

ENVIRONMENTAL AND PLANNING LAW JOURNAL

Volume 37, Number 3

2020

ARTICLES

The Murray-Darling Basin in Court: Administering Water Policy in the Eastern States of Australia – Administrative and Other Challenges – *Justice Nicola Pain and Georgia Pick*

The Murray-Darling Basin is significant environmentally, culturally, socially and economically in Australia. Its management is complex. The legal framework includes agreement between the Basin States of the ACT, Queensland, New South Wales, South Australia and Victoria and the Commonwealth Government reflected in the *Water Act 2007* (Cth) and instruments made under that such as the *Basin Plan 2012* (Cth). The on-ground regulation and enforcement of what is intended to be a complementary scheme occurs under the separate Basin State water management regimes. This article considers the extent to which the various courts and tribunals in the Basin States have been called on to consider aspects of these regimes, within the limits of their respective jurisdictions and powers. In the civil context, administrative review, both merits appeals and judicial review, are considered and differences between the various regimes highlighted. Criminal enforcement in two of the Basin States, New South Wales and Victoria, is also considered and observations made about the extent of enforcement action. The conclusion highlights the similarities and also the substantial differences between the Basin State schemes, as reflected in the widely varying cases or lack of these in each of the jurisdictions. 301

Landowners' Appeal of Seawalls Refusal Unsuccessful – *John R Corkill*

The primacy of public access to and along the beach is identified as the central reason for the Land and Environment Court's refusal of development consent for three seawalls at Belongil Beach, Byron Bay in New South Wales. The decision's effect on claims of superior private property rights, other seawall proposals, and local councils' coastal zone planning and management program preparation, are discussed. Conclusions are drawn on the unsuitability of litigation in responding to climate impacts, and the wisdom of attempting to "defend" lands from coastal hazards, under climate change conditions, rather than planning to "retreat". 322

Higher and Distinctive Standards for Urban River Protection? Special Purpose "River Laws" and Land-use Planning – *Bruce Lindsay*

The *Yarra River Protection (wilip-gin Birrarung murron) Act 2017* (Vic) established a new scheme and model for governance of this waterway and, potentially, for other waterways or natural features. The principal but not exclusive vehicle for this new scheme of waterway governance is strategic land-use planning along the river corridor. This article considers the legislative scheme and its interaction with the conventional land-use planning regime, with a view to assessing what these new arrangements contribute to planning, as well as limitations and ambiguities in this new legislative approach to river management. 338

Take Care or Beware: Victoria's New Environmental Protection Regime –
Alice Maxwell

In 2018, Victoria enacted a general environmental duty to take reasonable care in the management of general risks to human health and the environment arising from pollution and waste. Directly modelled on Victoria's Occupational Health and Safety legislation, the new duty recasts liability under Victoria's environmental protection regime in terms of risk, rather than harm. In this article, I explore the doctrinal origins, attractions, trade-offs and foreseeable complications involved in the roll out of this new duty-based regime. I contend that this reform is a timely and valuable intervention in environmental regulation in Victoria, which properly recognises the responsibility of all persons across all settings in identifying and mitigating environmental risk. Whether this new approach succeeds in reducing environmental harm will turn on how effectively both regulator and duty-holder adjust to this new regulatory landscape. 352

Serial Environmental Offenders: Putting Penalties into Practice – Kierra Parker

Legislation generally provides high maximum fines for environmental offences and sentences of imprisonment for individuals. Yet the sentences set by the courts in practice are often well short of the maximum penalty. Sentencing of "serial" environmental offenders poses a particular challenge to the application of sentencing principles. Drawing on recent judicial decisions in New Zealand and Australia, this article analyses whether the sentencing of serial environmental offenders achieves the purposes of sentencing. Measures to ameliorate the challenges of sentencing serial environmental offenders are considered. 364

Planning vs Planning Law: Reconciling Planning Policy and Case Law in the Victorian Planning System – Stephen Rowley

This article examines the relationship between urban planning and legal professionals, and their competing perspectives on policy dilemmas. While much attention has been given to the relationship between expert and non-expert participants in planning and legal systems, less attention has been given to the relationship between planners and lawyers. However in contested legal and quasi-legal contexts such as planning appeal tribunals, planners become in some ways non-expert professionals, which can affect the achievement of planning policy objectives. The so-called "National Trust principle", which relates to the breadth of valid planning considerations, is examined as a primary case study of this dynamic. The article argues that the intent of planners to widen the scope of considerations available in decision-making was compromised by a privileging of a case law-based discourse and the marginalisation of planning expertise and agency. 383

Climate Change Risk and the Urban Landscape – Sophie Tepper

The Intergovernmental Panel on Climate Change has reported unprecedented warming of the climate system since the 1950s. Climate change trends pose a severe threat to the global environment and economy which requires cooperative action from all international actors. In particular, urban areas are experiencing increasingly frequent climate-related disasters with catastrophic consequences. With the majority of the global population projected to reside in urban areas, it is essential that actions are taken to develop robust response systems. This article seeks to articulate the climate-related risks facing urban areas and the actions taken by private and government actors in Australia in response to these risks. Part II outlines physical climate change risks and liabilities faced by urban areas. Part III discusses the responses of government and private actors in Australia, using Sydney as a case study. Part IV explores the concept of climate justice in relation to the built environment, property rights and corporate governance. 403