
Sustainability and the Law

Lee McIntosh

Solicitor, Environmental Defender's
Office WA (Inc)

Overview

- The need for consistency
 - The object of legislation
 - Need to review all legislation
 - Requiring compliance with sustainability
 - Requiring reasons for decisions
 - Third party rights of review and public involvement in decisions
 - Requiring sustainability policies and reporting
-

The need for consistency

- Sustainability should not mean all things to all people
- Meyers and Muller reviewed existing definitions and found consistent elements were:
 - Intergenerational equity
 - Recognition that not all development can be sustainable
 - Ecosystem health considered equally with profits

(Meyers and Muller “The Ethical Implications, Political Ramifications and Practical Limitations of Adopting Sustainable Development as a National and International Policy” (1996) (1) *Buffalo Env Law Journal*)

The object of legislation

- Influences and directs agencies
 - Is a relevant consideration in all decisions
 - Objects must be internally consistent, or one will be preferred above others. Problems can arise with conflicting objectives eg:
 - *Conservation and Land Management Act 1984 (WA):*
Object is the “*use, protection and management of public lands*”
-

Need to review all legislation

- New and existing legislation
 - Review of all legislation – not just traditional “environmental” legislation
 - Special case of the proposed Economic Regulatory Authority:
 - Will issue energy and water service licences and conduct price inquiries
 - Will impact on downstream decision makers
 - No environmental or social experience
 - Environmental and social welfare considerations are each one of fifteen considerations, therefore will never be determinative
-

Requiring compliance with sustainability

- Objects clauses do not prevail over specific legislation
 - Legislation currently requires sustainability as a factor to be taken into account
 - eg *Environmental Protection and Biodiversity Conservation Act 1999* (Cth)
 - Decisions can be required to be made “in accordance” with sustainability
-

EPBC Act 1999 (Cth) s.136

- In deciding whether to approve, Minister must consider:
 - matter of environmental significance
 - economic and social considerations
 - In so considering, Minister must take into account:
 - Sustainability
 - Relevant information and comments
 - Environmental history
 - Must not consider any other matters
-

Requiring reasons for decisions (1)

“Probably the most significant of all the changes for improving administration was the requirement to provide written statements of reasons and findings of fact. This meant that public servants had to be more systematic and disciplined in their approaches to decision making. They even had to ensure that their decisions were in accordance with the applicable legislation and any policy guidelines that might apply.”

(Volker, “Just Do It – How the Public Service Made It Work” Volume 8 *Australian Journal of Administrative Law* August 2001 at 204.)

Requiring reasons for decisions (2)

- Will form public record of sustainability decisions
 - Will inform public of decisions
 - Will assist government to make consistent decisions
 - Will de-mystify the “what does sustainability really *mean*” question
-

Third party rights of review

- Any person should have the right to apply to review development decisions
 - Review should be undertaken by an independent body
 - Decision maker should provide reasons for decisions
 - Development should not take place until review is complete
 - No costs should be involved for bona fide review
-

Public involvement in decisions

- Need to be consulted about how want to be consulted!
 - Time frames must be realistic
 - Adequate information must be provided
 - Feed back must be provided about how comments were taken into account
 - Need for links between community and developers, as well as government
-

Requiring sustainability policies and reporting

- Develop sustainability policies consistent with overall sustainability framework
 - Amend corporate and business plans
 - Develop sustainability criteria
 - Eg decisions, purchasing, energy consumption
 - Provide independent audit reports measured against criteria
 - Report to Parliament
-

Conclusion

- Law has not yet been effectively used to deliver sustainability
 - Law will, however, be an important tool (but not the only tool)
 - Law will provide maximum benefit when there is good understanding of what sustainability *really means*
-