Welcome

Welcome to the National Graduate Law Conference 2010, *The Other Side of the Law: Beyond Legal Research*, hosted and sponsored by the ANU College of Law, Pro-Vice Chancellor (Research) and the ANU Registrar.

We have a busy and exciting program lined up for the next two days. Postgraduate research students will present their work on a diverse range of legal fields including criminal law, constitutional law, international environmental law, law reform, copyright, migration and refugee law, security, bio-prospecting and legal practice. In addition, student presentations will have an interdisciplinary flavour, drawing on the fields of sociology, anthropology, psychology, psychiatry, social work, philosophy, political science, biology and environmental science. We will hear about students’ comparative legal research on jurisdictions including Vietnam, Thailand, Europe, Indonesia, United States and Rwanda.

A range of guest speakers will also share their knowledge about life in legal research and beyond. We will hear from experienced legal researchers and ANU PhD alumni, as well as from the ANU Student Employment and Career Development Centre. Students will have many opportunities to talk to each other and share their knowledge and experiences, including at a social function on Thursday evening.

We are pleased to welcome you to this year’s conference and hope that you will find it rewarding and inspiring.

Dr Mark Nolan

Director of Higher Degree Research, ANU College of Law
and Higher Degree Research students at the ANU College of Law
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<td>Meet and greet</td>
<td>Hedley Bull Theatre 1</td>
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<tr>
<td>9.30 am</td>
<td><strong>Conference opening</strong></td>
<td>Welcome</td>
<td>Mark Nolan and ANU CoL HDR Gusman Siswandi</td>
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<td>9.45 am</td>
<td><em>Beyond legal research in citizenship law: A personal perspective</em></td>
<td>Professor Kim Rubenstein</td>
<td>Director of the Centre for International and Public Law (CIPL) in the ANU College of Law</td>
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<td><em>Beyond legal research in restorative justice: A personal perspective</em></td>
<td>Dr Nova Inkpen</td>
<td>ANU PhD Alumnus, Acting Manager, ACT Restorative Justice Unit</td>
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<td>10.30 am</td>
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<td><strong>Parallel HDR Presentations</strong></td>
<td>Bioprospecting</td>
<td>Victim Experience</td>
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<td><em>The draft protocol on access and benefit sharing: A victory for developing countries</em></td>
<td>Gusman Siswandi</td>
<td>Chair: Dr Matthew Rimmer</td>
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<td><em>Regional framework on “fair and equitable benefit sharing” from bio–prospecting in the South Pacific</em></td>
<td>Yuri Suzuki</td>
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<td><em>The red shirts: The intersection between law and politics in Thailand</em></td>
<td>Pornsakol Panikabutara</td>
<td>Chair: Moeen Cheema</td>
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<td><em>Legal pluralism and social change: An exploration of jurisprudential and social scientific understandings of law</em></td>
<td>Rhys Aston</td>
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<td>12.45 pm</td>
<td>Group photograph on College lawns followed by lunch</td>
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<td><em>Venue: Phillipa Weeks Staff Library, First Floor</em></td>
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<td><strong>Parallel HDR Presenters</strong></td>
<td>International Environmental Law</td>
<td>Copyright and Digital Culture</td>
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<td><em>Transboundary law for biodiversity conservation: advancing cooperation across international and disciplinary boundaries</em></td>
<td>Michelle Lim</td>
<td>Chair: Professor Dennis Pearce</td>
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<td><em>International environmental law and complex systems theory</em></td>
<td>Rakhyun Kim</td>
<td>Is there a valid theoretical basis for the Crown’s ownership of copyright?</td>
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<td>Dilan Thampapillai</td>
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<td>The utilisation of digital ethnography for studying digital cultures in law reform research Fabian Horton</td>
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<td>Parallel HDR Presentations (Bio) Security</td>
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<td>Chair: Aziz Rehman</td>
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<td>Synthetic biology and biosecurity</td>
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<td>Alison McLennan</td>
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<td>Are High Court judges scapegoats: An alibi for the citizen’s fear of the unknown in a time of exceptionalism</td>
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<td>Susan Clement</td>
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<td>4 pm</td>
<td>Beyond legal research: Reflections on interdisciplinary research</td>
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<td>Dr Mark Nolan</td>
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<td>4.45 pm</td>
<td>End of Day 1</td>
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<td>6.45 pm</td>
<td>ACTION Bus leaves from ANU College of Law South Wing Carpark to The Deck, Regatta Point</td>
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<td>Social function at The Deck</td>
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<td>Guest: Professor Margaret Thornton</td>
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<td>Beyond legal research in anti-discrimination law: A personal perspective</td>
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<td>9 pm</td>
<td>ACTION Bus returns to ANU College of Law South Wing Carpark</td>
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## Friday 9 July 2010

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<td>9.30 am</td>
<td><strong>Beyond legal research in international law: A personal perspective</strong></td>
<td>Dr Annemarie Devereux, ANU PhD Alumnus, Office of International Law,</td>
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<td>Commonwealth Attorney-General’s Department</td>
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<td>10.15 am</td>
<td><strong>Parallel HDR Presentations</strong></td>
<td><strong>Law and Mental Health Issues</strong></td>
<td><strong>Regulation and Constitutionalism</strong></td>
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<td><strong>Chair: Mark Nolan</strong></td>
<td><strong>Doing justice to law, ethics and rights in research: an interdisciplinary approach to decision making in law and practice for older people with reduced mental capacity</strong></td>
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<td><strong>Suzanne Jarrad</strong></td>
<td><strong>A patient not detained is a patient not treated. Is this public mental health in Australia?</strong></td>
<td><strong>The food pyramid meets the regulatory pyramid: Obesity prevention and responsive regulation of the food industry</strong></td>
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<td><strong>Maree Livermore</strong></td>
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<td><strong>Belinda Reeve</strong></td>
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<td><strong>Phronetic Justice — Charting the benefit of an intersection between phronetic social science and legal scholarship for future constitutional studies</strong></td>
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<td><strong>Chair: Dr Sarah Holcombe</strong></td>
<td><strong>Between two laws? Women, law and customary land in Solomon Islands</strong></td>
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<td><strong>Rebecca Monson</strong></td>
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<td><strong>Legal pluralism and human rights: A possible approach to the application of customary law in Vietnam</strong></td>
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<td><strong>Phan Thanh</strong></td>
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<td><strong>Beyond legal research: Careers</strong></td>
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<td><strong>David Rockawin</strong></td>
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<td><strong>ANU Careers Centre</strong></td>
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<td><strong>Chair: Matthew Zagor</strong></td>
<td><strong>Climate change displacement and international law: Justice through recognition?</strong></td>
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<td><strong>Fanny Thornton</strong></td>
<td><strong>A comparative analysis of seasonal worker programmes in selected European countries in contrast to a potential seasonal worker programme between Australia and the Pacific Islands</strong></td>
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<td><strong>Christine Brickenstein</strong></td>
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<td>Environmental Law Reform</td>
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<td>Chair: Andrew Mcintosh</td>
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<td>Water and the working class: an exploration of the legal and social relations surrounding water</td>
<td>Elinor Jean</td>
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<td>Perils of public participation in parliamentary process:</td>
<td>Tom Baxter</td>
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<td>An active research law reform example</td>
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<td>4.30 pm</td>
<td>Final remarks</td>
<td>Dr Mark Nolan</td>
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Conference administrator
Dinah Rigg (T: 6125 5877)
Guest speaker biographies

Dr Annemarie Devereux

_Beyond legal research in international law: A personal perspective_

Dr Annemarie Devereux is currently Head of the International Security and Human Rights Branch, within the Office of International Law, in the federal Attorney-General’s Department. She undertook her Law and Arts Honours degrees at the ANU, completed an LLM at Columbia University and her PhD at the Australian National University Law School. After working for Chief Justice Gleeson as his Research Director, Annemarie worked briefly in private practice before moving into the practice of public international and constitutional law. From 1995-2000 (a period encompassing the beginning years of her doctorate), she worked with the Attorney General’s Department before moving to work with the UN. Her work from 2000-09 with the UN included over six years in human rights field operations in Timor L’este and Nepal, working in particular on issues of constitutional processes, transitional justice, and institutional protections of human rights, interspersed by time in New York working with the Security Council’s Counter Terrorism Committee Executive Directorate. Alongside her legal practice, Annemarie has maintained adjunct positions and fellowships at universities including ANU, Sydney University, QUT, ACU and Columbia University.

Dr Nova Inkpen

_Beyond legal research in restorative justice: A personal perspective_

Dr Inkpen commenced her PhD in Restorative Justice with the ANU, Department of Sociology, in 1995. It coincided with the implementation of a large scale randomised controlled trial overseen by the ANU and the University of Pennsylvania. The Reintegrative Shaming Experiments, or RISE, provided Dr Inkpen with opportunity to combine a range of research methodologies to study the application of face-to-face restorative justice conferencing on a new offence type — Drink Driving. At the conclusion of the research, Dr Inkpen was invited, along with the same research team, to implement another large scale randomised controlled trial for the United Kingdom’s Home Office. Working with the Metropolitan Police in London, Dr Inkpen developed and implemented a pre–sentence randomised controlled trial examining whether restorative justice approaches applied to adults led to a reduction in re–offending rates and increases in victim satisfaction. At the conclusion of this work, Dr Inkpen returned to the ACT to aid in the development and implementation of the Restorative Justice Unit for the Department of Justice and Community Safety. Fifteen years after starting her PhD, Dr Inkpen continues to research and practice in the field of Restorative Justice.

David Rockawin

_Beyond legal research: Careers_

David is a careers counsellor at the ANU Student Employment and Career Development Centre.

Professor Kim Rubenstein

_Beyond legal research in citizenship law: A personal perspective_

Kim Rubenstein is Professor and Director of the Centre for International and Public Law (CIPL) in the ANU College of Law, The Australian National University. Kim’s current research projects are at the cutting edge of the intersection between public and international law. She is the co–series editor of the Cambridge University Press series _Connecting International with Public Law_. Her public law work spans constitutional and administrative law, and also includes her expertise in citizenship law. Her work analyses the legal status of citizen, and considers the differences between that formal notion and the broader normative understanding of citizenship as membership of a community. Her book,
Australian Citizenship Law in Context (Lawbook, 2002) represents much of that core work, looking at the disjuncture between the exclusive legal notion and the more inclusive normative understanding of citizenship. In 2002–03 she was based at Georgetown University Law Center, having won the prestigious Fulbright Senior Scholar award to study the status of nationality in an international law context. Kim initiated an international research network on feminism and constitutional law and, in 2004 and 2006 ran workshops looking at issues of feminism and federalism with participants from the US, Canada and Australia. Her international law research continues with the work she was developing at Georgetown and she has been invited to various international workshops and conferences to present her work. Kim is a graduate of the University of Melbourne and Harvard Law School. Her graduate work at Harvard was supported by the Sir Robert Menzies Scholarship to Harvard, a Fulbright postgraduate award, and a Queen Elizabeth Jubilee Trust award. Kim’s interests also encompass teaching (where she has co-authored a book on Feedback) and the broader field of education, particularly women’s education. She is currently completing a biography of Joan Montgomery OBE, former Principal of Presbyterian Ladies College Melbourne, and an influential educator. In addition to her scholarly work, Kim has made a significant contribution to the greater community. She has done so through media work and public community education. In the practical legal sphere, Kim has made significant contributions to the jurisprudence in citizenship. She was a member of the Independent Committee appointed by the Minister for Immigration and Citizenship to review the Australian Citizenship Test in 2008 and she has appeared three times in the High Court of Australia on citizenship matters, with her work cited in the judgment of Singh v Commonwealth (2004).

Dr Mark Nolan

Beyond legal research: Reflections on interdisciplinary research

Dr Mark Nolan is a Senior Lecturer and Director of Higher Degree Research at the ANU College of Law. He holds a PhD in psychology and BSc (Hons) and LLB degrees from ANU. His research interests include legal psychology, jury research (especially Australian and Japanese reform), criminal law and procedure, criminal justice, counter-terrorism law, legal and social psychological theories of justice and human rights, and intergroup relations. Dr Nolan has taught in the undergraduate courses Criminal Law and Procedure, Selected Topics in Criminal Law, Criminal Justice, and Foundations of Australian Law. He convenes the undergraduate elective Law and Psychology and teaches on the Advocacy, Military Discipline Law and Advanced Military Discipline Law courses in the LLM program.

Professor Margaret Thornton

Beyond legal research in anti-discrimination law: A personal perspective

Margaret Thornton is Professor of Law and ARC Professorial Fellow in the ANU College of Law. She has degrees from Sydney, UNSW and Yale, and has been admitted as a Barrister. She has been a Professor of Law for 20 years and has held visiting fellowships at various overseas institutions, including Oxford, London, Columbia and York University, Canada.

Margaret has had extensive research management experience as a member of the Australian Research Council and as a Director of Research. Her own research interests are in the areas of discrimination law and policy, legal education, the legal profession and feminist legal theory. Her current research project is entitled ‘EEO in a Culture of Uncertainty’. She is a Fellow of the Academy of Social Sciences in Australia and a Foundation Fellow of the Australian Academy of Law.
Does the mitigation standard unfairly advantage the plaintiff in tort recovery cases for third party mental harm?

ABSTRACT
The mitigation rule, also called the doctrine of avoidable consequences, requires a plaintiff to either take reasonable action to mitigate the effects of their tortiously caused harm or avoid whatever would aggravate said harm. For example, a plaintiff claiming tortiously caused clinical depression should not aggravate their condition by heavy consumption of alcohol, a known depressant. Instead the plaintiff would be expected to mitigate their depression by seeking treatment from an appropriately qualified medical practitioner or psychologist. Plaintiff’s compliance with the mitigation rule is not a ‘duty’ in that its breach is actionable by the defendant. Rather the plaintiff may not charge the defendant for the consequences of their failure to mitigate the tortiously caused harm.

The application of the mitigation rule in common law actions for compensation for tortiously caused mental harm is neither straightforward nor does it favour the defendant. First, the mitigation rule operates as an affirmative defence, the burden of proof falling on the defendant. Second, the defendant must prove that the plaintiff had been advised of all material aspects of the treatment, for example, possible harmful side-effects, the probability of beneficial results and the likelihood that the treatment would improve their condition. Third, the defendant must prove that in the light of this medical advice, ‘and all the circumstances known to [the plaintiff] and affecting [them]’, the plaintiff’s failure to mitigate their harm was unreasonable. Fourth, the reasonableness or otherwise of the plaintiff’s conduct is determined not by reference to a ‘reasonable person’ simpliciter but to a ‘reasonable person in the position of the plaintiff’. Here Australian, Canadian and American state law differ from that of England where the ‘subjective condition of the plaintiff’ may not be taken into account.

When the court applies the mitigation rule in response to the defendant’s request for a mitigation instruction, the evidence of psychiatrists qua expert witnesses may be a key factor in determining the reasonableness or otherwise of the plaintiff’s conduct. This paper will discuss the influence of expert psychiatric evidence in recent Australian cases involving the mitigation defence, in order to answer the question, ‘Does the mitigation standard unfairly advantage the plaintiff in tort recovery cases for third party mental harm?’

BIOGRAPHY
Philip Adey works on matters of subordinate legislation for the Department of Health & Ageing in Canberra. He lives in Canberra and is a PhD student at the University of Sydney Law School (topic: Third party tort recovery for negligent infliction of psychiatric injury). In a previous life he worked as a translator in Germany. He holds a Master of Health Law (Sydney), a Master of Medical Science (Newcastle) and an MA (Auckland).

Rhys Aston (Flinders University)

Legal pluralism and social change: An exploration of jurisprudential and social scientific understandings of law

ABSTRACT
In order to understand the relationship between law and social change it is a necessary first step to define the object of study. This demands the development of a theoretical framework through which
Much conventional legal philosophy (especially that conducted within a positivist paradigm), adopts an internal or ‘inside’ approach to understanding law. That is, it is primarily interested in ‘lawyers’ law’ and in developing clear definitional criteria and tests of validity in order to differentiate law from other social phenomenon. In effect, law is understood in a relatively narrow manner as unified, coherent, and state–based system. In assessing the political utility of law, therefore, such approaches tend to focus exclusively on engagements that take place within the formal legal institutions of the state. This understanding of law is in direct contrast to many contemporary approaches within social theory and the social sciences. In particular, many scholars within the fields of anthropology and socio–legal studies are increasingly employing ideas of legal pluralism to challenge state–centric frameworks. At the centre of their approach is a radically different conceptualisation of law — one that views law as a system of indeterminate and contested cultural practices, and which draws attention to the role of all social agents in the ongoing production and negotiation of law and legal meaning.

This paper will assert that these legal pluralist models of law can provide fresh insights into the relationship between law and social change. In particular, it will contend that any investigation of law’s political utility must accommodate the potential for agents/groups to construct, appropriate, and deploy law in novel or inventive ways outside of state–based frameworks. While engagement with formal legal institutions are undoubtedly important, situating studies solely within this narrow framework entails a reification of law in which it is falsely separated from the lived reality in which it is actually experienced.

In making this argument, this paper will explore the inevitable opportunities, tensions, and difficulties which emerge when relying on concepts from distinct traditions. Specific attention will be drawn to the issue of accommodating different disciplinary priorities and considerations, and to the relationship between theoretical and empirical approaches to the study of law.

BIOGRAPHY

Prior to commencing his law degree, Rhys completed a Bachelor of Arts at Adelaide University and then spent several years travelling and working in Europe. Arising from an interest in social justice and advocacy, Rhys commenced a law degree at Flinders University 2004, graduating with first class honours in mid 2008. He subsequently enrolled in a PhD in 2009. His current research interests include legal theory, social theory, the relationship between law, power, and resistance, and the role of law in everyday life.

Tom Baxter (University of Tasmania)

Perils of public participation in parliamentary process: An active research law reform example

ABSTRACT

Growing recognition of the importance of research impact is one driver towards more active research in pursuit of law reform. Such research is to be encouraged.

Proponents of social change should expect to encounter systemic inertia or resistance, combined with active pushback from those with interests in maintaining the status quo. This applies to researchers advocating law reform, even when engaging through formal avenues for policy review.

Positive recommendations from a review process, law reform body or other formalised inquiry may be a necessary, but not sufficient, condition for law reform. In controversial policy areas, formal recommendations for law reform inevitably intersect with politics: indeed, successful statutory law reform ultimately depends upon garnering sufficient reformist political will. At this nexus of policy, politics and law, interesting issues can arise as to academic independence and ‘objectivity’.

My PhD research examines Australia’s primary environmental statute, the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (‘EPBC Act’), specifically its exemptions for Regional Forest Law can be conceptualised. This paper will explore the potential for rethinking this relationship through the use of alternative concepts of law derived from social theory and the social sciences.
Agreement (‘RFA’) forestry operations. During my candidature, two significant reviews inquired into the EPBC Act’s operation:

- a Senate Committee Inquiry; and
- an independent review of the Act, required under s 522A, headed by Dr Allan Hawke.

As flagged in my PhD Preliminary Research Plan (though the former Inquiry was unanticipated), I made substantive written and oral submissions to both these reviews. Based on my research, I recommended law reform to amend the EPBC Act so as to:

(a) strengthen it objects by remedying legal weaknesses therein, apparent from judicial reasoning in Brown v Forestry Tasmania (No 4) [2006] FCA 1729; and
(b) repeal its ss 38–42 and 75(2B) exemptions for RFA forestry operations.

The Senate Committee’s first report adopted my reasoning for (a) as its Recommendation 1, citing ‘Governance expert Mr Tom Baxter’ amongst other submissions.

The Committee made consideration of (b), EPBC Act ss 38–42, the sole subject of its second and final report. In a dissenting report, three Coalition Senators devoted a paragraph to ‘note the heavy reliance of the majority report on the evidence of Mr Tom Baxter, and also the failure to disclose that he is a member of the management committee of both the Environmental Defender’s Office and the National Parks Association.’ Their term ‘the failure to disclose’ was, in my view, unwarranted.

During recent debate over the proposed resource super profits tax, the shadow finance minister attacked ‘a working paper by a graduate student at North Carolina University’, describing it as ‘the shonkiest piece of work you’ve ever seen’ <http://www.abc.net.au/am/content/2010/s2907247.htm>.

Researchers need thick skin and should not be deterred by the possibility of political attacks. If your robust research recommends law reform which would challenge vested interests, anticipate a backlash which may ‘play the man’ (or woman) instead of the ball, by attacking you rather than the substance of your arguments. Such attacks may be an indicator of research impact.

BIOGRAPHY

Tom Baxter is a Corporate Governance Lecturer and PhD candidate at the University of Tasmania in Hobart. He previously worked as Legal Officer for the Great Barrier Reef Marine Park Authority, the Australian Government statutory authority responsible for management of the Great Barrier Reef. Prior to that, he was a lawyer in private practice. Tom holds degrees in Economics and Law (with Honours in Law) from UTAS and a Master of Laws from ANU. He provides occasional media comment on governance issues in Tasmania.

Christine Brickenstein (Macquarie University)

A comparative analysis of seasonal worker programmes in selected European countries in contrast to a potential seasonal worker programme between Australia and the Pacific Islands

ABSTRACT

This research aims to compare different seasonal worker programmes (SWP) in order to draw general conclusions about the benefits and shortfalls of these programmes. Furthermore, it will be analysed whether a SWP could be recommended in Australia.

Therefore a comparative study of four cases will be conducted: Germany, France, New Zealand and Australia. Germany is an outstanding case study as it annually accepts the highest number of seasonal workers in Europe and France signed SWP with a supposedly preferential status with some of its former colonies. The European experience will be contrasted by Australia and New Zealand. The 2006 New Zealand SWP is often referred to as a model of best practise where as Australia still refuses a SWP with the Pacific Islands.
As a cross-national comparative analysis the most similar case design approach will be utilised. Different parameters have been set up to measure the phenomenon in the different countries.

The Economic Approach aims to determine whether seasonal worker constitute an economic benefit or loss for the receiving country. Therefore, it will be analysed whether the employment of seasonal worker results in lower wages or the replacement of the local work force. Additionally, it will be investigated in how far the free movement of workers can be seen as an extension of the free movement of goods (GATS).

The Rights–based Approach focuses on the ethnic dimension of what rights seasonal workers are granted in theory and practices. Points of interest are international human rights law, its enforcement and the national implementation. The promotion of rights by institutions (IMO, ILO) will be taken into account. Following, the outcomes will be compared to the rights granted to permanent migrants and nationals of the receiving country.

The Development Approach approaches the research question from the sending countries perspective and explores whether SWS are an effective method of development aid. Points of analysis are poverty reduction through remittances and the creation of sustainable livelihoods. Furthermore, it will be evaluated whether the colonial legacy results in a responsibility to help.

Finally, the Migration Policy Approach examines further reasons of migration policy. Amongst these are the racism, the fear of irregular migrants and visa over-staying, security and health issues as well as the assessment of the current permanent settlement policy which seems to contradict temporary migration.

BIOGRAPHY

Christine Brickenstein is a PhD candidate at the department of Law at Macquarie University in Sydney. Her research interests focus on temporary migration, especially on seasonal workers in Oceania and Europe. Prior to that Christine graduated from the interdisciplinary Master Course 'International Studies' at Otago University in Dunedin, New Zealand.

Her Masters thesis examined the case of an Algerian refugee in New Zealand. This refugee was detained for two years on the grounds of security concerns even though the authorities accepted him as a bona fide refugee. For her research she studied court decisions, analysed the role of the media and researched whether New Zealand acted in compliance with its obligations under the Refugee Convention. The more general task was to determine how states can find an appropriate balance between their human rights obligations on the one hand and their security duties on the other hand. The output of that research has been published by the New Zealand Law Journal in October 2009.

Aurélie Buthod–Garçon (The Australian National University)

BIOGRAPHY

Aurélie is a first-year PhD student under a Co-tutelle agreement between The Australian National University College of Law and the University of Grenoble in France. Her PhD research examines the opposability of regional regimes to third parties, with a special focus on the management and conservation regimes of marine resources particularly in Europe and the Asia-Pacific. Originally from France, Aurélie holds a Master of International Law (University of Sydney), a BA in Political Science (Sciences Po Grenoble) and a Diploma of Law (University of Grenoble). Her final year undergraduate thesis examined the impact of Article 8 of the European Convention on Human Rights on French law in the specific context of family and private life. Aurélie also undertook an internship at the Coalition for the International Criminal Court in New York, sparking a vivid interest for International Criminal Law.
Moeen Cheema (The Australian National University)

BIOGRAPHY
Moeen Cheema has been appointed as a Teaching Fellow and has an interest in comparative constitutional and administrative law and legal theory. Moeen will be pursuing a PhD in the Rule of Law and the development of judicial review theory and practices in South Asia. His earlier research focused on the implantation of Islamic legality, particularly criminal laws, in Pakistan’s postcolonial legal system. Moeen’s academic qualifications include an LLM from Harvard Law School and an LLB from the University of London.

Alison Christou (University of Queensland)

Phronetic Justice – Charting the benefit of an intersection between phronetic social science and legal scholarship for future constitutional studies

ABSTRACT
In light of the seemingly intractable surge of interest in tangible ‘outputs’ from universities, recent developments in social science and legal scholarship reveal promising pathways for the fulfillment of this mandate, whilst still maintaining research integrity. The so-called ‘Flyvbjerg Debate’ in social science has revealed the need for scholars to respond effectively to criticism regarding the usefulness or otherwise of the social sciences, as either predictive or indeed relevant arenas for scholarly endeavour. Less ominously, recent developments in virtue jurisprudence and therapeutic justice reveal the revival of the Aristotelian mission to seek ‘goodness’ both in legal practice and across legal systems.

This paper examines the potential to develop research activities in phronetic justice, with a view towards improving the various systems and approaches to justice delivery. Australian constitutional evolution, and in particular recent calls for recognition of a legitimate fourth branch of government, is examined through the phronetic justice lens. Within this space, questions such as:

- ‘what do we want our constitutional future to be?’
- ‘how is power gained and maintained by the three existing branches of government?’ and
- ‘what is legitimate or ‘good’ activity for constitutional actors?’ can most effectively be broached.

It is proposed that such analysis will refresh our approach to the ‘small brown bird’ of the Australian Constitution and will yield the types of results envisioned by the stakeholders of Australian tertiary scholarship. Such results might include, for example, University-driven advances in the CPD offerings available to actors within the legislature, judiciary and executive, which highlight the aretaic excellences pertinent to their respective mandates.

BIOGRAPHY
Alison Christou is a Research Scholar with the Centre for Public, International and Comparative Law at the TC Beirne School of Law, University of QLD. She is completing her PhD thesis on institutional legitimacy within the separation of powers doctrine. Admitted as a solicitor in 1996, Alison has extensive experience in merits review practice and is a current Legal Member of the QLD Mental Health Review Tribunal.
Are High Court judges scapegoats: An alibi for the citizen’s fear of the unknown in a time of exceptionalism

ABSTRACT
There has been a plethora of writings on the how the unprecedented nature of the September 11 attacks has altered the ‘meaning and character of terrorism’ (S. Sorial, The Use and Abuse of Power and Why We Need a Bill of Rights: ASIO (Terrorism) Amendment Act 2003 (Cth) and the Case of R v Ul–Haque, Monash University Law Review, Vol 34, No 2, 2008, p, 400) Although the questionable derogations to human rights/civil liberties has been at the base of numerous debates over the constitutional legitimacy of the government’s amendments to Australia’s anti–terror laws in 2002, there remains a void in academic writings that examine the fundamental influence that the individual’s response to the attacks has had in shaping an ‘episteme—a way of knowing—a philosophy of our time’, based on fear of the unknown (S. Thomas, The Political Rhetoric of American Aspiration, in, Rediscovering Rhetoric: Law, Language and the Practice of Persuasion, J.T. Gleeson & R. Higgins, eds, The Federation Press, NSW, 2009, p, 269).

In relation to modern terror-related cases, it is fear of the closest embodied forms of direct association to the 9/11 terrorists, capable of identifying what is, essentially, a relatively abstract embodiment of ‘evil’–Muslims. The Australian citizens’ feelings of ‘existential and sensory shock’, it will be argued in this paper, reflect the fundamental influence of the fusing processes associated with globally inclusive information networks — powers that drive the market ethos as an absolute in terms of capitalism’s historically specific notions of the rights of the ‘enlightened, modern individual over that of its antithesis – the other.

It is the limitations of current knowledge formations capable of conceptualising the denial of epistemological identity/difference of traditional Islamic organisations compared with Jihadist organisations, such as Al Quaeda, that modernity’s self–alienating class consciousness created, resulting in flawed concepts of both religion and/or reason, that necessitate the application of a new approach to social scientific labour, that the unprecedented nature of modern forms of terrorism demands, if real ‘freedom’ and ‘progress in overcoming it is to be achievable.

It will be suggested that since the September 11 attacks, a publicly and/or parliamentarily accepted alibi, or gap as I will term it, has been supported — fundamentally out of generalised, and of course understandable, public fear of what is a frustratingly abstract cause. The fear factor has been exacerbated, or more simply, supported by media spin. Although it is reasonable to suggest that the media’s inability to gather properly researched information, due to the government’s inclusion in the legislation of intentionally secretive processes of warrant, detention and questioning, under the unprecedented powers delegated to ASIO, it exposes the possibility that it has limited their scope to such a degree that the reporting of particular terror–related cases (Hicks, Haneef, and alias Jihad Jack) is based more on fiction than evidentiary fact. What effect has this, arguably, flawed information gathering, had upon legal research, and consequently, upon the attitudes and actions of members of the judiciary in terrorism cases.

The media’s spin, I argue, reflects that ‘rhetoric is not merely a ‘device’ or ‘method’, but a process of inquiry, of understanding — indeed of human intellectual evolution, [i]nvention, the first canon of classical rhetoric’ (Ibid, pp. 268–9). This, it is suggested, has been reflected in the government’s response to this ‘modern’ form of terrorism in its relatively unopposed passing of anti-terrorism legislation, following the attacks. Therefore, it is vital to vigorously interrogate the power of fear, voiced in rhetoric, in relation to the individual’s sense of denial of what is, unquestionably, a result of the modern, technologically driven world in which we, choose, to live. This, it will be suggested, is a cosmic war — a war in which rhetoric such as that of George W Bush Jnr, ‘you are either with us, or you are with the terrorists, admits of a metaphysical war between good and evil, which in and of itself
provided words of linguistic connection to Bin Laden as he responded with the line, ‘the words could have come out of my own mouth’.

Just as Bush, and subsequently, Howard pushed the hard line with harsh new anti-terrorism laws — laws that strove to provide a false sense of security in a time of unprecedented fear of the unknown, it exposed the fact that rhetoric is, never static but perpetually changing with the times, asking us to adapt to a shifting context of ‘reality’, ‘truth’, and knowledge (Ibib, pp.268-9). Attempting to fill the gap, like a bunker, governments have historically used public platforms as a means of persuasion. Like a blanket of simulacra — abstract constructs of artifice akin to government funded advertisements during the Cold War, in which the public were instructed to duck down and take cover under the house in the case of a nuclear attack. This is the ‘gap’ — the subaltern space in which the reality of the issues at hand are not vigorously interrogated, but rather, covered over with silken rhetoric capable of convincing the individual that particular laws are necessary in times of exceptionalism.

As the public and/or the parliament demonstrate limited dissent against the questionable derogations to human rights and/or civil liberties associated with the new laws, what influence has this had upon the judicial arm of government — specifically upon the High Court Judge? As truth and justice become increasingly based on fear of the unknown in a frustratingly abstract context, has public pressure influenced the decision-making capacities of the High Court Judge? Have they become ‘red herrings for public approval’, and not as intended by the founders of the Constitution (Cth), the final arbiters of justice within our Parliamentary system of governance — a democratic system of governance?

In contrast to the Communist case, launched by Prime Minister Robert Menzies, in which the High Court’s majority decision upheld the civil liberties, and/or human rights of the individual over that of the executive, my paper supports the argument put forward by Prof George Williams, that the exceptional nature of modern attacks has become normalised to a dangerous extent. It is here, that the responsibility, or as is further suggested, the lack of dissent demonstrated by the public, and/or the parliament, threatens to usurp the historical role of the judiciary to uphold civil rights.

BIOGRAPHY

2000–02: BA political science and international relations: Monash: University, Clayton Campus, Melbourne; 2003–04: BA Honours political science and international relations (especially political theory): University of Melbourne, Parkville Campus, Melbourne; 2007–current: PhD Law at SCU.

Whilst doing her honours degree at Melbourne University, Susan was a volunteer at the Federation of Community Legal Services in Melbourne as a member of the terrorism task team. She was honoured to be chosen as a part of this unique, and extremely well-informed group. Susan contributed heavily to two submissions of the FCLC to the Joint Parliamentary Commission Enquiry into the Howard Government’s amendments to the laws, held in Melbourne in 2004. She also worked with the Sydney team on their submission on the ‘proscription of terrorist organisations’.

Suan was a member of the Postcolonial Institute run by her honours supervisor. This was an invaluable source of information, via debates, papers and seminars.

While completing her thesis on the ‘Bush Administration’s Secularization of the Religious: the Symbiotic Absolutism that Defies Enlightened Use of Reason’, she spent more time at Melbourne University’s law library than the general one. Although her PhD is classified as being in law, she combines political theory with empirical political/legal discoursive debates, and/or data. She is currently doing a LLB Law part-time, and have completed Constitutional Law. This subject altered the fundamental direction of her PhD.

Susan is extremely interested in the fundamental epistemological alterations to the Parliamentary system as a whole, but, and as this conference is on ‘the other side of the law: beyond legal research’, she is excited at the prospect of, both hearing the other speakers perspectives, and also, the chance to meet other people researching in this area.
International Law’s promotion of collective experiences of mass violence

ABSTRACT

The paper to be presented at the conference explores one aspect of the presenter’s PhD thesis. The PhD thesis is concerned with the contribution of international law to social recovery in post-atrocity states.

The paper, to be presented, considers the promotion of accounts of collective experience of mass violence, as one of the means by which international law may improve its contribution to social recovery in post–atrocity states. The manifestation of international law is found in international criminal trials which are conducted by institutions created wholly or partially under the auspices of the United Nations or through multilateral treaty. The institutions are empowered to prosecute individuals for war crimes, crimes against humanity and genocide. The definition, adopted in the paper, deliberately excludes institutions created outside the principles which guide the international community in the United Nations Charter.

The experience of the victim majority, in relation to mass violence, is marked by impairment of interpersonal and communal relationships and damage to social structures as a result of collective perpetrator. The immediate experience of the victim majority is not of the meetings which occurred to plot out and plan genocide or to witness the distribution of ammunition, nor of the training of militia. The experience of the victim majority is one where the perpetrator is the neighbour, shopkeeper, provincial head or even a family member. In creating a nexus and connection between this immediate experience of the violence and international criminal trials, the paper argues that there must be an adequate account of collective experience. An adequate account avoids legal encumbrances which obscure an account of collective experience.

Through an examination of the International Criminal Tribunal for Rwanda three encumbrances are identified. Firstly, the existence of competition between a legal response to genocide, legal recognition of an armed conflict and the objective of prosecuting those most responsible, is described. This recipe of legal recognition and prosecutorial preference affords a public opportunity, within trials, for individual defendants to cry war–like behaviour rather than incontrovertible genocidal intent, thus obscuring the real nature and role of their perpetration. Secondly, the use of armed conflict as a backdrop to genocide is challenged because of the irreconcilable nature of both to adequately account for collective experiences of mass violence. The third encumbrance considered is procedural and it is argued that the use of judicial acceptance of commonly accepted facts in relation to the Rwandan genocide feigns ignorance about collective perpetration, thus obscuring the required accounting of collective experience.

BIOGRAPHY

Britt Conidi is a Bachelor of Laws (Honours) and Bachelor of Arts (Anthropology) graduate of Charles Darwin University who has worked as Judge’s Associate and in legal practice in the private, public and community sectors. In the year 2000 Britt was an Australian Youth Ambassador for Development and worked in the State Law Office and Office of the Public Prosecutor in the Republic of Vanuatu. Since 2008 Britt has worked as an academic at Deakin University delivering the Bachelor of Laws degree to Aboriginal and Torres Strait Islander students in community based delivery mode. Her PhD research with the University of Melbourne considers the contribution of international law to social recovery in post–atrocity states. The thesis is due to be submitted for examination in July 2010.
BIOGRAPHY
Catherine is a Visiting Fellow at the ANU Fenner School of Environment and Society and convenor of a Fenner School course 'Environment and Development'. She recently submitted her PhD which investigated perceptions of fairness, justice and injustice in water allocation in the Murray–Darling Basin. She bases her research work on developing a holistic understanding of societal problems in which differing perspectives frequently lead to social conflict. Catherine has made recommendations on the application of justice constructs to decision–making processes to facilitate greater acceptance of decisions by stakeholders affected by the outcomes.

Robyn Holder (The Australian National University)

*Legal mobilisation & the ordinary person: Exploring citizen interactions with the law following violence*

ABSTRACT
Many scholars have noted how few of society's problems end up resolved by the law and legal system (Lievore 2002; Genn 1999; Carcach 1997; Bumiller 1988; Galanter 1981; Fishman 1979). Whether these are civil disputes experienced as a 'justiciable event' (Genn 1999) under private law, or some breach of a community norm potentially subject to public law, so widespread is the phenomenon that sociologist Donald Black has stated 'legal inaction [is] the dominant pattern in empirical legal life' (1973: 133).

A common approach is to identify the problem as resulting from a failure of the law, of legal institutions and legal practitioners to enable 'access to justice'. This perspective focuses on the structural and societal impediments that create barriers between the disadvantaged citizen and the promise of legal remedy. 'Legal centralism' (Galanter 1981) places people as passive and external, and invests law and legal institutions with power that both attracts and repels. Enthralled as we are in facilitating people's access to justice, we do not commonly pause to ask why people may engage with the law. The assumption is that it is both normal and even inevitable.

This paper briefly presents the evidence against this assumption. At the same time, the extent to which a legalised discourse shapes and gives meaning to the everyday social world is discussed as a schema that encodes and positions people, places and events (Greenhouse et al 1994). The signs, signals and stories of legal consciousness are shown to make meaning, set boundaries and depict pathways. This consciousness is seen to interact with perceptions of injustice (Sen 2009) that are culturally, socially, politically and materially situated. Taken together those forces act to determine the margins to the exercise of legality and rights (McCann 2006).

From this point the paper moves to examine legal mobilisation theory from Black (1973), Lempert (1976), Zemans (1982) and McCann (1994) in order to explore how legal concepts influence the goals, options, choices, and problems of ordinary individuals when confronted with violence. Legal mobilisation theory takes seriously the idea that ordinary citizens are legal actors. These scholars all note the reliance of both the public and private law on the initiating citizen and each derives different interpretations from this point. In general the mobilisation of law for group interests or by social movements is deemed legitimate whereas illegitimate (or at least considered problematic) if mobilised for what is perceived an individual or personal interest. The implications of this analysis for citizens seeking the protection of the law are considered.

BIOGRAPHY
Robyn Holder is a PhD candidate at RegNet in the College of Asia and the Pacific. She is a member of the Canadian Observatory, an international research network examining criminal justice interventions in intimate partner violence. She has been working on crime and justice issues in Australia and the UK for the past 20 years.
The utilisation of digital ethnography for studying digital cultures in law reform research

ABSTRACT

How we think, how we react and how we perceive the rights and wrongs of our lives are all based on our connections. The family and community we live in. The schools we go to and the education we receive. The people we socialise and work with. Each connection informs us and contributes to our version of the world. When we take on new experiences, make new connections, we open the opportunity to changing our world view.

Consider then the mass communication tool that is the Internet. There are billions of connections between millions of people. And the connections are continuing to grow at an exponential rate.

These connections are different to anything that has come before. They are digital and virtual. These connections come in many unique forms. People connecting to people that they may have no prior connection to. People connecting to those close to them via multimedia. These are some of the aspects of social media. One aspect of these new connections is the speed in which ideas spread.

The speed of the spread of ideas has vastly increased with the uptake the Internet and social media. This in its simplest form can be seen in the Information Revolution that we are currently in. A growth in information and the spread of that information spreads is unprecedented. Information and technology is contributing to the creation of a new culture. The rise of the digital culture will bring its own set of challenges to society and the law.

Policy formation and law reform is difficult even when the target field is clearly defined. Developing policies for a group that has rapidly changing views and interests is even more difficult. This raises questions such as: How is a hyper-connected society going to influence our future laws? Is law reform able to keep pace with the changing attitudes of a digital society? Are we moving towards hegemony of law based on our shared digital culture experience?

Socio-legal ethnography, in particular digital ethnography, provides a valuable tool for researchers when seeking to answer questions in relation to digital culture and its effects on the law. The first part of the paper will consider a variety of methods and techniques that can be used to gain an insight in the digital culture. This includes cultural immersion techniques. The second part will review benefits to legal scholarship of undertaking social-legal research via ethnography.

BIOGRAPHY

Fabian Horton is a solicitor who has extensive experience in legal technologies and on-line legal applications. His main research interests include the internet and its effects on the law and legal research methodology. Previously he was the Training and External Relations Officer at the Australasian Legal Information Institute (AustLII). Fabian has lectured at UNSW, UTS and La Trobe Universities in legal research and has presented seminars on the subject across Australia. Prior to the law Fabian was a forensic analyst with the Queensland and New South Wales Police working in the area of Signal Processing.

Sue Jarrad (Flinders University)

Doing justice to law, ethics and rights in research: an interdisciplinary approach to decision making in law and practice for older people with reduced mental capacity

ABSTRACT

Any discussion on the concept of capacity is complex, ‘emerging from a rich history that spans health care law, ethics and philosophy’ says Charland (2008), while Beauchamp and Childress (1994) consider that ‘perspectives of medicine, psychiatry law, psychology and philosophy have given the concept
‘accumulated layers of meaning’ and Devereaux and Parker (2006) claim it as ‘a key concept in both bioethics and law, and a matter of considerable controversy’. Is there any common ground in the theoretical divide between natural and legal personhood, and the interdisciplinary approaches between law, bioethics and rights?

Commencing with some case stories as examples, this paper will explore the approaches of legal philosophy, medical law, bioethics and human rights, and their influences on the area of decision making and capacity. It will explore the non commensurability of different approaches to personhood (Naffine 2009), the avoidance of law to the moral frame (Silberfield, 2004), autonomy that extends beyond capacity through values and meaning when cognition is impaired (Jaworska, 1999), and the development of capacity legislation internationally influenced by a human rights approach. The presentation will identify any potential for integrating or aligning seemingly incommensurable domains in the ‘soft’ law of decision making and guardianship, drawing on international examples.

A number of research strategies have been devised to explore these areas further: an analysis of South Australian guardianship legislation in relation to human rights recognition of the ‘relational’ and autonomous person; an exploratory study of cases of capacity assessment in a hospital setting for an older person with cognitive impairment; focus groups in two organisations that have either a public guardian or advocacy role for people with fluctuating or impaired capacity; and a survey and interviews of private guardians and those with enduring powers of guardian, to ascertain their use of current legislative principles and their needs in navigating the complexities of their role.

Courage or folly: can a postgraduate researcher with a background in social work and policy advocacy, do justice to law through an interdisciplinary approach to the concept of decision making capacity?

BIOGRAPHY

Sue holds qualifications in Social Work (University of South Australia) and a Masters in Policy and Administration (Flinders University) and is now enrolled in the Post Graduate Research Program at Flinders University, in the School of Law.

Sue commenced her work as a social work practitioner in psychiatry, and later in assessment and support of older people with psycho–geriatric issues. Sue has held positions of Executive Officer, Executive Director (Services) and Director of Policy Development of the Alzheimer’s Association (SA) from 1988 until 2006. She has worked as a dementia services consultant and as acting Executive Director for the Health Consumer’s Alliance of SA. Sue commenced full time study in 2010.

Sue has a great concern for the well–being of older people particularly those most vulnerable from cognitive impairments. As Director of the Alzheimer’s Australia SA policy unit, Sue was responsible for systemic advocacy on needs of people with dementia and their families; facilitating consumer empowerment and greater opportunity for consumers voices to be heard; and contributing to service development and planning at the state and federal level.

Sue’s expertise includes policy analysis, policy development, organisational development and strategic planning. Sue currently has interest in guardianship legislation, capacity assessment and decision–making, legal and ethical issues, person–centred care, respite care, residential care, and mental health issues.

In 2006 Sue was awarded a Churchill Fellowship for overseas study ‘to investigate current practice in the protection of vulnerable older people with impaired decision–making’. Sue received a Community Service award in the 2006 South Australian of the Year Awards.
Water and the working class: an exploration of the legal and social relations surrounding water

ABSTRACT

In Australia it is well-recognised that water resources are in crisis. In the two decades since the late 1980s, there have been significant water reforms. Fundamental to the reform process has been a re-awakening of the debate over water rights — and in particular, an argument for the creation and strengthening of private property rights to water.

The debate over who owns water, who should own water, and whether in fact it is possible to own water, is a global one. It is also an old one. Blackstone argued that because water was a fluid resource, it could not be privately owned. Since then, the legal position has evolved considerably. Today, many Australian catchments have functioning water markets, based upon secure, transferable water rights. However, there is still substantial debate. In particular, many writers globally argue that water should not be privately owned, as access to water is fundamental to human survival, and water should therefore be regarded as an inalienable public good.

This thesis attempts to cut through this debate, by delving outside of the law. The thesis uses an historical materialist framework to explore the social relations surrounding water. Instead of focusing exclusively on legal categories and debates, the thesis looks instead at how social, political and economical forces shape control over water. The core thesis question is who controls water and how.

This paper focuses on one specific aspect of the social relations surrounding water: the relationship of the working class with water. The Australian working class is estimated to be approximately two-thirds of the population, living predominantly in the cities, but also in rural centres. The relationship between workers and water is explored from two key perspectives. Firstly, workers’ legal rights to water — as householders and as members of the public — are explored in depth. Secondly, the paper draws on ideas from urban political ecology, to explore the relationship of the urban working class as consumers of water. The conclusion is that while workers do have some limited rights as consumers, they lack control over water supply systems — whether for production or household use — and over water in the landscape.

The broader significance of the paper is two-fold. Firstly, it is hoped the research will help clarify legal debates over water ownership, and thus provide guidance in the water reform process. Secondly, and relevantly for the topic the other side of the law', the research provides key insights into the relationship between social relations and the law.

BIOGRAPHY

Elinor specialises in environmental law and has a particular interest in water law. Her PhD research focuses on rights to control and access water and water resources. She is using a Marxist legal and ecological theoretical framework to explore the relationship(s) between humans and water within the Australian landscape. Elinor is a full-time PhD student at the ANU College of Law. She is a recipient of the ANU Vice-Chancellor’s Scholarship for Doctoral Study. She is an ANU graduate, with two first-class honours degrees (LLB and BA). When not working on her thesis, Elinor most likely to be found practising martial arts or bellydance.

International environmental law and complex systems theory

ABSTRACT

This study explores the application of complex adaptive systems theory to international environmental law. I put forward a case for using the theory as a foundational paradigm for the system of international environmental law with a vision of building a continuum of laws that better reflects the law of nature.
Much groundwork is needed for this ambitious task. Drawing from the burgeoning legal scholarship on importing complexity theory into the study of legal systems, I give a general introduction to why and how systems thinking and complexity theory can expand our understanding of behaviour and properties of the legal system. More specifically, I ask the following questions. What does it mean to say that law is a complex system? Why is it important to conceptualise it as a complex system? What insights could be gained by looking through the lens of complex systems? What are the implications on law’s design if the subject matter is a complex adaptive system? What are the implications on law’s design if itself is or ought to be a complex adaptive system? How do law and its regulatory targets co-evolve and what does that mean for law’s design? And in terms of methodology, what are the available analytical tools for studying complex legal systems? These questions will be addressed by a literature review and illustrated with examples from my own research on a complex adaptive systems approach to international environmental law. I also discuss the link between complexity and normativity in the context of global environmental governance to highlight the ecological dimension of complexity theory. In sum, this study establishes the relevance of complexity to law for a more specific argument to be made in relation to international environmental law. For global ecological integrity, the design of international environmental law needs to reflect the nature of the tightly coupled, nonlinear interrelationships among sub-systems and processes in the Earth System. The lens of complex systems and its analytical tools can provide a vehicle through which we can overcome this design challenge of law and governance.

BIOGRAPHY
Rakhyun Kim is a PhD scholar in the Fenner School of Environment and Society at The Australian National University. Rak is working on his PhD thesis provisionally entitled, The Coevolution of the UNFCCC and the CBD: A Complex Adaptive Systems Approach to International Environmental Law and Governance. He holds two Master’s degrees in geography and international environmental law (First Class Honours) from the University of Auckland, New Zealand. He is a junior member of IUCN Commission on Environmental Law (Oceania regional coordinator for the Group of Young Professionals), a research fellow of the Earth System Governance Project, and has been actively involved with a number of environmental NGOs in South Korea. He was a visiting scholar at the Institute for Environmental Studies at Vrije University, Amsterdam in early 2010.

Michelle Lim (University of New England)

Transboundary law for biodiversity conservation: Advancing cooperation across international and disciplinary boundaries

ABSTRACT
Conservation scientists stress the importance of ecosystem approaches to biodiversity conservation. Further, many sites that merit conservation straddle the 220000km that make up the world’s international land borders. Thus, transboundary cooperation provides a valuable means of combining and coordinating biodiversity conservation efforts at a transnational scale. However, collaboration between adjacent states for transboundary biodiversity conservation occurs on a largely ad-hoc, case-specific basis without adherence to uniform standards or guidelines. In addition, State practice and academic commentary lacks detailed consideration of the principles of International Law that apply to biodiversity conservation in terrestrial transboundary ecosystems.

This research addresses the issues surrounding transboundary law for biodiversity conservation in ecosystems that span the territories of sovereign states. It is recognised that meaningful biodiversity conservation outcomes across international boundaries require integrative legal approaches which incorporate the disciplines of governance and conservation science. It is argued that International Law does not create concrete obligations for biodiversity conservation. Further, the specificities of biological resources and requirements for their conservation mean that the existing international law principles of transboundary pollution and international watercourses do not provide sufficient legal bases for
transboundary biodiversity conservation. With International Law as a framework, this presentation focuses on 'how to make the law work' across international and disciplinary boundaries.

Following an extensive review of the Transboundary Protected Area (TBPA) and Transboundary Natural Resource Management (TBNRM) literature, criteria for the effective realisation of transboundary biodiversity conservation have been developed. These criteria are applied in a critical reflection involving a comparative of two case studies. The first case study is located in the Pamir–Alai Mountains of Central Asia. It involves the adjacent former Soviet nations of Tajikistan and the Kyrgyz Republic. The second case study occurs in the highlands of Borneo and includes the island's three countries: Brunei, Indonesia and Malaysia. This presentation elaborates on the particular challenges of each case study and the lessons learnt, concluding with recommendations on ways forward for transboundary biodiversity conservation.

BIOGRAPHY
Michelle Lim’s PhD focuses on the legal and institutional requirements for biodiversity conservation across international boundaries. Michelle's research is linked to a United Nations transboundary project in the Pamir Mountains between Tajikistan and Kyrgyzstan. Michelle was in Tajikistan from April to May 2010. During this time she facilitated a workshop on legal and policy development for project's national teams. She also participated in meetings of local community leaders and an expert roundtable. This visit supplemented the three months in Kyrgyzstan and Tajikistan in 2009. During the previous visit Michelle visited project sites and met with project stakeholders and experts to discuss the issues and challenges related to achieving sustainable land management in the region.

For her PhD research Michelle has also examined The ‘Heart of Borneo’ project. This project was initiated by the World Wildlife Fund (WWF) and involves the three countries of Borneo — Malaysia, Brunei and Indonesia. In December 2009 and January 2010 Michelle conducted interviews with stakeholders and visited protected areas of this project.

Michelle obtained a double–degree in Science and Law with first–class honours from the University of New England in 2008. Michelle has had a long–term interest in International Environmental Law, Biodiversity Conservation and Sustainable Development. Her honours thesis questioned the adequacy of international law obligations for biodiversity conservation and she majored in Ecosystem and Natural Resource Management under the Science component of her degree. Michelle gained a Diploma in Expedition Management in 2006 while assisting in Rapid Biodiversity Assessments in the Nguru South Mountain Forests of Tanzania. Further in 2007 Michelle was project manager of the Jane Goodall Institute’s Mt. Kilimanjaro Community–Based Environmental Project.

Michelle is completing three publications which have resulted from her PhD work. The first has a rangeland governance focus. It compares the development of pasture law in the Kyrgyz Republic and Tajikistan and the implications for the management of rangelands across the Kyrgyz–Tajik border. The second highlights the gap in existing international environmental law for transboundary biodiversity conservation. The publication also provides recommendations on how the law should develop. The third integrates legal, institutional and ecosystem management disciplines and develops a set of criteria for ‘making the law work’ for biodiversity conservation across international boundaries.

Sylvia Lim (The Australian National University)

BIOGRAPHY
Sylvia Lim commenced professional life as a Physiotherapist in coastal NSW. Following the devastating earthquakes in Sichuan, China in 2008, Sylvia was recruited to set up and provide rehabilitation services for earthquake survivors. Following this experience, Sylvia was keen to acquire an academic framework that would enable her to participate further in the international arena. Hence, Sylvia decided to return to Australia to commence a Master of International Law. Detouring through Nepal to build toilets and trek some of the world's best known routes (including to Everest base camp), Sylvia now calls Canberra
A new challenge now faces Sylvia in the form of attempting to play Aussie rules football for the ANU football team.

Maree Livermore (The Australian National University)

A patient not detained is a patient not treated. Is this public mental health in Australia?

ABSTRACT

Access to mental health care has featured as an issue in public discourse in Australia for almost two decades. Governments have responded with national mental health strategies, plans, action statements, new programs and, from time to time, additional funding. Yet it appears that many Australians still cannot make connections with mental health services that they feel they need.

Writers and researchers in mental health law have begun to address the manner in which the law can affect consumer access to service. But work to date has focussed on the effects of the detail and machinery of the current law.

In this paper, the investigatory focus is retracted to consider the effect of the dominating tenor of the mental health law rather than its minuitiae. For, notwithstanding regional variations, Australian mental health law is characterised by an overriding emphasis on coercive treatment.

This paper will investigate how the coercive focus in our mental health law functions dynamically within the legal–policy–services matrix to actively inhibit and subvert effective access, for many sufferers, to mental health treatment. There will be address to the effect of the coercive focus on three of the principal stakeholder sets in the mental health system — government, clinicians and people with mental health conditions.

Applying the lens of therapeutic jurisprudence, the paper will explore the interrelationship between the coercive emphasis in the relevant law and the fixity of conditions related to access in the Australian mental health system. It will suggest that significant movement in the mental health law reform ‘agenda’ is required — with specific address to issues of access and to the developing concept of a right to health.

BIOGRAPHY

Maree Livermore is a lawyer, consultant, author and ANU PhD student. She has a background of involvement in social justice and law reform issues. Most recently, Maree has worked with the ACT Government as consultant to the review of the ACT’s mental health legislation, with the Commonwealth Attorney-General’s Department, in consultation, on changes to family law, and with the State Library of NSW and Law and Justice Foundation on communications projects. She has also consulted with various community groups on communications and governance projects. In earlier years, she worked as a legal practitioner in general litigation, consulted on communications issues with law firms around Australia, and worked as a family mediator with Relationships Australia and the NSW Legal Aid Commission. She has also worked with ACT Legal Aid and the Human Rights & Equal Opportunity Commission, and has written regularly for the Law Society of NSW and union journals.

Helen McGowan (The Australian National University)

What makes a happy lawyer?

ABSTRACT

Helen seeks discussion with colleagues on her proposed research into ‘What makes a happy lawyer’. Given the higher incidence of mental illness within the legal profession, she is taking an appreciative inquiry approach to identify and understand lawyers who are flourishing within their practice. She hopes her findings will assist in the supervision of lawyers, the management of legal practices and guide lawyers seeking more fulfilling careers.
BIOGRAPHY

Helen McGowan lives near Albury Wodonga where she works as a Practice Mentor for the ANU Legal Workshop. She has practiced law for twenty nine years, with the previous ten years spent within the community sector. She is an experienced lawyer having practiced in regional Australia within the private profession and more recently at the Hume Riverina Community Legal Service.

In 2007, she was the Victoria Law Foundation Fellow and piloted a program placing undergraduate law students in regional legal practices. In 2009 she worked with the ANU Legal Workshop and the National Association of Community Legal Centres to place ANU graduate law students in regional community legal centres. Her current research interest is ‘What does it take to build a sustainable regional legal practice?’

Alison McLennan (The Australian National University)

Synthetic biology and biosecurity

ABSTRACT

Synthetic biology is an emerging field of biotechnology research in which scientists are seeking to apply the principles of engineering to biological systems. This new field involves large-scale DNA synthesis and research into constructing organisms that do not exist in nature. This research has potentially beneficial applications in fields such as medicine and biofuels development. However, it could also be used for dangerous and illegal purposes such as biological weapons development, raising a ‘dual use dilemma’. Synthetic biology has a strong emphasis on de-skilling, and a community of ‘DIY’ biologists has already emerged.

In this context, it is important to consider how the synthetic biology community and regulators should deal with this biorisk. Various legal policy questions are raised including whether regulation of this research should be done by scientists or externally, and how regulation can be designed to accommodate the changing nature of this scientific field.

This paper will consider recent developments in security oversight of synthetic biology research in the United States, the largest player in synthetic biology internationally. In late 2009 – early 2010, several sets of voluntary guidelines were released for monitoring of gene synthesis activities. Differing guidelines were proposed by groups of gene synthesis companies and the US Government’s Department of Human Health and Services. The National Science Advisory Board for Biosecurity has also released its draft report about biosecurity and synthetic biology research.

Current Australian biosecurity regulation does not contemplate issues raised by gene synthesis and other aspects of synthetic biology research. It is hoped that by analysing regulatory structures in other jurisdictions, some recommendations can be developed for an appropriate regulatory approach in Australia.

BIOGRAPHY

Alison is a PhD Candidate at the Australian National University College of Law. She studied science (cellular and molecular biology) and law as an undergraduate at ANU. Before commencing a PhD Alison worked as a tipstaff in the Land and Environment Court of New South Wales and in the Commonwealth Attorney-General’s Department. She is interested in the regulation of emerging technology, particularly biotechnology. Alison is currently researching legal issues relating to synthetic biology, a new field of biology involving designing and synthesising new constructs such as bacteria and viruses. She hopes to explore the regulatory, intellectual property and bioethics issues raised by recent developments in this field. Alison is also interested in health and medical law, public health policy and history and philosophy of science.
Between two laws? Women, law and customary land in Solomon Islands

ABSTRACT
Land reform is currently high on the agenda of national governments and donor agencies throughout the South Pacific. In most of the South Pacific nations, the laws promulgated by the state expressly provide that land is governed by customary law.

The role of customary law and state legal systems in relation to land has been an extremely contentious issue among women’s groups and feminist scholars in many parts of the world. There are major disagreements about a range of conceptual and normative issues, including the nature of men’s and women’s interests under customary law; the ways in which the customary and state legal systems actually operate; and the effect of economic, political and legal transformations on those systems.

While these issues have received substantial attention elsewhere, they have received only very limited attention in the South Pacific. This paper draws on research in a peri–urban site in Solomon Islands. It explores the transformation of customary land tenure systems since the colonial era and their impact upon women. It demonstrates that male leaders have historically been privileged in the overlap between customary law and the state. This is being reinforced by contemporary land disputes, in which struggles over land boundaries are also struggles over authority and the ‘right to speak’ in land matters. Women are largely absent from the arenas in which these struggles play out. There is, however, scope for the empowerment of women within both the customary and state legal systems, and these must be recognised and supported.

BIOGRAPHY
Rebecca is a lawyer and geographer with an interest in social and economic development, natural resource management, and the interaction between customary and state legal systems. She is currently a Doctoral Candidate at the Australian National University College of Law. Her doctoral research examines the gendered impacts of customary and state regulation of land in Solomon Islands, and draws on fieldwork in several field sites.

Prior to commencing her PhD, Rebecca worked as a legal practitioner in the field of public law and disaster management law. She has also worked and studied in the field of law and development at several universities, including RMIT (Australia) and the Van Vollenhoven Institute at Leiden University (Netherlands). Rebecca’s law honours thesis, completed at Monash University, was on women’s access to customary land in Fiji and Vanuatu. This thesis received the 2004 Victorian Supreme Court Prize for Best Honours Thesis and, as one of the only extensive works on this issue, has been widely utilised by organisations in Australia and Melanesia.

Brendon Murphy (The Australian National University)

BIOGRAPHY
Brendon graduated from Newcastle University with a Bachelor of Social Work (Hons) in 1997, followed by a Bachelor of Law (Hons) and Diploma of Legal Practice in 2004. After working as a solicitor in private practice and in–house, he was seconded to the Newcastle Law School in 2007 as Associate Lecturer. Brendon is an enthusiastic teacher of law, and was awarded the Vice–Chancellor’s Citation for Contributions to Student Learning in 2009, and appointed Lecturer in 2010. Presently, Brendon is lecturing in crime at the University of Newcastle. His area of academic interest includes the criminal law and historical and socio–legal perspectives on criminal law. He is undertaking PhD studies at the ANU under the supervision of Professor Simon Bronitt. His thesis is entitled 'Offensive Language: A Socio–legal Study'.
The red shirts: The intersection between law and politics in Thailand

ABSTRACT
The primary objective of this thesis is to determine whether or not Thailand is governed by the rule of law. Many writers believe that Thailand is a nation which lacks sufficient constraint on the exercise of arbitrary power. These writers often blame the judiciary and other key institutions for not curbing corruption and other forms of abuses of power. While each writer adopts a different approach in analysing the rule of law, their views are almost always taken out of context and do not tell the entire story.

This is considered as inadequate, as these views often fail to appreciate the core sociological aspects of the rule of law. It is these core sociological aspects which are considered as essential to understanding the way the rule of law operates in Thailand. Without a proper understanding of the traditions and culture of Thailand, it is misguided to simply transplant the classic view of the rule of law and compare its key institutions in an ad hoc way. History has shown that more often than not the process generally does not work.

A more rigorous analysis is required. This thesis explains and adopts a new approach in examining the rule of law in Thailand. This approach examines the key influences of the rule of law in light of its sociological context. It looks beyond the judiciary and other independent institutions and into the uncharted area of social science. Particularly, the level of independence and performance of each major court in Thailand is examined, followed by a comprehensive evaluation of selected independent constitutional institutions.

These institutions are then considered in light of other sociological influences on the rule of law in Thailand. Such influences include: social values, political culture, religion, the King and the military. Other external influences such as Asian values and globalisation are also considered. These influences are something that has never been explored before. In saying this, the new approach differs considerably from past attempts to rule of law analysis in Thailand and concludes contrary to popular belief.

BIOGRAPHY
Pornsakol Panikabutara, or Dao, is a Doctor of Juridical Science (SJD) candidate at the Faculty of Law, University of New South Wales with the financial support from the New South Global Scholarship. Dao did her Bachelor of Laws at Chulalongkorn University in Thailand. She graduated with the University Medal in 1999. Dao became a Barrister at Law a year later.

Dao was a Shell Centenary scholar while she did her Master of Laws at the University of Cambridge in 2002. In 2004, she received the Australia Asia Award to study her second Master of Laws at the University of Sydney. Prior to coming to Australia, Dao worked as a legal researcher for the Supreme Court of Thailand and has taught at the Faculty of Law, Chulalongkorn University. During her time in Australia, Dao has worked as a research assistant to Hon. John Dowd, the President of the International Commission of Jurists. She also works for the Centre of Continuing Legal Education, UNSW on the Thai judicial training programs.

Romrawee Pornpipatpong (The Australian National University)

BIOGRAPHY
Romrawee holds a Bachelor degree in Law and Postgraduate Diploma in Legal Practice from The Australian National University. After being admitted as a solicitor in 2007, Romrawee decided to pursue her career in research. She is now completing a Doctor of Juridical Science (SJD) degree at The Australian National University. Her principal research interests lie in the field of international trade law, particularly exploring the relationship between Article XXIV of the General Agreement on Tariffs and Trade (GATT) and the safeguard provisions under GATT’s Article XIX and the Agreement on Safeguards.
Belinda Reeve (University of Sydney)

The food pyramid meets the regulatory pyramid: Obesity prevention and responsive regulation of the food industry

ABSTRACT
The 2009 National Preventative Health Strategy proposes the Federal Government’s response to the chronic diseases caused by obesity, as well as those linked to alcohol and tobacco consumption. (National Preventative Health Taskforce, 2009a). The Strategy discusses the role of the food industry in contributing to Australia’s high rates of obesity, including the wide-spread availability of cheap but unhealthy food, food advertising and marketing to children, and alcohol promotion and sponsorship. In targeting the food industry as a site of government intervention, the Preventative Health Taskforce advocates a ‘responsive regulation’ approach (National Preventative Health Taskforce, 2009b, p. 12).

The concept of responsive regulation has been highly influential in regulatory theory and is heavily based on the work of John Braithwaite and colleagues. (Ayres & Braithwaite, 1992; Braithwaite, 1985, 2002; Haines, 1997). It advocates a graduated approach to regulatory intervention and is often represented graphically in a pyramidal form, with persuasive and self-regulatory measures forming the pyramid’s base (Ayres & Braithwaite, 1992; Gunningham & Johnstone, 1999; Johnstone, 2004). Regulators should begin with these ‘softer’ measures, presumed to be the most effective because they are cheap, foster voluntary compliance and ensure co-operative relationships between regulatory agencies and companies (Braithwaite, 1985). When these initial regulatory efforts fail, regulators should move progressively up the pyramid to the more coercive measures found at its tip.

Although the law is a well-established tool in public health strategies (Gostin, 2006; Gostin, 2008), the use of regulatory interventions represents a relatively novel approach to obesity prevention (Magnusson, 2008a, 2008b; Magnusson & Colagiuri, 2008; Mello, Studdert, & Brennan, 2006). Regulation aimed at obesity prevention immediately raises questions about the framing of obesity as a regulatory problem (as distinct from an individual responsibility problem) and the government’s role in changing the consumption choices of individuals. (Epstein, 2003; Hall, 2003) The aim of this paper is to analyse how responsive regulation of the food industry might work in practice, using the example of television food advertising to children (Handsley, Mehta, Coveney, & Nehmy, 2009; Handsley, Nehmy, Mehta, & Coveney, 2007). I will examine questions such as: what are the components of a responsive regulatory regime? Why is it attractive to governments? What challenges would regulators face in implementing a responsive regime addressing food industry advertising practices? Would it necessarily be effective in changing children’s eating habits?

BIOGRAPHY
Belinda Reeve (BA (Hons), LLB) works as a Research Assistant on a project analysing the deterrent impact of OHS prosecutions at the Faculty of Law, University of Sydney. She is also a part-time PhD candidate at the Faculty, and her thesis research examines the role of food industry regulation in childhood obesity prevention. She has taught health sociology and workplace safety at undergraduate and postgraduate levels at the Faculty of Health Sciences.

Gusman Siswandi (The Australian National University)

The draft protocol on access and benefit sharing: A victory for developing countries?

ABSTRACT
The Convention on Biological Diversity (CBD) recognises the sovereign rights of States over their natural resources and, accordingly, the authority of national governments to determine access to genetic resources pursuant to their national legislation. The Convention, however, does not provide detailed provisions on this matter. Therefore, to assist parties, governments and other stakeholders in
establishing regulatory framework for access and benefit sharing, the Bonn Guidelines was adopted by
the Conference of Parties to the CBD at its sixth meeting.

Nevertheless, as mirrored in the Plan of Implementation adopted at the World Summit on Sustainable
Development in 2002, a specific international regime is still needed ‘to promote and safeguard the fair
and equitable sharing of benefits arising out of the utilisation of genetic resources’. For this purpose,
the Ad Hoc Open–ended Working Group on Access and Benefit Sharing has conducted a number of
meetings to identify and to elaborate the elements of the International Regime. At the ninth meeting
held in Cali from 22 to 28 March 2010, a draft protocol was tabled by the Co–Chairs and accepted by
Parties as a basis for further negotiations. The Draft Protocol will be further negotiated by the Parties
at the tenth meeting of the Conference of the Parties which will be held in Nagoya, Japan from 18 to
29 October 2010.

The Draft Protocol contains several essential provisions of access and benefit sharing mechanism. These
include, for instance, measures that should be taken to regulate access to genetic resources and to
ensure fair and equitable sharing of benefits arising from their utilisation, the protection of traditional
knowledge, and compliance measures. There have been various reactions to the Draft Protocol. Some
acclaim the Draft Protocol as a major breakthrough in the development of access and benefit sharing
mechanism. Others, however, perceive that there are still a number of unresolved issues and uncertain
outcomes.

The objectives of this paper are threefold. Firstly, it aims to analyse the main elements contained in the
Draft Protocol. Secondly, it discusses the likely impacts of the Draft Protocol to developing countries.
In this regard, the discussion will be particularly focused on Indonesia. Thirdly, it aims to demonstrate,
in the light of the theme of the National Graduate Law Conference 2010, that the ongoing debates over
access and benefit sharing mechanism are exceptionally complex and multidimensional therefore pose
a great challenge for legal academics and practitioners especially in developing countries.

BIoGRAPHy

Born in Bandung, Indonesia, on 22 August 1975, Gusman is currently a lecturer at Padjadjaran
University, Faculty of Law, in Bandung, Indonesia. His area of specialisation is Public International Law,
particularly International Law of the Sea, Intellectual Property Law, and International Human Rights
Law. He obtained his Law Degree (Sarjana Hukum) from Padjadjaran University in 1998 and Master of
Laws (LLM) degree from University College London in 2005.

He has published a number of articles and conducted several research projects, including: ‘Marine
Bioprospecting under International Law and its Implementation in Indonesia’ (2007); ‘The Development
of Port State Control in the Law of the Sea and its Implementation in Indonesia’ (2007); and ‘The
Academic Draft & Bill on the Management of Traditional Knowledge in Indonesia’ (2005–06). He also
acted as a legal consultant for the State Ministry of Environment in the field of traditional knowledge,
genetic resources, and transboundary movement of living modified organisms from 2007 to 2009.

At present, he is pursuing his PhD programme at The Australian National University College of Law. His
thesis topic is ‘Developing a Legal Framework for Marine Scientific Research in Indonesia in accordance
on Biological Diversity’.

Yuri Suzuki (Macquarie University)

Regional framework on ‘fair and equitable benefit sharing’ from bio–prospecting in the South
Pacific

ABSTRACT

South Pacific Island countries have been called as ‘Small Island Developing States (SIDS)’ because of
its vulnerability and currently face economic, social, and environmental issues to achieve the goal of
sustainable development. The region has been recognised as one of the centre of biological diversity in the world and, in terms of marine biodiversity, it shares common ecosystems among countries. In particular, unique biodiversity and relevant traditional ecological knowledge have attracted bio-prospectors, companies and researchers who exploit genetic resources, from developed countries since they found genetic resources contain valuable information for new products such as new medicines.

Under the Convention on Biological Diversity, bio-prospecting has been regulated by the principle of ‘benefit sharing’ or ‘access and benefit sharing’. Under this principle, States have sovereign rights over genetic resources and relevant traditional knowledge whereby they have right to benefit derived from ‘bio-prospecting’.

‘Benefit sharing’ has various implications for sustainable development in the South Pacific through reducing inequity among the North and South through distribution of benefits of bio-prospecting; enhancing capacity for conservation and sustainable use of resources as such; and protecting cultural identity of peoples in the region.

Although effort of ‘benefit sharing’ could enhance the region’s capacity for sustainable development only if it equips appropriate legal framework, the South Pacific region lacks legal and policy framework in this respect. In particular, regional framework which enhances cooperation among countries could play an important role where ecosystem is distributed throughout the region.

BIOGRAPHY

Yuri Suzuki is PhD candidate in Macquarie Law School in Australia and also recipient of iMGRES scholarship (2010–13). Her research topic is regional legal framework on ‘benefit sharing from bio-prospecting’ under the Convention on Biological Diversity with particular focus on South Pacific region for the regions’ sustainable development. Prior to her joining to Macquarie, she was casual teaching assistant in Faculty Law, Meijigakuin University (10/2009–01/2010).

She holds LLB (Meijigakuin, 2006), MA in environmental studies (Sophia, 2008) and LLM in international and comparative law (NUS, 2009). Through her research in masters both in Japan and Singapore as well as internship in JICA (2007) and United Nations University (2008) those currently focus on the issues including sustainable development in developing countries, she is interested in implementation of multilateral environmental agreements (MEAs) in developing countries, in particular, social justice, biodiversity conservation and biotechnology as means to promote environmentally sustainable development. In her masters thesis in Sophia, she assessed current status of protection of traditional knowledge in international law and in New Zealand and its implication to indigenous peoples issue in Japan. The output of the research has been published in 2009 (Sophia University, Journal of Global Environmental Studies, Vol.2).

Dilan Thampapillai (Deakin University)

Is there a valid theoretical basis for the Crown's ownership of copyright?

ABSTRACT

The Crown is a peculiar copyright owner and might even be regarded as something of an accidental monopolist. History has bequeathed to the Crown in Australia a set of copyright privileges which gives it the right to control information that it produces pertaining to the laws and governance of the nation. Given that most copyright owners exploit their ownership in relation to a particular market the position of the Crown in relation to copyright is remarkable because its potential impact upon Australian democracy. Accordingly, there must be a sound theoretical basis, and not just a historical tradition, that supports the Crown's ownership and exploitation of copyright.

This paper examines the traditional theories that support copyright and questions whether they would extend to supporting Crown copyright. These theories; the incentive theory, the tragedy of the commons, natural rights and Locke’s labour theory, fail to fully account for Crown copyright. Traditional copyright theory is prefaced on the basis of an author who exploits his work for profit, whereas the
Crown is a copyright owner in the course of its duties of governance. As such the Crown must find some other theoretical basis, one that does justice both to its position as keeper of the national and interest and also to its responsibility for maintaining Australian democracy. There are important free speech concerns at play in relation to Crown copyright. Cases such as Attorney–General (Cth) v John Fairfax and Ashdown v Telegraph Group Ltd demonstrate the ability of the Crown and other government–related entities to rely on copyright to suppress information from the public domain.

If the suppression of vital information is recognised as undesirable, the theoretical basis for Crown copyright must accommodate the need for freedom of speech alongside the valid reasons for the Crown’s ownership of copyright. Such a theory would be more akin to a free speech theory of copyright wherein copyright could exist to the extent that it supports valid public policy purposes but could not extend beyond a point of democratic legitimacy.

**BIOGRAPHY**

Dilan Thampapillai is a Lecturer with the School of Law. Dilan joined Deakin University in 2010 from Victoria University where he worked from 2008 to 2009. Prior to that Dilan was an Associate Lecturer at the Queensland University of Technology (2006–07). Dilan has previously worked as a Lawyer with the Commonwealth Attorney–General’s Department and the Australian Government Solicitor. Dilan has been admitted to practise in the Supreme Court of the Australian Capital Territory.

Dilan has a BA and an LLB degree from The Australian National University. He has a Master of Laws degree from Cornell University and a Master of Commerce degree from the University of Sydney. Dilan has also been a visiting student at Harvard University and the National University of Singapore.

At Cornell Law School, Dilan specialised in intellectual property law which is his main area of research as an academic. Dilan is currently a PhD candidate with the University of Melbourne where he is researching the applicability of an Open Access framework for Crown Copyright. Dilan also has research interests in international trade law and globalisation. Dilan has written papers on free speech and vilification.

At Deakin University, Dilan will be teaching Commercial Law and Intellectual Property. Dilan has previously taught Contract Law, Intellectual Property Law and Public International Law at Victoria University and QUT. Dilan will coach Deakin University’s team in the Philip C Jessup International Law Moot Competition 2010/2011.

**Phan Nhat Thanh (University of Wollongong)**

*Legal pluralism and human rights: A possible approach to the application of customary law in Vietnam*

**ABSTRACT**

Vietnam is a developing country and has had numerous complex and rapid changes in socio–economic and political fields over the last few decades. However, the Vietnamese legal system, particularly the source of law, does not stay abreast of changes and movement of society even although legal reform has been one of the issues which has attracted considerable attention from Vietnam State. In the contemporary Vietnamese legal system, state law is applied solely to regulate all social relations whereas customary law is disregarded. Many Vietnamese legislators argue that the state should follow the centralist paradigm of law with a monopoly on legal formation. Nevertheless, given the recent importance of improving the Vietnamese legal system, protecting minority groups and fostering human rights, the debate about Vietnam recognising and applying customary law is significant. Many Vietnamese scholars claim that by using custom as a source of law, not only will Vietnam deal with the issue of legal pluralism, especially for social justice and state management of polyethnicity but, more importantly, Vietnam will develop and foster democracy and human rights.

To seek the answer for the question whether customary law should be applied in Vietnam, the intent of this study is to provide a perspective on the possibility for the application of customary law in Vietnam. By means of library and secondary research, relevant evidence was selected, evaluated and organised
into three key areas: Legal pluralism, human rights and customary law. In order to explain the impact of these areas, the study firstly focuses on legal pluralism by exploring how to approach to the concepts of legal pluralism and how to analyse customary law issue on legal pluralism, with an emphasis on two paradigms of law: legal centralism and legal pluralism.

Secondly, the study will examine what the positive or negative impacts of customary law to human rights could be; whether customary law may be the best instrument for protecting and developing human rights for minority groups and Indigenous people, or whether it sometimes leads to violation of human rights because it provides different laws for people with regard to the same issues or disputes. The research discusses whether customary law could have some potential application, what the drawbacks of such a plan might be and how implementation could benefit the country's development.

BIOGRAPHY
Nhat Thanh Phan has worked at the District Party Committee, District 8, Hochiminh City as a legal expert. In 1998, he was appointed as lecturer at Hochiminh City University of Law, teaching at the Faculty of Administrative Law, specialising in the fields of legal doctrines, history of state and law and administrative law.

He holds a Bachelor degree in Law from Hochiminh City University of Law and Master of Laws degree from Transnational Law and Business University (TLBU) in Korea and is currently the second year PhD candidate in the Faculty of Law, University of Wollongong.

In addition to his role as lecturer, he is the Vice–Director of Library and Information Centre, Hochiminh City University of Law.


Fanny Thornton (The Australian National University)

Climate change displacement and international law: Justice through recognition?

ABSTRACT
The nature and scope of the international refugee regime continues to be a matter of debate. The last couple of decades have seen a number of arguments to extend or alter the regime, including the Convention that is its corner stone. Prominent to this debate has been the realisation that environmental factors can lead to displacement. In particular, the human consequences of climate change may include the displacement of significant numbers of people not currently protected under international law.

Whilst the climate debate initially focused on the basic science and the costs and benefits of reducing greenhouse gas emissions, attention has now equally turned to the urgent challenge of adapting to unavoidable changes and helping those most affected, including so–called ‘climate change migrants’. Underpinning this shift has been an increased focus on concepts of fairness and justice, essentially between prosperous nations (and their inhabitants) of the global North and less– and least–developed nations of the global South.

The objective of my research, then, is to examine how international law relates to climate change displacement through justice discourse. Discussion on the topic from an international law perspective has so far focused simply on pointing out the gaps in current international mechanisms and regimes for the protection of such displaced persons, whether they have crossed a national border or not. My research rather seeks to explore greater structural deficiencies in how international law is constructed by examining it through the lens of well–established justice themes, analysing how these may or may not assist in the delivery of principled and just outcomes for climate change migrants. Justice themes considered include justice and recognition, remedial justice, as well as distributive justice.
The purpose of this presentation is to outline just one of the themes I explore in my project — justice and recognition. Relying on the work of social theorists such as Nancy Fraser and Charles Taylor, I will argue that recognition of climate change migrants is a matter of justice. However, I will equally argue that current attempts to recognise and attribute legal status to those potentially displaced by climate change have largely been misplaced by focusing on definitional issues and labelling, built–into which appears to be an assumption that if we can only arrive at an acceptable definition, international policy makers may be prompted to reach collective agreement. Ignored in this discourse is the fact that framing the issue of recognition in such a fashion is taking place in an era of fracturing of the refugee label and the proliferation of generally harmful and discriminatory sub–labels, largely serving the interests of states.

BIOGRAPHY

Fanny is a second–year PhD student in the Faculty of Law at The Australian National University in Canberra. Her doctoral thesis focuses on climate change migration, international law and justice theory, paying particular attention to issues of justice and recognition, remedial justice, as well as distributive justice. Earlier, Fanny completed an MA in European Law at the University of Sussex in the United Kingdom, resulting in a thesis analysing human rights protection available through the European Court of Justice as opposed to the European Court of Human Rights. Fanny's academic pursuits have been complemented by stints at the Refugee Legal Centre in London, the United Kingdom Parliament and charity work in Southern Africa. Fanny is a German national, who now permanently resides in Australia. When not busy on campus, she is most likely to be found building an eco home outside of Canberra.

Masothy Yin

Masothy is a Senior Legal Officer in the Governance and Legal Division at the Department of Immigration and Citizenship. Masothy develops and delivers legal training to departmental staff and provide advice on refugee law issues. He has also provided advice to policy areas in the development and passage of migration legislation.

Prior to working at the department, Masothy was an intern at the International Tribunal for the Law of the Sea in Hamburg, Germany. He worked on a number of projects, such as the examination of the status of conventions and treaties concerning the law of the sea, and conducting research on maritime delimitation disputes in the South China Sea.

Masothy has an interest in pursuing a PhD in the areas of maritime security in Australia, where he can bring together his background in the law of the sea and experience in migration law.