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ARTICLES

Legislative limits on environmental decision-making: The application of the administrative law doctrines of jurisdictional fact and ultra vires – *Emma Bullen*

It is possible, having regard to the declining state of many aspects of the environment, that Parliament may wish to enact legislative limits on the decision-making powers of the executive so that, if an action is going to have a specified, unacceptable impact on the environment, an executive decision-maker will not have the power or jurisdiction to allow it to proceed. An essential consideration in imposing substantive limits on environmental decision-making is to ensure that the proposed limits can be judicially enforced without unduly straining the role of the courts in the process of judicial review. Through a consideration of the administrative law doctrines of jurisdictional fact and substantive ultra vires, this article evaluates possible techniques for limiting the discretion of environmental decision-makers and suggests the most appropriate means of doing so. 265

A comment on the draft report of the Productivity Commission's inquiry into the conservation of Australia's heritage places – *Matthew Baird*

In December 2005 the Productivity Commission released its draft report on the conservation of Australia's historic heritage places. The draft report advocated a number of significant changes to the current practices and procedures for heritage protection at local and national level. One of the draft report's primary recommendations was that the system of heritage listing by local governments should be amended so that an item could only be listed as an item of heritage if the owner of the item had entered into a voluntary conservation agreement with the local government authority concerned. Ignoring most of the submissions put before it by heritage based non-government organisations, the draft report rejected suggestions that there should be greater use of incentive or sanctions to preserve and protect items of historic heritage. Rather the recommendation focused on preserving the rights and interests of the property holder over society's interest in preserving items of historic heritage. The final report is due for release on 21 July 2006. 280

Can s 52 of the Trade Practices Act 1974 (Cth) be invoked against misleading statements by a proponent of a project in an environmental impact statement under Pts IV or V of the Environmental Planning and Assessment Act 1979 (NSW)? – *Anna Christie*

Environmental impact statements perform multiple roles. They inform decision-makers who decide whether to allow or prohibit a development (or "activity"). The role of EISs also extends further than the procedural requirements of impact assessment law. They are quasi-marketing documents which can be partisan towards the interests of the

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development proceeding. As such they have the potential to mislead their audiences about the extent and severity of impacts. A key feature of EISs is that they tend to contain highly technical and scientific information, which may be presented in such as way as to be misleading. The prohibition of "misleading or deceptive" conduct pursuant to s 52 of the *Trade Practices Act* is the subject of this analysis, in particular the test of what is "in trade or commerce" and who is a "consumer". Two other bodies of law are also discussed, namely the High Court's position on "adequacy of information" of EISs and the relevant law concerning expert evidence. 288

Biobanking in New South Wales: Legal issues in the design and implementation of a biodiversity offsets and banking scheme – *Paul Curnow* and *Louisa Fitz-Gerald*

The *Threatened Species Conservation Amendment (Biodiversity Banking) Bill 2006* was introduced in New South Wales Parliament in June this year. Its objective is to protect biodiversity in New South Wales, by imposing obligations on developers to protect and maintain biodiversity and allowing these obligations to be fulfilled through the purchase of "offsets" from landholders undertaking certain agreed conservation actions. The design and implementation of this type of environmental market requires consideration of a number of legal and regulatory issues, including the design of the new market "currency", new property rights, the monitoring and verification of biodiversity management plans and strategies to ensure permanence of biodiversity gains. This article examines these issues, drawing on experience in environmental markets from Australia and worldwide. 298

Pricing water for environmental externalities in Western Australia – *Alex Gardner*, *Darla Hatton MacDonald* and *Vivian Chung*

It is one of the premises of the Intergovernmental Agreement on a National Water Initiative that pricing water use for the environmental externality effects would contribute to the more sustainable use of water resources. This article explains the concept of the environmental externalities and the National Water Initiative pricing principles, considers the techniques of externality pricing and reviews the legal (constitutional and statutory) authority of the Western Australian government to set prices for water that include the costs of environmental externality effects of water use. It argues that the price of water to the licensed user and, subsequently, to the customers of water suppliers could reflect the annually determined scarcity of water in the surface or ground water system from which the water is taken. The article concludes with a discussion of the application of funds collected from the environmental externality pricing. 309

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