ENVIRONMENTAL AND PLANNING LAW JOURNAL

Volume 36, Number 3

May 2019

ARTICLES

Environmental and Planning Law in the Age of Human Rights and Climate Change – *The Hon Michael Kirby AC CMG*

This article, begins by contrasting the number of cases concerning environmental and planning law reaching the High Court of Australia in earlier times and today. Developments in England caused by the increase in cases involving human rights law are then described. From this, the author turns to the issues of climate change, the significance of the Framework Convention adopted in Paris in 2015 and of the Oslo Principles on Global Climate Change Obligations of 2015, in the drafting of the last of which he participated. From these international developments, the article turns to comparative law cases on climate change. Finally, the article considers the possible duty of officers of corporations in Australia to consider climate change risks under obligations imposed by s 189 of the *Corporations Act 2001* (Cth). The recent decision of the NSW Land and Environment Court in Gloucester Resources is noted. 181

Restorative Justice Intervention in an Aboriginal Cultural Heritage Protection Context: Chief Executive, Office of Environment and Heritage v Clarence Valley Council – *Mark Hamilton*

Disturbance, damage and destruction of Aboriginal cultural heritage can cause much harm to Aboriginal people and their communities. Restorative justice conferencing as part of the prosecution of Aboriginal cultural heritage offending has the potential to repair the harm occasioned by such offending. This article will demonstrate how the repair of harm can be achieved through conferencing fulfilling four functions – communication, education, resolution and reintegration. It will do so having regard to the recent prosecution of Chief Executive, Office of Environment and Heritage v Clarence Valley Council for Aboriginal cultural heritage offending; a prosecution in which restorative justice conferencing was utilised. 197

Critical Human Water Needs: Failing to Comply with the Objects of the Water Act and Human Rights Obligations – *Caitlin McConnel*

In developing water resource management plans pursuant to the *Water Act 2007* (Cth) (the Act), Basin States must have regard to the management of its water resources during extreme dry periods.This article critically analyses the provisions relating to critical human water needs in Pt 2A of the Act and whether they extend to meeting the basic human rights to water and an adequate standard of living with respect of Australian agricultural production and national security. It considers the importance of water and food security in the Murray-Darling Basin, Australia's international obligations and the economic and social costs of water management within the Murray-Darling Basin in conjunction with the overarching objects of the Act. Significantly, this article identifies that the current interpretation of Pt 2A conflicts with the objects of the Act and is in breach of international human rights obligations. 212

Corporate Disclosure on Climate Change: Evaluating the Australian Domestic Legal Framework's Ability to Oversee and Enforce Disclosures Made by Corporate Entities Participating in Voluntary International Disclosure Regimes – *Maria Nicolae*

This article analyses the ability of international disclosure regimes, voluntarily ascribed to by companies, to encourage Australian corporate entities to implement climate change reduction measures, and the regulatory synergies that arise (if any) from the interaction between the international disclosure regimes and the Australian domestic corporate legislation to increase such implementation and improve corporate climate change performance. Due to the number and variety of international disclosure regimes, this article focuses on the obligations imposed by a particular regime, namely the Global Reporting Initiative, and its oversight and enforcement. Similarly, due to the multitude of legislative instruments both at the State and federal level, this article focuses on the interaction between the international regime and the *Corporations Act 2001* (Cth) as the principal Act regulating corporate conduct. This article uses the Commonwealth Bank of Australia as the case study to illustrate this interaction between these two distinct regulatory regimes and identifies the reasons behind their inability to synergistically regulate the corporate sector. Finally, this article makes recommendations to improve the current corporate disclosure regulatory space to enable stakeholder regulation, namely by shareholders and investors, with the aim to improve corporate climate change performance. 229

Can the Market Decide? A Law and Economics Analysis of Models of Legislation Banning Plastic Bags – *Dai Moore and Murray Raff*

Pollution of the environment by plastics, especially the oceans, streams and water bodies, has emerged as one of the most pressing environmental issues of our time. Attempts to craft laws aimed specifically at reduction for environmental purposes of the consumption of lightweight shopping bags are a relatively new phenomenon worldwide and as yet there is no consensus on the most effective legislative response to the environmental issue. Law and Economics (L&E) provides a theoretical framework through which to consider the likelihood of success of the currently predominant Australian model of the legislation – a retail ban on lightweight plastic shopping bags. This article constructs the appropriate L&E framework for this challenge and then analyses within it the predominant Australian model of legislation directed to banning or reducing the sale of single use plastic bags, with particular focus on that adopted in the Australian Capital Territory. The *Plastic Shopping Bags Ban Act 2010* (ACT) was developed and implemented in response to growing environmental concern about the disposal of lightweight plastic shopping bags found in landfill and litter. Similar to States and Territories across Australia, the Australian Capital Territory (ACT) legislation makes it an offence for retailers to supply lightweight plastic shopping bags to customers for the purpose of carrying goods bought from the retailer. Empirical evidence shows that the legislation has been effective in reducing the prevalence of lightweight bags in landfill and litter. However, evidence is also pointing to a change in consumer behaviour in which consumers are turning to potentially more harmful substitutes, such as greater consumption of thicker plastic bags and of non-banned lightweight plastic bags to supplement consumer needs. This shift in consumer behaviour poses the danger of negatively impacting the success of the Plastic Bags Ban legislation. This legislative approach is compared with alternatives offered by the L&E framework such as supply-side taxation or demand-side levies. This L&E analysis demonstrates that the legislation left in its current form may lead to greater negative environmental impacts and there is evidence to suggest that this is already occurring. It is therefore recommended that the current model of the legislation be reformed to include a legislative levy on the retail of thicker plastic bags in conjunction with the continued wholesale ban on lightweight plastic bags. In the course of this study a critique is made of L&E theory and policy approaches generally adopted in the course of governmental development of environmental legislative packages in Australia. 242

Waste to Energy or Waste of Energy: Social and Regulatory Barriers for Waste-to-Energy in Australia – *Monique Vella*

In the face of the "energy crisis" and the issue of sustainable waste disposal being exacerbated by China's recent policy changes regarding waste imports, Australia continues to lag behind the rest of the developed world in the uptake of waste-to-energy (WtE) technology. Such technology has been widely applied in many developed countries, including Japan, the United Kingdom, the United States and in particular, France. Despite the practical advantages of WtE and its well-established status abroad, in Australia at present, no commercial-scale plants processing municipal solid waste exist. This article examines the causal factors behind this apparent anomaly, comparing Australia to the world-leader in WtE, France, and contends that an abundance of space for low-cost landfills, lack of political will and community distrust of regulators has resulted in Australia's failure to capitalise on the potential of this technology to contribute towards the solution to the energy and waste problems. 262

Hydraulic Fracturing (Fracking) in Australia – *Leslie Yong*

Hydraulic fracturing (fracking) has experienced a global increase in popularity as a method to increase the production of fossil fuels. This article explores how Australia regulates hydraulic fracturing and the factors that may influence its acceptance such as employment, income, a decrease of greenhouse gas emissions relative to coal for energy, water management, air pollution, and induced seismicity. In Australia, States and Territories have the responsibility to govern hydraulic fracturing processes within its boundaries. This has resulted in legislation in each State and Territory to differ and diverge, where some have existing enforceable laws, policies, and complete bans on the practice, others have moratoriums (temporary bans) or scientific inquiries in process. 277