

ANU COLLEGE OF LAW

GRADUATE PROGRAM IN LAW

COURSE OUTLINE

ENVIRONMENTAL LITIGATION

LAWS8187

CLASS 7561

6-8 July 2011

IMPORTANT NOTICE: We will communicate with enrolled students via their University Webmail account only.

Information provided by: Dr Chris McGrath
Date: 3 June 2011

Posted to web site by: Edwina Breingan
Date: 6 June 2011

Course Convenor

Name:	Dr Chris McGrath
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Consultation Times:	<i>After class or by appointment</i>

Classes

The course will be taught in intensive mode, on the following days:

Days:	6-8 July 2011
Time:	9am - 5pm
Room:	Sparke Helmore 1

Introduction

Welcome to the course in Environmental Litigation. This outline gives an overview of the course structure and content, provides details of how to obtain materials before the class, the preliminary reading for the first classes, and details of how to access the website for up to date information.

Course Objectives

The course aims to take students inside the practice of environmental litigation to teach the practical skills of being a litigator set within a wider theoretical context of environmental regulation.

The course is aimed primarily at litigation lawyers working in environmental law in private practice and government regulators but will also be relevant to managers, policy officers, and enforcement officers in environmental regulators. The course aims particularly to complement training available to environmental regulators and to support the Australasian Environmental Law Enforcement and Regulators neTwork (AELERT).¹ Expected learning outcomes from the course are:

Managers of environmental regulators	<ul style="list-style-type: none">• Improve skills and knowledge to lead or manage a regulatory team in the public sector• Complement Diploma in Government (Investigations)
Litigation lawyers	<ul style="list-style-type: none">• Integrate litigation skills within an overall policy and regulatory framework• Practical training in problem-solving and decision-making in litigation• Advocacy and legal drafting skills• Ability to analyse evidence and advise on prospects of success at trial• Avoid and narrow issues in dispute to achieve cost-effective outcomes for clients
Policy & enforcement officers	<ul style="list-style-type: none">• Gain advanced knowledge of civil and criminal litigation practice• Complement CERT IV investigations and statutory compliance training

¹ See <http://www.aelert.com.au/>

Method of Teaching

The method of teaching will use scenario-based learning – active learning through problem-solving involving specific factual situations and case studies. This aims to provide students with an integrated and practical knowledge of environmental litigation as a part of the environmental regulatory mix.

Assessment

The course will be assessed by:

1. A short essay summarising in plain English for a lay audience the jurisdiction of the main environmental courts and tribunals and the appellate structure for civil, criminal, State/Territory and federal proceedings in the student's jurisdiction (up to 800 words in length) (10%).
2. A practical exercise involving advising the Commonwealth Environment Minister on the discretion to prosecute (1,000-2,000 words in length) and drafting the relevant documents to initiate a criminal prosecution under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (30%).
3. A research paper (up to 4,800 words in length) on a topic of the student's choice relevant to Environmental Litigation (60%).

Further details on the assessment are set out in the approved Means of Assessment for this course available by logging onto the course website, from the commencement of the course. You must log in at the bottom of the page <http://law.anu.edu.au/Postgraduate/> using your ISIS username and password and select this course from your list of courses. The means of assessment is available under the 'Assessment' drop down menu. This means of assessment has been checked by the Director, Postgraduate Coursework Program, to ensure that it complies with the College's postgraduate assessment policy. In accordance with the University's Principles for Determination of Assessment and for Consultation, the course lecturer will discuss with and explain to the students the assessment system at the beginning of the course.

Students must ensure that they rely on the most recent means of assessment available on the course web page as outlined above.

Return of Assessment and Results

It is the responsibility of students to check the Services Office website regarding availability of marked assignments. When they are ready for collection a notice will be placed at the following address <http://law.anu.edu.au/servicesoffice/Assessment.asp> Students must ensure that they keep a copy of their submitted work, which can be readily accessed, until results for that course have been released.

Your results will be available on the ISIS website. Students can print a copy of their academic record (including the latest results) from ISIS. <http://isis.anu.edu.au> Results for postgraduate courses may not be available when standard semester results are released. This may affect your ability to graduate in the next ceremony. For approximate date of release, please check your means of assessment. As a general rule, results need to be available by mid-June for the July ceremony and mid-November for the December ceremony. Students should be aware that any late submission of work may mean that conferring of their award/degree may be delayed or that the offer to transfer to a higher level will be delayed to the point that a leave of absence may be required.

Under the rules adopted by the ANU College of Law, eligibility for a **supplementary assessment** arises where:

- the student received a final mark in a course which falls between 45-49; and
- the student attempted all the compulsory items of assessment in the course (ie, this policy does not apply to students receiving the grade of NCN (non complete fail)).

Students eligible for a supplementary assessment will be assigned a result of PX for that course. This interim result constitutes an offer of a supplementary assessment in the course. Students must then notify PG Admin (pgadmin.law@anu.edu.au) in writing of their intention to undertake a supplementary assessment within 7 working days of the results being released. Hardcopy results notices are not sent to students. The Course Authority, in consultation with the Delegated Authority will determine an appropriate form of supplementary assessment and advise a submission date. A student who attempts a supplementary assessment will receive a result of PS (with a maximum mark of 50) or N (fail). A student who does not provide the requisite notice will not be entitled to sit a supplementary assessment.

Text and Materials

In view of the intensive nature of the course, it is highly desirable for you to do some preliminary reading for the first classes.

This course is built around the case studies of environmental litigation provided on the lecturer's website, Environmental Law Publishing, at <http://www.envlaw.com.au/case.html>.

An electronic reading brick is also available that can be downloaded from the course page on the ANU Wattle website at <http://wattlecourses.anu.edu.au>. If you intended to use a laptop during the course, you can use the brick in its electronic form without printing. Alternatively, you can print a hardcopy for use during the course.

If you prefer, you can obtain a copy of the reading brick from the Services Office. This is the same document as is available for free download and printing. Students who wish to obtain a hardcopy from the Services Office can pay for the brick online through ISIS <http://isis.anu.edu.au>. If you would like your brick mailed out to you, please email a copy of your receipt to pgadmin.law@anu.edu.au; if you are collecting your brick, print your receipt and present it to the Services Office 10.30am-5pm Monday to Friday. See the procedure at <http://law.anu.edu.au/servicesoffice/newpaymentmethodPG.asp>

You can check availability and price at <http://law.anu.edu.au/ServicesOffice/Bricks.asp>.

Cash payments **must** be paid for at the Cashiers Office and the receipt presented at the Services Office for collection of materials. The Cashiers Office is located in the Pauline Griffin Building, Ellery Crescent. Please consider all brick purchases carefully as there are no refunds after purchase.

Prescribed text

There is no prescribed textbook for the course and the bulk of material referred to in lectures will be taken from the case studies available online at <http://www.envlaw.com.au/case.html>.

General references

There is no prescribed text or reading list for the course but students will benefit from access to the following general references:

Environmental policy and regulatory theory references:

Gunningham N and Graborsky P, *Smart Regulation: Designing Environmental Policy* (Oxford University Press, 1998).

General references for civil litigation practice:

Cairns B, *Australian Civil Procedure* (7th ed, Thomson, Sydney, 2007) (or later edition).

Dunstone S, *A Practical Guide to Drafting Pleadings* (LBC, Sydney, 1997).

Preliminary Reading

Read Part 1 (introduction to the course) of the Brick (40 pages).

Information available on the Course Home Page

Further information about this course may be gained from the course home page. Go to the Student Login at the ANU College of Law Postgraduate page <http://law.anu.edu.au/postgraduate/> Log on using your ISIS User Name and Password and follow the links to the course web page. The course web site will contain the Course Outline, Enrolment Information, Assessment information, periodic announcements and other course documents.

Please keep up-to-date by regularly checking the website. Please also check that your contact details on ISIS are up-to-date so that we can contact you if necessary – especially your contact details. **All correspondence from the Law School Office will be sent to your university email account.** You can access this by going to <http://students.anu.edu.au/> and clicking on Webmail. You are able to redirect your Webmail account to another email address by following the instructions available at <http://students.anu.edu.au/StudentITGuide/7olams.asp>

ANU Library

All enrolled ANU students can access the ANU databases (including the full-text databases such as Westlaw) through the ANU Library webpage - http://anulib.anu.edu.au/lib_home.html.

Opening hours for the Law Library can be accessed at

<http://anulib.anu.edu.au/subjects/law/collection/building.html>

To access restricted ANU web pages from home as though coming from a computer on campus you need the Reverse Proxy Server known as 'Virtual'. You can access Virtual through <http://virtual.anu.edu.au/login> .

Students living near another law school may need to access print resources from their local school. ANU students can use these collections through the University Library Australia national borrowing scheme. The scheme allows people who are enrolled at a university in one city to access university libraries in another city at a reduced rate. For further information see <http://www.caul.edu.au/ula/> . Students who wish to participate in this scheme need to join at the library they wish to access material from. The cost of the scheme is \$50 per academic year. For details of all participating universities see <http://www.caul.edu.au/ula/participants.html> .

The ANU document delivery service is available for remotely located students in non-capital cities. For further information see <http://anulib.anu.edu.au/docdel/index.html> .

The ANU Library Off-Campus Service is available to students who live more than 60 kilometres from the ANU campus at Acton, ACT or is registered with the Disability Services Unit <http://www.anu.edu.au/disabilities/atproject/index.php> . Before using the service for the first time, you will need to complete the online User Agreement Form. You will then be able to request a book, table of contents, chapter or article using the request forms on the Off-Campus Service web pages. For further information see <http://anulib.anu.edu.au/offcampus/> .

Important University and ANU College of Law policies

ANU College of Law postgraduate policies and guidelines are posted on the Law School's postgraduate webpage at: <http://law.anu.edu.au/Postgraduate/policies/policies.asp>. These include matters relating to attendance, applications for extensions for written work, and many other matters. It is also important that you pay attention to the relevant Working Rules available at: <http://law.anu.edu.au/Postgraduate/policies/Coursework/WorkingRules/workingrulesindex.asp>. You should familiarise yourself with these policies, in particular those referred to below.

Attendance requirements

The ANU College of Law offers postgraduate courses in a variety of modes. These modes include intensive, mixed mode and online delivery and occasionally courses run for a full semester.

For those courses taught face-to-face, the ANU College of Law considers participation in the classes offered to be an important part of the educational experience of the graduate program and students are required to attend **ALL** classes. In exceptional circumstances, a student may be granted permission by the teacher, in consultation with the program/specialisation Convenor or Director, Postgraduate Coursework Program, to miss some classes, provided (a) it does not exceed a maximum of 25% of the classes, (b) permission is requested in advance and (c) the request is supported, where appropriate, by adequate documentation. Failure to comply with this policy may result in a student receiving the grade of NCN (non complete fail). The normal pressures of work or planned personal trips do not constitute exceptional circumstances to justify an exemption from full compliance of this policy. For further information please see the full policy at: <http://law.anu.edu.au/Postgraduate/policies/Coursework/attendance.asp>

Academic dishonesty (including plagiarism)

The University has developed a *Code of Practice for Student Academic Honesty* available at http://info.anu.edu.au/Policies/DVC/Policies/Code_Practice_Student_Academic_Honesty.asp

Contact Details for Student Support Services

Academic and Personal Support

The ANU provides coordination and support services for students and academic staff across the University. Students experiencing academic or personal problems are welcome to discuss these with their teacher, stream convenor or the Director, Postgraduate Coursework Program.

Alternatively students may prefer to utilise the ANU's student support services links to which can be found at <http://students.anu.edu.au/> (including the Academic Skills and Learning Centre at <http://www.anu.edu.au/academicsskills/>, the Counselling Centre at <http://www.anu.edu.au/counsel/> and the Disability Support Unit at <http://www.anu.edu.au/disabilities/>).

LECTURE OUTLINE

DAY 1 – 6 July 2011

PART 1: INTRODUCTION		
1.	9am	Introduction to course: <ul style="list-style-type: none">• Course aims• Themes of course• Assessment Case study: Flying Fox Case
2.	10am	Frameworks for thinking about environmental litigation (I): <ul style="list-style-type: none">• Basic terms• Underlying theories, assumptions and beliefs• Thinking about environmental law Case study: Tasmanian Dam Case
3.	11am	Frameworks for thinking about environmental litigation (II) <ul style="list-style-type: none">• Environmental policy• Regulatory theory• Responsive regulation & the Enforcement Pyramid Case study: R v Boyle
4.	12pm	Overview of civil procedure Case study: Paradise Dam Case
	1pm	Lunch
5.	2pm	Overview of criminal procedure Case study: Hudson Case & Blyth fisheries prosecution
6.	3pm	Overview of the rules of evidence Case study: Japanese Whaling Case
7.	4pm	Settling good expert reports & protecting your experts Case study: Khyber case , Xstrata Case & Paradise Dam Case
	5pm	Close

PART 2: LITIGATION BY GOVERNMENT		
8.	9am	Use of administrative remedies by government Case study: Townsville Bitumen Primer Case [no online materials]
9.	10am	Use of civil remedies by government Case study: Pelican Links Case and Greentree Case
10.	11am	Criminal remedies & sentencing Case study: Hudson Case & Blyth fisheries prosecution
11.	12 noon	Making a plea in mitigation Case study: EPA v Feodoroff
	1pm	Lunch
PART 3: LITIGATION AGAINST GOVERNMENT DECISIONS		
12.	2pm	Judicial review of government decisions Case study: Nathan Dam Case
13.	3pm	Merits review of government decisions Case study: Plumb's Chambers Case & Wandoan Coal Mine Case
PART 4: LITIGATION BY PRIVATE INDIVIDUALS TO ENFORCE ENVIRONMENTAL LAWS		
14.	4pm	Litigation by private individuals to enforce environmental laws: <ul style="list-style-type: none"> • Standing • Choice of client (for EDOs and other public interest lawyers) • Finding an appropriate cause of action • Resources & costs Case study: Flying Fox Case and Paradise Dam Case
	5pm	Close
	7pm	Group dinner at restaurant TBC (Voluntary attendance)

PART 5: COMMON ISSUES IN ENVIRONMENTAL LITIGATION		
15.	9am	Drafting court documents & form of relief sought Case study: Flying Fox Case and Paradise Dam Case
16.	10am	Narrowing and simplifying issues in complex litigation Case study: Paradise Dam Case and Wandoan Coal Mine Case
17.	11am	Negotiated settlements / ADR Case study: Tornabene appeal
18.	12 noon	Appeals Case study: Japanese Whaling Case & Xstrata Case
	1pm	Lunch
19.	2pm	Litigation strategies and reality: riding the roller-coaster during a trial Case study: Xstrata Case
PART 6: CONCLUSION		
20.	3pm	Course wrap-up: concluding comments and questions
	4pm	Close