Power to the people

Public enforcement of NSW environmental laws

The open standing provisions of the *Environmental Planning and Assessment Act* 1979 (NSW) have allowed members of the community to bring actions to enforce New South Wales environmental laws and ensure that the proper processes are followed. An examination of three such cases demonstrates that government authorities cannot always be relied upon to carry out such enforcement or observe such processes.

Introduction

Section 123 of the *Environmental Planning and Assessment Act 1979* (NSW) ("*EP&A Act*") gives standing to any person to bring an action in the NSW Land and Environment Court to remedy or restrain a breach of that Act. There is no requirement that the litigant demonstrate that his or her rights have been infringed as a consequence of that breach. Section 124 of the *EP&A Act* gives the Court power to make such orders as it sees fit to remedy or restrain that breach.

In keeping with the open standing granted by s.123, the courts have stressed the public interest element of actions brought under that section. In *F Hannan Pty Ltd v Electricity Commission of New South Wales [No. 3]* (1985) 66 LGRA 306, the NSW Court of Appeal stated that in determining an action under s.123, the court must look beyond the rights of the immediate parties and accord "due weight ... to the public interest and the interests of other affected persons in the overall context of the pursuit of the objects" of the *EP&A Act* (at 313).

An action under s.123, however, has significant practical limitations. In many cases, the only challenge that may be brought is by way of judicial review. (For example, that in making a particular decision the decision maker (such as a local council) erred by taking into account an irrelevant factor in coming to its decision.) Such an action only allows a court to declare a decision invalid, not to substitute its own decision. The Court is also often precluded from looking at the merits of a particular decision, or taking into account new evidence that was not before the decision maker. In addition, the relief available under s.124 is discretionary, meaning that there is no absolute right to a remedy even if a breach is established.

In addition, other NSW environmental legislation contains similar provisions, granting standing to any person to bring proceedings to enforce a breach of those Acts. Such legislation includes the *Protection of the Environment Operations 1997* ("*PEO Act*") (s.252), the *National Parks and Wildlife Act 1974* (s.176) and the *Native Vegetation Conservation Act 1997* (s.63). The *PEO Act* also contains a provision (s.253) allowing any person to bring an action in the Land and Environment Court seeking orders to restrain a breach of any Act, if that breach is causing or is likely to cause harm to the environment.

The majority of public interest litigation in the environmental field in NSW has however been brought under s.123 of the *EP&A Act*. The following three cases, recently run by the Environmental Defender's Office NSW ("EDO"), are examples of cases in which s.123 has enabled a community member or organisation which has no direct interest in a matter to intervene to enforce NSW planning and environmental laws.

Iron Gates Pty Ltd v Oshlack & Anor

Land and Environment Court (unreported, Stein J, 6

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March 1997 and unreported, Pearlman J, 4 July 1997) Court of Appeal (unreported, Spigelman CJ, Mason P and Meagher JA, 9 February 1999)

Richmond River Shire Council granted a development consent to Iron Gates Pty Ltd to build a "green" subdivision on the environmentally sensitive "Iron Gates" site, on the north coast of NSW. The site comprised some 40 hectares of undisturbed bushland and provided habitat for a number of endangered species, including koalas and the Queensland Blossom Bat.

The works as envisaged by the original plans

The original proposal included measures intended to retain many of the environmental values of the site. The plans allowed for the preservation of large areas of bushland to provide wildlife habitat and to act as wildlife "corridors" to allow movement by wildlife; roads were to be narrow and winding, to reduce vehicle speeds and so decrease the chance of accidents involving wildlife; and the lot sizes were to be at least 800 square metres, to allow vegetation "easements" on the sites. These measures were included as conditions of the development consent.

The works as actually carried out

However, the works carried out by Iron Gates differed markedly to those envisaged in the original plans. In his judgment in the Court of Appeal proceedings, Gleeson CJ remarked that:

Contrary to what was proposed, there was extensive clearing of the subject land. Indeed, the timber on portions of it was clear-felled. The proposed wildlife corridor was obliterated. Far from retaining all native vegetation except to the extent to which its destruction was necessary, the developer, in substantial areas of the subject land, totally destroyed all vegetation.

In addition, roads were considerably wider than allowed by the consent, and many lots were smaller than 800 square metres. Two large drains, each around 15 metres wide, were constructed, one in what was supposed to be an environmental buffer zone along one boundary of the development area. The drains were not permitted by the development consent.

Enforcement action by the Council

Despite the numerous apparent breaches of the development consent the local government authority responsible for its enforcement, Richmond River Shire Council, took no action. In this respect, Gleeson CJ found that "[s]ubstantially everything [Iron Gates] did was done with the knowledge and approval of either the council itself, or of officers of the Council". In particular, the Council approved the construction of the two drains, even though these drains had considerable environmental impact.

Court proceedings

Mr Al Oshlack, a local conservationist represented by the EDO, brought an action against Iron Gates under s.123 of the *EP&A Act* in the Land and Environment Court. Mr Oshlack successfully sought orders preventing further works and orders for the revegetation of the site.

The Court found that Iron Gates had committed a number of breaches of its development consent and granted injunctions preventing Iron Gates from carrying out any further works. The Court later made extensive orders for remediation of the land, requiring Iron Gates to rip up the sealed roads, backfill the drains and replant the entire site with native vegetation, despite the hefty cost to Iron Gates. Iron Gates unsuccessfully appealed to the Court of Appeal.

Comments

The *Iron Gates* case demonstrates how the open standing provisions of the *EP&A Act* provide a crucial avenue for the enforcement of environmental laws. In this case, the government authority responsible for enforcing environmental laws not only failed to take action, but actually approved the actions that constituted the breaches.

However, the *Iron Gates* case also demonstrates one obstacle facing public interest litigants. After the tree clearing on the Iron Gates site had commenced, Mr Oshlack applied for an interlocutory injunction in the Land and Environment Court to prevent any further clearing taking place. However, the Court refused to grant the application, partly on the grounds that Mr Oshlack had failed to provide an undertaking as to damages. By the time the *Iron Gates* matter was heard, the balance of the tree clearing had taken place.

The Court has not always taken this approach, and has in ▶

the past granted injunctions without requiring such undertakings. In *Ross v State Rail Authority of NSW* (1987) 70 LGRA 91, the Court observed that had the Attorney-General, acting in the public interest, sought an injunction, there would be no requirement to provide an undertaking as to damages (at 100).

Timbarra Protection Coalition Inc v Ross Mining NL & Ors

Land and Environment Court (unreported, Talbot J, 23 February 1998)

Court of Appeal: (1999) 102 LGERA 52

High Court (unreported, Gleeson CJ and Gummow J, 14 May 1999)

In 1996, Ross Mining NL was granted a mining lease to construct a gold mine on the Timbarra Plateau, near Tenterfield in northern New South Wales. The mine was to cover an area of around 400 hectares, including some 76 hectares to be cleared of vegetation, and comprising two areas of open cut mining and a pipeline corridor to the Timbarra River.

Proposed extensions to the mine

In 1997, Ross Mining proposed to extend the area of the mine, by adding a new open cut pit and a new haul road. Tenterfield Shire Council granted development consent for the extensions to the mine, even though no formal environmental impact study had been carried out on the potential impact from the proposed extensions.

Opposition to the proposed extensions

The EDO acted for the Timbarra Protection Coalition Inc ("TPC"), a group of local residents opposing the mine on environmental grounds. The TPC's main contention was that Ross Mining had been required to prepare and submit a species impact statement ("SIS") to the Council before the Council could grant development consent, and had not done so.

The *EP&A Act* provided that if a development was likely to significantly affect threatened species or their habitat, a developer was to prepare an SIS which the relevant government authority (in this case, the Council) must take into account before granting consent. An SIS is a formal and fairly rigorous assessment of the potential impact of an activity on threatened plant and animal species.

The TPC gathered evidence to prove that the land affected by the proposed extensions to the mine would include habitat of threatened species including frogs, small ground dwelling mammals, arboreal bats and owls.

Proceedings in the Land and Environment Court

The TPC brought proceedings in the Land and Environment Court under s.123 of the *EP&A Act* challenging the validity of the development consent. The basis of the TPC's argument was that the failure to prepare an SIS meant that the Council had no power to grant the consent.

However, the TPC's application was dismissed. The Court held that the decision on whether or not the proposed development was likely to have a significant impact on threatened species was wholly within the power of the Council to determine. The only basis on which the Court would intervene would be if the decision was manifestly unreasonable on the basis of the evidence available to the Council when it granted consent. Accordingly, the Court ruled inadmissible the TPC's extensive expert evidence gathered after the Council had made its decision.

Proceedings in the Court of Appeal

The TPC successfully appealed to the Court of Appeal.

The Court of Appeal agreed with TPC's submission that this issue was a "jurisdictional fact", that is, a condition that had to be satisfied before the Council had power to grant the consent. If there was likely to be a significant effect on threatened species, then a council had no power to determine a development application until an SIS had been prepared.

The Court of Appeal therefore held that the TPC's fresh evidence could be admitted to decide whether an SIS was required. An application by Ross Mining for special leave to appeal to the High Court was refused. Ross Mining subsequently prepared an SIS before the Land and Environment Court made a decision about whether the consent was invalid.

Comments

The *Timbarra* case demonstrates how the open standing provisions may be used, firstly to remedy a substantial defect in the environmental decision-making process, and secondly, to encourage the protection of threatened species on land the subject of proposed development.

Coalcliff Community Association Inc v Minister for Urban Affairs and Planning & ors

Land and Environment Court: (1997) 95 LGERA 114

Court of Appeal: (1999) 106 LGERA 243

This case concerned a dumping site for coal washery refuse on the Illawarra escarpment.

In November 1984, after an extended planning approval application and public inquiry process, the Minister for Urban Affairs and Planning granted Kembla Coal and Coke Ltd ("Kembla") development consent to use the site as coal refuse dump.

The consent permitted Kembla to dump some 13 million tonnes of refuse at the site. However, the consent required Kembla to construct a drift (an underground tunnel) housing a conveyor belt, to transport the refuse to the site. The drift was to be constructed within 4 years of the date of the consent.

The consent also required that Kembla, prior to commencing operations at the site, enter into an agreement with the Minister for Urban Affairs and Planning to dedicate the site as open space public land after the operations had finished.

Completion of operations by Kembla

Kembla completed its operations at the site in 1991. By this point Kembla had neither entered into the agreement with the Minister to dedicate the land, nor had it even commenced construction of the drift. In his judgment in the Court of Appeal, Stein JA expressed the opinion that Kembla had never held any intention of constructing the drift; and the only deed which it sought to enter provided for construction and maintenance of a walking path at

the Minister's expense rather than dedicate the land, which Stein JA considered subverted the intent of the condition.

Modification to the original development consent

In 1995, another mining company, Metropolitan Collieries Ltd ("Metropolitan") leased the dump site from Kembla and sought modification of the 1982 development consent to allow use of the dump site for another 25 to 30 years. They also sought the removal of the conditions requiring the construction of the drift and dedication of the land. Wollongong City Council granted the modification, despite considerable community opposition.

Proceedings in the Land and Environment Court

A local residents group, the Coalcliff Community Association Inc ("CCA"), represented by the EDO, brought proceedings in the Land and Environment Court under s.123 of the *EP&A Act* challenging the validity of the modified development consent.

The Land and Environment Court found that Kembla had committed "technical" breaches of the original consent. However, the Court exercised its discretion not to declare the consent invalid. In coming to that conclusion, the judge took into account, as one of a number of factors, the fact that CCA did not have any direct interest in enforcing compliance with the consent.

Proceedings in the Court of Appeal

CCA appealed to the Court of Appeal. The Court of Appeal overturned the decision of the Land and Environment Court, finding that the consent had lapsed. The *EP&A Act* provided that a consent would lapse after two years unless the relevant work had commenced. If work had been commenced but that work was not lawfully permitted under the terms of the consent, then that would not constitute commencement of the works for the purpose of preventing lapse of the consent.

The Court of Appeal held that the original development consent required that the dedication of the land take place before the use of the land as a coal refuse dump began. Therefore, the use of the land as a coal refuse dump before this took place was unlawful, and did not constitute commencement of works.

In addition, Stein JA rejected the proposition that CCA's lack of interest in enforcing compliance was a relevant factor to take into account in the exercise of the court's discretion. His Honour stated that, "[CCA] did not have to establish any interest in the subject matter it sought to litigate. Its motive can be merely to advance the objects and policy of the [*EP&A*] Act, but it need have no direct or indirect interest in the subject matter of enforcing compliance" (at 259).

Comments

In his judgment, Stein JA commented that "the planning process revealed by the history [of the coal refuse dump] is extraordinary" (at 254). His Honour considered that this history showed a lack of willingness to enforce important, environmentally-oriented conditions of a development consent by a number of successive government authorities. The open standing provisions of the *EP&A Act* provide an avenue for enforcement of such conditions, without which the conditions would in all likelihood have no effect.

Conclusion

Government authorities traditionally responsible for the enforcement and administration of environmental laws have not always diligently ensured that those laws be given effect. In some such cases, the enforcement of those laws has only come about at the initiative of community groups or individuals who are able to bring proceedings by virtue of the open standing provision in the *EP&A Act*. This provision enables meaningful and powerful participation by the public in the environmental and planning regime in New South Wales. PL