ENVI5803
Law and the Environment

Lecturer: Professor Gerry Bates
(off campus)
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Classes: Lectures Tuesdays 5.00 pm – 8.00 pm April 1 – May 20 (8 weeks)

About the lecturer

Professor Gerry Bates has been devising and teaching courses in environmental law for nearly 30 years. He is the author of Environmental Law in Australia, the standard text on the subject, and Pollution Law in Australia (with Lipman). He is also the founder and Editor in Chief of the Environmental and Planning Law Journal, published by the Law Book Co. and now in its 25th year. Dr Bates was an independent green member of parliament in Tasmania for more than 9 years, returning to the law in 1996. He now works independently as an environmental law and policy consultant, and currently teaches specialist environmental law courses at the Universities of Sydney, New South Wales, and the Australian National University. Professor Bates is also a member of the Board of the NSW Environment Protection Authority; a member of the State of the Environment Advisory Council, and a Director-elect of Kimbriki Environmental Enterprises, a regional waste recovery centre and landfill site on Sydney’s Northern Beaches. In 1994 he was honoured with the National Environmental Law Association’s special award for "Outstanding Contribution to Environmental Law". In 2006 he was nominated for a Vice-Chancellor’s Award for Excellence in Teaching at the ANU; and a Carrick Institute Citation for Outstanding Contributions to Student Learning.

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Course Synopsis & Aims

Welcome to ENV 13111 and ENV 15803. I sincerely hope that your study of this course will prove to be not only useful, but also enjoyable, insightful and rewarding.

The course is designed to introduce to students from a variety of academic and practical backgrounds, the key principles of environmental law and policy - no previous knowledge is assumed.

Throughout the course, which is based on the course outline reproduced below, emphasis will be placed on analysis of contemporary environmental issues, using the knowledge we acquire during the course to question the structure, implementation and enforcement of the law; and design of environmental policies.

Objectives

The purpose of this course is to acquaint students with the fundamental principles of Australian environmental law; and to explain how these principles are applied to important areas of environmental management and regulation. The course assumes that participants have little or no background in the law, and so the course also provides some basic instruction about important legal concepts and structures as well as policy approaches to implementation of regulation and enforcement of the law. Although NSW is the ‘default’ jurisdiction for this course, the concepts and principles that are discussed are referable to all jurisdictions in Australia.

The course is divided basically into four parts

Part A  Creation of Environmental Law

Background to the Australian, NSW and other legal systems; sources of domestic law; the doctrine of the separation of powers; the court system; specialist environmental courts and tribunals; role of the judiciary; interpretation of statutes; the influence of the common law; the importance of rights and interests in property; common law remedies; international players and institutions; sources of international law; principles of international engagement; influence of international law on Australian policy-makers and the courts; the concept of sovereignty; application of international rules to Australian territory and natural resources.

Part B  Implementation of Environmental Law

The legal and political relationship between state and federal governments in the development and implementation of environmental policy; the structure of environmental laws; the content of environmental laws; regulatory tools for implementation of environmental policies; principles of sustainable development; market-based instruments for policy implementation.
Part C  Resolving Disputes in Environmental Law

Civil and criminal enforcement; administrative powers of regulators; personal criminal liability; liability of corporations and directors for employees and agents; citizen enforcement; judicial review; merits appeals; costs.

Part D  Issues in Environmental Law

Assessing the environmental impact of current and future land use and exploitation of natural resources; planning the use and management of land and natural resources; strategic environmental planning; integrated natural resources management; assessing the environmental impact of projects and activities; environmental impact assessment; land-based and marine pollution; waste management; contaminated sites; climate change.

The recommended textbooks

The text recommended for this course is


This text has been written for this type of course.

Satisfactory alternatives, though specifically for NSW, are:


For the international dimensions, students may refer to one of the two recommended international law texts:


These texts are extremely useful when considering the international law issues interwoven into this course.

Reference material

For reference, other useful legal and cross-disciplinary texts include:

Bonyhady et al Climate Law in Australia (2007) Federation Press
Most of these should be available for borrowing from Law Reserve
Other useful resources

Law Reports
The most useful series for this course is the Local Government and Environmental Reports of Australia (LGERA) published by LBC Information Services Ltd. Reports of cases can also be accessed on Austlii and other web-based sites (see internet resources below)

Legal Journals
The Law Library houses numerous legal journals covering most areas of law. The most useful for this course is the Environmental and Planning Law Journal, published by LBC Information Services. It is published bi-monthly.

Internet Sites
The following are useful internet sites that can be consulted for both substantive material as well as for further links:

Domestic Sites:
- Australian Centre for Environmental Law, Sydney (ACEL)  
  www.law.usyd.edu.au/~acel
- Australasian Law Information Institute  http://www.austlii.edu.au
- Commonwealth Department of the Environment, Water, Heritage and the Arts  
  http://www.environment.gov.au
- Environmental Defender’s Office www.edo.org.au
- NSW Department of Environment and Climate Change  

Lists of, and access to, current legislation can also be accessed in every jurisdiction through government websites. This is sometimes more up to date than Austlii
International Sites:

- Europa (European Commission Environment website)  
  http://ec.europa.eu/environment/index_en.htm

- International Treaties – the full text of treaties, but only up to 1998, can be accessed from this Australian Government website  
  http://scaleplus.law.gov.au/html/treaties/browse/TOC.htm. Scaleplus is being taken over progressively by COMLAW from 2005 so eventually may contain all relevant treaty material

- IUCN Commission on Environmental Law http://www.iucn.org/themes/law/

- United Nations Environment Program (UNEP) http://www.unep.org/

- United Nations Convention on Biological Diversity  
  http://www.biodiv.org/default.shtml

- United Nations Framework Convention on Climate Change  
  http://unfccc.int/2860.php
Course Overview

Part A  Creation of Environmental Law

Unit 1  Legal Institutions and Sources of Law

Unit 2  Influences on the Creation of Environmental Policy and Law: the common law
   (a) The importance of property and proprietary rights
   (b) Common Law Remedies

Unit 3  Influences on the Creation of Environmental Policy and Law: international law
   (a) General principles of International Engagement
   (b) International Law in Australia

Part B  Implementation of Environmental Law

Unit 4  Fundamental Principles in Domestic Law
   (a) Federal/State Legal Powers over the Environment
   (a) Structure and Content of Environmental Legislation
   (b) Sustainable Development

Part C  Resolving Disputes in Environmental Law

Unit 5  Enforcing Environmental Law: Remedies for Regulators
   (a)Administrative Remedies
(b) Criminal Prosecution

Unit 6  Civil Enforcement and Dispute Resolution
(a) General Principles of Litigation
(b) Judicial Review
(c) Merits Appeals

Part D  Issues in Environmental Law

Unit 7  Environmental Planning and Assessment

Unit 8  Pollution Control, Contaminated Sites and Climate Change

Part A: Creation of Environmental Law

Unit 1: Legal Institutions and Sources of Law

- Democratic governance, capitalism and the doctrine of the separation of powers
- Roles of parliaments, governments and the judiciary
- Framing environmental policy: social, scientific and legal influences
- The relationship between environmental policy and environmental law
- The nature of the common law system
- The sources of domestic law
- Legislation and subordinate instruments (regulations and environmental policies)
- The structure of the courts system
- Specialist environmental courts and tribunals
- The Land and Environment Court of NSW
- The doctrine of precedent
- Law reporting
- Interpretation of statutes
- Use of extrinsic material; Interpretation Act 1987 (NSW) s 34
- Importance of the distinction between legal challenges and merits review
- Planning Principles
For a complete list of planning principles developed by the LEC, and relevant case-law, go to http://www.lawlink.nsw.gov.au/lawlink/lec/lleqcnsf/pages/LEC_planningprinciples

Key questions:
(i) Does your jurisdiction have a specialist environmental court, or specialist division of a tribunal, to hear environmental cases? Find its website. What is it’s jurisdiction? Does it have both civil and criminal jurisdiction? Does it hear merits appeals?
(ii) How does the legal doctrine of precedent operate? Why is it necessary? What’s different about merits appeals? Do judges always appreciate being bound by precedents and if not how can they avoid them?
(iii) What external assistance is available to judges to help them interpret statutes? Find the NSW Court of Appeal decision in RTA v Ashfield MC (2005) 141 LGERA 278. When is a court allowed to use these aids?

Unit 2: Influences on the Creation of Environmental Policy and Law: the Common Law

(a) The importance of property and proprietary rights
- Ownership and possessory rights
- Property over natural resources; Water Management Act 2000 (NSW) ss ss 392, 393 and 52
- Distinction between property rights and licences
- Borrowing the concept of licensing for creation of statutory entitlements: Harper v Minister for Sea Fisheries (1989) 169 CLR 314 (Brennan J)
- Creation of new forms of statutory property rights: Conveyancing Act 1919 (NSW) ss 87A, 88AB (carbon sequestration)
- Compensation for acquisitions of property; Commonwealth v Tasmania (1983) 46 ALR 625; Newcrest Mining (WA) Ltd v Commonwealth (1997) 147 ALR 42;
- Status of common law rights vis a vis statutory control
- Savings for common law rights; Protection of the Environment Operations Act 1997 (NSW) s 322
- Protecting the local environment by the action in nuisance; Van Son v Forestry Commission (1995) 86 LGERA 108
- How Parliament responds to contemporary social values by modifying common law rules; Booth v Bosworth [2001] FCA 145; Trees (Disputes Between Neighbours) Act 2006 (NSW)
• Native title and environment protection; Commonwealth v Yarmirr (2001) 208 CLR 1

(b) Common Law Remedies

• Remedies for interference with property (nuisance and trespass)
• Remedies for personal injury and economic loss (negligence)
• Contaminated sites: problems for vendors, purchasers and decision-makers; Armidale City Council v Alec Finlayson P/L (1999) 104 LGERA 9; Noor Al Houda Islamic College Pty Limited Anor v Bankstown Airport Limited [2005] NSWSC 20;
• Exclusion of liability for managers of public resources; Puntoriero v Water Administration Ministerial Corp. (1999) 104 LGERA 419; Water Management Act 2000 (NSW) s 398; Forbes Shire Council v Pace (2002) 124 LGERA 3; Melaleuca Estate P/L v Port Stephens Council (2006) 143 LGERA 319
• Actions against protestors; Gunns v Marr [2006] VSC 329

Key questions:

(i) Is the common law an effective environmental protector or natural resources manager?

(ii) Why have traditional property rights been modified by environmental legislation? Give some examples.

(iii) What are the main differences between common law rights of property and licences and statutory versions of licences or entitlements to access natural resources?

(iv) Consider the case Van Son v Forestry Commission (1995) 86 LGERA 108. If the Forestry Commission had succeeded in its defence that since the EPA had licensed its emissions it should be allowed to continue, what implications might this have had on the doctrine of the separation of powers? How do licences issued by regulators sit alongside common law rights?

Unit 3: Influences on the Creation of Environmental Policy and Law: International Law

(a) General principles of International Engagement

• International institutions
• Sources of international environmental law
• Fundamental principles of international environmental law; *Australia v France (the Nuclear Tests Case); The Danube Dam Case: the Gabcikovo-Nagymaros Project*

• Entering into treaties

• Fundamental principles for engaging developing nations:
  - Equity between developed and developing nations
  - Principle of common but differentiated responsibility
  - Capacity building
  - Financial and technological assistance

• Resolution of treaty disputes: the choice of mechanisms

(b) International Law in Australia

• The status of international law in Australia

• Influence of international law on the development of legislation; *Environment Protection and Biodiversity Conservation Act 1999 (Cth)*

• Influence of international law and policy in the courts; *Interpretation Act 1987 (NSW) s 34(2)(d); Leatch v DGNPWS (1993) 81 LGERA 270 (precautionary principle); Greentree v Minister for Environment and Heritage (2005) 143 LGERA 1 (Ramsar Wetlands); Gray v Minister for Planning [2006] NSWLEC 720 (climate change); Taralga Landscape Guardians Inc v Minister for Planning [2007] NSWLEC 59 (climate change)*

• Access to Justice and environmental democracy; *The Aarhus Convention*

• Furthering the Convention ideals in Australian environmental law; public participation in plans and projects and access to the courts; *Environmental Planning and Assessment Act 1979 (NSW)*

• Human Rights; *the European Convention on Human Rights; Guerra v Italy ECHR 116/1996/735/93; Dennis v Ministry of Defence [2003] Env LR 34*

• Human rights as a constitutional guarantee; *Vellore Citizens Welfare Forum v Union of India AIR [1996] SC 2715*

• Human rights in Australia; *Human Rights Act 2004 (ACT); Charter of Human Rights and Responsibilities Act 2006 (Vic)*

• Sovereignty over land and access to natural resources


• Extensions of sovereign exercises of power; *Olbers Co Ltd v Commonwealth of Australia* [2004] FCAFC 262

• The Antarctic environment

• International trade and environmental management; *General Agreement on Tariffs and Trade (GATT) Art 20* http://pacific.commerce.ubc.ca/trade/GATT.html#XX; Tuna-Dolphin and Shrimp-Turtle disputes
Key questions:

(i) What is the difference between principles of international law and principles of international engagement?
(ii) Explain the concept of ‘common but differentiated responsibility’. How is this recognised by the Framework Convention on Climate Change?
(iii) How are issues of ‘capacity’ recognised and dealt with by the international community? Can you find examples of this in the Convention on Biological Diversity?
(iv) What are the practical difficulties that confront notions of liability and enforcement in international law?
(v) Choose a framework convention such as the Biodiversity or Climate Change Treaty, and find the provisions that relate to dispute resolution. What alternatives are offered?
(vi) Explain the tensions between principles of global trade and environment protection and how these are being tackled by the international community
(vii) How have international legal and policy developments influenced the courts and tribunals in Australia? Give some examples.
(viii) How might human rights guarantees relating to protection of the family be relevant to determining ‘environmental’ rights?
(ix) What practical effect does the concept of sovereignty have upon Australia’s ability to manage natural resources? How is this affected by rules developed under UNCLOS for determining maritime boundaries?

Part B: Implementation of Environmental Law

Unit 4: Fundamental Principles in Environmental Law

(a) Federal/State Legal Powers over the Environment

- Internal borders; the Offshore Constitutional Settlement
- The Constitution of Australia ss 51, 52, 92, 108
- ‘Heads of power’ for environmental law-making (s.51)
- Immunity of Commonwealth places; Corowa v Queensland (2006) 149 LGERA 1
- Co-operative federalism
• Development of national policies and strategies
• The Federal funding ‘carrot’; the *Natural Heritage Trust*
• The EPBCA and other Commonwealth legislation

(b) Structure and Content of Environmental Legislation

• Diffuse rather than integrated approach to creating legislation and administration: *Graham Barclay Oysters P/L v Ryan* (2000) 109 LGERA 1
• Prohibitions or restrictions?
• Functions of regulators and managers
• Objects of legislation; *Interpretation Act 1987 (NSW) s 33; Blue Mountains Conservation Society v DGNPWS* (2004) 133 LGERA 404
• Tools for environmental management; strategic and project based
• Licensing as the backbone of environmental regulation
• Environmental assessment of projects

(c) Sustainable Development

• The Rio Principles
• SD in Australian law: definitions and principles of ESD; *Sustainability Victoria Act 2005 s 4*
• Procedure or Outcome?
• Objects of legislation
• Instructions to decision-makers
• LEC Planning Principle; *BGP Properties Pty Limited v Lake Macquarie City Council* [2004] NSWLEC 399 revised - 05/05/2005
• ESD and the precautionary principle in the courts; *Telstra Corporation Limited v Hornsby Shire Council* [2006] NSWLEC 133; *Providence Projects P/L v Gosford CC* (2006) 147 LGERA 274
• Improved valuation, pricing and incentive mechanisms as principles of policy setting; tradable emission permits, green offsets and other market-based instruments
Key questions:

(i) What do you understand to be the practical effect of the Constitutional authorisation for the Commonwealth to make legislation in respect of ‘external affairs’? What other ‘heads of power’ might authorise Commonwealth environmental legislation?

(ii) What are the ‘matters of national environmental significance?’ Is this list exhaustive? What other legal responsibilities for environmental matters fall within Commonwealth control? How have these been affected, if at all, by the Offshore Constitutional Settlement?

(iii) What is the theoretical position in law if Commonwealth defence ships, berthed in Sydney Harbour at Commonwealth defence establishments, spill oil into the harbour, contrary to NSW environmental laws?

(iv) If the Commonwealth wants to sell off, or develop, defence land around Sydney Harbour, what legal problems might this pose for local councils in the area? What cautionary steps might they, or the state government, take to discourage, or work with, the Commonwealth?

(v) Can Telstra erect telecommunications infrastructure without having to comply with state environmental laws?

(vi) Find the case Blue Mountains Conservation Society v DGNPWS (2004) 133 LGERA 404. How did the court use the objects of legislation to reach a decision in that case?

(vii) What is the legal effect of an instruction on a decision-maker to ‘have regard to’ or ‘consider’ a matter?

(viii) Does a test for decision-making that is based on ‘significance’ give too much discretion to a decision-maker? Is this likely to be abused? What are the alternatives?

(ix) What are decision-makers instructed to do with principles of ESD? Is this enough? Might their responsibilities be affected by the objectives of the legislation? (see Unit 4). Give some examples.

(x) What is the difference between a ‘preventative’ approach to decision-making and a ‘precautionary’ approach?

(xi) How do you think scientific uncertainty should be addressed in environmental decision-making? By application of the precautionary principle? How are courts, as decision-makers, approaching this question?

(xii) Do you think that legal draftspersons, and politicians, have really understood the concept and purpose of sustainable development? Do judges understand it any better?

(xiii) What is the theory underpinning the use of incentive-based approaches vis-a-vis ‘pure’ regulation? Can ‘pure’ policy, or voluntary, initiatives work without legal sanctions? Is there any evidence that any of these incentive-based approaches are actually working?
Is corporate thinking in fact in advance of government policy and regulation in relation to implementation of principles of ESD?

Part C: Resolving disputes in environmental law

Unit 5: Enforcing Environmental Law: Remedies for Regulators

(a) Administrative Remedies

- Environment protection and other notices and orders
- Legal requirements for certainty and reasonable relevance; Cantarella Bros P/L v Ryde CC (2003) 131 LGERA 190; Holmes v DGDIPNR (2005) 139 LGERA 102
- Remedies for non-compliance
- Merits appeals

(b) Criminal Prosecution

- Investigative powers of regulators
- Stacking evidential requirements in favour of regulators
- Prosecution as a ‘last resort’
- Actus Reus and Mens Rea
- Strict liability crime
- Wilful and negligent conduct
- Accidents, malfunctions and trespassers; EPA v Dubbo CC (1994) 82 LGERA 361; National Rivers Authority v Yorkshire Water Service Ltd [1995] 1 All ER 225
- ‘Knowingly’; Histollo P/L v DGNPWS (1998) 103 LGERA 355
- Vicarious liability of employers for employees and agents; Filipowski v Fratelli D’Amato (2000) 108 LGERA 88; EPA v Multiplex Constructions P/L (2000) 112 LGERA 1
- Liability of corporations
- Defence of honest and reasonable mistake; Ostrowski v Palmer (2004) HCA 30
- Defence of unintentional consequence; Booth v Frippery P/L & Ors [2006] QCA 74
- Sentencing
- Environmental Management Systems and voluntary audits
Key questions:

(i) Give some example of administrative orders from statute law. What happens if the person served with the order refuses to comply? Can a person served with such an order challenge it? If so how?

(ii) How is intention relevant, or not relevant, to environmental offences?

(iii) What do you understand by the term ‘vicarious liability’ and how is it used in environmental law?

(iv) Why do defences to environmental offences hardly ever work?

(v) How do the courts react to claims that trespassers were responsible for the offence not the operator?

(vi) Consider the argument advanced, and upheld at first instance, in Booth v Frippery P/L & Ors [2006] QCA 74 as a defence. What ramifications would this have on the effectiveness of statutory offences if endorsed?

(vii) Consider the cases Environment Protection Authority v Barrett [2003] NSWLEC 182 and Environment Protection Authority v Hopley [2003] NSWLEC 112. How are they linked? Were the defendants being charged here with Tier 1 or Tier 2 offences? Did they plead guilty or not guilty? How did the court approach the question of sentencing?

Unit 6: Civil Enforcement and Dispute Resolution

(a) General Principles of Litigation

- Standing to enforce statutory schemes; EPBCA s 487 (‘person aggrieved’)
- ‘Any person’; Environmental Planning and Assessment Act 1979 (NSW) s 123
- Common law standing; Animal Liberation Ltd v Department of Environment and Conservation [2007] NSWSC 221
- Costs; Oshlack v Richmond River Council (1998) 96 LGERA 173
- Security for costs; Hunter Ecologically Sustainable Employment Group Inc v HEX P/L (2003) 129 LGERA 344
- Undertakings for damages (interlocutory injunctions)
- Remedies
- Civil penalties; EPBCA s 481
- Alternative Dispute Resolution
(b) Judicial Review

- Democracy in action; need for accountability and transparency;
- Gleaning the intent of Parliament in conferring functions on decision-makers
- Grounds of review; Administrative Decisions (Judicial Review) Act 1977 (Cth) s 5
- Dissecting reasons for decisions
- Functions of public servants: matters of policy and matters of law
- Assessing the individual merits of applications without being directed by policy; Perder Investments P/L v Lightowler (1990) 101 ALR 151
- Excess of power; Blue Mountains Conservation Society v Director-General National Parks and Wildlife Service (2004) 133 LGERA 406
- Manifest unreasonableness; Minister v Austral Fisheries P/L (1993) 114 ALR 409; Byron Bay Businesses for the Future Inc v Byron SC [1994] NSWLEC 159; Currey v Hargraves [2007] NSWLEC 471
- Dangers of trespassing on the merits

(c) Merits Appeals

- Nature of merits appeals
- Applicants and objectors
- The jurisdiction of the Land and Environment Court
- Costs

Key questions:

(i) What is public interest environmental litigation?

(ii) In what way are NSW residents better off in terms of environmental law enforcement than citizens of other states?

(iii) How has the Federal Court extended standing to environmental groups in the Gunns case (1995) 85 LGERA 296 and the North Coast case (1994) 85 LGERA 270?
(iv) Compare s 487 of the EPBCA. Does this go further than the test adopted in the Federal Court?

(v) How does the work of the EDO assist public interest environmental litigation? What are the criteria for legal aid in environmental cases in NSW?

(vi) What are the traditional rules of court in relation to costs and security for costs? In what circumstances may courts refuse to follow such traditional rules? Give an example.

(vii) What are the advantages of pursuing some form of Alternative Dispute Resolution over the traditional formal court hearing?

(viii) What are the essential differences between a legal challenge to a decision and a merits appeal?

(ix) What are the practical difficulties that confront persons seeking to challenge decisions of government beaurocrats and ministers?

(x) Statutory procedures for public participation may supplant common law rules of natural justice or procedural fairness. In what circumstances can this occur? What is the significance of the legislation itself giving a right of merits appeal to disputed decisions? See *Liverpool City Council v Cauchi* [2005] NSWLEC 675

(xi) Consider the case *Blue Mountains Conservation Society v Director-General National Parks and Wildlife Service* (2004) 133 LGERA 406. On what ground(s) of judicial review was the case decided? What remedy was sought? Did the court have a discretion whether to award such a remedy? How was this discretion exercised?

(xii) Statutes often provide ‘relevant considerations’ for decision-makers to ponder. Consider the case *Centro Properties Limited v Hurstville City Council & Anor* [2004] NSWLEC 401. Where were the ‘relevant considerations’ to be found? Were these mandatory considerations? How did the judge synthesize the requirements for identifying and assessing ‘relevant considerations’ in that case?

(xiii) The necessity to consider statutorily mandated ‘relevant considerations’ may later disclose that a decision-maker acted ‘unreasonably’ on the weight of evidence. How did this play out in *Byron Bay Businesses for the Future Inc v Byron SC* [1994] NSWLEC 159 in relation to the duty to furnish a Fauna Impact Statement?

(xiv) What happens when a plaintiff wins on a merits appeal? What happens when a plaintiff wins in an action for judicial review? How are costs determined?

(xv) Which statutory provisions in NSW legislation confer rights of merits appeal on ‘objectors’? Are such rights significantly different to those conferred upon
applicants for licences or upon persons served with administrative enforcement orders?

(xvi) Since determinations on the merits undeniably turn on their own particular facts, how is the LEC seeking to put more certainty into the process of adjudicating merits appeals?

(xvii) How is a merits appeal in danger of slipping into judicial review? Can you find an instance of a judge warning against this, and why?

Part D: Specific Issues in Environmental Law

Unit 7: Environmental Planning and Assessment

*Environmental Planning and Assessment Act 1979 (NSW); Environmental Planning and Assessment Regulation 2000 (NSW)*

- Strategic planning for land use; consideration of environmental and resource impacts
- Environmental planning instruments
- The planning system as the traditional focus for natural resources management
- Integrated natural resources management; the Natural Resources Commission and Catchment Management Authorities
- Integrated development approvals
- Consultations and concurrence
- ‘Fast-tracking’ projects of State Significance
- Environmental assessment of development
- Environmental impact assessment of development
- State and Commonwealth requirements
- Categories of assessment
- Content and quality of EIA
- Species impact assessment; *BGP Properties Pty Limited v Lake Macquarie City Council [2004] NSWLEC 399*
- Biodiversity certification and BioBanking; *Threatened Species Conservation Act 1995 (NSW)*
- Native vegetation clearance controls; *Native Vegetation Act 1993 (NSW)*
- Conservation and land management agreements
Key questions:

(i) What guarantees are made by legislation to members of the public about their ability to take part in the preparation of environmental planning instruments and management planning for natural resources?

(ii) Have a look at your local LEP or planning scheme (obtainable at your local council office or public library; or on the internet). What provisions are made for environment protection? What zones are created for environmental management?

(iii) Does your jurisdiction attempt to integrate management planning and project approval for natural resources with the planning system? If so how?

(iv) What are the essential differences between Part 4 and Part 5 environmental assessment in NSW? Are such distinctions relevant in your jurisdiction?

(v) When, and how, can a decision on a development be appealed to a court or tribunal (a) by an applicant and (b) by a third party? What happens if the appeal is upheld?

(vi) What devices does central government use to deflect a development application away from local government and have it dealt with at state level. What happens with regard to the environmental assessment of projects if this happens? Give some examples

(vii) When will a formal EIS be required in your jurisdiction?

(viii) Where the trigger for EIA is significant impact, how is such a discretionary concept determined, and able to be challenged? Are government guidelines available in your jurisdiction?

(ix) What was the difference the Minister argued between the external impact on a site of National Environmental Significance in Booth v Bosworth [2001] FCA 145 compared with Minister for the Environment and Heritage v Queensland Conservation Council (2004) 134 LGERA 272?

(x) Should proponents be allowed to prepare their own EIS? What are the alternatives?

(xi) Give some examples of different types of land management agreements. What are the perceived advantages of these sorts of arrangements (a) for landowners); (b) for regulators
Unit 8: Pollution Control, Contaminated Sites and Climate Change

- Land based sources of pollution; *Protection of the Environment operations Act 1997 (NSW)*
- Roles of EPA and local councils
- Difference in policy approaches between fixed and diffuse sources of pollution
- Importance of mix of regulatory and incentive-based tools
- Dealing with small and medium-sized enterprises
- Marine pollution; *Marine pollution Act 1987 (NSW)*
- Contaminated sites; *Contaminated Lands Management Act 1997 (NSW)*
- Investigative and remedial powers of the EPA
- Choice of target for clean-up
- Implications for strategic planning and development consent; *SEPP 55*
- Auditing
- Dealing with waste; *Waste Avoidance and Resource Recovery Act 2001 (NSW)*
- Extended producer responsibility

Case Study: Climate Change

- Common law remedies for property damage
- Greenhouse gases as ‘pollution’
- Climate change and judicial review
- Climate change and merits appeals
- Implications of developing ‘climate law’ for future law and policy

Climate change offers the ideal scenario for case studies of most, if not all, of the legal concepts that have underpinned this course. It brings in the possibility of using common law remedies (Unit 2); the Australian response to climate change is inevitably being affected by international policy and law (Unit 3); it raises issues about whether sovereignty really has to take a backward step to effectively deal with the problem, and emphasises the need for federal and state governments to work in harmony to project Australia’s position (Unit 4); it raises of course the ultimate in considerations of ecologically sustainable development (Unit 4); government decision-making on future energy requirements and sources of energy is being questioned via principles of judicial review and through merits appeals (Unit 6); climate change considerations affect strategic planning, integrated management of natural resources, and the environmental assessment of proposed developments (Unit 7); and greenhouse gases may of course be categorised as pollution (Unit 8).

The purpose of this section is to indicate how the law may respond to climate change.
The following issues are currently relevant.

- whether common law remedies may be used to compensate landowners for climate induced damage to their properties. Who would a landowner sue for compensation? What evidential problems arise? Are there better ways to prepare for climate induced damage than wait for landowners to start using legal avenues for compensation?

- Are greenhouse gases ‘pollution’ under existing statutes? If so could they be controlled under existing law without the need for law reform? If so why is this not happening? What are the legal responsibilities of government regulators such as environment protection authorities that are charged with statutory responsibilities for controlling pollution?

- How do instructions in legislation to ‘consider’ or ‘have regard to’ principles of ESD impact upon consideration of climate change in decision-making? (See for example Gray v The Minister for Planning and Ors [2006] NSWLEC 720; Alliance to Save Hinchinbrook v EPA (2006) 145 LGERA 32 (Qld SC)

- How do instructions in legislation to ‘consider’ or ‘have regard to’ the ‘public interest’ impact upon consideration of climate change in decision-making? (see Gray v The Minister for Planning and Ors [2006] NSWLEC 720; Drake-Brockman v Minister for Planning [2007] NSWLEC 490)

- Are climate change issues ‘relevant considerations’ in the consideration of proposals for development? If so, how may climate change be raised as an issue in proceedings for judicial review? (see for example Gray v The Minister for Planning and Ors [2006] NSWLEC 720; Wildlife Preservation Society of Queensland v Minister for the Environment and Heritage [2006] FCA 736)

- How may climate change be raised in merits appeals?

- Could reliance by a decision-maker on material that doubts the existence of climate change give rise to proceedings for judicial review? On what grounds? (see Queensland Conservation Council Inc v Xstrata Coal Queensland P/L [2007] QCA 338

- What effect might decisions taken in anticipation of climate change have on other projects and activities? (see for example Macarthur Wind Farm P/L v Moyne SC [2006] VCAT 1423

- Given that the role of a court is not to make policy, how may decisions of courts in (a) proceedings for judicial review and (b) merits appeals influence (i) government decision-making; (ii) government policy, about climate change?

- What impetus might climate change give to merits assessment of proposals for development of sources of alternative energy? (see for example Prest The Bald Hills wind farm debacle in Bonyhady ‘Climate Law in Australia’, Federation Press 2007; Taralga Landscape Guardians Inc v Minister for Planning and RES Southern Cross Pty Ltd [2007] NSWLEC 59); Perry v Hepburn SC [2007] VCAT1309

- If carbon trading becomes a reality in Australia, what role will the law play?
Assessment

The assessment for this course consists of one research assignment of approximately 3000 words (undergraduates); or 2 research assignments each of approximately 3000 words (postgraduates). The topics (below) have been designed to measure your achievement of the following learning outcomes.

Learning outcomes

After your study of this course you should be able to:

- distinguish between the various sources of environmental law and policy
- recognise the influence of the common law and of international environmental law to the development of Australian law
- discuss the structure of environmental laws and recognise the different methods, both regulatory and incentive based, that may be used to implement environmental policy
- discuss the different ways in which environmental disputes may be resolved
- discuss how the use and development of natural resources must be environmentally planned and assessed before decisions are made; and how resources should be managed
- discuss the social and economic context in which environmental law and policy has to be made and recognise the various pressures and influences on the search for optimal environmental protection laws.

Guidance on writing your research papers

The following basic steps will help you structure, research and write your papers:

- Read the question carefully and make sure you are clear on what the question really asks. The question will be looking for a broad appreciation of the subject-matter; and the breadth of the question may require appreciation of both legal and policy issues ranging over a number of units; as well as ‘extra-curricular’ research.

- Legal resources are divided into two main categories:
  - Primary sources ie the law itself, i.e. treaties, acts of parliament, subordinate legislation, and case law.
  - Secondary sources ie commentary on the law, e.g. texts and journal articles.

- Examine the relevant primary legal sources (research databases are very useful) in order to familiarise yourself with the basic regulatory regimes relating to the topic
Legislation (Always use the latest reprints of legislation. these may be found in Austlii at http://www.austlii.edu.au or one of the official government web sites listed above

Case law. Use the Local Government & Environmental Reports of Australia (LGERA) (UNSW Law Library) or Austlii at http://www.austlii.edu.au. Using Austlii you can access transcripts of cases from most major courts. The Land and Environment Court of NSW (http://www.lawlink.nsw.gov.au/lec) also lists decided cases from that court.

Delve into the literature (secondary sources) on the topic for the assignment. Most legal literature is usually found in journals and texts. These will provide context and commentary and assist in the analysis of the issues. Government policy statements may also be accessed on the internet and used to provide context for the objectives of the legislation.

Try to analyse the issues rather than simply provide a description of the relevant law.

General instructions

Proper referencing of material is required. These are research based assignments and, therefore, all sources relied on must be accurately referenced (see Citations in Law below)

Assignments are to be submitted to the appropriate student mailbox on campus. DO NOT EMAIL THEM TO ME!

Plagiarism is easily detected and will be heavily penalised (yes, I do give 0%!). Note that I will not accept extensive quotations from reading materials as an alternative to self-expression of ideas and concepts. Quotations should support your commentary, not be used to supplant it.

Citations in Law

You will notice that the method of using citations in legal texts and articles is noticeably different from that adopted by scientific and other social science disciplines. So far as assessment of assignments is concerned, you may use either the legal method, as you see it used in the course readings, or continue to use whatever method of citation you are used to.

In law a journal article is commonly cited thus: (2007) 24 EPLJ 100. This means refer to the twenty fourth edition of the Environmental and Planning Law Journal at page 100. The fact that the year of publication is in round brackets means you don’t need to know the publication date; only the volume number. This is because there can only be one volume 24.

By contrast, if the citation had been [2007] 1 EPLJ 100, it would mean that the year of publication would be essential to finding the article. This is because there will be more than one volume 1.
Citations of cases adopt both methods, depending on whether the publishers begin each year with volume 1 or not. The most frequently accessed case-law materials for this course are from the Local Government and Environmental Reports of Australia (LGERA), which uses a volume numbering system and therefore round brackets, thus: (2005) 135 LGERA 100. So does the ALR (Australian Law Reports) Series. By contrast, you may see for example [1974] 1 NSWLR 100 (New South Wales Law Reports).

Mistakes are frequently made with these citations and such mistakes will be ignored in assessing assignments.

It is however essential in assignment work to cite the sources of law. This will be either a statute or case-law. Textbooks and other articles are not sources of law; they may be cited for quotes and opinions, but not as definitive statements of the law. The most usual way to cite sources of law and other reference material is by footnotes. This avoids cluttering up the text with too many references.

Useful texts:
For assistance in thinking about and researching the law; and writing legal assignments, you could consult one of the following texts:


The book describes methods of legal problem solving and then demonstrates how the method can be applied in the solution of examination question - identifying the issues; stating relevant legal authorities; applying the law; arguing the facts and reaching a conclusion.


This book advises students how to organise their study habits by applying exam techniques, including basic rules and helpful hints on study techniques.


Marking criteria
The following features of your papers will be considered in awarding your marks:

1. Organization and presentation
2. Expression, language and style
3. Logical development of material
4. Coverage of issues
5. Understanding and use of primary legal materials
6. Appreciation of the social and political context in which the law operates
7. Use of secondary sources
8. Critical analysis of the issues
Assessment

Undergraduates: choose one (1) topic from amongst the following options:

EITHER:

TOPIC 1:
“Public bodies are taking significant steps towards the establishment of legislation which will promote the protection of the environment ... given that so much well informed and carefully structured legislation is now being put in place for this purpose, there is less need for the courts to develop a common law principle to achieve the same end and indeed it may well be undesirable that they should do so” per Lord Goff in the British case Cambridge Water Co and Eastern Counties Leather [1994] 1 All ER 53, 76.

Does this suggest that the common law has no part to play in environmental management and no relevance to environmental law?

OR

TOPIC 2:
“In weighing the factors which support an exercise of the Court’s discretion in favour of the grant of an injunction under s 475(2) of the Act against those factors which tell against the grant of such an injunction, it seems to me that it would be a rare case in which a Court could be satisfied that the financial interests of private individuals, or even the interests of a local community, should prevail over interests recognised by the international community and the Parliament of Australia as being of international importance”; per Branson J in Booth v Bosworth [2001] FCA 1453 and quoted by Marshall J in Brown v Forestry Tasmania (No 4) [2006] FCA 1729.

To what extent is the development of environmental law and policy subservient to international interests?

OR

TOPIC 3:
“ESD is a goal that requires environmental protection to be taken into consideration effectively when making development decisions”: per Justice Peter Briscoe, *Ecologically Sustainable Development in New South Wales* (LEC website 2007). Is this true? How are the courts progressing this ideal? Are considerations about ‘climate change’ demanding a new approach to issues of ‘sustainability’?

OR:

**TOPIC 4:**

Your client is the Rural Water Company (RWC), which has asked you to construct a water treatment plant on the banks of the Stressed River in the Hunter Valley to deal with waste water from a coal mine, which operates on the site and is planning to extend its operations to take advantage of Chinese interest in importing more coal from Australia to meet its energy demands. RWC has asked you to manage the project. Your inspection of the site shows the presence of neighbours just downstream; a koala bear sitting in a tree; and a strange dirty brown slime that appears to be emanating from a rusty old underground tank and leaking into the river. Local estate agent, Notobe Trusted, who is trying to offload this property for local tycoon Dee Velloper, tells you that “environmental problems won’t worry you. You can just apply to Frank Sartor to get this dealt with as a Part 3A project”. Driving away from the site you see a sign “Commonwealth of Australia: RAMSAR Wetland 2 kms”.

Subsequent investigations establish that the site is appropriately zoned for the proposal under the applicable LEP.

Explain:

1. the processes you will have to go through to gain permission to develop this land, both state and federal (if relevant)
2. the processes you will have to go through to emit polluted water into the river
3. the environmental assessments that will have to be carried out
4. the rights of ‘third parties’ who object to the proposals; or who might own property in the vicinity
5. The potential legal liability of all parties for any environmental damage that might be caused; and for failure to obtain necessary approvals or comply with conditions of approvals.

Your answer should refer to legislation and case law that might be relevant to determining the legal responsibilities and liabilities.
Postgraduates: choose two (2) topics from amongst the following options

**TOPIC 1:**
“Public bodies are taking significant steps towards the establishment of legislation which will promote the protection of the environment... given that so much well informed and carefully structured legislation is now being put in place for this purpose, there is less need for the courts to develop a common law principle to achieve the same end and indeed it may well be undesirable that they should do so” per Lord Goff in the British case *Cambridge Water Co and Eastern Counties Leather* [1994] 1 All ER 53, 76.

Does this suggest that the common law has no part to play in environmental management?

**TOPIC 2:**
“In weighing the factors which support an exercise of the Court’s discretion in favour of the grant of an injunction under s 475(2) of the Act against those factors which tell against the grant of such an injunction, it seems to me that it would be a rare case in which a Court could be satisfied that the financial interests of private individuals, or even the interests of a local community, should prevail over interests recognised by the international community and the Parliament of Australia as being of international importance”; per Branson J in *Booth v Bosworth* [2001] FCA 1453 and quoted by Marshall J in *Brown v Forestry Tasmania (No 4)* [2006] FCA 1729.

To what extent is the development of environmental law and policy subservient to international interests?

**TOPIC 3:**
“The Magna Carta recognised three basic principles which are, as summarised by Issacs J in ex parte *Walsh and Johnson; Re Yates*; “(1) primarily every free man has an inherent right to his life, liberty, property and citizenship; (2) his individual rights must always yield to the necessities of the general welfare at the will of the State; (3) the law of the land is the only mode by which the State can so declare its will”; per Preston CJ in ‘The Environment and its Influence on the Law’ (LEC website 2007)

How are such principles reflected in the approach of the courts to interpretation of environmental laws?
**TOPIC 4:**

“ESD is a goal that requires environmental protection to be taken into consideration effectively when making development decisions”: per Justice Peter Briscoe, *Ecologically Sustainable Development in New South Wales* (LEC website 2007). Is this true? How are the courts progressing this ideal? Are considerations about ‘climate change’ demanding a new approach to issues of ‘sustainability’?

**TOPIC 5:**

Your client is the Rural Water Company (RWC), which has asked you to construct a water treatment plant on the banks of the Stressed River in the Hunter Valley to deal with waste water from a coal mine, which operates on the site and is planning to extend its operations to take advantage of Chinese interest in importing more coal from Australia to meet its energy demands. RWC has asked you to manage the project. Your inspection of the site shows the presence of neighbours just downstream; a koala bear sitting in a tree; and a strange dirty brown slime that appears to be emanating from a rusty old underground tank and leaking into the river. Local estate agent, Notobe Trusted, who is trying to offload this property for local tycoon Dee Velloper, tells you that “environmental problems won’t worry you. You can just apply to Frank Sartor to get this dealt with as a Part 3A project”. Driving away from the site you see a sign “Commonwealth of Australia: RAMSAR Wetland 2 kms”.

Explain:

1. the processes you will have to go through to gain permission to develop this land, both state and federal (if relevant)
2. the processes you will have to go through to emit polluted water into the river
3. the environmental assessments that will have to be carried out
4. the rights of 'third parties' who object to the proposals; or who might own property in the vicinity
5. The potential legal liability of all parties for any environmental damage that might be caused; and for failure to obtain necessary approvals or comply with conditions of approvals.

Your answer should refer to legislation and case law that might be relevant to determining the legal responsibilities and liabilities.
TOPIC 6:
Devise a topic of interest or relevance to you, prepare a paragraph outlining your proposal, and email it to me for approval.