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edo NEWS

Newsletter of the Environmental Defender's Office WA (Inc)

Compensation for private land reserved for nature conservation

By Lee McIntosh and Sandy Boulter

Mount Lawley Pty Ltd v Western Australian Planning Commission [2002] WASC 307

Local governments and the Western Australian Planning Commission (WAPC) (Planning Authorities) have the power to protect environmentally significant private land by reserving it for public purposes, such as nature conservation. However, they are often reluctant to do so because they fear the private landowner will make a large claim for compensation.

Western Australian legislation requires Planning Authorities to pay compensation to private landowners whose lands are reserved for public purposes – but the compensation may not be as large as the developers claim. The amount of compensation which Planning Authorities have to pay to a private landowner was recently considered by the Supreme Court of WA in *Mount Lawley Pty Ltd v Western Australian Planning Commission* [2002] WASC 307 (the Mount Lawley case).

When are landowners entitled to compensation?

The Commonwealth Constitution provides that when the Commonwealth government compulsorily acquires private land it must pay the landowner compensation on "just terms". However, the Western Australian Constitution does not impose any such general obligation on the Western Australian government.

Therefore the only time the Western Australia government need pay compensation is when this requirement is specifically set out in a particular piece of legislation. The requirements for Planning Authorities to pay compensation when they reserve land for public purposes are found in:

- *Town Planning and Development Act 1928*: requires the local government to pay compensation *only if* the town planning scheme prohibits all development on land other than development for a public purpose (such as nature conservation); and
- *Metropolitan Region Town Planning Scheme Act 1959*: requires the WAPC to pay compensation *only if* the Metropolitan Region Scheme prohibits all development of land other than development for a public purpose.

Compensation is payable under this legislation for any "injurious affection" to land, or loss of economic value of that land, which results from the fact that the land can only be used for a public purpose such as nature conservation.

The Mount Lawley case

The Mount Lawley case concerned the amount of compensation which the WAPC was required to pay the private landowner of *Rural* zoned land at Ellenbrook which was reserved by the WAPC for *Parks and Recreation* (the Reserved Land). In 1992 various *Rural* zoned parcels of land at Ellenbrook were re-zoned under the Metropolitan Region Scheme as *Urban* and then subdivided and developed accordingly. However, the Reserved Land had been recognised in an environmental impact assessment undertaken by the Environmental Protection Authority to have great environmental significance and therefore was not re-zoned *Urban* but rather was reserved for *Parks and Recreation* and could only be used for the public purpose of nature conservation. The landowner was therefore entitled under the *Metropolitan Region Town Planning Scheme Act 1959* to be compensated for the "injurious affection" caused by the reservation.

"Compensation may not be as large as the developers claim"

The Court had to decide how much compensation was payable. The landowner argued that the amount of compensation should be equal to the loss it suffered because the Reserved Land was reserved for a public purpose instead of being zoned *Urban* and subdivided and developed. This is known as compensation for the "highest and best use" of land and attracts a high level of compensation. The WAPC, however, argued that the landowner should only be compensated for the loss the landowner suffered because the reservation meant that the *Rural* zoned land could no longer be used for general rural activities but rather could only be used for limited public purposes.

CONTINUED OVER ...

Level 2, Kings New Office Tower
533 Hay Street Perth WA 6000

Tel (08) 9221 3030
Fax (08) 9221 3070
Freecall: 1800 175 542

Email: edowa@edo.org.au
Web: www.edo.org.au/edowa

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The Court noted the landowner did not have a right to have the Reserved Land re-zoned as *Urban* – and in fact, that landowners never have a right to re-zoning. The Court also found that the Reserved Land was so environmentally significant that there was in fact no likelihood that it would ever have been re-zoned *Urban* and therefore rejected the landowner's arguments for the higher compensation. The Court held that the landowner should be compensated merely for the difference between the value of the environmentally significant land given that it could now only be used as a *Parks and Recreation* reserve and the value of the land had it been able to be continued to be used for *Rural* purposes.

> "Landholders never have a right to re-zoning"

Principles of compensation

The Court held that the following principles apply to the determination of compensation payable to a private landowner whose land is injuriously affected by a reserve for a public purpose:

- the value of land is to be determined as at the time of the reservation;
- the value of the land is the sum that a hypothetical willing, but not over-anxious, vendor would agree to sell the land for;
- the conservation significance of the land at the time of reservation must be taken into account; and
- unless a landowner can establish that re-zoning of land was likely, land must be valued in accordance with its actual zoning at the time of the reservation.

How will this case relate to other land?

The Mount Lawley case indicates that, in determining compensation payable to a landowner when their land is reserved for a public purpose (such as nature conservation), a Court will look at all the evidence to determine whether, on the balance of probabilities, the land is likely to have been re-zoned *Urban*. If it appears that the environmental characteristics of the land would have prevented it from ever being re-zoned *Urban*, the landowner will only be compensated for the diminution in the value of the land because it can now only be used for limited purposes. If, however, it appears that the land was likely to have been re-zoned *Urban*, the landowner will be entitled to be compensated for the injurious affection as if the land were in fact zoned *Urban*.

Please note that the Mount Lawley case is the subject of an appeal to the Full Court of the Supreme Court. Therefore while the Mount Lawley case is a useful legal precedent at the moment, it should be treated with caution until its principles and findings are endorsed or overturned by the Full Court. Contact Lee McIntosh or Sandy Boulter at the EDO if you would like more information. For a copy of the case see:http://www.austlii.edu.au/au/cases/wa/WASC/2002/307.html

EDO SA wins land clearing case

(Article is courtesy of EDO (SA) Principal Solicitor, Mark Parnell)

***McShane v DC Lower Eyre Peninsula* [2003] SAERDC 45**

The EDO (SA) has chalked up another important win in the Environment Resources and Development Court of South Australia. The *McShane* case involved an appeal by seven Coffin Bay residents (the Residents) against a local council approval for an "International Health Clinic" and 36-lot residential subdivision on pristine coastal bushland on the outskirts of the Coffin Bay township on the Lower Eyre Peninsula (the Land).

The Residents argued that the proposed development would:

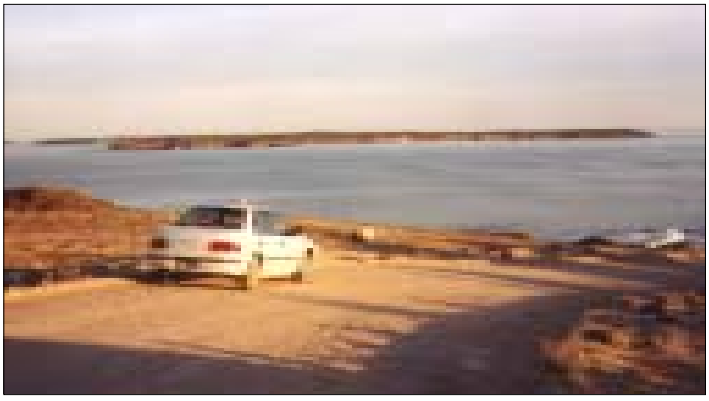
- irreversibly destroy important habitat on the Land;
- further over-exploit precarious groundwater resources;
- increase the bushfire hazard to the township; and
- undermine proper town planning for determination of the appropriate scale of development for the Land.

Ultimately, the case was decided on the fourth ground (town planning). The Land was zoned "Deferred Urban". The developer argued that the time was right to develop the Land. Much of the developer's argument was based on an alleged shortage of land in Coffin Bay and that the Land was the logical extension of the Coffin Bay township.

In rejecting this argument, the Court held that:

- the proposed development of the Land was premature; and
- only small-scale development should be considered until a proper study had been undertaken to determine how best to balance the competing demands of native vegetation protection, water availability, bushfire protection and urban development.

These are worthy goals for any town planning - including Western Australia. Contact the EDO WA if you would like more information about this case. A copy of the case is available at: http://www.edo.org.au/edosa/news/coffin%20bay.htm



Eliston on the lower Eyre Peninsula, north west of Coffin Bay.
PHOTO: J-P CLEMENT

EDO staff changes

The EDO now has two office co-ordinators. **Marilyn Ashton**, who has been the administrative assistant with the EDO for the last 3½ years, is now co-ordinator responsible for finance and reporting. **Linda Schur,** the EDO's latest recruit, is co-ordinator responsible for the EDO's special projects, fundraising and members. We congratulate Marilyn on her well-deserved promotion and welcome Linda to the EDO and hope she gets the opportunity to meet our members soon.


Marilyn Ashton


Lee McIntosh

Lee McIntosh commenced as a solicitor with the EDO when Michael Bennett was seconded to the Department of Premier and Cabinet in March 2002. When Michael decided not to return to the EDO early this year, Lee was appointed Principal Solicitor to take Michael's place.


Sandy Boulter

Sandy Boulter continues as the Coast Law Project Solicitor, and **Jean-Pierre Clement** is completing the Fact Sheet project.

Welcome Linda Schur ...

Linda is passionate about environmental conservation and people! She has a strong background in environmental education and some business acumen. As a result, she is optimistic that she will assist the EDO to increase its public profile, membership and donor bases whilst acting in a supportive role to the EDO solicitors.

Outstanding Effort!

EDO volunteer Sarah Knuckey was a member of the University of Western Australia team which recently became "world champions" in mooting (legal debating). The UWA team won the grand-finals of the international rounds of the 2003 Philip C Jessup International Law Moot Court Competition in Washington, DC. The competition attracts over 500 students from 80 law universities around the world. The UWA team was invited to compete in the international rounds after winning the Australian regional rounds in Canberra in February 2003. The Competition involves legal research into a dispute between two fictitious countries before the International Court of Justice, the preparation of written submissions, and the presentation of oral argument. This year's Jessup problem concerned the aftermath of a civil war and its regional repercussions, raising issues of State responsibility for war crimes, trafficking and corruption, and the responsibility of government officials. Congratulations Sarah!

USA work experience student arrives

Volunteer worker Edie Ringel arrived from the USA in May and will be with the EDO until August.

Edie is a third year law student at the University of Virginia Law School and has a special interest in environmental law. She has been a volunteer with a number of environmental organisations on the east coast of the United States and hopes to broaden her experiences by working in Western Australia.

The EDO warmly welcomes Edie as part of the team!

The EDO's work theme for 2003/2004:

Access to environmental justice:

Opportunities and constraints for public participation in environmental law

Australia has an international obligation to provide its citizens with access to environmental justice. The *Rio Declaration on Environment and Development - Principles on General Rights and Obligations,* Principle 10 provides that:

> "Environmental issues are best handled with the participation of all concerned citizens…. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."

During the coming year we will focus on access to environmental justice issues such as:

- Reforming "standing" rules in WA so that all people can access Courts and tribunals to raise environmental concerns;
- Ensuring that people can continue to raise environmental objections to mining leases in the Mining Warden's Court; and
- Reforming planning laws so that people can participate in planning and subdivision decisions.

We will let you know about the events we will hold during 2003/2004 on access to environmental justice issues. In the meantime, if there is a particular issue you would like us to look at, please let us know!

EDO fundraising committee

In May there was the first, productive meeting of a group of people interested in helping the EDO with its promotional work and fund raising events. It is hoped that by broadening the base of people associated within the EDO we will expand and prosper!

If you would like to be more actively involved with EDO activities or would like to share any good promotional or fund raising ideas please contact Linda on 9221 3030 or email: lschur.edowa@edo.org.au

Donors

More than ever, the EDO is relying upon your donation. We thank the following people who have answered our call so far:

Rosemary Ayers
Peter Robertson
Marilyn & Ken Zakrevsky
Beth Schultz
Sue Ellery MLC
Ross & Jay Anderson
Peter Murphy
Michael & Jacky Reeves
Iain Roberts
Jo Trevelyan
Steve Siegel
Janet & Barry Dufall
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Ken Lance

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Bill Castledon
Michael Bennett
Linda Siddall
John Beattie
Brian Moyle
Cameron Poustie

Members matter

The Baigup wetland, located between the Garratt Road Bridge and Swan View Terrace in Maylands, was once one of the most degraded vegetation habitats around the Swan-Canning Estuary. Thanks to the *Friends of the Baigup Reserve,* and the enthusiasm of its 83 members, the Reserve has been transformed. Under the direction of Harry Bastow, president of the group, two new lakes have been constructed and the whole area is now a popular recreational destination, offering important environmental education opportunities to children from local primary schools as well as TAFE students.

The EDO is proud to have members and friends such as those dedicated to environmental conservation and protection at the Baigup Reserve.

Tell us about you!
Tell us about us!

We'd love to hear about the environmental work being done by you or your organisation. Please let us know what you are up to so that we can share your good news with other members. We'd also like to hear what you think about us so that you can help us grow, develop and meet your expectations.

Send your contributions to Linda at: **lschur.edowa@edo.org.au**

Thanks to our volunteers ...

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

Jessica Panygeres
Sarah Knuckey
Marine De Kwant
Golnar Nabizadeh
Jerome Rivalland
Michelle Lord
Luke Ryan
Clara Bowman
Jane Geovese
Netta Goussac
Chris Bailey
Ken Passlow

Volunteers Netta Goussac, Luke Ryan and Golnar Nabizadeh help to send the Coast Law books to all those who attended the EDO's *Lines in the Sand* Conference. PHOTO MARTIN HELLER

EDO North Qld defends flying foxes

Humane Society International Inc. v Minister for Environment and Heritage (Cth) [2003] FCA 64

The EDO in North Queensland has successfully applied to the Federal Court to protect flying foxes under the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act).

Humane Society International Inc. v Minister for Environment and Heritage (Cth) Q191 of 2002 (HSI case) concerned the validity of agreements made between the Commonwealth government and the governments of Queensland, New South Wales and Victoria (the Agreements) which authorised the culling of up to 1.5% of the agreed national population estimate of flying foxes in the 2002/3 fruit season. On the basis of these Agreements, Environment Australia issued Administrative Guidelines which exempted fruit growers from having to refer their culling operations for environmental impact assessment (EIA) under the EPBC Act provided that the growers had a State licence to cull flying foxes.

HSI argued that the Agreements and the Administrative Guidelines were unlawful, and therefore could not exempt the fruit growers or Environment Australia from their EPBC Act EIA obligations. The Federal Minister for the Environment argued that the Guidelines did not have legal force, were merely advisory and that fruit growers who failed to refer their proposed culling of flying-foxes to the Commonwealth (even if they failed to do so in reliance on the Guidelines), might still be prosecuted if the culling had or was likely to have a significant impact on the flying fox listed species.

The Federal Court held that the Guidelines were unlawful to the extent that they purported to exempt the fruit growers from the EIA requirement under the EPBC Act. However, the Court noted that if the statements in the Guidelines containing the exemption were retracted, the Guidelines would be lawful. After the HSI decision Environment Australia amended the Guidelines so that they do not purport to exempt fruit growers from the operation of the EPBC Act. This means fruit growers whose culling activities may have a significant impact on flying foxes must go through the Commonwealth EIA and approval processes.

The HSI case shows that the vigilance of a community group, supported by the EDO in North Queensland, was crucial in defining the limitation on the powers of Environment Australia under the EPBC Act. Community groups can now monitor similar Administrative Guidelines published by Environment Australia for anything purporting to be such an exemption, in the knowledge that a Court has held such exemptions are beyond the lawful power of Environment Australia. Contact us if you would like more information about this case. A copy of the case is available at http://www.austlii.edu.au/au/cases/cth/federal_ct/2003/64.html

Providing misleading information in EIAs

Mees v Road Corporation [2003] FCA 306

The Federal Court has recently considered the issue of misleading statements in environmental impact assessment (EIA) documents. In the case of *Mees v Road Corporation* [2003] FCA 306 (8 April 2003), the Court found that the Victorian Roads Corporation, Victorian Minister for Transport and the Victorian government had provided the Commonwealth Environment Minister with misleading statements when they referred the proposed Scoresby Freeway to him for an EIA under the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act).

Regulations made under the EPBC Act required the Victorian government to provide information about whether or not the Scoresby Freeway was related to other regional actions or proposals. The information which the Victorian government provided did not refer to a possible additional freeway linking the Scoresby Freeway with the Metropolitan Ring Road. Mr Mees commenced proceedings in the Federal Court against the Victorian government after reviewing the referral information which the government had provided to the Commonwealth Minister. Mr Mees argued that the referral information was misleading because:

- the government had a secret agenda to build the further link to the Scoresby Freeway; and
- the construction of the Scoresby Freeway would make it inevitable that a link would be required.

Although, the Court did not find that the Victorian government had a secret plan, the Court was satisfied that the Victorian government had "failed to inform the [federal] Environment Minister of the strong chance that a freeway link would be built at some time in the future." Thus, the Court held that the referral information was misleading.

It is an offence to make misleading statements in EIAs

Section 489 of the EPBC Act provides that it is an offence for a person to be reckless or negligent as to whether the information they provide as part of the EIA process is false or misleading in a material particular. The Court held that this imposes a duty on people who prepare EIAs to fully disclose all relevant details. In so holding, Justice Gray stated that:

> "The Environment Minister must make a decision on the information provided in the referral. This consideration renders it all the more important that the referral document must contain information that is truthful and complete, so as not to mislead. The purpose of the EPBC Act, to protect the environment, would be subverted if the Environment Minister were to be called upon to make determinations in relation to proposals without full information of the kinds required by the EPBC Act and the EPBC Regulations."

Continued next page ...

The *Mees* case applies specifically to EIAs which are prepared under the EPBC Act. However, the same principles will apply to EIA in WA, as section 112 of the *Environmental Protection Act 1986* (WA) provides that is an offence for a person who, in purporting to comply with a requirement to give information to the EPA, gives (or causes to be given) information, that to his or her knowledge is false or misleading in a material particular. The *Mees* case makes it clear that information provided as part of EIA process must be truthful and complete and must not be misleading in any way.

Standing to complain before a Court

Mr Mees was able to bring his Federal Court proceedings because he had "standing" under the relaxed standing provisions of the EPBC Act. Section 475 provides that any person has standing to commence an action if they have conducted activities for the protection of, or research into, the environment within two years immediately before the action about which they complain. Mr Mees had standing because he was a lecturer in transport and land use planning at the University of Melbourne and a past president of the Public Transport Users Association.

Unfortunately, standing rules in WA environmental legislation are not as relaxed, and it may be difficult for a person in Western Australia to bring an action similar to the *Mees* case in respect of State EIA processes. The EDO therefore believes it is vital that the standing provisions of environment laws in WA be reformed.

Contact Lee McIntosh at the EDO if you like more information about this case. A copy of the judgment can be found at: http://www.austlii.edu.au/au/cases/cth/federal_ct/2003/306.html

Environmental Law News

Commonwealth EPBC Act Audit

The National Audit Office has completed the first performance audit of Environment Australia's administration of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). The Audit found, among other things, that:

- Environment Australia's responses to potential breaches of the EPBC Act have been *less than robust*;
- there have been no prosecutions under the Act; and
- monitoring of compliance with environmental conditions on approvals is still at an *early stage* and not ideal.

The Report makes a number of recommendations which should be adopted, not only by Environment Australia, but also by the Western Australian Environmental Protection Authority and any other relevant Western Australian government authorities. These include:

- improving the quality of referrals and avoiding over reliance on preliminary documentation produced by proponents through establishing a "consultants' accreditation scheme", and specific guides for each industry sector about what information is required from industry when referring actions;
- minimising the risk that staged developments may circumvent the requirements of the Act, by requiring mandatory disclosure when proposals are part of a wider staged development; and
- strengthening monitoring and review of compliance with environmental conditions by mandatory action progress reporting by recipients of approvals and better tracking of activities.

The Audit Report can be obtained by emailing Cwealthcopyright@finance.gov.au or writing to The Manager, Legislative Services, Ausinfo, GPO Box 1920, Canberra, ACT 2601.

EPBC Act Enforcement Policy

Environment Australia has released its "Compliance and Enforcement Policy" which sets out the policy framework for Environment Australia when it deals with possible contraventions of Commonwealth environment and heritage legislation.

The Policy sets out the factors that Environment Australia should take into account when determining its responses to possible or actual EPBC Act contraventions, including whether or not legal action will be commenced. In recommending responses to suspected contraventions of Commonwealth environment and heritage legislation, the Policy provides that Environment Australia should consider factors such as:

- the seriousness of the harm to people, the environment or cultural heritage;
- the level of malice or culpability of the offender: was the contravention intentional, reckless, negligent, or a mistake?;
- whether or not the offender has a history of prior contraventions;
- whether or not the offender has cooperated with authorities when the contravention was detected;
- the cost to the Commonwealth or general community of the contravention;
- the commercial value of a contravention to the offender;
- whether or not the proposed response option could be counter-productive in terms of maximising compliance with legislation; and
- whether or not prosecution or civil enforcement would create a desirable precedent.

Copies of the Policy are available at: http://www.ea.gov.au/about/compliance/index.html

All planning appeals must now go to Town Planning Appeals Tribunal

We reported in our December 2002 newsletter that, when it came into force, the *Planning Appeals Amendment Act 2002* would prohibit the Minister for Planning from hearing appeals against planning decisions, thereby directing all planning appeals to the Town Planning Appeals Tribunal.

On 22 April 2003, the Act came into force. It will apply to all appeals from planning decisions made on or after 22 April 2003. Any development applicants who disagree with a subdivision decision (made by the Western Australian Planning Commission) or a development decision (made by a local government or the Western Australian Planning Commission) cannot now appeal those decisions to the Minister for Planning.

Unfortunately, the *Town Planning and Development Act 1928* still does not empower third parties to institute appeals against the merits, or legalities, of planning decisions. Third parties appeal rights against unmeritorious planning decisions are, however, vital for the promotion of orderly and proper planning. We have made several submissions to government about third party planning appeal rights. Western Australia is the only State or territory (apart from the Northern Territory) which does not empower third parties to commence appeal against the merits of planning decisions.

Review of the Department of Environmental Protection

The Minister for the Environment recently commissioned a major review of the structure of the Department of Environmental Protection (DEP) and Water and Rivers Commission (WRC). The review (conducted by Derek Carew-Hopkins) found, among things, that:

- since the proposed merger of the DEP and WRC in 2001, too much emphasis was placed on change management without regard for maintaining a principal objective of creating managers that were advocates for the environment. This translated into an over-emphasis on corporate processes and not enough on technical capacity in environmental management;
- there needs to be greater support for DEP and WRC regional offices as the effective community interface for the agency. This will be the single most effective means of restoring community faith in the agency; and
- increased pressure on water resources will require focused measurement and assessment programs to generate the information needed for future planning, policy and management needs.

The review contains many recommendations which we hope are implemented. You can obtain a copy of the review at: http://www.environ.wa.gov.au/downloads/DEPWRCReview.pdf

CALM Management Plans: New Website

The Department of Conservation and Land Management (CALM) has developed a new website called "Planning Diary" which is dedicated to summaries of the progress of management plans being co-ordinated by CALM. The website can be found at:

www.calm.wa.gov.au/national parks/management/index.html#managementplans.

The first issue of Planning Diary covers the legislative role of management planning and then advises us about planning for the:

- Carnac Island Nature Reserve;
- Kalbarri National Park;
- Lane Poole Reserve;
- Leeuwin-Naturaliste Ridge parks;
- Scott National Park;
- Gingilup Swamp Nature Reserve;
- Yelverton, Margaret River and Forest Grove National Parks;
- Millstream-Chichester National Park;
- Thomson's Lake Nature Reserve;
- St John's Brook and Jarrahwood Conservation Parks;
- Shannon and D'Entrecasteaux National Parks;
- Walpole Wilderness Area;
- Wellington National Park;
- Turquoise Coast Islands Nature Reserve; and
- Yanchep and Neerabup Nationals Parks, and Neerabup Nature Reserve.

While the work being done on these management plans is commendable, it is salutary to remember that the detail of CALM management plans is not binding on CALM.

Stirling Range National Park from Kojaneerup Spring
PHOTO: J-P CLEMENT

A Guide to the EPBC Act for local government and natural resource management groups is available to help understand the Commonwealth *Environment Protection and Biodiversity Conservation Act* (1999). Free and available from www.wwf.org.au/epbc or by phoning (02) 6257 4010

State Coastal Planning Policy

By Sandy Boulter, Coast Law Project Solicitor

The State Coastal Planning Policy (the Policy) was released by the Western Australian Planning Commission (WAPC) in April 2003. A copy of the Policy is available at:

www.planning.wa.gov.au

Notwithstanding the merit or otherwise of the Policy, it is important to remember that under the present legislative regime for land use planning in Western Australia, the decisions of the WAPC to approve applications to subdivide previously undeveloped coastal lands that is one of the main threats to our coast. Unfortunately neither the Policy (made under section 5AA of the *Town Planning and Development Act 1928*) nor the provisions of a town planning scheme (see section 20(5) of the *Town Planning and Development Act 1928*) bind the WAPC when it considers and grants applications by landowners to subdivide their land. In fact, the WAPC's power to grant subdivision approval is almost unfettered: see *Re Western Australian Planning Commission; ex parte Leeuwin Conservation Group Inc.* [2002] WASCA 150. State Planning Policies are merely a relevant consideration that the WAPC may depart from (without even providing reasons for the departure!) when making subdivision decisions.

Western Australia urgently needs law reform to improve the legal effect of the Policy (and in fact all State Planning Polices). This (amongst other problems with our planning legislation) was highlighted by Mr Michael Barker QC (now Justice Barker of the Supreme Court of Western Australia) in Chapter 4 of the EDOs new publication *Coast Law in Western Australia*. The Policy should bind the WAPC when it approves subdivisions, because landowners in receipt of a conditional subdivision approval generally do not require development consent from the local government (but only mere approval for the standard of works) to undertake the subdivision infrastructure works for roads, water, sewerage and power (which may well be preceded by land clearing for which no approval is required). Thus, any restriction in town planning schemes (say for example, by incorporation of the Policy into a scheme) on coastal land use or development will only have effect once the land is cleared and subdivided, the infrastructure works completed and the owner of each lot applies to the local government for development approval for whatever is desired for the subdivided lot.

Western Australia's coastal regions are *definitely* not out of the woods as a result of the Policy. In fact, subject to the EPA refusing permission for a coastal development proposal referred to it for environmental impact assessment (which in our opinion is unlikely), one searches valiantly but unsuccessfully for any legislative provision that could stop the future subdivision of as yet undeveloped coastal lands, other than the Class A Crown land reserve provisions of the *Land Administration Act 1997*, or region planning scheme protection. The Policy may be a small step forward, but law reform is urgently needed to give the Policy more legal teeth. Please contact Sandy Boulter at the EDO if you like any more information about the Policy.

Coastal Maps

New maps have been created for the *Coast Law* book which show general coastal jurisdiction principles, as well as specific jurisdictions and boundaries in the **Perth, Cottesloe** and **Esperance** regions. While these maps are in black and white in the book, they will be placed on the EDO website in colour (**www.edo.org.au/edowa**). The maps are an initiative from the EDO Coast Law Project.

Further maps have been created for the **Busselton–Augusta** coastline and the **Geraldton/Abrolhos** coastline and poster size versions of these maps are respectively in the Margaret River Environment Centre and the Geraldton Environment Centre, and will also be placed on the EDO website.

LUCY'S BEACH

After presenting papers at the EDO's *Lines in the Geraldton Sand* conference, Iva Stejskal (who presented a paper on oil and gas) and EDO solicitor Sandy Boulter, returned from Geraldton by the coast road. On the way, they called into Lucy's Beach.

Lucy is a rather novel rubbish collection point for the remote beach, which is not serviced by council rubbish collection services. Lucy's rope skirt was found on the beach by Iva and Sandy, and added to Lucy's rather buxom figure of fashion.

"Lucy" shows off her latest garb - pictured here with Iva Stejskal PHOTO: SANDY BOULTER

And speaking of rubbish ...

South Australia, which is the only Australian State with container deposit legislation, recovers 85% of non-refillable beer bottles, while other States recover less that 50%. Recovery rates for other containers in SA is 84% for glass soft drink bottles, 84% for cans and 74% for PET drink bottles.

Coastal Law Book For Sale

The EDO's latest publication, *Coast Law in Western Australia*, is taken from papers presented at the EDOs "Lines in the Sand" conference held in May 2002. The papers were edited by the EDO Coast Law Project Solicitor, Sandy Boulter. The book has now been distributed to all conference attendees and can also be purchased from the EDO.

The book costs $55 (CD is $44). We are indebted to authors of the chapters, the Myer Foundation, Coastwest/Coastcare and the Departments of Land Administration and Industry and Resources for their support.

Comments on the book ...

"Excellent presentation and breadth of content"

"A good publication, well-done!"

"…it should be a regular publication!"

"... an excellent technical publication..."

"... a valuable literary addition".

"... a useful resource."

Cordinup Beach, north-east of Albany
Photo: J-P CLEMENT

Environmental Law Reform

New laws to protect animal welfare

New laws to protect animal welfare came into force recently. The *Animal Welfare Act 2002* replaces the outdated *Prevention of Cruelty to Animals Act 1920*. The purpose of the Act is to:

- promote and protect the welfare, safety and health of animals;
- ensure the proper and humane care and management of all animals in accordance with generally accepted standards; and
- reflect the community's expectation that people who are in charge of animals will ensure that they are properly treated and cared for.

The Act prohibits people from using animals for scientific purposes, such as teaching, research or product development or testing, unless they have a licence from the Minister for Local Government to use the animal. The Act also prevents people from using animals for scientific purposes unless they have approval from the animal ethics committee of the scientific establishment where they work and comply with a relevant scientific code for that animal.

The Act makes it an offence to release captive animals for the sport of hunting, chasing or killing them or to allow captive animals to fight with each other. Any person who takes part in, spectates at, organises, promotes or keeps animals for such purposes commits an offence. Fines of up to $50,000 or five years jail can be imposed for offences under the Act.

The Act will primarily be enforced by the Department of Local Government and Regional Development's Animal Welfare Branch in conjunction with the RSPCA. Call 9217 1500 if

Palmer and Ostrowski: Partial Post script

The December EDO News contained a case note on *Palmer v Ostrowski* [2002] WASCA 39 concerning a cray fisherman's ability to use the defence of "mistake of fact" when he was prosecuted for unlawful fishing because he had relied on incorrect advice provided by the Department of Fisheries about fishing laws. The Department of Fisheries sought special leave from the High Court (the Court of ultimate jurisdiction in Australia) to appeal against the decision of the Western Australian Supreme Court. On 9 May 2003, the Honourable Justice McHugh granted special leave to appeal on the basis that it was an important legal principle applicable in all Australian jurisdictions. However, special leave was only granted because the Department of Fisheries agreed to pay Mr Palmer's High Court legal costs. We await the outcome of the High Court appeal.

Frozen in time . . .

Ad medium filum

Ad medium filum is a Latin phrase which means *to the centre line*. It encompasses the legal principle that the owner of a parcel of land separated from another parcel of land by a stream or road is presumed to own the property *ad medium filum* (to the centre line) of the stream or road.

Hereto

While mostly obsolete in general speech, **hereto** in legal terminology means *up to this document, matter or thing*.

Economic Regulatory Authority

The EDO has given advice about the State government's proposal to create a new Economic Regulatory Authority (ERA). It is anticipated that the ERA will be responsible for licensing water and energy service providers, and be authorised to conduct inquiries into (amongst other matters) water and energy pricing.

The ERA is proposed to be created by the *Economic Regulatory Authority Bill 2002* (WA) (the Bill), which is now being reviewed by the State Legislative Council Standing Committee on Public Administration and Finance.

The Bill raises environmental concerns because:

- while the ERA will be obliged to consider environmental factors when regulating energy and water service providers, it need not give any weight to those environmental factors, and it is therefore unlikely that environmental factors will ever be determinative of the ERA's decisions;
- the ERA will not be required to look at environmental consequences of water and energy pricing;
- the ERA will not be required to implement government water and energy policies;
- the ERA is unlikely to have sufficient expertise to make informed decisions about the impact of its decisions on environmental factors;
- the Bill does not implement sustainability objectives and is not consistent with the Draft State Sustainability Strategy; and
- the EPA is unlikely to assess matters which the ERA makes decisions about, and therefore the environmental issues associated with the ERA's decisions will simply not be assessed.

Public submissions closed on 30 April 2003 and the Legislative Council Committee is now considering the Bill. Please contact Lee McIntosh at the EDO if you would like more information.

Defamation Law Reform

The State Attorney General has established a Western Australian Defamation Law Reform Committee to report on any reform which should be undertaken of defamation law in WA. The EDO made a submission to the Committee, the main points being:

- the current law fetters the right of people to speak out in the public interest on environmental matters. The EDO submitted that the defences against defamation should be expanded to provide a defence to people who make defamatory statements about environmental matters;
- defamation law is designed to protect private individual's personal reputations. However, it is often used by corporations who threaten to sue any person who makes a statement about the environmental consequences of a particular activity. The EDO submitted that corporations, statutory bodies and government agencies should be prohibited from commencing defamation proceedings;
- "Strategic Suits Against Public Participation" suits (SLAPP suits) are defamation proceedings primarily directed at preventing people from speaking out about an environmental issue and deterring others from doing so. The EDO submitted that SLAPP suits should be prohibited;
- people can currently commence a defamation action about statements that were made up to six years ago. The EDO submitted that people should be required commence defamation action within six months of the alleged defamatory statement; and
- proposals which reduce the cost and complexity of defamation proceedings should be implemented.

The Committee's recommendations are expected to be released shortly. Please contact Lee McIntosh at the EDO if you would like a copy of our submission.

Greenfields Mineral Exploration

The WA government has released the findings of a Ministerial Inquiry into Greenfields Exploration in Western Australia. The was completed by John Bowler MLA and is therefore known as the "Bowler Report." *Greenfields exploration* means exploration of minerals in areas away from existing mines. The EDO and the Conservation Council of WA made a joint submission on the Report, raising the following issues:

- the Report recommends that the Mining Warden's Court jurisdiction to hear environmental objections to mining and exploration tenements be removed. The EDO submitted that the Mining Warden's Court should retain this jurisdiction;
- the Report recommends that low level exploration be permitted in the Conservation Estate. The EDO submitted that the Conservation Estate should not be threatened or compromised by mining exploration activities; and
- the Report recommended that there should be legislative changes to remove the right of a private landowner to veto some exploration on their land. The EDO submitted that the limited right of veto to exploration on private land should be retained.

All public submissions on the Bowler Report are now being complied into a brief summary report for the Minister of State Development. The Bowler Report and public submissions are available at: www.dme.wa.gov.au/news/governmentreviews/bowler.html. If you would like a copy of the EDO's submission, please contact Lee McIntosh.

EDO's "World Environment Day" Film Night Fundraiser

"Secretary" (MA), Thursday 5th June

Where: Cinema Paradiso, 164 James Street, Northbridge

Time: 6.15 pm for Wine & Cheese - 7pm for the film (runs 104 mins)

Cost: $15 waged, $10 unwaged

Legal comedy!!!

Lee Holloway (Maggie Gyllenhaal) applies for a secretarial position at the law office of E. Edward Grey (James Spader). She was released only recently from a mental institution and soon learns that Mr. Grey is not your average lawyer!

Phone 9221 3030 now for bookings!

Coastal Law in WA Book Launch

"Coast Law in Western Australia" will soon be officially launched, and you are cordially invited to come and hear about our new book, meet the authors, and hear about issues relating to our coast. We look forward to your company at this EDO coastal social outing as your support is crucial for our continued work.

DATE: Thursday, 26 June, 2003.

TIME: 6.15pm for a prompt 6.30pm start.

PLACE: The Chandelier Room at the Ocean Beach Hotel (OBH),

Marine Parade, Cottesloe.

(This venue has been generously provided by the OBH).

Anyone wishing to book for dinner at the C-Blu restaurant in the OBH from 7.30pm onwards can do so by phoning the hotel directly on 9384 2555.

The book will be launched in conjunction with an "Environment Matters" information forum by the Conservation Council of WA and guest speakers from both the EDO and the Conservation Council will present information on current coastal issues. The evening therefore promises to be both interesting and sociable.

Please R.S.V.P. with numbers to the EDO on 9221 3030 by 19 June.

We look forward to seeing you there!

Lunchtime Law

EDO solicitor Lee McIntosh will present a lunchtime seminar on

Access to Environmental Justice

- considering the opportunities and constraints on

public participation in environmental law -

when: 1-2 pm, Wednesday, 2 July 2003

where: Petty Sessions Bar, Kings Hotel, 533 Hay St, Perth

The EDO hopes this will be the first of regular "lunchtime law" seminar and discussion forums for anyone interested in expanding their knowledge of environmental law and related issues - please come along!

RSVP to Linda or Marilyn on 9221 3030 or email: lschur.edowa@edo.org.au

(Lunches can be purchased from the hotel)

Thank you to the King's Hotel for kindly providing the venue