

POWER TO THE PEOPLE: THE ROLE OF CITIZENS IN U.S. AND AUSTRALIAN ENVIRONMENTAL LAW

**2015 EIANZ ANNUAL CONFERENCE -
PERTH 29 OCT. 2015: “CHALLENGING THE
STATUS QUO”
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Defender's Office
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EDOWA - BACKGROUND

▶ BRIEF BACKGROUND OF EDOWA

- Established Sept. 1995
- Non-profit, community legal centre, specialising in provision of legal services to public regarding environmental and administrative law
 - Funding (up to May 2015 anyway - mix of private and public)

▶ MY BACKGROUND

▶ EDOWA'S INVOLVEMENT IN ENVIRONMENTAL LITIGATION

EDOWA LITIGATION - EXAMPLES

▶ 2013 – James Price Point – LNG Hub

▶ 2014 – Aurora Helena Range
Banded Iron Formations



WA's Banded Iron Formations Source: 911 Metallurgist

▶ 2015 – Beelihar Regional Park
– Roe 8 Highway



James Price Point, Western Kimberley Source: Environs Kimberley



Lower Swamp, east of North Lake – Beelihar Regional Park
Source: DPAW

“CHALLENGING THE STATUS QUO”

▶ WHAT IS THE STATUS QUO?

- *State of the Environment Report (2011) (vs. 2006 Report):* Climate change; biodiversity loss; urban sprawl; resource depletion; water scarcity

▶ THE PROBLEM – FROM EDOWA’S PERSPECTIVE

- Environmental protection/enforcement left largely to government regulatory agencies
- Prosecutorial discretion – Lax Enforcement
- Ministerial discretion – Experts don’t decide
- Hostile judicial system

“CHALLENGING THE STATUS QUO” (CONT’D)

► POSSIBLE SOLUTIONS – ENGAGE CITIZENS (U.S. MODEL)

- Citizens suits
- Relaxed standing
- Liberal rules allowing intervention, amicus briefs
- Apply American Rule in “public interest” cases
- Introduce civil/administrative penalties
- Strict liability for civil penalties
- Joint and several liability for penalties



Source: Earth Justice

CITIZENS' SUITS IN THE U.S.

- ▶ **“BIG PICTURE” DIFFERENCES – U.S. v. AU LAWS**
 - Prescriptive
 - Proactive
 - “Experts” in charge
- ▶ **BIG, BIG DIFFERENCE – CITIZEN’S SUITS**
 - Found in virtually every U.S. Federal, State statute
 - Some examples (Federal law) – many more
 - Clean Water Act, 33 U.S.C. §1365
 - Clean Air Act, 42 U.S.C. §7604
 - Resource Conservation & Recovery Act, 42 U.S.C. §6972
 - Surface Mining Control and Reclamation Act, 30 U.S.C. §1270
 - Examples (State law)
 - Ohio: O.R.C. §3745.08

CLEAN WATER ACT §505, 33 U.S.C. §1365

(a) Authorization; jurisdiction

Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

(b) Notice

No action may be commenced—

(1) under subsection (a)(1) of this section—

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or.

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 1316 and 1317(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c) Venue; intervention by Administrator; United States interests protected

(1) Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section only in the judicial district in which such source is located.

(2) the Administrator, if not a party, may intervene as a matter of right.

(3) Protection of interests of united states.—Whenever any action is brought under this section in a court of the United States, the plaintiff shall serve a copy of the complaint on the Attorney General and the Administrator. No consent judgment shall be entered in an action in which the United States is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Administrator.

CLEAN WATER ACT §505, 33 U.S.C. §1365

(d) Litigation costs

The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Statutory or common law rights not restricted

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

(f) Effluent standard or limitation

For purposes of this section, the term “effluent standard or limitation under this chapter” means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 1311 of this title; (2) an effluent limitation or other limitation under section 1311 or 1312 of this title; (3) standard of performance under section 1316 of this title; (4) prohibition, effluent standard or pretreatment standards under section 1317 of this title; (5) certification under section 1341 of this title; (6) a permit or condition thereof issued under section 1342 of this title, which is in effect under this chapter (including a requirement applicable by reason of section 1323 of this title); or (7) a regulation under section 1345(d) of this title,¹

(g) “Citizen” defined

For the purposes of this section the term “citizen” means a person or persons having an interest which is or may be adversely affected.

(h) Civil action by State Governors

A Governor of a State may commence a civil action under subsection (a) of this section, without regard to the limitations of subsection (b) of this section, against the Administrator where there is alleged a failure of the Administrator to enforce an effluent standard or limitation under this chapter the violation of which is occurring in another State and is causing an adverse effect on the public health or welfare in his State, or is causing a violation of any water quality requirement in his State.

CITIZENS' SUITS – THE BASICS

▶ WHO CAN SUE? ANY “PERSON” OR “CITIZEN” WITH STANDING TO SUE

- Who has standing to sue: Any person whose interest is adversely affected (individuals, corporations, states)
- 3 elements of standing:
 - (1) “Injury in fact” – invasion of legally protected interest that is (a) “concrete” & “particularised”, and (b) actual or imminent, not conjectural or hypothetical
 - (2) Causal connection between injury and conduct complained of (injury “fairly traceable” to the conduct and not result of independent action of third party)
 - (3) Injury “likely” can be redressed by favourable decision

▶ WHO CAN BE SUED?

- Any “person” in violation of a standard, condition or order issued by USEPA or authorised State program administrator
- The head of any Federal/State agency failing to carry out a mandatory duty

▶ VENUE & JURISDICTION: TYPICALLY U.S. DISTRICT COURT (FEDERAL CITIZENS' SUITS)

CITIZENS' SUIT BASICS (cont'd)

▶ PREREQUISITES FOR SUIT: 60-DAYS' NOTICE

- Generally, a citizen suit can only be brought after 60-days written notice of intent to bring suit is given to: (i) defendant, (ii) USEPA Administrator and (iii) State authorised program administrator,
 - Gives government chance to enforce law first
 - Allows defendant to come into compliance before suit
 - Contents/form/manner of notice usually spelled out in USEPA regulations (varies by statute)

▶ BARS TO SUIT:

- Diligent Prosecution: If EPA or authorised State is “diligently prosecuting” defendant for violation, a citizen suit is normally barred
- “Ongoing” Violation: Citizens suits generally must be against “ongoing” violations; “ongoing” if there is likelihood of recurrence

CITIZENS' SUIT BASICS (cont'd)

▶ INTERVENTION

- By government in citizens' suit litigation: U.S. or State government has absolute right to intervene
- By citizen in U.S. or State civil or criminal enforcement action (per most major environmental laws)
- No intervention to support defendant permitted

▶ REMEDIES AVAILABLE IN CITIZENS' SUIT

- Injunctions (granted only where (1) showing of irreparable injury, (2) balancing of competing claims of injury favors plaintiff, and (3) public interest warrants)
- Civil penalties (payable to the U.S., State treasury)
 - Up to \$37,500/day/violation under CWA §505
- Settlements (“Supplemental environmental projects” or “SEPs”) – some legislation requires settlement to be by consent decree accepted by USEPA and Dept. of Justice
- Attorneys' fees and costs
 - In order to encourage citizen suits, Congress allows award of attorneys' fees in virtually all citizens' suit provisions
 - Awarded to a prevailing or substantially prevailing party
 - May include expert witness fees
 - “Prevailing” = material alteration of the legal relationship between the parties (meaning injunction, final order, or a judgment against defendant in some respect)
 - Payable out of the Treasury (not by the losing defendant)

BENEFITS OF CITIZENS' SUITS

- ▶ PROVIDE CITIZENS OPPORTUNITY AND AUTHORITY TO FILE LAWSUITS TO ENCOURAGE AND PROMOTE ENFORCEMENT OF ENVIRONMENTAL LAWS
- ▶ ALLOW CITIZENS TO ENGAGE THE COURTS TO DEVELOP CASE LAW INTERPRETING/APPLYING ENVIRONMENTAL LEGISLATION
 - 3 out of 4 judicial opinions re: environmental laws began with citizen suits
 - Of all Clean Water Act actions, citizens suits = double those brought by government
- ▶ INVITES PEOPLE IN COMMUNITIES TO TAKE AN ACTIVE ROLE IN PROTECTING THEIR ENVIRONMENT AND ENSURING LAWS ARE APPROPRIATELY ENFORCED/APPLIED
- ▶ COMPENSATES FOR INADEQUATELY STAFFED, RESOURCED FEDERAL/STATE AGENCIES

AU: INADEQUATE ENFORCEMENT

► EDOWA EXPERIENCE: VERY LITTLE ENFORCEMENT BY GOVERNMENT

Borne out by Government statistics (16 Oct. 2014 DER NELA presentation ([file:///E:/EIANZ%20Presentation/WA2014 Presentation Giles Bite.pdf](file:///E:/EIANZ%20Presentation/WA2014%20Presentation%20Giles%20Bite.pdf)))

“Environmental Enforcement and Compliance Statistics 2013/2014”

Environmental Complaints Received:	1521
Confirmed Environmental Incidents:	2142
Environmental Field Notice (caution):	139
Environmental Protection Notice:	2
Infringement Notice:	14
Letter of Warning:	58
Licence Review/Amendment:	12
Modified Penalty Brief:	0
Prosecutions	6

0.3% of confirmed environmental incidents (6/2142) → prosecutions

DER 2014-15 Annual Report (p 13) doesn't suggest much improvement
183 environmental sanctions in 2014–15, including infringement notices, formal warnings and prosecutions (by comparison: 231 sanctions in 2013-14).

Commonwealth Figures: Not much enforcement either (p 195 of 2014-15 Annual Report): 9 judicial determinations in 2013-14 for violations of EPBC Act – nearly all dealing with violations of fishing or wildlife taking violations

ENFORCEMENT – COMPARISON

▶ CALIFORNIA – CWA CITIZENS SUITS ONLY – MARCH 2009 – JUNE 2010

- Per report by the State Water Resources Control Board's Office of Enforcement (June 2011)
 - During 15-mo. time-period, 60 x 60-day notices issued
 - SWRCB had data on 70% of the notices (42 in all)
 - Of the 42 notices:
 - 18 settled
 - 21 in active negotiation or litigation
 - 3 notices not pursued
 - 15 different organisations/individuals filed 60-day notices
 - 9 law firms represented these organisations/individuals
 - Remedies obtained by consent decree:
 - Injunctions – giving citizen organisation additional, overseeing “regulatory” power by requiring submissions of discharge monitoring reports and plans to the organisation; and
 - Monetary payments rather than civil penalties (including legal fees, environmental project funding, payments for future compliance monitoring and oversight
 - Stipulated penalties for failure to comply with consent decree provisions
 - Financial obligations ranged from \$10,000 to over \$450,000

▶ CONTRAST THIS – 1 STATE, 1 TYPE ACTION, UNDER 1 STATUTE – TO CTH ENFORCEMENT

WA CITIZEN'S SUIT PROVISION

- ▶ THERE IS SOME PRECEDENT FOR ENVIRONMENTAL CITIZEN'S SUITS AT LEAST IN WA (SORT OF)
- ▶ *ENVIRONMENTAL PROTECTION ACT 1986* (WA) s.79: NOISE POLLUTION
 - Loud noise emissions are “pollution” under EP Act
 - Section 79(2) allows prosecution for unreasonable noise emission to be brought by: (1) police, (2) an “authorised person”, or (3) 3 or more persons, each the occupier of premises who claim to be directly affected by unreasonable noise emission (fewer if <3 affected, or others are unwilling/unable to prosecute, or person is particularly affected)
 - But this is a criminal prosecution for an offence

OTHER IMPEDIMENTS TO CITIZEN ACTION IN AU

- ▶ COMPARED TO U.S.A., THERE ARE MANY OTHER LEGAL DEVICES AT PLAY IN AUSTRALIA THAT LIMIT CITIZEN PARTICIPATION IN ENVIRONMENTAL LAW ENFORCEMENT AND INTERPRETATION
- ▶ STANDING:
 - In Australia, plaintiffs in public interest environmental action must demonstrate they satisfy “special” standing requirements first set down in *Australian Conservation Foundation v Cth* (1980) 146 CLR 493 at 526-30 (special interest in the preservation of a particular environment; not a mere intellectual or emotional concern; requires showing person likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle, or winning a contest, if action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if action fails; belief however strongly felt, that law generally, or a particular law, should be observed, or that particular conduct should be prevented, does not suffice to give standing)
 - Move afoot in Cth Parliament to remove the “open” standing provision in s.487 of the EPBC Act

OTHER IMPEDIMENTS IN AU (CONT'D)

▶ COSTS ORDERS

▶ COURT'S DISCRETION IN "PUBLIC INTEREST" OR "TEST" CASES

- Cth: *Oshlack v Richmond River Council* [1998] HCA 11; (1998) 193 CLR 72; but see *Bat Advocacy NSW Inc v Minister for Environment (No 2)* [2011] FCAFC 84
- WA: *Roe v Director General, Department of Environment and Conservation* [2011] WASC 57; *Sea Shepherd Australia v State of WA* [2014] WASC 66

▶ OTHER FINANCIAL BURDENS

- Security for costs
- Prospective costs orders
- Undertaking for damages

OTHER IMPEDIMENTS – U.S.A. v. AU

▶ JUDICIAL HOSTILITY TO INTERVENTION, *AMICUS* BRIEFS

- Intervenor (i.e., a party) v Amicus (friend of the court)
- Hon Michael Kirby AC, “Deconstructing the Law’s Hostility to Public Interest Litigation”, *Law Quarterly Review* (2011)
 - *Wurridjal v The Commonwealth* (2009) 237 C.L.R. 309 at 312-314 (amicus denied for 2 international law experts); *Minister for Immigration Multicultural and Indigenous Affairs v QAAH of 2004* (2001) 231 C.L.R. 1 (amicus denied for UNHCHR)
 - 1980s, HCA allowed only 11 interventions; 20 in 1990s
 - Contrast to US: May be 11 amicus briefs lodged in single, high-profile case

▶ STATUTE-SPECIFIC RESTRICTIONS ON PUBLIC ACTION

- Prohibition on public appeals of planning approvals under the *State Administrative Tribunal Act 2005* (WA)
 - Significant restrictions on intervention by public
- Limited right of public appeal of planning approvals under Sustainable Planning Act 2009 (Qld)
 - Public appeal limited to “impact” assessable development; no public appeal of “code” assessable development

▶ LESS OBVIOUS IMPEDIMENTS

- Access to information: Freedom of Information legislation
- Ex post facto legislation
- Wide range of Ministerial discretion
- Nature of criminal penalties and burden of proof
 - Strict v Criminal (specific intent v no intent)
 - Individual v Joint & Several Liability
- “All Or Nothing” Review – Legal Error vs. De Novo Review

SOME PROPOSALS FOR IMPROVEMENT

- ▶ **FUNDAMENTALLY – START TREATING THE PUBLIC AS A PARTNER, NOT AN ENEMY**
- ▶ **INTRODUCE CITIZENS’ SUIT PROVISIONS IN AU ENVIRONMENTAL LAWS**
- ▶ **INCLUDE CIVIL AND/OR ADMINISTRATIVE PENALTIES, IN ADDITION TO CRIMINAL SANCTIONS**
- ▶ **ENSURE THAT CIVIL PENALTIES ARE SUBJECT TO STRICT, JOINT & SEVERAL LIABILITY**
- ▶ **ELIMINATE COSTS ORDERS IN ALL “PUBLIC INTEREST” ENVIRONMENTAL LITIGATION**
- ▶ **IMPROVE PUBLIC ACCESS TO ENVIRONMENTAL MONITORING AND PERFORMANCE INFORMATION**
- ▶ **LIBERALISE RESTRICTIONS ON STANDING IN PUBLIC INTEREST ENVIRONMENTAL CASES**



Source: Wild Rice

QUESTIONS?

THANK YOU - EIANZ

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