

IMPACT!

A NATIONAL JOURNAL OF ENVIRONMENTAL LAW

Issue 95, 2013 // www.edonsw.org.au



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Australian Network of Environmental
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From the editor

EDO NSW has consistently argued that true public interest environmental laws should not only implement the principles of ecologically sustainable development (ESD), but provide the community with an opportunity to engage in legal and policy processes (otherwise known as access to environmental justice). Good examples of access to environmental justice include meaningful consultation aimed at informing new legislation, the right to appeal a decision approving a particular development, waiving costs in public interest litigation, and well-managed mediation.

This edition of **IMPACT!** highlights the importance of these processes for the environment, communities and society at large.

Nari Sahukar's article discusses the role that both ESD and genuine community engagement should play in the new planning system in NSW. He identifies five ways in which the proposed changes could be improved for the purposes of balancing environmental, social and economic factors, and restoring community confidence in the State's planning system.

Public participation is also at the heart of **BJ Kim and Desmond Sweeny's** article about the OECD's Guidelines for Multinational Enterprises, which can be used to guide dispute resolution between mining companies and local communities. Drawing on a Colombian case study and EDO NSW's work with affected landholders in Papua New Guinea, BJ and Desmond outline the advantages and disadvantages of mediating disputes under these Guidelines.

Elaine Johnson discusses a recent costs judgment in which the NSW Land and Environment Court found that a CSG case brought by EDO NSW on behalf of a community group in Fullerton Cove "epitomises the very concept of litigation properly brought in the public interest." Elaine's article reminds us that the threat of a costs order can deter genuine public interest litigants from enforcing the law on behalf of the broader community.

The CEO of ClientEarth, **James Thornton**, presents five ways in which the law can serve the needs of ecosystems and the people who depend on them. James, who was named by *New Statesman* as one of 10 people who could change the world, illustrates his arguments with some ground breaking cases run by ClientEarth in Europe, including litigation in a number of jurisdictions to ensure that the Aarhus Convention – which provides citizens with the right to access environmental information – is upheld.

Adam Beeson of EDO Tasmania provides an excellent overview of cases involving the Tarkine, ultimately arguing that a negotiated outcome between various interest groups must involve a landscape-based approach to management of the area.

Last but not most certainly not least, EDO NSW and **IMPACT!** would like to acknowledge the generous support of our sponsor, the Environment and Planning Law Association (**EPLA**). We encourage you to visit EPLA's website, www.epla.org.au, which includes useful information about environment and planning law events and activities.

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IMPACT! is a national journal of environmental law prepared by EDO NSW.

Publisher

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Freecall: 1800 626 239 Website: www.edonsw.org.au

ISSN

1030-3847

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Five big challenges for the nsw planning reforms

Nari Sahukar¹

Introduction

This article looks at five major changes set out in the NSW Government's *A New Planning System – White Paper* (April 2013) (**White Paper**) and draft legislation.² Changes that, as proposed, could undermine the Government's aim to restore confidence and integrity to the State planning system.³ Following some background on the reforms, the issues addressed in this article relate to:

- Objectives.
- Community Participation Charter.
- Strategic Planning Principles.
- 'Code Assessable' Development.
- Appeals and Enforcement.

In highlighting these issues, this article identifies five essential improvements that are needed before the draft legislation is passed by the NSW Parliament. Initially slated for early in the Spring 2013 parliamentary session, introduction of the legislation was delayed following strong community and local council concerns (see postscript to this article). Following its introduction in November 2013, the Bill was substantially amended in the Upper House and debate in the Lower House was suspended until 2014. A more comprehensive analysis and a full set of recommendations for the reforms are in the EDO NSW submission on the White Paper and draft legislation.⁵

The NSW planning reforms are a landmark opportunity for a 21st century planning system. The *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) began as a forward-thinking framework which aimed to embed environmental impact assessment and participation rights. Since then, frequent amendments to improve its operation, including significant and controversial overhauls like the introduction of Part 3A major project fast-tracking in 2005,⁶ have led to widespread support for a new planning Act. Looking at the EP&A Act's 33-year legacy, it could be mid-century before the next opportunity to remodel and influence the NSW planning framework from the ground up.



Consultation process and broad themes for reform

The Government allowed 10 weeks for public submissions on the White Paper and two exposure draft bills, receiving over 4500 responses by the end of June.

The exposure draft *Planning Bill 2013* (**Planning Bill**) deals with most substantive matters now addressed the EP&A Act. The *Planning Administration Bill 2013* deals with planning body protocols and procedural matters. Parallel consultations are already running on regional strategies and an overhaul of local government laws and structures, although linkages between these reforms have not always been clear.⁷

During the White Paper consultation period, EDO NSW ran a series of independent workshops around the State on the planning reforms – including in Bellingen, Campbelltown, Dubbo, Newcastle, Lismore, Sydney, Wollongong and Yamba. EDO NSW also released a plain-English briefing note and early analysis of the White Paper's major changes, and a series of explanatory web videos focusing on community participation and environmental protection.⁸

“Without significant changes, the White Paper and draft legislation could jeopardise an unparalleled opportunity for genuine integration of economic, social and environmental factors to achieve ecologically sustainable development in NSW.”

The White Paper and Planning Bill adopt the same set of strategic drivers as the Government's prior Green Paper (July 2012): a *'delivery' culture, community participation, strategic focus, streamlined approvals and infrastructure provision*. A sixth theme, *building regulation and certification* has also been added to the White Paper.

Prior to the Green Paper-White Paper process, the Government commissioned an independent review by two former NSW ministers, Tim Moore (Liberal) and Ron Dyer (Labor), who put forward 362 recommendations for reform. The Government has not responded directly to this review, but has used elements to inform its own policy approach. Each stage has involved public consultation, principally by written submissions and community forums.

The White Paper continues the Green Paper's trajectory, despite an official feedback summary revealing strongly divergent views on the Government's Green Paper proposals.⁹ Very broadly, the property development and industry sectors supported most changes; while local councils and community submissions expressed significant concerns regarding the Green Paper's narrow economic focus, scope for neighbourhood consultation, presumptive rights to develop, and a reduced emphasis on environmental protection.

Without significant changes, the White Paper and draft legislation could jeopardise an unparalleled opportunity for genuine integration of economic, social and environmental factors to achieve ecologically sustainable development in NSW.

Having set the broader context for the planning reforms, we turn to the five challenges identified above, with reference to the White Paper and draft Planning Bill.

1. Objectives – a weakened approach to 'sustainable development'

For two decades, NSW environmental and planning laws have included the guiding principles of ecologically sustainable development (**ESD**). If the bold vision of the White Paper becomes a reality, three of these – the precautionary principle, biodiversity and ecological integrity as a fundamental consideration, and internalising environmental costs (including

the 'polluter pays' principle) – will be consigned to history. This would be a significant retrograde step for environmental and social considerations in NSW planning decisions – from plan-making, to environmental assessment, approvals and conditions.

There are nine objects in the Planning Bill. These broadly correlate with the current EP&A Act objects, but with a greater economic emphasis. Like the current Act, the Bill has no overarching object (for example, 'achievement of ecologically sustainable development'). This can be problematic as it allows for wide discretion in interpreting and prioritising competing objects. However, the clear emphasis in the Bill and White Paper is on facilitating economic growth, faster approvals and less oversight or 'concurrences' from environmental agencies.¹⁰

On the issue of ESD principles, the first object in the Planning Bill is to promote 'economic growth and environmental and social well-being through sustainable development'. Under the draft Bill, 'Sustainable development is achieved by the integration of economic, environmental and social considerations, having regard to present and future needs, in decision-making about planning and development.'

This new and vague definition of 'sustainable development' only briefly refers to two ESD concepts – the *integration* principle ('of economic, environmental and social considerations'), and *intergenerational* equity (expressed broadly in the Bill as considering 'present and future needs').

Three other fundamental ESD principles, noted above, have fallen off the agenda. These principles have been enacted in over 50 NSW laws, and many more across Australia and overseas.¹¹ By contrast, two of Australia's most recent planning overhauls – in Queensland and the ACT – as well as national environmental laws, place ESD principles front and centre.¹²

Our concern is not so much the change of name (from 'ESD' to 'sustainable development' in NSW), but with it, the loss of an important decision making framework. A 21st century planning system needs to prioritise and implement the principles of *ecologically* sustainable development, not a watered-down concept of integrated decision-making. In our view, the Planning Bill needs to be amended to place ESD at the apex



of the planning system, and to apply its principles (alongside other decision making factors) when making planning and development decisions.

2. Community Participation Charter – inclusive but unenforceable?

The White Paper proposes to put public participation at the centre of planning – via a Community Participation Charter (**Charter**) with seven high-level principles for public engagement. The Charter concept is a welcome inclusion in the Bill, but firm details for this novel approach have been left to future Community Participation Plans and guides. This is proving problematic, given that consultations on 20-year regional plans, which should be guided by the Charter, have already started.¹³ Submissions on the draft Sydney Metropolitan Strategy (affecting up to two-thirds of NSW residents) closed the same date as White Paper submissions. This means the bulk of engagement on the State's most significant new regional plan may be over before the Charter, planning laws and Community Participation Plans are finalised.

The issue of timing aside, what is principally concerning is that it may be impossible to require or enforce compliance with the Community Participation Charter in

practice. Part 2 of the Planning Bill is devoted entirely to 'Community participation', and it sounds encouraging. For example, it appears to require planning authorities to develop Community Participation Plans that comply with the Charter, and exercise functions consistently with the Charter.¹⁴ However, at Part 10 of the Bill, this obligation is undercut by a wide-ranging clause stating that all of Part 2 is 'not mandatory'.¹⁵ This means that Community Participation Plans could not be challenged if they don't stack up to the Charter.

In principle, a general shift to upfront engagement certainly has its advantages, both for engaging the community and for resolving areas of recurrent conflict. However, there is a high risk of overburdening the community – most of whom start from a very low level of planning literacy or interest – as they come to grips with new plans and assessment approaches that will radically alter how people can 'have a say' (see 4 below). Motivating, upskilling and listening to a wide range of community members will require significant additional time, expertise and resources.¹⁶

To ensure the legitimacy of this centrepiece of the reforms, the Community Participation Charter needs to be binding. The public need the assurance and accountability that plan-makers will match the Charter's

intentions with actions. The Charter's principles – and their implementation in community participation plans – should also ensure that people have the information, advice and input they need to plan the communities and environments they want to live in.

3. Strategic plans and principles – locking in an imbalanced approach?

EDO NSW supports a comprehensive strategic planning framework set out in law. The White Paper and the Planning Bill (Part 3) set out 10 strategic planning principles to guide a hierarchy of State, regional, subregional and local plans. Several principles deal with appropriate governance measures, including community participation, accessibility and evidence-based planning. Other principles have a clear economic focus.

Critically, *none* of these principles deal with improving or maintaining environmental outcomes, assessing environmental pressures and cumulative impacts of multiple projects in an area or catchment, or preparing for climate change via mitigation and adaptation. This is despite recommendations from the Government's independent review panel to include these factors in the new planning system.¹⁷ A recent Productivity Commission report on barriers to adaptation also noted that 'a range of instruments could be used to manage climate change risks in land-use planning.' The Commission encourages a 'risk management approach' and 'transparent and rigorous community consultation processes' to get there.¹⁸ Despite the White Paper's commitment to evidence-based planning, the Planning Bill remains silent on climate change and cumulative impact assessment. We believe the draft strategic planning principles must be amended and supported to achieve environmental outcomes.

Turning to the strategic plans themselves, the challenge for State and local governments will be to attract and sustain meaningful engagement on multiple levels of plans without overwhelming communities. There is also a broader concern that, applying the strategic principles above, the various plans will prioritise economic targets without sufficient integration of social and environmental values. We briefly address each type of plan below.

High-level **NSW Planning Policies** (to replace current State Environmental Planning Policies) will set critical standards on around a dozen key issues such as housing, employment, mining and environmental protection. Lower-level strategic plans must be consistent with these Policies. They are to be Cabinet-endorsed and made by the Planning Minister, but not

subject to parliamentary or judicial oversight.¹⁹ We don't yet have a sense of what these Policies will look like or their level of detail. If these Policies do not adequately protect the environment and foster social outcomes, we are concerned that subsequent plans will be 'locked in' to growth-focused policies, rather than an integrated approach to ESD.

Similarly, we recommend that **Regional Growth Plans** should require balanced and 'ecologically sustainable' development that promotes community wellbeing. The draft Bill gives planning authorities broad discretion on whether or not to incorporate specific environmental aims and targets (cl 3.5(2) (d)). We believe these second-tier plans should adopt national, State and regional natural resource management (**NRM**) targets, ranging from native vegetation and biodiversity strategies to pollution limits and water quality.²⁰ Agencies and communities have invested significant time and resources developing environmental strategies and targets. NSW must not miss this opportunity to now embed these in the planning system – particularly if we are serious about 'evidence based, whole of government' strategic planning.

In turn, the proposed **Subregional Delivery Plans** should build-in urban sustainability, climate change responses, and a triple bottom line focus. Subregional Planning Boards should be required to exercise their functions to achieve ESD, as the new overarching planning objective.

Given the 'line of sight' consistency throughout the plan hierarchy, the system needs to minimise the risk of top-down determinism in Local Plans. Otherwise, local preferences could be shoe-horned into pre-set State priorities, to the detriment of community engagement. In addition, the White Paper's new approach to local zoning (fewer, broader zones) and 'development guides' (in place of Development Control Plans) requires further practical explanation and analysis. Any zoning system must ensure sensitive environmental and heritage areas have at least equivalent protections to existing Local Environmental Plans.

Finally, communities may be sceptical of a strategic planning process that calls for upfront engagement and certainty on residents' part; while providing additional developer rights to vary standards, 'spot rezone' sites,²¹ appeal development decisions, or seek 'strategic compatibility certificates' to leapfrog the local planning phase. More equitable community and developer rights would do much to restore public trust.

4. Code-based development assessment – all targets, no limits?

At the project-level development assessment stage, the biggest change in the White Paper's approach is to introduce 'code assessment' as the new, and predominant, assessment track. Code assessment proposes to transform community consultation on neighbourhood development across a range of residential, commercial and industrial projects. In principle, codes are to apply only to low-risk development with 'no significant impacts',²² but remain separate to smaller-scale 'complying development' which will continue.

The new Codes will require development standards to be set upfront in the Local Plan (via community consultation, with some State-level requirements). Most controversially, this will remove site-by-site consultation for code-based development proposals. Furthermore, local councils would *have* to approve projects that comply with a Code within 25 days, or trigger a developer's appeal right to the Land and Environment Court. The White Paper sets a mandatory target of 80% *code assessed* development (or smaller-scale *exempt and complying proposals*) within 5 years. Under-performing councils' code standards would be replaced with departmental guides.

It is a high-stakes proposal from a community engagement perspective – and it's safe to say the wider public know very little about code assessment at this formative stage. Clearly, no one wants a system where – say, two years from now – there is just as much angst about neighbouring development, but far less the community can say or do about it. There needs to be greater community understanding and input about codes (and their limits and safeguards) before setting ambitious targets.

Code assessment could certainly deliver faster approvals for developers – but in our view the *quid pro quo* should be a commitment to high-quality building design and nation-leading sustainability requirements. Unfortunately, while the White Paper includes a chapter on building design and certification, there is no commitment to update or expand the BASIX building sustainability tool (currently limited to housing) to provide for better water, energy and material efficiency across residential, commercial and industrial codes. Nor does the White Paper start from the premise of incentivising environmentally-friendly design through code assessment, despite its references to 'low impact' development.

All that being the case, the White Paper gives no evidentiary basis for the assumption that 80% of

developments can be code-assessed without any significant or cumulative environmental impacts. If code assessment proceeds, clear limits and safeguards will be very important. For example:

- Codes should be excluded from all areas of high conservation value, environmental sensitivity and cultural heritage significance.
- Codes will also need to deal with cumulative impact considerations (the combined impact of thousands of fast-tracked medium-scale developments) and deal with interfaces between built-up areas and more sensitive areas.
- The Government also needs to rule out code assessment for 'State Significant Development' (SSD). Under the existing EP&A Act (but not the Planning Bill), SSD automatically requires an Environmental Impact Statement.

5. Appeals and enforcement – letting in the light, or shutting out accountability?

A final aspect of the White Paper goes to the heart of access to justice and accountability under the new planning system – community rights to appeal the merits of a decision, and rights to challenge legal errors and breaches through 'civil enforcement'. These will be critical if the Government is to make good on its State Plan goal to 'Restore confidence and integrity in the planning system'.

Developers' rights to review and appeal decisions will expand under the White Paper proposals, including where a council refuses a 'spot rezoning' application, or fails to approve code-based development applications within 25 days.

On the other hand, there will be no *third party* appeal rights if a code-based development is approved that exceeds agreed criteria (the public must instead rely on limited consultation rights in future Community Participation Plans). Furthermore, where the Planning Assessment Commission (PAC) holds a public hearing – which can be requested at the Planning Minister's discretion²³ – objectors and developers will continue to lose merit appeal rights against major project decisions. Assuming the PAC continues to *approve* most projects, this will disproportionately affect community objectors. In summary, the new system further entrenches the inequity between developer appeals and community rights to independent accountability through the courts.

As the ICAC reiterated in its submission on the White Paper, 'The limited availability of third party appeal rights under the proposed system means that an important disincentive for corrupt decision-making is absent.'²⁴ In NSW, less than 1% of local council

decisions are appealed on the merits, and Planning Department statistics show that 99 out of 100 of these appeals are brought by developers, not community members.²⁵ But the benefit of third-party appeal rights goes beyond the few cases where they are exercised. The very existence of such rights puts decision-makers on notice, and leads to better decisions and greater community confidence.²⁶

On civil enforcement, consultations to date reveal widespread support for 'open standing' in the NSW planning system. This allows anyone to enforce a breach of the law in court (provided they can afford it). The White Paper proposes to retain open standing. However, the draft Planning Bill could seriously undermine this 'iconic right', by curtailing the public's ability to challenge a range of legal errors or breaches in court. This includes in fundamental areas such as community participation, strategic plans, and challenges under planning or pollution laws that would invalidate development consents for SSD or State Infrastructure Development.²⁷

EDO NSW has raised these concerns with the Planning Department, and we are continuing to seek changes that will maintain access to justice. In our view, the full force and spirit of open standing rights must be retained if these reforms are to have legitimacy.

Overall, the imbalance of review and appeal rights between developers and community members will continue to limit community confidence in the system. The draft legislation should therefore be amended to restore accountability, and put the community on an equitable footing when it comes to appeal, review and civil enforcement rights.

Conclusion

It remains to be seen how seriously the NSW Government takes the community's views on the scaffolding of the new planning system. To date though, many community and local councils' calls for a more balanced and sustainable system – socially, environmentally and economically – remain unanswered.

EDO NSW believes fundamental changes are needed to chart a better course for the planning laws. Five major improvements would bolster community confidence in the Government's consultation process, and show that it is serious about creating sustainable paths to land use planning, economic development and environmental protection:

1. Place ecologically sustainable development at the apex of the planning system, and apply all of its principles in legal decision-making.

2. Boost the status of the Community Participation Charter to make sure it is binding on planning authorities, and meaningful to communities.
3. Integrate environmental outcomes and sustainability requirements upfront in the strategic planning principles, including cumulative impact considerations and climate change readiness. Public participation and environmental outcomes must flow through the cascade of strategic plans.
4. Set and communicate clearer limits, safeguards and environmental design incentives around code-based development assessment.
5. Restore accountability by putting the community on an equitable footing for appeal, review and civil enforcement rights – in areas like community participation, developments that significantly exceed set standards, and projects with the biggest likely impacts.

These changes would help to build a positive legacy for the new planning laws, with shared benefits for NSW communities, businesses, governments and the environment – now and in the decades to come.

Postscript

In September 2013, the NSW Planning Minister announced changes to the Planning Bill prior to its introduction into Parliament.²⁸ According to the announcement, the changes will include:

- *Allowing councils to modify the State-wide codes to better reflect their local area*
- *Code assessable development will only apply to nominated growth areas ...*
- *The target for code assessable developments has been removed entirely*
- *Councils will be made to prepare Neighbourhood Impact Statements if they intend to implement code assessable development*
- *The full range of current land zonings will remain as they are*
- *Appeal rights will remain as they are and*
- *Local and State heritage protections will continue.*

On the whole these changes are positive steps. Important work remains to:

- Re-centre our planning laws on a more ecologically sustainable footing (see above).
- Engage, inform and empower communities on difficult decisions that shape their cities, towns and regions.
- Limit opportunities to exceed community-agreed plans and development standards.
- Coordinate whole-of-government decision-making, without usurping the expertise and powers of agencies such as the Office of Environment & Heritage and EPA.
- Apply a proportionate approach to assessing major projects, by ensuring projects with the greatest impacts receive the greatest scrutiny.

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- 1 Senior Policy and Law Reform Solicitor, EDO NSW.
 - 2 NSW Government, *A New Planning System – White Paper* (April 2013). www.planning.nsw.gov.au/en-us/policyandlegislation/previousstagesofplanningreview/whitepaper.aspx.
 - 3 NSW Government, NSW 2021. www.2021.nsw.gov.au.
 - 4 See for example, N. Hasham, 'Critics fearful of planning reforms', *Sydney Morning Herald*, 17 August 2013; 'Planning backflip: new laws in doubt', *Sydney Morning Herald*, 18 September 2013; 'Planning code reforms: Developers hit back', *Sydney Morning Herald*, 19 September 2013.
 - 5 See EDO NSW 'Planning reforms' webpage at www.edo.org.au/edonsw/site/planning_reforms.php.
 - 6 Part 3A was introduced, without consultation, to give the Planning Minister and Department greater control over major project approvals – it increased state-level discretion while reducing council powers and community appeal rights. The O'Farrell Government repealed Part 3A in 2011 (although some projects remain in transition), replacing it with a system of 'State Significant Development' and 'State Significant Infrastructure'. This regime places greater limits on major projects and ministerial discretion, but retains some aspects of Part 3A.
 - 7 NSW Department of Planning and Infrastructure, <http://strategies.planning.nsw.gov.au>; NSW Department of Local Government, *Review of the Local Government Act 1993 and the City of Sydney Act 1988*, www.dlg.nsw.gov.au/dlg/dlghome/dlg_LGAT.asp?mi=10&m=2&AreaIndex=HOME; Independent Local Government Review Panel, www.localgovernmentreview.nsw.gov.au accessed June 2013.
 - 8 EDO NSW, 'Planning reforms' page www.edo.org.au/edonsw/site/planning_reforms.php.
 - 9 NSW Department of Planning and Infrastructure, 'Green Paper Feedback Summary', December 2012.
 - 10 See for example, Planning Bill 2013, Strategic planning principles (cl 3.3) and Concurrences (Part 6).
 - 11 See for example, The Hon Paul Stein, 'Are Decision-makers Too Cautious With The Precautionary Principle?', Land and Environment Court of New South Wales Annual Conference (1999), available at www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/vwPrint1/SCQ_speech_stein_141099.
 - 12 *Sustainable Planning Act 2009* (QLD), ss. 3-5; *Planning and Development Act 2007* (ACT), ss. 6 and 9); *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 3-3A.
 - 13 See NSW Department of Planning and Infrastructure, 'Metropolitan and Regional Strategies' (Sydney Metropolitan and Lower Hunter regions). <http://strategies.planning.nsw.gov.au>. Greater Sydney is home to 64% of NSW's 7.3m people. See Australian Bureau of Statistics, '3218.0 - Regional Population Growth, Australia, 2012'. www.abs.gov.au/ausstats/abs@.nsf/mf/3218.0/.
 - 14 Planning Bill 2013, cll 2.2-2.4.
 - 15 Planning Bill 2013, cl 10.12(2)(a). The only mandatory clause is a minimum 28 day consultation period on draft CP Plans.
 - 16 As the Grattan Institute has observed, 'A strategy of local engagement to set development rules needs to be far more sophisticated, thorough and extensive than anything ever attempted before in Australia.' See J-F Kelly, 'Vision splendid for Sydney needs community input', *Sydney Morning Herald*, 17 April 2013.
 - 17 See T. Moore and R. Dyer, 'The Way Ahead for Planning in NSW: Recommendations of the NSW Planning System Review, Volume 1, Major Issues', May 2012. Recommendations 8, 12-13, www.planningreview.nsw.gov.au.
 - 18 Productivity Commission, *Barriers to Effective Climate Change Adaptation*, Inquiry Report No. 59, September 2012, Ch. 9, pp 178-81 www.pc.gov.au/projects/inquiry/climate-change-adaptation.
 - 19 See Planning Bill 2013, Division 3.2.
 - 20 See for example, *Natural Resources Commission Act 2003* (NSW), s. 13; and see targets at www.nrc.nsw.gov.au/content/documents/Standard%20and%20targets%20-%20The%20Standard%20and%20targets.pdf.
 - 21 'Spot rezoning' allows amendment of a local plan to allow prohibited development on a specific site.
 - 22 White Paper, p 31.
 - 23 Planning Administration Bill 2013, exposure draft cl 14(1)(iii). Cf *Environmental Planning and Assessment Act 1979* (NSW), s. 23D.
 - 24 NSW Independent Commission Against Corruption, *Submission regarding a new planning system for NSW* (White Paper and accompanying bills), June 2013, para 21. See further, ICAC media release, 15 February 2012 'ICAC recommends changes to the NSW planning system to minimise corruption risks', at www.icac.nsw.gov.au/media-centre/media-releases/article/4023.
 - 25 Department of Planning and Infrastructure, *Local Development Performance Monitoring Report 2011-12*, p 100; *Local Development Performance Monitoring Report 2010-11*, p 81, available at www.planning.nsw.gov.au/performance-monitoring#lpm.
 - 26 See, for example, N. Hammond-Deakin and E. Johnson, 'Merit appeal rights in NSW: Improving environmental outcomes', (2012) 92 *IMPACT!* 6.
 - 27 Planning Bill 2013, exposure draft cl 10.12. The White Paper states, 'The existing classes for state significant development will be retained.' Most of these are defined under the SEPP (*State and Regionally Significant Development*) 2011. State Infrastructure Development will replace 'State Significant Infrastructure' (see above, note 5; and Planning Bill Part 5, Division 5.2).
 - 28 The Hon Brad Hazzard MP, media release, 'Government listens to community and councils on Planning Bill', 19 September 2013.

OECD guidelines for multinational enterprises: a potential forum for environmental disputes

BJ Kim¹ and D. Sweeney²

Introduction

The terrestrial, coastal and marine ecosystems of the Pacific are of crucial social, economic and environmental significance both regionally and internationally. Key to conserving those ecosystems is improving the capacity of local lawyers and communities to assert their rights and develop their local laws. EDO NSW's International Program³ is therefore focused on building the capacity of environmental lawyers in the Pacific region.

Against this backdrop, this article has a specific focus: it considers the framework established under the Organisation for Economic Co-operation and Development (**OECD**) Guidelines for Multinational Enterprises (**Guidelines**) as a potential forum for resolving environmental disputes. It includes an outline of the complaints procedure under the Guidelines (referred to as the "specific instance procedure"), a discussion of sections of the Guidelines that are relevant to environmental disputes, an account of a Colombian case study, and a consideration of the pros and cons of the specific instance procedure based on EDO NSW's involvement in an ongoing dispute under the Guidelines involving a mining company in the South Pacific.

Remedial options for local communities dealing with multinational companies

A local community faced with an environmental dispute with a multinational company can potentially seek recourse in a range of jurisdictions or forums. These include domestic law, foreign laws with extra-territorial operation, or the "soft" law of international institutions. Of course, the availability and effectiveness of these options will vary from case to case, and generally depend on the factual and legal context, the pros and cons of each relevant jurisdiction or forum, the financial resources of the community, and the type of legal representation available.

The starting point for a local community will be considering their options under domestic laws. Key considerations include:

- The existence and willingness of local authorities to take action – in public interest environmental law cases, swift action by the relevant government agency is likely to be the best solution.
- Causes of action available either under common law or statute – what legal claims can be made? Typical environmental cases include common law claims in negligence or nuisance, applications for judicial review of administrative decisions, and actions prosecuting a breach of an environmental statute.
- Standing to enforce rights – does the claimant have the legal right to bring the proceedings? Standing to bring a claim generally arises because the claimant is directly affected by, or has the appropriate connection to, the issues in dispute. Standing can also be granted by statute.
- Issues related to the effective administration of justice in the relevant jurisdiction, including adequacy of legal representation and effectiveness of the courts.

If for one or more reasons, domestic law is not available or likely to be ineffective, the community may wish to consider their options under foreign or international law.

Laws of extra-territorial application, such as the Alien Torts Statute,⁴ can be useful in certain circumstances for deterring or restraining multinational companies from engaging in environmentally damaging activities, or seeking compensation following such activities. However, extra-territorial laws are extremely rare and indeed the Alien Torts Statute is presently one of a kind.⁵ Further, pursuing such a claim requires the sort of legal expertise that is likely to be beyond the reach of any local community groups unable to obtain highly specialised and well-resourced external assistance. In addition, the recent decision in *Kiobel v Royal*



*Dutch Petroleum Company*⁶ in the United States (US) Supreme Court will be an obstacle for claimants seeking to sue non-US companies for conduct outside of the US, in US Courts.

A real alternative to domestic laws and foreign laws of extra-territorial operation are the “soft” (or non-binding) laws of international institutions which essentially comprise a range of often overlapping international frameworks. These include the complaints mechanisms under various United Nations bodies;⁷ the World Bank Inspection Panel⁸ and Compliance Advisor Ombudsman;⁹ the Asian Development Bank Special Project Facilitator;¹⁰ and the focus of this article, the dispute resolution procedures under the Guidelines.¹¹

“A real alternative to domestic laws and foreign laws of extra-territorial operation are the “soft” (or non-binding) laws of international institutions which essentially comprise a range of often overlapping international frameworks.”

OECD guidelines for multinational enterprises

Background

The Guidelines are part of the 1976 OECD Declaration on International Investment and Multinational Enterprises (**Declaration**), which was most recently reviewed in 2011. The Declaration is a policy commitment by adhering countries to promote open and transparent international investment and to encourage multinational enterprises to make positive social and economic contributions in the countries in which they operate. It was made in response to calls for increased regulation of multinational corporations in a decade where their activities in developing countries were attracting greater scrutiny.¹²

The Declaration consists of four key elements:

- The Guidelines: Recommendations by governments to multinational enterprises operating in or from adhering countries for the purposes of promoting responsible business conduct.
- National Treatment: An undertaking by adhering countries to accord to foreign-controlled enterprises no less favourable treatment than that accorded to domestic enterprises in like situations.
- Conflicting requirements: An agreement that adhering countries will cooperate so as to avoid or

minimise the imposition of conflicting requirements on multinational enterprises.

- **International investment incentives and disincentives:** Recognition by adhering countries of the need to strengthen their cooperation in the field of international direct investment.

The Guidelines establish voluntary principles, standards, and a global framework for dispute resolution to promote responsible business conduct. They seek to cover all areas of business ethics, including: information disclosure; human rights; employment and industrial relations; environment; combating bribery; consumer interests; science and technology; competition; and taxation.

These principles and standards operate as a “soft” instrument of international law, that is, they are not binding on multinational companies. However, the global regulation of multinational companies is such that the Guidelines are one of the few mechanisms available for holding them to account. This is because international law does not regulate multinational corporations, but rather relates to state parties, and domestic law in many developing countries, can often be inadequate or poorly enforced.

Implementation and the specific instance procedure

Observance of the Guidelines is supported by an innovative implementation mechanism: each adhering country is required to set up a National Contact Point (**NCP**) and through its NCP, is responsible for promoting the Guidelines and helping to resolve issues arising under them.

NCPs can vary in form and structure and may include a senior government official, government office or an interagency group.¹³ The Australian NCP is the Foreign Investment Review Board.¹⁴

Complaints under the Guidelines are referred to as “specific instances” and the complaints procedure, the “specific instance procedure”. Essentially, the specific instance procedure is a process in which the NCP facilitates a conciliation or mediation regarding a complaint raised in relation to a breach of the Guidelines.

Where a complaint concerns activities taking place in an adhering state, the NCP responsible for facilitating the specific instance procedure will normally be the NCP of that state. Where the complaint concerns the activities in a country which is not an adhering state, the relevant NCP will normally be the NCP of the home country of the company in question.

Any interested party can file a specific instance or complaint under the Guidelines.¹⁵ This opens the door for NGOs to access the specific instance procedures; indeed NGOs form the largest group of organisations utilising this process.

Each NCP issues their own tailored information in relation to the specific instance procedure. However, complaints are generally documents setting out the identity of the parties, their connection to the issues raised, the relevant parts of the Guidelines, and a detailed description of the activities which the complainant says are in breach of the Guidelines.¹⁶

There are generally three stages involved in a specific instance procedure:

- Stage 1: receipt of complaint to initial assessment.
- Stage 2: acceptance of a case to conclusion of mediation or proceedings.
- Stage 3: drafting and publication of final statement or report.

Relevantly, in assisting parties to deal with the issues in a complaint, the Guidelines state that the NCP will:¹⁷

1. Make an initial assessment of whether the issues raised merit further examination and respond to the parties involved.
2. Where the issues raised merit further examination, offer good offices to help the parties involved to resolve the issues. For this purpose, the NCP will consult with these parties and where relevant:
 - a) seek advice from relevant authorities, and/or representatives of the business community, worker organisations, other non-governmental organisations, and relevant experts;
 - b) consult the NCP in the other country or countries concerned;
 - c) seek the guidance of the [Investment] Committee if it has doubt about the interpretation of the Guidelines in particular circumstances;
 - d) offer, and with the agreement of the parties involved, facilitate access to consensual and non-adversarial means, such as conciliation or mediation, to assist the parties in dealing with the issues.
3. At the conclusion of the procedures, and after consultation with the parties involved, make the results of the procedures publicly available, taking into account the need to protect sensitive business and other stakeholder information, by issuing:

- a) a statement when the NCP decides that the issues raised do not merit further consideration. The statement should at a minimum describe the issues raised and the reasons for the NCP's decision;
- b) a report when the parties have reached agreement on the issues raised. The report should at a minimum describe the issues raised, the procedures the NCP initiated in assisting the parties and when agreement was reached. Information on the content of the agreement will only be included insofar as the parties involved agree thereto;
- c) a statement when no agreement is reached or when a party is unwilling to participate in the procedures. This statement should at a minimum describe the issues raised, the reasons why the NCP decided that the issues raised merit further examination and the procedures the NCP initiated in assisting the parties. The NCP will make recommendations on the implementation of the Guidelines as appropriate, which should be included in the statement. Where appropriate, the statement could also include the reasons that agreement could not be reached.

The procedure does not offer any sanction beyond the possibility of an adverse public report. The process has nonetheless appeared to be useful on many occasions. This may be because multinational companies are aware of the potentially significant impacts on their operations, shareholder activity and creditors if they receive international attention for gross violations of international standards.

Scope of the OECD guidelines in relation to environmental issues

Section VI of the Guidelines – environment

The Guidelines have a specific section devoted to environmental issues.¹⁸ Although broadly worded and non-binding, the environmental standards in the Guidelines are grounded in sound principle. That is, the standards reflect the principles and objectives contained in the Rio Declaration on the Environment and Development, and take into account such instruments as the Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters (**Aarhus Convention**), and the International Organisation for Standardization

(**ISO**) Standard on Environmental Management Systems.¹⁹

More specifically, under this section, the Guidelines state that enterprises should, among other things:²⁰

- establish and maintain appropriate environmental management;
- publicly disclose in a timely fashion the potential environmental, health and safety impacts of their activities;
- engage in adequate and timely consultation with communities directly affected by the environmental, health and safety policies and their implementation;
- observe the precautionary principle.

The Guidelines encourage companies to improve environmental performance in those countries which may not have high environmental controls by applying the practices used by the company in countries which have more stringent requirements. The Guidelines do this by encouraging enterprises to adopt “technologies and operating procedures in all parts of the enterprise that reflect standards concerning environmental performance in the best performing part of the enterprise.”²¹

Section III of the Guidelines – disclosure, and other sections

As well as the disclosure requirements set out above, the Guidelines provide for general standards relating to disclosure which may be relevant to environmental disputes. Amongst other matters, the Guidelines provide that enterprises should:

- ensure that timely and accurate information is disclosed on all material matters regarding their activities;²²
- apply high quality standards for accounting, and financial as well as non-financial disclosure, including environmental and social reporting where they exist. The standards or policies under which information is compiled and published should be reported.²³

Further and interestingly, paragraph 33 of the OECD commentary that accompanies the Guidelines states that “[t]he Guidelines also encourage a second set of disclosure or communication practices in areas where reporting standards are still evolving, such as, for example, environmental and risk reporting.”

In countries where it is difficult to obtain information about the environmental impact of an activity being carried out by a multinational company, there is scope

to use the Guidelines to require that such information be provided to the community and that consultation takes place.

In addition to those sections in the Guidelines dealing with the environment and disclosure, the human rights²⁴ and “General Policies”²⁵ sections may also be relevant to environmental disputes. With regard to the former, companies are encouraged to respect internationally recognised human rights, while the latter encourage enterprises (amongst other things) to contribute to economic, environmental and social progress with a view to achieving sustainable development.

The Guidelines in practice

Some statistics

Since 2000, over 300 requests to consider specific instances have been lodged with NCPs globally.²⁶ Of these, the largest number of complaints have been lodged in the United States (44) and the United Kingdom (26). Six complaints have been lodged with the Australian NCP. The complaints raised concern a range of sectors, including the mining, manufacturing, agriculture, water and electricity generation, and finance. In the 2012 reporting year, 28 new specific instances were raised; by far the largest number of these concerned the mining sector. NGOs and then trade unions formed the largest category of entities lodging the complaints in the 2012 reporting year.

Case study: The BHP- Cerrejón specific instance

The Cerrejón Coal dispute between a number of Colombian communities and BHP-Billiton is an interesting case study of the specific instance procedure. Cerrejón Coal is one of the largest open-cut coal mines in the world and is co-owned by BHP-Billiton (Australia), Anglo-American (UK) and Xstrata (Switzerland). The dispute principally concerned the alleged forced relocations of local communities to make way for mine expansion but also dealt with a range of other issues including air quality. The complaint was initiated with the Australian NCP in respect of BHP-Billiton and a subsequent complaint was lodged with the Swiss NCP in respect of Xstrata. The principal complainant was a community from the township of Tabaco. It was joined by five other communities. The specific instance procedure ran for 23 months from July 2007 to June 2009.

After an initial meeting, the dispute was suspended for 14 months pending the outcome of a review of Cerrejón’s corporate social responsibility practices and

its relationship with neighbouring communities. The review was conducted by an independent international panel commissioned by the company. The review resulted in a series of findings and recommendations which, for the most part, addressed the concerns of the local landowners and their desire for resettlement.

In December 2008, a historic settlement was reached between Cerrejón and the Tabaco community, resolving legacy issues and clearing the way for sustainable development.²⁷ It appears that this agreement was the culmination of many years of action by the community including legal proceedings instituted in Colombian courts. The complaints under the OECD guidelines were one aspect of the many different actions taken by the communities.²⁸

As for the other 5 communities, their resettlement issues were left unresolved at the conclusion of the specific instance procedure. The Australian NCP closed the specific instance on the basis that the substantive issues had been dealt with: the Tabaco community achieved a settlement and there was an established process for managing the other issues. This decision was made despite the complainants’ opposition to the Australian NCP making a final determination in relation to the five other communities.

In this example, the NCP allowed for expert input into the process and that input was significant for enabling the two parties to come to a workable solution. The informal nature of the proceedings allowed for flexibility and meaningful engagement between the parties. Whilst not all parties left the mediation satisfied, this case does appear to be one example of how the specific instance procedure can be used to achieve real outcomes.

Observations on the specific instance procedure

The EDO NSW is currently involved in a specific instance procedure involving the actions of a major mining company in the South Pacific region. While neither the complainants, the company involved nor the NCP were based in Australia, the mediation process occurred in Sydney as it was convenient to the parties and because Australia was regarded as a neutral forum. As the process is ongoing at the time of writing, we cannot comment on the specific facts but can make some general observations.

Of significance is that the transparency standards under the Guidelines are much higher than under local laws in many developing countries.

Furthermore and based on our experience, benefits of the OECD specific instance procedure are that it may permit:

- a quick method to escalate issues to high level within company management;
- face to face contact between the community group and senior company representatives in a mediation;
- dealing directly with key decision makers around the mediation table unfiltered through layers of lawyers;
- the ability to build direct relationships with company representatives; a process with the advantage of a mediator who may cajole parties into positions they may otherwise be reluctant to take;
- the costs of the mediator is normally borne by the relevant NCP or OECD government; and
- a process with no potential for costs orders against the complainants.

For those in developing countries, additional benefits of the OECD procedure are that:

- the complaint can deal with activities even though they may be authorised by local laws or licences if they fall well short of international standards;
- the process sidesteps issues that may exist with the effectiveness of local court systems;
- holding the process in a third country, such as Australia, can mean local communities may be able to access additional legal assistance;
- it is often easier to reach settlements when the overseas head office of the company is directly involved, as is typically the case in complaints under the OECD process.

The downsides of the OECD procedure are:

- the lack of compulsory powers to obtain documents;
- a greater difficulty in gaining admissions in light of the informal nature of the process;
- that confidentiality requirements may limit the ability to use information gained in the process publicly or in other forums;
- during the pendency of a specific instance, communities may find themselves prevented from pursuing other advocacy options, including litigation;
- the lack of any final adjudication by a neutral person; and
- the lack of any sanctions or an ability to force an intransigent company to change its conduct.

Communities and their representatives are well advised to place any mediation agreement, and in particular any confidentiality clauses, under the microscope. This is to ensure that the agreement is fair, does not unduly restrict them from using their own information or information in the public domain outside of the mediation process, and will help them to achieve the desired outcomes.

Clearly, there are also incentives for multinational enterprises to engage in the OECD process in good faith as the process provides (*inter alia*):

- a convenient and relatively inexpensive forum for mediating and resolving disputes to avoid the potentially significant impacts of unresolved disputes on business;
- an opportunity for global heads within organisations to meet community leaders and to understand and lead the resolution of real issues;
- a means of clearly understanding and quantifying legal and other risks;
- an opportunity to fulfill their corporate social responsibility commitments by not only attending the mediation but also taking active steps to solve problems;
- for the possibility of an adverse public report against the company by an NCP.

Conclusion

In the mediation in which EDO NSW was involved, participants across a range of specialisations invested considerable time and money to meet and engage in face to face discussions. It was a committed process.

While face to face meetings offered a different dynamic to court processes, it is equally clear that litigation can potentially assist in obtaining meaningful outcomes for local communities. The community and its representatives will need to carefully consider their legal options and ultimately weigh the outcomes likely to be achieved against the potential costs of each available option. The OECD process can be resource intensive, however, through strategic management of the dispute by complainants, has the potential to deliver material outcomes, as seen in the Cerrejón Coal example. Clearly, the commitment of the multinational enterprise in question needs to be procured, and without this, the gains to be derived from the OECD process may be limited.

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- 1 BJ Kim is the International Programs Coordinator at EDO NSW. The authors thank Russell Schmidt, EDO NSW volunteer, for his assistance in the preparation of this article.
 - 2 Desmond Sweeney is a principal of Argent Lawyers. He assists in training international lawyers in the EDO's international program. He has been selected by his peers as one of the best lawyers in Australia for five years running. He was recently the lead Australian counsel in a complaint under the OECD Guidelines for Multi-national Enterprises against a major mining company concerning its operations in the South Pacific.
 - 3 EDO NSW's International Program is funded by the MacArthur Foundation.
 - 4 28 U.S.C. § 1350, also called the Alien Torts Claim Act.
 - 5 *The Corporate Responsibility Bill 2003*, failed to pass the UK Parliament and *Bill C-300, An Act Respecting Corporate Accountability for the Activities of Mining, Oil or Gas Corporations in Developing Countries* was narrowly defeated in Canada.
 - 6 *Kiobel v Royal Dutch Petroleum Company* No. 10-1491, 569 U.S. ___, 2013 U.S. LEXIS 3159 (U.S. Apr. 17, 2013)
 - 7 Principally, under the UN Office of the High Commissioner for Human rights. <http://www.ohchr.org>.
 - 8 <http://www.inspectionpanel.org>.
 - 9 <http://www.cao-ombudsman.org/>.
 - 10 <http://www.adb.org/site/accountability-mechanism/problem-solving-function/office-special-facilitator>.
 - 11 <http://www.oecd.org/daf/inv/mne/theoecdguidelinesformultinationalenterprisesfrequentlyaskedquestions.htm>.
 - 12 <http://oecdwatch.org/oecd-guidelines>.
 - 13 Guidelines Part II, Procedural Guidance, I.A.2.
 - 14 See <http://www.ausncp.gov.au/content/content.aspx?doc=home.htm>. For other countries see <http://www.oecd.org/daf/inv/mne/oecdguidelinesformultinationalenterpriseslinks.htm>.
 - 15 Guidelines, Part II, Procedural Guidance, I, C.
 - 16 To view the text of some complaints made under the Guidelines go to: <http://oecdwatch.org/cases>.
 - 17 Guidelines, Part II, Procedural Guidance, I, C.
 - 18 Guidelines, Part I, VI – Environment.
 - 19 Guidelines, Commentary on the Environment
 - 20 See Guidelines, Part I, VI, 1-8.
 - 22 Guidelines, Part I, VI, 6a.
 - 23 Guidelines, Part 1, III, 1.
 - 24 Guidelines, Part 1, III, 4.
 - 25 Guidelines, Part I, IV Human Rights.
 - 26 Guidelines, Part I, II.
 - 27 OECD, 'Annual Report on the OECD Guidelines for Multinational Enterprises 2012', p.28.
 - 28 Statement by the Australian National Contact Point, BHP-Billiton – Cerrejon Coal Specific Instance, dated 12 June 2009.
 - 29 Solly, Richard, 'Colombia: Seven year-long people's struggle achieves a victory', 1 January 2009. www.minesandcommunities.org/article.php?a=8999&highlight=Cerrejon.

Fullerton Cove case “epitomises” public interest litigation

Elaine Johnson¹

In a costs judgment delivered on 12 September 2013, the NSW Land and Environment Court found that a coal seam gas (**CSG**) case brought by EDO NSW on behalf of the Fullerton Cove Residents Action Group (**Fullerton**) “epitomises the very concept of litigation properly brought in the public interest.”²

It was on this basis that the Court ordered that, even though the resident group was unsuccessful in overturning government approval of CSG pilot wells at Fullerton Cove, they should not have to pay the legal costs of the NSW Department of Trade & Investment (**Department**) in responding to the case.

Significantly, the Court also ordered that the Department pay the legal costs of the residents group in disputing the costs of the court case.

The findings of the Court emphasise the importance of ensuring that genuine public interest litigants are not deterred from taking cases to Court for the purpose of protecting the environment and advancing the law. The matters considered in the judgment assist parties to public interest cases in better understanding and defining the scope of what is meant by “public interest litigation”. The judgment also serves as a caution to respondents (including government departments) who seek to pursue public interest litigants for costs.

The litigation

Fullerton filed judicial review proceedings in the Court in August 2012 against approval of Dart Energy’s CSG pilot project at Fullerton Cove near Newcastle, NSW.



Fullerton Cove. Photograph: © Sue Walker.

The pilot project proposed CSG wells that would extract gas and water continuously from depths of 800-900 metres for at least 12 months, with an option to extend operations to two years. The site itself is located on a floodplain, adjacent to an internationally-listed wetland (the Hunter Estuary Wetlands), in a drinking water catchment and in the middle of a quiet rural-residential area.

The residents of Fullerton Cove went to Court because they were concerned that there had been no groundwater assessment for the impact of the project on deep and shallow aquifers, and that there had been an inadequate assessment of biodiversity at the site. They sought orders that the approval be overturned so that a full Environmental Impact Statement (**EIS**) could be prepared to assess impacts on threatened species, endangered ecological communities, and important aquifers.

The project was highly controversial, in particular for its proximity to residents and the wetlands, and for the unknown impacts on groundwater. A nine-day blockade took place at the drill site in August, which was finally cleared by police. At that time, Fullerton was successful in obtaining an injunction against Dart Energy to stop the drilling of the wells until the main case had been heard.³ This was the first time a Court had issued an injunction to stop CSG in NSW.

After the injunction was granted, the main proceedings were expedited, and a five-day hearing took place in October 2013, some six weeks later. The hearing covered several complex legal arguments, in particular in relation to the admissibility of expert evidence, the jurisdiction of the Court, and whether the significance of the environmental impact was a “jurisdictional fact” to be determined by the judge.

On 28 March 2013, the Court dismissed Fullerton’s case, finding that on the facts, the groundwater and biodiversity assessments met the standards set by Part 5 of the *Environmental Planning and Assessment Act 1979* (**EPA Act**), even without a full groundwater assessment or EIS.⁴ Days later, Dart announced that it was leaving the site in any event, due to stricter government controls on CSG development.

The hearing on costs

The normal rule on costs is that the losing party must pay the costs of the winning party. After Fullerton lost the main case, Dart Energy advised that it would not pursue the residents for its legal costs. In an unusual move, the Department decided to actively pursue the residents for its own costs, without Dart Energy.

The residents group sought a special costs order under Rule 4.2 of the Land and Environment Court Rules 2007 (**LEC Rules**) on the basis that the case was public interest litigation. Rule 4.2 specifically states that if a case is brought in the public interest, the Court has the discretion to order that each party pay its own costs.

A number of arguments were advanced by the Department as to why this case was not public interest, all of which were rejected by the Court. While there are no set criteria for determining whether a case is public interest litigation, a particular analytical approach has been established by the Land and Environment Court.⁵ The application of this analysis by Justice Pepper in this case assists in understanding and defining some of the elements of “public interest” cases. It is therefore useful to consider the Court’s findings in respect of each of the Department’s key arguments.

Fullerton’s motivations in bringing the case

During the hearing on costs, the Department submitted that Fullerton was not concerned about the environment, but rather opposed CSG at Fullerton Cove to protect the private interests of residents. In support of this submission, the Department pointed to the following facts:

1. In its submission on the project, Fullerton had not listed out the Latin or generic names of each of the species that were ultimately in dispute in the litigation, indicating it wasn’t really concerned about those species.
2. The group was incorporated a week before the case was brought, indicating it was only formed for the purpose of the litigation.
3. When it incorporated, Fullerton selected “social services/community association” instead of “environment/horticulture/animal protection” as its principal activity, indicating its main concern was not the environment.

Justice Pepper rejected the Department’s submissions and found that:

1. It was sufficient for the group to express concern about the environmental impacts of the project generally without naming individual species.
2. The group had discussed incorporation as early as 2010 and 2011, and there was a reasonable explanation as to why incorporation took longer.

What matters is the motivation of Fullerton in commencing these proceedings, and that “it is

tolerably clear that the principal activity of Fullerton at the relevant time was that of environmental protection.”⁶

The Department extensively cross-examined both Fullerton and EDO NSW about the residents’ motivations in bringing the case. However, according to the judge, the cross-examination of Fullerton “only served to reinforce the genuineness of Fullerton’s contention that it had commenced the litigation in the public interest in order to protect Fullerton Cove from what it perceived to be an inadequate assessment of the potential adverse consequences of coal seam gas exploration in that environmentally sensitive area.”⁷

The Department also argued that Fullerton simply wanted to stop the development “come what may”. In support of this submission, the Department pointed to the fact that Fullerton had initially expressed a view in public that the pilot project was challenged under Part 4, not Part 5, of the EPA Act. In fact, the case was originally brought on the basis of a challenge under both Part 4 and Part 5 of the EPA Act.

On this point, Justice Pepper found that the fact that the litigation changed during the proceedings had no bearing on whether or not it was brought in the public interest. Fullerton was seeking assessment of this CSG pilot project by way of an EIS, whether under Part 4 or Part 5 of the EPA Act. Her Honour further stated that:⁸

... to the extent that it was suggested that Fullerton in reality desired to halt all coal seam gas exploration in the

Fullerton Cove area by instituting the proceedings, again, this does not militate against a finding that the litigation was brought in the public interest. At the heart of much environmental litigation such an aim may be found. It renders the proceedings no less in the public interest.

This last statement is important, as many public interest litigants bring cases in Court because they are worried about the potential impacts of a project on shared environmental values. There may be many genuine public interest cases brought by litigants who are concerned that the environmental harm or risk is so great that the project should not proceed *under any circumstances*. It is significant that the Court has recognised that such a concern does not preclude those individuals or groups from satisfying the test under Rule 4.2 of the LEC Rules.

The nature of the group

The Department also argued that Fullerton was a small group of 28 members, who were mostly residents of Fullerton Cove, and that therefore this should weigh against any finding that the litigation was in the public interest. Justice Pepper rejected this argument on three grounds. First, Her Honour found that 28 members is “more than sufficient”, second, that in any event, the size of the group is not a barrier to public interest litigation, and third, that there was “not insignificant” interest in the litigation outside of Fullerton Cove and its residents.⁹ Justice Pepper also found that even though some members of Fullerton were concerned about potential impacts of the project on property values, that did not amount to a financial interest that would preclude the case from being characterised as public interest litigation.

The nature of the project

Another submission made by the Department was that the CSG pilot project would only apply to a relatively small geographical area, and only last for a limited time (as compared with full-scale CSG production). Again, this argument was rejected by the Court, with Justice Pepper taking account of the location of the site and its proximity to ecologically important wetlands, aquifers and threatened species.

Raising novel points of law

In establishing that a case is brought in the public interest for the purposes of Rule 4.2 of the LEC Rules, Fullerton also had to show that there is “something more” to the public interest element than just the group’s own motivation.¹⁰ Often this is satisfied by demonstrating that the case raised novel points of law,



Black-tailed Godwit, a migratory species which forages at Fullerton Cove.
Photograph © Andreas Trepte, www.photo-natur.de

or advanced our understanding of the law, but it is not limited to legal aspects.

The Court found in this case that it raised “one or more novel issues of general importance” and “contributed in a material way to the proper understanding, development and administration of the law.”¹¹ Justice Pepper identified at least three novel areas of law raised by the proceedings, being:

1. whether the Court had jurisdiction to hear the case;
2. whether expert evidence was admissible for determining a breach of s. 111 of the EPA Act (which required the Department to consider the environmental impacts “to the fullest extent possible”); and
3. whether the assessment required by s. 112 of the EPA Act as to the significance of the environmental impact is a “jurisdictional fact” to be determined by the Court.

The Department argued that only the third issue could constitute a novel point of law, and that it should be given little weight because:

1. it emerged late in the case;
2. it was a matter of statutory interpretation;
3. the Department (not Fullerton) provided the most significant assistance to the Court on the issue; and
4. ultimately, it failed on the facts.

The Court rejected all the arguments put forward by the Department, questioning the relevance and factual basis of many of those submissions.

Finally, the Court found that in any event, the ecological significance of the area was sufficient to satisfy the requirement to prove the element of “something more”.

No countervailing circumstances

The Department submitted that as Fullerton’s case failed on the facts, it should never have been pursued and that therefore the residents should not be entitled to a public interest costs order under Rule 4.2 of the LEC Rules.

The Court saw this submission from the Department as amounting to saying, “because Fullerton lost, it should pay costs”. This submission was also reflected in a media statement issued by the Department on the day of the costs hearing, stating:¹²

It is important for resource sector investment certainty that where appeals such as this are unsuccessfully pursued,

costs incurred are recoverable from the unsuccessful party.

However, the view held by the Department goes against the very purpose of Rule 4.2, which recognises that in genuine public interest cases, the unsuccessful applicant should not be punished with an adverse costs order.

In rejecting the Department’s submissions on this point, Justice Pepper found that “there can be no legitimate complaint in respect of Fullerton’s conduct of the litigation,”¹³ and that ultimately, Fullerton lost on the facts but was successful in defending many of the legal arguments raised by both Dart Energy and the Department. The Court also found that there were no other countervailing circumstances that would suggest a public interest order shouldn’t be made.

The costs judgment

After carrying out a detailed analysis in accordance with accepted Land and Environment Court principles, Justice Pepper found that the litigation was conducted in the public interest, and that Fullerton should not have to pay the Department’s legal costs.

The final matter for consideration by the judge was the costs of Fullerton’s application for a special costs order under Rule 4.2 of the LEC Rules. Arguing costs in Court necessitated the preparation of substantial evidence on the public interest by Fullerton, as well as written submissions and a separate, full-day hearing.

Before the hearing, EDO NSW wrote to the Department on a number of occasions, urging it to accept that Fullerton’s case was public interest litigation. On each occasion, the Department denied that this was a public interest case without providing any further details. In delivering judgment on costs, Justice Pepper described the Department’s responses as, “for a model litigant, less than fulsome and unhelpful in the circumstances.”¹⁴

Justice Pepper found that Fullerton’s offers to avoid any hearing on costs were reasonable and should have been accepted by the Department. As such, the Court ordered that the Department pay Fullerton’s costs of the costs application.

Implications of the decision

Our environmental laws allow members of the general public access to the Courts in circumstances where it appears that there has been (or will be) a breach of those laws. If the law were to allow the general public to be frightened away from the Courts by the prospect of adverse costs orders worth tens of thousands of

dollars, there would be little point in allowing those people access to justice in the first place. As Justice Biscoe of the Land and Environment Court stated recently in another public interest case:¹⁵

There is little point in the legislature opening the door to public participation in this way if the doorway is then blocked by a menacing costs hound which threatens to savage the responsible public interest litigant who dares to enter and loses.

The Court's judgment in this case emphasises the importance of ensuring that genuine public interest litigants are not punished with costs orders simply because they are ultimately unsuccessful. Justice Pepper made it clear in this case that while caution should be exercised in making public interest costs orders, the overriding need to provide access to justice must be kept in mind, stating:

... caution must not give way to prohibition (the logical corollary of many of the Department's submissions, in my view) and be permitted to render nugatory, through the stultifying spectre of an adverse costs order, the open standing provisions enshrined by the legislature in the EPAA.

This costs judgment also provides litigants with much guidance on what kinds of cases may fall within the "public interest" category. While the Court's findings on each contention raised by the Department are numerous, the following general observations are helpful in further defining public interest case law:

1. It is necessary to look at the motivation of the applicant in bringing the particular case (and not necessarily its activities generally).
2. An applicant's desire to stop a particular kind of development in a certain location is not necessarily a bar to public interest litigation.
3. The changing nature of litigation has no bearing on whether or not a case was brought in the public interest.
4. The size of the group is irrelevant as to whether the matter is public interest litigation.
5. The size and scale of the project does not necessarily preclude a finding that the case was brought in the public interest.
6. Simply failing on the facts does not constitute a countervailing circumstance.

Finally, the fact that the Court in this case also made a costs order against the Department serves as a reminder to respondents to carefully consider whether the case falls within the "public interest" category before pursuing costs.

On the day of the costs hearing, the Department's media release stated that costs were being sought "to ensure taxpayers' money was not wasted fighting a case which was unsuccessfully brought against the Government."¹⁶ Yet, that is precisely what has resulted from the Department's unsuccessful pursuit of the residents to recover its costs. This judgment serves as a caution to Government departments, who have a responsibility to ensure that taxpayer's money is not wasted unsuccessfully pursuing public interest litigants for costs.

1 Senior Solicitor, EDO NSW.

2 *Fullerton Cove Residents Action Group Incorporated v Dart Energy Ltd (No 3)* [2013] NSWLEC 152 (Fullerton No. 3) at [16] per Pepper J.

3 *Fullerton Cove Residents Action Group Incorporated v Dart Energy Ltd* [2012] NSWLEC 207.

4 *Fullerton Cove Residents Action Group Incorporated v Dart Energy Ltd (No 2)* [2013] NSWLEC 38. For more detailed discussions on the Court's findings see Elaine Johnson and Melissa Lee, "Casenote: Fullerton Cove Residents Action Group Incorporated v Dart Energy Ltd (No 2)" (2013) *Australian Environment Review*, 38(6); Louise Camenzuli and Tim Poisel, "Rules of the Game: Evidence and the EPA Act" (July 2013) *Law Society Journal*, 51(6).

5 *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd (No 3)* [2010] NSWLEC 59; (2010) 173 LGERA 280.

6 *Fullerton No. 3* at [15] per Pepper J.

7 *Ibid* at [48].

8 *Ibid* at [59].

9 *Ibid* at [65].

10 See public interest test applied in *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd (No 3)* [2010] NSWLEC 59; (2010) 173 LGERA 280.

11 *Fullerton No. 3* at [69].

12 NSW Department of Trade & Investment, *Media Statement – Fullerton Cove* (10 September 2013). Accessed at http://www.csg.nsw.gov.au/_data/assets/pdf_file/0015/32370/Dart-Energy-Fullerton-Cove-Statement.pdf

13 *Ibid* at [79].

14 *Fullerton No. 3*, at [88].

15 *Friends of King Edward Park Inc v Newcastle City Council* [2012] NSWLEC 113 at [47] per Biscoe J.

16 NSW Department of Trade & Investment, *Media Statement – Fullerton Cove* (10 September 2013). Accessed at http://www.csg.nsw.gov.au/_data/assets/pdf_file/0015/32370/Dart-Energy-Fullerton-Cove-Statement.pdf on 21 October 2013.

On the value of law for the planet

James Thornton¹

If our current human cultures are to survive and have a flourishing tomorrow, we need to bring about global systemic change, and do so quickly. This change will amount to a renaissance. It will need to be expressed in laws and embedded in our governance structures. Lawyers working in the public interest have a key role to play in this great transition.

My client is the Earth and all who live upon her. The Earth has few lawyers. When we started ClientEarth five years ago, there were only a handful practising in Europe. Our rapid growth to a staff of around sixty suggests how needed the work is.

A lawyer of my type works in the public interest rather than for private gain. Our own habitat is inside a legal charity whose objectives include protecting the environment and human health, helping environmental groups, advising law and policy makers, and educating citizens, all for the public benefit.

Most environmental activists, including those in the name-brand organisations, do their work by campaigning. They campaign for protection of an environmental asset, for new regulations, against nuclear plants, and so on. They are often expert in politics and communications strategy.

In Europe, however, these organisations have not employed legal talent to develop legal strategies as integral parts of campaigns. This is in distinction to how both business and government operate. Neither of these great shaping forces in our society looks forward to the goals they wish to achieve or the pathways to reach them without generating and deploying sophisticated legal strategies. Campaigners tend to state general principles that should be followed. Those on the other side craft explicit legal proposals that meet their needs. When green campaigners face such calculated opposition without skilled lawyers on side, there is an inevitable inequality in arms. It is the environment that suffers.

The American and Australian environmental movements are different from their European brothers and sisters in this regard. Back in 2006 when I was doing the research that led to setting up ClientEarth the following year, there were estimated to be around 500 fulltime practising lawyers in the United States working for the planet inside environmental organisations. In Europe there was a small handful. In this way Australia is more like the United States, with a long history of public interest environmental lawyers - and in some cases in-house or private lawyers working for campaign groups - defending nature and indigenous people.



Photograph © Creative Commons: CEE Bankwatch Network 2011

Let us look at five separate dimensions of how law can serve the needs of ecosystems and the people who depend on them, which is to say all of us. Another way to put this is that we will consider five distinct types of public good that public interest environmental lawyers deliver. The examples are drawn mostly from the European Union (**EU**) given that is my current primary focus, but equivalent examples could be drawn from wherever such lawyers are active.

1. Writing good laws

Let us unpack what I mean by good laws. In the environmental arena, the right choices for society intricately depend on science. Air quality limits depend on a combination of physics and physiology. Fisheries laws depend on the ecology and biology of fish populations and ocean ecosystems. The appropriate regulation of toxic chemicals depends on toxicology and epidemiology. Guiding our actions on climate change, biodiversity loss, and so on, depends on sound science. The creation of policy follows from the science. We might say that the Earth speaks to us in the grammar of science.

Science gives us the goal. You generate policy by casting that goal into the templates of human institutions. Good environmental lawyers are systems thinkers. They start by understanding the relevant science. Then translate what the science is saying into a form the relevant political institutions can understand. Because lawyers are pragmatists, detail oriented and solution driven, policy created by lawyers is pre-adapted to succeed in the political process. This is not to say that every battle will be won, but that the strategic view of the experienced environmental lawyer will often give the clearest shot at realising meaningful environmental protection.

Moving from science to policy that embodies the best we know about what the environment or human health require, we move to the next step—legislation.

One day at a party I was explaining what ClientEarth does to the singer Annie Lennox. She is a quick study. Her reflection back was, “I see. It all comes down to legislation in the end.”

It is legislation that embodies the balance of rights and responsibilities. And between the strong—commercial and governmental interests—and the weak—ecosystems and their organisms, ordinary citizens and indigenous peoples—it is only law that can level the playing field.

In the creation of law, lawyers can be helpful. That seems a tautology, but I was surprised to find that all the European environmental groups in Brussels worked on legislation without lawyers helping them.

Even the European Parliamentarians, most of whom are not lawyers, were working on legislation with almost no legal input or support. This state of affairs reminded me of having an operation without a surgeon.

Companies, on the other hand, draw deeply on legal expertise as they engage in the legislative process. Of the 15,000 lobbyists in Brussels, many are corporate lawyers. Of the 100 or so full time environmental activists, none was a practising lawyer until I opened a Brussels office.

Partly as a result of this disposition of legal troops, European environmental laws often sound good. They have statements of objectives which are admirable, and a quick reading of the law leaves a high sounding impression. But they are frequently unenforceable. A law that is unenforceable is tantamount to authorising the behaviour you sought to prohibit.

In an air quality case that ClientEarth recently argued in the United Kingdom (**UK**) Supreme Court, the British Government told that Court with disarming honesty that they signed up to the EU Air Quality Directive (**Directive**)² because it never anticipated that anyone would enforce the Directive against them.³

Good environmental laws translate policy-based on science into enforceable obligations. Without laws of this kind, our planet’s living fabric, which is our vital life, will not endure.

2. Implementation

Once a good law is passed, it needs to be well implemented. Regulatory measures need to be drafted. The regulated industries and individuals need to understand their obligations and be induced to comply with them. The regulators need to understand the law and its purpose and find the backbone to do the job of bringing about adherence to both the law’s objectives and to its fine structure. All of this is patient, time consuming work, which can take real courage on the part of officials. Environmental laws are designed to change culture, within companies, within government and among citizens.

Even well-intentioned regulators will often have difficulty implementing laws because there is great countervailing pressure from the regulated community directed both at them and at their political superiors.

Take chemicals. The chemicals industry is one of the most powerful lobbies in both Europe and the United States. Teams of scientists and lawyers work to slow down the regulation and banning of profitable, hazardous chemicals such as neonicotinoid pesticides, implicated in the decline of bees in recent years.

If your focus is campaigning, you will see both a victory and an endgame when a law you campaigned for is passed. This was the case with the Registration, Evaluation, Authorisation and Restriction of Chemicals Regulation (**REACH**), the European chemicals law introduced in December 2006 which is the current world standard.⁴ All of the European green groups lobbied for its passage. Then the day the law passed they disbanded their teams. Not so the chemical manufacturers.

This makes sense if you assume laws are self-implementing, or you trust regulators to do a perfect job. From a lawyer's perspective, though, the fight for the change of culture envisioned in the law only begins with its passage. Everything depends on how it is implemented. If a good law is well implemented, it effects a shift in the relevant culture, and this counts as a profound public good.

If even a good law is not well implemented, it is a sham. Industry well understands this and has teams of experts working to have laws implemented in such a way that their culture is not disturbed. Much detailed, diligent legal work needs to be done on the other side as a countervailing force if even a good law is to have its intended effect. In the case of REACH, its ambitions have yet to create significant change. We are working on it.

Government agencies dealing with the implementation of laws often have dedicated people who are frustrated that only one side is pushing as a law is implemented. They often welcome a legal push on the side of the environment—it gives them the ammunition they need to do the right thing.

3. Enforcement

There will always be a need for enforcement. This is true of both companies and governments. Once legal duties are clear and enforceable and obligations bite, some regulated entities will not fulfil their duties.

Enforcement is another area where lawyers can help. Political pressure will often align against enforcement, to prevent even well-written and implemented laws from having their intended effect. When lawyers representing citizens bring enforcement cases, it is a strong and politically meaningful grass roots action for the environment.

Let me give a couple of examples. In the 1980s Ronald Reagan's government decided not to enforce environmental laws. As a young lawyer at the Natural Resources Defense Council (**NRDC**), I brought a series of cases against companies violating the Clean Water Act.⁵ After scores of these cases, the government

was embarrassed into getting into the enforcement business again.

I mentioned earlier an air quality case in the UK Supreme Court. ClientEarth brought this case because air quality in the UK is so poor it causes the death of 29,000 people a year, by the government's own calculations. In court, the UK Government admitted it had missed the Directive's 2012 deadline for cleaning the air, and that it had no intention of complying in London until at least 2025. When you say 2025, why not say 2075?

Although the lower courts refused to hold the UK Government liable even though it admitted violating the Directive, the Supreme Court reversed the preceding (High Court) decision. It held the government liable and is referring the case to the European Court of Justice for advice on how to craft the remedy.

I mention this case because it is just the kind of enforcement effort to give heart to citizens across Europe. Most EU capitals have unhealthily bad air, a result of Europe's unwise love affair with the diesel engine, coupled with inadequate regulation.

Because this is the first time the Europe wide Air Quality Directive has been enforced by a citizen's group, the hope is that citizens across Europe will now use the courts to fight for their health and that of their children.

Enforcement by citizens gives people hope. Environmental problems can seem overwhelming. Punishing offenders empowers the people.

4. Giving the right incentives

When it comes to climate change, neither governments nor the markets are providing the right incentives for companies to behave responsibly. By responsibly here I mean reducing carbon emissions. Interestingly, responsibility for carbon emissions is concentrated in relatively few hands. For example, two thirds of historic carbon dioxide and methane emissions from the 1850s until the present can be attributed to just 90 entities.⁶

There is a way that public interest lawyers can intervene and make a difference here too. How? By increasing the business risk of inappropriate carbon choices.

Let us look at coal fired power plants, because they are an irresponsible choice in today's warming world.

In Europe, Poland has a heavily dependent coal economy and a plan to build 14 large coal plants, around half of all those on the drawing boards for Europe. In this the present government is showing remarkably little imagination, because they are replicating the Soviet energy plan for Poland from the 1970s.

“ClientEarth brought this case because air quality in the UK is so poor it causes the death of 29,000 people a year, by the government’s own calculations. In court, the UK Government admitted it had missed the Directive’s 2012 deadline for cleaning the air, and that it had no intention of complying in London until at least 2025. When you say 2025, why not say 2075?”

ClientEarth decided to take a two pronged approach to increase business risk for coal as a way of nudging investment towards more responsible and sustainable choices. The first was to bring cases against all 14 investments in the Polish courts.⁷ The cases sought to make the investments comply with Polish and EU law, which in all cases they failed to do. Partly, one suspects, because the investors did not suspect that citizens were watching.

We have won a number of these cases, and so far killed four plants. The rest are on hold. One company, Energa, which controls about 20% of the Polish electricity market, announced it was abandoning coal and moving to gas and improving the efficiency of the grid.

A second and parallel approach was to attack a taxpayer subsidy that the Polish operators wanted. The investors wished to get free allowances to emit carbon, rather than pay for their emissions under the Emissions Trading Scheme. We argued to the European Commission that these subsidies were illegal, and we prevailed, in the end killing € billion in free allowances, making coal more expensive.⁸ Though the plants if ever built would still get subsidies—a mad idea—for construction, removing the free allowances nevertheless increases the business risk by making the coal investments pay more towards their true social costs.

Increasing the business risk for irresponsible investment is a strategy that will become increasingly important in the legal wars over climate change.

5. Building basic democracy

If we are to keep succeeding as a society, we will need to change both our legal frameworks and our attitudes. But there is also another set of changes that we will need to make. These are changes in institutions to make information more available to citizens, allow greater and more effective participation by citizens in decision making about how resources are used, land is developed, chemicals regulated, and all the rest of the decisions about how we fit into planetary systems. We also need to allow citizens to have more effective access to courts to enforce their environmental rights.

In even well developed legal systems such as we find in Europe, basic democracy needs to be improved in these ways. Let us take the example of access to the courts.

A democracy in which citizens cannot defend their rights against the authorities in court is not a fully realised democracy. In the UK, for example, the right to use the courts against the government, though available in theory since the 13th century, has not been available in practice. The courts are indeed open to citizens, but a pernicious rule on costs has made them effectively unavailable. This gave rise to the line that “Her Majesty’s courts are open to all citizens—just like the Ritz.”

The “English rule” on costs meant that if you lose you pay the other side’s legal costs and fees. And because the English barristers are perhaps the most expensive lawyers in the world, this meant in practice that if you lost a relatively routine case you might be liable for hundreds of thousands of pounds. Few can afford such a contest. In the environmental arena, I was told that the World Wildlife Fund (WWF) UK, with a budget of then over £50,000,000 a year, did not bring a case for ten years because, having lost a case that cost them around £100,000, their board refused to take the risk.

At the EU level, the case has been worse, if that is possible. While the EU has its own system of courts, EU citizens do not have a right under those courts’ jurisprudence to bring a case against EU institutions when they violate an environmental law. Though a sensible reading of the treaty that establishes the EU clearly gives citizens such a right, the courts refuse to confer it. Their view is that only direct economic harm gives a right to the courts,⁹ or an ‘individual’ harm that is unique to the individual and suffered by no other human being.

But of course citizens seldom wish to argue an economic harm in environmental cases. Instead they want, and often need, to argue, that the government or another actor is not complying with the law, to the

detriment of human health or the environment. In the case of air pollution, for example, one wants to hold the government to established standards for clean air. And the air pollution example shows why the EU courts' idea of 'individual' harm is remote from reality. Environmental harms are never unique to a single individual, indeed the worse they are the more widespread the suffering. In the UK air pollution case, it is 29,000 people a year who die, and many others who are affected.

As a result of the EU courts' attachment to economic harm and their inadequate notion of 'individual' harm, there is a complete denial of citizens' rights to use the European courts to contest the EU's action regarding the environment. And because the EU will not appear in the court of a member state, it is entirely remote from challenge. Yet EU bureaucrats often wonder why there is a 'democratic deficit' in the EU.

In Germany too, the courts were closed to citizens in a way parallel to that of the EU courts, in that standing relied on a personal, economic injury, meaning essentially that public interest environmental cases could not be brought.

How can lawyers address these kinds of systematic injustice? The first set of actions we brought as ClientEarth were directed against the UK, the EU, and Germany. The basis of the action was a relatively obscure treaty called the Aarhus Convention.¹⁰ The Convention was signed by all the EU countries and the EU itself. Signatories promised to give their citizens, regarding the environment, access to information, participation in decision making processes, and access to justice that shall not be prohibitively expensive. There is a panel sitting in Geneva, where representatives from signatory countries sit to hear cases in which citizens allege that countries are not abiding by their promises.

We won our cases against the UK¹¹ and the EU some time ago.¹² The case against Germany was on hold for several years as two cases and a piece of legislation relevant to our claims worked their way through the system. In November 2013, around six years after we filed the complaint, we won the case against Germany. Neither the legislation nor the other cases did enough to open the courts to citizens in environmental cases, and the ruling in our case therefore went squarely against Germany.¹³

The UK is now, partly due to this judgment, amending its cost rules, which will allow citizens access to justice. We are waiting to see how the EU courts handle their situation, in that their jurisprudence will have to change profoundly. And we are waiting to see how fully Germany gives citizens access to its courts.

Conclusion

The good news is that lawyers dedicated to serving the public interest can effect systemic change. For a very small investment, they can generate environmental public goods. Their work makes laws better, and sees laws implemented and enforced. They can improve basic democratic institutions. And where markets fail to do so, they can create the incentives for companies to do the right thing.

This is hard, patient and sweaty work in the boiler room of democracy. Because we need to bring about systemic changes in our legal systems to adapt them to the needs of people and the living world, it is work that I put at the heart of what is needed now. Either our civilisation winds down or we have a renaissance. My money is on public interest environmental lawyers to help design that renaissance.

1 CEO, ClientEarth. <http://www.clientearth.org/>

2 Directive 2008/50/EC.

3 *R (on the application of ClientEarth) v The Secretary of State for the Environment, Food and Rural Affairs* [2013] UKSC 25. Judgment available at: http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2012_0179_Judgment.pdf

4 Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency.

5 33 U.S.C. §1251 et seq. (1972).

6 Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers 1854-2010, Richard Heede, *Climate Change*, 22 November 2013; <http://link.springer.com/article/10.1007/s10584-013-0986-y>

7 <http://www.thelawyer.com/news/people/the-hot-100/hot-100-james-thornton-clientearth/1016131.article>

8 See ClientEarth, *Eligibility of proposed fossil-fuel power projects in Poland for transitional free allowances under the EU emissions trading scheme: Due diligence report by ClientEarth (Executive Summary)*, January 2012. Available at: <http://www.clientearth.org/reports/clientearth-due-diligence-report-executive-summary-january-2012.pdf>

9 The one exception is under the freedom to information regulations (Regulation (EC) No 1049/2001 of the European Parliament and the Council), which give any person a right to obtain information. If you request and are denied information, you have the opportunity to contest the denial in EU courts. Because the EU institutions routinely deny such information, we routinely bring such cases. And the European Commission has been trying to completely deny citizens access to such information. The gambit, which we and a group of allies have quashed for now, was to redefine 'document' to mean only what the Commission wanted to publish. Something of the spirit of Kafka lives on.

10 Formally known as the 1998 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. Note that Australia is not a signatory to this Convention.

11 Findings and recommendations of the Aarhus Convention Compliance committee with regard to communication ACCC/C/2008/33 concerning compliance by the United Kingdom. Available at: http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-33/Findings/C33_Findings.pdf

12 Findings and recommendations of the Compliance Committee with regard to communication ACCC/C/2008/32 (Part I) concerning compliance by the European Union. Adopted on 14 April 2011. Available at: <http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-32/DRF/C32Findings27April2011.pdf>

13 For further information, see Communication to the Aarhus Convention Compliance Committee concerning ACCC/C/2008/31, dated 22 February 2013. Available at: <http://www.unece.org/env/pp/pubcom.html>

Recent developments in the Tarkine evidence the need for a landscape scale approach to resource management

Adam Beeson¹



Photograph © Lynne Jordan

Introduction

In May 2013, “Tarkine” was adopted by the Tasmanian Government² as the name of an “unbounded locality” in the northwest of Tasmania. “Tarkine” has been used for many years to describe an area of about 440,000 hectares north of Macquarie Harbour and west of Cradle Mountain. The name is derived from that of an Aboriginal group that occupied part of the area, the Tarkineer.

This article looks at resource management decisions in the Tarkine, particularly past attempts to regulate at a landscape scale, as well as recent proceedings in the Federal Court and Tasmanian Resource Management and Planning Appeal Tribunal (**Tribunal**) with respect to

mine proposals. The article suggests that a landscape scale approach is preferable to managing the area on a case-by-case basis, as currently occurs. However, for that approach to be effective there must be some form of negotiated position arrived at between stakeholders. Indeed, this is the only way to get broad support for both resource exploitation and conservation.

Currently there are no negotiations. The environmental organisation, Save the Tarkine (**STT**) (formerly known as the Tarkine National Coalition) claim they want to negotiate a landscape scale compromise, however government and industry are not interested.³ The head of the Tasmanian Minerals’ Council is quoted as saying:

“The current Environment Minister has recently introduced amendments to the EPBC Act, explicitly in response to this decision, to retrospectively validate decisions where a similar error occurred. The amendment will also mean failure to have regard to a conservation advice will no longer result in a decision being invalid.”

I told [Save the Tarkine] that I wasn't interested because a compromise had been made in the nineties. Their idea of compromise is simply to preclude mineral exploration and mining from more of the compromised area.⁴

While resource management in the Tarkine has involved landscape scale approaches, none have included genuine negotiation of a compromise between stakeholders.

Attempts to plan at a landscape scale⁵ in the Tarkine

In 1993 the Tasmanian Parliament passed the *Mining (Strategic Prospectivity) Act 1993* (Tas). The long title reads “An Act to ensure continuing access for mining purposes to areas of the State having very high potential for mineral exploration”.⁶ The Act provides that Crown Land, with certain exemptions, in a declared “strategic prospectivity zone” cannot be sold, or have its “status” changed, other than by resolution of both Houses of Parliament.⁷ Strategic prospectivity zones cover the entire Tarkine Area. This Act was supported in Parliament by the Liberal and Labor parties and opposed by the Greens.

The Tarkine was also included in the Tasmanian Regional Forest Agreement (RFA) between the Tasmanian and Commonwealth Governments. The division of Tasmanian forest into classes in the RFA process was controlled by the Tasmanian Government. Environment groups heavily criticised the RFA process⁸ and, as evidenced by the on-going campaigns, clearly did not feel bound by it in a political sense. The RFA led to the creation of the Savage River National Park and Savage River Regional Reserve⁹ in the Tarkine. This is perhaps what the Minerals Council refers to as the “compromise” in the nineties. The RFA does not restrict mining in the Tarkine other than in the Savage River National Park.

In 2004 the Tarkine was nominated by STT for inclusion on the National Heritage List. The nomination excluded all the existing mines including extensions to the Savage River Mine in the centre of the Tarkine

(and adjacent to the Savage River National Park).¹⁰ As required under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act), the Australian Heritage Council (AHC) assessed the nomination. The AHC report found the Tarkine met eight of the criteria for National Heritage Listing.¹¹ The process involved consultation although not direct negotiation between the stakeholders. Subsequently the Minister decided not to list the entire Tarkine. The Minister listed 21,000 hectares in a 2km wide strip of coast. The Minister explained his decision as follows:

I have tried to find a boundary [for the listed area] which would incorporate the natural values without delivering unacceptable social and economic outcomes.

Tasmania has the highest unemployment rate in Australia and this region has the highest unemployment rate in Tasmania. I simply haven't been able to find a way to recognise the natural heritage values with a boundary that will find a balance.

For this reason I have decided to only put the indigenous values on the national heritage list.¹²

This decision was condemned by environmental groups and praised by the mining industry and local councils.¹³

Recent mining proposals

Shree Minerals – Nelson River

Shree Minerals' iron ore mine is located in the north-west of the Tarkine, adjacent to the Nelson River. The proposal is for a 225-metre deep, open cut mine and a separate 40-metre deep excavation, together impacting an area of 152 hectares. The mine life is expected to be up to 10 years. The ore will be trucked to the Burnie Port on the Tasmanian north coast. The Circular Head Council approved the mine and included in the permit conditions required by the Tasmanian Environment Protection Authority (EPA). On 18 December 2012 the Federal Environment Minister issued an approval with conditions, pursuant to the EPBC Act.

STT appealed to the Tribunal against the decision of Circular Head Council. The Tribunal refused to hear the appeal on the basis that STT had not made a valid representation during the Council consultation process. The right to appeal is enlivened by the submission of a valid representation.¹⁴ STT had lodged a representation via email and posted a hardcopy before the deadline for representations. The hardcopy, however, arrived a day after the deadline. The Tribunal found that the Council had not consented to representations being submitted via email and thus¹⁵ the email representation was not valid. The Tribunal held that as the hardcopy had not been received by Council before the deadline, it too was not valid.¹⁶

STT sought judicial review of the Federal Environment Minister's decision to approve the Nelson River mine in the Federal Court. Marshall J summarised the issues as:

- Whether, in deciding to approve the taking of the action, the Minister had regard to a document called "Approved Conservation Advice for *Sarcophilus harrisii* (Tasmanian Devil)" and in the event of failure to do so, the consequences of such failure;
- Whether, in approving the taking of the action, the Minister was entitled to attach conditions which require Shree to donate money to a program known as the Save the Tasmanian Devil Program Appeal ("the program").¹⁷

With respect to the first issue, the Court noted the Minister did not have a copy of the Approved Conservation Advice for *Sarcophilus harrisii* (Tasmanian Devil) (**Advice**) although it was referred to in his decision. His Honour found the Minister was obliged to "give genuine consideration to the document,"¹⁸ emphasising the significance of the Advice in the context of the EPBC Act and concluding:

The requirement to have regard to any approved conservation advice relevant to a threatened species before approving action which may have impact on that species is a pivotal element of that system of protection.¹⁹

In relation to the second issue, STT argued the conditions which related to the insurance population run by the Save the Devil program were invalid because they did not protect the Devil in the wild. STT urged the court, for the purpose of the EPBC Act, to distinguish between species extinct in the wild and others. The Court rejected this argument holding the condition making section²⁰ was broad enough to encompass an insurance population, at [74] His Honour stated:

...an introduced population is capable of protecting, repairing or mitigating damage to the Tasmanian devil as a threatened species notwithstanding that the Tasmanian devil is not currently extinct in the wild.

Based on its findings in relation to the Advice, the Court upheld the application and declared the Minister's decision invalid and of no effect.

Two weeks after the Court's decision, the newly appointed Environment Minister issued a new approval. The Minister considered he was able to "remake" the decision, presumably on the basis that, in effect, the previous decision had not been made because of the jurisdictional error in failing to consider the advice.²¹ This has not been appealed to the author's knowledge. The current Environment Minister has recently introduced amendments to the EPBC Act, explicitly in response to this decision, to retrospectively validate decisions where a similar error occurred. The amendment will also mean failure to have regard to a conservation advice will no longer result in a decision being invalid.²²

Operations at Nelson River commenced recently.²³

Venture Minerals - Riley Creek

The Riley Creek proposal is a strip-mine operation to extract iron ore. This will involve mining to a depth of two metres over an area of 119 hectares. Riley Creek is north of Lake Pieman and close to Roseberry and Tullah in the south-east of the Tarkine. The ore will be trucked from the site, and either transferred for rail transport or trucked through to the Burnie Port. The West Coast Council approved the mine on 21 May 2013, including in the permit conditions as required by the EPA. On 6 August 2013 the Federal Environment Minister issued an approval with conditions.

STT appealed against the West Coast Council approval of the Riley Creek mine to the Tribunal. STT argued that the EPA had failed to take into account the cumulative impact of two other proposed Venture Minerals mines²⁴ in the same area. Those two mines are proposed to use the same access road as the Riley Creek mine. As a result, the argument went, the approval was invalid. STT argued in the alternative that the impact on the Tasmanian Devil (**Devil**) and on water quality (due to erosion and sediment run-off) were unacceptable and hence the permit should be overturned. Finally, STT argued that many of the conditions were invalid due to vagueness and uncertainty and that the use of "commitments" in the permit (as drafted by Venture Minerals), was outside the relevant condition-making power.²⁵

Venture Minerals conceded in the course of proceedings that it was appropriate to limit truck movements to daylight hours to minimise risks to the Devil, and that the sediment and erosion plan should be prepared to address issues raised by relevant experts. Subject to those concessions, Venture Minerals submitted that the mine should proceed.

With respect to cumulative impacts the EPA, West Coast Council and Venture Minerals submitted that the assessment required under the legislation must be limited to the actual development referred to in the application, rather than proposals which “might be carried out elsewhere and in the future”. The Tribunal agreed with these submissions, concluding that:

...an assessment at this time about possible future impacts from possible future mines, would be so fraught with uncertainties and so likely to produce inaccuracies as to be of little, if any, assistance to the Tribunal and thus carry no weight in the Tribunal’s assessment of the development application. In the Tribunal’s view, such assessment would lack any reasonable worth or utility.²⁶

The Tribunal concluded that it could only consider the impacts of the current development. Subsequent developments would need to be considered in the context of those issues coupled with the Riley Creek approval. The Tribunal dismissed TNC’s ground that the failure to consider cumulative impacts invalidated the EPA’s decision. The Tribunal also rejected TNC’s submission that a more strategic approach should be adopted in order to consider whether the current proposal should proceed to the possible exclusion of the future mine proposals. The Tribunal held that there is no method or power allowing the Tribunal to make such an assessment.

The Tribunal ruled the erosion and sediment control issued were “manageable”. The conditions were amended to reflect the approach recommended by the expert witnesses, in particular use of the Best Practice Erosion and Sediment Control document published by the International Erosion Control Association. The Tribunal concluded that the local Devil population was relatively small and the number of Devils likely to be killed as a result of the mine would not be significant. The Tribunal was satisfied that impacts would be mitigated by the measures agreed to by Venture Minerals, and imposed a condition requiring those measures to be implemented. This included an additional condition restricting all transport to daylight hours. The Tribunal dismissed the TNC’s argument that the use of “Commitments” in the permit was unlawful, stating:

The Tribunal rejects the contention that the commitments defined in the permit are unenforceable or that they are vague or uncertain. They are not.²⁷

The Tribunal dismissed the appeal and adopted the existing permit with the additional and amended conditions.

Riley Creek was approved by the Federal Environment Minister on 6 August 2013. Save the Tarkine has sought judicial review of this decision. The hearing is set down for 18 – 19 December 2013.

Conclusion

Tasmania seems destined to experience another bout of acrimony over an environmental controversy, this time with respect to mining. The case-by-case approach to decision making in resource management fosters conflict and encourages stakeholders to adopt intractable positions. Existing dispute resolution systems are designed to resolve cases as they arise. In the Riley Creek case the Tribunal explicitly rejected a strategic, landscape scale approach to environmental assessment on the basis that it was outside the legislative remit.

There are several options to consider in terms of a landscape scale approach. Strategic assessment under the EPBC Act is one of those.²⁸ However, history suggests that landscape scale planning which does not include a stakeholder generated outcome is unlikely to build consensus. A consensus which might see broad support for both mining and conservation in the Tarkine.

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- 1 By Adam Beeson, Solicitor, EDO Tasmania.
 - 2 Tasmanian Government Gazette, 7 August 2013, 1294.
 - 3 Croxford, Kimberley, Drawing a fine line in the Tarkine, Inside Story, 6 September 2013 <http://inside.org.au/drawing-a-fine-line-in-the-tarkine/> (accessed 27 November 2013).
 - 4 Ibid.
 - 5 “Landscape scale” cannot be precisely defined, however, it means a scale larger than a single development site. An obvious example is planning in catchment sized parcels. In the case of the Tarkine it refers to the entire Tarkine area.
 - 6 *Mining (Strategic Prospectivity) Act 1993* (Tas).
 - 7 *Mining (Strategic Prospectivity) Act 1993* (Tas), s. 7.
 - 8 McDonald, Jan (1999) “Regional Forest Disagreements: The RFA Process and Sustainable forest Management,” *Bond Law Review*: Vol 11: Iss.2, Article 12, p. 341.
 - 9 Total area = 35,660 hectares.
 - 10 The National Heritage List is a creature of the EPBC Act. The Federal Environment Minister decides which places should be included on the National Heritage List. After a place is listed any activity which is likely to cause a significant impact on the values of place requires the Federal Environment Minister’s approval. The listing of a place does not ban mining nor make it so difficult to get approval as to be effectively a ban.
 - 11 The Minister must be satisfied one of the criteria is met in order to enter a place on the Register.

- 12 Media Release, The Hon Tony Burke MP - Minister for Sustainability, Environment, Water, Population and Communities, Tarkine added to National Heritage List, 8 February 2013. <http://www.environment.gov.au/minister/archive/burke/2013/mr20130208.html> (accessed 27 November 2013).
- 13 See generally Darby, Andrew "No" to Tarkine environment listing, The Sydney Morning Herald, 8 February 2013. <http://www.smh.com.au/environment/no-to-tarkine-environment-listing-20130208-2e2bo.html> (accessed 29 November 2013); STT response, Jordan, Scott *Burke's listing fails to deliver protection for the Tarkine*, Tasmanian Times, 11 February 2013. <http://tasmaniantimes.com/index.php?/weblog/article/tarkine-the-decision/> (accessed 29 November 2013);
- 14 *Land Use Planning and Approvals Act 1993* (Tas), s. 57.
- 15 The *Electronic Transactions Act 2000* (Tas) was held to govern the making of representations by email. This requires consent by the receiving entity for information to be provided electronically – see particularly s. 6.
- 16 This finding was based on an application of s. 30 of the *Acts Interpretation Act 1931* (Tas) which deals with effecting service by post.
- 17 The conditions referred to require a \$350,000 donation to the Save the Devil program.
- 18 *Tarkine National Coalition Incorporated v Minister for Sustainability, Environment, Water, Population and Communities* [2013] FCA 694, [47].
- 19 *Tarkine National Coalition Incorporated v Minister for Sustainability, Environment, Water, Population and Communities* [2013] FCA 694, [59].
- 20 EPBC Act, s. 134.
- 21 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) HCA 11. This case was an appeal by the Minister for Immigration against a decision of the Immigration Review Tribunal. The decision reversed a previous Tribunal decision and effectively amounted to a reconsideration of the matter. The Tribunal took this action because the first decision had been made in circumstances where clearly the affected individual had been denied procedural fairness. The majority (Kirby J dissenting), held the first decision was in fact not a decision at all and as a result the Tribunal had not exercised its jurisdiction so as to exhaust its power.
- 22 Sydes, Brendan, *First Rollbacks EPBC Act Begin*, 14 November 2013. <http://www.edovic.org.au/blog/first-rollbacks-epbc-act-begin> (accessed 29 November 2013).
- 23 Ryan, Jane, *First new Tasmanian mine in a decade*, 1 November 2013. <http://www.abc.net.au/news/2013-11-01/nelson-bay-river-mine-opens/5063210> (accessed 28 November 2013).
- 24 Notices of Intent had been submitted for both projects. The submission of Notices of Intent is provided for in s. 27B of the *Environmental Management and Pollution Control Act 1994* (Tas).
- 25 *Environmental Management and Pollution Control Act 1994*, (Tas), s. 25.
- 26 *Tarkine National Coalition Inc. v. West Coast Council and Venture Minerals Limited* [2013] TASRMPAT 103, [97].
- 27 *Tarkine National Coalition Inc. v. West Coast Council and Venture Minerals Limited* [2013] TASRMPAT 103, [101].
- 28 McDonald, Jan, *Tasmania's Tarkine needs a strategic plan*, The Conversation, 12 August 2013. <https://theconversation.com/tasmanias-tarkine-needs-a-strategic-plan-16876> (accessed 29 November 2013).



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