empirical studies about what participation as justice requires,¹²⁹ about intersections between landscape and human justice interests,¹³⁰ the recognition of interests in the breadth of environmental laws,¹³¹ and community perceptions of fairness and equity.¹³²

VII ENVIRONMENTAL JUSTICE GLOBALLY

By at least the early 2000s environmental justice had become a national and supranational policy. There had been a 'breaking away' of 'environmental justice' from the US.¹³³ The transition and institutionalisation of environmental justice beyond the local led to attempts to define and strategise environmental justice across spaces and sectors.¹³⁴ This was in part driven through the scholarship of US academics who observed global parallels with the local environmental justice experience from their nation.¹³⁵ Additionally, globalisation

¹²¹ See also Brian J Preston, 'Benefits of Judicial Specialization in Environmental Law: The Land and Environment Court of New South Wales as a Case Study' (2012) 29 *Pace Environmental Law Review* 396.

¹²² Deirdre Pirro, 'Access to Environmental Justice: A National Perspective' (2008) 38 *Environmental Policy and Law* 272.

¹²³ Nicholas Low and Brendan Gleeson, *Justice, Society, and Nature: An Exploration of Political Ecology* (Routledge, 1998); Low and Gleeson, *One Earth*, above n 68.

¹²⁴ Low and Gleeson, *One Earth*, above n 68, 18–19.

¹²⁵ *Ibid* 20.

¹²⁶ *Ibid* 11.

¹²⁷ Schlosberg, *Defining Environmental Justice*, above n 77.

¹²⁸ Preston, above n 119; Justice Brian Preston, 'The Effectiveness of the Law in Providing Access to Environmental Justice: An Introduction' (Speech presented at the 11th IUCN Academy of Environmental Law Colloquium, Hamilton, 28 June 2013).

¹²⁹ Amanda Kennedy, *Environmental Justice and Land Use Conflict: The Governance of Mineral and Gas Resource Development* (Earthscan, 2017).

¹³⁰ Mick Hillman, 'Situated Justice in Environmental Decision-Making: Lessons from River Management in Southeastern Australia' (2006) 37 *Geoforum* 695.

¹³¹ Brad Jessup, 'Justice, Recognition and Environmental Law: The Wielangta Forest Conflict, Tasmania, Australia' (2015) 34 *University of Tasmania Law Review* 5.

¹³² Catherine Gross, *Fairness and Justice in Environmental Decision Making: Water under the Bridge* (Routledge, 2014); Gross, 'A Measure of Fairness', above n 93.

¹³³ Walker and Bulkeley, above n 31, 655.

¹³⁴ Matt Watson and Harriet Bulkeley, 'Just Waste? Municipal Waste Management and the Politics of Environmental Justice' (2005) 10 *Local Environment: The International Journal of Justice and Sustainability* 411, 413.

¹³⁵ Walker, above n 88, 373. See also Robert R Kuehn, 'A Taxonomy of Environmental Justice' (2000) 30 *Environmental Law Reporter* 10681, 10684; Hari M Osofsky, 'Climate Change and Environmental Justice: Reflections on Litigation Over Oil

changed the ‘terrain’ for scholarship and movements.¹³⁶ For example, environmental justice activities and campaigns followed companies as they globalised and internationalised.¹³⁷ The shift upwards¹³⁸ was to see environmental justice conjoined with principles of intra and intergenerational equity¹³⁹ and public participation, all of which had been advanced, formalised and had begun to be entrenched within international environmental law, and had been a feature of Australia’s encounter with environmental justice.¹⁴⁰ This dissemination of the environmental justice idea beyond the US was an endorsement of the impact of the environmental justice movement in that nation,¹⁴¹ but it also represented a key moment of change. It particularly reinforced the value of looking globally, locally and historically for threads of environmental justice rather than attempting to find a conceptual transplant.¹⁴²

Within the international realm, ‘[environmental] justice concerns can be traced back in the history of environmental law at least to the 1941 *Trail Smelter Arbitration*’.¹⁴³ This transboundary conflict required the arbitral body to determine what a just outcome was across both place and time.¹⁴⁴ This is a notable revisit of the development of environmental justice because it positions international law and matters of global conflict within the early history of the concept – not simply in its modern day expansion and translocation. More recently, Ebbesson has recounted the influence of the Aarhus Convention on the refinement and prioritisation of various aspects of environmental justice.¹⁴⁵ In part owing to the function of the Aarhus Convention, access to justice became a key matter of inquiry for the United Kingdom (‘UK’) Environmental Justice Project in the early 2000s,¹⁴⁶ and its three limbs – of access to information, access to courts and meaningful involvement in environmental decision making¹⁴⁷ – are evident in the policy platform for a Victorian Environmental Justice Plan comprising rights to information, knowledge and enforcement of law.¹⁴⁸

The ‘global realities of the movement’¹⁴⁹ are that environmental justice is a notion unfixed in place and concept. It has been contextualised and grounded, and undergone processes of ‘tailoring and fitting’¹⁵⁰ wherever it has been expressed, and certainly not reproduced or replicated.¹⁵¹ The lesson for the Victorian government is to allow itself the leeway to tailor environmental justice for contemporary Victorians by listening to them. In the 1990s in the UK, the Friends of the Earth¹⁵² conducted an analysis of national income and pollution exposure, spawning a series of government reports.¹⁵³ Rapidly, however, the subject of the

Extraction and Rights Violations in Nigeria’ (2010) 1 *Journal of Human Rights and the Environment* 189; Julian Agyeman and JoAnn Carmin, ‘Introduction: Environmental Justice beyond Borders’ in JoAnn Carmin and Julian Agyeman (eds), *Environmental Inequalities Beyond Borders: Local Perspectives on Global Injustices* (2011, MIT Press) 1; Kate O’Neill, ‘Out of the Backyard: The Problems of Hazardous Waste Management at a Global Level’ (1998) 7 *Journal of Environment and Development* 138; Dara O’Rourke and Sarah Connolly, ‘Just Oil? The Distribution of Environmental and Social Impacts of Oil Production and Consumption’ (2003) 28 *Annual Review of Environment and Resources* 587.

¹³⁶ Agyeman and Carmin, above n 135.

¹³⁷ Anna R Davies, ‘Environmental Justice as Subtext or Omission: Examining Discourses of Anti-Incineration Campaigning in Ireland’ (2006) 37 *Geoforum* 708, 709.

¹³⁸ Walker, above n 88, 370 writes of the concept being expanded ‘vertically’.

¹³⁹ Watson and Bulkeley, above n 134, 412.

¹⁴⁰ Brad Jessup, ‘Environmental Justice as Spatial and Scalar Justice: A Regional Waste Facility or a Local Rubbish Dump Out of Place?’ (2013) 9 *McGill International Journal of Sustainable Development Law and Policy* 69 recalls and positions within an environmental justice frame the case of *Hub Action Group v Minister for Planning* (2008) 161 *LGGERA* 136. In that case Preston CJ applied the principle of intergenerational equity.

¹⁴¹ Alan Ramo, ‘Book Review: *The Promise and Peril of Environmental Justice* by Christopher H Foreman, Jr, Brookings Institution Press 1998’ (2000) 40 *Santa Clara Law Review* 941, 955. Ramo makes this claim in response to accusations that the US environmental justice movement has not had any impact.

¹⁴² Carruthers, above n 58, 400 urged ‘attention on the forms of environmental justice emerging organically’.

¹⁴³ Jonas Ebbesson, ‘Introduction: Dimensions of Justice in Environmental Law’ in Jonas Ebbesson and Phoebe Okowa (eds), *Environmental Law and Justice in Context* (2009) 5.

¹⁴⁴ *Ibid* 6.

¹⁴⁵ Jonas Ebbesson, ‘Environmental Justice through the Aarhus Convention’ (Speech delivered at the Environmental Rights in Europe and Beyond Conference, Lund University, 21 April 2016).

¹⁴⁶ Carol Hatton, Pamela Castle and Martyn Day, ‘The Environment and the Law – Does Our Legal System Deliver Access to Justice?: A Review’ (2004) 6 *Environmental Law Review* 240.

¹⁴⁷ Victoria Lambropoulos, ‘What Can Australia Learn from the Europeans About Public Participation? Article 6 of the Aarhus Convention and Environmental Impact Statements’ (2010) 27(4) *Environmental and Planning Law Journal* 272.

¹⁴⁸ Australian Labor Party Victorian Branch, above n 3.

¹⁴⁹ Julie Sze and Jonathan K London, ‘Environmental Justice at the Crossroads’ (2008) 2 *Sociology Compass* 1341.

¹⁵⁰ Walker, above n 88, 360.

¹⁵¹ *Ibid* 363, 369–70.

¹⁵² *Ibid* 366.

¹⁵³ Ole W Pedersen, ‘Environmental Justice in the UK: Uncertainty, Ambiguity and the Law’ (2011) 31 *Legal Studies* 279, 285, nn 32–33. Harriet Bulkeley and Gordon Walker, ‘Environmental Justice: A New Agenda for the UK’ (2005) 10 *Local*

inquiry developed a local nuance – with inquiries very much localised – on green spaces, local traffic and play parks – and contextualised – concerning flooding, gene technology, and the countryside and village life. The subjects represented different historical and contextual triggers and interests of environmental justice movements.¹⁵⁴

There has been a reluctance to use the term ‘environmental justice’ in the early phases of its ‘horizontal expansion’,¹⁵⁵ as was the case in Victoria when the EPA first released an Environmental Citizenship Strategy.¹⁵⁶ The Victorian government developed this policy in place of the environmental justice strategy it had been urged to adopt.¹⁵⁷ However, the reluctance abates when it is realised that the concept is not limited to the conventionally understood history of the term but that it has continually evolved and diffused¹⁵⁸ wherever it has been transposed.

Development geographers have also recorded and analysed the struggles of communities in the majority world for decades, particularly reaching prominence in the 1980s and 1990s through the work of scholars including Shiva¹⁵⁹ and Escobar.¹⁶⁰ The different basis for the struggles – development and livelihood as opposed to equality and toxicity – mask what are essentially comparable concerns about redressing inequity and altering dominant power arrangements.¹⁶¹ ‘Indigenous mobilisation’,¹⁶² rather than policy or literature, has been instrumental in spreading environmental justice within networks and across borders. The advent of the *United Nations Declaration on the Rights of Indigenous Peoples*¹⁶³ has triggered a discourse of human rights and environmental justice as capacity building.¹⁶⁴ As a jurisdiction with a human rights charter,¹⁶⁵ the function of rights beyond participation rights and access to justice to realise environmental justice seems underexplored in Victoria and not acknowledged in the government’s plans.¹⁶⁶ This is despite the provisional attempts to situate justice ideals within the mission of the Victorian EPA by drawing connections between rights and citizenship responsibilities.¹⁶⁷

The Australian experience includes trajectories drawn from these experiences – the anti-toxics movement of the US,¹⁶⁸ the concern for rural life similar to the UK,¹⁶⁹ and the concern for the environment as resilient.¹⁷⁰

Environment: The International Journal of Justice and Sustainability 329, 330 also note the role of the Environmental Agency, which embedded environmental justice within government policy in the decade from 1995, when it was established.

¹⁵⁴ Sze and London, above n 149, 1342.

¹⁵⁵ Walker, above n 88, 375 especially recalls this as being the case in South Africa.

¹⁵⁶ EPA Victoria, *EPA Environmental Citizenship Strategy* (2013).

¹⁵⁷ Krpan, above n 4; EPA Inquiry Ministerial Advisory Committee, above n 30.

¹⁵⁸ Walker, above n 88, 365.

¹⁵⁹ Vandana Shiva, *Ecology and the Politics of Survival: Conflicts Over Natural Resources in India* (Sage, 1991).

¹⁶⁰ Arturo Escobar, *Encountering Development: The Making and Unmaking of the Third World* (Princeton University Press, 1995).

¹⁶¹ Laura Pulido, *Environmentalism and Economic Justice: Two Chicano Struggles in the Southwest* (University of Arizona Press, 1996), xv.

¹⁶² David Schlosberg and David Carruthers, ‘Indigenous Struggles, Environmental Justice, and Community Capabilities’ (2010) 10 *Global Environmental Politics* 12, 19.

¹⁶³ GA Res 61/295, UN Gaor, 61st sess, 107th plen mtg, Supp 49, UN Doc A/RES/61/295 (13 September 2007)

¹⁶⁴ Ibid; Bridget Lewis, ‘Human Rights and Environmental Wrongs: Achieving Environmental Justice Through Human Rights Law’ (2012) 1 *International Journal for Crime and Justice* 65; Schlosberg, above n 78, includes capacity building as a component of environmental justice.

¹⁶⁵ *Charter of Human Rights and Responsibilities Act 2006* (Vic).

¹⁶⁶ Australian Labor Party Victorian Branch, above n 3. Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (Victorian Government Printer, 2015) dismissed calls to include a right to environmental health or protection in the Charter.

¹⁶⁷ EPA Victoria, above n 156, 13.

¹⁶⁸ Alviano and Mercer, above n 99.

¹⁶⁹ Masterman-Smith *et al.* above n 81.

¹⁷⁰ Low and Gleeson, above n 68.

VIII TOWARDS CONTEMPORARY UNDERSTANDINGS OF ENVIRONMENTAL JUSTICE

A *Political Justice as a Core Priority*

Irrespective of the local experience of the environmental justice concept, diverse communities across the globe have shared a process of battling decisions and impacts affecting them. Less politically and socially powerful groups¹⁷¹ have engaged in resistance, networked, and demanded enforcement action and inclusion in decision-making.¹⁷² They used their voices and deployed a localised, if not uniform, vocabulary of dissent. In Victoria, this can be seen in the battles led by community groups to the west of Melbourne – in Tullamarine against the expansion of a local landfill because the receiving community had endured its share of burden for the benefit of the state,¹⁷³ in Footscray in response to industrial fires – where the claims were of being targeted and ‘sacrificed’,¹⁷⁴ and in Werribee, where the community rallied against a proposal for a ‘toxic waste dump’ on the basis that it was being denied a chance to articulate and be heard on its opposition to the project.¹⁷⁵ The response of the community in Morwell was equally localised and directed towards self-support,¹⁷⁶ and – through the production and publication of series of health data¹⁷⁷ – designed to influence the presentation and treatment of the mine fire as a human welfare tragedy.¹⁷⁸

In the sense that justice is not simply an outcome but overwhelmingly a battle and a process, it reflects the claim by Schlosberg that ‘for all of the focus on the reality of ... inequities, environmental justice was never *only* about such maldistributions’.¹⁷⁹ Hence, since the 1990s there has been an acknowledgement that political disempowerment, not simply distributional inequity, needs redress.¹⁸⁰ There has been a realisation that environmental problems confronting communities are not always distributive in nature.¹⁸¹ The title of Shrader-Frechette’s 2002 book *Environmental Justice: Creating Equity, Reclaiming Democracy*¹⁸² bears the truth of this shift. The achievement of distributive justice cannot be separated from participatory justice.¹⁸³ That is clearly the lesson from the Hazelwood coal mine fire incident. The Morwell community will not be able to achieve the transition from a site of unequally distributed harm to a community with equal access to environmental health until it has the capacity and power to shape its destiny.¹⁸⁴ Environmental injustices are instances of not being asked, not being considered, not being recognised and hence not having an equality of opportunity¹⁸⁵ to contribute to decisions that affect livelihoods and wellbeing. The experience of Brookland Greens also tells us that this equality can be denied through processes that do not explicitly engage with the

¹⁷¹ Julie Sze, *Noxious New York: The Racial Politics of Urban Health and Environmental Justice* (MIT Press, 2007) 1.

¹⁷² Bullard (ed), *The Quest for Environmental Justice*, above n 42, 36.

¹⁷³ Environment Defenders Office (Vic), above n 29, 15–6.

¹⁷⁴ Hartland, ‘The Coode Island Disaster’, above n 105; Colleen Hartland, ‘Panel Discussion: Why Does Environmental Justice Matter’ (Presented at the Environmental Justice Symposium, Melbourne Law School, 27 July 2012).

¹⁷⁵ Strangio, above n 96, 45.

¹⁷⁶ Whyte, above n 23.

¹⁷⁷ Voices of the Valley, *Community Health Reports* (2014) <http://www.votv.org.au/community_health_reports>; Voices of the Valley, *About Voices of the Valley Inc* <<http://www.votv.org.au/about>>.

¹⁷⁸ Voices of the Valley, *So What Happened* (2014) <http://www.votv.org.au/what_happened> explains that [*sic*]: ‘We (VotV et.al.) have had to prove deaths (mortality) before the Health Department would officially acknowledge the existence of health problems (morbidity). Basically we had to prove their were deaths before they could begin to acknowledge the problem and treat the sick.’

¹⁷⁹ David Schlosberg, ‘Theorising Environmental Justice: The Expanding Sphere of a Discourse’ (2013) 22 *Environmental Politics* 37, 38.

¹⁸⁰ Luke W Cole, ‘Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law’ (1992) 19 *Ecology Law Quarterly* 619 argues that environmental justice attention has drifted away from distribution exclusively, and has become more focussed on experience and involvement with land use and environmental policies: at 622. See especially the work of Shrader-Frechette, above n 35. Shrader-Frechette sees distributive and participatory justice as interconnected. Beyond the environmental realm, Lane notes that within the legal system, there was by the 1980s a noticeable concern about procedural treatment and not simply just outcomes; Robert E Lane, ‘Procedural Goods in a Democracy: How One is Treated Versus What One Gets’ (1988) 2 *Social Justice Research* 177.

¹⁸¹ Bernice Bovenkerk, ‘Is Smog Democratic?: Environmental Justice in the Risk Society’ (2003) 29 *Melbourne Journal of Politics* 24.

¹⁸² Shrader-Frechette, above n 35.

¹⁸³ *Ibid* 24–5.

¹⁸⁴ Voices of the Valley, Submission No 65 to the Economic, Education, Jobs and Skills Committee, *Victorian Parliamentary Inquiry on Community Energy* (29 September 2016). The community group argued that community ownership of power would aid the transition to a healthy region.

¹⁸⁵ Shrader-Frechette, above n 35.

community – for instance when reports of potential harm provided to regulators are ignored or dismissed and not shared with community stakeholders.¹⁸⁶ Thus, environmental justice requires ‘structural changes in social, economic and political systems that effect distribution of environmental inequalities’,¹⁸⁷ and that lead to communities being noticed.¹⁸⁸ So when asked by representatives of the Victorian government, who should draft an Environmental Justice Plan, my answer was – find a community to write it.

Kaswan refers to ‘political justice’,¹⁸⁹ a more expansive concept, combining ideas of participation and ‘recognition’. The latter is a facet of justice that has occupied the recent attention of scholars.¹⁹⁰ For Schlosberg,¹⁹¹ recognition is removing oppression or displacing dominant perspectives and politics, validating identity and interests, acknowledging and prioritising experiences and subjective knowledge, and offering dignity and respect. Generally this means environmental justice should precipitate institutional or legal change, for instance in the Brookland Greens Estate saga: to create circumstances where community concerns about landfill leachate are treated with seriousness and regulators take a robust view of their role as defenders of the public interest.¹⁹² The experience of the residents of Morwell throughout the mine fire was that regulators did not respond suitably and quickly to their concerns and there was an absence of information and acknowledgement about the adverse health impacts of the fire. The inquiry into the fire and the government response also found that the health assessment conducted of the fire did not have regard to the heightened vulnerability of the community.¹⁹³ There was a lack of recognition of interests, concerns and vulnerabilities.

B *Justice and Sustainability*

‘Fairness, equity and sustainability’¹⁹⁴ connect the concepts and discourses of global justice and sustainable development within international law. Whereas early environmental justice scholarship sought to emphasise its difference from mainstream environmentalism,¹⁹⁵ more recent work has attempted to connect sustainable development, a mainstream environmental concept, with environmental justice.¹⁹⁶ Avoiding environmental injustice and developing sustainably is about rejecting environmental burdens and insisting on community benefits.¹⁹⁷ Together the concepts question the ongoing existence of harmful activities, the distribution of harm, the politics of decision-making and the inequity in power in those processes.¹⁹⁸ Summarised this way, there is an obvious crossover with the international environmental law concerns from the Rio Declaration and more recently in the draft Global Pact for the Environment,¹⁹⁹ and consensus attempts to articulate a transnational mission for environmental justice.²⁰⁰

Both concepts also question the existence of polluting activities – one largely across time and the other across space. They invite questions on whether fossil fuel extraction and landfills are inherently unjust land uses: because such uses simultaneously produce localised harms, foisted upon typically vulnerable or less

¹⁸⁶ Ombudsman (Vic), above n 6, 23-5 [109]-[118], 258-9 [1433]-[1442].

¹⁸⁷ Jonathan K London, Julie Sze and Raoul S Liévanos, ‘Problems, Promise, Progress, and Perils: Critical Reflections on Environmental Justice Policy Implementation in California’ (2008) 26 *UCLA Journal of Environmental Law and Policy* 258.

¹⁸⁸ David Pellow and Robert J Brulle (eds), *Power, Justice and the Environment: A Critical Appraisal of the Environmental Justice Movement* (MIT Press, 2005).

¹⁸⁹ Kaswan, above n 51, 239 she notes that ‘if a community consistently fails to be treated with equal concern and respect, then an unequal distribution of burdens can be expected, particularly over time’.

¹⁹⁰ Jessup, ‘Justice Recognition and Environmental Law’, above n 131.

¹⁹¹ Schlosberg, *Defining Environmental Justice*, above n 77, 59–64, 87.

¹⁹² Ombudsman (Vic), above n 6, notes the EPA ‘capitulation’ to demands on the landfill applicant for a works approval: at 14 [39], and the landfill operators not addressing often repeated concerns about the performance of the landfill: at 15 [51].

¹⁹³ Teague, Catford and Roper, above n 7, 23–4 Executive Summary. Community disgruntlement with the inquiry’s treatment of health evidence prompted the subsequent Hazelwood Health Study, above n 24.

¹⁹⁴ Duncan French, ‘Sustainable Development and the Instinctive Imperative of Justice in the Global Order’ in Duncan French (ed), *Global Justice and Sustainable Development* (Martinus Nijhoff, 2010) 3.

¹⁹⁵ Faber, above n 47.

¹⁹⁶ Emily Fisher, ‘Sustainable Development and Environmental Justice: Same Planet, Different Worlds?’ (2003) 26 *Environ* 201.

¹⁹⁷ *Ibid* 202.

¹⁹⁸ *Ibid* 207.

¹⁹⁹ *Rio Declaration on Environment and Development*, UN Doc A/CONF.151/26 vol I (14 June 1992) (‘*Rio Declaration*’).

²⁰⁰ The first National People of Color Environmental Leadership Summit’s principles of environmental justice, in Low and Gleeson, above n 123.

powerful communities through the use of Ministerial discretion,²⁰¹ while also entrenching unsustainable practices and generating long-term or irreversible environmental damage. Combined they question, for instance, not simply the inequity of the harms produced by the fire at the Hazelwood coal mine but the value in continuing to operate the mine because of its long term socio-economic and environmental cost.²⁰² They bring into question patterns and levels of consumption and waste and resource use, and, in the context of the Brookland Greens Estate case, ongoing urban sprawl and encroachment.²⁰³

C *New Boundaries and Geographies of Environmental Justice*

There has been an expanding of environmental justice domains²⁰⁴ and a consolidation during the process of transnationalism.²⁰⁵ Over time the discourse and understanding of environmental justice has broadened.²⁰⁶ The discursive and legal setting now involves disadvantaged communities and developing nations,²⁰⁷ indigenous peoples,²⁰⁸ anti-imperialists,²⁰⁹ environmentalists pursuing ecological conservation (and ‘nature’ itself),²¹⁰ and environmental democrats of varying financial standing and class who are affected or concerned by opaque and arbitrary environmental decision-making.²¹¹ Environmental justice analyses now address age, disability and gender.²¹² Here the linkages with international human rights law are also plain.

Sze and London note that contemporary environmental justice is a form of ‘subaltern environmentalism’, with the key characteristic of each environmental justice community being outside the dominant power structure.²¹³ Environmental justice also now has conceptual peers in climate justice²¹⁴ and food justice,²¹⁵ two of the planetary and social boundaries for justice.²¹⁶ Meanwhile the intersections between consumption and justice have begun to be explored, especially as a way to bridge concepts of environmental and ecological justice.²¹⁷

Climate justice is representative of the multi-facets now emerging in environmental justice more broadly. The Bali Principles, negotiated between grassroots, mainstream and development environmental groups, connect justice with consumption, grapple with disproportionate impacts and economics, and seek to valorise voices and knowledges of local people, and especially indigenous people.²¹⁸ Climate justice has

²⁰¹ Consider for instance the Anvil Hill coal mine and the Orange Waste Project: both projects approved by the New South Wales government after and notwithstanding successful community challenges to the projects in the New South Wales Land and Environment Court: *Gray v Minister for Planning* [2006] NSWLEC 720 (27 November 2016); *Hub Action Group Inc v Minister for Planning* [2008] NSWLEC 116 (17 March 2008).

²⁰² Jordan Ward and Mick Power, *Cleaning up Victoria's Power Sector: The Full Social Cost of Hazelwood Power Station* (Harvard Kennedy School of Government, 2015).

²⁰³ Julian Agyeman, *Introducing Just Sustainability's: Policy, Planning, and Practice* (Zed Books, 2013); Gill Seyfang and Jouni Paavola, ‘Inequality and Sustainable Consumption: Bridging the Gaps’ (2008) 13(8) *Local Environment: The International Journal of Justice and Sustainability* 669; Ombudsman (Vic), above n 6, 167-70.

²⁰⁴ Sze and London, above n 149.

²⁰⁵ Faber, above n 47, ch 5. Faber sees environmental justice as incorporating concerns of movements centred on occupational health, native land rights, environmental health, anti-waste and toxics trade, social justice and community empowerment and migrant rights.

²⁰⁶ This was noted in 1998 by Low and Gleeson, above n 123.

²⁰⁷ Second National People of Color Environmental Leadership Summit, above n 35.

²⁰⁸ Schlosberg and Carruthers, above n 162.

²⁰⁹ Faber, above n 47, 243.

²¹⁰ Low and Gleeson, above n 123, 101.

²¹¹ Michael Mason, *Environmental Democracy* (Earthscan, 1999). See also Agyeman, above n 203.

²¹² Gordon Walker, ‘Beyond Distribution and Proximity: Exploring the Multiple Spatialities of Environmental Justice’ in Ryan Holifield, Michael Porter and Gordon Walker (eds), *Spaces of Environmental Justice* (Wiley-Blackwell, 2010) 24, 27. Sze and London, above n 149, 1337 also refer to ‘disempowered populations’.

²¹³ Sze and London, above n 149, 1335.

²¹⁴ The Environmental Justice Climate Change Initiative was founded during COP6 in 2014 when a climate justice summit was held alongside formal proceedings, see *Website* (2017) <<http://ejcc.org/>>; J Timmons Roberts and Bradley C Parks, *A Climate of Injustice: Global Inequality, North-South Politics, and Climate Policy* (MIT Press, 2007) 133, note that a high point for the discourse of climate justice internationally was the staging of a climate justice rally in New Delhi, October 2002 during COP8, when climate change and human rights were a key agenda item.

²¹⁵ Thanks to Angela Harris for enforcing this point. See selectively Helen Kang, ‘Recognizing the Link Among Climate Change, Food, and Poverty’ (2012) 46 *Clearinghouse Review: Journal of Poverty Law and Policy* 289; Julie Guthman, ‘Doing Justice to Bodies?: Reflections on Food Justice, Race, and Biology’ (2012) 46 *Antipode* 1153; Robert Gottlieb and Anupama Joshi, *Food Justice* (MIT Press, 2010).

²¹⁶ Agyeman, above n 203, 51–5.

²¹⁷ O'Rourke and Connolly, above n 135, 590; Lucie Middlemiss, ‘Reframing Individual Responsibility for Sustainable Consumption: Lessons from Environmental Justice and Ecological Citizenship’ (2010) 19 *Environmental Values* 147.

²¹⁸ International Climate Justice Network, *Bali Principles of Climate Justice* (29 August 2002) <<http://www.ejnet.org/ej/bali.pdf>>.

rapidly moved beyond the distributive frame – to challenge the participatory justice of climate negotiations – between powerful and less powerful nations, between sanctioned NGOs and non-sanctioned. Between the ‘outsiders’ and ‘insiders’.²¹⁹

The battles over the Californian *Global Warming Solutions Act of 2006* (‘AB 32’)²²⁰ highlight the fluidity and relevance of environmental justice concepts to climate change at a domestic level with lessons for Victoria as it approaches the task of transitioning the Latrobe Valley away from coal based industry, following the closure of the Hazelwood mine and plant.²²¹

Before the late 1990s, environmental justice was routinely measured in ‘distributional and statistical’²²² terms. It is the absence of this mapping that led some Australian scholars to question the presence of robust environmental justice scholarship in Australia.²²³ Though, as Walker notes, these earliest conceptions of environmental justice dealt with ‘space ... conceived in flat Cartesian terms – straight line proximity, or coincidence of site grid references within census boundaries’.²²⁴ However, when environmental justice is understood as being political,²²⁵ integrated with sustainability and with blurry edges, the earlier spatial-harm connections must be reconsidered and recast. Fairness claims become more complex and contextualised, combining elements of distribution, participation and recognition, and with communities being more clearly appreciated for their common features but also their difference.²²⁶ What is necessary is to interpret justice goals relevant to the locale and the type of disadvantage or vulnerability of the community and environment, to situate justice in the ecological characteristics of the space, its history and its human utility.²²⁷

Mapping harms across the land use planning system becomes deficient, an environmental justice plan attached to the planning system incomplete. Hence the Victorian agenda for a whole of government plan drafted out of the Premier’s office is capable of capturing wider causes of injustice. Inequality might arise from, or be exacerbated by, a plurality²²⁸ of social or political factors.²²⁹ It might arise from the absence of spaces, or the lack of recognition or spaces, as was the oppositional narrative centred on the decisions of the Victorian EPA about its locating of air pollution monitoring stations, and the demarcating of the township of Morwell and the creation of a new place – Morwell South, throughout the Hazelwood coal mine fire management and monitoring processes.²³⁰

A focus on space invites a consideration of the local,²³¹ the temporal and relational.²³² It also draws in questions of scale.²³³ It is the tension points between scales,²³⁴ particularly the tension between the scale of

²¹⁹ Beth Schaefer Caniglia, ‘Global Environmental Governance and Pathways for the Achievement of Environmental Justice’ in Carmin and Agyeman (eds), above n 135, 139.

²²⁰ A battle that was litigated in the Superior Court of California. See *Association of Irrigated Residents v California Air Resources Board* (Cal Super Ct, No CPF-09-509562, 17 March 2011) (‘*Association of Irrigated Residents 2011*’); *Association of Irrigated Residents v California Air Resources Board*, 206 Cal App 4th 1487 (2012) (as appealed).

²²¹ State Government of Victoria, *Latrobe Valley Authority* <<http://lva.vic.gov.au/>>. The reviewers of the *Climate Change Act 2010* (Vic) recommended the reformed Act guarantee access to environmental justice. See Martijn Wilder, Rosemary Lyster and Anna Skarbek, *Independent Review of the Climate Change Act 2010* (Victorian Government, 2015) 23. The resulting *Climate Change Act 2017* (Vic) did not adopt this recommendation but included ‘equity’ as a guiding principle for decisions under the Act, and supporting ‘vulnerable communities and promot[ing] social justice and intergenerational equity’ as a policy objective: at ss 22(e), 26.

²²² Walker, above n 212. See also David Harvey, *Social Justice and the City* (University of Georgia Press, revised ed, 2009) who adopts the work of philosopher Henri Lefebvre on constructed spaces. Harvey defines ‘territorial social justice’ having regard principally to matters of distribution: at 116.

²²³ Chakraborty and Green, above n 90; Masterman-Smith et al, above n 81.

²²⁴ Walker, above n 212, 28. See also Mariana Valverde, ‘Jurisdiction and Scale: Legal “Technicalities” as Resources for Theory’ (2009) 18 *Social & Legal Studies* 139. Valverde notes that the earlier attempts to link law and scale were linked through mapping exercises or by matching scales with jurisdictions. Her own work challenges fixed views of space and scale.

²²⁵ Alice Kaswan, ‘Distributive Justice and the Environment’ (2003) 81 *North Carolina Law Review* 1031 sets out in depth ideas Kaswan raised in her earlier scholarship.

²²⁶ Walker, above n 212.

²²⁷ Hillman, above n 130.

²²⁸ Walker, above n 212, 26 identifies ‘multiple forms of spatiality’.

²²⁹ Hilda Kurtz, ‘Scale Frames and Counter-Scale Frames: Constructing the Problem of Environmental Injustice’ (2003) 22 *Political Geography* 887, 889.

²³⁰ Victorian Council of Social Service, above n 26, 17.

²³¹ Bovenkerk, above n 181.

²³² Braverman et al, ‘The Expanding Spaces of Law: A Timely Legal Geography [Introduction]’ (2013) *Buffalo Legal Studies Research Paper Series No 2013-032* 19, 24.

²³³ Andreas Philippopoulos-Mihalopoulos, ‘Spatial Justice: Law and the Geography of Withdrawal’ (2010) 6 *International Journal of Law in Context* 201, 206; Jessup, above n 140.

²³⁴ Robert W Williams, ‘Environmental Injustice in America and its Politics of Scale’ (1999) 18 *Political Geography* 49, 52, 66.

the problem and its determined solution that entrenches the struggle and invites an environmental justice critique.²³⁵ From a legal viewpoint, injustices are perceived in the failure of the law to address concerns at the community's scale of interest.²³⁶ In the Brookland Greens Estate case this was pronounced with local environmental compliance officers confessing themselves powerless to get the regional regulatory management team to act in the best interests of the local Cranbourne community, and to respond to the concerns of local on-the-ground environmental officers.²³⁷

IX CONCLUDING REMARKS: ENVIRONMENTAL JUSTICE FOR VICTORIA

The historical pathways of environmental justice are plural; not simply from the US or abroad. Environmental justice has not only been defined from outside of Australia. There are ample historical examples in Australia where potentially harmful industrial facilities or activities²³⁸ have roused organised community opposition²³⁸ or have been involuntarily located on land where the only people most obviously likely to suffer from environmental damage were Aboriginal Australians.²³⁹ Australia, and as mentioned throughout this article, incidents in Victoria – at Tullamarine, Footscray, Werribee, Cranbourne and Morwell – are part of the plural origins and contemporary transitions and translocations of environmental justice. Those incidents, perhaps more so than 'international best practice', represent an appropriate starting point for a Victorian Environmental Justice Plan. Collectively these justice milestones demonstrate a need to tackle inequitable historical distributions of environmental harm, to empower vulnerable communities to direct their futures, to respond to community concerns respectfully, recognising the value of their lived experience, and to build within communities a capacity to endure and flourish. Australian led and empirically grounded research demonstrates the breadth of application and the complex understandings of environmental justice for Australia.²⁴⁰ There is also a need to address the concerns raised during the Australian experience of environmental justice – captured, for instance, in the McPhillips book, which recorded the stories of Australian people 'motivated to change what was clearly wrong',²⁴¹ people from working class areas who became grassroots environmental activists with 'a steadfast belief that good can triumph'²⁴² 'because they witnessed a travesty of justice':²⁴³ an injustice perceived to have been brought about through the environmental harm wrought by industry and the unwillingness of governments to respond, to listen or to demonstrate care. The community of the Brookland Greens Estate, for instance, was, for instance, that had its interests ignored by the landfill operator and disrespected by the environmental regulator.

These are themes that have more recently been repeated following the Hazelwood coal mine fire, though without ready deployment by the community of the vocabulary of 'environmental justice'.²⁴⁴ That was an incident that invites a critical and geographical perspective of environmental justice, and to direct the future shape of environmental justice as it collides with the notion of sustainable development. It brings in the discourse of climate justice and presents the temporal, locational and scalar dimensions of disadvantage exposed communities face. As the Victorian government moves to develop its state plan on environmental justice, it will unquestionably be judged by how the plan will protect communities from enduring the same experiences as the residents of Morwell.

²³⁵ Ibid 56.

²³⁶ Ibid 59.

²³⁷ Ombudsman (Vic), above 6, 136.

²³⁸ See, eg, McPhillips, above n 95.

²³⁹ For example nuclear testing at Maralinga in the 1950s and 1960s, and early uranium mining. See Joe Lockard, 'Desert(ed) Geographies: Cartographies of Nuclear Testing' (2000) 6 *Landscape Review* 3; Low and Gleeson, above n 89.

²⁴⁰ See footnotes 128–32.

²⁴¹ McPhillips, above n 95, ii.

²⁴² Lynette Thorstensen, 'Preface' in Kathleen McPhillips (ed), *Local Heroes: Australian Crusades from the Environmental Frontline* (Pluto Press, 2002) ix.

²⁴³ McPhillips, above n 95, xii.

²⁴⁴ Melanie Birkbeck and Lauren Rickards, *A Tale of Two Power Stations: Comparing Australian and European Approaches to Regulation of the Impacts of Coal on Health* (Environmental Justice Australia, 2015); Voices of the Valley, *LaTrobe Valley Health Zone* <<http://www.votv.org.au>>.