WHAT IS THE ENVIRONMENT?

Concept of ‘environment’ is very broad, which creates a very wide range of interests to consider.

COMMON LAW: Queensland v Murphy (1990) HCA

- “Environment” is ascertained by reference to the person, object or group surrounded or affected
- Cannot look at land in isolation – must look more broadly.
- Broad definition

STATUTE:

- Section 8 EPA 1994 (Qld): “Environment includes –
  - (a) ecosystems and their constituent parts, including people and communities; and
  - (b) all natural and physical resources; and
  - (c) the qualities and characteristics of locations, places and areas, however large or small, that contribute to their biological diversity and integrity, intrinsic or attributed scientific value or interest, amenity, harmony and sense of community’ and
  - (d) the social, economic, aesthetic and cultural conditions that affect, or are affected by, things mentioned in paragraphs (a) to (c).

- Section 528 EPBCA 1999 (Cth): “Environment includes –
  - (a) ecosystems and their constituent parts, including people and communities; and
  - (b) all natural and physical resources; and
  - (c) the qualities and characteristics of locations, places and areas; and
  - (d) heritage values of places; and
  - (e) the social, economic and cultural of a thing mentioned in paragraphs (a), (b), (c) or (d).

Leading case: Qld v Murphy (1990) HCA

- Application to rezone land from rural to residential would substantially increase built environment and number of residents
- The land was across the road from a beach, which was an important turtle habitat.
- Local Government rejected application and resumed land under compulsory acquisition laws to turn it into an environmental park.
- Local Government Act s 32(a) required the government to take into account any adverse effect on the environment when making its decision.
- The owner challenged the refusal and resumption.
- Issue: whether the turtles (on another parcel of the land) were a relevant consideration.
- HELD: What constitutes the relevant environment must be ascertained by reference to the “person, object or group surrounded or affected”.
  - Land subject of the application was surrounding by other land where there were important environmental considerations.
  - Therefore, cannot look at land in isolation. Must look more broadly.

WHAT IS ENVIRONMENTAL LAW?

Functions

- Protects environmental values
- Regulates actions affecting the environment
- Ensures that the environment is taken into account in decision-making

Historical development of environmental law

- While most substantial laws are recent, the foundations date back to 14th century (e.g. pollution)
- Early laws anthropocentric focus
- More recent laws ecocentric focus

Sources of modern environmental law

- Traditionally – environmental laws were enforced through the law of nuisance, trespass
- Today – area of law in its own right
- All incorporate the principle of ‘ecologically sustainable development’
ECOLOGICALLY SUSTAINABLE DEVELOPMENT (‘ESD’)

“Development that meets the needs of the present without compromising the ability of future generations to meet their own needs...”  
(Brundtland Report)

ESD = environmental factors + economic factors + social factors

Principles underpinning ESD:

- Precautionary principle
- Intergenerational equity
- Conservation of biological diversity
- Improved valuation, pricing and incentive mechanisms
- Integration
- Environmental impact assessment

INTERNATIONAL ENVIRONMENTAL LAW AND POLICY

International law important

- Primary way Federal Government gives effect to international treaties is the “external affairs” constitutional power to give effect to treaties
- Hence why many of the domestic environmental laws are Federal laws

Key international environmental instruments

- GENERAL (mostly soft law):
  - Stockholm Declaration 1972
  - The Brundtland Report 1987
  - Rio Declaration on Environment and Development 1992
  - Agenda 21 1992
  - Johannesburg Declaration 2002
- SPECIFIC (mostly hard law):
  - World Heritage Convention 1972
  - Convention on Biological Diversity 1992
  - Ramsar Convention 1971

GENERAL INSTRUMENTS (SOFT LAW – PRINCIPLES)

Stockholm Declaration (1972)

- *First international instrument that focused solely upon the environment.
  - Proclamation 1: “A stage has been reached when, through the rapid acceleration of science and technology, man has acquired the power to transform his environment in countless ways and on an unprecedented scale”
  - Formulated the key principles which underpin environmental law:
    - Principle 1 – human rights and responsibilities → framed as a human right (note: international law moved away from this)
    - Principle 2 – foundations of intergenerational equity
    - Principle 4 – foundations of biodiversity protection
    - Principle 6 – greenhouse gas emissions
    - Principle 13 – integration
    - BUT – Principle 8 also recognises the importance of social and economic development

Brundtland Report (1987)

- 1983 - UN established the World Commission on Environment and Development
- TORs for the Report:
  - Proposing environmental strategies
  - Defining environmental issues
  - Considering how these issues may be dealt with
- Result → 1987 Report titled ‘Our Common Future’ (commonly, the ‘Brundtland Report’)
- Recognised change from the 70s to the 80s...
Before the 70s, most international instruments placed a heavy focus on economic developments → this was not to be hindered. However, during the 70s, this economic focus began to shift and environmental rights and obligations began to increase in prominence.

SHIFT TO ECOCENTRIC APPROACH: “70s has been marked by a retreat from social concerns. Scientists bring to our attention urgent but complex problems bearing on our very survival: a warming globe, threats to the Earth’s ozone layer, deserts consuming agricultural land”

- However, noted that the environment (where we all live) CANNOT be separated from development (what we all do to improve where we live).
- Proposed solution? ESD – as defined above.
  - Integration as solution – environment and development are inexorably linked.
  - Development cannot sustain on deteriorating environmental resource base; environment cannot be protected without growth.

Rio Declaration on Environment and Development (1992)
- Outcome of the UN Conference on Environment and Development in Brazil in 1992
- From Stockholm to Rio → focus shifted from human rights to sustainability (of natural resources)
- Principles:
  - Principle 2 – rights and responsibilities (in respect of natural resources) → shifted from individual human right to state right to exploit resources pursuant to environmental qualities
  - Principle 3 – intergenerational equity
  - Principle 4 – integration of environmental protection and development
  - Principle 11 – positive obligation to enact laws
  - Principle 15 – precautionary principle

Agenda 21 (1992)
- Supplements the Rio Declaration
  - Rio = principles
  - Agenda 21 = action plan
- Sets out objectives and activities for member states to implement at the domestic level → focus on integration
- Objectives for states:
  1. Review and develop policies to support the best possible use of land and the sustainable management of land resources
  2. Improve and strengthen planning, management and evaluation systems for land and land resources
  3. Strengthen institutions and coordinating mechanisms for land and land resources
  4. Create mechanisms to facilitate the active involvement and participation of all concerned, particularly communities and people at the local level, in decision-making on land use and management → public participation

Johannesburg Declaration (2002)
- World Summit on Sustainable Development in 2002 (the ‘Earth Summit’)
- Reaffirms the commitment to the programs established in Rio/Agenda 21
- Main focus was developing countries
- Also added social aspects to the concept of ESD

Rio+20 (2012)
- Took place in Rio – June 2012
- Two themes:
  - Green economy in the context of sustainable development and poverty eradication; and
  - Institutional framework for sustainable development.

SPECIFIC INSTRUMENTS (HARD LAW – OBLIGATIONS)

World Heritage Convention (1972)
- Applies to ‘cultural heritage’ and ‘natural heritage’ (Arts 1 and 2)
- Duties of identification, protection, conservation of these sites (Art 4)
- Article 5: Each State should:
  - Adopt a policy for heritage
  - Set up services for the protection of heritage
  - Develop scientific and technical studies to assess how to avoiding endangering heritage
  - Take appropriate legal measures

**Convention on Biological Diversity (1992)**
- Was also developed at the UN Conference on Environment and Development held in Brazil in 1992
- Importance in Australia → this Convention forms the basis of the EPBC Act
- Objective – (Art 1): the conservation of biological diversity and the sustainable use of its components
- What is biodiversity?
  - (Art 2): “The variability among living organisms from all sources including...terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part”
• Obligations:
  o Art 7: Identification and monitoring components of biological diversity important for conservation and sustainable use
  o Arts 8 and 9: In-situ and ex-situ conservation
  o Art 14: Introduction of an EIA process to assess projects that are likely to have significant adverse effects on biological diversity
• Why is conserving biodiversity important?
  o Intergenerational equity – saving natural and cultural values for future generations
  o Stability of ecosystems
  o Precautionary approach – uncertainty as to potential uses of components of the ecosystem

Ramsar Convention (1971)
• Relates to wetlands and waterfowl (defined in Article 1)
• State obligations:
  o Art 2: Select wetlands to be included on a list of ‘Wetlands of International Importance’
  o Art 3: Put in place planning measures to ensure that these wetlands are conserved
  o Art 4: Create nature reserves on these wetlands
• Domestically - Australian government has developed criteria to select wetlands.
  o E.g. Rare or unique wetland, supports endangered species etc.
  o For example: Moreton Bay


Framework Convention (UNFCCC) – Earth Summit 1992
• First binding legal instrument to address climate change as a stand-alone legal issue.
  o Article 2: the ‘ultimate objective is stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system’
  o Article 3: parties should be guided by intergenerational equity, precautionary principle, and special needs of developing countries
  o Article 4: commitments
• BUT did NOT set out any actual targets for states.

Kyoto Protocol to the Framework Convention 1997
• The Protocol set the binding targets in respect of reductions/emissions etc.
• Article 3:
  o “The Parties shall ensure that their aggregate CO2 emissions of the greenhouse gases do not exceed their assigned amounts, calculated pursuant to their quantified emission limitation and reduction commitments inscribed in Annex B and in accordance with the provisions of this Article, with a view to reducing their overall emissions of such gases by at least 5% below 1990 levels in the commitment period 2008-2012”
• Key points:
  o Annex I – parties (listed in the UNFCCC – essentially developed countries)
  o Annex A - gases
  o Annex B – commitments
  o Total overall reduction of 5% (based on 1990 levels)
• Flexibility mechanisms to reduce emissions:
  o (1) Emissions trading (Art 17)
  o (2) Clean development mechanisms
  o (3 Joint implementation
Key domestic policy

• (1) Intergovernmental Agreement on the Environment (1992)
  o Signed by all States and Territories
  o Two objectives:
    ▪ (1) A co-operative approach and definition of roles of government; and
    ▪ (2) Better environmental protection.
  o Uniform principles (underpin legislation in all jurisdictions):
    ▪ Art 3.2: Integration and intergenerational equity
    ▪ Art 3.3: Economic matters are relevant to decision-making
    ▪ Art 3.4: Environmental issues associated with a proposed project or policy are to be taken into consideration
      ▪ Precautionary principle
      ▪ Intergenerational equity
      ▪ Conservation of biological diversity
    ▪ Arts 3.5.1 – 3.5.4: improved valuation, pricing and incentive mechanisms

• (2) National Strategy for ESD
  o Supplemented the IGAE → set more specific goals
  o Signed by COAG - Prime Minister, state and territory Premiers, and a local government representative
  o Defined ESD:
    ▪ “...using, conserving and enhancing the community’s resources so that ecological processes, on which life depends, are maintained, and the total quality of life, now and in the future, can be increased”.
  o Core objectives:
    ▪ To enhance individual and community well-being and welfare by following a path of economic development that safeguards the welfare of future generations
    ▪ To provide for equity within and between generations
    ▪ To protect biological diversity and maintain essential ecological processes and life-support systems
  o Guiding principles:
    ▪ Integration of long and short-term economic, environmental, social and equity considerations
    ▪ Precautionary principle
    ▪ The global dimension
    ▪ Economic considerations
    ▪ International competitiveness (big issue in Australia – coal export markets)
    ▪ Cost effective and flexible policy instruments decisions
    ▪ Community involvement
ESD is a balancing mechanism:

- (2) Environmental factors
- (3) Economic factors
- (4) Social factors

Australia has fully embraced the concept of sustainable development through both policy initiatives and legislative reform, which have worked to make ESD a fundamental objective of legislative schemes.

PRACTICAL IMPLEMENTATION: ESD is often stated to be an “object” of environmental legislation. Accordingly, it has to be considered. Nonetheless, case law has demonstrated that must look beyond object to the broader context.

- **Chesol Pty Ltd v Logan City Council [2007] QPEC**
  - Council decision to refuse application – ‘material change of use’ to develop a retirement village (under the SPA)
  - Refused on a number of grounds
  - In making decision, Rackemann J looked at object of the Act → “seek to achieve ecological sustainability” (by inter alia managing the development process).
  - Appellants submitted the proposal was consistent with the objects of the Act
  - HELD: Object is relevant, but need to look at BROADER context
    - “Ecological sustainability is not necessarily advanced if every parcel of land is, in part, used for economic development of a kind which advances the wellbeing of people and communities and, in part, for the protection of ecological processes”
  - Balancing mechanism may not be site-specific → a more strategic approach may be appropriate

- **Metroplex Management Pty Ltd v Brisbane City Council [2009] QPEC**
  - ESD not just about protecting environment, but about economic and social wellbeing
  - Need to balance environmental, economic and social factors:
  - BUT, again, not just looking at a single site but looking at the broader context

## PRINCIPLES UNDERPINNING ESD

NO legal definition – problematic because tends to be little accountability for pursuing it. Usually drafted as an "objective". Nonetheless, key underlying principles.

**Principles:**

- (1) Precautionary principle
- (2) Intergenerational equity
- (3) Integration
- (4) Conservation of biological diversity
- (5) Improved valuation, pricing and incentive mechanisms
- (6) Environmental impact assessment

### PRECAUTIONARY PRINCIPLE

**CONCEPT:** The precautionary principle in the context of environmental protection is essentially about the management of scientific risk. It is a fundamental component of the concept of ESD and has been defined in a number of instruments:

- **Rio Declaration:** ‘Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation’

- **Intergovernmental Agreement on Environment:** 'Where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation’

**REQUIREMENTS:**

- If:
  - (a) Threat of serious or irreversible environmental harm/damage; AND
  - (b) Lack of full scientific certainty
- Then:
  - (c) ‘should not be used as a reason for postponing measures to prevent environmental degradation’.

Unless these preconditions are present, the PP need not be applied. However, a cautious approach may nevertheless be employed so as to reduce the risk below the threshold that might trigger application of the precautionary principle: Xstrata Coal v Friends of the Earth
When should it be considered?

- **TEST**: Look at overall intention of the Act: *Leach v National Parks* (1993) LGERA
  - Will be relevant if the overall subject matter, scope and purpose of the Act are consistent with the principle such that the principle “cannot be said to be an extraneous matter”:
  - For example, if case turns contrasting expert evidence, such that the outcome depends solely on which expert evidence was accepted – this is sufficient uncertainty to activate PP: *Yamauchi v Jondaryan Shire Council* (1998) QPELR

**Rationale: Conservation Council of SA v Development Assessment Committee** (1999) SAERDC

- Recognition that the environment could not assimilate all the consequences of activities impacting upon it
- Implicit in this recognition is acknowledgment that science and scientific method have limitations – and that because of this, it is unlikely that the full consequences of the impact of an activity can be known in advance
- PP is therefore a common sense approach to avoid or minimise serious or irreversible harm to the environment

**Onus of Proof: Conservation Council of SA v Development Assessment Committee** (1999) SAERDC

- Onus of proof in precautionary principle case is different.
  - (a) Opponent of the development must first argue that the potential impacts are sufficiently uncertain to attract the PP
    - i.e. that there is a prospect of serious or irreversible damage
  - (b) Onus then lies on the proponent to demonstrate on the balance of probabilities that the proposals complied with the principles of ESD i.e. the proponent must show:
    - (i) the measures it will take (within the limits of practicability) to avoid serious or irreversible damage
    - (ii) that “the risk-weighted consequences of the development assessed together do not suggest that serious or irreversible environmental damage would be sustained.”

**Relevant factors – to determine ‘serious and irreversible harm’: Telstra Corporation Ltd v Hornsby Shire Council** (2006) NSWLEC

- Spatial scale (i.e. size of area of land)
- Magnitude of possible impacts
- Perceived value of the threatened environment
- Temporal scale of possible impacts
- Complexity and connectivity of the possible impacts
- Manageability of possible impacts
- Public concern
- Reversibility of the possible impacts.

**Application – PP is activated: Telstra Corporation Ltd v Hornsby Shire Council** (2006) NSWLEC

- Permits the taking of preventative measures without having to wait until the reality and seriousness of the threats become fully known
- Should not try to avoid all risks
- Response will depend on the circumstances (i.e. proportionality)
- Will not necessarily prohibit development until there is scientific certainty

**KEY CASE: Telstra Corporation Limited v Hornsby Shire Council** [2006] NSWLEC 133

- Proposal - Telstra put antennas on the roof of a recreation club and build an equipment cabin at rear of clubhouse.
- Telstra applied for development consent to do this.
- Consent was refused – public submissions indicated significant concern about health impacts of the development (i.e. extensive mobile phone activity in area)

**HELD: Approval granted → PP did not apply.**

- Jointly appointed expert witness – Gave evidence that the public would NOT experience ANY health impacts.
  - In fact, it complied with the industry standards by significant margins.
  - No conceivable biological or health effect from the development.
- Therefore – first condition precedent of the principle (i.e. threat of damage) was NOT satisfied. Further, there was no scientific uncertainty as there were clearly acceptable standards of health impacts.
- **NOTE:**
  - Court set out relevant factors to determine whether there is a serious/irreversible harm.
  - Also discussed rationale of the principle and how this impacts its application.

**INTERGENERATIONAL EQUITY**

- Has received less attention from the courts – not often raised as an argument.
- However, there is a lot of academic commentary.

**Brian Preston (2005) Article** – Intergenerational Equity can be broken into 3 principles:

- (1) **Conservation of options principle:**
  - Each generation must conserve the natural and cultural diversity in order to ensure that development options are available to future generations.
- (2) **Conservation of quality principle:**