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FUTURE DIRECTIONS IN LEGAL EDUCATION: EARTH JURISPRUDENCE AND RIGHTS OF NATURE

KATIE O'BRYAN*

Abstract

Earth jurisprudence, and the associated Rights of Nature concept, are fields of law growing rapidly around the world, inviting us to rethink the way humans interact with the environment. As such, they have the potential to contribute to solving some of the most pressing environmental challenges of our time.

This article argues that these concepts should be incorporated into the legal curriculum so that law graduates will be adequately equipped to help find enduring legal solutions to current environmental challenges. After providing some background and context, the article explores various ways in which these concepts could be taught, considers possible obstacles that may be encountered and outlines various options for adapting the legal curriculum.

The article concludes that as well as providing students with knowledge of innovative legal pathways that are emerging in environmental law, there are also pedagogical benefits and positive learning outcomes that can be achieved. Further, institutional goals can also be addressed by incorporating Earth jurisprudence and Rights of Nature into the legal curriculum.

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I Introduction

In 2009, Kevin Rudd, then Prime Minister of Australia, declared climate change to be ‘one of the greatest scientific, economic and moral challenges of our time’.¹ That challenge has only intensified in subsequent years. As noted recently by the Secretary-General of the World Meteorological Organisation, Professor Petteri Taalas:

The year 2021 will be remembered for a record-shattering temperature of nearly 50°C in Canada, comparable to the values reported in the hot Saharan Desert of Algeria, exceptional rainfall, and deadly flooding in Asia and Europe as well as drought in parts of Africa and South America. Climate change impacts and weather-related hazards had life-changing and devastating impacts on communities on every single continent.²

In Australia, the last couple of years have seen yet more devastating fires and floods.³ The most recent report of the Intergovernmental Panel on Climate Change noted that greenhouse gas emissions for the decade 2010–2019 were ‘higher than any previous time in human history’.⁴

In parallel with these statements, on 27 July 2022, the United Nations General Assembly passed a resolution which recognised the right to a clean, healthy and sustainable environment as a human right.⁵

¹ Kevin Rudd, ‘Prime Minister’s Prizes for Science’ (Speech, 28 October 2009) <https://pmtranscripts.pmc.gov.au/release/transcript-16882>. Previously, on 31 March 2007 at the National Climate Summit, Kevin Rudd, while leader of the opposition (and in the lead up to the 2007 Federal election) famously said ‘climate change is the great moral challenge of our generation’: Australian Labor Party, ‘Climate Change: The Great Moral Challenge of our Generation’ (YouTube, 7 August 2007) 00:00:01–00:00:08 <<https://www.youtube.com/watch?v=CqZvpRjGtGM>>.

² World Meteorological Organization, ‘2021 One of the Seven Warmest Years on Record, WMO Consolidated Data Shows’ (Media release, 19 January 2022) <<https://wmo.int/news/media-centre/2021-one-of-seven-warmest-years-record-wmo-consolidated-data-shows>>. See also World Meteorological Organisation, *State of Global Climate 2021 WMO Provisional Report* (2022) 3–4. <https://library.wmo.int/index.php?lvl=notice_display&id=22080#.Yze5edhBzD4>.

³ Jamie Tarabay, ‘Why These Australia Fires Are Like Nothing We’ve Seen Before’, *The New York Times* (Online, 10 December 2020) <<https://www.nytimes.com/2020/01/21/world/australia/fires-size-climate.html>>. See also Joëlle Gergis and Geoff Cary, ‘Some Say We’ve Seen Bushfires Worse Than This Before. But They’re Ignoring a Few Key Facts’, *The Conversation* (Online, 14 January 2020) <<https://theconversation.com/some-say-weve-seen-bushfires-worse-than-this-before-but-theyre-ignoring-a-few-key-facts-129391>>; Rachel Pannett and Frances Vinall, ‘First Came the Fires, Then Came the Floods’, *The Washington Post* (Online, 18 October 2022) <<https://www.washingtonpost.com/world/2022/10/18/australia-floods-climate-change-storm/>>.

⁴ Intergovernmental Panel on Climate Change, *Climate Change 2022: Mitigation of Climate Change* (Report No TS-12, 2022).

⁵ The Human Right to a Clean, Healthy and Sustainable Environment, GA Res 76/300, UN Doc A/RES/76/300 (28 July 2022). This was preceded by a resolution on 8 October 2021 by the United Nations Human Rights Council declaring the ‘right to a clean, healthy and sustainable environment as a human right that is important for the enjoyment of human rights’: HRC Res 48/13, UN Doc. A/HRC/RES/48/13 (8 October 2021) [1]. Note, too, that the General Assembly passed a resolution on 14 December 1990, titled the ‘Need to ensure a healthy

In light of this, the legal academy has a duty to equip its graduates with the skills and knowledge to seek out, understand, critique and embrace innovative legal approaches to solving these intensifying global environmental issues. A recently emerging area of legal innovation responding to the critical global problem of environmental protection in the face of climate change is the concept of the Rights of Nature (also referred to as legal personhood),⁶ a branch of the Earth jurisprudence movement.⁷ Current environmental laws do not seem to be working, so by using law to reorient our relationship with nature, as Earth jurisprudence and Rights of Nature ask us to do, we give ourselves a chance to stem some of the damage that humans have caused to the environment. As Pain and Pepper note, 'it appears increasingly urgent that the law adapt, radically if required, in order to reverse, or at the very least decrease, the current course of accelerating environmental destruction. While not without limitations, environmental personhood is one such method by which the law can answer that call'.⁸

In this article, I set out the case for the inclusion of these emerging areas of law into the Australian legal studies curriculum, explore various ways in which they could be taught, and consider any challenges or obstacles that may be encountered. I then outline various options for reforming or adapting the legal curriculum to incorporate Earth jurisprudence and the Rights of Nature, options that could be

environment for the well-being of individuals', which '[bears] in mind the fact that increasing environmental degradation could endanger the very basis of life,' and '[r]ecognises that all individuals are entitled to live in an environment adequate for their health and wellbeing': GA Res 45/94, UN Doc A/RES/45/94 (14 October 1990) [1].

⁶ See, eg, Cristy Clark et al, 'Can You Hear the Rivers Sing? Legal Personhood, Ontology, and the Nitty-Gritty of Governance' (2019) 45(4) *Ecology Law Quarterly* 787; Nicola Pain and Rachel Pepper, 'Can Personhood Protect the Environment? Affording Legal Rights to Nature' (2021) 45(2) *Fordham International Law Journal* 315; Hendrik Schoukens, 'Granting Legal Personhood to Nature in the European Union: Contemplating a Legal (R)evolution to Avoid an Ecological Collapse (Part i)' (2018) 15(3-4) *Journal for European Environmental and Planning Law* 309; Hendrik Schoukens, 'Granting Legal Personhood to Nature in the European Union: Contemplating a Legal (R)evolution to Avoid an Ecological Collapse (Part II)' (2019) 16(1) *Journal for European Environmental and Planning Law* 65.

⁷ This movement is sometimes referred to as 'wild law'. See, eg, Cormac Cullinan, *Wild Law: A Manifesto for Earth Justice* (Green Books, 2nd ed, 2011) ('*Wild Law*'); Peter Burdon (ed), *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (Wakefield Press, 2011); or 'ecological jurisprudence', see, eg, Alessandro Pelizzon, 'Transitional Justice and Ecological Jurisprudence in the Midst of an Ever-Changing Climate' in Natalia Szablewska and Sacha-Dominik Bachmann (eds), *Current Issues in Transitional Justice: Towards a More Holistic Approach* (Springer, 2015) 317. For an outline of the rise of ecological jurisprudence, see Alessandro Pelizzon, 'An Intergenerational Ecological Jurisprudence: The Supreme Court of Colombia and the Rights of the Amazon Rainforest' (2020) 2(1) *Law, Technology and Humans* 33, 35-8. Pelizzon uses the terms Earth Jurisprudence, Wild Law and Ecological Jurisprudence interchangeably in Alessandro Pelizzon, 'Earth Laws, Rights of Nature and Legal Pluralism' in Michelle Maloney and Peter Burdon (eds) *Wild Law – In Practice* (Taylor and Francis, 2014) 176, 177.

⁸ Pain and Pepper (n 6) 377.

tailored to the particular circumstances of an individual law school. Although the focus of this article is largely on Australia, due to the global nature of the environmental challenges we face, and the global reach of Earth jurisprudence and the Rights of Nature, there is much to commend the incorporation of these concepts into the legal curriculum of other jurisdictions.

II Methodology

I begin by defining some key terms and outlining the background to, and evolution of, the concept of the Rights of Nature, with an emphasis on the value of teaching it at university. I then note the trends in environmental law and the associated approaches to teaching environmental law and related units in the tertiary education sector.

Following this, I outline the results of a brief survey of Australian universities on whether the Rights of Nature, Earth jurisprudence or a similarly titled topic is taught, either as a subject in its own right or featuring in any of the descriptions of units on environmental, natural resources management or a similar field of law. This approach has been taken because if these concepts are mentioned in the unit description, this would suggest that they are given more than a passing reference in the unit content. The focus is on the Bachelor of Laws (LLB) and Juris Doctor (JD) unit offerings as the LLB and JD programs are gateways to entering the legal profession. The survey indicates that the Rights of Nature or Earth jurisprudence do not feature heavily in the Australian legal curriculum at present.

Having explained their value as topics that should be incorporated into the legal curriculum, and given that they do not feature heavily, I then elaborate on how they could be taught, from a logistical, pedagogical and content perspective. As part of this elaboration, I identify and address any potential challenges or obstacles that may be encountered.

I conclude by discussing the future of the Rights of Nature and Earth jurisprudence as a field of study in the Australian legal curriculum.

III What Are Rights of Nature?

First, in order to understand what should be taught in this emerging field of law, we need to define the topic and its terms, starting with what we mean by 'nature'. In that respect, Soper notes that nature, although a term we use with 'ease and regularity' is 'an idea which most of us know, in some sense, to be so various and comprehensive in its use as to defy

our powers of definition'.⁹ More recently, the Secretary-General of the United Nations has expressed a similar view, stating:

Concepts of nature range from the basic elements of the natural world, trees, rivers and animal life, to how our world came into existence, to the world that exists without human beings or human civilizations, to the universe beyond our home planet, in all its staggering complexity. Nature refers to life in general and its presence is everywhere – in the metaphysical, subatomic and cosmic realms. ... [However, b]ecause its physical and metaphysical dimensions are so closely intertwined, it is difficult to provide a concrete definition of nature.¹⁰

Nonetheless, the Rights of Nature is a concept that has existed for at least 50 years in Western legal thought. Although first emerging in the writings of Aldo Leopold,¹¹ Christopher Stone has generally been credited with bringing it to wider attention in his seminal article published in 1972, 'Should Trees Have Standing? Toward Legal Rights for Natural Objects'.¹² Stone's article was cited in the dissenting judgment of Douglas J of the United States Supreme Court that same year in a case called *Sierra Club v Morton*, in support of his statement that '[c]ontemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation'.¹³ Yet, despite this judicial endorsement (albeit in a dissenting judgment), the concept of giving legal rights to nature was still seen by some in US legal circles at the time as somewhat fanciful, with one legal practitioner going so far as to write a satirical poem about what he saw as the potentially absurd ramifications of Douglas J's judgment, should it become reality.¹⁴

Recognition of the Rights of Nature eventually did become a reality in 2006 in the United States when the Tamaqua Borough in Pennsylvania passed an ordinance which recognised 'residents, natural communities and ecosystems [as] 'persons' for the purposes of the enforcement of the civil rights of those residents, natural communities,

⁹ Kate Soper, *What is Nature?: Culture, Politics and the Non-Human* (Wiley-Blackwell, 1995) 1.

¹⁰ *Harmony with Nature: Report of the Secretary-General*, UN Doc A/68/325 (15 August 2013) 4–5.

¹¹ Aldo Leopold, *A Sand County Almanac, and Sketches Here and There* (Oxford University Press, 1949). See also Cormac Cullinan, 'A History of Wild Law' in Burdon (n 7) 23 ('A History of Wild Law'). See also Roderick Nash, *The Rights of Nature: A History of Environmental Ethics* (Primavera Press, 1990) xiii, 63–74.

¹² Christopher Stone, 'Should Trees Have Standing? Toward Legal Rights for Natural Objects' (1972) 45 *Southern California Law Review* 450.

¹³ *Sierra Club v Morton*, 405 US 727, 741–2 (1972). Justice Douglas was a well-known advocate for environmental protection, having previously written a book in 1965 titled *A Wilderness Bill of Rights* (Little, Brown and Co, 1965).

¹⁴ John M Naff Jr, 'Reflections on the Dissent of Douglas, J, in *Sierra Club v Morton*' (1972) 58(8) *American Bar Association Journal* 820, 820.

and ecosystems'.¹⁵ A couple of years later in 2008 when Ecuador replaced its constitution, it included, for the first time in any national constitution, a provision which expressly stated that nature shall be the subject of rights.¹⁶ Since then, the concept has spread around the world in various forms, ranging from constitutional provisions to legislation and court judgments.¹⁷ According to the Eco Jurisprudence Monitor, various Mexican states have adopted constitutional amendments recognising the Rights of Nature.¹⁸ Legislation recognising the Rights of Nature in some form has been enacted in Bolivia,¹⁹ Aotearoa New Zealand,²⁰ Uganda,²¹ Spain²² and Panama.²³ Australia, too, has seen a limited form of legislative recognition for the Rights of Nature in Victoria's *Yarra River Protection (Wilip-gin Birrarung murrn) Act 2017* (Vic). Significant court judgments in favour of Rights of Nature have been handed down, some of the more familiar being in relation to the Atrato River in Colombia,²⁴ the Ganges and Yumana Rivers in India,²⁵ and the Turag River in Bangladesh.²⁶ In Ecuador, there have

¹⁵ Tamaqua Borough, Schuylkill County, Pennsylvania, Ordinance No 612 of 2006, s 7.6.

¹⁶ *Constitución de la República del Ecuador*, art 10. Article 71 then sets out the main rights of nature under the Constitution and who is required to enforce them.

¹⁷ For an up-to-date list of various manifestations of the Rights of Nature, see United Nations, 'Rights of Nature Law and Policy' *Harmony with Nature* (Web Page) <<http://www.harmonywithnatureun.org/rightsOfNature/>> ('*Rights of Nature Law and Policy*').

¹⁸ According to its website, '[t]he Eco Jurisprudence Monitor is an interactive online platform that compiles ecological jurisprudence initiatives globally as well as related resources for researchers, lawyers, policymakers, and activists. It was 'developed by an international group of independent scholars and researchers through a collaborative process': Eco Jurisprudence Monitor, 'About Us' <<https://ecojurisprudence.org/about/>> (Web Page) ('*Eco Jurisprudence Monitor*').

¹⁹ *Law of the Rights of Mother Earth 2010* (Bol); *Law No 300 Framework Law of Mother Earth and Integral Development to Live Well 2012* (Bol).

²⁰ *Te Urewera Act 2014* (NZ); *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ).

²¹ *National Environmental Act 2019* (Ug).

²² *Law 19/2022 for Recognition of the Legal Personality of the Laguna del Mar Menor and its Basin* (Es).

²³ *Que Reconoce los Derechos de la Naturaleza y las Obligaciones del Estado relacionadas con estos Derecho 2022* (Pan).

²⁴ Centro de Estudios para la Justicia Social 'Terra Digna' and Others v President of the Republic and Others No T-622 of 2016, Corte Constitucional [Constitutional Court] Sala Sexta de Revision [Sixth Chamber] (Colombia) (10 November 2016).

²⁵ *Mohd Salim v State of Uttarakhand & others*, 126/2014 (High Court of Uttarakhand, 20 March 2017). This decision has been stayed pending an appeal to India's Supreme Court, which at the time of writing, had not yet been heard.

²⁶ *Human Rights and Peace for Bangladesh and others v Secretary of the Ministry of Shipping and others*, Writ Petition No. 13989 of 2016. The court judgment extended this to all rivers in Bangladesh.

been numerous court cases on the Rights of Nature, both successful and unsuccessful, since the 2008 Constitution came into force.²⁷

By what means would nature hold legal rights? Stone, in his 1972 article, outlined three criteria that would be required for nature to be a holder of legal rights. First, the natural object must be able to ‘institute legal proceedings at its behest’.²⁸ In other words, it would need to have standing to appear in court. To that end, it would require a human to institute such proceedings, which Stone referred to as a guardian.²⁹ Second, ‘in determining the granting of legal relief, the court must take injury to it [the natural object] into account’.³⁰ And finally, any relief granted must run to the benefit of the natural object, not as compensation to humans for the injury done to the natural object.³¹ Importantly, Stone emphasised that for there to be any content to the legal rights of the natural object, there also needs to be an authoritative body that can review any action that threatens those rights.³² In other words, those rights need to be enforceable.

So, under the Rights of Nature approach, nature is no longer the object of rights, no longer considered as property to be owned and exploited by humans, but is the subject of enforceable rights of its own.

But what kind of rights would be recognised? This would depend on the nature of the natural entity. Thomas Berry, a prominent Earth jurisprudence advocate, points out that ‘[r]ivers have river rights. Birds have bird rights. Insects have insect rights. Humans have human rights. Difference in rights is qualitative, not quantitative. The rights of an insect would be of no value to a tree or a fish’.³³ Accordingly, there is no ‘one size fits all’ approach to the rights that could be recognised. To complicate matters, there are examples of whole ecosystems which have had their legal rights recognised.³⁴

²⁷ Craig M Kauffman and Pamela L Martin, ‘Can Rights of Nature Make Development More Sustainable? Why Some Ecuadorian Lawsuits Succeed and Others Fail’ (2017) 92 *World Development* 130.

²⁸ Stone (n 12) 458.

²⁹ Ibid 466–73.

³⁰ Ibid 458.

³¹ Ibid.

³² Ibid.

³³ Thomas Berry, *Evening Thoughts: Reflecting on Earth as Sacred Community* (Sierra Club Books, 2006) 111.

³⁴ See, eg, *Te Urewera* in Aotearoa New Zealand pursuant to the *Te Urewera Act 2014* (NZ). Further, in 2018, the Colombian Supreme Court recognised the legal rights of the Amazon River ecosystem: Nicholas Bryner, ‘Colombian Supreme Court Recognizes Rights of the Amazon River Ecosystem’, *International Union for Conservation of Nature* (Webpage, 20 April 2018) <<https://www.iucn.org/news/world-commission-environmental-law/201804/colombian-supreme-court-recognizes-rights-amazon-river-ecosystem>>; *Centro de Estudios para la Justicia Social ‘Tierra Digna’ and Others v President of the Republic and Others*, Corte Constitucional [C.C] [Constitutional Court] Sala Sexta de Revision [Sixth Chamber] noviembre 10, 2016, T-622/2016 (Colom.) and in India, in a case known as the

As noted earlier, Rights of Nature can be seen as part of a wider environmental movement called Earth jurisprudence, also referred to as ‘wild law’³⁵ or ecological jurisprudence.³⁶ Earth jurisprudence takes an ecocentric view of the environment, a view in which nature has intrinsic value. This can be contrasted with an anthropocentric view of nature, in which humans are central and nature exists only in terms of its value to humans.

As Berry notes, ‘we need a jurisprudence that would provide for the legal rights of geological and biological as well as human components of the Earth community. A legal system exclusively for humans is not realistic. Habitat of all species, for instance, must be given legal status as sacred and inviolable’.³⁷

Earth jurisprudence, although relatively new in terms of Western legal thought, closely aligns with Indigenous conceptions of country which extend back many thousands of years. Indigenous peoples have been practicing, through their own laws and customs, various versions of what Western legal tradition refers to as Earth jurisprudence since time immemorial. Relatedly, many cases involving the Rights of Nature have been influenced or led by Indigenous people as a means by which their rights can be given effect.³⁸

One of the first proponents of modern Earth jurisprudence, Cormac Cullinan, has described Earth jurisprudence as a ‘philosophy of law and governance that is based on the idea that humans are only one part of the wider community of beings and that the welfare of each member of that community is dependent on the welfare of the Earth as a whole’.³⁹

It is arguably the lack of a holistic view of nature, contrary to that as expressed above (and by many Indigenous peoples),⁴⁰ that has contributed to the major environmental challenges we face today, including climate change. Current approaches do not appear to be working. As noted by Australian academic Nicole Rogers, ‘[e]xisting

Glaciers case, the Uttarakhand High Court recognised legal rights for the ‘Himalayan Mountain ranges, glaciers, rivers, streams, rivulets, lakes, jungles, air, forests, meadows, dales, wetlands, grasslands and springs’, *Miglani v. Uttarakhand WPPIL* 140/2015 (Uttarakhand HC) March 30, 2017, 63.

³⁵ Cullinan, *Wild Law* (n 7); Burdon (n 7).

³⁶ The term ‘ecological jurisprudence’ is considered by some to more explicitly acknowledge Indigenous laws. See, eg, Erin O’Donnell et al, ‘Stop Burying the Lede: The Essential Role of Indigenous Law(s) In Creating Rights of Nature’ (2020) 9(3) *Transnational Environmental Law* 403, 410.

³⁷ Thomas Berry, *The Great Work: Our Way Into the Future* (Bell Tower, 1999) 161.

³⁸ O’Donnell et al (n 36).

³⁹ Cullinan, ‘A History of Wild Law’ (n 11).

⁴⁰ See, eg, Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Routledge, 2015) 13–15.

environmental law does not offer much by way of solutions'.⁴¹ Earth jurisprudence and the associated Rights of Nature concept gives us an alternative pathway to consider in our quest for solutions. As such, the value of incorporating them into the legal curriculum should not be underestimated.

IV The Growth and Importance of Earth Jurisprudence and Rights of Nature as a Law School Subject

As noted earlier, Earth jurisprudence and the associated Rights of Nature have been expanding rapidly around the world since the mid-2000s, a phenomenon that is reflected in the following statement made in 2019 by the Secretary-General of the United Nations: 'Earth jurisprudence can be seen as the fastest growing legal movement of the twenty-first century. The most significant consequence of acknowledging human interconnectedness and inextricability from the rest of the world has been casting the non-human world as a legal subject'.⁴²

Importantly, he then proceeded to state:

Redefining legal education and legal theory have become central to the development of an Earth-centred approach, as reflected in the rapid growth of pedagogical curricula in colleges and universities worldwide, either through formal teachings on the subject or by exposing students to the subject in informal settings such as study groups, workshops, seminars and conferences.⁴³

However, there is little evidence of this rapid growth in the Australian legal curriculum. Rights of Nature and Earth jurisprudence have yet to receive the same level of attention in mainstream legal education in Australia as other emerging (and important) fields, such as Artificial Intelligence (AI).⁴⁴ Yet law graduates are arguably central to any efforts to finding durable solutions to the global environmental challenges we are currently facing.

This is because law graduates are not only represented in the legal profession, they are 'also prominent in the business world and all levels of government. They are involved with determining rights and

⁴¹ Nicole Rogers, 'Performance and Pedagogy in the Wild Law Judgment Project' (2017) 27(1) *Legal Education Review* 53, 69.

⁴² United Nations Secretary-General, *Harmony with Nature*, UN Doc A/74/326, (July 26, 2019) [129] ('*Harmony with Nature*'). See also Eco Jurisprudence Monitor, <<https://ecojurisprudence.org/>> for visual representations of location, frequency and manifestations of Rights of Nature and related concepts.

⁴³ *Harmony with Nature* (n 42) [130]. See also [69]–[70] for examples of Australian Universities offering Rights of Nature courses.

⁴⁴ See, eg, Marjan Ajevski et al, 'ChatGPT and the Future of Legal Education and Practice' (2023) 57(3) *The Law Teacher* 352

responsibilities, what is enforceable and what is "just".⁴⁵ Nicole Graham explains that '[l]egal education plays an important but under-acknowledged role in anthropogenic environmental change because it shapes and qualifies people to become lawyers, judges and policy makers'.⁴⁶ It is therefore vital that law graduates are fully equipped with knowledge of the latest legal innovations being used to protect the environment and combat climate change.

One need look no further than at the innovative Whanganui River Treaty Claims Settlement in Aotearoa New Zealand which gave legal rights to the Whanganui River.⁴⁷ According to the Minister for Treaty of Waitangi negotiations, Christopher Finlayson, it 'was inspired by the writings on RoN [Rights of Nature] by North American legal scholars, particularly Christopher Stone, as well as US legal cases'.⁴⁸ Christopher Finlayson himself was a practising lawyer prior to becoming a member of parliament and has returned to the profession since his retirement from politics in early 2019.⁴⁹

A survey of the tertiary qualifications of federal members of the Australian Parliament following the federal election in May 2022 indicates that a significant number of them (approximately 24 percent) have a legal qualification.⁵⁰ In the State of Victoria, at the time of writing, approximately 20 percent of all Victorian parliamentarians had a legal qualification.⁵¹

Our elected representatives make important decisions about our future. It is therefore important to equip those representatives who have

⁴⁵ Jason Lowther and Joanne Sellick, 'Embedding Sustainable Development into Legal Education' (2009) 7(6) *International Journal of the Humanities* 11, 15.

⁴⁶ Nicole Graham, 'This Is Not a Thing: Land, Sustainability and Legal Education' (2014) 26 *Journal of Environmental Law* 395, 395.

⁴⁷ *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) ('*Te Awa Tupua Act*').

⁴⁸ Craig M Kauffman and Pamela L Martin, 'Constructing Rights of Nature Norms in the US, Ecuador, and New Zealand' (2018) 18(4) *Global Environmental Politics* 43, 57. In a footnote to this statement (fn 18), the authors note that '[l]awyers working on the settlement specialized in biodiversity law and were familiar with writings on RoN.'

⁴⁹ 'National MP Chris Finlayson to Leave Parliament in the New Year', *New Zealand Herald* (Online, 28 November 2018) <<https://www.nzherald.co.nz/nz/national-mp-chris-finlayson-to-leave-parliament-in-new-year/GIO4K3WMHEDJZIIWSSG7YCUKJ4/>>. See also: 'Chris Finlayson to Leave Parliament Early Next Year' RNZ (Online, 28 November 2018) <<https://www.rnz.co.nz/news/political/377043/chris-finlayson-to-leave-parliament-early-next-year>>.

⁵⁰ The author conducted a search of the Parliament of Australia website on 30 July 2022 for details of the educational qualifications of Commonwealth parliamentarians, Parliament of Australia, <<https://www.aph.gov.au/>>. Where this information was not on the parliamentary website, a search was conducted of that parliamentarian's personal MP website, or party affiliated website, or LinkedIn page (if they had one).

⁵¹ The author conducted a search of the Parliament of Victoria website on 15 March 2022 for details of the educational qualifications of Victorian parliamentarians, Parliament of Victoria, <<https://new.parliament.vic.gov.au/>>. Where this information was not on the parliamentary website, a search was conducted of that parliamentarian's personal MP website or party affiliated website, or LinkedIn page (if they had one).

a legal background with the ability to respond to the global climate change crisis with innovative pathways and educate their fellow parliamentarians about those pathways. One way of doing that is to expose them to a range of concepts during their law studies, including Earth jurisprudence and the associated Rights of Nature concept.

V Trends in Environmental Law and Law Teaching

Including Earth jurisprudence and Rights of Nature in the legal curriculum would dovetail neatly into the current trajectory of environmental law in Australia, which has been continually evolving over the years.⁵² It commenced with what has been described by Jessup and Carroll as 'first generation' environmental law,⁵³ being laws 'focused on command and control regulatory structures'.⁵⁴ This generation of environmental laws started in the 1970s and extended to the early 1990s. Second generation environmental laws were laws which 'embraced voluntarism, and market and economic instruments as supplants to bureaucracy-led governance'.⁵⁵ Third generation environmental laws were 'an experiment with collaborative and community involved governance, a focus on global dimensions and law-making, and laws guided by principles including sustainable development, environmental justice, human rights, duties of care and precaution'.⁵⁶ According to Jessup and Carroll, we are now in the era of 'so-called fourth or next generation of environmental laws',⁵⁷ being laws which are 'necessary in order to redress limitations or failures in the law, to respond to complex global challenges, and to rejuvenate otherwise stagnant laws'.⁵⁸

They describe this evolution of environmental law as one of being initially 'confined to legal categories (eg pollution laws, wildlife laws and town planning laws) to being defined by the problem that it is seeking to address'.⁵⁹ Climate change and environmental degradation are two such problems, and laws which recognise Rights of Nature could potentially aid in addressing these problems.

⁵² See JF Garner, 'Environmental Law as an Academic Subject' (1988) 3 *Denning Law Journal* 51, 51 for some lively historical examples of mediaeval environmental law: eg, 'William Shakespeare's father was fined in 1584 by the town council of Stratford for allowing a dung-heap to accumulate outside his house'.

⁵³ Brad Jessup and Claire Carroll, 'The Sustainability Business Clinic - Australian Clinical Legal Education for a "New Environmentalism" and New Environmental Law' (2017) 34 *Environmental and Planning Law Journal* 542, 545.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

The teaching of environmental law has similarly evolved, the problems to be addressed being increasingly global in nature. Sustainability was the focus of the decade 2005–14 following the UN General Assembly in 2002 declaring that that decade was to be the UN Decade of Education for Sustainable Development.⁶⁰ Since then, climate change has now become the dominant environmental problem to be addressed and is increasingly being reflected in environmental law curricula.⁶¹

It may be argued that Earth jurisprudence and the Rights of Nature concept are passing fads, that in a couple of years they will have faded away to be replaced by another “on-trend” legal innovation in environmental protection. However, the UN Secretary-General’s statement, set out earlier, belies this argument. Further, one only need look at the rising number of publications over the past twelve years (2010–21) referring to Earth jurisprudence and Rights of Nature to see that they are concepts that are likely to be around for, and evolve over, the long term. In that respect, a Google Scholar search on the use of the phrase ‘rights of nature’ in publications between 2010 and 2014 returned 2420 results; from 2015 to 2019 the results had almost doubled to 4810; and 2020–21 alone returned 3040 results. A similar result was achieved in relation to the phrase ‘earth jurisprudence’. A search of publications between 2010 and 2014 returned 330 results. In the following five years, this had more than doubled to 686. A search of the next two years alone (2020–21) returned a further 483 results.⁶²

The above search is by no means comprehensive, and its limitations must be acknowledged. They include that it was based only on citations, it was not limited to law publications, there is likely to be a significant overlap between the publications identified in each of the search phrases, and there is likely to be a doubling up of publications in the results for the one search phrase. The phrase might also be found only in a footnote, and the publication in which the phrase appears might not be specifically about the Rights of Nature or Earth jurisprudence. The search, however, was not intended to be a qualitative analysis of the publications behind the citations but is merely intended to give a general indication of the recognition and rise of these related concepts.

It is also not surprising that the last seven years have seen such a marked increase in publications on Earth jurisprudence and Rights of Nature. It was arguably the Whanganui River Settlement in 2017 in

⁶⁰ GA Res 57/254, UN Doc A/RES/57/254 (20 December 2002).

⁶¹ See, eg, Michael Mehling et al, ‘Teaching Climate Law: Trends, Methods and Outlook’ (2020) 32 *Journal of Environmental Law* 417. See also John C Dernbach, ‘The Essential and Growing Role of Legal Education in Achieving Sustainability’ (2011) 60 *Journal of Legal Education* 489, 505–10; Warren G Lavey, ‘Toolkit for Integrating Climate Change into Ten High-Enrollment Law School Courses’ (2019) 49(2) *Environmental Law* 513.

⁶² This search was conducted by the author on 22 October 2022.

Aotearoa New Zealand, referred to earlier, which re-invigorated Christopher Stone's 1972 argument that nature should be given legal rights, thus bringing the concept to the attention of a worldwide audience.

However, this growth of scholarly interest in Rights of Nature and Earth jurisprudence has not resulted in a corresponding growth of units in the Australian legal curriculum about or involving these concepts. There are 38 law schools in Australia and, although 35 of them (approximately 92 percent) offer an environmental or related law unit, only three law schools offer, or have offered sometime during the last three years, a unit specifically on Earth jurisprudence or Rights of Nature,⁶³ with only a further four including them in an environmental law or related unit.⁶⁴ For the reasons outlined earlier, this deficiency in the law school curriculum ought to be rectified.

VI How Could Rights of Nature and Earth Jurisprudence be Incorporated into the Legal Curriculum?

Having established the value of including Rights of Nature and Earth jurisprudence (hereinafter Rights of Nature) in the legal curriculum, it follows that consideration now be given to how that could be achieved. There are various ways that these concepts could be incorporated into the legal curriculum, a number of which are outlined below.

A *Stand-alone Unit*

The first, and arguably the most obvious, could be as a stand-alone unit. The immediate benefit of offering such a unit as a stand-alone unit is that it creates sufficient space within the unit's curriculum for students to take an in-depth look at the wide range of issues involved. In most law schools, a stand-alone unit like this is likely to be an elective, usually undertaken during the later years of a student's law degree.

A difficulty with offering Rights of Nature as a stand-alone elective is that enrolment could initially be limited, as only those students with a passion for, or deep interest in, environmental law and related issues are likely to enrol. There are ways, however, that this difficulty could be overcome. Rights of Nature draws on many different aspects of the core (mandated) curricular,⁶⁵ most obviously in Administrative Law in

⁶³ Namely Southern Cross University, Bond University and Griffith University.

⁶⁴ University of Technology Sydney, University of Melbourne, Macquarie University and Griffith University.

⁶⁵ In Australia, these are known as the 'Priestley Eleven' subjects, successful completion of which is required to be admitted to practice. The Priestley Eleven are named after the Honourable Justice Priestley of the Supreme Court of New South Wales, who was the chair of the Law Admissions Consultative Committee which recommended that these eleven subjects be 'required to be incorporated into any law degree accredited as satisfying the

relation to ‘standing’. This is evident from the title of Stone’s seminal article ‘Should Trees Have Standing?’ referred to earlier.⁶⁶ Accordingly, students could be introduced to the concept as part of a core, compulsory unit (about which more is said below), thus paving the way for creating an interest in a later elective.

An elective is not the only option for having Rights of Nature as a stand-alone subject. There is also some precedent in both Australia and the US for mandating subjects relating to environmental law, even as early as in the first year of a law course.⁶⁷ Given the pervasive nature of environmental issues and the need to find innovative solutions, an argument could be mounted that a unit focussing on the Rights of Nature should be part of a suite of mandated law subjects, not simply an elective. This could be bolstered by linking such a unit to the university’s or faculty’s strategic direction. For example, Monash University’s most recent strategic plan, *Impact 2030*, identifies three significant global ‘Challenges of the Age’, of which climate change is one.⁶⁸ And, as noted in the introduction, Rights of Nature is a concept which could provide an alternative pathway to finding solutions to protect the environment in the face of this particular challenge.

A counterargument to this is that mandating a unit on Rights of Nature would infringe academic freedom.⁶⁹ However, this does not seem to have been a concern at Southern Cross University which has had a mandated core environmental law unit in the Bachelor of Laws (LLB) program since 1993.⁷⁰ And with a government in Australia that

academic requirements for admission as a legal practitioner.’ David Barker, *A History of Australian Legal Education* (Federation Press, 2017) 6.

⁶⁶ Stone (n 12).

⁶⁷ MA Wolf and JB Eisen, ‘Practice, Policy and Pedagogy in a Mandatory Environmental Law Course’ (2000) 123 *Water, Air, and Soil Pollution* 409, 409 note that a mandatory environmental law course was introduced in 1992 as a first-year course at the University of Richmond School of Law in the US. In relation to Australia, see also Rogers (n 41) 68. At Southern Cross University, environmental law is still a core (second year) unit in 2024, the course overview stating: ‘In addition to the core units, which comply with professional accreditation requirements, the course includes unique core units such as the philosophy of law and environmental law, that reflect our focus on; justice and critique.’ Southern Cross University, ‘Bachelor of Laws 2023 Course Information for Domestic Students’ (Web Page, 2023) <<https://www.scu.edu.au/study-at-scu/courses/bachelor-of-laws-3007001/>>.

⁶⁸ Monash University, *Impact 2030*, (Strategic Plan 2021–2030) 6–9, <<https://www.monash.edu/about/strategic-direction/strategic-plan>>.

⁶⁹ See, eg, Jane Holder, “‘Doing the Sustainability Dance’: Tracing a Critical Route from the Education for Sustainable Development Movement to Environmental Justice in Legal Education’ (2012) 65(1) *Current Legal Problems* 145, 151 in relation to embedding sustainability into legal education in the UK. For an insight into the academic freedom debate in Australia in relation to teaching methods, rather than curriculum content, see Nick James, “‘How Dare You Tell Me How to Teach!’: Resistance to Educationalism Within Australian Law Schools’ (2013) 36 *UNSW Law Journal* 779.

⁷⁰ See, eg, Rogers (n 41) 68 where she notes that Southern Cross University made environmental law a core unit in the LLB in 1993. It is still a core (second year) unit in 2023, see above (n 67).

has placed climate change at the top of its policy and legislative agenda,⁷¹ unit proposals to teach law students about innovative pathways to potential solutions, such as those offered by Rights of Nature, are more likely to gain traction with unit approvers.

Another difficulty with incorporating Rights of Nature into the legal curriculum as a stand-alone subject is likely to be the availability of suitably experienced academics in the faculty to deliver it. Although researchers in Earth jurisprudence and Rights of Nature span various legal disciplines, including property law and legal philosophy, in the absence of an existing academic with direct expertise in the field, teachers of environmental law units may be well placed to deliver a unit on the Rights of Nature. However, this might require them to forego teaching an existing environmental law unit, the content and delivery of which they would already be familiar with. And if that existing unit had high enrolment numbers, there would be little merit in discontinuing the subject in favour of a specific unit on the Rights of Nature.

In either case, the necessary preparation and up-skilling for the delivery of a new unit would likely be a major factor in determining the feasibility of offering Rights of Nature as a stand-alone unit. As has been noted, albeit in relation to including sustainability into the general law curriculum (but arguably equally applicable to a stand-alone subject), obstacles include ‘an already full curriculum’ and ‘lack of expertise’.⁷²

Additionally, should an academic be sufficiently experienced and keen to take on the delivery of the unit, in order for the unit to have any longevity would require an on-going commitment from that academic to deliver it, along with ongoing support from the faculty. Militating against this is the nature of the academic workforce, which is a highly mobile and fluid one. Academics regularly move between institutions both in-country and internationally, as well as out of academia.⁷³ The reasons for doing so are varied, but academic mobility between institutions and countries is not inherently problematic. Further, the

⁷¹ One of the first bills to be introduced into the Australian Parliament by the new federal Labor government was the Climate Change Bill 2022 which subsequently became law in September 2022: Nicole Hegarty, ‘Federal Government’s Climate Bill Clears Final Hurdle, Becomes Law’, *ABC News* (Online, 8 September 2022) <<https://www.abc.net.au/news/2022-09-08/fed-gov-climate-bill-clears-final-hurdle-becomes-law/101416538>>.

⁷² Tracey Varnava, Jason Lowther and Simon Payne, ‘Sustainability – Is it Legal? The Benefits and Challenges of Introducing Sustainability into the Law Curriculum’ in Paula Jones et al (eds), *Sustainability Education: Perspectives and Practice Across Higher Education* (Routledge, 2010) 133, 141.

⁷³ See, eg, Emmaline Bexley et al, *The Academic Profession in Transition: Addressing the Challenge of Reconceptualising Academic Work and Regenerating the Academic Workforce*, (Report, Centre for the Study of Higher Education, University of Melbourne, September 2011) xi–xii; 17–19. See also Emmaline Bexley et al, ‘The Motivations, Value and Future Plans of Australian Academics’ (2013) 65(3) *Higher Education* 385.

receiving institution may reap the benefit of the incoming academic's expertise. However, if an academic who has been at the forefront of the introduction (and ongoing success) of the unit leaves a particular institution, they are likely to take with them their knowledge and enthusiasm for the unit. Unless there is a succession plan for a colleague to take on the unit, they will leave a gap to be filled.

Universities in Australia and overseas have an increasingly casualised workforce, the majority of whom are on teaching-only contracts.⁷⁴ Accordingly, that gap could be filled with the unit potentially being delivered by a casual staff member with sufficient expertise contracted specifically to deliver the unit. This could be a legal practitioner who has knowledge of and interest in the Rights of Nature,⁷⁵ an early career academic or a PhD student, who may be researching in the field, many of whom take on teaching roles while undertaking their PhDs. However, the precarious nature of casual academic work means that the longevity of the unit would depend on the availability of the casual staff member. It relies even more so on the ongoing support of the faculty to ensure continuity when an existing contract expires and a new contract is being negotiated. Should the unit be well subscribed then there is an incentive for the faculty to continue to offer the unit and therefore an incentive to recontract the teacher (or find a replacement). However, this also presupposes that the unit has had the opportunity to develop and build up sufficient enrolment numbers.

B As Part of an Environmental Law Subject

Another way of incorporating the Rights of Nature into the law school curriculum would be as part of an existing environmental or natural resources law elective. Most Australian law faculties have at least one environmental or natural resources law elective, or even a mandated core environmental law unit (such as at Southern Cross University, noted earlier).⁷⁶ To date, many instances where Rights of Nature have

⁷⁴ Vivien McComb, Narelle Eather and Scott Imig, 'Casual Academic Staff Experiences in Higher Education: Insights for Academic Development' (2021) 26(1) *International Journal for Academic Development* 95, 96.

⁷⁵ These sessional staff members have been referred to as 'industry experts' with 'extensive corporate experience and [who] seek to apply this in an educational setting on a temporary and part time basis.' Julia Richardson, Dorothy Wardale and Linley Lord, 'The "Double-Edged Sword" of a Sessional Academic Career' (2019) 38(3) *Higher Education Research and Development* 623, 624.

⁷⁶ According to a search done in September 2022 of publicly available information on the websites of the 38 Law Schools in Australia, 35 (92%) have an environmental or natural resources law elective in the LLB, JD or both. The three universities which do not offer any environmental or related law units are the University of the Sunshine Coast in Queensland, and Swinburne University of Technology and Victoria University in Victoria.

been recognised have involved legal rights for rivers.⁷⁷ This suggests that it could appropriately be included, for example, in a unit on water resources law.

But it may not be necessary to limit it to law units relating to the environment and natural resources. It could conceivably be incorporated to a greater or lesser degree into other electives, such as a human rights law unit (particularly now that the right to a healthy environment has been recognised as a human right), an international law unit, or even an Indigenous legal rights unit, given the context in which it has emerged in many instances.⁷⁸

C As Part of a Generalist Core Law Unit

A third way in which the Rights of Nature could be incorporated into the legal curriculum could be as part of a generalist core law unit such as Administrative Law, Tort Law, Criminal law, Property Law or Contract Law. Any core subject which considers cases or scenarios involving the environment could potentially incorporate Rights of Nature.⁷⁹

A major topic in Administrative Law is ‘standing’, namely the ability to initiate court proceedings (in Administrative Law, in relation to the legality of government decision-making). As noted earlier, Stone’s article specifically asks the question ‘Should Trees Have Standing?’ Recent developments in Earth jurisprudence and the Rights of Nature have started answering that question with an emphatic yes, particularly in relation to river rights.⁸⁰

Environmental non-government organisations (NGOs) often take on the role of initiating court proceedings against the government on behalf of a natural entity under increasingly liberal interpretations of standing requirements.⁸¹ Students could critically reflect on whether a natural entity (in practice a guardian of that entity) would be better placed than an environmental NGO to initiate such proceedings.

In relation to Tort Law and the “neighbour” concept, Brian Preston has noted that ‘Stone proposed that the concept of “neighbour” could be extended to include not merely persons, but also nature’, and goes on to discuss questions of standing and guardianship.⁸²

⁷⁷ See, eg, ‘Rights of Rivers: A Global Survey of the Rapidly Developing Rights of Nature Jurisprudence Pertaining to Rivers’, *International Rivers* (October 2020) <<https://www.internationalrivers.org/resources/reports-and-publications/rights-of-river-report/>> (‘Rights of Rivers’).

⁷⁸ See, eg, O’Donnell et al (n 36).

⁷⁹ See, eg, Brian Preston, ‘The Environment and its Influence on the Law’ (2008) 82(3) *Australian Law Journal* 180.

⁸⁰ *Rights of Rivers* (n 77).

⁸¹ See, eg, *North Coast Environmental Council v Minister for Resources* (1994) 55 FCR 492.

⁸² See, eg, Preston (n 79) 186.

Requiring students to consider why natural entities have been, or should be, given standing to bring a court action is an exercise in critical thinking, a vital skill for an aspiring law graduate.

In relation to criminal law, there are currently criminal sanctions for egregious breaches of various environmental laws, eg, flora and fauna, wildlife, noxious waste and pollution legislation. For example, Victoria's environmental protection legislation provides for five years imprisonment for an aggravated breach of the legislation by an individual, and hefty fines for both individuals and bodies corporate.⁸³ At the Commonwealth level, it is a criminal offence to take action that will have an effect on, for example, the world heritage value of a declared World Heritage property, punishable by a term of imprisonment of up to seven years, and/or a fine.⁸⁴

At the international level, there has been an ongoing campaign to have ecocide, which has been defined as 'unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and widespread or long-term damage to the environment being caused by those acts',⁸⁵ recognised as an international crime in the International Criminal Court, along with genocide, war crimes, crimes of aggression and crimes against humanity.⁸⁶

In India, shortly after the Uttarakhand High Court held that the Ganges and Yamuna Rivers were legal persons⁸⁷ and a week after the passage of the New Zealand Whanganui River Settlement legislation, an environmental activist went so far as to file a police report requesting that the police investigate 'an attempt to murder the Yamuna by poisoning'⁸⁸ on the basis that 'scientifically speaking, the Yamuna is ecologically dead'.⁸⁹

Accordingly, there is clearly scope for a Rights of Nature approach to criminal prosecutions involving the environment to be discussed in a

⁸³ See, eg, *Environment Protection Act 2017* (Vic) s 27.

⁸⁴ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 15A. The same penalties apply to offences in Ramsar wetlands, s 17B, and other matters of environmental significance, ss 18A, 20A, 22A, 24A, 24C, 24E.

⁸⁵ Stop Ecocide Foundation, *Stop Ecocide Foundation Independent Expert Panel for the Legal Definition of Ecocide, Commentary and Core Text* (2021) art 8(1). The draft law is a proposal to amend the Rome Statute.

⁸⁶ Haroon Siddique, 'Legal Experts Worldwide Draw up 'Historic' Definition of Ecocide', *The Guardian* (Online, 23 June 2021) <<https://www.theguardian.com/environment/2021/jun/22/legal-experts-worldwide-draw-up-historic-definition-of-ecocide>>.

⁸⁷ *Mohd Salim v Uttarakhand*, WPIL 126/2014 (Uttarakhand HC), March 20, 2017.

⁸⁸ Erin O'Donnell, *Legal Rights for Rivers: Competition, Collaboration and Water Governance* (Routledge, 2019) 176.

⁸⁹ Michael Safi, 'Murder Most Foul: Polluted Indian River Reported Dead, Despite Living Entity Status', *The Guardian* (Online, 8 July 2017) <<https://www.theguardian.com/world/2017/jul/07/indian-yamuna-river-living-entity-ganges>>.

criminal law unit. Further, the concept of restorative justice, described as ‘a way of responding to criminal behaviour by balancing the needs of the community, the victims and the offenders’⁹⁰ in relation to environmental crimes could be particularly well suited as a vehicle for discussing Rights of Nature, the victim in this instance being nature.⁹¹ As noted by Preston, ‘natural objects, such as rivers and trees, have been represented successfully by a surrogate victim in restorative justice conferences’.⁹²

Property Law is another core subject in which the Rights of Nature could be incorporated. It is uncontroversial that legal entities such as corporations and trusts (as well as individuals) can own property. However, the concept of who or what can own property has been expanded in countries such as Aotearoa New Zealand by virtue of the Rights of Nature approach. This has occurred in two ways. First, the legislation granting legal rights to the natural entity gives that natural entity all the rights of a legal person, which therefore would include the right to own property.⁹³ Second, and what is the more revolutionary aspect of the Aotearoa New Zealand legislation, is that it vests the fee simple estate in the bed of the river. In other words, the river owns itself.⁹⁴

Contract Law could also incorporate Rights of Nature. As noted above, Rights of Nature can involve giving nature legal personhood. An entity with legal personhood has the ability (among other things) to enter into contracts.⁹⁵ Students could consider, for example, why a natural entity might want to enter into a contract, the nature of the contracts that a natural entity might want to enter, and the enforceability of such a contract.

Even Constitutional Law has scope for incorporating Rights of Nature, given its recognition in constitutions such as the constitution of Ecuador, for example. In the Australian context, students could be tasked with considering what a constitutional amendment might look like, what rights would be protected, and the implications of

⁹⁰ Brian J Preston, ‘The Use of Restorative Justice for Environmental Crime’ (2011) 35 *Criminal Law Journal* 136, 136, citing United Nations Office on Drugs and Crime (UNODC), *Handbook on Restorative Justice Programs* (2006) 6.

⁹¹ *Ibid.*

⁹² *Ibid* 145 (citations omitted).

⁹³ *Te Awa Tupua Act* (n 47). This section declares Te Awa Tupua to have ‘all the rights, powers, duties, and liabilities of a legal person’.

⁹⁴ *Ibid* s 41. Note that the vesting of the fee simple estate in Te Awa Tupua is limited to the Crown-owned parts of the bed of the river and does not include the water in the river.

⁹⁵ *Ibid* s 14. This section declares Te Awa Tupua to have ‘all the rights, powers, duties, and liabilities of a legal person.’

entrenching Rights of Nature into the Australian *Constitution*.⁹⁶ Barriers to such a constitutional amendment could also be considered, which include the onerous amendment process set out in s 128 of the *Constitution*, and the nature of the *Constitution* itself, which does not readily lend itself to the recognition of rights, even for humans.⁹⁷

The benefits of incorporating the Rights of Nature into core, compulsory units are that relatively few and limited amendments would likely need to be made to the respective units and their reading guides and resources, and therefore relatively limited upskilling would be required of the lecturers. All students, not just a smaller, motivated number (as would be the case for an elective), would be exposed to a concept that they may be likely to encounter at some point (or need to consider) in their future professional career. Further, if it is able to be incorporated across various core units (not just a single core unit), this would provide students with an example of the interdisciplinary nature of legal issues, something that they are very likely to come across when they enter the profession. And as noted earlier, it may foster in the student an interest in the Rights of Nature concept sufficient to consider undertaking a more in-depth elective unit on it.

The relatively limited nature of any amendments necessary to incorporate the Rights of Nature into the core, compulsory units would also diminish the possibility of falling foul of accreditation bodies, noted as being a potential barrier to change.⁹⁸ In Victoria, the Victorian Legal Admissions Board is the relevant accreditation body.⁹⁹ Of course, this potential barrier would not apply to any offering of the Rights of Nature as an elective unit, or as part of an elective unit. The Victorian Legal Services Board awarded a grant to La Trobe University in 2023 to investigate mainstreaming climate change in legal education in all areas of law,¹⁰⁰ an aspiration which has also been expressed by the

⁹⁶ Costa Avgoustinos argues that an 'ecological limitation' could potentially be implied into the *Constitution*: Costa Avgoustinos, 'Climate Change and the *Constitution*: The Case for the Ecological Limitation' (2023) 49(1) *Monash University Law Review* 267.

⁹⁷ There are very few express rights set out in the *Australian Constitution*. These consist of freedom of religion (s 116), the right to a trial by jury for Commonwealth indictable offences (s 80), freedom from discrimination based on state residence (s 117), freedom of interstate trade, commerce and intercourse (ie movement) (s 92), and a right to just compensation for compulsory acquisition of property (s 51(xxxi)). There are also two rights that have been implied by the High Court of Australia into the *Constitution* based on ss 7, 24, namely freedom of political communication and the right to vote.

⁹⁸ Holder (n 69) 174 notes that this is a barrier to change involving education for sustainable development.

⁹⁹ Victorian Legal Admissions Board, 'Academic', *Qualifications and Training*, (Web Page) <<https://www.lawadmissions.vic.gov.au/qualifications-and-training/academic>>.

¹⁰⁰ Victorian Legal Services Board, '2023 Grant Recipients' (Web Page, 2023) <<https://lsbc.vic.gov.au/grants-and-funding/grants/2023-grant-recipients>>.

judiciary.¹⁰¹ A subsequent project could extend this mainstreaming to include Rights of Nature.

There are also additional arguments for introducing the Rights of Nature concept in particular into core foundation law units (ie first year units such as Torts and Criminal Law) as well as later year core units (eg Administrative, Property and Contract Law) because of the Indigenous element to the Rights of Nature. As noted by Gary Meyers, ‘Indigenous issues are important at this early stage because, as required courses, foundation units provide all students with uniform exposure to fundamental Indigenous concerns’.¹⁰² Although likely to be only a small element of a foundational law unit, and arguably insufficient to do justice to the Indigenous aspect, it could then be reinforced in later core units where this element could be expanded.

Whether the Rights of Nature is incorporated as a standalone unit, part of a wider environmental law unit or part of a core/mandated unit will also have a bearing on the pedagogical methods by which it could be taught, to which we now turn.

VII Pedagogical Methods for Teaching Rights of Nature

As noted above, the pedagogical methods chosen for teaching Rights of Nature will largely depend on how the concept is to be incorporated into the legal curriculum. That is, whether as a stand-alone unit, embedding it within an environmental (or other) law elective, or within a compulsory core unit. There is a range of pedagogical methods that could be used to teach Rights of Nature. However, this section will focus on the following two pedagogical methods: place-based learning and judgment rewriting.

The greatest scope for using a range of engaging and innovative pedagogical methods would be in a stand-alone subject, although elements of them could work in other teaching structures. One such category of pedagogical methods particularly suited to the environmental law arena, including Rights of Nature, are place-based methods of learning. Such methods involve field trips and outdoor classes and are associated with the emergence of ‘experiential’ student learning as an important aspect of legal education, and indeed all tertiary education.

¹⁰¹ See, eg, Brian Preston, ‘Mainstreaming Climate Change in Legal Education’ (Webinar, Te Piringa Faculty of Law, University of Waikato and IUCN Academy of Environmental Law, 6 July 2023). The Honourable Brian Preston SC is the Chief Justice of the Land and Environment Court of New South Wales.

¹⁰² Gary Meyers, ‘Examples of Incorporating Indigenous Issues in the Law School Curricular’ (2008) 7 *Indigenous Law Bulletin* 6, 6.

A *Using Experiential Learning to Teach Rights of Nature*

What is experiential learning? Experiential learning initially stems from the work of John Dewey¹⁰³ and has been defined by David Kolb as ‘the process whereby knowledge is created through the transformation of experience. Knowledge results from the combination of grasping and transforming experience’.¹⁰⁴

Experiential learning in law is not a new concept; clinical legal education¹⁰⁵ and practical legal training¹⁰⁶ are well established forms of experiential learning. The study of law in Australia (and elsewhere in the common law world)¹⁰⁷ started out as practical legal training, ie an experiential learning process. Indeed, prior to the formation of law schools, the process by which one became a lawyer in the early days of the Australian colonies was by undertaking an apprenticeship, the epitome of practical training.¹⁰⁸ Reinforcing the study of law as experiential, Oliver Wendell Holmes, Justice of the Supreme Court of the United States, stated that ‘[t]he life of the law has not been logic; it has been experience’.¹⁰⁹ If one wants to further reinforce the value of experiential learning, not just in relation to the law, we can even turn to the great Chinese philosopher Confucius,¹¹⁰ who is credited as saying ‘I hear and I forget. I see and I remember. I do and I understand’.¹¹¹

¹⁰³ John Dewey, *Experience and Education* (Collier, 1938).

¹⁰⁴ David A Kolb, *Experiential Learning: Experience as the Source of Learning and Development* (Pearson Education, 2nd ed, 2015) 51.

¹⁰⁵ Commonly undertaken during the course of a law degree: see, eg, Monash University’s clinical legal guarantee: Monash University, ‘Clinical Legal Education’, *Faculty of Law* (Web Page) <<https://www.monash.edu/law/home/cle>>.

¹⁰⁶ In the Australian context, this term refers to training that is undertaken at the conclusion of a law degree and is a pre-requisite to admission. See Law Admissions Consultative Committee, *Model Admission Rules 2015*, cl 3. See also *Legal Profession Uniform Law Application Act 2014* (Vic) s 4, sch 1 s 3 (definition of practical legal training), ss 15(a), 17(b), 19(3)(a), 20(1)(b).

¹⁰⁷ See, eg, David Thomson, ‘Defining Experiential Legal Education’ (2015) 1 *Journal of Experiential Learning* 1, 2 in relation to the US. See, eg, Peter Spiller, ‘The History of New Zealand Legal Education: A Study in Ambivalence’ (1993) 4 *Legal Education Review* 223 in relation to New Zealand. See, eg, William D Moull, ‘Law and the Social Sciences in Canadian Legal Education: Some Perspectives on the Arthurs Report’ (1984) *Journal of Legal Education* 515, 519 in relation to Canada.

¹⁰⁸ Linda Martin, ‘From Apprenticeship to Law School: A Social History of Legal Education in Nineteenth Century New South Wales’ (1986) 9 *UNSW Law Journal* 111, 113–120. See also Barker (n 65) 28–34.

¹⁰⁹ Oliver Wendell Holmes Jr, *The Common Law* (Online ed., Harvard University Press, 2009) 3.

¹¹⁰ Born in 551 BC, Confucius is ‘China’s most famous teacher, philosopher, and political theorist, whose ideas have profoundly influenced the civilizations of China and other East Asian countries: Annping Chin, ‘Confucius’ *Encyclopedia Britannica* (Web Page) <<https://www.britannica.com/biography/Confucius>>.

¹¹¹ Quoted in Noelle Higgins et al, ‘Field Trips as Short-Term Experiential Learning Activities in Legal Education’ (2012) 46(2) *The Law Teacher* 165, 178.

Much of the literature on experiential learning in the legal curriculum focusses on clinical legal education,¹¹² or putting the students in the role of legal practitioners ('attorneys') by various other means (eg simulations).¹¹³ However, Kolb's definition is wide enough to encompass experiences other than legal clinics and other forms of legal practitioner-type experiences. Field trips and place-based learning have been referred to by a number of scholars as a form of experiential learning in legal education.¹¹⁴ This type of experiential learning, as with the legal practitioner focus of law clinics and simulations, gives the law student a greater appreciation of the wider context for the concepts about which they are learning. However, place-based learning takes experiential learning further than traditional legal clinic type experiential learning, encompassing more fully the political, social, cultural, economic and environmental context. As explained by Deborah Curran:

'[m]oving beyond clinical legal education whose focus is often the acquisition of lawyering skills, field schools allow students to engage with the context of law and gain personal understanding of the way law interacts with and shapes relationships – interpersonal, political, and of power – within a specific community environment'.¹¹⁵

Being able to contextualise concepts and issues means that students are not learning in a vacuum: they are more easily able to see and understand the practical impact of what they are learning.

Although focussing on the more traditional forms of experiential legal education, Deborah Marranville suggests three reasons why context is important:

First, students are more interested in learning when the information they are studying is placed in a context they care about. Second, when teachers provide context for their students, they increase the likelihood that students will understand the information. Third, and especially significant for the law school context, in learning information, we may organize and store it

¹¹² See, eg, Jeff Giddings and Jacqueline Weinberg, 'Experiential Legal Education: Stepping Back to See the Future' in Catrina Denvir (ed), *Modernising Legal Education* (Cambridge University Press, 2020).

¹¹³ Thomson (n 107) 20.

¹¹⁴ See, eg, Higgins et al (n 111); Bork Karrigan and Kurtis Burmeister, 'Cases and Places: A Field-Based Approach to Teaching Natural Resource and Environmental Law' (2019) 68 *Journal of Legal Education* 338; Paul Leadbeter, 'Into the Wild: Improving Law Student Knowledge and Understanding through Experiential Field Trips' (2016) 41(2) *Alternative Law Journal* 125.

¹¹⁵ Deborah Curran, 'Putting Law Schools in Place: Field School Explorations of Indigenous and Colonial Legal Geographies' in Deborah Curran et al (eds), *Out There Learning: Critical Approaches to Off-Campus Study Programs* (University of Toronto Press, 2019) 135, 136.

in memory differently for the purpose of studying for a test than we do order to retrieve it for legal practice.¹¹⁶

These reasons are amplified in place-based experiential learning.

There are also other benefits of place-based learning, including field trips, identified in the literature. In addition to pedagogical benefits, case studies have shown that field trips are highly valued by students because they enable them to get to know their fellow students, and their lecturers, in a more informal setting.¹¹⁷ This can lead to greater engagement with the unit, and a greater desire to learn.

There are, however, some obstacles to implementing place-based and field trip teaching methodologies into the law curriculum. Most of these are largely of a logistical nature, such as cost, co-ordination, risk management and accessibility. None of these should be fatal to a field trip, but they do need to be addressed if a field trip (or any other form of place-based learning) is to be successful.

It is also important to make sure that the field trip is ‘properly synthesised with the educational curriculum’ and that the students ‘actively engage with the learning experience’.¹¹⁸ These concerns, however, can be addressed with proper planning and preparation.

Experiential education is a feature of the Law Faculty at Monash University, particularly at the undergraduate level.¹¹⁹ As noted above in relation to the literature, the current focus is on clinical placements (including virtual clinics). Although many law faculties in Australia offer clinical placements, the Monash Law Faculty was the first in Australia to offer a guaranteed clinical placement, reflecting what it describes as the ‘transformative effect of experiential education’.¹²⁰ However, a focus on clinical placements should not preclude other forms of experiential education, such as field trips and site visits. These experiences could potentially also encompass virtual site visits which, although not as rewarding as being physically on-site, may help overcome the accessibility issue noted earlier.

Place-based learning is not a new concept; it is also the basis for Indigenous pedagogies,¹²¹ and as such, has been incorporated into at

¹¹⁶ Deborah Marranville, ‘Infusing Passion and Context into the Law School Curriculum Through Experiential Learning’ (2001) 51(1) *Journal of Legal Education* 51, 56.

¹¹⁷ Higgins et al (n 111) 178.

¹¹⁸ Ibid 170.

¹¹⁹ Monash University Faculty of Law, *Balanced Ambition: Future Directions 2020-2022*, 4 (February 2020) (copy on file with the author).

¹²⁰ Monash University Faculty of Law, ‘For Students: What is Clinical Legal Education?’ (Web Page) <<https://www.monash.edu/law/home/cle/clinical-legal-education>>.

¹²¹ See, eg, John Borrows, ‘Outsider Education: Indigenous Law and Land Based Learning’ (2016) 33 *Windsor Yearbook of Access to Justice* 1; Estair Van Wagner, ‘“Seeing the Place Makes It Real”: Place-based Teaching in the Environmental and Planning Law Classroom’ (2017) 34(6) *Environmental and Planning Law Journal* 522, 537.

least one law school curriculum in Australia.¹²² When incorporating Indigenous pedagogies and perspectives, it is vital to ensure that Indigenous scholars, academics and community members participate in the design and delivery of the curriculum.¹²³ However, this should not be to the extent that ‘the responsibility for indigenising the law curriculum [is given] exclusively to Indigenous academics’.¹²⁴ This is important in order to ensure that Indigenous academics are not unduly burdened,¹²⁵ but it is also likely to be a particular challenge for universities with few (if any) Indigenous legal academics.

Place-based learning involving Indigenous perspectives, however, may ultimately assist with addressing this particular challenge. As Douglas explains, ‘the whiteness of the law school, by its very nature, exclude[s] Indigenous students’.¹²⁶ Accordingly, the use of place-based Indigenous learning methodologies is likely to make the law school more welcoming to Indigenous students; it would become a safe learning space, because it indicates to them that the law school values Indigenous knowledges and ways of thinking. This will likely assist in the retention of Indigenous students who may feel less marginalised and more supported to complete their legal studies. As noted by Gore et al, ‘inclusive environments that incorporate Indigenous content in curricula and involve members of the local Indigenous community were found to be important enablers for ongoing participation and retention’.¹²⁷ This will likely have a flow-on effect on the entry of Indigenous law graduates into the legal profession, and academia.

Rights of Nature (and its parent concept, Earth jurisprudence), given their parallels with (and acknowledgement of their origins in) Indigenous conceptions of country are therefore an ideal vehicle for incorporating Indigenous pedagogies and perspectives into the law school curriculum. Incorporating Indigenous perspectives is a stated goal of the Australian University sector,¹²⁸ and of individual

¹²² See, eg, Anette Gainsford, ‘Connection to Country: Place-Based Learning Initiatives Embedded in the Charles Sturt University Bachelor of Law’ (2018) 28(2) *Legal Education Review* 1.

¹²³ Ibid 4.

¹²⁴ Ibid 13.

¹²⁵ Ambelin Kwaymullina, ‘Teaching for the 21st Century: Indigenising the Law Curriculum at UWA’ (2019) 29 *Legal Education Review* 1, 12 notes that ‘[t]he disproportionately heavy workload of Indigenous university staff is well recognised’, citing Australian Government, ‘Review of Higher Education Access and Outcomes for Aboriginal and Torres Strait Islander People’ (Final Report, Department of Education and Training, July 2012).

¹²⁶ Heather Douglas, ‘Indigenous Legal Education: Towards Indigenisation’ (2004) 6(8) *Indigenous Law Bulletin* 12, 14.

¹²⁷ Jennifer Gore et al, ‘The Participation of Australian Indigenous Students in Higher Education: A Scoping Review of Empirical Research, 2000–2016’ (2017) 44(3) *Australian Education Researcher* 323, 333.

¹²⁸ Universities Australia, *Indigenous Strategy 2022-25* (Report, 8 March 2022) 19.

universities,¹²⁹ thus lending further weight to the arguments for incorporating the Rights of Nature into the legal curriculum.

B *Rewriting Legal Judgments*

Another innovative pedagogical tool that could be used for teaching the Rights of Nature involves a rewriting of legal judgments. This has already been trialled in Australia by Nicole Rogers, who drew her inspiration largely from various feminist judgment rewriting projects.¹³⁰ This pedagogical tool asks students to critically evaluate judgments written from an alternative perspective, or themselves rewrite an existing judgment from an alternative perspective. In the case of Earth jurisprudence and the Rights of Nature, this involves analysing or rewriting judgments from an ecocentric perspective.

The Wild Law Judgments Project,¹³¹ the use of which was trialled by Rogers in the classroom, importantly includes a section on First Nations law and its relationship with Earth jurisprudence. In that respect, two of the contributors to the Wild Law Judgment Project in their introduction to their rewritten judgment emphasise the relationship between Earth jurisprudence and Indigenous world views, noting that ‘First Nations peoples’ law is formed in the earth, their sacred beings reside there – theirs is an Earth jurisprudence’.¹³² This, they also note, is inextricably linked to issues of sovereignty.¹³³

Given the parallels with Indigenous world views, the link with sovereignty, and the fact that Indigenous peoples have been at the forefront of many examples of the implementation of the Rights of Nature, a judgment rewriting tool would be well placed to expand on and analyse judgments rewritten from an Indigenous perspective. In that respect, material is already available for students to use; a recent publication, *Indigenous Legal Judgments*,¹³⁴ contains legal judgments ‘which have been re-imagined so as to be inclusive of Indigenous people’s stories, historical experience, perspectives and worldviews’.¹³⁵ Certain of those re-written judgments, particularly those in Part 1 relating to sovereignty and Part 2 relating to land and sea country, could be analysed and contrasted with some of the wild law judgments.

¹²⁹ See, eg, *Monash University Strategic Plan 2021 – 2030: Impact 2030* (Report, 2021) 1, 9, 14; *La Trobe University Strategic Plan 2020 – 2030: A University for the Public Good in a COVID-19 Affected World* (Report, 2020) 11.

¹³⁰ Rogers (n 41) 53.

¹³¹ Nicole Watson and Heather Douglas (eds), *Indigenous Legal Judgments: Bringing Indigenous Voices into Judicial Decision Making* (Routledge, 2021).

¹³² Greta Bird and Jo Bird, ‘Nuclear Waste Dump: Sovereignty and the Muckaty Mob’ in Watson and Douglas (n 131) 244.

¹³³ *Ibid* 243–44.

¹³⁴ Watson and Douglas (n 131).

¹³⁵ *Ibid* i.

According to Rogers, the benefits of using this method (which she draws from the feminist judgment rewriting projects) include that ‘rewritten judgments can be discussed and analysed in the course of teaching the original or “real” judgment in a number of different legal subjects. This process enables students to understand the “partiality of the original judgment” and facilitates student engagement with theory’.¹³⁶ Where students attempt to rewrite judgments themselves (more rewarding than analysing previously rewritten judgments, according to Rogers),¹³⁷ the outcomes can include a ‘sense of intellectual and emotional empowerment in the students’.¹³⁸

As noted, Rogers talks about ‘teaching the original or “real” judgment in a number of different legal subjects’, suggesting that this method may be particularly suited to incorporating the Rights of Nature into various core units.¹³⁹

VIII Learning Outcomes

Teaching Earth jurisprudence and the Rights of Nature can provide many opportunities to enhance learning outcomes for students.

No longer can (or should) law be siloed into particular categories, or from other disciplines, and the legal curriculum should reflect this reality. As noted above, Earth jurisprudence and the Rights of Nature touch on many legal subject areas. But they also have a social, cultural, political, scientific and economic component. They are both multi-disciplinary and multi-faceted. Accordingly, the study of Earth jurisprudence and the Rights of Nature provides law students with the opportunity to experience the intradisciplinary, interdisciplinary and transdisciplinary nature of legal issues.

The teaching of these concepts necessarily involves an exploration of Indigenous perspectives, given that they have many parallels with and arguably evolved from an understanding of Indigenous relationships with nature. Learning about Indigenous world views adds an important dimension to students’ understanding of legal issues and how they affect Indigenous peoples.¹⁴⁰ This will likely contribute to better policy development and outcomes for Indigenous peoples.

¹³⁶ Rogers (n 41) 66 (citations omitted).

¹³⁷ Ibid 67.

¹³⁸ Anna Grear, ‘Learning Legal Reasoning While Rejecting the Oxymoronic Status of Feminist Judicial Rationalities: A View from the Law Classroom’ (2012) 46 *The Law Teacher* 239, 248.

¹³⁹ For Wild Law Judgments project being used in the classroom, see, eg, Isabelle Giraudou, ‘Environmental Legal Education as if Earth Really Mattered: A Brief Account from Japan’ (2021) 8(1) *Asian Journal of Legal Education* 7, 13–14.

¹⁴⁰ See, eg, Virginia Marshall, ‘Removing the Veil from the “Rights of Nature”: The Dichotomy between First Nations Customary Rights and Environmental Legal Personhood’ (2019) 45(2) *Australian Feminist Law Journal* 233 for a critique of the Rights of Nature from an Indigenous perspective.

They also provide scope for comparative analysis, given the many different manifestations of the Rights of Nature around the world; be it constitutional (as in Ecuador), legislative (as in Bolivia and Aotearoa New Zealand), regulatory (such as local ordinances in the US and Canada) and court ordered (as in Colombia, India and Bangladesh).¹⁴¹ A comparative analysis could also extend to or encompass a comparison with existing environmental laws. In Australia, this could include inter-state/territory comparisons, given the federal nature of the Australian legal system and the division of legislative responsibility between the federal government and the states.

Studying new and innovative concepts such as these also invites critical analysis, an important skill for law students and practitioners as well as for those students who go on to become involved in policy development and implementation.

The methods by which these concepts can be taught provide scope for utilising innovative pedagogical methods, including place-based, experiential forms of teaching and learning, such as site visits, and the rewriting of legal judgments to reflect the perspectives of the previously voiceless, silenced or marginalised (eg nature and Indigenous peoples). This may result in better engagement by students with the curriculum leading to better retention of students, including particularly Indigenous students.

These learning outcomes provide law students with the skills and knowledge to think beyond traditional environmental law and embrace new concepts, such as Rights of Nature and Earth jurisprudence, thus creating an opportunity for them to have a meaningful impact on the future of the planet.

IX Conclusion

The above discussion has identified many cogent arguments for incorporating Earth jurisprudence and the Rights of Nature into the law curriculum and has dealt with a number of potential issues that have been identified. At the highest level, the importance of Earth jurisprudence and the Rights of Nature have been acknowledged internationally by the Secretary-General of the United Nations. But acknowledgment by the United Nations is likely to be insufficient on its own to convince those who decide the content of the law curriculum that Earth jurisprudence and Rights of Nature should be an essential component of that curriculum. They need to be convinced that there are also pedagogical benefits for students, learning outcomes that can be achieved which students can take with them into the workplace. They also need to be convinced that these components of the law curriculum

¹⁴¹ For an up-to-date list of the various forms of recognition of the Rights of Nature, see *Rights of Nature Law and Policy* (n 17). See also *Eco Jurisprudence Monitor* (n 18).

will address institutional goals, whether those goals be internal (incorporating Indigenous perspectives) or external (making an impact and helping to find solutions to global crises). It is hoped that this article goes some way to creating a convincing case that by incorporating Earth jurisprudence and the Rights of Nature into the legal curriculum all these outcomes can be achieved thus contributing to solving ‘one of the greatest scientific, economic and moral challenges of our time’.¹⁴²

¹⁴² Rudd (n 1).