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ARTICLES

Carving the Path for the Future of Climate Change Litigation Using Tort Law: A Comparative Case Study of the Australian Sharma Decision and the Dutch Decision of Urgenda – *Eloise Culic*

A code red for humanity, the issue of climate change poses a significant challenge for current and future generations around the world. The global commitment made to limit warming to well below 1.5℃ of pre-industrial levels is becoming increasingly urgent. Recent significant case law developments, including the Australian *Sharma v Minister for the Environment* and Dutch *Stichting Urgenda v Government of the Netherlands (Ministry of Infrastructure and the Environment)* decisions highlight the value of tort law as a mechanism to argue climate cases, influence public debate, and shift governmental and corporate decision-making. This comparative analysis of tort litigation in Australia and the Netherlands aims to inform future climate litigation direction. By assessing the convergences and divergences of these jurisdictions the strengths and weaknesses of a tort law approach can be better informed. Ultimately, there is a compelling case for the use of tort law to advance the climate agenda which should not be abandoned because of entrenched legal obstacles. 279

Solastalgia: Recognition by the Land and Environment Court of the Social Impacts of Fossil Fuel Developments – *Jasper Brown, Matt Floro, Francesca Cutri and Grace Huang*

Solastalgia is a psychoterratic phenomenon relating to place-based distress caused by environmental changes. The concept of solastalgia was developed in 2003 by Professor Glenn Albrecht and its use has been mostly limited to social studies purposes, medical purposes, and international environmental purposes. Recently, judges in the New South Wales Land and Environment Court have utilised solastalgia in State planning law. The decisions in Gloucester Resources Ltd v Minister for Planning and Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure explored solastalgia and applied it within the development application assessment process. These decisions represent changing assumptions concerning ontology, epistemology, and social research. This is consistent with the observable shift in the Court's decision-making process to a more constructivist position of epistemology with a more balanced weighting of qualitative research methods. This is reflective of an established position in the philosophy of science, critical realism. 295

What Is "Waste" for the Purposes of the Protection of the Environment Operations Act 1997 (NSW) and the Practical Implications for Its Management, Including Opportunities and Challenges for Resource Recovery and Re-use, on Linear Infrastructure Projects in New South Wales? – *Nathan Hegerty*

Waste. What is it, and how is it legally defined? These questions have been at the forefront of several cases heard in the New South Wales (NSW) Land and Environment Court in recent

years. Judicial interpretation has favoured a broad, rather than restrictive interpretation of the definition of waste for the purposes of the *Protection of the Environment Operations Act 1997 (NSW)* (PEOA). This article seeks to provide a critical analysis of the definition of waste provided in the PEOA, along with a review of relevant case law to demonstrate the evolving judicial interpretation of the definition. Statutory and judicial interpretations of the definition of waste are then applied to real world scenarios using linear infrastructure projects (road and electricity) to illustrate some of the opportunities and challenges for waste management, resource recovery and re-use under the current NSW legislative framework. Several recommendations are provided for potential reforms. 315

Opportunities to Regulate Greenhouse Gas Emissions as Air Pollution – *Rebecca Hiscock*

Despite being a Paris Agreement signatory, the Australian Government has so far declined to enact comprehensive legislation to control greenhouse gas emissions or to adopt a net zero target. Favouring a "hands off" approach to this politically divisive issue, federal climate policy relies on technological advancements, and their adoption by the private sector. This climate law vacuum is being filled in an ad hoc way by climate litigation and a growing body of industry standards, with the private sector taking cues from the growing environmental, social and governance movement to adopt net zero targets. A decisive regulatory response would support Australia's economic recovery from the pandemic by providing greater certainty, particularly in the energy and resources sectors. This article examines the extent to which emissions intensive activities are regulated at the State level, identifying three opportunities to do so more comprehensively within the existing statutory framework for air pollution. 332

Carrots and Sticks: Is There Room for More Anti-pollution Incentives? – *Kenny Ng*

Pollution, which includes greenhouse gas emissions, is a by-product of human activity that must be controlled in an industrial and capitalist world. The law, by itself, is not a tool which can effectively respond to all pollution problems, being inadequate in creating strong enough incentives to not pollute or disincentives to pollute. Hence, pollution laws must work in tandem with other instruments to create such effective pollution-related incentives and disincentives, given the human-centredness of the pollution issue in contemporary societies. This article evaluates Australia's current greenhouse gas emissions framework. It argues that more can be done in Australia to improve the existing incentives to not pollute and disincentives to pollute, and to achieve a better balance between these incentives and disincentives to more effectively reduce pollution. Public and private sector solutions are proffered. 349

Unbearable Darkness of Denial – The Conundrum of Nature Resource Development on Country – *Dr Judith Preston*

This article considers how legal and governance framework can be changed to effect changes in an attempt to prevent an incident like the Juukan Caves destruction. The first part considers the changing priorities of the international legal framework regulating corporate behaviour in resource development. The second part overviews how significant Aboriginal cultural heritage, could occur in the 21st century. The third part considers, in the light of corporate recriminations by Rio Tinto and other influential corporate parties, how reform can be effected towards systemic changes to Aboriginal cultural heritage protection and corporate practice for human rights and environmental justice. 383