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POLICY AND PRACTICE: AUSTRALIAN CAPITAL TERRITORY

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ARTICLES

A question of fact and degree: The impact of the doctrine of ancillary use on place-based planning – *Jennifer Manefield*

This article explores the issue of characterisation of applications for development. It considers the development in case law of the test of “fact and degree” in determining whether a proposed development contains elements that might be considered ancillary and/or independent to the primary proposed development. It posits that both applicants and objectors have sought to exploit this distinction to promote planning outcomes that were not envisaged or desired under Environmental Planning Instruments and Development Control Plans that were created through processes of public participation. Alternatively, the development of the “fact and degree” test may encourage genuine flexibility and encourage a place-based approach to plan making that reflects a community’s needs and aspirations. It is therefore important for local governments to reflect on the possible range of ancillary uses that might be connected to a particular dominant use so as to ensure that these ancillary uses are properly controlled, and that local communities are aware of the sorts of developments and land uses that might be considered “ancillary” to the dominant use permitted on land in their localities. This will facilitate a greater level of public participation in the plan making system, and will ensure better communication between communities, land regulators and developers about the sorts of developments that might be pursued in particular areas. 135

Taxation incentives for conservation covenants – *Susan Shearing*

A variety of taxation incentives to encourage philanthropy and environmental conservation by private landowners have applied in jurisdictions such as the United States and Canada for many years. This article examines the introduction of tax incentives under the *Income Tax Assessment Act 1997* (Cth) to encourage the use of conservation covenants by private landowners to provide permanent protection to the environment in Australia. The amendments, which apply to certain types of conservation covenants entered into on or after 1 July 2002, provide for income tax deductions and concessional capital gains tax treatment where a qualifying conservation covenant is created. The legal and policy background to the introduction of the tax concessions in Australia is outlined and the requirements of the relevant legislative provisions discussed. The article raises a number of issues concerning the potential effectiveness of such incentives to facilitate private conservation of biodiversity. 139

The approach of the courts to the construction and application of time limit privative clauses – Ian Ellis-Jones

A time limit privative clause differs from other types of privative clauses in that it is analogous to a statute of limitations. By its very nature, this type of privative clause does not constitute an absolute bar to judicial review. Thus, there is not the same compulsion to construe the clause as strictly as is the case with other types of privative clauses. Subject to one important qualification (compliance with the well-known Hickman principle and any other “inviolable limitations or restraints” on the power), a time limit privative clause in a statute passed by a state legislature ordinarily will prevent judicial review once the time period has expired. Despite some earlier confusion, a much clearer and more predictable and consistent approach is now being taken by superior courts in the exercise of their inherent supervisory powers of judicial review of administrative decisions. In particular, it now seems beyond doubt that a failure to observe “inviolable limitations or restraints” is a jurisdictional error and, accordingly, not a “decision” under the relevant enactment even as regards a time limit privative clause expressed to prevent the questioning of “validity” of a decision which has been held to otherwise extend to “purported decisions” as well as “decisions”. 153

New approvals system for major projects in New South Wales – what does it all mean? – Rob Campbell-Watt

The commencement of new Pt 3A of the *Environmental Planning and Assessment Act 1979* (NSW) on 1 August 2005 introduced a new approval system for major development and infrastructure projects in New South Wales. The New South Wales Government intended that the new legislation would bring economic and other benefits through a streamlined approval process. The legislation is controversial and likely to remain so, particularly with the high profile Sydney Water Desalination Plant proposal declared as critical infrastructure under its provisions. This article examines the new legislation and provides comment on the kinds of Pt 3A projects, the new environmental assessment process, opportunities for public participation and appeal rights. The article also compares the benefits of the new Pt 3A approvals process with the existing Pt 5 approvals process for infrastructure projects proposed by public authorities. 160

Founding environmental rights in the natural order: A new rationale for environmental protection – Sydney Birchall

A universally accepted rationale for the protection of the environment has so far eluded environmental thinkers. In particular, theories espousing rights for nature appear to have fallen from favour. This article makes a fresh attempt at developing a coherent rationale for environmental protection based on rights theory, by carefully re-examining the logic of rights theory itself, then replacing morality and intrinsic value with the natural order of Earth as a foundation for a code of rights for nature. 170

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