USING ENVIRONMENT AND PLANNING LAWS TO PROTECT TRADITIONAL LANDS

by Sarah Mansfield

INTRODUCTION

The relationships between Indigenous communities and developers can be complex. Putting it simply, their respective interests are not always aligned, with developers frequently wanting to exploit land which Indigenous communities have a special connection with and are duty bound to protect. Adding to the complexity, Indigenous communities also desire financial independence and sustainability, and these objectives can be consistent with land development. The competing interests of Indigenous communities and developers are typically dealt with by the mechanisms provided by the *Native Title Act 1993* (Cth), such as the provisions relating to the 'right to negotiate', Indigenous Land Use Agreements, compensation and heritage legislation.[1]

This article explores some of the mechanisms which may be useful to Indigenous communities under environment and planning laws in order to protect their lands and communities from the adverse impacts of development, focusing on the regime in Western Australia ('WA'). Because these mechanisms are not specifically directed at Indigenous rights and interests, they can sometime be overlooked by Indigenous communities.

Environment and planning laws may allow Indigenous communities, in certain circumstances, to participate in the assessment and review of development applications and approvals. These laws are therefore potentially useful to Indigenous communities who desire to protect land from adverse environmental impacts arising from any developments, including mining projects and the associated work camps, infrastructure and services centres.

It should be noted that whether the mechanisms discussed below are available or appropriate will very much depend on the circumstances of each case, including the nature of the development—how it has been assessed, stage of assessment, who the approval authority is, when the approval was issued and the desired outcome. However, the potential for environment and planning laws to assist Indigenous communities is worth considering, particularly in circumstances where the actual or anticipated environmental impacts are significant.

SUBMISSIONS OF PLANNING SCHEMES AND PROJECTS

Development in regional WA is governed by a mix of statutory planning instruments, such as local planning schemes, structure plans and community layout plans,[2] state planning policies[3] and planning strategies.[4] When each of these planning instruments is created or amended, they are generally subject to a public consultation process.[5] This process can provide Indigenous communities with a valuable opportunity to participate in the formulation of the criteria which future development proposals will be assessed against. This may assist Indigenous communities to influence development within their communities, including development which can be carried out by members of community, as well as external developers.

In particular, under the *Planning and Development Act 2005* (WA)[6] and the *Mining Act 1978* (WA),[7] the applicable planning instruments must be considered during the assessment of an application for approval of development. If a development proposal is consistent with the applicable planning instruments, it is more likely to be proposed and approved.

It follows that, by participating in the formulation of planning instruments, Indigenous communities may influence the developments which are proposed to be carried out within and near their traditional lands and communities, and the criteria which they are assessed against.

TRIGGER AND PARTICIPATE IN THE ASSESSMENT OF ENVIRONMENTAL APPROVALS

In WA, any person can refer a project to the Environment Protection Authority ('EPA') for assessment under Part IV of the *Environmental Protection Act 1986* (WA) ('EP Act').[8] Once referred, the EPA must decide whether or not to assess the project, and if it is to be assessed, the level of assessment.

As a general rule, any person aggrieved by the EPA's decision *not* to assess a proposal, has 14 days from the date of publication of the EPA's decision in which to lodge an appeal with the Office of Appeals Convenor.[9] Decisions regarding the level of assessment and the EPA's recommendations to the Minister for Environment regarding the approval of the proposal can also be appealed to the Office of Appeals Convenor.[10] In addition, proposals assessed by the EPA are made available for public comment.

In each State and Territory in Australia, similar mechanisms exist which provide the public with the opportunity to participate in the assessment of a project and, in some cases, the review of a decision to approve a project. These mechanisms provide all third parties, including Indigenous communities, with the opportunity to convey their concerns about projects and have decisions regarding the approval of those proposals informed by those concerns.

A recent example of the power of public participation in planning decisions is the decision of the New South Wales ('NSW') Land and Environment Court of *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure*[11] ('*Bulga v Minister*'). In that decision, the Bulga Milbrodale Progress Association Inc ('Bulga')—a community action group who objected to the proposal of Warkworth Mine Ltd ('Warkworth') to expand an existing open cut mine in the Hunter Valley—commenced proceedings, challenging the Minister for Planning and Infrastructure's decision (through his delegate) to approve the expansion of the Warkworth Mine.

The nature of the proceedings commenced by Bulga in the NSW Land and Environment Court were 'merits review'. In this type of proceeding, the commissioner or Judge (in this case the Chief Judge Brian Preston) stands in the shoes of the original decision maker and, having regard to the evidence presented at the hearing regarding the environmental impacts of the proposal, determines whether the proposal should be approved, and if so, on what conditions. In WA, an appeal to the Office of Appeals Convenor is also a merits review. However, unlike in NSW, the review is not carried out by an independent court, but rather the Minister for Environment, who is advised by the Office of Appeals Convenor.

The Office of Appeals Convenor could be criticised for not offering a truly independent review of decisions made by the EPA, and it certainly lacks the independence of NSW's Land and Environment Court. However, in the author's experience, the Office of Appeal Convenor's review process is relatively informal and cheap when compared to the Land and Environment Court, and this may make the Office of Appeals Convenor more accessible to Indigenous Communities.

In *Bulga v Minister*, the Court considered evidence presented and determined that the impacts of the project on biodiversity and the village of Bulga, including the noise, dust and socio-economic impacts, were unacceptable and could not be appropriately mitigated. As a consequence, the Court disapproved the expansion of the Warkworth mine and thereby prevented it from going ahead.

Absent the proceedings commenced by Bulga and the evidence submitted by it, the expansion of the Warkworth could have (and likely would have) proceeded, together with the associated environmental impacts.

These laws are potentially useful to Indigenous communities who desire to protect land from adverse environmental impacts.

REPORT TO THE DEPARTMENT OF ENVIRONMENT REGULATION

If an Indigenous community becomes aware of, or reasonably suspects, a breach of an environmental approval or that a project is causing environmental harm, including through the pollution of land, water and air, then this information can be reported to the Department of Environment Regulation ('DER').[12] The DER has vast powers to investigate, require remediation works and prosecute environmental offences, including under Parts V and VI of the EP Act. Most (if not all) enforcement actions taken by the DER are triggered by public complaints. [13]

Particularly in remote communities, where environmental harm may be less visible, Indigenous communities can play an important role in informing the DER of events which warrant its attention.

JUDICIAL REVIEW

Judicial review proceedings are another means by which third parties can seek the review of an administrative decision relevant to the assessment and approval of a development. In judicial review proceedings, the Court will review the lawfulness of the decision, rather than the merits of it. Common grounds of judicial review include a breach of natural justice, an error of law or failure to take into account a relevant consideration.

The decision of the Supreme Court of Western Australia in *Wilderness Society of WA (Inc) V Minister for Environment*[14] (also known as the James Price Point Decision) is an example of a judicial review proceeding which assisted an Indigenous

community. In that case Richard Hunter, a Senior Goolarabooloo man, together with the Wilderness Society, successfully challenged the lawfulness of the Minister for Environment's decisions under the EP Act to approve Woodside's proposal to build a liquefied natural gas precinct at James Price Point, WA.

In short, as a consequence of the EPA's failure to comply with the provisions relating to conflict of interest in the EP Act, the Chief Justice held that the environmental approval of Woodside's proposal was invalid.[15] Hence, Woodside could not develop its liquefied natural gas precinct.

Significantly, it was accepted by the parties and confirmed by the Court that Mr Hunter, as a 'Law Boss' with responsibility to protect the lands within the vicinity of the proposed location of Woodside's project, had standing to commence the proceedings. This aspect of the James Price Point decision may be particularly relevant to other Indigenous people seeking to challenge the lawfulness of decisions to approve developments, as it strongly supports their legal standing to do so.

CONCLUSION

Environment and planning laws have the potential to assist Indigenous communities at a number of points in the development lifecycle. For example, environment and planning laws may offer Indigenous communities the opportunity to participate in the development of the framework which will govern future proposals, participate in the assessment of proposals and seek the review of any decisions made in relation to proposal. The potential benefits of some of these tools was demonstrated by *Bulga v Minister* and the James Price Point Decision.

Environment and planning law should form part of the options considered by Indigenous communities seeking to protect their traditional lands and communities from adverse environmental impacts.

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1 *Native Title Act 1996* (Cth) pt 2 div 3.
2 A complete list of all community layout plans in WA is available on the WA Planning Commissions' website <http://www.planning.wa.gov.au>.
3 Such as State Planning Policy 3.2 – Planning for Aboriginal Communities.
4 Department of Planning and the Western Australian Planning Commission, 'Dampier Peninsula Planning Strategy' (Draft Report, May 2014).
5 *Planning & Development Act 2005* (WA) pt 4 divs 2-3; pt 5 div 4.
6 Ibid s 162.
7 *Mining Act 1978* (WA) s 120.
8 *Environmental Protection Act 1986* (WA) s 38(1).
9 Ibid s 100(1)(a).
10 Ibid s 100(1)(d).
11 *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure* [2013] NSWLEC 48.
12 The DER's advice on how to report is available at: http://www.der.wa.gov.au/your-environment/reporting-pollution. You can also call the Pollution Incident Reporting Line 1300 784 782 or make a report at your local DER office.
13 Government of WA Department of Environment Regulation, 'Quarterly Reporting, Quarter 4 2013-14' (August, 2014) 25.
14 *Wilderness Society of WA (Inc) V Minister for Environment* [2013] WASC 307.
15 Ibid 307 at [1].

Missionary
Reminded me of the old people
Silas Hobson
Acrylic on linen, 1190mm x 680mm