

1. INTRODUCTION TO THE UNIT; WHERE IS PLANNING LAW HEADED AND WHERE HAS IT BEEN?	1
1.1. CONTOURS, CONTEXT AND THE IMPORTANCE OF NARRATIVE	1
1.2. PLANNING LAW	1
1.3. PROPOSED LEGISLATIVE CHANGES	2
1.4. ENVIRONMENTAL LAW	2
1.5. VALUES UNDERLYING LAND USE	2
2. LOCAL GOVERNMENT OVERVIEW – ROLE IN PLANNING AND DEVELOPMENT LAW	3
2.1. SUPPORTING PLANNING THROUGH LAW	3
2.2. REGULATORY BLEND	4
2.3. BLENDING DIFFERENT ELEMENTS	4
2.4. OUTCOMES	5
2.5. BALANCING DIFFERENT CONSIDERATIONS	5
2.6. FUNCTIONS OF PLANNING LAW	5
2.7. PLANNING LAW INSTRUMENTS	6
2.8. CHALLENGE OF CERTAINTY	6
2.9. DISCRETIONARY-BASED DECISION-MAKING	7
2.10. LIMITS TO DISCRETION	7
3. LAND USE PLANNING – THEORETICAL BACKGROUND	8
3.1. OVERVIEW	8
3.2. VISIONS	8
3.3. THE NOTION OF PLANNING ‘THEORY’	8
3.4. PLANNING PHILOSOPHY AND RATIONALITY	9
3.5. IS RATIONALITY RESTRICTING BETTER PLANNING OUTCOMES?	9
3.6. SMART GROWTH	9
3.7. NEW URBANISM	10
3.8. CRITICISMS OF SMART GROWTH/NEW URBANISM	10
3.9. SMART GROWTH AND NEW URBANISM IN AUSTRALIA	10
4. PLANNING THROUGH THE ENVIRONMENTAL PRISM	12
4.1. <i>ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979 (NSW) (EPAA)</i>	12
4.2. <i>ENVIRONMENTAL PLANNING REGULATION 2000 (NSW)</i>	12
4.3. ENVIRONMENTALLY SUSTAINABLE DEVELOPMENT (ESD)	13
4.3.1. THE PROBLEMATIC NATURE OF THE LEGAL DEFINITION OF ESD	
4.3.2. APPLICATION OF ESD IN A LEGAL CONTEXT	
4.4. PRECAUTIONARY PRINCIPLE	14
4.4.1. HOW SHOULD A DECISION-MAKER RESPOND?	
4.5. CAN UNCERTAINTY BE REDUCED MOVING FORWARD?	15
5. THE ROLE OF LOCAL GOVERNMENT IN LAND USE PLANNING LAW	17
5.1. KEY FACTORS	17
5.2. BACKGROUND OF LOCAL GOVERNMENT	17
5.3. WHAT DO LOCAL GOVERNMENTS DO?	17
5.4. SIGNIFICANCE OF LOCALISM	17
5.5. LOCAL GOVERNMENT AND FEDERALISM	18
5.6. PLANNING RESPONSIBILITIES OF LOCAL GOVERNMENT	18
5.7. LEGAL STATUS OF LOCAL GOVERNMENT	19
5.8. <i>LOCAL GOVERNMENT ACT 1993 (NSW)</i>	19
5.9. LEGAL STATUS OF LOCAL AUTHORITY	20
5.10. COUNCIL MERGERS	20
5.10.1. PROCESS OF AMALGAMATION	
5.11. <i>KU-RING-GAI COUNCIL V GARRY WEST AS DELEGATE OF THE ACTING DIRECTOR- GENERAL, OFFICE OF LOCAL GOVERNMENT [2017] NSWCA 54 (27 MARCH 2017)</i>	20
6. ENVIRONMENTAL PLANNING INSTRUMENTS	22
6.1. CONTEXT OF EPI OPERATION	22
6.2. EPIs	22

6.2.1. OBJECTS OF EPIS	
6.2.2. INCONSISTENCY BETWEEN EPIs	
6.2.3. STANDARD INSTRUMENTS	
6.3. STATE ENVIRONMENTAL PLANNING POLICIES (SEPP)	24
6.3.1. PROCEDURE FOR MAKING SEPPs	
6.4. LOCAL ENVIRONMENTAL PLANS (LEP)	27
6.4.1. CREATION OF LEPS	
6.4.2. COMMUNITY CONSULTATION	
6.4.3. APPEALING AGAINST LEP DECISIONS	
6.5. DEVELOPMENT CONTROL PLANS (DCP) – NOT AN EPI	29
6.6. EPAA PT 3B	30
6.6.1. IMPLEMENTATION	
6.7. GREATER SYDNEY COMMISSION	30
6.8. ZONING	31
6.9. CHARACTERISATION OF PURPOSE	31
6.10. WHY THE CHANGE TOWARD STRATEGIC PLANNING?	31
6.11. EPIs AND DEVELOPMENT ASSESSMENT	32
7. DEVELOPMENT CONTROL AND APPROVAL PROCESS	33
7.1. DEVELOPMENT CONSENT UNDER PT 4	33
7.1.1. REQUIREMENT FOR DEVELOPMENT CONSENT	
7.1.2. CONSENT AUTHORITY	
7.1.3. DEFINITION OF 'DEVELOPMENT'	
7.1.4. TYPES OF DEVELOPMENT	
7.1.5. CHARACTERISATION AND PURPOSE	
7.1.6. RELEVANCE OF EPIs	
7.2. DEVELOPMENT APPLICATIONS	37
7.2.1. FORMAL REQUIREMENTS	
7.2.2. PUBLIC NOTIFICATION	
7.2.3. MATTERS TO BE CONSIDERED	
7.2.4. DETERMINATION	
7.2.5. DEVELOPMENT CONSENT	
7.2.6. CONSTRUING A DEVELOPMENT CONSENT	
7.2.7. LAPSE, MODIFICATION, AND REVOCATION [text at 113]	
7.3. CERTIFICATION OF DEVELOPMENT	41
7.3.1. CERTIFICATES [text at 116]	
7.3.2. ISSUING AUTHORITY [text at 117]	
7.3.3. ACCREDITED CERTIFIERS [text at 118]	
7.4. APPEAL AGAINST DECISION [text at 118]	41
7.5. SECTION 96 MODIFICATION OF CONSENT	42
7.6. EXISTING USES	42
7.7. DECISION-MAKING PANELS	42
7.8. PLANNING PRINCIPLES	43
8. MAJOR PROJECTS AND THE APPROVAL PROCESS	44
8.1. MAJOR PROJECTS	44
8.2. APPROVAL PROCESS	44
8.2.1. STATE SIGNIFICANT DEVELOPMENT	
8.2.2. STATE SIGNIFICANT INFRASTRUCTURE (SSI)	
8.3. ROLE OF LOCAL GOVERNMENT	45
8.4. 'CALL IN' POWER	45
8.5. STATE AND REGIONAL DEVELOPMENT	45
8.6. STATE SIGNIFICANT SITES	46
8.7. ASSESSMENT OF MAJOR PROJECTS	46
8.8. DETERMINATION OF MAJOR PROJECTS	47
8.9. ENVIRONMENTAL IMPACT ASSESSMENT/STATEMENT	47
8.9.1. WHEN IS EIA REQUIRED?	
8.10. EPAA PT 5	48
8.11. REVIEW OF SEPP INFRASTRUCTURE	48
8.12. PLANNING AMENDMENT BILL	48

9. ENVIRONMENTAL ASSESSMENT AND THE FEDERAL APPROVAL PROCESS	49
9.1. "ONE STOP SHOP"	49
9.1.1. CRITICISMS OF ONE STOP SHOP	
9.2. BILATERAL AGREEMENT	49
9.2.1. CLASSES OF ACTION NOT REQUIRING ASSESSMENT UNDER <i>EPBCA</i>	
9.3. HISTORY OF COMMONWEALTH ENVIRONMENTAL LAW	50
9.4. SINGLE ASSESSMENT	50
9.5. ENVIRONMENTAL ASSESSMENT	50
9.5.1. ADEQUACY OF EIA	
9.5.2. SHORTCOMINGS OF THE EIA/EIS PROCESS	
9.6. <i>EPAA PT 5</i>	51
9.7. <i>ENVIRONMENTAL PROTECTION AND BIODIVERSITY CONSERVATION ACT 1999 (EPBCA)</i>	52
9.7.1. MATTERS OF NATIONAL ENVIRONMENTAL SIGNIFICANCE (MNES) – <i>EPBCA PT 3 DIV 1</i>	
9.7.2. CONTROLLED ACTION	
9.7.3. ASSESSMENT PROCESS	
9.7.4. MINISTER DECISION	
9.7.5. RECENT DEVELOPMENTS UNDER <i>EPBC</i>	
10. LAND AND ENVIRONMENT COURT	54
10.1. OPERATION OF REVIEW	54
10.2. LAND AND ENVIRONMENT COURT (LEC)	54
10.2.1. OBJECTIVES OF THE ESTABLISHMENT OF THE LEC	
10.2.2. PRESTON CJ'S TWELVE POINTS	
10.2.3. BREAKDOWN OF JURISDICTION	
10.2.4. ENFORCEMENT	
10.2.5. "MULTI-DOOR COURTHOUSE"	
10.3. MERITS REVIEW	56
10.3.1. OPERATION OF MERITS REVIEW	
10.4. JUDICIAL REVIEW	57
10.4.1. GROUNDS FOR JUDICIAL REVIEW	
10.4.2. PROCESS IN LEC	
10.5. PUBLIC PARTICIPATION IN CIVIL ENFORCEMENT	58
10.5.1. <i>EPBCA</i>	
10.6. RELIEF GRANTED BY LEC	59
10.6.1. ENFORCEMENT	
10.6.2. DECLARATIONS	
10.7. COSTS	59
10.7.1. MERITS REVIEW	
10.7.2. JUDICIAL REVIEW	

LEGEND	
<i>BLUE TEXT</i>	Legislation
<i>RED TEXT</i>	Cases
<i>GREEN TEXT</i>	Theorists

1. INTRODUCTION TO THE UNIT; WHERE IS PLANNING LAW HEADED AND WHERE HAS IT BEEN?

1.1. CONTOURS, CONTEXT AND THE IMPORTANCE OF NARRATIVE

- Interdisciplinary approach – planning as a practice and the relationship to the law.
- Land use planning and the overlay of environmental law.
- Sustainable development is central to modern planning law.
- Strong legislative focus, *Environmental Planning and Assessment Act 1979 (NSW) (EPAA)* is the primary legislative instrument.
 - Legislation provides context for decision-making regarding land use planning, development and contains environmental considerations.
- Local government's role as a major player in planning law is diminishing.
- *LEPs/SEPPs*: delegated legislation.
- Emphasis is placed on **process** – was the correct legal process followed?
- Environmental law is driven by what happens on the international level.
- SOURCES OF PLANNING LAW:
 - Conventions and treaties.
 - Legislation.
 - Case law.
 - Not common law.
- AREAS OF REGULATION:
 - Natural environment.
 - Built environment.
 - Cultural and social environment.
 - Intersection between each.
- Greater Sydney Commission – slots between state and local government.
- THEMES:
 - Balance between technocrat and on-the-ground knowledge; experience vs power e.g. how governments implement legislation without considering the intrinsic issues to a certain local area.
 - Transparency and accountability.
 - Prescription.
 - Hierarchy.
 - Devolution.
 - Localism.
 - Public participation and deliberation.
- Move away from land use planning towards spatial planning.
- The absence of formal law does not result in an absence of regulation.
- Be critical of 'evidence', trends, and the basis for conclusions.
- It is not always what the law SAYS, but what the law DOES NOT SAY.

1.2. PLANNING LAW

- Planning law is **interventionist** – tends to have a very difficult relationship with the central pillar of the legal system (freedom of property).
- "Process of making decisions to guide future allocation and development of land".
- Three aspects of planning:
 - Strategic planning.
 - Development control.
 - Environmental assessment.
- Importance of a contextual approach to planning law, and the value of multi-disciplinary viewpoints.
- Every development is assessed on its own merits.
- Q: how do the instruments under the *EPAA* work together?
- ELEMENTS OF PLANNING LAW:
 - **Planning.**
 - **Zoning.**
 - **Development assessment.**
- Management of growth of cities and towns is one of the biggest issues in planning.
- Preservation of the environment – how is this balanced with the need for more housing?
- Promotion and coordination of the orderly and economic use and development of land i.e. there's no point building a house in an area that is inaccessible.

- Providing for the health, safety, and general wellbeing of those that use the area.
- Land is a finite resource – liveable land can be coordinated in an orderly way, but it is finite.
 - E.g. concentration of the population on coastlines in Australia.
- Adaptability of planning law – how can we adapt land use and planning rules to make better use of what we have?
- ‘Cascading’ responsibility and authority.
- Plans (state and local): local plans are divided into ‘zones’.
 - Zone: grouping areas of similar characteristics, separating incompatible uses.
 - Based on land use e.g. residential, industrial, and commercial.
 - Plans set out criteria defining acceptable uses of land within that zone.
- **Development must ensure consistency with zone criteria and objectives.**
- Development application must undergo assessment to ensure it accords with the Plan – includes environmental requirements.
- KEY VALUES:
 - Public and community participation.
 - Accountability.
 - Transparency.
- Balancing act – competing **social, environmental, economic goals.**
- Regulatory influence exerted by planning instruments.
- KEY ISSUES: **housing affordability, WestConnex.**

1.3. PROPOSED LEGISLATIVE CHANGES

- Amendment to the [EPAA](#) to go before NSW Parliament during 2017.
 - ‘Build greater confidence’.
 - ‘Enhance community participation’.
 - ‘Upfront strategic planning’.
 - ‘Delivering transparent process’.
 - ‘Critical design’.
- [Environmental Planning and Assessment Bill 2017](#):
 - Community participation: enhancing community involvement in the key decisions that shape our cities, towns and neighbourhoods.
 - Strategic planning and better outcomes: continuing to improve upfront strategic planning to guide growth and development.
 - Probity and accountability in decisions: improving transparency, balance and expertise in decision-making to improve confidence and trust in the planning system.
 - Simpler and faster planning: creating a system that is easier to understand, navigate and use, with better information and intuitive online processes.

1.4. ENVIRONMENTAL LAW

- POPULAR CONTEMPORARY ENVIRONMENTAL CHALLENGES: climate change, desertification, biodiversity.
- Environmental law is highly inter-disciplinary, drawing upon science, finance, economics and human rights.
 - These factors impact the relationship of planning law and environmental management.
- ROLE OF ENVIRONMENTAL LAW ([EPAA](#)):
 - Traditionally separate.
 - System of ‘resource management’ – managing finite (natural) resources.
 - ‘Land’ conceptualised as a finite resource – conflict of resource use e.g. preservation vs development.
 - Anthropocentric or human-centred approach to the role of environmental law – rarely recognised for intrinsic value only (eco-centric).
 - Prohibits behaviours; qualifies by allowing exceptions on a case-by-case basis.

1.5. VALUES UNDERLYING LAND USE

- Regulation of land use central to environmental and planning law.
- Land as a resource has conflicting views.
- **Private property vs public good**: private property is difficult to regulate, right of exclusion (impact of activities upon others?); public interest in land being a finite source.