Basic glossary for environmental regulation & policy in Australia

Dr Chris McGrath (24 February 2020)

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 *Planning Act* 2016 (Qld).[2] When an Act is presented for consideration by Parliament and before it is passed by Parliament, it is called 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.

The "**Crown**" is commonly used in Australia to refer to the sovereign or executive government of the Commonwealth and each of the States and Territories, including regulatory agencies acting on behalf of the sovereign government to administer and enforce the 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 impact assessment**" (EIA) is the term used to describe a variety of processes used to assess the environmental impacts of a proposal and the ways of mitigating those impacts. One form of EIA is the preparation of an environmental impact statement (EIS), which is a document that generally describes: the proposed development; the relevant environment; potential impacts of the development on the environment; ways of mitigating impacts; and alternatives to the proposed development. The purpose of EIA is normally to inform the relevant decision-maker of potential environmental impacts and mitigation measures to enable them to decide

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[1] See further, Bates G, *Environmental Law in Australia* (10th ed, LexisNexis Butterworths, Sydney, 2019); and Maguire R, Hamman E, Bell-James J, Kennedy A and England P, *Environmental, Planning and Climate Law in Queensland* (LexisNexis Butterworths, Sydney, 2020).

[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. You can find and download Commonwealth legislation at https://www.legislation.gov.au/ and Queensland legislation at https://www.legislation.qld.gov.au/.

whether to allow the development to proceed and what conditions, if any, should be placed upon it.

"**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.[3] 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.

"**policies**" are positions taken and communicated by government that recognise a problem and in general what will be done about it.[4] 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:[5]

- **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

[3] See McGrath C, *Does environmental law work? How to evaluate the effective the effectiveness of an environmental legal system* (Lambert Academic Publishing, Saarbrücken, 2010), Ch 1, available at http://envlaw.com.au/wp-content/uploads/delw.pdf.

[4] See Dovers S and Hussey K, *Environment and Sustainability: A Policy Handbook* (2nd ed, The Federation Press, Sydney, 2013).

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

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**"[6] are used interchangeably with the words "law" and "legal system" to refer to the system of laws that regulates human activities.[7] 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 or the Crown) 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.

"**sovereignty**" is a power and right, recognized or effectively asserted in respect of a defined part of the globe, to govern in respect of that part to the exclusion of nations or states or peoples occupying other parts of the globe.[8] The ruler is known as the "sovereign". The Commonwealth has sovereignty over the whole of Australia subject to the Australian Constitution recognising and protecting the States. Each State government has sovereignty within its state borders.

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

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

[7] 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 5.

[8] *NSW v Commonwealth* (1975) 135 CLR 337 (the Seas and Submerged Lands Act Case) at 479, Jacobs J.

"**statutory instruments**" are, subject to some exceptions, any document made under the authority of an Act of Parliament, including subordinate legislation.[9] The most common type is a "regulation". Other less common types are "local laws" and "ordinances" made by local governments. The Minister's guidelines and rules for preparing and amending planning schemes made under s 17 of the *Planning Act 2016* (Qld) are statutory instruments, as are regional plans, state planning policies, and planning schemes created under the Act.

"**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 *Planning Act 2016* (Qld) (PA), while regulations provide administrative details within that framework. For instance, s 163 of the PA makes it an offence to carry out assessable development unless all necessary development permits are in effect for the development. Schedules 7 and 10 of the *Planning Regulation 2017* (Qld) set out dozens of types of development that are accepted or assessable development at a State level under the PA.

"**tenure**" refers to different types of private and public land ownership and use rights granted by the Crown. The two most common types of tenure are "freehold" (covering about 20% of Queensland) and "leasehold" (covering about 70% of Queensland). Freehold (or "fee simple") land is privately owned land, although minerals and petroleum are normally reserved to the Crown and the owners must still comply with any laws controlling development or use of the land. Leasehold land is owned by the Crown but leased to private individuals. Other forms of tenure include national parks (8% of Queensland) and unallocated state land (USL). In Queensland and other Australian states ownership of land is recorded on a central registry known as the "land title register" and each parcel of land is identified with exact boundaries and an individual number known as the "real property description" (e.g. Lot 1 on SP204459 refers to a freehold parcel of land near Port Douglas).

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

[9] For Queensland, see the *Statutory Instruments Act* 1992 (Qld).