



Environmental Defender's Office

Western Australia (Inc)

Annual Report

2012

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MANAGEMENT COMMITTEE

Dr Johannes Schoombee	Convenor
Lee McIntosh	Secretary
Sarah Van Gent	Treasurer
Peter Robertson	Member
Wayne O’Sullivan	Member
Emma Cavanagh	Member
Dr Donald Stevenson	Member
Susan Liddicoat	Member

STAFF

Josie Walker	Principal Solicitor
Jessica Smith	Outreach Solicitor
Annaleen Harris	Outreach Solicitor
Jane Siddall	Coordinator

Hours of Operation

The EDO operates Monday to Friday from 9am to 5pm.

Convenor's Report – Dr J T Schoombee

Overview

This has been a busy and quite eventful year for the EDO. We have had the feeling for some time that we should seek to get more involved in litigation and generally in what may be termed "more active representation" of clients. We have certainly achieved this during the past year, and I shall later refer to some of the cases we have been involved in.

Management Committee

The following have assisted me on the Management Committee: Lee McIntosh (Secretary), Sarah Van Gent (Treasurer), Wayne O'Sullivan, Peter Robertson, Emma Cavanagh, Susan Liddicoat and Don Stevenson.

Personnel

The EDO has had available to it the able and dedicated services of our principal solicitor, Josie Walker and our outreach solicitors Jessica Smith and Narelle Pierce. Narelle left the EDO in October 2011 to take up a position with the Public Trustee, and we are grateful for her contribution to the office. Between January and July 2012, Edward Fearis was employed as a temporary paralegal, helping especially with the running of litigation matters. In July 2012, we have also been very fortunate to acquire the services of Annaleen Harris, who will also be working as an outreach solicitor alongside Jessica.

Over the course of the year, first Renee Asher and then Natalie Arcus filled the position of Coordinator, and kept the office running smoothly.

At the date of compiling this report, we have also implemented a long held goal, actively pursued during the relevant year, namely to have a person appointed to the EDO with the dedicated task of pursuing fund raising. We have been able to acquire an experienced and enthusiastic person to fill that role in our new coordinator Jane Siddall. We will also, for the first time, be employing a part time Administration Officer to take over some of the administrative work of the office which was previously done by the Coordinator.

At the AGM we will again honour the number of volunteers who have so ably assisted us.

Funding

Obtaining sufficient funds for activities is a perennial problem. We were however fortunate in the relevant financial year under discussion, to obtain a Public Purpose Trust grant which will assist us in the present financial year.

Litigation and Representation

I have mentioned that we have significantly raised our profile in litigation during the past financial year. I here give some examples.

In May this year, the EDO assisted Law Boss Richard Hunter to challenge Woodside which has started to drill into the Broome aquifer at James Price Point.

Mr Hunter commenced proceedings in the Supreme Court on 28 May 2012. Woodside agreed not to commence drilling on the site until the Court had made a finding about the validity of its approval. Considering the economic importance of the project, and the seriousness of the legal issues to be tried, the matter was referred for an expedited hearing in the Court of Appeal in early July.

However, only 7 days before the Court of Appeal was due to hear the case, the Minister for Planning took the extraordinary step of amending Broome's local planning scheme specifically to make Woodside's works exempt from the need for planning approval. This resulted in the case being dismissed due to lack of utility. The Minister stated in the media that the purpose of the amendment was to avoid the need for a hearing in the Court of Appeal. In our view he just shifted the goal posts to suit the Government.

This year the EDO has acted in some significant matters in the Mining Warden's Court. The increased level of scrutiny of the environmental impacts of mining which is now occurring in the Mining Warden's Court is leading to an increased demand for legal representation for objectors. The warden's decision in *Darling Range South v Ferrell* (not an EDO case) shows that there is a real possibility of tenements being

rejected in the Mining Warden's Court if the landscape-scale environmental impacts of activities have not been properly assessed by other agencies.

The EDO is representing Nyikina traditional owner Dr Anne Poelina in her fight against the first proposed coal mine in the Kimberley. Dr Poelina is concerned that the proposed Duchess Paradise mine in the Canning Basin will threaten the health of the mighty Fitzroy River and hinder the development of sustainable livelihoods for indigenous people in the region.

The Duchess Paradise mine is also undergoing assessment by the EPA. In June 2012 the EDO, with the assistance of Barrister James Healy, argued that the proceedings in the Mining Warden's Court should be stayed until the EPA process was complete, so that the Mining Warden would have the benefit of a full environmental assessment of the proposal. We were partially successful in this application, with the Mining Warden agreeing to stay some of the grounds of challenge, although unfortunately not all grounds have been stayed.

In another Warden's Court matter, the EDO acted for landowners Cath Miller and Karen Galloway who objected to coal exploration licences affecting their properties near Cowaramup in the Margaret River wine region. A total of 80 objections, mostly by landowners, were lodged in relation to the same two licence applications. In addition to representing Ms Miller and Ms Galloway, the EDO provided helpful information about the Mining Warden's Court processes to other objectors who were self-represented.

It is important for environmental objectors that they should be able to engage freely in debate on environmental issues. For this reason, the EDO sometimes provides advice and assistance to activists threatened with defamation suits.

The EDO is currently representing Jane Genovese, an objector to the proposed rezoning of rural land in Wattle Grove. The case started in the first part of 2012. Ms Genovese is being sued for defamation by the proponent of the development, Ross Leighton. Mr Leighton alleges that Ms Genovese and others defamed him in an internet blog and a

newspaper article critical of how the rezoning had been promoted by Mr Leighton and others.

I am acting as Barrister for Jane, instructed by the EDO. The case is continuing.

Principal Solicitor's Report – Josie Walker

This has been an exciting one for all at the EDO, a year in which we have continued to pursue our mission of protecting WA's environment by providing community groups and individuals with environmental legal services.

Over the past three years, in response to community need, the EDO has been developing new areas of practice beyond its traditional focus on environmental assessment processes. This has included acting in Mining Warden's Court matters, providing defamation advice, acting on review applications under the *Freedom of Information Act 1997* and providing more intensive assistance to clients dealing with environmental merits appeals. In all of the matters in which it acts, the EDO remains focussed on achieving public interest environmental outcomes and fostering effective public participation.

Lodging an objection to the grant of a mining tenement is a powerful way for environmental objectors to have their say in relation to the impacts of mining. In past years, the grant of mining tenements, especially subsurface exploration licences, was often made without any involvement, or even knowledge on the part of landowners and local residents. However, the controversy over proposals for coal mining and bauxite mining in the South-West has increased public awareness of objectors' rights. This has led to an increased demand for legal assistance on the part of objectors. With the benefit of legal assistance, objectors can raise the potential impacts of mining on the landscape before mining companies commit resources to explore for minerals and develop mining proposals in sensitive locations.

In accordance with our new Strategic Plan, the EDO has increased the level of assistance provided in relation to merits appeals under the

Environmental Assessment Act 1986. This has included drafting appeals, liaising with technical experts and appearing with, or on behalf of, clients at meetings with the Appeals Convenor. Just as proponent companies benefit from legal assistance from private firms to navigate the approvals system, objectors can benefit from the assistance of the EDO to focus their appeals on key legal and policy considerations for maximum impact. Engaging in this process often has more potential to affect environmental outcomes than challenging decisions after the event.

Nevertheless, an important role of the EDO continues to be review of the legal correctness of environmental decisions after they are made. Community groups and individual objectors rely on the EDO to provide them with expert legal advice on challenging decisions which do not comply with legal or procedural requirements. Where the EDO's analysis indicates that a legal error has been made, and public interest environmental outcomes are at stake, the EDO remains ready to launch judicial review appeals on the part of clients. This occurred this year in the matter of *Hunter v Woodside*.

What we have achieved this year could not have been done without the work of talented EDO staff including Outreach Solicitor Jess Smith, Coordinators Renee Asher and Natalie Arcus and Paralegal Ed Fearis. I would like to thank them for their hard work and commitment to the organisation throughout the year. Staff were ably assisted by our enthusiastic law student volunteers, who provided over 700 hours of unpaid legal work. I am also grateful for the contribution made by of our volunteer Management Committee, who represent a cross-section of legal and community stakeholders. The Management Committee have given most generously of their time to oversee the running of the organisation and to keep us on track with meeting our strategic objectives.

Services Provided

Litigation and Representation

This year the EDO took on several Mining Warden's Court matters, including representing Nyikina traditional owner Dr Anne Poelina in her fight against the first proposed coal mine in the Kimberley. Dr Poelina is concerned that the proposed Duchess Paradise mine in the Canning Basin will threaten the health of the mighty Fitzroy River and hinder the development of sustainable livelihoods for Indigenous people in the region.

There are strong indications that if this first mine is approved, many more will follow, resulting in major impacts on land and water. Therefore it is important that this first application should be properly scrutinised in terms of its strategic implications for the greater Kimberley Region. In the Mining Warden's Court, Dr Poelina will be arguing for a broad consideration of the regional environmental, social and economic implications of granting of the mining lease.

In November 2011, the EDO was also engaged by landowners Cath Miller and Karen Galloway to represent them in the Mining Warden's Court in relation to their objections to coal exploration licences affecting their properties near Cowaramup in the Margaret River wine region.

In January and February of 2012, the EDO was busy preparing for the hearing of these objections in the Mining Warden's Court when the applicant withdrew the applications in the week that the objectors' evidence was due to be lodged. The applicant said that it was discouraged by the strength of resistance in the affected community.

Following this, the EDO assisted residents to make a submission to the Minister for Mines requesting that all pending exploration and mining tenements in the region be terminated under s 111A of the Mining Act. This initiative was successful, with the Minister for Mines declaring on 24 July 2012 that all pending applications for coal exploration in the Margaret River wine region would be terminated.

Later in the financial year, the EDO commenced proceedings on behalf of Goolarabooloo Law Boss Richard Hunter to challenge preliminary works carried out by Woodside on James Price Point.

A convoy of Woodside vehicles rolled up to James Price Point on 21 May 2012 to commence large-scale investigation works on James Price point, accompanied by a formidable police presence. These works included hydrogeological drilling into the Broome aquifer. These works were of particular concern to Law Bosses such as Richard Hunter because of their spiritual beliefs connected with groundwater.

Woodside had purportedly received planning approval for these works from the Kimberley Joint Development Assessment Panel. However, some important legal prerequisites to the approval had been ignored in the process of making this decision. The most significant was that the Panel had not obtained an endorsed report on the proposal from the Shire of Broome, which was the local government authority responsible for administration of the relevant planning scheme.

A week after the commencement of works, the EDO lodged proceedings with the Supreme Court on behalf of Mr Hunter, seeking an urgent interlocutory injunction. The matter was listed urgently for hearing in the Court of Appeal on 7 July 2012. Our client might have been successful in this matter were it not for the fact that the Minister for Planning amended the planning scheme at the last minute to remove the need for planning consent for Woodside's development. Due to the amendments to the planning scheme, the Court of Appeal found that there was no utility in further hearing the matter, and the proceedings were dismissed.

In the interests of protecting free speech, the EDO is also currently assisting Jane Genovese, an environmental objector, to fight defamation proceedings brought against her by a local property developer. The EDO commenced acting in this case in June 2012. The first step taken by the EDO was to lodge an application to strike out parts of the plaintiff's claim.

Another major activity for the EDO this year has been assisting clients to write submissions, objections and appeals against EPA reports to the Minister for Environment on environmentally significant proposal. The

involvement of the EDO has helped to highlight deficiencies in proponent documentation, over-reliance on other agencies to regulate environmental impacts in place of the EPA, and failures of the authorities to make important documentation available to objectors prior to the end of the submission or appeal period.

The EDO is also representing a number of clients in complaints to the Information Commissioner relating to refusal of freedom of information requests. We have been concerned to observe an increasingly broad interpretation of some exemptions, leading to decisions by agencies not to release documents, long delays in releasing documents, or documents being heavily edited prior to release. By acting for clients in freedom of information complaints, the EDO can help to argue for a more balanced application of these exemptions, and for agencies to give more weight to the public interest in the release of documents related to environmental decision-making.

The issue of access to information is also being dealt with as a law reform issue (see further below under Law Reform).

Advice

The EDO has provided advice this year on a wide variety of issues affecting the environment and public participation. Our assistance has helped many people to better understand the laws affecting the environment about which they are concerned, empowering them to speak out and take action to defend the environment.

The greatest area of demand continues to be for advice on State and Commonwealth environmental impact assessment processes related to significant proposals. The clearing of urban bushland and the potential for this to impact on threatened black-cockatoos is another area of concern to many of our clients.

The EDO has also given advice on issues as diverse as misleading green claims, defamation, clearing of native vegetation, fisheries management, protection of national heritage sites and the regulation of greenhouse gas emissions.

Law Reform

This year the EDO has collaborated with the Australian Network of Environmental Defender's Offices to provide a response to various proposed changes to Commonwealth environmental laws. This has included representations in relation to implementation of the Hawke Review of the *Environment Protection Biodiversity Conservation Act 1999*. This review recommended several major reforms to the Act, many of which would have strengthened environmental protection, however to date little action has been taken to date to implement these reforms. Another submission was lodged in support of the Commonwealth establishing a committee to provide advice to the Minister for Environment on coal seam gas and large coal mining projects. This committee is now operational.

The EDO also contributed to a national review by ANEDO of approvals processes for mining across all states of Australia.

The EDO continued to provide input to the Environmental Protection Authority's stakeholder reference group. Through this group, the EDO has had input into the latest a review of the *Environmental Impact Assessment Administrative Procedures 2010*. One of the issues which has been discussed in this forum is the EPA's practice of relying on other agencies to manage impacts, where possible, rather than carrying out its own assessment. The EDO continues to stress that, even where other agencies have regulatory responsibilities, the EPA should continue to assess projects which are likely to have a significant impact on the environment, in order to ensure an holistic consideration of the impacts of major proposals.

An issue of major concern to many of the EDO's clients is access to government information. Access to information is critical to enable the community to participate in environmental decision-making processes, and to hold companies to account for breaches of environmental law which too often go unnoticed by the regulators.

The EDO, together with the Conservation Council of WA, carried out an audit of access to information regarding statutory approvals in early

2012. We surveyed the principal WA state agencies with responsibilities for natural resource management.

The results of the survey revealed markedly different practices across different agencies. While some make applications, reasons for decision and approvals freely available, others will not release any of these documents except in response to a freedom of information request. Unfortunately, the time taken to process a freedom of information request is usually too long to allow the public to take action in relation to time-sensitive matters, such as preventing the grant of approval or commencement of a possibly unlawful development.

The EDO would like to see all of these documents made publicly available on agency websites. It seems reasonable that where a private person or company obtains a licence to access a public resource, or a statutory approval providing a defence to conduct that would otherwise be prohibited, any member of the public should be able to access the primary documents to verify whether people who are undertaking such actions are authorised to do so. The EDO will continue to work with CCWA to advocate for law reform in this area in the financial year ahead.

The EDO has also participated in community fora and provided comment on emerging proposals for law reform in the area of biodiversity legislation. Western Australia currently has no legislation specifically designed to protect biodiversity. While biodiversity issues may be addressed indirectly through the environmental assessment process for significant projects, by planning controls or controls on clearing of native vegetation, a comprehensive legal framework is lacking. A dedicated biodiversity act is urgently needed to ensure comprehensive protection of the state's unique biodiversity values.

Community Legal Education

This financial year, the EDO delivered environmental legal education seminars in Albany, Margaret River and Broome. In each seminar, information was provided on the legal framework relevant to issues of local concern, to assist members of the community to more effectively participate in environmental decision-making and monitor the impacts of existing developments. Seminars were well attended and we received very positive feedback from seminar attendees on the usefulness of the information provided.

Further information about regional workshops is included below the heading “Outreach Activities”.

Outreach Activities

The EDO has continued to provide a comprehensive environmental law advice service to areas outside the Perth metropolitan area. EDO solicitors this year travelled to Broome, Margaret River and Albany to deliver workshops and provide in-person advice to regional clients. In addition, we have assisted a significant number of clients from remote, rural and regional areas by the provision of telephone advice.

The Margaret River workshop was convened in response to an increasing level of demand for information about objecting to mining proposals. This demand has come not only from the area around Margaret River, but also from other areas threatened by mining exploration proposals around Collie and Bridgetown in the south-west. The workshop provided information on rights to object to mining tenement applications and procedures in the Mining Warden’s Court. For would-be objectors who were not able to attend the workshop in Margaret River, we published an article in the EDO News on the Mining Warden’s Court process for self-represented objectors. This article is available on our website, and complements our existing fact sheet on mining law.

As the dredging of Albany port is a major environmental issue for local residents, the Albany workshop focussed on environmental assessment

and monitoring processes as they relate to ports and the protection of environmental values in state and Commonwealth waters.

In May 2012 the EDO delivered a workshop which focussed on the strategic assessment process to the Broome community, which is grappling with the assessment of the proposed Browse LNG proposal. We also provided legal information about the various court decisions which have been made relating to this proposal since 2010. At the conclusion of this workshop, there was an opportunity for members of the audience to ask questions about the assessment and appeals process. An EDO solicitor was available to provide in-person advice Broome residents on public interest environmental law questions over the following two days.

Activity Summary

Activity	2011/2012	2010/2011
Information & Referrals	43	35
Advices	117	152
Cases Opened	65	53
Cases Closed	62	49
Community Legal Education	12	29
Law Reform and Legal Policy	13	10

Volunteer and Pro Bono Assistance

The EDO's capacity to provide services to clients is greatly increased by the assistance of law student volunteers. Our outstanding volunteers have contributed greatly to the work of the EDO this year, through providing legal research support, answering the phone, compiling briefs for counsel, summarising evidence and serving court documents. The EDO is very grateful for the hard work of its law student volunteers who contributed 702 hours of unpaid work to the EDO this year.

We would also like to thank EDO supporter Craig Chappelle who again assisted us with the professional layout of the *EDOnews*.

The EDO relies on the assistance of barristers working *pro bono* or on a reduced fee basis to take public interest environmental matters to court on behalf of its clients. This year our Convenor, Dr Johannes Schoombee has assisted with running defamation proceedings for our client Jane Genovese. Anthony Papamatheos and Peter Quinlan SC assisted with the running of Margaret River coal mining proceedings, and James Healy appeared on behalf of Dr Anne Poelina to argue for a stay of her matter in the Mining Warden's Court. We are very grateful for this generous assistance provided by members of the WA bar.

Volunteer Awards

The EDO wishes to acknowledge the contributions of the following volunteers who gave their time, knowledge, skills and enthusiasm to the EDO in 2011-12:

Gold Award

Moshe Phillips

Silver Award

Amy Smith

Emily Wilson

Leanne Law

Simona Grieco

Bronze Award

Kate Rodrigues

The EDO grants awards to volunteers as follows: Gold Award 100+ hours service; Silver Award 50+ hours service; Bronze Award 25+ hours service.

Collaboration

The EDO has collaborated with the Australian Network of Environmental Defender's Offices on submissions on Commonwealth environmental law reform and mining law reform.

We have also continued to collaborate with environmental non-government organisations on state-based law reform submissions. The EDO carried out a survey of access to information and is continuing to advocate for access to information reform jointly with the Conservation Council of Western Australia.

All of our workshops were organised with assistance from environmental groups. The Albany workshop was jointly presented with the Conservation Council of Western Australia and the Albany Dredging Environment Network, while the Broome Workshop was organised by Environs Kimberley. Augusta Margaret River Shire Council helped to organise and provided a venue for our coal mining objections workshop in Margaret River.

Treasurer's Report – Sarah Van Gent

The majority of our income is recurrent funding from the State and Commonwealth governments. This is supplemented with top-up grants, firstly in the form of non-recurrent government funding and also from non-government sources.

Non-government funding during the 2012 financial year came from a number of sources and was mostly targeted at specific projects. In 2011 Lotterywest granted funding for our Strategic Planning Process and Factsheets. As at 30 June 2012 these project are nearing completion. We also received a much needed grant from Lotterywest towards upgrading our office equipment with the funds spent on new computers and laptops and a new multifunction printer.

Income was also received in the form of legal fees and client disbursements relating to litigation during the year and, importantly, members fees and donations.

Employee expenses remain our largest cash out-flow. Towards the end of the financial year the decision was made to increase our staffing hours to better meet community demand. We now have a full-time principal solicitor, full-time outreach solicitor position (job-shared), a part-time co-ordinator, and we are seeking to recruit a part-time administrator officer. We did have a surplus in the current year that was driven by vacancies in staff positions during the current year. With the increase in staffing for financial year 2013 we anticipate spending these funds in the current year.

We also note that the surplus above is driven by accounting treatments with the capital items being depreciated over three years, thereby causing a discrepancy between our cash and accounting expenses.

Review of other expenses shows that we continue to operate at minimal levels and it is therefore necessary that EDOWA continues to source additional funds to be able to meet its operating costs.

Acknowledgement of Funders

EDOWA would like to acknowledge the following funders:

The Commonwealth Attorney-General's Department

The Legal Aid Commission of Western Australia

Lotterywest

Balance Sheet

As at 30 June 2012

The full financial statements are available to members upon request.

	2012	2011
	\$	\$
CURRENT ASSETS		
Cash at bank:		
- General	12,813	11,879
- Fund	97,961	82,288
- Online Saver	63,596	62,346
- Cash on hand	37	87
Accounts Receivable	3,431	3,661
Sundry debtors and Prepayments	7,201	5,268
Rental Bond	1,760	1,760
Undeposited Funds	2,415	1,935
TOTAL CURRENT ASSETS	189,214	169,224
NON-CURRENT ASSETS		
Property, Plant & Equipment	15,855	1,554
TOTAL NON-CURRENT ASSETS	15,855	1,554
TOTAL ASSETS	205,069	170,778
CURRENT LIABILITIES		
Payables	17,722	21,144
Unearned Income	54,740	28,598
Provisions	9,518	10,540
TOTAL LIABILITIES	81,980	60,282
NET ASSETS	123,089	110,496
EQUITY		
Accumulated Surplus – Opening Balance	110,496	95,308
Net Surplus/(Deficiency)	12,593	15,188
Accumulated Surplus – Closing Balance	123,089	110,496

Income & Expenditure Statement

For year end 30 June 2012

	2012	2011
	\$	\$
INCOME		
Grants		
- Commonwealth	96,708	114,474
- State	112,957	91,139
- Ian Potter Foundation	-	17,000
- Lotterywest	38,654	12,049
Bank Interest	7,122	7,172
Donations	12,490	11,745
Clients Disbursements	3,488	7,520
Membership Subscriptions	3,282	2,907
Legal Fee Income	5,418	14,000
TOTAL INCOME	280,119	278,006
LESS EXPENSES		
Salaries	155,083	152,576
Superannuation	15,765	14,223
On Costs	13,338	11,626
Office Costs	12,458	12,575
Repairs and Maintenance	194	-
Staff Training	1,560	531
Staff Recruitment	2,096	594
Communications	3,288	3,523
Office Overheads	7,519	11,308
Insurance	2,080	2,323
Finance, Audit & Accounting Fees	14,468	16,164
Library, Resources and Subscriptions	6,519	3,868
Travel	2,349	2,232
Programming and Planning	2,083	2,677
Lotterywest – Fact Sheet	1,691	10,400
Lotterywest – Information Technology	3,807	-
Lotterywest – Strategic Planning	11,220	3,740
Client disbursements	4,092	7,082
Ian Potter Fact Sheets	-	6,600
Depreciation	7,916	776
TOTAL EXPENSE	267,526	262,818
SURPLUS/(DEFICIENCY)	12,593	15,188

