The Changing Face of Environmental Litigation

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Introduction

This paper looks at the removal of Commonwealth government funding to Environmental Defenders Offices (***EDOs***), and at a few key legislative changes in Queensland relating to mining and planning that will affect public interest environmental litigation in Queensland.

Paradoxically, this is at a time when there are a record seven public interest proceedings pertaining to mining in Queensland and protection of the Great Barrier Reef, with the Environmental Defenders Office Queensland (***EDO Qld***) on the record in various Courts as well as the Administrative Appeals Tribunal.

Defunding of Environmental Defenders Offices

If members of community groups cannot obtain legal support then they cannot effectively participate in Court processes, be they merit appeals or enforcement actions. It is well established that to run public interest litigation, the ingredients almost always necessary include open legal standing rights, costs rules sympathetic to the public interest, legal resources and a well-based legal case. EDOs are community legal centres which have helped in part to overcome the imbalance of resources for the community compared to government and developers. EDOs have provided professional representation in scores of public interest cases over the years to those seeking to protect the environment.

On 17 December 2013, the new Commonwealth Attorney-General the Hon. George Brandis QC wrote to each EDO advising that their Federal funding, increased under Attorney-General Mark Dreyfus QC, would cease. This has meant that EDOs have struggled with varied success to obtain replacement private funds to continue to provide services, while still providing some much needed services to communities affected by development, coal seam gas and mining proposals. EDO Qld was defunded by the new Queensland Government in 2012. Novel funding types such as crowd funding are being explored but are not a satisfactory substitute for consistent government funding.

Certainly, the mining industry lobbied against continued funding of EDOs. This year, the industry also successfully lobbied to cut most long standing public rights to object to the Queensland Land Court against mining leases and environmental authorities for mining.

Reductions in public objection rights to the Queensland Land Court

This year, the Queensland Government removed most long established rights for any person or group to make a formal objection to the environmental authority and mining lease for any proposed mine to the Queensland Land Court. Those changes are set out in the *Mineral and Energy (Common Provisions) Act 2014* (Qld). Not all of those provisions have yet commenced operation.

It is established knowledge that mining projects and infrastructure pose grave risks to the environment, and it is in the public interest that there is the widest possible community scrutiny of such proposals to identify and properly consider such serious potential impacts. Public objection

[1] Paper presented at NELA Conference 2014: *Transformation or Train Wreck? Environmental and Climate Change Law at the Crossroads*.

rights enable the costs and benefits of proposed mines to be debated openly and transparently in the Land Court, and are a valuable deterrent to government and corporate corruption.

This public right has been overtly disregarded by the Queensland Government, which has justified its actions by talking-up the benefits of streamlining mining approvals and alleging that individuals and groups have been deliberately lodging objections to delay or obstruct mining projects, rather than for valid relevant grounds under law. EDO Qld and indeed the Queensland Parliamentary library's research during the Parliamentary Committee hearing into the reforms in 2014, found there was no evidence of such deliberate delay or disruption by community group objectors using the Land Court mining objection process.

In fact, Land Court objectors have traditionally been hardworking, honest and responsible people concerned about the array of potential impacts of mining on the environment.

Alpha Coal Mine case[2]

A prime example of the importance in maintaining third-party objection rights is the Alpha Coal case in which groundwater issues were not adequately addressed by the Queensland Coordinator-General during the State government assessment process. The case concerned a massive proposed coal mine for the Galilee Basin, Queensland.

The case was heard in the Land Court in 2013 and the objectors included local landholders – the Andersons, the Curries and Paola Cassoni – concerned citizen Katheryn Kelly and conservation group Coast and Country Association of Queensland (this last group represented by solicitors EDO Qld). These objectors raised legitimate, immensely important and professionally presented issues, including the potential impact of the massive coal mine on local economies and regional groundwater, as well as contribute to climate change.

On 8 March, this year the Land Court agreed with the objectors that:

> "... there is insufficient hard data to have a sufficient level of confidence that groundwater impacts will be as predicted by the model (groundwater modelling as set by Hancock)."[3]

That Land Court decision is subject to two judicial review actions in the Queensland Supreme Court.

The withdrawal of public notification and most objection rights set out in the *Mineral and Energy (Common Provisions) Act 2014* (Qld) means that local communities – including Natural Resource Management groups, community groups and many important stakeholders – may not be made aware of proposed mining activities in their community. If the mining project is a 'coordinated project' declared under the *State Development and Public Works Organisation Act 1971* (Qld) such as Alpha coal mine then in the future it is up to the Coordinator General to determine whether public objection to the Land Court apply in the case of that project.

Another significant change relevant to environmental litigation is changes to costs rules in the Queensland Planning and Environment Court.

Cost issues in the Planning and Environment Court

The Queensland Land Court, where the Alpha case was heard has a discretion as to costs. By contrast for over 20 years the Queensland Planning and Environment has had rules that the each side pays his or her own costs, subject to exceptions. This meant that community groups with a reasonable case could go to that Court in the public interest.

Despite a lack of evidence that these provisions were abused, by amendments to the *Sustainable Planning Act 2009* (Qld) the Court's powers were changed to a discretion and other elements. This

[2] *Hancock Coal Pty Ltd v Kelly & Ors and Development of Environment and Heritage Protection* [2014] QLC 12
[3] Ibid at 193, page 87.

has created uncertainty amongst community groups who are now more reluctant to use that Court. In some cases there is no opportunity to go to Court due to special legislation.

Special legislation to benefit particular groups

This year, the *Electoral Reform Amendment Act 2014* (Qld) was enacted in order to reverse changes to the electoral funding system put in place by the previous Labor government in 2011. This makes it harder to scrutinise the potential impact of supporters' donations on the legislative process and assessment of development applications by the State government.

Development and mining approvals are immensely valuable business assets. However community groups are deprived of opportunities to challenge decisions when special legislation is passed as has happened in a number of cases in Queensland recently. The fact Queensland has only one House of Parliament also means reduced scrutiny of contentious legislative reforms.

Around the 2012 Queensland election, mining company Sibelco made a large, undisclosed donation to the Liberal National Party election campaign, as well as engaging in a public relations campaign against the proposed ending of sand mining on Stradbroke Island by 2019. Subsequently, the elected Newman Government passed special legislation[4] allowing the option for Sibelco to extend sand mining on Stradbroke Island to 2035, and bypassing the normal approvals process that would be required for such an extension.[5]

Karreman Quarries, a large donor to the Liberal National Party, was the subject of Department of Natural Resources investigation relating to unlawful extraction of quarry material from the Brisbane River. This prosecution was sidestepped by a legislative amendment that retrospectively legalised Karreman's activities. The amendment was secretly inserted, without general notice, into other legislative amendments relating to the *Water Act 2000* (Qld).[6]

For the full set of papers and presentations from the NELA Conference 2014, go to www.nela.org.au/NELA/Events/National_Conference_2014_Presentation.aspx

[4] *North Stradbroke Island Protection and Sustainability and Another Act Amendment Act 2013* (Qld), Act No. 63 of 2013.
[5] Stephen Keim 2014, 'Clive Palmer, Jeff Seeney and Campbell Newman's Straddie donation', *Independent Australia* 10 June 2014, available at: https://independentaustralia.net/politics/politics-display/seeney-palmer-and-campbell-newmans-straddie-donation,6564, viewed 17 Nov 2014.
[6] Mark Willacy 2014, 'Queensland LNP donor Karreman Quarries escapes prosecution for illegal quarrying after Depty Premier orders legislation change', *ABC Online* 23 June 2014, available at: http://www.abc.net.au/news/2014-06-23/karreman-quarries-escapes-prosecution-for-illegal-quarrying/5543896?pfm=ms, viewed 17 Nov 2014.