



Consideration of environmental economic & social impacts in the Courts

Earth Laws & Regional Community Environmentalism

Sue Higginson – Principal Solicitor
23 October 2014



Public interest environmental litigation – What is the public interest?

EDO NSW test:

- the issue has significance beyond the material or financial interests of a particular individual or group, and
- the issue involves a real threat to the environment; or
- engagement in the issue has the capacity to result in good environmental outcomes; or
- the issue concerns the manner in which the environment is regulated, now and into the future; or
- the issue raises matters regarding the interpretation and future administration of statutory provisions.



Public interest lawyering



Key advantages of litigation

- Can result in substantive outcomes – Court can overturn bad decisions or void illegal decisions
- Can raise awareness of an issue – focus public attention
- Provides a forum for framing and debating the issues
- Can help make decision-makers accountable
- Even unsuccessful litigation can expose weaknesses in the law and highlight the need for law reform



Elements of public interest environmental litigation

- 2 key elements of public interest environmental litigation in NSW
 - The law
 - Substantive legal protections
 - Open Standing
 - The Land and Environment Court
 - Specialist jurisdiction
 - Developed jurisprudence on costs
 - Facilitates access to information for members of the public.



Key challenges to public interest environmental litigation

- Tight time frames
- Limited merits appeal rights
- Most cases are judicial review proceedings
 - Court discretion not to grant relief
 - Ability to remake same decision
- Civil Enforcement – evidence
- Costs
 - No Legal Aid
 - Security for costs orders
- Special legislation
- Proponents reapply – Bulga
- Ad Hoc outcomes – little scope for broad application



Our Challenges

- Resources

Usual suspects line up for new attacks on EDO NSW Friends, supporters and observers of EDO NSW may have noticed a new round of attacks on our public interest environmental law office in recent days and weeks, via the usual suspects of the NSW Minerals Council and The Australian newspaper.

— Jeff Smith EDO NSW CEO November 06, 2013

- Clients

- Keeping abreast of the growing field of environmental law

Types of Litigation

- Judicial Review
- Third Party enforcement proceedings
- Merit Appeals
 - Consumer law
 - Corporations law
 - Criminal law
 - Nuisance (public & Private)



Warkworth case

Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited [2013] NSWLEC 48



Our Clients:

Bulga Milbrodale Progress Association

– a community group against coal mine expansion in the Hunter Valley

“Determined to save our village from a coal mine expansion, the Association secured the services of the EDO NSW to prepare an appeal. This started a relationship which achieved a landmark case in the Land and Environment Court by overturning the approval.

The residents of Bulga, with very limited experience and funding, were only able to achieve this success by the engagement of the EDO and the team of experts and advisors they assembled.”

John Krey, President

Warkworth case

Facts:

- In 2003 Warkworth agreed to protect Saddleback Ridge, a buffer between Bulga village and the mine. Also agreed to protect significant remnant vegetation including endangered ecological communities in perpetuity
- In 2012 Minister for Planning approved extension of open cut coal mine
- Impacts of the extension project:
 - closure and excavation of Wallaby Scrub Road;
 - clearing of approximately 766 ha of four types of endangered ecological communities protected under threatened species legislation;
 - the removal of Saddleback Ridge;
 - Increased dust and noise for residents of Bulga.

Warkworth Case – a significant judgment

- *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited [2013] NSWLEC 48*
 - Court refused the mine expansion
 - The substantial economic and social benefits of the mine do not outweigh the unacceptable impacts on biodiversity and the affected community
- 14 days of hearing
- Experts
 - Economics
 - Biodiversity
 - Social & solastalgia



Image: John Krey

Warkworth Case – a significant judgment

A polycentric problem

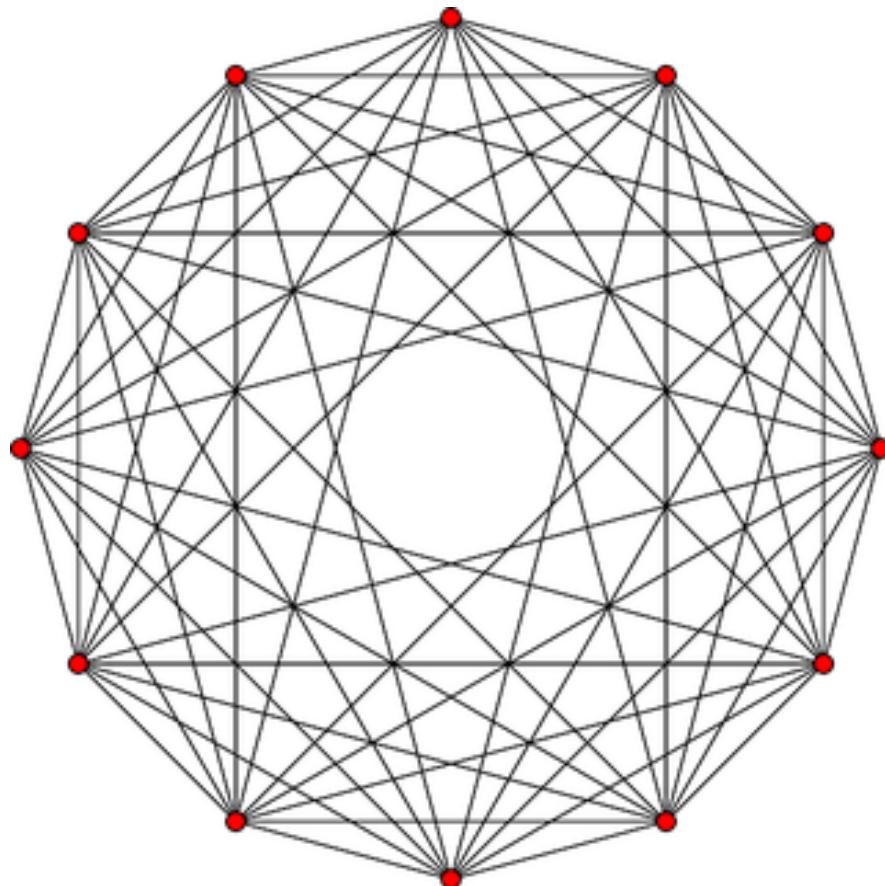


Image: <http://voluntaryistreader.wordpress.com>

Warkworth Case – a significant judgment

Economics

- Court criticised elements of Warkworth's economic modelling, in particular its attempt to put a value on non-market elements such as endangered ecological communities and social impacts
- Economic analysis, such as cost benefit analysis, is of limited assistance to decision making process, which requires balancing of economic, environmental and social factors
- Court concluded that the economic benefits of the mine were outweighed by the negative impacts on social and environmental factors

Warkworth Case – a significant judgment

Social impacts

- Residents of Bulga provided evidence of noise, dust and other social impacts
- Court recognised negative social impacts of noise and dust conditions routinely imposed by Minister for Planning to mitigate impacts of large mines
- Conditions allowing for acquisition of properties in ‘zone of affectation’ have adverse social impacts
- Court recognised that the mine expansion would damage Bulga’s “sense of place”, or solastalgia

Warkworth Case – a significant judgment

Social impacts – ‘Solastalgia’

- Solastalgia has its etymological origins in the concepts of nostalgia, solace and desolation.

I therefore describe solastalgia as the pain or sickness caused by the ongoing loss of solace and the sense of desolation connected to the present state of one's home and territory. It is the 'lived experience' of negative environmental change manifest as an attack on one's sense of place. It is characteristically a chronic condition tied to the gradual erosion of the sense of belonging (identity) to a particular place and a feeling of distress (psychological desolation) about its transformation (loss of wellbeing). In direct contrast to the dislocated spatial and temporal dimensions of nostalgia, it is the homesickness you have when you are still located within your home environment.

- Professor Albrecht

Warkworth Case – a significant judgment

Biodiversity

- Warkworth Sands Woodland EEC – at least 25% of the remnant vegetation would be cleared by the project
- No evidence that the EEC could be regenerated from grasslands
- Court considered this a significant impact to WSW EEC
- Biodiversity offsets not satisfactory
- Offsets must provide flora and fauna species that are ‘like-for-like’ – the offset must protect the **same species** that are being impacted

Court approach to offsets

Like-for-like required for biodiversity offsets

- The Court applied NSW Government guidelines requiring biodiversity offsets to provide flora and fauna species that are ‘like-for-like’
 - the offset must protect the same species that are being impacted by the development.
- This is in contrast to the approach increasingly taken by government in accepting biodiversity offsets that do not require such a high standard of protection for threatened species.



Warkworth NSW Court of Appeal

- Some 12 grounds pressed
- Appeal:
 - Denial of procedural fairness, *inter alia*
 - Cross Appeal
Director Generals Report a fundamental element of consideration for weighting
- Appeal dismissed with costs
- Unanimous decision (Bathurst CJ, Beazley P & Tobias AJA)
- A second win for the environment!

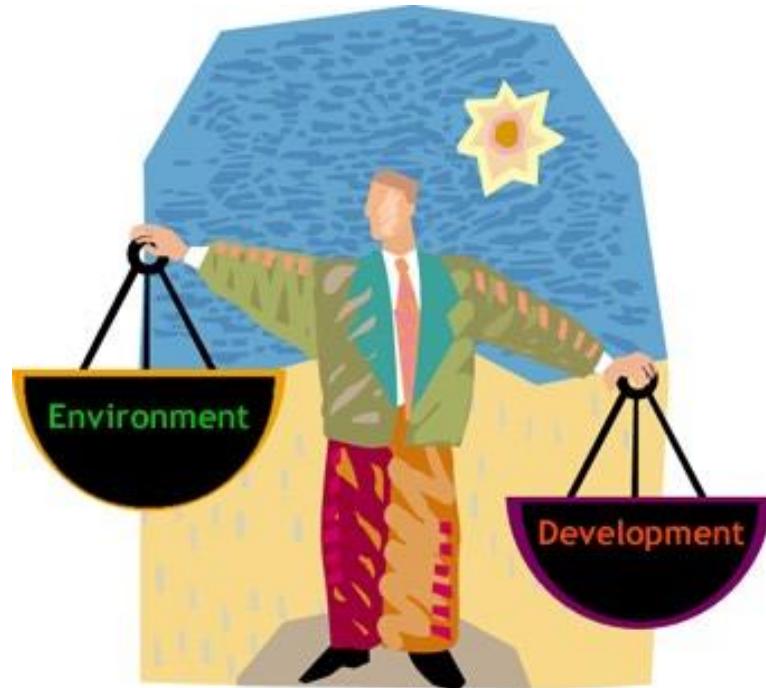


Warkworth – an Earth Centred Approach?

- Community group as conduit or voice for environment
- Environment as key consideration?
 - Court still bound to weigh environment, social & economic impact
 - But emphasis placed on environmental impacts
 - Offsets to be “like-for-like”
 - Precautionary approach to regeneration
- Ethical considerations and public participation?
Court took into account resident concerns
- Ecological economics?
Attempt to value EECs and social impacts found to be flawed

The rules changed - Mining SEPP balance and weight

- *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007-* amendments apply to coal and other minerals, but not CSG
- The economic benefits of a mining project = ‘principal consideration’ for decision-makers for new mining developments and expansions
- The Mining SEPP now prioritises the significance of the resource over other environmental, social and economic considerations in the SEPP
- Consideration of these matters is to be ‘proportionate’ to the significance of the mineral resource, based on advice from the State mining department.



The future – where are we heading?

- A new Development Application has been lodged under the new rules



Image: the globalmail.org

MORE INFORMATION



Free initial legal advice, website, fact sheets and updates

- Free Environmental Law Line Monday-Friday
 - 1800 626 239
- Fact sheets and other resources
- Free weekly eBulletin – updates on environmental law, policy and decisions



THANK YOU - Support our work

- Your support for EDO NSW will help us to:
 - Provide legal advice and representation
 - Promote changes to environmental laws
 - Provide community legal education
- Donations are tax deductible
- <http://www.givewell.com.au/edonsw>

