

# ENVIRONMENTAL AND PLANNING LAW JOURNAL

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## ARTICLES

**The role of property law in environmental management: An examination of environmental markets** – *Dr Rowena Maguire and Angela Phillips*

Market-based environmental regulation is becoming increasingly common within international and national frameworks. In order for market-based regimes to attract sufficient levels of stakeholder engagement, participants within such schemes require an incentive to participate and furthermore need to feel a sense of security about investing in such processes. A sense of security is associated with property-based interests. This article explores the property-related issues connected with the operation of environmental markets. Relevant property-related considerations include examining the significant role that market-based regulation is playing in connection with the environment; examining the links between property rights and markets; exploring the legal definition of property; analysing the rights and powers associated with environmental interests in land; advancing theory on the need for landholder responsibilities in relation to land and examining the legal mechanisms used to recognise environmental property rights, including the registration thereof. .... 215

**Trading emissions for arbitration: Can an ETS give rise to liability under the laws of investment?** – *Leigh Howard*

This article will argue that the law of international investment could thwart the objectives behind the imposition of emissions trading schemes. It argues this by applying the protections afforded by investment law against the proposals that are currently on foot throughout the world. In light of the projected costs, differing assistance provided by governments, and the uncertain application of the investment protections, it becomes evident that investors will be able to have recourse to investor-state arbitration to claim compensation. Accordingly, this allows one to conclude that it is likely that challenges to trading schemes will emerge within the international jurisprudence in the near future, which in turn, will impose major obstacles for governments wishing to regulate climate. .... 243

**Legislating for offshore wind energy in South Australia** – *Dr Alexandra S Wawryk*

Although Australia has excellent wind resources offshore, the offshore wind energy industry is non-existent in this country. Despite the vast array of laws governing development in marine areas in Australia, there is no specific legal framework for offshore renewable energy, thus creating a legal barrier to development. This article critically examines the current planning regime as it applies to offshore wind energy development in South Australian coastal waters and Commonwealth marine waters adjacent to South Australia, taking into consideration developments in marine spatial planning. It will consider options for developing the legal regime to better accommodate the development of the offshore wind energy industry. Although this article focuses on offshore wind energy, many of the points made are relevant to other forms of offshore renewable energy and to the other States of Australia. .... 265

**Climate change regulation in Australia: Addressing leakage and international competitiveness consistently with the law of the WTO – Rudi Kruse**

This article considers how a compensatory mechanism within a broader climate change regulation is limited by Australia's obligations under the World Trade Organization Agreements, and how World Trade Organization law might shape the design of a climate change regulation in Australia. The award of compensation to emissions-intensive trade-exposed industry has been justified on both economic grounds (protection against the impact of international competition) and environmental grounds (reducing the risk of carbon leakage). However, following recent economic studies on carbon leakage in Australia, this article concludes that a compensatory mechanism is unlikely to be justifiable under the environmental exceptions in Art XX of the General Agreement on Tariffs and Trade. Given this limitation, the article considers the scope available to enact a compensatory mechanism that does not need to rely upon any environmental justification. It concludes that a compensatory mechanism is most effective when built within a border tax adjustment. Importantly, this limitation on compensatory mechanisms has broader implications for the design of a climate change scheme. Should the Australian government wish to include a compensatory mechanism in a climate change regulation, it is best administered through a domestic carbon tax. .... 297