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ARTICLES

The Judicial Development of the Precautionary Principle – *Brian J Preston*

The precautionary principle is the best known and most commonly applied of the principles of ecologically sustainable development (ESD). Nevertheless, the meaning and application of the principle still remains elusive. Courts around the world, through their decisions, have started to develop a body of jurisprudence on ESD and its principles, particularly the precautionary principle. This article summarises how the courts have interpreted and applied the precautionary principle. 123

The Market Model for Carbon Reduction: Planning for Success Post-Paris – *Katy Milne and Paul Latimer*

This article provides a conceptual analysis for plotting the legal field of the new carbon markets. The field is a contemporary instance of a role that law has historically assumed in constituting markets and governing their operation. Markets can provide a creative and cost-effective means to reduce emissions, but they will need regulation by government to support an Emissions Trading Scheme (ETS). This article identifies the key elements in the regulation of the carbon market, with examples of the EU ETS, the New Zealand ETS, the Regional Greenhouse Gas Initiative in the United States and the Californian ETS. It analyses successes and failures with risky commodities, excessive number of credits and the oversupply of permits. It concludes that establishing a functioning, reliable and effective carbon market includes managing permits, including their pricing and supply, managing credits, ensuring adequate monitoring and government regulation. This article recommends an ETS in a combined regulatory matrix aimed at reducing greenhouse gas emissions. 142

Subsidising Fossil Fuels in Australia: Analysing the Agreement on Subsidies and Countervailing Measures from a Climate Change Perspective – *Sanja Nenadic*

This article explores whether the Australian Government’s proposals to subsidise the Adani Carmichael coal mine project and new, “clean coal” power plants contravene the Agreement on Subsidies and Countervailing Measures (ASCM). While the Adani subsidy would be considered a prohibited subsidy, legal, practical and political hurdles render a challenge unlikely. The “clean coal” proposal, on the other hand, would escape the reach of the ASCM altogether since the Agreement is solely concerned with subsidies that distort international trade. This focus is a key reason why the ASCM is ineffective at disciplining fossil fuel subsidies from a climate change perspective. The ASCM is inadequate in its current form to reconcile economic with environmental values, leading to calls for reform of the subsidies discipline. Crucial to any reform initiative will be a clarification of definition and standards, effective regime interaction and attentiveness to principles of development and equity. 159

Ms Onus and Mr Neal: Agitators in an Age of “Green Lawfare” – *Rachel Pepper and Rachael Chick*

There is an undeniable connection between access to justice and the rule of law, including the emerging concept of an environmental rule of law. Attempts to restrict standing of community groups and individuals to challenge exercises of executive power affecting the environment due to so-called ‘environmental lawfare’, and the existence of other barriers, undermine access to justice, and therefore, have a real tendency to undermine the rule of law. At a time when trust in public institutions is in decline in Australia, attempts to limit access to justice warrant close examination as to their justification and efficacy. 177

Redefining CSG “Waste” Water: New Opportunities for Managed Aquifer Recharge – *Jacqui Robertson*

Despite calls for increased gas exploration and development, water impacts by coal seam gas (CSG) projects are a continuing concern for many. Apart from fears about hydraulic fracturing, key tensions relate to the quantity of water co-produced with the gas. Some projects in Queensland, Australia, have been required to conduct aquifer injection trials with the CSG produced water: essentially, government-mandated Managed Aquifer Recharge (MAR). MAR is usually associated with other types of excess surface water. Aquifer injection of CSG produced water is potentially a key opportunity for the process. Despite this, the issues around injection of CSG produced water have not been considered in the developing policy frameworks for MAR. This article suggests that further research in respect of the regulatory frameworks governing aquifer injection in the CSG industry could guide regulatory reform not only relating to the CSG industry but also in respect of MAR projects generally. 188

Case Note – Millers Point Community Assoc Inc v Property NSW [2017] NSWLEC 92: The Sirius Building Case – *Dr MacLaren North*

The July 2017 decision by the NSW Land and Environment Court in *Millers Point Community Assoc Inc v Property NSW* concerns a challenge by a community group advocating for heritage and social housing within Millers Point, New South Wales, to the 2016 decision by the NSW Minister for Heritage to decline to list the social housing apartment building known as the Sirius Building on the NSW State Heritage Register, a register established under s 31 of the Heritage Act 1977 (NSW). This is an uncommon example of a heritage listing decision being litigated, and provides a number of important judicial insights into the heritage listing process in New South Wales. The case considers several matters which have never been previously tested before the courts in this context. These include the consideration of “undue financial hardship” and the duties of the Minister when deciding on a heritage listing. 212

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