What's happening to our Environmental Laws?

State of the Environment Summit
Griffith University, Gold Coast campus

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EDO (Qld) Inc.

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Who are we?

• Specialist Community Legal Centre.
• Provide legal advice, representation, education and law reform around public interest environmental law
• Entirely citizen funded
• Not government organisation
• Not private law firm

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Our publications

The Community Litigants Handbook
Third Edition

MINING AND COAL SEAM GAS LAW IN QUEENSLAND
A guide for the community

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Outline

• Restricting community involvement
• Changes to Vegetation laws
• New Environmental Offsets laws
• ‘One stop shop’ - update
• Concerned? What you can do
Restricting community involvement

1. Withdrawal of Funding
2. Changes to Mining laws
3. Changes to Planning laws
4. Skeleton legislation

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Withdrawal of Funding

• July 2012 - Queensland Government withdraw funding
• December 2014 – Federal Govt withdrew funding
• EDO now 100% citizen funded.

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Federal Govt., Senator Brandis

• "... the government's view [is] that legal financial assistance should be directed to disadvantaged Australians who are most in need of legal assistance - rather than using public money on advocacy and lobbying activities... It is vital that vulnerable Australians receive the help they need with their legal problems.”

Responses

The ACT’s Environment Minister, Simon Corbell:
"It's wrong to pitch the needs of vulnerable citizens against the needs of the natural environment."

"It was a grossly irresponsible move of the federal government ... the funding cut means ordinary citizens will no longer be able to get legal advice on environmental issues, but big developers will still be able to fund their advice."

Responses

• “...that community groups of all kinds are free to advocate for systemic change in this country is a mark of our maturity as a democracy. I know, from personal experience, that criticisms from these groups may not be pleasant for governments. But community organisations form a vital part of the conversation in a robust democracy, and their ideas improve the quality of the political and policy debate in this country.”

Changes to Mining laws

Currently anyone can object to a mine:

- Mining lease Application
- Environmental Authority (EA) Application
Objecting to mining leases

- Is the land an appropriate size and shape for mining?
- Does the mining company have the necessary financial and technical capabilities?
- Will the mining conform with sound land use management?
- Will the public right and interest be prejudiced by the granting of the lease?
- Is the mine an appropriate land use taking into consideration the current and prospective uses of the land?

_Mineral Resources Act 1989 (Qld), s 269(4)_
Objecting to EAs

- Objections can be raised based on environmental, or social or economic grounds:
  - Dust
  - water
  - noise
  - biodiversity loss
  - erosion
  - weeds etc.
Proposed Changes

• Restricting *who* can object to mines:
  – To the mining lease, that only ‘affected landholders’ can object in Court
  – To the EA, only ‘site specific’ mines will be publicly notified for objection/appeal

• Restricting *when* someone can object to mines:
  – Must make a *submission* when the Environmental Impact Statement is released or may *lose your rights to object* (also for Coordinated Projects)


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"IT IS OUTRAGEOUS TO EXCLUDE GROUPS AND INDIVIDUALS FROM LONG-STANDING LEGAL RIGHTS TO OBJECT TO PROPOSED MINES"

- ENVIRONMENTAL DEFENDERS OFFICE QLD
Who is ‘affected’?

Unclear at this stage, there is a (similar) definition in the new Regional Planning Interests Act 2014, section 71:

“an owner of land that may be adversely affected because of:

(a) the proximity of the affected land; and

(b) the impact the activity may have.”

(irrelevant parts of s 71 omitted)
"There is no one left in Acland to object to this mine."

Nicki Laws, Oakey Coal Action Alliance
What is ‘site-specific’?

- Unclear. Will depend on ‘eligibility criteria’
- As a guide, out of 100 applications per year, about 90 of those are not site-specific.


- On average 90% of mining projects may go without any public notification except to those directly affected
- Govt. says will release criteria to public
- Watch EDO website and EHP website for this

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Changes to Planning Laws

• Up Until November 2012: each party pays their own costs unless the Court orders otherwise

• Changed to: Costs are now in the ultimate discretion of the Court
Discretion of the Court

- the relative success of the parties
- the commercial interests of the parties
- where the proceeding involves an issue that affects, or may affect, a matter of public interest
- whether a party commenced or participated in the proceeding:
  - for an improper purpose
  - without reasonable prospects of success
- where a party has acted unreasonably in the proceeding or in the lead up to a proceeding
- where a change to an application on which the decision being appealed has been made

SUSTAINABLE PLANNING ACT 2009 - SECT 457
Changes to Planning Laws: Introduction of SARA

• Single State Assessment and Referral Agency:
  a single agency lodgment and assessment point for development applications, where the state has a jurisdiction. Under the new arrangements, the chief executive of SPA is the assessment manager or referral agency for all development applications where the state has a jurisdiction.

• Other departments like DEHP will still provide technical advice, **but final say rests with SARA**
Changes to Planning Laws Single State Planning Policy

- Replaces 13 existing State planning policies
- EDO raised concerns that the draft did not provide adequate protection for the Great Barrier Reef, nor advance the purpose of ‘ecologically sustainable development’ as required under SPA.
- The language was broad and inconclusive and vague
- Reduced protection for rare, near threatened and least concern wildlife
Skeleton Acts

- Tendency to put important rights and criteria into Regulations and Policy
- Ultimate discretion with Govt
- Reduction in transparency and accountability
- E.g. “Any other factor the Minister considers appropriate”
Skeleton Acts

“Skeleton acts raise a number of concerns, ranging from the transfer of substantively important legislative power from the parliament to the executive, and the diminution in the transparency of a legislative process increasingly conducted without parliamentary debate.”

EDO’s concerns

• Regional Interests Planning Bill 2014, went before a Parliamentary Committee (now passed).

• The Bill left significant decision making criteria to regulations yet to be seen and which totally subverted the parliamentary scrutiny process and was ultimately undemocratic.
Skeleton Act For Resource Tenures: A new Mega Act?

- New Mega Act proposed
- Pull all resource tenures into one Act
- You can get involved!

Check DNRM’s website for release of discussion papers (still early)
Why a mega Act?

“The current tenures administration system is characterised by separate legislation for minerals and coal, petroleum and gas... As it has evolved, the legislative framework has become complex and inefficient to administer.

“Queensland mining, petroleum and energy resources legislation is one of the most lengthy in the developed world. Compared to an equally sized jurisdiction with similar mining industry complexity, Alberta (Canada) has 27 per cent of Queensland's regulatory volume.”


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Changes to Vegetation laws
Vegetation management framework

• The *Vegetation Management Act* (VMA) operates with *Sustainable Planning Act* (SPA)

• two areas fall outside of the VMA/SPA system:
  – clearing for mining/gas and other ‘resource’ projects;
  – areas protected by the *Nature Conservation Act* (such as national parks)
Restoring the ‘balance’??

“These reforms restore much needed balance to the State’s vegetation management framework—a set of laws that had become so skewed towards supposedly protecting the environment that they forgot about protecting people...twenty years of Labor allowed the pendulum to swing too far towards radical green policies that threatened the ability of landholders to effectively manage their businesses and maintain productivity.”

Hon. AP Cripps, Minister for Natural Resources and Mines, State Parliament, 20 March 2013
What are the changes?

- Under the law, clearing can only be undertaken for a ‘relevant purpose’

- New relevant purposes:
  - clearing for ‘high value agriculture’
  - ‘irrigated high value agriculture clearing’ and
  - ‘necessary environmental clearing’.
High value agriculture clearing??

- “Clearing for annual and perennial horticulture and broad acre cropping.”
Irrigated high value agriculture clearing

- clearing for annual and perennial horticulture and broad acre cropping, in addition to pasture (for example, pasture-based dairy farms), which requires irrigation.
‘Necessary Environmental Clearing’?

- restore the ecological or environmental condition of the land;
- to divert existing natural channels in a way which replicates the existing form;
- to prepare for natural disasters which have a high likelihood of occurring; or
- for the removal of contaminants on the land.
Creation of Self-Assessable Codes

- Purpose is to allow self-assessable clearing (without a permit) for:
  - Maintaining fences or firebreaks
  - Fodder harvesting
  - Property infrastructure
  - Thinning
  - Managing encroachment

- If the clearing activities comply with a code, landholders don’t need a permit provided they notify the department.
Clearing regrowth
Clearing regrowth

- High value regrowth vegetation on freehold and indigenous land will no longer be protected
- These areas were cleared in the past, are now rehabilitating and in some instances may be up to 40 years old.
Riverine Protection Permits

• Removal of requirement for River Protection Permit (under the Water Act) to destroy vegetation in a watercourse.

• A permit may still be required under SPA (unless an exemption applies).

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Vegetation clearing offences...

- Reversal of onus of proof so that all elements of the illegal clearing must be proved beyond reasonable doubt by the prosecution
- An honest mistake is a defence to clearing
- The guide for deciding a penalty for a clearing offence has been removed
- Will this result in an increase in clearing?
  - Unclear. WWF estimates that unexplained and possibly illegal clearing represents 12.5% of all clearing (WWF bushland at risk of renewed clearing Report (Dr M Taylor, 2013)
What will these changes mean for biodiversity?

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WWF report estimates...

- 1.3 million ha of mature bushland at risk due to ‘high value’ agriculture clearing = 184 million tonnes of Carbon Dioxide.
- 700,000 hectares of high conservation value regrowth at risk. 79% of which is protected due to presence of threatened species or endangered ecosystems.
- Regrowth bushland holds 46 million tonnes of carbon dioxide. Allowing it to grow to maturity would absorb additional 139 million tonnes.
Where can I get more information?


(Available online)
Environmental Offsets

What do we understand by the word ‘offset’?

**noun:** “a consideration or amount that diminishes or balances the effect of an opposite one.”

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Federal Government says offsets are...

“a conservation action that is intended to compensate for the negative environmental impacts of an action, such as a development.”

Or....

“measures that compensate for the residual impacts of an action on the environment, after avoidance and mitigation measures are taken...”
‘Compensate??’
Queensland Government says offsets are...

- Offsets are “to counterbalance permanent or temporary impacts or loss on ... resources”
  
  FHMOP 005.2: Marine fish habitat offset policy (PDF, 332.7KB)

Or

- “environmental offset means works or activities undertaken to counterbalance the impacts of a development on the natural environment.” (SPA s 346A(8))
‘Counterbalance’??
The Legal Framework for offsets
The ‘hierarchy’ approach

AVOID

MITIGATE

OFFSET

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Avoid, Mitigate, Offset

Both Fed and Qld are adopting this approach

Recall the Queensland Government’s definition:

“measures that compensate for the residual impacts of an action on the environment, after avoidance and mitigation measures are taken…”

Pop Quiz

How much land in Queensland do you think will be totally ‘avoided’?
All coal, gas and geothermal exploration and production tenures in Queensland

Source: IRTM Map (DNRM website) 30.01.14
Mitigation?

• If the impacts can’t be ‘avoided’, then the developer is asked to move to ‘onsite mitigation measures’

= Effectively conditioning the development: requiring monitoring, data analysis, plans, different extraction techniques etc.
Get Involved!

Does the proponent make it clear that all ‘cost effective’ mitigation measures have been canvassed?

Can the Govt be satisfied of this?
Get Involved!

“offsets [are not supposed to] make unacceptable actions acceptable.”

Are offsets being proposed for actions which would otherwise be unacceptable?


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Example

China First – Bimblebox nature reserve
Bimblebox Nature Refuge

• 8,000 hectare
• 30km north of Alpha and 450km west of Rockhampton
• Contains ‘remnant semi-arid woodlands with an understorey largely made up of native shrubs, forbs and grasses’ Over 150 different species of birds
• In May 2011 the endangered Black Throated Finch was sighted on Bimblebox. (Source: bimblebox website)
• At the time of gazettal of the refuge “the underlying coal resources were known but no coal exploration tenements had been issued.” (Source: CG’s EIS report)
Bimblebox

http://bimblebox.org/gallery/  Sonya Duus

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Bimblebox

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China First

• Part of Galilee Coal Project (Northern Export Facility)
• Massive ‘Coordinated Project’
  – 4 x underground coal mines
  – 2 x open-cut coal mines
  – 453 km standard-gauge railway line to Abbot Point
• Approved by Coordinator General in August 2013.
• Given Federal approval on 19 December 2013
Coordinator General EIS Report

“The BNR will be significantly impacted by the GC project with approximately half of its area subject to direct clearing and open-cut mining and the balance largely underlain by underground mining and likely to be impacted by subsidence.”
Coordinator-General’s EIS Report.

“On balance, while I recognise the values of the BNR, I do not consider them sufficiently high or unique to find that the project should not proceed in the interest of saving the BNR. I do, however, recognise the loss that will result from disturbance of the BNR and require Waratah to compensate the State for the lost biodiversity, conservation and educational values by including in its offset proposal, a direct offset area of at least the size of the BNR and of equivalent or higher ecological value, capable of being secured as a nature refuge or higher conservation tenure. I am advised by DEHP that suitable offset sites of similar size and equal or better ecological value are available within the bioregion to replace the BNR.”
Federal Approval
Galilee Coal and Rail Project

- Offsets required to *compensate* for ‘authorised’ unavoidable impacts on MNES
- Must establish or contribute $100,000 for 10 years to a ‘pool of funds’
- For development and implementation of research programs.
- In addition, the ‘minimum offsets’ which must be secured are…
## Offsets required for EPBC listed threatened species

<table>
<thead>
<tr>
<th>Species</th>
<th>Required offset: Primary Habitat</th>
</tr>
</thead>
<tbody>
<tr>
<td>Black-throated Finch</td>
<td>10,000 hectares</td>
</tr>
<tr>
<td>Squatter Pigeon</td>
<td>6,000 hectares</td>
</tr>
<tr>
<td>Red Goshawk</td>
<td>383 hectares</td>
</tr>
<tr>
<td>Northern Quoll</td>
<td>500 hectares</td>
</tr>
<tr>
<td>Yakka Skink</td>
<td>5,800 hectares</td>
</tr>
<tr>
<td>Ornamental Snake</td>
<td>270 hectares</td>
</tr>
<tr>
<td>Dunmall’s Snake</td>
<td>72 hectares</td>
</tr>
<tr>
<td>Threatened Ecological Community</td>
<td></td>
</tr>
<tr>
<td>Brigalow (Acacia harpophylla dominant and co-dominant)</td>
<td>199 hectares</td>
</tr>
</tbody>
</table>

Offset management Plan

• Federal Approval said that Waratah “must submit an Offset Management Plan to the Minister”

• The Offset Management Plan must be ‘approved’ by the Minister in writing prior to the commencement of Project Stage 2.

• Amendments can be made.
‘One stop shop’ - update

• approval bilateral agreement ensures that only one decision - which accounts for both state matters and matters of national environmental significance - is required.

• covers approvals on major projects under the State Development and Public Works Organisation Act 1971 (Qld) and resource projects under the Environment Protection Act 1994 (Qld).
Have your say!

• Goal is to have one stop shop arrangements, including negotiations on assessment and approval bilateral agreements, concluded by September 2014, and December 2014 in Victoria

• The draft approval bilateral agreement with Queensland is open for public comment until Friday 13th June.

Concerned? What you can do?

- Keep up to date
- Law Reform opportunities (Qld and Cth), Local Plans, Regional Plans
- Write to local member about any concerns
- Join local group
- Collect and disseminate data, publish articles
- Take an interest in particular projects which might effect the environment (public interest submission and appeal rights still exist)
- Use twitter, facebook to garner support for your cause

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Access to Justice…. Some things are just not negotiable

Please donate:

http://www.chuffed.org/project/EDO/

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