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What is Environmental Law? - SG12 & TXT 1.1 – 1.35 & TXT 2.29 – 2.31

Environmental law is the body of legislation designed to protect the environment, and to regulate human activity in the interests of the environment (this definition is misleading)

Even though environmental laws do exist, groups are constantly fighting for the effective implementation of these laws

Environmental Law within a liberal 'democracy' – SG15 & TXT 2.2 – 2.4

Geoffrey Leane feels that the domination of Western societies and (in particular) Western legal systems, by the values and normative assumptions of liberalism has meant that environmental law has evolved in accordance with a development paradigm

- 'development paradigm' refers to a way of viewing the world according to which development rather than environmental protection is the most important consideration

Robyn Eckersley argued that one of the most important elements of liberal democracy – the concept of rights – could be 'enlisted and developed in an ecocentric direction' by extending the rights discourse to encompass the rights of non-human species

- She considered the possibility that certain fundamental rights of non-human species (such as the right to exist) could be protected within a liberal democratic system in the same way that the rights of humans are currently protected, although the rights of ecological entities such as ecosystems would be difficult to define within the limitations of the liberal rights discourse

Environmental Law and Private Property – SG16 & TXT 3.2 – 3.5 & Activity 1.3

Environmental law has evolved within a legal system in which the right to own & use land, to exclude others from that land, and to pass that land on to others are recognised as fundamental

This has influenced the content & efficacy of environmental law

While legislation designed for environmental protection has posed challenges to traditional common law definitions of private property, these challenges are not sufficiently fundamental to ensure that what private landholders do on and with their land is in the interests of the environment

Hume Coal Pty Ltd v Alexander (No 3) [2013] NSWLEC 58 – Court held that Hume Coal had the right to use a carriageway to gain access for coal exploration on a neighbouring property & the owners of the carriageway had no right to block access or permit parties to blockade it

The protection of private property rights is 1 of the major obstacles to effective environmental protection

Example 1: Existing uses – SG17 & TXT 81 & TXT 8.52 – 8.53

NSW Planning legislation permits existing uses of land to continue unchecked even when planning instruments are subsequently made which prohibit uses of that kind on the area of land in Q

- or which require development consent before the contentious activity can be carried out
- the existing use can be carried on indefinitely by the owner or by an successor in title, lapsing only if the owner so decides for some reason the existing use ceases for a period of at least 12 mths (similar provisions exist in other jurisdictions)
- the principle of existing uses allows inappropriate developments to continue on an indefinite basis, often with disastrous consequences
the incorporation of existing uses into planning law is clearly one area in which private property rights prevail over the public interest in protecting the environment

**Example 2: Standing – SG18 & TXT50 & TXT 17.1 – 17.19 & 17.43**

Common law rules on standing also reflect the traditional emphasis on private property over the public interest of the environment.

The law of standing refers to the common law rules which determine whether a potential litigant is entitled to bring an action before the court.

If the court considers a litigant to have sufficient interest in the proceedings they are said to have ‘standing’ to sue.

**NSW** – most of the critical pieces of environmental legislation contain open standing provisions, which effectively remove the requirement of establishing standing before a member of the public can take legal action under the legislation.

- However the Carr Labor govt removed 3rd party enforcement rights with respect to most forestry operations in 1998.

**Other jurisdictions** – standing remains a significant obstacle to the enforcement of laws relating to environmental protection.

- Before Ps can bring claims before a Court, they must establish they have sufficient interest in the subject matter to justify calling on the court to adjudicate.

- While a private property interest is sufficient to establish standing, the Courts have (in the past) held that Ps do not have standing to bring an action on the basis of an interest in protecting the environment.

- **Australian Conservation Foundation Inc v Cth of Australia** (1980) – landmark case where ACF sought declarations that Cth, Govt Ministers & RBA failed to comply with the law & procedures in approving the construction of a tourist resort in central Q. – majority held that ACF held no ‘special interest’ in the land concerned & therefore had no standing to sue.
  - This case suggests that an individual must suffer personal or private damage in order to establish standing – public interest was irrelevant to the issue of standing.

**Common law standing requirements** can prove to be disastrous for enviro groups.

- **Central Queensland Speleological Society Inc v Central QLD Cement P/L** (1989-1990) 17 ALD 403 – The society was refused standing by SCQ when attempting to prevent further blasting of the Mount Etna caves & prevent destruction of the Speaking Tube cave which was an essential habitat for the endangered ghost bat (society had to stop due to $$).

- Public interest concerns are devalued at common law & private (preferably property-related interests) are given priority over the public interest.

However other cases reveal changing attitudes to public interest Ps in the courts:

- **ACF and Anor v Minister for Resources and Anor** (1989-1990) 19 ALD 70 – ACF attempted to establish standing to challenge the Cth govt issue of a licence to export woodchips obtained from SE forests in NSW – Davies J recognised ACF had a special interest re SE forests.

- **North Coast Environment Council Inc v Minister for Resources** (1995) 127 ALR 617 – The Council was held to have legal standing & entitled to a statement of reasons from the Fed Minister of Resources to grant an export woodchip licence after the Minister refused to provide his reasons, stating the Council were not a 'person aggrieved'.
**Topic 4: Developmental Control**

**Part 4 NSW EPAA** deals with developmental control

**SEPP (Major Development) 2005** defines certain developments that are major projects be assessed under **Part 3A EPAA** & determined by Minister for Planning

- It also provides planning provisions for State significant sites
- It identifies the council consent authority functions that may be carried out by joint regional planning panels (JRPPs) & classes of regional development to be determined by JRPPs

QLD – all development is exempt unless falling into a category that requires assessment: **s231(2) Sustainable Planning Act 2009 (QLD) (“SPA (QLD)”).**

- A development permit is only required for assessable development: **ss235-238**
- Assessable development is set out in **Sch 3 Sustainable Planning Regulations 2009 (QLD)** or otherwise declared under a planning scheme
- Even though it might not need a development permit, other types of development may need a compliance permit or compliance with a code: **ss236(2), 237(2) SPA (QLD)**

<table>
<thead>
<tr>
<th>Different categories of development – SG60 &amp; TXT9.5-9.11 &amp; TXT87-93</th>
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There are 3 classification of developments within **Part 4 – Development Assessment**

- Developments that do not need consent: **s76**
- Developments that need consent: **s76A**
- Developments that are prohibited: **s76B**

Within these 3 categories are a number of sub-categories

**General process of development consent:**

- Anyone wishing to undertake development that requires consent must apply to the relevant planning authority (usually local authority or Minister for planning) for permission
- Some activities specified under the Act may also need development consent under the environmental planning legislation
  - Eg. Clearing of native vegetation on freehold & other land is assessable development unless otherwise exempt: **Sch 3 SPA (QLD); s14 Native Vegetation Act 2003 (NSW)**
- Before development can proceed, the application may need to be referred to other govt agencies:
  - Either for concurrence with the proposal (eg. With Director-General of National Parks where development may impact on threatened species or their habitats: **s76B EPAA**)
  - Or advice in relation to it (advice agencies are set out in **Sch 7 SP Regs 2009 (QLD)**)
- Many proposals will also require the issue of licences for other aspects of their proposal
  - Such as separate licences to clear native vegetation, affect threatened species, emit pollution or impact on heritage areas
  - Other licensing agencies may be able to veto the proposal by refusing to issue a licence for aspects of the proposal controlled by them:
    - NSW: If approval authority refuses to issue licence, consent authority cannot issue development consent: **s91A(4) EPAA**
If a concurrence agency's response requires application to be refused, the assessment mgr must refuse it: s93A EPAA; s325(4) SPA (QLD)

Crown development (development proposals by govt agencies) are generally subject to same provisions for assessment of development but not in the same way:-

- NSW – application for development consent cannot be refused (or conditions placed on it) except with ministerial or other relevant agency consent: s89 EPAA

Just because a development does not need planning consent does not mean environmental assessment will not be relevant

- NSW – although development consent may not be required under Pt 4 EPAA, environmental assessment may still have to be carried out under Pt 5

- Exempt development may be restricted to development that has perceived minimal environmental impact: s76(2) EPAA

- It may even still exclude certain types of environmental features (eg. Wilderness or the critical habitat of endangered species: s76(3) EPAA

Sometimes an EPI may also provide that a development that would otherwise require consent can be addressed by specified pre-determined development standards (s76A(5) – complying development) OR a code (s574 – self-assessable development must comply with code, Sch 3 – Code, Sch 5 SP Regs (QLD))

If submitted for development consent, the permitting authority will generally be required to advertise the application: ss79(1), 79(5), 79A, 89f, 1152; Cl 77-81 – (designated development), 82-85B (state significant development), 86-91 (other advertised development) EPA Regs (NSW)

- Submissions or reps may have to comply with the requirements of the regs (eg. Be in a form required by law)

- Failure to comply will not necessarily deprive the reps of lawful authority but it may not be given much weight: Mackenzie Intermoodal Pty Ltd v Lawson (2003) 127 LGERA 219

- After consideration of the submissions the authority must decide whether to permit the development (with conditions) or refuse it (Pt 4 Div 2 EPAA)

Any conditions imposed for a planning purpose must be fair and reasonably relate to the permitted development: Enfield City v Development Assessment Commission (2000) 106 LGERA 419; WA Planning Commission v Temwood Holdings P/L (2004) HCA 63 etc (fn39@300)

- Conditions must also be within the scope of power granted by the legislation & be certain in their operation: Charalambous v Ku-ring-gai Council (2007) 155 LGERA 352 (imposition of bond for tree protection outside the scope for which bonds might be imposed under legis)

- Invalid conditions may be severed from the rest of the permission so long as that does not fundamentally affect the nature of consent: Winn v Director-General of National Parks & Wildlife (2001) 130 LGERA 509

- NSW – restrictions may be toward more significant categories of development like designated developments, state significant developments & advertised developments: Pt 6 Divs 5-7 EPA Regs

Apart from such rights granted by legislation, the general position is that there are no rights to public notification of a development application unless an EPI extends such rights (s29A; Idonz P/L v National Capital Development Commission (1986) 58 LGRA 99; Rapid Transport P/L v Sutherland Shire Council (1987) 62 LGRA 88)