
CIVIL ENFORCEMENT OF ENVIRONMENTAL LAWS IN AUSTRALIA

JOHNSON, JAMES

Director, Environmental Defender's Office, Level 9, 89 York St, Sydney, New South Wales 2000, Australia

SUMMARY

Public interest litigants in Australia who seek to enforce environmental laws face many procedural and cost barriers. However, there have been some positive developments in the law recently. This paper looks at some cases conducted by the Environmental Defender's Office ("EDO") over the past few years. These cases illustrate the ways in which barriers can be overcome and enforcement proceedings can be used by the community to help protect the environment.

The paper will first provide a brief description of the Environmental Defender's Office, then an outline of the facts of the cases. Finally, it will discuss the issues that the cases raise for civil enforcement of environmental obligations. These cases were hard fought. This brief and simplified summary does not do justice to the blood and sweat that went into the cases!

1 THE ENVIRONMENTAL DEFENDER'S OFFICE

The Environmental Defender's Office in Sydney, Australia, is a community legal centre which specializes in environmental law. It has six lawyers, two education staff, administrative staff and volunteers. It provides free legal advice to people concerned with protecting the environment. In a small number of cases, it represents clients in public interest cases in court. There are smaller Environmental Defender's Offices, with one lawyer each, in each State of Australia.

By responding to thousands of requests for assistance, the Office can identify systemic problems with administration and enforcement of environmental laws. The Office carries out law reform and policy work to address these problems. Finally, education projects such as conferences, workshops and plain language publications explain the law and the legal system. We help people participate in environmental decisions.

2 THE CASES

2.1 Tasmanian Conservation Trust

One of the greatest causes of environmental damage in Australia is woodchipping of virgin native forest. Over five million tons of woodchips are exported each year from Australia. The volume of chips exported has remained reasonably constant, despite the lifting of export limits. This is due in part to cheaper products from plantations in other nations such as Brazil.

In 1994 the Commonwealth Minister for Resources gave approval for a new licence to export woodchips from Tasmania. The Environmental Defender's Office acted for the Tasmanian Conservation Trust (TCT), the peak group conservation organization in Tasmania, to challenge the approval. Commonwealth environmental assessment laws in Australia are next

to worthless. The only obligation on the Resources Minister was to refer the matter to the Department of Environment, which would then decide whether an environmental assessment was required. Even if assessment takes place, no environmental approval is required. This case was part of a campaign to institute change in these laws.

The Commonwealth had conducted a general environmental assessment of woodchipping in the State of Tasmania in 1985. This encompassed the activities of three woodchipping companies but not the new exporter. The Resources Minister considered that the export of woodchips was a matter which had already been assessed as part of this 1985 assessment. He considered that he was therefore under no obligation to refer the matter to the Minister for Environment. This was despite three letters of advice from the Department of Environment that the activity ought to be referred to it for assessment.

The Court held that the Minister had made a legal error. He had applied the wrong legal test and taken into account an irrelevant consideration. The judgment received broad media coverage. It brought home to Commonwealth Ministers and bureaucrats the nature of their obligation to refer matters to the Department of Environment. The budget and staffing levels of the Department were increased to cope with its increasing workload. This work encompassed the provision of preliminary advice on environmental impacts of a range of developments, as well as determining whether developments need formal assessment.

However by the time judgement had been delivered the licence under challenge had expired. The Minister had issued a fresh export licence. The Environmental Defender's Office promptly commenced fresh proceedings against this new licence. The company and the Minister "did a deal" on the first day of the hearing of this challenge. The licence under challenge was forfeited and yet another licence was issued.

2.2 North Coast Environment Council

The North Coast Environment Council ("NCEC") is a regional conservation organization. It is involved in environmental issues generally, and forestry issues in particular. The Council had made submissions to government, conducted research with grants from the government, produced publications and participated in government processes over a number of years. It had an extended track record of activity on woodchipping and logging in the locality.

This case sought to compel the Minister for Resources to give his reasons for issuing a licence for woodchip exports from the North Coast of NSW. The issue in the court proceedings was whether the North Coast Environment Council had standing to compel the Minister to give reasons. The outcome is discussed in Chapter 3 of this paper.

2.3 Mushroom Composters

The Environmental Defender's Office acted for Mr Peter Foster, who represented the Ebenezer concerned Residents Committee. An unincorporated group can not bring enforcement proceedings. Proceedings were brought to stop odors coming from a facility which composts poultry manure, straw and other ingredients by letting them rot. The compost is then used for growing mushrooms. The odors were so bad that children at the local school were sometimes ill. People had to live with their doors and windows closed even in mid summer.

The proceedings were successful. In 1993 an injunction was granted, although it was suspended for 12 months to enable the company to relocate its operations. Two years later, the company was still operating in breach of the court order. Foster brought proceedings for contempt of court.

Foster led evidence from 35 local residents that the odors continued and that the company made \$230,000 profit while operating in contempt. The Court found that the company:

“...took decisions largely for commercial reasons, which involved a wilful or deliberate breach of (the Court’s) order”.

The Court imposed a fine of \$80,000, together with \$8,000 per week for each week the company remained in contempt. While not as much as the profit made by the company, this was by far the largest fine imposed by the Court.

A second set of contempt proceedings brought by Foster was settled on the basis that the company stop its operations immediately and pay our client’s legal costs.

2.4 Irongates

The Environmental Defender’s Office acted for Mr Al Oshlack, an activist on the north coast of New South Wales, to stop a residential development in 1996. The site is one of great environmental sensitivity. It contains a listed wetland, a rare coastal rainforest, a resident koala colony and numerous other endangered species. It is bounded on three sides by National Parks.

The Local Council granted a development consent for the construction of 110 lots of a proposed 700 lot residential subdivision on the site. The development was supposed to minimize the impact on the adjacent wetlands and the stand of remnant rainforest. It was also to retain wildlife corridors to allow wildlife to move between the national parks to the north and south of the site. In short, this was not to be a traditionally engineered subdivision, rather a ‘green’ one.

Ameliorative measures to reduce the impact on threatened species included preserving the remnant rainforest with a buffer against any further disturbance and maximum retention of trees. A wildlife corridor was to be kept between the littoral rainforest and the National Park.

In early July 1996, Iron Gates Pty Ltd began to clear vegetation for its subdivision. On 9 July 1996 the Environmental Defender’s Office commenced Court proceedings, seeking an urgent interlocutory injunction to restrain the clearing of the land pending the final hearing of the matter. However, the Court refused to grant the injunction.

Oshlack pressed on with the case and received a judgement in his favor. In carrying out the development, the Court found that the Developer cleared all of the vegetation on the proposed lots and cut a swathe through the designated wildlife corridor. The developer had also cleared the vegetation buffer and installed a massive drain in its place, 300 meters long x 6 meters wide x 4 meters deep, and constructed a second drain adjacent to the wetland.

The Court found that the extensive clearing of native vegetation was not permitted by the Company’s development consent, which required “maximum tree retention”. It also found that there had been serious breaches of environment laws by the destruction of the habitat of threatened species, including the Koala and the Queensland Blossom Bat.

In March 1997, there was a 5 day hearing on remediation. Evidence was led as to the continuing environmental impact of the illegal drains. The drain adjacent to the wetland was likely to result in the draining of that wetland, and the other drain would result in the die-back of the rainforest species.

On 4 July 1997, the Chief Judge ordered Iron Gates Pty Ltd to demolish its residential subdivision and to restore the Iron Gates site to its pre-development state. The Order included establishing a plant nursery with seed to be collected from surrounding vegetation and replanting the entire site with native vegetation. The company also had to rip up all of the roads, backfill all of the drains and undo the extensive earthworks. The Department of Land and Water Conservation has been appointed by the Court to oversee the implementation of the remediation plan.

The National Parks and Wildlife Service is responsible for enforcing the laws protecting threatened species in NSW. Despite urgent requests for action to stop the clearing, it did nothing. The local council, Richmond River Shire Council, not only failed to act, but supported the Company's case in Court.

2.5 Friends of Hinchinbrook

If you haven't been to the Hinchinbrook Channel, then I suggest you go there quickly. Otherwise, read a copy of Margaret Thorsborne's book "Hinchinbrook Island - The Land that Time Forgot". As the Regional Director of the Queensland Department of Environment wrote in the 1994 Draft Management Plan for the area:

"The scenery of the Hinchinbrook Channel is nothing short of awe inspiring..."

In addition to the spectacular scenery, the area is crucial for the protection of the endangered species, Dugong. The Dugong depends on the seagrasses of the channel and is especially vulnerable to being struck by boats and to loss of its seagrass feeding grounds.

This place is special. It is one of the eleven World Heritage sites in Australia.

In May 1993, Cardwell Properties Pty Ltd purchased land on Hinchinbrook Channel to develop a resort and marina complex. The land is adjacent to the Great Barrier Reef World Heritage area. In September 1994 a deed setting out the terms of the development was executed by Cardwell Properties with the State and Local governments. In October 1994 Cardwell Properties began clearing mangroves on the site.

The Commonwealth government has power to stop actions which threaten world heritage areas. A proclamation under the World Heritage Properties Conservation Act 1983 was gazetted on the afternoon of 15 November 1994, covering areas of the Channel adjacent to the development.

On 15 November 1994 the Minister for Environment telephoned the company's managing director to request that mangrove clearing cease. The rest is, as they say, history. The director not only refused to cease clearing, but set up lights and worked with bulldozers until the early hours of the following morning. Clearing stopped when the incoming tide bogged the vehicles.

In February 1995 Cardwell Properties made application to the Commonwealth government for consent to carry out several activities which now clearly required consent under the World Heritage Act. These included construction of breakwaters and an artificial beach, dredging of the marina access channel and implementation of a foreshore management plan. The Department of Environment commissioned a report to consider the impact of the proposed activities on the proclaimed area. In September 1995 the Minister for Environment granted consents to removal of fallen mangroves and the trimming of mangroves in certain areas. He refused consent to all other activities.

This wasn't good enough for Cardwell Properties. The company stands to make \$20 million from the sale of waterfront blocks. As the company stated to the Minister:

"Having visited the site, I am sure that you would be able to tell the difference in value between:

- a. A waterfront block looking out over the sea to the magnificent spectacle of Hinchinbrook Island, and*
- b. A waterfront block looking into a 15 meter high forest of old and gnarled mangroves which completely block out all views of Hinchinbrook Island..."*

In March 1996 there was a change of Federal government. On 12 April 1996 Cardwell Properties made a fresh application for the Minister's consent. Consent was subsequently granted by the Minister for the Environment. The Environmental Defender's Office then acted for a local group, Friends of Hinchinbrook Society (FOH), to challenge the Minister's decision. The result of this case is discussed in Chapter 3 of this paper below.

3 DISCUSSION

With these cases as background, we can now examine some of the key issues for civil enforcement of environmental laws.

3.1 Standing

One of the first hurdles to confront public interest litigants is standing, or the right to take a case to Court. Different jurisdictions frame the hurdle in different ways. At the State level in NSW, the standing barrier has been largely removed. (It is much more difficult in other States). Environmental laws in New South Wales provide that any person has the right to seek orders to remedy or restrain a breach of those laws. Indeed, any person can seek an order to restrain a breach of any act which is likely to cause harm to the environment. You only have to satisfy the Court as to some formal requirements. At the Commonwealth level, to have standing you must have a special interest in the subject matter of the litigation. This has been codified for the review of Commonwealth government decisions. You must be a "person aggrieved" by the decision to have standing in these cases.

The Environmental Defender's Office has conducted two cases for environment groups in the Federal Court which clarified and extended the law of standing in Australia at the national level.

In the North Coast Environment Council case, the Court reviewed existing Australian authorities on standing. In summary a "mere intellectual or emotional concern" is not sufficient. In 1990 Australia's then largest environment organization had been denied standing by the High Court. The council needed to show that its circumstances were different from that case to succeed.

The Court considered four main factors and decided that the group had a "special interest" as a person aggrieved. Firstly, the North Coast Environment Council is the peak organization for the north coast region of New South Wales. Its activities relate directly to the area to be woodchipped. Next, it has been recognized as a significant and responsible environmental organization by government. Governments gave grants and allowed nominees of the Council to participate on a Forest Policy Advisory Committee. Next, the Council conducted or coordinated projects and conferences on matters of environmental concern. Finally, it had made submissions and funded studies on forestry management issues.

We were concerned that the Court might regard national or "peak" organizations as more appropriate, denying standing to local groups. However, the Court noted that "a regional organization may well be able to demonstrate a closer concern with a particular decision affecting or potentially affecting the environment than a national organization".

In the Tasmanian Conservation Trust case, in essence the same considerations applied and there was a similar outcome. What these cases did is push the envelope of standing for environment groups further than had been established before. Government and industry are on notice that environment groups can gain access to the Courts to enforce laws if they have been broken.

3.2 Interlocutory Relief and Commercial Damages

Environmental damage is often serious and irreversible. Once you are in Court, the next hurdle is to stop the very essence of your case disappearing before the proceedings can be heard. Traditionally, courts have insisted on an undertaking being given by the person seeking the injunction to pay any damage suffered by the other party if the case is unsuccessful.

In the Court of Appeal, Street CJ in F. Hannon Pty Ltd v. Electricity Commission (New South Wales) (No. 3) discussed the pivotal role that open standing provisions play in the State planning laws:

“Section 123 grants virtually unlimited status to any person to bring proceedings in the Court for an order to restrain or remedy a breach of the Act... This provision read in the context of the objects of the Act as set out in s.5 makes it apparent that the task of the Court is to administer social justice in the enforcement of the legislative scheme of the Act. It is a task that travels far beyond administering justice (between the parties). Section 123 totally removes the conventional requirement that relief is normally only granted at the wish of a person having sufficient interest in the matters sought to be litigated.... The precise manner in which the Court will frame its orders in the context of particular disputes is ultimately the discretionary province of the Court to determine in the light of all the factors falling in the purview of the dispute.”

This duty to take into account the broader public interest is reflected in the Court's approach to requests for undertakings to pay damages. In Ross v. State Rail Authority (New South Wales) Cripps J. recognized that the failure to give the usual undertaking to pay damages should be but one factor to be taken into account when considering the balance of convenience. The Court has followed this reasoning in many public interest cases subsequently.

As noted above, in the Iron Gates case the Court refused to grant an interlocutory injunction. The site was devastated by the time the matter came up for trial. This was primarily because

Oshlack was unable to give an undertaking to pay damages, estimated at about \$100,000 if the development had been delayed and he lost the case.

The National Parks and Wildlife Service had seen the clearing and had raised no concerns.

Because the government agency charged with protecting wildlife had no concerns, the judge would not grant an injunction unless our client undertook to pay damages. Our client had no money and could not give the undertaking. The injunction was refused. As it turns out, the judge's faith in our government watchdog was seriously misplaced.

3.3 Security for Payment of Legal Costs

In Australia, the usual rule is that the loser pays the costs of the other parties in litigation. Where the party bringing the proceedings (the applicant) has few assets, other parties frequently seek an order that the applicant lodge funds with the Court to pay for any future costs order. This order for a security to be lodged is generally only made in special circumstances. An example might be where the proceedings are being brought for the benefit of someone else, such as a company director. The theory is that even if you are poor, you can have your day in Court!

In the Iron Gates case, the issue did not arise because our client received legal aid. The Legal Aid Commission indemnified our client for any costs he might have to pay. When the developer subsequently appealed, our client was able to insist that the development company lodge a guarantee for \$42,000 with the Court as security for costs. This was because we had

evidence that the company had no assets and was being funded by its director through a private trust. The developer lost the appeal. Mr Oshlack called on the guarantee to pay for his legal costs.

In the case for Friends of Hinchinbrook, the developer's solicitors put on evidence of the costs to be incurred by their client up to the date of the hearing. The estimate was approximately \$115,000.

After reviewing the authorities, Her Honor held that

"an order for security for costs in anything like the sum sought by the second respondent would prevent the applicant from being able to litigate".

Her Honor noted that the World Heritage Properties Conservation Act gives standing to an interested person.

"The above provisions, in my view, whilst concerned principally with the issue of standing, disclose an intention that legitimate organizations and associations concerned with World Heritage Properties should be able to agitate before the Court issues arising under sections 9 and 10 of the Conservation Act. Organizations and associations of this kind will not infrequently have limited financial means. On considering an application for security for costs in a proceeding involving the Conservation Act, it is legitimate, in my view, for the Court to have regard for the apparent intention of Parliament that such organizations and associations should be able to initiate such litigation".

The application for security for costs was dismissed. Friends of Hinchinbrook fought on, but were ultimately unsuccessful.

3.4 Restoration

In the Iron Gates case, the damage had been done while the court proceedings were grinding on. Ultimately, the Court ordered Iron Gates to demolish its residential subdivision and to restore the site at Evans Head to its pre-development state. The judgment represents the most extensive and comprehensive restoration order made by the Land and Environment Court to date.

In determining whether it was "practicable" to order remediation, the Court weighed up the environmental harm of leaving the structures in place as compared to the harm which might be caused by removing them. The Court held that:

"...the correct approach is (that) the Court should make orders designed to bring about reinstatement, so far as is practicable, of the site to its condition before the breach was committed. That approach requires the Court to assess the possible environmental consequences of requiring the drains and internal roads to be removed as against the environmental consequences of allowing them to remain in place."

A detailed remediation plan proposed by Oshlack on advice from experts was adopted by the Court. It required the developer to rip up approximately 2kms of sealed roads, backfill the extensive drains, undo the earthworks over approximately 20 ha, and replant the site (approximately 30 ha) with local native plants. The plants are to be grown by the developer in a nursery established for that specific purpose. Her Honor found that,

"(The developer's) evidence demonstrated that it would be financially difficult for the developer to carry out remediation..., but there was no conclusive evidence that the developer would be unable to meet the cost. Funding may need to be obtained from borrowings or rearrangement of assets within the group of companies, but there was no evidence which would warrant refusing to make the remediation orders".

The company has recently gone into liquidation. No remediation has yet taken place, but our client is pursuing the finance company which has security over the land. Those proceedings may result in a whole new interesting story.

3.5 Contempt

Nothing is more frustrating for a public interest litigant than succeeding in a court case, then having the other party ignore the Court's orders and continue causing environmental harm. Unfortunately, it is up to the litigant to put in more time, money and effort to bring contempt proceedings to ensure the Court's orders are followed.

In the mushroom composting case, the company made more money from being in contempt than it paid by way of fine. Our client even had to prepare a second set of contempt proceedings before it could force compliance. Fortunately, we recovered costs from the company on behalf of our client.

3.6 Costs

As mentioned above, the usual rule in litigation in Australia is that the losing party pays the costs of the winners. This is a great disincentive to public interest litigation. It is unfair because public interest litigants do not stand to gain financially from the litigation. It is unfair because respondents who are businesses can claim a tax deduction for their costs. It is also unfair because there will usually be several respondents, and therefore several sets of legal costs to be paid if the public interest litigant loses. On the other hand, if the public interest litigant wins, its legal costs are divided among the losers.

At the NSW level, the Court has developed a line of authority that the fact that proceedings have been brought "in the public interest" is a relevant factor to consider when making an order for costs. In several cases where the public interest litigant has lost, the Court has required each party to pay their own costs. This approach was confirmed recently in the High Court.

In the Friends of Hinchinbrook case, the group now faces orders for costs for three sets of proceedings, with three respondents in each case. If the respondents pursue their costs, the group will be wound up. However, the individual members of the group are not liable for these costs.

4 CONCLUSION

The Environmental Defender's Office will continue to push for greater access to courts and judicial processes for the community. Our adversaries will continue to push for barriers to be maintained. We are coming from behind because our legal system developed to protect private property rights. It is still not well adapted to deal with public rights of environmental protection in the public interest. This needs to change. As Justice Wilcox of Australia's Federal Court noted in *Ogle v. Strickland*, another Australian case on standing;

"..to assume that competitive instincts are aroused only by concern for material wealth would be to ignore history. Much of the progress of mankind has been achieved by people who have sacrificed their own material interests in order to champion ideals against fierce resistance".