

# ENVIRONMENTAL AND PLANNING LAW JOURNAL

Volume 33, Number 5

September 2016

ARTICLES

**Canary in the coal mine: Why the approval conditions for the Carmichael Mine reveal the need to amend the EPBC Act to incorporate adaptive management principles – *Christian Slattery***

When completed, the Carmichael Coal Mine will be the largest mine in Australia. The mine’s impact on groundwater resources, and the ecological communities that depend on them, has the potential to be severe. Accordingly, the approval conditions applied to the mine under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) imply the use of adaptive management. Adaptive management is a technique of natural resource management that demands participatory objective-setting, ongoing monitoring, and iterative decision-making. It is ideally suited to projects where uncertainty about an ecosystem is high and the impact of decisions may be irreversible. This article compares the articulation of adaptive management in the Commonwealth approval conditions to the “best practice” model expressed in scientific literature. This analysis reveals that although the conditions establish a framework for adaptive management, they fail to include substantive limits to guide post-approval decision-making, relegate the identification of baseline environmental conditions to a post-commencement timeframe, and down-play the interests of a broad range of stakeholders. As a result, survival of the unique ecology at the Doongmabulla Springs is not guaranteed. Further, relying upon the current EPBC Act to compel best practice adaptive management is undesirable. This article suggests three legislative amendments. ....

421

**Reforms required to the Australian tax system to improve biodiversity conservation on private land – *Fiona Smith, Kate Smillie, James Fitzsimons, Bruce Lindsay, Gary Wells, Victoria Marles, Jane Hutchinson, Ben O’Hara, Tom Perrigo and Ian Atkinson***

Private land conservation forms an integral part of Australia’s natural resource management and biodiversity conservation efforts, and the past two decades have seen a significant growth in the establishment of in-perpetuity conservation covenants. Specifically, conservation covenants address key national goals such as building the National Reserve System and expanding the markets for ecosystem services. However, a number of financial barriers exist to achieving these goals, and the national tax review in the form of the Tax White Paper Task Force provides an opportunity to address these barriers. This article provides a number of specific recommendations which outline how these financial barriers for private land conservation might be addressed by the Federal Government. ....

443

**Threatened species, endangered justice: How additional maximum penalties for harming threatened species have failed in practice – *Andrew Burke***

Since 2002, New South Wales has had distinctive sentencing provisions for offences of harming threatened plants or animals. In addition to a starting maximum penalty for the offences, an additional maximum penalty can be added for each individual plant or animal harmed. The effectiveness of these provisions has never been examined. The NSW

Government has recently proposed to retain these provisions in a new Act following extensive review, despite offering no explanation or justification for them. This study evaluates whether or not these provisions have achieved their apparent goal: to facilitate a penalty proportionate to the gravity of the offence. Every relevant sentence imposed by the NSW Land and Environment Court since 2002 has been considered. The study finds that these provisions have been unsuccessful because they do not reflect the reality of environmental crime. The consequence has been that relatively serious offences carry a lesser maximum penalty than relatively minor offences. These provisions should be reconsidered, and reforms which could better achieve their goal are proposed. .... 451

**The duty to report pollution incidents and regulator image in New South Wales pollution law – Sarah Wright**

A regulator's image is important in ensuring compliance. From its inception in 1992, the NSW Environment Protection Authority (EPA) was perceived as the strong regulator needed to ensure protection of the State's environment from pollution. However, a 2011 pollution event involving a breach of the statutory duty to report a pollution incident as soon as practicable by a company proved to be a defining moment for the EPA. It highlighted that, as a result of the EPA's amalgamation into a larger government department in 2003, it had lost its public visibility as a regulator. The EPA was re-established as a separate, independent agency. Legislative changes were also made to strengthen the duty to report. This article considers the incident and subsequent case law regarding the duty to report, and its impact on the EPA's image as a regulator. It argues that the case law has potentially undone the purpose behind the legislative amendments and the duty to report; namely, to ensure that regulators are quickly made aware of pollution incidents. This impacts upon the ability of regulators to effectively perform their protective role and has consequently weakened their position. .... 467

**Restorative justice intervention in an environmental and planning law context: Applicability to civil enforcement proceedings – Mark Hamilton**

The NSW Land and Environment Court has broad power to "remedy and restrain" breaches of environmental protection legislation. This broad power, combined with the lower standard of proof required to prove a civil breach, make civil enforcement proceedings a viable alternative to criminal prosecution. This article proffers restorative justice conferencing as the ideal vehicle through which remedy and restrain orders can be formulated. Such conferencing fulfilling communicative, educative, resolving and integrative functions results in remedy and restrain orders which are truly "restorative". .... 487

**Tuna ranching and Australia's obligations for the conservation and sustainable use of Southern Bluefin Tuna – Katharine Huxley**

Australia has a strong interest in the conservation of the Southern Bluefin Tuna (SBT), which is Australia's largest fishery. In the wild, the SBT stock has undergone rapid depletion in the last 60 years with industrialised fishing practices responding to an increased international demand, threatening the stock as a fishery and as a species. Nearly all SBT fished in Australia undergoes tuna ranching, an aquaculture process in which young tuna are caught, fattened in captivity and then harvested. This article examines whether Australia's international and domestic obligations in relation to the SBT are met by the practice of tuna ranching. It concludes that ranching of SBT in Australia does not fully accommodate Australia's obligations towards the species, and posits some of the ways in which the system could be improved. .... 502