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Part 1: Sources of law

Topic 1: The broad framework of environmental law

Environmental law is founded upon traditional philosophies which do not necessarily value environmental protection. It is important to note from the outset that environmental law does not necessarily cater for ‘environmental’ values such as ecologically sustainable development. Rather, environmental law is principally concerned with development and other such activities and the procedures for their approval. The international and domestic sources of environmental law have largely developed in response to liberalism and private property rights.

1.1 International sources

Environmental law is constantly changing at a global level. At its very core, the character of environmental law is global. As such, the role of conventions and treaties is fundamental in developing international standards of environmental protection. For example, the Convention on Biological Diversity, 1993 has aims for the international sphere to cooperate in biological diversity conservation and to promote ecological sustainability. The Convention on the Conservation of Migratory Species of Wild Animals, 1991 promotes international cooperation in the conservation of animals, especially endangered species, migrating across nation States. The Convention Concerning the Protection of the World Cultural and Natural Heritage, 1977 (‘World Heritage Convention’) is further important in promoting international cooperation to protect all forms of heritage, natural and cultural, that are of universal significance.

Such international sources of law may be ratified by nation States. In Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh (1995) 128 ALR 353 the High Court upheld the legitimate expectation that decision makers in Australia are to act in accordance with any international conventions that are ratified by the Commonwealth government. As such, those conventions of environmental protection ratified by the Commonwealth are enforceable in Australia. Significantly, in 2007 the then Rudd government ratified the Kyoto Protocol which
chiefly aims to reduce greenhouse gas emissions. It has been reported in 2010 that Australia is making sound progress to meet its targets in 2012, although no updated information has since been published. However, it may be seen from Rudd’s later rejection of the Carbon Pollution Rejection Scheme that State sovereignty acts as a major impediment to the implementation of environmental legislation in Australia.

1.1.1 Free trade agreements

Free trade agreements are specific forms of international instruments which may be utilised to protect the environment. Notably, the General Agreement on Tariffs and Trade was incorporated into the Charter of the World Trade Organisation (‘WTO’) with the view to impacting upon domestic polices of environmental protection. The WTO has enacted further free trade agreements such as the World Trade Agreement on Sanitary and Phytosanitary Measures, 2002. On 10 January 2012 this agreement issued a strategy for 2012-16 to assist developing countries to implement international food safety and animal and plant health standards. This is and will be done through the Standards and Trade Development Facility, which administers standards for dealing with pests, animal and plant diseases and contaminants in food services and exports. Such standards provide an example of how free trade agreements may operate to facilitate environmental protection. However, opposition to such agreements may be rife where they actually operate to destruct the environment.

1.2 Domestic sources

In Australia environmental law is principally governed by State laws. See Topic 2 below for a detailed discussion of the role of the Commonwealth. The Environmental Planning and Assessment Act 1979 (NSW) is a key statute in New South Wales governing the environment. The Act contains key provisions for the protection of threatened species, populations or ecological communities, or their habitats (section 5A), critical habitat (section 5B), threatened species conservation (section 5C) and vulnerable ecological communities (section 5D).

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The objects of this Act are:
(a) to encourage:
(i) the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment,
(ii) the promotion and co-ordination of the orderly and economic use and development of land,
(iii) the protection, provision and co-ordination of communication and utility services,
(iv) the provision of land for public purposes,
(v) the provision and co-ordination of community services and facilities, and
(vi) the protection of the environment, including the protection and conservation of native animals and plants, including threatened species, populations and ecological communities, and their habitats, and
(vii) ecologically sustainable development, and
(viii) the provision and maintenance of affordable housing, and
(b) to promote the sharing of the responsibility for environmental planning between the different levels of government in the State, and
(c) to provide increased opportunity for public involvement and participation in environmental planning and assessment.

In contrast, the Environmental Protection Act 1994 (QLD) provides a single object that defines ecologically sustainable development. This is ‘to protect Queensland’s environment while allowing for development that improves the total quality of life, both now and in the future, in a way that maintains ecological processes on which life depends (ecologically sustainable development)’: section 3.

In New South Wales, the Wilderness Act 1987 (NSW) is also important in protecting some areas as wilderness, thereby protecting them from human intervention: section 6(1)(a). However, the Act may be critiqued in its key objective of benefiting the community as opposed to the environment: section 3(c). The very definition of a wilderness area in section 6(1)(c) that ‘the area is capable for providing opportunities for solitude and appropriate self-reliant recreation’ is indeed human-centered.

The Protection of the Environment Operations Act 1997 (NSW) is fundamental to the control of pollution in New South Wales. It chiefly aims to ‘protect, restore and enhance the quality of the environment in New South Wales, having regard to the need to maintain ecologically sustainable development’: section 3(a). This Act is discussed in detail in Topic 8 below.
In Tasmania, the *Environmental Management and Pollution Control Act 1994* (NSW) focuses on ‘best practice management’. As stipulated in section 4(1), this involves ‘management of an activity to achieve an ongoing minimisation of the activity’s environmental harm through cost-effective measures against the current international and national standards applicable to the activity’. This management is significant in providing vast scope for environmental protection, as well as working within a capitalist scheme which values cost-effective measures.

### 1.3 Barriers to environmental protection

Although environmental law purports to be concerned with environmental protection, it can be seen that such protection is not effectively afforded within the broader context of the Australian legal system.\(^3\) This context is made up of liberal ideology, the sanctity of private property rights and compensation for land use restrictions. Anthropocentrism, or human-centeredness, seems to be the prevailing theme of environmental law as opposed to ecocentrism, or environmentalism. That is, environmental law is framed in such a way that is beneficial to humans and for preserving the environment as a resource for human interest.


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