



Overview of environmental law in Western Australia

An Introduction to the Overview of environmental law in Western Australia

Western Australia has a coastline of 12,500 kilometres and a land area of almost 2.6 million square kilometres. Within this vast region, the State is host to a diverse range of environments and native species of plants and animals, and the south west botanical province is classified as one of only 25 "biodiversity hotspots" on Earth. The State's environmental laws play an important part in protecting Western Australia's environment.

This fact sheet provides an overview of environmental regulation in Western Australia, including an examination of the roles of Commonwealth, State and local governments.

This fact sheet is intended for information purposes only. If you require advice about a specific issue, please contact the EDO. This fact sheet is current as at March 2011. It is possible that changes to the law have been made since this time.

What is "environmental law"?

The term "environmental law" refers to laws for protecting soil, air, water, the oceans and biodiversity, as well as laws which protect the environment as a whole. Environmental laws can protect areas of land or ocean (such as in national parks), individual species (such as wildlife conservation laws), require environmental impact assessment be done before approvals are granted for an activity, make it an offence to harm the environment, and require people to remediate any environmental damage they cause (such as contaminated sites laws).

There are many different environmental laws in WA. The details of these different laws are set out in the EDO WA fact sheet series. The purpose of this fact sheet is to provide an overview framework for understanding where those laws come from, and how they are upheld.

Sources of environmental law

Environmental law derives from five sources - common law, statute, subsidiary legislation, policies and administrative guidelines, and international law.

- Common law

Common law refers to laws that have been developed by the courts over many years. Whilst most environmental laws derive from statutes (see below), there are a number of common law principles which are relevant to protecting the environment, particularly where the issue involves a dispute between neighbours (see [Fact Sheet 2: Common law](#)).

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- Statute

Statutes are laws enacted by the State or Federal Parliament. A great deal of what is commonly referred to as “environmental law” is derived from statute (for example, the *Environmental Protection Act 1986 (WA)* (“EP Act”). Statute law prevails over common law, although there is a presumption that a statute does not take away common law rights unless it clearly says so.

- Subsidiary legislation

A statute may allow for the making of subsidiary legislation by government (rather than parliament). Subsidiary legislation contains local or specific details of how a statute applies. Examples of subsidiary legislation are local town planning schemes made by local governments under the *Planning and Development Act 2005 (WA)*, and the *Environmental Protection Regulations 1987 (WA)* made by the Department of Environment and Conservation (“DEC”) under the EP Act.

- Policies and administrative guidelines

Although not laws themselves, policies and administrative guidelines applied by government affect how particular laws are enforced and administered in practice. Statements of planning policy and guidelines to the environmental impact assessment process are examples of policies and guidelines that affect the way the law is applied by government authorities. Policies and administrative guidelines are not binding documents on developers or government, but government must give them proper consideration when it is making a decision.

- International law

Australia is a signatory to a number of international treaties. These treaties do not have direct legal effect in Australia until they are implemented by Commonwealth legislation. An example is the *World Heritage Convention* which is implemented by Australia in the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)*.

Guiding principles of environmental law

In developing new environmental legislation, law-makers are increasingly adopting a number of internationally recognised principles:

- ecologically sustainable development and the principle of intergenerational equity;
- the precautionary principle;
- conservation of biological diversity and ecological integrity;
- economic valuation of environmental factors and the polluter pays principle;
- waste minimisation; and
- public participation.

The principles are not binding in themselves on developers or government, but government may be required to give them proper consideration when it is making a decision affected by these principles. This is especially the case when a principle is stated to be an objective of a statute, or if the statute states the principle has to be taken into account.

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Who makes environmental law - roles of Commonwealth, State and local government Commonwealth

The *Commonwealth Constitution* gives specific law-making powers to the Commonwealth Parliament. Although these powers do not specifically include the power to make laws about the “environment” (in fact the environment isn’t even mentioned in the *Commonwealth Constitution*), the Commonwealth does have powers that may be exercised for the purposes of environmental regulation, including:

- control of interstate and overseas trade and commerce (e.g. granting export licences with conditions that protect the environment); and
- external affairs (e.g. implementation of the *World Heritage Convention* to protect world heritage areas).

The Commonwealth may also exercise its financial powers to make laws about taxation and expenditure of Commonwealth money in ways which protect the environment. For example, the Commonwealth may make grants to the States on conditions that the money be spent in a certain way, including ways which promote sustainable land management.

For an overview of the most important Commonwealth environment laws, see Fact Sheet 6: Commonwealth environmental impact assessment, Fact Sheet 9: Biodiversity protection under Commonwealth law and Fact Sheet 17: Marine reserves.

State

The Western Australian Parliament has the power to make laws with respect to “peace, order and good government” of the State. This includes the power to make laws regulating the use of land and natural resources, and therefore also allows the State to make laws to regulate and manage how the use of the land and ocean impacts the environment.

A State law that is inconsistent with a Commonwealth law is invalid to the extent of its legal inconsistency. Legal inconsistency is not just where two laws overlap or deal with the same area, but rather where it is not possible to comply with the two laws at the same time or when the Commonwealth clearly intends to cover the whole area alone. This rarely happens in practice, and so there are quite often both State and Commonwealth laws applying to the same environment or land use.

Local government

Local government has the function of providing for the good government of persons within their districts. This includes the authority to make specific local laws that may protect the local environment. Local government also exercises important powers under the *Planning and Development Act 2005 (WA)* and the *Health Act 1911 (WA)*.

Local laws made by local government are inoperative to the extent that they are inconsistent with a written law of the State or Commonwealth, and they can be disallowed by the State government. There are also some provisions in local planning schemes which are common to all schemes (called “model” or “deemed” provisions).

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Regional local governments may also be formed, and have the power to make local laws applying to the region in the same way as local governments.

How is environmental law upheld?

Often the easiest way to resolve a situation where environmental harm is occurring is by approaching the person causing the problem and raising it with them. It could be that they did not know that their activity was causing harm, and that on becoming aware of your concerns, they may agree to modify their activities.

If this doesn't work or isn't appropriate, however, then you may want to take some action to uphold the law. The type of action you can take depends on whether the environmental law you are concerned about is criminal, civil or administrative. Some environmental law concerns can involve more than one of these.

Criminal law

A criminal law is one which states that to do something is an "offence" and imposes a fine or custodial sentence on an offender. An example of a criminal environmental law is that it is an offence under the EP Act for any person to cause pollution or allow it to be caused. See the ([Fact Sheet 27: Pollution and environmental harm](#)) for more information about this.

Criminal laws can be enforced by prosecution, which means the person who is alleged to have committed the offence is formally charged and required to attend court. Prosecutions have to be started within a certain time after the offence, known as a "limitation period". The limitation period for offences depends on the statute that creates the offence. Under the EP Act for example, prosecutions for the most serious offences can be started at any time, but for lesser offences have to be started within 2 years of the DEC becoming aware of the offence.

In order to be successful, the prosecutor (usually a government department) must prove "beyond reasonable doubt" that the accused committed the offence. Prosecutions usually take at least 6 months to be heard, use significant government resources, and are formal Court proceedings. For this reason, criminal environmental laws are not usually enforced by way of prosecution, but instead are dealt with by way of the issue of a written warning, an infringement notice (for minor offences), penalty notices or civil penalties (for moderately serious offences), the amendment, revocation or suspension of approvals, or notices to prevent further harm. The range of enforcement powers which can be used depend upon the statute which is breached, and the government agency who enforces it. For example, the enforcement options which the DEC has under the EP Act are set out in the DEC Enforcement and Prosecution Guidelines 2008.

Who can take action under criminal law?

It is usually only the government department who administers a statute that will be able to enforce provisions of that Act. For example, the EP Act provides that prosecution of offences under that Act may only be instituted by the Chief Executive Officer of the DEC, or a person authorised under a power issued to her or him pursuant to the Act.

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Members of the public usually do not have the right to enforce criminal law against people they believe may have committed an environmental law offence. However, you can report your concerns to the relevant agency. If you do this, you should ask that your concern/complaint be recorded, for your complaint to be investigated and dealt with, and for the agency to give you a response. Some agencies have a formal recording system for complaints, in which case you should ask for your complaint reference number so you can keep track of it.

If you make a report to the government, it will be helpful to tell them: **who** did it and who did it happen to; **what** happened; **when** did it happen; **where** did it happen; **how** did it happen (if you know); **what** was its impact. It is also helpful if you make notes at the time of the incident you are reporting, and collect evidence (eg photographs of things observable from a public place).

If you are concerned that the government agency is not taking proper action in response to your concerns, you can make a complaint against a government authority to the State or Commonwealth Ombudsman (depending on whether a State or Commonwealth authority is involved). The Ombudsman will investigate and hand down a finding on the matter. Although government departments are not bound to follow an adverse finding, they will usually do so to avoid negative publicity.

If a government department does successfully take some enforcement action, members of the public may be able to recover some of the damages which they suffered as a result (for example, if a member of the public acted to prevent or clean up after an offence affecting them). Refer to the ([Fact Sheet: Common Law](#)) for more about this.

Civil law

The civil law is concerned to protect people's personal and private interests (such as their property rights or financial interests, or their health). Where a person's private interests are harmed by the activities of another person (such as where a person's ability to use their own land is affected by pollution from a neighbour) and there are grounds for legal action, civil proceedings may be commenced in an appropriate court or tribunal to remedy that harm.

An example of a civil law is negligence. There will be grounds for legal action under negligence if someone can show:

- A person had a duty of care to take action (or stop doing something) to make sure reasonably foreseeable harm did not occur to another person or their interests;
- That person breached their duty of care; and
- That breach caused damage.

A person breaching a civil law is not subject to a fine or imprisonment, but could be ordered to pay damages, or to refrain from further infringements of the rights of another person.

If a general public right is harmed (for example, a nature reserve is unlawfully cleared by a developer), it will be harder for a person to commence legal proceedings unless they can prove that they have a "special interest" going beyond that of other members of the public. Civil law does not allow any person to bring an action on behalf of the environment.

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Civil law proceedings have to be commenced within a certain period of time from when the breach of law occurred (usually 6 years). Refer to the ([Fact Sheet 2: Common Law](#)) for civil law actions which may be able to be used when someone is concerned about the environment, and the limitation periods which apply.

Administrative law

Administrative law is the area of law dealing with the review of decisions made by public bodies, such as Ministers, government departments and statutory corporations. It has been said that the “primary purpose of administrative law is to keep the powers of government within their legal bounds, so as to protect the citizen against their abuse.”

Administrative law can permit you to challenge/review a government decision on either the merits of the decision, or on the legal process used by the government to make the decision.

Merits review

Reviewing the merits of a government decision, or challenging the decision because you disagree with it or the reasoning or facts used to make it, can only occur where a statute provides a specific right to you to do so. The EP Act is an example of this, it provides rights to any person to appeal to the Minister for Environment if they disagree with the EPA's environmental impact assessment of a significant development proposal. Merits reviews in WA (apart from under the EP Act) are usually to the State Administrative Tribunal. To see whether you have any rights to have a government decision challenged under a merits review, refer to the fact sheet which deals with the law you are concerned about.

Review of legal process

Reviewing the legal process used by the government to make a decision is (in theory) open to any person, but must identify some “legal error” in the decision (described below), and can only be heard by the Courts. Where the public body is a Commonwealth one, its decision can be reviewed by the Federal Court. Where the public body is a State one or a local government, its decision can be reviewed in the Supreme Court.

If you are concerned about the legal process used by the government to make a decision, here are some things you should know about what will be involved in using the Court process to challenge the government's decision. Court proceedings are usually a significant undertaking, so in the first place make sure you are dealing with the decision using other avenues as well, for example continuing to deal with government, using merits appeals or using the political process. Even if you do end up taking a case to Court, it will usually help your case to show that you have explored all other options solve the problem.

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You must have “standing” to bring an action

As a way of limiting the number of cases that go to court and avoiding cases being brought by “busy-bodies”, a person must prove that he or she has “standing” before the matter can be heard. This requires that you have an interest in the subject matter of the action that goes beyond the interests of other members of the public.

The issue of standing will most commonly arise in cases where the damage you are complaining of affects the community at large (for example, smoke haze caused by a hazard reduction burn). If you cannot show that you have suffered some special damage over and above that suffered by the community at large (for example, physical damage to land or to your person), then the court is unlikely to grant you standing to appear in court.

A conservation group (as opposed to an individual) would also have to prove that it has “standing” to bring the challenge. This means it would also have to show that it has a special interest in the decision, being an interest which is more than a “mere intellectual or emotional concern”. In several cases in WA conservation groups have been able to show standing with relative ease. However, in one case one of the Supreme Court judges indicated that she thought that standing was probably being granted too readily, and indicated that this area of the law should be reviewed (and probably tightened). Therefore, standing must still be shown in any case that a conservation group decides to bring.

Standing can be amended by statute, and has been amended under the *Environmental Protection Biodiversity Conservation Act 1999* (Cth). Under that Act, people or conservation organisations with a history of environmental activity or research for the previous 2 years are automatically granted standing.

You must identify a legal error

To challenge a government decision in the Courts, you must identify a specific type of legal error in the decision making process (known as an “error of law”), rather than just that you disagree with the government’s decision. Errors of law include that the (government agency or Minister):

- Considered an irrelevant consideration (for example, under the EP Act the Environmental Protection Agency (“EPA”) is not permitted to consider the economic impacts on developers if a development does not go ahead. If the EPA does consider this, it will have committed the legal error of having considered an irrelevant consideration);
- Did not consider a relevant consideration (for example, if the EPA did not consider the impacts of lighting on turtles of a development on a significant turtle nesting beach, it would have committed the legal error of not considering a relevant consideration);
- Was biased (for example, if the Minister was a director of a development company and granted approval to that same company, the decision would be able to be challenged on the basis the Minister was biased);
- Did not follow the correct procedures (for example, if a statute says that the public must have 28 days to be consulted about a proposed approval and they are not consulted, this will be a legal error);

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- Acted in excess of jurisdiction or beyond power (for example if a statute says that an approval must contain certain conditions and the approval is granted without those conditions, the decision will be beyond power).
- Made a decision which was manifestly unreasonable (where the Minister or agency's decision was so unreasonable that no reasonable person would have made it).

It is usually difficult to identify a legal error with a decision unless you know the reasons for that decision. You should therefore seek to get access to all the relevant documents that are used by the government to make a decision. To do this you may need to refer to the ([Fact Sheet 40: Freedom of Information Law in Western Australia](#)) or ([Fact Sheet 41: Freedom of Information Law under the Commonwealth](#)). For Commonwealth decisions, a person with standing may also lodge a request for reasons under the *Administrative Decisions (Judicial Review) Act 1977 (Cth)*. A request for reasons usually has to be lodged within 28 days of notification of the decision.

You can only challenge a “final” decision

The Courts usually will not hear any legal challenges to a decision until the decision is actually made. Therefore although most legal challenges are based on some error during the process, you can't start the legal challenge until the process has concluded. It is therefore important to “track” the process as it goes along so you can identify errors as they occur. This also helps you to be able to let the government know when you think there is a problem so it may be rectified and hopefully avoid a decision you disagree with being made in the first place.

Who will the legal proceedings involve?

A challenge to the legal process used by the government to make a decision would be framed in terms of a challenge to the government (eg the government agency or the Minister), rather than a challenge to any particular development or developer. The developer therefore would not strictly need to be involved in the action. However, as the developer/development itself is affected by the outcome of the legal challenge, most of the time the developer will want to be granted permission to present its own arguments, and the Court will usually allow this.

The government and the developer may seek security for their legal costs from the person who starts the legal challenge. However, where an environmental group brings a challenge in the public interest, and that group does not have the capacity to provide the security for costs, the Court usually hears the case without requiring the group to provide security.

Limitation periods

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Legal proceedings must be commenced by lodging the necessary papers in court within a period set by law (called a "limitation period"). The limitation period depends upon the type of error you are challenging. Some proceedings need to be commenced within 28 days of the decision, and it is rare for proceedings to be allowed to be brought after about 6 months. You will need to get specific legal advice about limitation periods.

Process of legal challenge

The process for legal challenge is a two stage one. The first stage is to go before a single judge and seek an "order nisi" (an order that the State must show cause why the decision should stand). At this stage you must simply show that you have an "arguable case". If this is successful, you must then go before the Full Court (3-5 judges) and seek an "order absolut" (final remedy). This stage is a full hearing and considers all the available evidence. Depending upon whether the Court agrees to hear the matter in an expedited manner or not, this process can usually take from 6 months to 2 years.

Until an "order absolut" is issued by the Court, the government's decision will remain valid, and the developer will be entitled to rely upon it to commence construction, implement a management plan, etc. For this reason, people bringing an action to try and protect the environment usually seek an interim injunction to prevent the developer from carrying out any actual works until the case is finally determined. The test for whether an interim injunction includes weighing up the cost to the developer of the delay against the cost to the environment of work being done under the guise of an invalid approval. It is not uncommon for interim injunctions to be granted in cases concerning the environment, particularly if actual work has not yet commenced on the development which is the subject of the approval.

If you seek an interim injunction, the developer will be entitled to seek that you provide an undertaking as to the damages the developer will suffer due to the delay if your case is unsuccessful. While the Court usually requires such undertakings as a matter of course, in circumstances where an environmental group brings a challenge in the public interest, and that group does not have the capacity to provide the undertaking, the Court may (and has) granted an interim injunction without requiring an undertaking.

What remedies are available?

If you successfully show that the government made some error of law when granting an approval or making a decision, the Court has a discretion about what remedy it can provide.

The most likely remedies are a "writ of certiorari" (to quash the decision)) and a "declaration" (eg declaring that a particular legal error was made). If the Court finds that there was an error in the process of decision-making, then the the decision-maker is free to make the same overall decision again as long as they follow the correct process this time. However if the Court finds that the decision-maker did not have power under the statute to make the decision, this will stop the decision-maker from making the same decision again unless the circumstances which gave rise to the lack of power are altered.

The Court can, but is very unlikely to, issue a "writ of mandamus" (to compel a particular decision) or "writ of prohibition/ final injunction" (to prohibit a particular decision), because granting these remedies would require

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the Court to put itself in the place of the government itself as the decision maker when parliament intended the decision be made by the government. The Court's role in our legal system is to review administrative decisions, not to make them.

Note also that, even if you do successfully show that the Minister made some error of law, the Court has a discretion whether to grant any remedy at all. The Court can, and has in one case brought by an environmental group, decided that the error of law was of a merely technical nature, and therefore not one that justifies overturning an approval or in fact providing any remedy at all.

How much will legal proceedings cost?

Legal action can be expensive. In addition to court fees, you will usually have to pay for your lawyer and the legal costs of the other party if you are unsuccessful. If you are successful, the court will generally award you costs, but these usually only amount to around two-thirds of what you will have to pay your lawyer.

What legal assistance is available?

It is increasingly difficult to obtain legal aid funding for anything other than serious criminal offences. The Legal Aid Commission of Western Australia would generally not be able to assist people to take civil action.

The Environmental Defender's Office assists individuals or groups with advice on environmental law problems, and may even represent you in court if you cannot afford to do so yourself. The EDO will only provide advice or representation where it is in the public interest to do so.

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The Environmental Defender's Office WA (Inc)

The Environmental Defender's Office WA (EDO) is a community legal centre specialising in public interest environmental law.

The objects of the EDO include:

- to provide community groups and individuals with legal advice and representation to help protect the environment;
- to promote law reform that improves environmental protection; and
- to provide community education about environmental law.

The EDO is a non-profit, non-government organisation. The EDO receives its principal funding from the Federal and State Attorney-General's Departments.

However, these funds are limited and donations from the public provide a vital source of funds for many of our activities. Donations over \$2 are fully tax deductible. The EDO also welcomes people with a commitment to the environment to join as members.

If you require legal advice on an environmental issue or wish to find out more about the EDO, please contact us at the following address:

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