



## Victory against coal mining in Margaret River

*Josie Walker, Principal Solicitor*

In the previous EDO newsletter, the article "Time for cautious optimism in the Margaret River coal fight" provided an update of the EDO's involvement in acting for affected parties opposing coal mining in the region. This included drafting a submission on behalf of Koorup resident Cath Miller to the Minister, requesting that he exercise his power under section 111A of the *Mining Act* to terminate or refuse all pending exploration licence applications targeting coal. The EDO's submission was one of dozens made to the Minister by coal mining objectors in the Capes region.

The initiative was a great success, with the Mines and Petroleum Minister Norman Moore issuing a media statement on 24 July 2012 that all pending applications for coal exploration in the Margaret River wine region would be terminated.

The media statement also stated a policy position that a 230km zone covering the region's coal deposit would be off limits and any applications for mining tenements targeting the deposit would not be supported. The Minister said: "This decision sends a signal to the industry – applications will not be accepted to explore for or mine coal in this area."

The media statement referred to an earlier EPA advice which had indicated coal mining in the area posed an unacceptable environmental risk. The EPA's reasoning was evident in its report that recommended refusal of the Vasse Coal mine in May 2011. In preparing the submission, the EDO had the benefit of a report by senior geologist Peter Lane, which demonstrated that the EPA's conclusions in the Vasse Coal mine report could be applied to any coal mining activities in the region. [▶ page 5](#)



*One of the properties threatened by coal exploration.*

—Cath Miller

## EDO win on defamation defence

*Annaleen Harris, Outreach Solicitor*

The EDO encourages and supports freedom of speech and public comment from individuals and communities concerning developments which may have an impact on their environment and community. Recently, a client of the EDO had a court win in successfully bringing a strike-out application in defence of aspects of a defamation case against her.

Ms Jane Genovese continues to defend the defamation allegations brought against her and two others by a developer, Mr Ross Leighton. Mr Leighton alleged in the Supreme Court that the defendants defamed him in relation to a proposed rezoning of rural land in Wattle Grove to allow for an aged-care development at Gavour Road, Wattle Grove. In his pleadings Mr Leighton alleged the defendants, including Ms Genovese, had published articles in the local newspaper and on an internet site containing imputations that Mr Leighton, in his capacity as a developer, was a liar.

The alleged defamatory allegations arose in the context of a long, heated debate within Wattle Grove and the Kalamunda Shire regarding the proposed rezoning of Mr Leighton's land. Non-supporters of the rezoning and aged care facility development have expressed opinions that the rezoning of the land from 'Rural' to 'Special Use' is inappropriate and at odds with the rural use and low density character of the existing suburb. [▶ next page](#)

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# Courts consider the greenhouse gas impacts of coal mining

Leanne Law, EDO Volunteer

Australia is currently experiencing a rapid expansion in coal mine development and exploration projects. Such developments come at a very high environmental cost. Amongst the various environmental concerns is the climate change risk associated with the large amounts of greenhouse gases produced by the burning of coal. Such concerns have led environmental groups in Queensland and New South Wales to commence legal challenges to the development and expansion of coal mines, demanding that conditions requiring a reduction or offset of greenhouse gas emissions be imposed. As coal mine exploration expands in Western Australia, it is an issue of increasing local relevance.

In 2006, EDO North Queensland and EDO Queensland represented the environmental group, Wildlife Whitsunday in its challenge to Commonwealth decisions relating to two large mines in the Bowen basin – the Isaac Plains Coal Project, and the Sonoma Coal Project. The mines were to produce 48 million tonnes of coal over 15 years, with emissions equivalent to approximately 25% of Australia's total annual greenhouse gas emissions. The Court dismissed the case, stating that the government decision maker had acted lawfully in considering greenhouse emissions, but at the same time finding that there was no proven link between the greenhouse gas emissions and any specific damage to Australia's environment. It was held that whilst greenhouse gas emissions are a relevant consideration, assessment under the federal *Environmental Protection and Biodiversity Conservation Act 1999* (EPBC Act) is not expressly triggered by greenhouse gas emissions.

The Queensland Conservation Council (QCC) represented by EDO Queensland lodged an objection to expansion of Xstrata's Newlands coalmine in the Land and Resources Tribunal in 2007. QCC argued that the mine would have adverse environmental impacts due to greenhouse gas emissions unless conditions were imposed to limit or offset emissions. Both sides accepted that anthropogenic climate change was occurring, but Xstrata argued that mitigation was not required because the impacts of a single coal mine on global climate change would be negligible. Contrary to the position adopted by both parties, the President of the Tribunal declined to impose any greenhouse mitigation conditions because he found that anthropogenic climate change was not a scientifically proven phenomenon. QCC successfully appealed this decision in the Court of Appeal. The Court of Appeal found that QCC had been denied procedural fairness due to the President making a decision which was based on his own interpretation of the literature on climate change, which QCC had not had an opportunity to rebut at the hearing.

However, claiming that it was acting to protect the Queensland economy, development and jobs, the Queensland government quickly introduced special legislation to validate Xstrata's lease and prevent the matter from being reheard in the Tribunal.

More recently, EDO NSW assisted the Hunter Environment Lobby (HEL) to challenge the approval by the NSW Minister of Planning of a proposed expansion of the Ulan coal mine, a joint venture between Xstrata Coal and Mitsubishi Development. It was submitted by EDONSW that this expansion would be expected to produce approximately 575 million tonnes of carbon dioxide over its 20-year life span, with direct emissions averaging at more than 100,000 tonnes of carbon dioxide per year. HEL argued that, to the extent that the developer was not required to pay a carbon price for emissions under the *Clean Energy Act 2011* (Cth), conditions should be imposed requiring the Ulan mine to offset its direct greenhouse gas emissions. The matter was a landmark case in that the condition sought was the first of its kind to be considered by the Court.

The NSW Land and Environment Court handed down a judgment on 13 March 2012, declining to impose such a condition. Despite the court's original decision in December 2011 expressing an intention to impose the greenhouse gas condition, it ultimately decided that the greenhouse gas impacts of the proposal would be sufficiently addressed by the *Clean Energy Act 2011* and related legislation.

The cases litigated in Queensland and New South Wales highlight the need for effective regulatory mechanisms to require decision-makers to take into account climate-change risks posed by coalmine development and expansions. Environmental groups have advocated for a review of legislation such as the EPBC Act to have assessments triggered by large greenhouse gas emissions. In the midst of global climate change, the need for Western Australia to have a legal framework that can adequately regulate the greenhouse gas emissions of developing coal mines has never been greater. ■

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## Defamation win

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They have also expressed beliefs that more suitable locations for aged care facilities are available and fear the rezoning could result in other high density or 'Special Use' rezonings in the surrounding area.

On 2 August 2012, Ms Genovese and the other defendants brought a strike out application against aspects of Mr Leighton's pleadings in the Supreme Court. One of the issues raised was that the publications relied upon by Mr Leighton could not support an imputation that Mr Leighton was a liar in his capacity as developer of the relevant site. The defendant argued further that as a matter of pleading, this allegation was also too imprecise and ambiguous. On 4 September 2012, Justice Le Miere of the Supreme Court held that part of Mr Leighton's pleading be struck out. Justice Le Miere did not find the articles published by the defendants capable of supporting the imputation that Mr Leighton was a liar in his capacity as developer of the development.

The case is continuing in the Supreme Court. ■

# What to look for in environmental offsets

Lee McIntosh, EDO Management Committee Member

An environmental offset is an offsite action to address significant residual environmental impacts of a development or activity.

Offsets can be direct (eg, for rehabilitation and conservation of habitat outside of the area affected by the proposal) or indirect (eg, to improve scientific or community understanding).

Environmental offsets are often applied to proposals subject to environmental impact assessment under the EP Act and EPBC Act. They are also often imposed as a condition of native vegetation clearing permits. Offsets used under these Acts are often inconsistent with offsets policies, and this can be used to question the offsets, as well as the broader project assessments and decisions.

The primary offsets policy documents in WA are:

- *EPA Position Statement No 9, Environmental Offsets* (2006)
- *EPA Guidance Statement No. 19, Environmental Offsets* (2008)
- *SEWPaC EPBC Act Environmental Offsets Policy Consultation Draft* (2011)
- DEC Native Vegetation Fact Sheet 11– *Direct and Contributing Offsets* (extracted from EPA Position Statement No 9)
- *WA Government Environmental Offsets Policy* September 2011

The following principles are included in all of the above policies relating to offsets, but are not always applied in practice. If you are responding to an environmental offset proposal, consider whether it satisfies the following criteria:

**Environmental offsets are only to be used as a last resort, after due consideration of avoidance and mitigation measures. Offsets must not replace proper on-site environmental practices, such as avoidance and mitigation.**

This means that offsets should not be proposed as part of a proposal until the avoidance and mitigation strategies have been proposed and assessed, ie they should not be proposed upfront or early in the assessment process. They should not be proposed at least until residual impacts are known and avoidance and mitigation measures identified.

Offsets should be off site and separate to the project altogether, not simply avoidance of an area that would otherwise be impacted by the project (which is avoidance), or management and mitigation measures which are part of managing the on and off site impacts of the project anyway (including boundary impacts), or monitoring of the impacts of the project (monitoring should be a standard feature of projects anyway), or assessment of the type of impacts the project has (assessment should already have been completed for the specific project).

**Offsets are to address significant residual environmental impacts of a development or activity–**

**they will not be applied to minor environmental impacts and are not appropriate for all projects.**

This means if an offset is being proposed, significant residual impacts must first be identified by the proponent. The proponent's identification of these significant impacts can assist in considering the assessment of the project, as any conclusions that the project has significant impacts may actually show project unacceptability. Vice versa, if the proponent concludes there is no significant impact they should not propose an offset for it to assist them to gain approval.

**Offsets cannot make the project which otherwise has unacceptable impacts, acceptable.**

Offsets are not a project approval negotiation tool. Any information which indicates negotiation is occurring with government during the assessment process may show an improper procedure is being used.

**Proposals for the use of environmental offsets should be underpinned by sound information and knowledge. The information should be credible and capable of scrutiny to support transparent and accountable decision-making.**

The offset itself must be assessed using environmental impact assessment procedures. This means there must be some certainty around what and where the offset is, a clear statement of the proposed environmental outcome of the offset, and assessment of whether the offset is likely to meet this.

Claims about what an offset will actually achieve need to be tested, and if found to be unlikely or uncertain, the offset should be dismissed as a method of offsetting the proposal.

An offset should not come about as a condition of approval if it has not been previously proposed as part of the proposal and if there has not been adequate opportunity for public comment of it or assessment of it.

**Offsets should be like for like or like for better, and in the same general area where possible.**

Offsets should be commensurate with the level of impacts of the development. Offsets should result in the specific matters said to be being impacted by the project and requiring offset being “maintained or enhanced” by adequately compensating for the impacts of the development.

**Offsets are to be designed to achieve long-term outcomes.**

Funding open ended research programs which deliver little or no on-ground benefit for the matter impacted are not considered to deliver a conservation outcome. Purchase of existing unprotected habitat only provides a real conservation outcome if that habitat becomes protected in perpetuity and actively managed for long term conservation purposes, and if surrounding land uses are unlikely to have a significant impact on this.

**There should not be double counting of environmental offsets.**

The same offsets cannot be used to satisfy >>>

>>> two or more different approval requirements for the same project. And the same offsets cannot be used to satisfy the offsets requirements of two or more projects.

**Offsets need to be certain, transparent, clearly defined, enforceable, achievable.**

Given that environmental offsets are often complex to develop and may have a time lag before delivering a conservation outcome, it is important that an offset package be well formulated at the time of approval and preferably implemented prior to the commencement of the development. This is likely to maximise the chances of the offset package succeeding.

Offsets must be as certain as any of project element or condition. There therefore needs to be certainty about:

- The outcome which will be met. This means offsets should not be capped as sums of money – they should be capped by the attainment and maintenance of the environmental outcomes which they are proposed to meet.
- Where the offset is.
- Timeline of implementation.
- Monitoring and auditing.
- Contingencies if the outcomes are not met or the offsets becomes unworkable.
- Not depend on third party actions which are not in the control of the proponent.

**Offsets should not rely on third parties' agreement or action.**

Offsets which require proponents to enter into any agreements with or which rely on third parties' actions should be challenged on the basis they are uncertain. Eg If an offset relies on the future purchase of land, there is a chance that the vendor won't sell for a reasonable price (because they are now in a good bargaining position as they know the purchaser needs the offset!) so the offset is uncertain and can't be relied upon. If the offset requires land management by a third party, there is the chance that the manager (who as a third party isn't bound by the offset condition) won't manage the land properly, so the offset is uncertain and can't be relied upon.

Offsets can also be applied under other legislation, including subdivision and development approvals under the *Planning and Development Act 2005* and mining proposals under the *Mining Act 1978*. This doesn't happen very often though, and therefore there is scope for offsets to be used to improve environmental outcomes under these Acts provided that it is in addition to the usual approvals process (ie not double counting environmental approval outcomes, and certainly not detracting from usual processes and conditions), and is not used to “buy” what would otherwise be an unacceptable outcome. ■

**Editor's note:** Since this article was written, the EPBC Act Environmental Offsets Policy has been released in final form. The final policy differs from the Consultation Draft referred to above.

## COAG reforms threaten to end Commonwealth environmental oversight

On 13 April 2012 the Council of Australian Governments (COAG) agreed to implement a series of reforms of Australia's environmental laws. These reforms include accrediting state processes under the *Environment Protection Biodiversity Conservation Act 1999* (EPBC Act), that will effectively end Federal involvement in the approval of environmentally sensitive developments under federal environmental laws, and fast-tracking the approval of major developments in each state.

The Commonwealth has agreed to enter into fast-tracked agreements with each state to transfer its powers of assessment and approval under the EPBC Act to the states. This will cover all developments apart from those that affect world heritage, commonwealth marine waters and nuclear actions. This means that the Commonwealth would no longer have any role in either assessing the environmental impacts of State developments on nationally significant environmental matters or deciding whether to approve those developments. COAG stated that a framework for such agreements would be settled on by December 2012 and all agreements would be signed off by March 2013.

The above information is extracted from the document *ANEDO response to attacks on Environmental Laws*, by the Australian Network of Environmental Defender's Offices Inc. A full version of this document is available at:

[www.edovic.org.au/downloads/files/law\\_reform/ANEDO%20response%20to%20attacks%20on%20environmental%20laws.pdf](http://www.edovic.org.au/downloads/files/law_reform/ANEDO%20response%20to%20attacks%20on%20environmental%20laws.pdf)

To find out more about the campaign to stop these reforms, logon to [www.placesyoulove.org](http://www.placesyoulove.org) ■



Sea turtles (above) and whale sharks could be affected by the reforms.

—Jenita Envoldsen

# Fracking has begun in our Northwest

Annaleen Harris, Outreach Solicitor

Shortly after the gazettal of the new *Petroleum Geothermal Energy Resources (Environment) Regulations 2012 (WA)* in late August, Jurien Bay hosted a community meeting regarding gas fracking. The meeting aimed to better inform farm, business and land owners of their rights—or lack of them—in light of the encroaching gas fracking operations across mid-west WA within the past year. This is despite calls for a moratorium on the industry by the CCWA since February 2011. The problem is that gas fracking is a novel form of mining, and the consequences are still largely unknown.

Unfortunately, amidst the debate surrounding fracking and its associated health and environment concerns, the government has jumped the gun, and has not only assisted with the funding of gas exploration but given the go-ahead for fracking to begin.

Gas fracking involves pumping water, sand and chemicals into underground rock formations in an effort to split the rock, allowing natural gas to be released and collected from the underground wells. Gas fracking continues to attract controversy around the world because of its potential to cause seismic activity, groundwater contamination, and other negative environmental impacts.

Despite known risks and minimal investigative studies in WA, the WA Environment Minister, Bill Marmion, supported the EPA's decision in March this year to approve the fracking of four wells in WA. Mr Marmion also upheld a decision by the EPA to not assess Norwest Energy's fracking of the Arrowsmith-2 well, 30km north of Eneabba. Appeals against the EPA decision not to assess were dismissed by Mr Marmion in support of the EPA's findings that potential impacts from fracking were not significant enough to warrant in-depth investigation. Approvals were subsequently granted to frack gas wells near Dongara, Jurien Bay and Eneabba. Gas explorer and producer AWE is now drilling at the Irwin River region, 15km east of Dongara, and the Woodada deposit, 10km west of Eneabba. Transerv Energy is also now fracking at its tight gas operations in the Warro Region, east of Jurien Bay.

The EPA's decision in March 2012 to not assess the Norwest project was based on the projects being small-scale “proof of concept” proposals, not full-scale production projects. This is in keeping with the EPA's *Environmental Impact Assessment Administrative Procedures 2010*. The EPA considers that all potential environmental impacts can be managed and monitored by the Department of Mines and Petroleum (DMP). The EPA's expectation is that proponents make their management plans and monitoring results public. However, two independent reviews have found the DMP is failing to monitor the conditions it places on existing mining projects. The DMP also lacks the legal powers to enforce environmental conditions, even where monitoring does occur.

A six-month moratorium on fracking was introduced in NSW in June 2011, and a Senate inquiry was conducted

into the effects of the industry on the Murray Darling Basin. Fracking has already been banned in France and Bulgaria, due to risks of chemical contamination of aquifers and water supplies, yet WA has raced head-on into this short-term economic opportunity.

The chemicals injected into the ground contain known carcinogens. A common combination of chemicals used in gas fracking are the “BTEX” chemicals, which include benzene, toluene, ethylbenzene and xylene. A drop of benzene in a swimming pool is contaminant enough to have carcinogenic effects on human health.

In WA the DMP argues that the gas wells are far deeper than those in the eastern states, and are far below the “at risk aquifers”. However, mining companies are still in an experimental phase of this novel form of mining, so the consequences are still unknown. The DMP and mining companies are taking the approach that they will “dig and see”. This is unacceptable when the consequence of a mistake, failed technique or lack of monitoring is likely to result in wide-reaching and potentially lethal contamination of aquifers, farms, livestock and air.

The gas fracking industry is potentially damaging to rural communities, because under the *Petroleum Geothermal Energy Resources Act 1967 (WA)* landowners do not have the right to say no to fracking on their land.

The EDO is currently working on a new publication to inform the community about the law governing gas fracking. ■

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## No coal mining in Margaret River

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The Minister's decision and declaration of a no-coal zone represent a significant victory for the region's environment, community and economic pillars of tourism, viticulture, winemaking and agriculture. The EDO's submission canvassed the threats that coal mining posed to all these aspects.

In addition to the threats posed to the regional values, the community experienced frustration over the lack of information and opportunity to comment on coal mining exploration applications. The uncertainty created significant anxiety in the community and undermined confidence in the region's future. While the Minister's decision and policy position has given comfort, there have been growing calls to make certain the protections for the region by introducing legislation to entrench safeguards.

In May, a private members bill giving the Minister greater powers to declare areas exempt from mining and requiring mining to be consistent with local government planning schemes was introduced into Parliament by Greens MLC Giz Watson. The bill is currently before the legislative council and represents a viable solution for providing mining exclusion zones and empowering communities through planning schemes to better prepare and protect against mining in areas that have conflicting priorities. For the Margaret River wine region, this would represent the final blow against coal mining that the local community is seeking. ■

# Legal challenge fails to stop drilling on James Price Point

Josie Walker, Principal Solicitor

Goolarabooloo law boss Richard Hunter (pictured below) has called on the Shire of Broome to prosecute Woodside for allegedly illegal development carried out on James Price Point for four weeks between 21 May and 25 June 2012, and in the previous dry season in 2011.

Mr Hunter, who was represented by the EDO, commenced a legal challenge against Woodside's works in the Supreme Court in May 2012. Mr Hunter alleged that the works were carried out without planning approval, but the case was dismissed after the Minister for Planning intervened to change the local planning scheme on 26 June 2012 to provide that the works did not need planning approval.

Mr Hunter says that it is the duty of the Shire to hold Woodside accountable for non-compliance with the planning law. Dozens of protesters have been arrested trying to stop these works, while the authorities have taken no action over alleged breaches by Woodside.

On 21 May 2012 a convoy of Woodside machinery rolled up to James Price Point to commence a series of geotechnical investigations related to the proposed LNG gas processing hub. The convoy was accompanied by more than 100 police officers, paid for by the WA taxpayer, supposedly to stop protesters from interfering with Woodside's "lawful" activities. However, the lawfulness of Woodside's activities was seriously called into question in legal proceedings commenced by Mr Hunter.

Woodside had supposedly received planning approval for these works from the Kimberley Joint Development Assessment Panel (KJDAP). However, some important legal steps were ignored by the KJDAP in the process of making this decision. The KJDAP did not receive a report and recommendations on the proposal from the Shire of Broome, and the meeting at which the approval was granted was not notified in accordance with the planning regulations.

Mr Hunter commenced a legal challenge to Woodside's planning approval in the Supreme Court on 28 May 2012. The Court agreed to expedite the matter, considering the importance placed on the project by the government of Western Australia. All evidence and submissions were lodged within four weeks, and the matter was set down for hearing in the Court of Appeal on 3 July 2012.

Meanwhile, Woodside gave an undertaking to Mr Hunter that it would halt all drilling on the site until the Court had made a ruling on the validity of its approval.

However, only seven days before the Court was due to hear the matter, the Minister for Planning took the extraordinary step of amending Broome's local

planning scheme, specifically to make Woodside's works exempt from the need for planning approval. The Minister openly stated in the media that his reason for changing the planning instrument was to prevent the hearing from going ahead in the Court of Appeal.

Members of the community were understandably outraged that the Minister would use his planning powers to prevent a traditional owner who was challenging the legality of high-impact works on his traditional lands from having his day in court. However, the Court ruled that the Minister did have power to amend the planning instrument for this purpose.

As a result the Court then held that the case against Woodside must be dismissed, because the change to the planning instrument would enable Woodside to legally continue its works even if Mr Hunter succeeded on all grounds. The Court was also concerned that if Woodside had potentially committed an offence by carrying out works without approval, then this should be tested in a criminal court based on the criminal standard of proof, rather than in a civil court based on the civil standard of proof.

These extraordinary steps taken by the Minister to put Woodside's works beyond the reach of the Court have prevented the public from finding out whether Woodside's works between 21 May and 25 June were legal. They have also left Mr Hunter to carry his own legal costs and disbursements in this matter – costs which Woodside and the Minister most likely would have been ordered to pay if the legal challenge was successful.

In a further blow, Mr Hunter was also ordered to pay \$3,500 each to Woodside and the Minister, for their legal costs in relation to Mr Hunter's challenge to the amendment to Broome's planning scheme. The Court rejected this case at the preliminary stage because it held that there was insufficient evidence to show that the Minister had acted for an "improper purpose" when deciding to amend the planning scheme to legalise Woodside's works. ■



–Mike Gray

# Mining Warden rejects Bridgetown bauxite licences

**Darling Range South Pty Ltd v Ferrell & Ors [2012]  
WAMW 12**

Simona Grieco, EDO Volunteer  
Josie Walker, Principal Solicitor

In a major win for mining objectors in the South-West, the Mining Warden has recommended refusal of three exploration licenses for bauxite over farmland and state forest near Bridgetown. The Warden's findings on the meaning of "public interest", his consideration of the environmental factors, and comments on environmental condition-setting by the Department of Mines and Petroleum make for very interesting reading.

The application before the Warden was in respect of three mining exploration licences sought by Darling Range South Pty Ltd (the Applicant) to explore for bauxite. The Applicant sought rights to explore on private land below 30m in depth, and on Crown land at all depths, including the surface.

The first issue was whether, if a subsurface-only licence was granted, and the Applicant later obtained consent from some of the surface owners, the licence could be amended to include those surface rights without a new licence application being lodged. The Warden held, contrary to what had been assumed by many in the jurisdiction, that a fresh application would need to be lodged, and notification of surface owners occur before rights could be extended to the surface.

The objectors were all members of the local community, and were not legally represented. They objected on the grounds of current and future impact on the environment, impact on the soils and river and water systems, conflict between the proposal and existing landuses and the social impact that any future mining may have in the area the subject of the application. The Objectors raised these issues under the category of matters of "public interest" under provisions of s111A of the Act. This entitles the Minister to refuse to grant an application or terminate an application if the Minister is satisfied on reasonable grounds that it is the public interest to do so.

The Warden referred to the definition of "public interest" as expressed by Jacobs J in *Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473 at 487 and found that the grounds raised by the objectors fell squarely into the area of "public interest".

The Applicant argued that the objectors had not proved that there would be any environmental impact caused from the Applicant's proposal, because they had not called any expert evidence. The Applicant's solicitor further submitted that any environmental impacts of the proposal would be adequately addressed by the standard conditions imposed by the Department of Mines and Petroleum on mining leases, and by the oversight of other agencies with environmental decision-making responsibilities.

The Warden considered the meaning of the word "environment" and found that the definition that should be adopted for the purpose of consideration of the

objections was the definition under s 3 of the *Environment Protection Act (WA)* (the EP Act). Therefore, the Warden looked broadly at the physical, social and economic impacts of the proposal in considering the likely impacts of the proposal on the environment.

Warden Wilson held that the objectors' lay evidence was sufficient to raise the possibility of significant environmental and social impacts. The objectors had not conclusively proved that the impacts would be unacceptable, but they had done enough to demonstrate that the impacts warranted assessment under Part IV of the EP Act prior to the grant of an exploration licence.

The Warden held that it was necessary for him to consider not only the potential direct impacts of exploration but also the potential impacts of mining which might result if the proposed exploration program was successful. This was due to the fact that the grant of exploration licences for mining licences under s75(7) of the *Mining Act* created an expectation that the applicant would later be entitled to obtain a mining licence.

Based on the above, the Warden recommended that the Minister for Mines should refuse to grant the exploration licences because there had been no proper investigation of the effects that the proposal would have upon all aspects of the environment. In the alternative, if the Minister was minded to grant the licences, the Warden recommended that each application should be referred to the EPA for environmental assessment under the EP Act, accompanied by a copy of the Warden's reasons.

At the time of writing, the Minister has yet to make his final decision whether to grant the applications. ■

## GM contamination on highway

Josie Walker, Principal Solicitor

A survey released by the CCWA Citizen Science program in October has revealed that 62% of fugitive canola plants growing on the edge of the Albany Highway at Williams are genetically modified.

One of causes of this very high rate of GM contamination may be the clean-up from a major spill of GM canola from a truck accident on the highway in August 2011. Another factor could be pesticide use by Main Roads to control roadside weeds, selecting for Roundup-resistant GM plants.

Whatever the cause, the results of the survey suggest that the current regulatory regime is failing to prevent GM plants from spreading into the environment, against the wishes of many in the community, who want their farms and their environment to remain GM-free.

It also shows how the cost of dealing with the fallout of GM crops may end up being carried by the broader community, rather those who profit from GM crop production.

CCWA Citizen Science Coordinator Dr Nic Dunlop said 'the operation of the polluter-pays principle would avoid problems we're having now, where the cost of multiple herbicides, and additional weed control and spraying programs is forced on non-beneficiaries including tax- and rate-payers.' ■

# NSW case contests legitimacy of cost-benefit analysis

Annaleen Harris, Outreach Solicitor

In September 2012 the EDONSW raised exciting novel arguments regarding the assessment of economic impacts of coal and mining projects, in merits appeal proceedings in the NSW Land and Environment Court. EDONSW commenced the appeal in March 2012 against the Planning Assessment Commission's decision to approve a \$282 million open cut coal mine expansion at Warkworth, in the Hunter Valley region of NSW.

EDONSW lodged the appeal on behalf of the community group Bulga Milbrodale Progress Association (BMPA), representing the interests of the village of Bulga, located 2.6km west of the project site. The proposed expansion to the Warkworth mine, managed by Rio Tinto as part of the Mount Thorley Warkworth complex, is expected to produce an additional 18 million tonnes of coal per year and allows for the mining of part of a biodiversity offset which was previously set aside for protection as a condition to a prior approval in 2003. The biodiversity offset, as well as providing habitat for threatened flora and fauna, has also acted as an important buffer between the small town of Bulga and the existing mine's noise pollution and dust contamination. The Warkworth mine currently operates 24 hours a day, seven days a week, and would continue to do so under the proposed expansion.

Within and to the west of the project site is located one of the largest surviving remnants of vegetation on the Hunter Valley floor. This land forms part of a vegetation corridor across the valley floor between Wollemi and Yengo National Parks, and the Barrington Tops National Park. The expansion will require clearing of approximately 764ha of this area, including the clearing of vegetation unique to the locality and defined in the *Threatened Species Conservation Act 1995* (NSW).

The BMPA objected to the expansion on the grounds that mining of the offset was contrary to the public interest, in that the mine expansion would result in detrimental economic and social impacts on the Bulga community and conflict with ecologically sustainable development principles. The mine would also have an adverse impact on threatened species within the project site, which is contrary to the principles of biological diversity, ecological integrity and the precautionary principle. In other words, the cost-benefits analysis of the mine expansion undertaken by Rio Tinto did not accurately reflect the actual benefits or costs of the expansion.

EDONSW and Counsel for the appellant, Robert White, raised a new argument which sought to establish that the proponent's assessment of the economic impact of the expansion was incorrect and based on flawed methodology. The appellant sought expert evidence from the nationally acclaimed economic experts, Dr Richard Denniss of the Australia Institute, Prof John Quiggen of the University of Queensland, and Rod Campbell, an Associate Economist from Economists at Large. The expert evidence went towards showing the methodology used to generate the proponent's cost-benefit analysis (CBA) of the project was flawed and that the proponent had inadequately

assessed the real and potential economic impact of the expansion on a number of counts.

The economic experts concluded that the input-output model used to generate the CBA analysis of the project were inappropriate and a "computable general equilibrium" (CGE) model was better suited for the task. The Warkworth BCA used standard methodology which is often seen in a variety of development applications, but according to the EDONSW submissions, the principles of ecologically sustainable development required the proponent to integrate into the valuation of the project the cost of all environmental factors, including the costs the project imposed on the rest of society.

The CBA failed to adequately and appropriately assess non-market valuations, where the real and potential economic impact of biodiversity from the clearing of the offset had not been identified and weighed as a cost arising from the project. The economic cost of the mitigation of climate change attributed to the project had also not been identified and weighed as a cost arising from the project. Professor Quiggin argued that, given we are at or near the so-called "non-accelerating inflation rate of unemployment", then, to the extent the Warkworth project increased employment, it would only make it more likely the Reserve Bank of Australia would raise interest rates and in turn cause job losses. The project would then have no net impact on jobs.

The appellant further submitted that significant social costs stemming from the project had not been assessed as part of the CBA. Rio Tinto had stated that the Warkworth expansion was projected to extend the life of the mine from 2021 to 2031, and would create a further 150 jobs in addition to the existing workforce of 1300. However, expert evidence given by Dr Dennis indicated that the expansion would in fact result in detrimental economic and social impacts on the Bulga community. Dr Denniss argued that Rio's model was based on out-of-date 2001 data and assumed the existence of a "ghost workforce" which could be mobilised when the project went ahead. In reality, employees would be drawn from other areas of the local economy, and particularly the struggling manufacturing sector. This was particularly relevant where Singleton Shire, where the Warkworth mine is located, was shown to have an existing unemployment rate of less than 1.1 per cent. This would result in a negative social impact being felt on local and state industry. Dr Denniss also stated that the number of mining jobs in the economy was routinely overstated by up to 500 per cent.

This *Bulga Milbrodale v Warkworth* appeal could potentially create a precedent upon which merits appeals may be sought in the event economic and social impact assessments overstate the claimed economic social benefits of a project and fail to identify the real and potential negative economic impacts arising out of a proposal. The Court's judgement is expected to be handed down later this year. ■

## Gas fracking community meeting in Jurien Bay

The EDO presented at a Community Meeting on gas fracking in Jurien Bay on 22 September. The meeting aimed to better inform members of the community of the risks of gas fracking, and landowners' rights, or lack of them, in light of the encroaching gas fracking operations across mid-west WA in the past year.

The panel of speakers included Annaleen Harris, EDOWA Outreach Solicitor, Jamie Hanson from CCWA, Greg Glazov from Doctors for the Environment Australia and Ron Snook, a retired local Jurien farmer. Jamie discussed some of the key known risks associated with gas fracking and its effects on health and environment. Annaleen outlined some of the legal issues affecting land rights and some key areas for legislative reform. Greg spoke about the effects of fracking to human and animal health caused by groundwater contamination and surface spills, and Ron discussed his own experiences with the mining and petroleum industries.

After the formal presentations, there was an opportunity for members of the audience to ask questions of the speakers and express their views on the implications of fracking for their community. This is certainly a hot topic in WA right now. ■



Annaleen Harris (top) and Jamie Hanson at the Jurien Bay community workshop

## New faces at the EDO

### Welcome Jane Siddall

In September 2012 we were fortunate to be able to appoint Jane Siddall (below) to the role of Coordinator. Jane comes to the EDO with a background in fundraising, management and community relations, and will be looking to diversify the EDO's funding sources and increase engagement with members. Jane believes strongly in environmental protection, and is looking forward to contributing her skills to the important work of the EDO.



Jane Siddall.

### Welcome Annaleen Harris

This year we are delighted to welcome Annaleen Harris (pictured in article at left) as a new member of our team of solicitors. Annaleen will be job-sharing with our other part-time Outreach Solicitor, Jessica Smith, who has been at the EDO since January 2010.

Annaleen commenced work for the EDO as part-time Outreach Solicitor in July. Previously, Annaleen worked for several years as an energy and resources lawyer at a top-tier national firm, specialising in Mining and Construction law, including a stint on secondment in Paris. Annaleen has a long-term interest in environmental law, and is currently a director of the National Environmental Law Association, and a member of the NELA WA working committee. ■

