EDO AGM coming up - 11

edonews

Vol 13 No 3
September 2007

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

The latest on climate change law: EDO 07-08 strategic focus

Nicola Rivers, EDO solicitor

It's almost impossible to keep up with the myriad greenhouse initiatives being announced by the Federal and State governments, and even more difficult to determine which ones are really beneficial and which are just window dressing. For those who have fallen behind lately, here is a wrap up.

Federal policy

The Federal Government released its greenhouse policy in July this year, appropriately titled *Australia's Climate Change Policy*. The policy reiterates previous government announcements and current programs. The key points are: an aspirational (ie non-binding) target for greenhouse emissions will be set in 2008; the primary tool for emissions reduction will be a Commonwealth emissions trading scheme introduced no later than 2012; investment in "low emission technologies" such as renewables, geosequestration (injecting carbon underground) and nuclear power will continue; and there will be an increasing focus on how Australia will adapt to the impacts of global warming.

The objectives underpinning the policy are that Australia will remain a major supplier of energy and resources to international markets, and that the Government will only undertake emission reduction activities that result in the least economic cost, and are commensurate with international measures, to avoid negatively affecting our economy.

Nuclear program

It should also be noted that the Federal Government is actively working towards establishing nuclear power in Australia. A media release from the Prime Minister in April announced that the Government was implementing a strategy for the development of nuclear power in Australia. The Government is repealing current legislation that prevents nuclear power in Australia (see page 6), developing a legal regime to regulate the nuclear power industry, identifying what training is needed to ensure there are people to work in the nuclear energy industry, and investing in research and development for the next generation of nuclear power stations. A progress report is expected in Cabinet in mid-September.

Mandatory emissions reporting legislation

In August the Federal Government finally introduced legislation which will set up a mandatory emissions and energy reporting scheme and will apply nationally. Companies which emit more than 125,000 tonnes of CO_2, or produce or use 500 terajoules of energy per year, will be required to report their greenhouse emissions and energy consumption for themselves and all their related companies. The threshold will reduce each year for the following two years, to include lower emitters. The reports will be publicly available via the internet, unless a company's results are deemed to be commercial in confidence. The scheme is set to begin on 1 July 2008.

State policy

The State Government released its greenhouse policy in May – *The Premier's Climate Change Action Statement*. The State Government has announced an aspirational goal of a reduction of greenhouse emissions of 60% of 2000 levels by 2050. It has also identified aspirational targets for 'cleaner energy' and renewable energy for the southwest of the State. The Government reaffirms its commitment to join a national emissions trading scheme, preferably led by the Federal Government. Two important initiatives in the policy are a mandatory energy efficiency program for large and medium power companies; and new energy and water efficiency standards for new homes to a "5-star plus" standard. Note though that these initiatives are still just policy announcements – laws have not yet been passed. The Government's intention is to introduce the "Climate Change Bill" in 2008 to give legal effect to some of these initiatives.

➤ *continued page 11*

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

Defending those who defend the public interest

Christal George, EDO volunteer intern

Defending the public interest has always been a nebulous concept, because what will be in the public interest is determined on a case-by-case basis and by looking at the context. The environment is often said to be a public interest matter, as it does not belong to some of us but to all of us.

Many legal cases have been brought by groups in the name of defending the environment in the public interest, and many of those have been supported by EDOs across Australia. One example is the Anvil Hill Coal case, where local group Rising Tide challenged a large coal mining company on its greenhouse gas emissions statement. In Far North Queensland, local group Wildlife Whitsunday challenged coal mining in the Bowen Basin, arguing that CO_2 emissions would have a significant impact on the Great Barrier Reef when the coal was burned in power stations. The Australian Conservation Foundation challenged the renewal of licenses to operate Australia's

oldest coal fired power station, in Victoria. All these cases were public interest environmental law cases, and attempted to stop activities harmful to the environment and to future generations. But public interest litigation is not a silver bullet, and a wide range of strategies are needed to engage the public and create better outcomes for the environment.

The media is usually the first point of reference for the public in finding out about public interest environmental issues and unfortunately we live in a democracy where we are media poor – in WA for example there is one daily newspaper, which for many people may be their primary source of information. A diversity of news sources is an essential start if the general public are to engage in democracy:

> *The idea of democracy is that people are encouraged to express their criticisms…of elected governmental institutions in the expectation that this process will improve the quality of government. The fact that the institutions are democratically elected is supposed to mean that, through a process of political debate and decision, the citizens in a community govern themselves.*
>
> – Chief Justice Gleeson, *Council of the Shire of Ballina v Ringland*

In an environmental context the expression of criticism in the expectation of improving the quality of government is speaking out on issues such as climate change, dryland salinity, habitat and species protection, and waste.

It is often left to agitators and activists who go beyond this first stage of reading about public issues, to investigation and action. Investigation often leads to a whole range of actions – including public interest litigation – and also letter writing to key players, production of leaflets and websites, awareness raising events, stalls, lobbying decision makers, and civil disobedience. Justice Lionel Murphy in 1986 said:

> *If he is an agitator, he is in good company. Many of the great religious and political figures of history have been agitators, and human progress owes much to the efforts of these and many who are unknown.*

Justice Murphy was deciding a matter involving a Queensland Aboriginal man, Mr Percy Neal, and the prosecution had proposed he should receive a harsher punishment because he was a known activist!

There is a long proud history of civil disobedience worldwide. Australia can share in some of that history– roadblocks, sit-ins and demonstrations during the Vietnam war; women marchers at Anzac Day Parade at the National War Memorial protesting the rape of women in wartime; flag burning to protest the Indonesian military occupation of East Timor; mass arrests at the proposed Jabiluka uranium mine in Kakadu National Park; painting 'No War' on the Sydney Opera House to protest Australia joining with the US to invade Iraq; installing solar panels on the roof of the Prime Ministers' residence; and there have been countless non-violent direct actions (NVDAs) to prevent the clearfelling and "selective logging" of Australia's native forests.

Galvanising public support and prompting law reform, many of these examples of civil disobedience have resulted in the application of the criminal law for the individuals involved. Often activists plead guilty to these charges simply because of the time and money involved in defending them. Charges such as trespass, obstruction, disorderly conduct, hindering arrest and assault are all common charges laid against activists.

In the court work we've done to date we greatly appreciate the pro bono support we receive from lawyers such as Steve Walker, Peter Rattigan and Hylton Quail, and we look forward to expanding that pool of people keen to take on public-interest criminal work. Later this year, look out for the launch of the EDOWA handbook on criminal laws and conducting NVDA, which volunteer law student Kevin Sneddon has spent many hours working on so far, and which we have recently partnered with the Youth Legal Service to finalise.

Protecting the environment will continue through people taking action – in the courts, in the streets, and in the media. Activists will continue to engage with government, corporations and a disaffected public on public interest issues such as forest protection, nuclear waste and reduction of greenhouse gas emissions. The EDOWA is proud to assist where it can in defending the rights of activists and agitators who are protecting the environment.

Elwood chips off some EP Act question marks

Cameron Poustie, EDO principal solicitor

Re Minister for the Environment; Ex Parte Elwood [2007] WASCA 137 related to a quarry in Herne Hill which is now operated by Hanson Construction Materials. A Public Environmental Review (PER) document included a commitment that the operations of the proposed new quarry would not be visible outside Hanson's property once screening bunds and vegetation were established.

The then Environment Minister approved the quarry in 1991, subject to various conditions, including the need to fulfil the above commitment. The quarry was ultimately constructed in a way that was visible from the neighbouring land belonging to Mr Elwood, who commenced Supreme Court litigation. Much of the court's judgment related to the specific facts of the case, which were too complex to deal with here, but in the course of the judgment a number of important areas of law are confirmed and in some cases discussed for the first time at the Supreme Court level.

How does section 45C of the Environmental Protection Act work?

Section 45C of the EP Act provides that a proposal can be changed after implementation conditions for it have been issued, and without the need for further environmental assessment, provided that the changes do not have "a significant detrimental effect on the environment in addition to, or different from, the effect of the original proposal".

Justice Buss (the key judgment in the Court of Appeal) went into some depth about the approach the Minister should adopt under section 45C, but for now it suffices to outline the following key findings:

- the EP Act does not actually prohibit the implementation of proposals that have not been referred to the EPA
- the EP Act operates in relation to a proposal until the proposal has been fully implemented
- in view of the above, the Minister can use section 45C even when the proponent has already commenced making the changes that are now the subject of the section 45C application
- the Minister should compare the effect on the environment which the relevant changes might have, with the effect on the environment the original proposal has had or will have, given how the original proposal was in fact implemented (as distinct from how the original proposal was supposed to be implemented).

What is a 'proposal' under the EP Act?

Buss JA noted that it will often be necessary to determine the content of a proposal, including:

- to consider whether that proposal has previously been referred to the Environmental Protection Authority, because if it has the proposal cannot be referred again
- to determine whether something done is in purported implementation of an existing proposal, or is in fact a new proposal (see further below).

His Honour made a number of key observations about the concept of a "proposal" under the EP Act, including that:

- assessment documents such as PERs are part of the assessments of proposals but do not define the content of those proposals, and
- similarly, implementation conditions regulate proposals but do not themselves define the content of those proposals.

Frustratingly, however, Buss JA did not go on to clarify exactly how the content of a proposal might be defined, although his Honour was clear that implementation conditions should generally be taken into account in determining the scope of the original proposal.

When does a supposedly revised proposal actually include a new proposal?

A risk for proponents, which the Elwood case does not directly address, is that activities not strictly in compliance with implementation conditions can potentially be treated by the courts as a new proposal. That may at first seem like it releases proponents from the obligations of complying with their implementation conditions; in fact the risk for proponents in such a result is that the actions said to be the new proposal may well then not be subject to the normal defences available under the Act.

➤ *continued page 11*

Arcadia on trial

Christal George, EDO volunteer

Arcadia forms part of the network of southern WA forests and in 2006 it was discovered by government scientists to contain habitat of the extremely rare mainland quokka. Since then forest campaigners ramped up the campaign to protect this creature's habitat and have undertaken a wide range of activities – including some civil disobedience – to draw attention to the issue.

EDOWA is currently handling two public interest criminal matters relating to Arcadia.

One client has pleaded not guilty to a charge of obstruction of a police officer, and one charge of disorderly conduct in relation to a peaceful protest in Arcadia forest in 2006. The matter has been part heard and is next set down for 13 September at Collie Magistrates Court.

Mr David Rastrick is facing one charge of trespass and one charge of obstruction of a police officer, also in relation to a peaceful protest in Arcadia forest in 2006. This matter will be heard in February 2008.

The EDO would like to give BIG thanks to pro bono lawyers Steven Walker and Peter Rattigan for time, experience and professionalism in defending these matters. Thanks also to high profile criminal lawyer Hylton Quail for his phone advice on these and other criminal law-related areas.

Anvil Hill case heads to the Federal Court

Rahima Bannerman, EDO volunteer

On 21-22 August the proposed open cut mine at Anvil Hill in the Upper Hunter Region of NSW was again the subject of litigation, this time in the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977*. The Anvil Hill Project Watch Association Inc is challenging the Minister's decision, which found that that the project is not a "controlled action" under the *Environment Protection and Biodiversity Conservation Act 1999* and therefore could proceed. In 2006 the project was successfully challenged at State level in *Gray v Minister for Planning & Ors* [2006] NSWLEC 720 on the basis that it did not adequately comply with that State's environment assessment requirements.

As the project also required approval under the EPBC Act, Centennial Hunter referred the project to the Federal Minister for environmental assessment and approval. Under Section 75 the Minister must decide if the proposal is a "controlled action" by reference to all significant adverse impacts the action may have on a finite list of matters of national environmental significance (MNES). If the action or proposal is found not to be "controlled" by part 3 it can proceed without the need for a formal environmental assessment process.

Centennial Hunter's referral to the Minister acknowledged the existence of MNES, which included threatened species and endangered ecological communities in the project area. It also addressed the issue of greenhouse gas emissions generated by third parties (the pivotal factor in Gray's case) but submitted that their proposed coal mine was not a "controlled action" as there was no likelihood that it would have a significant impact on MNES.

The Minister's delegate agreed with Centennial Hunter, finding that there would be no significant impact to two listed ecological communities, two listed flora species, two listed fauna species and four listed migratory species if the project were to proceed. The delegate also found that the additional contribution of greenhouse gas emissions in the atmosphere was likely to be negligible in the context of existing emissions.

The Anvil Hill Project Watch Association's application for review relies upon seven grounds, which fall into three categories. Two of those categories follow familiar ground: that the wrong test or irrelevant considerations were taken into account in deciding the presence of a threatened ecological community, and to the contribution that greenhouse gas emissions would make to climate change. The third category, jurisdictional fact, is an argument that will potentially open the door for the court to revisit decisions about whether or not something is a controlled action. This effectively grants a court a limited merits review, and would provide an opening for giving directions when remitting the matter back to the Minister for further consideration.

Such an outcome would be a major change to the way environmental decisions under the EPBC Act are made, so we await with interest the court's judgment.

Remote rural and regional news

Nicola Rivers, EDO RRR solicitor

In August I visited Broome to present a public seminar on climate change law and meet with Environs Kimberley, the major local environmental organisation, which was formed in 1996 by a group of locals to protect the natural environment and culture of the Kimberley. It is involved in a huge range of environment issues, such as the protection of the Fitzroy River, and minimising marine and greenhouse impacts by offshore gas projects.

In my seminar I outlined current State and Federal laws and policies on climate change, and discussed the big initiatives that governments are preparing for, such as emissions trading and nuclear energy.

I was in Broome during national science week, and Environs Kimberley organised a program of events to engage the community. Although my presentation focused on law rather than science it fitted in well, as a number of workshops had a climate change theme.

I also participated in a public "Geoffrey Robertson-style" hypothetical discussion entitled *Twenty-twenty Vision – How will climate change our world? – A Kimberley Hypothetical*. The panel members included local business people, councillors, a representative from Inpex (a large resource company working in the Kimberley) and a coral reef scientist. A local traditional owner was called away at the last minute to fight bushfires, so unfortunately could not participate.

The hypothetical was hosted by the local ABC producer, who came up with a scenario set in a fictional Kimberley town in the year 2020. The largest natural gas field in the world had just been discovered off the coast, and panel members were posed a number of ethical questions around the pros and cons of tapping it, as well as the impact of sea level rise and increasing temperatures.

Many thanks to Maria, Rachel, Jacqui, Gary and Louise at Environs Kimberley, and Peter and Robyn for their hospitality.

Revised EPBC Act bilateral agreement

Nicola Rivers, EDO solicitor

The Federal and State environment departments recently reviewed and amended the bilateral agreement for WA. The agreement allows projects which would normally be assessed under both State and Federal EIA to go through the State EIA process only, to avoid duplication. The agreement applies only to WA projects set at the PER or ERMP level.

Once the EPA has made an assessment it sends a copy to the Federal Minister, and both Federal and State ministers then make a separate decision on whether the project can go ahead, and under what conditions.

The amendments to the agreement are minor, mainly to reflect recent changes to the EPBC Act. The agreement will continue for 25 years, with five-yearly reviews. See the review report and the new agreement at http://www.environment.gov.au/epbc/assessments approvals/bilateral/wa/index.html

Everyone needed for environmental protection – Brazil and Australia unite!

Isabela Gera, EDO volunteer and Brazilian lawyer

Australia and Brazil are the two biggest countries in the southern hemisphere. Due to their large area and variety of climates, they have extraordinary biodiversity, including great numbers of endemic species. Brazilians and Australians are proud of their amazing beaches, hot sun, exotic animals and natural landscape.

Both countries were subject to European colonisation, which underestimated Indigenous culture. An aggressive way of dealing with the land was imposed, causing enormous destructive environmental impacts. The colonization of Brazil started with the arrival of the Portuguese 500 years ago. Their initial interest was to extract and export native wood, the Pau-brasil tree, which gave the country its name. The Brazilian economy was based on sugar cane and coffee monoculture in *latifundius* (huge one-owner properties) developed at the cost of massive forest destruction.

In Brazil, 93% of the original 1.3 million km^2 of coastal atlantic forest (*Mata Atlantica*) has been cleared since colonial times, mainly for farming and urban settlements.

The Amazonia is the largest tropical forest on the planet at seven million km^2, of which 5.5 million km^2 lies within Brazil, covering 59% of its territory. There is an estimated 20 million species living in the Amazonian ecosystems, of which only 1.4 million are currently known. Besides its natural richness, there is also a diversity of culture represented by Indigenous communities that live in harmony with their land. The Amazon rainforest has lost 14% of its original size, which is an area equivalent to France. Causes of degradation include the rubber industry, legal and illegal logging, and land clearing for cattle pasture and soybean farming.

A large part of Australia's natural vegetation has also been destroyed by land clearing for agriculture and settlement.

Deforestation is a local problem with global consequences. Rainforests help maintain world climatic conditions by regulating atmospheric gases, stabilising rainfall, and impeding desertification. Conserving native vegetation protects flora and fauna biodiversity, preventing the threat of extinction of many species. Controlling deforestation is a key challenge for both countries.

Nowadays Brazil has a rapidly rising population of more than 180 million, most living by the coast, and Australia has more than 20 million people, also concentrated by the sea. Both countries find their coastal ecosystems under pressure, and environment impacts need to be mitigated.

Urban development is proven to be very destructive to marine ecosystems. Scientists have alerted us of recent mass coral mortality. The reefs worldwide are under threat by over-fishing, water pollution, ocean warming and fertilizer or chemical run-off into the sea. Public awareness needs to be increased about the ecological and economic importance of coral reefs. Coral reefs are essential not only to ocean health, but also to human wellbeing.

Chapada dos Viadeiros, Brazil.

It's clear that in Australia as well as in Brazil environmental destruction has been widespread. There is an urgent need to protect and rehabilitate ecosystems. Partnerships need to be formed, uniting effort between government and societies towards environment protection. Networks can be shaped to gather information and action. Initiatives such as summits and projects have been started in the fields of permaculture and coastal sustainable cities. Environmental education must be used to improve sustainable use of the forests, water and land.

Environmental consciousness in Brazil has been rising. Following the United Nations Declaration on the Human Environment at Stockholm in 1972, Brazil created important laws protecting the environment. In 1988 the new Brazilian Constitution expressed concern about environmental equilibrium. RIO-92, the United Nations conference in Brazil, confirmed the concept of sustainable development in its action-guide document called Agenda 21. But only in 1998 did acts against the environment become criminal in Brazil. Unfortunately the courts still struggle to deal with the concept of sustainable development. In general, government institutions are conservative and sometimes even corrupt.

There is a growing effort from non-governmental organisations to monitor the government's actions and to overcome serious Brazilian issues. There is a lot to be done for disparities in income and opportunities, lack of access to sanitation and water facilities, conflicts over land concentration and many other issues. Implementing existing laws is a good start, as Brazilian environmental legislation is considered quite well developed but not necessarily well used in practice.

Environmental issues demand an integration of nations according to environmental ethics. Innovative values based on harmony between humans and nature are urgently needed.

State Government attempts to ensure WA remains free from nuclear power

Penelope Pain, EDO volunteer

The Labor Government has recently introduced the *Nuclear Facilities Prohibition Bill 2007* into the State Parliament. The Bill seeks to directly prohibit the construction or operation of a nuclear reactor and also prohibits the transport of materials to a nuclear facility, and connection of electricity generated by nuclear reaction to transmission and distribution systems, within the State.

New South Wales, Victoria and Queensland already have legislation banning the construction or operation of nuclear power plants. What is unusual about the proposed WA legislation is its attempt to prevent the Commonwealth from overriding the legislation. The Bill takes the unusual step of triggering a referendum if the Commonwealth moves to override the State ban on nuclear facilities. Queensland has included a similar mechanism in its legislation. Victoria attempted to amend its legislation to include a referendum trigger, but the Bill was defeated. NSW currently has a Bill before its Parliament to amend its legislation to include a referendum trigger.

The Howard Government's pro-nuclear push in response to the climate change crisis has stirred community fear in WA about nuclear facilities in the State. The Switkowski Report identified Western Australia as an appropriate site for at least two nuclear power stations. Media reports allege that the Federal Government has secretly considered a site near Perth airport for a nuclear reactor.

The Howard Government's push for the development of a nuclear industry increases the prospect of the Government using its legislative power to override a State prohibition of nuclear facilities. The Commonwealth does not have specific legislative power to make laws relating to nuclear power. However, the trend of the High Court is to widely interpret the powers of the Commonwealth. Arguably, there is scope for the Commonwealth to introduce legislation, using either its external affairs power or the corporations power, or both.

The power of the referendum trigger, and indeed the legislation itself, is not in its legal impenetrability but in making it politically more difficult for the Commonwealth to override State prohibition on nuclear facilities.

Nuclear bans in other states

WA lags behind New South Wales, Victoria and Queensland in introducing specific legislation banning the construction or operation of a nuclear power plant. Of these, Queensland's legislation is the most recent, gaining assent in February this year.

- Queensland legislation prohibits the construction or operation of nuclear facilities, including nuclear reactors, nuclear fuel enrichment facilities and reprocessing plants and nuclear waste storage or disposal facilities: *Nuclear Facilities Prohibition Act 2007*. This Act includes a plebiscite (referendum) trigger.
- Victorian legislation prohibits the construction or operation of a nuclear power plant or nuclear power reactor: *Nuclear Activities (Prohibitions) Act 1983*. A recent attempt was made to amend the legislation to introduce a referendum trigger. As noted in the Second Reading speech, the Bill sought to ensure the voice of all Victorians would be heard if the Commonwealth ignored the state's nuclear free laws. However, the Bill was defeated.
- New South Wales legislation prohibits the construction or operation of a nuclear facility, other than by the Australian Atomic Energy Commission (or by any authority that replaces that Commission) under an Act of the Commonwealth: the *Uranium Mining and Nuclear Facilities (Prohibitions) Act 1986*. Numerous Private Members' Bills have been introduced to make further provision for prohibiting nuclear facilities and in connection with storage and disposal of nuclear waste in the State, but have been unsuccessful. On 19 June 2007, Dr John Kaye, MLC for the Greens, introduced the *Uranium Mining and Nuclear Facilities (Prohibitions) Amendment (Plebiscite and Stronger Prohibitions) Bill 2007*. We wait to see if NSW goes the way of Victoria or Queensland on this issue.
- We also await a decision by the Tasmanian Parliament, which currently has the *Uranium Mining and Nuclear Facilities Prohibition Bill 2006* (a Private Member's Bill introduced by Greens MHA Nick McKim) before it. The Bill seeks to prohibit uranium mining and the construction or operation of certain nuclear facilities.

ACT climate change overview

Melissa Lui Yuen, EDO volunteer

On 27 July 2007 the ACT government announced a $100 million plan to fight climate change. The *Climate Change Strategy 2007-2020* will introduce ways to reduce greenhouse gas emissions over the next few decades. The Government expects more than $8.8 million of the total to be spent in the first year.

The plan aims to achieve a 60% reduction in greenhouse gas emissions by 2050. This will put the ACT in line with international and other Australian jurisdictions.

A number of highlights from the 2007-2011 five-year Action Plan include requiring electricity retailers to source their energy from renewable sources. There are also mandatory proposals for electricity customers to be offered a "green product" as their first choice – that is, people will be encouraged to use environmentally friendly products. The scheme will also see millions invested in promoting carbon neutrality in schools and government buildings, as well as pouring millions into improving energy efficiency in government housing.

ACT Chief Minister Jon Stanhope believes the plan will be a significant step forward for the ACT with regard to addressing climate change. However, effective leadership and the commitment of the general public will be vital to the success of the plan.

The regulation of uranium mining in Australia

Rosie Phillips, EDO volunteer

In June 2006 the Prime Minister appointed the Uranium Mining, Processing and Nuclear Energy Review Taskforce to undertake an objective, scientific and comprehensive review of uranium mining, processing and nuclear energy in Australia. Their final report, which was published in December 2006, identifies the current regulatory framework as a barrier to the growth of these industries in Australia. This is because of restrictive government policies and the decentralised nature of the regulatory regime, which varies in each jurisdiction.

How is uranium mining currently regulated?

Generally, regulation of mining is the responsibility of the state and territory governments. However, certain aspects of uranium mining involve Australian Government regulation. For example, Commonwealth legislation sets out the following requirements in relation to uranium mining:

- A party seeking to mine uranium must obtain a permit from the Australian Safeguards and Non-Proliferation Office: *Nuclear Non-Proliferation (Safeguards) Act 1987*
- New uranium mines or significant expansion of existing mines require environmental assessment and approval: *Environment Protection and Biodiversity Conservation Act 1999*
- To export uranium ore, a mine operator must have a licence issued under the *Commonwealth Customs Act 1901*
- Certain aspects of uranium mining operations in the Alligator Rivers Region in the Northern Territory are a Commonwealth responsibility: *Environment Protection (Alligator Rivers Region) Act 1978*.

States and Territories

In addition to the general mining legislation of the states and territories, some of the states and territories have specific legislation relating to uranium mining.

In the **Northern Territory** the Territory Minister has the power to grant persons the authority to mine "prescribed substances" (including uranium) on behalf of, or in association with, the Commonwealth. The Minister must exercise this power in accordance with, and give effect to the advice of, the Commonwealth Minister: s 175 *Mining Act 1980*. The Commonwealth Minister also retains executive authority over uranium mining in the Northern Territory: *Northern Territory (Self-Government) Regulations 1978*.

In the **Australian Capital Territory** (as in the Northern Territory), the Commonwealth retains ownership of uranium under the *Atomic Energy Act 1953* (Cth). Nonetheless, provided the requirements of the *Land (Planning and Environment) Act 1991* (ACT) have been satisfied, rights relating to minerals on land which is classified as 'territory land' may be available for mining activities under a lease or other agreement.

In **South Australia**, mining operations for the recovery of radioactive materials are permitted, if the Minister endorses an authorisation to carry out mining operations specifically for the mining of uranium on the mining lease or license: *Mining Act 1979*. Additionally, a license is required for the mining or milling of radioactive ores: *Radiation Protection and Control Act 1982*.

New South Wales and **Victorian** legislation prohibits uranium exploration and mining: *Uranium Mining and Nuclear Facilities (Prohibitions) Act 1986* (NSW); *Nuclear Activities (Prohibitions) Act 1983* (Vic).

Western Australia and **Queensland** do not expressly prohibit uranium mining by legislation. Despite this, it is unlikely that a license for uranium mining (required by general mining legislation) would be issued under the current policies of the Western Australian or Queensland governments.

There is currently no restriction on uranium exploration and mining in **Tasmania**, and this situation will persist unless the *Uranium Mining and Nuclear Facilities Prohibition Bill 2006* – a Private Member's Bill introduced by Greens MHA Nick McKim – is passed. In the meantime, the requirements under the State's general mining legislation, including the requirement to be licensed, are applicable.

Landmark scientific study on the nature of Northern Australia

MEDIA RELEASE

A landmark scientific study on the Nature of Northern Australia: its natural values, ecological processes and future prospects was launched in Darwin, Broome and Cairns in August.

The future of Northern Australia has become an issue of national prominence over the last year. Over the next few years decisions will be made for the North which will have significant long term impacts on the Northern environment and its people. It is vital that in this debate the best science is used to inform decisions.

Four leading Australian scientists- Dr. John Woinarski, Professor Brendan Mackey, Professor Henry Nix, and Dr. Barry Traill spent 3 years compiling and researching this new study on Northern Australia and its environment.

Published by the Australian National University, this landmark study details the environmental significance of the North, how the unusual environment really works, and shows the pathways forward to develop the North in ways that work for people and the country. The study can be purchased via the ANU E-press website: http://epress.anu.edu.au/, or by phoning (02) 6125 2981; or you can download the PDF files free.

For more information about the study contact project coordinator Larelle McMillan on 0413 807 786.

Water Bill rushes past Federal Parliament

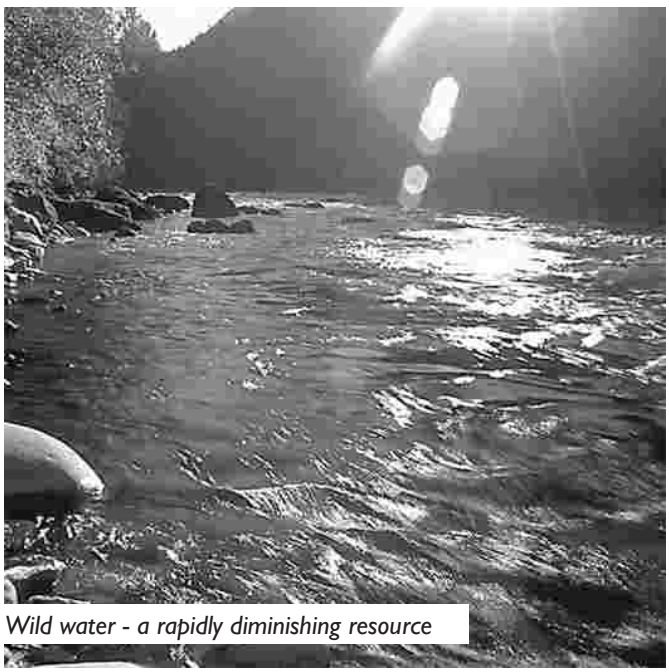
Michelle Ng, EDO volunteer

The *Water Bill 2007* passed through the Senate unamended on 17 August with bi-partisan support. The $10 billion National Plan for Water Security for the Murray-Darling Basin was pushed through with what Democrats Senator Andrew Bartlett described as "an atmosphere of urgency", resulting in a rushed consultation process and inadequate examination of the legislation.

The planning and management of water in the Murray-Darling Basin will be placed under the sole authority of the Murray-Darling Basin Authority, meant to be an independent, expert-based body. Critical to the plan is the referral of constitutional powers through an inter-governmental agreement with the four Murray-Darling states. Victoria has so far refused to sign the IGA, and it seems that New South Wales, after initially supporting the plan, is unlikely to sign due to a dispute with the Federal government over who pays for compensating irrigators.

Opposition primary industries spokesmen Kerry O'Brien told the Senate 'Labor is worried that the Prime Minister appeared to change the conditions for the IGA at the very last moment … [and] as a result, the states might not sign up.' As it stands, the new Murray-Darling Basin Authority will be set up, but the old Murray-Darling Basin Commission will remain – at least for the time being. Despite the Federal government's best efforts, it seems likely that it will still have to share responsibility with the states.

A very short Senate Committee Inquiry was conducted, resulting in the receipt of just 12 public submissions, including one from the Australian Network of Environmental Defenders Offices. Considering the size of the project, and that water resources in the Murray-Darling Basin are responsible for 40 per cent of Australia's food production, public consultation on the Bill has been abysmal.



Wild water - a rapidly diminishing resource

Illegal fisher reeled in by Commonwealth Government

Shevaun Stringer, EDO volunteer

In the recent Federal Court case *Minister for Environment and Heritage v Warne* [2007] FCA 599, a commercial fisher was ordered to pay in excess of $50,000 in fines and court costs for undertaking commercial trawl fishing activities in the Mermaid Reef Marine National Reserve, located 300km off the coast of Broome.

The skipper of the commercial fishing vessel entered the reserve on four different occasions over two days, catching more than 450kg of fish with a total commercial value of $11,400. The respondent was consequently held to have breached the Commonwealth *Environmental Protection and Biodiversity Conservation Act* by taking scampi, a crustacean, and carrying out an action for commercial purposes.

The two contraventions of the Act meant that the fisher faced a maximum penalty of $110,000. However, the parties in pre-court proceedings had agreed upon the amount of $25,000. In determing whether the fine negotiated by the parties was appropriate the judge recognised that the activity of trawl fishing within the reserve significantly undermined the objects of the EPBC Act.

The judge also held that the damage caused by the skipper's activities were not to be measured solely by reference to the commercial value of the catch, but also required consideration of the substantial environmental damage caused to other marine life through the use of nets. The judge therefore concluded that the pecuniary penalty needed to contain a deterrent element, depriving the fisher of not only commercial gain from his illegal activites, but also indicating the community's disapproval of the environmental harm his actions caused to the reserve.

His Honour contended that $25,000 would not normally be classed as containing a sufficient deterrent element in the circumstances; however, several mitigating factors were required to be taken into account, including the respondent's cooperation and his previous clean record. Therefore the penalty of $25,000 was held to be appropriate in the circumstances, and the fisher ordered to pay more than $50,000, including costs.

The full judgment can be found at www.austlii.edu.au/au/cases/cth/federal_ct/2007/599.html

Temperate deep sea Marine Reserves declared

Michelle McComish, EDO volunteer

After four years, the South-East Commonwealth Marine Reserve Network has finally reached fruition. In early July the Hon Malcolm Turnbull, Federal Minister for the Environment and Water Resources, announced a legally-protected temperate deep sea marine reserve, which came into effect on 3 September 2007. This will be the first of five similar marine reserves to be declared in Australia, and the first of its kind in the world.

The South-East Commonwealth Marine Reserve will be a network of 13 new reserves in waters off southern New South Wales, Victoria, Tasmania and South Australia, totalling 226,000 square kilometres. The reserves are said to contain representative examples of marine life, including species that are found nowhere else in the world. Consultations had been held with stakeholders including the marine industries, conservation sector, scientists, Indigenous groups and State governments.

Destructive fishing methods such as bottom trawling will be banned throughout the network, whilst zoning will provide the framework for allowed activities.

The five zones will be:

- Sanctuary zones; where no extractive uses are allowed
- Benthic (sea floor) sanctuary zones; where extractive uses are not allowed between 500m below sea level and the sea floor
- Multiple use zones; where all commercial fishing is prohibited, but oil and gas activities, and recreational fishing are allowed
- Recreational use zones; where recreational and charter fishing is allowed, but not other extractive activities.

Through zoning and limiting commercial activities and fishing by an approval process the government hopes to protect these unique ecosystems. However the Australian Conservation Foundation has already expressed concerns that over 1/3 of the reserves will still be open to 'exploitation' by oil and gas companies, and that protection is not being given to high biodiversity areas.

A map of the reserves can be viewed at http://www.environment.gov.au/coasts/mpa/southeast/index.html

Queensland looks to get tough on litterbugs

Shevaun Stringer, EDO volunteer

The Queensland Government is currently introducing new litter enforcement methods as part of the *Environmental Protection Amendment Bill 2007*, being considered by Parliament, in an aim to reduce roadside litter. The new legislation is designed to make enforcement of littering offences easier and safer, particularly in regards to rubbish thrown from vehicles, by allowing authorised persons to issue infringement notices through the mail by using the vehicle's registration details. The current system requires authorised persons to stop the vehicle or person and obtain their particulars, before directly issuing them an infringement notice; a confrontational situation that has resulted in very few litter infringement notices being issued since 2000.

The Bill also introduces two discrete littering offences: depositing litter from a vehicle, incurring an infringement notice penalty of up to $225; and dangerous littering, incurring an infringement notice penalty of up to $300. Dangerous littering may include throwing a lit cigarette onto dry grass during extreme fire danger conditions, smashing a bottle and leaving the broken glass on the footpath, or throwing an item from a car at another road user or pedestrian.

The changes in the legislation have been applauded by Keep Australia Beautiful, as their latest figures 'show that 55 per cent of the total volume of litter [in Queensland] is found on highways'.

In WA under the *Litter Act 1979* if a person is observed to have deposited litter from a vehicle, the authorised person does not have the power to use the registration details of the vehicle for enforcement; rather they must obtain the details of the offender in order to issue an infringement notice of up to $200.

The WA Act furthermore does not distinguish between general littering, depositing litter from a vehicle and dangerous littering, though it does contain a separate offence for breaking glass.

The WA Act will shortly be repealed and new litter provisions will be incorporated in the Environmental Protection Act. The changes include the new offence of illegal dumping, increasing fines for littering by corporations and enhancing the investigative powers of enforcement officers.

Queensland litterbugs will soon face substantial fines

2007 State of the Environment Report for Western Australia released – USE IT OR LOSE IT!

Christal George, EDO volunteer intern

This is the first comprehensive report on the state of the Western Australian environment since 1998. Its findings indicate that although some of the environmental problems in WA have improved since then, many have got worse.

In late July the Environmental Protection Authority held a public seminar on the findings and recommendations outlined in the report. EDO (WA) Principal Solicitor Cameron Poustie attended this seminar.

The State of the Environment Report (SoE Report) summarises the condition of the Western Australian environment, assesses the major environmental issues and makes recommendations for addressing these.

The Report is a very useful and strategically important tool for environment groups, and the SoE website (www.soe.wa.gov.au) is an excellent resource. The Report contains up-to-date scientific information to back up your own data when you and your group are making submissions, letter writing, writing media releases, or speaking to other members of the public.

Indeed, the EPA has called on all sectors of the WA community to take action on the basis of the findings and recommendations in the State of the Environment report, including the State Government, local government, industry, business and the broader community.

While initiatives are in place to address most of the issues identified in the report, substantially more action needs to be taken to make significant progress in many of these problems. The current level of economic prosperity (much of which is derived from our natural resources) in WA provides an opportunity to commit significant resources to protecting and improving our environment.

The *State of the Environment Report: Western Australia 2007* can be viewed online at www.soe.wa.gov.au For copies and enquiries about the Report contact the Department of Environment and Conservation: soe@dec.wa.gov.au or phone 6364 6510.

South Australia's No Species Loss Plan

Michelle McComish, EDO volunteer

The South Australian Government has released the *No Species Loss Plan*, their first state wide nature conservation strategy. It is a ten year plan with the goal to lose no more species on land, in rivers, creeks, lakes, estuaries or the sea. It has been billed as one of the major targets of the broader South Australian Strategic Plan.

The strength of the *No Species Loss Plan* is that it recognises that damage has been done that will take hundreds of years to repair, and in turn defines what is required to protect South Australia's ecosystems in the next ten years.

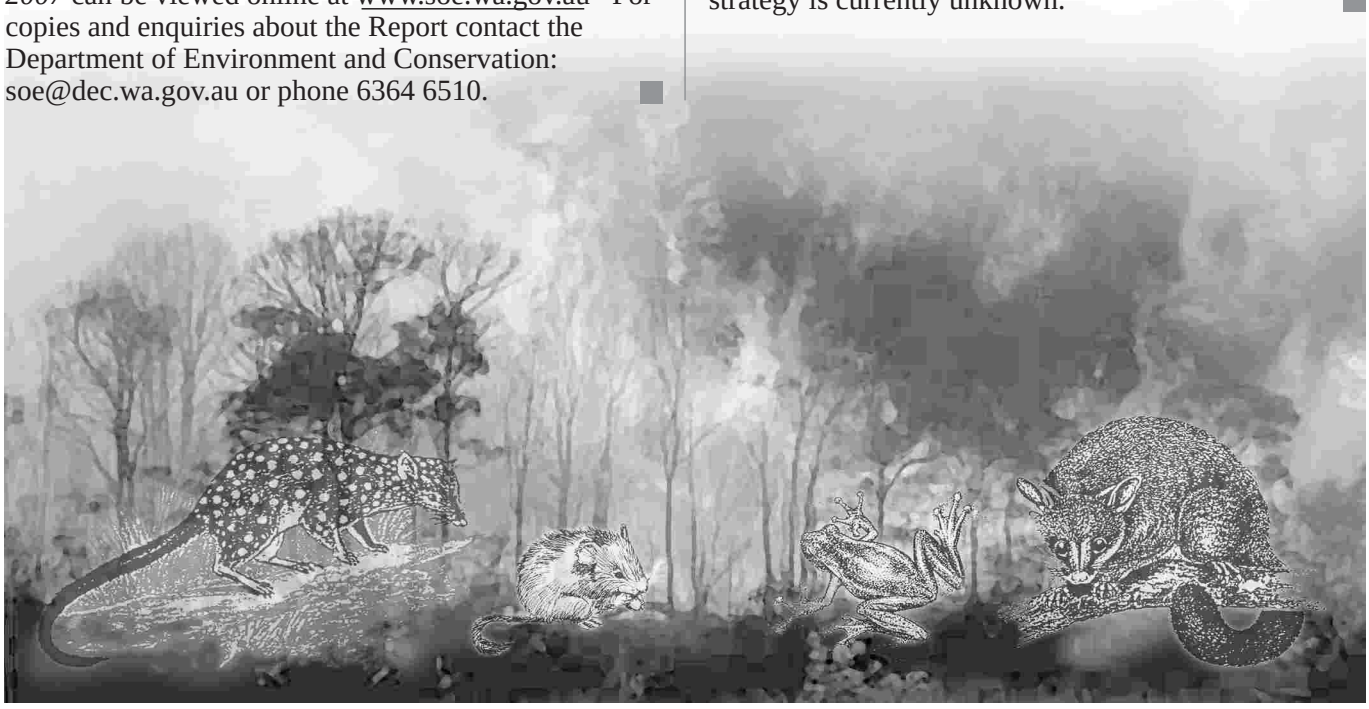
The Plan proposes 37 targets grouped under five broad goals:

- conserving SA's biodiversity
- addressing the impacts of climate change
- improving information, knowledge and capacity
- coordinating the way natural resources are managed to protect native species
- getting the community on board in the campaign to save our species.

The strategy can be viewed at www.environment.sa.gov.au/biodiversity/bioplans.html

Readers will probably be aware that WA is in the process of developing a Biodiversity Conservation Strategy, although progress on that front has been slow. Interestingly, although WA's draft strategy plans for longer timeframes than its SA equivalent (namely, up to 100 years), there is no explicit commitment to avoid further species loss. Instead, the weaker 2029 goal of "a significant reduction in the rate of biodiversity decline" is adopted.

WA's draft strategy can be downloaded from http://www.naturebase.net/component/option,com_docman/task,cat_view/gid/441/ The release date of the final strategy is currently unknown.



Hydrogen fuel cell bus trial draws to a close

MEDIA RELEASE

Planning and Infrastructure Minister Alannah MacTiernan announced on August 20 that the operational phase of Perth's hydrogen fuel cell bus trial would be completed in early September.

Ms MacTiernan said that the buses had prevented more than 300 tonnes of greenhouse gas emissions since the trial started in 2004.

"The three hydrogen fuel cell buses in the Transperth fleet, operated by Path Transit, have covered more than 260,000km and carried more than 330,000 passengers during that time," she said.

"The trial of the clean green technology has resulted in a wealth of hydrogen related skills and expertise in the State Government, academia and industry. It has also greatly increased public awareness of transport energy issues."

The Minister said that the trial had been the flagship project for the Department for Planning and Infrastructure's Sustainable Transport Energy Program (STEP).

Ms MacTiernan said the achievements and interest in the work had been recognised nationally and internationally.

"Perth was the only southern hemisphere participant in the international trial, along with Hamburg, Stuttgart, Luxembourg, Stockholm, London, Barcelona, Amsterdam, Reykjavik, Madrid, Porto and most recently Beijing," she said.

"Most of the cities have finished their trials, while Beijing is close to finishing and Hamburg and Amsterdam have continued on to a fourth year, with nine and three buses respectively."

Ms MacTiernan said the State Government had invested about $10million in the research and development project, while the Federal Government contributed another $3million through the Department of Environment and Water Resources.

Western Australia would continue to benefit from the trial with ongoing participation in the HyFLEET Clean Urban Transport Europe (CUTE) program and collaboration with international automotive development companies and energy policy developers for a hydrogen based transport system in the future.

EDO annual general meeting

The Annual General Meeting of the Environmental Defender's Office WA will be held at 6pm on Thursday 18th October (venue to be advised). Your attendance is eagerly anticipated by EDOWA Convenor Hannes Schoombee. There will be reports by staff and Management Committee members on EDOWA's major achievements during the past year, and a taste of things to come for 2008 and beyond.

The latest on climate change law

from page 1

Nuclear power

In opposition to the Federal Government's intentions, a Bill has been introduced into State Parliament to prohibit the use of nuclear power in WA. Under the Bill, if the Federal Government tries to override the prohibition it will trigger a State referendum on the matter. The referendum will not prevent the Commonwealth from continuing to override the Act, but the State Government hopes a strong no vote would dissuade the Federal Government.

EDO climate change and energy law project

The EDO will continue to look at these issues in detail over the next 12 months. The Law Society's Public Purposes Trust has granted the EDO funding to review current and proposed climate change and energy laws in Western Australia during the 2007/2008 financial year. The aim of the project is to review gaps and weaknesses in the current law, in order to suggest reforms to improve WA's response to climate change.

The EDO will also provide legal education to the community and increase public awareness on the topic. It is intended that a public seminar to discuss the results of the review will be held early next year.

The EDO will be seeking feedback from regional and metropolitan areas to feed into our law reform program. If you have any queries about climate change law in WA, or would like the EDO to speak about climate change to your group or community, please contact Nicola Rivers on 9221 3030 or nrivers@edowa.org.au

Elwood chips off EP Act questions

from page 3

In other words, actions said to be a new proposal could potentially constitute, say, unlawful clearing, without the normal clearing defence for actions in compliance with Part IV approval. This point presents an even greater risk when one has regard to the Water Corporation case ([2006] WASC 256) which suggests that the clearing exemptions under the EP Act and associated regulations will likely not be interpreted broadly.

Given the above importance it is disappointing that Buss JA provided only the following general guidance about the issue (at para 103):

> *A proposed change and the original proposal will not, in combination, constitute a revised proposal if the change is unrelated to or unconnected with the subject matter of the original proposal. Questions of degree will undoubtedly arise. An alleged change may be so separate or distinct from the original proposal that it is properly to be characterised as a new proposal which must be assessed and authorised from the beginning.*

The full judgment can be found using the above citation at: http://decisions.justice.wa.gov.au/supreme/supdcsn.nsf

The EDO thanks the following sponsors for their support:

lotterywest supported

Public Purposes Trust

Environmental Defender's Office Western Australia (Inc)

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.....