

## TEMPORALITIES OF ENVIRONMENTAL GOVERNANCE: Insights from Australia's Marine Reserves Review

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As the biosphere perches on the precipice of irreparable collapse, many explanations have been offered for our weak environmental laws. But one that lacks currency is how environmental law deals with time. The emphasis is on spatial dimensions (for example, property interests, jurisdiction and the physicality of ecological problems).<sup>1</sup> To the extent that it considers time, environmental law dwells narrowly on the 'present future',<sup>2</sup> namely, how our present actions may have future effects such as global warming.<sup>3</sup> The mantra of sustainable development, environmental governance's preeminent norm and temporal ballast, underpins this future bias.

There are other important temporal dimensions to environmental governance that warrant attention, such as the past, timing and the 'pace' of time. Without apparent essence, time's significance is primarily as a marker of changes in phenomena, including environmental changes and those wrought by society. We need both a deeper understanding of how environmental governance in practice deals with these temporalities and elaboration of the normative principles about how it should address time. The ensuing brief remarks illustrate these issues by reference to Australia's recently initiated Marine Reserves Review. It's a pertinent example of the partiality in governance to space over time, and the value of using temporal concepts to critique an environmental initiative.

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<sup>1</sup> Jane Holder and Carolyn Harrison (eds), *Law and Geography: Current Legal Issues* (OUP, Oxford 2003).

<sup>2</sup> Lisa Heinzerling, 'Environmental Law and the Present Future' (1999) 87 *Georgetown Law Journal* 2025; Daniel Farber, 'From Here to Eternity: Environmental Law and Future Generations' (2003) *University of Illinois Law Review* 289.

<sup>3</sup> Edith Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (Transnational Publishers, New York 1989).

Commonwealth (or federal) marine reserves can be declared pursuant to *the Environment Protection and Biodiversity Conservation Act (EPBCA) 1999 (Cth)*,<sup>4</sup> Australia's principal federal environmental legislation.<sup>5</sup> The federal government (in partnership with state and territory governments) committed to establishing a national representative system of marine protected areas by 2012.<sup>6</sup> Marine protected areas have been gradually established, but in November 2012 a significant expansion occurred with an additional 2.3 million square kilometres of ocean being protected.<sup>7</sup> These reserves were established with much fanfare. The then Federal Environment Minister declared: 'Australia's most precious ocean environments will be protected by the world's largest network of marine reserves'.<sup>8</sup> Management plans were developed and were due to come into effect in July 2014.

A change of government in late 2013, to a politically conservative regime under Prime Minister Tony Abbott, saw these management plans discarded, but the boundaries of the reserves remained.<sup>9</sup> As described by an Australian Senator for the Greens Party, the marine reserves are now 'little more than lines on a map'.<sup>10</sup> Given this, even the idea of 'space' is

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<sup>4</sup> Act no. 91 of 1999.

<sup>5</sup> For an overview of the relevant legislation, see: Department of the Environment, 'Commonwealth Marine Reserves - Legal framework', <<http://www.environment.gov.au/topics/marine/marine-reserves/overview/legal-framework>> accessed 30 September 2014.

<sup>6</sup> Department of the Environment, 'Goals and principles for the establishment of the National Representative System of Marine Protected Areas in Commonwealth waters', <<http://www.environment.gov.au/resource/goals-and-principles-establishment-national-representative-system-marine-protected-areas>> accessed 30 September 2014.

<sup>7</sup> The Hon. Tony Burke MP, 'Gillard Government Creates the World's Biggest Marine Reserves Network' (Press release, 14 June 2012) <<http://www.environment.gov.au/minister/archive/burke/2012/mr20120614.html>> accessed 25 September 2014.

<sup>8</sup> Ibid. This press release noted that: 'The new marine reserves take the overall size of the Commonwealth marine reserves network to 3.1 million square kilometres, by far the largest representative network of marine protected areas in the world.... Together the Great Barrier Reef Marine Park and the Coral Sea Commonwealth marine reserve will become the largest adjoining marine protected area in the world, covering 1.3 million square kilometres'.

<sup>9</sup> The Hon. Greg Hunt MP and Senator the Hon. Richard Colbeck, 'Supporting Recreational Fishing while Protecting our Marine Parks' (Press release, 14 December 2013) <<http://www.environment.gov.au/minister/hunt/2013/mr20131214.html>> accessed 26 September 2014.

<sup>10</sup> Senator the Hon. Rachel Siewert, 'Protecting our Marine Future', <<http://rachel-siewert.greensmps.org.au/marine>> accessed 30 September 2014.

currently of limited value. The new government initiated a so-called Marine Reserves Review (MRR), the agenda for which is to rebalance the management of marine reserves towards greater economic opportunities, especially fishing.<sup>11</sup> The reports of the MRR will be considered by the government and inform development of new marine management plans.

The first temporal dilemma about the MRR is its *timing*. The review was delayed for about one year, and further setbacks are likely because of the public consultation planned by the Abbott government in order to enhance the legitimacy its agenda.<sup>12</sup> In the meantime, economic access to the marine areas continues under the pre-2012 regime; there are no changes 'on the water' for 'users'.<sup>13</sup> Such an unhurried approach to modernizing environmental management contrasts to the lightening speed with which this government abolished Australia's carbon 'tax'.<sup>14</sup> Authorities like to fast-track economic development or remove hindrances to it,<sup>15</sup> but typically procrastinate in legislating pro-environmental controls. Ironically, the current Australian government justifies its leisurely approach to the MRR because the previous marine management arrangements were supposedly 'rushed' by its predecessor.<sup>16</sup>

Another interesting temporal dimension of the MRR relates to the lack of treatment of the *past*. The review focuses, according to the terms of reference of the expert scientific panel,

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<sup>11</sup> Department of the Environment, 'About the Commonwealth Marine Reserves Review', <<http://www.environment.gov.au/marinereservesreview/about>> accessed 30 September 2014. Also, Oliver Milman, 'Marine Reserves Review: Coalition Says Recreational Fishers Have Been Left Out' *Guardian* (London 12 September 2014) <<http://www.theguardian.com/environment/2014/sep/12/marine-reserves-review-coalition-says-recreational-fishers-have-been-left-out>> accessed 30 September 2014.

<sup>12</sup> Further, as noted on the MRR website, the 'development of new management plans will be a separate statutory process, involving two periods of public consultation' under the EPBCA: Department of the Environment, 'About the Commonwealth Marine Reserves Review' <<http://www.environment.gov.au/marinereservesreview/about>> accessed 30 September 2014.

<sup>13</sup> *Ibid.*

<sup>14</sup> Emma Griffiths, 'Carbon Tax Scrapped: PM Tony Abbott Sees Key Election Promise Fulfilled After Senate Votes to Repeal' ABC News (18 July 2014) <<http://www.abc.net.au/news/2014-07-17/carbon-tax-repealed-by-senate/5604246>> accessed 30 September 2014.

<sup>15</sup> Another example is the state of Victoria's Major Transport Projects Facilitation Act 2009 (Vic), Act no. 56.

<sup>16</sup> The Hon. Greg Hunt MP, 'Review of Commonwealth Marine Reserves Begins' (Press release, 11 September 2014).

on 'future priorities' and 'understanding of threats to marine biodiversity'.<sup>17</sup> Further, the bioregional advisory panels are directed in the terms of reference to provide advice on 'areas of contention' (which one can assume means *current* contention). This temporal orientation thus downplays historic losses to marine life. The prevailing environmental baseline – current fisheries populations – becomes the 'normal' benchmark for management, rather than healing past damage. Furthermore, until the MRR is completed, past fisheries practices are grandfathered<sup>18</sup> – a measure to protect the seafood industry, which has enthusiastically welcomed the Review.<sup>19</sup> Effective environmental governance sometimes requires tilting our gaze to the past in order to restore and 'rewild' damaged ecosystems whose present condition is not sustainable. An example is the need for bush regeneration in Australia to restore habitat for viable populations of threatened mammals.<sup>20</sup> The MRR lacks attention to the goals of environmental restoration and regeneration.

Thirdly, a spatial management bias is strongly evident in the MRR and the government's 'Goals and Principles for the Establishment of the National Representative System of Marine Protected Areas in Commonwealth Waters'.<sup>21</sup> Zoning is the principal means by which management units are designated to demarcate allowable activities. Zoning can certainly be very useful for governing competing uses for natural resources, but it can be problematic when zones foster a 'static' view of nature that emphasizes relative stability over flux in ecosystems.<sup>22</sup> Climate change will likely intensify such flux. Because nature is thus difficult to predict, we should not assume that marking boundaries in the oceans (or land) and leaving nature alone would achieve our environmental goals. Instead, we need management

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<sup>17</sup> Department of the Environment, 'Marine Reserves Review – Terms of Reference' (2014).

<sup>18</sup> Department of the Environment, 'Commonwealth Marine Reserves – Management' (see section on 'Transitional management arrangements', <<http://www.environment.gov.au/topics/marine/marine-reserves/overview/management>> accessed 30 September 2014.

<sup>19</sup> 'Fisheries Association Welcomes Commitment to Marine Reserves Review' (16 September 2014), <<http://www.thefishsite.com/fishnews/24094/fisheries-association-welcomes-commitment-to-marine-reserves-review>> accessed 30 September 2014.

<sup>20</sup> Robin A Buchanan, *Bush Regeneration: Recovering Australian Landscapes* (TAFE Student Learning Publications, Sydney 1989).

<sup>21</sup> Department of the Environment, <<http://www.environment.gov.au/resource/goals-and-principles-establishment-national-representative-system-marine-protected-areas>> accessed 30 September 2014.

<sup>22</sup> On addressing the dynamism of nature, see Bryan Norton, 'Change, Constancy, and Creativity: The New Ecology and Some Old Problems' (1996) 7 *Duke Environmental Law and Policy Forum* 49.

policies that are designed to be flexible and adjustable in an iterative, learning process.<sup>23</sup> The philosophy of 'adaptive management' speaks most directly to this challenge, but it does not appear to be prioritized in the MRR other than a broad reference to making 'suggestions' about continued engagement with regional stakeholders in the terms of reference.<sup>24</sup>

The problems with Australia's marine management planning process are indicative of the malaise in much environmental law worldwide. Its guiding philosophy of sustainability focuses on prospective actions. In downplaying other relevant temporalities, especially healing past losses, we don't have enough temporal depth to understand and resolve anthropogenic ecological changes. Cultural and psychological filters heavily modulate our understandings of time and the changes it signifies, and reformers must be more attentive to how law influences and distorts our temporal perception in ways that may harm the environment. As a starting point, our challenge to the MRR is for the expert scientific panel to think of governance approaches other than 'static' zoning and for the bioregional panels to investigate historical fisheries in their respective areas (including engaging with Indigenous communities and Indigenous knowledge).

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<sup>23</sup> Holly Doremus, 'Precaution, Science, and Learning while Doing in Natural Resource Management' (2007) 82 *Washington Law Review* 547.

<sup>24</sup> Adaptive management is listed among the cluster of management principles in Australia's administrative framework for marine reserves, but the concept is not found in the governing legislation of the EPBCA: <<http://www.environment.gov.au/topics/marine/marine-reserves/overview/legal-framework>> accessed 30 September 2014.