

# Introduction

“It is an offence to throw litter in a public place”

- Is it an offence to:
  - throw rubbish from a third storey apartment into the street?
  - throw a newspaper from the footpath into a park?
  - place an empty can on a park bench?

# Introduction

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- Is it an offence to:
  - throw rubbish from a third storey apartment into the street?
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  - place an empty can on a park bench?
- Re-interpret with this legislative object:
  - to preserve and protect the environment and public amenity

# Basic rules for interpreting law:

- prefer the interpretation which achieves the object
- later instrument preferred to earlier instrument
- specific words preferred to general words
- prefer interpretation which gives all words meaning
- ordinary meaning to be preferred where no definition
- inconvenient interpretations can't be rejected on that basis alone

# Environmental law objects

- *Environmental Protection Act 1986* (WA) s. 4A (EP Act)
  - to protect the environment of the State
  - precautionary principle
  - intergenerational equity
  - conservation of biological diversity and ecological integrity
  - improved valuing of environment
  - waste minimisation (and associated management hierarchy)
- s. 5 EP Act: EP Act prevails over inconsistent laws
- *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) s.3
  - protection of environment, especially matters of NES
  - ecologically sustainable development (s. 3A)
  - conservation of biodiversity

# Environmental law jurisdiction

- EP Act scope
  - WA land
  - WA waters (3 nautical miles and boundaries around some Islands)
  - sets up EPA as independent authority
  - assessment of projects (Part IV)
  - licensing and clearing permits (Part V)
  - offences and enforcement (Part V)
- EPBC Act scope
  - Cth land
  - Cth waters
  - assessment of projects which may have significant impact on matters of NES
  - protection of biodiversity

# State Ministerial approval

- Part IV *Environmental Protection Act 1986* (WA)
- For proposals likely to have a significant effect on environment
- Referral to EPA
  - no requirement to refer, but approval provides defences/exemptions to laws
  - any person may refer
  - referral not permitted in some cases
- Referral published on EPA website
  - 7 days public comment
- EPA decides whether to assess
  - appeal to Minister
  - no appeal if decide not to assess because will be dealt with under Part V
- If EPA decides to assess:
  - all other decision makers are prohibited from issuing approvals until Minister's decision made
  - offence to implement until Minister approves
  - exception to offence: minor and preliminary works can be approved by EPA

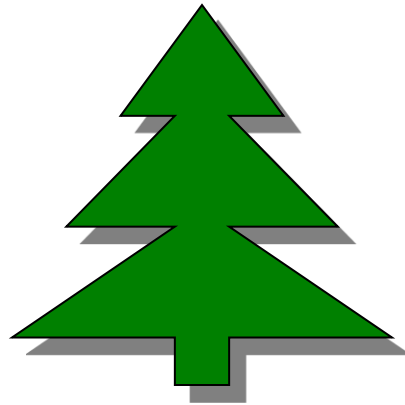
# State Ministerial approval

- EPA sets assessment level
  - Assessment on Proponent Information (API) or Public Environmental Review (PER)
- Proponent prepares and finalises assessment documents
  - initial API may be sufficient
  - public consultation for PER
- EPA prepares report and recommendation for Minister for Environment
  - appeal to Minister
- Ministerial consultation process
  - referral to Cabinet if no agreement
- Minister's decision and condition setting
  - decision must be consistent with EPA report appeal decision
  - appeal to Minister (proponent only)

# State Ministerial approval

- EAG 1, 8 and 9
- EPA has lots of discretion over process
- Legal appeals usually can only be lodged once final approval issued
- Piecemeal, bifurcated approvals not permitted
  - eg can't approve transport separate to refinery etc
- EPA can't consider economic or commercial issues other than those directly affected by physical disturbance area
  - but Minister can!
- Conditions should be reasonably related to proposal
  - offsets are common but legally problematic
- Approval should be “final” and not require future approvals
  - future approval of management plans common but legally problematic
- Appeals
  - raise substantive issues
  - suggest alternative EPA power/strategy

# 1<sup>st</sup> obligatory graphic



# Cth Environment Minister approval

- *Environmental Protection and Biodiversity Conservation Act 1999* (Cth)
- For proposals which are likely to have a significant impact on a “matter of national environmental significance” (MNES)
  - World Heritage Area
  - National Heritage Place
  - Ramsar wetland
  - Listed threatened species or ecological community
  - Migratory species
  - Nuclear activity
  - water resource affected by coal seam gas/ large coal mining development
  - Cth waters (from 3 nautical miles offshore)
- Proposed new greenhouse trigger

# Cth Environment Minister approval process

- Referral to Minister
  - an offence to take action which likely to have significant impact without approval
  - proposal must be referred by proponent, can be referred by State
  - no third party referral allowed
  - no restriction on other approval decisions
- Minister's decision to assess
  - may decide does not need approval if taken in particular manner
  - becomes an offence to take action if being assessed
- Minister's decision on assessment level
  - Bilateral agreement if WA using a PER Proponent prepares documents
- Public consultation

# Cth Environment Minister decision process (cont)

- SEWPaC report
  - can't be provided to anyone except Minister until after decision
- Minister's consultation
  - must consult proponent
  - may consult public and State
- Minister's decision and condition setting
  - must take into account proponent comments and cost effectiveness
  - usually tries to “add value” to State approval
  - offsets only with proponent agreement
- Procedural appeals common
  - appeals on conditions usually fail
- Early works?
  - State and Cth

# Changing State Ministerial approval

- section 43A - changes to proposal before approval can only be made with approval of EPA *before* it publishes its report
  - If satisfied unlikely to significantly increase any impact
- section 46C – minor changes to conditions
- section 45C – can change to proposal with no change to conditions
  - EPA can not approve if might have a significant detrimental effect on environment from proposal in addition to or different from proposal *as implemented*
  - No third party procedural rights, and no appeals for anyone
- section 46 – change to conditions
  - EPA investigation
- section 46B – major change to proposal as agreed by all DMAs
  - new referral to EPA

# Changing Cth Ministerial approval

- s 156A limited power to change proposal once being assessed
  - only if satisfied has substantially the same character as the original proposal, considering impacts on NES
  - but can re-refer whole proposal
- Changes to approval conditions limited to where necessary or convenient to protect MNES
- Broad referral documents mean some scope of change within approval

# Clearing laws

- Part V *Environmental Protection Act 1986* (WA)
- Offence to clear native vegetation unless:
  - have clearing permit
  - exemption under EP Act
  - exemption under EP Regs (do not apply in environmentally sensitive areas)
- Clearing permits
  - area permits
  - purpose permits
  - DER and DMP grant permits
  - must be consistent with clearing principles

# Clearing laws

- Exemptions narrowly interpreted
- Exemptions under EP Act
  - implementing proposal with State Environment Minister approval in accordance with conditions
  - clearing to give effect to legal requirement
  - forest management and logging
  - Bush Fires Act
  - subdivision
- Exemptions under EP Regs (not in environmentally sensitive areas)
  - around buildings and infrastructure
  - to prevent fires, accidents
  - for exploration
  - low impact or other mineral activities (up to 10 ha per year)
- Clearing permit can't be issued contrary to or otherwise in accordance with Part IV approval
  - legal position is that can't get and don't need clearing permits if have Part IV approval

# Works approvals

- Part V *Environmental Protection Act 1986* (WA)
- Necessary to construct “prescribed” premises or alter it so causes/alters emissions, or take any step to do this unless for general maintenance
- Prescribed premises:
  - processing more than 50,000 tonnes ore per year
  - 350 kilolitres alcoholic beverage produced per year
  - any level of bauxite or oil or gas refining
  - 10 megawatt electrical power generation using fuel
- Limits concerned with capacity, not actuality
- Deals with site location, construction and design, but not operational, issues
- Issued for up to 5 years
- Conditions re equipment, monitoring, environmental management systems
- DER decides what the premises boundaries are

# Licences

- Part V *Environmental Protection Act 1986* (WA)
- Necessary to cause/alter emissions from (operate) “prescribed” premises
- Do not deal with site location, construction or design issues
- Deals with operational issues
- Issued for up to 5 years
- Conditions re emissions standards, monitoring, environmental management systems
- Comment must be sought from people with a direct interest in works approval/licence
  - suggest advise DER that are interested
- Licences and works approvals can be appealed to Minister within 21 days
  - Proponent can appeal refusal or conditions
  - third parties can only appeal conditions or amendments

# Altering works approvals and licences

- Can be amended on application, or by DER independently
- Can amend conditions, area, purpose, term
- DER must give proponent 21 days notice of proposed change
- Proponent has 21 days to appeal
- No public comment on amendments
  - but sometimes comment is sought

# Offences

- Offences under EP Act:
  - Tier 1 eg
    - Intend to cause pollution/environmental harm
    - Permit pollution/env harm to be caused
    - Breach Ministerial approval condition
    - Clearing without an exemption or permit
  - Tier 2 eg
    - Breach of licence condition
    - Dumping any solid or liquid waste in water or in any place to which the public has access
  - Tier 3 eg
    - Smoky vehicle
- EP Act Regulations
  - Noise
  - Unauthorised Discharges
- Overarching offence – section 51 duty to take all reasonable and practicable measures to prevent or minimise emissions

# Specific offences

- No offence under Part IV if change proposal without approval
  - no offence to implement significant proposal until being assessed
  - section 47 offence in relation to implementation conditions only
  - section 48 monitoring in relation to implementation conditions only

BUT
- Offence under Part V if cause pollution/environmental harm/unauthorised discharge without defence of implementing a proposal
  - onus on proponent to prove defence
- Clearing exemption only applies if implementing a proposal
  - exemptions narrowly construed, onus on proponent to prove
- Liable for contractor actions
- Occupier liable for all actions on prescribed premises

# Penalties

- Depends on specific offence
  - Tier 1 up to \$1 million
  - Tier 2 up to \$125,000
  - Tier 3 \$5,000
  - Regulations \$25,000
- Daily penalties for ongoing offences
- Modified penalty notices for tier 2 offences can be issued for 10% maximum
  - must be reporting, remedial steps, co-operation
- Infringement notices can be issued for tier 3 offences and some Regulations
- Court can order restoration, compensation etc

# Enforcement options

- See DER Enforcement and Prosecution Policy
- Warnings – written Environmental Field Notices (should not be verbal)
- Infringement/modified penalty notices
- Statutory notices to cease or modify activity
  - environmental protection notices
  - closure notices
  - prevention notices
- Changing of approval conditions or revoking/suspending approval
- Civil penalties (EPBC Act only)
- Criminal prosecutions

# Directors and managers

- Corporations can be prosecuted, and usually are subject to higher fines than individuals (x5)
- Individuals can be gaoled
- EP Act:
  - Directors and managers of corporations are deemed to commit the same offence as their corporation unless they can show they couldn't have stopped the offence
- EPBC Act:
  - Directors and managers deemed to commit the same offence as their corporation if they knew about offence and could have stopped it but didn't

# Defences

- As long as took reasonable precautions and notified CEO, it is a defence if:
  - action was to prevent danger or irreversible damage, as long as took reasonable precautions and notified CEO
  - Accident (other than by negligence), as long as took reasonable precautions and notified CEO
  - exercised due diligence (systems to address foreseeable risks, monitoring, continuous improvement, enforced, but not required to be perfect)
- Honest and reasonable mistake about the facts
- It is NOT a defence to make a mistake about the law – even if a government department gives you incorrect information about the law (*Ostrowski v Palmer* (2004) HCA 30)

# 1<sup>st</sup> Obligatory quote

*“a mistaken belief that an activity is lawful or authorised will be a mistaken belief as to the matter of law rather than to a matter of fact. Accordingly, the fact that Mr Palmer's mistake was induced by the conduct of an employee of Fisheries WA cannot convert what is a mistake of law into a mistake of fact... **it is irrelevant whether the mistake of law is induced by incorrect information obtained from an official government body** or from any other third party or is induced by any other form of mistaken factual understanding.”*

# Reporting

- Monitoring reports are specific condition of approvals
- Annual compliance reports are condition of approvals
- Section 72 reports required where discharge of waste which is likely to cause pollution or environmental harm
  - phone/email/fax as soon as practicable
  - in writing as soon as practicable after
- Defences (s. 74) rely on written notification being given to CEO as soon as practicable
- Reduced penalties rely on written notification being given to CEO as soon as practicable
- Offence to give information which know is false or misleading (s.112)

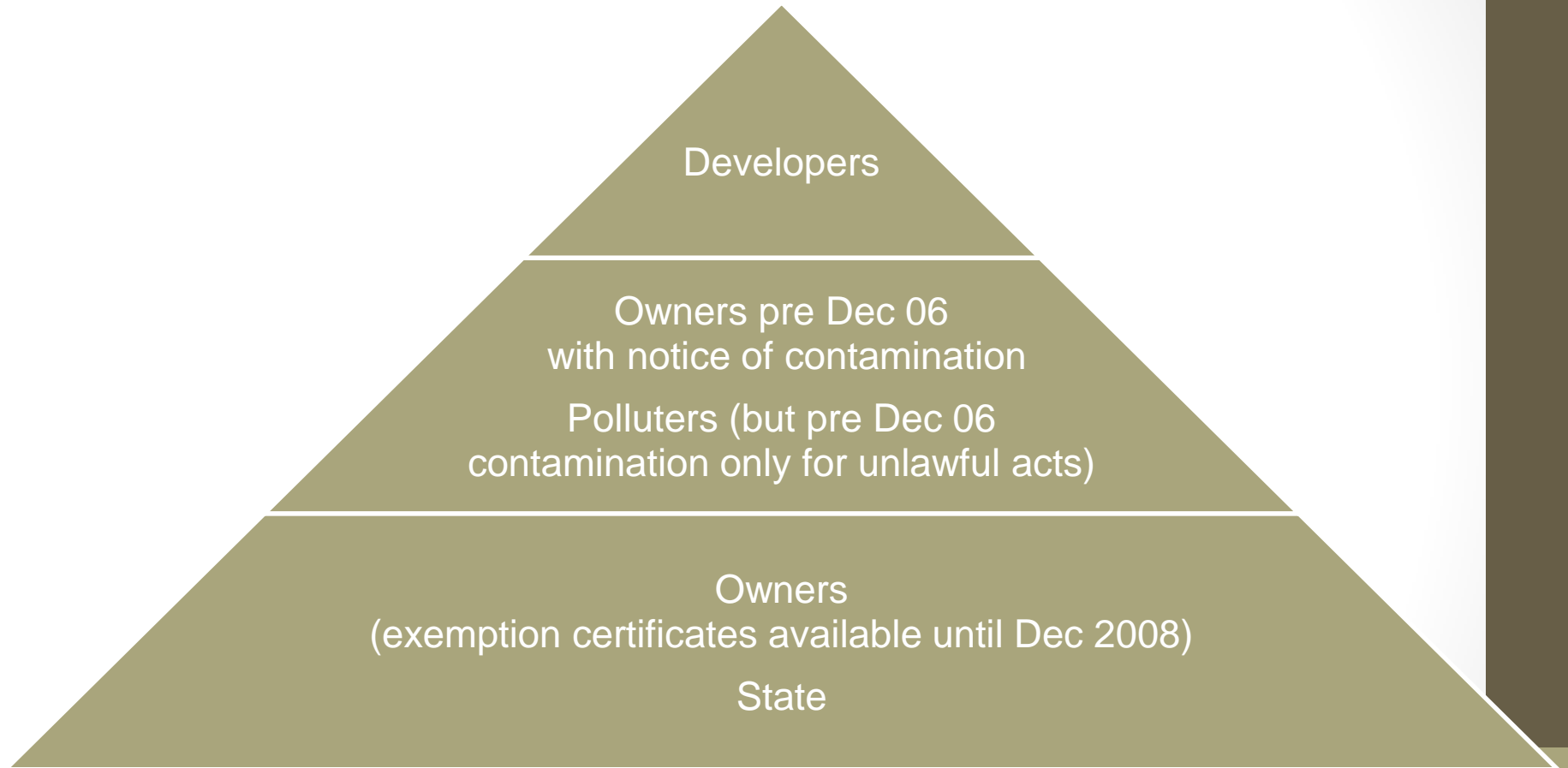
# DER/OEPA powers

- Subject to some notice provisions, inspectors have power to:
  - enter land
  - take samples
  - do monitoring
  - conduct search of premises
  - request/view documents
  - take photographs
  - carry out or require audit
  - require operation of equipment
- Offence to delay, obstruct or not comply with reasonable requirement of inspector when they are carrying out a duty

# Contamination

- Contaminated Sites Act 2003 (WA)
- obliged to report sites:
  - known: within 21 days
  - suspected: as soon as is reasonably practicable
- 7 tier site classification system, many still not classified
- clean up only required of “contaminated – remediation required” sites
- statutory hierarchy for clean up
- statutory notices can be issued to compel action if DER unhappy
- need DER approval to transfer liability outside of hierarchy
- memorials on title, notification of transfer, directors and managers liable

# Hierarchy of responsibility



# Rare flora and fauna

- *Wildlife Conservation Act 1950 (WA)*
- proposed new Biodiversity Conservation Act
- all flora and fauna protected
- flora can be taken if unavoidable consequence of right or duty
- rare flora only taken with approval of Minister
- fauna can only be taken with licence
  - “taken” requires direct harm
  - short range endemics and stygofauna – no licence to take for development!
- New listing can affect existing project
  - not under the EPBC Act though

# Conservation of reserves: WA

- *Conservation and Land Management Act 1984* (WA)
- Terrestrial reserves made by Minister for Lands
- Marine reserves made by Minister for Environment with concurrence of Ministers for Fisheries and Mines
- (for most) Purpose can only be changed by both Houses of Parliament (other than 5%)
- Mining leases and general purpose leases in national parks and class A nature reserves only granted with consent of both Houses of Parliament
- Conservation Commission/Marine Parks and Reserves Authority is vested with reserves and makes management plans
- Department Parks and Wildlife manages reserves
  - management plans (10 years and beyond)
  - if no plan, then only necessary or compatible operations
  - difficult to enforce management obligations

# Conservation of reserves: WA

- Types of reserve:
  - Nature reserve/Marine nature reserve: protection. No fishing or petroleum activities.
  - National park: protection and recreation
  - Marine park: protection and recreation. Fishing and petroleum activities permitted (but not in sanctuary zone)
  - Conservation park/Marine management area: conservation, recreation, scientific and commercial activities consistent with management plan
- Sanctuary zones, recreation zones, special purpose zones
- Class A needs to be specially declared as well as underlying reserve

# Petroleum management

- Land: *Petroleum and Geothermal Energy Resources 1967 (WA)*, *Petroleum Pipelines Act 1969 (WA)*
- Coastal waters: *Petroleum (Submerged Lands) 1982 (WA)*
- Petroleum (Environment) Regulations 2012 (for all WA Acts)
  - DMP
- 3nm to 200nm: *Offshore Petroleum and Greenhouse Gas Storage Act 2006 (Cth)*
  - *Offshore Petroleum and Greenhouse Gas Storage (Management of Environment) Regulations 2009 (Cth)*
  - NOPSEMA
- Mirror legislation (pretty much)

# Petroleum management

- Regulates seismic, drilling, production, pipelines, decommissioning
- Good oilfield practice required by Acts, plus environmental conditions can be placed on approvals
- Environmental Plans required under Regulations for any activity (like an EMS, but focussed on activity)
- Environmental impact assessment for significant activities (EP Act (WA) and EPBC Act (Cth))
- Works approval/licence under EP Act for more than 5,000 tonnes per year

# Petroleum EPs

- Require public consultation
  - initial
  - ongoing
  - responses to comments
- Require reporting
- Focussed on environmental objectives and performance standards
  - risks need to be ALARP
  - risks need to be acceptable
  - old plans being transitioned

# Fisheries management: State

- *Fish Resources Management Act 1994 (WA)*
- Objects: conservation, develop and share fish *resources*
- Fish: not just fin fish. All aquatic organisms (but not mammals, birds, reptiles, amphibians)
- Recreational fishing: bag limits, size limits, seasons, equipment
- Commercial fishing: management plans
- Fish habitat protection areas

# Fisheries management: Cth

- *Fisheries Management Act 1991* (Cth)
- Object: exploitation of fish *resources* consistent with ESD
- 1995 Offshore Constitutional Settlement
- WA Dept Fisheries manages fisheries in Cth waters under WA law, other than specified fisheries (eg tuna), which have specific management plans
- EPBC Act strategic assessments of fisheries for MNES, and assessment for exports

# Planning approvals

- *Planning and Development Act 2005* (WA)
- Individual town planning schemes
- Planning approvals process doesn't usually consider environment
  - but in can
- Mining:
  - Minister, warden or mining registrar *shall take into account* planning scheme when considering whether to grant a mining tenement
  - Planning Schemes *will not prohibit or affect* the granting of a mining tenement or any mining operations authorised under the Mining Act.
  - Local Government or WAPC can object to the grant of a mining tenement on the ground that it will effect the implementation of and future course of a town planning scheme or local laws. Minister for Mines shall not dispose of the application unless first they have consulted the Planning Minister.

# Aboriginal heritage

- *Aboriginal Heritage Act 1972 (WA)*
- All sites of importance and significance to Aboriginal people are protected (regardless of whether on the Register)
- section 18 consent to disturb
  - Minister after considering report of ACMC
- Due diligence defence to disturbing (thus heritage surveys)
- *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)*
  - only applies to declared places
  - used as a last resort

# Native title

- *Native Title Act 1992 (WA)*
- rights and interests that Aboriginal people have to land that come from their traditional laws and customs
- non exclusive, bundle of rights
- Can only be exercised in accordance with traditional laws, may allow travel through area, fishing (non commercial), visiting/protecting spiritual places
- Native title yields to inconsistent laws eg freehold title
- No mineral/petroleum rights
- Future acts: Right to negotiate (and lesser rights) enable Aboriginal people to raise/obtain protection for environment for particular development

# Common law actions

- Negligence
  - duty of care owed to take reasonable actions to avoid foreseeable harm
  - breach of duty of care
  - damage caused
- Nuisance
  - unreasonable interference with land or public amenity
- Trespass
  - direct interference with land

# Going to Court

- Merits appeal – “errors of fact”
- Judicial review – “errors of law”
  - What are errors of law?
- Who can apply for a review - “standing”, a barrier to review
- Remedies
- Other barriers to review

# Merits Appeals

- Concerned with the substance or merit of the decision – was the outcome good or bad?
- Grounds of appeal based on whether there were errors of fact made in the decision.
- Appeal is usually heard by a Minister or an independent Tribunal (eg SAT).
- Person hearing the appeal “stands in the shoes” of the original decision maker and hears all the old (and new) evidence again .
- Have to be created by statute
  - eg EP Act, Aboriginal heritage, fisheries, planning, water
- Standing only created by statute

# Judicial review

- Exists in common law regardless of statute
- Concerned with the process by which the decision was made, not with the substance
- Grounds of appeal based on whether there were errors of law made in the decision
- Appeal is heard by the Supreme Court for State law, Federal Court for *EPBC Act* or other Commonwealth law

# Grounds of appeal – errors of law

- Failure to provide procedural fairness
- Bias
- Excess of jurisdiction
- Improper delegation
- Failure to consider relevant considerations
- Consideration of irrelevant considerations
- “Wednesbury” manifest unreasonableness
- Improperly applying policies/guidance statements
- Failure to follow legislated process

# “Standing” – a barrier to review

- Only people/groups with “legal standing” can apply for merits appeal or judicial review
- Merits appeals – standing depends on the statute which creates the right of appeal
- Judicial review rights exist in common law, so standing depends on common law, unless rules are modified by statute.
- Common law - a person must have a “special interest” in the matter (*ACF v Cth* (1980) 146 CLR 493). Special interest is “more than a mere emotional or intellectual concern”.
- Judicial review of State law – common law standing applies.
- Judicial review of Cth Law – common law standing has been modified. Under *EPBC Act 1999 (Cth)*– any person/group who has engaged in activities to protect the environment for at least two years

# Remedies

- Writs of certiorari, mandamus, prohibition
- Declaration
- Injunction
- Interim Injunction
- Damages

# Other barriers to review

- Legal costs
- Security for costs
- Undertaking as to damages
- Delay
- Very limited legal aid
- Access to information

# Overview of Mining Law Workshop

1. Scope of Mining Act 1978 and amendments
2. Decision makers and their powers under the Act
3. Applications and objections
4. Pollution controls
5. What can you do



Photo Courtesy Cara Ratajco

# 1A - Terminology



Image sourced [www.ey.com](http://www.ey.com)

- “Ownership” : s9(1)
- “Minerals” : s8(1)
- “Mining Operations” : s8(1)
- “Mining Tenement” : s155(1)

# 1B - Land open for Mining

- Crown ownership of “minerals”
- **Crown land generally open for mining**
- **Reserves**
  - “A” Class nature reserves and national parks: approval of both houses of parliament required.
- **Private land**
  - Consent of landholder often required
  - Compensation must be agreed prior to mining

# 1C - Types of Mining Tenements

- Prospecting licence
- Exploration licence
- Retention licence
- Mining lease
- General purpose lease
- Miscellaneous licence



Photo Courtesy of Louise Williams, Environs Kimberley

# 2 - Decision Makers

- Mining Registrar
  - recommends grant or refusal of uncontested application for mining lease
- Mining Warden
  - recommends grant or refusal of contested application for a mining lease
- Minister for Mines
  - grants or refuses application for mining lease

# 3 - Applications and Objections

- Objections can be lodged by any person s75(1)
- Warden may hear an objector s75(4)
- Objections can relate to matters of public interest including environmental matters

# 4A - Pollution controls

- **Mining Act and Regulations:**

- Conditions of licence
- Reporting and inspection
- Enforcement of conditions



Photo Courtesy Cara Ratajczak

# 4B - Other Controls on Mining

- Environmental Impact Assessment
  - When will a mining proposal be assessed by the EPA?
  - Assessment of mining proposals after grant of mining lease
- Part V EP Act (works approval, pollution licence)
- Planning laws do not apply

# 5 - What can you do?

- Monitor newspaper
- Object (Mining Lease, Exploration Licence)
- Refer to EPA
- Appeal conditions of works approvals and pollution licences
- Monitor compliance with conditions
- Notify Dept Mines & Petroleum, and DEC of any breach

# Thank you

- Questions?
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