



## LAW AND THE ENVIRONMENT

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### Abstract

Addresses motivations behind environmental legalisation and its use for promoting different agendas. Means of achieving environmental outcomes that benefit the public are examined.

### Introduction

English law derives from the establishment protecting their position. Those with wealth used the law to protect themselves from those without, ensuring they benefited further along the way.

Those without wealth protected themselves in the only way possible, by forming groups. This was never completely successful unless the group could become the government, but it was much better than remaining isolated as an individual. For employment these groups were later to become formalised as unions.

The development of the House of Commons saw a major shift in power with the general public having more say in their lives. However, the establishment retained much of their control.

Laws since then have been mainly directed at establishing basic rights for individuals while achieving the degree of compliance needed for a society to function. Absolute freedom represents anarchy where there is no society. Humans are a communal species and there has always been a need for rules of engagement for societies to function. These have variously been expressed, as with traditions, taboos and the like, but they are now expressed as laws. Laws represent the basic rules of engagement between individuals considered necessary for a society to function.

The original expression of the environment in law was through ownership. Titles were given for land, streams, timber, game and the like. For titles to be appropriate the entity had to be tangible and spatially located. The seas were open to all, and the atmosphere was not even considered.

The best known exposition of uncontrolled exploitation associated with lack of ownership has been the tragedy of the commons. This has always been taken as indicating a need for ownership but that interpretation provides a rosy account of the consequences of exploitation of resources under ownership.

With global warming we are now experiencing the consequences of exploitation of a resource under ownership. Agriculture has been pushed past the limit in the unrelenting push for

profit wherein the entire environment of the earth is collapsing. Unlimited exploitation under competition is unsustainable, as illustrated by fisheries, but unlimited exploitation without competition for the resource is no different. It generally just takes a little longer.

Laws go well beyond addressing resources as wealth and power<sup>1</sup> can be had by controlling individuals. Indeed, that was the basis for government in early civilisations. Today laws even address such personal activities as sex. While sex is not addressed here the motivation behind the introduction of such laws is fundamental to how the environment is now being addressed.

Science and the law is also addressed. While this reflects a personal interest it has general applicability through scientists providing the information on which societies now develop.

## **Western Capitalists**

Use of the term rules of engagement reflects the development of societies through interplays where different factions battle to improve their position. The axiom that truth is the first causality in war applies. Names are assigned to factions and each faction seeks to improve its position by denigrating the others. The connotations assigned to a name therefore vary depending on ones position and hence view. As the victor gets to write history the name associated with the winners is given prestige and elevated status. The losers are treated as looses and that connotation is assigned to their name.

Western capitalists are in the ascendancy. All societies have embodied fundamental elements of capitalism but it has been refined and promoted so as to exclude even the consideration of alternatives. The reasons for this success can be variously interpreted. Fundamentally it works off the instinct for survival but embellished by greed. Enough to survive is not enough. The objective is to acquire as much as possible. For me this approach is irrational but from considerations given in Evolutionary Direction II<sup>2</sup> it accords with basic instincts. It is a primeval response.

The mechanics of the accelerated rise in capitalism can be illustrated by the economist Hayek. Impacted by World War 2 and the persecution of Jews, he wrote a brief article called The Road to Serfdom. It is doctrinaire but was treated as being intellectual. It is unclear why it was considered to be intellectual other than the opposition being referred to as pseudo intellectuals. By inference Hayek assigned himself the status of an intellectual.

The crux of Hayek's argument was that socialism inevitably led to dictatorships. The fact that most dictatorships arise from those with wealth achieving the ultimate goal in capitalism of a monopoly was either unknown or disregarded. Hayek promulgated a lie that dictatorships were an inevitable consequence of socialism. There was also a lie in the omission of the fact that dictatorships could arise from any form of government, but particularly capitalist.

Socialism was presented as constraining individual rights. The inference was that with capitalism all individuals had freedom. However, the outcome with capitalism is that those with money control those without. With capitalism businessmen can achieve what previously could only be achieved by governments. The individual rights espoused by Hayek was the right for some to exploit others without interference by government.

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<sup>1</sup> Wealth and power are intertwined to the extent that they are treated as being the same. The differences are subtle when addressing law.

<sup>2</sup> On [www.eric.com.au](http://www.eric.com.au)

This had great appeal to industrialists in the USA who had grown enormously from the war. The response was dramatic with anyone that opposed the ideals of the capitalists being persecuted. Illustrated by McCarthyism it was one of the greatest witch hunts ever. To be non-capitalist was to be non-American.

That has continued with the military industrial complex costing the American public dearly in lives as well as money. They recently achieved their ideal with a puppet as president.

And what has this to do with the environment? Everything as the mantra of the current capitalists is that everything can be exploited to the fullest extent possible to maximise their profits. Damage to the environment was disregarded as addressing it would reduce their profits.

This exploitation now has maximum expression in multi-national companies. These have developed using advanced technologies to exploit technologically undeveloped nations. Referred to as technological subjugation<sup>3</sup> it represents a businessman's version of colonialism.

Governments have been instrumental in the rise of capitalism. The earliest governments owned all and functioned through patronage. Support me and I will support you, oppose me and you will be annihilated. For the general public little has changed except that the power now resides with business rather than government.

Business uses government to implement controls that benefit business. The suggested need for free trade is the most diabolical as it allows the weak to be fully exploited, but the range of legislation designed to promote particular businesses is essentially unlimited. Capitalism has used control imposed by laws to flourish.

Some such laws are mainly social, as with those directed at preventing workers from establishing group bargaining when that is the only means for them to protect themselves. In Australia group bargaining rights were recently effectively stripped by government. While that has changed there is still a push by business for government to restrict group bargaining.

Business represents this as benefiting workers, where it can benefit some. However, the goal is to increase business profits by decreasing the returns to workers.

There is an interesting aside as business depends on consumers having the money to purchase goods. Decrease salaries and profits drop due to decreased demand. The current situation is like a dog chasing its tail. I still don't know what happens if it catches it.

The environmental consequences of the control of government by business derive through the exploitation of resources and the desire for cheap labour and a large consumer market. For business more people as consumers equates with increased profit. We had the Big Australia policy, and still have incentives for people to breed at a time when the earth's environment is collapsing due to overpopulation.

The push to exploit more resources is linked to population growth. The infrastructure needed to support the population projected for the future will need development of new resources. Moreover, we need to provide employment for the masses that are bred. At present Australia has a high intake of immigrants because of the desire of industry for cheap skilled labour.

The appeal to government is greater power through greater wealth and a larger population. However, for individual societies and the human race generally it represents a highly organised and efficient means of accelerating the demise of humanity. No animal population

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<sup>3</sup> Social aspects of evolution On [www.eric.com.au](http://www.eric.com.au)

has ever been able to achieve unlimited growth and none ever will. The consequences of attempting unlimited growth are inevitably a catastrophic decline at some time. This is all aided by laws designed to benefit business as business is seeking unlimited growth.

A somewhat aside to the law is the use of denigration to defeat an opponent. This is prominent in the USA where scientists with limited scientific ability that assume they are right use the most abusive language possible to denigrate others without fearing prosecution. The foul language is used to gain attention and assert some form of superiority but the need to resort to foul language is a good indication of their lack of ability. This tactic was used by Hayek and seems to be embedded in the USA system.

The above is only somewhat an aside as the legal version is to question status, validity or whatever. This does not require specialist knowledge and can be used to cast doubt on the reliability of any witness. It is a polite form of denigration. McCarthyism was based on denigration but it was anything but polite, and he used the law to its maximum.

### **Environmental Impact of Laws Promoting Business**

Some laws designed to protect business have had pronounced environmental impacts. The greatest in the USA I am aware of was the prohibition of growing hemp to protect the cotton industry. Cotton has long been the most polluting form of agriculture due to the need for chemicals to control pests and pathogens.

In Australia, margarine was banned and then could not be called butter. Ground groundnuts were peanut paste as it could not be called butter as in the USA. Meat sales in butcher shops could not include chicken or anything that competed with cattle, sheep and pigs. Bread producers were allowed to sell on wet rather than dry weight so as to increase profits by selling very highly priced water. Historically governments have always protected established businesses regardless of the impact on the public, and that has not changed.

Some recent legislation designed to benefit business has benefited the environment. However, it has been highly iniquitous in appropriating the rights of a minority to benefit large business.

The Australian Government pressured the States to stop land clearing and funded them to implement the necessary legislation and controls. The actions were justified as protecting the environment when the intent was always to profit from appropriation of carbon sequestered on farmer's lands. The general public was identified as being the beneficiaries through improvements to the environment when the main beneficiaries were large businesses such as coal miners and power generators.

Economists have continuously berated the support for farmers through subsidies such as drought relief. They were even joined by those with an environmental bent, as with the Wentworth Group of self-proclaimed eminent scientists. There was no comment by economists on the appropriation of long held rights of farmers embedded in their title to the land, and the environmental scientists applauded.

The potential disparity in value between subsidies and the appropriation of carbon is enormous<sup>4</sup>. While having difficulty making a living farmers were expected to contribute to the already large profits of industry. Most profits from farmers cycle internally when most profits from miners go overseas.

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<sup>4</sup> This does not apply if my work on global warming is accepted. However, that was unknown when the legislation was introduced.

## **Pro-environment Laws**

Concern for the environment by the general public has resulted in the development of legislation designed to 'protect' the environment. The need for the legislation has arisen from the expanding population and excesses of business in exploiting resources. The legislation represents interplay between government attempting to win votes by appeasing the general public while continuing as usual in their relations with business.

The 'new' influence with environmental law derives from conservationists and environmentalists, referred to here as generically greens without necessarily implicating the Greens political party.

While the green influence is new the influence of group beliefs is not. Religion has always had a prominent part in legislation and is linked with the control of sex through the promotion of breeding and restrictions placed on abortion. Even the use of suggested knowledge to justify the laws arises now as it did with religion. Religion uses historic hearsay as fact when greens use modern hearsay as fact. The use of modern hearsay is justified through it being said to represent or derive from science.

For greens science has become a religion with environmental scientists as the priests. Scientists are displaying their origins in shaman in providing information tailored to suite the expressed needs of those in the public that support them.

## **Protection**

The general theme is that laws are there to protect the environment. That by passing a law something that exists and is considered desirable can be maintained in perpetuity. The approach is based on the protection of property.

Several issues make protection impossible when addressing the environment as property. Property can be maintained by excluding impacts from the site and that is the approach used for the environment. While this can be successful for a few specific circumstances in general it fails. The reason is that all significant impacts cannot be excluded. Climate change, for example, has the potential to change all and it cannot be addressed by assigning protection. The same arises with feral animals, pollution and the like where the impact cannot be contained.

Another issue is that property can be assigned a monetary value whereas the environment cannot unless some attribute is commercially exploited. Economists have resorted to numerous forms of manipulation in attempts to value the environment in the same manner as business assets. To them it gives status in addressing the environment, but the result has been counterproductive to the environment. This is seen in the concept of ecosystem services where the value ascribed to the environment derives from its benefit to humanity. Legislation based on ecosystem services addresses commercial benefits rather than the environment.

Given the complexity of the environment many protections address something considered most important rather than taking account of the system dynamics and the interactions with land use. The Wild Rivers legislation is an example where it assumed that the environment will be protected by prohibiting development in proximity to rivers. This assumption is based on the assertion that the areas are now essentially pristine when they have been highly degraded by grazing. As ongoing grazing is permitted the legislation can only serve to promote further environmental degradation.

The reason for the Wild Rivers legislation was to win votes in the city where this was done by removing rights from landholders. Given the low population density in affected areas few votes were lost.

As usual science was used to justify the legislation when most assertions have no basis in science. A review of the legislation identifies that those preparing the legislation had no knowledge of the relevant science and simply assumed that the areas were largely pristine due to the low density of population.

The errors of fact are sufficient to negate the legislation. For example, it appears to have been assumed that an order one stream represents the maximal development of a river as expressed at its mouth. However, the situation is the reverse. An order one stream is the first occurrence of an incised drainage line and so is the smallest stream and generally occurs in the hills. Order one streams were protected by imposing a 1km development exclusion area on each side.

### **Precautionary Principle**

A legal interpretation is that the precautionary principle places the onus of responsibility on a proponent to demonstrate that proposed activities will not damage the environment. This is logically impossible as there will always be impact. Moreover, due to constraints beyond a proponent's control there can be significant impacts that would not have occurred under normal conditions.

The occurrence of global warming is an example where decreased rainfall could render a proposal unsustainable. However, with existing knowledge it cannot be determined where rainfall will decrease or by how much. As global warming is accepted by government, and as it has a potential to significantly decrease rainfall, it could be used to justify excluding numerous proposals. A global warming is associated with numerous other changes, such as increasing sea levels, development could largely cease.

The realised effect of the precautionary principle is to justify decisions based on ignorance. We don't know and because we don't know therefore you can't do whatever. In that way government can do as it pleases. If it can't exercise control through other clauses then the catch all of the precautionary principle can be applied.

The main concern with the precautionary principle is that administrators and scientists take it seriously. It is considered to be deep and meaningful when it is simply a control mechanism. It has even been taken to be a valid management principle in a CSIRO book on the sustainable management of woodlands. The book purports to address the sustainable management of woodlands but does not address the recruitment of trees. It was assumed that trees live forever.

### **Water**

Water is a developing environmental battle ground. Water can have a well defined commercial value, as when used for irrigation. However, there is no commercial basis for valuing water used for domestic consumption other than the cost of delivery. As there is little profit in valuing water on the cost of delivery business is attempting to gain control and impose its own pricing.

Applying business principles of maximising profit the public will be expected to pay as much for water as a company can extort. The extortion would arise for a resource that the public

owns via the Crown. It would relate to a resource that is essential for life. In owning water business would achieve the ultimate position in having absolute control of its 'clients'. In effect the clients would be subjects.

The exploitation of water by business requires government participation as the water is owned by the Crown. This exploitation has already commenced with the States handing water licenses to irrigators at no cost, and the Australian Government now buying back water licences to obtain water for the environment. Farmers ostensibly received a windfall gain at a very high cost to the public.

The law will likely come to the fore with water licences. The Crown owns the water and governments determine how much water is available for irrigators. The licences do not identify ownership of water as has been assumed. Licences identify a right to a proportion of the allocation of water made by government. The intriguing aspect is that government cannot legally buy water licenses as it administers water for the Crown. Water required by government for environmental purposes is simply taken from the available water thereby reducing the allocation to those holding licenses.

### **Murray Darling Basin Audit**

The Murray Darling Basin illustrates the legal complexities that currently exist as barriers to producing desired environmental outcomes. The Murray Darling Basin Authority (the Authority) was established to address the use of blue water in the Murray Darling Basin (the Basin). The political issues were allocations to South Australia where the State essentially produces none of the water, and allocations of water to the environment identified as environmental flows.

There is no credible definition of environmental flows and the Authority went to great lengths to develop and produce a methodology for estimating requirements for environmental flows. After identifying that different environmental assets have differing requirements it was concluded that the requirements could be met using the approach of one size fits all. Environmental needs were to be met by specifying a minimum annual outflow from a river system. As such flows did not occur naturally their achievement would depend on using infrastructure developed for irrigation.

This specification of required outflows is an inevitable consequence of the desire of the Authority to impose a uniform approach across the basin. No justification was given for the need for uniformity. The role of the Authority is to provide an integrated response, not uniform.

In the MDB guide the estimate of available water is identified as deriving from CSIRO modeling of catchment yields. However, a CSIRO report summarising the methods identifies that the estimates of yields derived from existing river models run mainly by the States. The CSIRO 'results' were only used to rescale the estimates from river models according to different climate scenarios. While the method used is most reliable the identification of the use of CSIRO results in the Guide is misleading. The intent of the deceit can only be speculated on but could relate to CSIRO seeking kudos from its modeling and the Authority seeking status from the use of CSIRO.

The general thrust in the MDB Guide is that the environment of the Basin is deteriorating and that it can be fixed by taking water from irrigators and assigning it to the environment. The notion is absurd for many reasons, as addressed in a review<sup>5</sup>. A key one is that the

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<sup>5</sup> Review of the MDB Guide. TBA

degradation in the Basin derives from damage to the land and therefore cannot be fixed by solely managing streams.

This is the crux of the legal issues involving the environment in Australia. The States control the land and the involvement of the Australian Government is highly limited. In being prepared by the Australian Government the MDG Guide has been restricted to addressing blue water, hence the Authority is meant to maintain the health of the basin by solely addressing blue water. Absurd is one word, and there are many others that are more expressive.

## **Solution**

The absurdity of the above situation arises because of attempts to achieve desired environmental objectives through regulations that impose controls. This is doomed to failure for several reasons, a key one being that our knowledge does not allow identification of the controls needed to achieve particular objectives.

The situation is most clearly illustrated by my work on indensation. Control of carbon has been touted as the solution to global warming. However, nothing proposed relating to carbon emissions for climate change / global warming has any chance of providing benefit. While soil carbon sequestration under agriculture would provide great benefits it is currently excluded because big business cannot exploit it.

The occurrence of high costs for the proposed cuts to carbon emissions serve only to increase business profits. This partly arises through deficiencies in the application of the scientific method by scientists, and partly to the desire of business to develop new means of draining money from the general public.

This is exacerbated by administrators seeking simple solutions. Salinity is addressed by limiting stream salinity levels because they can be measured. Keeping salt on the land, which has to be done to limit stream salinity, has historically caused the demise of most irrigation areas around the world. With the MDB Guide the simplistic solution is to control end of system flows.

The need is for policy that supports land users in achieving environmental objectives. Until now the focus of environmental legislation has been the exercise of control. It is assumed that environmental objectives can be met by increasing constraints and imposing penalties. While this approach has a role it is really only suited to point located intensive industries. It is generally inapplicable with extensive industries such as grazing. While it may work with grazing its main effect is to make the activities unsustainable.

The appropriate approach with extensive land use is to facilitate management so that it produces the desired environmental outcomes. The approach should also improve production. The approach has not been used because governments claim that they should not be using money to aid business.

Government has always used public monies to aid business. Numerous government schemes exist to aid in business development. Moreover, there have been many direct subsidies, particularly to manufacturing industries.

Agriculture has traditionally been supported by public funds, as with drought subsidies. Inevitably the funds have been used to ameliorate a degraded situation. The funds would be much better spent in developing productive and sustainable systems that don't require subsidies during drought.



The provision of support for agriculture does not necessarily involve direct subsidies. Indeed, there are compelling reasons as to why it should not. Support is best given indirectly as with the provision of environmental information that aids land management and environmental outcomes.

### **Role for legislation**

In Australia the separation of Church and State means that laws should not be based on beliefs. The religious beliefs of some should not be used to constrain the activities of others. While this has not been completely achieved with religious beliefs incorporated in historic legislation, and some politicians assuming a moral right to impose their religious beliefs onto others, new legislation is largely free of religious beliefs. Individuals have a right to their religious beliefs but no right to impose them onto others.

For a democracy to work the majority must consider the rights of minorities. Conversely, the minorities must consider the rights of the majority. At present the green minority considers they have the right to dictate to the majority. The origin of that assumed right is unclear other than the greens know they are right. That is, yet again we have laws being based on beliefs but with the new wave religion scientists are the priests. For the greens the environmental scientists are on their side in spirit if not in fact.

The issue is how to obtain sensible legislation when power is wielded by a minority seeking to impose their beliefs onto the majority. At present the only means is to challenge the legislation which is time consuming and expensive. While the deficiencies in some environmental legislation make it easy to negate, the procedures to be followed to effect its removal dissuade challenges.

One means for minority governments to limit the excesses of minorities is to employ policy rather than law. This allows government to implement positive support directed at improving environmental outcomes but without policing. It would be a good move if only to wean greens and others off the power drug of being able to dictate to others. Policy is paramount.

While the penchant of greens to dictate requires attention the influence of big business is of greatest consequence in being primarily responsible for the environmental degradation. If it continues as before without abatement any affirmative action to improve the environment will be more than lost in actions by business. Business will simply profit from the affirmative actions directed at improving the environment, as proposed with carbon trading.

For the public this is the greatest challenge due to the inextricable link between big business and government. Governments that damage big business do so at their peril as business then uses its resources against the government. While big business is not the major employer they employ sufficient staff to be able to make sufficient noise to convince that damaging them damages all workers. Indeed, it damages the entire society, or so they say.

The future for the environment is bleak if some businesses get their way. For example, Lowry intends to organise overseas investors to buy up big on Australian water licenses. As profit is the sole motive this cannot benefit the environment or the Australian public as control of the water will be manipulated solely to maximise profit. Given sufficient control a consortium could hold the Australian public to ransom. As the owners of the licenses do not reside in Australia why should they care about the environment or the Australian public.

There is something fundamentally wrong when the occupants of a country lose control of its resources. With capitalism this loss of control has been justified on development. Without external dollars and technology the resources would not be exploited and hence would provide no benefit to the resident population. No one has bothered to question what the

development provides. We know it degrades the environment, and it inevitably results in limited resources being spread across more, but the gains are not so clear.

The suggested need for investment of money or technology is similarly spurious, as illustrated by the proposal to buy Australia's water supply. The supply exists and the investment does nothing to alter the supply. No money is needed. Moreover, no technology transfer is involved. Indeed, countries are being forced to take technology they don't want, as with genetically engineered crops, simply because it increases business profits.

From an ecological perspective the accelerated development arising from the current expression of capitalism serves only to decrease the survival time for humanity. The direct effect is manifest through the period taken to deplete a fixed resource. Suggestions that the resource is not fixed are false. While discoveries raise the ceiling there is still an absolute ceiling.

The last point identifies a secondary factor that is likely more important than the direct effects. Evolution takes time, and the greater the time the better the adaptations. The rush to exploit more now results in inefficient use of resources, where this is clearly illustrated by mining companies. Given more time society can develop more and improved methods that prolong survival. The approach would also greatly improve the living conditions.

## **The Legal System**

For the environment the main concern relates to the use of controls and constraints to achieve environmental objectives. However, this derives from government and not the legal system.

My limited experience limits comment but several cases have involved references to the High Court. This has been useful in identifying the important principles that government is meant to incorporate into legislation. The references to the High Court have arisen where government has sought to promote a particular cause without due consideration of those affected. If nothing else, this identifies the importance of the High Court for the Australian public.

