EDO
Vol 13 No 4
March 2008

edonews

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

Public interest win for EDO WA in criminal case

Cameron Poustie, principal solicitor

We had a win with one of our two Arcadia (a former WA southwest forest coupe) criminal matters on Friday 14 December 2007!

'Roger', as he would like to be known when we refer to this case publicly, was charged with obstructing a public officer, contrary to s172 of the *Criminal Code* (WA), and disorderly behavior, under s74A of the Code. When the police finally deigned to give us particulars of those charges (see more about this problem on page 5), the former was allegedly because Roger moved his hands or wrists inside the metal tube that was his 'lock-on' device, so as to make it more difficult to cut him off the front-end loader he was attached to. His action in having locked on to the vehicle to start with was said to be disorderly behavior. It should be noted that this second charge arose only after police dropped a charge of hindering the driver of the loader, after we pointed out that he was not in fact a "public officer" but a contractor for the Forest Products Commission.

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Roger, victorious Arcadia NVDA client.

Magistrate Steve Wilson considered the authorities we had provided him on disorderly behavior, as well as referring to some other authorities. His Honour considered that Roger's conduct while he was locked on was "quiet and passive", and therefore that there was no evidence Roger had "caused a scene or seriously offended the values of orderly conduct which are recognised by right-thinking members of the public."

His Honour went on to find that if conduct is related to a political demonstration, that must be taken into account in considering if the conduct is "disorderly", and indeed (by reference to an NT case) that 'political activity, because of the desire of a democracy to allow vigorous dissent, may justify or at least protect from prosecution behavior which might otherwise be considered offensive.' Quite obviously this is a good quotable reference, even if not a precedent that will bind other magistrates and courts!

As to obstruction, the magistrate found as a fact that Roger had moved his hands and wrists inside the pipe from time to time while police were trying to cut him off, but accepted his explanation that it was a function of the cramped position he was in over the long period during which he was being cut off, combined with the weight of the lock-on device. It is implicit from his Honour's judgment that he accepted that Roger was unable, having got himself into position under the vehicle, to assist the police by removing himself.

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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

Remote, Rural and Regional solicitor news

Nicola Rivers, outgoing RRR solicitor

Nicola talks with members of NEAT during her visit to Narrogin last November.

In February I finished two years working with the EDO. I really enjoyed my time there, and hope that I was able to help our clients negotiate the often confusing path of environmental law. The highlight of my job was travelling around WA and meeting so many clients through the remote rural and regional program. I particularly enjoyed discussing environmental law with communities through our legal education program.

RRR visit to Narrogin

In November 2007 I visited Narrogin and met with members of the Narrogin Environmental Action Team Inc (NEAT). Narrogin is a small wheatbelt town about 200km southeast of Perth. I gave an informal presentation on how community groups can use environmental law to protect their local environment, focusing on environmental impact assessment and environmental licensing.

Residents of Narrogin have been impacted by very strong odour emissions from a local cattle feedlot since 2005. Animal odour problems are not new to Narrogin – in prior years the community was heavily impacted by odour from a piggery. However, new owners of the piggery worked with the community to implement measures to reduce the odour. Unfortunately for the community, the odour from the cattle feedlot is having a significant impact on their lives. When the feedlot was referred to the EPA for assessment in 2004 the EPA decided not to assess it as they stated the odour and other environmental impacts could be managed under a pollution licence. However when the licence was issued it had no conditions directed at odour. The cattle feedlot's licence is currently being reviewed, which provides a good opportunity for the community to have input into the conditions they would like the feedlot to operate under. Ultimately, the Environment Minister will decide the final conditions. Pollution licences for feedlots are much less stringent in WA than in NSW, as a member of NEAT recently discovered when she found a NSW licence containing 24 pages of very comprehensive conditions.

Thank you

I'd like to say a huge thank you to all the clients and supporters that I have worked with at the EDO. It is wonderful to see that there are so many communities around WA concerned about the environment and who work so hard to protect it. I may be in contact with many of you again as I will remain part of the EDO community through EDO membership and volunteering. ■

PLEASE NOTE: EDO WA MEMBERSHIP RENEWALS ARE DUE ON 1 JULY 2008 – see page 12

EDO WA helps force disclosure

Rosie Phillips, EDO volunteer

Must an offset proposal, which is produced to comply with a condition on a clearing permit, be made public?

Some native vegetation clearing permits given to local governments include the condition that clearing cannot commence before the proponent submits an offset proposal and has it approved by the Department of Environment and Conservation (DEC).

In the second half of 2007 the EDO, acting on behalf of the Conservation Council of WA, sought access to information relating to certain offset proposals which had been approved by the DEC. The DEC refused to provide this information, with the effect that the offset arrangements were not subject to public scrutiny.

The DEC is required by statute to publish the conditions to which a permit is subject. The DEC was of the opinion that offset proposals did not form part of the conditions, but rather constitute what is produced in compliance with conditions, and are therefore not required to be published.

On 19 November 2007 the EDO wrote to the Minister for the Environment seeking access to relevant offset proposals, arguing that they form part of the conditions, because the conditions are not finalised until the offset proposal is approved.

The EDO noted that Environmental Protection Authority Position Statement No9 provides that offsets should be transparent, and that "the general public should be able to see that offset principles have been put into place and that offset goals are being achieved".

The EDO also argued that the information would be available under the *Freedom of Information Act 1992*, and providing the information would avoid the unnecessary cost and delay resulting from an FoI application.

The Minister did not accept that the offset proposals form part of the conditions, stating that it was inappropriate to generally commit to providing all offset proposals in full to third parties, because confidential information may be involved. On the other hand, the Minister indicated that, as far as possible, details of offset proposals should be available to interested people, upon request. The Minister stated that the DEC would provide the CCWA with approved offset proposals that would be made available if an application under the Freedom of Information Act were made. ■

Public interest win

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In the end Roger was acquitted of both charges, and significant costs were awarded against the police, with a nice portion of that to be retained by the EDO.

My thanks go to the masterful court work of barrister Steve Walker, who has quite a record when it comes to representing environmental activists. A number of volunteers also provided invaluable help, particularly our intern Christal George, who is a passionate supporter of nonviolent direct action. ■

A great win for climate change activists

Walker v Minister for Planning [2007] NSWLEC 741

Lisa Burton, EDO volunteer, and
Cameron Poustie, principal solicitor

Walker challenged the validity of the Minister's approval of a concept plan for a residential subdivision and development of a retirement home at Sandon Point, NSW. The objection was based, among other things, on claims that the Minister had failed to take into account relevant considerations, including the principles of ecologically sustainable development (ESD).

Part 3A of the *Environmental Planning and Assessment Act (1979)* NSW (EPA Act) states that a person is prohibited from carrying out a "project" within the meaning of Part 3A, without the Minister's consent. A development would essentially constitute a project for this purpose if it was significant in scale. The Minister could require that concept plans for the project be submitted for assessment, as was done here. The Minister approved the concept plan, subject to some modifications.

Justice Briscoe explained at length the case law surrounding ESD, and its significance "to the survival and well-being of human beings and other species". His Honour noted that Australia is party to various treaties, such as the Rio Declaration of 1992, which advocate the pursuit of ESD in governmental decision-making. His Honour noted that 'ESD or its encouragement is not an exclusive legislative goal of the EPA Act', but has been listed as one of the objectives thereof since 1998: s5(a). His Honour stated: 'The legislative goal is that encouragement of ESD, including precaution regarding the environment, is to take its place along with other considerations so as to ensure an environmentally informed decision-making process.'

Justice Briscoe stated that while ESD was not listed as a mandatory consideration, the requirement to consider the "public interest" in s79C is ample enough, having regard to the subject matter, scope and purpose of the EPA Act, to embrace the principles of ESD where those principles are relevant to an issue.

His Honour ultimately held that the Minister, being obligated to consider ESD, had failed to do so, by failing to consider whether the impacts of the proposed development would be compounded by climate change – in particular, by failing to consider whether changed weather patterns would lead to an increased flood risk in connection with the proposed development in circumstances where flooding was identified as a major constraint on development of the site.

How this case might be applied to different factual circumstances will require careful thought, but there is no question it is a tremendous result for Australian environmental jurisprudence. ■

Judgment in landmark anti-whaling case

Humane Society International Inc v Kyodo Senpaku Kaisha Ltd [2008] FCA 3

EDO NSW Special eBulletin, 21 January 2008: no 545

The Environmental Defender's Office (NSW) has successfully represented the Humane Society International Inc (HSI) in their Federal Court case against Japanese whaling company Kyodo Senpaku Kaisha Ltd (Kyodo).

The judgment, which was handed down on 15 January 2008, is the culmination of more than four years of legal action to prevent whaling in the Australian Whale Sanctuary off Antarctica.

His Honour Justice Allsop made a declaration that Kyodo was in breach of Australian law by whaling in the Australian Whale Sanctuary, and granted HSI an injunction to restrain Kyodo from further breaches of the *Environmental Protection and Biodiversity Conservation Act 1999* (EPBC Act).

Kyodo is the owner of a number of ships that whale Antarctic waters pursuant to the Japanese Whale Research Program. The evidence presented to the Court was that Kyodo had killed 3558 minke whales and 13 fin whales since 2000/2001.

The Court concluded that most of killings had occurred in the Australian Whale Sanctuary and that Kyodo had no permit under the EPBC Act authorising these acts. Sections 229-230 of the EPBC Act makes it an offence to kill, injure, take or possess a cetacean.

Kyodo does not recognise Australia's claim to Antarctic waters and did not attend the Court hearing to contest the case. [The matter was therefore heard in their absence. Redundant?]

The Act has wide terms and applies to all of Australia including its external territories. The Act applies to all persons and vessels within waters claimed as Australia's Exclusive Economic Zone (EEC). This includes the Australian Whale Sanctuary in the EEC adjacent to Australia's Antarctic Territory. Australia's claim to its Antarctic EEC is controversial, as Australia's Antarctic Territory is formally recognised by only four nations – New Zealand, France, Norway and the United Kingdom. His Honour found that despite the fact that Japan disputed Australia's jurisdiction, it was not a ground for invalidity of the EPBC Act, as the sovereign claim by Australia is not a matter capable of being questioned in the Court.

The next step is to serve Kyodo with the injunction, which will be done as soon as possible. Should the company continue to whale in the Australian Whale Sanctuary in contravention of the injunction, it will be in contempt of court and enforcement action may be taken against it.

The EDO and HSI are grateful for the assistance of barristers Stephen Gageler SC and Chris

McGrath, who argued the case before the Court on a pro bono basis.

The complete judgment is available online at http://www.austlii.edu.au/au/cases/cth/federal_ct/2008/3.html ■

NSW Land and Environment Court challenge against Anvil Hill Coal Project defeated

Dean v Minister for Planning and Andros Australia Pty Ltd (No 2) [2007] NSWLEC 830

Alicia McAllister, EDO volunteer

On 28 November 2008, Preston CJ of the NSW Land and Environment Court dismissed an appeal against the Minister for Planning's decision to grant conditional development consent to the Anvil Hill Coal Project in the Wybong, NSW. The appellant was represented by the NSW EDO.

The applicant contended that the Minister did not have power under section 75J(1) of the *Environmental Planning and Assessment Act 1979* (NSW) (the Act) to approve the project because carrying out of the project was "wholly prohibited" under the applicable Muswellbrook Local Environment Plan 1985 by the operation of section 76B of the Act. By way of background, it had been found (and this was not a point of contention) that certain parts of the project, which were located on land subject to the Muswellbrook Plan, were prohibited. The applicant submitted that limitations imposed by the then section 75J(3) on section 75J(1) precluded the Minister from approving any project which included prohibited parts.

Counsel for the Minister and Andros argued that the carrying out of a project is only "wholly" prohibited if each and every part of the project is prohibited and hence, since parts of the project were permissible, then the project was not "wholly" prohibited.

The Court rejected the applicant's submissions and agreed with the respondent. Thus, as the Anvil Hill Coal Project was permissible with development consent on certain parts of land, it was not wholly prohibited by operation of section 76B, and the Minister was therefore not precluded from approving the project. ■

Black flying fox case rehearing successful

EDO QLD MEDIA RELEASE

Friday 16 November 2007

The Planning & Environment Court will grant conservationist Dr Carol Booth orders requiring that lychee farmers Merv and Pam Thomas of Mutarnee, NQ, stop using their electric grids and dismantle them within two months, unless they get a permit from the EPA.

Dr Booth took the legal action after she and a colleague found dead flying foxes on the property in 2003 and 2004. The property is partly e nclosed by the Paluma National Park.

In his judgment in *Booth v Frippery*, Judge Robin found that the Thomases had illegally killed "thousands" of flying-foxes, and were likely to continue to kill or injure "substantial" numbers, despite their claims that the grids were non-lethal: 'Deaths by electrocution … itself are not

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the end of the matter … flying foxes which have suffered injury by electricity may not die then and there, but manage to fly off and then perish in various ways at some remove in time and place in outcomes that would not have happened but for the contact with the electrified grid. An associated phenomenon, to be expected in the fruiting season, is lethality for vulnerable fetuses of mothers which suffer electric shock.'

The Respondents had attempted to rely on a defence provided under the Act where they had to prove that they had not intended to take the flying foxes. The word "take" has a definition under the Act which includes killing, injuring, or harming a protected animal. They were unsuccessful in their attempt to raise this defence. Judge Robin said it was important not to confuse motive with intent. He said that the Respondents had as their motive the protection of their lychee crops, and, as a way of satisfying their motive, had intended that the flying foxes should be killed or at least harmed. The judge considered a number of cases dealing with the concept of intent in arriving at this conclusion.

'This is the second lychee business required by the courts to dismantle their grids, and the third ordered to stop electrocuting flying foxes,' Dr Booth said. 'It's time for the government to order all electric grids dismantled to prevent any further illegal killings.'

Solicitor for Dr Booth, Jo-Anne Bragg of EDO Qld, said the case proved once again the great importance of community legal rights. 'As the judgment recognised, such rights allow members of the community like Carol Booth to stop illegal activity when the state lacks "the capacity or the will to adequately police compliance" with environmental legislation,' she said.

'These cases run by the community have saved the lives of tens of thousands of flying foxes, set new legal precedents for nature conservation, and forced the government to do something about large-scale bat slaughter in orchards.'

'However,' Dr Booth said, 'the government should now move to totally end the killing of flying foxes as a method of crop protection, by requiring that grids be dismantled and that non-lethal methods be used instead of shooting. Netting is now being adopted by most farmers as it makes both commercial and environmental sense.'

A history of flying fox cases

2001: *Booth v Bosworth* - the Federal Court found that Rohan Bosworth had probably electrocuted 18,000 spectacled flying-foxes in 2000, and ordered that he stop. This was the first ever case under then new Federal environment laws.

2002/03: *Booth v Bosworth* – subsequent appeals by the farmer failed to overturn the original judgment.

2005: *Booth v Frippery, Thomas & Ors* - the Planning & Environment Court refused to grant orders against Merv & Pam Thomas. This was the first ever case run under the Nature Conservation Act using third party rights.

2006: *Booth v Frippery* - the Appeal Court found there had been errors made in the original hearing and ordered a retrial.

2007: *Booth v Yardley* - the Planning & Environment Court ordered that Richard Yardley dismantle his grid, after he admitted on public radio to electrocuting 1100 spectacled flying foxes.

2007: *Booth v Frippery* - in the rehearing of the case, the Planning & Environment Court ordered that the electric grids be dismantled. ■

Full police powers, not full police disclosure

Is it easier just to plead guilty and be done with it?

Christal George, EDO volunteer intern

Though police have more power than ever before to charge and detain people suspected of committing an offence, there are serious shortcomings with the way the way police handle their obligation of providing full disclosure of evidence to the accused before a trial commences. Full disclosure provides the opportunity for the accused to seek proper legal advice, and be able make an informed decision about how to plea. In the context of peaceful protest the EDO recently experienced police incompetence in their failure to fully disclose the evidence upon which they sought to rely.

The outcome of Australia's first-ever forest blockade at Terania Creek, in northern NSW, in August 1979 taught campaigners that outcomes for the forest lie in political solutions. The peaceful direct action, associated police arrests and media interest sparked a year-long enquiry chaired by Simon Isaac QC, which found in favour of the timber industry. However, in October 1982 the NSW Wran government, with an election looming, overturned the findings and banned the logging of rainforest areas on the north coast.

Ever since, peaceful direct action (or, nonviolent direct action, NVDA) is one tool used by campaigners to achieve political solutions for forest protection, alongside media and litigation strategies, public education and lobbying. Often it is the last resort.

EDO WA has been asked on numerous occasions to provide legal assistance to environmental defenders who have come into contact with police in peaceful protest situations. In one situation the protestors concerned lodged a formal police complaint regarding the disproportionate use of force by police. In the same incident an assault police charge was dropped by police after video footage clearly showed the police hitting the protestor, not the other way around. The type of charges protestors can expect include obstruction, trespass, assault police and disorderly conduct.

Most common has been the use of the charge of obstruction when police are confronted with peaceful direct action. Obstruction of a public officer "in the lawful execution of his duty" is broad enough to cover all range of situations including prevent, hinder, or resist a public officer. The Explanatory Memorandum to the *Criminal Law Amendment (Simple Offences) Bill 2004* An accused faces a summary conviction for obstruction with a

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Steve Walker, whose win in Roger's case continues his enviable NVDA record.

maximum penalty of 18 months' imprisonment and a fine of $18 000.

Roger & Rastrick

The EDO in June 2006 newsletter reported on the plight of the quokka, and the landmark study by Hayward, De Tores Dillon and Fox, stating that the species was on the verge of extinction in the northern jarrah forest (extending from Mundaring to around Collie in the south). A few months later, when logging was to commence in Arcadia forest near Collie, a series of peaceful protests occurred that drew attention to logging of quokka habitat.

Police laid a series of charges relating to separate incidents, including Roger, charged with two counts of obstruction of a public officer (later changed to one of obstruct and one of disorderly conduct) and Rastrick, charged with trespass and obstruction of a public officer. Both pleaded not guilty and the EDO reported in September 2007 that we were proceeding to trial in these matters.

The EDO can confirm from our recent experience that police rely on the accused simply accepting the police version of events as typed up in the Statement of Material Facts (SMF). Police are required by law to provide full disclosure of evidence upon which they seek to rely in order to prove each element of the offence, not just the SMF and a couple of witness statements.

Understandably, police prefer securing a guilty plea before trial, as it saves a lot of work and time; but this must not be done at the expense of compromising the future prospects of the accused persons. Further, the WA Police Annual Report shows that the performance remuneration base of WA police is assessed using eight key effectiveness and efficiency indicators. One of the four Outcomes upon which police performance is evaluated concerns how "Offenders are apprehended and dealt with in accordance with the law". To measure this Outcome key performance indicators (KPI) are used including:

- the percentage of guilty pleas secured before trial (KPI 5.1) and
- the percentage of convictions recorded for matters that went to trial (KPI 5.2)

(*WA Police Annual Report 2007, pp 109, 126*).

WA Police achieved their target of securing greater than 92 per cent of guilty pleas before trial in 2006-07 (KPI 5.1). The annual report notes that the introduction of the full disclosure requirement in 2005 in the Criminal Procedure Act greatly assisted in meeting this target. It is inferred that full disclosure of evidence by police before a trial date was set assisted the accused person to make an informed decision to plead guilty without going to trial.

It is certainly not always the case that offenders are given full disclosure of police evidence pre-trial, as shown by the Roger and Rastrick matters. Two other forest protestors with Roger in Arcadia were interviewed by police on site, told they had committed an offence and were subsequently charged with obstruction of a public officer (driver of the log loader, who was a contractor). The protestors pleaded guilty straight up, securing for the police statistics of two guilty pleas pre-trial. As it turns out the protestors had been wrongly charged. There could be no charge of obstructing the driver of log loader because he was not a public officer (ie a forestry officer or a police officer). Roger was similarly charged with obstructing the contractor, but the police dropped this charge when the EDO pointed out that contractor was not a public officer.

In relation to KPI 5.2, WA Police reported that they did not reach their target of securing greater than 70 per cent of convictions in matters listed for trial – rather, the success rate for convictions at trial decreased in 2006-07. The EDO is not surprised, given its dealings with police in the Roger and Rastrick matters. Our recent experience indicates that police are not following the disclosure requirement by producing the evidence relevant to their case in a timely manner. Without such documentation it is near impossible to provide appropriate legal advice and prepare the defence case.

In both Roger's and Rastrick's matters the EDO repeatedly asked for full disclosure before trial. In Roger's case the EDO never received full disclosure, despite repeated requests over a period of a year. In the end full disclosure of the evidence upon which the police sought to rely was done verbally in court on the day of the trial! In Rastrick's case we counted 120 days in waiting whilst we made repeated requests for full disclosure.

Nonviolent direct action is an opportunity to shift the politics and public opinion, not necessarily to get a criminal record. Exercising your right to peaceful protest requires courage and forward thinking, and it poses a risk that you may be both charged with and convicted of a criminal offence.

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Full Federal Court of Australia dismisses appeal against Anvil Hill open cut coal mine

Anvil Hill Project Watch Association Inc v Minister for the Environment & Water Resources [2008] FCAFC 3

Alicia McAllister, EDO volunteer, and Cameron Poustie, principal solicitor

On 14 February 2008 the Full Federal Court of Australia dismissed an appeal by the Anvil Hill Project Watch Association Inc (the Association) against the NSW Minister for the Environment and Water Resources' (the Minister's) decision to approve the construction and operation of the Anvil Hill open cut coal mine and colliery in Wybong, NSW. The association was represented by the EDO NSW.

The Minister had decided that the Anvil Hill project was not a "controlled action" within the meaning of section 67 of the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) (the Act). Section 75(1) of the Act requires the Minister to decide whether the subject of a proposed action referred to the Minister is a "controlled action", and if so which of the "controlling provisions" in Part 3 of the Act apply to the action. (The provisions of Part 3 contain prohibitions on certain activities without Ministerial approval due to the impact which those activities have upon the environment.)

Two key submissions were made by the association: Firstly, that a precondition to the Minister's exercise of discretion under section 75(1) was the question of whether a proposed action has, will have, or is likely to have a significant impact on a matter protected by Part 3 of the Act. This argument was rejected. The court held that there is no express or implied "jurisdictional fact" in the language of section 75(1) – that is, the section simply requires the Minister to make a decision. The exercise of this power is not contingent upon a pre-existing, objectively determined fact or condition.

Secondly, the association argued that a report relied upon by the Minister took into account irrelevant considerations because it used a private classification system for endangered species, not the published list in s181 of the Act. This argument was also rejected.

The decision has effectively ended public law attempts to stop the mine from proceeding. The end result is that if all the coal produced by the proposed mine is consumed it will produce 12.5 million tonnes of CO^2 per annum over 21 years – equal to 0.04% of current annual global greenhouse gas emissions.

The case illustrates that it was lawful to approve such a project in these circumstances.

EDO NSW was supported by the excellent *pro bono* work of Chris McGrath; and Lucy McCallum SC, now a judge on the NSW Supreme Court. ■

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A criminal record shapes a person's identity in some ways: you will be judged by others (positively and negatively), be potentially unable to travel to certain countries; and potential employers may view you in a different light. It is important to seek legal advice first, before entering a plea. A guilty plea ensures the matter is dealt with speedily, but with the consequence of gaining a criminal record. Entering a plea of not guilty requires personal gumption to sit it out, as resolution may take up to six years in some peaceful protest cases.

Whilst in our experience the police have shown themselves to be underprepared and incompetent in the provision of evidence upon which they seek to rely, there is never a guarantee of successfully defending the charges, and there is the risk of having to pay both a fine and an additional amount in court costs.

In Roger's case the EDO was ultimately successful at trial (see separate article on page 1), and was able to pursue a costs order against the police. Upon hearing news of victory, the defendant said 'Police will have to be very careful about how they charge people, and we don't have to fear about taking direct action in defence of the forests.' The barrister in Roger's case, Steven Walker, stated outside court: 'The decision is important in a number of ways. Firstly it is about the protection of forests and support for those who take direct action in a democratic society such as ours where freedom of political debate is an essential component. Secondly it is about the protection of civil liberties and human rights, and ensuring those rights are not trampled on.' ■

Private member's bill on water conservation

Ray Redner, EDO volunteer

In late 2007, Paul Llewellyn MLC (Greens WA) introduced a Private Member's Bill; the *Water Services Licensing (Water Conservation Target) Amendment Bill 2007*, which aimed to promote effective water conservation by amending several current water services legislation.

The growing populations of Perth and the southwest region have placed an increased strain on water resources in those areas. The demand for scheme water is rising sharply, while the capacity to provide water is diminishing, due to lower rainfall. In the Perth region this has resulted in an increase in water drawn from underground sources, possibly resulting in the diminished health of vegetation communities, acidification of wetlands, and threats to cave fauna.

The Bill aims to minimise these effects by introducing a water conservation target system, in which a minimum target will be introduced, of 1.5% per capita reduction of water consumption on the previous year, until 2020. Operators of water services must take actions to achieve this minimum or face financial penalties.

In addition to these new water conservation targets, licensed suppliers must also provide the Economic Regulation Authority with two reports annually. These reports will be a statement of the water conservation targets for each region, and a demand management strategy.

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Furthermore, the licensees must provide services and education programs that promote more effective water use within the community. This creates a system where the water service providers are held accountable for their management actions and their per capita water consumption rates.

The Bill is aimed at establishing long-term water conservation targets, rather than those limited by a shorter time frame. It would also bring Western Australia's water-management actions into

line with other states around Australia where similar legislation is in effect. ■

Changes to a project after referral to the Minister: the Blue Wedges case

Rosie Phillips, EDO volunteer

Where a project may have an environmental impact upon an area of Federal responsibility outlined in the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act), the action must be referred to the Federal Minister, and approval by the Minister may be required.

In *Blue Wedges Inc v Minister for the Environment, Heritage & the Arts* ([2008] FCA 8) Heerey J of the Federal Court held that substantial elements of an action can be changed between referral and approval, without rendering the approval invalid. The changes will only render the approval invalid if the action approved by the Minister is no longer the same action which was described in the referral.

The decision concerned a proposal by the Port of Melbourne Corporation to deepen shipping channels in Port Philip Bay and the Yarra River. The action was referred to the Federal Minister in 2002 and approval was given in 2007.

Blue Wedges Inc, an organisation which represents community and environment groups, challenged the approval decision. Blue Wedges Inc argued that the scale, location, nature and impact of the action had changed substantially since the legislative approval process started, and should be recommenced.

Heerey J held that the approval was valid. His Honour accepted that changes had been made to the project since it was referred to the Minister in 2002, commenting that 'in a project of this magnitude, it would be surprising if there were not'. Nonetheless, these changes did not render the approval invalid. The action approved by the Minister in 2007 was the same action described in the 2002 referral, that is: "to deepen the shipping channels at Port Phillip Heads, in Port Phillip Bay and the Yarra River and its approaching channels".

Blue Wedges also argued that the Federal Minister's approval decision was invalid because the environmental impact assessment provided to the Minister did not adequately assess all the impacts of the project, the Minister did not request further information from the proponent about these matters, and therefore the Minister failed to have regard to all considerations relevant to the decision.

Heerey J commented that the power to request further information was discretionary and depended upon the Minister's judgment as to whether he or she had enough information to make an informed decision. It was held that there was no evidence that the Federal Minister believed that he did not have enough information to make an informed decision.

Blue Wedges' application was dismissed. Despite this, the Court did not order Blue Wedges to pay its opponents' costs. This was because, among other things, the case concerned matters of high public concern and public interest, and raised novel questions of general importance as to the approval process under the EPBC Act. ■

Ratification of the Kyoto Protocol – what does it mean for Australia?

Nicola Rivers, EDO solicitor

For nine years the Australian Government refused to ratify the Kyoto Protocol, on the grounds that it was not in Australia's best interests. That all changed in December when the Labor government, in line with its election promise, lodged Australia's ratification with the UN. The Kyoto Protocol came into force for Australia on 11 March 2008.

What does ratification mean in a practical sense for Australia? At first glance the practical implications seem minor, but they will prove to be significant in the longer term.

According to the previous government Australia will slightly exceed its Kyoto target of 108% of 1990 levels by 2012 (the end of the first Kyoto commitment period). This apparent reduction in emissions from previous years is largely due to our reduced rate of land clearing since 1990. If we continue on this trajectory, we will need to make only minimal cuts to meet the 2012 target. However, this calculation hides the fact that our actual emissions (when you don't remove credits for reduced land clearing) are at 125.6% of 1990 levels. Energy emissions, which make up the majority of Australia's emissions profile, are at 150% of 1990 levels. Parties to the Kyoto Protocol have started negotiations to establish targets for the second commitment period, and unless Australia makes some significant reductions soon, it will be very difficult for us to meet our post 2012 targets, regardless of the amount.

One area that has immediately opened up to Australia by ratifying Kyoto is the ability to participate in the clean development mechanism (CDM). The protocol allows developed countries to invest in technologies in developing countries, in exchange for carbon credits. This is a potentially significant area of investment that was not open to Australia under the previous government's refusal to ratify. Although a number of issues surrounding Australian companies' participation in the CDM are still to be worked out, companies will be starting to seek out these opportunities.

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The Australian emissions trading scheme, currently being developed by the Federal Government, could now also link into international trading schemes through the Kyoto Protocol. The government will decide whether credits gained through CDM projects will be able to be used by companies under the Australian scheme to reduce their total emissions.

Australia's ratification leaves the US as the only developed country not to have signed the Kyoto Protocol, which increases pressure on the US to join in negotiations for the post-2012 commitment period, or at the least to take some significant action to tackle climate change.

Importantly, ratification also means we are now able to join negotiations on what the post-2012 extension of the Kyoto protocol will look like, particularly what future emission reduction targets will be. Before ratification Australia was only able to observe, not participate in these crucial discussions.

Despite the former Liberal Government's continual assertions that ratification of Kyoto would disadvantage Australia, it is clear that most sectors in Australia, including the business sector, welcome the change and are looking forward to taking advantage of the many opportunities it will bring. ■

Private Member's Bill on greenhouse gas emissions

Ray Redner, EDO volunteer

In late 2007 Paul Llewellyn MLC (Greens WA) introduced a private member's Bill; the *Greenhouse Gas Emission Reduction (Hot Water Systems) Bil*l.

Currently, an enormous amount of energy is used by domestic hot water systems. The Bill aims to limit the types of water heater systems available for sale and distribution in Western Australia to those that meet strict energy saving standards.

In 1999 16.8 million tonnes of carbon dioxide equivalent (CO^2e) was produced providing residential hot water, compared with 700,000t by industry. By restricting the use of hot water systems to those of a high standard, emissions can be reduced dramatically. Mr Llewellyn argues that if a household replaces a current electric storage system with an electric-boosted solar system or gas system it results in an energy saving of approximately 75%; or replacing the same original system with a gas-boosted solar system the energy savings are nearly 95%. The Bill proposes a minimum standard of energy savings from solar and heat pump systems.

The Bill aims to be equitable to the entire community, as the only hot water systems available will be limited to those that comply with energy-saving standards. It is believed that, as old systems are replaced with new energy efficient systems, there will be a progressive reduction in the amount of energy used to produce household hot water. This, added to the increasing numbers of new systems being installed in newly constructed houses could mean significant energy savings in the near future, thereby reducing the greenhouse gas emissions of Western Australia's energy-generation industry. ■

Garrett back in Federal Court over dredging

Lawyers Weekly – www.lawyersweekly.com.au
1 February 2008, page 6

Federal Environment Minister Peter Garrett is back in court again over his approval of the Port Phillip Bay channel deepening project last December.

Garrett's statement of reasons for approving the project, released on 22 January, has been jumped on by environment group the Blue Wedges Coalition, and forms the basis of the group's latest effort to have the approval overturned. The group was unsuccessful in a previous application, the Federal Court siding with Garrett.

As reported by The Age, the group claim that Garrett had failed to consider key social impacts of the project, such as the impacts on recreational fishing and swimming; failed to notify Climate Change Minister Penny Wong that the project would raise water levels; and failed to consider that the Port of Melbourne breached its own environmental management plan during trial dredging, when rocks fell 20 metres onto coral beds.

In his statement of reasons, Garrett said that while he recognised the project as highly controversial he believed that, on balanc,e the project provided an economic benefit. In particular, he considered that the international competitiveness of the Australian and Victorian economies would suffer if the project didn't go ahead, with the additional costs borne by Victorian importers and exporters.

He also said that because of 'the strict conditions [I was] contemplating imposing' on the project, the approval was consistent with the principles of ecologically sustainable development and with Australia's obligations under international conventions related to the protection of the environment. ■

Amendments to Petroleum Act fuel development of geothermal energy

Lisa Burton, EDO volunteer

The Department of Industry and Resources has opened the gates for the development of WA's geothermal energy sources, releasing acreage in the state's western corridor for bidding pursuant to a new permit system created by amendments to the Petroleum Act (WA) 1967.

The *Petroleum Act Amendment Act* (WA) 2007 has extended the application of the Petroleum Act (WA) 1967 to the mining of geothermal energy, defined in the Act as "thermal energy that results from natural geological processes". This essentially enables interested parties to obtain the right to exploit geothermal energy resources via the same process which regulates the mining of petroleum.

Firstly, the Minister must choose to release land for exploration. Interested parties may then submit an

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application stipulating the work they propose to undertake on the land. If an exploration permit is granted the permit holder has an exclusive right to explore that land for at least six years. If an energy source is discovered the permit holder must notify the Minister, and then has a priority right to apply for a production licence.

The Minister has now released land consisting of 495 lots, each of 320 km2, which explorers have until April 24 to bid for. The land stretches from Kalbarri in the north to Dunsborough in the south, and east to approximately 250km inland. A second allotment, in the Carnarvon basin region is expected to be released later this year. These areas encompass sedimentary basins whose heat can be harnessed as a form of clean, renewable energy.

Minister for Industry and Resources Francis Logan heralded the move as the beginning of 'a dynamic clean energy industry in WA.' The Minister highlighted that geothermal energy deposits are situated close to existing townsites and infrastructure, and that their development produces virtually no carbon emissions.

Professor Klaus Regenauer-Lieb, a geothermal expert and Premier's Research Fellow in Multi-scale Earth System Dynamics, has also welcomed the release, stating that 'WA [now] has a unique opportunity to stake its claim in the international geothermal energy boom and to fill a niche in the renewable energy industry.' ■

Keeping GM crops separate from non-GM crops (part 2)

Christal George, EDO volunteer intern

The Victorian and NSW parliaments recently sanctioned the growing of GM crops in those states. So far WA is strongly resisting, but pressure needs to be maintained. As Part 1 of this article reported (EDO news December 2007) there is no guarantee anywhere in the world that contamination will not occur. Recent Canadian experience showed that it has been impossible to segregate GM from non-GM canola in Canada, and farmers there had no choice but to market all canola as GM. WA would be jeopardising its lucrative GM-free markets if the moratorium was lifted.

The Conservation Council of WA (CCWA) is part of the Say No to GMO Alliance, which has gathered more than 14,800 signatures calling for an extension of the moratorium until 2019, so that the environmental, economic and social implications of genetically modified organisms (GMO) can be fully considered.

Dr Maggie Lilith, Sustainable Agriculture Officer with the CCWA says the issues need to be openly discussed and resolved before the moratorium is lifted. Firstly, according to Dr Lilith, "seed owners" – in particular corporations Monsanto and Bayer, who own the patents on GM seeds – will be able to dictate terms to growers and farmers, such as charging a yearly "technology fee", or royalty, for cultivating the seeds. In addition, farmers and growers will be required to enter into agreements that prevent them from saving or exchanging the seed, and agree to buy seed from the "seed owners".

Dr Lilith says such farms become comparable to a franchise business. The growing number of legal disputes in the courts that deal with franchises, unconscionable conduct and the experiences of the less powerful party in the franchise agreement, prompted legislators to amend the *Trade Practices Act 1974* (Cth) to include a Franchising Code of Conduct. This code requires franchisors to disclose specific facts to franchisees, and to follow ethical procedures in their dealings with franchisees.

Secondly, if the moratorium is lifted there are issues regarding responsibility for contamination. Dr Lilith says that in the current situation, if a farm is GM-free, the onus will be on that farmer to prove there is no GM contamination, when applying for certification of GM-free produce for export. To do this, non-GM farmers would need to have buffer zones on their land, which would absorb land that could be used for crop growing, and require extra equipment – double the number of harvesters and trucks to work the areas close to the buffer zone and the crops not close to the buffer.

The "who takes responsibility" issue is one of the key messages of the GM Alliance, which plans to pursue this strict liability issue by drafting a motion to present to WA Parliament. The motion will propose that liabilities should rest with the GM grower and companies selling GM food products, not the farmer who is GM free.

Take action

- see the film "Future of Food" – contact Dr Maggie Lilith on 9420 7266 or srlo@conservationwa.asn.au
- ask your local shire to join the Say No to GMO Alliance – as Manjimup Shire did recently
- access a copy of the True Food Guide (a useful consumer tool on GM products) for yourself and your friends, at www.truefood.org.au
- support the positives – pesticide- and chemical-free foods, local foods and local growers' expertise in the varieties of seeds that can be grown and are GM-free
- write to the key people responsible for the decision – ask Dr Lilith at the Conservation Council
- gather your signature and friends to sign the new petition available at http://no-gmo.asn.au/2007/12/petitions/ and return to M Lilith, PO Box 189, Hamilton Hill 6963. ■

Rudd promised much, and has already started delivering

Ross Davenport, EDO volunteer, and Cameron Poustie, principal solicitor

November 24 saw a landslide victory for Kevin Rudd's Labor Party. Labor's victory was in large part due to its policies on the environment being a distinct alternative to the Howard government's stand on Australian environmental policy. Kevin Rudd provided an agenda to create an energy industry not reliant on fossil fuels, but on renewable energy and low emission technologies.

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In the weeks following the win, the new Prime Minister implemented his first environmental policy, by ratifying the Kyoto Protocol. Rudd Labor had also previously promised to set a new 20% Renewable Energy Target by 2020. While it is still early days, it appears that the new government is willing to lead on key environmental issues.

The commitment to renewable energy and the environment was most apparent in initiatives outlined in Labor's election policy, *Clean Energy Plan*, comprising the Renewable Energy Fund, Energy Innovation Fund, and a Clean Business Fund designed to help achieve the 2020 goal.

The Renewable Energy Fund is a $500m initiative to 'develop, commercialise and deploy renewable energy in Australia'. It aims to develop renewable technologies such as solar, geothermal, wave, biomass and hybrid technologies to decrease Australia's dependence on fossil fuels.

The $150m Energy Innovation fund focuses on promoting and developing renewable energies. $50m will be invested to expand and improve the capacity of the Australian Solar Institute. Another $50m will go to research and development in the photovoltaic industry, and $50m is promised for research and development of clean energy technologies.

Commercial and public business energy efficiency is the aim of the $240m Clean Business Fund, to develop a "partnership with business and industry to deliver energy and water efficient projects with a focus on productivity and innovation". This will help achieve the 2020 target.

The National Clean Coal Initiative is a $500m commitment to develop a cleaner way of providing Australia's major energy source. The policy consists of a $50m pilot gasification plant, $50m to develop carbon capture and storage technology, and a $75m national research program 'to develop clean coal and related low emissions technologies".

Labor's commitment to a $500m Green Car Innovation Fund is another step in the right direction towards cutting vehicle emissions. The fund is designed to develop and promote the production of low emission cars in Australia.

Labor has set a substantial agenda to tackle current and future environmental problem – only time will tell what parts of its agenda are solid commitments and what, if any, are just rhetoric. There are positive signs in the ratification of Kyoto, and we look forward to the Clean Energy Plan being implemented. It will be the ability to negotiate these matters with business that will ultimately determine Labor's true colours in this area. ■

Your consumer rights:
ACCC environmental claims factsheet

On 17 January the ACCC published a factsheet advising consumers' rights in relation to environmental claims. The factsheet provides information about understanding and evaluating some common environmental claims. You can download it from http://www.accc.gov.au/content/index.phtml/itemId/808269

WA embarks on new waste management path

Lisa Burton, EDO volunteer

After years of debate and many mooted Bills, the WA Parliament has finally passed the *Waste Avoidance and Resource Recovery Act 2007* (the WARR Act) and *Waste Avoidance and Resource Recovery Levy Act (2007)* (the WARRL Act). The main purpose of the acts is to achieve the government's goal of zero waste to landfill by 2020, by encouraging reuse or recycling of resources.

The WARR Act establishes an independent Waste Authority to oversee waste management in WA. The five-person body will consist of members appointed by the Governor on Ministerial recommendation. It is intended that the Authority enter into a formal service agreement with the Department of Environment and Conservation and the Minister for Environment, as the Environmental Protection Agency did some ten years ago.

The Authority will be able to make regulations, develop policies and implement programs for progressing waste avoidance and resource recovery. For these purposes, "waste" is defined as any "matter, whether liquid, solid, gaseous or radioactive and whether useful or useless, which is discharged into the environment", or which is "prescribed by the regulations to be waste".

A key area in which the Authority is expected to act is in establishing extended producer responsibility (EPR) schemes. Producers will be encouraged to design products using materials conducive to recycling. Entering an EPR scheme is voluntary, but the WARR Act gives the Director General of DEC power to request any entity to provide a report on its compliance with waste strategies in the Act, or the reasons for any non-compliance. It is not envisaged that fines will be imposed for non-compliance, but the Director General may report an entity's failure to comply in the department's annual report. The WARR Act also gives the Authority power to award grants from the fund created by the WARRL Act, to encourage entering into an EPR scheme, and complying with it.

The WARRL Act is intended to raise money to fund policies and programs implemented by the Waste Authority, and deter waste going to landfill, by increasing the cost of landfill disposal.

There are several ancillary provisions in the acts, such some waste provisions from the Health and Environmental Protection acts – for example, provisions regarding local governments' responsibilities to provide waste management services.

The acts were a long time in the making because various stakeholders and local governments disagreed about the exact form they should take. There has not been much comment from environmental groups so far, though Environment Minister David Templeman has advocated the acts' environmental benefits: 'Historically, waste management was predominantly a health and amenity issue. But in our changing climate, it has become so much more than that. these are an important step forward in dealing with waste and reducing greenhouse emissions in WA.' ■

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