Master of Environmental Management

Fundamental Knowledge in Environmental Management: Law

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Fundamental Knowledge in Environmental Management: Law

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About the academic staff

Professor Gerry Bates has been devising and teaching courses in environmental law for over 30 years. He is the author of *Environmental Law in Australia*, the standard text on the subject; and the founder and Editor in Chief of the Australian *Environmental and Planning Law Journal*. Dr Bates was formerly a ‘stagiaire’ or trainee of the European Union; and an independent green member of parliament in Tasmania for more than 9 years, returning to the law in 1996. He now works independently as a specialist in environmental law and policy. Professor Bates was a member of the Board of the NSW Environment Protection Authority for more than 12 years between 1998-2010; and a Director of Kimbriki Environmental Enterprises, a regional waste recovery centre and landfill site on Sydney’s Northern Beaches from 2005-2010. 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 Australian National University; and a Carrick Institute Citation for Outstanding Contributions to Student Learning.

His email address is gerry@gerrybates.com.au
Welcome to *Fundamental Knowledge in Environmental Management: Law*. I sincerely hope that your study of this course will prove to be 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 structured study guide, 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.

The course will be taught in intensive mode over five days, adopting a tutorial-style, interactive and participatory approach. Your participation is therefore not only welcome but expected and essential!

Each Unit has a number of themes and a focussed reading programme. Not all of the issues listed on the outline will necessarily be covered during a lecture; but they are included to complete the structure of that Unit or to indicate the context in which discussion will take place. Neither is it necessary to attempt to prepare for all issues listed in this course outline; priorities should be guided by your own interests and expectations. Some prior reading of the recommended text, or materials, will however assist participation and understanding.

This course focusses upon the concepts and principles that underpin all environmental laws, enabling you to interpret and understand any environmental law, in any jurisdiction. Examples of the law in action will be drawn from the major areas of environmental planning, pollution and waste (including climate change), native vegetation and biodiversity protection, with some references to other subject areas, such as water, mining including coal seam gas, forestry and fisheries; but depending upon the backgrounds and interests of participants, we can easily give more or less attention to certain aspects of the course and target subject-matter for more or less consideration. Questions are always welcome on any aspect of the course and its materials.
Aims

The purpose of this course is to acquaint students with the fundamental principles of Australian environmental law; to explain how these principles are applied to important areas of environmental management and regulation; and to explain how Australian law and policy is directed and influenced by key concepts such as the common law and international law and policy. 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, and also to other legal systems. Participants from other Australian jurisdictions will be guided to the applicable law in their own jurisdiction; participants from overseas should be prepared to make comparisons with their own jurisdictions, and think about the extent to which Australian approaches to environmental law might be applicable ‘back home’; or indeed whether Australian approaches miss something that other countries legal systems might deliver.

The course is divided basically into four parts:

Part A  Creation of Environmental Laws

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 property; common law remedies; sources of international law and its influence on Australian law; The concept of sovereignty; application of international rules to Australian territory and natural resources; trade and environment; human rights.

Part B  Implementation of Environmental Laws

The legal and political relationship between state and federal governments in the development and implementation of environmental policy; co-operative federalism; Commonwealth legal responsibilities for environmental management; the structure of environmental laws; the content of environmental laws; regulatory tools for implementation of environmental policies; principles of sustainable development.

Part C  Application of Environmental Laws

Environmental planning; development control; environmental assessment of projects and activities; native vegetation; protection of biodiversity; pollution and waste; climate change and clean energy; mining and coal seam gas.
Part D  Enforcement of Environmental Laws

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

The course and this study guide

This course is primarily about Australian environmental and natural resources law, using NSW as the ‘default’ jurisdiction. The course focuses on legal concepts and principles common to all legislation in all jurisdictions, rather than adopting a ‘statute by statute’ approach; and using examples of principles in action from across a range of environmental legislation. Principles will be taught using the following major pieces of legislation:

- Environment Protection and Biodiversity Conservation Act 1999 (Cth)
- Product Stewardship Act 2011 (Cth)
- Environmental Planning and Assessment Act 1979 (NSW) and Regulation 2000
- Protection of the Environment Operations Act 1997 (NSW)
- Native Vegetation Act 2003 (NSW)
- Threatened Species Conservation Act 1995 (NSW)

Reference may also be made to:

- Water Act 2007 (Cth)
- National Greenhouse and Energy Reporting Act 2007 (Cth)
- Fisheries Management Act 2001 (Cth)
- Water Management Act 2000 (NSW)
- Coastal Protection Act 1979 (NSW)
- Fisheries Management Act 2004 (NSW)
- Mining Act 1992 (NSW)
- National Parks and Wildlife Act 1974 (NSW)
- Contaminated Land Management Act 1997 (NSW)
- Natural Resources Commission Act 2003 (NSW)

Legislation from other jurisdictions may be referred to as the need arises.
This study guide is designed to complement the recommended text and provide context and structure for focused self-learning. It should not be viewed as a substitute for a relevant text or attendance in class, nor for the benefits of independent research.
The recommended textbooks

Preliminary Reading:
Participants are encouraged to obtain a copy of Chisholm and Nettheim, *Understanding Law*, Butterworths, 2012 (available at UNSW bookshop for around $50); though a previous edition will still be useful for background reading. This useful text discusses fundamental issues in use throughout this course such as the nature of case law, statute law and the methodology used by courts to interpret legislation.

**Recommended text:**
The text recommended for this course is


This text has been written for this type of course. You can find regular updates to the content of this book on-line. Go to [https://campus.lexisnexis.com.au](https://campus.lexisnexis.com.au) select Register, and create an account.

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


Most of these should be available for borrowing from Law Reserve.
Link to other courses in the MEM program

This course is one of the six Fundamental Knowledge courses offered in the Master of Environmental Management.

Fundamental Knowledge courses aim to help you develop basic ‘environmental literacy’ program in key disciplinary areas.

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The core subjects focus on a critical appreciation of different frameworks for environmental management.

The wide choice of electives enables you to design the program that best meets your needs.
Course Outline

Common case-law references used in this outline are:

LGERA Local Government and Environmental Reports of Australia
EPLJ Environment and Planning Law Journal
LGLJ Local Government Law Journal
HCA High Court of Australia
LEC Land and Environment Court of NSW
NSWCA New South Wales Court of Appeal
NSWCCA NSW Court of Criminal Appeal
FCA Federal Court of Australia
FCAFC Federal Court of Australia Full Court
VCAT Victorian Civil and Administrative Tribunal
QPEC Queensland Planning and Environment Court
SAERDC South Australia Environment, Resources and Development Court

Preliminary

We will discuss matters regarding the teaching method used in this course, student expectations and participation, environmental law materials, research tools and assessment requirements. I will ask you to briefly introduce yourselves to the rest of the Group, focussing upon academic or professional background, reasons for studying environmental law, what you hope to get out of the course, and where you hope it may take you in the future.

Unit 1: Fundamental concepts in Australian law

This unit is designed to answer fundamental questions about the role of law in society and how it works, such as:

1. Where does the law come from?
2. What does it mean when we say that Australia is a ‘common law’ legal system?
3. What’s the difference between legislation, acts of parliament and statutes?
4. What’s a ‘regulation’?
5. What is the status of policies, plans and strategies?
6. Is Australia bound by international law?
7. What’s the difference between treaties, conventions and protocols?
8. What’s the difference between parliament and government?
9. What do the courts do?
10. What is the ‘doctrine of the separation of powers’?
11. What’s the ‘Crown’?
12. How does the Land and Environment Court work?
13. What are the laws in NSW that protect the environment?
14. What’s the purpose of environmental legislation?
15. What is the relationship between state law and federal (Commonwealth) law?

Answering these questions takes us to the following issues for discussion:

- Democratic governance, capitalism and the doctrine of the separation of powers
- Framing environmental policy: social, scientific and legal influences
- The relationship between environmental legislation and the common law
- The relationship between environmental policy and environmental law
- The functions and legal status of legislation, regulations, environmental policies, guidelines and codes of practice
  
  *Environmental Planning Instruments: EPAA 1979 (NSW) Pt.3 (mandatory policies, must be complied with)*
  
  
  *Byron Ventilink P/L v Byron SC (2005) 142 LGERA 215 (heritage guidelines mandatory)*
  
- The role of the judiciary
- Judicial approach to statutory interpretation
  
  *In Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (2009) 239 CLR 27 (at [47]) the High Court explained the process of statutory interpretation as follows:*
  
  “This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself (105). Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text (106). The language which has actually been employed in the text of legislation is the surest guide to legislative intention (107). The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision (108), in particular the mischief (109) it is seeking to remedy”.
- Aids to statutory interpretation: (Interpretation Act 1987 (NSW) ss 33, 34
- An intermediate appellate court (state court of appeal) is entitled to depart from its earlier authority when that authority is ‘plainly’ or ‘clearly’ wrong; see *Jemena Gas Networks (NSW) Ltd v Mine Subsidence Board [2010] NSWCA 146*
- Judges do not make policy: eg *Ilic v City of Adelaide [2010] SASC 139* (what is ‘heritage’)
- Specialist environmental courts and tribunals
- Jurisdiction of the Land and Environment Court of NSW
  
  *www.lawlink.nsw.gov.au/lec*
- Importance of the distinction between legal challenges and merits review
- Legal precedent and Planning Principles
For a complete list of planning principles developed by the LEC, and relevant case-law, see

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

A. The importance of property and proprietary rights

- Private property and public property
- Rights over someone else’s property: covenants and easements
- Protection of the local environment by restrictive covenants
- Removal of covenants under planning regimes to facilitate public interest in environmental planning; EPAA 1979 (NSW) s 28
- Supremacy of statutory schemes over contracts and covenants
  Hume Coal Pty Limited v Alexander (No 3) [2013] NSWLEC 58 (The Mining Act 1992 (NSW) must prevail over any private contract or covenant. ‘If landholders could thwart the legislative scheme by such covenants, the exploration activities promoted and facilitated by the Act would become impossible, and the State's mineral resources would be sterilised’ (at [108]).
- Distinction between property rights and licences (revocable permit)
- Categorisation of entitlement as property or licence affects rights to compensation for ‘acquisition’ but not restriction;
  Commonwealth Constitution s 51(xxxi)
  Commonwealth v WMC Resources Ltd [1998] HCA 8 (where a law of the Commonwealth creates or authorises the creation of a right, a statutory modification or extinguishment of the right effects its acquisition if, but only if, it modifies or extinguishes a reciprocal liability to which the party acquiring the right was subject. But where a law of the Commonwealth creates or authorises the creation of a right that does not impose on the Commonwealth a reciprocal liability, the mere extinguishment of the right effects no acquisition of the right by the Commonwealth. The Commonwealth's position remains unchanged by the extinguishment).
  Newcrest Mining (WA) Ltd v Commonwealth (1997) HCA 38 (The law which sterilised Newcrest's right under its mining lease to carry on "operations for the recovery of minerals" on land vested in the Commonwealth was a law for the acquisition of property because it extinguished the liability of the Commonwealth to have those minerals extracted from its land and thereby enhanced the property of the Commonwealth);
  Acquisitions or restrictions are often accompanied by ‘structural adjustment’ payments
  ICM Agriculture P/L v Commonwealth [2009] HCA 51 and Arnold v Minister Administering Water Management Act 2000 [2010] HCA 3 (a reduction in volumes of water allocated by aquifer licences, which had replaced old style bore licences, did not amount to an acquisition of property)
Spencer v Commonwealth [2008] FCA 1256 (Federal Court); (2009) 174 FCR 398 (Full Court); (2010) ALR 233 (High Court) (restrictions are not acquisitions; claimed acquisition of carbon sequestration rights)
Spencer v NSW Minister for Climate Change, Environment and Water [2008] NSWSC 1059

- How concepts of property may influence the courts when interpreting legislation:
  South Australian River Fishing Association v South Australia (2003) 126 LGERA 122; [2003] SASC 174

B. Protecting Property Rights and Economic Interests at Common Law

- Actions for interference with property (nuisance, trespass, negligence)
  State of SA v Simionato [2005] SASC 412 (liability in negligence for plantings of trees and shrubs that took away moisture from the plaintiff’s land that led to damage to the plaintiff’s property).
  Byron Shire Council v Vaughan [2009] NSWLEC 88
  Gales Holdings Pty Limited v Tweed Shire Council [2011] NSWSC 1128

- Actions for personal injury and economic loss (negligence)
  Armidale City Council v Alec Finlayson P/L (1999) 104 LGERA 9
  Puntoriero v Water Administration Ministerial Corp (1999) 104 LGERA 419
  Graham Barclay Oysters P/L v Ryan (2002) 125 LGERA 1

- 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
  Armidale City Council v Alec Finlayson P/L (1999) 104 LGERA 9;
  Environmental Planning and Assessment Act 1979 (NSW) s.145B
  Local Government Act 1993 (NSW) s.733
  Forbes Shire Council v Pace (2002) 124 LGERA 3
  Bankstown CC v Alamdo Holdings P/L (2005) 142 LGERA 1 ((a) it is unlikely “good faith” will be established merely from evidence that the party relying on the defence acted honestly and without malice; and (b) for the defence to be made out there should be evidence that a real attempt was made to do properly the very thing for which immunity is sought: this may involve following an established system, or set of procedures).
  Melaleuca Estate P/L v Port Stephens Council (2006) 143 LGERA 319
  Gales Holdings Pty Limited v Tweed Shire Council [2011] NSWSC 1128
  Environmental Planning and Assessment Act 1979 (NSW) s.149(6)
  Port Stephens SC v Booth (2005) 148 LGERA 351 (CA)
  Rural Fires Act 2003 (NSW) s 128.
  Warragamba Winery Pty Ltd v State of New South Wales (No 9) [2012] NSWSC 701
  (exclusion of liability in relation to the escape of bushfires that had been caused by a lightning strike with resultant destruction of property

- Statutory exemptions do not extend to criminal liability
  Garrett v Freeman (2006) 147 LGERA 96

- Using common law actions against protestors; Gunns v Marr [2006] VSC 329
C. Creation of Tools of Environmental Management by Using Common Law Concepts

- Nature of the new forms of statutory entitlements; *Fisheries Management Act 1991 (Cth)* ss 48, 49 *Water Management Act 2000 (NSW)* Pt. 2 Div. 9
- Creation of new forms of statutory property rights: *Conveyancing Act 1919 (NSW)* ss 87A, 88AB (carbon sequestration)
- Statutory entitlements do not affect common law rights unless expressly or by necessary implication; *Van Son v Forestry Commission* (1995) 86 LGERA 108
- Statutory covenants with private landowners
  - *Native Vegetation Act 2003 (NSW)* s 31
  - *Conveyancing Act 1919 (NSW)* Pt. 6 Div. 4 (public positive covenants)
  - *Newcastle & Hunter Valley Speleological Society Inc v Upper Hunter Shire Council and Stoneco Pty Limited* [2010] NSWLEC 48 (a registered public positive covenant was an appropriate condition of development consent to secure the performance of requirements under a Biodiversity Management Plan)
- Savings for common law rights; *Protection of the Environment Operations Act 1997 (NSW)* s 322 42

D. How Parliament may respond to contemporary social values by modifying common law rules;

Rules of ‘standing’; *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* s 475
*Booth v Bosworth* [2001] FCA 14

Environmental Planning and Assessment Act 1979 (NSW) s.123 (open standing ‘any person’)

Or overriding them, creating new regimes of control
*Trees (Disputes Between Neighbours) Act 2006 (NSW)*;
*Robson v Leischke* (2008) 159 LGERA 280
*Water Management Act 2000 (NSW)* ss.52, 393 (riparian rights to water)

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

A. Fundamental Concepts
International institutions
- United Nations Environment Programme www.unep.org
- International Union for the Conservation of Nature www.iucn.org
- Global Environment Facility wwwgefweb.org

Sources of international environmental law

Statute of the International Court of Justice Art.38
- Framework and other conventions (treaties)
  Vienna Convention on the Law of Treaties
- Customary international law
  The Trail Smelter Case
- General principles of international law (recognised by civilised nations)
  Australia v France (the Nuclear Tests Case) (good faith);
  The Danube Dam Case: the Gabčikovo-Nagymaros Project (good faith and obligation to make reparation for breaches of international obligations)
- Judicial decisions and the teachings of the most highly qualified publicists of the various nations

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
United Nations Framework Convention on Climate Change Art.14

Sustainable development as an internationally accepted principle of decision-making:
UNCED, the Brundtland report (‘Our Common Future’) and the Rio Declaration on Environment and Development

B. Influences in Australia

- The status of international law in Australia
- Entering into treaties
- 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 (ESD and precautionary principle);
  Greentree v Minister for Environment and Heritage (2005) 143 LGERA 1 (interpretation of domestic law by reference to international convention);
  Taralga Landscape Guardians Inc v Minister for Planning [2007] NSWLEC 59 (climate change and need for renewable energy)
  Humane Society International Inc v Kyodo Senpaku Kaisha Ltd [2008] FCA 3; [2008] FCA 36 (breach of domestic laws on whaling; domestic law prevails)

C. Human Rights and Trade Issues

- 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)
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Unit 4: Federal Governance and Environmental Law

A. Rules about sovereignty and control over resources

- Sovereignty over land and access to natural resources (Stockholm Conference 1970 Principle 21 and Rio Conference 1990 Principle 2)
- Limitations on sovereign exercises of power; USA v Canada (the Traill Smelter Arbitration)
- Antarctica: the Antarctic Treaty and Protocol on Environmental Protection
- The Exclusive Economic Zone (EEZ) UNCLOS Art.56 (extension of sovereign powers and jurisdiction in conformity with the treaty) Olbers Co Ltd v Commonwealth of Australia [2004] FCAFC 262 (UNCLOS Art 111 – right of hot pursuit))
- UNCLOS Pt.XII Protection and Preservation of the Marine Environment
Art.193: States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment.

B. Division of environmental responsibilities between federal and state governments

- Internal borders; the Offshore Constitutional Settlement
  Coastal Waters (State Title) Act 1980 (Cth)
  Coastal Waters (State Powers) Act 1980 (Cth)
  New South Wales v Commonwealth (1975) 8 ALR 1
  Bonser v La Macchia (1969) 122 CLR 122
- The Constitution of Australia ss 51, 52, 92, 109
- ‘Heads of power’ for environmental law-making (s.51)
  National Greenhouse and Energy Reporting Act 2007 (Cth) (corporations power)
  Clean Energy Act 2011 (Cth) s 3 (external affairs)
- Co-operative federalism
- Development of national policies and strategies
- Federal funding arrangements; Natural Heritage Trust of Australia Act 1997 (Cth)
- Exclusive Jurisdiction over Commonwealth places (s.52)
- Inconsistency between Federal and State laws; Constitution s.109
  Telecommunications Act 1997 (Cth) sch.3 div.3 (carriers might engage in authorized activities despite state planning laws)
  Leichhardt Council v Telstra Corp. [2005] NSWLEC 152
  EPBCA 1999 (Cth) s.10 (not intended to ‘cover the field’)

C. The Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBCA)

- The EPBCA and other Commonwealth legislation
- Legal Responsibilities of the Commonwealth are triggered by a ‘significant impact’ on a ‘Matter of National Environmental Significance’ (MNES)
  Booth v Bosworth [2001] FCA 145 (the ‘barbecued bats’ case)
  Minister for the Environment and Heritage v Queensland Conservation Council (2004) 134 LGERA 272
  Greentree v Minister for Environment and Heritage (2005) 143 LGERA 1
  Minister for Environment, Heritage and the Arts v Lamattina [2009] FCA 753 (penalty of $220,000 for unlawfully clearing habitat of an endangered cockatoo)

  If the Minister considers an impact may be ‘significant’ an environmental assessment must be done and the action approved by the Federal Minister (see Unit 7).

- Exemption for RFA forests (ss 18..38)
  Forestry Tasmania v Brown (2007) 158 LGERA 191 (obligation to protect threatened species satisfied by establishment and maintenance of reserves in RFA areas)
- Coal seam gas
A new ‘Matter of National Environmental Significance’ has recently been added to the EPBCA. A corporation (within the meaning of 51(xx) of the Constitution), the Commonwealth or a Commonwealth agency must not take an action that involves coal seam gas or large coal mining development without Commonwealth approval if the action has, will have, or is likely to have a significant impact on a water resource (within the meaning of Water Act 2007 (Cth)); (EPBCA ss 24D and 24E). Before the Minister decides whether or not to approve the taking of the action, the Minister must obtain the advice of the Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development (s 131AB).

‘Coal seam gas development’ and ‘large coal mining development’ means any activity involving coal seam gas extraction or coal mining that has, or is likely to have, a significant impact on water resources (including any impacts of associated salt production and/or salinity):

(a) in its own right; or

(b) when considered with other developments, whether past, present or reasonably foreseeable developments (s 528).

The Independent Expert Committee has been created (ss 505C and 505D) to advise the Commonwealth Minister about whether coal seam gas developments or large coal mining developments in a state or territory are likely to have a significant impact on water resources.

A National Partnership Agreement on Coal Seam Gas and Large Scale Coal Mining Development between the Commonwealth and New South Wales, Victoria, Queensland, South Australia and the Northern Territory commenced on 14 February 2012. To view the agreement go to http://www.federalfinancialrelations.gov.au.
Unit 5: Principles of Sustainable Development

A. Fundamental concepts

- The Rio Principles
- Implementation of Principles in Conventions; 
  *Climate Change* http://unfccc.int/resource/docs/convkp/conveng.pdf Art.3 
  *Biodiversity* http://www.biodiv.org/convention/convention.shtml Arts 6,10
- SD in Australian law; definitions and principles of ESD: 
  *Protection of the Environment Administration Act 1991 (NSW) s 6(2)*
  *Sustainability Victoria Act 2005 s 4*
  *EPBCA 1999 (Cth) s.3A*
- Procedure or Outcome?
- Objects of legislation (should ESD take priority?)
  *PEOA 1997 (NSW) s.3* (objects are … having regard to…)
  *EPAA 1979 (NSW) s.5* (object to encourage ESD)
  *EPBCA 1999 (Cth) s.3* (promote ESD)
  *Fisheries Management Act 1991 (Cth) s.3* (objectives to be pursued)
  *Water Management Act 2000 (NSW) (object of Act is to apply principles of ESD)*
  *National Parks and Wildlife Act 1974 (NSW) s.2A*
- Instructions to decision-makers (consider, apply?)
  *EPBCA 1999 (Cth) s.391* (take account of; consider)
  *Fisheries Management Act 1994 (NSW) s.30* (give effect to objects; have regard to)
  *National Parks and Wildlife Act 1974 (NSW) s.2A*
- Statutory requirement for decision-maker to take into account principles of ESD may be exercised ‘globally’
  *Blue Wedges Inc v Minister for Environment [2008] FCA 399* (EPBCA s 136(2); (not necessary to take principles of ESD into account when considering each of the matters in s 136(1) separately and independently of each other)

B. ESD and the precautionary principle in the courts

  **Note:** the powers of the Court vary according to whether the action is for merits or judicial review

  *Leach v DGNPWS (1993) 81 LGERA 270*
  *Telstra Corporation Limited v Hornsby Shire Council [2006] NSWLEC 133*
  *Providence Projects P/L v Gosford CC (2006) 147 LGERA 274* (precautionary approach to conflicts of evidence; threatened species)
- Adaptive Management as part of a precautionary approach
  *Ulan Coal Mines Inc v Minister for Planning [2008] NSWLEC 185* (precautionary approach enlivens adaptive management)
EPA v Ballina SC (2006) 148 LGERA 278 (monitoring conditions of licences are being complied with is an important part of a precautionary and adaptive management approach) 

Lawyers for Forests v Minister for Environment Heritage and the Arts [2009] FCA 114 (conditions on the operation of a pulp mill inter alia requiring the mill to stop operating if maximum effluent standards were likely to be exceeded and response strategies were unlikely to prevent this occurring) 

Newcastle & Hunter Valley Speleological Society Inc v Upper Hunter Shire Council and Stoneco Pty Limited [2010] NSWLEC 48 (“Adaptive management is a concept which is frequently invoked but less often implemented in practice. Adaptive management is not a “suck it and see”, trial and error approach to management, but it is an iterative approach involving explicit testing of the achievement of defined goals. Through feedback to the management process, the management procedures are changed in steps until monitoring shows that the desired outcome is obtained. The monitoring program has to be designed so that there is statistical confidence in the outcome. In adaptive management the goal to be achieved is set, so there is no uncertainty as to the outcome and conditions requiring adaptive management do not lack certainty, but rather they establish a regime which would permit changes, within defined parameters, to the way the outcome is achieved)"

SHCAG Pty Ltd v Minister for Planning and Infrastructure and Boral Cement Limited [2013] NSWLEC 1032 (The preparation of a management plan as a condition of consent should not be a panacea to overcome the necessity to consider a requisite matter, as the consent authority has an obligation to consider and determine all relevant matters. In this case the requirement for the preparation of a water management plan as a condition of consent left major and fundamental issues undetermined in respect of the impact of the proposal, which essentially deferred consideration of a matter that the consent authority was required to consider and determine before issuing consent)

C. Intergenerational equity

Taralga Landscape Guardians Inc v Minister for Planning [2007] NSWLEC 59 (alternative sources of energy; greenhouse effect)
Hub Action Group Inc v Minister for Planning [2008] NSWLEC 116 (prime agricultural land)
Anderson v Director-General, Department of Environment and Climate Change (2008) 163 LGERA 400 (aboriginal cultural heritage)

D. Does a statutory requirement to consider the ‘public interest’ in decision-making enliven a duty to consider principles of ESD?

EPAA ss 79C, 75I and EPAA Reg 2000 cl.8B
Minister for Planning v Walker [2008] NSWCA 224; overruling Gray v Minister for Planning (2006) 152 LGERA 258 (the Anvil Hill case)
Aldous v Greater Taree City Council [2009] NSWLEC 17
Kennedy v NSW Minister for Planning [2010] NSWLEC 129

E. Improved valuation, pricing and incentive mechanisms

Tradeable permits, green offsets and other market-based instruments
F. **Biodiversity** (see Units 7 and 8)

**Unit 6: Environmental Assessment of Projects in NSW: Environmental Planning and Assessment Act 1979 (NSW) (EPAA)**

We will look at environmental assessment through a particular project chosen by the group; for example a coal mine, wind farm or other relevant project.

1. **Strategic Planning**

   Strategic planning may:
   
   (a) govern decision-making in respect of decision-making for particular projects
   
   EPAA Pt 3 (‘environmental planning instruments’ (EPIs))
   
   (b) obviate the necessity to provide an environmental assessment for each individual project
   
   Threatened Species Conservation Act 1995 (NSW) ss 126B-126N (certification of EPIs as biodiversity compliant).
   
   State Environmental Planning Policy (Sydney Region Growth Centres) 2006

2. **Major Projects**

   ‘Fast-tracking’ projects of major economic and environmental significance (state significant projects and infrastructure); EPAA Pt.4 Div 4.1 and Pt 5.1 (Director-General assesses environmental impacts; Minister is consent authority)

   State Environmental Planning Policy (State and Regional Development) 2011

   State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007

   EPAA Regulation 2000 sch.2

   State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) Amendment (Resource Significance) 2013 (NSW)

   This amendment applies to the consideration of development consents for mining. It states:

   1. that in determining whether to grant consent to a proposed mining development, the significance of the resource is to be the consent authority’s principal consideration. Accordingly, the weight to be given by the consent authority to any other matter for consideration (including environmental impacts) is to be proportionate to the importance of that other matter in comparison with the significance of the resource.

   2. The amendment also introduces development standards for various environmental impacts, such as noise, air emissions and aquifer interference, relating to mining that, if complied...
with, prevents the consent authority from requiring more onerous standards for those matters; although this does not prevent the consent authority granting consent even though any such standard is not complied with.

3. In determining a development application for development for the purposes of mining, the consent authority must consider any certification by the Chief Executive of the Office of Environment and Heritage or the Director-General of the Department of Primary Industries that measures to mitigate or offset the biodiversity impact of the proposed development will be adequate.

It remains to be seen whether this amendment will have any practical affect on the consideration of mining development, particularly by the Planning Assessment Commission (PAC), and, where merits appeals are not taken away by a referral to the PAC for a public hearing, the Land and Environment Court.

**Mining and Agricultural Land: Gateway Process for Strategic Agricultural Land**

Amendments to the *Environmental Planning and Assessment Regulation 2000 (NSW)* have been introduced to establish a gateway process for mining and petroleum development on strategic agricultural lands. This Regulation must be read in conjunction with *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) Amendment 2007, Part 4AA* (the Mining SEPP) and *Environmental Planning and Assessment Amendment (Gateway Process for Strategic Agricultural Land) Regulation 2013 (NSW)* (see below).

**Strategic agricultural land** comprises:

- biophysical strategic agricultural land – land which has the best quality soil and water resources and is capable of sustaining high levels of productivity
- critical industry cluster land – a concentration of significant agricultural industries potentially impacted by coal seam gas or mining development (see Mining SEPP reg 3).


*Environmental Planning and Assessment Regulation 2000 Clause 50A* now requires that a development application for consent to mining or petroleum development on strategic agricultural land must be accompanied by:

- (a) a gateway certificate; or
- (b) a site verification certificate that certifies that the land on which the proposed development is to be carried out is not biophysical strategic agricultural land.

Site verification certificates are issued by the Director-General of Planning under regs 17C–17E of the *Mining SEPP*. Applications for gateway certificates (regs 17F–17M must be made to the Gateway Panel (regs 17N–17U).

A Gateway assessment is an independent scientific assessment of the impact of new State significant mining and coal seam gas proposals on strategic agricultural land and its associated water resources. This assessment must be completed before an applicant can submit an application for development consent. The Panel will issue a certificate outlining its findings and making recommendations about the proposal.
Before determining an application for development consent that is accompanied by a Gateway certificate, the consent authority must consider the recommendations set out in the Gateway certificate, as well as a number of other prescribed matters, including impacts on water resources, and other advice provided by the Gateway Panel and Minister for Primary Industries (Mining SEPP reg 17B).

**Environmental Planning and Assessment Amendment (Gateway Process for Strategic Agricultural Land) Regulation 2013 (NSW):**

1. requires development applications (or applications for modification of consent) relating to certain mining or petroleum development on specified strategic agricultural land to be accompanied by a Gateway certificate in respect of the proposed development (or, in certain cases, a site verification certificate that certifies that the land on which the proposed development is to be carried out is not biophysical strategic agricultural land);
2. provides that, if a Gateway certificate has been issued in relation to a proposed development, the Director-General of the Department of Planning and Infrastructure, in preparing environmental assessment requirements under Schedule 2 to the EP&A Regulation, must address any recommendations of the Gateway Panel set out in the certificate;
3. provides that, if a Gateway certificate has been issued in relation to a proposed development because of the expiry of the time limit set out in proposed Clause 17I (3) of the Mining SEPP, the Director-General, in preparing such environmental assessment requirements, must consult with the Gateway Panel and have regard to the need for the requirements to assess any key issues raised by that Panel;
4. provides that, if a Gateway certificate in respect of proposed development is issued after environmental assessment requirements for that proposed development have been notified, the Director-General must have regard to any recommendations of the Gateway Panel set out in the Gateway certificate and may modify the environmental assessment requirements; and
5. requires information regarding any relevant site verification certificate to be included in planning certificates issued by councils under s 149 of the EPAA.

**New coal seam gas exploration and development** is now prohibited in and within a 2 kilometre buffer around existing residential and village areas across NSW, and the North West and South West Growth Centres of Sydney (Mining SEPP reg 9A).

**A National Partnership Agreement on Coal Seam Gas and Large Scale Coal Mining Development** between the Commonwealth and New South Wales, Victoria, Queensland South Australia and the Northern Territory commenced on 14 February 2012. To view the agreement go to http://www.federalfinancialrelations.gov.au.

Impacts on water resources from coal seam gas and large coal mining developments are now a **Matter of National Environmental Significance** under the EPBCA (see Unit 4).

3. **Designated Development**

Environmental assessment of applications for development under *EPAA Pt.4* (local council is consent authority) *EPAA Regulation 2000* sch.1 and 3

‘Designated development’ requires an environmental impact statement (EIS): *EPAA Regulation 2000* sch.2; *EPAA s 78A(8)(i)*
4. **Duties of decision-maker in evaluating applications for development**

*EPAA ss 79C, 89H.* Decision-maker must consider environmental impacts and the public interest. ‘Public interest’ includes principles of sustainable development (see Unit 5)

- Essential and non-essential pre-conditions for making decisions;
  *EPAA 1979 (NSW) s 78A(8), (9)*
  *Cranky Rock Road Action Group Inc v Cowra Shire Council* [2006] NSWCA 339

5. **Environmental assessment of ‘activities’ where development consent not required**

Government agencies to consider environmental impacts before issuing consents
*EPAA Pt.5 ss 111, 112-112B; EPAA Regulation 2000 reg 228*

6. **Environmental assessment under the EPBCA**

*EPBCA Ch.4*  
Assessment and approval bilateral; Ch.3  
Choice of process for assessment; *EPBCA s.87*

**Note:** Content and quality of EIA may be challenged under processes for judicial review and/or merits appeals (see Unit 10)

7. **Coastal Planning**

*Byron Shire Council v Vaughan, Vaughan v Byron Shire Council* [2009] NSWLEC 88

**Note:** the Coastal Protection Act 1979 (NSW) has recently been amended as a result of the *Vaughn* litigation to introduce *inter alia* the following provisions:

- landowners in specific locations will now be able to place sand or sandbags on the beach under strict conditions in order to reduce the impact of coastal erosion on their properties. If the bags cause erosion they are to be removed. Draft Minister's Requirements for these works have been released for consultation.
- consent authorities assessing development applications for long term coastal protection works such as seawalls must be satisfied that appropriate arrangements are in place to restore beaches if they are eroded by the works.
- councils may levy a coastal protection service charge on land where the current or past landowners have voluntarily constructed coastal protection works. This charge covers council's costs of maintaining the works and restoring the beach if the works cause erosion.
- a NSW Coastal Panel has been established to provide expert advice to the Minister and councils on coastal management issues. It is proposed that the
Panel will also be the consent authority for long term coastal protection works where the council does not have a coastal zone management plan in place.

- Enhancing statutory exemptions from liability for councils and State agencies when their coastal management activities are carried out in good faith.

**Unit 7: Protection of Biodiversity**

**A. The planning system as the traditional focus for natural resources management arising from ‘development’**

Biodiversity and threatened species: requirements for consultation and concurrence; *EPAA* ss. 34A (*EP1s*); 79B(3) (applications for development), 112C-E (activities)
Duties to ‘consider’; *EPAA* ss 5B-D, 79C
Species impact statements; *EPAA* ss.5A, 78A(8)(ii); *TSCA* s.110
Biodiversity certification and biobanking; *TSCA* 1995 (NSW) Pts.7AA and 7A

**B. Native vegetation**

*Native Vegetation Act 2003 (NSW)*
Property vegetation plans or development consent for broadscale clearing
Biodiversity certification for clearing; *s.12*

**C. Conservation and land management agreements and plans**

*National Parks and Wildlife Act 1974 (NSW)* Pt.4 Div.12
*Heritage Act 1977 (NSW)* Pt.3B
*Native Vegetation Act 2003 (NSW)* Pt.4

**D. Native species**

*National Parks and Wildlife Act 1974 (NSW)*
*Threatened Species Conservation Act 1995 (NSW)*
*EPBCA* s 266B (‘approved conservation advice’)
*Tarkine National Coalition Inc v Minister* [2013] FCA 694

- Consultants beware:
  
  In *Gordon Plath of the Department of Environment and Climate Change v Fish; Gordon Plath of the Department of Environment and Climate Change v Orogen Pty Ltd* [2010] NSWLEC 144, the defendants were convicted under s.118D of the National Parks and Wildlife Act 1974 (NSW) in that, as consultants assisting in the preparation of an application for development consent, they failed to advise the developer that damaging koala habitat was unlawful under the NPW Act. The developer subsequently cleared the vegetation based on the advice of the defendants. Both defendants pleaded guilty and were convicted. Justice Pain imposed fines totalling $15,000 ($5000 Fish; $10,000 Oregon) plus prosecutor's costs amounting to $105,000 which the defendants agreed to equally share. Both
defendants were also ordered, pursuant to s. 205(1)(c) of the NPW Act, to conduct mapping in specific parts of the koala habitat and to publicise the offence.

- And keep a good eye on what your contractors are doing: NVA s.44 ascribes legal responsibility for unlawful clearing to the landowner, unless it is established that the clearing was carried out by another person whom the landowner did not cause or permit to carry out the clearing. See Director-General, Department of Environment and Climate Change v Walker Corporation Pty Limited (No 2) [2010] NSWLEC 73

E. Offsets for impacts on biodiversity

An offset is basically any works or other action that makes reparation for losses of native vegetation; or, more specifically, an agreement to carry out works or activities to conserve, enhance, maintain, monitor or rehabilitate an area of vegetation. There are basically three avenues through which offsets may be negotiated; by way of a planning agreement between a developer and the consent authority, reflected in conditions of consent (EPAA ss 80(6), 93F); by conditions of development consent that require dedication of land or monetary payments where the development might increase the demand for public services or amenities (EPAA ss 80(6), 94), or through conditions of approval for clearance of native vegetation where that does not require development consent. Offsets are intuitively contentious, for obvious reasons: first, what is certain is that native vegetation will be destroyed on the development site; second, although the offset site must generally be maintained ‘in perpetuity’ for offset management, this may be inherently insecure; third, where there is no current proposal to develop, or threat to, the offset site, it may in any case never be affected, with or without being designated as an offset site, in which case there will effectively be loss without real gain; fourth, it is virtually impossible to offset both qualitative and quantitative proportional values from one site to another, even if ratios of say 6:1, 10:1 or whatever are applied to the offset; that is, that for every hectare of land cleared, six or ten hectares of offsets must be provided. The oft-held suspicion is that offsets are really a device for permitting development that should not be allowed (particularly where endangered ecological communities are involved); and this legitimate concern must be allayed by the rules applied to offsetting and by decision-makers, including the specialist courts and tribunals which have, it must be said, generally applied rigorous standards to offset schemes; see Bulga Milbrodale Progress Association Inc v Minister [2013] NSWLEC 48 (extension of mine refused because of inadequate offsey plan and social impacts)

F. Trees

Tree preservation orders

Warringah Council v Bananno [2012] NSWLEC 265

Trees may also be protected through conditions of development consent

Hunters Hill Council v Gary Johnston [2013] NSWLEC 89

Unit 8: Managing pollution and waste
A. Pollution

*Protection of the Environment Operations Act 1997 (NSW)*
- Prohibitions on polluting activities and the licensing regime
- Environment protection notices (see Unit 10)
- Voluntary and compulsory audits; pollution reduction plans
- Criminal enforcement (see Unit 9)

B. Product stewardship and extended producer responsibility

*Product Stewardship Act 2011 (Cth)*

C. Landfills and alternative waste treatment facilities (AWTs)
- Principles of waste management; avoid, reduce, re-use, recycle, dispose
- Quality standards for application of compost derived from AWTs to land

D. Contaminated Sites

*State Environmental Planning Policy 55 – Remediation of Land*

*EPAA ss 145A-C* (exemptions from liability)

*Contaminated Land Management Act 1997 (NSW)*
- Obligation to report
- Powers of EPA to order investigation and clean-up
- Choice of person to be held legally responsible for clean-up

Unit 9: Enforcing Environmental Law: Remedies for Regulators

A. Administrative Remedies
- Environment protection and other notices and orders
  PEOA ss.91-94; NVA ss.37, 38
- Remediation orders; EPBCA ss.480A-C
- Legal requirements for compliance with conferred power, 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

B. Civil Remedies
• **Civil Penalties**  
*EPBCA ss.481-486D*  
*Minister for Environment v Greentree (No 3) (2004) 136 LGERA 89*  
*Minister for Environment Heritage and the Arts v Lamattina [2009] FCA 753* (penalty of $220,000 for the clearance of 170 eucalypts on a property that was within the nesting range of the south-eastern red-tailed black cockatoo, a listed endangered species under the EPBCA).

• **Enforceable Undertakings**  
*EPBCA ss.486DA, 486DB*  
Undertakings given under these provisions include two NSW mining companies agreeing to pay $1.450,000 in an enforceable undertaking after damaging three endangered swamps; and $305,000 committed by a plantation timber company to repair damage done to a critically endangered grassland.  
*PEOA s.253A*  
Several undertakings have been negotiated; including $100,000 to help improve land and water quality in the Hunter River catchment following releases of pollution from a coal mine; $120,000 for environmental rehabilitation for unauthorized emissions of sewage; and $100,000 for rehabilitation work along the Thredbo river following pollution caused by an escape of diesel oil.

C. **Criminal Remedies**

• Investigative powers of regulators;  
*PEOA Ch.7*  
*Native Vegetation Act 2003 (NSW) s.35*  
*DG Dept. of Planning v Epacris P/L (2006) 147 LGERA 372*  
*Hardie Holdings P/L v DGDNR (2007) 151 LGERA 373*  
*Walker Corporation P/L v Director-General, DECCW (No.2) [2009] NSWLEC 177*  
• Stacking evidential requirements in favour of regulators; *PEOA s.257*  
• Evidence has to support prosecution ‘beyond reasonable doubt’; *Norvill v Stokes [2006] NSWLEC 622; Port Stephens Council v SS and LM Johnston P/L [2007] NSWLEC 30*  
• Prosecution as a ‘last resort’; *EPA Prosecution Guidelines*  
• Principle of ‘Double Jeopardy’ (elements of offences must be the same)  
*Rosser v NSW DPI [2008] NSWLEC 109*  
*Greentree v Minister for Environment [2005] FCAFC 128* (defendant charged both in personal capacity and as director of company)  
• Protection against self-incrimination (only applies to individuals not corporations)  
• Actus Reus and Mens Rea  
• Strict liability crime; *PEOA s.120*  
*EPA v Tyco Water P/L (2005) 142 LGERA 241* (purpose of strict liability not to punish ‘luckless victims’).
• Causation: 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*

• Wilful and negligent conduct; PEOA s.116

• ‘Knowingly’; *Histollo P/L v DGNPWS (1998) 103 LGERA 355*

• ‘Permit’; *Hardt v EPA [2007] NSWCCA 338*

• 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 as an accessory: PEOA s.116(2) *Environment Protection Authority v Warringah Golf Club [2003] NSWLEC 140*

• Liability of corporations: PEOA s.169

• Liability of directors and managers; PEOA s.169; *EPA v Fernando (2003) 129 LGERA 416; DGDLWC v Greentree (2003) 131 LGERA 234*

• Defences
  Operating under a licence
  ‘Due diligence’ (wilful and negligent conduct)
  Defence of honest and reasonable mistake of fact (strict liability)

• Principles of Sentencing
  *Axer Pty Ltd v Environment Protection Authority (2001) 113 LGERA 357 Harrison v Harris [2013] NSWLEC 105 (‘instinctive synthesis’ taking into account both objective and subjective factors)*
  *Hardt v EPA [2007] NSWCCA 338 (intention and appreciation of offence relevant, even in strict liability and non-intentional proceedings, to determine level of seriousness of offence)*
  *Resourceco P/L v Harvey (2007) 154 LGERA 37 (repeatedly ignoring orders and enhancing profitability without due regard to licence conditions demanded substantial penalty)*
  *Ngo v Fairfield City Council [2009] NSWCCA 241 (the NSW Court of Appeal stressed that in strict liability cases it is particularly important that there should be an appropriate assessment of the culpability of the offender. It is axiomatic that the penalty should reflect not only the gravity of the offence but the circumstances of the offender. So in this case, where a fine and costs order would have forced the defendant to sell his home, this could be seen to be an excessive consequence of the strict liability of the defendant for an offence committed in subjectively innocent circumstances. The Court therefore reduced the penalty of $22,500 imposed by the Land and Environment Court to $3000; and ordered costs of $4,110.)*

• Effect of the Crimes (Sentencing Procedure) Act1999 (NSW) ss 5,10
  *Betland v Environment Protection Authority [2010] NSWLEC 183 (when imprisonment may be justified)*

• Sentencing options: *PEOA ss.245-250 Environment Protection Authority v Centennial Newstan Pty Ltd [2010] NSWLEC 211 (award of $105,000 to Lake Macquarie City Council, for its Ecosystem Enhancement Operations Program, in lieu of a fine for an offence of unlawful pollution).*
Environment Protection Authority v Chillana Pty Ltd [2010] NSWLEC 255 (penalty of $60,000 to contribute towards a program of restoring the banks of the Castlereagh river)
  
- Failure to carry out court orders: contempt of court

Environment Protection Authority v Ramsey Food Processing Pty Ltd (No 4) [2011] NSWLEC 246 (fine 3x that imposed at sentencing would be appropriate)

Chief Executive Officer, Department of Environment and Conservation v SZULC (No.2) [2011] WASC 315 (15 months imprisonment)

Unit 10: Civil Enforcement (private citizens and NGOs)

A: Fundamental Principles of Citizen Enforcement

- Be wary of time limits for citizen enforcement (though these are unlikely to apply where some form of decision-making ‘illegality’ is found)
  Minister for Planning v Walker (2008) 161 LGERA 423

- Standing to enforce statutory schemes
  EPBCA s 487 (extended standing for ‘person aggrieved’)
  Booth v Bosworth [2000] FCA 1878
  Environmental Planning and Assessment Act 1979 (NSW) s 123 (any person)

- Common law standing
  Animal Liberation Ltd v Department of Environment and Conservation [2007] NSWSC 221

- The role of the Environmental Defenders Office (EDO) www.edo.org.au

- Interim injunctions pending hearing of proceedings (to preserve the ‘status quo’) and requirements for giving undertakings for damages

Note: In Save Our Figs Inc v General Manager of Newcastle City Council [2011] NSWLEC 207 the plaintiffs sought an interlocutory injunction to restrain the removal of iconic fig trees. The court said that in exercising its discretion in relation to the usual undertakings for damages, the three-step process adopted by the court in relation to orders for costs should be applied; first, can the litigation be characterised as having been brought in the public interest? Second, if so, is there ‘something more’ than the mere characterisation of the litigation as having been brought in the public interest? Third, are there any countervailing circumstances which speak against departure from the usual rule? In this case application of this three step process resulted in the court’s discretion being awarded in favour of the applicant and the applicant was not required to give the usual undertakings as to damages.

- Remedies
  Great Lakes Council v Lani [2007] NSWLEC 681 (nature of declaratory relief and civil remediation orders)
  Hill Top Residents Action Group Inc v Minister Administering the Sporting Venues Authorities Act 2008 (No 4) [2011] NSWLEC 6 (although making a declaration would have no practical effect on the rights and duties of the parties, the court held that it would be appropriate to make a declaration inter alia because of the seriousness of the breach (clearing vegetation of high conservation value), the fact that the respondent had committed previous breaches, and the fact that a public authority ought to lead by example. Making a declaration also marks the
disapproval of the court of conduct that Parliament has proscribed. It also serves to
discourage others from acting in a similar way and may, therefore, be seen to have
a deterrent and educative element).

- Alternative Dispute Resolution
  
  \textit{Land and Environment Court Act 1979 s.34} (conciliation conferences)
  
  \textit{Land and Environment Court Rules 2007 r.3.8} (neutral evaluation)

\textbf{B. Costs of Taking Action}

- Normal rules about costs (costs follow the event)
  
  \textit{Civil Procedure Act 2005 (NSW) s.98}
  
  \textit{Land and Environment Court rules 2007 r.4.2}

- Actions brought in the public interest
  
  \textit{Oshlack v Richmond River Council} (1998) 96 LGERA 173
  
  
  \textit{Lansen v Minister for Environment and Heritage (No.3)} (2008) 162 LGERA 258
  
  \textit{Minister for Planning v Walker No.2} [2008] NSWCA 334

  Note: the LEC has adopted a three step approach to costs in public interest
  litigation: first, was the litigation truly brought in the public interest;
  second, were there any countervailing circumstances, such as disentitling conduct by
  the applicant or matters contrary to the public interest; third, is there ‘something more’
  that would entitle a party to relief from the usual costs order?
  
  \textit{Caroona Coal Action Group Inc v Coal Mines Australia P/L (No.3)} [2010]
  
  NSWLEC 59
  
  \textit{Snowy River Alliance Inc v Water Administration Ministerial Corporation} [2011]
  
  NSWSC 652

- Protective costs orders in public interest litigation
  
  \textit{Uniform Civil Procedure Rules 2005 (NSW) rule 42.4; Land and Environment
  Court Rules 2007 (NSW) rule 4.2}. (Acting in accordance with the dictates of justice
  is the primary consideration for exercising such a discretion; \textit{Civil Procedure Act
  2005 (NSW) ss.58 and 60}).
  
  \textit{Blue Mountains Conservation Society Inc v Delta Electricity (No 2)} [2009]
  
  NSWLEC 193
  
  \textit{Caroona Coal Action Group Inc v Coal Mines Australia Pty Limited and Minister
  for Mineral Resources} [2009] NSWLEC 165

- Indemnity Costs. In \textit{Australians for Sustainable Development Inc v Minister for
  Planning} [2011] NSWLEC 33, and \textit{Australians for Sustainable Development Inc v
  Minister for Planning (No 2)} [2011] NSWLEC 70 indemnity costs were awarded
  against the Minister, who was ultimately successful in the proceedings, because of
  his decision after the hearing had concluded, to exercise a statutory power of
  exemption that effectively destroyed a ground of complaint on which the plaintiff
  would have succeeded but for the intervention. Biscoe J said that because the
  amendment had not been made in a timely way, considerable legal costs and
  resources had been wasted by the applicant and resources of the Court had also
  been wasted.

- Security for costs and balance of convenience
Williams v Pardoe (2003) 132 LGERA 54 (grant of security would stifle action)
Save Little Beach Manly Foreshore Inc v Manly Council [2013] NSWLEC 155
Illawarra Residents for Responsible Mining Inc v Gujarat NRE Coking Coal Inc [2012] NSWLEC 259

Unit 11: Judicial Review and Merits Appeals (Remedies against regulators)

A. Judicial Review

- Democracy in action; need for accountability and transparency
  Coffs Harbour CC v Arrawarra Beach P/L [2006] NSWLEC 365
- Matters of policy are for decision-makers not Courts
  Outback Leather P/L v DGNPWS (1996) 92 LGERA 319 (kangaroo culling)
  Haggarty v NSW (1995) 98 LGERA 226 (cessation of logging and creation of national park)
  Dubler Group v Ku-Ring-Gai MC (2004) 133 LGERA 438 (Minister’s opinion on matters of planning significance)
- Judicial review is based on the implied intention of Parliament; therefore principles may give way to express statutory intent; for example procedural fairness in planning legislation
- Grounds of review
  Administrative Decisions (Judicial Review) Act 1977 (Cth) s 5
- Reasons for decisions
  Administrative Decisions (Judicial Review) Act 1977 (Cth) s 13
  Note: where legislation provides that a decision-maker must be ‘satisfied’ about certain matters before making a decision, the onus lies on the applicant to prove that the decision-maker did not form the required mental state of satisfaction. Such an inference may be gleaned from relevant documentary material evidencing the decision-making process; from responses to interrogatories directed to the decision-maker; and, in NSW, by calling in aid rule 4.3 of the Land and Environment Court Rules 2007, under which a public authority may be required to furnish a written statement setting out reasons for a decision; see Caroona Coal Action Group Inc v Coal Mines Australia P/L [2010] NSWLEC 1
  Whether such ‘satisfaction’ was reasonably open to the decision-maker on the facts may be challenged by judicial review; but not whether the facts underlying the formation of the relevant state of satisfaction actually existed; Casa v City of Ryde Council [2009] NSWLEC 212
- 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
- Decision-makers must follow the processes directed by the legislation
  Phosphate Resources Ltd v Minister for Environment [2008] FCA 1521
- According procedural fairness (natural justice) before making decisions
  Liverpool CC v Cauchi [2005] NSWLEC 675 (obligation to accord natural justice before issuing administrative order);
  Anderson v DGDEC [2006] NSWLEC 12 (legitimate expectation to be consulted before issuing permit to destroy aboriginal relics)
Queensland Conservation Council Inc v Xstrata Coal Queensland P/L (2007) 155 LGERA 322 (CA) (obligation of court or tribunal to allow parties to make submissions on fresh evidence used by the court before making its decision)

- Common law rules for procedural fairness may be displaced by legislation
  EPAA 1979 (NSW)
  Harvey v Minister Administering WMA 2000 [2008] NSWLEC 165
  Wilderness Society Inc v Turnbull (2007) 158 LGERA 134 (EPBCA s 131AA(7))

- Apprehension of bias in decision-maker
  McGovern v Ku-Ring-Gai Council [2008] NSWCA 209 (whether fair-minded lay observer may reasonably apprehend the decision-maker may not bring an impartial mind to the exercise of the power)
  Castle Constructions P/L v North Sydney Council [2007] NSWCA 164 (reasonable apprehension of pre-judgment by Commissioner of LEC)
  Gwandalan Summerland Point Action Group Inc v Minister for Planning [2009] NSWLEC 140 (because of the minister’s public commitment to a particular outcome, his freedom to determine an application on its merits had been limited, causing fair minded lay observers to reasonably apprehend that the minister may not have brought an impartial and unprejudiced mind to determination of an application for development consent. This case was to lead to the demise of EPAA Pt 3A)

- Excess of power/improper purpose

- Improper purpose/ulterior motives
  Re. Minister for the Environment ex p Elwood (2007) 154 LGERA 366

- Relevant and irrelevant considerations
  Northcape Properties P/L v District Council of Yorke Peninsula [2008] SASC 57 (climate change; refusal of development)
  Aldous v Greater Taree City Council [2009] NSWLEC 17 (coastal inundation from climate change)
  Gray v The Minister for Planning and Ors [2006] NSWLEC 720 (greenhouse gas emissions; extension to coal mine)
  Anderson v DGDEC [2006] NSWLEC 12 (cultural significance of Aboriginal site)

- ‘Consider’: Parramatta CC v Hale (1982) 47 LGRA 319
  Lansen v Minister for Environment and Heritage (2008) FCA 903 (consideration of media release not the same as addressing content)

Note: A minister’s decision may be vitiated for failure to have regard to mandatory and materially relevant considerations by reason of being based on misleading departmental advice; see Williams v Minister for Planning [2009] NSWLEC 5. This is because a misleading departmental communication may lead the minister to fail to take into account a materially relevant consideration; see Sharples v Minister for Local Government [2008] NSWLEC 328

- Uncertainty
  Lucy v OCC Holdings P/L (2008) 157 LGERA 279 (licence conditions)
  Hakim v Waterways Authority (NSW) [2006] NSWCCA 376 (invalidity of stop order for failure to state the activity that should ‘stop’)

- Unreasonableness
Save Our Street Inc v Settree (2006) 149 LGERA 30 (unreasonableness must be ‘manifest’; ‘something overwhelming’);  
Baarmutha Residents Association v Indigo SC [2005] VCAT 1521 (a decision so devoid of plausible justification that no reasonable body of persons could have reached it)  
Minister v Austral Fisheries P/L (1993) 114 ALR 409  
Byron Bay Businesses for the Future Inc v Byron SC [1994] NSWLEC 159  
King v Bathurst Regional Council [2006] NSWLEC 505 (unreasonable of council to conclude ‘minimal environmental impact’)  
- Parliamentary attempts to exclude judicial review (the Hickman principle) 
Minister for Planning v Walker (2008) NSWCA 224 (EPAA s 75X)  
- Does legal error automatically lead to the invalidity of the decision?  
Project Blue Sky Inc v ABC (1998) 194 CLR 355 (HCA)  
Wilderness Society v Turnbull [2007] FCA 1178 (procedural failure not intended to invalidate action)  
Botany Bay CC v Minister for Planning (2006)148 LGERA 251 (substantial compliance not strict compliance with requirements for compiling EIS)  
Cranky Rock Road Action Group v Cowra SC (2006) 150 LGERA 81 (CA) (difference between requirements re. EES and EIS and SIS)  
RAID Inc v Chase Property Investments P/L (2006) 149 LGERA 360 (CA) (application for designated development invalid if not accompanied by EIS; EPAA s 78A(8))

B. Merits Appeals

The nature of merits appeals was explained in Unit 1. For merits appeals involving ecologically sustainable development see Unit 6.

**Note:** A decision-maker hearing a merits appeal cannot simply put aside and substitute a standard set by a planning instrument for one the decision-maker considers more reasonable. This may lead the decision-maker to fail to comply with a statutory obligation to ‘consider’ the relevant planning instrument; Botany Bay City Council v Premier Customs Services P/L [2009] NSWCA 226.

- **A note about costs in merits appeals**

The Land and Environment Court Rules 2007 r.3.7 states that the Court is not to make an order for the payment of costs unless the Court considers that the making of an order as to the whole or any part of the costs is fair and reasonable in the circumstances.

In Port Stephens Council v Sansom [2007] NSWCA 299 the Court of Appeal stressed that administration of justice requires a high level of consistency in approach to interpreting ‘fair and reasonable’.

In Meriton Apartments P/L v Council of the City of Sydney (No.2) [2010] NSWLEC 63 the Court said that so long as a party raises issues of merit that are at least ‘arguable’ then costs are unlikely to be awarded against an unsuccessful party.
The Learning Program

Your learning in this course will be facilitated by the following activities:

- independent study of the twelve units of work in the study guide
- classroom /web based discussions related to analysis of material presented in the study guide
- in depth examination of environmental protection laws
- consideration of ‘real world’ applications: applying the law to factual situations
- engagement in traditional and electronic based legal research
- questioning the effectiveness of environmental law and policy

Useful resources

Law Reports

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

Legal Encyclopaedias

Legal encyclopaedias provide overviews of all the areas of law in Australia. The Law Library has both of the major legal encyclopaedias:

- Halsbury’s Laws of Australia, Butterworths
- Laws of Australia, Thomsons

These publications, however, by their very nature, are likely to be out of date, although they may give you a valuable overview and structure for specific areas of interest.

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 Thomsons. It is published bi-monthly. Another good specialist journal is the Australasian Journal of Natural Resources Law and Policy, published out of the University of Wollongong. The Local Government Law Journal (Thomsons) also often provides commentary on relevant areas of environmental interest.

Loose Leaf Services

Loose leaf law and practice services are invaluable for accessing the latest versions of legislation, case law and commentary in particular areas. Relevant loose leaf environmental services include:

- Land and Environment Court Law and Practice, Thomsons
- Planning Law in Australia Thomsons
- *Environmental Responsibilities Law (NSW)* Thomsons

**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 Climate and Environmental Law, Sydney (ACCEL) http://www.law.usyd.edu.au/accel/
- Australasian Law Information Institute http://www.austlii.edu.au
- Environmental Defender’s Office www.edo.org.au
- NSW Office of Environment and Heritage www.environment.nsw.gov.au

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:**

- 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 should 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/
Assessment

The assessment for this course has 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.

Your assessment tasks

<table>
<thead>
<tr>
<th>Assessment 1</th>
<th>Research paper</th>
<th>50%</th>
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<tr>
<td>Assessment 2</td>
<td>Research paper</td>
<td>50%</td>
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# Please note that assignments must be submitted to IES for passing on to me. I will neither accept, nor acknowledge, emailed assignments.
Guidance on writing your research papers

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: (2013) 30 EPLJ 100. This means refer to the twenty fifth 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 25.

By contrast, if the citation had been [2013] 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 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. By contrast, you may see for example [2012] LEC 100 (Land and Environment Court NSW).

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

Legal Resources

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 approaches ranging over a number of issues; as well as ‘extra-curricular’ research.

- Legal resources are divided into two main categories:
  - Primary sources ie the law itself, treaties, acts of parliament, subordinate legislation, and case law.
  - Secondary sources ie commentary on the law, texts, legal encyclopaedias, journal articles, reports, studies, and law reform proposals.
Examine the relevant primary legal sources 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

- Case law. Use the Local Government & Environmental Reports of Australia (LGERA) or Austlii. 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.

**Useful texts on legal method and legal writing**

For assistance in thinking about and researching the law; and writing legal assignments, you could consult the following text:


**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 1

Weighting: 50%
Due date: Monday April 14
Length: 3000-4000 words

Choose one (1) of the following topics:

**TOPIC 1:**

“Environment protection in Australia should be a federal responsibility”.

1. Analyse the legal responsibilities of state and federal governments for environmental management.

2. What co-operative arrangements are in place to enable the federal government to take an interest in environmental management that is not a legal responsibility?

2. What might be the advantages and disadvantages of giving more control for environmental management to the Federal government?

**TOPIC 2:**

“In order to achieve sustainability … hortatory statements of principle and aspirational
goals are insufficient; the grand strategy must be translated into action”; per Preston CJ in *Hub Action Group v Minister for Planning* [2008] NSWLEC 116

1. What legal responsibilities lie on decision-makers (including courts and tribunals hearing merits appeals) to progress or implement principles of ESD?

2. Is it really possible to ‘balance’ economic, social and environmental considerations in decision-making?

3. What are the limitations on courts and tribunals in implementing principles of sustainability?

**TOPIC 3:**

“Environmental laws in Australia generally, and NSW in particular, allow for a significant degree of public participation in designing strategies for, and making decisions about, environmental management.”

Critically analyse how members of the public may:

1. participate in the design of environmental policies, plans and strategies;

2. Take part in environmental assessments of projects;

3. Challenge decision-making in respect of projects or activities that may have significant environmental impacts.

**TOPIC 4:**

“The claim that overall biodiversity values can be maintained or improved in a system based on gradually eroding the stock of patches of remnant vegetation has a rhetorical element and is counter-intuitive.” (Robinson D, “Strategic Planning for Biodiversity in NSW” (2009) 26 EPLJ 213 at 221.)

Is biodiversity off-setting a legitimate approach to mitigating impacts on biodiversity from development? Your answer should include an analysis of the legal context in which offsetting may occur.

**TOPIC 5:**

Devise a topic of interest or relevance to you (within the framework of the course), prepare a paragraph outlining your proposal, and email it to me for approval.
Assessment 2 (compulsory for all participants)

Weighting: 50%
Due date: Monday May 26
Length: 3000-4000 words

Your client is China Coal. You are approached to conduct an environmental assessment to accompany an application for development of an open cut coal mine for a greenfield site in Northern NSW. The Minister for Mines holds a press conference in which he expresses support for ‘such an important investment’ and confirms the issue of a mining lease to China Coal. Your client, buoyed by the positive response from the Minister, wishes to begin developing its chosen site immediately. Prior to development consent being issued, China Coal engages Shelby Wright to do some ‘preliminary earthmoving’, in the course of which a large area of native vegetation is disturbed, resulting in significant siltation of a nearby watercourse. On being called to inspect the operations, you pass by a sign about 2 kilometres away that reads ‘Commonwealth of Australia: over-wintering habitat for migratory birds’. The hippie commune living nearby, which takes its water from the stream, isn’t too happy about either the earthmoving or the mining proposal.

Advise your client about:

1. the regulatory requirements (state and federal) for environmental assessment and approval of such a project in NSW
2. the legal obligations of the consent authorities in dealing with such an application
3. the rights of the public to participate in, and challenge consent for, such a project
4. the legal liabilities of the company in respect of the ‘preliminary earthmoving’;
5. the role of the courts, should such challenges arise.

Your answer should contain references to relevant case-law.