edonews

Vol 13 No 2
June 2007

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

Third-party planning rights win in Albany

Kim Stanton, South Coast Progress Association and Cameron Poustie, EDO Principal Solicitor

Community involvement in planning decisions has been given rare recognition after the City of Albany decided by just one vote on 20 March 2007 to include third-party planning appeal rights in its proposed draft Community Planning Scheme (CPS). That proposal contemplates not just the retention of the existing planning rights that exist in part of the City, but the expansion of those rights across the whole of the City's boundaries.

The EDO assisted the South Coast Progress Association in pushing for this important decision, which will need more community effort in coming months in order to ensure that it is ultimately approved by the Planning Minister in those terms.

In the late 1970s The Albany Shire Council passed its Town Planning Scheme (TPS) No3, in order to deal with new planning issues in the growing Shire district. Issues such as non-conforming uses were dealt with differently from TPS-1, then in place for the Town of Albany, a separate local government area. Most importantly, the Shire's TPS-3 also differed from the Town's TPS-1 by giving any "person aggrieved" by a decision of Council the right to appeal under the Town Planning and Development Act. Previously, this appeal right was extended to the applicant for planning approval only in the Town's TPS-1(which was the much more common approach for other local governments at the time, and we understand that currently in all other local government areas only the appplicant has a voice of appeal).

Albany's Lake Seppings and Middleton Beach, seen from Mt Clarence.
(photo with permission of Steve McKiernan)

When State planning laws were changed with the introduction of the *Planning and Development Act 2005*, the State Government refused to introduce third-party planning rights across the State, even though a similar right then existed in every other Australian State and Territory except NT (which introduced it in September 2005). It should be noted that the new planning Act did not extinguish existing third-party rights.

The amalgamation of the Shire and Town into the City of Albany, on 1 July 1998 gave Albany a single local government, but to this day the City administers two schemes – namely, the old Town scheme (now called TPS-1A) & the old Shire TPS-3.

Even the continuing existence of the current third-party appeal right has been contentious in Albany in recent years. In January 2001 the City passed a motion to remove the right in the old Shire TPS-3 area, and it took until September that year to reverse the decision. Indeed, the September 2001 decision was that such a right should be extended to all Albany residents, but the move was stopped by Planning Minister Alannah MacTiernan.

How the Minister ultimately handles the issue in 2007 depends to a large extent on the response of Albany residents to the draft CPS. The draft will be advertised publicly in the coming months, and it will be up to residents – especially those in the current Town area – to strongly push for a voice in planning matters that is considered equal to that of developers. The proposed CPS must ultimately go to Minister MacTiernan, and Albany must ensure that when it happens the Minister feels politically obliged to do the bidding of the ratepayers.

contents

Suite 4, 544 Hay Sreet, Perth 6000
Tel (08) 9221 3030 • Fax (08) 9221 3070 • FREECALL 1800 175 542 • edowa@edowa.org.au • www.edowa.org.au

Busselton wetland gains yet another reprieve

Nicola Rivers, EDO Solicitor
and Martin Pritchard, Chair, Busselton Dunsborough Environment Centre

The Busselton Dunsborough Environment Centre (BDEC) with the help of the EDO has been working hard to ensure that environmental considerations for a local project are properly dealt with by the Government.

In the 1980s the Shire of Busselton decided to investigate building a crossing over the Vasse estuary along the alignment of Ford Rd, an unmade road in Busselton. The Ford Road alignment is the western boundary of the Ramsar listed Vasse-Wonnerup wetlands. The road reserve, and the desire of some in the Shire to build a crossing along it, was a likely reason for the boundary finishing at its current western most location, as the wetlands continue westward into the town of Busselton. BDEC's main concerns with the proposal were the impact on waterbirds, changes to water flow, and water quality problems through run-off of oil and chemicals.

The EDO has helped buy time for Busselton's wetlands.

The proposal was assessed by the EPA under the environmental impact provisions of the *Environment Protection Act* (EP Act) and was rejected on three separate occasions. Under the Environment Protection Act, the Minister for the Environment must consult with the relevant decision-making authority before making a final decision. In this case the Shire of Busselton was both the proponent and the primary decision-maker. If the Minister and the primary decision-maker are unable to agree on whether the proposal should or shouldn't be implemented, the Minister must set up an appeals committee to look at the proposal and make a recommendation. When this occurs, the Minister must follow the advice of the committee.

In 2001 an appeals committee was appointed by then-Minister Judy Edwards. In July 2002 the committee advised the Minister to approve the development of the road through the wetland, subject to a number of conditions.

An appeals committee must not give advice to the Minister that conflicts with any approved policy or standard under the EP Act, including environment protection policies. A close review by the EDO of the decision revealed that the committee's advice was inconsistent with the *Swan Coastal Plain Lakes Environment Protection Policy (Lakes Policy)*. The EDO raised these concerns with the Minister's office on behalf of BDEC. In 2006 the EDO was advised that the Minister's office agreed that the Lakes Policy was not properly dealt with, and the Minister had therefore recalled the appeals committee to make a fresh decision.

Later in 2006 BDEC expressed concern that one of the members of the appeals committee was the CEO of the Shire of Busselton at the time the road realignment was proposed by the Shire. BDEC was concerned that that this member could be biased, due to his previous position. These concerns increased when it was revealed that the member was running for election as a Shire councillor in 2007.

The appeals committee and the Minister, like all government decision-makers, are bound by the rules of decision-making that have been set down over many years though a branch of law called administrative law. One such rule is that decision-makers cannot be biased in their decision-making. The test for bias is that an informed member of the public would have a reasonable apprehension or suspicion of a lack of impartiality on the part of the decision-maker. Therefore the decision-maker does not have to actually be biased for this rule to apply; rather, if there is a reasonable apprehension that they could be biased, they should not be allowed to make the decision. BDEC was not alleging that the member would necessarily make a biased decision, but rather that the community could reasonably be concerned that such a person could have a lack of impartiality.

The EDO raised this issue with the appeals convenor on behalf of BDEC and was later informed that the member in question had resigned from the committee. BDEC is now awaiting a fresh decision from a new committee. The proposal was also deemed a "controlled action" in 2005 under the Federal *Environment Protection and Biodiversity Conservation Act*, and BDEC is awaiting further information from the Department of Environment and Water Resources.

Government advisory group supports container deposits

By Toby Nisbet, EDO volunteer lawyer

In January 2007 the Stakeholder Advisory Group on Best Practice Container Deposit Systems for Western Australia, chaired by John Hyde MLA, submitted its final report to the Minister for Environment.

A container deposit system means that when customers purchase (for example) cans of soft drink, they can return the cans for recycling and redeem a small deposit. The deposit is generally included in the purchase price of the container. Such a scheme has been running in South Australia for more than 30 years.

WA has one of the worst rates of container recycling in Australia, and the advisory group expects that WA's recycling rate would at least double under a container deposit system. It found that there were many likely advantages of a deposit system, and proposed how it should or could operate.

Some of the advantages identified were:

- increased recycling (particularly of goods consumed away from home in urban areas, and recycling generally in rural and remote areas)
- generating investment in WA through increased demand for recycling facilities and services
- creation of recycling drop-off points that could easily be expanded for recycling other recyclables
- a significant reduction in litter in public places.

The advisory group proposed a deposit between 10 and 20 cents, and a combination of three different methods to handle the return of containers:

1. return to point of sale (particularly useful in rural and remote areas)
2. a depot system, and/or
3. automated systems such as "Reverse Vending Machines" (RVMs).

The group recommended point-of-sale returns for rural and remote areas, and a combination of depot systems and RVMs for built-up areas.

Further proposals included creating an unredeemed deposit fund for use in community awareness/education campaigns; a government-regulated system administered partly by government and partly by an independent board with stakeholder board members (such as producers and local government representatives); the system applying to as wide a range of material as possible; and encouraging producers to use recycled and recyclable material.

It is now up to the Government to seize on these recommendations and develop container deposit legislation to support a scheme. The beverage industry has strongly opposed a scheme, despite the benefits shown in South Australia and around the world. If this scheme is to be introduced in WA, the community will need to show strong support.

For more information and to register your support with Government for a container deposit scheme go to www.bringitback.org.au

The full advisory group report can be downloaded from www.zerowastewa.com.au/ourwork/specificprograms/

Revised Aquaculture factsheet

The EDO's Aquaculture factsheet has been updated. Check it out at http://factsheets.edowa.org.au/pdf/cma_aquaculture.pdf

Yarragadee saved!

Steven McKiernan, Water Policy Officer, Conservation Council of WA

An amazing coalition of people has triumphed over the Water Corporation's plans to tap the Yarragadee Aquifer near Nannup. For more than four years communities in the South West have engaged with Water and Rivers Commission, Department of Water and Water Corporation staff over plans to suck 45 million tonnes of water from the South West and send it to Perth.

Despite a concerted media campaign to placate, diminish and later lambast the legitimate concerns of South West locals, the State Government has decided to listen to the community campaigners, local governments, farmers, irrigators, local politicians of all flavours, distinguished scientific advice from academia (and from those within the bureaucracy) to shelve the Water Corporation's plans.

Premier Carpenter decided that the risks associated with climate change and diminishing rainfall in the South West represented too great a risk for the future of WA's public water supply, and the Yarragadee proposal would jeopardise the environmental health of the South West.

The Government has decided to proceed with a large-scale reverse osmosis desalination plant in the Binningup area to the north of Bunbury, claiming "that while the South-West Yarragadee aquifer had effectively received environmental approval, it remained a source that was still reliant on climate and rainfall....We can no longer rely on traditional, seasonal climate patterns and rainfall," the Premier said. "Seawater desalination is clearly the best long-term feasible and practical option for our State, along with more water recycling initiatives."

The Conservation Council applauds the long years of hard work made by community activists that have gone into opposing the South West Yarragadee proposal. The broad-based coalition united sometimes opposing sectors of the community, and focused attention on the environmental, social and economic characteristics of the South West of the State.

The South West of Western Australia remains a biologically diverse hotspot that faces immense pressure due to climate change and human development. Are we to see the united community fight for environmental values against one large proposal, only to see those same environmental values diminished by numerous applications to increase the take of water from the Yarragadee aquifer on a smaller and less transparent basis?

The large amount of public money expended on 'proving up" the sustainability of Yarragadee should not be wasted. More research and resources are required to manage the environmental values of the Swan and Scott Coastal Plains, and the Blackwood Plateau, as we struggle with the climate change induced decline in rainfall.

The Conservation Council is now seeking that the Water Corporation's application for a water licence be rejected under the Rights in Water and Irrigation Act.

Time now to sit back for a while, regroup and rejoice in a campaign win. It doesn't happen nearly enough.

The Lobbyists Register: should you be on it?

Michael Bennett, EDO Management Committee member

Following revelations at Corruption and Crime Commission proceedings concerning the influence of lobbyists Brian Burke and Julian Grill, the Carpenter Government announced that Western Australia would become the first State in Australia to introduce a Register of Political Lobbyists. This Register came into effect on 16 April 2007.

What is the Register?

The Register is a publicly accessible document, available online at https://secure.dpc.wa.gov.au/lobbyistsregister It contains details including:

- the names of clients for whom the lobbyist is currently providing paid or unpaid services as a lobbyist, and
- names of clients for whom the lobbyist has provided paid or unpaid services as a lobbyist during the previous three months (minimum).

What is the legal basis for the Register?

Rather than being created by legislation, the Register has its legal basis in a "Contact with Lobbyists Code" and requirements for public sector bodies to comply with that Code. The Contact with Lobbyists Code provides that "Government representatives" must not permit lobbying by a lobbyist who is:

- not on the Register of Lobbyists, or
- has failed to disclose that they are a registered lobbyist and advise who they are working for.

"Government representative" is defined in the Contact with Lobbyists Code as "a Minister, Parliamentary Secretary, Ministerial Staff Member or person employed, contracted or engaged by a public sector agency." The independent Commissioner for Public Sector Standards is able to monitor and report on compliance with agencies' Codes of Conduct, pursuant to the *Public Sector Management Act 1994*.

What are lobbyists required to do?

Apart from the requirement to register, the Contact with Lobbyists Code also requires lobbyists to observe particular principles when engaging with Government representatives, which include the following:

- lobbyists shall not engage in any conduct that is corrupt, dishonest or illegal, or cause or threaten any detriment, and
- lobbyists shall use all reasonable endeavours to satisfy themselves of the truth and accuracy of all statements and information provided to parties whom they represent, the wider public, governments and agencies.

The Code provides that if a lobbyist fails to observe these principles, the Director General of the Department of the Premier and Cabinet may remove them from the Register.

➤ *continued next page*

The Lobbyists Register: should you be on it?

from previous page

Who should register?

Only people who fall within the definition of "Lobbyist" in the Contact with Lobbyists Code need register. That definition is as follows:

"Lobbyist" means a person, body corporate, unincorporated association, partnership or firm whose business includes being contracted or engaged to represent the interests of a third party to a Government representative. "Lobbyist" does not include:

(a) an association or organisation constituted to represent the interests of its members

(b) a religious or charitable organisation, or

(c) an entity or person whose business is a recognised technical or professional occupation which, as part of the services provided to third parties in the course of that occupation, represents the views of the third party who has engaged it to provide their technical or professional services.

True environmental groups will not fall within this definition for two reasons: first, because they are not "contracted or engaged to represent the interests of a third party"; and second, because they are "an association or organisation constituted to represent the interests of its members".

However, so-called "astroturf" groups, which purport to be running a grassroots campaign but in fact have been created to lobby on behalf of a particular developer, may fall within the definition of "lobbyist" and be required to register if they wish to deal with a government agency.

The future of the Register

When the Premier announced in November 2006 the Government's intention to create a Lobbyists Register, he indicated that "the register will be reviewed after 12 months by a Parliamentary committee to determine whether changes or legislation are required."

When the Register is reviewed, consideration should be given to establishing legislation to establish a more comprehensive, robust system that:

- covers contact with all public officials, including non-government Members of Parliament
- covers all paid lobbyists, rather than just consultant lobbyists
- imposes penalties on lobbyists for failing to register or for breaching a code of conduct, and
- establishes an independent body to police compliance by lobbyists with the registration and code of conduct requirements.

A model along these lines has been operating in Canada for more than a decade under its Lobbyists Registration Act.

Conclusion

The creation of a Lobbyists Register is a step forward in promoting greater transparency in the activities of paid lobbyists in Western Australia. However, a stronger system of broader application should be considered when the system is reviewed early next year. Legislation that covers all paid lobbyists may impose some administrative burden on paid environmental campaigners who would have to place their names on the register, but this would be a small price to pay for more robust and comprehensive oversight of lobbyists' activities.

Further reading

Website of the WA Lobbyists Register: https://secure.dpc.wa.gov.au/lobbyistsregister/

Website of the Canadian Office of the Registrar of Lobbyists: http://www.orl-bdl.gc.ca/epic/site/lobbyist-lobbyiste.nsf/en/Home

Remote, rural and regional news

Nicola Rivers, EDO's RRR solicitor

Nicola lays down the law to workshop participants at Port Hedland.

In May I set out for my most northerly trip so far as the EDO's RRR solicitor – to Port Hedland. The Care for Hedland Environmental Association invited me to speak to the local community on environment issues. Care for Hedland was established just over four years ago to look at environmental and sustainability issues in Hedland and the Pilbara. The group is involved in a number of local activities such as submission writing, beach cleanups, tree planting and weeding activities. It also runs a very successful volunteer Flatback turtle-monitoring program, which this past nesting season attracted 120 volunteers.

The environment in and around Port Hedland is under pressure from the mining boom and the associated need for accommodation for workers. Environmental concerns include contaminated site cleanup and emissions from the port. One of the issues that Care for Hedland is keeping a close eye on is the Pretty Pool housing development, where originally up to 365 residential dwellings were planned. The beachfront directly adjacent to the development is a prime nesting site for the protected Flatback turtle. The turtles are easily disturbed during the nesting season by light and human interference, both of which will increase with the housing development. Hatchlings can be disorientated by light from housing as they mistakenly believe it to be the horizon and move inland towards the light, rather than out to sea.

➤ *continued on page 11*

Major State water reform program is under way

Rosie Phillips, EDO volunteer

Western Australia is currently engaged in a process of large-scale reform of water management. On 6 April 2006, WA signed the National Water Initiative, Australia's blueprint for national water reform, giving greater impetus to the reform process. Subsequently, the State Government commissioned the Water Reform Implementation Committee to advise on progressing water reform in WA.

On 27 February the State Government released the committee's final report, *A Blueprint for Water Reform in WA, Final Advice to the West Australian Government* ("Blueprint") and the State Government's response. On the same day, it also released WA's *Draft Implementation Plan for the National Water Initiative*, which sets out how water reform will be implemented in WA and the key timeframes.

The Blueprint

The Blueprint contains 72 recommendations, most of which were accepted by the State Government. The key proposals include:

1. Introduction of statutory water management plans

The plans will set out water entitlements, water access rules and other information relating to the relevant region's water resources. The statutory water management plans will be legally binding and cannot be appealed once they are completed. They will be reviewed at least once every ten years.

2. Implementation of a new water entitlement system

A new water entitlement system will be implemented, consisting of three co-existing forms of water entitlement:

- basic domestic, livestock and riparian rights defined by common law and statute
- water licences, which permit a certain volume of water to be taken for a specific purpose for a specific period of time, and
- water access entitlements, which are entitlements to a share of the "consumptive pool" in a given water system. The consumptive pool is the amount of water resource that can be made available for consumptive use.

Water access entitlements will be established by statutory water management plans. In an area where a statutory water management plan has not been implemented, or where the characteristics of the water system preclude the establishment of a consumptive pool, the current water licensing system will remain in place.

Water access entitlements will be registered on a Torrens-style register and will be freely tradeable, subject to the statutory water management plans. It will not be necessary to have legal access to land to hold a water access entitlement, as there will be separate titles for land and water.

The number of kilolitres allocated to each share will be announced seasonally, annually or as necessary and will depend upon the amount of water available in the relevant water system.

3. More extensive water metering

More extensive water metering will be implemented to improve efficiency of water use and to collect accurate data. Metering will be required for existing allocations above 50 million litres per year and where new water allocations are issued.

Statutory water management plans may also require metering for existing allocations less than 50 million litres per year.

4. Introduction of licence administration fees and water resource management fees

A licence administration fee will be imposed from July 2007. It is also likely that water resource management fees will be introduced.

5. Investing in water use efficiency

The Government will support a range of programs to encourage water efficient practices and behaviour, including subsidies, market mechanisms and appropriate price settings.

WA's Draft Implementation Plan for the National Water Initiative

The Draft Implementation Plan sets out how the National Water Initiative will be implemented in WA and the key timeframes. It draws upon previous consultation undertaken in developing the Blueprint and other documents comprising WA's water reform program. The final Implementation Plan is due shortly.

Most of the programs required to implement WA's obligations under the National Water Initiative will be developed in the next two years, including a register for water access entitlements, metering systems, and a water trading register.

Significant legislative reform is required to implement the water reforms. WA's water legislation is currently under review, and new water resources legislation is scheduled for introduction into Parliament early in 2008.

For more information on the water reform program in WA, go to http://water.wa.gov.au

Note that the State Water Plan, which among other things will guide the development of the proposed statutory water management plans, was released on 8 May 2007.

To see the EDO's 2 May 2007 submission in response to the draft report on the proposed *Water Resources Management Bill*, visit www.edowa.org.au

Community implications of the Contaminated Sites Act

Melissa Lui Yuen, EDO volunteer

In the December 2006 EDOnews we outlined the operation of the *Contaminated Sites Act 2003* (WA). This new legislation imposes a duty to report on occupiers, landowners and people who know or suspect they have caused or contributed to the contamination. General community members who know or suspect a site is contaminated may also report on a voluntary basis.

Mandatory reporting: grace period coming to an end

When the Act came into force on 1 December 2006, an initial six-month grace period for mandatory reporting was given, to allow owners time to report all affected sites. This came to an end on 31 May, and from 1 June the statutory time limits apply. Effectively, the report must now be made within 21 days after first becoming aware of the contamination.

Since 1 December there have been 355 new reports loaded onto the Department of Environment and Conservation's (DEC) contaminated sites database. However, the DEC has noted that a number of large companies are yet to report. The DEC was expecting a flood of reports after the 31 May deadline.

Non-mandatory reporting

The Act provides that any person may report known or suspected contamination to the DEC, on a voluntary basis. Unlike the obligation imposed on landowners and occupiers, there is no time frame for non-mandatory reporting. Rather, the requirement is that the report be made as soon as practicable.

Evidence of contamination

Not all industrial sites are contaminated. There should be reasonable grounds to suspect contamination before a voluntary report is made. Potential signs of contamination include abnormal colouring of soil, odours emanating from soil, inappropriate waste disposal on site or migration of chemicals or contaminants into adjacent rivers or wetlands.

It is an offence to report on vexatious or malicious grounds, with a maximum fine of $250,000. Members of the public should also be cautious not to make statements in their reports that are misleading or false, and should disclose all the information they know which is materially relevant. Failure to do so will incur a penalty. DEC has produced fact sheets and guidelines to assist the community in deciding when a voluntary report should be made.

Reporting formalities

The Act requires the report to be in the prescribed form, which can be found on the DEC website. It is very important to clearly identify which site or part of a site you think is contaminated. Sending in a marked-up copy of the relevant land title is preferred, but if you do not have access to the land title it is sufficient to clearly identify the site on a copy of a map from a street directory, and send it in with the form.

Protection for those who assist the DEC

The DEC must keep the identity of reporters confidential. Breach of this confidence incurs a $125,000 penalty. However, if the identity of a reporter is discovered it is an offence for the landowner or occupier or others to victimise, threaten or harass the person who made the report.

More information on the Act can be found in our contaminated sites factsheet at http://factsheets.edowa.org.au/pdf/pwm_contamsites.pdf

United States Supreme Court weighs in on climate change

Michelle Ng, EDO volunteer

The United States Supreme Court handed down an important climate change decision this April. In a five-to-four ruling the court decided that the State of Massachusetts (joined by environmental organisations, 11 other states and three major cities) had sufficient standing to litigate based on the causal connection between greenhouse gases and global warming. It was held that the Environmental Protection Authority could regulate on carbon dioxide as a "pollutant," that their discretion not to regulate was limited by the Clean Air Act, and that they had not provided a reasonable justification for not regulating.

Changes in the perception of climate change are evident in the ruling. Global warming is linked as a risk to public health and welfare. The decision of the court does not change the discretion of the EPA. It has been remitted back to them to decide the issue taking into consideration climate change and the effect it has on public welfare. If the EPA decides that the effect of carbon dioxide on climate change is insufficient to override other policy considerations, it can still refuse to regulate emissions. Nonetheless, the court ruling – that even if the harm is incremental it is not beneath the observation of regulatory authorities – is a shift in traditional views of causation.

It is less likely that Australian courts would grant standing on the connection between pollution and global warming. The Queensland case last year, *Wildlife Preservation Society of Queensland Proserpine / Whitsunday Branch Inc v Minister for the Environment & Heritage*, Justice Dowsett expressed that the "possibility that at some unspecified future time, protected matters in Australia will be adversely and significantly affected by climate change" was insufficient. The test about belonging to a class of persons specially affected in a climate change context could prove insurmountable. The courts are also reluctant to overturn any discretion by a Minister or public body which would appear on the surface to be reasonable. Australian courts may, however, find the interpretation of carbon dioxide as an "air-pollutant" to be persuasive.

Justice Steven's opening words, when delivering the US Supreme Court majority judgement, were: "A well-documented rise in global temperatures has coincided

➤ *continued page 11*

Queensland tribunal hands down first climate-change decision

Hayden Teo, EDO Volunteer

In *Re Xstrata Coal Queensland Pty Ltd & Ors*, the Queensland Land and Resources Tribunal has made its first ruling in a case relating to greenhouse gas (GHG) emissions.

A mining application was made by Xstrata under which it proposed to increase its mining operations at Suttor Creek. The Queensland Conservation Council Inc (QCC) was the principal objector, with Mackay Conservation Group Inc also objecting to the application. They alleged (among other things) that allowing the application would cause adverse environmental impact, prejudice the public right and interest, and fail to consider ecologically sustainable development (ESD) principles, unless conditions were imposed on the grant to avoid, reduce or offset 100% of GHG emissions likely to result from the mining, transport and use of the coal from the mine.

The objectors' case

QCC led evidence alleging that GHG emissions are significantly contributing to global warming and climate change, relying on the British Government's 2006 Stern Review on the Economics of Climate Change, and assessments by the Intergovernmental Panel on Climate Change. QCC submitted that in assessing Xstrata's application, the tribunal should have regard to ESD principles "to mitigate the serious environmental degradation caused by global warming."

The tribunal's decision

Ultimately, the tribunal was not satisfied that a necessary causal link was validly established by QCC between the mine's proposed GHG emissions and any discernable harm to the environment. The tribunal referred to the mine's expected annual output of CO_2, which would represent 0.001098% of global annual output, and accepted an expert assessment that this would make "no difference" to the rate of global warming. Moreover, the tribunal found that even if the mine's GHG emissions were eliminated entirely, QCC failed to show this would have any effect on climate change.

Finally, the tribunal held that allowing the objectors' claims had the potential to cause serious adverse economic and social impacts, and that in the absence of "universally applied policies for GHG reduction" requiring only this mine to reduce or limit its GHG emissions would be "arbitrary and unfair". As a result, the tribunal granted the mining application without any of the conditions sought by the objectors.

It should be noted that the tribunal distinguished this case from the recent decision in *Gray v The Minister for Planning & Ors*, on the basis that causation in Gray was not an issue (see the March issue of EDOnews). As a result, it seems that for the law to develop a step further from Gray, objectors must establish a clear causative link between the estimated amount of GHG emissions and "discernable harm to the environment". Unfortunately, the degree of harm required by the courts in order to be "discernable" remains uncertain.

For the full text of the decision, see http://www.austlii.edu.au/au/cases/qld/QLRT/2007/33.html

Yallingup residents challenge consultation

Cameron Poustie, Principal Solicitor and Melissa Lui-Yuen, EDO volunteer

The Yallingup Residents Association, representing residents in the locality, challenged the Shire of Busselton's decision to change the zoning of a township lot to "tourist". Under s7(2) of the *Town Planning and Development Act 1928*, the Shire is obliged to consult "such public authorities and persons as appear… likely to be affected" before bringing new town planning schemes into effect. The Association alleged that failure to meet this obligation rendered the rezoning invalid.

A key issue was whether the Shire had actually failed to comply. Johnson J's conclusion on the matter provides some useful clarification of community consultation rights in the planning regime.

What is community consultation?

It is the process of consulting communities or relevant individuals about decisions that may impact them. It is an important process helping to maintain transparency between local government and individuals, and achieving decisions targeted at satisfying the community's wants.

Ideally, consultation should not merely be a one-way linear process, but an "interactive" forum which itself informs decisions. What we see from this case is that the circumstances will largely dictate the degree of consultation that will be required. This is not necessarily easy to assess, and the notion of "interactive consultation" may not always be required by the law.

The extent of the obligation

It was argued that mere advertising notice of the scheme was sufficient to comply with s7(2), and anything more in the circumstances would be too onerous. The association countered that the term "consult" in s7(2aa) has a two-stage definition which requires the Shire to provide affected and adjacent landowners sufficient information to enable them to determine how their interests may be affected, and then to give them sufficient opportunity to make any submission in relation to the proposal.

Ultimately, Johnson J held that consultation should have directly involved owners of the rezoned land as well as adjoining landholders. However, the court was not willing to impose any greater a duty than to directly inform those individuals of the scheme changes in total, and ensure they had an opportunity to respond. This, the court said, was reasonable in the circumstances.

Johnson J was also unwilling to speculate as to how far this obligation to consult would extend in circumstances different from this case.

Effect of non-compliance

Though the outcome was a finding that residents had not been duly consulted, this did not invalidate the scheme.

➤ *continued next page*

Yallingup residents' challenge

from previous page

The court reiterated the point that when a statutory obligation has not been complied with, we must look to legislative intention in the context of the Act. In this case, Johnson J held that the Act could not have intended a scheme to be invalidated by failure to consult persons likely to be affected.

This finding will have significant consequences for the relationship between local government and the community. Community consultation rights may be undermined if local governments do not feel obliged to abide by those requirements to consult.

Certainly promoting public involvement in formulating local environment plans is of great importance. How to encourage local governments to effectively integrate this into their planning schemes is the ongoing challenge.

(*Yallingup Residents Association [Inc] v State Administrative Tribunal and others [2006]* WASC 162.)

Queensland legislates to ban nuclear facilities

Cameron Poustie, Principal Solicitor and Kelly Harmer, EDO volunteer

Queensland's State Government has recently introduced legislation prohibiting nuclear facilities throughout the State. The *Nuclear Facilities Prohibition Act 2007* (Qld) extends to both the construction and operation of a nuclear facility. The Act covers nuclear power stations, nuclear waste sites other than those which facilitate the disposal of waste for medical and research reasons, and uranium enrichment plants.

The purpose of the legislation is to protect the health, safety and wellbeing of Queensland residents. The Queensland Government was concerned that the State would become a site for several nuclear reactors. The recent Commonwealth-commissioned report on the future of nuclear energy in Australia heightened these concerns, as six locations in Queensland were nominated as potential sites for nuclear reactors.

Despite the potential role of nuclear energy in the reduction of greenhouse gas emissions, the Queensland Government believes clean coal technology and renewable energy sources will lead to a similar and quicker reduction in greenhouse gases. Given Queensland's access to a vast, long-term supply of coal and gas, the Queensland Mines and Energy Minister, Mr Geoff Wilson, believes this technology is a better option for Queensland and renders nuclear energy unnecessary for the State.

The legislation also considers the possibility of a Commonwealth Government attempting to override the new law, with provisions for Queenslanders to vote on the issue in a referendum if the Commonwealth Government ever indicated a desire to construct or operate a prohibited facility in the State. The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) prohibits the Commonwealth Environment Minister from approving an action involving the construction or operation of a nuclear fuel fabrication plant, a nuclear power plant, or a nuclear enrichment plant or reprocessing facility.

The Act is significant in the ongoing debate over the utility of nuclear energy in greenhouse gas reduction. It signals the Queensland Government's view that nuclear energy is not an answer to this environmental issue. However, with many proponents of the role of nuclear energy in Australia's future, the discussion over this issue will undoubtedly continue.

NSW State Environment Planning Policy 2007

Rosie Phillips, EDO Volunteer

On Friday 16 February 2007 the NSW State *Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* ("SEPP") was gazetted. The SEPP consolidates and updates many existing planning provisions relating to mining, petroleum production and extractive industries in New South Wales. Additionally, the SEPP requires that specified environmental factors, such as landuse compatibility, environmental management and resource recovery are taken into account during the assessment and determination of development proposals.

Requirement for development consent

The SEPP categorises developments for the purposes of mining, petroleum production and extractive industry based upon, amongst other things, whether or not development consent is required under Part 4 of the *Environmental Planning and Assessment Act 1979* (NSW) ("EP&A Act"). The SEPP sets out the following categories:

- developments which are permissible with development consent
- developments which are permissible without development consent
- prohibited developments
- exempt developments (neither development consent nor environmental assessment is required) and
- complying developments (development consent in the form of a complying development certificate is required).

The SEPP does not affect the operation of Part 3A of the EP&A, which requires the Minister's approval for major projects identified in the NSW State *Environmental Planning Policy (Major Projects) 2005*.

Consolidation of existing planning provisions

The SEPP consolidates existing planning provisions and gives greater consistency as to the circumstances in which development for the purposes of mining, petroleum production or extractive industry requires development consent under Part 4 of the EP&A Act. The SEPP applies to the whole of New South Wales and contains a clause which overrides the effect of certain provisions in local

➤ *continued next page*

EDO out and about

Fran Jones, Office Coordinator

The EDO both participated in and contributed to the 40th anniversary of the Conservation Council and 2007 Conservation Week.

We contributed to celebrating Conservation Week and raising environmental awareness by mounting a display at the State Library along with a range of other environment groups.

Nicola Rivers, Outreach Solicitor, attended the conference and met new people in the conservation movement, increasing her appreciation of the value of past conservation efforts in Western Australia and improving her awareness of contemporary WA conservation issues.

Cameron Poustie, Principal Solicitor, spoke about recent changes to the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) to a group of enthusiastic participants as part of the biodiversity field trip on the second day of the conference.

NSW Environment Planning Policy

from previous page

environmental plans relating to the permissibility of developments for the purposes of mining, petroleum production or extractive industry.

New matters for consideration

The SEPP introduces new matters that must be considered in determining whether development consent should be granted under Part 4 of the EP&A Act. In assessing an application for development consent for the purposes of mining, petroleum production or extractive industry, the consent authority must take into account the following factors:

- Existing and future land use compatibility
- Natural resource and environmental management (including consideration as to whether conditions should be imposed to ensure that the impact of the development on water resources, threatened species and biodiversity are avoided or minimised to the greatest extent possible)
- Greenhouse gas emissions (including downstream emissions) having regard to any applicable State or national policies, programs or guidelines concerning greenhouse gas emissions
- Resource recovery – the consent authority must consider the efficiency of the development in terms of resource recovery, and may refuse to grant consent if it is not satisfied that the development will be carried out in such a way as to optimise the efficiency of recovery of minerals, petroleum or extractive materials and to minimise the creation of waste in association with the extraction, recovery or processing of minerals, petroleum or extractive materials.
- Rehabilitation – the consent authority must consider whether conditions ensuring rehabilitation of land affected by the development should be imposed.

EDO law reform submissions during the 2006/07 year

The EDO keeps busy every year making recommendations to State and Federal governments about ways that environmental laws (or other laws affecting environment groups) could be improved. In most cases these submissions are made in response to invitations from government having regard to the value of suggestions we have made about other topics in the past.

In the 2006/07 year we made submissions on the following areas:

- proposed changes to the *Environmental Protection Act 1986* (August 2006)
- community consultation (August 2006)
- proposed *Waste Avoidance and Resource Recovery Bill* (November 2006)
- the *Biosecurity and Agriculture Management Bill* (February 2007)
- the review of the *Public Interest Disclosure Act 2003* (February 2007)
- proposed Planning Infringement Notice regulations (March 2007)
- the draft *Biodiversity Conservation Strategy* (March 2007)
- the draft paper on the proposed *Water Resources Management Bill* (May 2007)
- proposed changes to the *Associations Incorporation Act* (May 2007).

Most of these submissions are on our website at http://www.edowa.org.au/submissions/index.html Otherwise, email Cameron Poustie at cpoustie@edowa.org.au

Check out our new Waste Management factsheet

Our new waste management fact sheet is ready to go! Why not check it out, and browse some of the other topics we cover through factsheets, at http://www.edowa.org.au/factsheets.html

Our thanks to the Public Purposes Trust, whose Waste Management grant allowed us to do this and other waste management work in the 2006/07 financial year. Thanks also to the skilled volunteers who worked on this project, and in particular Paul Graham and Michelle Ng.

Public Purposes Trust

Remote, rural & regional news

from page 5

While in Port Hedland I presented sessions on environmental law and the new Contaminated Sites Act. Both presentations focused on how the community can use environmental laws to improve decision-making processes and protect the environment.

A big thank you to Kelly Howlett and Lisa for looking after me in Port Hedland.

Earlier in the year I visited Busselton and presented sessions on defamation and the changes to the federal Environment Protection and Biodiversity Conservation Act, in conjunction with the Busselton Dunsborough Environment Centre. The changes to the EPBC Act are significant and will impact on a number of EIA assessments in WA.

Presentations from both visits are available on our website.

We are now developing our program of remote, rural and regional visits for the coming financial year, which will tie in with our law reform focus for the year – "Climate change and energy". If you would like the EDO to speak to your community about climate change and energy, or indeed any environmental law topic, let us know.

US Supreme Court weighs in on climate change

from page 7

with a significant increase in the concentration of carbon dioxide in the atmosphere." The significance of this case therefore can't be underestimated. An inherently conservative institution has delivered this verdict. All political parties are now talking about climate change. Business groups have been calling for a stance to be made on the issue. This has now become a populist debate. It remains to be seen what part the Australian courts have to play in addressing the issue.

(from Greenlaw, *the EDO SA newsletter, April 2007)*

South Australian climate-change Bill debated

Opposition and independents propose setting of an interim emission reduction target

The South Australian Government's *Climate Change and Greenhouse Emissions Reduction Bill 2006* is now undergoing debate in the State's Parliament. The Bill passed through the Legislative Council on 29 March 2007, with several amendments, the most important of which was the setting of an interim target.

The Bill has been widely criticised for failing to include compulsory emission reduction targets and is largely aspirational. Its principal target seeks a reduction by 31 December 2050 of at least 60%, to an amount that is equal to or less than 40% of 1990 levels. During the course of the debate it emerged that the Government's target could allow for an increase in greenhouse gas emissions in the next two decades.

In the Upper House the Liberal opposition combined with independents to vote in favour of setting an interim target which seeks a reduction by 31 December 2020 of at least 20%, to an amount that is equal to or less than 80% of 1990 levels. Whilst still a voluntary target it is clearly more useful than the Government's principal target, given the widespread view that we have just 10-15 years to act in relation to the dangers of climate change.

The Bill also sets a related target – namely, to increase by 31 December 2014 the proportion of renewable electricity generated and consumed such that it comprises at least 20% of the total amount of electricity generated and consumed in South Australia.

The Bill is likely to be reconsidered in the next few months.

In case you'd forgotten, we've moved ... across the road

Cameron Poustie, Principal Solicitor

After five enjoyable years in the Kings building on Hay Street, we recently moved across the road into the arguably more-appropriately named Woods Building (Suite 4, 544 Hay St). The new premises are smaller but cheaper, which frees up resources to maintain our paid staffing levels.

Our heartfelt thanks go to LotteryWest, who have supported the move with funding that has included new painting, carpets and air-conditioning (the existing system was very old and inefficient). LotteryWest has also extended funds for new computers for the office, which we will be purchasing in the near future.

The EDO thanks the following sponsors for their support:

Core funding for the EDO WA (Inc) is provided by the State and Commonwealth Attorney General Departments.

If undelivered please return to:

Environmental Defender's Office WA (Inc)
Suite 4
544 Hay Street
Perth WA 6000

Print Post approved
PP602669/00208

SURFACE MAIL

POSTAGE PAID AUSTRALIA

MEMBERSHIP* Please return to EDO, Suite 4, 544 Hay St, Perth WA 6000

Title ..... First name ..... Surname .....

Postal address ..... Postcode .....

Tel ..... Mob ..... Email .....@.....

PAYMENT

➤ ☐ Enclosed is my cheque/money order for $..... (including $ ..... donation)

– OR

➤ ☐ Please debit my credit card the amount of $..... (including $ ..... donation)

Card Number ☐☐☐☐ ☐☐☐☐ ☐☐☐☐ ☐☐☐☐

Name on Card ..... Expiry ☐☐ ☐☐

➤ ☐ **Please renew my subscription annually, using the above credit card details.** (Leave blank if you do not wish to use this facility)

Date ☐☐ ☐☐ ☐☐ Signature .....

MEMBERSHIP FEES (please circle one)

$15 Unwaged or concession
$40 Waged, household, or non-profit group
$110 Corporate

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

Office use only: R#..... Date rec'd ..... Expiry date..... Email bulletin..... QB.....