

The Law and Wombats



BJ Kim – EDO NSW
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Purpose and overview

Purpose

- ▶ Who we are and how we can help.

Overview

- ▶ The Environmental Defender's Office
 - who, what, when, how?
- ▶ The law and wombats
 - licenses to cull
 - development proposals and wombats
 - case studies

EDO – who we are...

- ▶ Community legal centre focussed on public interest environmental law
- ▶ NGO – completely independent of government
- ▶ ANEDO – Australian Network of EDO's



EDO – what we do...

- ▶ Help the community protect the environment using the law
- ▶ Don't campaign but provide legal services
- ▶ Free advice line
- ▶ Cases, policy advice, education
- ▶ Clients: individuals/activists, community action groups, local environmental organisations and international environmental organisations.



EDO – when...

- ▶ EDO NSW established in 1985
- ▶ 25th anniversary in 2010



EDO – how we do it...

Core areas of operation

- Litigation and legal advice
- Policy and law reform
- Scientific and technical advice
- Community programs (Education, International, Indigenous)
- Media and communications



Priority areas	Examples
Climate Change and Energy	<i>Challenging approvals of coal-fired power stations (Bayswater B and Mount Piper), coal mines (Ulan, Duralie)</i>
Planning and development	<i>Engagement in the planning process, testing planning law (Part 3A), challenging unsustainable development</i>
Biodiversity conservation	<i>Japanese whaling case, Bats case, Biodiversity Conservation paper for NCC</i>
Natural resource management	<i>Snowy River case, Murray Darling Basin Plan submission, Mining law reform paper</i>
Environmental justice	<i>Defending environmental activists in the criminal courts</i>
Corporate social responsibility	<i>ACCC complaints</i>



EDO – outcomes

- ▶ Stop unsustainable development – Eg. Catherine Hill Bay
- ▶ Stop harming of flora and fauna – Eg. River Red Gums, Japanese Whaling case
- ▶ Highlight problems in the law and government administration – Eg. Part 3A, Barangaroo
- ▶ Promote legislative reform
- ▶ Developing case law
- ▶ Education



The law and wombats – Commonwealth v State legislation

- ▶ Commonwealth environmental law
 - Environment Protection and Biodiversity Conservation Act 1999 (EPBCA)
- ▶ State environmental law – NSW
 - Protection of the environment (Threatened Species Conservation Act 1995, National Parks and Wildlife Act 1979)
 - Environmental Planning and Assessment Act 1979 (EPAA)



The law and wombats – key weak points

- ▶ Licensing
 - authorises harming protected and threatened fauna
 - granted on an *ad hoc* basis
 - little or no monitoring of compliance
- ▶ Planning and Development
 - Weak protections for protected and threatened species, including wombats



The law and wombats – what can be done?

- ▶ Rude letter to NPWS/Planning
- ▶ Bring a case to challenge the issue of a licence/development consent
- ▶ Law reform through the parliamentary process – lobby MPs, make submissions etc
- ▶ Engagement in the planning process



Licensing case study – *North Coast Environment Council v National Parks and Wildlife Service & ors (1999)*

- ▶ NCEC challenged a licence to harm flying foxes granted under Section 120 of the NPW Act
- ▶ Licence authorised disturbance activities near Maclean Rainforest Reserve
- ▶ Validity of the licence challenged on 4 grounds:
 - Insufficient evidence to establish facts to enliven licensing power (s 91(2) of TSC Act – welfare of animal or threat to life or property)
 - Consideration of irrelevant information – political benefit
 - Failure to consider relevant information – disturbance activities likely to fail
 - Decision was manifestly unreasonable – never been a successful removal using disturbance activities
- ▶ Court granted interlocutory injunction



Planning and development case study – *Tugun Cobaki Alliance v Minister for Planning and Roads and Traffic Authority [2006] NSWLEC*

- ▶ Challenge to decision of Minister for Planning to approve the Tugun Bypass between Currumbin and Tweed Heads – Part 3A EP&A Act major project
- ▶ Minister failed to properly consider EIS and Species Impact Statement
- ▶ Jagot J found that whilst Minister was given copies of the EIS and SIS – no obligation on him to read these documents (which he did not do)
- ▶ Intent of Part 3A – infrastructure projects of significance to the state delivered quickly and efficiently



Planning and development case study – *True Conservation Association v The Minister Administering the Threatened Species Conservation Act 1995* [2005] NSWLEC 221

- ▶ Challenge to decision by Minister to grant biodiversity certification to the State Environmental Planning Policy (Sydney Region Growth Centres) 2006 (Growth Centres SEPP)
- ▶ Effect of biodiversity certification is that SIS's no longer need to be carried out for individual development applications
- ▶ Biodiversity certification is a process by which up-front planning for threatened species protection is intended to take the place of site-by-site assessments
- ▶ The Minister cannot grant biodiversity certification unless she is satisfied that the SEPP will lead to the overall improvement or maintenance of biodiversity values
- ▶ TCA – biodiversity certification granted prematurely and based on inadequate information – 16 threatened plant species and 22 fauna species would suffer a loss of habitat as a result of the planned development under the Growth Centres SEPP
- ▶ On 25 June 2008 the NSW Parliament passed special legislation conferring biodiversity certification – so even if the original order was declared invalid the Growth Centres SEPP would have the benefit of biodiversity certification



Planning and development – engagement with the planning process and the Standard LEP

- ▶ A local environmental plan is a legal document that controls development and sets out how land is to be used in a local government area
- ▶ Standardisation of LEP's by 2011 – Standard Instrument
 - Contains 34 different zones
 - 8 broad headings: rural, residential, business, industrial, special purpose, recreation, environment protection, waterway zones
- ▶ Commenting on an a draft LEP
 - Contact council or check their website to see where they are up to
 - Look at the maps and see how land is zoned
 - Decide what areas should be conserved, what areas are appropriate for development
 - Key questions
 - Has the council changed zone objectives or zone uses?
 - Are native flora and fauna adequately protected?



Thank you for listening and please call us!

