ENVIRONMENTAL LAW

SUMMARY

LAWSKOOL.COM.AU

LAWSKOOL PTY LTD
# TABLE OF CONTENTS

**TABLE OF CONTENTS**

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>TABLE OF CONTENTS</td>
<td>2</td>
</tr>
<tr>
<td>TABLE OF AUTHORITIES</td>
<td>6</td>
</tr>
<tr>
<td>Part 1: Sources of law</td>
<td>10</td>
</tr>
<tr>
<td>Topic 1: The broad framework of environmental law</td>
<td>10</td>
</tr>
<tr>
<td>1.1 International sources</td>
<td>10</td>
</tr>
<tr>
<td>1.1.1 Free trade agreements</td>
<td>11</td>
</tr>
<tr>
<td>1.2 Domestic sources</td>
<td>12</td>
</tr>
<tr>
<td>1.3 Barriers to environmental protection</td>
<td>14</td>
</tr>
<tr>
<td>1.3.1 Liberalism</td>
<td>15</td>
</tr>
<tr>
<td>1.3.2 Property rights</td>
<td>15</td>
</tr>
<tr>
<td>1.3.3 Compensation</td>
<td>15</td>
</tr>
<tr>
<td>1.4 Values of environmentalism</td>
<td>16</td>
</tr>
<tr>
<td>1.4.1 Ecology</td>
<td>16</td>
</tr>
<tr>
<td>1.4.4 Pressure groups</td>
<td>17</td>
</tr>
<tr>
<td>1.4.5 Ecologically sustainable development</td>
<td>17</td>
</tr>
<tr>
<td>1.4.5.1 The precautionary principle</td>
<td>19</td>
</tr>
<tr>
<td>Topic 2: Constitutional limitations on environmental law</td>
<td>20</td>
</tr>
<tr>
<td>2.1 Commonwealth Constitutional powers</td>
<td>20</td>
</tr>
<tr>
<td>2.1.1 Constitutional Powers: Historic and Present</td>
<td>21</td>
</tr>
<tr>
<td>2.1.2 Trade and commerce</td>
<td>23</td>
</tr>
<tr>
<td>2.1.3 External affairs</td>
<td>23</td>
</tr>
<tr>
<td>2.1.4 Corporations</td>
<td>26</td>
</tr>
<tr>
<td>2.1.5 Just terms compensation</td>
<td>26</td>
</tr>
<tr>
<td>2.1.6 Free trade</td>
<td>26</td>
</tr>
<tr>
<td>2.1.7 Excise duties</td>
<td>27</td>
</tr>
<tr>
<td>2.1.8 Financial grants to the States</td>
<td>27</td>
</tr>
<tr>
<td>2.2 The <em>Environment Protection and Biodiversity Conservation Act 1999 (Cth)</em></td>
<td>27</td>
</tr>
<tr>
<td>2.3 State powers</td>
<td>29</td>
</tr>
<tr>
<td>2.4 Intergovernmental activity</td>
<td>32</td>
</tr>
<tr>
<td>Topic 3: Mechanisms for dispute resolution</td>
<td>34</td>
</tr>
</tbody>
</table>
3.1 Environmental litigation ................................................................. 34
3.2 SLAPP suits .................................................................................. 36
3.3 Administrative appeals ................................................................. 36
3.4 Alternative dispute resolution ....................................................... 36
3.5 The inquiry process ...................................................................... 37
3.6 Direct action .................................................................................. 37
3.7 Outcomes of litigation .................................................................. 38

Part 2: Planning Provisions .................................................................. 39

Topic 4: Environmental Planning Instruments in New South Wales ...... 39
4.1 The role of EPIs ........................................................................... 39
4.2 The hierarchy of EPIs ................................................................... 41
  4.2.1 SEPPs .................................................................................... 41
  4.2.2 LEPs ..................................................................................... 44
  4.2.3 DCPs ..................................................................................... 47
4.3 Evaluation of EPIs ....................................................................... 48
  4.3.1 Ecologically sustainable development .................................... 48
  4.3.2 Public participation rights ....................................................... 49
  4.3.3 Native title ............................................................................ 49
4.4 Recent amending instruments to the NSW scheme ....................... 49

Topic 5: Protection policies and the territory plan in the Australian Capital Territory ........................................................................ 51
5.1 Environment Protection Act 1997 (ACT) ....................................... 51
  5.1.2 Environment protection policies ............................................ 53
  5.1.3 Environmental improvement plans ......................................... 54
  5.1.4 Evaluation of the policies and plans ....................................... 56
5.2 Planning and Development Act 2007 (ACT) ................................. 56
  5.2.1 The territory plan .................................................................. 58
  5.2.2 Evaluation of the territory plan ................................................ 61

Topic 6: Development classifications and approval procedures in New South Wales ....................................................................... 63
6.1 Development Classifications .......................................................... 63
  6.1.1 Developments that do not require consent/ exempt developments .... 63
  6.1.2 Developments that require consent ........................................... 64
  6.1.3 Prohibited developments ......................................................... 65
9.1 Commonwealth law .................................................................................................................. 108
9.2 State law .................................................................................................................................. 109
  9.2.1 Protection of the environment policies ............................................................................... 110
  9.2.2 Environment protection licenses ...................................................................................... 111
  9.2.3 Environment protection notices ...................................................................................... 113
  9.2.4 Environment protection offences .................................................................................... 113
9.3 Evaluation of pollution control ............................................................................................... 115
  9.3.1 Command and control regimes ....................................................................................... 115
  9.3.2 Market mechanisms ......................................................................................................... 115

Topic 10: Heritage .......................................................................................................................... 117
10.1 Meaning of heritage .............................................................................................................. 117
10.2 International law .................................................................................................................. 117
10.3 Commonwealth law ............................................................................................................. 118
  10.3.1 World Heritage properties ............................................................................................. 119
  10.3.2 National Heritage place ................................................................................................ 119
  10.3.3 Commonwealth Heritage place ..................................................................................... 119
  10.3.4 Conservation agreements .............................................................................................. 121
  10.3.5 Commonwealth responsibilities .................................................................................... 121
  10.3.6 Evaluation of Commonwealth law .............................................................................. 121
10.4 State law .................................................................................................................................. 123
  10.4.1 The State Heritage Register ........................................................................................... 124
  10.4.2 Heritage agreements ....................................................................................................... 124
  10.4.3 Prosecution .................................................................................................................... 125
  10.4.3 Evaluation of State law .................................................................................................. 125
10.5 Aboriginal cultural heritage ................................................................................................. 126

Topic 11: Climate Change ............................................................................................................. 127
11.1 International law .................................................................................................................. 127
11.2 Commonwealth law ............................................................................................................. 128
11.3 Litigation .................................................................................................................................. 129

SOURCES CONSULTED ............................................................................................................. 131
## TABLE OF AUTHORITIES

Agreement on Commonwealth State/Roles and Responsibilities for the Environment 1997  32
Aldous v Greater Taree City Council [2009] NSWLEC 17 .......................................................... 79
Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources  
[2007] FCA 1480 ....................................................................................................................... 82
Argos Pty Ltd v Corbell, Minister for the Environment and Sustainable Development [2014]  
HCA 50 (10 December 2014) .................................................................................................. 34
Beverage Container Amendment Act 1986 (SA) ..................................................................... 26
BGP Properties Ltd v Lake Macquarie City Council [2004] NSWLEC 399 .......................... 79
Biodiversity Conservation Act 1999 (Cth) ............................................................................. 82, 89
Booth v Bosworth (2001) 114 FCR 39 ...................................................................................... 121
Carriage v Stockland Development Pty Ltd (No 4) [2004] NSWLEC 553 ........................ 125
Castlemaine Tooheys Ltd v South Australia (1990) 169 CLR 436 ........................................ 26
Cessnock Local Environmental Plan 2011 ................................................................................ 63
Commonwealth v Tasmania (1983) 158 CLR 1 ............................................................... 15, 23
Connell v Santos NSW Pty Limited [2014] NSWLEC 1 ............................................................ 37
Conquest Constructions (NSW) Pty Ltd v Sutherland Shire Council [2011] NSWLEC 52 (20 
April 2011) ........................................................................................................................... 46
Convention Concerning the Protection of the World Cultural and Natural Heritage, 1997 .... 10
Convention for the Protection of the World Cultural and Natural Heritage 1972 ..... 24, 25, 116,  
117, 118, 120
Convention on Biological Diversity, 1993 .............................................................................. 10
Council of the City of Sydney v Adams [2015] NSWLEC 206 ............................................. 124
Council of the City of Sydney v Trico Constructions Pty Ltd [2015] NSWLEC 56 .......... 124
Environment and Biodiversity Conservation Act 1999 (Cth) ............................................. 81
Environment Protection (Impact of Proposals) Act 1974 .................................................... 23
Environment Protection Act 1993 (SA), ............................................................................... 14
Environment Protection Act 1997 (ACT) ................................................................................ passim
Environment Protection and Biodiversity Conservation Act 1999 (Cth) ................................. passim
Environment Protection and Biodiversity Conservation Regulations 2000 (Cth) ............. 29
Environment Protection Authority v Gardner (unreported, Land and Environment Court, NSW  
7 November 1997) .................................................................................................................. 114
Environment Protection Biodiversity Conservation Act 1999 (Cth) .................................... 90
Environmental Assessment Act 1982 (NT) .......................................................................... 14
Environmental Management and Pollution Control Act 1994 (NSW) ...........................................13
Environmental Planning and Assessment Act 1979 (NSW) ....................................................... passim
Environmental Planning and Assessment Amendment (Part 3A Repeal) Act 2011 (NSW) ..76
Environmental Planning and Assessment Regulation 2000 .........................................................84, 87
Environmental Protection Act 1994 (QLD) ..................................................................................12
Environmental Protection Act 1997 (ACT) ..................................................................................14
General Agreement on Tariffs and Trade ....................................................................................11
Gray v Minister for Planning and Ors [2006] NSWLEC 720 .......................................................20, 128
Heritage Act 1977 (NSW) ............................................................................................................122, 123, 124, 125
Hunter Environment Lobby Inc v Minister for Planning [2011] NSWLEC 221, ....................129
Intergovernmental Agreement on the Environment ......................................................................32
Intergovernmental Agreement on the Environment 1992 .............................................................21, 32
Kyoto Protocol ..............................................................................................................................11
Kyoto Protocol to the United Nations Framework Convention on Climate Change..... 126, 127
Lane Cove Council v Minister for Urban Affairs and Planning [2003] NSWLEC 205 ............41
Lemonthyme and Southern Forests (Commission of Inquiry) Act 1987 (Cth) .........................24
Levy v Victoria (1997) 146 ALR 248 ............................................................................................37
Local Government Act 1993 (NSW) ............................................................................................66
Mabo v Queensland (1992) 107 ALR 1 .........................................................................................15
Minister for the Environment and Heritage v Greentree (No 2) [2004] FCA 741 ......................94
Minister for the Environment and Heritage v Queensland Conservation Council Inc and
  WWF Australia [2004] FCAFC 190 ..........................................................................................81
Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh (1995) 128 ALR 353 ....10
Murphyores Inc Pty Ltd v Commonwealth (1976) 136 CLR 1 ...............................................21, 23
Myrphyores Inc Pty Ltd v Commonwealth (1976) 136 CLR 1 .................................................23
National Environment Protection Council Act 1994 (Cth) .....................................................107, 114
National Parks and Wildlife Act 1974 (NSW) ..........................................................................125
National Parks and Wildlife Conservation Amendment Act 1987 (Cth) .............................26
National Strategy for Ecologically Sustainable Development, 1992 ....................................17
Newcrest Mining (WA) Ltd v Commonwealth (1997) 190 CLR 513 ..........................................26
Newcrest Mining (WA) Ltd v Commonwealth and the Director of National Parks and Wildlife (1997) 147 ALR 42 .................................................................................................16
North Sydney Municipal Council v Boyt Radio and Electrical Pty Ltd and others (1989) 67
  LGRA 344 .................................................................................................................................15
NSW Coastal Planning Guideline: Adapting to Sea Level Rise (2010) ...................................47
Ozone Protection Act 1989 (NSW) ................................................................. 113
Planning and Development Act 2007 (Cth) ................................................. 59, 60
Protection of the Environment Legislation Amendment Act 2011 (NSW) .......... 113
Protection of the Environment Operations Act 1997 (NSW) ......................... passim
Queensland Conservation Council Inc v Minister for the Environment and Heritage [2003] FCA 1463 .............................................................. 81
Queensland Conservation Council v Minister for Environment and Heritage [2003] FCA 1463 .............................................................. 121
Queensland v the Commonwealth (1989) 167 CLR 232 ................................... 25
Queensland v the Commonwealth (1989) 167 CLR 332 ................................... 25
Richardson v Forestry Commission (1988) 164 CLR 261 ................................. 24
Richmond River Council v Oshlack (1996) 91 LGERA 99 .............................. 33
Rosemount Estates Pty Limited and Anor v Minister for Urban Affairs and Planning and Anor (1996) 91 LGERA 31 .................................................. 47
Save the Showground for Sydney Inc v Minister for Urban Affairs and Planning (1996) 92 LGERA 283 .............................................................. 43
Save the Showground for Sydney Inc v Minister for Urban Affairs and Planning [1996] NSWLEC 237 .............................................................. 30
Save the Showground for Sydney v Minister for Urban Affairs and Planning [1996] NSWLEC 237 .............................................................. 48
Sea Level Rise Policy Statement (2009) .......................................................... 47
SEPP (Kosciuszko National Park – Alpine Resorts) 2007 ................................. 42
Standard Instrument (Local Environmental Plans) Order 2006 (NSW) .............. 43
State Environmental Planning (Permissible Mining) Act 1996 (NSW) ............... 47
State Environmental Planning Policy (Exempt and Complying Development Codes) 2008.63, 68
State Environmental Planning Policy (Exempt and Complying) Development Codes 2008..78
State Environmental Planning Policy (Major Projects) 2005 ............................. 76
SW) specifically extends its provision ................................................................ 125
Taralga Landscape Guardians Inc v Minister for Planning and RES Southern Cross Pty Ltd [2007] NSWLEC 59................................................................. 19, 79
Tarkine National Coalition Incorporated v Minister for Sustainability, Water, Population and Communities [2013] FCA 694 .................................................................. 95
Telstra Corporation Ltd v Hornsby Shire Council [2006] NSWLEC 133 ............ 19, 79
Threatened Species Conservation Act 1995 (NSW) ......................................... passim
Threatened Species Conservation Amendment (Biodiversity Banking) Act 2006 (NSW) .... 89
Walker v the Minister for Planning and Ors [2007] NSWLEC 741 .................................................. 20
Warren v Electricity Commission of New South Wales (unreported, Land and Environment Court, 31 October 1990) ................................................................................. 87
Water Act 2007 (Cth) .................................................................................................................. 32
Wilderness Act 1987 (NSW) ........................................................................................................ 12
Wildlife Preservation Society of Queensland Proserpine/ Whitsunday Branch Inc v Minister for Environment and Heritage [2006] FCA 736 ................................................................. 19, 128
Williams v Director General of National Parks and Wildlife Service and Ors [2004] NSWLEC 613 ................................................................................................................................. 125
World Heritage Properties Conservation Act 1983 (Cth) ......................................................... 23, 24, 25
Part 1: Sources of law

Topic 1: The broad framework of environmental law

Environmental law is founded upon traditional philosophies and legal principles that do not necessarily value environmental protection as an end point. 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

Given that the environment is not bound by political borders, by necessity, 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, 1972 (‘World Heritage Convention’) is 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.
In 2007 the then Rudd government ratified the *Kyoto Protocol* which chiefly aimed to reduce greenhouse gas emissions. It has been reported in 2010 that Australia was making sound progress to meet its targets in 2012. In 2012, the parties agreed to an extension of the Kyoto protocol for a period of 8 years from 2013.¹

### 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 policies 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.² 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.

---

**To order the complete version of the Lawskool Environmental Law Summary please visit www.lawskool.com.au**

---
