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ARTICLES

Does the "One-Stop Shop" Need Refurbishing? Evaluating the Review Jurisdiction of the NSW Land and Environment Court – *Christopher Pearce*

This article examines the role of the New South Wales (NSW) Land and Environment Court. It considers the criticisms levelled at the Court's review processes, in particular, suggestions that review bodies may intrude upon the merits of the original decision, and thereby disrupt or confuse the accepted understandings of principles applied by practitioners. This article then examines the benefits associated with review proceedings, in particular their ability to protect litigation brought in the public interest, and to shed light upon biased or corrupt decision-making. This article also highlights the ongoing development of the Court's role, with the continued evolution of Planning Principles and opportunities for continued growth into the future. This paper ultimately posits the view that the ongoing tension between planners, councils and the Court should not be viewed as a cause for concern, but a sign of a healthy system of accountability in the NSW Planning System. 235

Offsetting Cultural Heritage: Lessons from the Theory and Practice of Biodiversity Offsets – *Robert Holbrook and Professor Jan McDonald*

There is growing interest in the use of offsets to compensate for the loss of cultural heritage values through development, and evidence that cultural heritage offsetting is already occurring in practice. Cultural heritage offsets should be approached with great caution as they risk normalising the destruction of cultural heritage and the commodification of unique cultural heritage values. If cultural heritage offsets are already occurring, however, there is an opportunity to fill the policy and legislative vacuum in which this practice is occurring. The theory and experience of biodiversity offsetting offers important guidance on pitfalls and what features require particular attention to create a highly precautionary framework that provides more accountability, robust standards and enforceable processes. In particular, compliance with the mitigation hierarchy should be both a substantive and procedural requirement. Offset requirements should also be premised on an objective of net enhancement of heritage values. The specific requirements for meeting "net enhancement" should be articulated and elaborated in a way that is capable of measurement and evaluation, and should allow for "no go" sites where enhancement cannot be achieved because of unique or intangible values. As a general rule, like-for-like offsets should be preferred and indirect offsets minimised, but there may be strong arguments in some cases for why a more strategic and landscape-scale approach to offset identification and funding can yield more important heritage outcomes. The identification of strategic benefits requires an accurate and up-to-date information base and the right people and groups engaged in decision-making. In this case of Indigenous cultural heritage, free, prior and informed consent to offset arrangement should be a necessary but not sufficient prerequisite. Finally, cultural heritage offsets arrangements must be rigorously monitored and enforced for effectiveness.

This requires ongoing monitoring of offset performance and the incorporation of adaptive management mechanisms to allow new requirements where evidence shows that offsets are falling short of net enhancement outcomes. 247

The Assessment of Flooding Risks in the Courts: Seeds of a Divergent Jurisprudence – *Dr Philippa England*

In Australia, risk analysis, risk assessment and risk management are buzz words for decision-makers who must deal with the prospective – but relatively uncertain – impacts of climate change and other environmental risks. But what do these terms mean in practice and how do they play out in the courts? This article identifies some divergent approaches to these issues with particular regard to planning policies, instruments and case law involving a risk of flooding. It identifies three alternative policy approaches and tracks their application (and non-application) in the courts in particular flooding cases. It argues that, despite a dominant policy paradigm favouring strategic land-use planning and adaptive risk management, when assessing flooding risks, the courts have often applied a more normative and precautionary approach in their own decision-making. Some reasons for this "divergent jurisprudence" are discussed. 267

Australian Government's Ongoing Challenge to Achieve Fuel Efficiency Standards by 2025 Can Impact on 2015 Paris Agreement – *Anna Mortimore and Hope Ashiabor*

There is a clear need for the introduction of fuel efficiency standards to reduce road transport emissions which have increased since 1990 and are at their peak in 2017. Fuel efficiency standards have been adopted by over 80% of the global vehicle market and have successfully helped to reduce road transport emissions. This article considers the failed policy transfer by Australian Governments in adopting fuel efficiency standards and critically assesses the rhetoric across the political spectrum – the continuing climate discourse and climate politics between the Australian Government and industry actors since 1996 to 2017. While public statements paid lip service to reducing road emissions, climate action ultimately reflected industry interests. The upshot is a failed regulatory regime; increasing consumer demand for higher CO_2 emitting vehicles and an international reputation that Australia is a laggard in reducing road transport emissions. With the Australian Government ratifying the 2015 Paris Climate Agreement, the international expectation is for climate discourse and climate politics to come to a head and for Australia to finally phase in internationally harmonised fuel efficiency standards by 2025. 280

It Is about Time: Understanding the Textures of Time in Australian Environmental Law – *Benjamin J Richardson*

Environmental law functions through temporal concepts and time-related mechanisms, as well as influences the timescales of natural systems through its regulation of environmental-impacting activities. These textures of time are not only poorly conceptualised in accounts of environmental law, many environmental decisions diverge from the timescales of biological, ecological and climatic systems. The dominant philosophy of sustainable development, which orientates governance to the future, has displaced our attention from other germane temporal dimensions of governance, namely: repairing historic ecological damage (ie past time), improving the law's responsiveness to mutable circumstances (ie adaptive time), and managing the pace of environmental change (ie tempo). These weaknesses stem from deficiencies in the design of laws and their cultural and economic milieu. With primary reference to the Australian context, this article advances a novel critique of environmental law through the lens of time and suggests ways to align it with nature's timescales. 299

Public Participation and the Adani Syndrome – *Dr Noeleen McNamara and Dr William Crane*

The ability of members of the public to participate in environmental decision-making is regarded as a key component of achieving ecologically sustainable development. Indeed, public participation principles are now incorporated into Commonwealth and State resource development legislation. In recent years, specific projects (particularly coal projects) have been targeted by very well-organised and funded groups, resulting in delays or abandonment of projects, long after Commonwealth and State approvals have been obtained. The Adani Carmichael mine in Queensland is but one case in point. This article argues that, while there is a valid role for members of the public to be consulted and make submissions to the regulators or courts, the public have adequate opportunities to participate by appealing the regulators' decisions in the State court system rather than the current duplication of appeals in both State and federal courts. 320

Evaluating the Governance Potential of Voluntary Stewardship Programs for Farmers – *Andrew Lawson and Paul Martin*

Neither traditional public law, nor non-governmental, self-regulatory approaches seem able to protect the ecological, social and productive capacity of Australian rural lands. This has spurred interest in collaborative approaches to stewardship, with the hope they combine the best of the public and private spheres. Collaborative agri-environmental governance experiments underway in rural Australia include a co-regulation model involving non-government voluntary stewardship programs (VSPs) for farmers. There is insufficient empirical evidence of how such arrangements work in practice. This article outlines a preliminary investigation of the potential for VSPs in governance partnerships. It examined the design of an operational VSP, Certified Land Management, canvassing participating and non-participating farmers on their views of it. The evidence suggests that participation in VSPs can make important contributions to environmental governance, which could be enhanced in partnerships with other government and non-government actors. 331

CORRECTION

Please note that in the previous part of the journal in Brian J Preston, The Judicial Development of the Precautionary Principle (2018) 35 EPLJ 123, footnote 82 should be cross referenced to footnote 81 and footnotes 86–95 should be cross referenced to footnote 61.