



Environmental law, EIA and the role of environmental consultants

Flora and Vegetation in EIA Symposium

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Environmental Defender's Office WA

EDOWA – the State’s public interest environmental lawyers

- We are a not for profit community legal centre
- Our work – public interest environmental law:
 - Litigation and legal advice;
 - Community legal education;
 - Environmental policy and law reform;
 - Fundraising!
- We act for a range of clients:
 - Community groups
 - Large NGOs
 - Traditional owners

EDOs across Australia

- EDOWA founded in 1996
- EDO in every State and Territory (except Victoria)
- EDOs of Australia established in 1996
- Independent but collaborate on issues of national significance (including law reform submissions)



We act for a range of clients on public interest environmental law matters....

Environmental NGOs



Community

- Local action groups, eg:
 - Esperance
 - Exmouth
 - Albany
 - Dalyellup
- Traditional Owners (eg Kimberley)

What is a public interest environmental law issue?

- has significance beyond a material or financial interest of a particular person or group
- involves a real threat to environment
- has the capacity to result in good environmental outcomes;
- concerns manner in which the environment is regulated; and
- raises matters regarding the interpretation and administration of the law

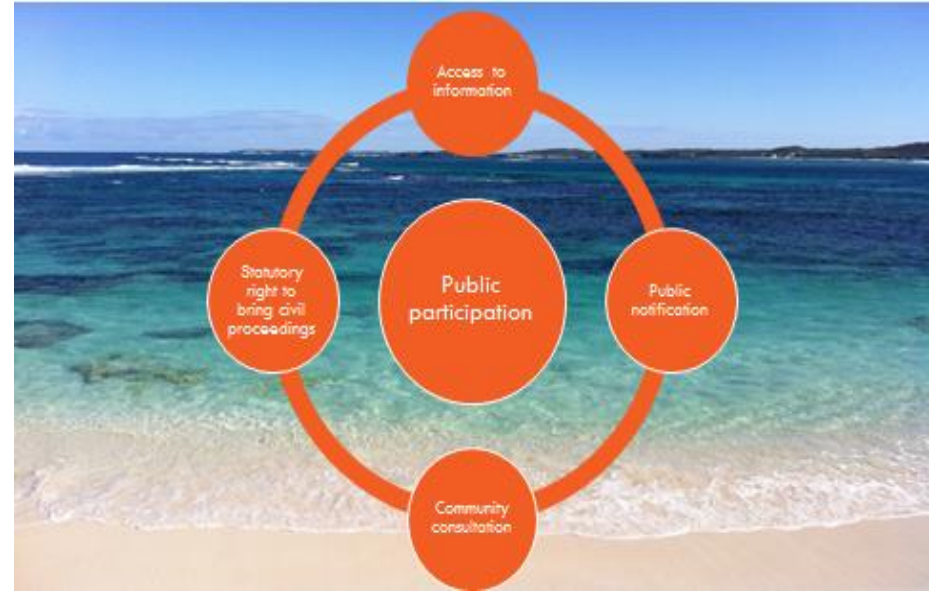
Eg: using the law to protect habitat!



Some key elements of public interest environmental law

Not in all jurisdictions (hence the need for reform!)

- Right to access information (not just through FOI)
- Right to have a say (public participation)
- Independent EIA & decision makers
- Right to bring legal action, eg:
 - Merits review
 - Judicial review
 - Civil enforcement
- Mining Act – Minister’s ‘public interest’ discretion (eg Helena Aurora Range)
- May involve a specialised court or tribunal
 - In NSW / Qld
 - Not WA (Ministerial appeals instead)



Most of these environmental laws will be relevant to the day to day work of botanists or other environmental consultants

Examples of Laws:

- *Environmental Protection Act 1986 (WA)*
- *Mining Act 1978 (WA)*
- *Mining Rehabilitation Fund Act 2012*
- *Petroleum & Geothermal Energy Resources Act 1967 (WA)*
- *Planning and Development Act 2005 (WA)*
- *Biodiversity Conservation Act 2006 (WA)*
- *Rights in Water & Irrigation Act 1914 (WA)*
- *Environment Protection and Biodiversity Conservation Act 1999 (Cth)*

Examples of issues:

- Illegal land clearing, pollution and environmental harm
- Environmental impact assessment
- Licensing / works approvals
- Environmental considerations in mining, petroleum and resources operations
- Planning assessment considerations of environmental
- Duties of directors and management of companies

EP Act – Part IV – A quick EIA refresher!

- EIA recognised in international, national and State environmental law
- For **proposals** likely to have a **significant** effect on **environment**
- Process:
 - **Referral** to EPA
 - **no requirement on proponent** to refer, but approval provides defences/exemptions to other laws. Also risk others referring.
 - **any person** may refer (incl proponent; 3rd party)
 - **decision maker** “must” refer a “significant proposal” (eg DMIRs)
 - referral not permitted in some cases (eg if already been referred)
 - EPA decides **whether to assess** proposal
 - appeal to Minister
 - **If EPA decides to assess:**
 - all other decision makers are prohibited from issuing approvals until Minister’s decision made
 - offence to implement until Minister approves
 - exception to offence: minor and preliminary works can be approved by EPA

EP Act – Part IV – EIA Cont'd

- EPA sets “**level**” of **assessment** (eg public review) and scope of assessment
 - Will help define environmental work / studies required to be done
- Proponent (with **advice from botanists and other consultants**) prepares and finalises assessment documents
 - Includes **surveys** and analysis of likely impacts on environment and proposed management measures
 - **public review** / consultation / comments
 - proponent response
- **EPA prepares report** and recommendation for Minister for Environment
 - Environmental issues only (*Coastal Waters case*)
 - Appeal to Minister
- Ministerial and other decision-maker consultation process
 - Can include non-environmental considerations
- Implementation decision and condition setting (**Ministerial Statement**)
 - decision must be consistent with EPA report appeal decision
 - appeal on conditions only (proponent only)

EP Act – Part V – Native vegetation, licensing and pollution / environmental harm offences

- Matters regulated or provided for under Pt V:
 - Native vegetation clearing controls (ie Clearing Permits)
 - Works approvals and licences
 - Notes orders and directions (Environmental Protection Notices, Vegetation Conservation Notices, Closure Notices)
 - Pollution; Environmental Harm; Unreasonable Emissions; Waste
- Focus today on clearing permits

EP Act – Part V - Clearing Permits

Offence to clear native vegetation unless:

- have clearing permit; or
- exemption under EP Act; or
- exemption under EP Regs (do not apply in environmentally sensitive areas)

EP Act – Part V - Clearing Permits

- Applications assessed by DWER / DMIRS (depending on activity)
- Permit assessment reliant on quality of survey information and analysis of this information
- Dept must “have regard to...the clearing principles”
- Clearing Principles – EP Act, Schedule 5:
 - Circumstances in which native vegetation “should not be cleared”
- DWER / DMIRS’ assessment as to whether clearing is at variance with clearing principles will depend on quality of information before it (including survey information)
- Written reason if approved clearing “seriously at variance” with a clearing principle

Some examples of the Clearing Principles – Sch 5, EP Act

Native vegetation should not be cleared if —

- it comprises a **high level of biological diversity**; or
- it comprises the whole or a part of, or is necessary for the maintenance of, a **significant habitat for fauna** indigenous to Western Australia;
- it includes, or is necessary for the continued existence of, **rare flora**;
- it comprises the whole or a part of, or is necessary for the maintenance of, a **threatened ecological community**;
- it is significant as a **remnant of native vegetation** in an area that has been extensively cleared;
- it is growing in, or **in association with**, an environment associated with a **watercourse or wetland**;
- the clearing of the vegetation is likely to have an impact on the environmental values of any **adjacent or nearby conservation area**;

The role and importance of surveys in these EP Act processes

- Provide crucial information to inform the EPA and other decision makers (including the Minister) in the environmental impact assessment clearing permit process.
- Key decisions relying on good environmental information such as:
 - Whether a proposal should be assessed
 - Level of assessment
 - Recommendation as to approval
 - Approval (or not!) and conditions to be applied
 - Information for appeals
 - Whether a clearing permit required (or exemption)
 - How do survey results inform assessment against clearing principles?
- These processes, which are implemented through the law, are reliant on quality and accurate information
- Public process – therefore not just the client that reviews and relies on the information

Legal and other considerations for surveys

- Are you obtaining an “approval” or undertaking an “assessment”?
 - **Hint:** EP Act, Part IV entitled: “Environmental Impact Assessment”
- Who is the survey being undertaken for and who will rely on the survey information?
 - client vs EPA vs broader public
- There are a range of interests which environmental studies are likely to affect, and conflict with.

“It is conceivable that an environmental study may have to take into account each of these interests in a way that satisfies the contractual responsibilities of the consultant to their client but also any statutory and common law responsibilities of a wider nature”

(Fisher DE: “Legal Pitfalls for Environmental Consultants”, *EPLJ*)
- Whether they are entitled to or not, numerous parties may rely on survey / assessment information:
 - Land owner; purchaser; lender; insurer; developer of resource; government; community; potential objectors etc etc
- What are client imperatives? Approvals; cost; quality; schedule; reputation; social licence?

Legal and other considerations for surveys

- Ethics and codes of conduct are often grounded in or guided by law
 - **ECA Code of conduct**, examples!
 2. The responsibility of members to the community will come before their responsibility to the profession, to sectional or private interests, or to other consultants
 4. Members will not condone misrepresentation or misuse of work they have carried out or directed;
 6. Members will uphold the honesty, standing and dignity of the profession in all matters
 7. Members will maintain their skills and knowledge throughout their careers;
 8. Members will only practice in areas in which they are competent.
- Legal example – EP Act, s112:

“A person who, in purporting to comply with a requirement made by or under this Act to give information to the Authority, the CEO, an authorised person or an inspector or a police officer, **gives or causes to be given information** that to his knowledge is **false or misleading** in a material particular commits an offence.”
- Implications for false / misleading survey information? (case examples to come!)

Some risks for incomplete / inadequate surveys

- Longer assessment / approval time
- Loss of public confidence / licence to operate for client (developer)
- Appeals
- Reputation of consultant with regulator / potential clients / public
- Requirement for changes to approvals / Minister “call in” power if unforeseen environmental impact

Case study: *DECC v Orogen Pty Ltd [2010] NSWLEC 144*

- Environmental consultant advice on approvals for project
- Consultant (and client) guilty of providing incorrect advice to regulator under *National Parks and Wildlife Act* (NSW)
- Failed to advise developer that koala habitat could not be cleared without licence
- Clearing occurred without licence (3.7ha of high quality koala habitat and narrowed a koala habitat corridor link)
- Court penalty:
 - Fine, costs of litigation and requirement to undertake koala habitat mapping (cost \$150k).
 - Publication of decision in several newspapers
- Justice Pain:

“The offences underscore the importance of consultants... advising those engaged in the property development process to ensure they undertake work only within their area of competence. I surmise that these prosecutions will provide an important signal to those engaged in similar activities of the need to ensure that correct advice is given.”

Case study: *Environment Protection Authority v Aargus Pty Ltd* [2013] NSWLEC 19

- Property owner in western Sydney required additional topsoil for landscaping project
- Local council officers inspected stockpiles of imported soil and observed construction and demolition waste and suspected asbestos
- Property owner then engaged consulting firm Aargus
- Aargus project manager inspected stockpiles and observed two pieces of suspected asbestos fibro cement, but he saw no other asbestos materials. He removed the pieces of suspected fibro and took samples of the remaining soil stockpile.
- Argus analysis of the soil samples found no asbestos. Issued a “Soil Classification Report” and an Asbestos Clearance Certificate stating the at the stockpiles contained no asbestos
- Council officers re-inspected the property and saw several pieces of suspected asbestos in the stockpiles
- Council requested Aargus to prepare another report. This identified presence of asbestos in the stockpiles and recommended remediation

Environment Protection Authority v Aargus Pty Ltd [2013] NSWLEC 19

- EPA inspection - issued a clean up notice
- EPA also seized the pieces of possible asbestos in the bin outside the Aargus office which tested positively for asbestos. It then prosecuted Aargus, its project manager and its environmental manager for breach of section 144A of the Protection of the Environment Operations Act 1997:
 - “a person who supplies information, or causes or permits information to be supplied, that is **false or misleading in a material respect** about waste to another person in the course of dealing with the waste is guilty of an offence”
- Defendants pleaded guilty. Therefore only concerned with penalty
- The project manager admitted that statements in initial reports that no asbestos fibro was observed was misleading. He had in fact observed two pieces of suspected asbestos fibro in his first site visit.
- Consultant: "At the end of the day we're there to help the owners. We are engaged by the owners of the site, and it wasn't my intent to be misleading."
- The environmental manager made similar comments, emphasising a desire to minimise cost to the client.
- Court concerned with consultants' approach. Imposed fine.
- EPA sought publication of offence on consultant's website for 12 months. Not ordered by court. But risk still there.

Thank you!

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Photo Courtesy Cara Ratajczak