



Environmental Defender's Office W.A. (Inc.)

# **Annual Report 2010**



# Environmental Defenders Office

Western Australia (Inc)

## **MANAGEMENT COMMITTEE**

Dr Johannes Schoombee	Convenor
Sharon Mascher	Deputy Convenor
Lee McIntosh	Secretary
Sarah Van Gent	Treasurer
Peter Robertson	Ordinary Member
Wayne O'Sullivan	Ordinary Member
Garry Rutherford	Ordinary Member
Emma Cavanagh	Ordinary Member

## **STAFF**

Josie Walker	Principal Solicitor
Jessica Smith	Outreach Solicitor
Claudia Maw	Coordinator & Paralegal

## **Mission Statement**

The EDO WA (Inc.) is a non-profit, non-government community legal centre specialising in public interest environmental law. Our mission is to protect Western Australia's environment by providing community groups and individuals with environmental legal services, including advice, education and representation, and the opportunity to participate in reform of laws affecting the environment.

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## Convenor's Report – Dr Johannes Schoombee

This year the EDO has continued to provide valuable legal advice and representation to the West Australian community in public interest environmental law matters, and to advocate for the interests of the environment in environmental law reform debates.

In May 2010, convenors and staff from the Environmental Defender's Offices network around Australia met in Sydney to celebrate 25 years since the founding of the first EDO – our "big sister" – in New South Wales. This provided an opportunity to reflect on the role played by EDOs in protecting the environment and promoting the development of environmental law throughout the country. The Attorney General of Australia, Mr Robert McLelland, acknowledged that the EDOs have an important part to play in civil society, holding governments and corporations accountable to compliance with environmental laws.

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In the litigation field, a highlight of the year was the withdrawal of Cable Sands' application for a mining lease at Lake Jasper, a case which the EDO commenced over 12 years ago on behalf of South Coast activists.

Proposals to begin uranium mining in WA are of concern to many of our clients and members and the EDO has provided several advices on issues connected with uranium mining. In June 2009, several conservation groups appealed BHP's proposal for a uranium mine at Yeerilie, and this year the EDO helped the Conservation Council of Western Australia ("CCWA") and its affiliate groups to argue for a public inquiry to address not only the impacts of the proposed mine, but also the broader environmental and health risks of starting up a uranium mining industry in Western Australia.

My critical evaluation of the assessment process which gave the go-ahead to the Gorgon Gas project on Barrow Island was originally completed as a conference paper in 2008 with the research support of the EDO. It was published this year, in updated form, as Chapter 7 of the well-received publication *Mines, Mills and other Controversies. The environmental assessment of major projects*, ed. Tim Bonyhady and Andrew Macintosh (Federation Press; 2010.)

The EDO participated in the Minister for Environment's Environmental Stakeholder Advisory Group on matters relating to the approval of significant proposals, the Ministerial Appeals process, native vegetation clearing, and the role and structure of the Environmental Protection Authority. In this area of law reform, the EDO is in a unique position to represent the perspective of objectors and community groups on how the environmental approvals system and public participation can be enhanced and protected. The EDO also plays an important role in helping members of the community to understand and fully participate in the environmental approvals system.

The EDO will be conducting a Strategic Planning Project from October 2010 to May 2011 to plan for the future direction of the EDO. An important part of this process will be deciding on the EDO's priority work areas, staff levels and resources required to meet the need for legal services in the next six years. I urge all EDO members to get involved in this process and to have your say in building a strong and effective EDO for the future.

We have an able, dedicated and keen Principal Solicitor in Josie Walker, so we should be able to make the most of our opportunities, particularly as regards running test cases. However, we are still struggling for funds. We did receive some additional once-off funding from the Federal government before the Federal election, but, like many community legal centres across Australia, the EDO continues to suffer from the lack of a comprehensive publicly funded support scheme.

I would like to take this opportunity to recognise the contributions of this year's Management Committee members, who have put in many hours of unpaid work to oversee the running of the EDO. Management Committee members who continued from the previous year were Janice Dudley, Lee McIntosh, Peter Robertson, Garry Rutherford, Wayne O'Sullivan and Sharon Mascher. New Management Committee members who served in 2009/2010 were Alex Gardner, Michael Hillgrove, Emma Cavanagh and Sarah Van Gent. Sarah continues in the important role of Treasurer.

In early 2010, we farewelled Janice Dudley, who served as Deputy Convenor of the EDO for nine years. The EDO in general and myself personally received

tremendous support and effort from Janice over this time. She will be sorely missed. Alex Gardner also retired from the Management Committee in early 2010 due to his appointment as a Sessional Member of the State Administrative Tribunal. Alex has been involved with the EDO since its inception, during which time he has served several terms on the Management Committee.

Kristy Robinson, Outreach Solicitor, left the EDO to pursue further studies in January 2010. Kristy made a wonderful contribution to the EDO as Outreach Solicitor by providing much valued assistance to regional clients in particular and travelling to Denmark, Albany, Margaret River, Esperance, Broome and Exmouth to deliver workshops and provide face-to-face legal assistance. Kristy was also instrumental in completing the Public Purposes Trust Climate Change Law Project, which involved researching and providing law recommendations to the State Government on climate change and energy law.

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John Dyer was Coordinator from June 2009 to March 2010. John brought many talents to the role, in which he helped to streamline the EDO's financial procedures and produced a new updated design for the EDO website.

In February this year, we welcomed two new employees: Jessica Smith as part-time Outreach Solicitor and Claudia Maw as paralegal (Claudia also took over the Coordinator's responsibilities in May 2010). Jessica was formerly at a top tier law firm and brings a wealth of experience in dealing with major projects, as well as a special interest in Climate Change law, an area in which she has published at a high level. Claudia is from the UK and came to the EDO as a volunteer in December 2009, after completing an overseas practitioners' course at the University of Notre Dame Australia.

## Litigation and Advocacy Report

There were no new litigation matters this year, however a long-running and very significant matter in the Mining Warden's Court reached a positive conclusion with Cable Sands finally withdrawing its application for a mining lease at Lake Jasper, in D'Entrecasteaux National Park.

Lake Jasper is WA's largest freshwater lake and an important habitat and refuge for waterbirds. In 1996, the Court government excised an area from D'Entrecasteaux National Park adjacent to Lake Jasper to permit mining.

When the EDO first lodged objections on behalf of over thirty individuals and environmental organisations, including the Denmark Environment Centre, Cable Sands argued that the Mining Warden did not have the power to consider objections on environmental grounds. A few years previously a decision had been made in the Full Court of the WA Supreme Court in *Re Warden Heaney; Ex parte Serpentine-Jarrahdale Ratepayers and Residents Association* (another EDO case) that objections on environmental grounds were valid. However, the findings in *Re Warden Heaney* were still controversial at that time, so Cable Sands appealed the question again all the way to the Full Court. The Court's decision in *Warden Calder: Ex Parte Cable Sands (WA) Pty Ltd* confirmed that the Warden had the power to consider objections on environmental and other public interest grounds. This decision helped to clarify the law and has paved the way ever since for environmental activists to have their say in relation to mining lease applications in sensitive areas.

After the objectors' win in the Full Court, the matter was returned to the Mining Warden for consideration. In the meantime, Cable Sands had referred the mining proposal to the EPA for assessment. The EDO argued on behalf of the objectors that the Warden's Court proceedings should be adjourned until the environmental assessment report was published, so that the environmental impacts of the proposal could be properly considered. The Warden agreed, and the proceedings were adjourned pending finalisation of the Environmental Review and Management Report.

In the event, this report was never finalised. The EPA rejected a number of draft reports by the applicant on the grounds that environmental issues had not been adequately addressed. Meanwhile the proceedings were adjourned year by year on a dozen occasions, waiting for the environmental assessment process to be completed. Finally, the EPA terminated assessment of the proposal in 2009. Cable Sands initially said that it would refer a fresh proposal to the EPA, and asked for the Warden's Court proceedings to be adjourned for a further six months. However, just before the matter was due to be in Court again in June 2010, Cable Sands notified the EDO that it would be withdrawing its mining lease application.

In several public interest cases the EDO represented clients in their dealings with government decision-makers in an attempt to secure better environmental outcomes.

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The EDO helped the Avon Valley Environment Society to advocate for rehabilitation of Chris Hill Quarry. This site, a former railway quarry on land excised from Avon Valley National Park, has been a blight on the landscape since it was used as a tyre dump in the early 90's and not properly rehabilitated. Intervention by the EDO has led to acknowledgement from the Public Transport Authority that they are responsible for restoring natural vegetation cover. Furthermore, DEC agreed that the site should be incorporated back into the National Park once it is rehabilitated.

We acted on behalf of the CCWA in relation to its Ministerial Appeal against the setting of the level of assessment for the proposed Yeeliree uranium mine at an Environmental Review and Management Plan. We argued that the proposal for WA's first uranium mine should be the subject of a Public Inquiry so that the assessment could address not only the direct environmental impacts of the proposed mine, but also the impacts of transporting and using uranium and the lack of safe disposal options for radioactive waste. While we were not successful in persuading the Minister to increase the level of assessment, important issues relating to the commencement of a uranium industry in WA were raised in the appeal process.

## Advice Report

This has been a very busy year for advice work, with EDO solicitors providing over 100 one-off advices, and many more advices in connection with ongoing casework matters.

Due to client confidentiality issues, we cannot report on the specifics of advices given, however some overall trends can be observed.

The urban sprawl of Perth, impacting on sensitive bushland on the City's fringe, was an issue in many of the advices that we gave. Many clients were concerned about the loss of remnant bushland and impacts on threatened species due to clearing for new subdivisions. Some of these proposals triggered referrals to the Federal Minister for Environment, principally due to the potential for impacts on Black Cockatoos. It is frustrating that in spite of the recognition under the *Environmental Protection and Biodiversity Conservation Act 1999* of Carnaby's Black-Cockatoo, proposals are seldom refused on these grounds.

Increased bushfire threat levels have led to an increase in demands by local governments for clearing for fire-breaks on private land. This is opposed by conservation-minded residents who want to preserve precious vegetation and wildlife habitat on their properties. It is of concern that local governments seldom have regard to impacts on threatened species when issuing fire safety orders to landowners.

Many clients asked us for advice about issues of air, water and noise pollution, and toxic waste from industry.

The global financial crisis has barely had an impact on the pace of resource development in Western Australia and conservation group clients and concerned individuals have kept us busy with requests for advice on major mining and petroleum proposals, such as Chevron's (now approved) LNG plant on Barrow Island, the Browse LNG proposal earmarked for the Kimberley Coast, and proposals for oil exploration off the coast at Margaret River.

We are often called upon for advice on defamation issues by activists concerned about the risk of defamation action by their opponents. Companies will sometimes issue defamation threats against environmental activists in an attempt to silence them, regardless of whether they have actually said anything defamatory. Educating our clients about the principles of defamation and safe speech is an important way of contributing to a healthy public debate about the environmental impacts of development.

## **Law Reform Report**

This year, the EDO participated in the Minister for Environment's Environmental Stakeholder Advisory Group on matters relating to approval of significant proposals, the Ministerial Appeals process, native vegetation clearing and the role and structure of the Environmental Protection Authority.

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The Advisory Group included representatives from government, industry, environmental scientists and conservation groups. There was a surprising amount of agreement within the group on several issues, including the need for greater independence of the EPA, more emphasis on the policy-setting role of the EPA, more early-stage stakeholder consultation on significant proposals, and greater use of the strategic assessment process.

The Advisory Group's first report on the Role and Structure of the EPA was released in August 2009. Its key recommendation was that the EPA should be given greater functional independence through establishment of a separate Office of the EPA. Although the West Australian EPA has always been legally independent of the government of the day and not subject to direction by the Minister for Environment, historically it has relied on staff and funding provided through the Department of Environment and Conservation, which creates the potential for a conflict of interest.

The Minister for Environment acted upon this recommendation and established the independent Office of the EPA in November 2009.

Reform of the Ministerial Appeals processes was more contentious. All participants agreed that a rigorous and transparent third party appeals system was an important element of the *Environmental Protection Act 1986*, and should be retained. There was concern that the Minister's role as a Minister of the Crown and the ultimate decision-maker on significant proposals conflicted with her role as appeal body. However there were varying opinions on what kinds of appeals should continue to be heard by the Minister for Environment and what kinds of appeals could be better dealt with by the State Administrative Tribunal or an alternative decision-maker. None of the group was in favour of transferring Part IV appeals on significant proposals to SAT.

In November 2009, the government tabled the *Approvals and Related Reforms (No. 1) (Environment) Bill 2009* which, if passed, will make significant changes to the *Environmental Protection Act 1986*, including removing the right of appeal against the setting of levels of assessment by the EPA and against declaration of derived proposals. The EDO considers these reforms to be a backwards step, as they reduce appeal rights at the early stages of the assessment process when there is the greatest potential to influence the design and manner of assessment of proposals. They are contrary to the recommendations of the Environmental Stakeholder Advisory Group that early-stage stakeholder engagement and the use of strategic assessments should be encouraged.

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The EDO lodged submissions on the Bill with the Legislative Standing Committee on Uniform Legislation. The Standing Committee on Uniform Legislation handed down its report in May 2010 recommending that most changes proposed in the Bill should be scrapped because there was no evidence that the changes would reduce delays in the approvals process, and they were not consistent with the Federal-State Bilateral Agreement on environmental assessments. Nevertheless, at the time of writing this report the Bill is before parliament again, essentially unchanged, and looks likely to pass.

In September 2009, the EDO made a submission to the review of the *Genetically Modified Crops Free Areas Act 2003*, arguing for a continued ban on cultivation of genetically modified crops in Western Australia.

For many years the EDO has helped local groups to lobby for better protection of urban bushland. In June 2010, the EDO welcomed the gazettal of *Statement of Planning Policy No. 2.8 (Bushland Policy for the Perth Metropolitan Region)* (“the Statement”), which has existed in draft form since 2004.

The Statement is a key element of the state government’s Bush Forever policy, which is designed to protect 10 per cent of each of the original 26 vegetation complexes of the Perth Metropolitan Region. Under the policy, 287 Bush Forever sites covering 51,200 ha were earmarked for protection. While progress has been made on securing and reserving key sites, the state government has been slow to implement a legal framework to support this important policy.

The Statement provides that any application to clear regionally significant vegetation on a Bush Forever Site, regardless of ownership, must satisfy a series of stringent tests. There is a general presumption against clearing on reserved lands and publicly owned land except where this can be reasonably justified with regard to social and economic goals, and all reasonable alternatives have been considered.

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This is a welcome step towards better legal protection of Bush Forever sites. Changes to the Metropolitan Regional Scheme are also required to ensure that the special status of Bush Forever sites is recognized in all cases by landowners and the West Australian Planning Commission.

## Community Legal Education Report

Community legal education workshops provide legal information to members of the community, empowering them to take action to defend the environment. EDO workshops are tailored to the interests of the communities in which they are held.

In 2009/2010, the EDO held community legal education workshops in Denmark, Albany and Bunbury. All three workshops provided an overview of environmental impact assessment law at a State and Federal level. The Denmark and Albany workshops also covered native vegetation clearing specifically. The community legal workshop in Bunbury, which was co-presented by the Bunbury Community Legal Centre, not only covered environmental law but also protest rights and rights on arrest.

In addition to these workshops, the EDO presented at a number of other public forums during the year. In February, Josie Walker presented at a forum hosted by the CCWA on the contentious *Approvals and Related Reforms (No. 1) (Environment) Bill 2009*. Josie also presented on the topic of climate change litigation at a forum organised by the University of Western Australia Progressive Law Students' Association in May 2010.

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Our fact sheets provide another form of community legal education. The EDO has fact sheets on 48 environmental law topics on its website. The fact sheets explain the law on each topic in a format that is easy to understand and relevant to members of the community concerned about the environment. They are a cost-effective way of educating the community about environmental law. A large number of client queries about environmental law are answered simply by accessing our fact sheets. In other cases, fact sheets give clients an understanding of the environmental law framework so that queries about specific matters can be answered more quickly.

Keeping such a large number of fact sheets up-to-date with frequent changes to the law is a daunting task. We have been fortunate enough to secure new funding from the Ian Potter Foundation and Lotterywest to update our fact sheets in 2010/2011.

## Volunteer Report

The position of EDO volunteer can be extremely challenging and rewarding for those law students and graduates who dedicate their free time to helping the EDO solicitors with research and drafting tasks. Given the specialist nature of the work conducted by the EDO, volunteers are able to gain a detailed level of insight into the issues facing environmental lawyers in Western Australia. In 2009/2010, volunteers contributed a total of 655 hours of service to the EDO, and have researched a diverse range of topics, including:

- Local government decision-making procedures
- Freedom of Information requests
- Uses of Crown land and reserves
- EPBC Act referrals
- Climate change litigation
- Native vegetation clearing regulations
- Removal of trees in urban areas

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The contribution volunteers make to the EDO's quarterly newsletter is invaluable, and ensures that each edition is filled with insightful and topical articles on the legal and policy issues that really matter to our members.

## **Volunteer Awards**

The EDO wishes to acknowledge the contributions of the following volunteers, who gave their time, knowledge and enthusiasm to the EDO in 2009-2010:

Renee Asher (**Gold Award**)

Josephine Barron (**Silver Award**)

Sally Carlin (**Gold Award**)

Lisa Harris (**Gold Award**)

Madison Hershey (**Silver Award**)

Monika Kryger

Hannah Lee (**Silver Award**)

Midori Lee (**Silver Award**)

Claudia Maw (**Gold Award**)

Clarence Paul (**Bronze Award**)

Nisha Richardson (**Bronze Award**)

Rohini Thomas

Una Tseng (**Silver Award**)

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The EDO grants awards to volunteers as follows:

Gold Award = 100+ hours service

Silver Award = 50+ hours service

Bronze Award = 25+ hours service

## **Finance Report**

Financially, this was a difficult year for the EDO. We rely on two primary sources for income: firstly, recurrent funding from the Commonwealth and State Attorney-General Departments; and, secondly, top-up grants from other sources. In addition to meeting running-costs, these funds have traditionally been used to retain two full-time solicitors plus a part-time Co-ordinator. In the 2009/2010 financial year, the EDO was not successful in obtaining any top-up funding and therefore it was necessary to reduce staff numbers.

For the first half of the financial year we were able to retain 2.8 staff by using unspent funds from the previous year's Legal Contributions Trust grant. In February 2010, however, staffing was reduced with the Outreach Solicitor's position reduced to 2 days per week, supported by a 3 day per week paralegal. The Co-ordinator's hours were also reduced from 4 to 2 days per week. Despite the reduction in staffing, the demand for environmental legal services remained the same.

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Post year-end, the EDO has been successful in obtaining additional one-off funding of \$35,000 from the Commonwealth, which should allow staff numbers to be maintained throughout 2010/2011. As running costs have been reduced to a minimum however, it is necessary for the EDO to continue seeking additional funding sources in the future to ensure that a sustainable level of staffing is maintained and the organisation is able to effectively meet community demand.

## **Acknowledgments**

The EDO gratefully acknowledges the following funders:

- The Government of Western Australia Department of the Attorney General
- The Australian Government Attorney General's Department
- The Law Society of Western Australia (Legal Contributions Trust)
- EDO Members and Donors

## Balance Sheet as at 30 June, 2008/09 vs 2009/10

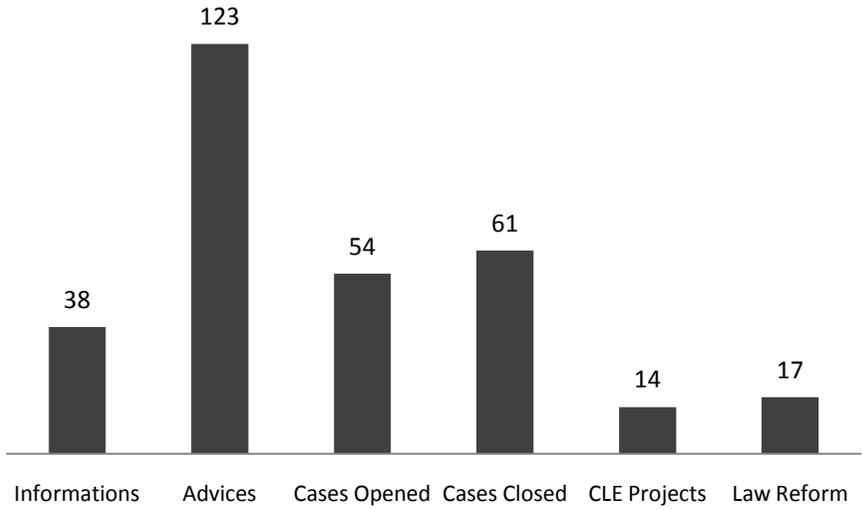
	2010	2009
	\$	\$
<b>CURRENT ASSETS</b>		
Cash at bank:		
- General	13,801	3,892
- Fund	69,059	4,843
- Online Saver	35,448	127,380
- Cash on hand	100	81
Accounts Receivable	-	28
Sundry debtors and prepayments	4,935	5,913
Rental Bond	1,760	1,760
<b>TOTAL CURRENT ASSETS</b>	<b>125,103</b>	<b>143,897</b>
<b>NON-CURRENT ASSETS</b>		
Property, Plant & Equipment	-	9,415
<b>TOTAL NON-CURRENT ASSETS</b>	<b>-</b>	<b>9,415</b>
<b>TOTAL ASSETS</b>	<b>125,103</b>	<b>153,312</b>
<b>CURRENT LIABILITIES</b>		
Payables	13,552	14,635
Unearned Income	8,287	32,025
Provisions	7,956	3,519
<b>TOTAL LIABILITIES</b>	<b>29,795</b>	<b>50,179</b>
<b>NET ASSETS</b>	<b>95,308</b>	<b>103,133</b>
<b>EQUITY</b>		
Accumulated Surplus – Opening Balance	103,133	115,141
Net Surplus/(Deficiency)	(7,825)	(12,008)
<b>Accumulated Surplus – Closing Balance</b>	<b>95,308</b>	<b>103,133</b>

## Income & Expenditure Statement, 2008/09 vs 2009/10

	2010	2009
	\$	\$
<b>INCOME</b>		
Grants		
- Commonwealth	86,417	108,452
- State	76,865	79,318
- CLSP	-	1,000
- Legal Contribution Trust	30,366	24,634
- Other	800	-
Bank Interest	3,808	6,580
Fundraising	8,785	5,263
Publications	-	1,076
Legal costs recovered	-	41
Membership Subscriptions	3,587	3,854
Legal Fee Income	6,000	7,440
<b>TOTAL INCOME</b>	<b>216,628</b>	<b>237,658</b>
<b>LESS EXPENSES</b>		
CLE & other staff training expenses	4,158	3,845
Client disbursements	-	81
Communications	4,746	4,936
Consultant fees	3,580	2,673
Depreciation	9,415	14,001
Finance, audit & accounting charges	8,846	5,626
Insurance – contents, directors & volunteers	2,164	1,025
Minor Equipment	222	141
Office costs (new premises)	10,651	14,312
On-costs	2,002	1,397
Overheads	5,009	9,306
Practice certificates	1,900	2,400
Promotions	-	1,246
Reference material	64	1,158
Salaries	153,276	166,397
Staff recruitment	360	554
Subscriptions	3,342	2,388
Superannuation	13,665	12,949
Travel	1,353	5,231
<b>TOTAL EXPENSE</b>	<b>224,453</b>	<b>249,666</b>
<b>SURPLUS/(DEFICIENCY)</b>	<b>(7,825)</b>	<b>(12,008)</b>

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## EDO Service Delivery by Activity Type 2009-2010



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**Hours of Operation:**  
Monday to Friday, 9:00am to 5:00pm