Basic glossary, underlying theories and assumptions for environmental regulation & policy

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BASIC GLOSSARY[1]

"**Act of Parliament**" (or "statute" or "legislation") is a law made by Parliament. Two examples are the *Environment Protection and Biodiversity Conservation Act* 1999 (Cth) and the *Sustainable Planning Act* 2009 (Qld).[2] When an Act is presented for consideration by Parliament and before it is passed by Parliament, it is known as a "Bill".

"**Amendment**" refers to a change in an Act of Parliament or a statutory instrument. Where new sections are inserted they are often numbered with a capital letter to avoid re-numbering subsequent sections (e.g. where two sections are inserted between ss 20 and 21, they might be numbered ss 20, 20A, 20B, 21).

The "**common law**" is the body of legal rules developed by binding decisions of courts. Australia, Canada, New Zealand and the USA all inherited the common law tradition from England. In countries that do not adopt the English legal system, such as France, Russia and China, there is less reliance on decisions of the courts. However, in common law countries there is now heavy reliance on legislation/statutes/Acts of Parliament. Most environmental law is contained in legislation. Legislation may change or override the common law.

"**Environment**" is a protean term as it readily assumes different forms and characters but it is defined here to mean the natural and human-made world, excluding economic and social matters. This includes: the ecosystem (including biodiversity and natural resources); all areas and structures modified or built by humans; and all factors affecting human health and the quality of human life (including cultural heritage and amenity).

"**Environmental law**" and "**environmental regulation**" are used inter-changeably to refer to the body of law that regulates human impacts on the environment. Environmental law includes, but is not limited to, traditional categories such as environmental protection, conservation, pollution, mining, fisheries, cultural heritage, environmental impact assessment, and planning and development laws. It is a very wide area of law without precise boundaries.

"**Environmental regulatory system**" or "**environmental legal system**" is the combination of environmental law with the government departments, local governments, courts and other bodies that administer it within a particular jurisdiction or geographic area. It includes the decision-making processes, policies, practices and constitutional constraints that affect the administration of the law. There are normally multiple layers of law and administration within any environmental legal system. These layers typically include international, national, regional/state and local laws depending on the governance and constitutional arrangements of the particular jurisdiction.

"**Law**" is the rights, duties, powers and liabilities contained in international treaties, customary international law, domestic legislation, and the Common Law. Most environmental laws in Australia are contained in legislation and subordinate laws and instruments such as regulations and planning schemes.

"**Legislation**" – see Act of Parliament.

"**Parliament**" is the body that makes legislation. At a federal level in Australia there are two houses of Parliament, the House of Representatives and the Senate. At a state level Queensland has only one house of Parliament, known as the "Legislative Assembly". See also – Separation of Powers.

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[1] See further, Bates G, *Environmental Law in Australia* (7th ed, LexisNexis Butterworths, Sydney, 2010); Fisher D, *Australian Environmental Law* (2nd ed, Lawbook Co, Sydney, 2010); McGrath C, *Does Environmental Law Work? How to Evaluate the Effectiveness of an Environmental Legal System* (Lambert Academic Publishing, Saarbrücken, 2010), Ch 1, available at http://www.envlaw.com.au/delw.pdf.

[2] The numbers refer to the year when the Act was passed. "Cth" denotes that the Act was made by the Commonwealth Parliament and is therefore Commonwealth legislation while "Qld" denotes that the Act was made by the Queensland Parliament.

"**Policies**" are positions taken and communicated by government that recognise a problem and in general what will be done about it.[3] For example, a widely accepted environmental policy is a commitment to ecologically sustainable development through integrating environmental considerations into decision-making.

"**Policy instruments**" are the tools or means used by governments to implement policies and achieve policy goals. Law/regulation, education campaigns, and taxes are all examples of policy instruments. Governments typically use combinations of different types of policy instruments, including:[4]

- **Command and control laws (or regulation)** involve laws backed by sanctions to prohibit or restrict harmful activities. A common regulatory approach is to prohibit an activity by making it an offence unless it is approved by government. This forces people to gain approval if they wish to undertake the activity and government can typically control how the activity is conducted by imposing conditions on the approval.
- **Economic instruments** are primarily based on using positive and negative financial incentives rather than direct government control, including enforceable property rights, a trading market, or taxation (e.g. the Australian emissions trading scheme for greenhouse gases). These instruments are typically backed by legislation/law.
- **Government funding** for research into an environmental problem or to support community action such as land rehabilitation.
- **Education and information instruments** include such things as education and training, corporate environmental reporting, and pollution inventories**.**
- **Self-regulation** involves industry or professional associations controlling the conduct of their members without direct government control.
- **Voluntary measures** involve individuals undertaking to do the right thing without any basis in coercion from government, industry or professional bodies.

"**Regulation**" and "**regulatory system**"[5] are used interchangeably with the words "law" and "legal system" to refer to the system of laws that regulates human activities.[6] In the appropriate context, "regulation" or "regulations" is also used to refer to an important type of subordinate legislation.

"**Section**" is the most common name for an individual provision of a statute or statutory instrument. The normal abbreviation for a section is "s" and for sections is "ss". Lower levels within a section are typically referred to as "subsections", "paragraphs" and "Roman numerals" (e.g. s 75(1)(a)(i)).

"**Separation of powers**" is a doctrine that divides the institutions of government into three branches: legislative; executive; and judicial. The legislature (the Parliament) makes the laws; the executive (the government) puts the laws into operation; and the judiciary (judges appointed to the courts) interprets and resolves disputes according to law. In Australia there is not as clear a separation between the three limbs as in the USA and some other countries. At a federal level in Australia, the leader of the party that controls the lower house of Parliament is the Prime Minister and he or she appoints ministers to head the executive government comprised of the Commonwealth public service and organised in different departments (normally collectively referred to as "the government"). At a state level, the leader of the party that controls the Parliament is the Premier and he or she appoints ministers to direct the executive government comprising the Queensland public service.

"**Statute**" – see Act of Parliament.

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[3] See Dovers S, *Environment and Sustainability Policy: Creation, Implementation, Evaluation* (The Federation Press, Sydney, 2005), pp 12-15; Althaus C, Bridgman P and Davis G, *The Australian Policy Handbook* (4th ed, Allen & Unwin, Sydney, 2007).

[4] Adapted from Gunningham N and Grabosky P, *Smart Regulation: Designing Environmental Policy* (Oxford University Press, 1998), p 38.

[5] The titles of ENVM3103 & ENVM7123 refer to "regulatory frameworks" in this sense but this is not commonly used elsewhere.

[6] Regulatory Theory deals with theories of government regulation and is closely related to Policy Analysis and Compliance Theory. See, e.g., Gunningham and Grabosky, n 4.

"**Statutory instruments**" are, subject to some exceptions, any document made under the authority of an Act of Parliament, including subordinate legislation.[7] The most common type is a "regulation". Other less common types are "local laws" and "ordinances" made by local governments. Regional plans, state planning policies, and planning schemes created under SPA are statutory instruments that have the force of law.[8]

"**Subordinate legislation**" is a class of statutory instrument, the most common type of which is "regulations". Generally, legislation/statutes/Acts of Parliament create the broad frameworks for a particular area of law, such as planning law contained in the *Sustainable Planning Act* 2009 (Qld) (SPA), while regulations provide administrative details within that framework. For instance, section 578 of SPA makes it an offence to carry out assessable development without an effective development permit. Schedule 3 of the *Sustainable Planning Regulation* 2009 (Qld) sets out dozens of types of development that are assessable or self-assessable development at a State level under the SPA.

"**Treaty**" (also often termed "convention") is an international agreement between two or more countries. For example, the *United Nations Convention on Climate Change*, done at Rio in 1992, is a major international treaty dealing with climate change.

UNDERLYING THEORIES & ASSUMPTIONS

The following is a summary of some of the key assumptions that underpin legal reasoning and the environmental legal system in Australia and this course:

Our goal: The principal purpose of the law and government is to protect people, including their happiness and quality of life. We want a good society. Everything else the law and governments do is a spin-off from this purpose. Sustainable development reflects this goal in an environmental context.[9]

Scientific and evidence-based reasoning, not religious views underpin application of the law: Since the Age of Enlightenment in the 17 and 18th centuries, mainstream law, science, engineering and government policy in Western culture has assumed that the world can be fully explained by natural elements and forces without reference to supernatural or spiritual forces (a philosophy known as "Naturalism" [10]). Consequently, the world is viewed as a physical entity that is capable of being understood and explained without reference to any god or supernatural forces. Environmental issues are considered in terms of cause-and-effect relationships that science is capable of discerning and predicting. Religion is, therefore, irrelevant to the application of environmental law and policy except to the extent that political, cultural or cultural heritage matters are involved.

Legal Positivism: When deciding what the law is to resolve a dispute, courts and lawyers are concerned with what the law *is* and not what the law *ought* to be. This is known as "Legal Positivism".[11] "What is law" is defined as the rights, duties, liabilities and powers written down or otherwise established under international treaties, customary international law, domestic legislation and subordinate legislation, and the precedents established by decisions of judges. Strict Formalism (colloquially known as "Black-Letter Law") is no longer generally adopted because morals, values and politics are inherent in the creation and operation of the law. Beyond this, criticism of the law is still legitimate and may lead to changes to the law but until the law is changed it does not affect what the law is. A bad law is still the law.

Political theory: The concept of liberal democratic government, where elected representatives are subject to the Rule of Law and constitutional constraints that protect minority rights, is another assumption that

[7] For Queensland, see the *Statutory Instruments Act* 1992 (Qld).
[8] Sections 24, 41 and 80 of the *Sustainable Planning Act* 2009 (Qld).
[9] This adopts an anthropocentric and utilitarian perspective.

underpins environmental law in Australia.[12] Broadly speaking, the Rule of Law refers to the presence of transparent fairly applied legal requirements. It depends upon an independent judiciary that interprets and applies the law in an impartial and transparent manner.[13]

Economic theory: The paradigm of Capitalism has been dominant in Western culture since the 15th century, in the sense of a promoting a mixed economy where markets, private property, profits and regulation all play key roles. It is the dominant economic paradigm in Australia. Neo-liberalism, a *laissez-faire*, anti-regulation and anti-government ideology of extreme conservatism, has become an increasingly influential economic, regulatory and political theory in recent decades, particularly in the USA,[14] but is rejected in this course.

Ethics: The ethical theory underpinning this course is Utilitarianism.[15] Consequently, the overall objective of law, society and politics is seen as to achieve public good and happiness. The environmental ethic underpinning this course is human stewardship for the natural world.[16] Stewardship implies a responsibility to care for the natural world and manage it sustainably for future generations due to humanity's special ability to alter the natural environment and knowledge of the consequences of such actions. This concept implies a notion that humanity's power to alter the environment itself creates an obligation to exercise that power wisely for the benefit of future generations and nature itself. This ethic forms the basis for the concept of sustainable development – now the unifying objective of environmental legal systems.

Governments should use regulation sparingly and efficiently: The four main goals of government policy and regulation are to be effective (achieve the intended policy outcome); efficient (achieve the intended policy outcome at minimal cost and with administrative simplicity); equitable (fair in the burden-sharing among people affected by the policy); and politically acceptable (which includes factors such as liberty, transparency, and accountability).[17] Social values play a central role in policy and regulation.

Box 1: Four key assumptions that underpin environmental policy in Queensland and Australia

- We want our society to prosper and to achieve this we need to maintain a healthy environment.
- Regulation / law is an important means for maintaining a healthy environment but it is not the only means and we should use it sparingly and equitably.
- We want regulation / law to be as effective, efficient and equitable (fair) as possible. We want it to have community and political support. We avoid regulation where possible.
- We accept the paradigm of Capitalism in the sense of a mixed economy where markets, private property, profits and regulation all play key roles.

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[10] See generally, Rachels J, "Naturalism", Ch 4 in La Follette H, *The Blackwell Guide to Ethical Theory*, (Blackwell Publishers, Malden, Mass, 2000); Wikipedia at http://en.wikipedia.org/wiki/Naturalism_(philosophy).

[11] See generally Freeman M, *Lloyd's Introduction to Jurisprudence* (6th ed, Sweet & Maxwell, London, 1994); Wacks R, *Jurisprudence* (4th ed, Blackstone Press Limited, London, 1995), Ch 4.

[12] See generally, Carter A and Stokes G (eds), *Liberal Democracy and its Critics: Perspectives in Contemporary Political Thought* (Polity Press, Cambridge, 1998).

[13] See International Network for Environmental Compliance and Enforcement (INECE), *Principles of Environmental Compliance and Enforcement Handbook* (INECE, Washington, 2009), p 17, available at http://inece.org/principles/.

[14] See Frank T, *The Wrecking Crew: how conservatives rule* (Metropolitan Books, New York, 2008).

[15] See generally, Mill JS, *Utilitarianism*, (Fount Paperbacks, London, 1979); Van DeVeer D and Pierce C, *The Environmental Ethics and Policy Book: Philosophy, Ecology, Economics* (3rd ed, Thomson/Wadsworth, Belmont CA, 2003), pp 24-27.

[16] See Brennan A and Lo Y, "Environmental Ethics" in Zalta EN (ed), *The Stanford Encyclopedia of Philosophy (Fall 2007 Edition)* (Stanford University, Stanford, 2007).

[17] See Gunningham and Grabosky, n 4, pp 26-27; and Dovers, n 3.