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edo NEWS

Newsletter of the Environmental Defender's Office WA

Can you photograph illegal environmental activities in Western Australia?

What if you want to take a photo, film or video record of an unlawful environmental activity in Western Australia? Can you do it without the consent of the parties to the activity? Who can you show it to and under what circumstances? What are the possible consequences for you for making such a record?

The primary statute that regulates the photographic or video recording of a *private activity* in Western Australia is the *Surveillance Devices Act 1998 (WA)* (the Surveillance Act). An article exploring the operation of the Surveillance Act appeared in the December 2002 No 68 edition of Impact, the quarterly journal of the National Environmental Defender's Office Network, and is also on the EDO WA website.

Recording a *public activity* is not prohibited in Western Australia. However, recording a *private activity* is prohibited (subject to certain exceptions). Whether an activity is *private* or *public* for the purpose of the Surveillance Act is complex and very much determined by the particular factual circumstances. In essence, a *private activity* is one conducted in circumstances which, objectively considered, indicate that any one of the parties taking part in the activity desire only to observed by themselves. However, activity is a *public activity* if the parties ought to reasonably expect that they could be observed by a member of the public: For example, illegally removing wood from a national park or State forest is likely to be considered a *public activity*.

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In summary:

- Any person may make a video recording or take a photo of any *public activity* (unless specifically prohibited, such as on CALM managed lands: the *Conservation and Land Management Regulations 2002*).
- Any person may make a video recording or take photos of a *private activity* with the consent of one of the parties to the activity (unless the person making the recording is on CALM managed lands: the *Conservation and Land Management Regulations 2002*).
- Any person may make a video recording or take photos of a *private activity* without the consent of any of parties to the activity, to protect a *lawful interest* or (if there are reasonable grounds for believing that the circumstances are so serious and the matter of such urgency) taking a photo or making a video recording is in the *public interest*. Under the Surveillance Act the *public interest* is an interest which concerns national security, public safety, the economic well-being of Australia, the protection of public health and morals, and the protection of the rights and freedoms of citizens. This list is not exhaustive and may include other interests. It is not clear however, that the public interest always includes taking a photo/ video of an illegal activity.
- Any person may give a photo or video record to a member of the police force if that person believes on reasonable grounds that it was necessary to make that publication in connection with an imminent threat of serious violence to persons or of substantial damage to property.
- In situations other than those described above, the photo or video recording of a *private activity* (together with a report about the circumstances of the recording if it was taken without consent of a *party*) must be provided to a judge of the Supreme Court who may then make an order in the *public interest* concerning the recording
- The video recording or photo of a *private activity* may not be more than is reasonably necessary for the purpose and must be in the *public interest*.

Conservation covenants tax relief

The Australian Tax Office (ATO) has issued a ruling which confirms that a landowner who enters into a conservation covenant and benefits because of the covenant, may still be entitled to an income tax deduction.

Income tax deductions for entering into a conservation covenant are only allowable to a landowner when the deduction sought meets the conditions of Division 31 of the *Income Tax Assessment Act 1997* (Cth). These conditions include that the landowner must not "receive any money, property or other material benefit for entering into the covenant".

There are many ways in which a landowner may benefit from a covenant. For example, the landowner may:

- receive a grant to fence land the subject of a covenant
- receive a rate reduction because it has entered into the covenant
- benefit if other land the landowner holds in the area increases in value because of the covenant
- enter into a management agreement with the covenanting body and therefore benefit from advice, expertise and services about how to manage the land.

The ATO has, however, ruled that these benefits are not "benefits for entering into a covenant", and therefore do not preclude the landowner from obtaining income tax deduction in connection with covenanted land. Specifically, the ATO has ruled that:

- while the landowner may benefit from lower rates and fencing grants, such benefits are not received "for entering into the covenant". It is not enough that the conservation covenant was a prerequisite to receiving an otherwise unrelated benefit. Accordingly, rate reductions and fencing grants do not prevent a tax deduction under Division 31;
- any increase in the value of other land owned by the landowner is not a "material benefit for entering into the covenant". While the value of the other land increases because of the covenant, this is not sufficient to conclude that a material benefit has been received for entering into the covenant;
- any benefits given to the landowner by the covenanting body under a management agreement are too remote from the covenant, and therefore any related advice, expertise or services are not "for entering into the covenant". Accordingly, they do not prevent a deduction under Division 31.

The ATO ruling was made on 26 June 2002 and is valid for the year of income ending 30 June 2003.You can find a copy of the ruling at:

http://law.ato.gov.au/atolaw/results.htm?basic=2002/678

Greenhouse Issues Paper released by WA government

The State government has released *its Greenhouse – Issues Paper* which deals with issues such as:

- How should the government ensure that greenhouse issues are integrated into planning and development decisions?
- Should mandatory greenhouse gas emission limits be imposed?
- Should a greenhouse gas emissions trading system be established by the WA government?
- What institutions, if any, should the government establish to implement greenhouse gas emission reduction initiatives?

Although public comment closed on 31 January 2003, copies of the paper are still available at **www.greenhouse.wa.gov.au**

Copies of the EDO's submission on the paper are available from the EDO – see our website or contact Lee McIntosh if you would like a copy.

EPA Greenhouse Guidance Statement

The Environmental Protection Authority has released a "Guidance Statement for Minimising Greenhouse Gas Emissions". The Guidance Statement applies only to proponents carrying out formal EIA, and is advisory only – it is not legally binding. The Guidance Statement recommends proponents include the following factors in their environmental review documentation:

- Greenhouse gas emissions inventory and benchmarking;
- Measures to minimise greenhouse gas emissions, both in the development of the project and over the life of the project; and
- Consideration of carbon sequestration measures.

The Guidance Statement was officially open for public comment until 31 January 2003. However, the EPA has indicated it will review the Guidance Statement when the State government's State Greenhouse Strategy is developed. The Guidance Statement is available at **www.greenhouse.wa.gov.au**

"…..it appears Australia will breach its international obligations….." Australia's Third National communication on Climate Change "A Report under the United Nations Framework Convention on Climate Change", prepared by the Australian Greenhouse Office, 2002 is now available at:

http://www.greenhouse.gov.au/international/third-comm/index.html

Biodiversity Consultation Paper

The State government has released for public comment a consultation paper on the need for new biodiversity protection laws in WA. Issues covered in the consultation paper include:

- the need for new legislation,
- what biodiversity the Act should protect,
- special protection and recovery planning for threatened species and ecological communities,
- habitat protection and controlling threatening processes,
- bioregional planning,
- providing assistance for biodiversity management and restoration,
- managing sustainable use of biodiversity,
- bioprospecting,
- nature-based tourism and recreation,
- use of biological resources by indigenous people, and
- compliance, enforcement and penalties.

The Biodiversity Conservation Act Consultation Paper is available at **www.calm.gov.au.** Submissions close on 5 March 2003. Copies of the EDO's submission on the paper will be available from the EDO – call Lee McIntosh on 9221 3030 if you would like a copy.

Word of the day .....
Third Party in relation to a contract, means a person who is not party to that contract. Generally speaking, only parties to a contract are bound by its terms and can enforce that contract. In relation to an action in a Court or Tribunal, a third party is not a party to the originating action ....

Perth Biodiversity Project

The Perth Biodiversity Project is developing 'Local Government Planning Guidelines'. In early 2003 each metropolitan local government will receive a listing of all the local biodiversity areas within their boundary. Ensure your faviourite place is listed and appropriately ramked. For more information contact Andrew Del Marco on 08 9213 2047

Planting the Seed

A Guide to Public Participation and the Environment Protection and Biodiversity Conservation Act

The NSW EDO has published an 82 page, plain English, spiral bound guide to the kinds of decisions that the Commonwealth government can make under the *Environment Protection and Biodiversity Protection Act 1999 (Cth)* and how you can participate in this decision making is now available.

Cost: $19.00, or $16.00 not-for-profit organisations. GST is included and postage is $5 for the first copy and $1 for each copy thereafter. To order either visit our website at edo.org.au and download an order form, call the office on 02 9262 6989 with your credit card details.

Removal of corporations' responsibility to report on environment?

The Commonwealth government has released the *Exposure Draft Corporations Amendment Bill 2002* for public comment. Among other things, the Bill seeks to:

- remove from the *Corporations Act* 2001 (Cth) the requirement for companies to include in their annual reports details of compliance with environmental regulation (s 299(1)(f)); and
- remove the rule that currently allows 100 shareholders to requisition special general meetings even if those shareholders hold only one share each (s 249D of the Corporations Act). (This rule has been used effectively by environment groups to force corporations to hold meetings to discuss environmental issues).

The Draft Bill and its EM are available on the Treasury Website at

http://www.treasury.gov.au/contentitem.asp?Content ID =500&pageId=002>

The closing date for submissions is Tuesday, 25 March 2003.

'Coast Law in Western Australia'
order you copy now - out soon
Book $45
CD $25

Amendments to National Environmental Protection Measures

National Environmental Protection Measures (NEPMs) are Australia-wide broad framework-setting statutory instruments. They are made under the *National Environment Protection Council Act 1994* (Cth) (the Act) by the National Environmental Protection Council (NEPC) – a body made up of the Commonwealth, State and Territory Environment Ministers. NEPMs outline agreed national objectives for protecting and managing particular aspects of the environment. Draft NEPMs, and impact statements about draft NEPMs, must be available for public consultation for at least two months before final NEPMs are made. NEPMs have been made on several issues, including:

- ambient air quality
- site contamination
- used packaging material
- national pollutant inventory.

Amendments to NEPMs may have as significant an effect upon the environment as the NEPMs themselves. Until recently, the same procedure applied to amending NEPMs as applied to making them. However, the Act has recently been amended so that the NEPC can make "minor variations" to NEPMs with only one month's (instead of two month's as previously required) public consultation. The Act has also been amended so that amendments to NEPMs can be made by the NEPC without consideration of all the factors it has to consider when making NEPMs, such as consistency with the Intergovernmental Agreement on the Environment, environmental, economic, and social impact, relevant international agreements, and regional environmental differences.

Rescuing injured native fauna

The *Wildlife Conservation Regulations 1970 (WA)* have recently been amended to allow people to care for sick, diseased, injured or abandonded juvenile fauna, without a licence. Provided people advise CALM they are doing so, people are now allowed to care for such animals until they recover and can fend for itslef. Contact the Wildlife hotline 08 9474 9055 for further information.

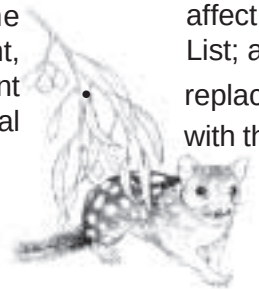
Contaminated Sites Bill 2002 (WA)

The *Contaminated Sites Bill 2002* (WA) was introduced into State parliament in late 2002. If passed, the Bill will require landowners/occupiers and polluters to report known or suspected contaminated sites, and will establish a register of contaminated sites. It will also enable the Chief Executive Officer of the Department of Environmental Protection to issue notices requiring people to investigate and remediate contaminated sites.

Changes to protection of National Estate

The proposed amendments to the Commonwealth's environment and heritage protection laws have passed the House of Representatives and are now before the Senate. If passed, the *Australian Heritage Council Bill 2002* (Cth) and the *Environmental and Heritage Legislation Amendment Bill 2002* (Cth), will:

- establish a new National Heritage List (in lieu of the National Estate);
- require Commonwealth Ministerial approval for any proposal which may have a significant affect upon a place on the National Heritage List; and
- replace the Australian Heritage Commission with the Australian Heritage Council.



EPBC ACT GUIDES

Guide for Conservationists

This is a 52 page (size A5) guide that provides a comprehensive overview of aspects of the Act that are relevant to conservationists and other people involved in environmental work. It provides information on the assessment & approval processes (including information on exemptions), Commonwealth area permit processes, wildlife trade provisions, the various lists under the Act, conservation agreements and environmental plans that can be made under the Act.

Short Guide for Conservationists

Guide for On-ground Conservationists

This is a 12 page (A5) guide that provides information on those aspects of the Act that are likely to be relevant to people involved in on-ground conservation activities. This could include members of recovery teams, re-vegetation groups, and people studying threatened species and ecological communities.

Short Guide for Rural Landholders

Get your free guide by ringing (02) 6257 4010,
email amacintosh@wwf.org.au or on the EPBC website at: www.wwf.org.au/epbc).

CASE NOTE: *Palmer v Ostrowski [2002] WASCA 39*

Sandy Boulter, EDO Solicitor

Mr Palmer was the holder of a commercial fishing licence and lessee of the Fishing vessel "FIRE 11". As a result of licences issued under the *Fish Resources Management Act 1994* Mr Palmer was authorised to fish for rock lobster commercially. Mr Palmer was advised by the Fisheries department that he could fish for rock lobster in an area near Point Quobba which in fact was closed to rock lobster fishing. He was subsequently charged by a fisheries officer, Mr Ostrowski. Following a criminal trial, Mr Palmer was convicted of fishing for lobster in a prohibited area. The Court found Mr Palmer to be a truthful witness but did not accept Mr Palmer's defence that he had made an *honest and reasonable mistake of fact* (which is a statutory defence under section 24 of the WA Criminal Code). Rather, the Court held he had made a *mistake of law,* for which there was not a statutory defence.

On appeal from this decision, two justices of the Full Court of the Supreme Court of Western Australia overturned the Magistrate's decision in substituting a verdict of not guilty, they found that because Mr Palmer:

- had directed his mind to the particular issue;
- inquired at a major Fisheries office; and
- acted on false representations made in response to his inquiry,

the matter was a, "…*classic illustration of a proper section 24* [mistake of fact] *defence*…" see para 73 Olsson, AUJ. Furthermore, Auxiliary Justice Olsson held that,

> "…*In the broadest sense, a mistake of fact to which section 24 attaches will almost inevitably also involve a mistake of law...a conclusion that the appellant was entitled to fish where he did was no doubt a belief as to the question of law. However, that conclusion cannot be disassociated from the factual events which gave rise to it*…"

para 77 Olsson, AUJ.

The Honourable Chief Justice, Justice Malcolm in agreeing with Justice Olsson, made the point that the *mistake of fact* under which Mr Palmer laboured was that,

> "…*the materials with which he had been provided* [by Fisheries] *comprised a complete set of what was required to enable* [Mr Palmer] *to determine where he could and where he could not set his pots for lobster…*".

Justice Steytler dissented from the decisions of Justices Malcolm and Olsson. In first observing that the distinction between a *mistake of fact* and a *mistake of law* is not easily drawn, Justice Steytler identified the 2 competing legal principles being:

- Ignorance of the law is no defence; and
- A person who acts under an honest and reasonable, but mistaken, belief in the state of things should not be found guilty of an offence made based on that mistake.

Justice Steytler then held that

> "… [Mr Palmer] *made no mistake of fact in respect of any element of the offence…He knew where he was fishing for lobster ... the only mistake that he made was that it was lawful for him to fish for lobster in the place he was in fact fishing. That in my opinion was a mistake of law*…"

Justice Steytler also observed that Mr Palmer may have had grounds that his error was induced by the Department of Fisheries, but that this argument had not been raised for consideration by the Court. The EDO understands that the Department of Fisheries may be considering an application to the High Court for leave to appeal.

The case raises the following issue: To what extent can a member of the public rely on advice given by a government agency and have a statutory criminal defence of *mistake of fact,* if that advice is wrong? The problem of finding a distinction between *mistakes of fact and law* is well demonstrated by this decision and shows how statutory interpretation by the Court sets legal precedent and can influence government administration. As the legal precedent now stands, advice from a government agency in similar circumstances will enliven the statutory defence in answer to a prosecution for a breach of the law.

To what extent can a member of the public rely on advice given by a government agency and have a statutory criminal defence of *mistake of fact,* if that advice is wrong?

EDO Success: Ramsar wetlands in the Mining Warden's Court

In March 2001 Environs Kimberly Inc lodged an objection to an application by Eaglehawk Kaolin Pty Ltd for mining leases to mine kaolin on Thangoo Station adjacent to the Ramsar wetlands of Roebuck Bay, near Broome. (Ramsar wetlands are listed in the International Convention on Wetlands (signed in Ramsar, Iran, in 1971). The treaty provides the framework for national action and international co-operation for the conservation and wise use of wetlands and their inhabitants. There are presently 63 Ramsar wetlands in Australia.)

Environs Kimberly's objection was successful in this case because it led to the mining lease application being withdrawn and struck from the Mining Warden's list, on 6 December 2002. This happened after Environs Kimberly Inc, represented by EDO solicitor Sandy Boulter; and John and Lesley Grey (the Thangoo Station pastoral leaseholders and represented by a private solicitor) raised the following legal issues:

Sandy Boulter, Maria Mann of Environs Kimberley and Lesley Gray, Thangoo Station Owner

1. the initial mining lease applications to the Mining Warden were premature; and
2. the Mining Warden when sitting in Open Court (as he is when hearing such applications) does not have jurisdiction to permit exploratory drilling by an order of the Court.

In accordance with the EDO's submissions on the second issue, the Mining Warden decided that he did not have the power to make an interlocutory (intermediate) order to conduct preparatory exploratory drilling. The Mining Warden did not deal with the first issue because Eaglehawk Kaolin Pty Ltd withdrew their application before that issue was required to be decided by the Mining Warden (22 months after Environs Kimberly's objection was first lodged). Environs Kimberly Inc is to be congratulated for their efforts in successfully making and maintaining this objection.

Environs Kimberly Inc could lodge an objection only because the Mining Warden is authorised under the *Mining Act 1978* to hear third party objections to mining tenement applications on environmental grounds and cannot require objectors to pay legal costs if their objection is unsuccessful (unless their application is frivolous or vexatious). However, as noted in the EDO's last newsletter, the recent Keating Report on the State Projects Approvals system unfortunately proposed that this jurisdiction be abolished.

Coast law and maps on jurisdiction

The long awaited the "Coast Law of Western Australia: the Conference Proceedings…" will shortly be published.

The papers have been edited by the EDO Coast Law Project Solicitor, Sandy Boulter. New maps have been created for the book and they show general coastal jurisdiction principles, and the **Perth, Cottesloe** and **Esperance** regions. While these maps are in black and white in the book, they can be found on the EDO website in colour.

The maps are a new initiative of the EDO Coast Law Project and if any information you are looking for does not appear on these maps please let us know. Further maps are being created for the **Busselton – Augusta** coastline and the **Geraldton/Abrolhos** coastline.

Oxfam's International Mining Ombudsman

Oxfam Community Aid Abroad has just released the second Annual Report of their Mining Ombudsman, Ingrid Macdonald.

Oxfam Community Aid Abroad established the Mining Ombudsman as a pilot project in February 2000. The aim of the program is to assist communities whose human rights or local environments are being adversely affected by Australian mining operations working overseas. It attempts to facilitate a process by which the voices of communities being affected by Australian mining companies are heard by those with power within these companies.

The 2001 – 2002 Annual Report documents cases in Peru, Papua New Guinea and Indonesia where local communities brought their grievances to the Mining Ombudsman. It outlines the historical background to the issues, the violations experienced by the communities and the dialogue and actions that have taken place in an effort to resolve these problems.

This report is available online at: www.caa.org.au/campaigns/mining/

Two great conferences coming your way, based on the outstanding Lines in the Sand conference held in May 2002

Lines in the South West Sand

Sunday 9 March 2003
10.00am – 4.00pm

Margaret River Cultural Centre, Wallcliffe Road

TIME	TOPIC	SPEAKER
9.30am	Registration. Tea and coffee	
10.00am	Welcome & overview of the Capes marine and coastal environments	TBA
10.15am	Coastal jurisdiction – Busselton to Augusta	Sandy Boulter EDO Solicitor
10.45am	Coastal planning – land clearing and development approvals	Sandy Boulter EDO Solicitor
12-12.45	Lunch – please bring your own	
12.45pm	Native title sea rights and Aboriginal heritage	David Ritter Yamatji Land & Sea Council
1.15pm	Marine parks and reef protection	Nic Dunlop CCWA and Jessica Meeuwig CALM
2.45pm	Marine protection workshop	
4.00pm	Close	

Land Clearing and Law Reform

National Environmental Defenders Office Network Conference

Conference proceedings are now available

Price: **$25 + $5 p&h (92pp)**

Includes:

- EDO Network law reform proposals;
- Speaker and panelist presentations;
- Workshop notes;
- Summary of 2 day conference.

To order, or for more information:
Michelle Seaton 02 9262 6989 or
michelle.seaton@edo.org.au

Volunteers

We thank the following who have worked as legal researchers at the EDO during January to February 2003.

Giovanni Fardin	Netta Goussac
Clara Bowman	Alana Woldan
Lara Norman	Claire Robertson
Sarah Keighery	James Fielding
Stephanie Yung	Elise Croft
Bradley Cox	Cameron Potts
Katie Potts	Amandi Danti
Anthony Wilkinson	Ken Downsborough
Dean Elek-Roser	Guy Peterson
Luke Ryan	Cilla de Lacy
Michele Lord	Jessica Panegyres
Sumit Dutta	Dale Bennett
John Hockley	Henry Litton
Andrew Beech	Richard McCormack

Lines in the Geraldton Sand

Saturday 22 March 2003
12.45 – 6pm

Geraldton Regional Community Education Centre

TIME	TOPIC	SPEAKER
12.45pm	Registration and Introduction to the Conference	
1.15pm	Overview of coastal environment	TBA
1.45pm	Coastal Jurisdiction: Geraldton to the Abrolhos	Sandy Boulter EDO Solicitor
2.30pm	Marine Reserves	Nic Dunlop CCWA
3.15pm	Aquaculture	Sandy Boulter EDO Solicitor
4.00pm	Afternoon tea	
4.30pm	Environmental regulation of oil and gas coastal exploration	Iva Stejskal Marine Scientist & Solicitor
5.15pm	Coastal planning and development	Sandy Boulter EDO Solicitor
6.00pm	Close	

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Do you have any librarian skills? The EDO is looking for someone to help organise our library - filing and cataloguing and generally keeping it tidy! If you have a couple of hours to spare, please call and we would love to introduce you to our library system.

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