

# ENVIRONMENTAL AND PLANNING LAW JOURNAL

Volume 27, Number 3

May 2010

## ARTICLES

### **Climate change law: Lessons from the Californian experience** – *Jacqueline Peel* and *Michael Power*

California is widely recognised as a leading jurisdiction in the area of climate change law, adopting innovative and ambitious measures on issues such as renewable energy use and the incorporation of global warming considerations into environmental assessment. This article analyses the key elements of Californian climate change law in order to highlight the ways in which other climate regulatory frameworks might be modified, or more imaginatively implemented, in order to improve their environmental effectiveness. Comparisons are drawn principally with Australian climate change measures because of the similarities that exist in environmental factors, governance and regulatory structures between Australia and the United States. The final section of the article focuses on the broader lessons for domestic climate change law from the Californian experience, including the importance of an integrated regulatory approach and the capacity to adapt pre-existing environmental laws to deal with the novel problem of climate change. .... 169

### **Integration and reconciliation of social, legal and environmental interests under Indigenous land rights sea claims** – *Shoanne Labowitch*

The desire for Traditional Owners and Indigenous groups within Australia to exert greater control over their ancestral land and water has been growing in momentum since *Mabo v Queensland (No 2)* (1992) 175 CLR 1. Recognition of native title over claimed areas by the judiciary can often illicit resistance from pre-existing usage regimes that have managed and exploited the resources. The expansion of Indigenous land claims to include seaward margins has revealed such a conflict, with the granting of land and sea claims to the Yolngu Traditional Owners coming into conflict with the capacity for the Director of Fisheries to issue commercial licences according to Northern Territory Fisheries legislation. The matter was taken to the High Court and the rights of native title holders in regard to their sea country, in the presence of conflicting statutory regimes, was further clarified. .... 189

### **Exclusion of agriculture from the (prospective) CPRS – good policy or good politics? A discussion of legal and policy options in the context of current political developments** – *Steven Geroe*

This article assesses whether the exclusion of agriculture from the cap-and-trade CPRS is justified, through an evaluation of the range of policies put forward in the current debate – including voluntary offsets linked to the CPRS, Mr Abbot's ERF proposal and a phased/hybrid scheme transitioning through a baseline-and-credit stage as has been proposed by Land and Water Australia. The article places considerable focus on technical and methodological problems associated with both full inclusion of the agriculture sector as a whole, as well as in relation to accreditation of potential offset categories such as biochar and soil carbon accreditation. Broader issues of social/economic equity in terms of exclusion of agriculture, as well as the potential role of agricultural/land-use (LULUCF) offsets in the context of an overall approach to emissions reduction are considered. .... 202

**The limits of merits review and the EPBC Act: Grey nurse sharks, fisheries and the AAT – Rachael de Hosson**

The grey nurse shark is listed as a critically-endangered species under the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act). One of the primary risks to the continued survival of the species is commercial fishing activity. Part 13A of the EPBC Act prohibits the export of product from a fishery if its operations will be detrimental to the survival of a taxon to which the operation relates. In 2007, the New South Wales Nature Conservation Council (NCC) brought a case in the Commonwealth Administrative Appeals Tribunal (AAT) challenging a decision of the Minister made under Pt 13A that allowed a commercial fishery in New South Wales to continue to export product. The NCC argued that the fishery's continued operation would be detrimental to the survival of the shark. The case was only the second time a decision in relation to fisheries assessment under Pt 13A had been challenged, and the first concerning a State-managed fishery. This article analyses the AAT's judgment and argues that it is flawed in many respects. It then uses the case to assess the role of merits review under the EPBC Act, highlighting that, although the AAT is not an ideal forum for review of environmental decisions, it is nevertheless important. Finally, the Grey Nurse Sharks Case is used to assess the effectiveness of Commonwealth regulation of State and Territory-managed fisheries under Pt 13A. .... 223

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