2. About our Environmental Laws

Until the 1970s Tasmania had virtually no specific environmental controls. We had no government agencies to look after the environment, no national parks department, no environmental control department. Planning for the future was, at best, ad hoc.

A first wave of environmental awareness struck the world in the 1960s and Tasmania, like elsewhere, introduced a number of very basic environmental laws early in the 1970s. These were basically piecemeal attempts to deal with particular and obvious problems.

Many of these new laws did not fit in with each other. There was no guiding philosophy. Industries that polluted were simply given 'licences to pollute'. Ordinary citizens generally had no rights of appeal, because the public was generally regarded as an antagonist or a nuisance. The only recourse for concerned citizens was to knock on politicians' doors or create a fuss in the media.

By the 1980s, public concern about deteriorating environmental quality had grown to such an extent that politicians were increasingly unable to cope with the ever-increasing burden of issues directly confronting them. There was an obvious need for comprehensive environmental and planning laws that:

- are integrated with each other
- have common objectives (guiding philosophy)
- enable the community to be involved

To do this a lot of old notions had to be thrown out. Imaginations had to be challenged.

2.1 Environmental law today

In response to the above challenges, environmental law-making went through a dramatic shift and a rash of new laws were introduced during the 1990s.
☛ Go to Chapters 3 and 4 for an outline.

Environmental law remains a dynamic area of law, and things change regularly. Protecting the environment today relies to a great extent on community participation. This is because the environment is now rightly regarded as public property and many of the new laws governing it are designed to incorporate public involvement.

Not only do ordinary people have a right to participate, a number of our new laws make it mandatory for the public to be consulted.

So, what is environmental law?

We use the term 'environmental law' to refer to the full range of laws directed towards protecting aspects of our natural and human environments. This includes laws about everything from planning to water management, vegetation clearance to threatened species protection, coastal erosion to animal welfare and air pollution to mining controls.

These laws are explored in the following chapters. The purpose of this chapter is to provide a framework for understanding where those laws come from and how they are enforced.

Litigation – just one string to your bow

One legitimate and important aspect of community participation is the ability to take regulators and developers to court or to the Tribunal for failing to comply with their legal requirements.

However, the outcome of litigation is often uncertain and can be costly and unsatisfactory for all involved. For example, after many months of litigation, the outcome may be a fine imposed on the offender, but no orders to actually repair the damage that was done. If all parties have a better understanding of their rights and obligations as well as the options available to address environmental harm, many legal battles could be avoided. If the community is properly involved in the early planning stages, outcomes are more likely to be publicly acceptable.

Environmental law is much more than litigation – it's about understanding, and getting involved in, the processes for environmental decision making. We hope that this guidebook will help to promote community participation in environmental decision-making from the ground up – in the courts and out of the courts.

2.2 Division of powers

The first thing you need to do when you face an environmental problem is to work out which law you should be using to deal with it.

There are actually three levels of government in Australia – federal, state and local. It is important to understand their basic roles.

Although all three levels of government make laws concerning the environment in some form, most environmental powers lie with state government (though they sometimes give the job of implementing these laws to local government). However, where the issue is considered to be of national significance, federal laws may also apply.

☛ Go to Chapter 15 for information about federal environmental laws.

State powers and laws

When an environmental problem arises, you will mostly need to refer to state legislation, described throughout this Handbook.

State parliaments pass laws to regulate conduct which is likely to affect environmental quality, including regulating the use of land, use and development of natural resources and protection of special areas or species. These laws are called "legislation".

☛ Go to Chapters 3 and 4 to see how Tasmania's environmental laws are set up.

For example, State government agencies are responsible for:

- managing Crown land;
- development and maintenance of significant infrastructure, such as highways, railways and ports;
- assessing large projects (☛ Go to Chapters 4, 5 and 11);
- managing the Tasmanian Heritage Register and Tasmanian Aboriginal Sites Index (☛ Go to Chapter 7);
- developing management and recovery plans for protected areas and threatened species (☛ Go to Chapter 7);
- setting targets for greenhouse gas emissions reduction (☛ Go to Chapter 16)
- taking enforcement action where significant environmental harm has occurred.

What is the role of local government?

You will also see, throughout this Handbook, that local councils in Tasmania play a very significant role in environmental protection. Local governments (also referred to as 'councils' and 'planning authorities') are generally your first port of call if you are affected by a development activity or an environmental problem in your local area.

For example, councils are generally responsible for:

- developing planning schemes to set standards such as building heights, siting of developments near sensitive areas, setbacks from waterways etc;
- assessing development proposals for small operations (Level 1 activities – ☛ see Chapter 5);
- developing by-laws to deal with specific issues (such as keeping chickens in residential areas, activities in Council reserves or operating hours for outdoor festivals);
- imposing conditions to regulate pollution (including dust, smoke, noise and liquid emissions) (☛ Go to Chapter 6);
- taking enforcement action where permit conditions are not complied with.

Where small operations may cause environmental harm, the council may consult with relevant State government agencies, such as Mineral Resources Tasmania and the EPA, before making land use decisions.

☛ Go to Chapters 4, 5 & 6 to find out more about how this system works.

What is the role of the Commonwealth government?

When Australia's constitution was drafted, the environment was not considered to be a significant national issue, so the federal government was not given any explicit power to make laws about environmental matters. As a result, there has been some confusion about the division of responsibility for environmental protection between states and the federal government.

Many of the ad hoc national laws in relation to the environment have been introduced to give effect to Australia's obligations under over 90 international environmental agreements that the government has signed on to. These agreements cover topics such as World Heritage, climate change, marine pollution, recording of pollutants, remediation of land and biodiversity management.

In an attempt to clarify confusion between state and Federal environmental powers, and to make sure that Australia was complying with its international obligations, new federal environmental legislation was introduced in 2000. The new legislation, the ***Environment Protection and Biodiversity Conservation Act 1999***, gave the Federal government responsibility for developments with the potential to impact upon "matters of national environmental significance". These include:

- World Heritage areas
- Wetlands of international significance (known as 'Ramsar wetlands')
- National heritage places
- Nationally listed threatened species and ecological communities
- Nuclear actions
- Migratory species (including birds and cetaceans, such as whales)
- Commonwealth marine areas

The Federal government is also responsible any development on land owned by the Federal government (such as defence facilities and airports), fishing and development in waters outside the State limits (☛ Go to Chapter 9), whaling, export of threatened species and climate change laws (☛ Go to Chapter 16). The Federal government also uses its powers in relation to corporations and taxation to impose requirements about environmental reporting (including greenhouse gas emissions reporting) and tax deductible status for environmental organisations.

The Federal government continues to be lobbied to extend the range of matters that it can get involved in. For example, conservation groups have requested that developments which will result in significant greenhouse gas emissions be subject to Federal approval. The Federal government also recently proposed to include coal seam gas developments and large mining projects with the potential to impact water supplies in the list of matters that require Federal government approval.

Possible reforms

The EPBC Act currently provides an opportunity for the Federal government to delegate some of its powers to State governments, provided the relevant State assessment process has been accredited by the Federal government. Many states already have assessment processes accredited, so that they effectively carry out the assessment on behalf of the Federal government, but the actual decision whether or not to approve a development remains with the Federal government.

In early 2012, the Council of Australian Governments (**COAG**) announced a proposal to allow approval powers to also be delegated to the State governments. Many environment groups are opposed to granting the State governments further powers to approve activities that may affect a matter of national environmental significance, arguing that this responsibility should remain with the Federal government. The principal reasons are that state governments often have an economic interest in the development proceeding, and give preference to State interests over what is best for Australia's national environmental interest.

Unless national interests are appropriately considered in assessing developments that will impact upon matters of national significance, the EPBC Act's capacity to protect Australia's environment could be compromised.

☛ Go to Chapter 15 for more information about the EPBC Act and the proposed changes.

National Environmental Protection Measures

The Federal government also manages a number of research organisations that produce information guides and develop national standards in relation to environmental issues. For example, the National Environment Protection Councildevelops National Environmental Protection Measures on issues such as soil contamination and remediation assessments and the Australian Pesticides and Veterinary Medicines Authority develops standards in relation to maximum exposures to chemicals and water quality guidelines. These standards are usually adopted by each state and implemented through State laws.

Funding

The Federal government can also influence environmental outcomes by providing funding for environmental projects (for example, the Caring for Our Country grants have helped to maintain natural resource management activities throughout Australia), and insisting that grant applications for large projects (such as infrastructure projects) include information about environmental impacts.

2.3 Types of law

A very basic understanding of how the legal system works will be helpful for those engaged in defending the environment.

Most environmental cases are based around either (or both):

- Acts of Parliament (known as "statute law" or "legislation"); or
- Legal precedent (known as "common law").

What is 'statute law'?

This is the main legal device used to protect the environment in Australia. A statute is a law made by parliament. It is more commonly known as an Act of Parliament or a regulation, collectively referred to as "legislation".

Governments pass laws in order to regulate conduct which is likely to affect our various environments. The courts (or the Tribunal) have a key role in enforcing laws made by parliament.

(☛ Go to Chapter 4 for information about key Tasmanian legislation).

What are 'regulations'?

An Act of Parliament can become too bulky if all the necessary details are included within it. To cope with this problem, a number of Acts have provision for the making of 'subordinate legislation'. These are called "statutory rules" or "regulations".

Regulations contain more specific details of how the Act is applied – such as lists of banned chemicals, lists of threatened species, or maximum hours of operation for particular activities. Regulations are more easily updated than Acts but, once enacted, hold the same force of law as any other legislation.

Beware – policies are not laws!

Many people mistakenly confuse policy with law.

Governments these days produce mountains of policies, guidelines, strategies, codes of practice… and so forth. These documents often include broad statements about what the government aims to do. However, the government is often not required to follow these policies – they are general statements of intent or guides for government officers or commercial operators.

Examples include the *Code of Practice for 1080 Poison Use*, the *Quarry Code of Practice*, *Environmental Best Practice Guidelines: Management of Riparian Vegetation* and the *Enforcement Policy for the Water Management Act 1999*.

You can use statements made in policies as to argue about what government ***should*** be doing. However, there is often nothing that can be done to force a government to act in accordance with a policy.

Some policy documents **DO** have statutory force, because they are tied to a specific Act of Parliament. For example, the legislation dealing with chemical use requires all operators to comply with the Code of Practice on Aerial Spraying (☛ See Chapter 10).

Policies can also be given legal force by being incorporated into licence or permit conditions. For example, a permit for a quarry operation may require the operator to comply with the Quarry Code of Practice. If the Code of Practice is not complied with, the operator will be breaching the permit conditions and could be fined or prosecuted under the ***Land Use Planning and Approvals Act 1993*** (☛ See Chapters 4 and 5).

What is 'common law'?

Common law (ie. 'judge made law') is based on the court's interpretation of decisions that other judges have made in similar cases. If a case sets a 'precedent', future cases dealing with the same issue / same provision of the legislation must be decided in the same way.

Please note, the Resource Management and Planning Appeal Tribunal (**RMPAT**) is not a 'precedent' setting body. This means that, although the Tribunal will generally make consistent decisions, it is not necessarily required to adopt the same interpretation of a provision of a planning scheme in a future case if it later considers that a different interpretation is more appropriate.

☛ Go to Chapter 14 for more information about the RMPAT.

Statute law can override the common law. For example, if a court makes a decision that a provision of an Act must be interpreted in a particular way, Parliament may decide to change the Act. The new, amended Act will then be applied to future cases.

As more and more statute law is made, there is less and less need to use common law. However, there are still some ways in which common law can be used to deal with activities causing environmental harm. It can be used to prevent a neighbour polluting the air, land or water or causing land degradation or otherwise interfering with your enjoyment of your land.

'Private nuisance'

Generally speaking, common law is used to protect private interests. By far the most widely used common law action for controlling cross boundary environmental harm is that of nuisance – unreasonable interference with a person's land or use and enjoyment of the land - and to recover loss or damage caused by the interference.

'Public nuisance'

Where an activity interferes with a right enjoyed by the community at large, it is called a public nuisance. Private individuals can take action to stop or prevent a public nuisance, even though that person may have no interest in the land subject to the interference. Public nuisance includes pollution of the air or water. However, common law has not been terribly effective in protecting public interests which have no connection with private rights – such as the public interest in preserving native bush – so options under statute law are often used to pursue that protection.

What is 'administrative law'?

Reviewing decisions

More often than not, environmental law cases deal with challenging particular decisions made by government authorities under various pieces of legislation. This is a branch of law known as administrative law.

Administrative law is not about the merits of a particular decision (that is, whether the decision is good or bad). It is about the decision-making process. Rather than looking at whether the "right" decision was made, the court or Tribunal simply decides if there was power to make the decision and if the correct process was followed. This process is called judicial review.

Generally, if a court finds that the decision is flawed for administrative reasons, the matter will be sent back to the original decision-maker to reconsider.

☛ Go to Chapter 13 to find out how government decisions can be challenged.

What is 'criminal law'?

'Criminal law' includes laws where a fine or prison sentence can be imposed on someone who breaks the law. Often, environmental protection legislation includes both criminal penalties and civil remedies (such as remediation orders).

Many of the Acts described in this Handbook contain criminal offences. These set out penalties and explain who is responsible for taking enforcement action. While it is rare for individuals to take criminal proceedings (these are usually commenced by the police or a government agency), individuals can initiate legal action by making a complaint to the relevant government agency or by going to the police or the Director of Public Prosecutions.

Environmental defenders can also face prosecution under criminal law. For example, if you protest in a state forest, you may be liable to fines or a prison sentence for trespass or nuisance. (☛ Go to Chapter 13 for more information about protecting yourself).

What are 'remedies'?

If you are successful in a court case (that is, the court agrees with your arguments), the court (or Tribunal) can make a range of decisions. For example, the court or Tribunal may order that:

- an invalid decision made by a public body be "quashed" (cancelled out);
- an officer must not make undertake a particular action;
- a public official must make a decision (where he or she is delaying unreasonably or neglecting to perform his or her duty);
- work be undertaken to fix environmental damage that has been caused;
- conditions be imposed on some activity (such as limiting operating hours on a service station in a residential area); or
- the person responsible for causing environmental harm pay damages to those people who are affected.

These various options are called "remedies".

Does government have to abide by the law?

In most situations, yes - many Acts of Parliament specifically say "This Act binds the Crown", which means that the government must follow the law, just like anyone else. However, there are some exceptions to this, so make sure that you check the relevant legislation to confirm that the government agency is bound by the Act.

If you suspect that a government agency or officer is breaking a law, it is generally prudent to assume that they are bound by the law and proceed to make a complaint about their behaviour.

☛ Go to Chapter 13 for more information about taking action against government agencies.

2.4 Who can initiate legal action?

In many cases, individuals are able to commence court proceedings. However, you may first have to show that you have "standing". This means that you may need to show that you have a legitimate 'interest' in the case, greater than the interest of the public at large.

In the past, it was necessary for a person to show that they would suffer damage to their property before they could take legal action. This often meant that it was necessary to find

an affected person willing to take action before any environmental case could be taken to court. It was not enough to simply care about protecting our natural resources.

Over the past few decades there has been growing recognition of the benefits of allowing citizens to initiate legal action in order to protect not just their commercial or property interests, but to protect the environment, public health, visual amenity and quality of life. It is still necessary, in most cases, to show that you will suffer some 'special damage', over and above that of the rest of the community rather than just having a concern about some aspect of the environment. However, the courts have started to adopt a broader test for standing. In some instances, legislation provides for open standing to commence legal proceedings – that is, anyone is able to take action. Some countries (India, Chile and Ecuador) have also recognised that "nature" itself should be afforded legal "standing", and that people have a right to represent "nature" in court proceedings. Legal standing varies from court to court and from issue to issue, depending on the statutes involved. ☛ Go to Chapter 14 for more information about legal standing.

Please note, for mining issues, the test for standing remains very narrow (☛ Go to Chapter 11).

2.5 Parliament vs the courts

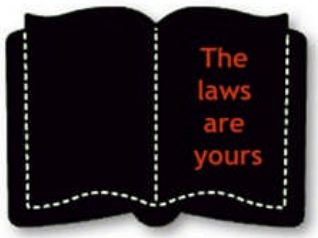
It is prudent to be aware that parliament can decide at any time to make a new law, thus making an illegal act legal. It can even make such changes apply retrospectively.

Judges cannot overrule parliament. The courts simply interpret written laws and ensures that they are properly made and adhered to. However, courts can decide that particular legislation passed by Parliament is unlawful (for example, if it is not consistent with the Constitution).

In some notable situations such political action has prevented prosecutions from being successful in court. A prominent example in Tasmania was parliament passing a retrospective law to stop legal action against the flooding of Lake Pedder National Park in 1972. More recently, the Tasmanian government passed legislation preventing any further legal action in relation to the controversial Parliament Square development.

2.6 Where can I get copies of legislation?

Until recently, Acts of Parliament were written in convoluted legal language. They were rather difficult to get hold of and were often expensive to purchase.



These days, efforts are made to write legislation clearly and Acts are generally much easier to read and understand. Now is the time to drop your queasiness about legislation.

These laws belong to the community, after all!

Online

All current legislation is freely available on the internet at the following sites:

Tasmanian legislation:	www.thelaw.tas.gov.au
Commonwealth legislation :	www.comlaw.gov.au
Both Commonwealth and Tasmanian legislation:	www.austlii.edu.au

You don't have to know the precise name of an Act. Just type in key words and you should be able to find what you're looking for.

If you prefer to have a hard copy of legislation (and don't want to print it yourself), you can find most legislation at the Supreme Court library, the university library and major public

libraries around the State. You can also purchase full copies of legislation from the Printing Authority.

Legislation gets amended fairly regularly – sometimes small changes, sometimes significant ones. If you are using a hard copy, be careful to check that it includes all the most recent amendments.

Hints:

- When purchasing Acts, you should pay a little extra to have all subsequent amendments included with the Act.
- When researching an Act, you will need to find all the relevant amendments. If you are looking at legislation at www.thelaw.tas.gov.au, you can reveal the history of changes to an Act by hitting the "History On" button. This will tell you when the Act, or particular sections of the Act, came into force or were changed or deleted (called "repealed"). If you are researching in a library, the historical information should be found with each particular Act or in the annual Index to Legislation - this is usually kept near the legislation, but just ask your librarian if you are having trouble finding it!