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EDITORIAL

- Why Australia (Desperately) Needs a New National Sustainability Strategy –
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ARTICLES

**Urgent Need to Use and Reform Critical Habitat Listing in Australian Legislation in
Response to the Extensive 2019–2020 Bushfires – *James A Fitzsimons***

The unprecedented bushfires of 2019–2020 burnt significant areas of forest and woodland in eastern and southern Australia. The size of the area burnt, and intensity of the fire has meant the majority of habitat for a large number of threatened species has been impacted, placing high conservation value on the unburnt refuges remaining. Most Australian jurisdictions have provision for “critical habitat” listing under their threatened species legislation. However, these provisions have been under-utilised. Here, I review these provisions in the jurisdictions impacted by these fires. Considering the number of threatened species and the crucial role of critical habitat in their recovery, new processes will need to be implemented to rapidly assess and designate critical habitat under existing provisions and future reforms to legislation implemented in order to deal with future events such as these extensive bushfires.

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**A Case Study of Incentive Regulation in Electricity Transmission Networks for the
Uptake of Renewable Energy: Build It and They Will Come – *Simon Anderson***

Electricity transmission is the blood line of the electricity industry and is a critical component in the transition towards renewable generation of electricity. This article analyses the current framework that regulates electricity transmission investment within the National Electricity Market and why the current incentive model for transmission investment is inadequate to facilitating the matching of transmission investment to the uptake of renewable generation. Alternative transmission investment models and regulatory approaches are comparatively assessed, including a case study of Texas and the development of renewable energy in Australia including offshore wind and solar PV. These case studies and alternative regulatory models showcase that more direct action is required if the transmission network is to adequately facilitate renewable energy generation uptake while also reducing prices for consumers.

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**“If We Don’t Mine Coal, Someone Else Will”: Debunking the “Market Substitution
Assumption” in Queensland Climate Change Litigation – *Justine Bell-James and Briana
Collins***

The market substitution assumption (MSA) has been widely used in both courts and policy circles as a justification for approving a coal mine. The MSA is the assertion that, if a particular mine is rejected, another mine will be developed elsewhere in its stead – therefore approving the mine has no consequences for the environment. In this article,

we systematically address and analyse the problems with the MSA, using climate change litigation in Queensland as a case example. These problems include the economic theory on which it is based, the role of changing market conditions, the uncertainty associated with it and the resulting implications for the standard of proof and precautionary principle, and finally its moral and ethical issues. We conclude that there are ample grounds upon which courts can reject the MSA. 167

Environmental Class Actions in Australia: A Coming Storm? – Corey Byrne

Class actions are still in a period of relative infancy in Australia and, to date, Australian class action jurisprudence has been heavily dominated by shareholder and investor claims. However, recent developments including the expansion of State-based class action regimes and the growth of the litigation funding market offer opportunities for new types of claims to be brought as class actions. One of those is the environmental class action, which is a largely unexplored area of Australian class action jurisprudence. This article examines the potential of environmental class action in Australia, concluding that, unlike comparable jurisdictions, the Australian class action regime provides fertile ground for such claims. The article also considers the viability of some novel types of claims which may be brought in Australia as environmental class actions, including claims for breach of statutory environmental duties, claims by foreign claimants against Australian-domiciled entities responsible for foreign pollution and climate change based claims. 186

Climate-induced Displacement: Protection under the Current International Legal Frameworks – Ishrat Jahan

Climate-induced displacement is one of the major challenges of the 21st century for the international community. The complex situations of climate-induced displacement raise questions about how well current international legal frameworks truly protect people who are displaced by the adverse impacts of climate change. The Paris Agreement is the latest international treaty adopted under the climate change regime. It has recognised the linkage between climate change and displacement. However, the Paris Agreement is not sufficient to address climate-induced displacement and other existing international legal frameworks do not fill the gaps. To protect the climate-displaced people, it is necessary to take some robust steps. Such vigorous measures could be done by adding a Protocol to the United Nations Framework Convention on Climate Change or by amending the Convention Relating to the Status of Refugees 1951. The international community should build consensus for possible solutions to address climate-induced displacement. 225

Reconsidering the Species-specific Approach: Insects and the Environment Protection and Biodiversity Conservation Act – Sophie Lloyd

This article discusses Australia’s national protection of insects under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (*EPBC Act*). After briefly outlining the state of insect biodiversity in Australia, the article outlines the limitations of the *EPBC Act*’s species-specific protections. Most native insect species are not yet scientifically described or adequately observed, making species-specific protections impossible. Furthermore, current protected-species lists demonstrate a prejudice in favour of native mammal species. Parts IV and V propose alternative species-specific protections appropriate for potentially threatened insect species, including a data-deficient or short-range-endemics listing category. While this article concedes that improvements could be made to the species-specific approach, it also recognises that this approach is not suitable for the great number of unknown native insect species. Instead, it is suggested that increased utilisation of ecosystem-scale approaches would be more effective. The

article briefly considers landscape-scale approaches, focusing on increased utilisation of bioregional planning under the *EPBC Act*. 242

Muddied Waters: Revealing Methodological Confusion in Australia’s Environmental Impact Assessment Process – *Maya Suzuki*

Environmental impact assessment (EIA) is a tool which identifies and evaluates the likely impacts of a development project on the environment, economy and society. It forms an integral part of the regulatory framework of the *Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act)*. There appears to be, however, an issue which is undermining EIA’s intended purposes to facilitate informed decision-making and achieve the environmental objectives of the *EPBC Act*: the methodological clarity of EIA. Currently, there is no widely accepted method for assessing environmental and economic impacts. This study exposes the methodological confusion in the assessment of environmental and economic impacts of mining projects assessed under the *EPBC Act* and analyses the implications of this issue for EIA’s ability to achieve its intended purposes. The article concludes that failure by the legislature to address methodological confusion risks undermining the legitimacy and effectiveness of EIA in Australia. 267

Essay Topic: A New Era for a Higher Level of Public Participation in the Administration of Environmental Law and Justice in the People’s Republic of China – *Xu (John) Zhang* 282

