



Speaking for the Environment; Standing and Litigation in Environmental Law

Natasha Hammond-Deakin, Senior Solicitor

WildLaw Workshop, Sydney



EDO – Lawyers for the Environment

- Community legal centre specialising in public interest environmental law
- Non-government and not for profit
- Mission: To empower the community to protect the environment through law
- Part of a network of 9 EDOs across Australia



NSW Environment and Planning Laws

- Anthropocentric – humans first
- Development focused – human needs and desires
- Weighing of numerous competing objectives - environment, social, economic
- Ecologically Sustainable Development including Precautionary Principle - only one objective
- Environment is subsidiary
- Cumulative impact ignored

Environmental Planning and Assessment Act 1979 (NSW)

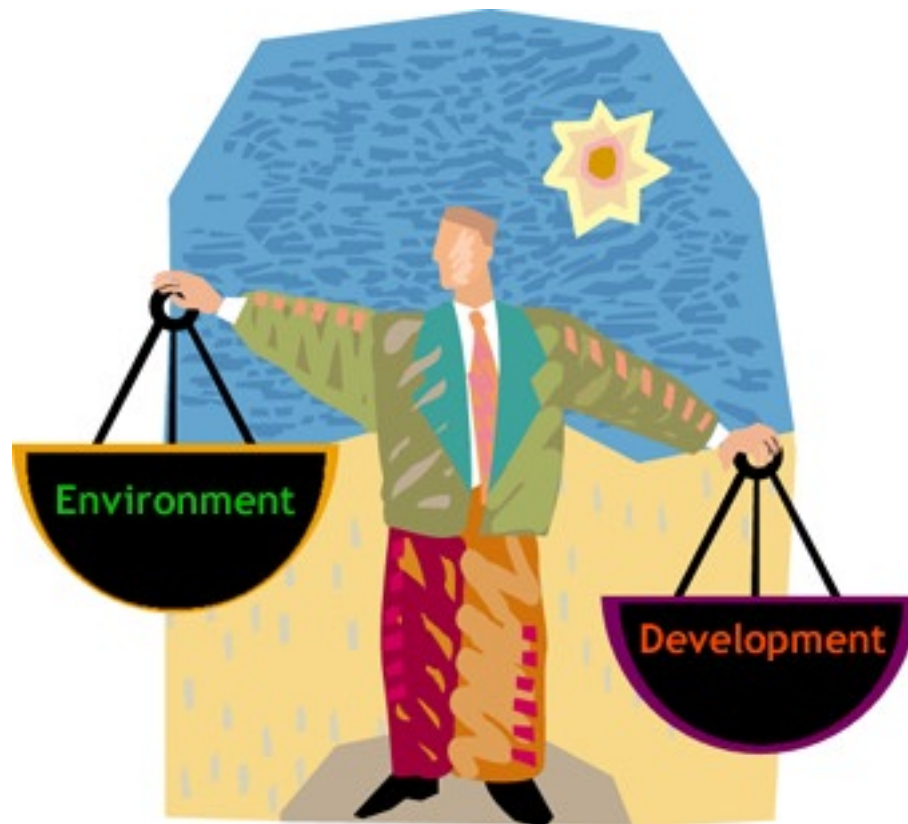
Section 3 – Objects

(a) to encourage:

- (i) proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment,
- (ii) promotion...of the orderly and economic use and development of land,
- (iii) protection, provision and co-ordination of communication and utility services,
- (iv) provision of land for public purposes,
- (v) provision and co-ordination of community services and facilities, and
- (vi) protection of the environment, including the protection and conservation of native animals and plants, including threatened species, populations and ecological communities, and their habitats, and
- (vii) ecologically sustainable development, and
- (viii) provision and maintenance of affordable housing

...

Environmental protection through conditions



Public Interest Litigation – A Voice for the Environment

- Open standing

S.123 EPA Act

“Any person may bring proceedings in the Court for an order to remedy or restrain a breach of this Act, whether or not any right of that person has been or may be infringed by or as a consequence of that breach.”

- Specialist jurisdiction – NSW Land and Environment Court
- Public interest costs discretion
- Barriers:
 - Security for costs
 - Usual costs rule; loser pays



Types of Litigation

- Judicial Review
- Merit Appeals
- Third Party enforcement proceedings



Warkworth case

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



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

Preston CJ's decision - A polycentric problem

- The range of interests affected, and the complexity and interdependence of the issues means that decision-making involves a polycentric problem. The resolution of one issue will have repercussions on the other issues, and the other issues may change in nature and scope depending on how the first issue is resolved.
- Decision maker must determine the relevant matters to be considered in deciding whether or not to approve the project, and also *subjectively* determine the weight to be given to each matter and balance those weighted matters.
- Extension refused, due to significant and adverse impacts on biological diversity, and adverse noise, dust and social impacts on Bulga village.

Warkworth case

Preston CJ's decision - 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 here, 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

Preston CJ's decision - 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

Warkworth case

Preston CJ's decision - Social impacts

- Residents of Bulga provided evidence of noise, dust and other social impacts
- Court recognised detrimental 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 – an Earth Centred Approach?

- Community group as conduit or voice for environment
- Environment as key head of consideration?
 - Court still bound to weigh environment, social, economic
 - 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

EDO NSW

Defending the Environment; Advancing the Law

Natasha Hammond-Deakin
Senior Solicitor

www.edonsw.org.au