

INTRODUCTION TO THE IDEA OF ENVIRONMENTAL PLANNING LAW

1. A MATTER OF ORIENTATION

1.1 Administrative Law Approach

A person approaching the study from a legal stand-point tends to see planning law in terms of Administrative Law. Emphasis upon controlling planning decision-makers. Key concepts include:

- Natural justice;
- Acting in excess of power (ultra vires);
- Abuse of power;
- Standing to take action (locus standi);
- Statutory appeals or remedies;
- Prerogative and equitable relief.

In this course we will look at Administrative Law in the Environmental Planning Law context. But as a comprehensive approach to the relevant law, it is not the most useful orientation for people engaged in the various branches of planning practice.

1.2 Environmental Law Approach

- (a) Planning by C21 has become fully pro-active and eclectic in adopting a total environment point of view.

In Western Australia while there is a very limited body of environmental law so called, there is a powerful body of experts claiming status as environmental scientists who regard planning as a sub-branch of environmental study.

- (b) There is an element of truth in this approach, if the environmental protection legislation in W.A. is seen as the latest stage in the historical progression:

- (i) Laissez-faire;
- (ii) Health legislation to deal with sanitation problems;
- (iii) Building legislation to deal with substandard building problems and overcrowding;
- (iv) Planning legislation to promote amenity and orderly planning through planning schemes;

- (v) Legislation aimed at protecting the environment.
- (c) However this approach is not particularly helpful for the planner. By emphasizing the dominance of environmental protection it predicates an approach to planning which is not total and inclusive.
- (d) Furthermore the approach ignores the fact that, in our rarefied industrial atmosphere in W.A., environmental law without the element of land use control which is traditionally the province of planning law and mining law, amounts to little more than pollution control. This explains the persistent intrusion of ep into the province of planning control.

In this course we will consider environmental protection legislation, but will see it, where it overlaps with planning, as a contributor to the total body of Environmental Planning Law, and as a partner rather than a dominant discipline in the planner's task of land use planning and land use control.

### 1.3 **Land Law Approach**

- (a) In W.A. our planning law has its roots set deeply in the origins of planning law in the U.K. Attempting an identification of the historical origins of planning law, and considering that the first public planning legislation appeared only in the early C20 in an already matured legal system, there is a temptation to regard the law of land use planning and control as an emanation of Land Law.
- (b) There is scant factual justification for the suggestion that planning law, or now Environmental Planning Law has descended or emanated from the body of law which lawyers would call Land Law. However, the practice of professional planners does touch upon a range of laws which fall within or are closely related to Land Law.
- (c) In this course, in addition to the various environmental planning statutes and subordinate legislation, we will study:
- Land Law - a very general overview of some important common law principles, and statutes;
  - The Torrens System of land title registration, especially as it touches planning practice in its overlap with subdivision procedures;
  - The laws of land acquisition and compensation.
- (d) Therefore, while we do look at Administrative Law and Environmental Protection legislation to provide a complete context, the principal orientation of the course, for convenience, will be the Land Law orientation.

## 2. **THE BIG PICTURE IN 3D**

## 2.1 Land

Land is defined in detail in the lecture on Land Law.

## 2.2 Title

The term "title" is also explained in detail in the lecture on Land Law and later the lecture on the Torrens System. For present purposes it may be regarded as the basis upon which a claim is made to ownership of land.

If we regard the fundamental focus of planners as land, then we see a number of factors in tension. For the planner land is significant for the use it is put to. Traditionally, and under the common law, the right to use land has depended upon title. However there are 2 further dimensions which widen our C21 perception of the law that planners deal with, namely:

Native Title; and  
Environmental Control.

We will return to them after considering title and land use.

## 2.3 Use

See *University of W.A. v. City of Subiaco* (1980) 52 LGRA 360 at 363  
“... activities which are done in ... or on the land but do not interfere with the actual physical characteristics of the land.”

Compare “development”.

Also see the comments of Stephen, J. in *Eaton & Sons v. Warringah Shire Council* (1972) 46 ALJR 380 at 386-389.

## 3. THE BATTLE LINE - TITLE

- 3.1 Title = ownership rights.
- 3.2 The dominance of possession.
- 3.3 Special position of the Crown - sovereignty.
- 3.4 The other possessor - native title.

## 4. HISTORICAL PARADIGMS FOR TITLE THEORY

### 4.1 Vacant Land Paradigm - Arnarson the Land-Taker

We read in chapter 26 of the Icelandic Saga of Egil, how Ingolf Arnarson and his companions, their friends and acquaintances, under pressure at home in Norway, first settled in Iceland, taking land there without paying for it because it was unoccupied. There early settlers or land-takers took land which no one

else had taken, and held it initially by their force of arms and that of their kin and supporters. That arrangement ultimately hardened into customary law, similar to what we refer to as “the Common Law”.

#### 4.2 **Conquest Paradigm - 1066**

- (a) Sovereignty;
- (b) Feudal system of land tenure.

We read in the Anglo Saxon Chronicle how in 1066, William Earl of Normandy, pursuing a claim to the English Crown, landed at Pevensey on Michaelmas Eve, and built a stronghold at the town of Hastings. It is trite history that William's Norman army shortly afterwards defeated the largely Anglo Saxon army of Harold Godwinson, weakened from the successful battle north in Stamford against the army of the powerful Norwegian King Harold Hardrada. William (while claiming sovereignty by principles of succession) took England by conquest. He claimed sovereignty over the whole of the land, and established a highly structured system of land tenure based on service. The central concept was the radical or sovereign title of the Crown over all the land in the country. William's sovereign title was based on legitimacy of succession to the English Crown, reinforced by conquest. It was the conquest which facilitated the claim to sovereign title over all land, and the introduction of the feudal system of land tenure.

### 5. **SWAN RIVER COLONY 1829**

- 5.1 By the mid C17 the feudal system of land tenure had become greatly simplified and formalised. Upon the restoration of the English monarchy in 1660 after the period of the Commonwealth, the feudal tenures were all simplified to free and common socage, or freehold title, the title-holder paying a token peppercorn rental to the Crown. This form of title is referred to as "fee simple".

That was the state of the law relating to land titles in England in 1829.

- 5.2 Capt. Charles Fremantle recorded in a letter to the British Admiralty that on 2 May 1829 -

"...formal possession was taken of the whole of the West Coast of New Holland in the name of His Britannic Majesty and the Union Jack was hoisted on the South head of the River." (Appleyard, R.T. and Manford, T. "The Beginning" U.W.A. Press, 1980).

- 5.3 At the time of the establishment of the Colony (June 1829):
  - (i) all of the land was taken as land of the U.K. Crown; and
  - (ii) the law of England as it existed at that time became the law of the Colony.

The vestigial feudal system was introduced with all land starting as Crown land, and freehold title being alienated by Crown Grant to settlers according to the service given or capital introduced to the Colony.

In some circumstances, the Crown granted leases instead of freehold title, principally for pastoral and mining purposes. Vast areas of W.A. remain as Crown Land, which may be:

- (a) Vacant Crown Land;
- (b) Subject to Crown Lease; or
- (c) Vested in some public authority for a public purpose (Vesting Order).

5.4 Land once alienated went into circulation, and could be negotiated. The Colony from the outset was a capitalist venture. Land has remained a critical item of capital in Western Australia, perhaps more than in many other places. This impacts on planning practice.

## 6. LAND USE - The Control Problem and Planners

6.1 Where land is not in use, and not intended in the foreseeable future to be used, there is little need for land use planning. The need for control arises out of the use of land.

6.2 Planning is concerned with control. That is the province of the environmental (town?) planner. That is the concern of environmental planning law.

## 7. NATIVE TITLE - The Fourth Dimension

7.1 Effect of the Mabo decision.

7.2 Native Title Act 1993 (Cwth).

7.3 Titles Validation Act 1995.

7.4 Effect of the Wik decision.

7.5 Claims may still be made over -

- Crown land;
- Crown leases;
- Possibly, land granted to an agency of the Crown or a local government (a question mark on this), even if held by freehold title.

7.6 Clarification of issues in *State of WA and Ors v. Ward and Ors* (2002) 191 ALR 1

**8. IMPORTANCE OF LAND TITLE TO PLANNING PRACTICE**

- 8.1 Land as an important unit of property.
- 8.2 Controls on creation of new titles. Planners are critically involved in the creation of new titles.
- 8.3 After issues of title are settled, planners are critically involved in controlling land use and development.

**9. ENVIRONMENT - The Fifth Dimension**

- 9.1 Land.
- 9.2 Use.
- 9.3 Title.
- 9.4 Native Title.
- 9.5 Environment.

**10. HERITAGE**

Is there a further dimension in heritage, including aboriginal heritage. Heritage proponents do not see it as subordinate to anything.

**11. SYNTHESIS**

One of the aims of this course is to bring these dimensions together into the composite picture of environmental planning law.

**12. LEGAL CITATION AND REFERENCING**