Pest or Protector – The Environmental Defence Lawyer in 2010

Chief Justice Robert French

Environmental Defenders Office 25th Anniversary Dinner

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It is sometimes possible in moments of extravagant day dreaming to think of the law as a lush jungle ecology. Lawmakers, law enforcers, regulators, administrators, lawyers, judges and the members of the public who are expected to live their lives within the framework of the law are amongst its genuses. Within each genus there are species. A relatively new species is the environmental lawyer. There is a taxonomic debate about whether such persons are entirely pestiferous, unattractively beneficial like the dung beetle, or a truly wonderful new example of God's ongoing creative handiwork. One thing is clear. The species is ineradicable

Evidence of the spread of the environmental lawyer is incontrovertible. It is global and perhaps, depending upon your point of view, a global challenge. John Bonnie a legal academic writing in 2003 in a journal called the *Widener Law Review* described the phenomenon in rather lyrical terms:

> Environmental law is being created and implemented from the forests of southern Chile to the Pacific islands off the coast of Far East Russia, from the highlands of Papua New Guinea to the high plains of Armenia

> in the shadow of Mt Ararat. Citizens are taking governments, polluters, and developers to court in Hebrew, Spanish, Tagalog, and Ukrainian.[1]

While there is some hyperbole in his statement, there are facts which give it substance. The Environmental Defender's Office of New South Wales, which was Australia's first such office, finds its place in national and global networks of similar offices and organisations. The Australian network of Environmental Defender's Offices, which came into existence with the help of Commonwealth funding in 1995, comprises nine independently constituted and managed community environmental legal centres in each State and Territory of Australia. The network has common objectives which are not confined to the reactive elements of defence. They are:

- protecting the environment through law;
- ensuring that the community receives prompt advice and professional legal representation in public interest environmental matters;
- identifying deficiencies in the law and working for reform of these areas;
- empowering the wider community, including indigenous peoples, to understand the law and to participate in the environmental decision-making;
- assisting the growth of the national EDO network across Australia.

The proactive, creative and constructive role of the environmental lawyer in the development of public awareness, public policy and new and better laws is as important, if not more important, than signal victories in courts of law.

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[1] J Bonnie, 'Public Interest Environmental Lawyers – Global Examples and Personal Reflections', (2003-2004) 10 *Widener Law Review* 451 at 451.

Beyond Australia's shores there are many organisations similar to the Environmental Defender's Office of New South Wales. Such organisations are to be found in the United States, Canada, the United Kingdom, New Zealand, Sri Lanka and Bangladesh, Latin America, Europe, South Africa and Tanzania. They have varying emphases and priorities as between public policy development, public education and litigation.

Many of these organisations, including the EDO, form part of what is now the world's largest litigation and law reform environmental network, the Environmental Law Alliance Worldwide (ELAW). The ELAW network was created in 1989 at the annual Public Interest Environmental Law Conference at the University of Oregon Law School. Its founders agreed to collaborate, to replicate successful environmental policies and to learn from each other's experience. Their cross-border collaboration relies significantly on the Internet and electronic communications generally. It uses technology to expand the impact of work done in disseminating information in response to specific requests for legal and scientific assistance. Today more than 300 public interest advocates, from 70 countries participate in the ELAW network.

The Environmental Defender's Office of New South Wales tonight celebrates the first 25 years of its existence and does so as part of a global movement. The national and worldwide networking of environmental defenders and like organisations reminds us that the environment is a global concern. That concern has never been more acute than today particularly in relation to climate change. Detailed prognoses of climate change are beset by the inherent complexity of our climatic system, which makes modelling and precise prediction difficult. However, the science, despite its difficulties, appears to have established the reality of a global warming trend. That reality will not be displaced or secured by the discourse of culture wars which informs some of the climate change debate.

By way of anecdotal pre-history, there were environmental organisations in existence around Australia before the Environmental Defender's Office was formed,

some of which engaged in litigation, although not with a particularly high success rate. As a young lawyer in the late 1970s and early 1980s I went to court on occasion for environmental organisations and their members in matters arising out of bauxite mining in the South West of Western Australia and the management and exploitation of South West forests. Like most experiences in the law, these engagements brought moments of euphoria and humour, and occasionally mild depression.

Bauxite mining in the South West of Western Australia in the late 1970s generated significant concern among local environmentalists, including such bodies as the Campaign to Save Native Forests, the South West Forests Defence Foundation and the Conservation Council of Western Australia. That concern led to litigation, in which I was involved with my helpful academic friend, Peter Johnston, in the surprisingly disparate centres of Harvey, a small south west town, Perth, and Pennsylvania. I found myself in Magistrates Courts on two occasions defending people who were charged with obstructing endeavours to mine and refine bauxite at Wagerup and other locations in the South West. These defendants were identified by alpha-numeric group names. I refer to the Harvey 11 and the Wagerup 23.

The Harvey 11 was so named because there were 11 of them and they were prosecuted in the Magistrates Court at Harvey. Their offence, as I recall it, was to obstruct the progress of mining operations by tying some form of tent rope to a bulldozer. To the best of my recollection, the magistrate found as a matter of fact that this did not amount to obstruction. The case did not enunciate any new legal principles. Its highlight came during the luncheon adjournment when a street theatre known as 'Desperate Measures' performed, in the main street of Harvey, a satirical version of the Sound of Music directed at bauxite miners, Sir Charles Court and all their friends and supporters. It is a tribute to the indifferent majesty of the law that His Worship, Mr Boyce, who ate his sandwich lunch in chambers well within ear shot of this noisy musical polemic, did not take it out on the defendants.

The Wagerup 23 generated some interesting law, a new statute and a querulous editorial from the West Australian newspaper. The protestors, who threw themselves on and in front of Alcoa's bulldozers at Wagerup, were charged with an offence, created under s 67 of the *Police Act 1892* (WA), of obstructing somebody from doing something pursuant to an authorisation issued under a law of the State. This time there was no doubt about the obstructing part of it. But the law of the State was said to be the government agreement between Alcoa and Western Australia, which was scheduled to an Act of the West Australian Parliament. The 23 having been found guilty in the Magistrates Court went to the Supreme Court where *Sankey v Whitlam*[2] was invoked for the proposition that scheduling an agreement to an Act of Parliament does not make it a law. The Supreme Court ducked the big question, but gave the appellants a win on a little point – namely, that what Alcoa had been doing was not done pursuant to an authorisation issued under the agreement[3] The State appreciated that it might be in some difficulty on the big question so within a week of the Full Court decision the Government introduced the Bill which was enacted as the *Governments Agreement Act 1979* (WA) to overcome the problem. The West Australian newspaper was bemused by the whole thing and published an editorial saying, in effect, that the law was an ass although it used more polite phrases such as: 'common sense … overlooked' and 'too silly to be true'.[4]

Two victorious war stories should be balanced by one of defeat. I have therefore carefully selected a defeat the blame for which can be directed offshore.

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2 (1978) 142 CLR 1.

3 *Margetts v Campbell-Foulkes* (unreported, WASC, 29 November 1979, FC, SCL2764)). See also Johnston and French, 'Environmental Law in a Commonwealth State Context – The First Decade' (1980) 2(2) *Australian Mining and Petroleum Law Journal* 77 at 86-87; Warnick – State Agreements (1988) 62 ALJ 878 at 896-899.

4 West Australian, 1 December 1979.

The Conservation Council of Western Australia in 1980 was very keen to find some way of agitating, in a court, its concerns about bauxite mining in the South West of Western Australia. There were considerable obstacles in its path. One was want of a cause of action. The other was want of standing, though it was said at one stage that potato farmers, threatened by increased salinity in south west water courses, might be possible plaintiffs. Surprisingly, no potato farmer was found willing to expose himself to the financial downside of speculative litigation against a multi-national mining giant. The Conservation Council then turned its gaze offshore.

Acting on the advice of a West Australian lawyer, who was in turn acting on the advice of a New York lawyer who had written about the rights of trees, the Conservation Council commenced proceedings against Alcoa and Reynolds Metals in the United States District Court of Pennsylvania. The pleading invoked somewhat elusive applications of US anti-trust laws, specifically the Sherman and Clayton Acts. This was not the first time that environmental issues had been litigated as anti-trust law. In one such case in 1976, plaintiffs had alleged that automobile manufacturers had conspired in restraint of trade to prevent development of anti-pollution technology.[5]

To cut a long story short, the defendants filed a motion to dismiss. Their prospects of success on the merits were high. At this stage the Conservation Council decided to brief my firm. We had the task of preparing factual material for filing in the US Court to provide some basis for the allegation of environmental harm in the plaintiffs' pleading which had been filed in the US Court. A number of substantial affidavits from Western Australian based scientists and medical experts were filed.

The strike out motion succeeded. This came as no surprise. To add insult to injury, the trial judge's judgment opened with a piece of breathtaking condescension

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[5] *In Re Multi District Air Pollution* 538 F.2d 931 (9th Circuit, 1976).

designed to demonstrate his classical education and the plaintiff's foolishness. It read thus:

> According to Greek mythology, Palladium, a Trojan statue of the goddess Pallas Athena (represented with a spear in her right hand and a distaff in her left), fell from the heavens near the tent of Ilus, a prince who was employed in building the citadel of Troy. Apollo, by an oracle, declared that the city of Troy would never fall as long as the Palladium was contained within its walls.
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> Plaintiff, an Australian conservation group, seeks from this court a Palladium for the Darling Range of Western Australia. Unable to obtain one in the country from which it comes, plaintiff has travelled to the United States in an unprecedented attempt to have a United States court sit in judgment on mining and refining activities taking place entirely within the foreign country from which plaintiff comes and whose allegedly deleterious effects on that foreign nation's environment plaintiff opposes. The case is now before this court on defendants' motion to dismiss.[6]

That judgment was delivered in July 1981. In the same year, while all that was going on, the Environmental Law Association of New South Wales (ELA) set up a committee which was to become the Environmental Defender's Office of New South Wales. At that time, Murray Wilcox QC was President of the Australian Conservation Foundation and presided over the ELA's executive. The initial concerns of the committee were to secure approval from the Law Society of New South Wales for the

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[6] *The Conservation Council of Western Australia v Aluminium Company of America* 518 F Supp 270 (1981).

formation of the Environmental Defender's Office and the funding necessary to operate it.[7] To overcome Law Society concerns about unfair attraction of business and touting among other things, assurances were given that the Office would operate like other community legal centres and cater generally to members of the public not otherwise serviced by the legal profession.

Initial funding came from Lend Lease which donated $10,000 and Esso, which donated $1,000. Fortunately, the Chairman of Lend Lease had just finished reading a book called *The Extinction of the Species and the Impact thereof on Mankind*, or some such title, which as he said in a letter to Murray Wilcox, 'laid the groundwork for acceding to your request'.[8] Eventually other funding came from the Legal Aid Commission conditional upon the EDO becoming 'independent'. This meant its move from being a committee of the ELA to a free-standing organisation. In 1984, an interim Board of Management was established and by January 1985 the office was incorporated.

Staff recruitment was not straightforward. The first advertisement for a principal solicitor required three years experience practising in the field of environmental law by a person who will have acted 'for both proponents and opponents of both major and minor development …'. This person would also have a sound knowledge of environmental planning, local government, mining and pollution law.[9] As Professor Boer was to write:

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[7] B Boer, 'Legal Aid in Environmental Disputes', (1986) 3 *Environmental and Planning Law Journal* 22 at 35-37; M Wilcox, 'The Role of Environmental Groups in Litigation', (1985-1986) 10 *Adelaide Law Review* 41.

[8] D Robinson, 'The Environmental Defender's Office NSW 1985-1995', (1996) 13 *Environmental and Planning Law Journal* 155 at 156.

[9] D Robinson, fn 8, 155 at 158.

The response to these advertisements was not overwhelming.[10]

Nevertheless, applicants for the position were found and appointments made. One of the early appointments was Brian Preston, currently the Chief Judge of the New South Wales Land and Environment Court. By 30 May 1985 the Office had opened 12 files, of which five were litigious.[11] In the years that followed it took a number of important cases to courts, including the High Court, covering a variety of issues concerned with development and activities impacting on the environment. Since its early years the Environmental Defender's Office has expanded its services into a wide range of areas. In 2008 and 2009 it undertook a variety of cases involving issues of significant public concern including climate change, biodiversity issues, Aboriginal cultural heritage and planning and coastal development. Its staff dealt with over 1,000 telephone inquiries on the Environmental Law Line, some 65% of which came from rural and regional New South Wales.

Litigation conducted by the Office since its creation reflects the diversity of its practice. It has acted for groups and individuals and indigenous communities. It has, like many such organisations, faced ongoing challenges posed by limited resources. Not unexpectedly, it has not enjoyed success in every case it has taken on. Nevertheless, its record in the face of challenges posed by limited resources is one of which those who do work with it, those who have worked with it, and those involved in its governance, can take some pride. It is an ongoing reminder to all, of the proposition which is good at the local and global level that our environment must be respected and protected. That is not just to provide gainful employment for the species known as the

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[10] B Boer, 'Legal Aid in Environment Disputes', (1986) 3 *Environmental and Planning Law Journal* 22 at 27.

[11] D Robinson, fn 8, 155 at 159.

environmental defence lawyer. It is also to provide a liveable and survivable environment for the whole human species.