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Michelle Maloney · Michael Davis

Declaration of Peace for Indigenous Australians and Nature

A Legal Pluralist Approach to First Laws
and Earth Laws

 Springer

Declaration of Peace for Indigenous Australians and Nature



Carved Law stick by Dr Tyson Yunkaporta.

'The stick tells the story of the Ouroboros (Serpent) on it, wrapped around the three-dimensional knob of the stick. The image is etched deep in the wood, with the tail not quite touching the mouth of the Serpent. Dingo and moon story of endless cycles of time is also carved alongside it. The stick is then rolled around the perimeter of a massive circle of clay, producing an image in relief of an endless line of creation serpents. Instead of an entropic enclosure under the second law of thermodynamics, this creates a closed loop of limitlessly regenerative energy and matter, shifting time into the first law of thermodynamics rather than the second'

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Foreword

The latest report from the Intergovernmental Panel on Climate Change predicts grave consequences for human and non-human communities if dominant, Western societies do not change their relationships with the Earth.¹ The latest report by the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services predicts that more than one million species are imminently threatened with extinction.² This is 1000 times the background rate (if humans did not exist) and is predicted to rise to 10,000 times the background rate with current population growth, overconsumption and climate change.³ According to the International Union for the Conservation of Nature, 41% of amphibian, 26% of mammal, 21% of reptile and 13% of bird species face extinction unless we reduce the human footprint upon the planet.⁴ Experts warn that climate change exacerbates already grave human threats to biodiversity by raising temperatures, acidifying oceans, altering precipitation regimes, mistiming synchrony between plants and pollinators, thus rendering protected biodiversity no longer habitable, but leaving few places to which flora and fauna can migrate.⁵ In other words, in many places, particularly in wealthy redoubts, humans have developed a deeply unhealthy relationship with the planet on which we depend.

¹ Intergovernmental Panel on Climate Change (IPCC), AR6 CLIMATE CHANGE 2021: THE PHYSICAL SCIENCE BASIS (2021), available at <https://www.ipcc.ch/report/ar6/wg1/>.

² IPBES, Media Release: Nature's Dangerous Decline 'Unprecedented'; Species Extinction Rates 'Accelerating.' Available at <https://ipbes.net/news/Media-Release-Global-Assessment>.

³ Jurriaan M. De Vos et al., Estimating the Background Rate of Species Extinction. 29(2)CONS. BIO. 452 (2014). Available at <https://doi.org/10.1111/cobi.12380>.

⁴ See <https://www.iucnredlist.org>.

⁵ IPBES & IPCC, Biodiversity and Climate Change Workshop Report 15, 30. 2021. https://ipbes.net/sites/default/files/2021-06/20210609_workshop_report_embargo_3pm_CEST_10_june_0.pdf.

More than 10% of Australia's Land mammals have gone extinct since the 1850s.⁶ In the 20 years between 2001 and 2021, Australia's tree cover decreased by 21%, emitting over 2 gigatons of carbon, which will further exacerbate global heating, and which will further destroy the nation's forests.⁷ In 2019–2020, Australia was the world's leading exporter of metallurgical coal and the second largest exporter of thermal coal,⁸ thus aggravating the planet's heating to levels that threaten continued life in the nation and elsewhere on Earth.

As the authors of this 'think tank of ideas' from Australia understand, it is not an accident that the savagery of how the dominant class has treated the planet is mirrored by the savagery of how that class has treated Aboriginal peoples. The ideology of domination links abuse of humans and of planet. Thus in this volume, Aboriginal and allied Australian thinkers convene to offer saner lifeways for planetary health. They offer rich testimonies that evoke what it means to see oneself as embedded in the landscape, to see one's life in relationship with the planet that sustains all life, including one's own.

Hegemonic legal thinking, as instantiated in Australia, has subjugated, and continues to subjugate Aboriginal peoples, while also subjugating the planet. Law itself needs healing if culture and nature, and nature-culture is to endure. As part of a program of reparations for the savagery the dominant culture has evinced, the authors assert that law must be decolonised. As Donna Bagnall expresses it below, they seek to 'Remedy the Australian Western law as it is sick and in decay'. The authors advocate for legal pluralism, for healing the dominant culture's law by infiltrating and intertwining that law with the autochthonous lore of the Land that has been the law of Aboriginal culture for tens of thousands of years.

This volume richly evokes what it means to live in an inextricable relationship with the Land. As Mary Graham notes, 'I am located, therefore I am'. Or, as Anne Poelina introduces herself in her story 'I am a Nyikina Woman who belongs to the Mardoowarra Fitzroy River'. When colonisers dispossessed people of their Lands, they also dispossessed them from their cultures, from their selves. Aboriginal law starts with First Law, asking people to adopt lifeways to the laws of nature, rather than hubristically thinking nature will respond to our legal prescriptions for it.

In *Dark Emu*, a bestselling volume that has evoked a paradigm shift in the way many Australians think about Aboriginal society, Bruce Pascoe writes that 'Human survival on a healthy planet is not a soft liberal pipe dream; it is sound global management and the deepest of religious impulses'.⁹ The authors here look to co-design legal pluralism in Australia (and, by extension, elsewhere), where, as part of a decolonisation project, the Australian government incorporates Aboriginal law, founded in

⁶ Adam Morton, Australia Confirms Extinction of 13 More Species, Including First Reptile Since Colonisation. *Guardian* 3 March 2021, available at <https://www.theguardian.com/science/2021/mar/03/australia-confirms-extinction-of-13-more-species-including-first-reptile-since-colonisation>.

⁷ See <https://www.globalforestwatch.org/dashboards/country/AUS/>.

⁸ Australian Government, Coal: <https://www.ga.gov.au/digital-publication/aecr2021/coal>.

⁹ Pascoe, B. (2018). *Dark Emu: Aboriginal Australia and the birth of agriculture*. Magabala Books (p. 226).

co-management of Land according to Aboriginal principles of human/non-human co-relationship. The authors would reform the law to honour Aboriginal notions of interdependence by giving local communities authority to work with Lands according to their lore/law. Legal pluralism—particularly around alternate conceptions of nature to be instantiated in the law—is part of response and redress to colonial savagery.

This project has analysed some very tentative, tender buds in the nation. For example, it has looked at some recent groundbreaking developments in Western law that recognise Aboriginal connections with environments and ecologies. One such development is Victoria's *Yarra River Protection (Wilip-gin Birrarung murrong) Act* 2017, which recognises the Yarra as 'one living, natural entity'.¹⁰ The Act's Aboriginal title means 'keep the Birrarung alive'.¹¹ It is Australia's first piece of English/Aboriginal language legislation, and puts the relationship of Aboriginal peoples to the River at the centre of the Act. Wilip-gin Birrarung murrong begins with Wurundjeri text, part of which reads, in translation: 'The Birrarung is alive, has a heart, a spirit and is part of our Dreaming. We have lived with and known the Birrarung since the beginning. We will always know the Birrarung ... Since our beginning it has been known that we have an obligation to keep the Birrarung alive and healthy—for all generations to come'.¹² The Act notes the 'role of the traditional owners as custodians of the Yarra River Land' as well as the 'cultural diversity and heritage of post-European settlement communities'. That is, while the Act acknowledges the traditional owners, those communities will share responsibilities with the descendants of more recent arrivals.¹³

The Act creates an independent Birrarung Council, in a sense, 'the Voice of the River', which is appointed by the Environment Minister.¹⁴ The Birrarung Council includes at least two Aboriginal traditional custodians, in addition to representatives from environmental groups, agricultural interests, and at least two 'skill-based' representatives (e.g. environmental planners) to speak for the River.¹⁵ While the Council does not speak directly *as* the River, it is envisioned to advocate for the River's needs in a long-term planning process.¹⁶

Rethinking our relationship with the planet means reimagining governance of the human/non-human interrelationship. The *Yarra River Protection (Wilip-gin Birrarung murrong) Act* gives just an inkling of what healing legal pluralism could look like in Australia. The authors of this volume look to combine the modern with the autochthonous, learning from each, all the while recognising that modern ecological science only reaffirms Aboriginal practice rooted in deep understandings of human/

¹⁰ *Yarra River Protection (Wilip-gin Birrarung murrong) Act, 2017* pt 1 s 1(a) (Austl.).

¹¹ *Id.* Preamble, at 1.

¹² *Id.* Preamble, at 1 (Austl.).

¹³ *Id.* pt 2 s 12(2)-(3), at 13.

¹⁴ *See id.* pt 5 s 48(1), at 36.

¹⁵ *Id.* pt 5 s 48(1)(b), at 36.

¹⁶ *Id.* pt 5 s 48(1) (Austl.).

nature interdependence, which modern ‘resource management’ too often ignores. Modern ‘resource managers’ often don’t understand they are born into, and marinated in, a paradigm based in domination of, rather than interrelationships with, the natural world. One of the shining lights of this work is that it sheds light both from inside and outside the dominant culture on some of the unremarked features of that system of law. Law should come from the Land, not be imposed on the Land. When we see Land as creator of all life and remake law to respect that first principle, we set about healing nature and healing all cultures.

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Addendum to the Foreword

The central concern of relations between the two different laws in Australia—the Aboriginal traditional law of great age and the Western positivist law with its postulates rejecting morality in law—is the question of how to bring together different societies and legal systems with such different world views.

Aboriginal societies, with Custodial Ethics, ecological stewardship and Laws of Obligation, are built on a relationalist rather than a survivalist ethos. The monumentality of Aboriginal law resides not only in the old saying ‘The Land is the Source of the Law’¹, and in its integrity, gravity and authentic majesty, but in its moral foundation all without the contradictions inherent in Western law.

Western law, in contrast, continues to be hierarchical, anthropocentric and enforced through the threat of state violence (survivalist rather than relationalist). John Austin (1790–1859) argued that law, as opposed to moral imperatives, should be viewed simply as a form of command, made by an acknowledged and legitimate ruler, that gains adherence solely by means of an effective punishment.²

So, a question that arises from the discussions in this book is: even if we were to resolve the contradictions in the legal systems, and the Land and the environment in general might be better looked after, with recognition in the common law of Indigenous laws, and with appropriate legislation, how could this be reconciled with the ongoing mistreatment of Aboriginal people in Australia? Today we still see that no one is ever held accountable for the many deaths in custody or prisons of Aboriginal people where even young children of 10–12 years old are still being put in jail; state authorities still break up Aboriginal families and Aboriginal people still suffer socio-economic disadvantage in mainstream Australian society.

The real task of improving and raising Western law to a higher ethical level where humane, respectful treatment of *Land and people*, becomes the norm, is obviously the real challenge. Furthermore, part of this task would be to also address the Aristotelian

¹ Black, C. (2010). *The Land is the source of the law: a dialogic encounter with indigenous jurisprudence*. Routledge, 2010.

² Austin, John. “The Province of Jurisprudence Determined” 1832. Encyclopedia.com 13 August 2013.

logic of the 'excluded middle' argument, which is so often utilised in the West's adversarial systems. It will be difficult but doesn't have to be a complete obstruction in making future law.

Hopefully, with respectful and courageous discussions about what law could come to mean, there could emerge in an organic way the embryonic form of an intact, collective spiritual identity for all Australians, which will inform and support our daily, safe lives, our legal and political systems, aspirations and creative genius.³

Mary Graham

December 2022

³ Graham, M 1999, 'Some Thoughts about the Philosophical Underpinnings of Aboriginal Worldviews', *Worldviews Environment, Culture, Religion*, 3.

Declaration

I declare my story titled *Narratives of First Law from the Martuwarra Fitzroy River* consisting of 12 pages in length, which is less than 10% of the full manuscript 124 pages as submitted herewith, titled *Declaration of Peace for Indigenous Australians and Nature: A Legal Pluralist Approach to First Laws and Earth Laws* (Poelina, A., Bagnall, D., Graham, M., Williams, R., Yunkaporta, T., Marshall, C., Diop, S., Samnakay, N., Maloney, M. and Davis, M.), was developed into a 22-page publication and submitted as a separate peer review publication titled '*Ancient Wisdom Dreaming a Climate Chance*', authors Martuwarra RiverOfLife, Poelina, A., & Perdrisat, M. (In Review). Editors: Penteadó, A., Chakrabarty, SP. and Shaikh, OH. (2023). *Traditional Knowledge and Climate Change: An Environmental Impact on Landscape and Communities*, Springer: Singapore. (unpublished)

I make this declaration in good faith, to have full disclosure to resolve any conflict of copyright and request this story be left as written within this manuscript as it has been referred to by other authors of the manuscript.

I make this Declaration on 19 October 2023.

A handwritten signature in black ink that reads "Anne Poelina". The signature is written in a cursive style with a large, stylized 'P'.

Prof. Anne Poelina

Acknowledgements

This book has benefited from collaborations and the collective wisdom and lived experiences of colonialism witnessed through Indigenous people's stories—from the past, in the present and dreaming of a new and just future.

In partnership with non-Indigenous colleagues, we have written a book which we believe informs current legal practice. The Think Tank, literature reviews and analysis in the book are all informed by insights gained from diverse legal practitioners. We acknowledge the active participation of the Indigenous storytellers, all championing the need to shift from 'wrong to rights, justice and equity' for the generations of our families of past, present and into the future; Mary Graham, Anne Poelina, Chels Marshall, Donna Bagnall, Ross Williams, Tyson Yunkaporta and Shola Diop provided rich insights that have shaped this book. Individually and collectively, these Indigenous leaders share their personal reflections on how Australian law fails to uphold the holistic principles espoused by First Law and Earth-centred law, and they suggest alternative legal futures. These stories are presented as case studies, and through collective wisdom, with much talking, writing, reviewing and more talking and writing with our non-Indigenous colleagues, we present this book in a spirit of good faith and goodwill. We send the Dream out as a '*Declaration of Peace for Indigenous Australians and Nature: A Legal Pluralist Approach to First Laws and Earth Laws*'.

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