

## Widgie #2

*Our September 2004 newsletter front page read "Logging stopped in Widgiemooltha - another EDO win"*

**It went on to say that the EDO has been working hard to assist The Wilderness Society of WA to prevent the logging of 30,000 hectares of woodland to the west of Widgiemooltha, some 100km south of Kalgoorlie.**

Charles Roche, Outback Conservation Manager, Wilderness Society WA, wrote the article when the Minister for the Environment overturned the EPA refusal to assess the Forest Products Commission's proposal in June 2004.

The matter was sent back to the EPA with some clear direction for further information to be supplied.

On 11 January 2006, the EPA, once again, published a refusal to assess. Once again, the Wilderness Society has appealed this decision. The appeal grounds include the uncertainty as to the extent of the area to be logged.

Widgie (No 2) promises to be as long drawn out as the previous appeal. The proposal was first referred in 2002. The proposal documents contained very little about the environmental impacts and have been supplemented by a report. The material lodged with the EPA by the proponent



since June 2004 will be at the centre of the appeal.

In our September 2004 newsletter the observation was made that the EPA should not be able to refuse to assess a proposal that has been referred as having significant effects on the environment without giving reasons – which is what the EPA presently does. It was said that this option should be removed from the menu. Two years on, the same can be said and with more force, because the need for a further appeal may be as much due to lack of good processes within the EPA, as the merits (or otherwise) of the proposal.

In our view, third party "appeal" rights to ask the Environment Minister to review the EPA's decision cannot be exercised in the absence of reasons. It's very hard for third party community groups to draft grounds of appeal without them. The EPA should make a commitment to better transparency in decision-making. A strong democratic process reflecting the whole of the community of interest that is given rights of review under the *Environmental Protection Act* is needed to ensure better decision-making.

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### ***Pennings v Vlak* [2005] WASC 107**

This case is an appeal dealing with the dismissal of a prosecution under the *Wildlife Conservation Act 1950 (WA)*, (WC Act). Kevin and Karina Vlak were charged with taking protected flora without a licence under the Act. On several occasions they took a quantity of firewood logs and cut down fire damaged trees on unallocated Crown land.

The sole issue on appeal was whether the Magistrate erred in finding that dead trees and timber taken were not “protected flora” for the purpose of the WC Act, where flora is defined as “any plant”. Therefore, it had to be determined whether the definition of “plant” includes dead as well as living plants.

The appeal was dismissed. Jenkins J considered the appellant’s argument that problems will arise under the Act if “flora” is narrowly construed. It was argued that wildlife officers’ powers would be limited depending on whether the plant in question is alive or dead at the time of seizure, and the selling of dead, dried wildflowers would not be an offence under the Act.

However, as “plant” is not defined in the act, Jenkins J found that the common meaning of the word should be substituted and that meaning included the plant being living. It was also determinative that the Act specifically includes carcasses of animals in its definition of “fauna” while not expressly including dead plants in its definition of flora.

*A copy of this decision is available at the Supreme Court website, or from the Principal Solicitor on request.*

### ***Shire of Augusta Margaret River v Gray* [2005] WASCA 227**

*A judgment of the Court of Appeal of Western Australia.*

In this case the Shire of Augusta Margaret River appealed from the dismissal of its application to be joined in proceedings or make written submissions. The case arose from an appeal against the refusal of the Western Australian Planning Commission (“WAPC”) to approve the subdivision of land in Margaret River.

#### *Facts*

Mr Gray owns land south of Margaret River, which he wishes to subdivide for the purpose of creating a number of rural residential lots. In the matter of any subdivision, the WAPC is the decision-maker. The Shire is merely authorised to make comment on the subdivision (if asked). In response to the request for comment from the WAPC, the Shire recommended refusal of the proposed subdivision on the grounds that, amongst others, the Leeuwin Naturaliste Ridge Statement of Planning Policy No 7 (a relevant planning policy to which it is mandatory that the decision-maker have due regard) protected natural remnant vegetation in the area. The WAPC rejected Mr Gray’s application on the sole basis that there were insufficient

development controls under the present zoning. (Since the *Town Planning and Development Act* was amended in 1996 to include s20(5) giving the power to the WAPC to override zoning prescriptions found in town planning schemes when making subdivision decisions, this was a bizarre decision.)

This prompted Mr Gray to appeal to the Town Planning Appeals Tribunal. The Shire’s application for joinder and in the alternative to make written submissions was refused by the Tribunal. The Shire sought a judicial review of that decision in the Supreme Court.

#### *Decision*

The majority decision of the Court of Appeal (“CA”) was that the Tribunal was incorrect in refusing to allow the Shire to be joined in the Gray appeal. Of importance was whether the Shire could add anything to the arguments of the WAPC for rejecting the subdivision. It was held that, notwithstanding that both the WAPC and the Shire were united in rejecting the subdivision, it was only with the Shire’s participation in the action that evidence would be adduced regarding the existence and importance of the remnant vegetation on the land. It was found that, without the Shire participating as a party, the environmental issues could not be canvassed because there would be no evidence adduced as to the presence of or quality of the vegetation and habitat at issue.

The joinder provisions no longer exist in planning matters, so there is little precedent effect resulting from the decision. By finding that the Tribunal erred in law by refusing the Shire’s application, the CA has recognised the importance of local government in the process of considering subdivisions and accorded more weight to consideration of State Planning Policies than the WAPC did.

Equally pleasing, from an environmental point of view, is Pullin JA’s discussion of the importance of the conservation of biodiversity in the south-west.

*Copies of the decision are available from the Principal Solicitor on request.*

### **Matthew Quinn lecture on sustainable development**

On 14 February 2006 at the Alexander Lecture theatre, Matthew Quinn gave a lecture on progress being made by Wales with regional sustainable development. The presentation was wide ranging, and it was fascinating. Copies of the paper will be available on request from the Principal Solicitor, Leigh Simpkin [lsimpkin@edowa.org.au](mailto:lsimpkin@edowa.org.au) 9221 3030

Useful sites relevant to the topics under discussion:

<http://www.wales.gov.uk/themessustainabledev/index.htm>

<http://www.nrg4sd.net/ENG/Index.asp>

### Acts: progress being made at last!

1. *Defamation Act* (WA) 2005– assented to on 19<sup>th</sup> of December 2005; commenced on 1<sup>st</sup> January 2006
2. *Contaminated Sites Act* (WA) 2005 - assented to on 12<sup>th</sup> of December 2005; likely to be proclaimed in July 2006
3. *Mining Amendment Act* (WA) 2005 - assented to on 12<sup>th</sup> of December 2005
4. *Planning and Development Act* (WA) 2005 - assented to on 12<sup>th</sup> of December 2005; to be proclaimed on 9 April 2006
5. *Dangerous Goods Safety Act* 2004 – ss. 1 and 2 came into operation on 10<sup>th</sup> June 2004; balance to be proclaimed (likely mid-2006).

### Bills

1. *Gene Technology Bill* (WA) 2005 – Legislative Council Second Reading 17<sup>th</sup> May 2005
2. *Gene Technology Amendment Bill* (WA) 2005 – Legislative Council Second Reading 17<sup>th</sup> May 2005
3. *Swan and Canning Rivers Management Bill* (WA) 2005 - Legislative Council Second Reading 22<sup>nd</sup> November 2005
4. *Swan Valley Planning Legislation Amendment Bill* (WA) 2005 - Legislative Council Second Reading 21<sup>st</sup> June 2005

### Draft legislation

*Biosecurity and Agriculture Management Bill 2005 and Biosecurity and Agriculture Management Rates and Charges Bill 2005* – tabled for public comment

*Waste Avoidance and Resource Recovery draft* (“WARR”) likely release date - May 2006

While waste law reform is an important part of the government agenda, the likely date for introduction of legislation to Parliament has slipped to next year.

Although the draft legislation has not been released to the public, likely concepts to be given statutory effect in the Bill include ‘zero waste’ (see the Waste Management Board website [www.wastewa.com](http://www.wastewa.com)) and Extended Producer Responsibility (EPR).

EPR involves developing a pattern of extending the lifecycle of producer involvement in waste issues beyond the post-consumer stage through involving producers, either physically or financially, in the process of collecting, processing, recycling or disposing of post-consumer waste. The Municipal Waste Advisory Board has assisted in the preparation of policy on EPR. In June 2005 the State Government adopted a formal policy on EPR as a policy approach to managing waste and resource consumption issues. There is now opportunity to include legislative head powers for EPR schemes in the WARR draft.

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K.Mathew@murdoch.edu.au

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### The EDO Management Committee

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Andrew Roberts - Deputy Convenor  
Janice Dudley - Secretary  
Cameron Poustie - Treasurer  
Angas Hopkins - Committee Member  
David Garnsworthy - Committee Member  
Jay Anderson - Committee Member  
David Lloyd – Committee Member

*Harriet Ketley has resigned from the EDO’s Management Committee after years of service. Harriet has also worked as a volunteer for the EDO. Many thanks Harriet for all your time and skills.*

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### EDO Staff

Leigh Simpkin - Principal Solicitor  
Nicola Rivers - Solicitor  
Fran Jones - Coordinator for Finance and Administration

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### EDO Mission Statement

Protection of WA’s environment by providing community groups and individuals with environmental legal services including advice, education, representation and opportunity to participate in reform of laws affecting the environment.



## Biodiesel from waste cooking oil to hit market in WA

*This is the second in a series of articles prompted by our research into waste law reform and policy in WA.*

Australian Renewable Fuels Limited ("ARF"), a Western-Australian based company, is in the final stages of completing a biodiesel manufacturing plant in Picton capable of producing 45 million litres of biodiesel per annum. ARF will initially seek large commercial customers as its target market. The CEO, Darryl Butcher said:

"Biodiesel is a cleaner burning alternative for diesel engines, there's better engine combustion performance, better engine lubrication and less air and water pollution..."

### What is biodiesel?

Biodiesel is made from animal fats and vegetable oils- a renewable source. These can be sourced from the waste stream (i.e. waste cooking oil) and/or from canola, rapeseed or other vegetable oils that are purpose-grown. The largest potential source of waste cooking oil in Australia for the production of biodiesel is McDonalds' restaurants. Hence the term McDiesel for biodiesel made from, or partly from, waste cooking oil, such as that produced by ARF.

It can be used in blends with mineral diesel to run vehicles, or non-road plant and machinery. ARF says it can be blended in any ratio and used as a 100% alternative to mineral diesel.

It is currently taxed in the same way as mineral diesel but under the cleaner fuels energy grant scheme, until 2011, a producer of biodiesel receives a grant equivalent to the excise payable. After that date, the grant will be reduced gradually to 50%. This provides an incentive to producers to start up now.

It has been produced in Europe since 1987, and is a growing source of fuel around the world, although it will always be a niche market in Australia. Australia could not provide enough feedstock for biodiesel to free itself of its dependence on fossil fuels.

### Is Biodiesel A Good Thing?

The World Energy Council, based in London, notes the reduced health risks for biodiesel than petroleum diesel emissions resulting from reduced PM, CO and HC emissions. Diesel exhaust is listed on the World Health Organisation as a known carcinogen, see [www.who.int/inf-pr-1998/en/pr98-57.html](http://www.who.int/inf-pr-1998/en/pr98-57.html) but measures to encourage biodiesel to replace diesel on the basis of less harmful emissions have not been undertaken by governments in Australia. Willie Nelson, the celebrity / country singer, has put his name to a brand of biodiesel in the US. Surely it is A Good Thing.

Not everyone is so sure. It is regarded as a better transport fuel than fossil fuels which are not renewable. Diesel engine exhaust emissions' adverse effects are reduced by blending with biodiesel, according to reports published in the US by

the EPA and by the Australian Greenhouse office. However, there are important qualifications to these reports.

A US EPA investigation dated October 2002 was designed to test claims made about the emission benefits of biodiesel. This report is published online at [www.epa.gov/otaq/models/biodsl.htm](http://www.epa.gov/otaq/models/biodsl.htm)

The findings were based on the emission impacts of 20% volume biodiesel for soybean-based biodiesel added to an average base fuel. The table below presents the comparison with ordinary diesel emissions in ordinary commercially available diesel engines:

Emissions	% change in emissions
NOx (oxides of nitrogen)	+2.0%
PM (particulate matter)	-10.1%
HC (Hydrocarbons)	-21.1%
CO (carbon monoxide)	-11.0%

The EPA summarised its findings as being encouraging for PM and HC but with some cautionary statements as follows:

"Biodiesel is also predicted to reduce fuel economy by 1-2 % for a 20 % biodiesel blend. Aggregate toxics are predicted to be reduced, but the impacts differ from one toxic compound to another. We were not able to identify an unambiguous difference in exhaust CO2 emissions between biodiesel and conventional diesel. However, it should be noted that the CO2 benefits commonly attributed to biodiesel are the result of the renewability of the biodiesel itself, not the comparative exhaust CO2 emissions. An investigation into the renewability of biodiesel was beyond the scope of this report...[which is]... not designed to address the wide variety of additional factors that could be considered by a State when initiating a fuel control rulemaking. For example, this Report does not consider issues such as air quality, need, cost, cost effectiveness, technical feasibility, fuel distribution and supply impacts, regional fleet composition, and other potentially relevant factors."

An older report by the CSIRO, "Comparison of Transport Fuels Study", which outlines the results of a life cycle assessment of the environmental impacts of a variety of renewable and non-renewable fuels, including biodiesel, indicates that biodiesel meets Australian design parameters for alternative fuels except for oxides of nitrogen (NO<sub>x</sub>) which may be slightly above the Euro4 standards. This report was prepared for the Australian Greenhouse Office and is available on its website. The following excerpt summarises the pros and cons of biodiesel:

#### "4.6 Summary

The advantages of biodiesel are:

- It is a renewable bio-based fuel and, as such, has lower life cycle CO2 emissions than diesel derived from mineral oils.

- Neat biodiesel contains almost no sulphur and no aromatics. In a properly tuned engine this is expected to lead to lower particulate exhaust emissions.
- The material is bio-degradable and non-toxic.
- As an oxygenated compound, it reduces the non-soluble fraction of the particles.
- The PAH content of exhaust particles is reduced.
- In a mixture with low-sulphur diesel, biodiesel can act as a lubricity improver (Arcoumanis, 2000).
- The absence of sulphur allows more efficient use of oxidation catalysts.

The disadvantages of biodiesel are:

- Constraints on the availability of agricultural feedstock impose limits on the possible contribution of biodiesels to transport.
- The kinematic viscosity is higher than diesel fuel. This affects fuel atomisation during injection and requires modified fuel injection systems.
- Due to the high oxygen content, it produces relatively high NO<sub>x</sub> levels during combustion.
- Oxidation stability is lower than that of diesel so that under extended storage conditions it is possible to produce oxidation products that may be harmful to the vehicle components.
- Biodiesel is hygroscopic. Contact with humid air must be avoided.
- Production of biodiesel is not sufficiently standardised. Biodiesel that is outside European or US standards can cause corrosion, fuel system blockage, seal failures, filter clogging and deposits at injection pumps.
- The lower volumetric energy density of biodiesel means that more fuel needs to be transported for the same distance travelled.
- It can cause dilution of engine lubricant oil, requiring more frequent oil change than in standard diesel-fuelled engines.
- A modified refuelling infrastructure is needed to handle biodiesels, which adds to their total cost.”

See <http://www.greenhouse.gov.au/transport/comparison/index.html>.

ARF advises that the NO<sub>x</sub> emissions can be reduced below mineral diesel levels with the use of a catalytic converter.

### Biofuels: the policy debate

For those suffering from diesel fumes in their work or living environment, alternative fuel availability would appear to be a godsend.

In Australia, as yet, there is no consumer distribution network in place. There is no federal or state level policy encouraging the use of alternative fuels in WA. Indeed, the use of standard petroleum-based diesel is heavily subsidised by the WA Government via the “On-Road Diesel Subsidy Scheme”.

The federal government’s extensive diesel subsidies has been investigated by Dr Chris Riedy in an article called ‘*Counting the cost of government subsidies*’, published in Canberra Times, 8 November 2001, that has been shortened and posted on the web as “*Subsidies to Fossil Fuels are Undermining a Sustainable Future*”.

(see <http://www.sustainabilitycentre.com.au/Subsidies.pdf>)

In other parts of the world, by contrast, policy initiatives are creating incentives to the reduction in use of petroleum-based products, such as Directive 2003/30/EC which was adopted by the European Parliament and the Council on 8 May 2003. This Directive aims at promoting the use of biofuels or other renewable fuels to replace diesel or petrol for transport purposes. Austria plays a leading role in the European Community in the development of biodiesel as a commercial alternative to petroleum-based diesel products. Austria has indicated that it will be looking to increase biodiesel use in vehicle fleets, in preference to other alternative fuels, in order to make further progress in compliance with the Directive and corresponding reductions of harmful emissions.

The main biofuel in Austria is derived from rapeseed, and is used in diesel engines. The biofuels debate was kick-started in Austria in 1987 with a large scale pilot project on biodiesel at the Federal Institute of Agriculture Engineering at Wieselburg. The uptake of biodiesel was actively encouraged with tax incentives. In 2003, 55 000 tonnes of biodiesel were produced in Austria, of which approximately 90% was sold abroad, as the price which can be obtained for biodiesel in Italy and Germany was higher than that in Austria. Over 80 biodiesel stations selling biofuels provide a consumer network.

### What you can do

Now that there is a commercial alternative to ordinary diesel in WA there are a number of changes that can be made to promote sustainability. Why not write to your State and Federal MP to ask for the staged removal of perverse subsidies to the fossil fuel industry that are both economically and environmentally harmful, (refer Riedy’s article). If you belong to an organisation with large diesel consumption, alert it to the existence of an alternative fuel so that the biodiesel option can be costed and the benefits to your organisation assessed and compared.

### Other useful websites

[http://www.eere.energy.gov/afdc/altfuel/fuel\\_properties.html](http://www.eere.energy.gov/afdc/altfuel/fuel_properties.html)

[www.worldenergy.org](http://www.worldenergy.org)

[www.wnbiodiesel.com](http://www.wnbiodiesel.com)

[www.isf.uts.edu.au/publications/riedy.html](http://www.isf.uts.edu.au/publications/riedy.html)

[www.abc.net.au/health/regions/features/diesel/](http://www.abc.net.au/health/regions/features/diesel/)

[www.pm.gov.au/news/media\\_Releases/media\\_release1580.html](http://www.pm.gov.au/news/media_Releases/media_release1580.html)



## The Yannarie Salt proposal

In response to an increased demand for salt in the Asia-Pacific region, Straits Salt Pty Ltd ("Straits") is proposing to construct a solar saltfield on the eastern side of Exmouth Gulf. At full capacity, the salt mine complex would cover 40,000 hectares, extend for over 65 kilometres in a North/South direction, and would be over 10 kilometres wide in places.

Although the saltfield is to be located several kilometres inshore there are concerns about the impact of the proposed developments on the coastal mangroves and the wider Exmouth Gulf ecosystem. The project will be subject to an Environmental Review and Management Programme ("ERMP"), which will include studies of the local ecosystem, as well as whether and how their development will impact upon it.

The project itself is envisaged to last for at least 50 years, the first five years for construction and reaching economic viability and five more years for expansion to capacity. Solar saltfields are quite energy efficient, using sunlight to evaporate the seawater and concentrate the salt. The waste material, however, is concentrated sea water that is lethal to fish in undiluted form. An accepted practice is to dilute the bitterns with seawater and discharge them back into the sea. Straits states that it will not have to discharge for up to 10 years and it will look for other disposal options.

The development includes a number of pipes that will suck in seawater to fill the salt ponds, various infrastructure on site including fuel sheds, an airstrip and some marine structures, all of which could have potential negative impacts on the native wildlife. Salt will be transported to transport ships approximately 20km offshore by barges.

The Conservation Council of WA is strongly against the proposal and, with campaign partners including the local prawn industry, has started a campaign against the proposal called "Halt the Salt" ([www.haltthesalt.org](http://www.haltthesalt.org)). The concern is that massive industrial development carries with it grave risks of damage to an ecosystem which is being considered for World Heritage listing. The campaign asserts that if anything went wrong with such a large scale enterprise, the damage to the gulf ecosystem would be irreversible. Of particular importance is the fact that the eastern side of the Gulf is generally regarded as a nursery area for a wide range of marine species. The Gulf and deeper waters are known to support dugongs, manta rays and humpback whales, among others, all of which are protected species.

Straits does not believe that its proposal will be overly damaging to the gulf ecosystem and that it can be managed in such a way as to abide by all relevant legislation and environmental recommendations.



## EDO Secures Grant

The Public Purposes Trust of the Law Society has granted the EDO funds for a 12 month Waste Law Reform project which will likely involve a conference in late 2006 or early 2007. The draft waste legislation that is scheduled to be released in May will be discussed at the conference. The EDO will also research waste policy and run other legal education projects on waste law reform in WA with the funds. Research has been underway for some time. The EDO newsletter articles on Container Deposit law reform and biodiesel are intended to keep members informed about relevant waste initiatives in WA. Why not submit a relevant topic to use for inclusion in the next newsletter?

## National Pollutant Inventory

National Pollutant Inventory (NPI) data for 2004-2005 was published on 31 January 2006 by the Australian Government on the NPI website. The web address is: <http://www.npi.gov.au>

The National Pollutant Inventory (NPI) gives information on the types and amounts of pollutants being emitted to the Australian environment. The NPI programme relies on self-reporting by industry and is run cooperatively by the Australian, state and territory governments because knowing where the sources of emissions are and whether they are emitted to air, water or land is the first step in assessing the nature of pollution in Australia.

The NPI data assists communities to keep an eye on pollution. The WA data is at <http://www.npi.gov.au/overview/reports/wa-location-report.html#Summary>

The top three individual active sources of pollution for the 2004-5 year in WA were (in order):

- metal ore mining;
- architectural surface coatings; and
- burning (including prescribed burns, wildfires, agricultural clearing etc).

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## Farewell From Rick Fletcher



*Rural, Regional and Remote Solicitor, EDO WA*

I expect this will be my last newsletter article for some time. My fiancée is a high school science teacher and the Department of Education has given her a contract to work at Newton Moore High School. By the time this newsletter is published I will be married, living in Bunbury and almost certainly unemployed!

I have enjoyed my time at the EDO. My current job (for just a little longer) was an opportunity I had been waiting for since I first started volunteering with the EDO as a law student back in 1999 and it was a pleasure to be able to take that opportunity and see where it led.

Of the work I have done since I started in September 2004, I am most pleased with the Water Law Project. Our conference in July 2005 was well received and papers from the conference, especially those written for the conference by Dr Alex Gardner and Ms Vivian Chung, continue to have a role in shaping the debate about management of Western Australia's water resources. The EDO has been invited to participate in a number of stakeholder consultation workshops arising out of the Minister for Environment's Water Resources Stakeholder Forum, the Irrigation Review Final Report (and the Government response) and the State Water Strategy. One of my final tasks here will be to prepare and distribute a water law reform paper dealing with some of the issues raised at the Roundtable discussions that were conducted as part of the project.

Conversely, my greatest regret (and there are always regrets when you have less than 18 months in a job) is not getting to see the regional visits program take off. As Rural, Regional and Remote Outreach Solicitor I visited Mandurah, the South-West, Geraldton, Broome and Kununurra in 2005. While it was great to meet some long-time supporters of the EDO and it generated some advice work, the legal advice sessions and presentations that I held were poorly attended. I can't help but feel they were something of an opportunity lost. I am sure one of the first jobs my replacement, Ms Nicola Rivers, will find waiting for her is the preparation of a new schedule of visits. Keep an eye on this column and if she's coming your way, please get out there and support her.

I would like to thank Leigh, Marilyn, Pete and Jane, as well as the many volunteers who come through our doors, for all their support and making the EDO such an enjoyable place to work. We may not win every fight, but the EDO work is essential in supporting those who want to protect their environment, in challenging bad decisions and in encouraging change in government policy and legislation.



## Thank you Volunteers!

The following people have volunteered their time and expertise at the EDO office over the last 4 months. Their help is greatly appreciated. We would particularly like to thank Xian-Li Davies for coming in every day during her summer vacation to assist the lawyers. Thank you to all!

Jeffery Dundas, Julia Horsley, Hanaa Hansia, Michael Laczko, Katherine Dowling, Robert French, Chloe Henderson, Joshua Wilcox, Karynn Wolter, Tim Donisi.

## Staff Changes

**Rick Fletcher** resigned as Outreach Lawyer on the 17th of February 2006. Rick has been involved with the EDO as a volunteer, committee member and staff member since 1999. His commitment to the organisation has been fantastic and we wish Rick and wife Nicole all the best in their new life together in Bunbury.



**Nicola Rivers** graduated from Monash University in Victoria in 2001 with a Bachelor of Laws, Bachelor of Arts and Postgraduate Diploma in Legal Practice, Skills and Ethics. From 2002 to 2005 Nicola worked in Canberra at the Federal Department of Environment and Heritage and the Federal Attorney-General's Department, on a range of domestic and international environmental and criminal law issues. In 2005 Nicola moved to Perth and worked with the WA Department of Environment on greenhouse issues. During university and while working in Canberra Nicola volunteered at three community legal centres, including the Victorian EDO, and is looking forward to making a contribution to the EDO in WA.

**Pete Stone** resigned as Coordinator for Special Projects and Promotions on February 28. Pete has moved on to run his own events business and continue his studies.

**Fran Jones** began work at the EDO as Coordinator for Finance and Administration on February 17. Fran has a wealth of experience in the NRM sector and we are delighted to welcome her to the team.

We currently have **166 members**. If you would like to become a member or buy a membership as a gift for a family member or friend please contact the office on 9221 3030 or [edowa@edowa.org.au](mailto:edowa@edowa.org.au)

Alternatively you can download the membership form at <http://www.edowa.org.au/membership.html>

Your support is vital to the ongoing operation of the EDO.

## GMO Regulation

Researched by Xian-Li Davies and Jeffrey Dundas

GMO regulation is a divisive policy issue in Australia. Scepticism about management of GM crops in the conservation movement was exacerbated by the contamination incident in Victoria in July 2005, where GM canola was found in canola seeds that was about to be shipped to Japan, and WA's own GMO contamination scare, in the Great Southern, in October 2005, involving approximately 10,000 acres of canola that was thought to be slightly contaminated by GM material.

Genetically Modified Organisms ("GMOs") legal issues have been on the radar at the EDO for a long time. The EDO's Fact Sheet No. 16, which was published in December 2005, outlines regulation of 'intentional release' of GMOs in Australia under the *Gene Technology Act 2000 (Cth)* ("GTA"). Former Principal Solicitor, Lee McIntosh has produced several papers on the GTA.<sup>1</sup>

In 2004, the Asia Pacific Law Journal of Environmental Law produced a special edition on sustainable regulation of biotechnology, with contributors offering local and international perspectives. Two articles, one reviewed here, focus on Australian law.<sup>2</sup> David Kemp's article on biotechnology regulation addresses the broad area of biotechnology in the field of agricultural science. It's a good introduction for those new to the issue.

Jeremy Tager, a campaigner with Greenpeace Australia Pacific together with Bob Phelps, has produced a scathing critique of the GTA. Their main concerns are:

- a) The GTA fails to implement a "polluter pays principle". This principle would greatly improve accountability, forcing GMO companies to take responsibility for any harm their GMO products may cause;
- b) The Office of the Gene Technology Regulator ("OGTR") which undertakes risk assessment, risk management and guides implementation processes for GMOs imposes no burden of proof on applicants to show that their products are safe, or to show that there are benefits that justify the risks of their introduction;
- c) The opportunities for review are greater for applicants – applicants are entitled to a full merits review but members of the public who oppose an intentional release must apply for judicial review.
- d) No adequate remedies in the legislation for non-authorized release.
- e) The unclear relationship of the State and Federal governments to GMO assessment and regulation five years after its introduction; and
- f) The definition of "environment" in the GTA being too narrow and failing to include social and economic elements.

The GTA is intended to form a component of a nationally consistent scheme for the assessment and regulation of GMOs.<sup>3</sup> The advantage of a national cooperative scheme was said to be its ability to regulate comprehensively all dealings with GMOs.<sup>4</sup> However, five years on from the federal legislation, the WA Government has not passed matching legislation – the only state government not to have done so. This means that currently individuals and corporations are following two different sets of rules, because of the constitutional limitations of the federal government to regulate behaviour of individuals c.f. trading companies.

The State government did pass the *Genetically Modified Crops Free Areas Act (WA) 2003* and on 22 March 2004 placed a State-wide moratorium on GM crops under this Act. The differences between the State and Federal laws, while complementary, nevertheless leave unregulated gaps. For example, a GMO researcher in a laboratory is not subject to the GTA unless the research is being done for a trading company.

Until November last year, there were limited exemptions (for two GM cotton trials and for one stand at a certain flower show). Therefore, the problems with the different federal and state rules were able to be remedied, although no real urgency was attached to doing so. However in November 2005, an exemption was published in the WA Government Gazette for anyone in WA to grow GM canola that had been approved under the GTA provided certain limits were met on the percentage of canola that can be genetically modified. Individual farmers are now authorised to grow this canola without any regulation under the GTA (being outside the ambit of federal regulatory authority for GMO crops for the reason described above.) The moratorium is supported by many farmers. It would be undermined if numerous small exemptions such as this were to be granted, all having negligible effects, but cumulatively adding up to de facto acceptance of GM crops in WA.

Tager and Phelps highlight the lack of remedies for farmers whose crops are damaged by GMO contamination. This concern is held in many quarters. In August 2005, State Agriculture Minister Kim Chance, called on the Federal Government to develop a robust legal framework to address liability issues resulting from contamination by genetically modified (GM) crops to protect Western Australian agriculture. After the contamination incident, he called on GM companies to take greater care and responsibility for their product or face clean up costs in Western Australia.

These are not new concerns. In her paper to the 2002 Conservation Council conference, published on the EDO website, Lee McIntosh argued that responsibility for environmental harm is not addressed by the GTA, concluding:

"... any person who releases GMOs without authorization will be liable for some resultant damage to the environment. However it is unlikely that any person will be liable (either at common law or pursuant to any State or Commonwealth legislation) for environmental damage caused by



the authorized release of GMOS into the environment.”<sup>5</sup>

The federal Department of Agriculture has canvassed concerns about liability issues associated with GM crops, here and internationally, publishing an article in 2003 that is cited in the Tager article.<sup>6</sup>

The WA Farmers Federation Inc. (“WAFF”) made a submission on the GTA review committee late last year. WAFF also listed the absence of adequate remedies as a problem with the GTA regime.

Previously, the federal government has managed the divisiveness of the GMO debate by focussing on adequate risk management involved in the permit system set up for intentional release of GMOs - leaving it to the States to get with the program or to opt out (see section 21 of the GTA). Having an impartial and independent body to assess the risks (the OGTR) was presented as a better policy than providing what the conservation groups wanted, which was a much more cautious approach to permits, with strict liability for damage caused by unintentional release or unauthorised intentional release. (That ‘softly-softly’ approach did not stop Monsanto blaming over-regulation for its withdrawal from Australia of GM Canola production in 2004.)

It is hoped that the review of the GTA that is underway at the moment will lead to better legislation at Federal level. But if that is not forthcoming, then better laws and policies are also needed at State level.

<sup>1</sup> See for example Lee McIntosh, “Liability for Environmental Damage Caused by the Release of Genetically Modified Organisms”, *For Who's Benefit? - Evaluating Genetically Modified Organisms in Western Australia from a Different Perspective*, Conference held by Conservation Council WA 10 October 2002.

<sup>2</sup> D.R. Kemp, “Biotechnology Regulation: GMOs, Agriculture, Science and the Environment,” (2004) 8 *Asia Pacific Journal of Environmental Law* p 7; J. Tager & B. Phelps, “A Critique of the Australian Gene Technology Act and its Implementation,” (2004) 8 *Asia Pacific Journal of Environmental Law*, page 97.

<sup>3</sup> s5 of GTA.

<sup>4</sup> Parliament of Australia, Parliamentary library, Bills Digest No. 11 2000-01.

<sup>5</sup> See footnote 1.

<sup>6</sup> David Dalton, Brian Jones and Britt Maxwell “*Liability Issues Associated with GM Crops in Australia*” (Department of Agriculture Fisheries and Forestry, Canberra:2003); see also David Dalton “*Transgenic Crops and Genetic Contamination: Assessing the need for a Regulatory Response to Protect Organic Farmers*” (2003) 8 *The Australasian Journal of Natural Resources Law and Policy* 129-177 at 136.



### Contacts and Further Information

EDO Fact Sheet #16 Genetically Modified Organisms <http://www.edowa.org.au/factsheets.html>

OGTR - MDP54 PO Box 100 Woden ACT 2606;  
tel: 1800 181 030; website: [www.ogtr.gov.au/](http://www.ogtr.gov.au/)

Jeremy Tager – website: [http://www.nongmfarmers.com/news\\_print.asp?ID=1752](http://www.nongmfarmers.com/news_print.asp?ID=1752)

Parliament of Australia, Parliamentary Library – website:  
<http://www.aph.gov.au/library/pubs/index.htm>

### Hate being spammed?

If there's no unsubscribe button and it looks dodgy just delete it. Otherwise, take action!

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In both the above on-line complaint situations, include the header information (which is data hidden within every email message and which will assist the ACMA to track the source of spam).

### Volunteer at the EDO!

We need admin as well as law volunteers.  
Contact Fran Jones [edowa@edowa.org.au](mailto:edowa@edowa.org.au) or call  
9221 3030



**ANEDO**  
**Australian Network of**  
**Environmental Defender's Offices**

From EDO NSW

**Carbon Disclosure Project Highlights Climate Risk  
for ASX100 Companies**

The global economy is becoming increasingly aware of the impact predicted changes in weather patterns are likely to have on investment.

On 1 February 2006, the Carbon Disclosure Project (CDP), a coalition of institutional investors with funds under management worth \$US 21 trillion, sent a questionnaire about the impacts of climate change to leading companies around the world, including the FT500, ASX100 and NZX50.

The questionnaire will focus on the impacts that carbon emission restrictions and predicted changes in weather patterns will have on surveyed companies' bottom lines.

For more information about this project, please visit:  
[www.cdproject.net](http://www.cdproject.net)

**NCC Welcomes Decision to Scrap Desalination Plant**

The Nature Conservation Council (NCC) has welcomed the NSW Government's decision to scrap the desalination plant, and is calling for this to be matched with permanent water restrictions.

"The scrapping of the desalination plant is an exciting first step to making Sydney's water supply sustainable, but must be matched with permanent Level 3 water restrictions," said Cate Faehrmann, NCC Director.

"The announcement of a \$300 million water recycling plant will set Sydney on the right path to securing a sustainable water supply. We intend to work with the NSW Government to ensure similar projects get off the ground in the near future.

"We also welcome the scrapping of the desalination plant as it would have created greenhouse gas emissions equivalent to an extra 125,000 cars on the road. It would have seriously undermined efforts to combat climate change.

"Water efficiency and permanent restrictions as well as large scale water recycling should mean that water transfers from stressed river systems like the Shoalhaven and Nepean Rivers will not be necessary.

"The end of the desalination plant, and an investment in water recycling are exciting first steps to ensuring Sydney's water supply is sustainable," Ms Faehrmann said.

For more information about NCC's Water Campaign, please visit [www.nccnsw.org.au/freshwater](http://www.nccnsw.org.au/freshwater).

From EDO VIC

Current Cases

2006 is already looking to be a busy year one for the EDO. We are presently working on a number of cases for a range of community and environment groups. Issues range from the protection of native vegetation to waterway management. In a case which commences in VCAT on Monday, Annette Jones of the EDO and Matthew Townsend, barrister, are representing Lethbridge Environment Group in their battle against a huge chicken factory complex proposed for their small rural community. The case involves several important issues including the interpretation of the Victorian Broiler Farm Code, compliance with the *Environment Protection Act 1970* and the protection of endangered grassland sites in the area of the proposed development.

**Many thanks to all those who attended  
the EDO WA 10th birthday celebrations  
at Piney Lakes in December 2005.**

**A great time was had by all.**

**The staff and committee are now  
looking forward to another 10 years of  
hard work!**

**EDO WA Event**

**'Best Practice in Community Consultation'**

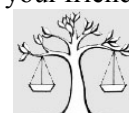
Join guest speaker Dr Wally Cox at The Mecure Hotel in Perth on Tuesday March 21<sup>st</sup> from 9.30am to 12 noon.

The seminar will provide the opportunity to hear expert views on consultation in relation to environmental impact assessment under the *Environmental Protection Act 1986*.

In addition to Dr Cox's presentation EDO Principal Solicitor Leigh Simpkin will present a paper dealing with consultation law on conservation matters in general.

Morning tea will be provided. Entry is \$10 with funds raised going to the EDO. For reservations please call 9221 3030 or email [edowa@edowa.org.au](mailto:edowa@edowa.org.au)

See the following page for a membership form to give to  
your friends.





The EDO thanks all our sponsors for their support



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