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GETTING INTO HOT WATER

Water Corporation's reports on the South West Yarragadee released

"Underground Water Bonanza" read the headline in the Australian on Friday 11 March 2005. Following the release of Water Corporation studies, the South West Yarragadee aquifer was pronounced to be almost twice the size previously thought at 800,000 billion liters of water. Of course, the Water Corporation proposes to make use of this by taking 45 gigalitres of water from the Yarragadee aquifer each year to supplement Perth's water requirements.

The implication of the news article was that the Water Corporation's proposal is *sustainable*, the reasoning being that with about 350,000 billion litres of rainfall recharging it each year, the Yarragadee aquifer is a 'renewable' resource. But in the drying climate of the southwest, does being 'renewable' automatically mean the proposal is sustainable? Some of those who have read the Water Corporations report have reported serious concerns, especially about the effect of the proposal on the Blackwood River.

Environmental concerns are not the main political issues: there are social and economic factors which must also be studied before the proposal can be considered properly. The proposal means that Perth's water could come at the price of future development in the southwest region, which is already exoerienciung a surge in growth and under pressure to meet its own needs water-wise.

As a result, political sensitivities are high, particularly among irrigators and farmers. There will always be political consequences to any transfer of water from region to region. However, as a key strategic sustainability issue on which the Gallop Government's second term will be judged, and with many uncertainties, this proposal must attract the scope and depth of analysis that it deserves.

It appears, however, that the Water Corporation wants a decision on exploitation of this resource by the end of this year, as indicated by the following, taken from its website:

"The Water Corporation expects to complete its evaluation and deliver a report to the EPA in mid 2005, while a decision on development of the aquifer is expected to be made by the State Government later this year.

Development of the aquifer would provide a valuable new water source for the south west and boost the Integrated Water Supply Scheme which supplies Perth, Mandurah, parts of the South West, widespread agricultural areas and the Goldfields."

Information on the investigations, including the scoping report and latest technical reports, is available on the Water Corporation's website at: http://www.watercorporation.com.au click on 'our water sources' then 'south west yarragadee.'

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COOGEE CASE UPDATE

The proceedings issued last year by the EDO on behalf of the Coogee Coastal Action coalition (Inc.) were heard on 3 March 2005 before a Court of Appeal comprised of Wheeler JA (presiding), McLure JA and Pullin JA .

Dr Schoombee appeared as counsel. He argued that the WAPC had created a situation where it was subject to a conflict of interest. The WAPC entered into a contract with the Port Coogee developers. Under the contract, the WAPC committed itself to carry out certain duties with regard to the developer, and the development of the land and sea area at north Coogee Beach.

Those duties were alleged to be inconsistent with the responsibilities imposed on the WAPC by section 33 of the Metropolitan Region Scheme Act to zone land under the Metropolitan Region Scheme.

The EDO also argued that the *Land Administration Act* did not provide the Minister of Lands with power to sell unallocated Crown land at Coogee Beach in derogation of public common law rights of fishing and navigation.

A decision is awaited. *If you would like a copy of the decision it may be obtained in due course from Leigh Simpkin, EDO (WA) Tel: 92213030.*

APPEAL TO HIGH COURT OF AUSTRALIA

ADMINISTRATION OF WATER ALLOCATION PLAN IN RURAL NSW

The Nature Conservation Council ("NCC") appeal to NSW Court of Appeal concerning the water management plan for the Gwydir wetlands and catchment was heard last year. The decision was released last month. The EDO (NSW) act as solicitors for the NCC in this action. Mr Tim Robertson SC and Ms Jayne Jagot are counsel for the NCC. ***Volunteer Julia Powles reports below on the application for special leave to the High Court of Australia.***

The NSW NCC is struggling to comprehend how a water management plan (WM Plan) can remain valid, despite a NSW Court of Appeal decision acknowledging that it was made in breach of the Act regulating the exercise of the Minister's administrative power.[1]

The appeal focused on s 8 of the *Water Management Act* 2000, ("Act") a provision requiring the establishment of environmental water rules for all classes of water, including "environmental health water"; which means "water that is committed for fundamental ecosystem health at all times, and may not be taken or used for other purposes". The Court found that the WM Plan only provided for extraction of water that was above an "extraction limit", and thus could not be described as a commitment at all times to fundamental ecosystem health.[2] Further, guaranteed water flow through the Gwydir Wetlands region of the catchment did not satisfy the requirement for fundamental ecosystem health across the catchment area.[3] However, the CA held that such failures were insufficient, of themselves, to invalidate the WM Plan.

In the words of Chief Justice Spigelman, "it is necessary to ask whether there is a legislative purpose to invalidate the exercise of the statutory power by reason of the alleged failure".[4] The Chief Justice was referring to the High Court decision in *Project Blue Sky v Australian Broadcasting Authority*[5]. In that case, the ABA formulated an Australian content standard in breach of a provision regulating the exercise of its power. The Court in that case considered textual factors in the relevant Act that favoured invalidity, but was strongly influenced by public policy considerations in holding that the purpose of the regulatory Act was not to invalidate any administrative action done in breach of that provision.

Applying the principle in *Project Blue Sky* to the NCC case, Spigelman CJ listed five textual indicators of a legislative intent for invalidation. These included the mandatory terms of s 8 and the obligation to enforce environmental water rules provided by s 48 of the Act. Only one textual factor going against a conclusion of invalidity was cited, namely the s 50(2) requirement for a Minister to deal with environmental water rules only "in general terms", even although s 50 related to an alternative Ministerial power to create water management plans. On balance, this led Spigelman CJ to the conclusion that the Legislature intended breaches to be redressed by invalidity.

Nevertheless, the Court still declined to invalidate the WM Plan. The Chief Justice referred to evidence and held that that the WM Plan did, in substance, commit a substantial flow of water to fundamental ecosystem health.[6]

The judgment closed with a reference to "factual context" being determinative, effectively importing the subjective opinion of the Court as to the ecological merits of the plan into the *Project Blue Sky* principle. The NCC has sought special leave to appeal to the High Court of Australia. Given the timeframes for court preparation, it is understood that the application would not be heard before May.

[1] See article by I Millar and S Magick, 'Court Rejects Appeal for Environmental Flows in NSW', Impact No 76, Dec 2004, p9.

[2] *Nature Conservation Council of New South Wales Inc v The Minister Administering the Water Management Act* 2000 [2005] NSWCA 9 at [67].

[3] Above at [77].

[4] Above at [90].

[5] (1998) 194 CLR 355.

[6] *Nature Conservation Council* case at [93]-[94].

If you would like a copy of the Court of Appeal decision please contact Leigh Simpkin, EDO (WA) Tel: 9221 3030.

GUNNS GUNNING FOR PROTESTERS

Gunns Limited, Tasmania's largest logging company and the world's largest woodchip exporter. Gunns have now moved in on Western Australia and operate, among other things, three hardwood sawmills, a processing centre and a distribution yard.

Gunns served writs on twenty defendants claiming $6.4 million dollars in damages associated with claims arising from the campaign to protect Tasmania's old-growth forests last year.

Gunns is claiming damages for financial loss allegedly suffered as a result of protest actions by The Wilderness Society and other environmental groups and individuals. The writ, filed on 14 December 2004, includes allegations of machinery sabotage, destruction of property, trespassing, blocking access to land and obstructing police officers at several logging sites.

The writ further alleges that "environmentalists conspired to pressure Japanese buyers out of doing business with Gunns, and that "The demands were to be accompanied by threats expressed and implied, of adverse publicity, consumer boycotts and direct action against the Japanese customers and all their operations."" (Quoted from www.corpwatch.org)

The Wilderness Society faces a total compensation claim of $3.5 million after being accused of organising a campaign against Gunns.

The defendants have filed papers outlining their intent to contest the company's claim against them in the Supreme Court.

The Wilderness Society has engaged the law firm of Maurice Blackburn Cashman to represent it. The law firm claims to have "a long history and solid reputation of looking after everyday Australians."

LUDLOW MINE PROTESTORS DEFENCE SUCCCESSFUL

Several of the Ludlow mine protesters have been successful or partly successful in defending prosecutions commenced against their actions on the mine site.

Many thanks to **Hylton Quail, Steve Walker** and **Peter Rattigan** for their efforts in securing these excellent outcomes.

SOUTH SISTER

LOGGING OPERATIONS

Forestry Tasmania has received approval to harvest timber on a Coupe near South Sister (north-east Tasmania). Springs within the coupe provide the domestic water supply for numerous local residents and also the town water supply for the nearby town of St Marys and there is evidence that the harvesting operations will seriously damage groundwater supplies in the area. There is also significant evidence that the coupe is prone to landslide and harvesting activities will lead to further instability in the area.

EDO Tasmania made an application to the Tribunal on behalf of residents seeking orders to restrain forestry operations on the coupe until a full risk assessment is done regarding the impact on water supplies and land stability.

The Tribunal was satisfied that EDO Tasmania has a prima facie case and has set the matter down for hearing. Unfortunately, it refused an application for temporary orders on the basis that the applicants were not willing to give an undertaking for damages. There is a real possibility that harvesting could be completed before the Tribunal hearing, which would make the EDO application futile.

Everyone is lobbying fairly hard on this one. Senator Bob Brown has made a Senate motion that the logging should be suspended until the final hearing and the residents continue to have a significant media presence. Sadly, Forestry Tasmania isn't likely to bow to public pressure...

LAKES ACTION GROUP ASSOCIATION (INC.)

HEARING IN THE STATE ADMINISTRATIVE TRIBUNAL SCHEDULED FOR 11 APRIL 2005

The LAG residents commenced this action when it was discovered that no planning approval was issued to the operator of a quarry in the Shire of Northam when it commenced operations in 1990.

The procedure is based on s 18(2) of the *Town Planning and Development Act* 1928 which gives the Minister for Planning a discretion to supervise the enforcement of district schemes by issuing instructions to Councils if they fail to do so.

When the LAG complained to the Minister about the omission to obtain a planning approval in January 2004 the Minister after due consideration referred it to the Tribunal, where the matter was treated as an appeal.

The LAG is therefore, having to run thematter as if it were the appellant although the Act makes it the Minister's responsibility to supervise the Council's enforcement of the relevant district scheme. This is a neat trick. It is time s 18(2) of the *Town Planning and Development Act* was repealed and proper third party appeal rights were given to parties under the State's new *Planning and Development Bill.*

SUSTAINABILITY AND THE PLANNING AND DEVELOPMENT BILL 2004

EDO's Principal Solicitor, Leigh Simpkin with the assistance of volunteer, Joanne Teng.

In the last half of 2004, the *Planning and Development Bill* (WA) was about to be passed after several years in drafting. Before the Bill could complete its passage, the Western Australian Parliament was prorogued in the lead-up to the State Election, resulting in the Bill lapsing. This delay presents an opportunity to improve the Bill's sustainability purpose[1]: "the promotion of the sustainable use and development of land in the State". The other purposes of the Bill are:

1. to consolidate and streamline the fragmented and complex legal framework of WA's planning legislation; and
2. to provide for an effective land use planning system.

As a legal concept, sustainable use and development, or sustainability, is a difficult goal to define.

As a legal concept, sustainable use and development is a difficult goal to define. The Bill does not ensure that the State definition of sustainability in land use planning legislation is consistent with the principles of sustainable development in the international commitments Australia has made.[2] It also needs to be consistent with existing State sustainability legislation[3] and national legislation such as the *Environmental Protection and Biodiversity Conservation Act* 1999, and to the extent that it may be wise, with principles of sustainable development in the State Sustainability Strategy.[4]

...there needs to be a consistent understanding and definition of sustainability...

That Strategy defines sustainability as *meeting the needs of current and future generations through an integration of environmental protection, social advancement, and economic prosperity.*[5] This is unexceptional but is elaborated in a series of principles that unfortunately can be translated into many different agendas for action. It means all things to all people. Reading the list of measures showing progress in Year One of the Strategy, it appears that everything done by the Gallop government is tumbled into the list - even before the strategy was adopted in the case of its 2002 Anti-Racism Strategy!. No new initiatives appear to have been driven by the Strategy except of the course the creation of a committee (the Sustainability Roundtable). The fact that these principles have not been used as the definition of sustainability in the Bill is perhaps a good thing. They were not drafted for use as a legal concept. In the writer's view, the woolliness of the State Strategy's sustainability principles suits those who consider sustainability has limited relevance to administrative decision-making in WA. At worst, it would undermine those initiatives that have been thoroughly thought through with regard to sustainability.

Ecologically sustainable development ("ESD") is an important legislative concept at national level, so much so that Australia reports to the UN Commission on Sustainable Development on its achievement in terms of those principles. It is suggested that if a definition of sustainability is used in WA it should be the same as ESD at national level.

Academic and author, Dr. Gerry Bates has criticised the manner in which drafting of sustainability principles in Australian legislation has proceeded, saying that:

> "[i]t is difficult … to resist the criticism of current drafting approaches that, by including ESD as one of a number of objectives of the legislation; or as one of a number of features to which regard should be had by decision-makers it has missed the point that ESD is not a factor to be balanced against other considerations: ESD *is* the balance between development and environmental imperatives."[6]

The drafting of the objects of the Planning and Development Bill is a prime example of drafting that offends Dr Bates. To specify sustainable development as one of a number of objectives effectively makes it subject to a decision-maker's discretion as to how to apply it. It is not unthinkable that in some future circumstances 'efficient and effective land use planning system' and 'promotion of the sustainable use and development of land' will conflict? It would be considered quite proper for more weight to be given to one object over the other (provided both are seriously considered). This is troubling because in the administrative planning and development sector weight is always accorded to economic and social factors. over environmental factors. This undermines the Bill's stated goal of sustainability being a 'fundamental and underlying purpose of the Bill'[7].

If you would like a copy of the Planning and Development Bill, contact leigh Simpkin.

[1] *Planning and Development Bill 2004* s.3(1)

[2] ie.The Rio Declaration 1992, the Framework Convention on Climate Change and the Convention on Biological Diversity.

[3] Compare for example s 4A of the *Environmental Protection Act* 1986 which provides: The object of this Act is to protect the environment of the State, having regard to the following principles "… and then goes on to define the precautionary principle; intergenerational equity; conservation of biological diversity and ecological integrity; and improved valuation, pricing and incentive mechanisms.

[5] *Hope for the Future: The Western Australian State Sustainability Strategy*, September 2003

[6] *Environmental Law in Australia 5th Edition,* Butterworths Australia (2002) Chapter 5, 5.16, Bates, Dr. G.

[7] *Planning and Development Bill 2004* Explanatory memorandum

SUSTAINABLE DEVELOPMENT:

IS THE ENVIRONMENT SAFE IN THE HANDS OF THE EUROPEAN UNION?

This article was written for EDO News by Jantine Vezzeboer, a law graduate of the Netherlands, who volunteered with the EDO in 2004 and is now completing her LLM in Rome.

One of the most common objectives associated with environmental law and policy-making is sustainable development – a concept highly developed at International, European and National levels. The idea of sustainable development can be traced back to 1972, at the United Nations Stockholm Conference on the Human Environment. The common definition of this ideal was termed as:

> *"Development that meets the needs of the present without compromising the ability of future generations to meet their own needs."*

The concept of sustainable development was introduced into European Community law under Articles 2 and 6 of the Community Treaty. Article 2 states that one of the Community's objectives is 'sustainable growth'. This is supported by Article 6, which explicitly requires the integration of environmental protection into other policy areas, "in particular with the view to promoting sustainable development." In order to enforce integration, the European Union created the Sustainable Development Strategy in 2001 which provides a framework for the implementation of sustainable development. This is conducted at two levels:

- integration of environmental issues into other EU policy areas; and
- making EU policy more sustainable.

Each member state determines its own sustainable development strategy. Therefore national priorities are likely to be represented. The framework seems stable.

In recent times however, it has been suggested that the role of the environment has been marginalised within the concept of sustainable development. Academic argument suggests, for example, that the environment has been 'squeezed' out of the United Kingdom's policy for achieving sustainable development. If one takes the example of the Lisbon Strategy, the environment was left out altogether! The Lisbon Strategy was planned at the EU Summit in March 2000, held in Lisbon. It is a free trade initiative that seeks to make Europe the most competitive knowledge-based economy in the world by 2010, through 'open coordination' to promote sustainable economic growth. In March 2001, the European Council met in Stockholm and added sustainable development to the economic and social targets of the Lisbon Strategy. It was only when the Sustainable Development Policy was added that the new dimension of the environment became part the Lisbon Strategy.

It appears as if the sustainable development 'car' set off on its journey to 'Most Competitive', without realising it had left behind a passenger – 'environment'. So it turned around and went back to collect it.

Is this is the future path of sustainable development? Like most things connected with the European Union, time will tell, although time is not something of which the environment has a great deal.

For a summary of the Lisbon Strategy:
http://secretariat.efta.int/Web/EuropeanEconomicArea/LisbonStrategy

DR POH-LING TAN, KEYNOTE SPEAKER EDO WATER LAW CONFERENCE

The EDO is delighted to announce the keynote speaker for our 2005 conference, 'Water Law in WA' is Dr Poh-Ling Tan.

A Senior Lecturer in Law at the Queensland University of Technology and Griffith University, Dr Tan will give a brief overview of water law policy overseas and interstate.

Dr Tan's research interests are currently in the law of water allocation and management.

Dr Tan sits on the Water Resources Implementation Group, a peak body which advises the Queensland Minister for Natural Resources and Mines on key issues, and has done research work for several organizations including the Murray-Darling Basin Commission, the New South Wales Department of Land and Water Conservation, and Land and Water Australia.

Her publications are in the areas of Asian legal systems, Property law, Environmental law and Water law.

WATER LAW RECOMMENDED READING

The draft Swan and Canning Rivers Management Bill was released for public comment on 16 December 2004. Submissions close 29 April 2005. Copies can be obtained from the Swan River Trust.

"**Heritage Rivers - protection for freshwater resources in a flurry of natural management reforms**" (2004) 21 EPLJ 329. Claire Allen's article on Heritage Rivers which examines Australian water resources protection law and policy from a sustainability standpoint. It also usefully summarised the history of the National Water Initiative and its links with national competition policy reform.

Money Money Money- It's a rich man's world

- lessons from the Methanex arbitration for AUSTFA Article 11.7

In our March 2004 newsletter, we reported on ANEDO's concerns regarding the Australian US Free Trade Agreement, ("AUSFTA") which included the opportunity afforded American companies to be compensated for loss of trade caused by any Australian State governments' regulatory action designed to protect the environment.

Our concern was that legitimate public welfare legislation designed to effect pollution reduction would fall into the definition of 'expropriation" under clause 11.7 of the AUSFTA and thus be compensable. We cited as an example the arbitration arising out of the North American Free Trade Agreement, ("NAFTA") which pitted the Canadian methanol manufacturer, Methanex, against the US, following a decision by the State of California to ban MTBE, a chemical found in Methanex's product, methanol. Methanex has claimed $970 million dollars in lost profits.

An update on that litigation follows. The core issue is the rationale for the MTBE ban. The inference taken from the ban was that it was connected to detection of the chemical in Californian groundwater sources used for drinking water, and was a legitimate public health / environmental protection measure. Methanex challenges the science behind the decision taken in 1999 and says former Governor Davis never claimed that it was a public health measure. It says the MTBE detected in groundwater is "caused by the release of gasoline from leaking underground gasoline storage tanks and inefficient 2-stroke boat motors". It goes further and says that the political influence of those manufacturing ethanol, the competing product, had more to do with the ban than concerns about public health. Part of its case was that the State of California's enforcement of its water protection laws is inadequate.

In 2002 after an initial jurisdictional hearing, the arbitration was adjourned to allow Methanex to replead certain grounds of its claim and provide evidence. The merits hearing was held in June 2004. A decision is expected shortly.

The relevance of this arbitration to Australian environmental law and policy grows as the anticipated increase in trade between the US and Australia grows, because States cannot ignore the risk of American trade losses in the hundreds of millions of dollars caused by new State environmental or public health laws coming into effect after AUSFTA. Legislation of that nature may involve the State in compensation disputes, in which it might need to justify its use of regulatory action that affects American corporate interests by showing the merits of regulatory means versus other non-regulatory means of intervention. How would this be evidenced? States (or, more accurately, Parliaments) may have to consider the various options and their effect on trade before making new laws. Perhaps they should call for formal reports on as part of their internal processes, in order to defend their actions.

It appears from the transcripts of the Methanex case that there was evidence presented that water protection laws have not been properly enforced by the State of California. The implications are of relevance to Australia in this regard also: if a State wishes its environmental and public health protection laws to be respected in AUSFTA disputes, it has to enforce them properly.

The other interesting issues from our perspective are those regarding the status of public interest groups in the arbitration, which was adverted to, briefly, in our original March 2004 newsletter report.

Because the NAFTA agreement has an arbitration provision (which is not provided in the AUSFTA), this dispute was taken to the UNCITRAL, the UN's commercial arbitration Tribunal. The provisions of Article 15 of the UNCITRAL Arbitration Rules were analysed by the Tribunal.

The US, as respondent, was defending the State of California's rights to regulate to protect the environment in damages. The State of California did not have standing, under NAFTA, so the US (specifically the Office of the Trade Representative) represented its interests. Some criticism was directed at the misalignment of interests involved in the federal government having this responsibility, when, should Methanex succeed, its claim for $970 million dollars would be paid by the citizens of the State of California. Canada and Mexico also had standing, as the two other signatories of NAFTA. Two non-governmental organizations ("NGOs") sought status in the arbitration to make submissions in the public interest, namely:

- the International Institute for Sustainable Development ("IISD") of Winnipeg: and
- the Centre for "International Environmental Law ("CIEL") and others jointly.

No third party public interest group had previously applied to be heard before UNCITRAL. Third parties have no express rights to appear in any capacity in UNCITRAL proceedings. Nor is there any express prohibition. UNCITRAL granted two NGOs standing as *amici curiae*, (that is they could make submissions but did not have a right to receive materials from the Tribunal). As Canada supported their application, it is inferred that Canada provided the relevant materials to the NGO's in question. The precedent-making decision about public interest group participation in the UNCITRAL proceedings can be found at:

http://www.international-economic-law.org/Methanex/Methanex%20-%20Amicus%20Decision.pdf

Their amicus curiae submissions can be found here:
http://www.state.gov/s/l/c5821.htm

The hearing was open to the public. All pleadings, submissions, preliminary rulings and transcripts of hearing can be found at: www.naftaclaims.com/disputes_us/disputes_us_6.htm

WHAT'S IN THE LEGISLATION PIPELINE?

The state government election on Saturday, 26 February 2005 has come and gone. The votes have been cast and counted and the Gallop government has been re-elected. What are the implications for WA?

The EDO's Rick Fletcher reviews legislation in the pipeline and Acts coming into force

When the 36th Western Australian Parliament was prorogued on 23 January 2005, 77 Bills lapsed. In some cases this may not be such a bad thing. We hope that the extra time available will lead to improvements to bills such as the Planning and Development Bill 2004, and the Mining Amendment Act 2004, which was proclaimed recently, but which is about to have its proclamation revoked.

Nevertheless, one can confidently say that the election has resulted in the likelihood of the following lapsed legislation being reintroduced:

i) the **Gene Technology Bill 2001** which, if enacted, would establish the Western Australian component of the regulatory scheme for genetically modified organisms created under the Commonwealth *Gene Technology Act* 2000;

ii) the **Swan Valley Planning Legislation Amendment Bill 2004**, which incorporates recommendations from the review of the *Swan Valley Planning Act* 1995; and

iii) the **Contaminated Sites Amendment Bill 2004**, which included a number of measures designed to improve the effectiveness of the *Contaminated Sites Act* 2003, including the concepts of source sites and affected sites, which would have a significant effect on liability for the clean-up of indirect contamination.

We also hope that progress will finally be made on the drafting of a **Biodiversity Conservation Act**. The Biodiversity Conservation Strategy was released before Christmas and work is being done on a Bill.

Interestingly the ***Contaminated Sites Act* 2003** has yet to be proclaimed. The proclamation of the Act is waiting on the preparation of complementary regulations. The latest advice from the Department of Environment is that unless the regulations become a political priority they are highly unlikely to be ready before mid-2005.

Similarly the ***Dangerous Goods Safety Act* 2004**, which received the Governor's assent on 10 June 2004, still has not been proclaimed.

It remains to be seen whether the Sustainability legislation that was being discussed last year with interested groups will be introduced. The Sustainability Policy Unit that successfully released the State Sustainability Strategy is no more, and the Department of Premier and Cabinet had yet to make a decision when we went to print.

DRAFT AMENDMENT BILL - CORPORATIONS ACT 2001 (CTH) -

implications for corporate environmental reporting

The second draft of the Corporations Amendment Bill (No. 2) 2005, no longer repeals s 299(1)(f) - the section that came into force lsat year that requires company directors to report on compliance with environmental legislation. A previous draft of this year's amendment did contain a repeal of this particular provision.

Treasury is seeking comments on environmental reporting. It is anticipated that industry will be making submissions on the effectiveness of mandatory environmental reporting. The closing date for comments to be taken into account is 1 April 2005.

Further information may be obtained at www.treasury.gov.au.

EDO NSW conference

PUBLIC INTEREST ENVIRONMENTAL LAW IN AUSTRALIA

On **13-14 May 2005**, the Environmental Defender's Office (NSW) will be hosting a two day conference to celebrate the 20th anniversary of the Environmental Defender's Office Network.

This conference provides an opportunity to reflect on the development of public interest environmental law in Australia over the last twenty years, to discuss current issues of importance and to explore future directions in environmental law and policy in Australia.

The conference will be held in the historic Customs House building at Circular Quay in inner-city Sydney. A reception will be held at the conference venue on the first night of the conference for participants and members of the public

To register for the conference please visit
http://www.edo.org.au/edonsw/site/conferences.asp

NOISE! NOISE! NOISE!

Cities are immeasurably less noisy than they used to be. Advances in transport, improved waste disposal industrial activities and fewer people per building ensure that we live in relative peace and quiet. We can expect a certain amount of noise from traffic, lawn mowers, dogs, or aircraft. However, sometimes, noise drives people beyond their limits. Common causes of excessive noise are noise caused by machinery close by for which there is no noise standard, or which has been poorly fitted, such as an air-conditioning unit in a block of flats. There is the famous case of the East Perth resident, Mr Cohen, who successfully sued the Council over the noise caused by garbage trucks in the early mornings.

In Sydney, police and councils are called to over 100,000 noise complaints a year, in one of Melbourne's inner cities, noise complaints make up 35% of all complaints. Rural landholders seeking a 'sea-change' can also get a shock at how noisy the country can be, for example, from people living near fields where noise is deliberately generated to scare birds from crops.

Impact of noise

Recently the EDO assisted a woman with two little children whose sleep was disrupted when the neighbour installed a commercial freezer in the gap between his property and hers. The measured noise levels inside her house were about 300% higher than is generally regarded as being within tolerable limits and the freezer operated 24 hours a day. Her complaints to the neighbour were useless, and it took the Shire some days to borrow recording equipment. At the time she approached us, the noise had been constant for over 48 hours. She was distressed, due to lack of sleep, and had concerns about how her family was coping, but within a day of the Shire's involvement and the neighbour having made some adjustments, she was a different person.

Noise affects human health and well-being in many ways such as causing irritation, disturbing sleep, hindering communication and distracting us from activities or work. This can lead on to indirect effects such as loss of productivity. Unfortunately, noise pollution is not always taken seriously by Councils.

Complaints

In the cases described above, first complaints should be made to the 'emitter' and then the local environmental health officer at the Shire or City Council. Most complaints to the EDO arise because the first complaints have not resulted in any action to reduce the noise. One woman waited 6 months for action by the Council, and eventually moved house. If you are not getting any response at all from the Council, we recommend that you approach your local MP. It has proved to be a highly effective tactic.Where the noise is significant enough to be causing a public nuisance, then complaining to the Department of Environment is appropriate. Even if you live or work in an industrial area, there is usually a remedy. As an alternative to prosecuting, as described below, the Department of Environment may be able to adjust the terms of any licences it has granted, so as to impose reasonable noise emission limits on the operator of the licensed premises.

Actions Against Noise

Section 49 action – Department of Environment

Where noise emissions from premises are so excessive as to be unreasonable, the CEO of the Department of the Environment may prosecute the occupiers: see s49(4) of the *Environmental Protection Act* 1986 ("EP Act"). Actions cannot be commenced by affected persons. The maximum penalty for offences under s49 are $125,000 or $250,000 for bodies corporate. Additional daily penalties may also be imposed.

Section 79 – private prosecution

Section 79(3) of the EP Act provides that any three or more persons, each of whom is the occupier of premises and claims to be directly affected by the offence, can bring an action against a person on any premises who causes any unreasonable noise to be emitted from that premises in the Court of Petty Sessions. The maximum penalty is $5000. Since you will usually need a lawyer to represent you this is not a well used option.

Civil action

Where noise causes a nuisance then compensatory damages or an injunction may be sought from the person responsible under the common law relating to the tort of nuisance. It is prohibitively expensive for most people to seek injunctive remedies.

Unreasonable noise

What is unreasonable must be assessed with regard to the relevant regulations. There are also certain exemptions in the regulations and exemption procedures by which the Minister can exempt certain events. (Further information may be found in Fact Sheet 25 on our web site.)

OUTREACH SOLICITOR REACHES OUT

As I mentioned in my column in the December newsletter, planning of my regional visits as EDO Outreach Solicitor was something I hoped to prioritise early in 2005. Consequently, I am very pleased to be able to announce the dates for my first set of visits.

Mandurah	22 April 2005
Busselton	27 April 2005
Bridgetown	28 April 2005
Denmark	29 April 2005
Albany	29 and 30 April 2005

The intention is that each visit will consist of a legal advice session where I am available to provide legal advice on any matters of public interest environmental law -or at least take instructions so that I can provide more detailed advice later!

This will be followed by a seminar addressing an environmental law topic relevant to the region. The Busselton presentation will deal with the regulation of clearing of native vegetation under the Environmental Protection Act and associated Regulations. The topics of the other seminars have yet to be finalised but are expected to include drainage and water allocation issues as well as aerial spraying of pesticides.

While I am in Albany, I will also be putting on my other "hat" as EDO Water Law Solicitor to meet with interested persons to conduct a roundtable session to discuss water law reform. Details of all sessions will be advertised in local newspapers and the EDO Bulletin as soon as they are available.

Hope to see you there!

Rick Fletcher

WATER LAW IN WA

an EDO WA Conference

Friday 8 July, 2005
Elizabeth Jolley Lecture Theatre,
Curtin University of Technology

Western Australia faces major issues with water quality and water quantity, yet the legal framework applying to the management and regulation of our most precious resource is characterised by a myriad of complex legislative instruments.

'In dealing with Perth's water supply crisis over the coming years, citizens and government agencies in Perth will need to be able to understand and utilise best practice water laws and policies.

The 'Water Law in Western Australia' conference will take water law into the community, making it understandable and accessible to all, yet informative and challenging for legal professionals.

For more information about the conference program and speakers visit the EDO WA website: http://www.edowa.org.au or contact the EDO WA on Tel: 9221 3030

EDO NSW Turns 20!

Visual History Project

The EDO (NSW) celebrates its 20th anniversary in 2005. A number of exciting activities are planned.

From modest beginnings the Environmnetal Defender's Office Network has expanded to include nine independently constituted public interest environmental law centres around Australia.

We seeking photos, posters, stickers and other materials detailing our work Australia-wide over the last twenty years for a visual history project to be launched during 2005.

For more information, or to contribute material to the project, please contact Samantha Magick, EDO NSW Public Affairs Officer at **Samantha.magick@edo.org.au**

Donors

We are grateful to the following donors for their generous cash donations over the period December to February 2004:

Ken Lance, Russell Burne, Pierre Horwitz, John Storey, Mark Hingston, Lara and Greg O'Neil, John Kolo, Garry Middle

Volunteers

We thank the following law students and graduates who have worked as legal researchers at the EDO recently:

Joanne Stewart, Kirsten Gammer, Sara Adhitya, Sally Koerting, Kirsty Grant, Claire Nolan, Drew Broadfoot, Joanne Teng, Bethan Craig, Sheryn Prior, Tracey Chung, Daiwei Shi, Sophie Fuhurmann, Fiona Cross, Michelle Arnold,Chris Bailey, Yew Sin (Nick), Wei Kiet Su, Julia Powles, Lucy Hopkins Hanouska Marmarac

and particularly

Coogee Case Volunteers
Greg Martin and **Stephanie Tan**
for their may hours of research on the Coogee Case.

Donors-in-kind

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

Peta Blight,JP Clement, James Duggie, Alex Gardner, Stephen Jennings, David LLoyd, Greg McIntyre SC, Hylton Quail, Peter Rattigan, Steve Walker, Louise White, and Garry Middle

FOLLOW SIMPLE RULES TO PROTECT YOURSELF FROM DEFAMATION SUITS

Now there's no excuse not to dob in a polluter

Concerns were raised with us recently about threats of defamation received in response to a complaint that an offence had been committed. There are some simple rules to follow to protect yourself from defamation suits. If in doubt, check with us. When complaining of an offence:

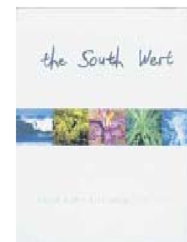
- Do find out before you complain which Department or agency enforces the law (referring to our useful table)
- Put your complaint in writing listing all the facts, attaching photographs and so on and address it to that Department for the attention of the person to whom you are complaining. Such a complaint is confidential and you are protected from defamation claims arising from this communication.
- DO NOT copy that material to other people, and that means neighbours, the local Shire, the LCDC, consultant groups- particularly not the alleged offender's commercial partners or PR people. Communication to other people of that same material is NOT confidential and does not protect you from defamation.

NATURAL HERITAGE CAPTURED

Landscape and nature photographer Rob Olver has kindly agreed to allow the EDO WA to use some of his spectacular images on our website.

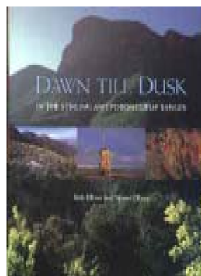
Rob has published two books, 'Dawn till Dusk in the Stirling and Porongurup Ranges' and 'the South West - from Dawn to Dusk''. Both can be purchased from UWA Press.

http://www.uwapress.uwa.edu.au



"This descriptive, well photographed and generously laid out book devotes ample space to thoughtful full colour photography...an approachable format that will help guide experienced vistiors and newcomers." Subiaco Post

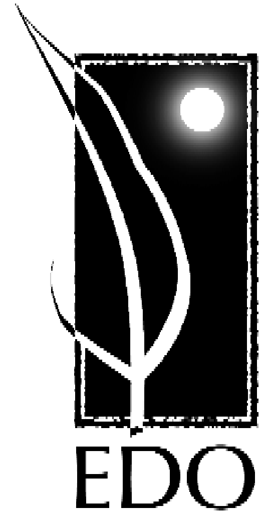
"... some of the most stunning photographs of the South West." Mandurah Telegraph



"Dawn to Dusk" is a practical guide to, and a visual celebration of, the Stirling and Porongurup ranges.."

With its stunning photographs, detailed maps, and information on social and natural history, flora and fauna, bushwalks and climbs, special attractions and facilities, it will delight ...anyone who has ever dreamed of standing on a misty peak, surrounded by mountain wilderness.

The EDO thanks all our sponsors for their support



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 State and Commonwealth Attorney-General Departments

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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.