Legal Advice & Litigation

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These Fact Sheets are a guide only and are no substitute for legal advice. To request free initial legal advice on an environmental or planning law issue, please visit our website[1] or call our Environmental Law Advice Line. Your request will be allocated to one of our solicitors who will call you back, usually within a few days of your call.

Sydney:	02 9262 6989
Northern Rivers:	1800 626 239
Rest of NSW:	1800 626 239

Overview

'The law' is a very broad field and most lawyers tend to develop experience or specialisation in particular areas of the law. A solicitor experienced in environmental law is more likely to be able to quickly identify the legal issues in your matter and whether there is a potential court action available.

You may also need a barrister's opinion about the prospects of success in a potential court action. Solicitors inexperienced in environmental law may have to refer the matter to other lawyers and may not know which barristers are best to brief for your particular matter. For information on who to contact to find a lawyer, contact EDO NSW. EDO NSW, with its specialist knowledge of environmental issues, is an obvious starting point.

Choosing a Lawyer

Barristers and Solicitors

There are two kinds of lawyers: solicitors and barristers. Solicitors advise about a broad range of aspects of the law including both court and non-court matters. Barristers are specialists in advising on and running court cases.

Most people dealing with lawyers will engage a solicitor who will decide whether they should also engage a barrister. You can approach a barrister directly without a solicitor. However, many barristers will insist that you see a solicitor first.

[1] http://www.edonsw.org.au/legal_advice

Solicitors often work in firms which can range in size from sole practitioners to hundreds of lawyers. Solicitors in private practice will advise in different areas of law, although many specialise.

All of the large law firms in Sydney now have an environmental law department. There are also some smaller firms that specialise in local government and environmental work. Solicitors can also appear before any court without a barrister.

In practice, many solicitors will get a barrister's opinion about whether to take a particular case to court. If you need a barrister's advice, your solicitor will prepare a 'brief', which includes all the relevant information and documents, to send to the barrister for their opinion.

Community Legal Centres

You can also usually get free preliminary legal advice from community legal centres. There are around 40 community legal centres in NSW.

Of these, nineteen are general centres which operate around the state. These centres focus on issues like social security, debt, tenancy, family, employment, some criminal and general neighbourhood law issues.

For information about your nearest community legal centre, contact the NSW Community Legal Centres Group on 02 9212 7333 or visit their website at www.nswclc.org.au.

There are also twenty-two specialist centres who give advice on particular areas of the law.

To request free initial legal advice on an environmental or planning law issue, please call EDO NSW's free Environmental Law Advice Line. Your request will be allocated to one of our solicitors who will call you back, usually within a couple of days.

Need to get advice quickly

You should get legal advice as soon as an issue arises because delay can adversely affect the outcomes of court cases. Once a decision has been made there are strict deadlines for making appeals. Delay can mean losing your case even if your legal claim is correct. Delays can also be expensive.

Increasingly, the NSW government is seeking to focus public input and participation on the strategic planning framework rather than individual development applications. This may mean that opportunities to challenge particular development proposals are reduced.

More generally, however, it is always better to organise and mount a response to a proposal at an early stage. The longer a proposal is in train, the greater the likelihood that investment expectations and commitments by developers and governments alike will create a momentum in its own right to fight challenges.

Contacting a lawyer early for preliminary advice will help you to understand the legal issues involved, the kind of information you need to collect and to make a practical decision about what course of action to pursue, including a court challenge.

Your lawyer will also tell you about time limits. For example, a legal challenge to a development consent must be started within three months of the date that the consent is advertised in the newspaper. If no notice is given, you must commence within a reasonable time.

If you object to a designated development, you only have twenty-eight days from the date that the consent authority notifies you of its decision to commence merits appeal proceedings in the Land and Environment Court.

Restraining orders

If an illegal activity is going on, you may need to get an urgent injunction (restraining order) to stop the activity. Once substantial work has commenced or is completed on a development, it is more difficult to successfully seek orders from the Court.

When deciding whether or not to grant an injunction, the court will consider a number of factors including the time and money spent by the developer as well as the utility of the orders. Usually, the more time and money the developer has invested, the less likely the court will be to grant an injunction. Similar considerations apply where work or clearing has already commenced. It is therefore important that you act early.

Legal advice for Access Arrangements

An exploration licence can be granted over your land without your consent. However, no exploration can take place on your land until an access arrangement is in place.[2] An access arrangement sets out the terms upon which the mining or CSG company can access your land to explore for minerals or petroleum.

Your right to negotiate an access arrangement at the exploration stage is one of the most important opportunities you will have to influence how coal or CSG exploration is carried out and to protect your property from any adverse impacts.

It is therefore crucial that you seek legal advice and/or legal representation when negotiating the terms of an access agreement.

Read our Fact Sheets on Mining and Coal seam gas for more information about access arrangements.

What information do I need to give my lawyer?

If you need advice from a lawyer you will need to give them as much information as possible. For example, in an appeal against a development consent, you may need to provide:

- The development application and development consent. A register of development applications and development consents are available for public inspection at your local council offices.
- Any reports or minutes of meetings held by local council and its relevant committees. Council meetings are generally open to the public and most councils have business papers available on request. These papers often

[2] *Mining Act 1992* (NSW), *s.* 140*; Petroleum (Onshore) Act 1991* (NSW), s. 69C*.*

include important reports of council officers, giving the history of the matter and the particular officer's appraisal of the issue.

- Evidence showing environmental harm such as photographs and statements of witnesses.
- Expert opinion or at least well-informed opinion on the potential or apprehended harm you are concerned about. List your concerns, referring to particular consent conditions if relevant.
- Documents used to support the development application such as environmental impact statements or other studies.
- Reports or letters of any agencies who may have been consulted such as the Environment Protection Authority, the Australian Heritage Commission, National Parks and Wildlife Service or the Department of Planning and Environment. If you can't get a copy from the council, get one from the agency itself. Make phone inquiries first to check which reports are most important to get.
- Reports of environmental organisations such as the Australian Conservation Foundation and the Total Environment Centre.
- Information about zoning laws, like the local environmental plan that applies to the site and any relevant development control plan or development guidelines adopted by council.
- A map of the area indicating any environmental features of concern.
- The date the decision was made.
- Whether a notice of the development consent has been published in a public newspaper.

By contrast, if you are complaining about a pollution incident, you will need to get a copy of any pollution licence from the Environment Protection Authority. You may be able to get some monitoring results under freedom of information laws.

Paying for legal and expert advice

Get quotes from lawyers and experts about the cost of their services. Under the law, lawyers must disclose their fees to you and give an estimate of the likely costs. Legal aid is available in a limited number of public interest environmental cases in New South Wales. EDO NSW has also established a scientific register of experts, who may be prepared to provide scientific evidence in certain cases. For further information, contact the NSW Legal Aid Commission or EDO NSW.

As an example of costs, a development appeal in the Land and Environment Court lasting two days would rarely cost less than $10,000, taking into account the time lawyers and experts take to prepare the case and attend the hearing.

The fee that a client pays their solicitor is a matter for negotiation. Standard fees don't apply. Some lawyers may agree to reduce their fees if the case isn't successful. If you win the case and get an order for costs against the losing party, you may still

have to pay the difference between the rates allowed by the court and any higher rates you've agreed to pay your solicitor.

Case Study: *Friends of Hay Street Inc v Hastings Council and Lesmont Pty Ltd* (1994) 87 LGERA 44

Local residents objecting to a proposal to build a large shopping centre in the vicinity of several heritage items in the town of Port Macquarie brought a judicial review proceedings challenging Hastings Council's granting of a development consent. The residents lost their case but no costs were ordered on the basis of the public interest in the development and because the applicant had raised important matters including the interpretation of the local environmental plan, and whether the council had fulfilled its public duties in assessing the proposal.

Who pays if I lose?

The way costs are assigned to the parties depends on the kind of proceedings, namely whether they are merit appeals or, alternatively, judicial review or civil enforcement matters.

In merits appeals in the Land and Environment Court, each party usually pays their own costs, whether they win or lose. Exceptions to this rule may apply if unnecessary evidence is given. For example, if an objector to a large poultry farm indicates that odour will be an issue, prompting the developer to get expert odour evidence, but the objector doesn't raise odour as an issue in court, the developer may seek a special costs order making the objector liable for the unnecessary cost of consulting the odour expert. Costs may also be awarded in merits appeal matters if the action is frivolous or vexatious.

In judicial review or civil enforcement proceedings, the loser usually pays both their own and the winner’s costs. The loser pays rule is a major disincentive to many community members who wish to take a court action. People can often raise $20,000 to pay for their lawyers and witnesses. However, many people are unwilling to take the risk of losing the case and having to pay unknown costs to the other side.

Two factors occasionally apply to limit the loser pays rule:

- availability of legal aid indemnities: if you have a grant of legal aid, the Legal Aid Commission of NSW normally grants an indemnity so that if you lose the case, you don't have to pay the other party's legal costs; and
- court’s discretion not to award costs in public interest cases: public interest litigation is when the applicant's concern represents a much broader community concern or the ramifications of the decision will be important for other developments or legal proceedings.

In *Oshlack v Richmond River Council (1997) 152 ALR 83*, the High Court found that the fact that litigation is in the public interest is a factor that the court can take into consideration in deciding whether or not to order costs against an unsuccessful party.

An applicant is most likely to succeed on this point if they have no financial stake in the litigation, but are simply seeking to ensure environmental laws are obeyed. It is

also be helpful to show that other members of the public share the same views as the applicant, and that the case has raised and resolved significant issues.