

# ENVIRONMENTAL AND PLANNING LAW JOURNAL

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## ARTICLES

**Planning law v property law: Overriding statutes and the Torrens system after *Hillpalm v Heaven's Door* and *Kogarah v Golden Paradise*** – *Brendan Edgeworth*

This article examines recent case law where planning law principles have collided with the property law imperatives of a cheap and efficient land title system. Planning and environmental legislation typically interacts with the Torrens system of registration of title to land in the form of statutes that override the protection otherwise provided to registered proprietors. Where the later statutes expressly or impliedly repeal the *Real Property Acts*, they reflect a policy preference that accords primacy to the regulation of land use and the environment in the public interest, with public rights taking priority over the regime of private property rights. However, recent case law, in particular the High Court's decision in *Hillpalm v Heaven's Door* and the New South Wales Court of Appeal's decision in *Kogarah Municipal Council v Golden Paradise*, appears to signal a more restrictive approach to the interpretation of planning and environmental legislation. In these cases, relevant provisions in planning legislation were held not to be expressed clearly enough to override the indefeasibility of the Torrens system. In consequence, the policy of protecting private property rights on the register has taken precedence over the relevant public law enactments, the *Environmental Planning and Assessment Act 1979* (NSW) and the *Local Government Act 1973* (NSW). This article examines the reasoning in these decisions, and proceeds to argue that the most recent case of *Bonaccorso v City of Canada Bay* represents a more defensible balancing of public and private interests in the regulation of rights over land. .... 82

**A history of Aboriginal heritage protection legislation in South Australia** – *Kelly D Wiltshire* and *Lynley A Wallis*

In recent decades changes in the administration and organisation of Aboriginal heritage protection have left this area in control of bureaucrats with problematic policy and practice. By retrospectively examining Aboriginal heritage protection in South Australia, with a focus on the *Aboriginal and Historic Relics Preservation Act 1965* (SA), the *Aboriginal Heritage Act 1979* (SA) and the *Aboriginal Heritage Act 1988* (SA), this article discusses how a lack of government will and poor administration policies have led to the inadequate management of Aboriginal heritage. It concludes that whilst the State Government continues to push for new protective legislation for Aboriginal heritage, without the appropriate administration policies and procedures, any new Act will continue to fail in its protective mechanisms and its hope of self-determination for South Australia's Aboriginal population. .... 98

**Climate change litigation actions for future generations – Dr Laura Horn**

Major impacts of climate change will occur in the future and will inevitably affect future generations of humans and life on the planet. This article reviews the theory of intergenerational equity and considers the reasons why the present generation should take into account the needs of future generations when developing policy and taking action to protect the environment. The elements of this theory are implicit in the United Nations Framework Convention on Climate Change because of the objectives of this convention however this theory will be examined to the extent that it could enable future generations to take action to ensure the climate is protected. The issue of standing is also addressed to consider possible options to enable the representation of future generations in future environmental international and national court actions. .... 115

**Conservation Agreements – Contracts or not? – Elisabeth Peden**

Voluntary agreements are being increasingly legislated for across a variety of environmental areas, including protection of flora, fauna and pollution regulation. This article argues that conservation agreements designed by legislation are at most distant relatives of common law agreements or contracts. The various key elements of common law contracts are outlined in comparison with examples of legislative agreements, including the elements of parties to the agreements, enforceability, duration, and available remedies for breach. This investigation provides an insight into the consequences of governments regulating environmental protection through pseudo-contractual means and highlights possible weaknesses of the use of legislative agreements. .... 136

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# Guidelines for Contributors

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