This paper explains and explores how a controversial waste development in the rural town of Molong, Australia was approved under the maligned, and since repealed, Part 3A of the New South Wales ("NSW") Environmental Planning and Assessment Act 1979. It adopts a legal geography approach to demonstrate how the activation of the planning law both dramatically shifted political and legal power from the community to the government and proponent, and altered the scale of environmental concern from the local to the regional. The law, and in particular, the imposed geographic scale, undermined the argumentative position, place creation and imagination of the community group opposing the development. It allowed centralized decision making to disregard the environmental effects of the project that were acknowledged by the NSW Land and Environment Court in the case Hub Action Group v. Minister for Planning. It illustrates the entrenched power imbalance in state-significant development laws. The inquiry uncovers spatial and scalar injustices, which are presented as being a component of the concept of environmental justice, with that concept reinterpreted in light of recent scholarship that rethinks the meaning of space. In this respect the paper extends the boundary of, and the community for, environmental justice.
1. INTRODUCTION

The administrators of the Orange City Council, the municipal government of the city of Orange in rural New South Wales, Australia, had been searching for a new “waste solution” since the mid-1990s.¹ The former mayor of neighbouring Cabonne Shire (“Cabonne”) recalls unsuccessfully trying to find a new landfill site for that municipality since the 1980s.² Both councils had worked out how much landfill space they had remaining, and the figures calculated were sobering. Orange would need more rubbish capacity within two decades and Cabonne even sooner.³ It became obvious for both councils that the most efficient, convenient, and potentially less contentious option was to work together. In 2000, following initial inquiries, they formally decided that they would devise a “regional” solution to their respective problems, the Hub, referred to in this article as the Orange Waste Project.⁴

¹ Orange City Council, "The Hub: Sorting the Facts From the Rubbish", Advertisement, Central Western Daily (Orange) (8 July 2006).
² John Farr, "Mayor replies to waste facility protesters", Letter to the Editor, Molong Express (27 March 2002); Mark Filmer, "Ratepayers 'deceived'", Central Western Daily (Orange) (17 June 2005).
³ Orange City Council, Environmental Impact Statement—Hub Regional Resource Reprocessing Facility: Euchareena Road, via Molong, Summary (Orange: RW Corkery & Co, April 2005) at 2-3 [Orange City Council, EIS].
⁴ Orange City Council & Cabonne Council, Reprocessing Hub Resource Farm: Part of the NetWaste Group (June 2000) [brochure]. See also Ian Gosper, "No community meeting on Hub", Central Western Daily (Orange) (27 July 2006).
Both councils would have been aware that landfill proposals generate opposition; often some of the most intense local opposition to land use proposals. The oft-repeated and dismissive response to such opposition tends to be that no one wants to live near a dump, but that they have “to go somewhere.” One local environmental group, in a quandary over which side to support, acknowledged that landfills are necessary in a society encouraged to consume and that readily disposes of much that it accumulates. With this thinking, armory of argument, and at least complicit support of those established groups most likely to oppose any development, logic suggested that one landfill for the wider region—when the alternative might be two—ought to be easier to have approved.

Planning and environmental assessment laws, specifically the NSW Environmental Planning and Assessment Act 1979 (the “EPAA 1979”), would regulate the design, evaluation, and approval decision for the project. Throughout the assessment of the project, this law would change in a way that would alter the scale of the project and the places created by and in response to the proposed development, consequently generating moments of perceived injustice. The project that the councils developed went through various iterations and changes leading up to its final and unchallenged approval under the widely despised and since repealed Part 3A of the EPAA 1979. In 2005, this part of the act was introduced into New South Wales’ primary planning and environmental assessment law, as part of an ongoing co-operative effort on the part of Australian state-level governments to provide a common, certain, certain


6 "The Editor’s Viewpoint", Editorial, Molong Express (27 April 2005).


8 Neil Jones & Stephen Nugent, "ECCO Orange Clarifies Position", Letter to Editor, Central Western Daily (Orange) (28 August 2006). Tellingly for the conflict explored in this paper, Christopher Rootes notes that "[t]he modern management of waste, even with newer modular technologies, requires a measure of centralisation of waste treatment such that the few will inevitably play host to the unlovely facilities that treat the waste of the many" ("Environmental Movements, Waste and Waste Infrastructure: An Introduction" (2009) 18:6 Environmental Politics 817 at 832).

9 Environmental Planning and Assessment Act 1979 (NSW) [EPAA 1979].

10 Not only were the decisions made under Part 3A extremely difficult to challenge, the process was shown to be corruptible (see the below discussion of the Gwanadlan case, infra note 166). Kristian Ruming records the criticisms of professional planners to the laws ("Cutting Red Tape or Cutting Local Capacity? Responses by Local Government Planners to NSW Planning Changes" (2011) 48 Australian Planner 46 at 49).
and straightforward approach to the development and approval of proposed major projects throughout the country. Decisions about these projects would be removed from local municipal governments and allocated to the Minister for Planning, for assessment by the Department of Planning. Part 3A of the EPAA 1979 was not the first law regulating major projects and state-significant development assessment in New South Wales (nor its last), but it was the first set of laws that sidelined communities—restricting their capacity to seek review of decisions approving projects, and lessening their influence in preventing projects from proceeding. Part 3A consolidated immense decision making power, and often unconstrained discretion, in the minister and the department. Under Part 3A, assessed projects were almost always approved by the minister. Toward the end of its short statutory life, communities became resigned to the fact that a project nominated for assessment could not be stopped. Shortly after the Orange Waste Project had been approved, the Environmental Planning and Assessment Amendment (Part 3A Repeal) Act 2011 (NSW) (the “EPAAA 2011”) was enacted, removing Part 3A from the NSW statute.11

While the Orange Waste Project and the laws that regulated its assessment changed throughout the life of the project, certain aspects of the project remained relatively constant. First, to the group of opponents formed early in the assessment process, the project was always a “tip” (an Australian colloquialism for a rubbish dump), a “dump” or a “landfill”. To supporters and proponents, it was a “solution”, a “farm”, or a “facility”. These words appeared to matter in the battle to win over those unsure about the proposal. Additionally, and significantly, from the very start, the project’s supporters presented it as being “regional.” This characterization stuck even when Cabonne walked away from the project after the Land and Environment Court rejected the project.12 As a result, the Orange City Council was left on its own to argue that it should be permitted to build a landfill in a neighbouring municipality. At this point, the scale and relative space of the regional classification was vital. The council and the Minister for Planning could only use Part 3A of the EPAA 1979 to shepherd through an approval for the landfill if the project was classified as “regional.” Reliance on these provisions would then result in the displacement of the spaces cultivated by opponents to the project.

The Orange Waste Project conflict has the hallmarks of a typical environmental justice controversy.13 It became a battle between a large, provincial, economically diverse, and historically wealthy city, and a small, agricultural country village. The focus of this paper is narrower, however. It contributes to the scholarship on spatial and scalar justice, which I position as being a component of environmental justice, particularly by taking a law and geography approach to

11 Environmental Planning and Assessment Amendment (Part 3A Repeal) Act 2011 (NSW) [EPAAA 2011].


13 Christopher Rootes and Liam Leonard note that opposition to waste facilities was one of the early features of the environmental justice movement in the United States ("Environmental Movements and Campaigns Against Waste Infrastructure in the United States" (2009) 18:6 Environmental Politics 835). Robert Bullard notes that the environmental justice movement rose from the "hostility to facility siting decisions that were seen as unfair, inequitable, and discriminatory toward poor people and people of color" (Dumping in Dixie: Race, Class, and Environmental Quality, 3rd ed (Boulder, CO: Westview Press, 2000) at 29). The larger project within which this paper is positioned explores the environmental justice dimensions of the conflict particularly as the justice concept is conceived by David Schlosberg (Defining Environmental Justice: Theories, Movements, and Nature (Oxford: Oxford University Press, 2007)).
the analysis of the project. It provides an avenue to see a dispute between two communities as producing an environmental injustice—not because one community is grossly disadvantaged or historically discriminated against, but because one community is relatively disempowered—by law, geography and scale—and displaced, its place ignored. It demonstrates how within this controversy, like many others, law and place are connected and self-referential. Whereas Neil Smith has argued that capital defines and produces spaces, in this article I will show that geography was categorized and produced by the law. The development of the township of Molong, located in Cabonne, approximately 35 kilometres northwest of Orange, and the city of Orange, respectively, have been marked through legal instruments, creating the difference, separation, and boundaries that fomented the discord between the opposing parties. The law also specifies scales—the “state,” “regional,” and “local”—and then devises regimes for the assessment of projects of each category. The application of these regimes in the instant case forced the law to confront certain geographic facets of the case, including the agricultural quality of the land, the sense of place, a community charged by dissent, the threat to amenity, and the importance of the rural landscape.

This article tells the story of a local environmental and planning conflict, seen through legal documents, environmental assessment reports and submissions, and local news media. Much of the information was collected through a series of research visits to Sydney, Orange, and Molong (three cities in New South Wales, Australia) and via twenty interviews with NSW government, local government, community, and business stakeholders. Many documents continue to be available online or searchable in research databases. However, this article relied on interviewees providing their submissions and court documents, the *Molong Express* newspaper offering copies of its news reports, and members of the Hub Action Group providing me with access to their extensive catalogues of news clippings and brochures. The documents provide a variety of insights. Court documents frame the legal issues, government policies and assessment reports expose the assessment scale and project priorities, environmental assessment documents detail the project and its impact, submissions outline the support and opposition to the project, and news reports capture emotional moments in the dispute that show changes in the attitude of the community and the proponents. The news reports and submissions are used to document the stories, priorities, and concerns of the stakeholders I interviewed. Building on the work of David Delaney, this article depends greatly on the words and views of those participants in the controversy, captured in letters, submissions and news reports. It seeks to offer a geographically- and legally-based reason explaining why the project was approved. It argues that this approval is due to the way in which the law was used to categorize the scale of the development. This categorization shifted power away from the project opponents and toward its proponents. The decision makers then prioritised benefits and the

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15 David Delaney, *The Spatial, the Legal and the Pragmatics of World-Making: Nomospheric Investigations* (New York: Routledge, 2010). Equally, the work contributes to the scholarship of the geography of waste politics and governance, which is contextualized by Davies, *supra* note 5 at 375-378. She explores the "spaces of engagement" for Irish waste incineration conflicts (*ibid* at 379).
‘public interest’ at the regional scale, perceiving them as outweighing the adverse impacts that would be experienced by the people of Molong. While this prioritization does occur in other projects, the peculiar aspect of this project assessment lies in the questionably ‘regional’ nature of the project. That argument was never ventilated. Instead, it was merely decreed by the NSW Minister for Planning—who played a pivotal legal role throughout the approval process—and remained unchallenged.

In making this argument, I first briefly describe the features of the project—its promise and feared impacts—and explain how opposition to the project emerged, and subsequently formed a crescendo as the legal landscape changed. I introduce more fully the locality of the dispute and its geographic, physical, economic, and social aspects. This is necessarily contextual—I attempt to offer historical, cultural, social, political, and environmental insights into the place of conflict. I then turn to explore the legal dimensions of the conflict. I pick up the conflict following the Land and Environment Court’s rejection of the project in 2008. I analyse Chief Justice Preston’s decision and show how the change to the legal regime that previously applied to the project altered the legal and spatial aspects of the dispute. These are referred to by Delaney as the “nomic” settings, where context, including place and space and the law—especially observed through governance forms and the exercise of power—combine, conflict, and are prone to sudden shifts. It refocussed decision making on a particular geographic scale—the regional scale. Place-based concerns did not halt a project of decreed significance. Finally, I critique the executive decision to declare the project of regional importance, suggesting that the most powerful legal actors are capable of redefining the space and scale of a conflict to ensure a specific resolution. I argue that this was an environmental, spatial, and scalar injustice.

While the telling and recording of a story offers an illustration of law as experienced and policy as implemented, the purpose of this article is more substantial. It aims to offer a critical reflection on the development assessment laws of major projects, through an analysis of the EPAA 1979. While the EPAA 1979 has caused controversy throughout the state, little scholarship has yet sought to explain why this is so. The perceived unfairness has not been situated within a body of literature. The article seeks to show that the legal controversy created by these laws is a community expression of environmental injustice. The article attempts to do this by drawing on the literature on spatial and scalar justice. It attempts to create a link between this literature and the largely separate literature on environmental justice, a task that remains novel. In doing so, I hope to broaden scholarly understandings of environmental justice and expand the sphere of disadvantage upon which a community can be seen as enduring an environmental injustice—not simply a disadvantage based on race, ethnicity, class, or poverty, but also a disadvantage based on scale or space.

2. ENVIRONMENTAL JUSTICE, SPATIAL JUSTICE, AND SCALAR JUSTICE

Environmental justice has always been about space. From the time the movement coalesced in the United States in the 1980s, scholars and activists linked disadvantage, environmental harm, and geography. Environmental justice concerned harm across and in places, space, and location. Reporting by the United Church of Christ Commission for Racial Justice, an often cited advent in the anthology of environmental justice, mapped, located, and placed
toxic waste harms, showing correlations between these harms and race. Correlations between harms and disadvantage more generally have since been demonstrated. Environmental harms were not simply present, and disproportionately so, in the neighbourhoods of black, Latino and non-white Americans but also in the neighbourhoods of working class communities. The evidence showed that environmental harms were disproportionately proximate to the homes of those socially, politically, and economically disadvantaged communities. The disadvantage was relative to, and also contributed to by, others with political, social, and economic power. Moreover, Robert D Bullard argues that environmental justice can be conceived as a response to regional political circumstances. In the American context, environmental justice was and remains particularly evident in the South, an expansive space with contemporary and historical disparities between races and classes.

As Gordon Walker notes, however, the earliest conceptions of environmental justice were exclusively spatial, with “space … conceived in flat, Cartesian terms—straight line proximity, or coincidence of site grid references within census boundaries.” Before the late 1990s, environmental justice was measured in “distributional and statistical” terms. It was not until environmental justice was understood as being political that the earlier spatial-harm connections were reconsidered and recast.

18 Bullard, supra note 13 at 14.
21 Gordon Walker, "Beyond Distribution and Proximity: Exploring the Multiple Spatialities of Environmental Justice” in Ryan Holifield, Michael Porter & Gordon Walker, eds, Spaces of Environmental Justice (Chichester, UK: Wiley-Blackwell, 2010) at 24. See also Mariana Valverde, "Jurisdiction and Scale: Legal 'Technicities' as Resources for Theory” (2009) 18:2 Social & Legal Studies 139 (noting that the earlier attempts to link law and scale were linked through mapping exercises or by matching scales with jurisdictions). Her own work challenges fixed views of space and scale.
22 Walker, supra note 21 at 28.
23 Ibid. See also David Harvey, Social Justice and the City (Athens, GA: University of Georgia Press, revised ed, 2009) who adopts the work of philosopher Henri Lefebvre on constructed spaces. Harvey defines "territorial social justice" having regard principally to matters of distribution (ibid at 116).
David Schlosberg’s scholarship has been especially important in this change. He saw environmental justice as a struggle, the meaning and extent of the concept defined by participants in those struggles, with the concept being capable of plural definitions. So, understandings of environmental justice changed. Claims in fairness became more complex and contextualized, combining elements of distribution, participation, and recognition, with communities being more clearly appreciated for their common features but also their differences. What stood for space or proximity in these contexts also evolved. Scholars saw that there was more than one space of concern within the environmental justice framework. Racial spaces, poverty spaces, or other spaces of disadvantage might not necessarily overlap, and the conflict within those spaces might not exclusively concern the distribution of environmental harms. Rather, inequality might arise from, or be exacerbated by, other social or political factors. It might arise from the absence of spaces. This is seen in the work of Michelle Wilde-Anderson, who demonstrates the disadvantages suffered by communities who live in areas of California that are unincorporated, and therefore beyond the boundary of the law. Without actually using these terms, Walker illustrates what “spaces of recognition” and “spaces of democracy” might look like. These spaces, like other spaces or “territories,” are no longer seen as being solely physical, fixed, or mappable, but also as “highly contested, intrinsically politicized,” historical, social, cultural, virtual, or as expressions of power—they are truly geographic. The concept of environmental justice necessarily changed. It no longer deals exclusively with the distribution of environmental harms in impoverished neighbourhoods. Instead, environmental justice can be analysed within and between “communities” (however defined) where one community is more vulnerable to environmental deterioration than the other. The emergence of a climate

26 Schlosberg, supra note 13.
27 Walker, supra note 21.
30 Walker, supra note 21.
31 David Delaney discusses "social territory"—where social boundaries have greater meaning than the legal one (Territory: A Short Introduction (Malden, MA: Blackwell, 2005)). Richard Ford similarly challenges the legal basis of "jurisdiction," which Ford argues entrenches a political racial segregation ("The Boundaries of Race: Political Geography in Legal Analysis" (1994) 107:8 Harv L Rev 1841).
justice movement also saw justice concerns recontextualized. Spaces of vulnerability and privilege were recognized as especially evident across scales.34

In the same critical trend, Delaney has introduced to the academic lexicon the concept of the “nomosphere”: the culturally, socio-spatially, and legally constructed spaces where everyday life happens and changes.35 This work is situated at the forefront of a new approach to legal geography, as post-disciplinary scholarship, where space becomes so important that it transcends the inquiry, or rather, it becomes the inquiry itself.36 Like much geographic work, this approach does not force rigid concepts of geography, rather it invites scholars to explore relationships between power, location, and being. Though a justice analysis is not explicit in his work, Delaney’s starting point,37 like in his previous scholarship,38 is the experience of injustice. In a nod to legal ethnographers,39 Delaney prioritises the lived experience and consciousness of law and space, something he claims is too frequently neglected in scholarship.40 His work encourages scholars to analyse how and why spaces are constructed, imagined, and experienced,41 how they might be oppositional, and to identify the influence of power in place-making. With this knowledge what is ‘just’ within space depends on history, experience and power. Similarly, Irus Braverman, Nicholas Blomley, David Delaney, and Alexandre Kedar have encouraged consideration of the temporal and relational aspects of space and justice.42

Andreas Philippopoulos-Mihalopoulos is also seen as contributing critical scholarship in this area.43 His work, like Delaney’s, repositions “space” from being the context or background to the “active factor” for inquiry.44 Space, he argues, is repeated and manifold.45 It can be legally fixed or socio-culturally nomadic.46 It can be the province of humans and of non-humans: both

34 Isabelle Anguelovski & Debra Roberts make this point in a localized study in Durban, where adaptation measures are protecting wealthy properties while the most vulnerable communities to the likely effects of climate change are the poorest communities in that city (“Spatial Justice and Climate Change: Multiscale Impacts and Local Development in Durban, South Africa” in JoAnn Carmin & Julian Agyeman, eds, Environmental Inequalities Beyond Borders: Local Perspectives on Global Injustices (Cambridge, MA: MIT Press, 2011) 19). Within their contextual setting, the authors argue that it is local political power that had resulted in unequal distribution of infrastructure and services.

35 Delaney, supra note 15 at 25, 45.


37 Delaney begins his book by telling the story of raids on the homes of undocumented migrants in the United States (supra note 15 at 1).


39 Braverman et al, supra note 36 at 16.

40 Delaney, supra note 15 at 36.

41 Ibid at 23.

42 Braverman et al, supra note 36 at 19, 24.

43 Ibid at 17.


45 Ibid at 207 ff (where Philippopoulos-Mihalopoulos refers to “manifold space keeps on spreading by folding itself like a boundless origami”).

46 Ibid at 210 ff (on the “nomad” and on “smooth” as opposed to “striated” space).
can have and create space. Spatial justice arises when the legally “striated” spaces correspond with the smoother, socially constructed spaces.

As much as environmental justice is about space, it is also about scale. This is because environmental justice is relational. This is evident even from the early environmental justice scholarship identified above. In showing correlations between harms and spaces, researchers were also demonstrating, implicitly if not explicitly, that environmental injustice might be observed at one scalar resolution but not another. Environmental injustice can also be seen as a “spatial disconnect” between consumption and environmental burdens. On this theme, Karen Bickerstaff and Julian Agyeman argue that environmental justice is “a multiscale set of relationships of contradictions and dependencies.” Just as spaces and territory, in meaning and belonging, have become politicized, so have scales, with scales of justice invoked strategically in order to build allies and coalitions, or to legitimate inclusion or exclusion in decision making processes.

In her empirical research conducted in Louisiana, Hilda Kurtz distilled environmental inequity arising from “spatial ambiguity” where governance decisions are made “with no indisputable rationale for favouring one scale of resolution and analysis over another.” She noted that this ambiguity will typically follow a contest of scale frames. While decision makers may recognize that harm or injustices might occur at one scale, a political resolution often will be required at a different scale. Kurtz’s work emphasizes that the notion of scalar justice is drawn from the experience of communities. It is defined by opposition and, typically, a localized scale assessment of the extent of environmental harm.

Julie Sze and her co-authors recorded another instance in scalar injustice, this time in the Central Valley region of California. They argued that “scalar ambiguity” is linked with “political power.” They traced the conflict over scale to the time that the particular area was defined. An initial political decision to define the space privileged some parts of the community or

See e.g. Been, supra note 17.


Kurtz, supra note 28.

Bickerstaff & Agyeman, supra note 49 at 196.

Kurtz, supra note 28 at 895. Hilson argues that scale frames (for instance the ‘international’) can be deployed strategically in legal disputes (supra note 14 at 102-103).

Kurtz, supra note 28 at 888.

Ibid at 891.

Kurtz, supra note 28.


Ibid at 809.
some matters or interests over others, while endorsing particular versions of environmental history and social struggles over place. Sze et al assert that this process “very consciously builds-in scale conflict, ignores different visions of justice, and depends on views of nature that, as befitting its larger ideological underpinnings, are in the service of the state and capital.”

This scholarship is also linked with Delaney’s work on nomospheres, as it depends on analyzing conflict occurring within a network of “everyday places.” Moreover, to interpret the political-spatial privileging observed in this recent research, scholars refer to historical and cultural perspectives—to see how a place has been perceived, exploited, controlled, and viewed over a temporal range.

3. THE ORANGE WASTE PROJECT AND ITS OBJECTIONS

The Orange Waste Project has its origins in 1996, when the Orange City Council and Cabonne Council first met to discuss a joint waste project. A feasibility study into a “regional landfill” was initiated, culminating in a 1997 report by Corkery & Co., the consulting firm that would later prepare the first environmental assessment for the project. This report, along with a series of reports to follow, focused on site constraints, site possibilities, and criteria for a landfill, as well as an accompanying waste recycling and composting facility. The reports provided very few details describing what the project was or its location. Consultative documents indicate that the priority of the councils was to name and brand the project—setting the parameters for its future assessment—rather than define it. There was a clear intention on the part of the councils to use the project to improve local waste recovery and recycling rates and boost the sustainability credentials of the area. The councils wanted to develop a strategic waste program that would divert waste from landfills, meaning that any new landfill would have a much longer life. No evidence indicates that private or business interests motivated the development.

The historical record indicates that the councils and its consultants were particularly attuned to the need to site the landfill in an appropriate location, having regard to a long list of social, economic and environmental factors. They involved the community in setting and explaining the site selection criteria. Ultimately, the site was chosen following a call for expressions of interest. The expressions of interest process garnered offers for just two sites from landowners. One was a site eighty-five kilometres from Orange, in the far south-west corner

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58 Ibid at 837.
59 Ibid at 811.
60 Orange City Council, supra note 1.
61 Orange City Council, EIS, supra note 3 at 2-3.
62 The report, Regional Landfill Investigations/Feasibility Study, was prepared by Corkery & Co. See Christine McIntosh, "Questions for Councillor Farr", Letter to the Editor, Central Western Daily (Orange) (22 June 2006) (discussing the report Regional Landfill Investigations/Feasibility Study).
63 Orange City Council & Cabonne Council, supra note 4.
64 Orange City Council, EIS, supra note 3 at 2-3–2-6.
of Cabonne that was quickly rejected on the basis of its distance from the key waste sources.66 The other site offered was a property on Euchareena Road in Molong, approximately forty kilometres from Orange. Following an unsophisticated comparative alternatives evaluation, this site was subsequently chosen due to its proximity to the city of Orange.67

Sometime after June 2001, a decision was made to locate the waste facility on Euchareena Road, five kilometres northeast of the Molong town centre. The purchase of the land occurred in December 2001,68 and transfer of ownership occurred on January 31, 2002.69 The community of Molong claimed that it did not know of the purchase until advised by the media in February,70 and that it perceived that the purchase and decision about the location of the tip had been part of a plan hatched in secrecy.71 This infuriated a number of Molong landowners, especially those living near the selected site. The fury spawned what later became known as the Hub Action Group (the project was locally referred to as “the [Waste] Hub”), an incorporated association whose vocal objection continued until the project received its final approval. This alleged secrecy also infused the project with distrust and suspicion concerning the exercise of discretion from the beginning of the approval process. This project, designed to enhance the environmental management status of Orange and Cabonne, would have its environmental qualifications persistently questioned due to the process of site selection.

In fact, objections to the site selection process were raised throughout the assessment of the site, and were reiterated in the final submissions made by project opponents to the Department of Planning in November 2009.72 The Hub Action Group stated their belief that “this proposal inevitably continues to be tainted by the original ‘consultation’ and site acquisition process.”73

The focus on process and siting of the facility was especially understandable in the early instance because the lack of detail about the project meant there was very little else upon which the community could form a judgment about the project. As is not atypical for large projects subject to environmental assessments, the project was defined and refined throughout the assessment process.74 When the first environmental impact statement was released in April 2005, the project was comprised of a collection and drop-off point for a variety of wastes, a

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66 Orange City Council, EIS Supplement—Hub Regional Resource Reprocessing Facility (Orange: RW Corkery & Co, September 2007) at sections 3, 6 [Orange City Council, EIS Supplement].

67 Orange City Council, EIS, supra note 3 at 2-26–2-28. For a defence of the process adopted, see Orange City Council, Hub Regional Resource Reprocessing Facility: Response to Key Issues Raised in Submissions (RW Corkery & Co, January 2006) at 85.


69 Orange City Council, EIS, supra note 3 at 2-29.

70 Letter from Bill Dunlop to the General Manager of Orange City Council (3 May 2002); "Molong property selected as waste system ‘Hub’", Molong Express (27 February 2002).

71 Rod Maxey, "HUB public hearing", Letter to the Editor, Molong Express (17 December 2009).

72 Ian Gosper, "Submission to Planning Assessment Commission" (12 November 2009) [Gosper, “Submission”]; Botetzagias & Karamichas, supra note 5 at 941 (reflecting on research that concludes that opposition to waste facilities is more likely to arise when the siting process is seen as being unfair and inequitable).


74 Hub Action Group, supra note 12 at paras 16-17.
resource recovery facility where compost would be created and sold and recyclables sorted and recycled, and a conventional landfill and associated infrastructure with supporting land use changes. All of this infrastructure and activity would occur at the Euchareena Road site in Molong. The project was refined in a supplementary environmental impact statement in response to directions of the Land and Environment Court when the project approval was appealed. Nevertheless, at that time it remained much the same project.

It was only through the Part 3A process, explained below, that the project changed substantially. The changes were in part offered by the Orange City Council in its third environmental impact assessment, and in part required of Orange by the NSW Minister for Planning as conditions of approval. The principal change was the relocation of the collection of waste, recyclables, and compostables to Orange’s current waste facility at Ophir Road in Orange, with the sorted waste arriving at Molong in fewer truck movements, and with the landfill waste baled and wrapped in plastic. The ultimate role of the Molong site would be a conventional dump.

The project did not immediately inspire broad opposition. The initial outrage of the surprise purchase of the block subsided during the first environmental assessment. The local paper reported a general disinterest from the community around the time the first environmental assessment was released. There appeared to be apathy in the media in the early stages, with muted support and minimal critique. A reason for this may have been that the landfill was a sufficient distance from most Orange residents so as not to inspire objection. Still, 139 submissions objecting to the project were made with respect to the first environmental assessment. Of course, opposition typically builds once a project has been defined and assessed, and the potential harm it could create has been understood. In this project, atypical of most, opposition consolidated as the project was cycled through environmental assessments, and as the Hub Action Group had a stunning success at the Land and Environment Court. Only

75 Orange City Council, EIS, supra note 3.
76 Orange City Council, EIS Supplement, supra note 66 at section 5.
78 Alan Dick, "Molong ‘outrage’ at waste plan", The Land (Sydney) (15 September 2005).
80 Gallagher, Ferreira & Convery, supra note 5 (exploring a distance effect to objection, where distance is a proxy for perceptions of environmental risk in locations where people have not experienced living near to a waste facility); "Examine EIS with equal vigour", Editorial, Central Western Daily (Orange) (4 May 2005); "Winning the battle for The Hub", Editorial, Central Western Daily (Orange) (2 August 2005).
81 New South Wales, Department of Planning, Assessment Report: Proposed Landfill & Regional Resource Reprocessing Facility, Molong (NSW Department of Planning, December 2006) [New South Wales, Department of Planning, Assessment Report]. See also "Strong local support for Hub protest group", Molong and District Advocate (20 July 2005).
toward the end of the process, especially as Orange City Council received support from former high-profile project doubters, did the previously enthused community and media appear to tire of the project and the objections to it.

The central objections that had been ventilated in 2005 persisted. The project was opposed because it was located on the wrong site. It lacked the necessary environmental strategies and planning support, with the Cabonne Local Environment Plan 1991 (the “CLEP 1991”) protecting the prime agricultural land of the site from adverse impacts. The project posed a risk to the local apiary industry, particularly to the neighbouring landowner’s use of his land for beekeeping, and the local community would suffer amenity impacts, notably from trucks driving to and from the site through Molong’s town centre.

The objections to the project became unrelenting, well organized and sophisticated. The opposition, led by the Hub Action Group, swayed the community. The group became idolised by the media for its court success. Its chief organiser won local acclaim for her efforts. It also contributed to the re-ordering of the local council, persuading the council to change its position on the project, and ultimately, to walk away from it. The group built social and political power, but that power and influence was always localised within Molong, lacking the networked or multi-scaled resistance uncovered by Anna R Davies in her research into waste conflicts in Galway, Ireland. This resistance was never so great so as to disturb the distribution and exercise of power in Orange or at the state level. It could not halt the regional rescaling of the project that led to the project’s approval.

4. A COMMENT ON METHOD—A FORM OF NOMOSPHERIC INVESTIGATION

Delaney’s “nomospheres” contribution is particularly valuable for socio-legal scholars, who have built upon and contextualised this concept. Undertaking “nomospheric investigations” into events that encounter the law, as I do here, can offer more detailed and critical perspectives about the law and the world in which we live. Central to these investigations is a focus

84 See e.g. Total Environment Centre, News Release, "Cabonne Council Dumps on Orange" (25 November 2009) online: Total Environment Centre <http://www.tec.org.au>; Lisa Cox, "Green group recycles its idea on Hub", Central Western Daily (Orange) (27 November 2009); Bevan Shields, "Consultant is no longer Mr Wright", Central Western Daily (Orange) (18 June 2008); "Hub site 'superior option'", Central Western Daily (Orange) (18 June 2008).
85 "Cop the tip and back proposal", Editorial, Central Western Daily (Orange) (2 March 2009).
86 Christine McIntosh, "Dumping the facts on Farr", Letter to the Editor, Central Western Daily (Orange) (10 September 2005).
87 Cabonne Local Environment Plan 1991 (NSW) (repealed), cl 2(a) [CLEP 1991].
88 "Have a go - no matter how daunting the battle may be", Molong Express (28 January 2010).
on “situations,” not on “cases;” on experiences, viewpoints and the dynamics of power, not so much on the legal outcome. This explains the heavy focus on grey literature and published opinions in this paper. Delaney makes the point that the lived experience of the law is frequently neglected.\footnote{Delaney, supra note 15 at 36.} For this reason, this article offers a depth of explanation of the background to the dispute. The typical legal analysis focuses on the text of a case. For this work, however, \textit{Hub Action Group}\footnote{\textit{Hub Action Group}, supra note 12.} will represent a landmark in a much longer history; a moment when the nomosphere was disturbed\footnote{See Delaney, supra note 15 at 42 for a discussion on “nomospheric disturbances” [emphasis in original].} as “the participants turned to formal state institutions, ... [when] someone tried to vindicate his or her rights.”\footnote{\textit{Ibid} at 164.}

Delaney’s idea encourages the investigator to listen for the “nomospheric consciousness.” He puts it this way:

\begin{quote}
[A]s situations unfold they are assessed by participants. One dimension of assessment or judgment is the degree to which what is happening is seen as comporting with notions of fairness or justice. Actors assess not only what \textit{does}, \textit{can} or is \textit{likely} to happen, but what \textit{should} happen or \textit{shouldn’t} happen, \textit{should} or \textit{shouldn’t} be happening.\footnote{\textit{Ibid} at 47 [emphasis in original].}
\end{quote}

The investigator is prompted to ask: how did things come to be how they are now? “Whose interests are served … whose are subordinated?”\footnote{Ibid.} How was objection developed and how was it received? How did the facts change? How did positions change? In this paper there are competing nomic settings: the “regional” settings (encompassing the environs of the provincial city of Orange) and the more “local” ones (centred around the town of Molong) within the nomoscape of the Orange Waste Project.\footnote{In his fourth chapter, Delaney refers to a “nomoscape” as the spatialization of expressed ideologies, like meanings of home, public space and tenure (supra note 15). While the Orange Waste Project is not a common spatial term like these examples, it is a term of art that has particular meaning to different people. It is also unquestionably a spatial term—in terms of location, project composition, and (significantly for this paper) geographic reach.}

5. MOLONG AND ORANGE

When Australia’s first federal Parliament was searching for a capital city, gentry from Orange, in a lobbying effort directed at the politicians of the day, claimed about Orange that “the healthiness of the district is proverbial, and medical gentlemen highly recommend it as a health resort. The locally-born persons are famous for longevity. Orange is frequently quoted as one of the healthiest places in Australia all the year round.”\footnote{Orange Federal Capital League, \textit{Canobolas: The Ideal Site for the Federal Capital of Australia} (Orange: The League, 1902).} Orange was overlooked for the capital twice.\footnote{The \textit{Seat of Government Act 1908} (Cth) named Canberra as Australia’s capital city. Section 2 of that act repealed the \textit{Seat of Government Act 1904} (Cth), which had proclaimed Dalgety, New South Wales, as} However, the townsfolk of Orange had high opinions of their home, an attitude that
seems not to have been held by their neighbours in Molong concerning that town. Just a decade after the exclamations of the Orange Federal Capital League, JCL Fitzpatrick wrote of “Molong—little Molong—dumped down in a fertile spot two hundred miles and more from the site of Australia’s first settlement.”

Molong has never shared the prominence and platitudes received by Orange. As such, it has always been a separate place, with its own identity and legal structures. The discovery of copper in Molong in the mid-1840s proved to be less profitable and iconic than the discovery of gold in Orange just a few years later. The fact that the Packham pear was first propagated in Molong and the town's first vineyard dates to the 1910s is overlooked when Orange is presented as the district's wine and food hub. Europeans first arrived in the Wiradjuri country, which spanned both towns and beyond, in the early 1800s, with records of cattle being run in Molong in 1819, residents arriving in 1830s and the displacement of the local Aborigines shortly after. Both towns were officially recognized as separate villages in the 1840s and were each administered by their own local councils by the end of the 1870s. The local railway arrived in Orange in 1877, and subsequently in Molong in 1885, to transport produce—particularly orchard fruit and flour—to faraway Sydney. By the late 1800s,

Australia’s future capital.


102 Bowie & Goldney, *ibid*.


104 For instance, the Orange FOOD Week (Food of Orange District) prioritises, and is centred around, the city of Orange. The local wine-making association is the Orange Region Vignerons Association and wines are classified as being from the Orange Wine Region.

105 Bowie & Goldney, *supra* note 101.

106 RD Drummond, *Walkabout Through History: A Pedestrian Guide to Molong’s Past* (1985) [held for reference and loan in the Orange and Molong Libraries, New South Wales, Australia] (the first residents established a home on the Euchareena Road, the road upon which the Molong landfill will be located).

107 Donald, *supra* note 101; Bowie & Goldney, *supra* note 101 at 43 (in the decades following the arrival of Europeans there was a ‘disastrous decline’ in the Aboriginal population).

108 Orange first in 1846, then Molong in 1848 (Bowie & Goldney, *supra* note 101).

109 The municipality of Orange was established in 1860 (Orange City Council, “A Brief History of Orange”, online: Orange City Council <http://www.orange.nsw.gov.au>). See also RC Sheridan, *Early Orange: a short history from the Blackman’s Swamp days and covering the proclamation of the area as a village and later as a municipality, and recording many interesting facts and happenings prior to 1900* (Orange: Orange and District Historical Society, 1971). The municipality of Molong was created in 1878 (“History of Molong”, online: Molong.com <http://www.molong.com/history.shtml>). See also DA Rutherford, *One Hundred Years of Local Government in Molong 1879-1979* (Molong, Australia: The Molong Historical Society, 1979).

110 Bowie & Goldney, *supra* note 101.

both towns were prosperous and the population of Molong, supported by the ready access to cheap agricultural land, was quickly increasing.\textsuperscript{112}

While in many respects Molong has existed in the shadows of the neighbouring city of Orange, the differences between the two places have only become pronounced since the end of the Second World War.\textsuperscript{113} The 1940s and 1950s—after the war and with the growing popularity of the automobile—marked the onset of the stagnation and decline of Molong relative to the growth of Orange,\textsuperscript{114} with Orange becoming a city in 1946,\textsuperscript{115} and Molong staying much as it always had been. IJS Bowie and David Goldney note that the “changing economic, transport and social patterns” dating from this time “created a hierarchy of towns” throughout the district with places like Orange rising to become towns and cities and, places like Molong remaining villages.\textsuperscript{116}

As mentioned above, the opposition to the project could be most clearly characterized as being between a small rural town and a larger municipal city. It was the people of Molong who offered the media the storyline of a David versus Goliath battle: the small and outnumbered taking on the large and powerful.\textsuperscript{117} They were the ones who defined themselves as being other than from Orange, from being localised in a place distinct from the major regional city. As indicated below, demographic data does show some significant differences between the two communities, suggesting some truth to the perception that the combatants were not on equal footing. The residents of the city of Orange outnumber the residents of the township of Molong by a ratio of sixteen to one.\textsuperscript{118} Though the two municipalities are separated by just over thirty kilometres, Molong residents are employed in lower-paying—typically agricultural—jobs relative to the jobs held by Orange residents. While there is little difference between the two locales in the Australian Bureau of Statistics’ Socio-economic Index for Areas, the scores indicate that Molong is slightly more disadvantaged than Orange.\textsuperscript{119} For the purpose of the Orange Waste Project, however, the principal difference that supports a justice analysis is not a

\begin{thebibliography}{99}
\bibitem{footnote112} Yvonne McBurney, \textit{Road to Molong} (Strathfield, NSW, Australia: Y McBurney, 1992).
\bibitem{footnote113} Scott M Carpenter, \textit{Cabonne Shire Heritage Study: Part 1 Report} (1997) [held for reference in the Orange Library, New South Wales, Australia].
\bibitem{footnote114} \textit{Ibid}.
\bibitem{footnote116} Bowie & Goldney, supra note 101 at 55. See also Brown, supra note 103 at 5, 16 ("we saw the business heart shrink when good roads and motor vehicles made travel to larger centres an everyday event, but Molong always survived"; "in the first half of the century, Molong’s business district was much larger and busier than it is today [in 1984]").
\bibitem{footnote117} Ellen Vaz, "Why Hub is just rubbish to some", \textit{Central Western Daily} (5 September 2007) [Vaz, "Why Hub is just rubbish to some"]. A billboard-sized painting near the waste site used the David and Goliath battle as an allegory for the waste conflict.
\bibitem{footnote118} In the 2006-2007 statistical years, the population of Molong was 2,135 and Orange 35,339 (Australian Bureau of Statistics, \textit{Basic Community Profile - Molong (State Suburb)}, (Cat No 2001.0 - 2006 Community Profile Series) (2007); Australian Bureau of Statistics, \textit{Basic Community Profile - Orange (Urban Centre/ Locality)}, (Cat No 2001.0 - 2006 Community Profile Series) (2007)).
\bibitem{footnote119} Australian Bureau of Statistics, \textit{Socio-economic Indexes for Areas (SEIFA), Data Only}, 2006 (2008), online: Australian Bureau of Statistics <http://www.abs.gov.au>. See Table 2 in the dataset for Statistical Local Areas (Orange 966) and State Suburbs Codes (Molong 950). Within the same dataset, Molong (950) is relatively more disadvantaged/less advantaged than most of Orange’s suburbs. For instance, Orange
disadvantage based on wealth or race. Rather it is one of scale. Orange was able to characterise itself as a regional centre, whereas Molong was disadvantaged by the law because of its local perspective, interest, and status.

6. THE COURT CASE AS A NOMIC DISTURBANCE

In the Land and Environment Court, Preston CJ’s decision to reject the merits of the project reshaped the dispute and recalibrated the distribution of power within the conflict. To arrive at this decision, the Hub Action Group had exercised its right under section 98 of the EPAA 1979 to seek a merits review of the Minister for Planning’s decision to approve the project.

The Minister for Planning, based on the first environmental impact assessment carried out for the project and having considered more than one hundred objections to the project, approved the proposal on January 15, 2007. His decision was seen as a foregone conclusion, with a combined Orange and Cabonne project perceived as wielding much greater influence and power than the objectors ever could. The minister approved the project in accordance with the recommendation of the Department of Planning which acknowledged “community concerns about the proposal.” However, the department concluded that these concerns were overwhelmed by the demand for additional landfill space and a desire to facilitate the development of a “long-term waste management strategy” for the two local councils, while the local community would benefit from new services and infrastructure, like road upgrades. Further, the department recommended that trade-offs be made. Specifically, it stated that the project should proceed despite “the loss of at least 21 hectares of prime cropping land; [an] increase [to] the risks of disease at the adjoining apiaries; and [a potential] increase [to] the costs of mineral exploration or extraction on the site.”

Preston CJ of the Land and Environment Court comprehensively rejected this decision and the foundations for it. In particular, the court’s interpretation of the relevant planning policy directly conflicted with the very liberal interpretation used by the department and minister to justify the conclusion that the landfill could be built on prime agricultural land.

The decision was one of the first to apply the principle of intergenerational equity in Australia. Of particular importance, Preston CJ was dissatisfied with the proposal to develop the site in stages, with the second stage—the development of a waste recovery facility—only planned to begin a number of years into the life of the landfill. The delayed implementation of part of the project, together with the lack of enforceable waste minimization strategies upon which the project appeared to depend, led Preston CJ to find that the project failed to meet

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120 Hub Action Group, supra note 12.
121 "Appeal lodged against planned Molong landfill hub", ABC News (15 February 2007). The appeal was lodged on February 14, 2007.
122 New South Wales, Minister for Planning, Development Consent, (Application No DA 95-4-2005) by Orange City Council (2007).
123 "Hub approval a foregone conclusion", Editorial, Central Western Daily (Orange) (17 January 2007).
124 New South Wales, Department of Planning, Assessment Report, supra note 81 at 3.
the requirements of ecological sustainable development.\textsuperscript{125} He considered that there was a gap between the good words and intentions of sustainability and the proposed actions, stating, “[i]n order to achieve sustainability, however, hortatory statements of principle and aspirational goals are insufficient; the grand strategy must be translated into action.”\textsuperscript{126} While the minister had been swayed by the councils’ argument that to define and commit to a waste recovery facility upfront might result in the choice of dated technology,\textsuperscript{127} Preston CJ was not. He reiterated that:

The great bulk of environmental benefits the Orange City Council claims will be achieved depend on the implementation of the resource reprocessing facility. Conversely, without the resource reprocessing facility, the proposed development is unsustainable and unacceptable.\textsuperscript{128}

The Department of Planning and its minister appeared resigned to accommodate the approach taken by the councils, despite the opposition to this approach and valid criticism that, without additional details of the particular facility, any environmental impacts could not be sufficiently and clearly assessed. The department commented that it was not responsible for the waste strategy, did not have the power to direct the resource recovery facility be built elsewhere, and would not expedite its construction to ensure that the site would be more than a landfill.\textsuperscript{129} Nor did it venture to challenge the project’s proponents in its public documents. The usual course was seemingly followed. Proponents of the project were given the benefit of the doubt, and opponents of the project were simply given the benefit of being heard. What the minister, together with the department, did have the power to do, but did not do, was to reject the project. In this case, that remedy was left to the court.

The most forceful finding of Preston CJ was that the project was not supported by local planning policy. In essence, the judge concurred with the project’s opponents that the site was not appropriate. The Molong site was zoned No 1(a) General Rural. The objectives of the zone included protecting, enhancing and conserving the land for agricultural use and resource conservation and extraction.\textsuperscript{130} These were locally designated objectives for this particular type of land in the municipality. The landfill required a permit. Like all developments subject to development applications, it had to be assessed against relevant land use policy. The relevant provision of the \textit{CLEP 1991} in this case provided that:

\begin{enumerate}
\item The Council shall not consent to an application to carry out development on land within Zone No 1 (a) … unless it has made an assessment, where relevant, of the effect of the carrying out of that development on:
\end{enumerate}

\begin{itemize}
\item \textit{Hub Action Group, supra} note 12 at para 127. Chief Justice Preston notes about the “principles of ecologically sustainable development” that they “are reasonably settled. They include: sustainable use of natural resources; integration of economic, environmental and social considerations in decision-making; the precautionary principle; inter-generational equity and intra-generational equity; conservation of biological diversity and ecological integrity; and internalisation of external, environmental costs by use of improved valuation, pricing and incentive mechanisms” (\textit{ibid} at para 1).
\item \textit{Ibid} at para 2.
\item New South Wales, Department of Planning, \textit{Assessment Report, supra} note 81 at 17.
\item \textit{Hub Action Group, supra} note 12 at para 102.
\item New South Wales, Department of Planning, \textit{Assessment Report, supra} note 81 at 18.
\item \textit{Hub Action Group, supra} note 12 at paras 30-32.
\end{itemize}
(a) the present and potential use of the land for the purposes of agriculture,

and the Council is satisfied that the development will not have an adverse effect on the long term use, for sustained agricultural production, of any prime crop and pasture land.

(2) In assessing the effect referred to in sub-clause (1), the Council shall have regard not only to the land the subject of the application but also to land in the vicinity.131

Preston CJ found that the development would have an adverse effect on the site, which was prime agricultural land, by reducing its current and future use for agriculture. The landfill would displace agricultural uses while in operation, and after rehabilitation the soil profile above the landfill cap would be reduced, limiting the types of crops that could be grown on the site.132 Preston CJ considered that these limitations could lead to a lowering of the agricultural class of the land.133 Further, the risk of contamination by the development would have an adverse impact on the nearby land used to farm bees and produce honey.134 Preston CJ concluded:

[T]o approve a development which is likely to have these adverse effects on the long term use, for sustained agricultural production, of prime crop and pasture land would not be consistent with the principles of ecologically sustainable development.

The provisions of the [Local Environmental Plan] relating to the 1(a) zone, including cl 10(1), are part of a law supporting sustainable development, by protecting, enhancing and conserving the valuable resource of agricultural land and in particular prime crop and pasture land in a manner which ensures its use for sustained agricultural production..

The principle of inter-generational equity involves the right of the present generation to use and enjoy the resources of the earth but without compromising the ability of future generations to do likewise. The present generation needs to ensure that the health, diversity and productivity of the environment are maintained and enhanced for the benefit of future generations. This obligation of inter-generational equity would be breached by the carrying out of development which has an adverse effect on the long-term use, for sustainable agricultural production, of prime crop and pasture land. Such development compromises future generations’ ability to use and enjoy to the same degree as the present generation the prime crop and agricultural land.135

He demonstrated a concern for a much broader interest than the department in its assessment. He was conscious of the implications for justice and fairness of the development locally, as well as across time, with his application of the principle of intergenerational equity. Preston CJ characterized the provisions of the planning policy that sought to preserve the agricultural

133 Ibid at paras 39-55.
135 Ibid at paras 68-72.
quality of land as safeguarding a food-secure future for the local area. As will be shown later, in the Part 3A process, the "public interest" was defined in a much different manner.

The Department of Planning reached similar findings of fact about the impacts of the landfill and associated facilities. However, as mentioned above, the department had interpreted clause 10 in a way that allowed the minister to approve the project, notwithstanding the spatial and scalar injustice on the inhabitants of Molong this would generate. As a sign of things to come, the department even went so far as to claim that the development should not be refused because it would not have a “significant impact on the agricultural capability of the area or region” owing to its relatively small footprint.\(^{136}\) That is, the current and future residents of Molong would suffer from a reduced farming capacity because that burden was insufficiently significant for the department. Nowhere in the relevant planning provisions was an assessment so warranted. It appeared that the department was willing to allow agricultural land in Cabonne to be swallowed up for other uses as it had previously allowed for the cumulative development of coal mines elsewhere in the state.\(^{137}\) It unilaterally, and without legal foundation, changed the scale upon which the assessment for the project would be made.

7. A SHORT-LIVED EQUALIZATION OF POWER AND CONSIDERATION OF THE LOCAL SCALE

Early in the case, Preston CJ briefly adjourned to provide an opportunity for Orange City Council to clarify and modify its proposal.\(^{138}\) A supplementary environmental impact statement was prepared, generating what was thought to be more than twice the number of objections than the first statement.\(^{139}\) It would be a crude use of data to suppose that the level of opposition had actually doubled. However, by the end of the case, and in reaction to the response of the Orange City Council, it was clear that the opposition to the project was at its greatest. The court had centred concern on the Molong township—on the local scale. The negative impacts of the project in Molong would prevent the project from proceeding.

The attention of the project’s principal opponents appeared to be directed to convincing their local council, Cabonne, to walk away from the project, which they achieved. In May 2008, the Cabonne Council voted by a narrow margin not to support Orange City Council’s efforts to reactivate the project development application.\(^{140}\) In September 2008, six months after the court decision, local council elections saw the make-up of the Cabonne Council

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\(^{136}\) New South Wales, Department of Planning, *Assessment Report*, supra note 81 at 20 [emphasis added].

\(^{137}\) New South Wales, Department of Planning, *Independent Review of Cumulative Impacts on Camberwell* (July 2010).

\(^{138}\) “Councils withdraw to get their act together”, *Molong Express* (16 August 2007). The Chief Judge had reportedly expressed concern about the lack of detail of the project, commenting that he was not sure what it was that he was being asked to approve: “It is extraordinary that the Council put forward something that is incapable of being approved” ("My pen is poised…I’m ready to go", *Molong Express* (16 August 2007)).

\(^{139}\) Ellen Vaz, "Group says submissions show public’s concern for tip project", *Central Western Daily* (23 November 2007). 291 submissions were lodged, of which almost all were objections.

\(^{140}\) "Cabonne not to support Part 3A application", *Molong Express* (29 May 2008).
change with anti-Hub candidates elected, including bee-keeper Ian Gosper. This led to a change in mayor: John Farr, a re-elected supporter of the Orange Waste Project, was displaced from his mayoral position. The new council commissioned another inquiry into its landfill capacity. Using new calculations, it discovered that it had as many as 30 to 50 years of landfill capacity remaining. The urgency, as well as the original rationale for the project, now appeared to be gone.

Finally, in June 2009, Cabonne terminated the joint venture agreement with Orange City Council that it had entered into almost a decade earlier, leaving Orange to pursue the project on its own. The effect of the shift in view of Cabonne was profound. It represented a heightened attention to local concerns and crystallized the allegation that this project essentially represented Orange dumping its waste onto Molong—a project affecting spatial justice. This shift was also crucial to the claim that the project was not a regional one.

Cabonne’s decision to distance itself from the project also triggered the fracturing of the united support for the project within Orange City Council, with Greens Councillor Jeremy Buckingham withdrawing his support for the project. In his view, without Cabonne’s waste, the project no longer represented the regional solution that had been promised. The great attraction of “diverting half of the region’s waste from landfill” could not be fulfilled. Other Orange councillors soon followed suit in withdrawing their support.

\[141\] Vaz, “Shake-up”, supra note 89. Ian Gosper was a vocal opponent of the project. His family has lived near the Orange Waste Project site for a long time. By 2013, he had risen to the position of mayor of Cabonne.

\[142\] Before and after the local council elections, John Farr supported the project largely on the basis that Cabonne needed landfill capacity. He was replaced as mayor by Kevin Duffy, who had reversed his position before the election from being a supporter to opponent of the project.


\[144\] A belief that Cabonne was running out of waste capacity triggered the joint project (the first EIS claimed that with the exception of one, “Cabonne landfills … are either closed or almost exhausted, creating an urgent need for a new facility” (“Last Chance for Protest”, Molong Express (4 May 2005)). However, this belief and claims of urgency were criticized (Gosper, supra note 4).


\[147\] For a discussion on the spatial aspects of environmental injustice, see Walker, supra note 21 at 24.


\[150\] Ellen Vaz, ‘Landfill Goals Achievable but Buckingham Says Hub is the Key’, Central Western Daily (Orange) (10 December 2007).

\[151\] Bevan Shields, "Council makes titanic decision to pursue Hub", Central Western Daily (Orange) (7 June 2008); "Orange to stick with Hub site", Molong Express (12 June 2008).
8. PART 3A AND THE NORMALIZATION OF THE POWER IMBALANCE

The decision of the Land and Environment Court in *Hub Action Group*, particularly Preston CJ’s interpretation of clause 10 of the *CLEP 1991*, was unequivocal. Without a change to Cabonne’s planning policy, which seemed unlikely given Cabonne Council’s retraction of support for the project, a new proposal or an appeal to the NSW Court of Appeal was unlikely to succeed. However, the success of the Hub Action Group,152 and its position of influence, would be undone by the activation of New South Wales’ Part 3A planning regime. This part of the *EPAA 1979* would allow the project to be revised and revived, with decision making and political power reverting once more to the Department of Planning, the minister, and—as a proponent of a project subject to the ‘fast-track’ planning laws—to Orange City Council by proxy.

The conflict became even more partisan and personal. The debate was infused with a narrative of injustice and unfairness. An “us against them” mentality, with “us” consisting of the residents of Molong and “them” the Orange officials and their contacts in Sydney, charged local opposition to the project.

Part 3A was introduced into the *EPAA 1979* in June 2005, following the proclamation of the *Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Act 2005* (NSW). Its stated purpose was to “reform” planning in New South Wales, to “streamline” assessments and facilitate “projects of significance to the State.”153 Implicit in the government’s decision to pursue legislative change was a belief that the existing process for state-significant projects—the process through which the Orange Waste Project was first assessed and then rejected—was not working. The new law aimed at making it easier and quicker to make decisions approving developments with greater certainty that those approvals would not be overturned by courts. No other meaning could reasonably be distilled from these opening words in the minister’s second reading speech to Parliament:

By establishing greater certainty in the assessment of projects of State significance and major infrastructure projects, the [B]ill further assists in the Government’s desire to afford opportunities for the private sector to participate in the delivery of our infrastructure programs.

There is no doubt that this [B]ill dramatically improves the climate in which to do business in this State.154

The provisions of the amended act reinforced this intention. Under Part 3A, the Minister for Planning could declare projects to be of critical importance or of state or regional significance. Generally, this was achieved by creating a list of development project types of significance in the relevant *State Environmental Planning Policy*.155 The list proved particularly

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154 New South Wales, Legislative Assembly, *Hansard* (27 May 2005) at 16332 (Mr Craig Knowles) [*Hansard* (Knowles)]. This is the Second Reading Speech for the Bill later passed as the *Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Act 2005* (NSW).
155 Originally the *State Environmental Planning Policy (State Significant Development)* 2005, the *State Environmental Planning Policy (Major Projects)* 2005 [*SEPP-MP*], and later, the *State Environmental
controversial due to its inclusion of coastal residential development.\textsuperscript{156} Declarations of state or regional significance could also be made on a project-by-project basis in the minister’s discretion.\textsuperscript{157} Once a project fell within the Part 3A system, it became subject to a project-specific environmental assessment.\textsuperscript{158} Decisions concerning the approval of these projects were broadly discretionary, with mandatory considerations excluded from the \textit{EPAA 1979}. This discretion created significant barriers to substantive judicial review. Further, a large proportion of projects, those that were approved at the conceptual level or that underwent a public planning assessment, were immune from merits review.\textsuperscript{159} As a result, large-scale coastal developments could receive approval with insufficient regard to the possible local effects of climate change-related sea-level rises on the development.\textsuperscript{160} There was simply no hook to challenge these decisions that were made under such immensely broad discretion. The system’s “nomospheric technicians”\textsuperscript{161} were stripped of their function. The minister, intent on retaining utmost executive power, confined the judicial creativity that had sought to incorporate mandatory considerations into the decision-making process.\textsuperscript{162} The minister went so far as to argue that he was not even required to consider ecological sustainable development,\textsuperscript{163} the environmental principle

\begin{footnotesize}
\begin{enumerate}
\item[156] See \textit{Minister for Planning v Walker and Others}, [2008] NSWCA 224, (2008) 161 LGERA 423, \textit{[Minister v Walker]} (an appeal of the successful judicial review challenge to an approval of a residential and retirement village development on the coast near Wollongong, a project that was deemed to be of state-significance under the policy). See also the commentary by Robert Ghanem, Kristy Ruddock & Josie Walker, “Are Our Laws Responding to the Challenges Posed to Our Coasts by Climate Change?” (2008) 31 UNSW Law Journal 895. When the NSW government moved to repeal Part 3A, its first step was to amend the policy “to remove residential, commercial and retail development and coastal subdivisions from the operation of Part 3A” and to revoke existing declarations about such developments (New South Wales, Department of Planning and Infrastructure, \textit{Fact Sheet: Removing Coastal Subdivision and Residential, Commercial & Retail Developments from Part 3A} (May 2011) at 1).
\item[157] \textit{EPAA 1979}, supra note 9, s 75B(1)(b). It was the existence of this broad discretion that led the NSW Independent Commission Against Corruption to conduct an inquiry into the corruptibility of the law (New South Wales, Independent Commission Against Corruption, \textit{The Exercise of Discretion Under Part 3A of the Environmental Planning and Assessment Act 1979 and the State Environmental Planning Policy (Major Development) 2005} (Independent Commission Against Corruption, 2010) \textit{[Exercise of Discretion Under Part 3A]}).
\item[158] \textit{EPAA 1979}, supra note 9, s 75F.
\item[159] \textit{Ibid} at ss 75K(1), 75L(1). Under the laws that replaced Part 3A, merits review is still unavailable; however, there is now more scope to initiate judicial review proceedings, as the minister must consider a variety of matters, including environmental impacts.
\item[160] \textit{Minister v Walker}, supra note 156.
\item[161] Delaney, supra note 15 at 159.
\end{enumerate}
\end{footnotesize}
that has reached hegemonic status in Australia, and that was so important in Preston CJ’s rejection of the Orange Waste Project.

The claim that the amendments to the *EPAA 1979* would “strengthen the rigour, transparency and independence of the process of assessment” cannot be substantiated. In fact the case of *Gwandalan Summerland Point Action Group Inc v. Minister for Planning* suggests that Part 3A could be used for the exact opposite purpose: opaqueness. In that case, one of the few successful Part 3A judicial review decisions initiated by project objectors, Justice Lloyd of the Land and Environment Court upheld a claim that the Minister for Planning had breached principles of natural justice. Justice Lloyd found that the minister approved a large coastal subdivision in exchange for the developer giving the government land that it would reserve to fulfill a strategic policy commitment, the creation of park land. The minister had pre-judged his decision. This case is not the only example of such pre-judgment; such “up-front certainty for the proponent” from very early on in the process has existed in other project approvals.

Orange City Council’s response to the court decision indicated that it was aware of its Part 3A alternative. After all, the council had both reason and time to reflect on a possible court loss after being encouraged by Preston CJ to revise the project and undertake a supplementary assessment. The Department of Planning had also advised the council that the project could have been assessed under Part 3A of the *EPAA 1979* had the original development application been submitted at a slightly later date. After the decision was handed down, Stephen Sykes, the council officer with principal oversight of the project, said that once the council had digested the decision it would “get some advice on what the planning options might be and then get the council to determine how we deal with those.” He gave no indication as to an appeal. Orange City Council went into lock-down and started advancing a Part 3A alternative. After all, the council had both reason and time to reflect on a possible court loss after being encouraged by Preston CJ to revise the project and undertake a supplementary assessment.

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165 *Hansard* (Knowles), supra note 154.


167 *Ibid* at paras 126-127.

168 *Hansard* (Knowles), supra note 154. Notably, the Independent Commission Against Corruption recommended changes to Part 3A in order to limit the possibility of corruption arising from the use of the law (*Exercise of Discretion Under Part 3A*, supra note 157).


170 New South Wales, Department of Planning, *Assessment Report*, supra note 81 at 8. The first application for development approval for the project was lodged on 26 April 2005. The notice of motion for amendments to the act to incorporate Part 3A was made on 14 May 2005. The amending act received royal assent on 16 June 2005.


172 "Public Look at Court Rulings", Editorial, *Central Western Daily* (Orange) (19 March 2008) (the council blocked a motion to conduct an inquiry into the planning processes that saw the project rejected by the Land and Environment Court). Daniel Briggs, "Council Won’t Give Up on Hub", *Central Western Daily* (Orange) (21 March 2008) [Briggs, "Council Won’t Give Up"].
proposal; a response it argued was responsible and economically efficient, making best use of the time, effort and funds already invested in the project.\textsuperscript{173}

However, some in the community found this proposal objectionable, unfair, and undemocratic. Adopting the words of Iosif Botetzagias and John Karamichas, the people of Molong felt that they were “dragged into an ‘unfair’ deal,” that their predicament was a consequence of a lack of political allies to shield them from the development.\textsuperscript{174} The despair and disappointment is captured in the submission by Ian Gosper to the Department of Planning for consideration by the Planning Assessment Commission established to undertake the Part 3A assessment. He wrote:

\begin{quote}
The Hub Action Group, myself, and the community in general were told by the Department of Planning way back in early 2002 … that if we wanted to object to the proposal we could have input into the EIS, which we did. We were then told we could make submissions if we disagreed with the EIS, which we did. We were then told if we disagreed with the Dept. of Planning’s decision we could go to the Land and Environment Court and get a Judgement Ruling, which we did, but only after consideration because of the large financial cost involved. The one thing we were not told way back in early 2002 was that if you want to object to this proposal, don’t bother, don’t go to the Land and Environment Court and spend large amounts of money because we will change the law.\textsuperscript{175}
\end{quote}

People questioned the regard Orange City Council had for the judicial process and claimed that its decision reflected an arrogant treatment of the residents of Orange and Cabonne. The basis for objection was extended to incorporate process concerns.\textsuperscript{176} The \textit{Molong Express} editorialized:

\begin{quote}
OCC intend to lodge a “Part 3A application” with the NSW Department of Planning. Under this planning provision the Minister can deem the proposal “state significant” and rubber stamp the HUB proposal on prime agricultural land on Shades Road. And no one, not even our Courts, can stop him. The “back door” route.\textsuperscript{177}
\end{quote}

The fear was that the minister would overlook the findings of the Land and Environment Court, particularly those local concerns relating to the agricultural value of the land, the potential impact to the neighbouring apiary interests, and critically, the inappropriateness of the site for the development. The project opponents’ interpretation of the decision was that no landfill would be suitable for the site, emphasizing Preston CJ’s comment that his finding “does not mean that another proposal at another site would not be acceptable.”\textsuperscript{178}

\begin{footnotes}
\item[174] Botetzagias & Karamichas, \textit{supra} note 5 at 941.
\item[175] Gosper, "Submission", \textit{supra} note 72.
\item[177] "‘Appeal’ … what appeal? Orange City Council resorts to misinformation", \textit{Molong Express} (27 March 2008).
\item[178] "Orange City Council’s Tactics Stink", \textit{Molong Express} (27 March 2008) [emphasis added].
\end{footnotes}
The Molong community did have reason to be concerned that their interests would be displaced by Part 3A. In the context of a Part 3A decision, section 75J(3) of the EPAA 1979, together with the regulations under the EPAA 1979, freed the minister from the constraining provisions of the CLEP 1991 that had been decisive in the Land and Environment Court case. Provided the development was not prohibited by the plan—in this case it was not—the minister was not required to consider the provisions of the plan. The minister could therefore ignore clause 10, which sought to protect prime agricultural land from any adverse impacts. The Molong community would also have been aware of the very low rejection rate for Part 3A applications; this had become lore in New South Wales. Between the 2006-07 and 2009-10 reporting years, just six of 442 total applications were rejected. None of the rejected applications were lodged by local councils. By contrast, in the 2005-06 reporting year, where the records combine Part 3A rejection figures with those of the previous regime, there were thirty-four rejections of 173 original applications.

9. ORANGE’S APPLICATION UNDER PART 3A

Orange’s mayor, John Davis, was correct in claiming that it was within his council’s legal rights to try to employ Part 3A. This legal regime constituted an avenue open to all developers who were able to convince decision makers that their project or site qualified as being of state-significance. Nevertheless, the decision to pursue this legal route rather than attempt to appeal the decision of the Land and Environment Court angered Molong residents. Cabonne councilors echoed this anger, arguing that if the court had erred, Orange City Council should have appealed the decision instead of reverting to Part 3A. They suggested that this reliance on Part 3A was not “fair play.” Battered by the Land and Environment Court, Orange City Council was, nonetheless, dramatically and unquestionably able to reclaim the dominant position in the conflict. It appeared willing to face criticism for doing so, maintaining the line that it was acting in its community’s best interests, and going so far to claim that “Part 3A was created to ensure [s]tate-significant developments, like the Orange Waste Project, had a fair and rea-

179 Environmental Planning and Assessment Regulations 2000 (NSW), r 80 [Regulations].
182 New South Wales, Department of Planning, New South Wales Major Development Monitor 2005-2006 (2006). The figure of 173 applications does not include those applications that were withdrawn or that related to modifications to approvals.
183 Delaney describes this as a “nomic trace” (supra note 15 at 71).
Reasonable opportunity to be approved." This claim was unsupported by legislative history but became a catch phrase reiterated by political actors. Moreover, this claim constituted a state-scale invocation employed in order to reject accusations of unfairness and concern for its own interests.

Orange City Council’s claims on even-handedness were weakened, however, when the former local councillor and the then-member of the state parliament for the electorate of Orange, Russell Turner, made an extraordinary incursion into the debate to support the council’s Part 3A efforts just as claims of unfairness and arrogance arose. Turner stated, “I believe the Chief Justice of the Land and Environment Court was totally biased in his findings and some of his comments were so far from reality that it defies belief.” He equated Orange City Council’s use of Part 3A to the Hub Action Group’s use of a merits review judicial process. He argued that, as a former farmer, he was better equipped than the urban judge to determine potential impacts of the project on agricultural land. He also drew on majoritarian arguments asserting that the majority of his wider constituency “desire a new waste facility” and his manoeuvre increased community anxiety about the project assessment. It also demonstrated the sense of infallibility and impertinence of those associated with a Part 3A application. They are, after all, the nomic power players in this game.

10. THE PRIORITIZATION OF THE ‘REGIONAL’ SETTING

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188 "Council’s bid to state govt for Hub plan" Central Western Daily (Orange) (15 June 2008); Davis, supra note 186.
189 He was a councillor of Orange City Council when it entered into the project joint venture agreement with Cabonne Shire in 2000.
190 Russell Turner, "It is Time to Bring Some Commonsense Back into the Hub Debate", Advertisement, Central Western Daily (Orange) (16 April 2008).
191 Ibid.
192 Ibid.
193 Letter from Russell Turner to unspecified addressee (21 May 2008) [on file with author].
The SEPP-MP specified at schedule 1, clause 27 that certain landfills and waste recovery facilities were of state or regional significance, to which Part 3A of the EPAA 1979 applied. That clause stated, as relevant, that if the Minister for Planning was of the opinion that a development satisfied the following criteria, it would be of state or regional significance:

1. Development for the purpose of regional putrescible landfills or an extension to a regional putrescible landfill that:
   a. has a capacity to receive more than 75,000 tonnes per year of putrescible waste, or
   b. has a capacity to receive more than 650,000 tonnes of putrescible waste over the life of the site, or
   c. is located in an environmentally sensitive area of State significance.
2. Development for the purpose of waste transfer stations in metropolitan areas of the Sydney region that handle more than 75,000 tonnes per year of waste.
3. Development for the purpose of resource recovery or recycling facilities that handle more than 75,000 tonnes per year of waste or have a capital investment value of more than $30 million.

Orange City Council sought to qualify its project as a regional landfill with a capacity to receive more than six hundred fifty thousand tonnes of waste over the forty-year life of the development. It would not qualify under sub-section 3 because the waste recovery component of the development did not meet the minimum tonnage or capital levels. As detailed below, the Department of Planning determined that the development satisfied the qualification in clause 27(1)(b) in schedule 1 of the SEPP-MP. It was no doubt helped by the fact that Orange City Council had portrayed its project as a regional one. Mayor Davis, for instance, in the period following the council’s public confirmation that it would apply for a development approval under Part 3A, argued that:

Orange City Council has a responsibility to act in the best interests of the community to provide long-term regional waste management strategies ... This proposal

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197 See also SEPP-MP, supra note 155, cl 6(1) (the ministerial power to declare projects of state or regional significance). The heading of clause 27 refers to "resource recovery or waste facilities." However, the clause that Orange City Council relied on refers only to landfills. Section 35(2) of the Interpretation Act 1987 (NSW) provides that the heading is not part of the Policy, so the reference to landfills in this instance cannot be conflated with waste recovery facilities. As noted in the text, different state significance qualifications apply to waste recovery facilities.

198 Supra note 155. Later the SEPP-MD, supra note 155, would apply.

199 SEPP-MP, supra note 155, sch 1, cl 27.

200 In the environmental impact assessment, it is estimated that the landfill would be required to accommodate approximately 30,000 tonnes per year (Orange City Council, Orange Resource Recovery and Waste Management Project Environmental Assessment (GHD, September 2009) [Orange City Council, "Project Environmental Assessment"] at D.1-5).

201 Ibid at A.2-4.
will deliver waste management solutions for the region well into the second half of this century.202

As mentioned above, the council had long considered its project to be one for the region, but it originally got no legal or strategic benefit from so describing the project. It is unlikely that this regional characterization was originally invoked as a frame; rather, as a term used to describe a vision that both councils shared. When the first landfill investigation, the *Regional Landfill Investigations/Feasibility Study*, was presented to Orange City Council in 1997, the law provided no windfall for regional landfills. At that time, the only notable consequence of the councils working in unison was that the Minister for Planning, rather than the local authority governing the land where the landfill was to be located, would be the determining authority for any development application.203 It was only with the coming into force of certain amendments to the *EPAA 1979* that the concepts of “[s]tate-significant development” and regionally-significant developments were introduced into the *EPAA 1979*.204 These provisions were later reinforced, entrenched and accompanied by the significantly increased legal and political power of the Minister for Planning through the creation of Part 3A, power that remains in the legislative landscape even after its repeal.205 The changes wrought by Part 3A confirmed a departure from the participatory objectives of New South Wales’ planning laws and the imposition of centralist and technocratic decision making—a trend toward a neoliberal model that has been pursued nationwide.206 Matters of environmental justice, particularly in terms of spaces and scales, never intruded into the Part 3A approval process.

The regional narrative had only been formalized in a Joint Waste Management Working Party Committee in February 2002. At that meeting, it was resolved that “[a]ll references to the proposed facility shall be in the context of the “Regional Resource Reprocessing Facility.”207 There was also an unpublicised intent to approach other councils, in order to direct their waste to the Molong facility. While the project proponents occasionally veered from script,208 the narrative was a successful one. The Cabonne Council mayor encapsulated the message

203 At the time, the *State Environmental Planning Policy No 48—Major Putrescible Landfill Sites (NSW)*, at r 6-7, provided that the minister was the consent authority for landfills with a lifetime capacity of more than 650,000 tonnes servicing more than one local government area.
204 *Supra* note 9.
205 The *EPAAA 2011* replaced the state-significant development provisions in Part 3A with a new Part 4, Division 4.1 (state-significant development) and a new Part 5.1 (state-significant infrastructure). See also Davies, who identifies the trend toward centralized, critical infrastructure planning decisions in the Irish context (*supra* note 5 at 391).
207 "Community consultation process a farce", *Molong Express* (20 October 2005).
208 Christine McIntosh, "Have your say on the Hub", Letter to the Editor, *Central Western Daily* (Orange) (26 April 2005). (Mayor Davis referred to the facility as a "super waste disposal facility").
they hoped to sell when he argued that “the Hub will not be a ‘tip’ or a ‘dump’ but the best Resource Recovery centre in this region.” The councils argued that there was a need for such a “regional facility.”

The overwhelming message from the development’s opponents, however, was that the project would benefit Orange alone, while disadvantaging Molong. One place would generate waste, the other would receive it and bury it, all the while suffering lasting local effects. Opponents believed that:

[Orange City Council] has no concern for Molong business that may be significantly affected. The applicant has no concern for those residents whose homes and lifestyles will be seriously affected. The applicant is insistent it is right, its offsider (Cabonne) hasn’t got a clue what it [has] got into.

For landholders in the vicinity there are no apparent benefits and plenty of costs associated with having the Hub nearby.

What really irked people in and around Molong was that their community was being used as a dumping ground for Orange rubbish.

Dumping Orange’s waste on Cabonne’s prime agricultural land is not the way to go.

Whenever Orange ratepayers are disgruntled, Mayor Davis seems to bend over backwards to be seen to be listening to their concerns. However, because Orange City Council managed to buy a prime block of agricultural real estate 40 kilometres from Orange to dump all of its rubbish, the concerns of those directly affected near, and on route to, the site seem to be of little relevance.

The opponents’ own place-based narrative, embedded with notions of fairness and environmental injustice, characterized the project as turning Molong into “Orange’s Waste Basket,” and derailing efforts of rural rejuvenation. This fight was deeply emotional for its participants, who sought inspiration in an analogy to the battle of David versus Goliath. While

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210 Nick Redmond, ”Mayors cop pisling”, Central Western Daily (Orange) (16 June 2006).
211 Jeff Rogers, ”Councils Put on Notice Over Hub”, Letter to the Editor, Central Western Daily (Orange) (7 December 2007).
212 "Winning the battle for the Hub", Central Western Daily (Orange) (2 August 2005) (local impacts included land use changes, odour, dust, and truck movements).
213 Nick Redmond, "Anger at Hub Meeting", Central Western Daily (Orange) (8 January 2007).
215 Christine McIntosh, "Hub appeal no surprise”, Letter to the Editor, Central Western Daily (Orange) (23 February 2007).
216 This is a parody of Cabonne’s institutional brand as “Australia’s Food Basket.” See e.g. "Have U Been informed?”, Advertisement, Molong Express (15 June 2005).
217 See “One of the three R’s Hits a town’s nerve”, Molong Express (22 February 2007) (“who wants to move to a ‘Hub dump town’ if they want to be part of a positive image and dynamic future?”).
218 Vaz, “Why Hub is just rubbish to some”, supra note 117.
energizing opposition locally, the narrative seemed to fail to excite the people of Orange.\textsuperscript{219} It also had little traction with the Department of Planning, especially once the Part 3A application was made. The opponents’ appeal stayed at the local scale, while the decision maker’s interest was focused on a different, larger scale. The Molong nomosphere that had figured prominently in the investigation by Preston CJ was now displaced by the subsequent legal deliberations.

Approval of the project was seen as inevitable due to it being a Part 3A project.\textsuperscript{220} Orange City Council’s Director of Enterprise Services, Stephen Sykes, was less than convincing in his statement that the Council not been certain of receiving an approval despite the fact that the “vast majority” of Part 3A projects are approved.\textsuperscript{221}

The most illustrative indication that the regional categorization of the project was essential to its approval is found in the report of the Planning Assessment Commission to the Minister for Planning. One of three functions of the Planning Assessment Commission, whose appointment and narrow jurisdiction meant that there would be no avenue for a merits review appeal to the Land and Environment Court,\textsuperscript{222} was whether the project would be in the public interest or have a “public purpose.”\textsuperscript{223} Within its report, the commission repeatedly framed the project as being in the public interest, which it assessed at a regional, rather than local, scale. The interest of the Molong community was not a key concern.

One of the first things the commission did was to dismiss the limitation on the use of the land imposed by the CLEP 1991. The Part 3A application would not be denied on the same basis that had allowed for the project’s previous rejection by the Land and Environment Court. Local policy would be disregarded in favour of presumed regional significance. The commission concluded—almost mimicking the assessment made four years earlier by the Department of Planning,\textsuperscript{224} though this time in a way permitted by, rather than inconsistent with, the law—that evaluations of the impact on agricultural land could, and should, be cast within a regional perspective. It wrote:

\textsuperscript{219} See "Trip to Rubbish Site Goes to Waste", Editorial, Central Western Daily (Orange) (9 November 2009) (“there is an alarming lack of interest shown by both the people of Orange and some of their elected representatives when it comes to finding out where their rubbish is going to be dumped for the next few decades”).

\textsuperscript{220} Bevan Shields, “Group ’knew it was coming”, Central Western Daily (Orange) (30 April 2010).

\textsuperscript{221} Interview of Stephen Sykes by Angela Owens (30 April 2010) on ABC Radio Central West Mornings (30 April 2010), online: ABC <http://www.abc.net.au>.

\textsuperscript{222} EPAA 1979, supra note 9, ss 75K(1)(c), 75L(1)(c).

\textsuperscript{223} New South Wales, Planning Assessment Commission, Review of Orange Resource Recovery and Waste Management Project (Sydney: Planning Assessment Commission, March 2010) at 1. Under regulation 8B of the Regulations, that report was required to include "any aspect of the public interest" considered relevant by the Director-General of the Department of Planning (supra note 179). What is the “public interest” is not defined (ibid). In Minister v Walker, Hodgson JA for the NSW Court of Appeal noted that “this requirement…operates at a very high level of generality” but will typically, but not always, encompass the principle of ecologically sustainable development because that principle is one of the objects of the statute (supra note 156 at paras 41-43; see also EPAA 1979, supra note 9, s 5). See also Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure [2013] NSWLEC 48, (2013) 194 LGERA 347 at para 55 and seq where Preston CJ revisits this issue.

\textsuperscript{224} See New South Wales, Department of Planning, Assessment Report, supra note 81.
The [environmental assessment] has satisfactorily considered the impact of the Project on the agricultural capability of the Euchareena Rd site and adjoining land and is taking the necessary measures to mitigate and manage this. In making this judgment, the PAC takes into consideration the agricultural capability of the Region, not just the site in question.\(^\text{225}\)

The commission recognized that:

It is likely that many of the residents of Molong would believe that the siting of the landfill (and to a lesser degree the composting facility) at Euchareena Rd is not in their ‘interest’. The proposal under consideration is not supported by their own Council. Residents of Molong are unlikely to see the greater environmental outcomes of the Project and may argue that there is no improvement in their amenity or convenience.\(^\text{226}\)

Nevertheless, it believed “that the public interest is best served by the Orange region achieving a sustainable solution to waste management, with minimal impact on people in the region, businesses and the environment.”\(^\text{227}\)

Though the commission accepted that the proposal would potentially have adverse amenity impacts on the people of Molong, it did so from a position far removed from the local context.\(^\text{228}\) The proposal would also create a risk to bee farms located near the waste site. Nevertheless, both of these local concerns were seen as capable of being reduced to a “reasonable level” or an “acceptable level” by changes in the handling of waste and the imposition of conditions on approval.\(^\text{229}\) The commission considered that “most concerns” of the project’s opponents could be addressed by conditions and project restrictions.\(^\text{230}\) The project would proceed because of its “regional potential.”\(^\text{231}\) The commission’s view on the composting facility – that it was “infrastructure that could not be built by smaller communities” – was an important factor in this decision.\(^\text{232}\) Interestingly, that infrastructure, on its own, would not have qualified as a Part 3A project; it was only assessed as a component of a Part 3A landfill.\(^\text{233}\) The commission did not recognize the landfill itself as having particular regional features.

\(^{225}\) New South Wales, Planning Assessment Commission, *supra* note 223 at 17.

\(^{226}\) *Ibid* at 28.

\(^{227}\) *Ibid* at 27 [emphasis added].

\(^{228}\) *Ibid* at 18; Ruming, *supra* note 10 at 49 (identifies the main criticism of professional planners to Part 3A decisions is that they are made "by a Minister who has limited knowledge of the local context"). Ruming also notes that this recognition of adverse amenity impacts is common in other Part 3A applications.

\(^{229}\) New South Wales, Planning Assessment Commission, *supra* note 223 at 29.

\(^{230}\) *Ibid* at 27.

\(^{231}\) *Ibid* at 29.

\(^{232}\) *Ibid*.

\(^{233}\) Under *SEPP-MP*, a waste resource recovery or recycling facility could only be a state-significant development if it would “handle more than 75,000 tonnes per year of waste or have a capital investment value of more than $30 million” (*supra* note 155, cl 27(3)). The waste recovery component of the project, however, would have a capacity of up to 20,000 tonnes and the total capital cost for the whole project was estimated at $14.6 million. See Orange City Council, *Project Environmental Assessment*, *supra* note 200 at iii and xvii.
11. A REGIONAL PROJECT?

In the lead up to approval and in the immediate aftermath, there was disagreement about whether the project was truly regional. Under the SEPP-MP, the project had to meet landfill capacity levels and qualify as a “regional” facility in the opinion of the Minister for Planning.234 The Molong Express declared, “[t]he decision is wrong and it seems misinformed given that Kelly approved a ‘regional’ facility for the proposed HUB site. It is not a ‘regional’ facility.”235 This regional characterization would also have been the only point of law that objectors could potentially pursue in court. Despite seeking out legal advice, the project’s opponents ultimately opted not to take legal action.236

Cabonne, through its new mayor Kevin Duffy, persisted that, without its involvement, the project could not be characterized as regional. Cabonne offered to find a regional solution jointly with Orange City Council – subject to the landfill being located at a different site. Mayor Duffy and Cabonne commented:

I’d like to see it turned down simply because we could then go away and have a regional approach to the situation where it would involve other local government and shires associations.237

The new Orange rubbish tip is not a regional solution. And what’s more the Land and Environment Court found the proposed site is inappropriate.238

The Hub Action Group’s official position was that the project was not a regional one. Its members argued:

It portrays itself to be a regional solution. It is not. It is not supported by any other regional [local government area] and is opposed by the host Council, Cabonne. It has been ‘dressed up’ as a regional landfill for the purposes of Part 3A qualification. But in substance it is not.239

Because the Hub Action Group or other opponents did not pursue judicial review of the Part 3A approval, the question of whether the project was regional remained unanswered. Doubt still exists as to whether the decision to approve the project under Part 3A was legally valid. While it is likely that the declaration of significance would not have been overturned by the courts, a proper construction of the policy would have concluded that the project was not

234 SEPP-MP, supra note 155.
235 Rozzi Smith, "Molong – don’t give up", Editorial, Molong Express (6 May 2010) [emphasis added]. By this time, the Minister for Planning was Tony Kelly. Frank Sartor had earlier been replaced as the relevant Minister by Kristina Keneally.
237 "Council meeting to discuss tip stance", ABC Regional News (6 July 2009), online: ABC <http://www.abc.net.au>.
239 Christine McIntosh, Oral Presentation to the Planning Assessment Commission, 8 December 2009 [emphasis in original].
regional, and that it was therefore appropriate to further prioritize the concerns identified at the local scale. 240

For instance, the department, in advising the minister on the matter, did not look at usual and ordinary meanings of the word “regional.” 241 It failed to interpret the clause contextually, as demanded by the High Court of Australia in Project Blue Sky Inc v. Australian Broadcasting Authority, 242 and conflated the clear and public purpose of the law 243 with an internal and private understanding of the reasons behind an alteration to the policy. 244 What it means to propose a “regional” waste dump was not considered.

Had the department followed a proper course of action, it would have observed that section 4 of the EPA 1979, the interpretation provision, does not define a ‘region.’ It simply notes that a region may consist of local government areas or parts of those areas. 245 The Macquarie Dictionary definition of “regional” emphasizes that the term refers to “an area of considerable extent; not merely local.” 246

There is, however, a very commonly understood meaning of what the regions of New South Wales are. Regions have been created socially, culturally, and politically throughout the state. As noted above, Orange and Cabonne are identified as part of the state’s Central West; this region is recognized as a statistical division by the Australian Bureau of Statistics, 247 New South Wales’ Department of Trade and Investment, 248 the Australian Broadcasting Corporation, 249 and geographers, 250 among others. Clause 27(2) of the SEPP-MP gives a contextual under-

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240 This is particularly due to the broad discretion afforded to the minister to make the decision in his or her opinion. Clause 6(1) of the SEPP-MP, invested power in the minister to decide whether a project met the stipulated criteria in his or her opinion (supra note 155). The only potential restriction would be the need for the minister to validly find a "jurisdictional fact." See e.g., Plaintiff M70/2011 v Minister for Immigration and Citizenship (2011), [2011] HCA 32, [2011] 244 CLR 144.

241 New South Wales, Department of Planning, Director-General’s Environmental Assessment Report – Major Project Assessment – Orange Waste Project (April 2010) [Director-General's Environmental Assessment Report].


243 Interpretation Act, supra note 198, s 33.

244 Director-General’s Environmental Assessment Report, supra note 241 at 10 (the Director General argues because of a change to the policy, that it was no longer a requirement that waste come from more than one local government area for a tip to be classified as being "regional." The Director General then dismisses the ongoing importance or relevance of the reference to a waste facility being "regional" within the policy).

245 See Local Government Act 1993 (NSW).


249 “ABC Central West NSW”, online: Australian Broadcasting Corporation, online: ABC <http://www.abc.net.au/centralwest>.

250 See e.g., Kevin Dunn and Amy McDonald, “The Geography of Racisms in NSW: A Theoretical Exploration and Some Preliminary Findings from the Mid-1990s” (2001) 32 Australian Geographer 29 at 37.
standing of the meaning of “regional,” and suggests that the state-wide recognized regional divisions represent the meaning of “regional” intended by the legislature. For example, sub-clause 2 refers to the “metropolitan areas of the Sydney region,” indicating that “regional” does not necessarily mean “rural.”

Finally, the department misconceived the purpose of the policy. Within the departmental bureaucracy, the purpose of clause 27 may well have been to centralize power in the minister and so deny communities and local governments an effective contribution to planning decisions, the objects of the clause and policy must be set within the broader objects of the EPAA 1979. These objects expressly include allocating responsibility for decision making, encouraging the economic and orderly use of land, and, implicitly, facilitating controversial development. However, they also include objects of fairness in decision making, community participation, and ecological sustainable development—those factors considered so important by Preston CJ—and the principle of intergenerational equity. The state-significant development procedures are also intended to deal with those projects of complexity, high cost, and demonstrable importance to the state. It would be a longbow to draw to suggest that the facility, despite its “regional opportunity,” could be objectively analyzed as being significant to the Central West region when the only certainty about the development, and particularly the landfill, is that it would support the city of Orange alone.

Nevertheless, under the minister’s broad Part 3A discretion, this significance was so decreed. Not only were objectors disempowered by the Part 3A process as a whole, but owing to that absence of power, they also saw the terms of inquiry further narrowed, and their concerns about the project sidelined by this declaration as the minister and the department designated an ambiguous geographic scale at which the assessment of the project would take place. There was, in Kurtz’s words, no “indisputable rationale” for the declaration.

12. CONCLUSION

The foregoing discussion has shown that the law that oversaw the assessment and ultimate approval of the Orange Waste Project constructed and prioritized particular spaces and scales. The community, and indeed the judiciary, had limited control over the scale of assessment. The law, Part 3A of the EPAA 1979, displaced and repositioned the conflict and the matters of concern to the communities involved.

The localized space—and future spaces across generations—curated by Preston CJ in his judgment had a limited effect on the resolution of the conflict over the Orange Waste Project. The CLEP 1991 created the agricultural spaces that founded legal objections to the project. The Hub Action Group corralled the township in Molong into a space of dissent, drawing on history and social circumstances to stake out a place of solidarity and difference. However, this space-making amounted to little once the Minister for Planning was positioned as the

251 EPAA 1979, supra note 9.
252 SEPP-MP, supra note 155, cl 27(2).
253 EPAA 1979, supra note 9, s 5.
254 Ibid.
255 See generally Sze et al, supra note 56 at 809.
256 Kurtz, supra note 28 at 888.
entrenched decision maker. The efforts of the Orange City Council at this stage (and earlier, in tandem with Cabonne) to defend its project by strategically invoking the regional scale or frame\textsuperscript{257} generated a “spatial disconnect.”\textsuperscript{258} The decision to approve the project as a regionally significant development under the SEPP-MP was political. It had the effect of diverting the manner and direction of the opposition to the project. As the statutory interpretation analysis shows, the law facilitated the approval decision, but could not defend it. The limited avenues of review and the wide ministerial discretion meant that, once made, there was little hope of challenging this decision. The law recast historical, social, and political differences at the centre of the conflict. Local and judicial concerns were evaded, diminished by the imposition of an analysis of the public interest at a higher level. This constituted an injustice. Spaces that were legally recognized were not attended to at the scale at which they were defined in the ultimate decision making process. The invocation of a regional scale by the minister meant that the community of Molong was unfairly disadvantaged in terms of process. This invocation also imposed a scale of interest at which a decision about the project would be made from which the community of Molong was disconnected – historically, socially and legally. The space constructed by the Hub Action Group and acknowledged by Preston CJ did not appear in the regional striation imposed by law.\textsuperscript{259}

It is not uncommon for environmental conflicts to play out like the Orange Waste Project did – with a localized opposition facing off against powerful proponents with access to provincial or national governments. It is also not uncommon for governments to depend on major projects or significant development laws to facilitate controversial land use changes. What is unusual about this project, and what renders it useful as a case study for illustrating the effects of state-significant development laws, is that the courts were involved and that the project was assessed multiple times by different legal regimes. The displacement, disempowerment, and ignorance of the local scale, even when prioritized by law, all appear in this case. Laws like Part 3A of the EPAA 1979 embolden proponents and politicians. Their actions appear above and beyond the law, because in many respects, they are. In this way, the law normalizes a power imbalance. Both the government’s interpretation of the SEPP-MP and the outburst of government politicians to criticize the judiciary following Preston CJ’s decision illustrate this normalization.

It is little wonder that Part 3A would not stand the test of time. The EPAAA 2011 came into force on October 1, 2011,\textsuperscript{260} bringing to an end a law whose effects many communities throughout New South Wales experienced just as Molong did, with localized impacts of projects ignored in favour of benefits invoked at a regional or state scale through the unchallenged declaration of the Minister for Planning.

The story of the environmental justice movement in the United States is one of communities of colour or financial disadvantage being unduly and inequitably burdened by the distribution of environmentally harmful activities. However, the origins of the environmental

\begin{footnotesize}
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\item \textsuperscript{257} Hilson, supra note 14.
\item \textsuperscript{258} Agyeman & Carmin, supra note 48.
\item \textsuperscript{259} See Philippopoulos-Mihalopoulos, supra note 44 at 210-214.
\item \textsuperscript{260} Supra note 11. A revised policy on state-significant development was also developed: the State Environmental Planning Policy (State and Regional Development) 2011 (NSW).
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justice movement do not restrict the future path of the concept or prevent the characterization of the struggle of the residents of Molong to oppose a rubbish tip as battle for environmental justice. Recent academic developments of the concepts of spatial and scalar injustice have broadened the community studied by the environmental justice movement. This is a clear implication of the scholarship of Walker, among others, and the principal message of this article. This is particularly so when ideas of scale and space are not fixed, and when notions of temporal justice, articulated through the principle of intergenerational equity, are identified. In this respect, the paper contributes to the existing scholarship in the field of environmental justice and forms part of the increasingly coherent ideas that re-conceive understandings of the relationship between space and justice. Through the Hub Action Group case explored in this article, links have been drawn between spatial justice and intergenerational equity. I have argued that the sense of unfairness and disempowerment experienced by a community can be interpreted as an environmental injustice, both because of historic, institutional, social, economic, or political disadvantage, and because a community has been disadvantaged through legal processes due to incompatible scales of environmental concern or public benefit. I have shown that “scalar ambiguity” is evident in law, and that law, together with politics, can be responsible for redefining scales and spaces.

The paper also advances the legal geography approach to scholarship, responding to the invitation from Delaney to analyze injustices both contextually as well as legally: to see the context from the law, to bring the context into focus, to understand motivations, imaginations and political devices that create a legally relevant geography—such as a scale, a place, a relationship, or a community. Delaney’s work, like this paper, reminds us that geography is not simply about place or scale. It is a much broader discipline, with particular interests in process, politics, and power. Hence, efforts at connecting law and geography ought to be rich and plural. What links geographic research is an effort to understand and appreciate context: to question the way things are or are understood to be. So this should be the effort of legal geographers, too, and this article illustrates that endeavour.

The repeal of Part 3A does not, however, signify the end of laws that diminish the influence of the courts and communities of opposition in environmental assessments. Major projects and significant development laws are likely to be with us for many years to come in some form. They have become the norm, with decisions of law, questions of scale, and geography centrally controlled. However, as this article has demonstrated, a new conception of environmental justice and an illustration of scalar and spatial injustice offer a new way to challenge and critique both the legislative enactment and the executive use of these laws.

261 Walker, supra note 21.

262 Delaney, supra note 15.