edonews
Vol 13 No 4
December 2007
Newsletter of the Environmental Defender's Office WA (inc)

Impact assessment win for Denmark's Wilson Inlet

Nicola Rivers RRR solicitor

The EPA recently agreed to the Denmark Environment Centre's urgent request to assess the environmental impacts of drainage works by the Water Corporation at Denmark. The EPA will assess the corporation's proposal to breach the Wilson Inlet sandbar, as it believes that opening the bar will have a significant effect on the environment.

This decision demonstrates that it's not just private developers who must refer significant proposals to the EPA for assessment, but any person, including State and local governments.

The Water Corporation has an agreement with landowners in various parts of the State to provide drainage services so that their properties do not flood. In Denmark this is done by artificially opening a sandbar at the inlet mouth, so that water from the Denmark River and its catchment can flow to the ocean.

In wet seasons when the water reaches about 1.3 metres AHD (Australian Height Datum) this happens naturally, allowing an exchange of seawater and freshwater which benefits the inlet ecology. However, in times of lower rainfall, such as this year, the sandbar does not breach


A mussel-fishing lease on Wilson Inlet

and there is no exchange. Artificial breaching while the water is high (above 1.1m) can benefit the inlet, but causes environmental degradation when water levels are too low.

Members of the local community, including the Denmark Environment Centre, were concerned about environmental impacts in the inlet last year, when the bar was artificially breached at 0.8m, leaving the inlet depleted and adversely affecting surrounding wetlands and dependent fauna.

Subsequently low rainfall meant that the water level was not restored by inflow from rivers, and fell to record lows during summer. Extensive beds of the seagrass *Ruppia megacarpa* dried out and their root mass was depleted. The feeding of migratory waterbirds was also affected. A low water level also meant that the channel effectively remained open only for two weeks, preventing proper marine exchange and the migration of fish in and out of the inlet.

Although government agencies had previously agreed that the inlet should not be breached until water levels reach 1.1m, the Water Corporation was again intending to open the bar at a level of 0.8m in October this year. The Denmark Environment Centre, on the advice of the EDO, made an urgent referral to the EPA, asking that they assess the environmental impacts of breaching at such a low level.

Barry Carbon, then chair of the EPA, sought comment from a number of stakeholders. The Department of Water, the Shire of Denmark, the Department of Fisheries, and the chair of the Wilson Inlet Management Advisory Group stated that they saw environmental problems with opening the bar this year. The EPA therefore decided to

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Moore protection: a 2007 good news story

Melissa Yuen *EDO volunteer, and*
Cameron Poustie *Principal solicitor*

Moore River Company Pty Ltd v Western Australian Planning Commission [2007] WASAT 98 (delivered 1 May 2007) signified a rare outcome where the State Administrative Tribunal (SAT) ruled in favour of the environment. The case involved an appeal against the Western Australian Planning Commission's (WAPC's) decision to refuse approval for subdivision of a block of land owned by the Moore River Company. The matter ended up before the SAT, who ultimately upheld the WAPC's decision.

History

The decision brought to an end the long-running campaign against the Moore River Company by local community and environmental groups wanting to preserve the area. The company itself is one with enormous resources and extensive experience in building and developing in Western Australia. The proposal would have seen the area turn into more urban sprawl, with low and medium density residential developments to cater for around 10,000 people.

The main objection against the large subdivision was the potentially adverse environmental impact it would have on the sand dunes and the pristine river running through the area. The Moore River Company might have seen the subdivision as progress and a general development of the area but environmentalists saw it as destruction of a unique tract of West Australian coast.

A few years earlier, the land had been rezoned from "rural" to "urban development". Having successfully secured this rezoning, it was assumed that approval of the subdivision would follow.

Refusal to approve the plan for subdivision

However, the WAPC recommended against the subdivision, and this decision was upheld on appeal by the SAT. Essentially, the SAT's reasons for refusing to approve the proposal revolved around its inconsistency with current planning schemes for the area, as well as local and State planning policies.

One of the particularly important considerations for the SAT was that the proposal did not adhere to State planning policies in relation to sustainability and minimising the "ecological footprint" of human settlement. The introduction of considerations of "sustainability" in the decision-making process will hopefully have a significant effect on the assessment of development proposals in the future.

The State planning schemes directed at promoting sustainability aim to achieve their objectives through managing large scale urban and regional developments. The WA Government's *State Sustainability Strategy*, adopted and published in September 2003, aims to facilitate sustainability by promoting well planned patterns of settlement across the state. The proposal was evaluated in the context of this strategy. Any proposed expansions or new settlements, should be accompanied with a planned "economic and employment base", and in this case, those elements were not present.

There were also other significant issues raised by the local planning schemes. These included conflict with the provisions discouraging "continuous linear urban development along the coast", as well as the fact that settlements with "a high level of car dependency" were to be discouraged.

Conclusion

The case marks a significant milestone for environmental groups and demonstrates how environmental protection can sometimes be achieved through the application of planning policies and initiatives.

New fed government outlines plan to tackle climate change

Lisa Burton *EDO volunteer*

Environmental groups have welcomed the success of the ALP at the recent Federal election, hoping the win heralds a more promising era for the control of greenhouse gas emissions.

Earlier in November Labor announced it would implement a "Clean Energy Plan" to enable the business community and consumers to tackle climate change. Central to the new government's plans is the aim to cut GHG emissions by 60% by 2050.

Spending has been promised to establish four new funds aimed at controlling the emission of GHGs:

- a $500 million Renewable Energy Fund to develop renewable energy sources
- a $240 million Clean Business Fund to help business and industry deliver energy and water efficiency projects
- a $150 million Energy Innovation Fund to keep leading scientists and researchers in Australia
- a $500 million Clean Coal Fund to fund the deployment of clean coal technologies.

Labor also announced it would allocate $50 million for a pilot coal gasification plant in Queensland, $50 million to demonstrate carbon capture and storage in NSW, and $5 million to undertake mapping and testing of potential carbon storage sites in WA.

These proposals are in addition to Labor's existing plans to immediately ratify the Kyoto Protocol, set a 20% Renewable Energy Target by 2020, and offer rebates for consumers who adopted energy and water saving technologies, such as solar hot water systems, in their homes.

Don Henry, head of the Australian Conservation Foundation, welcomed Kevin Rudd as Prime Minister but stressed that it was now time for the ALP's plans to be put into action. 'I think it's important that Mr Rudd now moves quickly to ratify the Kyoto Protocol and starts to develop a good, solid 20/20 [20% Renewable Energy by 2020] target for us to cut greenhouse pollution here in Australia.'

Benchmarks for Australia: international responses to climate change

Amelia Thorpe *EDO volunteer, and*
Nicola Rivers *Climate Change solicitor*

One of the Federal Labor Party's key election promises was to take action on climate change. So far the new government is keeping that commitment, with Australia finally ratifying the Kyoto Protocol. Although the Howard government announced last month that Australia is on track to meet its Kyoto target, in real terms (ie, excluding land clearing) Australia's emissions have increased by 25.6 per cent since 1990.

In order to reduce Australia's greenhouse footprint the government will need to look at binding measures that can be implemented domestically to make real cuts to our greenhouse emissions. Climate change schemes in other countries can provide a benchmark for Australia's actions. EDO WA has been conducting a survey of international greenhouse reduction schemes, focusing on legislative actions. Responses to climate change vary widely among countries and regions, however a number of countries have introduced mandatory initiatives that are aimed at producing a real reduction in greenhouse emissions. The frontrunners are discussed below.

The European Union provides a framework for actions by member states, setting mandatory minimum requirements for all members. It has committed to high targets by world standards (20 per cent for both renewable energy use and emissions reductions from 1990 levels), and it continues to negotiate for adoption of higher targets by all developed countries (30 per cent by 2020). Key initiatives to achieve these targets include:

- Emissions trading. The EU ETS is the world's largest emission trading scheme, setting caps on emissions from combustion plants, oil refineries, coke ovens, iron and steel plants, and factories making cement, glass, lime, brick, ceramics and pulp and paper. The ETS has been trading since 2005, and is set to expand to include Norway, Iceland and Liechtenstein, and to cover aviation
- Energy taxation. The EU has set minimum tax levels on all energy products including coal, natural gas and electricity, and minimum requirements for sales of biofuels and other renewable fuels for transport
- Energy efficiency schemes. It is mandatory for targetted products to incorporate energy efficient designs and product labelling
- Mandatory greenhouse emissions reporting.

In addition, many European countries have adopted innovative initiatives: Finland introduced the world's first carbon tax in 1990; Germany has renewable energy targets of 12.5 percent by 2010 and 20 percent by 2020, and guarantees prices for the sale of renewable energy; Norway has operated a cap and trade emissions trading scheme since 2005.

The UK's range of schemes is currently the most comprehensive. Like the EU, the UK has set high targets: 20 per cent renewable energy by 2020 and a 60 per cent reduction in emissions by 2060. Key initiatives include:

- Emissions trading. The UK ran a voluntary ETS from 2002-2005, and is currently developing a mandatory scheme which will cap emissions from more than 2,000 organisations
- Energy taxation. The Climate Change Levy taxes the use of energy in industry, commerce and the public sector. Climate Change Agreements provide discounts tied to targets to encourage efficiency improvements by large energy users
- Renewable energy targets and energy efficiency schemes. The Renewables Obligation requires electricity providers to source increasing proportions of their supply from renewable energy (2.6 per cent in 2006-07). Energy Efficiency Commitments set targets for domestic energy efficiency to be achieved by electricity and gas suppliers, primarily through assistance to low income households (eg providing free compact fluorescent globes, subsidising the cost of cavity wall insulation)
- Mandatory emissions reporting.

In the US, federal Acts are limited to subsidies for lighter vehicles and basic fuel quality standards; the EPA has declined to regulate greenhouse gas emissions under the *Clean Air Act*. While this may change (the Supreme Court ruled recently that CO_2 is a pollutant for the purposes of the CAA, and over 127 climate-related proposals have been introduced since the Democrats took control of Congress), the US has kept pace to some extent through the actions of states such as California. Key initiatives include:

- Emissions targets. California's are the most ambitious (1990 levels by 2020; 80 per cent below that by 2050), and other states are increasingly adopting and tightening theirs
- Emissions trading. The Chicago Carbon Exchange provides a voluntary but legally binding cap and trade scheme; three regional groups have agreed to establish multi-state schemes
- Energy taxation. The City of Boulder, Colorado introduced the US's first tax on carbon emissions electricity in 2007
- Emissions reporting. The Climate Registry currently provides for voluntary reporting, with 43 state members at present. California will require emissions reporting by 2008
- Vehicle emissions standards. Standards have been promulgated federally and in California; states may choose which to follow. Twelve states have adopted California's tougher standards.

The situation in Canada is similar. The Federal government has announced that it will not meet its commitments under the Kyoto Protocol, but states are taking action: Alberta has set an emissions reduction target of 50 percent below 1990 levels relative to GDP by 2020; Québec has announced plans to introduce Canada's first carbon tax; Ottawa requires that gasoline consist of 5 per cent renewable content by 2010.

➤ *continued next page*

Closer to home, New Zealand has also introduced a number of noteworthy initiatives. New Zealand has set a target of 90 per cent renewable energy by 2025, and its mandatory emissions trading scheme will commence trading in 2008. Other legislative schemes require emissions reporting, a reduction in emissions from transport of 50 per cent below 2007 levels by 2040, sales of biofuels by fuel retailers, and collection and destruction of greenhouse gas emissions by landfills receiving more than a million tonnes of refuse.

There are numerous examples that Australia can draw from, in combination with our own innovative initiatives, to ensure that our greenhouse emissions decrease in real terms over the coming years.

Queensland legislation overrules Xstrata court decision

Lisa Burton *EDO volunteer*

The Queensland Parliament has rushed through special legislation overriding the decision in *Queensland Conservation Council Inc v Xstrata Coal Queensland Pty Ltd & Ors* [2007] QCA 338, permitting Xstrata's expansion of a mine 130km west of Mackay to proceed without conditions regulating greenhouse gas emissions.

Earlier in 2007 the Queensland Conservation Council (QCC) argued before the Land & Resources Tribunal that Xstrata's application to expand its mining lease should not be approved without conditions requiring Xstrata to offset the greenhouse gas emissions produced. President Koppenol ultimately found in favour of Xstrata, recommending the application be approved without the conditions sought. QCC was held to have failed to demonstrate that Xstrata's operations would have any significant impact on global warming (Re *Xstrata Coal Queensland Pty Ltd & Ors* [2007] QLRT 33).

The Tribunal's decision was overturned by the Full Court of the Supreme Court of Appeal Queensland on October 12. The Court found QCC had been denied natural justice by the Tribunal, as it was refused leave to amend the amount of offsets sought to be imposed, and not given opportunity to respond to an article doubting the science of climate change – "The Stern Review: A Dual Critique" – considered by the Tribunal. The matter was remitted to the Land Court for rehearing.

The *Mining and Other Legislation Amendment Act 2007* (No. 46 of 2007), passed by the Queensland Parliament just days later effectively nullified this ruling, permitting Xstrata's expansion to proceed without conditions before the matter could be reheard. The Queensland Government claimed the legislation was necessary to save jobs.

In a media release on 17 October Anita O'Hart of the Environmental Defender's Office Queensland stated: 'It is misleading for the government to say that their special legislation is to save jobs. The laws relating to the assessment and approval of coal mines have been in existence for some time and already require a detailed assessment of both the environmental impacts and economic benefits of proposed mines in Queensland.

'It is hard to envisage a project or development that does not involve jobs. Will they all be excused from proper assessment and legal process?

'The government argues for a consistent approach to assessing coal mines, but at the same time it specifically excludes one individual mine from an assessment according to the law. This is a dangerous precedent and a blow to the sensible consideration of greenhouse gas emissions as part of the assessment process.'

2007 AGM report

Fran Jones *Coordinator*

The Environmental Defender's Office WA (Inc) held its Annual General Meeting on 19 October 2007.

The meeting was well attended, with past and present staff members in attendance, law student volunteers, Legal Aid officers, law school academics, *pro bono* lawyers from city firms, and of course people from our client conservation groups.

Members were treated to an overview of the year's events by Convenor Hannes Schoombee, as well as staff Cameron Poustie, Nicola Rivers and Fran Jones, along with a visual display of natural environment images from around WA.

Andrew Roberts, retiring from the committee, was thanked for his contributions and awarded with an EDO life membership.

Elections for committee positions were held and the 2007-2008 committee is:

Dr Johannes Schoombee (Convenor)
Janice Dudley (Deputy Convenor)
David Lloyd (Treasurer)
Taron Brearley (Secretary)
Angas Hopkins (Committee Member)
Lee McIntosh (Committee Member)
Sharon Mascher (Committee Member)
Michael Bennett (Committee Member)
Dr Stephanie Turner (Committee Member)
Alison Xamon (Committee Member)

Inaugural Parks and Protected Areas forum had limited benefits

Cameron Poustie *Principal solicitor*

In the middle of the current mining boom, one would hope that society would consider that we are generating the kind of wealth that would allow for big increases in the size of, and resources dedicated to the management of the conservation estate. That seemed to be happening on 20 September 2007 when State Environment Minister David Templeman announced a "historic" addition to WA's parks and reserves, mainly in the Gascoyne and Murchison regions (see media release reprinted on page 9). But by the Minister's own admission, the "vast majority" of these additions cannot be considered protected areas, because as "unclassified conservation parks" they will still allow exploration and mining.

It was fitting then, that for four days beginning on 23 September 2007, an effort was made to refocus attention on the vital importance of genuine parks and protected areas, at the inaugural Parks and Protected Areas Forum. Co-hosted by a number of key conservation organisations, including the Conservation Commission and the Conservation Council of WA, the event brought almost 300 delegates from three countries to Fremantle, to discuss and plan for a future with much better representation of our natural heritage within the protected area system.

Plenary speakers included filmmaker Malcolm Douglas from Broome, Pilbara author Sally Morgan, former NSW Premier Bob Carr, and Penny Figgis AO, representing the IUCN World Commission on Protected Areas. Breakout sessions covered a wide range of topics, from eco-tourism to Burrup rock art, to the links between parks and human health.

For me there were two standout presentations. One was that of Malcolm Douglas, whose passion for the Kimberley wilderness and concerns about LNG proposals in the region had him (and some audience members) on the verge of tears at times. The real surprise package, however, was the keynote by Bob Carr. Even when compared with other experienced politicians, his note-free oratory was skilful and cogent, and he is now a passionate advocate of action on climate change and the importance of large protected areas in that context.

The subheading for this event was these stirring words: "a sense of place, for all people, for all time". Was that message successfully conveyed? I would suggest only the first and third elements were adequately covered. While it was clearly the view of the speakers that all people will benefit from a "complete" reserve system (leaving aside the contentious question of what that might entail), this expensive and often academic event was almost exclusively preaching to the converted. Its reach was extended by a significant program of sponsored registrations (which the EDO benefited from), but the "punters" were not really sought after. With the exception of the media coverage the event generated, it is difficult to see how much, if any, additional political support for protected areas was achieved.

$70 million to international programs on GHG reduction

Isabela Gera *EDO volunteer lawyer*

September saw the then Federal Government announce $70.7 million to support international programs towards greenhouse gas reduction. On the eve of the Sydney APEC (Asia-Pacific Economic Cooperation) meeting, Malcolm Turnbull, then Minister for the Environment and Water Resources, said that the amount would be used to strengthen the global research effort into new energy technologies, further support the development and regional deployment of such technologies, and help build the skills needed to underpin regional action on sustainable forest management.

The funding included $50 million to further support practical climate change action through the Asia-Pacific Partnership on Clean Development and Climate (APP). The APP is a partnership between Australia, China, India, Japan, Republic of Korea and the United States of America to address the challenges of climate change, energy security and air pollution in a way that encourages economic development and reduces poverty.

These six countries represent around half the world's emissions, energy use and population. The partnership is an important initiative that engages the key greenhouse gas emitting countries in the Asia Pacific region on practical clean development and climate action. The then-Australian Government committed $100 million over five years for the partnership, which started with the inaugural meeting in Sydney on January 2006.

A new initiative, the Asia-Pacific Forestry Skills and Capacity Building Programme, was allocated $15.7 million to assist countries in the Asia-Pacific region improve the ability of their forests to capture and store carbon dioxide, and help to develop their forest management expertise.

Five-million dollars will establish an Asia-Pacific Network for Energy Technology (APNet), an energy science and technology initiative for clean energy research and development collaboration in the Asia Pacific region. The aim of APNet will be to accelerate technology breakthroughs, which will assist in making deep cuts to medium-term greenhouse gas emissions.

The initiative is a step in the right direction, but Australia needs to do more, through taking a leading role in regional and international action on climate change. Perhaps much more can be expected now that Australia has ratified the Kyoto Protocol.

Thanks to climate change donors

Fran Jones *Coordinator*

Thank you to all the people who generously responded to the EDO WA 2007 Climate Change Appeal. Those who did not request anonymity are, in alphabetical order:

Shelley Archer MLC, Rosemary Ayers, Victor Beacham, Heather Christian, Barbara Churchward, JB Horner, Jean Laing, Paul Llewellyn MLC, Gary Nixon, Margaret Quirk MLA, Ian Rudd, Giz Watson MLC, Uta Wicke.

Challenge to Anvil Hill decision rejected by Federal Court

Lisa Burton *EDO volunteer*

The Federal Court has dismissed a challenge by the Anvil Hill Project Watch Association to the decision of the then Federal Minister for the Environment that the Anvil Hill coal mine was not a controlled action for the purposes of the *Environment Protection and Biodiversity Act 1999* (Cth). That decision had the effect that the proposal did not require formal environmental assessment under Commonwealth law.

The EPBC Act requires environmental impact assessment of "controlled actions": actions which have or are likely to have a significant impact on matters of national environmental significance (such as ecological communities or threatened species).

Centennial Hunter Pty Ltd proposed to build the open-cut mine near Wynbong, in the Hunter Valley Region of NSW. It is intended to produce up to 10.5 million tonnes of coal per annum for 21 years – making it one of the largest mines in Australia. After an application by Centennial the Federal Minister for Environment held that the project would not constitute a "controlled action" for the purposes of the EPBC Act.

The Minister's delegate accepted that emission of GHGs can cause changes to the atmosphere and weather patterns. She also accepted that these changes could affect matters of environmental significance protected by the Act. However because the process by which this occurred was "highly complex", and consumption of all the coal proposed to be extracted from the mine would amount to only 0.04 per cent of global GHG emissions, a link between the extra GHG emissions produced by the mine and a measurable increase in global warming could not be identified.

The association challenged the Minister's decision, arguing that the questions to be answered in applying the Act was whether the project's GHG emissions would contribute to climate change and, if so, whether climate change would have a "significant impact" on matters protected by the Act; it argued that these questions should clearly have been answered affirmatively.

Justice Stone of the Federal Court explained that "impact" was defined in the Act (in s527E, which was inserted on the day of the delegate's decision) to include 'an event or circumstance' that is a direct consequence of the project in question, and an indirect consequence of a project if that project 'is a substantial cause of that event or circumstance'.

Her honour ultimately held that it was reasonably open to the delegate to find that the GHG emissions flowing from the project would not have a significant impact on matters protected by the Act. The interpretation of the Act put by the association – that a mere contribution to climate change would suffice – was rejected. (*Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources and Centennial Hunter Pty Ltd* [2007] FCA 1480).

The Environmental Defender's Office of NSW, which represented the association, sees this decision as a worrying precedent which demonstrates the need for law reform. If a project with the climate impact of the Anvil Hill mine – that is, the emission of more then 12m tonnes of carbon dioxide per annum for 21 years – is not sufficient to require federal assessment of its climate impacts, it seems unlikely that any coalmine or other project will.

Indigenous Conservation Title Bill recognises need for joint management

Michelle Ng *EDO volunteer, and*
Cameron Poustie *Principal solicitor*

The *Indigenous Conservation Title Bill* (ICT) was introduced into State Parliament on 26 September 2007. The Bill is aimed at recognising indigenous interests of the Martu and Gibson Desert people over two of the State's largest conservation areas – the Ruddall River National Park and the Gibson Desert Nature Reserve – since the extinguishment of native title rights created by vesting the reserves.

The ICT allows for the cancellation of the current Class A reserves over the area. Deputy Premier Eric Ripper claims that the '[s]pecial protections that applied to the Parks by virtue of their Class A status will also be maintained'. The land is to be held as a modified freehold title by a native title prescribed body corporate. The land cannot be sold or mortgaged (but can be leased), and can only be transferred to another prescribed body corporate.

The current Bill does indeed seem consistent with current protections. For the purposes of the *Mining Act*, the Ruddall River National Park and Gibson Desert Nature Reserve are still considered Class A reserves. It also treats indigenous rights holders as owners of conservation areas when providing for consultation and compensation over damage caused to that land by mining activities. The process for amending ICT land is the same as accorded to Class A reserves.

There are provisions for the joint management of conservation areas by setting up a body representing ICT holders and representatives of the *Conservation and Land Management (CALM) Act* CEO. Jointly managed land is taken to have been land vested in the Conservation Commission for purposes of the CALM Act. Activities that would otherwise constitute offences under the CALM Act or the *Wildlife Conservation Act* (WC Act) are permitted in certain circumstances; essentially (for the CALM Act) when the activities are undertaken by traditional owners in accordance with a management plan, and (for the WC Act) for sustenance, medicinal or cultural purposes.

The State Government is moving in the right direction. The ICT allows for indigenous landuse over the Ruddall River National Park and the Gibson Desert Nature Reserve without compromising the current protections over these conservation areas. It is hoped that similar models of meaningful joint management can be introduced in other parts of WA in a reasonable timeframe.

Keeping GM crops separate from non-GM crops

– can the law prevent pollen talking to each other?

Christal George *EDO volunteer intern*

The *Seed Amendment Bill 2007* (the Bill) is directed at maintaining a moratorium on genetically modified (GM) food crops, as Parliament intended with the *Genetically Modified Crops Free Areas Act 2003* (the GM Free Act), and which intends to keep separate non GM food crops from GM crops. The Bill was introduced into WA Parliament in July this year and amends the *Seeds Act 1981* (the Seeds Act).

The Bill allows for the Minister to be able to declare a type or class of seed containing certain characteristics to be prohibited in WA. It also allows the Minister to prohibit a certain percentage of seed or a type or class of seed from being present within a seed lot. The amendments are designed to increase the usefulness of the Seeds Act to maintain a moratorium on GM crops, and where necessary ban new varieties of weed seeds entering WA. Provisions in the Bill make it an offence (with a fine of up to $20,000) to import, sell or be in possession of a type or class of seeds, for the purposes of cultivation, that has been declared prohibited.

One of the issues EDO WA raised when the GM Free Act was first proposed in 2003 was that the Act regulated some aspects of GM seed – for the purposes of cultivation – but did not deal with the movement of, storage of, research into or any other dealings with GM food crops. The focus of the new Bill is on creating offences for the movement of GM seed for the purposes of cultivation. Whilst the Bill addresses movement of seed (carried by person) it still does not extend to storage of, research into or any other dealings with GM food crops.

In the GM Free Act the burden of proof to be established by the Crown was actual knowledge or recklessness. The EDO WA had recommended that the burden of proof be that a person could be reasonably imputed to have knowledge that the food crop was GM. Clause 13 of the 2007 Bill requires that the prosecution prove a person knows, or ought to know that the seed lot contains prohibited seed or prohibited seed content. This is in line with the earlier EDO WA recommendation, and will make successful prosecutions easier.

The WA Government has imposed a moratorium on GM food crops until 2008. The use of the law to prohibit the transport of GM seeds into WA is one of the steps the Government is taking to segregate GM from non-GM food crops. However, whether the law can effectively prevent weather cycles and such things as pollen transfer by birds, bees or kangaroos, contamination or cross breeding between GM crops and non-GM crops, including weeds becoming "superweeds" resistant to insecticides, is another matter. These are issues that the Say No to GMO Alliance is raising with the government.

For more information contact Dr Maggie Lilith at the Conservation Council of WA, on 9420 7266 or srlo@conservationwa.asn.au

Recreational fishing: no longer a game of chance

Kathryn Grocke *EDO volunteer*

According to the discussion paper released on 17 September 2007 by State Minister for Fisheries Jon Ford, *Managing the Recreational Catch of Demersal Scalefish on the West Coast*, unless the mortality of demersal scalefish is reduced by 50 per cent, stocks of the iconic WA species will collapse within four or five years. Demersal scale fish are bottom-dwelling fish often unique to WA, such as the dhufish, baldchin groper and pink snapper. Western Australia is in need of a long-term management strategy that will curtail exploitation and ensure future sustainability.

The paper is emphatic that not only commercial but also recreational efforts must be more closely regulated to ensure sustainability. Recreational fishing in the period 2005/2006 accounted for 45 per cent of the dhufish catch in the west coast bioregion. So it seems that recreational fishing is no longer the idle, unthreatening "lottery" that it may once have been. Anglers are becoming increasingly efficient and accurate. Fishing technology such as global positioning systems (GPS) and high-quality colour echo sounders have dramatically increased angler efficiency in the targeting of demersal species such as dhufish and pink snapper. Anglers are also taking advantage of improvements in angling gear, such as chemically sharpened hooks, low-stretch d braid lines and fishing rod and reel designs, which have improved catch efficiency, particularly in deep water. With such advanced technology it is little wonder these unique species have no chance.

The discussion paper suggests a number of "management tools" and encourages community debate over the possibilities. The paper suggests angler registration, tagging regulations, stricter zoning, and the possibility of "closed seasons" for a period of years in certain areas. It is too late, and unsuitable for the slow growth of demersal species, to merely impose bag and size limits. Indeed, considering the severity of the threat, it would not be unreasonable to suggest that all tools need be imposed to some extent. Sustainability requires the cooperation and commitment of commercial and recreational anglers alike.

A series of meetings were held in October and public submissions closed on November 17. The report can be viewed at www.fish.wa.gov.au

Impact assessment win for Wilson Inlet

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formally assess the proposal, effectively preventing the Water Corporation from opening the bar. Government agencies and the Denmark Environment Centre believe that if the bar is not breached this year the water remaining in the Inlet over summer will rejuvenate the system, and the water level will rise more rapidly next year, resulting in a water level high enough to breach the bar in June or early July, with the bar remaining open until at least February. Most importantly the environmental impacts associated with opening the bar at low water levels will be avoided.

Renewable energy target announced by previous Federal Government

Lisa Burton *EDO volunteer*

The previous Federal Government's promise to ensure that 15 per cent of Australia's energy was derived from clean or renewable sources by 2020 received a mixed initial response.

The *Clean Energy Target* (CET) scheme would see 30,000 gigawatt hours (GWh) of energy obtained from low emission sources each year, by 2020. It was intended that after consultation with State and Territory governments the CET would be legislatively implemented next year, replacing the existing Mandatory Renewable Energy Target (MRET) as well as existing and proposed State and Territory schemes. The CET was said to be designed to work in conjunction with the recently announced national emissions trading scheme, which was proposed to be established in 2011.

Electricity generators using technologies that emit less than 200 kilograms of greenhouse gases per Megawatt hour of electricity supplied would be eligible to participate in the scheme. Industry groups supported the proposal at the time, stating that it provides certainty for the sector and would encourage investment.

The Climate Institute welcomed the move, in part. Spokesperson John Connor agreed that a single national target would cut costs and red tape for business, but said the scheme was still inadequate. 'Unfortunately, under this scheme we won't see one extra electron of renewable energy into the system,' he said. Mr Connor also noted the 15 per cent target lagged behind those set internationally.

The ALP and the Greens criticised the proposal at the time, saying it was a mere compilation of existing schemes, which would open the renewable energy target up to contributions from nuclear power and fossil fuels – if the carbon emissions of the latter were captured and stored – rather than forcing an actual increase in renewable energy production.

We await further information about the status of this proposed target under the new government.

Drake-Brockman v the Minister for Planning & Anor

Melissa Yuen *EDO volunteer, and*
Cameron Poustie *Principal solicitor*

Introduction

Drake-Brockman ([2007] NSWLEC 490) is the first case in Australia that deals with the considerations of climate change on large urban development proposals and will inevitably become a benchmark for other such developments. Many have touted this as a "David and Goliath" battle, with local resident Drake-Brockman taking on mammoth beer mogul Fosters, and Planning Minister Frank Sartor. However, this time, Goliath won.

The case

On 9 February 2007, a concept plan for a project relating to the former Carlton United Brewery site was approved under s75O of the *Environmental Planning and Assessment Act 1979 (NSW)* (EPA Act). The development would effectively triple the population and car ownership in the area, as well as opening up the disposal of sewerage into the ocean and encouraging an enormous use of water during the whole term of construction.

The Applicant challenged, on a number of grounds, the validity of the approval for the development, which was granted by the Minister. Significantly, the application of Part 3A of the EPA Act was addressed. The Part gives the Minister significant discretion when deciding to approve projects and proposals.

One of the main arguments brought by the Applicant was that in the approval process, the Minister was required to consider the impact of the development on climate change.

Arguments: Fosters and the Minister

The argument posited by Fosters and the Minister was that 'ecologically sustainable development should not take primacy over economics'. Furthermore they argued that under Part 3A the Minister is under 'no obligation to take environmental sustainable development considerations into account'.

Alternatively, they also argued that the Minister had already sufficiently considered the concept of 'environmentally sustainable development' by rejecting an extra public carpark, and making sure the proposal complied with the sustainability requirements of the State sustainability requirements (BASIX – a building sustainability index).

Arguments: Drake-Brockman

The Chippendale community, along with other Sydney residents, supported Drake-Brockman in his cause against the proposed site. The Applicant alleged that the Minister's Part 3A decision failed to properly consider the principles of ecologically sustainable development. The approved concept plan was unsustainable for a number of reasons, such as significantly contributing to greenhouse gases, as well as estimates that the project would consume about 1.2 billion litres of water a year.

It seems that Drake-Brockman was following the precedent set in the case brought by Peter Gray against Planning Minister Sartor in approving a large CBD redevelopment. Last year, Gray won his case over the approval of a proposed mine at Anvil Hill. Drake-Brockman was using the Anvil Hill case as authority for the argument that principles of environmentally sustainable development are mandatory considerations.

The verdict

The Court found that Gray's case was distinguishable from the present case. Essentially, the NSW Land and Environment Court held that though Minister Sartor's decisions should be guided by notions of sustainable development, under law the Minister was not compelled to do so and the Court has no jurisdiction to force the Minister to do so. However, the outcome of the Drake-

Brockman case does not necessarily mean that greenhouse gas assessments will not be required for every proposal. Rather, the case has set a low threshold for "sustainability".

The finding in favour of the Respondents' arguments will potentially, therefore, reduce the Part 3A reference to "environmental development considerations" to mere "guidelines" which are there to encourage but not necessarily achieve sustainability.

More protection offered by Swan and Canning rivers legislation

Alicia McAllister *EDO volunteer*

On 25 September 2007 the *Swan and Canning Rivers Management Act 2006* came into effect. The current legislation replaces the *Swan River Trust Act 1988* and the *Environmental Protection (Swan and Canning Rivers) Policy 1997*.

Passed in October 2006, the aim of the Act is to provide a new mechanism to better protect the Swan, Canning, Helena and Southern rivers (known collectively as "the Riverpark"). It sets up a more coordinated management framework to deal with commercial and recreational activities, and urban and rural influences on the rivers.

The new legislation clarifies the roles, powers and accountability for activities that affect the Riverpark. Public authorities will now be required to take into account the objectives and principles of the new Act when they undertake their functions.

The legislation also sets up a new Swan River Trust Board to oversee the implementation of the legislation. The Board will comprise of members from a wide cross section of the community with expertise including planning and development, natural resource management and conservation.

A comprehensive outline of the legislation was featured in the December 2006 EDO WA newsletter. Current and past newsletters can be accessed via the EDO WA's website www.edowa.org.au

EDO NSW sharks case judgment

(from EDO NSW's Bulletin, *23 October 2007)*

In a judgment handed down on 18 October 2007, the Administrative Appeals Tribunal (AAT) upheld the Minister's approval of the NSW Ocean Trap and Line Fishery (OTLF) as a wildlife trade operation on the basis that the fishery operates in accordance with the conditions imposed by the Minister, and will not be detrimental to the survival of the Grey nurse shark.

Whilst the Tribunal acknowledged that the deaths of Grey nurse sharks caused by the operation of the OTLF has an adverse impact on the survival of the species, it found that the threats to the Grey nurse shark 'are the consequence of the biology of the sharks, of the fact that they are already critically endangered, and of the fact that they are subject to sufficient deaths each year from causes outside the OTLF to threaten their existence'.

The AAT concluded that the protection measures contended for by NSW Conservation Council (NCC) will not have a measurable impact, even taking into account the precautionary principle.

NCC argued that a key threat to the survival of the Grey nurse shark is hooking caused by fishing in and around the sharks' key aggregation areas. The NCC sought the implementation of fishery closure of specific key aggregation areas and the banning of the use of wire traces in deeper waters.

The decision of the Tribunal, which appeared to point to the inevitability of extinction of the Grey nurse shark, was a very disappointing outcome for the NCC, which has been campaigning for many years for the protection of this species.

The Federal Minister for Environment and Water Resources is due to consider the approval of the OTLF again in December this year and this will provide an opportunity for the Minister to attach more stringent conditions on the OTLF that will help ensure the continued existence of the Grey nurse shark.

For more information about this matter, visit www.edo.org.au/edonsw A full case summary and link to the judgment can be accessed from the "casework" link.

Historic addition to Western Australia's conservation estate

(State Government media release, 20 September 2007)

Environment Minister David Templeman today announced the single biggest addition to Western Australia's prized collection of parks and reserves in history. The Minister said more than 2.7 million hectares - most of it former pastoral lands in the Gascoyne and Murchison - would be converted into 11 new conservation parks and 14 new nature reserves, or added to existing parks and reserves. The new parks and extensions will mean WA's network of national parks, nature reserves and conservation parks will extend over 20.1 million hectares, or eight per cent of the State's land area.

'This new allocation represents around one per cent of our huge State and is a significant step in the Carpenter Government's commitment to creating a world-class parks system,' Mr Templeman said.

'While WA is enjoying an unprecedented boom under this Government, we have also seen a record amount of land set aside for conservation, including 33 new national parks and nature reserves. It is crucial that in times of prosperity we do not become complacent and the Carpenter Government is acting now for the future to ensure our unique biodiversity is protected.'

The Minister said that managed and protected areas such as national parks, nature reserves and conservation parks were the cornerstones of biodiversity conservation.

'Without the creation of well-managed parks, we will continue to lose much of our unique flora and fauna and ecosystems,' he said.

➤ *continued next page*

Under the latest reservations, eight new conservation parks will be created from the former pastoral leases. The Kennedy Range National Park near Gascoyne Junction will be expanded by more than 177,000ha, a further 35,600ha will be added to King Leopold Ranges Conservation Park in the Kimberley while 180,000ha will be added to the Cane River Conservation Park, south-east of Onslow in the Pilbara.

In the Southwest, the Government has acquired 7,750ha of freehold land in 26 parcels for inclusion in the reserve system. Three new conservation parks and 14 new nature reserves will be created. Two new areas will be included in existing national parks and six new areas will be added to nature reserves.

These areas will protect a range of threatened species and threatened ecological communities, as well as retaining remnant vegetation in what is otherwise a largely cleared landscape.

'Parts of the rangelands are poorly represented in conservation reserves and setting aside these areas is an important step in developing a parks network that is comprehensive and represents all the bioregions in the State,' Mr Templeman said.

Land is selected based on scientific criteria, including habitat condition and quality and the presence of threatened species and ecological communities.

Most of the former pastoral stations had been acquired by the Government over the past nine years under the Gascoyne-Murchison Strategy. Charnley, in the Kimberley was bought in 1992 and Burnerbinmah in the Gascoyne-Murchison was bought in 1995. One parcel of land, in the Chapman Valley, was bequeathed to the Government to be set aside for conservation.

The Minister said that in determining the classification for the land, the Government had taken into consideration mineral prospectivity.

'For this reason, we have decided that the vast majority of the land will be reserved as unclassified conservation parks,' he said.

'Existing mining and petroleum tenements on proposed reserves will co-exist following the change to conservation park status. Exploration and mining may also occur in conservation parks, subject to the normal environmental approvals. There are also advanced resource development projects on several of the former pastoral leases to be reserved. These areas will be excluded from the reservations.'

Conservation park status does not preclude recreational activities such as camping and bushwalking.

Mr Templeman said the latest reservations pushed WA even further towards the international benchmark of 15 per cent.

The Minister said that the Government would preserve all existing native title rights and interests by applying the non-extinguishment principle when creating the reserves. Native title claims were registered over nearly all the proposed conservation reserves and the State would comply with the Future Act provisions of the Native Title Act. Mr Templeman has asked the Department of Environment and Conservation, in consultation with the State Solicitor's Office and the Office of Native Title, to liaise with the native title claimants.

'Once the new reserves are created there will be opportunities for joint management with the traditional owners,' he said.

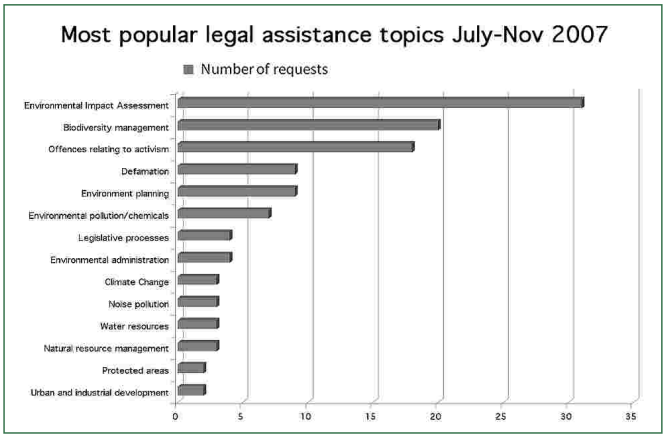
The year so far – we've been very busy!

***Cameron Poustie** Principal solicitor*

2007-8 began at a cracking pace, as the accompanying table shows. The table gives a fairly one dimensional view of our work, so I thought it would be worth listing some of the issues and campaigns that work has involved. As I often say about the EDO, we have been working on a good combination of local and high-profile issues, although in almost all cases our work is "behind the scenes". But that's the lot of the vast majority of lawyers!

The issues and campaigns we have worked on, from July to November 2007 included:

- Gorgon gas / Barrow Island (Pilbara)
- Negligent administration by government agencies
- Conservation of the Western Ringtail possum (Southwest)
- Wilson Inlet (Denmark)
- Airport and industrial noise
- A cattle feedlot at Narrogin
- Waste biosolids (Wheatbelt)
- Criminal charges arising from peaceful protest
- Clearing at Jandakot airport
- Conservation of karstic (cave) areas (Perth metro)
- Logging of native forests
- Conservation of the Fitzroy River (Kimberley)
- Native vegetation clearing "offsets"
- The Burrup Peninsula (Pilbara)
- Alcoa's Wagerup facility
- Bushwalking
- Urban development at Brigadoon
- Waterbird conservation
- The Great Western Woodlands (south of Kalgoorlie)



Marine Parks Bill (SA) 2007

(From GreenLaw, *EDO SA's newsletter, November 2007)*

The SA *Marine Parks Bill* aims to protect and conserve examples of all marine habitats and the wide diversity of plants and animals that depend on them. The Bill is geared towards biodiversity conservation and not fisheries management. Its primary objects are to protect and conserve marine biological diversity and habitats by declaring and providing for the management of a comprehensive, adequate and representative system of marine parks and to help maintain the natural function of coastal, estuarine and marine ecosystems and their interdependence on one another.

A key component of the Bill will be the management plans, which will determine what can or cannot be undertaken in different marine parks or in different zones within marine parks.

South Australia's marine parks will be zoned for multiple-use to protect and conserve marine biodiversity while providing for the ecologically sustainable use of suitable areas.

Conservation groups are critical of the multiple-use model proposed, fearing that activities incompatible with biodiversity conservation (mining, petroleum exploration, commercial and recreational fishing, waste discharge etc) will be allowed.

The Bill imposes a number of obligations and powers on the Minister (s21) and some quite significant penalties; in some instances a maximum fine of $100,000 or imprisonment for two years.

HG&R, Maddocks join action for animal rights activist

(from Lawyers' Weekly, *19 October 2007)*

The Public Interest Law Clearing House (PILCH) coordinated the efforts of barristers and lawyers from Herbert Geer & Rundle and Maddocks to help defeat an action against animal rights activists sued for hindering trade under the secondary boycott provisions of the *Trade Practices Act.*

In *Rural Export & Trading (WA) Pty Ltd v Hahnheuser* [2007] FCA 1535, Acting Chief Justice Peter Gray found Ralph Hahnheuser's placement of shredded ham in feed troughs to prevent the sheep being exported to the Middle East fell within the environmental protest exclusion in section 45DB of the *Trade Practices Act.*

Hahnheuser was sued, along with Animal Liberation SA Inc, by Rural Export & Trading (WA) and Samex Australian Meat Co Pty Ltd.

However, just before the trial both parties agreed that the action against Animal Liberation should be dismissed.

'It was an interesting test case,' said HG&R counsel Matthew Barrett. 'The secondary boycott provisions introduced as part of Peter Reith's [Liberal Government] industrial relations reforms were directed towards preventing coordinated industrial action.'

'The applicants in this case, however, were trying to use the provision to sue animal rights protestors for damages. The result seems more consistent with the initial purpose of the section.'

Justice Gray agreed with Hahnheuser's view – that his dominant purpose was to 'protect sheep from cruelty and suffering as a result of live transport by ship to ... the Middle East; and also to increase public awareness and education of the suffering and cruelty suffered by sheep during live transport by ship'– and said there were two additional obstacles to the applicant's claims.

'[Rural Export's] trade and commerce was not prevented or substantially hindered by anything that Mr Hahnheuser did and, in any event, the trade and commerce in which it engaged relevantly was not trade or commerce involving the movement of goods between Australia and places outside Australia,' Justice Gray said.

Minister tells mining companies to clean up their act

(State Government media release, 13 November 2007)

Resources Minister Francis Logan has called on mining companies to clean up their act or face losing their tenements, after an examination of exploration sites uncovered widespread environmental and regulatory breaches.

Mr Logan said recent inspections of 56 different exploration sites had found 46 that had breached exploration tenement conditions.

The breaches included uncapped drill holes, the construction of exploration camps without approval, excessive clearing for drill pads and access tracks. and a failure to rehabilitate these areas. Some of the breaches had occurred in environmentally sensitive areas.

'The worst offenders will be fined but, if these practices continue, I am prepared to remove tenements from offending companies,' Mr Logan said.

'I have also asked the Department of Industry and Resources (DoIR) to review the level and range of fines for such offences. I need to be convinced they are true disincentives.'

Another ten of the non-compliant sites were issued with direction-to-modify work practices, which must be undertaken for the companies involved to avoid fines or forfeiture.

DoIR referred details of the incidents to the Department of Environment and Conservation, to investigate whether offences under the Environmental Protection Act had also occurred.

'Mining companies are constantly calling on the State Government to speed-up the exploration approvals process and yet, when approvals are granted, some companies are showing a complete disregard for the environment and blatantly disregarding the exploration conditions.'

'If the industry wants continued access to sensitive areas of the State, then it has to demonstrate a much higher standard of environmental practice.'

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