

ANNUAL REPORT

1 July 2004 – 30 June 2005

2004/2005 - A Year of Expansion

Dr Hannes Schoombee, Convenor



On 1st July 2004, the WA State Government entered into an agreement with the EDO WA to provide funding for an outreach environmental legal service for a three year period – a funded 'Bushlawyer' position. This was an historic point for the EDO. Thanks must go to Giz Watson MLC and Hon Jim McGinty MLA for the work they put into making this invaluable funding happen.

The financial security and increased scope of operations which resulted from State Government funding have been significant. Plans can now be made a couple of years ahead, and we have been able to move away from the uncertainties and ad hoc planning we had to live with for the past 10 years.

Throughout those ten years, the EDO WA has played an important part in ensuring that the natural and built environment is protected – by the law. We trust we will be able to continue to provide environmental legal advice, environmental legal education and promote law reform.

One of the biggest changes the EDO and its members have seen since the EDO's inception in 1995, is the establishment of the State Administrative Tribunal (the "SAT"). SAT's inaugural President is Justice Michael Barker, whom you will remember as the EDO WA's first Convenor in 1996.

The SAT was established in Western Australia in 2005 as an independent body that makes and reviews a range of administrative decisions. The *State Administrative Tribunal Act 2004* and the *State Administrative Tribunal (Conferral of Jurisdiction) Amendment and Repeal Act 2004* (Conferral Act) established the SAT in law. The Conferral Act refers to more than 130 existing Acts of Parliament, known as enabling Acts. The enabling Acts give the SAT the jurisdiction to make decisions on specific matters.

Relevant to our sphere of operations, those include matters in the areas of town and regional planning, water resources, the Rights in Water and Irrigation Act, WA Planning Commission Act, Land Administration

Act, Fish Resources Management Act and other pieces of legislation on which EDO clients regularly seek advice.

The EDO solicitors have appeared in the SAT. One issue that remains contentious is that the SAT legislation does not recognise either third party appeal, or joinder, rights in respect of review matters, such as the review of a grant of development approval. Therefore EDO clients will continue to have concerns with 'standing' to challenge such decisions seen to be deleterious to the environment.

Third party rights to appeal or to be heard in development applications are a perennial issue for EDO clients, particularly in light of recent cases. In the Coogee case, to which I referred in last year's Annual Report, the EDO acted on behalf of the Coogee Coastal Action Coalition Inc in bringing judicial review proceedings in the Supreme Court over proposed development in the seabed area north of Coogee Beach. Unfortunately the case was ultimately lost before the Court of Appeal, but some important and oft neglected issues were ventilated, such as the existence and protection of common law rights of navigation and fishing in coastal waters, and the extent to which genuine consideration should be given to State Planning Policies in a coastal context.

The second case the EDO took on this year was brought before the SAT on behalf of the Lakes Action Group Association Inc which asked the Minister to take enforcement action in relation to a quarry in the Lakes area. The group wanted to test allegations that there was no planning approval for the ten year old quarry. However, we decided to represent the group because the group did not have the means to afford private representation and the public interest in the matter was deemed high. It was decided that there was a public interest in the consistent enforcement of district schemes, and that if the EDO did not take the case, the group would have been unrepresented. In the result, released on 1 August, 2005, the case was lost. Costs have been claimed not

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EDO gratefully acknowledges the support of



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Legal Advice

As reported last year, the EDO is now using a new system of reporting legal activities to the Commonwealth and State Governments. This caused a few 'teething' problems but staff are now able to use the Community Legal Centre Information System (CLSIS) efficiently. CLSIS requires the EDO to report on:

Information/referrals Clients who call the EDO but we are not the appropriate provider. These clients are referred to another Community Legal Centre, to a government department, or to the EDO WA's web page for fact sheet downloads. From 1 July 2004 until 30 June 2005, the EDO recorded **192 Information activities** - people who were referred to Legal Aid, Health Department, Department of Environment, Ombudsman, Aboriginal Affairs, local government, private practitioners and many other agencies;

• **Advices** Legal activities that require one phone call, letter, face-to-face interview or email to provide the client with requested legal advice; and

• **Cases** Legal advices requiring two or more activities to provide the necessary advice. These may be as short as two letters, or as long as a Supreme Court representation.

During 2004-2005 the matters that EDO WA solicitors attended to were as diverse as they have been in past years. A snapshot of matters and advice provided is represented below.

What the problem was.	What the EDO WA did to solve it.
A landowner began clearing a 'fire break' along a fence line that extended into a wetland categorised 'conservation'. The EDO client wanted to know if a permit was required and could the wetland be exempted from clearing regulations under the Bush Fires Act.	The land had been classified as remnant native vegetation and as such was not exempt under the Bush Fires Act. In addition the method of clearing - chainsaw/blade loader - and the lack of a fire permit, also excluded the possibility of an exemption under Schedule 6 of the Act.
A local government wanted to sub-divide land that is listed by the Heritage Council and did not involve the Heritage Council in its decision-making.	There was a breach of the Heritage Act and the client was advised to write to the relevant State Government Minister and Heritage Council, armed with the information given to the client by the EDO.
A regional council was found to be sending household waste (originally destined for recycling and/or landfill) to South East Asia in ship containers.	The EDO investigated Commonwealth Hazardous Waste Act provisions.
A client was threatened with defamation action when he reported a fishing regulation offence and sent it to the industry body.	The client had a right to report the offence and to educate the community about fishing regulations by highlighting the offence.
A client wanted to know what powers are legally available to exclude whaling vessels from Australian ports.	The whaling issue has been reported widely in the Australian press as well as EDO News. EDO NSW also appeared for the Humane Society International in the attempt to stop whaling - even for scientific reasons. The success of this case illustrates the power of one voice attracting the attention of other voices.

Solicitors' Reports



Leigh Simpkin, Principal Solicitor

As members well know, the EDOs Commonwealth funding contract constrains us from using solicitor time for court work. In recent years, the EDO has found it so difficult to fund representation of clients in court that no representative work was accepted. The advent of State funding from 1 July 2004 has meant we could take on two cases in the 2004-5 year. Both were lost, as discussed below, but we gave our clients the opportunity for justice in the courts that previously was unavailable.

The Coogee case – testing State coastal policy and defending public rights in relation to the foreshore and seabed at common law

The Coogee case involved a long-standing project to build a residential precinct and marina on what is now foreshore and seabed at the northern end of Coogee Beach. It was sanctioned by Cabinet, although this was never formalized by any State Agreement between the developer and the State. The State had given Australand, the developer's parent company 37 ha of foreshore and seabed and Australand had acquired about 50 ha of adjacent land to the landward side of it. The gazettal of an Improvement Plan by the State had assisted Australand to consolidate its holding in the landward 50 ha. of the proposed development area

Initially, the client, the Coogee Coastal Action Coalition (Inc.), was concerned about the manner in which the State Coastal Planning Policy had been construed. This, together with a bias claim in relation to the WA Planning Commission who had had a project officer working on the project for several years, was the main bone of contention and the reason we wanted to pursue the legal challenge in the Supreme Court ("SC"). Further, in our view, in the redevelopment of the foreshore and seabed, common law rights of public access were being overlooked.

The State prepared zoning amendments under the region plan that would rezone Australand's land, including the gifted seabed part of it, for urban development. The State Coastal Planning Policy or SCPP (issued April 2004) was a relevant mandatory consideration in the rezoning decision. It required a 100m plus setback from the beach to the development (technically from the toe of the foredune to the first building. Controversially, no setback was applied in the zoning decision on the regional plan. While the boat pens did not have to be set back, the residential component of the development ought to have been set back. In our view, the stated explanation showed that the SCPP had been misconstrued, or that the setback requirement had been given no weight. We also considered it important that the public's common law rights to access the foreshore and sea for fishing bathing and navigation should not be sold and this alienated forever because of this private development. As the relevant documents arrived in the office, it became clear that there were a number of other defects with the decision. For example, development over the 37ha of seabed could not have been undertaken because the Improvement Plan did not extend to the seaward side of the foreshore.

In judicial review cases brought by incorporated associations one also has to carefully consider the preliminary hurdles of security for costs, and 'standing' to appear in the Supreme Court. Only the commercial parties (Australand et al) raised these issues. The State also claimed Parliamentary privilege prevented us from relying on evidence before a Parliamentary committee so research time had to be given to such issues: Cabinet documents were subsequently produced to the Court of Appeal by one of the commercial parties to confirm that the seabed land had been gifted to Australand, but not until the ground on which we had relied had been ruled out by the SC at the Order Nisi stage.



The case proceeded quickly. We took the case on in July 2004, and prepared the challenge which was lodged in October 2004. The hearing was held on 1 December 2004 and the decision was released on 10 December 2004, giving us leave to continue to the Court of Appeal on 3 March 2005. The pace at which we had to prepare on so many issues was breathtaking and the office staff and our volunteers deserve huge praise for the hours that they put in and the cheerfulness under pressure that they displayed.

Despite getting leave to proceed, we were dismayed that some of our best arguments were knocked out. Our argument that there had been a misconstruction of the SCPP went nowhere. (It got a raised eyebrow, and the 2002 SC case we relied on went unmentioned in the judgment.) The absence of an Improvement Plan over the seabed was ruled "premature". As a footnote, we can add that the State remedied the gap in its Improvement Plan on 15 December 2004, gazetting it on 31 December 2004, so that our window of opportunity had we but been able to get into court in that timeframe. We would also have had to evidence the intention. From the State's perspective, our challenge can be seen to have provided the opportunity to fix mistakes that might have proved more costly later on.

We proceeded to the Court of Appeal with the bias and common law rights arguments hoping that these arguments would win the day. Dr Schoombe presented the case beautifully; his hundreds of hours of preparation showing in the confidence with which he pressed ahead. It was stimulating and enjoyable experience for me watching the court and the barristers at work. The result was frustrating. Again one of our arguments - the common law rights argument - was held to be "premature". The difficulty of getting cases up in the SC for a non-governmental organization means that "prematurity" is a killer blow. It's difficult to see from the decisions when we could have applied to the SC and not been premature, or, too late.

Costs were awarded against our client.

The Lakes Action Group case

The decision in the Lakes Action Group case was issued on 1 August 2005 without the draft being circulated to parties for comment, as is required in the relevant jurisdiction of the State Administrative Tribunal. A dispute as to costs remains outstanding.

The claim concerned the existing BGC quarry in the Shire of Northam. It arose because in an earlier Tribunal hearing for a quarry on the adjacent site, no planning approval for this quarry was produced by any of the planning witnesses, and evidence was given that none of them had sighted it, or verified that it existed. Our client, the Lakes Action Group Association Inc., obtained a letter from the Shire of Northam which said that although there was a planning approval process, no planning approval had been issued. In discovery, which was obtained via the evidence of the Shire of Northam's CEO, reliance was placed on an application for an excavation licence for a different site, which was approved despite the matter being referred to the EPA. At this point it appeared that we would win. In addition, in a recent shire of Chittering case, the Town Planning Appeals Tribunal had held that a licence application for excavation approval under a Shire's Bylaws could not double as a planning application. However, such decisions do not have precedent status. The Shire of Northam's case relied on the whole suite of correspondence and Committee decisions that were made in relation the alternate site (the current site) which had not been referred to any town planning committee, nor the EPA. The State Administrative Tribunal held that a Works Committee decision to approve the excavation that stated that an operations plan would still need to be approved by the Committee was a planning approval.

LEIGH SIMPKIN
PRINCIPAL SOLICITOR





Rick Fletcher, Rural, Regional and Remote Solicitor

In July 2004, the EDO received recurrent funding from the WA government for the first time through Legal Aid. This funding allowed for the employment of a second full-time solicitor to expand the EDO's work in rural, regional and remote (RRR) areas of Western Australia. In September 2004, I started work as the EDO's RRR Outreach solicitor.

As well as being first point of call for many of the telephone and email inquiries originating outside Perth, my role involves regional visits to provide on site legal advice and legal education sessions, to make contact with local community groups and community legal centres and to raise the profile of the EDO. This builds on similar work done by Sandra Boulter as the EDO's original Bushlawyer and Kirstine Forestier who was our NRM project solicitor.

To date, I have visited Mandurah, Busselton, Bridgetown, Denmark, Albany, Geraldton, Broome and Kununurra. These visits have been quite productive and I hope we will be able to build on them with some follow-up visits next year. We are still looking at ways to improve the number of people who come to the legal advice and legal education sessions and we will try to implement some of these improvements in the next regional visit tentatively scheduled for late November/early December to the Wheatbelt.

**RICK FLETCHER
RURAL, REGIONAL AND REMOTE SOLICITOR**



Participants in the Natural Resource Management Project, Kununurra October 2004



Audited Accounts

An extract of audited accounts for the year ended 30 June 2005 is provided overleaf, together with some explanatory notes. A full set of accounts, including the auditor's report, is available on request.

Income

This year's income highlight was the very welcome addition of State Government funds on a three-year recurrent agreement. The Attorney General announced at a special EDO function that \$75,000 pa for three years had been allocated to the EDO WA, to set up an outreach environmental legal service. We also received a \$15,350 'set-up' grant which was extremely useful in getting the program off the ground.

Income shows again that we were very fortunate in attracting \$40,000 from the Law Society's Public Purposes Trust. This grant plays an invaluable part in allowing the EDO to keep delivering core services.

Expenses

Salaries decreased in 2004/2005 as the two major projects funded by the Natural Heritage Trust and Rural Industries Research and Development Corporation came to an end during the year, making it necessary to reduce staffing levels. Other expense items tended to retain their status quo.

'Computer consultant' has increased considerably, due to contracting out our information technology maintenance. Msquared works at a reduced rate for us and is available at any time to come to the office and fix problems, do upgrades and generally keep the EDO on-line and networked. He is contracted again for 2005/2006.

Surplus and Assets

A modest surplus was managed this year, as indicated in last year's report that deficit budgeting has ended. It is anticipated that this trend will continue.

Depreciation

This item is higher than last year, mainly due to the purchase of a new photocopier (thanks to the State Government Outreach set-up grant). The new machine has severely reduced the time wasted fixing outdated equipment, clearing frequent jams and waiting for service repairmen. In addition, it acts as a printer, facsimile and scanner so it has also reduced office clutter.

Conclusion

The Management Committee continue to be committed to finding new avenues of funding for the EDO and 2004/2005 did bring much needed State Government funds into the budget. Staff and volunteers are continually working to promote the EDO, raising its profile and therefore attracting the attention of potential funders. Notwithstanding our State and Commonwealth funding, we continue to rely on successful applications to philanthropic bodies, membership and donations to fund what are, in fact, increasing core services and any extra project work we are called upon to undertake.

CAMERON POUSTIE
TREASURER



Legal Education

Legal Education continued to play a key role in the EDO's Objective "to empower the community to protect the environment through law and through use of the legal process, recognising (among other things) ... the importance of public participation in environmental decision making to achieve environmental protection". Highlights of the 2004/2005 community legal education calendar included rural visits and presentations under our new State Government funded Outreach Program. The full list is set out below:

- State-wide Catchment Council Natural Resources Management Groups – on using the legislative framework to ensure that Strategic Plans for each Catchment Council recognised legal impediments and opportunities for implementation of the Plans. To assist with the strategies, Kirstine Forestier put together a legal 'tool kit'.
- Presentation on the CCWA/EDO submission on an EPA Discussion paper on fire. The issues impliedly involved reform of the Bush Fires Act and the CALM Act.
- Regular speaking spots on RTR-FM radio about topical legislation affecting the environment including AUSFTA (Australia/USA Free Trade Agreement), Metropolitan Region Scheme amendments, the Wetland Environmental Planning Policy, Bio-security and Agricultural Management Bill, draft Swan-Canning legislation and consolidation of planning legislation
- Urban Bushland Council – Perth Airport plan. In particular how the Federal Airports Act 1996 overrides State planning and building laws
- DoE – Quarantine Issues on Offshore Islands. In particular marine ballast water, pest/plant and animals law and the role of AQIS and the Department of Agriculture as regulators and the need for a comprehensive State-wide weeds policy
- CCWA Conference presentation on accessing the EDO's services
- Economic Torts and implications for environmental activists – breach of confidence, interference with business relations and the emerging tort of privacy were discussed

- Outreach in Mandurah, Busselton, Bridgetown, Denmark and Albany – Clearing Laws
- First regional round table on Water Law – leading to the Water Law Conference in July
- EDO as a Political and Legal Institution – Murdoch University
- Third Party Rights in the EP Act Parts IV and V – should these appeals be heard by the SAT? A Law Week presentation done in conjunction with SAT Senior Member, Mr David Parry.



The EDO is committed to applying access and equity principles in the provision of advice and services and in its own management and administration.

The EDO WA (Inc) has a dedicated Management Committee and staff committed to ensuring the EDO continues to provide a high standard of service delivery.

2004/2005 Management Committee

Convenor	Hannes Schoombee
Deputy Convenor	Andrew Roberts
Secretary	Janice Dudley
Treasurer	Cameron Poustie
Committee Member	Angas Hopkins
Committee Member	Harriet Ketley
Committee Member	David Garnsworthy
Committee Member	Chris Bailey
Committee Member	Jay Anderson

2004/2005 Staff Members

Leigh Simpkin	Principal Solicitor
Kirstine Forestier	NRM Project Solicitor
Rick Fletcher	Outreach Solicitor
Marilyn Ashton	Coordinator
Jayne Head	Coordinator



Law Reform

Since the EDO began in September 1995, submission of law and policy reform has been one of the major core services provided by its solicitors. The first of our impressive list of law reform submissions was on the Land Administration Bill 1995 (WA). Since then the list of EDO WA submissions has become long and varied. Below, in chronological order, are some of the more memorable ones:

February 1996

- Land Administration Bill 1995 (WA)
- Planning Legislation Amendment Bill 1995

July 1997

- Contaminated Sites position paper

March 1998

- WA's Wildlife Conservation Act

March 2000

- WA Biodiversity Conservation Act (replacing Wildlife Conservation Act)
- CALM Amendment Bill
- Forest Products Bill
- Commonwealth Gene Technology Bill 2000
- Amendments to the draft Water and Rivers and Irrigation Act

June 2000

- Land Conservation Regulations
- Planning Appeals Bill

December 2000

- Natural Resource Management

September 2001

- Mining Act
- Draft State-wide Policy Transferable Water Entitlements
- Bellevue fire – contaminated sites

December 2001

- Mineral Tenements and Land Title Applications

September 2002

- Legislative Council Standing Committee on Public Affairs and Environment in respect of Gene Technology Bill 2002
- Limitations Law Reform
- WAPC Act
- Wildlife Conservation Regulations

March 2003

- Joint Review of CLC in WA
- DEP licensing review
- DEP enforcement and prosecution review

September 2003

- DEP and EPA on how to make Ministerial Conditions and licence conditions more enforceable
- Water Corporation on wastewater overflows
- Committee On Water Services in WA

November 2003

- State Administrative Tribunal lodged with Legislative Council Committee

December 2003

- Joint Management of CALM lands
- CALM's prosecution guidelines and administrative procedures
- Strategic Direction for Waste Management in WA

February 2004

- Draft Native Vegetation Clearing Regulations

March 2004

- Proposed CALM regulations
- Appearance before the Standing Committee of the Legislative Council regarding the SAT legislation
- Hon Ken Travers in relation to draft clearing regulations

April 2004

- National Water Initiative Stakeholders forum

May 2004

- Joint EDO/CCWA submission on Planning and Development Green Bill

August 2004

- EPA –fire management discussion paper

November 2004

- Joint EDO/CCWA submissions on draft Contaminated Sites Regulations 2004

February 2005

- Mining Act amendments (jointly with the Conservation Council Western Australia and Alex Gardner)

April 2005

- Draft Swan and Canning River Management Bill CALM – Biodiversity Conservation Strategy for WA



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only from the client, but also from the EDO. The costs matter will be heard on 27 October 2005.

Litigation takes up enormous amounts of scarce resources and the EDO must make careful and difficult choices about what cases to run on behalf of clients.

I wish to thank the Management Committee members once again for their support over the year. My sincere thanks are extended to the current Management Committee members:

- Andrew Roberts - Deputy Convenor;
- Janice Dudley - Secretary;
- Cameron Poustie - Treasurer;
- Angas Hopkins - Committee Member;
- Chris Bailey - Committee Member;
- David Garnsworthy - Committee Member;
- Harriet Ketley - Committee Member; and
- Jay Anderson - Committee Member.

Pro bono assistance was received from Greg McIntyre, Peter Rattigan, Richard McCormack, Lee McIntosh, Anette Schoombie, Hylton Quail and Steve Walker. Sincere thanks to all of you.

Staff Changes

A number of staff changes occurred during the year.

Our IT systems support was formalised with a series of six-month contracts with Msquared. The need for this support was never greater than during the Coogee case, when the fax and the network server died on the same day and the outage lasted nearly a week. Our ISP was changed, too. We have continued to upgrade the systems as funding becomes available.

Katrina Strong, Events Coordinator, left for a few months to have baby Dane, and look after him at home. She returned in February, but then followed her partner, who had been successful in getting a job back in his home town of Bendigo. Jayne Head then worked for the EDO two days a week for two months, notably in respect of our Water Law conference planning.

As regards, legal staff, we reported last year that Vivian Markovich, our project solicitor for the RIRDC project, left the EDO in May to take up a position with the Department of Environment. Kirstine Forestier continued with both the NHT and RIRDC funded projects until those contracts ended in November 2004, at which time we farewelled Kirstine.

Mid-September Rick Fletcher started with the EDO – formerly an EDO volunteer and Management Committee member – to undertake the State Government Outreach Program. Rick continues to provide a great service to rural areas.

Many thanks go to all the staff for their support in what has been a challenging year. As a postscript, Marilyn Ashton, our Finance and Reporting Coordinator, has recently resigned to work closer to home. Marilyn worked for the EDO for nearly six years and provided nearly all the institutional memory of the EDO. She will be greatly missed.

Funding and support

As usual, it is the members and supporters who really see the EDO Management Committee and Staff through the hard times of diminishing funds and heavy work loads. On behalf of the Management Committee and staff, I extend sincere thanks to you all.

2004/2005 has been a year of looking at a new horizon with the assistance of State Government funding. We look forward to 2005/2006 with anticipation.

My final thanks must go to the EDO as a whole, for giving me the opportunity to work with fine minds and dedicated people. To this end I was delighted to be awarded the 2005 Law Society's Law Week Community Service Award after nomination by the EDO – awarded to me for my services to the EDO in particular and the community in general, in providing pro bono legal assistance.

HANNES SCHOOMBEE CONVENOR

Hours of operation and contact details

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EDO services do not include a 'duty lawyer'.