

Underlying theories and assumptions for environmental regulation & policy in Australia

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Four key assumptions underpin legal reasoning and the environmental legal system in Australia and this course:

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 as the foundation of all our economic and social goals.
- 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.

These key assumptions and related theories and issues are explained in more detail in the following sections.

Our goals

The principal purposes of the law and government are to protect people, including their happiness and quality of life, and to create a safe and prosperous society. Virtually everything that the law and governments do is directly or indirectly linked to these goals. Sustainable development reflects these goals in an environmental context.¹ Environmental laws and regulation are fundamental to these goals by providing a “green safety net”² and the foundation for achieving other social goals such as jobs, housing and public health.

A good way to think of the role of governance and the legal system is to imagine that a safe and prosperous society is like a tree where social and economic goals such as jobs and housing are the fruit we aim for and education, good governance and justice, and a healthy environment are the roots that sustain the tree (Figure 1).

“Jobs vs the environment” is a common but false dichotomy

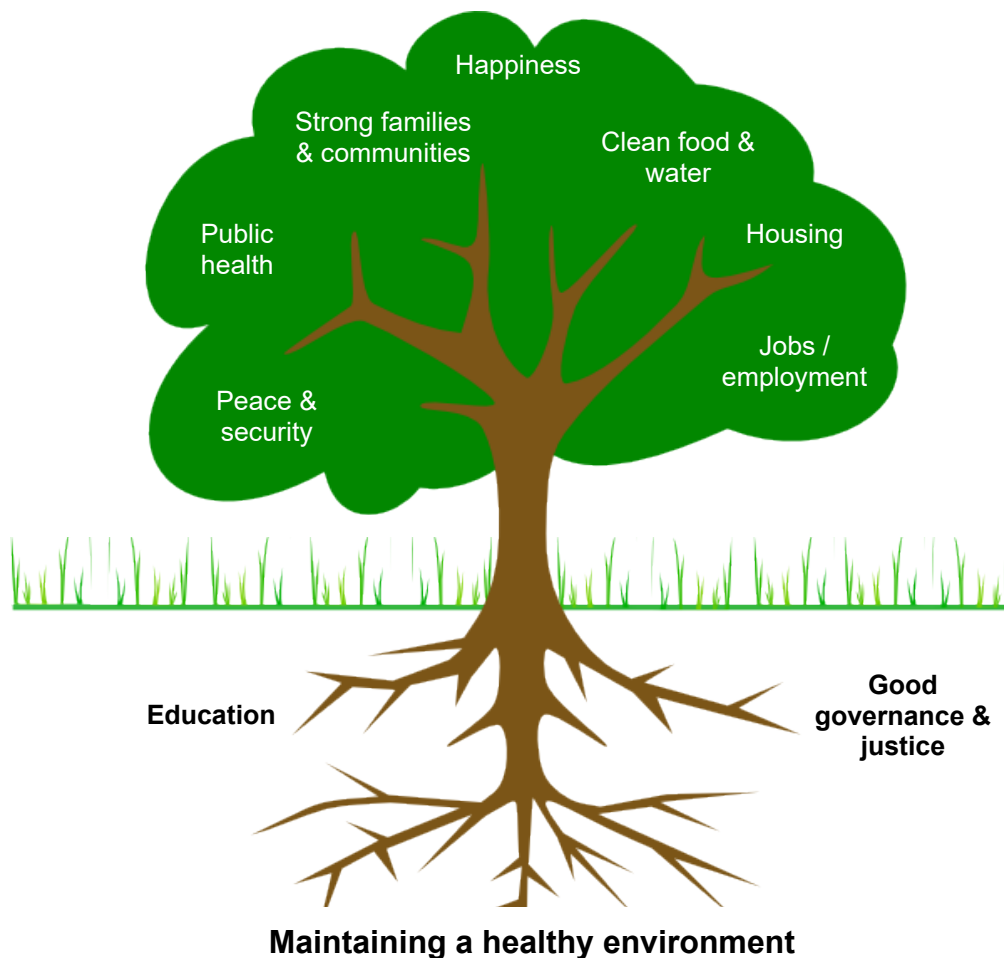
There is a widespread myth in Australia and elsewhere that protecting the environment costs jobs and prosperity. Put another way, it is “jobs vs the environment”. It is a false story.

¹ This adopts an anthropocentric and utilitarian perspective.

² See McGrath C, “Sydney Harbour’s toxic legacy shows value of green safety net” (*The Conversation*, 17 Dec 2012), <https://theconversation.edu.au/sydney-harbours-toxic-legacy-shows-value-of-green-safety-net-11197>. Note, the acceptance of the need for a regulatory system to protect the environment is not universal. The political ideology of neoliberalism opposes regulation of business activities and private property rights, including laws to protect the environment.

In reality, protecting our environment is the foundation for sustainable jobs and future prosperity (Figure 1). We can't maintain our jobs and prosperity if we don't protect where we live and what sustains us. In addition, the jobs linked to maintaining a healthy environment are a major part of the economy (what can be called the "environmental protection industry").³ Rather than costing jobs, providing goods and services that protect the environment (e.g. through creating and administering government regulation, town planning, environmental research and monitoring, environmental engineering, pollution control, the renewable energy sector, and waste management) is an important job creator.

Figure 1: Maintaining a healthy environment is the foundation of a safe and prosperous society



Scientific and evidence-based reasoning, not religious views, underpins application of the law, although science is rarely the dominant factor in government decisions

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"⁴). Consequently, the world is viewed as a physical entity that is capable of being

³ See McGrath C, "Environmental protection industry a job creator" (*The Conversation*, 20 August 2013), <https://theconversation.com/environmental-protection-industry-a-job-creator-17040>.

⁴ See generally, Ritchie J, *Understanding Naturalism* (Acumen, UK, 2008).

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. In addition, governments in Australia are officially secular rather than theocratic.⁵ 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.

Politics⁶ and ideology⁷ dominate many government decisions

While science often plays an important role in government decisions, it is naïve to assume that government decisions reflect the best available science or that laws that speak of protecting the environment actually do so in practice. “[Environmental] Legislation may be partly symbolic, designed to satisfy international obligations, or to quiet public interest groups, with the tacit understanding between government and regulators of under-enforcement.”⁸

There is often a big gap between what the law says on paper, and the reality of how it is implemented and enforced. Sometimes there is even outright rejection of scientific information. For example, in late-2014 the then Queensland Deputy Premier Jeff Seeney ordered the removal of all references to climate change-derived sea level rises of 0.8 m from the draft Moreton Bay Regional Council planning scheme contrary to the best available scientific and technical advice. The stated reasons were to protect property values of low-lying coastal land⁹ but denial of climate science was the major factor that quite obviously underlay the decision.

What the law says on paper and what happens in practice is like seeing a shark fin on the surface of the water. The shark fin is what the law says e.g. the mining lease for a coal mine must be in the “public interest”. The “exercise” of discretion is what lies beneath the words on the paper. In practice, beneath the surface in decisions, there is a strong preference / culture supporting growth (i.e. unlimited expansion), private profit (i.e. money) and employment / jobs (e.g. in construction).

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”.¹⁰ “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.

⁵ A secular state separates religion from government and is officially neutral in matters of religion. In contrast, in a theocratic state a deity is officially recognized as the civil ruler and official policy based on the doctrine of a particular religion or religious group. See generally, Wikipedia, http://en.wikipedia.org/wiki/Secular_state

⁶ Things done to win or hold power in government.

⁷ Things based on a based a set of political, cultural, or religious beliefs rather than science or evidence.

⁸ Briody M and Prenzler T “The Enforcement of Environmental Protection Laws in Queensland: A Case of Regulatory Capture?” (1998) 15(1) EPLJ 54 at 55.

⁹ See Solomons M and Willacy M, “Jeff Seeney orders Moreton Bay Regional Council to remove references to climate change-derived sea level rises from regional plan” ABC News online, 9 December 2014, <http://www.abc.net.au/news/2014-12-09/seeney-removes-climate-change-references-from-council-plan/5954914>.

¹⁰ See generally Freeman M, *Lloyd's Introduction to Jurisprudence* (9th ed, Sweet & Maxwell, London, 2014).

Theory of government

The concept of a liberal democracy, where government is formed by representatives elected by a public vote and subject to the Rule of Law and constitutional constraints, is another assumption that underpins environmental law in Australia.¹¹ Broadly speaking, the Rule of Law refers to the presence of transparent and fairly applied legal requirements. It depends upon an independent judiciary that interprets and applies the law in an impartial and transparent manner.¹² As governments in Australia are democratically elected, building and maintaining public support for laws and policies that protect the environment is essential and the need for public support should not be underestimated. The acrimonious debate in Australia in 2010-2013 over creating a price on carbon pollution is a graphic illustration of this. Prime Minister Julia Gillard was perceived to have broken an election promise to not have a “carbon tax”. This became a lightning-rod that significantly contributed to the downfall of her government and subsequent repeal of the carbon tax and Australian emissions trading scheme.

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. Neoliberalism, 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,¹³ but is rejected in this course.

Ethics

The ethical theory underpinning this course is Utilitarianism.¹⁴ 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.¹⁵ 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 which, until recently, was the unifying objective of environmental legal systems.

Governments should use regulation sparingly and efficiently

The four main objectives 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).¹⁶ Social values play a central role in policy and regulation.

¹¹ See generally, Carter A & Stokes G (eds), *Liberal Democracy and its Critics* (Polity Press, Cambridge, 1998).

¹² See International Network for Environmental Compliance and Enforcement, *Principles of Environmental Compliance & Enforcement Handbook* (INECE, Washington, 2009), p 17, <http://inece.org/principles/>.

¹³ See Harvey D, *A brief history of neoliberalism* (Oxford University Press, Oxford, 2005).

¹⁴ Mill JS, *Utilitarianism*, (Fount Paperbacks, London, 1979).

¹⁵ See Vromans K, et al, *Environmental Ethics: An Introduction and Learning Guide* (Greenleaf Publishing, UK, 2012).

¹⁶ See Gunningham N and Grabosky P, *Smart Regulation: Designing Environmental Policy* (Oxford University Press, Oxford, 1998), pp 26-27; and Dovers S and Hussey K, *Environment and Sustainability: A Policy Handbook* (2nd ed, Federation Press, Sydney, 2013).