

# ENVIRONMENTAL AND PLANNING LAW JOURNAL

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## ARTICLES

### **Sustainable development law in the courts: The polluter pays principle**

– *Hon Justice Brian J Preston*

The polluter pays principle is a key principle of ecologically sustainable development. The principle holds that those who generate pollution and waste should bear the costs of containment, avoidance and abatement. This article discusses Australian cases relating to four situations which reflect the polluter pays principle as this principle arises in the courts. These four situations are: in sentencing for environmental crimes; in imposing civil penalties for statutory breach; in reviewing administrative orders imposed by regulatory agencies; and in granting approval for development in merits review appeals. .... 257

### **Australia's draft climate laws – Dr Chris McGrath**

This article examines the mechanics of Australia's proposed Carbon Pollution Reduction Scheme. The scheme is intimately intertwined with the National Greenhouse and Energy Reporting Act 2007 (Cth), which was Australia's first step towards national regulation of greenhouse gas emissions. Key concepts creating liability such as "facility" and "operational control" straddle both pieces of legislation and their subordinate legislation. The resulting scheme is marred by convoluted drafting but it has immense importance for Australian business and may form a cornerstone for Australia's response to climate change. The scheme is by no means the final word on climate change regulation in Australia. Laws to avoid dangerous climate change are likely to increase rapidly and in large leaps in the future in response to severe impacts of climate change being felt. .... 267

### **Who will be liable for Australia's solution to pollution? An analysis of the scope of businesses' liability under the Carbon Pollution Reduction Scheme**

– *Mia Louise Livingstone*

Consistent with achieving an international agreement to reduce greenhouse gas emissions at Copenhagen in December 2009, Australia, like the United States, is currently in the throes of having its emissions trading scheme legislation processed through Parliament. The Rudd Government is on track to have its heavily-debated Carbon Pollution Reduction Scheme (CPRS) passed during Parliament's Winter sessions this year. If successful, Australian businesses will only have until 1 July 2011 to prepare for the onerous obligations imposed upon those liable under the wide-reaching legislation. This article analyses businesses' liability for the core reporting and surrendering obligations imposed under the CPRS. It finds that businesses and their executive officers who contravene the CPRS will not only be liable for the wide-ranging administrative, civil and criminal penalties in the CPRS itself, but they may also face civil and criminal liability under the Corporations Act 2001 (Cth), the Australian Securities and Investments Commission Act 2001 (Cth), the Criminal Code 1995 (Cth), the Trade Practices Act 1974 (Cth) and State and Territory fair trading legislation in respect of the same conduct. In particular, businesses and their executive officers should be aware of the extensive monitoring and information-gathering powers that will be conferred upon the regulatory body established

under the CPRS, the Australian Climate Change Regulatory Authority, and adopt procedures to protect the disclosure to, and use by, the regulator of privileged and confidential information. .... 292

**The European Union's Emissions Trading Scheme: International emissions trading lessons for the Copenhagen Protocol and implications for Australia?**

– *Caroline Haywood*

In preparation for the UNFCCC Copenhagen Conference in December 2009, the world is focusing on the content of the post-2012 climate change regime. In particular, the flexibility mechanisms of the Kyoto Protocol, including international emissions trading under Art 17, must be enhanced if they are to remain meaningful elements of this regime. The European Union's Emissions Trading Scheme (EU ETS) is the first and largest multinational ETS to date. In analysing the successes and failures of and potential improvements to the EU ETS, this article argues that an improved EU scheme should be adapted to suit a global setting and adopted at Copenhagen to improve the current international emissions trading scheme. Due to the growing number of domestic ETSs, a "bottom-up" emissions trading scheme should be considered as an alternative to a UNFCCC international emissions trading scheme. A study of the implications of linking the EU ETS to Australia's Carbon Pollution Reduction Scheme will prove that "bottom-up" schemes are a viable means of exploiting this significant emission reduction instrument. .... 310

**BOOK REVIEW**

*Climate Change Law – Comparative, Contractual and Regulatory Considerations*

edited by Gumley W and Day-Winterbottom T ..... 330

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    - <sup>2</sup> Hayton, n 1, p 286.
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