# BEFORE ENVIRONMENTAL LAW

## *A History of a Vanishing Continent*

BENJAMIN J RICHARDSON

# BEFORE ENVIRONMENTAL LAW

This landmark book unveils the history of defending Australia's natural environment and examines the subject's legal and political contexts from the birth of the nation in 1901 until the advent of the so-called modern era of environmental regulation in the late 1960s. Across nature conservation, pollution control, natural resources governance and other domains, this book reveals how many of today's environmental laws emerged from precedents or events much earlier in the 20th century.

The history is told through analysis of lawmakers' far greater efficacy to exploit rather than protect the environment, a discrepancy that grew as nature's backlash intensified in a rapidly degrading continent colonised to build the Australian nation. In exploring these dynamics, the book offers a rich tapestry of case studies illustrated with historic photographs that show the origins of Australia's environmental laws and how they borrowed from international precedents or furnished lessons for other nations to consider.

Through its multi-disciplinary enquiry, the book offers scholars and students of environmental law, legal history and the environmental humanities a unique story about the failures and successes in the making of environmental law.

# Before Environmental Law

## *A History of a Vanishing Continent*

Benjamin J Richardson

• HART •
OXFORD • LONDON • NEW YORK • NEW DELHI • SYDNEY

HART PUBLISHING

Bloomsbury Publishing Plc

Kemp House, Chawley Park, Cumnor Hill, Oxford, OX2 9PH, UK

1385 Broadway, New York, NY 10018, USA

29 Earlsfort Terrace, Dublin 2, Ireland

HART PUBLISHING, the Hart/Stag logo, BLOOMSBURY and the Diana logo are trademarks of Bloomsbury Publishing Plc

First published in Great Britain 2023



A catalogue record for this book is available from the British Library.

A catalogue record for this book is available from the Library of Congress.

Library of Congress Control Number: 2023938423

ISBN: HB: 978-1-50996-902-9
ePDF: 978-1-50996-904-3
ePub: 978-1-50996-903-6

Typeset by Compuscript Ltd, Shannon

To find out more about our authors and books visit www.hartpublishing.co.uk. Here you will find extracts, author information, details of forthcoming events and the option to sign up for our newsletters.

*For my mother, Margaret, a child of Orchardfield,*
*and to Vanisha, my samesie*

# ACKNOWLEDGEMENTS

Like many history books, *Before Environmental Law* had a long history of its own. It began decades ago when I enquired about my mother's ancestral farm, Orchardfield, established by her great grandfather Franklin Jackes in the 1860s near Armidale. My mother died before I could document all its environmental history but fortunately, I was assisted by my maternal uncle and aunt, Edward and Mary Jackes. Thank you also to cousin Warrick for some of the vintage photographs. Orchardfield inspired my larger journey to understand the environmental upheavals unleashed by the colonisation of the Australian continent and the failures or successes to govern them.

For the scholarly stage of this project, I'm indebted to a number of kind friends and academic colleagues in Australia and abroad. To Dr Vanisha Sukdeo, many thanks for your patience and perspicacious feedback on some of my ideas, and being a great role model in your own prodigious scholarly writing. Maria Riedl, a tenacious environmental activist, was a wonderful conveyor of environmental literature from her huge personal library. Dr Lisa-ann Gershwin, a world-famous jellyfish scientist, was a source of ebullient counsel, and an inspiration in her own prolific book authoring. Others who intellectually, spiritually or emotionally nourished my journey at various stages include Austra Maddox, Iona Flett, Paul Costin, Tabatha Badger, Liz Downes, Gary Burke, Claire Burgess, Neil Davidson and Ellen Lund Jensen. And Tui deserves a pat in appreciation of his patience. I'm also very grateful to my academic colleagues and friends closest to the book's subject, including Professor Afshin Akhtar-Khavari, Dr Phil McCormack, Dr Anja Hilkemeijer, and Dr Susan Bartie. From them I gained deeper insights into legal history and some of the subject's niches, although I remain accountable for any deficiencies in the text.

I'm fortunate that excellent museums and libraries were available to assist my research, especially Australia's National Library and National Archives, from where I sourced many of the book's photographs and newspaper archives. I also benefitted from the excellent advice of the anonymous peer reviewers of my draft manuscript. Finally, I'm thankful to the editorial staff of Hart Publishing for preparing the publication with scrupulous care and courtesy.

# TABLE OF CONTENTS

# LIST OF ABBREVIATIONS AND ACRONYMS

| | |
|---|---|
| AAPA | Australian Aboriginal Progressive Association |
| AAD | Australian Antarctic Division |
| AAT | Australian Antarctic Territory |
| ACF | Australian Conservation Foundation |
| ACT | Australian Capital Territory |
| AGM | Annual general meeting |
| ALP | Australian Labor Party |
| AOFGS | Australian Organic Farming and Gardening Society |
| APCMA | Associated Portland Cement Manufacturers Australia |
| AWTSC | Atomic Weapons Tests Safety Committee |
| BANZARE | British Australian and New Zealand Antarctic Expedition |
| BLF | Builders Labourers Federation |
| BSES | Bureau of Sugar Experiment Stations |
| CPPB | Commonwealth Prickly Pear Board |
| CSIR | Council for Scientific and Industrial Research |
| CSIRO | Commonwealth Scientific and Industrial Research Organisation |
| CSR | Corporate social responsibility |
| EEZ | Exclusive Economic Zone |
| HEC | Hydro-Electric Commission (Tasmania) |
| IGY | International Geophysical Year |
| IUCN | International Union for Conservation of Nature |
| IWC | International Whaling Commission |

| | |
|---|---|
| NSW | New South Wales |
| SCAR | Scientific Committee on Antarctic Research |
| SMS | Snowy Mountains Scheme |
| UK | United Kingdom |
| UNESCO | United Nations Educational, Scientific and Cultural Organization |
| UNLCOS | United Nations Convention on the Law of the Sea |
| US | United States of America |

# LIST OF FIGURES

PART I

# Governing 1901 to 1967

# 1

# Young Nation, Ancient Continent

## I. Coloniality and the Environment

Concern for the environment isn't recent. Yet, conventional wisdom suggests environmental law dates from the late 1960s, give or take a few years, and that its forerunners were insignificant. A leading Australian textbook on the subject opens: 'the development of environmental law in Australia has been concentrated effectively into the last 50 years'.[1] Another declares, 'Most of what we would today identify as environmental law … had its origins in legislation introduced in the late 1960s and early 1970s'.[2] This view pervades other jurisdictions; American academic Richard Lazarus declared, 'prior to 1970 environmental protection law in the United States was essentially nonexistent'.[3] The shift, explains his compatriot Zygmunt Plater, unleashed 'a massive upwelling of layer upon layer of substantial public and private law doctrines, almost volcanic in the power and mass of its eruption'.[4] In so-called 'developing countries' the shift evidently occurred a bit later, such as in China promulgating its lodestar environmental statute in 1979.[5] Likewise in international law, one leading commentator observed 'there was little … environmental law before 1972' but in the following 'forty years … [it] evolved rapidly'.[6] A more liberal political climate coupled with economic prosperity and better scientific understanding of ecological impacts are among the factors scholars identify as nourishing these changes.[7]

[1] G Bates, *Environmental Law in Australia* (LexisNexis Butterworths, 2019) 1.

[2] L Godden and J Peel, *Environment Law* (Oxford University Press, 2010) 126.

[3] RJ Lazarus, 'The Greening of America and the Graying of United States Environmental Law: Reflections on Environmental Law's First Three Decades in the United States' (2001) 20 *Virginia Environmental Law Journal* 75, 76.

[4] Z Plater, 'From the Beginning, a Fundamental Shift of Paradigms: A Theory and Short History of Environmental Law' (1994) 27(3) *Loyola of Los Angeles Law Review* 981, 1003.

[5] B Zhang et al, 'A New Environmental Protection Law, Many Old Problems? Challenges to Environmental Governance in China' (2016) 28 *Journal of Environmental Law* 325.

[6] E Brown Weiss, 'The Evolution of International Environmental Law' (2011) 54 *Japanese Yearbook of International Law* 1, 1, 26.

[7] See also J Dryzek et al, *Green States and Social Movements: Environmentalism in the United States, United Kingdom, Germany and Norway* (Oxford University Press, 2003).

Like the few pioneers such as Tim Bonyhady, Ben Pontin and David Schorr unveiling environmental law's neglected history in other times or places,[8] my book does so in one country's era not yet closely examined – Australia in the first two-thirds of the twentieth century, from the nation's inauguration in 1901 until 1967. My aims are: to ascertain the various laws of relevance to environmental decision-making; to evaluate their changes over time; and thirdly, to assess their efficacy. I will argue that it's implausible to claim that prior to the late 1960s Australia lacked laws dealing with its environmental problems and challenges, but I show that their application was nested within broader modes of governance, which I call scientific expertise, enlightened despotism, polyarchy and markets, and via these modes there was a significant disparity in outcomes whereby Australians were far more effective at exploiting rather than conserving nature. Environmental law helped lessen the losses but much of the continent still vanished.

Australia is the world's only nation that governs an entire continent, a geologically ancient landmass whose animals and plants evolved from eons of continental drift, isolated from most of the world. Species endemism is high, with 87 per cent of its mammals, 45 per cent of its birds, 93 per cent of its reptiles and 92 per cent of its vascular plants unique to Australia.[9] The continent's biota co-existed with Aboriginal people for at least 60,000 years, the world's oldest continuous culture. The island continent has over 25,000 kms of coastline, encircled by the third largest maritime waters of any nation,[10] at 8.2 million $km^2$, larger than its landmass (7.69 million $km^2$). These and other distinct qualities of the ancient continent have helped make its landscapes and ecologies intensely significant to the nation, and their losses all the more jarring, as Australia has lost more mammal species to extinction than any other country.

Australia's history also owes much to factors beyond its shores, including the British Empire, immigrants and global trade. Especially in its early years, the young nation identified more with these exogenous influences than its ancient past. National identity was born out of European colonisation that disregarded Aboriginal traditions in search of the myth of a peacefully 'settled' continent. Australia's role in the Empire – notably the Gallipoli landings in 1915, a battle on foreign soil under British command[11] – acquired greater significance in national folklore than anything endogenous. A collateral national mythology as a 'big country', and an 'empty country', with abundant space and resources available to be exploited, fuelled violence against the ancient land and its Indigenous people.[12]

[8] DB Schorr, 'Historical Analysis in Environmental Law' in MD Dubber and C Tomlins (eds), *The Oxford Handbook of Legal History* (Oxford University Press, 2018) 1001; T Bonyhady, *The Colonial Earth* (Miegunyah Press, 2000); B Pontin, 'Nuisance Law and the Industrial Revolution: A Reinterpretation of Doctrine and Institutional Competence' (2012) 75 *Modern Law Review* 1010.

[9] AD Chapman, *Numbers of Living Species in Australia and the World* (Australia, Department of the Environment, Water, Heritage and the Art, 2009) 7.

[10] Defined as 'Exclusive Economic Zone' under international law.

[11] C Holbrook, *ANZAC, the Unauthorised Biography* (NewSouth, 2014).

[12] JM Powell, *An Historical Geography of Modern Australia: The Restive Fringe* (Cambridge University Press, 1988).

Narratives about 'man against nature', as the big country was tamed, complemented settlers' belief in Australia as a 'child of Mother England'.

The confluence between these endogenous and exogenous influences are key to understanding this book's history. Law is crucial for every nation's adaptive capacity, influencing how it understands and adapts to its environmental challenges.[13] Australia's environmental laws evolved within a legal system maladapted to the continent's geography, in which the nation's birth and official decolonisation in 1901 didn't entail any complementary commitment to decolonise how it governed its lands and Aboriginal people. In a society intent on creating what Ross Johnston calls a 'neo-Europe in the antipodes',[14] shaped by the legal traditions of the Mother Country, there was no radical paradigm shift to make Australia more attuned to the continent's geographical varieties and constraints. Nationhood intensified the colonial paradigm, levying an onerous environmental burden from expanded settlements and economic activity, along with consolidating the ongoing dispossession of the continent's First Nations.

With the nation's Constitution leaving largely undisturbed the former colonies' (now states) dominion over natural resources, an English property tenure system lacking norms of environmental stewardship, and bureaucratic regimes that stifled innovation, it would be difficult to interpolate environmental laws to leverage adaptive change. Such laws at federal and subnational levels nonetheless arose where they dovetailed with nationalism and economic success. Environmental lawmaking in Australia didn't begin with the nation's independence, as regulations governing some of these subjects were already enacted by the colonies or transplanted from Britain.[15] Though no empire of environmental law ensued, there were diverse achievements including the replacement or supplementation of the common law with statutory regimes (eg in water allocation), some centralisation of governance (eg for transboundary resources) and new laws to tackle novel challenges (eg soil erosion). There were also policy shifts, including recognition of the economic benefits of resource stewardship (eg with water and soils), the notion of community 'amenities' (eg in town planning) and a 'scientific' approach to managing natural resources (eg forests).[16] Yet, in some areas little changed, including the marginalisation of Aboriginal people.

As the theory of path dependency postulates, where past institutions shape and constrain options for future reform,[17] the young nation's environmental laws

[13] J McDonald, 'Mapping the Legal Landscape of Climate Change Adaptation' in T Bonyhady, A Macintosh and J McDonald (eds), *Adaptation to Climate Change: Law and Policy* (Federation Press, 2010) 1.

[14] WR Johnston, 'An Environmental Education for a Local Community: Knowing the Border Ranges' in S Dovers (ed), *Environmental History and Policy: Stilling Settling Australia* (Oxford University Press, 2000) 146, 158.

[15] See eg T Orgill, *The Forgotten Decade: The Legislative Conservation of Game, Fish and Timber in 1860s Victoria* (LLB thesis, ANU, 2014).

[16] AB Costin and TG Marples (eds), *Conservation* (Penguin, 1971) 208, 242.

[17] O Hathaway, 'Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System' (2001) 86 *Iowa Law Review* 601.

worked within that colonial edifice and the nation's anthroparchic underpinnings rather than springing from a blank slate open to radical change. There was limited teleological imperative to environmental law's evolution, as reforms were 'seldom normative, but usually procedural and administrative and highly discretionary and, very often, … subject to political control', explains Douglas Whalan.[18] Whilst the mainstream political parties governed with some policy variances (eg Labor's interest in improving urban amenities), they shared a commitment to economic growth and supporting extractive industries. It wasn't until the 1970s that a distinct green agenda entered Australian politics with the United Tasmania Group (forerunner to the Australian Greens).[19] Before then, individual politicians sometimes were environmental advocates, such as Robert Martin Collins, elected as an independent to Queensland's Legislative Council who helped found the state's national park system in the early 1900s. But proponents of environmental protection rarely if ever challenged the political and economic *system* driving environmental degradation,[20] just stimulated reform *within* that system.

The motif of coloniality doesn't furnish a complete overview of this book's history because nature's agency needs credit. Colonisation of landscapes wrought upheavals including plagues of invasive pests, dust storms of eroded soils and depilated landscapes shorn of their vegetation. Non-Indigenous Australians weren't ignorant of nature's agency, but New World settlers' assumptions of fertile lands and watered environments were often ill-matched to the continent's ecologies. The nineteenth-century acclimatisation societies, who imported plants and animals to anglicise the land, compounded this failure to adapt to nature.[21] Occasionally some landholders thought differently, such as farmers in Gippsland and the Atherton Tablelands saving pockets of scenic rainforest, points out Warrick Frost.[22] And in cities, explains Andrea Gaynor, a culture of backyard agriculture developed where households growing vegetables and poultry learned to appreciate the vicissitudes of the environment.[23]

Many environmental laws were designed not to save remnants of an unadulterated nature but to manage nature's unruly reaction to colonisation. Wars waged against so-called 'vermin' reflected a struggle to tame a continent whose natural balance was upset. Nature's backlash made it particularly difficult for

[18] DJ Whalen, 'The Structure and Nature of Australian Environmental Law' (1977) 8 *Federal Law Review* 194, 316.

[19] P Manning, *Inside the Greens* (Schwartz Books, 2019).

[20] D Hutton and L Connors, *A History of the Australian Environmental Movement* (Cambridge University Press, 1991).

[21] A few historians however suggest that the societies' work wasn't entirely detrimental, such as valuing the land's soil and climate: P Osborne, 'The Queensland Acclimatisation Society: Challenging the Stereotype' (2008) 20(8) *Royal Historical Society of Queensland Journal* 337.

[22] W Frost, 'Did they Really Hate Trees? Attitudes of Farmers, Tourists and Naturalists towards Nature in the Rainforests of Eastern Australia' (2022) 8(1) *Environment and History* 3, 9–11.

[23] A Gaynor, *Harvest of the Suburbs: An Environmental History of Growing Food in Australian Cities* (UWA Press, 2006).

environmental law to succeed because of the uncertainties and complexities introduced by disturbed ecological and biological processes shifting in unprecedented ways. Nature's backlash created economic and social problems that contemporary Australia has still to solve. Climate change, the most virulent repercussion conceivable, now exacerbates many of these long-standing permutations, such as the massive bushfires and then floods in eastern Australia during 2019 to 2022. This discrepancy between the powers of the legal system to colonise and protect the environment owing in part to nature's agency permeates this book's history.

In the next section, I introduce the modes of governance, and their relationship to law, in shaping environmental outcomes. 'Environmental law', whose definition scholars often debate,[24] includes not only the legal norms, tools and agencies of the nation-state for use or protection of the natural environment including human settlements, but also has tendrils spread ubiquitously across many other domains of the legal system including in property tenure and constitutional law. The notion of 'governance' beneficially expands our enquiry, by highlighting decision-making power beyond the state, and especially the interactions between government and non-government actors.[25]

This approach to this book's history is particularly apt in an era where the body of official environmental law was relatively small, a void filled by many other actors and processes. Australian environmental laws before the late 1960s didn't owe much to the law profession – judges, legal academics or other law-related actors – unlike the prominent position the profession holds today through dedicated environmental lawyers and specialist tribunals, matched in the academic world by numerous scholars and students in this field. Non-lawyer constituencies including scientists, town planners, trade unions, the media and community groups were occasionally quite influential shapers of environmental governance. Concomitantly, the instruments or tools of environmental decisions went beyond conventional legal institutions such as legislation and court cases to include policy-making processes, public inquiries, economic incentives and much more.

## II. Tendrils of Governance

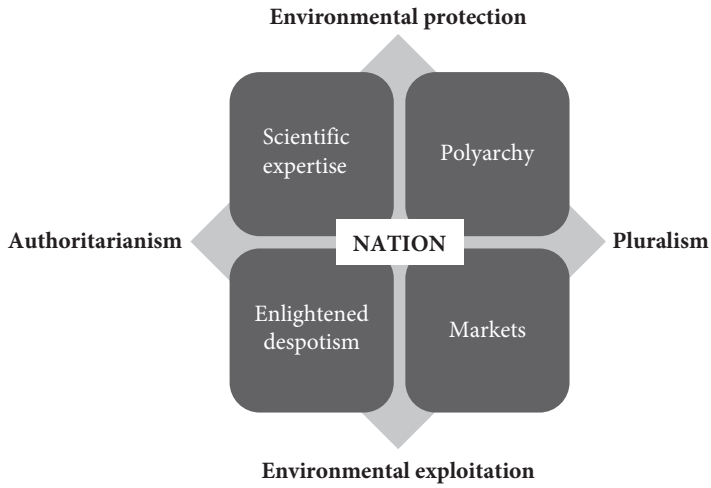
Several modes of governance were operative in this book's history, distilled in Figure 1.1: scientific expertise, enlightened despotism, polyarchy and markets. Still applicable today with some adjustments, these modes straddle two axes: authoritarianism versus pluralism, and environmental exploitation versus protection. The modes represent *tendencies* associated with their assigned quadrants rather than

[24] E Fisher, B Lange and E Scotford, 'What is Environmental Law?' in *Environmental Law: Text, Cases and Materials* (Oxford University Press, 2013) 5–20.

[25] C Holley, N Gunningham, and C Shearing, *New Environmental Governance* (Earthscan, 2012).

rigid trajectories, and sometimes they co-existed or operated in tension depending on the political, economic, cultural and legal context. Science tended to assist decisions to protect nature but could facilitate practices and technologies to exploit it, and even in its more benign guise science might surreptitiously aid nature's subjugation. Likewise, markets serve economic expansion but could moderate profligacy where they helped convey the economic value of using natural resources frugally. And whilst market mechanisms could counter-weight the power of state bureaucracies and legislatures, market actors themselves can acquire coercive dominance. Moreover, governments themselves participated heavily in markets in ways unfamiliar to contemporary Australians, through Crown corporations, ownership of railways, energy and many other vital parts of the nation's economic infrastructure, in addition to intrusive economic planning, as in many other nations before the rise of neo-liberalism.[26] These modes of governance applied to both the state and federal spheres of the nation, but their salience varied in time and place. For example, during and after World War II the nation saw a rise in 'big government'.

**Figure 1.1** Antinomies of Australian environmental governance




To elaborate on these modes, ***scientific expertise*** refers to how scientific knowledge and its practitioners contribute to environmental decision-making. Thomas Dunlap's seminal history of nature in settler societies contends that the changing role and increased value of the natural sciences in the early twentieth century, especially the shift from amateur naturists to professionalisation in domains such as soil and forestry management, helped settlers in Australia and other societies

[26] L Bernier, M Florio and P Bance (eds), *The Routledge Handbook of State-Owned Enterprises* (Taylor and Francis, 2020).

to seek accommodation with their land and its wildlife in contrast to the prevalent attitudes in the previous century of 'man versus nature' and the concomitant attempts to remake their new environs in the image of their countries of origin.[27] Science could aid environmental regulation by setting standards for 'rational' resource use, wildlife management and control of destructive pests. The natural sciences were advanced through many actors, including natural history museums and field naturalist clubs, including the Australian Academy of Science,[28] plus government-run scientific institutions for advancing agriculture and other resource uses. Whilst they didn't design laws, these actors helped shape societal understandings of environmental threats and impacts to which regulators could respond. Some stakeholders opposed these scientific approaches, such as bushmen and graziers who preferred their own learned experience, or what Chris Soeterboek calls a 'folk ecology', in contrast to the 'theoretical' understandings of academic scientists.[29] Furthermore, Aboriginal environmental knowledge was not widely respected by mainstream scientists in this history, with a few exceptions.[30]

By invoking the assumption that through science humankind could master its environmental adversities, science was also complicit in coloniality. In creating a new Advisory Council in 1915, Prime Minister Billy Hughes declared 'in the destiny of this great country … Science can lend a most powerful aid. Science can make rural industries commercially profitable [and] develop great mineral wealth'.[31] The Commonwealth went on to establish in 1926 the Council for Scientific and Industrial Research, renamed in 1949 the Commonwealth Scientific and Industrial Research Organisation (CSIRO), which Joseph Powell argues 'represented the consummation of the visionary schemes for the future dominion of science'.[32] They and other federal bodies collaborated with the states in promoting a scientific approach to managing the continent's natural resources, though often in ways that helped lessen damage (eg soil conservation and control of invasive pests).

Whilst this turn to science partly reflected the increasing complexity of the nation's modernisation, it was attractive to authorities wishing to depoliticise issues by placing them in the hands of trusted, 'value-neutral' experts.[33] The authoritarian potential of science is accentuated when government agencies

[27] TR Dunlap, *Nature and the English Diaspora: Environment and History in the United States, Canada, Australia, and New Zealand* (Cambridge University Press, 1999).

[28] L Robin, 'Nature Conservation as a National Concern: The Role of the Australian Academy of Science' (1994) 10(1) *Historical Records of Australian Science* 1.

[29] C Soeterboek, '"Folk-Ecology" in the Australian Alps' (2008) 14 *Environment and History* 241.

[30] See eg HH Finlayson, *The Red Centre: Man and Beast in the Heart of Australia* (Angus and Robertson, 1935).

[31] Quoted in G Currie and J Graham, *The Origins of the CSIR: Science and the Commonwealth Government 1901–1926* (Melbourne University Press, 1966) 15.

[32] JM Powell, *Environmental Management in Australia 1788–1914* (Oxford University Press, 1976) 111.

[33] RC Lewontin, *Biology as Ideology* (Harper, 1991).

mobilised science to restrict public dissent; science was enlisted in the 1950s for managing the 'safety' of atomic bomb testing and allay public concerns, for instance. Scientists working for government who refused to toe the official line could find themselves out of favour. The self-taught Edward Swain, a forester in the NSW and Queensland governments between 1918 and 1948, who campaigned against the indiscriminate allocation and permanent clearance of forested lands, became alienated from government land departments favouring land for agriculture. Another who was out of step was Walter Froggatt, an entomologist in the NSW agricultural portfolio, who in the 1930s opposed the introduction of South American cane toads into Queensland sugarcane plantations because of the risk the omnivorous species posed to non-target biota.

Thus, science has played a dyadic role in environmental governance, being an empowering tool to challenge pernicious dogma, as Rachel Carson did in the 1960s in critiquing the dubious science behind agricultural pesticides,[34] yet also a means by which authorities can foster elitist decision-making that excludes lay persons. 'Expert' perceptions of environmental problems are likely to be judged as rational and more consistent with societal interests than the 'subjective' opinions of lay public. The scientific priesthood thus stifles open debate of the values that must accompany decisions.[35]

A second, more authoritarian mode of governance is ***enlightened despotism***, a term coined by Leonard Krieger,[36] though it was Thomas Hobbes in the seventeenth century who first valorised it.[37] In its contemporary formulation serving the collective welfare, enlightened despotism serves to legitimate government interventions to maintain law-and-order, manage national emergencies, safeguard national security and mitigate economic downturns. World history since 1901 has provided numerous pretexts for it: the Great Depression, two World Wars, a Cold War and the COVID-19 pandemic. Some historians argue that Australia's origins as a penal colony embedded a 'strong tradition of government initiative' and centralisation of authority.[38] In the economic sphere particularly, this notion has sometimes been called 'high modernism', defined by leading theorist James Scott as a 'strong … muscle-bound, version of self-confidence about scientific and technological progress, the expansion of production … [and] the mastery of nature' in meeting the collective welfare.[39] High modernism commonly takes the form of authoritarian, large-scale planning and administrative re-orderings.

[34] R Carson, *Silent Spring* (Houghton Mifflin, 1962).

[35] R Keat, *The Politics of Social Theory: Habermas, Freud, and the Critique of Positivism* (Basil Blackwell, 1981) 3.

[36] L Krieger, *An Essay on the Theory of Enlightened Despotism* (University of Chicago Press, 1975).

[37] T Hobbes, *Leviathan* (Penguin Books, 1968, first published 1651).

[38] G Bolton, *Spoils and Spoilers: Australians Make their Environment 1788–1980* (Allen and Unwin, 1981) 17.

[39] JC Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (Yale University Press, 1998) 4.

This book's history is punctuated by authoritarian interventions. The colonial and successor state governments' punitive surveillance of Aboriginal people was one domain, and included sequestering their lands for more 'productive' development.[40] At the national level, 'big government' took off during the 1940s, especially during the nation's post-war reconstruction, explains Stuart Macintyre.[41] It includes the Commonwealth's leadership in the Snowy Mountains Scheme and atomic bomb testing, both purported exercises of its constitutional power over national defence. Each had momentous environmental legacies. Precedents set during World War II included regulations promulgated under the National Security Act 1940 to bolster Commonwealth control over many sectors of domestic industry and natural resources. The Commonwealth also sought (unsuccessfully) in 1944 to amend the Constitution to give itself legislative authority over many matters including soil conservation, a national concern after successive droughts and land degradation. Nonetheless, the High Court's wide interpretation of Commonwealth constitutional powers to meet the needs of nation building already facilitated its growing share of power despite a few setbacks, such as when the Court disallowed the Menzies government's outlawing of the Communist Party.[42]

Enlightened despotism could also have seemingly pro-environmental objectives, as seen lately where state governments have coercively restricted landowners' rights to clear native vegetation. Interference in property rights has a longer history, whereby water, minerals, forests, wildlife and the like were brought under Crown ownership. Illustratively, Victoria's Water Act 1905 declared 'the right to the use and flow and to control of the water' in any river or lake shall 'vest in the Crown', for management by its state-wide State Rivers and Water Supply Commission.[43] In Western Australia, the state government took control of some logging and opened its own sawmills in the early twentieth century to supply materials for construction of its railways.[44] Concomitantly, state governments sometimes shielded themselves from accountability in their control of such resources by taking advantage of the long-standing doctrine of Crown immunity.[45] Conflict over increasingly scarce natural resources may engender more neo-Hobbesian responses in the future, warn environmentalists.[46]

On the pluralist ledger of governance, Australian governments have operated within two modalities. ***Polyarchy*** refers to the institutions that support a

[40] A Armitage, *Comparing the Policy of Aboriginal Assimilation: Australia, Canada, and New Zealand* (UBC Press, 2011).

[41] SF Mcintyre, *Australia's Boldest Experiment: War and Reconstruction in the 1940s* (NewSouth, 2015).

[42] *Australian Communist Party v Commonwealth* [1951] HCA 5.

[43] Section 4(1).

[44] M Calder, *Big Timber Country* (Rigby, 1980) 134.

[45] *Dean v Attorney-General of Queensland* [1971] Qld R 391.

[46] W Ophuls, 'Leviathan or Oblivion' in H Daly (ed), *Toward a Steady State Economy* (WH Freeman, 1973) 215.

democratic polity, including parliamentary elections, political parties, recourse to the courts and freedoms of assembly and speech.[47] Polyarchy can be supplemented in the executive branch of government by mechanisms to engage the community such as public inquiries and stakeholder representation on advisory committees. In theory, polyarchal mechanisms enable more diverse voices to contribute to environmental decisions and to nurture a vibrant civil society including the formation of nature conservation groups, learned societies and a free press. In turn, a democratic polity can aid environmental governance by making authorities more accountable to society. Polyarchal processes were important for articulating growing community interest in Australian nature conservation for public amenity, recreation and aesthetic appreciation.[48]

Opportunities for public participation have been unequal, however. Aboriginal people historically lacked equivalent rights to vote or stand for election: the first federal electoral law, the Commonwealth Franchise Act 1902, gave women the right to vote and stand for election but excluded Aboriginal people (unless already enfranchised as voters in their state), a gap which would not be fully rectified until the Commonwealth Electoral Act 1962. At the state level, enfranchisement of Aboriginal people and women was also incomplete at the time of Federation.[49] The discriminatory franchise for local governments, which favoured property owners, also marginalised the voice of the impecunious.

Furthermore, equal enfranchisement didn't mean equal political influence. Women and Aboriginal people historically were in practice excluded from much political life. Electorates in some states were gerrymandered to give (conservative) rural seats more weight in legislatures.[50] And in a political system where money talks, business interests had (and still have) the ear of lawmakers. Notoriously, for instance, areas of Tasmanian national parks were excised in 1939, 1950 and 1967 for mining, forestry and dams respectively, a pattern known as 'regulatory capture'.[51] The problem is exacerbated in executive agencies wielding broad discretionary powers subject to limited parliamentary or judicial oversight.

In this history, lay people had limited recourse to the courts, as private litigants typically needed to have affected property or pecuniary interests, even in town planning law where people's own communities were at stake.[52] Victoria's Town and Country Planning Act 1961 heralded a shift towards wider community rights to

[47] R Dahl, *Polyarchy: Participation and Opposition* (Yale University Press, 2008).

[48] Powell (n 32) 115.

[49] J Chesterman and B Galligan, *Citizens Without Rights: Aborigines and Australian Citizenship* (Cambridge University Press, 1997); A Oldfield, *Woman Suffrage in Australia: A Gift or a Struggle?* (Cambridge University Press, 1992).

[50] JR Kelly, 'Vote Weightage and Quota Gerrymanders in Queensland, 1931–1971' (1971) 43(2) *Australian Quarterly* 39.

[51] M Levine and J Forrence, 'Regulatory Capture, Public Interest and the Public Agenda: Toward a Synthesis' (1990) 6 *Journal of Law, Economics and Organization* 167.

[52] PA Management Consultants, *Guide to Environmental Law in Australia* (1974) passim.

participation in decision-making, a shift that gathered momentum in other states in the following decades (albeit with some unevenness). Until then, third parties could petition their elected representatives to express grievances. Public inquiries by royal commissions or parliamentary committees allowed some public submissions and deliberation. Nongovernmental constituencies such as scientists or farmers sometimes also had a voice in advisory committees and boards constituted under statutes to aid their administration. The necessity to routinely legitimate environmental governance with public participation did not become well established until after the late 1960s.[53]

As earlier noted, in this era the law profession was largely a bystander to the vanishing continent. A few practising lawyers shone, however. One was Marie Byles (1900–79) who with NSW bushwalking clubs in the 1920s and 1930s lobbied for enlarging the conservation estate, becoming a trustee on the governing board of one she helped create in 1935, the Bouddi Natural Park.[54] Another pioneer lawyer was Rae Else-Mitchell (1914–2006), who was an energetic contributor to the early years of the NSW National Trust (established 1945), helping it secure protection of historic buildings and scenic natural places for public benefit.[55] Yet, in the bigger picture, the law profession (including the judiciary) was not a major stakeholder in environmental law. Tellingly, a compendium of 85 leading, all-time environmental law cases for Australia, published in 2012, lists just three before 1970, and all foreign judgments.[56] Courts occasionally adjudicated tort and property cases touching on environmental issues,[57] and enforced regulations concerning wildlife hunting, vermin control and pollution abatement.[58] Some legal professionals also served on public inquiries appointed to investigate land management issues.[59] This deficit in the law profession's role wasn't unique to environmental law however, in an era before the growth in legal education and access to legal services seen from the 1960s onwards.

The biggest champions for defending nature in this book's history tended to be far removed from legislatures or courtrooms – scientists, journalists, travel writers, bushwalkers and artists were among disparate constituencies questioning remaking the continent, though much less so Aboriginal dispossession. They engaged the mass media (eg, letters to newspaper editors and participation in radio broadcasts), undertook scientific research into environmental problems, and

[53] BJ Richardson and J Razzaque, 'Public Participation in Environmental Decision-making' in BJ Richardson and S Wood (eds), *Environmental Law for Sustainability* (Hart Publishing, 2006) 165.

[54] A McLeod, *The Summit of Her Ambition: The Spirited Life of Marie Byles* (Anne McLeod, 2016) 50–58.

[55] C Logan, 'The National Trust and the Heritage of Sydney Harbour' (2015) 16(1) *Landscape Review* 63, 67.

[56] B Jessup, *Environment Law* (LexisNexis, 2012).

[57] See M Lunney, *A History of Australian Tort Law 1901–1945* (Cambridge University Press, 2017).

[58] See eg *Browne v Button* (1923) Tas LR 52; *Winterton v Wilson* (1929) 29 SR (NSW) 186.

[59] See eg *Royal Commission to Inquire into the Condition of the Crown Tenants of the Western Division of New South Wales* (NSW Legislative Assembly, 1901).

promoted appreciation of the outdoors through bushwalking and field naturalist associations. Individual personalities sometimes were pivotal in specific environmental controversies. Myles Dunphy was one, helping to save NSW's Blue Gum Forest and enlarge its national parks system. Another was zoologist David Fleay, who by managing wildlife sanctuaries and public advocacy helped awaken societal interest in native fauna, especially endangered varieties. The stories of individuals' achievements 'emphasises the importance of appreciating human agency, under even limited space to manoeuvre', in leveraging social change, explains legal historian Susan Carle.[60]

The last key mode of governance is ***markets***. Like polyarchy, markets can counterbalance authoritarian rule. Yet they have a much stronger economic bias than polyarchy. Markets in a capitalist system aid its logic of indefinite growth, thereby creating a fundamental tension with an environmental agenda of restraint and sustainability.[61] Markets need to be understood as a governance institution because they are shaped politically and legally. Governments manipulate markets to promote specific economic policies; for example, Prime Minister Stanley Bruce's mantra 'Men, Money and Markets' (1922) signalled a programme of government-stimulated development to populate the continent's 'empty' spaces and grow prosperous industries trading in the British Empire.[62] Two areas of law most germane to state-leveraged markets are property rights and corporate governance.

Property rights are fundamental to the history of the continent's colonisation.[63] Crown grants of freehold or leasehold were often conditional on landholders' clearing forests and other 'improvements', evident particularly in the soldier settlement schemes.[64] Through its ownership of minerals, governments allocated rights to mining ventures to leverage development and raise revenue. Allocation of water rights have the same effect. Countervailing efforts to protect the environment have tended to operate by limiting private property rights, such as obliging landholders to control pests and protect soils, thereby representing a partial nationalisation of the bundle of property rights.[65]

Property law has also aided dispossession of Australia's First Nations, with environmental ramifications. The notion of *terra nullius*, a land without owners, was the fig-leaf of colonisation;[66] the courts before 1992 didn't recognise

[60] SD Carle, *Defining the Struggle: National Organizing for Racial Justice, 1880–1915* (Oxford University Press, 2013) xiv.

[61] The literature is vast here; see recently A Buller, *The Value of a Whale: On the Illusions of Green Capitalism* (Manchester University Press, 2022).

[62] D Lee, *Stanley Melbourne Bruce: Australian Internationalist* (Bloomsbury, 2016).

[63] See N Graham, *Lawscape: Property, Environment and Law* (Taylor and Francis, 2010).

[64] B Scates and M Oppenheimer, *The Last Battle: Solder Settlement in Australia 1916–1939* (Cambridge University Press, 2016).

[65] MJ Davies, *Property: Meanings, Histories and Theories* (Routledge-Cavendish, 2007).

[66] H Reynolds, *The Law of the Land* (Penguin, 1992).

Aboriginal title.[67] Even the small reserves set aside for disposed Aboriginal people were during the twentieth century attenuated to reallocate land for mines or farms, and in South Australia, to make way for testing atomic weaponry. The creation of national parks was also problematic, for the mythology of an unpeopled wilderness erased its Aboriginal history. It's no coincidence that justice for Aboriginal peoples gained to some extent in recent decades, such as via the federal Native Title Act 1993, has coincided with growing recognition that their customs for 'caring for country' can aid environmental rehabilitation and conservation.[68]

Property also shapes the business corporation, a market institution that both owns property and itself is property for investors. As in other societies, the corporation is a ubiquitous part of Australia's commercial landscape, and as the primary agent of economic development it has been deeply complicit in the vanishing continent. The phenomenal success of the corporation relies heavily on its legal framework including separate legal personality, limited liability for its members and transferable shares, that became established in English law in the mid-nineteenth century. The first Australian companies operated under less flexible frameworks, such as the Royal Charter issued for businesses aiding government policy. While no Australian chartered company was as large as Canada's famous Hudson's Bay Company,[69] a local version was the Van Diemen's Land Company, founded in 1825 with a 250,000-acre grant to develop the colony's agricultural base. The UK's Joint Stock Companies Act 1844 and Limited Liability Act 1855 created many of the building blocks of modern company law, along with the House of Lords' landmark 1897 ruling that upheld the company's separate legal personality.[70] Australian parliaments transplanted the British reforms,[71] including specifically to facilitate natural resources development such as Victoria's Act for the Better Regulation of Mining Companies 1855. Federation gave the Commonwealth some power to legislate in this field, doing so in piecemeal fashion in an attempt to promote a national unified system that was not complete until 2001.[72]

Corporations law is vital for economic growth by encouraging pooled investment in business ventures. Legal historian Phillip Lipton argues that 'mining companies, and ultimately the mining industry itself, benefited greatly from the

[67] *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141. Explicit judicial discussion of the *terra nullius* however didn't occur until *Coe v Commonwealth* [1979] HCA 68, and the doctrine was explicitly rejected by the High Court in *Mabo v Queensland (No 2)* [1992] HCA 23.

[68] JC Altman and S Kerins, *People on Country: Vital Landscapes, Indigenous Futures* (Federation Press, 2012).

[69] VH Sukdeo, *Regulating the Corporation from Within and Without* (PhD dissertation, York University, 2022) 214–18.

[70] *Salomon v Salomon Co Ltd* [1897] AC 22.

[71] See eg Companies Act 1864 (Vic) and Companies Act 1874 (NSW).

[72] Corporations Act 2001.

introduction of a general incorporation system and limited liability legislation'.[73] Australia's largest corporation today, BHP, was founded in 1885 to undertake mining. In the agricultural sector, many Australian farms were, and continue today to be, family affairs but large corporations took control of much of the processing and retail side including Colonial Sugar Refining (founded 1855), Arnott's (1865) and Rosella (1895). The forestry industry also flourished with incorporation, such as Associated Pulp and Paper Mills founded in 1936. Governments themselves formed statutory corporations to operate commercial businesses and manage economic infrastructure, such as Tasmania's dam-building, political citadel, the Hydro-Electric Commission (created in 1929–30).[74]

Harnessing the corporation to further economic goals was not matched by a commitment to include social justice or environmental responsibilities in the corporate mandate. The movement for corporate social responsibility (CSR) is largely a post-1970 phenomenon, although there were sporadic antecedents. Researchers have found evidence of CSR-related disclosures by Australian companies such as BHP since the early twentieth century.[75] So too academics in this era began to reflect on the importance of CSR, such as American Howard Bowen's landmark book in 1953.[76] Yet overall, prior to the late 1960s, corporations took their cues from government regulation (or tried to limit it) rather than seek any societal licence beyond such regulation as is more commonly sought today.

The foregoing modes of governance were means of articulating competing considerations of environmental protection and exploitation but they weren't of even significance or influence. In a young nation bereft of heroic or revolutionary deeds, an outpost of the British Empire forged out of a convict colony that sought to erase the continent's Aboriginal history, the legitimacy of the nation could hardly be sustained by appealing to the manner of its founding. Rather, its legitimacy depended on future outcomes associated with economic, territorial and demographic expansion.[77] Responsible for national housekeeping, the modernising Australian state grew to resemble the *parens patriae*, tasked with encouraging settlement of the continent, building economic infrastructure, lifting living standards and maintaining security. The economy might not always trump environmental considerations, but it usually had the upper hand.

[73] P Lipton, 'A History of Company Law in Colonial Australia: Economic Development and Legal Evolution' (2007) 31(3) *Melbourne University Law Review* 805, 817.

[74] B Davis, 'Adaptation and Deregulation in Government Business Enterprise: The Hydro-Electric Commission of Tasmania 1945–94' (1995) 54(2) *Australian Journal of Public Administration* 252.

[75] J Guthrie and LD Parker, 'Corporate Social Reporting: A Rebuttal of Legitimacy Theory' (1989) 19 *Accounting and Business Research* 342.

[76] HR Bowen, *Social Responsibilities of the Businessman* (New York University Press, 1953).

[77] See also Fraser's analysis of genetic versus telic legitimacy in Australian constitutional law: A Fraser, 'False Hopes: Implied Rights, Popular Sovereignty in the Australian Constitution' (1994) 16 *Sydney Law Review* 213.

## III. 1901 to 1967

This book's history concentrates on 1901 to 1967. Whilst periodisation may provide an incomplete account of any history, and scholars of environmental law will debate its different chapters, 1901 to 1967 is compelling. It begins with Federation, a milestone that created a national government with the Commonwealth of Australia Constitution Act and altered the legal milieu for the subnational states. Some environment-related laws in Australia were adopted by the states' colonial predecessors, as Tim Bonyhady and Joseph Powell have examined,[78] with some continuing after 1901. But in the first two-thirds of the twentieth century the states also embarked on legislative programmes that impacted the natural environment, and some of this governance was influenced by the Commonwealth. An example is the states' environmentally damaging soldier settlement schemes to accommodate veterans of wars to which the Commonwealth had committed the nation. Federalism also necessitated a new governmental territory – the Australian Capital Territory, hosting Canberra – which would become an incubator for new approaches to urban planning. A second territory – the Northern Territory – was separated from South Australia in 1911 and came under federal oversight. The Commonwealth itself began its own direct forays into environmental matters, including brokering an agreement for allocating waters of the Murray-Darling Basin in 1914,[79] and curbing the rapacious international trade in some Australian fauna.[80] And with the transfer to Australia in 1933 of Great Britain's putative Antarctic territories,[81] the Commonwealth acquired the potential to control a vast domain.

Nationhood also influenced the states and territories, and the Commonwealth itself, through a heightened sense of nationalism that culturally began to accommodate the continent's unique wildlife and ecosystems. Australian nationalism had colonial antecedents, aided by self-governance such as the Australian Colonies Government Act passed by the Imperial Parliament in 1850.[82] Nature conservation laws were one domain where this connection between nationalism and the continent's natural heritage was strongly forged, benefiting the charismatic species, such as the lyrebird and koala, and scenic landscapes possessing mountains and waterfalls, that were harnessed as symbols of Australianness.

[78] Bonyhady (n 8); Powell (n 32).
[79] River Murray Waters Agreement 1914; River Murray Waters Act 1915.
[80] Regulated under the Customs Act 1901.
[81] Australian Antarctic Territory Acceptance Act 1933, taking effect on 24 August 1936.
[82] Formally entitled, Act for the Better Government of Her Majesty's Australian Colonies, 1850, coming into effect in 1851.


**Figure 1.2** Lyre-bird stamp, 1932, a species the Commonwealth helped protect by banning international trade in its plumage; Australia Post

Nationhood in 1901 however didn't precipitate an overnight cohesive national identity, let alone one to leverage ambitious federal leadership in environmental affairs, as historian William Coleman cautions in citing Western Australia's secessionist movement.[83] Not until World War II, when Australia faced an existential threat, did the balance of power decisively tilt to the federal sphere, thereby spurring initiatives such as the Snowy Mountains Scheme and the testing of atomic bombs. Even so, not until Whitlam's election in 1972 did national environmental leadership emerge, though serious gaps remain owing to the political wrangling of meddling with the states' economic prerogatives.

The terminus of this study might seem less obvious because of the absence of a discrete milestone equivalent to Federation. The 1960s was a period, now well-documented, of significant social and cultural change in Australia, as in other

[83] WO Coleman, *Their Fiery Cross of Union: A Retelling of the Creation of the Australian Federation, 1889–1914* (Connor Court Publishing, 2021).

Western countries.[84] The year 1967 specifically marked the onset of several environmental campaigns that brought new values and tactics in a decade of heightened political activism, and these campaigns highlighted unprecedentedly the deficiencies of existing environmental laws, thereby helping to inspire extensive reforms including greater national leadership in the following decade. Environmentalists challenged brazen proposals for mining in the Great Barrier Reef and NSW's Colong Caves, plans to farm Victoria's Little Desert and dam Tasmania's Lake Pedder, and urban residential development in Sydney that inspired the 'Green Bans'. Such outbursts of environmental concern shouldn't imply that Australian society previously lacked agitation but it was less intense and less well organised on environmental issues.

Both the Great Barrier Reef and Lake Pedder campaigns led to calls for federal intervention – a shift from viewing environmental entanglements as merely a local or state concern. This growing sense of the national dimension is also exemplified in another significant occurrence of 1967 for Australia in the constitutional amendment to give the Commonwealth concurrent legislative power over Aboriginal affairs; in ensuing decades it would transfer control of the continent's land via the Native Title Act 1993. Environmentalists themselves during this era began to organise themselves nationally. The Australian Conservation Foundation (ACF) was founded in 1965 (though a forerunner was the Wild Life Preservation Society, established in 1909).[85] Seeking political respectability, with its initial president being the High Court Chief Justice, Sir Garfield Barwick, followed by Prince Philip, the ACF was however more conservative than the grassroots campaigners trying to save Lake Pedder or the Colong Caves.[86] Activist groups also flourished at a community level in the major cities in the 1960s, seeking to protect residential life from inappropriate urban development.

Some researchers might prefer to extend this book's history into the 1970s or even early 1980s because of Commonwealth initiatives that solidified cooperative federalism on environmental matters. These include the historic Senate Select Committee reports on air and water pollution in 1969 and 1970 respectively,[87] the House of Representatives Select Committee report on wildlife conservation in 1972,[88] the National Estate report in 1974,[89] and landmark laws of the Whitlam

[84] S Robinson and J Ustinoff (eds), *The 1960s in Australia: People, Power and Politics* (Cambridge Scholars Publishing, 2012).

[85] J Webb, *100 Years of Saving Australia's Wildlife: The History of the Wildlife Preservation Society of Australia 1909–2009* (Wildlife Preservation Society of Australia, 2010).

[86] For a history of the ACF, see B Broadbent, *Inside the Greening: 25 Years of the Australian Conservation Foundation* (Insite Press, 1999).

[87] Australia, Parliament, Senate, *Report from the Senate Select Committee on Air Pollution* (Government Printing Office, 1969); Australia, Parliament, Senate, *Report from the Senate Select Committee on Water Pollution, Water Pollution in Australia* Government Printer, 1970).

[88] Australia, Parliament, House of Representatives, *Wildlife Conservation – Report* (Government Printing Office, 1972).

[89] Committee of Inquiry into the National Estate, *National Estate: Report of the Committee of Inquiry* (Government Printer, 1975).