The river as a legal person: evaluating nature rights-based approaches to environmental protection in Australia

by Meg Good*

> The Great River flows
> From the Mountains to the Sea
> I am the River, and the River is me[1]

In August 2012, the New Zealand Government signed a landmark preliminary agreement, recognising the 'legal standing' and 'independent voice' of a major river on NZ's North Island (Whanganui River).[2] Although the agreement is a significant achievement in itself, it also represents a noteworthy milestone in a broader movement towards the legal recognition of the rights of nature. Christopher Stone, who famously began the international discussion on this topic in 1972 with his book *Should Trees Have Standing?,* has acknowledged that proposals to confer rights on nature can seem 'odd or frightening or laughable'.[3] Nevertheless, he maintains that they are 'neither fanciful nor devoid of operational content'.[4]

The aim of this paper is to evaluate this claim, by exploring the possible benefits and limitations of nature rights approaches to environmental protection. As noted by one commentator two decades ago, '[b]efore we get too eager…perhaps we should stop and ask just what it is we are trying to accomplish with a new category of rights'.[5] Ascertaining how nature rights can contribute to existing legal/policy regimes is crucial if these approaches are to fully develop from theory into practice. Criticisms of these approaches, both in terms of their theoretical integrity and practical utility will be considered with a view to answering the question, 'where to from here?'

Rights-based approaches to environmental protection

Rights-based approaches to environmental protection fall broadly into two main categories: rights possessed by human beings, and rights possessed by natural entities (such as lakes, rivers, trees, etc…). For ease of identification, the former shall be referred to as 'environmental rights' and the latter 'nature rights'. In order to define the content of these 'rights', it is impossible to sidestep broader philosophical arguments concerning the differences between anthropocentric and ecocentric conceptions of rights. Obviously, a *human right* to a healthy environment has a utilitarian aspect – it is a human right to live in and utilise the resources of, a 'healthy' natural environment which can provide for the requirements of a decent human life.[6] It is not a right to have nature protected purely in recognition of its intrinsic worth, irrespective of how that ecological preservation impacts upon the welfare of human beings.

The rights of nature discourse occupies a different theoretical space by claiming that natural entities possess 'rights' in the same way that human beings possess 'rights' simply by virtue of their existence. This debate is often associated with the jurisprudence of Stone, who proposed granting 'legal rights to forests, oceans, rivers, and other so-called 'natural objects' in the environment'.[7] In his criticism of Stone's proposal, PS Elder argues that non-living natural entities are not 'morally relevant' as they lack sentience and are incapable of experiencing pain.[8] Accordingly, he argues that they are incapable of possessing 'rights'.[9] Arguably the focus Elder places on sentience and pain perception is irrelevant to Stone's argument, who (as Elder notes) approaches the issue from a 'deep ecology' perspective.[10] Whilst a river lacks sentience and pain perception, it contributes to the broader system of life on earth, and from a deep ecology perspective has an intrinsic worth and right to exist. It could be argued that perhaps it is the Earth itself that has a 'right to life', and it is from this right that the rights of nature are sourced.

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1 Whanganui Iwi and the Crown of New Zealand, *Tūtohu Whakatupua*, New Zealand, 30 August 2012 [1.1] <http://nz01.terabyte.co.nz/ots/DocumentLibrary/WhanganuiRiverAgreement.pdf>.
2 Office of Treaty Settlements New Zealand, *Whanganui River Agreement* (2012) <www.ots.govt.nz/>.
3 Christopher D Stone, *Should Trees Have Standing? Law, Morality, and the Environment* (Oxford University Press 5th ed, 2010), 3.
4 Ibid.
5 Myrl L Duncan, 'The Rights of Nature: Triumph for Holism or Pyrrhic Victory? ' (1991) 31 *Washburn Law Journal* 64.
6 As noted in an earlier paper, the human right to a healthy environment is a 'right of uncertain status at international law', as it has not 'been formally recognised in any binding global international agreement' despite receiving recognition in the domestic law of some nation states: Meg Good, 'Implementing the Human Right to Water in Australia' (2011) 30(2) *University of Tasmania Law Review* 107, 117. See further: Donald K Anton and Dinah L Shelton, *Environmental Protection and Human Rights* (Cambridge University Press 2011) 519–43. The right has also been expressed in some regional human rights systems: Rowena Cantley-Smith, 'A Human Right to a Healthy Environment' in Paula Gerber and Melissa Castan, *Contemporary Perspectives on Human Rights Law in Australia* (Thomson Reuters 2013) 446–74.
7 Stone, above n 3, 3.
8 PS Elder, 'Legal Rights for Nature – The Wrong Answer to the Right(s) Question' (1984) 22(2) *Osgoode Hall Law Journal* 285, 290.
9 Ibid.
10 Ibid 286.

As with human rights, defining the content of these rights is conceptually difficult. The Ecuadorian Constitution attempted this task by stating that 'nature' has the 'right to integral respect for her existence, her maintenance and for the regeneration of her vital cycles, structure, functions and evolutionary processes'.[11] Defining rights in such broad terms immediately raises a myriad of questions, including (and certainly not limited to), whether such provisions could ever provide a basis for a legal cause of action, or whether they are intended merely as broad statements of policy. British barrister Polly Higgins maintains that constitutional statements acknowledging the rights of nature recognise 'pre-existing rights' which are capable of legal recognition *and* enforcement.[12] Whilst this is certainly possible, it is arguably unlikely that legally enforceable constitutional provisions protecting the rights of nature will become a reality in the majority of the world's states any time soon given the struggle still facing the recognition of *human rights*. Moreover, as argued by Joshua Bruckerhoff,

> It is unlikely that a constitutional environmental right will ever be nonanthropocentric because it is difficult to conceptualize how to enforce a right that is, by its very definition, not connected to a human concern.[13]

In support of this argument, Bruckerhoff cites a claim made by Merrills that enforceable rights require a 'rights-holder', as the 'concept of a right without a rights-holder is a contradiction in terms.'[14] Both authors discount the practical workability of a right possessed by a non-human entity, such as a river or a tree.[15] However, the recent recognition of the rights of the Whanganui River in New Zealand (albeit non-constitutional recognition) casts doubt upon this presumption. For this reason, the model adopted under the Whanganui River Agreement ('WRA') deserves further consideration, as it may demonstrate how nature rights can have a practical legal operation.

The guardianship approach

The approach adopted by the WRA is in keeping with the 'guardianship approach' advocated by Stone. The guardianship approach conceptualises 'major natural objects as holders of their own rights, raisable by [a] court-appointed guardian'.[16] Under the WRA, two people will be appointed to a 'guardianship role', to act on the River's behalf, and to 'protect its status and health and wellbeing'.[17] These guardians will be appointed by the Crown and by the Whanganui River '*iwi*' (Māori tribe), in order to 'provide the human face' for the river.[18] The River itself will have a 'legal personality', which will 'enable the river to have legal standing in its own right'.[19] The legal implications of giving a non-human entity legal personality have been explored in a variety of other areas of the law, in jurisdictions across the world. To quote from a US decision which considered the possibility of granting legal standing to the world's cetaceans, the courts have had a wealth of experience with 'artificial persons such as corporations, partnerships or trusts, and even ships, or of juridically incompetent persons such as infants, juveniles, and mental incompetents.'[20] A river as a legal person is similar to an 'incompetent person' as it is incapable of speaking for itself, and as with a corporation, involves humans speaking on behalf of an 'entity' that has no singular human physical existence. However, none of the existing categories are completely analogous with granting a natural non-human entity legal personality, exercisable through human guardians. Creating a legal person out of a river raises novel legal questions. How are the 'best interests' of the river to be identified? How will giving the river a legal voice create different outcomes from allowing environmentalists to bring actions in the interests of environmental sustainability? How can/should the content of nature rights be determined?

11 Constitution of Ecuador, Art 1 cited in Erin Daly, 'The Ecuadorian Exemplar: The First Ever Vindications of Constitutional Rights of Nature' (2012) 21(1) *Review of European Community & International Environmental Law* 63, 63.
12 Polly Higgins, *Eradicating Ecocide: Laws and governance to prevent the destruction of our planet* (Shepheard-Walwyn 2010) 154.
13 Joshua J Bruckerhoff, 'Giving Nature Constitutional Protection: A Less Anthropocentric Interpretation of Environmental Rights' (2008) 86(3) *Texas Law Review* 615, 635.
14 JG Merrills cited in Bruckerhoff, Ibid 635.
15 Bruckerhoff, Ibid 636.
16 Stone, above n 3, 12.
17 Whanganui Iwi and the Crown of New Zealand, above n 1.
18 Ibid [2.20.2].
19 Ibid [2.7.2].
20 *The Cetacean Community v. George W. Bush* – a 2004 Court of Appeal decision from the US in which the Court was asked to consider the possibility of allowing an action to be brought in the name of the world's cetacean community. The Court ultimately denied the appeal on the grounds that the cetacean community lacked standing under the relevant legislation.

Determining the content of nature rights

The content of the Whanganui River's rights are yet to be fully enunciated or explored. Cormac Cullinan suggests that rivers may have specific 'river rights':

> ..a fundamental river right (i.e. the riverine equivalent of a human right) would be the right to flow. If a water body couldn't flow it wouldn't be a river, and so the capacity to flow (given sufficient water) is essential to the existence of a river. Therefore, from the perspective of the river, building so many dams across it and extracting so much water from it that it ceased to flow into the sea, would be an abuse of its Earth rights.[21]

As Cullinan explains, how we define the content of such a right depends on 'what we consider the essential nature of the river to be'.[22] Under the Whanganui River Agreement, this understanding is derived from Māori conceptions of the River system's significance and purpose.[23] Therefore, it would seem that the 'content' of such a right is necessarily influenced and limited by context-dependent human understandings. Accordingly, the content of a river right will most likely differ according to jurisdiction. For this reason, it may be difficult to transport into the context of nature rights, the human rights concept of a 'minimum core' content. This concept involves the identification of the 'core' elements of the right, which must be respected immediately and are not capable of limitation.[24] Unlike human rights, nature rights are not 'universal' – a major Australian river may have fundamental 'rights' which differ from a major Ethiopian river, and so forth. Whilst this cultural divergence may not sit well with the theory underlying nature rights, it is the practical (and political) reality of the situation. In practice, the scope of nature rights (however, whenever and wherever they are recognised) will inevitably be negotiated through the political process.

Determining their content is further complicated by the fact that there is as yet no definitive exposition at the international level of the content of nature rights (although, there has been some debate over a proposal to introduce a charter of mother earth rights).[25] Conjecture as to their content has largely occurred within the academic and environmental not-for-profit communities, and is certainly far from settled. For example, the Earth Law Centre has proposed that rivers have rights 'to flow, and flow with clean water',[26] but there is no international treaty governing this issue or global agreement providing guidance. Even if such assistance existed, it would raise a crucial question regarding who has authority to speak on behalf of natural entities (an issue which is explored below).

Utility of nature rights for environmental protection

Proceeding on the presumptions that nature rights *can* and *should* be recognised, the focus then turns to an assessment of their potential utility for environmental protection. Many environmentalists have welcomed the introduction of nature rights approaches to the legal repertoire available for environment protection,[27] whilst others have questioned whether such recognition would be of rhetorical significance only.

Elder argues that recognising rights for nature will not further the goals of environmental protection,[28] as the same ends can be achieved through 'conventional legal notions'.[29] In his view, the 'real problem' is not the legal concepts involved but a 'lack of political will' to achieve environmental protection.[30]

In order to respond to Elder's criticisms, four questions must be considered:

- How will recognition of nature rights further the goals of environmental protection?
- What are the goals of environmental protection?
- What do nature rights add to the existing legal armoury?
- How would recognition of nature rights overcome the 'real problem' of lack of political will?

21 Cormac Cullinan, *Wild Law: A Manifesto for Earth Justice* (Green Books, 2nd ed, 2003) 118.
22 Ibid 121.
23 For example, see Whanganui Iwi and the Crown of New Zealand, above n 1 [1.2].
24 For more information about the concept of the 'minimum core' in relation to economic, social and cultural human rights, see: George S McGraw, 'Defining and Defending the Human Right to Water and its Minimum Core: Legal Construction and the Role of National Jurisprudence' (2010) 32–34 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1721029>.
25 A global campaign has developed, seeking recognition of a *Universal Declaration of Rights of Mother Earth*. Bolivia has been a strong supporter of this campaign, as well as a range of international non-governmental organisations and networks working towards legal recognition of the rights of nature. For more information: Global Alliance for the Rights of Nature, 'Universal Declaration of Rights of Mother Earth' (2012) <http://therightsofnature.org/universal-declaration/>.
26 Linda Sheehan, *Rights of the Waterway* (2011) Earth Law Centre 3 <http://earthlawcenter.org/static/uploads/documents/The_Rights_of_the_Waterway_3_121.pdf>.
27 See generally, Jason Mark, 'Natural Law: From Rural Pennsylvania to South America, A Global Alliance is Promoting the Idea that Ecosystems Have Intrinsic Rights' (2012) 27(1) *Earth Island Journal* 40.
28 Elder, above n 8, 285.
29 Ibid 291.
30 Ibid.

The following discussion attempts to address these issues by outlining a few possible benefits of nature rights approaches, whilst also acknowledging areas of limitation and/or uncertainty.

Goals of environmental protection

A preliminary issue concerns the identification of the goals of environmental protection. Over the past few decades, the aims of the environmental protection movement have been associated with the achievement of 'sustainable development', famously defined in the *Brundtland Report* as development which 'seeks to meet the needs and aspirations of the present without compromising the ability to meet those of the future'.[31] Although this is an oversimplification of the concept, it can be seen that 'sustainable development' does not characterise the environment as a composition of rights-bearing entities. The aim of sustainable development is to ensure that development remains within the ecological 'limits' of nature, which is distinct from requiring development to respect the 'rights' of nature. Arguably, nature rights approaches to environmental protection may go further than requiring sustainable development. Whilst sustainable development situates environmental protection within a broader discourse of 'development', nature rights approaches may perceive a fundamental inconsistency between certain 'development' and the protection of the rights of nature.

For sustainable development advocates,[32] environmental protection may require the preservation of natural entities for future human use. Conversely, from a nature rights perspective, natural entities may be preserved irrespective of or despite their current or potential utility for humans. Therefore, whilst a regulatory approach based upon the concept of sustainable development might be appropriate for achieving the goals of environmental protection according to that concept, a nature rights approach may be the more appropriate option for achieving environmental protection in keeping with the concept that natural entities have 'rights'. Accordingly, the question of which approach 'best' serves the goals of environmental protection cannot be answered in isolation from broader questions about the theoretical legitimacy and practical utility of these (potentially) alternative approaches.

Benefits and limitations

As noted by legal philosopher Ronald Dworkin, rights claims can operate as 'trumps' in the legal system.[33] Huffman argues that it is this aspect that makes them 'attractive to nature advocates' as they have the ability to trump 'ordinary political decisions'.[34] Accordingly, perhaps one of the benefits associated with 'rights talk' is the increased weight such characterisation may give to environmental considerations.[35] Moreover, there may be particular advantages to using the language of 'rights' when arguing for a heavier weighting of environmental criteria in decision-making where human rights claims or human property interests are at issue.[36] In response to those who doubt the normative impact of the rights discourse, it should be noted that the sustainable development discourse has had significant influence as both a guiding principle and legal standard. Therefore, it would not be unreasonable to presume that an alternative guiding principle may enjoy a similar degree of influence.

Despite the potential benefits, it must be recognised that there are limits to the utility of nature rights approaches, and conditions for achieving their maximum effectiveness. Stating that natural entities have rights which must be given serious consideration in decision-making affecting the environment will only contribute to environmental protection, if they are reinforced by a supportive institutional and political environment. For instance, it is well known that human rights recognised in countries with poor governance structures are often essentially only 'paper rights', as they are incapable of adequate enforcement. Conversely, rights recognised in countries with well established, stable and generally effective governance systems can be ineffective if they are under-utilised, or 'watered down' to such an extent that they are essentially merely statements of public policy. A prime example of the importance of a conducive political, institutional and legal environment for the effective operation of nature rights is provided by an examination of the Ecuadorian experience with the nature rights amendments to the twentieth version of the Ecuadorian Constitution. Mary Whittemore argues that 'successful execution of the amendments

31 *Report of the World Commission on Environment and Development: Our Common Future* (1987) <www.un-documents.net/wced-ocf.htm>.

32 There is a large body of literature devoted to the contested meanings of the concept of sustainable development– it is not possible to adequately explore this literature here.

33 Ronald Dworkin cited in James L. Huffman, 'Do Species and Nature Have Rights?' (1992) 13 *Public Land Law Review* 51, 56.

34 Huffman, Ibid 75.

35 Elder (above n 8, 291) argues that Stone's argument essentially seems to be aimed at providing a justification for granting a 'heavier weighting of environmental criteria' in decision-making.

36 See further, Christopher Stone, 'Response to Commentators' (2012) 3 *Journal of Human Rights and the Environment* 100, 104.

is unlikely'[37] due to 'Ecuador's legal and political environment', 'lack of government accountability', 'legal barriers to implementation', 'past corruption in Ecuador's constitutional court' and 'procedural confusion over standing'.[38]

Compounding these structural problems, are issues with the text of the amendments themselves which Whittemore argues suffer from 'textual vagueness' and 'internal inconsistencies'.[39] Accordingly, it can be seen that there are pre-conditions for the realisation of the full benefits of nature rights. Although Ecuador may be the first country to recognise nature rights at the constitutional level, in the four years since the amendments were passed the Ecuadorian Government has achieved little in the way of ensuring the development of a conducive environment for their effective operation.[40] Moreover, the reality remains that environmental degradation is still increasing in Ecuador despite the amendments, due largely to the fundamental inconsistency between the Constitution's protection of the rights of nature and the government's pursuit of profit.[41]

A further limitation for nature rights relates to the issue of human representation. Huffman argues that Stone's guardianship approach 'fails because we humans cannot know what serves the interests of natural objects, even assuming that they have interests in any meaningful sense.'[42] His critique is therefore twofold – firstly, that nature rights *presume* that natural entities are capable of possessing 'interests', and secondly, that humans are capable of determining the nature and scope of these interests. In a similar vein, Elder questions whether 'deep ecologists' (often associated with the nature rights movement) are 'themselves not being 'anthropocentric' in believing they know what is best for the natural environment?'[43]

It may be unrealistic to presume that human beings would ever be capable of completely accurately representing the 'interests' of natural entities, if it were presumed that natural entities were capable of possessing their own interests.

However, the rights of nature discourse by necessity must rely upon the theoretically questionable presumption that natural entities possess interests which humans are capable of defining and defending. In the absence of this presumption, these rights would be unworkable as it would never be possible for nature rights advocates to make reasoned arguments in favour of the protection of the 'interests' of natural entities. These arguments will be informed by human conceptions of the interests of natural entities, and the key challenge for the nature rights movement over the coming decades will be the development of a rationale for the identification and valuing of these interests. This rationale will need to be capable of responding to difficult questions, such as why a natural entity has an interest in existing if it can't even comprehend its own existence (its 'self')?

Stone argues that a lack of conscious self-interest or 'sentience' is not problematic, as 'there is no reason why the law cannot adopt *intactness* as the threshold for intervention and relief'.[44] However, it is difficult to see how adopting 'intactness' as the basis for relief avoids the problems raised by human representation of the interests of non-sentient natural entities. Why would a natural entity have an individual interest in remaining intact? On what basis can we presume that all naturally forming things that are currently in existence, have an interest in continuing to exist (presumably in the form in which they originally developed, or would have developed prior to human interference)? And, if they were held to do so, how would a human guardian determine how this interest in intactness applied in particular situations?

In contrast, human rights approaches to environmental protection are able to overcome many of these philosophical problems by characterising environmental protection as a human concern.

Theory aside, in reality nature rights will have to be defined, interpreted and defended by humans and in this process may become the instruments of the pursuit of human political agendas.[45] This is a possibility with *any* legal regime established for the protection of *any* legal rights, and should therefore not be viewed as a definitive argument against the recognition of nature rights. Rather, it should be viewed as a pragmatic warning that dressing a claim in the language of 'rights' can be used as a vehicle to legitimate the political interests of humans.[46]

37 Mary Elizabeth Whittemore, 'The Problem of Enforcing Nature's Rights Under Ecuador's Constitution: Why the 2008 Environmental Amendments Have No Bite' (2011) 20(3) *Pacific Rim Law & Policy Journal* 659, 659.
38 Whittemore, Ibid 661.
39 Ibid 669.
40 It is acknowledged however that such institutional change requires significant resources and cultural change, and therefore perhaps it is too soon to pass judgement.
41 Whittemore, above n 37, 663.
42 Huffman, above n 33, 59.
43 Elder, above n 8, 289.
44 Stone, above n 36, 102.
45 Huffman, above n 33, 75.
46 Ibid.

The effectiveness of nature rights approaches will also be affected by the nature of their recognition. The following section discusses some possible forms of recognition, evaluates their ability to contribute to the goals of environmental protection and assesses the likelihood of their implementation in Australia.

Possible means of implementation in Australia

Charter of nature rights

One possible means of implementing nature rights would involve the creation of a federal, or state level bill or charter of nature rights. Katherine Wells argues in the context of Australia that '[t]here can be little doubt… that a constitutionally entrenched Bill of Rights would help to ensure that nature's rights are not able to be easily eroded.'[47] There are a number of potential benefits associated with the adoption of a constitutional approach to environmental protection. According to Tim Hayward these benefits include:

> …it entrenches a recognition of the importance of environmental protection; it offers the possibility of unifying principles for legislation and regulation; it secures these principles against the vicissitudes of routine politics, while at the same time enhancing possibilities of democratic participation in environmental decision-making processes.[48]

Even if it was accepted that all of these benefits would result from constitutional recognition, there are potential barriers to legal implementation, especially in the Australian constitutional context. To enact a constitutionally entrenched charter of nature rights at the federal level, the Charter would have to pass through the amendment process established by s 128 of the *Australian Constitution*. Given that only 8 of the 44 proposed amendments to the *Constitution* have been successful over the *Constitution*'s 112 year history,[49] it is very far from certain that even if agreement could be reached to put the vote to the people in the first place, that it would result in a successful amendment.

Moreover, as noted by Peter Burdon, '[i]n a country like Australia, which does not recognise a Bill of Rights for human beings, we are a long way off achieving such recognition for nature.'[50] It is probably true that Australia's failure to enact comprehensive human rights legislation does indicate that constitutional recognition of nature rights is unlikely, given that human rights are generally considered to be of more immediate, and morally superior import than nature rights. However, as Katherine Wells notes, some might argue that 'a Bill of Rights for Nature is *more necessary than a Bill of Rights for humans*, given that nature's rights are nowhere represented in a systematic fashion in our current legal system - in contradistinction to many human rights.'[51] Accordingly, although constitutional recognition is unlikely in Australia, there may be persuasive grounds for arguing that some form of legislative recognition of a charter of nature rights is necessary.

Prior to considering the necessity of such a charter, it is first necessary to examine whether it would even be possible to enact federal legislation on the subject matter of 'nature rights'. There is no direct federal legislative head of power under the *Australian Constitution* which would enable the Commonwealth to pass a charter of nature rights. Any charter at the federal level would have to source its constitutional validity from an indirect source, such as the external affairs power. This power enables the Commonwealth to pass laws with respect to 'external affairs', such as matters geographically external to Australia, the implementation of treaty obligations or matters of international concern.[52] The most common use of the external affairs power is for the domestic implementation of treaty obligations. Whilst work is underway at the international level to achieve recognition of an international charter of nature rights, at present there is no international treaty or agreement recognising nature rights in an analogous manner to the International Bill of Human Rights.[53] In the absence of treaty obligations, it might be possible to argue that the recognition of nature rights constitutes a 'matter of international concern', and therefore falls under the scope of the external affairs power.[54] However, the application and scope of this aspect of the external affairs power is uncertain,[55] and in this specific context it is arguable

47 Katherine Wells, 'An Ecocentric Bill of Rights for Nature: Some of the Legal Issues' (1995) October *Environmental and Planning Law Journal* 344, 345.
48 Tim Hayward, *Constitutional Environmental Rights* (Oxford University Press, 2005) 7.
49 Parliamentary Education Office, 'The Australian Constitution' (2012) 6 <www.peo.gov.au/students/cl/CloserLook_Constitution.pdf>.
50 Peter Burdon, 'What if trees could sue?' (2011) <www.abc.net.au/environment/articles/2011/05/17/3216161.htm>.
51 Wells, above n 47, 345.
52 Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (Thomson Reuters, 3rd ed, 2010) 137.
53 Comprised of the *Universal Declaration of Human Rights (UDHR)* and the two binding covenants – *International Covenant on Civil and Political Rights (ICCPR); International Covenant on Economic, Social and Cultural Rights.*
54 See generally, Elise Edson, 'Section 51 (xxix) of the Australian Constitution and 'Matters of International Concern': Is There Anything to be Concerned About?' (2008) 29 *Adelaide Law Review* 269.
55 Ibid.

whether a successful argument could be mounted in favour of its application. Although there is certainly a significant history of concern at the international level with regards to the state of the natural environment, the nature 'rights' discourse lacks the same degree of international recognition.[56]

Presuming for argument's sake that the Commonwealth was able to find a way of legislating to guarantee a charter of nature rights, it is relatively unlikely that the charter would receive political support in the current political climate in Australia. Australia is heavily dependent on its resource sector, and this dependency greatly influences Australian natural resource management, law and policy. Even if sufficient support could be garnered from the populace for a charter of nature rights, it is questionable whether this public support would translate into political support in the Federal Parliament. Moreover, given the fact that Australia already has in place a complex system of federal, state and local level environmental legislation and policy, it is likely that lawmakers would be hesitant to introduce broad general grants of rights to natural entities which could interact with this pre-existing framework in unpredictable ways.

As noted by Whittemore in the context of the Ecuadorian constitutional amendments discussed earlier, a 'broad grant of protection' can be 'impractical' and 'confuse courts and litigants alike'.[57] Obviously the utility and workability of any charter will ultimately depend on its specific wording, and the institutional structure within which it is intended to operate. However, it is likely that any charter would face similar criticisms to those directed towards proposals to legislatively implement economic, social and cultural ('ESC') human rights in Australia.[58] Objections to ESC rights have been made on the grounds that such rights are merely aspirational, of uncertain legal content and place the judiciary in an improper position.[59] It is not difficult to see how such arguments could be applied in the context of nature rights, which at their heart concern issues of distributive justice.[60]

In the alternative (or additionally) to a federal charter of rights, it would be possible for the states to utilise their plenary legislative power to enact a legislative charter of rights, or even to entrench a charter of nature rights into their state constitutions. Given that the vast bulk of environmental and planning decisions are made at the state/local government level, arguably such recognition is vital for achieving full implementation of nature rights. Again, however, the likelihood of recognition is dependent upon the level of political support the initiative could gather, and it is possible that significant inconsistency issues could arise with respect to federal legislation.

Specific agreements

Rather than legislating for the protection of broad nature rights, it would be possible for the rights of specific natural entities to receive recognition under government agreements, similar to New Zealand's WRA model discussed earlier. This form of recognition might avoid some of the legislative difficulties identified above, and arguably also avoid some of the criticisms of nature rights, specifically those which are targeted at their lack of precision and ambiguous application. An agreement which specified the rights recognised for a particular natural entity (such as a river or watershed more generally) would be easier to apply and enforce in the current context of Australian environmental law.

Preamble of environmental legislation

Rather than providing constitutional or legislative recognition of nature rights as broad actionable 'rights', it would be possible to introduce nature rights into the 'preamble' or 'objects' section of environmental legislation to be used as an aid to statutory interpretation. An objection to this approach (if not pursued in conjunction with broader methods of protection) may be made on the grounds that the nature rights discourse aims to effect wider systemic change. It is doubtful whether such change could be adequately effected by the method under consideration as it would be limited to the interpretation of environmental legislation, even though the rights of nature may be affected by decisions (legislative, administrative or otherwise) made in other spheres. Notwithstanding this however, the insertion of 'rights' language into the 'objects' section of environmental legislation could for example have implications for how the court interprets the duties of decision-makers with regards to the balancing of competing interests in environmental decisions.

56 James A. Nash notes that some view the rights of nature discourse as 'the morally irrelevant ponderings of persons beyond the fringe of intellectual respectability': James A. Nash, 'The Case for Biotic Rights' (1993) 18 *Yale Journal of International Law* 235, 235.

57 Whittemore, above n 37, 669.

58 For a summary of some of the objections made to the legal implementation of ESC rights, see: John Tobin, 'Economic, Social and Cultural Rights and the Charter of Human Rights and Responsibilities - A Framework for Discussion' (Victorian Equal Opportunity and Human Rights Commission Report, 2010) <www.humanrightscommission.vic.gov.au>.

59 Ibid. For a counter-argument, see: Meg Good, 'Implementing the Human Right to Water in Australia' (2011) 30(2) *University of Tasmania Law Review* 107, 138–39.

60 As defined by Nash (above n 59, 238), rights 'are a way of conceptualizing the basic demands of distributive justice and of giving substance to its abstract and formal principles about who should get what and why'.

Statement of government policy

A more politically realistic, but perhaps less powerful means of implementation would involve recognition of nature rights in a statement of government policy (at the federal, state and/or local levels). Statements of government policy have different legal effects, depending on their particular form. Some policies are mandated by legislation, and are given legally binding force by virtue of their supporting legislation. Others are merely statements of policy, and act as non-binding but instructive guidelines for decision-makers. Should a government policy recognising the importance of protecting the rights of nature take the latter form, its impact may be minimal. Its impact will also differ according to which level of government introduces policy recognition, as demonstrated by the US experience with recognition at the local government level.[61]

Establishment of a parliamentary committee on nature rights

A Parliamentary Committee could be established to screen legislation (proposed and existing) for consistency with nature rights, in a similar fashion to the work of the recently established Parliamentary Joint Committee on Human Rights.[62] Statements of compatibility could be produced, which would highlight areas where Australia could improve its protection of nature rights. However, the Committee would need to be guided by a mandate, created either by legislative recognition of nature rights at the federal level, or through Australian ratification of a relevant global agreement (neither of which would appear to be likely at present).

Creation of a guardian of nature rights

Finally, it is possible that a statutory authority could be created to oversee the implementation and protection of nature rights in Australia. The authority (or 'Guardian') could follow the model established by the Australian Human Rights Commission ('AHRC'). The AHRC is an independent statutory authority established under federal legislation, dedicated to the creation of a human rights culture in Australia.[63] The Commission serves a number of important functions, including the resolution of complaints, holding public inquiries into human rights issues of national importance, providing legal advice, conducting legal research and developing law reform submissions.[64]

Although there would be obvious differences between the functions and capabilities of the AHRC and a nature rights authority, it is clear that the establishment of an authority would contribute to the development of a nature rights 'culture'. The authority could operate in conjunction with any of the other possible forms of implementation explored (i.e. statements of government policy, legislative recognition, etc…). In terms of likelihood of implementation in Australia, it must be borne in mind that the establishment of any statutory authority requires an often significant investment of resources which may prove prohibitive.

Possible, desirable and likely?

The various forms of implementation explored have different strengths and limitations. For instance, whilst constitutional protection of nature rights may be the more legally significant option (although not necessarily the most 'desirable'), it is also the least likely to be implemented. Legislative recognition is arguably quite desirable, but there are substantial legal hurdles to overcome. Proposals which would have a more narrow impact are more likely to achieve political support, but their limited scope may impact on their ability to contribute to the goals of environmental protection. In order to allow nature rights their full operation, it would be necessary to introduce a suite of reforms.

For instance, similar to the human rights legal regime, national legislation could be supported by broader government policies and the establishment of supportive institutional arrangements (such as the AHRC model explored). Of course, some may argue that pursuing nature rights approaches is unnecessary and distracting, given the availability of human rights approaches to environmental protection which are able to build upon pre-existing and generally more accepted legal and institutional frameworks. Whilst it may be true that human rights approaches would be easier and more likely to be implemented, it is still uncertain which approach would be the most beneficial in terms of achieving the goals of environmental protection.

61 See generally, Jason Mark, 'Natural Law: From Rural Pennsylvania to South America, A Global Alliance is Promoting the Idea that Ecosystems Have Intrinsic Rights' (2012) 27(1) *Earth Island Journal* 40.

62 Parliament of Australia, 'Parliamentary Joint Committee on Human Rights' (2013) <www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=humanrights_ctte/index.htm>.

63 Australian Human Rights Commission, 'About the Commission' (2012) <www.humanrights.gov.au/about/index.html>.

64 Ibid.

Conclusion: where to from here?

> …there is little hope for achieving radical social change by simply adding 'rights of nature' to the catalogue of legally recognised rights.[65]

Stone noted in the most recent edition of his seminal work that his proposal had impacted 'environmental law and ethics, quite out of proportion to its actual impact on the courts'.[66] In light of the recent developments discussed in New Zealand, Ecuador and the US, it would appear that no longer can the rights of nature discourse be dismissed as 'the morally irrelevant ponderings of persons beyond the fringe of intellectual respectability.'[67]

Nature rights approaches are not only capable of being implemented, but may in fact offer certain benefits for environmental protection. However, there are both theoretical and practical limitations to these approaches. As noted in the quote by Burdon above, recognition of the rights of nature will not act as a panacea for the challenges facing environmental protection. Recognition may have more subtle influences on the legal system. One beneficial impact of the rights discourse may lie in the encouragement of the 'notion that our current legal system should be seen as a system which balances competing interests and rights.'[68] It is not fanciful to suggest that the rights of nature should figure more prominently in this equation.

Further academic enquiry is required to examine the practical implications of this shift towards a rights-based approach to environmental protection. The concept is moving from theory into practice, and it is vital that the legal commentary in this area moves with it. Who knows where it will go from here?

65 Peter Burdon, 'Environmental Protection and the Limits of Rights Talk' (2012) <http://rightnow.org.au/topics/environment/environmental-protection-and-the-limits-of-rights-talk/>.
66 Stone, above n 3, xi.
67 Nash citing criticisms made of these approaches, above n 59.
68 Katherine Wells, above n 47, 347.