

Protecting the environment

The Environmental Defender's Office in NSW

By Jessica Wood

The Environmental Defender's Office NSW Ltd (EDO) is a community legal centre specialising in public interest environmental law.

Photography Bill Madden



The EDO was first established in Sydney in 1985 at the initiative of Murray Wilcox, then QC and President of the Australian Conservation Foundation.¹

The impetus for establishing the EDO was the lack of resources for public interest litigants attempting to protect the environment using the provisions of the recently enacted *Environmental Planning and Assessment Act* 1979 (NSW) (EP&A Act). At an environmental assessment

symposium on 26 September 1981, held to review the first year of operation of the EP&A Act, it was agreed that:² 'there is a significant resource imbalance in the area of environmental assessment... [P]eople other than developers, including opponents, rarely have adequate legal advice and representation. The imbalance is so severe as to call into question the possibility of obtaining the community involvement, which is one of the objects of the EP&A Act.'

This imbalance, identified by the symposium, continues today, but the EDO aims to bridge the gap.

The EDO's mission is to empower the community to protect the environment through law. It has traditionally sought to achieve its mission by working at a grass-roots level within the community. It provides legal advice and representation in public interest environmental matters and runs community education workshops on aspects of environmental law and advocacy.

The EDO encourages people to engage its services at an early stage. It assists people who are attempting to understand the legal and scientific documents that often accompany high-impact development proposals. (Early engagement is particularly important in matters where merits appeal is available, since limitation periods are short.)

The EDO's work also involves identifying deficiencies in environmental laws and working towards reform. To this end, it writes submissions to government on law reform issues and advises other organisations that are lobbying for law reform.

The EDO is funded primarily by triennial grants from the Public Purpose Fund (PPF). The PPF is a trust administered by appointees of the NSW attorney-general, two of whom are members of the Law Society Council.³ The PPF's funds are sourced from the interest earned on solicitors' trust accounts.⁴

The NSW EDO has served as a model for EDOs in each state and territory of Australia.⁵ Together, these offices form an Australian Network of EDOs. This national body is the voice for joint submissions on federal law reform issues, and is the EDOs' representative at international forums, such as the Access Initiative,⁶ and the Partnership for Principle 10⁷ programs.

The most recent extension of the NSW EDO's services was the opening in July 2006 of a regional office in Lismore to service the Northern Rivers area.

FUNCTIONS OF THE EDO

The EDO, which started life as a single solicitor working from a spare desk at the offices of Bruce Woolf & Associates, is now a multi-disciplinary environmental law centre. Its staff includes six full-time solicitors, two policy officers, two scientific advisers, two education officers, an Aboriginal liaison officer and a programs director, as well as a chief executive officer, who manages and oversees the work of the office, and an administration team of four people.

Legal Public Representation

The EDO's legal work involves providing written legal advice, writing letters and submissions on behalf of clients, and acting for clients in court. The EDO's clients range from individuals and locally based community groups to peak state, national and international environment organisations.

Most of the casework run by the EDO is undertaken in the Land and Environment Court of NSW, the Federal Court, the Administrative Appeals Tribunal and the Administrative Decisions Tribunal.

The EDO's advice and casework guidelines inform its decision as to whether to become involved in a matter. Before

deciding to represent a client in legal proceedings, the EDO must satisfy itself that:

- the matter involves a public interest environmental issue; and
- the issue has significance beyond the material or financial interests of a particular individual or group; and
- the issue involves a real threat to the environment; or
- engagement in the issue has the capacity to result in good environmental outcomes; or
- the issue concerns the manner in which the environment is regulated, now and into the future and across all areas of government; or
- the issue raises matters regarding the interpretation and future administration of statutory provisions; and
- if the matter is going to be litigated, it has good prospects of success.

Scientific advice

With the aim of empowering the community to better participate in environmental decision-making, the EDO introduced a scientific advisory service in 2003. That service currently consists of two in-house scientific officers, as well as a register of 98 scientific and technical experts.

The EDO's scientific officers interpret technical reports, such as environmental impact statements, which are used to inform decision-makers; and they assist in the preparation of submissions, both in respect of development proposals and for court proceedings where expert evidence is required.

Policy

The EDO has made an important contribution to the development and reform of environmental law in NSW and nationally. Most recently, the EDO was closely involved in the negotiations that led to reforms to the legislation governing the management of native vegetation in NSW.⁸

Education

The EDO runs regular community workshops and seminars, both in Sydney and throughout rural and regional NSW, providing a basic introduction to environmental laws and the community's rights and responsibilities.

In 2006, the EDO introduced a specialist workshop that is conducted on private farms and focuses on rural issues such as water, pesticides, weeds, native vegetation and private conservation.

As part of its education program, the EDO has also recently published plain English guides designed to inform the community about environmental law.⁹

International programs

The EDO works closely with partner organisations in Asia and the Pacific. Its longest-standing international partnership has been with the Environmental Law Centre in Papua New Guinea (ELC). The EDO receives funding from the MacArthur Foundation, based in the US, to provide capacity-building support, legal advice and training to ELC lawyers and staff.

EDO CASES

A central part of the EDO's work is conducting public interest litigation, and to date it has conducted a number of significant test cases.

Assessing the impact of logging

In 1989, the EDO acted for Wendy Jarasius in proceedings against the then NSW Forestry Commission.¹⁰ Jarasius sought orders for declarations and injunctions restraining the Forestry Commission from logging, burning, roading and other forestry activities in the Coolangubra, Bondi and Nalbaugh State Forests (near Eden in southern NSW), until it had complied with Part 5 of the EP&A Act.

Part 5 of the EP&A Act requires that, before an authority can carry out an activity, it must consider 'to the fullest extent possible' the impacts of the activity on the environment.¹¹ If that activity is likely to significantly affect the environment, the authority must prepare an environmental impact statement (EIS) in the form prescribed by the EP&A Act and regulation.¹²

At the time of the *Jarasius* proceedings, the Forestry Commission was blatantly neglecting its obligations under the EP&A Act with respect to assessing the environmental impacts of its logging and forestry operations.

The Land and Environment Court found that the forestry operations were activities that were likely to significantly affect the environment, and that the Forestry Commission was in breach of the EP&A Act because it failed to prepare an EIS. The case was important, in that it highlighted the statutory requirement for the environmental assessment of forestry operations in NSW.

Since the *Jarasius* case and other cases brought in the 1980s and 1990s to compel the Forestry Commission to comply with the EP&A Act, most state forests in NSW are now regulated by integrated forestry operations approvals. This new system exempts the logging of these areas from the environmental assessment requirements of the EP&A Act and the scrutiny of third-party appeal.¹³

Requirement for Species Impact Statement

In 1999, the EDO acted for the Timbarra Protection Coalition against Ross Mining.¹⁴ The issue to be decided was whether a development consent for extensions and modifications to the Timbarra gold mine was invalid because the Tenterfield Shire Council had failed to require that a Species Impact Statement (SIS) be prepared in respect of the application.

The Court of Appeal held that the question as to whether a development application is likely to significantly affect threatened species, and therefore require a SIS in accordance with the relevant provisions of the EP&A Act, is a jurisdictional fact.¹⁵

This decision meant that evidence of whether the development application in question would have a significant impact on threatened species was admissible before the Court. Thus, the Court was able to engage in merits review in the context of judicial review proceedings to determine *de novo* whether the proposed development would be likely to significantly affect threatened species.

This case represented a significant and important expansion of the court's power to move into the realm of administrative decision-making.

Protection of wilderness areas

In 2004, the EDO represented the Blue Mountains Conservation Society in proceedings to prevent the filming of box office flop, *Stealth*, in the Grose wilderness area of the Blue Mountains National Park.¹⁶

The Society argued that the approval granted by the director-general of the Department of Environment and Conservation for the filming breached the *National Parks and Wildlife Act 1974* and the *Wilderness Act 1987* and contravened the spirit and intention of the declaration of an area as wilderness.

The Court set aside the filming approval, thereby affirming the Society's claim, with the words – 'declared wilderness areas are sacrosanct'.¹⁷

Japanese whaling

Since 2004, the EDO has been acting for the Humane Society International Inc (HSI) in proceedings seeking to stop a Japanese whaling company from killing whales in the Australian Whale Sanctuary adjacent to Australia's territory in Antarctica.¹⁸

Causing harm to whales in Australian waters is an offence under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act).¹⁹ >>



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Despite the international moratorium on all commercial whaling declared in 1982 under the *International Convention for the Regulation of Whaling (International Whaling Convention)* 1946, the government of Japan continues to permit the killing and sale of whales under the guise of 'research'. Each year, Kyodo Senpaku Kaisha Ltd (Kyodo) takes Antarctic minke whales in the Southern Ocean and in the Australian Antarctic Territory. It has recently extended its catch to target humpback and fin whales.

HSI was required to seek the Federal Court's leave to serve the proceedings, seeking a declaration that Kyodo is breaching the EPBC Act, and an injunction to restrain Kyodo from continuing to kill whales in the Australian Whale Sanctuary. Despite some obstacles, the full Federal Court ultimately granted HSI leave to serve the proceedings by diplomatic process.²⁰ The case is expected to be heard later this year.

Aboriginal cultural heritage

In 2006, the EDO acted for traditional owners of land at Angels Beach in Ballina. The applicants sought to challenge the validity of a consent issued by the director-general of the Department of Environment and Conservation, which permitted a private developer to destroy objects of Aboriginal cultural heritage significance for the sake of a residential subdivision.²¹

Justice Pain held that the consent was invalid, due to a failure to take into account certain relevant matters.²² Her Honour also found that the director-general should have had regard to the principles of inter-generational equity in considering whether to grant a permit to destroy Aboriginal objects.²³

The principle of inter-generational equity is one of the principles of ecologically sustainable development (ESD).²⁴ ESD is a concept of international environmental law,²⁵ which has been enacted into domestic legislation both nationally and at state levels.

The relevance of the principle of inter-generational equity in the context of permits to destroy Aboriginal cultural heritage is that the fewer sites that remain, the less opportunity there will be for future generations of Aboriginal people to enjoy the cultural benefits of those sites.²⁶

Elephants in zoos

In 2005, the EDO acted for three peak conservation groups in proceedings in the Administrative Appeals Tribunal (AAT) seeking merits review of a decision of the Commonwealth environment minister to allow the import of endangered Asian elephants, to be displayed at Taronga and Melbourne Zoos.²⁷

There were three grounds of appeal:

- that the importation of the elephants would be detrimental to the survival and recovery of the species;
- that the zoos would not be able to meet the welfare needs of the elephants; and
- that the zoos would not be able to achieve the targets of the approved captive breeding program.

The AAT decided that the import permits should be granted

to the zoos. However, it placed stringent conditions on the permits in an attempt to meet the welfare needs of the elephants in captivity.

LEGAL AID IN PUBLIC INTEREST ENVIRONMENTAL LITIGATION

The availability of Legal Aid in NSW

EDO NSW is blessed with many advantages over the EDOs in other states and territories. It has three times the number of solicitors of any other EDO in Australia, and it is able to run more cases than any other office.

There are three reasons for this. Firstly, the other states and territories have not been able to find sources of funding similar to those available to the EDO in NSW. Secondly, the Commonwealth attorney-general's department places a restriction on the grants that all community legal centres receive, whereby no Commonwealth funds may be used for litigation. Some of the EDOs rely exclusively on this funding to run their services and so cannot run cases at all. Thirdly, only NSW makes Legal Aid available in public interest environmental cases.

The availability of Legal Aid and the accompanying immunity from costs²⁸ in public interest environmental cases is fundamental to the EDO's casework: many of the EDO's clients would not be able to financially support legal proceedings without Legal Aid. However, obtaining Legal Aid is not easy. Legal Aid is available only for proceedings heard by a judge (that is, not usually for merits appeals), and only for NSW matters, not those involving national or inter-state jurisdiction.

Grants of Legal Aid are capped at a lump sum, which rarely covers the actual cost of professional fees, let alone disbursements in court proceedings. This means that even where Legal Aid is granted, the EDO and its clients are dependent upon the generosity of barristers who greatly reduce and cap their fees.

Means test anomaly in public interest cases

A further obstacle to Legal Aid is that the Commission applies a means test when determining applications for Legal Aid in all civil cases. This test is also applied in public interest environmental cases brought by the EDO's clients. The EDO is of the view that this test should not apply in public interest cases because the means of the applicant is largely irrelevant, since the applicant is not seeking any financial gain by bringing the proceedings.

The means test is especially crippling where the applicant is an incorporated association. When determining whether an incorporated association has the means to financially support legal proceedings, the Commission looks behind the 'corporate veil' of the association and requests information about the assets of each individual member of the association.

The majority of the incorporated associations that come to the EDO for assistance comprise individuals who have incorporated purely for the purpose of pursuing the protection of the environment.

Applying the Legal Aid means test to these people

invariably results in the refusal of a grant of Legal Aid, because the Commission believes that such people can afford to finance court proceedings themselves, even if this means that they may lose their homes and livelihoods in trying to protect the environment. This is a denial of access to justice for the protection of the environment, which the EDO has been working for 20 years to overturn.

WHERE TO FROM HERE?

Despite the obstacles, these are interesting times to be working as an environmental lawyer for the EDO.

NSW has traditionally led the way in facilitating the public's right to review decisions relating to the environment, with open standing provisions and the right of merits review of certain decisions under the EP&A Act.²⁹

Recent changes to the planning legislation have limited the ability of the public to participate in the planning process, and made it more difficult to seek review of decisions under the EP&A Act.³⁰ In some cases, the right of third-party appeal has been completely removed.³¹

These changes have made it more difficult for the EDO to advise the community about how to respond to development proposals, which often have a major impact on the environment and the locality. However, the courts – in particular, the Land and Environment Court – have recently been leading the way in ensuring better decision-making, even within the framework of a legislative scheme that continues to water down the requirement for environmental assessment.³² A recent body of case law in NSW has established that decision-makers must consider the principles of ESD where issues relevant to those principles arise.³³

This recent jurisprudence is in keeping with international developments, and is opening doors to third-party review of decisions where a decision-maker has not considered the principles of ESD. This is particularly promising in the area of climate change litigation, which the EDO is currently embracing. The EDO is continuing to look for new opportunities to ensure that the public interest is upheld and that the environment is protected. ■


Notes: **1** Also president of the then Environmental Law Association of NSW, and former judge of the Federal Court. **2** Extracted in David Robinson, 'The Environmental Defender's Office NSW 1985-1995' (June 1996) 13 *Environmental and Planning Law Journal*, pp155-6. **3** *Legal Profession Act 2004*, Division 7, Part 3.1. **4** *Legal Profession Act 2004*, s285. **5** EDO Queensland was established in 1989, EDO Victoria in 1991, EDO South Australia in 1992 and funding for EDO offices in the other states and territories was obtained from the Commonwealth in 1995. **6** See www.accessinitiative.org. **7** See www.pp10.org. **8** The EDO's policy submissions from 2003 to 2007 are available at www.edo.org.au/edonsw/site/policy.php. **9** *Campaigning and the Law in New South Wales* (2007); *Rural Landholder's Guide to Environmental Law in New South Wales* (2005-2006); *Environmental Law Toolkit – NSW* (2005); and EDO Factsheets, all available at www.edo.org.au/edonsw. **10** *Jarasius v Forestry Commission of NSW* (No. 1) (1988) 71 LGERA 79. **11** Section 111, EP&A Act. **12** Section 112, EP&A Act. **13** See Part 4, *Forestry and National Park Estate Act 1998*. **14** *Timbarra Protection Coalition v Ross Mining* (1999) 102 LGERA 52. **15** (1999) 102 LGERA 52 at 60-1. **16** *Blue Mountains Conservation Society Inc v Director-General National Parks and Wildlife; the Minister for the Environment and AFG Talons Pty Ltd* (2004) NSWLEC 196. **17** (2004) NSWLEC 196 at para 59. **18** *Humane Society*

International Inc v Kyodo Senpaku Kaisha Ltd [2004] FCA 1510; [2005] FCA 664; and [2006] FCAFC 116. **19** See ss229-230 EPBC Act. **20** *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2006] FCAFC 116. **21** *Anderson & Anor v the Director-General of the Department of Environment and Conservation & Ors* [2006] NSWLEC 12. **22** *Ibid*, at para 197. **23** *Ibid*, at paras 199-201. **24** Defined in *Protection of the Environment Administration Act 1991*, s6(2). **25** See the *Rio Declaration on Environment and Development* made at the United Nations Conference on the Environment and Development (Earth Summit) held in Rio de Janeiro in 1992. **26** See Note 21, at para 199. **27** *The International Fund for Animal Welfare (Australia) Pty Ltd, the Humane Society International Inc and the RSPCA Australia Inc v Minister for Environment and Heritage and Ors* [2005] AATA 1210 (7 December 2005); [2006] AATA 94 (6 February 2006). **28** See s47, *Legal Aid Commission Act 1979* (NSW). **29** See ss98 and 123, EP&A Act. **30** See *Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Act 2005* which introduced Part 3A Major Infrastructure and Other Projects into the EP&A Act, and the *Environmental Planning and Assessment Amendment Act 2006*. **31** See s75T EP&A Act. **32** See Div 2 and Div 3, Part 3A, EP&A Act. **33** *BGP Properties Pty Ltd v Lake Macquarie City Council* (2004) 138 LGERA 237; *Telstra Corporation Limited v Hornsby Shire Council* (2006) 146 LGERA 10; *Bentley v BGP Properties Pty Limited* [2006] NSWLEC 34; *Gray v The Minister for Planning and Ors* [2006] NSWLEC 720; *Taralga Landscape Guardians Inc v Minister for Planning and RES Southern Cross Pty Ltd* [2007] NSWLEC 59.

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