Vol 10 No 1
March 2004

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

CONTAMINATED LAND AND WATER MANAGEMENT - THE NEXT PHASE

By Rob Campbell-Watt

1. Introduction to the new legislation

The *Contaminated Sites Act 2003* (WA) (***CS Act***) is a legislative answer to what many have described as shortfalls in the system of addressing and managing the State's contaminated land and water. Contaminated land and water is widely recognised as a legacy left by past land use and land management practices in the State.

The *CS Act* was assented to by the Western Australian Parliament on 7 November 2003 and will commence on a day to be fixed by proclamation. Regulations are currently being drafted that would complement the CS Act upon its commencement.

Many people who will be indirectly affected by the CS Act will also need to understand its operation. For example, those involved in marketing, construction, conveyancing and development of land, stand to be indirectly affected during the implementation of the new legislation. The general public also have rights and obligations under the CS Act.

This aim of this article is to overview the effects of its introduction. A new fact sheet has been developed by the EDO (Fact Sheet 30) to provide more detailed information on the implentation of the CS Act and how to comply.

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2. Legal framework

When reviewing new legislation, it is often helpful to contexualise it within its the legal framework in which it will operate. Aspects of the CS Act reviewed below are:

Object and principles
Effect on other laws
Exemptions and
Regulations.

3. Objects and principles

The object of the CS Act is stated in section 8 as being to:

'protect human health, the environment and environmental values by providing for the identification, recording, management and remediation of contaminated sites in the State, having regard to the principles in the Table to this section.'

(see section 3.2 on page 6)

3.1 Rights and obligations

To achieve the object, the CS Act establishes up a mix of mandatory and voluntary measures that are designed to provide for the identification, management and remediation of 'contaminated sites.' Many of these measures, in the form of obligations, are apportioned to the owners and occupiers of land and water. There is implicit acknowledgment that their existing rights of use and enjoyment of that land and water will attract concomitant obligations where they are the cause of known or suspected contamination. However, the CS Act also provides statutory acknowledgment that owners and occupiers may not be responsible for causing that contamination and that it will not always be fair for those obtaining the benefits from their property rights and rights of possession to be burdened with all of the obligations and risks. Accordingly, obligations and associated risks have been apportioned to those who caused the contamination, related bodies corporate, the State Government and financial institutions in certain circumstances under the *CS Act*.

The Department of Environment (**DoE**) is the State Government agency charged with administration of the legislation. The DoE is obliged to record contaminated land and water through a process of classification of reported sites and subsequent recording.

The system of recording will affect title to land in Western Australia. A source of contamination may result in one or more 'sites' being classified as contaminated under the CS Act by reference to the affected land titles on the Register in accordance with the *Transfer of Land Act 1893*.

The Chief Executive Officer of the DoE (or delegate) is charged with regulation of the *CS Act* and is granted new discretionary powers and mandatory duties to achieve the objects of the *CS Act*. A Contaminated Sites Committee, established by the Minister for Environment, is to determine responsibility for remediation under the CS Act and hear appeals on questions of fact from the decision of the CEO as to the extent of contamination, amongst other things.

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MINISTER DIRECTED TO CONSIDER 'ALL IMPACTS' OF NATHAN DAM

On Friday 19 December 2003 EDO QLD won a case about the ambit of environmental assessment. The case was about the proper scope of the environmental assessment (at the Commonwealth level) of the proposed Nathan Dam, and whether impacts from agriculture which would be facilitated by the Dam should be considered an impact of the Dam itself, for the purposes of the Commonwealth assessment and approval process under the *Environment Protection and Biodiversity Conservation Act* ('EPBC Act'). EDO (Qld) were the solicitors on the record for successful clients Queensland Conservation Council (QCC) and the World Wide Fund for Nature Australia (WWF).

The Minister for Environment and Heritage was referred a proposal to construct a dam (the Nathan Dam) on the Dawson River in Queensland under the *Environment Protection and Biodiversity Conservation Act* 1999 (Cth) ("EPBC Act"). Part 3 of the EPBC Act contains prohibitions on activities which will have or are likely to have a significant impact on the world heritage values of a declared World Heritage property and provides for penalties and offences in that regard. The Dawson River leads to the Fitzroy river and ultimately to the coast, near Rockhampton, where it enters the Great Barrier Reef World Heritage Area ("GBRWHA"). The GBRWHA has world heritage values. The rivers' system is about 500km long from the proposed Nathan Dam to the GBRWHA.

The Minister's enquiry into the Nathan Dam proposal considered only the impacts of the construction and operation of the dam on certain threatened species in the vicinity of the dam, and did not consider the other consequences which might follow including other people's decisions to establish cotton-farming uses downstream of the dam and the effects of such uses on the GBRWHA.

Conservation groups challenged the resulting decision as to what the controlling provisions were and his assessment of "all relevant impacts (if any) that the proposal is likely to have": section 75. The Minister defended this approach as being consistent with the Act. On appeal to the Federal Court, the issue was whether the Minister must consider all impacts on the GBRWHA including those from other people's decisions. Conservation groups also challenged the level of assessment: section 85. As the Federal Court (Justice Susan Kiefel) observed, it is not difficult to infer that the Minister's decision as to impacts will have an effect on the level of assessment likely to be chosen. Her decision (*Queensland Conservation Council Inc v Minister for the* conservation groups that a dam would enable cotton farming, which uses irrigation, and chemicals, to be undertaken downstream of the Nathan Dam. Kiefel J held that the Minister should have considered the whole, cumulated and continuing effect of the dam and his assessment should be wide ranging, as contended by the Queensland Conservation Council. The Minister has been directed to determine what all the impacts will be, whether they will be significant in their impact on the GBRWHA and whether they are likely to occur. The full text is available from the EDO (WA) on request or at www.fedcourt.gov.au.

Justice Kiefel held that
the Minister should have considered the whole, cumulated and continuing effect of the dam
and his assessment should be wide ranging.

However, on 28 January 2004 the Minister appealed from Justice Kiefel's decision. If this appeal is successful then the EDO's clients could expect a much narrower interpretation of the likely environmental impacts of controlled activities under Part 3 of the EPBC Act. The Full Court is currently expected to hear the appeal in Brisbane in May 2004.

The Grounds for Dr Kemp's appeal are that:

1. The Minister is required by s 75(2) of the EPBC Act to consider the adverse impacts that are **inherently or inextricably involved** in the proposed action"; and that
2. Kiefel J should have held that the Minister is **not** required by s 75(2) of the EPBC Act to consider:
   (a) all of the consequences which could be predicted to follow from the proposed action;
   (b) the likely impacts of activities undertaken by persons other than the proponents of the proposed action when those activities are neither proposed by the proponents nor inherently or inextricably involved in the proposed action; or
   (c) the likely impacts of all those activities on the part of persons other than the proponents which the proposed action would be likely to generate.

DRAFT CLEARING REGULATIONS

Just before Christmas 2003, the draft native vegetation clearing regulations were released for comment. Since then, there has been a heated debate becuase they contained some unwelcome surprises.

The clearing regulations provide for a number of exemptions from the statutory scheme that requires all clearing of native vegetation to be licensed. Proposed exemptions for access tracks of up to 8m, for single paddock trees and for firewood are controversial. The regulations also set out what will be protected intentionally planted native vegetation for the purpose of the licensing regime.

Currently, no existing intentionally planted vegetation requires a permit. This means it would only be protected if it was planted pursuant to a condition or commitment in an approval already in existence, or under a conservation covenant entered into by private arrangement with the owner. This was unexpected because intentionally planted vegetation was not exempt under the Soil and Land Conservation Commissioner's regime. As a result, NHT-funded biodiversity and Landcare plantings could therefore be cleared under the new regime without a permit. There are also exemptions for certain activities that are governed under other Acts. The latter kind of exemption is of particular concern because other Acts do not contain the clearing principles that have been included in the *Environmental Protection Act 1986*. It is hoped that the draft clearing regulations can be improved quickly.

The new clearing regime is expected to come into effect mid-year.

AUSFTA

The agreement between Australia and the US regarding access to each other's markets for trade was agreed in February ("AUSFTA"). The process involves AUSFTA being ratified through US processes involving Congress, and Australia processs involving the Commonwealth Cabinet, then approval by the Joint Standing Committee on Treaties. ANEDO (the Australian Network of Enivronmental Defender's Offices) has made submissions on the AUSFTA treaty earlier this year. Its concern arises from the North American Free Trade Agreement (or NAFTA) which was signed a decade ago and which contained an innocuous looking provision - Article 1110 under chapter 11, "dispute resolution." This provision allowed investors to sue governments for "expropriation" - or the taking of private property without compensation. Article 1110 - provided a right of compensation for such action. Using this provision, the Canadian company Methanex sued the State of California for banning MTBE, which is a toxic compound affecting dozens of Californian groundwater resources from which Californian drinking water is taken. MTBE is found in methanol, a Methanex product. This case was taken despite Article 1114 which states that: 'Nothing in Chapter 11 should be construed as preventing a Party from adopting... any measure ... that it considers appropriate to ensure that investment activity in its territory is undertaken in an manner sensitive to environmental concerns'. (Incidentally, two NGO's obtained standing to be heard in relation to this proceeding, but that's a separate story). In August 2002, the arbitral body ruled that Methanex needed more evidence, and the case was adjourned.

Overall, Chapter 11 of AUSFTA is very similar to NAFTA. Article 11.7 of AUSFTA cntaines the same expropriation/compensation clause as NAFTA, although Annex 11-B provides that 'except in rare circumstances, non-discriminatry regulatory actions by a party that are designed and applied to achieve legitimate public welfare objectives, such as the protection of ... the environment, do not constitute indirect expropriations'. What 'rare circumstances' could they be thinking of? Methanex? The devil will be in the detail. Chapter 11 of the AUSFTA contains an equivalent to NAFTA's Article 1114, (Article 11.11 of AUSFTA). While disputing parties under NAFTA go into arbitration, there is currently no arbitral provision in AUSFTA. In early February 2004, the Department of Foreign Affairs and Trade (DFAT) published a note on its website indicating that nothing in the investment section of the AUSFTA agreement provides for additional investor-state dispute settlement clauses given the "robust developed legal systems" in each country. However, Article 11.6 addresses strife in such a way as to emphasize the compensation provisions of Article 11.7.

In the Courts

C Harding and H Read V Shire of Chittering and Ors. [2003] WATPAT 147

The Planning Tribunal allows no third party rights to appeal to the Town Planning Appeals Tribunal (TPAT) but third parties are permitted to make submissions to the TPAT providing they have a sufficient interest in the case.

In the above-mentioned case, the TPAT decided that s51 (e) and (f) of the *Town Planning and Development Act* 1928 also allows the submitter to call evidence as well as make submissions in the discretion of the TPAT.

A copy of this case is available from the EDO on request.

Frozen in Time....

Country Areas water Supply By-Laws 1957

5A. Flushing apparatus for water closets

(1) If apparatus referred to in by-aw 5(1)(b) [*a toilet]* incorporates or consists of a water pan, the owner and occupier of the house concerned shall provide apparatus authorised by the Commission for -

(a) the effective application of water to that pan;

(b) the efficient flushing and cleansing of that pan;

(c) the removal from that pan of any solid or liquid matter which may from time to time be deposited therein.

PROPOSED AQUACULTURE FACILITY IN GIDGEGANNUP

EDO Member John Beattie shares the history of a proposed aquaculture facility in Gidgegannup. As Chris Tallentire comments, this story is an example of how laws designed to protect our watercourses are not being administered in a way that ensures environmental protection.

John Beattie writes -

December 2000.

The proponents submitted a development application to the City of Swan. The application disclosed a facility consisting of three dams on the watercourse and twenty aquaculture ponds within a seepage belt alongside the watercourse. Production was specified at 10,000 kilos of silver perch and marron per annum.

Local landholders and the Wooroloo Brook LCDC were concerned about blockage of the watercourse, use of a large amount of water, leaching of nutrients and increased salinity, through the development and exploitation of a salt scald. They referred the proposal to the EPA which set the level of assessment at 'Not Assessed – Public Advice Given' and indicated that the proposal would be managed under Part V of the Environmental Protection Act 1986 ("EP Act") which, amongst other things, regulates such proposals through licence and works approvals. The Minister was requested to review the decision. She did not do so on the basis that the proposed development being managed under Part V of the EP Act and under the *Rights in Water and Irrigation Act 1914* ("RIWI Act").

July 2002

On release of the Minister's decision in July 2002, the Appeals Convenor emailed the Waters and Rivers Commission (WRC) to ensure interested parties were consulted during the surface water licensing phase. The response of the WRC was "we don't want to go down the path of licensing this development under the RIWI Act as we do not actively license other users on Wooroloo Bk. If we start with this one we will be obliged to go down the path of surveying the Brook and licensing others. …"

In April 2003

Interested parties met with the WRC in April 2003. Six days after that meeting the WRC indicated that the development may be given a licensing exemption, due to the defined watercourse commencing immediately below the point of damming and water extraction. Some interested parties had been landholders for over thirty-five years, and had observed that the watercourse was subject to continual uninterrupted flow from well upstream of the site for at least seven months each year.

An independent hydrologist was consulted and a statutory declaration obtained from a past long-term occupier of the site. This led to an inspection by the WRC hydrologist and the WRC ultimately reversing its view.

However, in the meantime the proponent had relied on that indication to its benefit; it had sought development approval from the City of Swan for two dams. The City of Swan sought advice from the WRC. In a file note dated 29 April 2003 the City of Swan recorded the WRC advice as " the subject dams are not located on a deemed watercourse and therefore has no comments to make."

May 2003

In early May 2003, construction commenced on the first major dam. Repeatedly, concerns were raised with the WRC that construction was proceeding in breach of section 17 of the RIWI Act, which prohibits interference with watercourses (or their banks). On 10 July 2003 the WRC finally issued a section 17 permit under the RIWI Act.

When watercourse flows commenced after the construction of the first dam considerable turbidity was evident from the site through the full length of the watercourse. This continued for six months until the end of the flow season. On two occasions government officers inspected the turbidity, and obtained samples. No enforcement action was taken.

July 2003

On 10 July 2003 the WRC issued a licence to 'take' water, containing conditions intended to protect riparian vegetation, under the RIWI Act. Requests for details of the license terms and conditions were refused. Following protests to the Minister for the Environment's office copies of the take and the dam and divert permits were obtained. A meeting was subsequently held with the WRC to obtain an understanding of the licence conditions and how key concerns that had been raised were to be satisfied. WRC officers confirmed that the key impacts of blockage of the watercourse, use of the amount of water, and salinity had not been addressed.

October 2003

An application for Works Approval under Part V of the EP Act was lodged. On 19 March 2003 a determination was made that a Works Approval was not required. The rationale for this was that the proponent stated that intended production was now only 600 kilos of finfish, and marron should not be counted. There was no change in the intended size of the facility. As the regulations require a works approval where the production or design capacity of fish or prawns exceeds 1,000 kilos, the EDO assisted to make representations that this determination was wrong in law, but under the terms of its funding arrangement with the Commonwealth, could not represent its clients. Interested parties then engaged the Environmental Law partner of a major national law firm. This resulted in a submission to the Minister for the Environment and a site visit by a Minister's office staff member. On 24 October 2003, advice was received from the Minister's office that a Crown Law opinion had confirmed the requirement for a Works Approval on design grounds.

Before any Works Approval had been granted and after the licence to take had expired (so that there were no longer any clearing provisions binding the proponents at this time) construction work commenced on the second major dam. The dam is in a location that appears to be significantly different to the scale plan within the Section 17 permit. Complaints were made that the proponents also appear to have committed numerous breaches of section 18 of the RIWI Act (at right) in pushing material quantities of detritus and other matter into and

around the watercourse well downstream of the construction site. Sections of riparian and roadside vegetation were destroyed. The Department of Environment maintains the current works are being managed in accordance with normal department practice. **Key concerns** of blocking the watercourse, the amount of water to be used and downstream impacts, the positioning and design of the pond system to avoid nutrient seepage and avoiding increased salinity are to be addressed in the works approval which – still - has not been issued.

RIWI Act

18. Obstruction of flow

Any person who conveys or discharges, or causes or permits to be conveyed or discharged any sludge, mud, earth, gravel or other matter likely to obstruct the flow of the current, into any watercourse, is guilty of an offence against this Act.



The effectiveness of the Department in bringing about meaningful consultation and addressing the key concerns was put under scrutiny by Chris Tallentire, the Director of the Conservation Council of Western Australia, at his workshop at the EDO conference held on 20 February 2004. Below he summarises his comments about the Gidgegannup aquaculture proposal at the workshop.

The Gidgegannup aquaculture proposal highlights how the licensing systems of the EP Act and the RIWI Act are not being administered in a way that ensures the integrated management of the environmental protection provisions of these Acts.

Government and proponents frequently dismiss the need for environmental impact assessment to deliver legally binding conditions on development approvals. All too often informal advice is given, and a claim is made that a range of environmental factors can be managed under the licensing provisions of the *Environmental Protection Act* 1986 (EP Act). The EPA is also inclined to say that proposals can be managed under other legislation, such as the *R*RIWI Act. Such arrangements are totally unacceptable from an integrated environmental management standpoint.

On grounds of ecological sustainability and environmental acceptability I believe the license to "take" and to build the dams for the Gidgegannup aquaculture proposal should have been refused using the powers under clause 7 of Schedule 1 of the RIWI Act. (see inset at right)

A further twist in the tale of the Gidgegannup aquaculture story is that appeals against the original level of assessment were dismissed by Dr Judy Edwards, the Minister for the Environment. The appeals were decided on the basis that other powers wthin the Environment portfolio would ensure the appropriate management of the proposal. However, as subseuent decisions have shown that reliance was misplaced. Some of the later decisions defy belief: the WRC coming to the view that the watercourse started below the dam. Begging the question 'why would the proponents be building a dam there?' What we see from this saga is that integrated environmental management has not yet been achieved in WA. ■

RIWA Act

Schedule 1 — Licensing and related provisions

7. Grant or refusal at Commission's discretion

(1) The grant or refusal of an application for a licence and the terms, conditions and restrictions to be included in the licence are, subject to clause 8, at the discretion of the Commission.

(2) In exercising that discretion the Commission is to have regard to all matters that it considers relevant, including whether the proposed taking and use of water

(a) are in the public interest;

(b) are ecologically sustainable;

STOP THE DESTRUCTION OF YOUR HERITAGE AT PERTH AIRPORT

As the EDO is uable to represent clients in the Administrative Appeals Tribunal ("AAT") Mary Gray of the Urban Bushland Council is taking on the Commonwealth in the AAT this month on behalf of the flora and fauna at Perth Airport. She writes about the UBC's campaign below:

Within the boundaries of Perth Airport there are magnificent bushland and wetland areas of the highest conservation significance.

Large expanses of this bushland and wetland habitat are now being developed with the wholehearted approval of the Commonwealth Government. Over 30 hectares of bushland was cleared in early 2004 to make way for a warehousing and distribution park. Precious bushland is being destroyed, not for aviation purposes, but to allow Westralia Airports Corporation to derive income from sub-leasing this Commonwealth land to commercial interests.

WHAT YOU CAN DO:

Complete the form letter on the back of this newsletter and mail to Prime Minister Howard.

DID YOU KNOW...?

- The Airport is home to fauna such as bandicoots, echidnas, eagles, herons, blue wrens, racehorse goannas, and tortoises
- Construction of a deep drainage channel has diverted Poison Gully Creek away from valuable wetlands, including Munday Swamp, with no consultation undertaken.
- The environmental assessment conducted by Western Australian agencies recommended that only half the recently cleared area be cleared for the warehousing and distribution park
- The recommendations of the Commonwealth Department of Environment and Heritage are inconsistent with the technical evidence given in the rest of their assessment report for the proposed warehouse and distribution park.

From cover

3.2 Principles

In exercising these rights, powers and obligations to achieve the objects of the CS Act, those affected are to have regard to the following principles:

(a) The polluter pays principle, interpreted as being that 'those who generate pollution and waste should bear the cost of containment, avoidance or abatement.'
(b) The principle of full life cycle costs, interpreted as being that 'the users of goods and services should pay prices based on the full life cycle costs of providing goods and services, including the use of natural resources and assets and the ultimate disposal of any wastes.'
(c) The principle of waste minimisation, interpreted as being that 'all reasonable and practicable measures should be taken to minimise the generation of waste and the discharge into the environment.'

It is important to note that the CS Act does not exclude other accepted principles from consideration. For example, the precautionary principle is not excluded from the decision making process in the *CS Act*, requiring decision-makers to positively weigh and assess environmental consequences, even where these consequences are scientifically uncertain.

The polluter pays principle is enshrined in the hierarchy of responsibility for remediation in Part 3 of the *CS Act*. The Contaminated Sites Committee will have to have regard to this principle when apportioning liability for costs of remediation. It is also implicit in the wording of the polluter pays principle that all contaminated sites are not necessarily to be restored to a pristine condition. Remediation can mean many things in the pursuit of the object of protecting human health and the environment. Remediation includes containment, avoidance or abatement of contamination.

4. Effect on other laws

The primary environmental legislation in Western Australia is the *Environmental Protection Act 1986 (WA)(**EP Act**)*. The EP Act prevails if there is an inconsistency with any other legislation the State.

This legal position is not affected by the commencement of the *CS Act* Section 9(1) of the CS Act states that it is complementary to and not in derogation of the provisions of any other law of the State. Therefore, a person can be charged under other legislation for an offence punishable under the CS Act. Section 9(3) confirms the existing law that a person can not be sentenced twice for an offence that is punishable under different legal regimes. It is implicit from section 9 that the CS Act is not intended to supplant or replace other remediation measures that are already in place. For example, a mining lease granted under the *Mining Act 1978 (WA)* would generally condition the rehabilitation of a minesite. The CS Act would complement and not replace those conditions.

The common law is also preserved by section 9 of the CS Act. This generally refers to protection available before the courts that is generally limited to those with sufficient interest to take action, such as the holder of property rights to an affected property. For example, a cause of action could be available to an owner or occupier of land that is affected by contaminated land and/or water from a neighbouring source. Possible causes of action would include a claim of nuisance or negligence. Affected owners may seek damages as a form of compensation or some other appropriate remedy in the circumstances, such as the equitable remedy of an injunction. In this manner, the common law can complement the *CS Act* where offsite or downstream contamination occurs. Where there is an inconsistency between the common law and the provisions of the *CS Act*, the provisions of the statute will prevail.

5. Exemptions

The CS Act provides for exemptions from all or any of the provisions of the CS Act where the Governor declares by order that they do not apply to a specified area or premises, act or thing (of a specified class or otherwise). Similarly, Regulations may be made under the CS Act that enable further exemptions. It has been suggested that pesticide/fertilisers, unexploded ordnance and saline soils are among the exemptions being considered.

6. Regulations

There is a broad range of matters that may be considered necessary or convenient for giving effect to the purposes of the *CS Act*. One likely area of regulation is in relation to the Contaminated Sites Committee. The composition of and procedures to be followed by the Contaminated Sites Committee are areas of current uncertainty under the CS Act. Similarly, the definitions of 'interested person,' the contaminated sites auditor accreditation process, prescribed forms and fees for service are matters that are anticipated to be included in Regulations.

EDO WIN: CAPE RANGE TREASURES RECOGNISED BY MINING WARDEN

Finesky Holdings Pty Ltd v Australian Speleological Federation (Inc) & Others [2001]WAMW1

The Cape Range peninsula on the Gascoyne coast of WA is a breathtaking place of world significance. The Cape Range is an extra-ordinary karst limestone system that needs protection. There is a unique diversity of subterranean fauna, which live in the underground caves and mesocaverns of this karst system - treasures hidden under an arid desert surface.

by Jay Anderson

The Mining Proposal

In July 1999, there was an application for 10 mining leases over a combined area of 8,250 hectares in the Cape Range area. Initial mining was proposed for a small part of the area, for the production of limestone for the controversial Mauds Landing project.

The Objections

The Australian Speleological Federation (Inc) ("the ASF") objects to any mining on the Cape Range peninsula. The EDO represented the ASF in its objection to the grant of the mining leases.

Significant related events since last update

An update was provided in 2001 in the EDO Newsletter (Vol7 No1 March/ April 2001). You may be aware that the legal action was concluded in the Wardens Court in Perth on 10 November 2000. The Warden made the recommendation (to the Minister for Mines on 9 February 2001), having accepted the evidence of several witnesses called by the ASF The Warden found that the Cape Range is a unique karst system, outstanding on world scale in terms of its location, geological structure, subterranean fauna and it's integrity. He also agreed that the Cape Range contained unique and extraordinary subterranean fauna, and that it was likely that unique fauna would be destroyed by a mining operation. The Warden also noted a high potential for significant undiscovered anthropological sites. The Warden accepted that the Cape Range contained World Heritage values and that mining activity would be a "significant negative factor" in future decisions regarding World Heritage nomination or listing.

The proponent had referred the proposed mine to the EPA for evaluation. Objections to the level of evaluation (Public Environmental Review - P.E.R.) were lodged during 2001, with the A.S.F. recommending for a change to a Proposal Unlikely to Environmentally Acceptable (PUEA). The outcome was that the level of assessment was changed from a PER to an Environmental Review and Management Program (E.R.M.P). Once again, this was a positive outcome, and the Minister allowed an extended period of public comment (10 weeks instead of 8 weeks).

Despite the outstanding comments made by the Mining Warden and the positive outcome of the EDO/ASF court case, however, it is the Minister for Mines, who will have the final decision regarding the granting of the mining leases. Although the legal action was concluded in the Wardens Court 2000, 3 years later - the process STILL continues. The EPA. process of assessment (ERMP) occurred in 2002. The public comment for this closed on the 7/10/2002. There were submissions from both the A.S.F. and the State Speleological Groups. Additionally, the Conservation Council and the Wilderness Society met with speleological representatives to gain an understanding of the karst issues involved. The ASF provided conservation colleagues with access to the information held by the EDO (and utilised in the ASF court process).

Some weeks after submissions had closed – the EPA made contact requesting permission to forward the speleological submission in totality to the proponent – rather than just including the concerns in a summary report that includes other groups concerns.

It is the ASF recommendation that limestone mining on the Cape Range peninsula is opposed and calls for the Government to remove the strategic limestone mining purpose from the proposed 5(h) reserve, enlarge the Cape Range National Park and advocate for World Heritage Listing. The ASF and its member groups in WA continue to consult and lobby the Government regarding this issue.

There is now more support for the ASF ups are now aware of the issues. Through the campaigning of other conservation groups, the public became more aware of the proposed resort at Mauds Landing. After much lobbying by the WA Conservation Groups, in July 2003 the State Government rejected the proposed marina resort, stating that it would "not accept developments that threaten this precious and fragile coast."

During August 2003, the Wilderness Society met with the EPA., using a multimedia presentation to outline to the EPA. the global significance of Cape Range. It is understood that the EPA is still trying to decide on whether to allow the project to go ahead and they are corresponding with the proponents regarding several significant environmental concerns that would require the proponent's attention. We have an optimistic outlook and would like the EPA and the Minister for Mines to uphold the recommendations made by the Mining Warden and not allow the proponent to proceed.

But rejection of this particular proposal will not be enough to secure the values of this fragile environment. The Cape Range National Park, which occurs adjacent to the proposed quarry site, currently has its boundaries and management plan under review.

It would be the ideal time for the Government to extend the boundaries of the National Park eastwards, beyond the quarry site, to take in the whole tract of limestone landscape through to Exmouth Gulf. It is also understood that the Government may aquire some land from pastoral leases that are currently under review. It would be an excellent outcome for the overall management of the area if the Government were able to acquire tracts of significant pastoral land ahead of the 2015 deadline and have it all incorporated in the National Park. The new boundaries and Management Plan for the National Park is expected to go out to the public for comment by August of 2004. Keep an eye out for this and please contribute your thoughts toward the need for increased protection for Cape Range.

There is now a formal process occurring regarding the plans to nominate the Cape Range for World Heritage Status.

Additionally, there is now a formal process occurring regarding the plans to nominate the Cape Range for World Heritage Status. We understand that the State Government is working towards a deadline of December 2004 for completing the documentation and securing agreement with all the key stakeholders. The A.S.F. hopes to be involved in this process and will be advocating that the Cape Range is a significant karst system that deserves World Heritage care and recognition in perpetuity.

EMS PROJECT

1. EDO Links with WA EMS groups

The Blackwood Basin faces some significant natural resource management challenges, such as the spread of dryland salinity, water and wind erosion, and a decline in the areas of remnant vegetation. These challenges, if left unchecked, will have a significant impact on the future of agricultural industries in this region.

The Blackwood Basin Group will be running a pilot Environmental Management System (EMS) project aimed at improving the profitability and sustainability of production systems in the Blackwood Basin. The pilot will be one of 15, funded across a range of industries and regions by the Commonwealth government's EMS National Pilot Program.

Twenty farmers in the Blackwood Basin, the South West Region's largest catchment, will test the on-farm benefits of implementing an EMS program over the next three years The project will also link EMS outcomes with catchment NRM targets.

The EDO has agreed to provide information relating to legal compliance requirements which will form part of the template document that will be used by Blackwood Basin Group participants. We look forward to being involved with this community initiative. *For further details about the Blackwood Basin EMS see contact below.*

Legal advice regarding relevant laws and legal compliance requirements was also provided to EMS groups in the Fitzgerald Biosphere area and the Mingenew-Irwin area late last year.

The Mingenew-Irwin Group has built its own EMS guidelines for use by broad acre producers The group will make available to their members a 'master plan' document to help guide those members in adopting an EMS. The master plan includes lists of typical farm activities that could have an impact on the environment, typical targets, monitoring, management programs, records, etc. Master plan sections relating to legal compliance requirements were drafted drawing on the EDO's publication *The Law of Landcare*. This information was updated with reference to the EDO's factsheets and WA Agriculture Department publications. *For further details about the Mingenew Irwin Group's EMS project see contact below.*

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Email: weeks@wn.com.au

2. Future Workshops anticipated

The EMS project has been asked to provide community legal education sessions in relation to the changes to the EP Act which were passed on 19 November 2003 and which are to be proclaimed later this year. The topics for these sessions, to be delivered later in the year will include 'Environmental Harm provisions : their relation to pumping and dumping of saline groundwater'.

The EDO's Vivian Markovich attended the 2nd State Coastal Conference on the multiuse of coastal areas.

In November 2003, leading experts, government agencies, educators, community groups and private business interests congregated together in Geraldton, for three days of key note speakers, workshops, open forum discussion, debate and action setting.

The conference explored ways we can all continue to use and enjoy a pristine coastline now and into the future.

Speakers delivered papers on a wide range of topics from a focus on natural ecosystems and coastal and marine biodiversity through to 'marine management', research, aquaculture and coastal engineering.

Vivian presented a pre-conference talk on Marine Parks and Reserves. In a legal advice session, Vivian received several development related queries from coastal community residents.

As pressure builds for more coastal development north and south of Perth, the EDO is seeing an increase in requests for advice about coastal environmental issues.

FROM THE EDO's POINT OF VIEW:

A plenary session on the Coastal impact of the grain industry by Imre Mencshelyi, CEO of Co-operative Bulk Handling, provided a valuable insight into the self-image of the grain industry and was

EDO PUBLICATION

Coast Law in Western Australia

"This book contributes to both the capacity of the interested citizen and also the expert lawyer or scientist to understand the framework and intricate detail of the law which governs our coast."

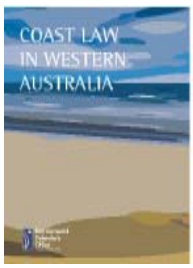
Greg McIntyre SC

."... For the ordinary citizen confronting government departments, media monopoliesand powerful business interest in disputes over marine and coastal issues, there may be few things more crucial than access to the rules.... I can but commend this book to all comers and thank its contributors for the promise of real progress in coastal affairs."

Tim Winton

An essential reference for anyone interested in coastal law in Western Australia.

Available from the EDO Office.
- $55 book
- $50 members discount
- $50 student discount
- $44 CD version



Roundtable forum on NRM law reform

The EDO believes there is an urgent need for an integrated approach to environmental and natural resources management in WA to support Regional Natural Resources Management Groups to achieve better outcomes.

A Roundtable discussion was held in September 2000 which resulted in "Reform of Natural Resources Management in Western Australia Issues Paper". The paper outlined a rationale for reforming environmental and NRM law and explored some options for pursuing that reform.

The shape of NRM in WA has changed significantly since then, with the release of the National Action Plan for Salinity and Water Quality and the next phase of Natural Heritage Trust. With regional NRM groups having been recognised by State and Commonwealth governments, and currently developing accredited NRM plans, the law becomes a significant factor in terms of both:

a) the overarching legal framework guiding environmental management and NRM in Western Australia, and

b) enabling or obstructing NRM outcomes in the implementation stage.

On 6 February 2004 the EDO held a second Roundtable to provide a forum for focused discussion on aspects of environmental and NRM legislative reform in the current context. Discussion focused on the law as a tool for promoting better natural resource management outcomes, and on changes needed so the law helps facilitate better management of Western Australia's natural resources.

The forum aimed to foster greater understanding of the legal constraints and enablers facing NRM in WA. Participants explored whether there is a requirement for environmental and NRM law reform in WA and if so what this reform might look like. The major vehicle for considering these factors further after the Roundtable is a second Issues Paper, to be circulated to participants, and those who were invited but unable to attend.

There were nineteen participants were policy officers from the Ministers for Agriculture, Environment, staff from the Department of Heritage, Water and Rivers Commission, Natural Resources Management Council, Conservation and Land Management, representatives from WA Local Government Association, Conservation Council of WA, some executive officers from NRM Groups, an indigenous land management facilitator, environmental consultants, Environmental Defender's Office solicitors, and other legal officers.

Some of the issues identified as requiring change additional to current reforms are: deep drainage in agricultural contexts, urban water management, catchments management, and water quality protection generally, concerns about effective protection of native vegetation, for example penalties in new clearing regulations not being strong enough.

Additionally, concern was expressed about: ineffective wetland conservation, land degradation problems relating to unclear governance arrangements, the possible need for NRM groups to have a statutory basis, the powers of LCDC's are not being used, lack of coordination in the legislation and agencies implementing law, lack of policy development to utilise and enact some law and no tax incentives for contributions to biodiversity.

The role of Department of Planning and Infrastructure and Shires was considered to be unclear particularly in relation to coastal developments. Participants talked about the implications for property rights of changing community expectations and roles in NRM, that there is no recognition for communal property rights, and native title issues are not well integrated in regional planning. Rangelands issues are not being addressed, apart from a review of *Land Administration Act,* and there was a lack of integration of marine issues in NRM planning. Some felt there is a need for a state mediation act or other dispute resolution methods.

Broader issues identified were: a need to analyse different approaches to law reform in other jurisdictions, focusing on whether umbrella NRM legislation is necessary in the Western Australian context, or whether existing law would be adequate if gaps and weaknesses are addressed; the need to communicate state biodiversity targets to regional groups; the need for regional NRM planning guidelines to be parallel with the State Sustainability Strategy; and the need for a common framework or management system to support decisions made in the regional NRM planning process.

The resulting Issues Paper will be circulated widely for comment. In the meantime if you wish to provide feed-back about the Roundtable forum, and/or any of the issues raised above now, then please contact Kirstine Forestier on 9221 3030 or kforestier.edowa@edo.org.au.

LUNCHTIME LAW

SPONSORED BY THE LAW SOCIETY PUBLIC PURPOSES TRUST

Principal Solicitor Leigh Simpkin will present a seminar and discussion forum on

Telecommunications

Planning and mobile network's base transmitter stations (BTS)

Wednesday 7th April
12:30 - 1:30pm

EDO WA Office
Level 2, Kings New Office Tower
533 Hay Street (corner of Pier), Perth

BYO paper bag lunch. Drinks provided.

ALL WELCOME

RSVP to Katrina or Marilyn on Tel: 9221 3030 or email: kstrong.edowa@edo.org.au

This is the fourth and final in the series on the 'Access to Environmental Justice' theme for anyone wishing to expand their knowledge of environmental law and related issues.

Access to Environmental Justice Conference

by Leigh Simpkin

'Access to Justice' conferences have been held by inter-State EDO's for over a decade, and are targeted at clients who have little or no experience at using the available Government pathways to put their objections and viewpoints on various developments, activities and proposals. It is a feature of the 'Access to Justice' theme that seminars, workshops and conferences are specifically not aimed at local government or statutory authority attendees - by contrast, for example, to our previously held conferences on planning and coastal laws.

Nineteen speakers were carefully selected for the ambitious programme. The topics chosen for the speakers had been previously identified as those on which most clients required legal information and which most clients did not have the skills to elicit from the relevant bodies. Information was presented about using systems for objection or appeal either already in place or about to be implemented (such as the State Administrative Tribunal). The morning's speakers came predominantly from government departments. A number of speakers presented their experiences in the advocacy behind the legal procedures, and policy, and they tended to present a less rosy view of the system based on their experience of government departments (eg: Dennis Beros, Dr Beth Shultz). It is hoped that those clients who attended the conference will be more useful to their groups and/or causes as a result.

Dr Robyn Eckersley's key note presentation was the highlight for me. A copy of her paper on Access to Environmental Justice can be obtained from the EDO on request.

The speaker's abstracts and the EDO presentations are published on our website.

"Access to environmental justice extends beyond administrative and legal remedies to include inclusive political participation in environmental decision making from policy making, law making, administation, enforcement and adjudication."

Dr Robyn Eckersley
Senior Lecturer
Department of Political Science
University of Melbourne

Special thank you for conference assistance

A special thank you to volunteers **Holly Templeton** and **Rebecca Francis** for their great attitudes, never-ending smiles and tireless efforts during the course of the 'Access to Environmental Justice' conference.

EDO staff and management committee would like to acknowledge the many hours of hardwork our former Special Projects Coordinaor, **Linda Schur,** put into the preparation of the Conference. Thank you Linda, your groundwork certainly made follow through easy.

EDO WA to join ANEDO

The EDO WA is about to formally join the Australian Network of Environmental Defender's Offices (ANEDO). This will allow us to jointly apply for funding projects of strategic significance to the national networks of EDO's.

WATER LAW PROJECT

Water Law – the EDO WA's focus for 2004-2005

The Public Purposes Trust of the Law Society of WA has agreed to part fund our Water Law project for the next financial year. Sincere thanks are extended to the PPT for their support.

The project will include research of current laws and regulations dealing with water in WA and research of ways these laws and regulations can be improved through law reform. In particular, the project will provide:

- legal advice and/or representation regarding water law in WA to people who meet the EDO's client criteria;
- opportunities for public participation in the law reform process; and
- community legal education services to promote understanding of water laws and regulations.

The project is one of the most important and ambitious on which the EDO WA has embarked. Once again, thanks are extended to the PPT for recognising the EDO as a worthwhile recipient of valuable funds.

The EDO thanks all our sponsors for their support.

LexisNexis™

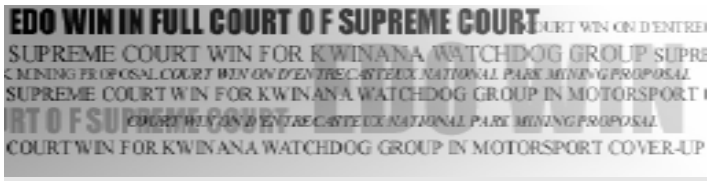
RIRDC
RURAL INDUSTRIES RESEARCH AND DEVELOPMENT CORPORATION

Government of Western Australia
Department of Agriculture

Natural Heritage Trust
Helping Communities Helping Australia
A Commonwealth Government Initiative

Public Purposes Trust

Core funding for the EDO WA (Inc) is provided by the Commonwealth Attorney General's Department.


EDO WIN IN FULL COURT O F SUPREME COURT
SUPREME COURT WIN FOR KWINANA WATCHDOG GROUP
SUPREME COURT WIN FOR KWINANA WATCHDOG GROUP IN MOTORSPORT
COURT WIN FOR KWINANA WATCHDOG GROUP IN MOTORSPORT COVER-UP

Wondered why we're

NOT MAKING HEADLINES?

The answer is simple - lack of funding. We can only represent clients when we use funds donated by private corporations or philanthropic bodies.

The EDO has been providing Western Australians with much needed free legal advice and education on public interest environmental issues for almost 8 years, but just because we're well established with a strong reputation doesn't mean we're financially safe and sound. We are not a government body; we do not receive great amounts of tax payers' money to run our services. In fact we have to compete intensively for every bit of funding we receive.

We receive no State government funding. We receive less than $80,000 recurrent funding per annum, subject to a three year contract. The Commonwealth funding from the guiding principles prevent the EDO from using any of this funding for representing clients, (see box below - italicised words) limits us to law reform submissions, legal advice and environmental law education rather than representing you in court.

Australian Government
Attorney-General's Department
Family Law Legal Assistance
Commonwealth Community Environmental Legal Program

"The Commonwealth is committed to purchasing high quality and accessible legal information, advice and community legal education on environmental issues:

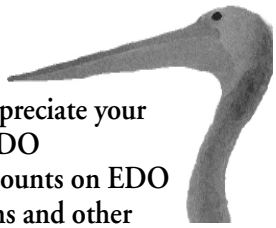
In determining the most cost-effective use of scarce Commonwealth resources available in the legal aid field, the Government has made a considered decision to focus more clearly on the environmental legal services it purchases. Resources are to be quarantined from costly, time consuming litigation and applied to more cost-effective areas of work. Consequently, services purchased by the Commonwealth under the commonwealth Community Environmental Legal Program (CCELP), cannot be provided for litigation, and must be applied to the services as detailed in the program priorities detailed below. The use of Commonwealth budget allocations for litigation related work is precluded".

In other words -

WE NEED YOU!

Help us to help you to the help the environment. Become a member or make a donation to the EDO WA and help us to work towards environmental justice in Western Australia.

MEMBERSHIP



To show how much we really do appreciate your membership, in 2004-2005 your EDO membership will entitle you to discounts on EDO publications, seminars and functions and other incentives.

Your support is vital to our ability to provide representation to community to test in court the legality of government and private actions affecting the environment.

By supporting the EDO, you will help us provide legal assistance to community groups and individuals who are seeking access to environmental justice in their efforts to:

- § preserve WA's flora and fauna, wilderness environment, water quality, urban bushland and historic buildings,
- § control pollution and environmental degradation;
- § obtain information on government decisions about the environment; and
- § implement and improve WA's environmental laws.

To join, or renew your membership please fill in the membership form on the back page and send it to us.

Volunteers

We thank the following law students and graduates who have worked as legal researches at the EDO during January to March 2004.

Chris Bailey
Greg Cox
Rick Fletcher
Rebecca Francis
Joel Nathan Trigg
Heidi Nore
Simeran Ranbir
Holly Templeton

Donors

We are grateful to the following donors for their generous cash donations over the period Janaury to March 2004.

Ken Passlow, Nerali Needham, Mark Hingston

Major Donors

John and Tanya Beattie
Janice Dudley
Barbara Porter

Donors-in-kind

We extend our sincere thanks to the following people who donated their expertise and time to the EDO:

Barry Richardson
JP Clement
Nic Dunlop
Cameron Poustie
Anette Schoombee
Richrd McCormack
Sophie Moller
Lee McIntosh

Mr John Howard
Prime Minister
Parliament House
Canberra ACT 2600

Dear Prime Minister

Perth Airport Bushland is one of the largest and most pristine bushland sites in the Perth area. It has great biological diversity and is of major regional significance. The *Preliminary draft Airport Master Plan 2004* is a recipe for the destruction of flora and fauna habitat.

*The Airport bushland and its flora and fauna must be protected.*I insist that your government ensure the long-term protection and management of the bushland and wetlands at Perth Airport.

Signed……. Date:……..

Name…….

Address……

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2nd Floor Kings New Office Tower
533 Hay Street
PERTH WA 6000

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MEMBERSHIP FEES:

$15 Unwaged or concession

$40 Waged or household

$40 Non-profit organisation

$65 Corporate

Date _____ Signature_____

* Please note: memberships are subject to approval by the EDO Management Committee. Members must agree to abide by the EDO's Rules.

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