

ENVIRONMENTAL AND PLANNING LAW JOURNAL

Volume 27, Number 2

March 2010

ARTICLES

Water law, the High Court and techniques of judicial reasoning – Professor DE Fisher

The status of rights and interests in relation to water has never been unambiguous. Are they rights of access, of use or of property? Is the status of individual rights the same as the status of the statutory rights of the State to the use and control of water? Much depends upon which stage of the hydrological cycle is relevant: water in its natural state, water stored in a reservoir, water piped to a distant destination, or water contained in a receptacle. The High Court has recently addressed some of these issues in the context of s 51(xxxi) of the Commonwealth Constitution restricting acquisition of property to acquisition on just terms. In undertaking this analysis the High Court has revealed an interesting range of approaches to legal reasoning. This article seeks to review some of these issues.

85

An evaluation of compliance and enforcement mechanisms in the Environment Protection and Biodiversity Conservation Act 1999 (Cth) and their application by the Commonwealth – Zada Lipman

The Environment Protection and Biodiversity Conservation Act 1999 (Cth) was heralded as a landmark in environment protection. It provides a range of innovative remedies and sanctions – administrative, civil and criminal – which include pecuniary penalties of up to \$5.5 million for a corporation and \$550,000 for an individual, and criminal penalties of up to seven years’ imprisonment. Clearly, the Act was intended to be a major deterrent to those causing harm to the environment; yet, despite increasing environmental degradation, there has been a significant lack of enforcement by the Commonwealth. When action has been taken, the Commonwealth has preferred a negotiated settlement to adversarial proceedings. This article evaluates some of the most significant compliance and enforcement mechanisms in the Act and their application by the Commonwealth. It discusses some of the recommendations of an independent review for strengthening compliance and enforcement. It argues that Commonwealth lack of enforcement has not been due to a lack of enforcement mechanisms in the Act, but rather to its adherence to a policy of responsive regulation and the manner in which it has been applied.

98

The use of facilitative dispute resolution in the State Administrative Tribunal of Western Australia – Central rather than alternative dispute resolution in planning cases – David R Parry

The State Administrative Tribunal of Western Australia has adopted the term “facilitative dispute resolution” (FDR) to refer to a suite of non-adjudicative processes that it employs to resolve or narrow disputes. The tribunal resolves about 75% of planning review applications (appeals) by FDR and also reduces the scope of dispute in many cases that require adjudication by these means. This article describes and discusses the use of FDR processes in the tribunal, before comparing the proportion of planning review applications resolved by FDR in the tribunal with other Australian planning jurisdictions. Finally, the article identifies six benefits of FDR in achieving quick, just and proportionate dispute resolution with minimum costs to the parties and to the State.

113

Emissions trading in Australia: Markets, law and justice under the CPRS
– *Michael Power*

Throughout their short history, emissions trading schemes have exhibited some serious perennial weaknesses, inherent in the nature of the market solution they provide. Nonetheless, the international community and the Rudd Government have put their faith in this regulatory response to climate change. As the CPRS makes the transition from policy idea to legal fact, this article draws on the history of emissions trading schemes to critically analyse the CPRS legislation currently before Parliament, and identify three broad areas in which the Australian carbon market is likely to encounter challenges: market design, scheme enforcement, and climate justice. 131

Submission requirements

All contributions to the journal are welcome and should be emailed to the Production Editor, *Environmental and Planning Law Journal*, at LTA.eplj@thomsonreuters.com for forwarding to the Editor.

Licences

- It is a condition of publication in the journal that contributors complete a licence agreement. Licence agreements can be downloaded at http://www.thomsonreuters.com.au/support/as_contributors.asp and emailed with the submission or mailed separately to the Production Editor, *Environmental and Planning Law Journal*, Thomson Reuters (Professional) Australia Limited, PO Box 3502, Rozelle, NSW 2039.

Letters to the Editor

- By submitting a letter to the Editor of this journal for publication, you agree that Thomson Reuters, trading as Lawbook Co, may edit and has the right to, and may license third parties to, reproduce in electronic form and communicate the letter.

Manuscript

- Manuscript must be original, unpublished work that has not been submitted or accepted for publication elsewhere, including for online publication.
- Personal details (name, qualifications, position) for publication and a delivery address, email address and phone number must be included with the manuscript on a separate page.
- Manuscript must be submitted electronically via email in Microsoft Word format.
- Manuscript should not exceed 15,000 words for articles or 3,000 words for section commentary or book reviews.
- An abstract of 100-150 words must be included at the head of articles.
- Authors are responsible for the accuracy of case names, citations and other references. Proof pages will be emailed to contributors but excessive changes cannot be accommodated.
- **Graphics** (diagrams and graphs) to be grayscale; in .jpeg format; no more than 12 cm in width; within a box; of high resolution (at least 300 dpi); font is to be Times New Roman, no more than 10pt. The heading for a graphic should be placed outside the box.

Peer review

- This journal complies with the Higher Education Research Data Collection (HERDC) Specifications for peer review. Each article is, prior to acceptance, reviewed in its entirety by a suitably qualified expert who is independent of the author.

Style

1. **Levels of headings** must be clearly indicated (no more than four levels).
2. **Unpointed style** is to be used – there are no full stops after any abbreviation or contraction.
3. **Cases:**
 - Where a case is cited in the text, the citation follows immediately after the case name, not as a footnote.
 - Authorised reports must be cited where published, and one other reference can be used in addition.
 - For “at” references use media-neutral paragraph numbers within square brackets whenever available.
 - For international cases best references only should be used.
4. **Legislation** is cited as follows:
 - *Trade Practices Act 1974* (Cth), s 51AC (including in full within footnotes).
5. **Books** are cited as follows:
 - Ross D, *Ross on Crime* (3rd ed, Lawbook Co, Sydney, 2006) pp 100-101.
 - In footnotes do not use *ibid* or *op cit*. Repeat author surname and add footnote reference to first mention.
 - ¹ Hayton D, “Unique Rules for the Unique Institution, The Trust” in Degeling S and Edelman J (eds), *Equity in Commercial Law* (Lawbook Co, Sydney, 2005) p 284.
 - ² Hayton, n 1, p 286.
6. **Journals** are cited as follows:
 - Kirby M, “The Urgent Need for Forensic Excellence” (2008) 32 Crim LJ 205.
 - In footnotes do not use *ibid* or *op cit*. Repeat author surname and add footnote reference to first mention.
 - ³ Trindade R and Smith R, “Modernising Australian Merger Analysis” (2007) 35 ABLR 358.
 - ⁴ Trindade and Smith, n 3 at 358-359.
 - Wherever possible use official journal title abbreviations.
7. **Internet references** are cited as follows:
 - Ricketson S, *The Law of Intellectual Property: Copyright, Designs and Confidential Information* (Lawbook Co, subscription service) at [16.340], <http://www.thomsonreuters.com.au/default.asp> viewed 25 June 2007. Underline the URL and include the date the document was viewed.

SUBSCRIPTION INFORMATION

The *Environmental and Planning Law Journal* comprises six parts a year.

The journal is available for subscription via paper and/or online. An online subscription can include access to archived volumes of the journal dating back to 1984 and has the following benefits: all content is fully searchable; PDF versions are provided for easier reading; users can subscribe to an RSS feed to be instantly informed of updates.

For further information on how to subscribe:

Visit www.thomsonreuters.com.au

Tel: 1300 304 195

Email: LTA.Service@thomsonreuters.com

Advertising inquiries:

Contact Andrew Parsons on (02) 8587 7462 or email a.parsons@thomsonreuters.com

Editorial inquiries: Tel: (02) 8587 7000

Customer service and sales inquiries:

Tel: 1300 304 195 Fax: 1300 304 196

Web: www.thomsonreuters.com.au

Email: LTA.Service@thomsonreuters.com

Head Office

100 Harris Street PYRMONT NSW 2009

Tel: (02) 8587 7000 Fax: (02) 8587 7100



THOMSON REUTERS

© 2010 Thomson Reuters (Professional) Australia Limited ABN 64 058 914 668

Lawbook Co.

Published in Sydney

ISSN 0813-300X

Typeset by Thomson Reuters (Professional) Australia Limited, Pyrmont, NSW

Printed by Ligare Pty Ltd, Riverwood, NSW