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Federal Court Award $450,000 Fine in Land Clearing Case
Minister for the Environment & Heritage v Greentree (No 3)

Larrisa Waters, Solicitor, EDO Queensland

The decision of the Full Supreme Court of South Australia on 9 December 2003 in *Conservation Council of SA Inc. & Ors v Chapman & Ors* [2003] SASC 398 [1] has a range of implications for any organisation or person publishing statements about a community campaign, and is particularly relevant for conservation organizations.

In *Minister for the Environment & Heritage v Greentree (No 2) [2004] FCA 741 (11 June 2004),* Justice Sackville of the Federal Court found Mr Ronald Greentree and Auen Grains Pty Ltd guilty of breaching s.16(1) of the *Environmental Protection Biodiversity Conservation Act, 1999* (Cth). This decision represents the first case concerning impacts on a matter of national environmental significance under the Act.

The facts of that case revealed that Mr Greentree had instructed the manager of Greentree Farming to clear and plough an area of land on Windella, including the Windella Ramsar site, in preparation for a seedbed. The court found that this was likely to have a significant impact on the ecological character of the Windella Ramsar site. In addition, Auen Grain Pty Ltd was found guilty due to its part in the mis-management of the Windella Ramsar site located on the Greentree property. Mr Greentree is a director and the sole shareholder of Auen Grain Pty Ltd.[1]

Following this, the decision in *Minister for the Environment & Heritage v Greentree (No 3) [2004] FCA 1317* (14 October 2004) continues the high profile and importance of the case in the context of the enforcement of the Act. Justice Sackville made extensive orders preventing both respondents from any further destruction of the internationally significant Gwydir wetlands by prohibiting them from engaging in:

- land clearing, ploughing, cultivating, herbicide or pesticide spraying, sowing, harvesting or other activities disturbing or otherwise affecting the soil within that portion of the declared Ramsar wetlands known as the Gwydir Wetlands; and

- any activity on the Windella Ramsar site designed to alter, or which is reasonably likely to have the effect of altering, the flow regime of waters into, within or out of the Windella Ramsar site, other than activities undertaken with the consent of the proprietors of Windella and in accordance with any approval that may be required under the *Rivers and Foreshores Improvement Act 1948* (NSW) or any other legislation governing such activity; and

- bringing or allowing any vehicles or machinery to be brought onto the Windella Ramsar site at any time, other than such machinery as may be reasonably necessary to carry out any approved activities; and

- bringing or allowing domestic or grazing stock to be brought onto the Windella Ramsar site at any time before 1 April 2007.

In addition, both Mr Greentree and Auen Grains Pty Ltd must do everything reasonable within their power within 30 days to,

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- engage a tree planting contractor, to be approved by the Minister for Environment & Heritage, to plant

National Water Initiative

Ilona Millar, Principal Solicitor, EDO NSW

Background

For the past 10 years, the Council of Australian Governments (COAG) have been working on a Strategic Framework for Water Reform. This has seen almost all Australian governments implementing varying degrees of reform of their legal and institutional frameworks for the management of water resources.

In 2003, COAG agreed to continue the implementation of the Framework and to develop a National Water Initiative (NWI). Agreement was reached, in principle, to address the declining health of the Murray-Darling river system through central co-ordination of the management of environmental water. This was to be achieved by a $500 million investment between the governments of New South Wales, Victoria, South Australia and the ACT.

At its meeting on 25 June 2004, COAG endorsed the $500 million rescue package for the Murray-Darling River. All States except Tasmania and Western Australia agreed to the NWI.[1] Details of the NWI are discussed below.

Summary of the National Water Initiative

The COAG Communique of 25 June 2004 identifies the outcomes that the NWI seeks to achieve:

- *expansion of permanent trade in water bringing about more profitable use of water and more cost effective and flexible recovery of water to achieve environmental outcomes;*

- *more confidence for those investing in the water industry due to more secure water access entitlements, better and more compatible registry arrangements, better monitoring, reporting and accounting of water use, and improved public access to information;*

- *more sophisticated, transparent and comprehensive water planning that deals with key issues such as the major interception of water, the interaction between surface and groundwater systems, and the provision of water to meet specific environmental outcomes;*

- *a commitment to addressing overallocated systems as quickly as possible, in consultation with affected stakeholders, addressing significant adjustment issues where appropriate; and*

- *better and more efficient management of water in urban environments, for example through the increased use of recycled water and stormwater.*

To achieve these results the State and Territory governments must introduce a number of legal mechanisms that represent a significant change to current management practice.

One such mechanism is the creation of water access entitlements that are comparable with a proprietary interest. These entitlements are to be granted in perpetuity and to take the form of a right to a perpetual share of the water resource that is available for consumption as specified in a water plan.

A corollary of such allocations is the assignment of risks for water users over possible reductions of water availability. COAG has agreed to a framework that assigns the risk of future reductions in water availability as:

- *reductions arising from natural events such as climate change, drought or bushfire to be borne by water users;*

- *reductions arising from bona fide improvements in knowledge about water systems' capacity to sustain particular extraction levels to be borne by water users up to 2014. After 2014, water users to bear this risk for the first 3 per cent reduction in water allocation, State,Territory and Commonwealth Government would share (one-third and two-third shares respectively) the risk of reductions of between 3 per cent and 6 per cent; State, Territory and the Australian Government would share equally the risk of reductions above 6 per cent;*

- *reductions arising from changes in government policy not previously provided for would be borne by governments; and*

- *where there is voluntary agreement between relevant State or Territory Governments and key stakeholders, a different risk assignment model to the above may be implemented,*

In addition, the NWI has recognised the issue of over-allocation, including the fact that many systems are already over-allocated. The NWI sets a goal of achieving substantial progress by 2010, to return overallocated systems to sustainable levels of use in order to meet environmental outcomes.

Associated with redressing overallocation and improving the health of inland rivers is the requirement that States give statutory recognition to environmental water. The NWI requires environmental water to be allocated with at least the same security as water for consumptive uses and requires improved accountability for the use of that water.

COAG has also agreed to the establishment of a National Water Commission (NWC) that will assess States' progress in implementing the NWI and advise on actions to better achieve the objectives set out above.

What does the NWI mean for the environment?

Rights in perpetuity

With respect to perpetual entitlements, it must be acknowledged that the entitlement is granting very special and new rights to water users and that these rights must be linked to responsibilities both to the environment and to the wider community.

The EDO has previously made submissions to COAG that the security of past entitlements to water has always been illusory. Despite a misplaced expectation of water users to always have an entitlement to extract a particular volume of water, licences under almost all States' previous water regimes were for short fixed terms and were capable of revocation by the Crown.

Essentially, by granting licences in perpetuity, this expectation that a share of the water in a system will always be available is perpetuated – making it more difficult for governments to effectively regulate water systems in the future. This issue will become critical as pressure on water increases due to population growth and climate change.

As States' seek to convert existing entitlements to perpetual ones, the following issues should be kept in mind:

- these rights must be responsive to future planning, development and land use changes. In our opinion there is a need for clearer benchmarks and triggers including regular reviews of entitlements that can look with a view to amending aspects of a licence to meet best practice standards from time to time;

- there should be clearer criteria for cancelling, suspending or revoking licences in various circumstances. This needs to be linked to provisions which provide guidance as to how and when compensation may be payable; and

- there is a need for effective compliance regimes providing for investigation and enforcement of compliance with access licences.

Addressing over-allocation

The NWI initiative to return over-allocated systems to sustainable levels of consumptive use is a landmark in natural resources policy.

The Communique requires States to demonstrate substantial progress to achieving this goal by 2010.

However, the means by which this will be achieved is less than clear. Whilst Victoria is proposing to invest $100 million to repair rivers and aquifers, which may involve returning significant percentages of flows back to the environment[2], current NSW water management planning will only see reductions in consumptive use by approximately 3%.

Assuming that States adopt a business-as-usual approach to the implementation of their existing water management regimes, in States such as NSW it is difficult to see how over allocation can be substantially addressed during the 10 year life of water sharing plans.

Arguably, what is required is a dramatic claw-back of environmental water in severely over allocated systems. However, in cases such as NSW this is likely to attract hefty claims for compensation.

The EDO has previously submitted to COAG that there is a need to:

- provide criteria for States to assess the health, values and capacities of their river and groundwater systems. States should be required to carry out that assessment as a priority as it will inform the need for and extent of "initialisation" in water systems;

- define the ecological values of those systems – using defined terminology that is consistent across jurisdictions,

- prioritise environmental flows (both in determining shares in water and in managing that water) and manage those flows through adaptive planning instruments,

- set objectives and benchmarks for management of the health of river systems and define performance indicators, capable of useful measurement, to assess the achievement of those objectives,

- ensure accurate data collection and monitoring of all water use in systems, including overland flow, to determine the ability of set environmental flows to promote improved ecological outcomes; and

- enable consumptive entitlements to be altered or varied in circumstances where systems are not achieving the identified environmental outcomes.

Unfortunately, the NWI Communique does not address how river health and sustainability will be measured now or in the future. These issues will be left to the States unless a lead role is taken by the new NWC.

Risk Assignment

In the lead up to the COAG meeting, the issue of risk assignment was extremely contentious and a range of options were put forward by the farming lobby, conservationists, each State Government and the Federal Government.[3]

The agreement reached on risk assignment represents a compromise between a number of the options mooted and has the potential to expose governments to significant compensation payments, particularly if there is not substantial progress to address over-allocation before 2014.

As noted above, the means of redressing over-allocation is not dealt with by the NWI. Some States are already locked in to arrangements (such as NSW water sharing plans) that would require compensation to be paid for reductions in the next 10 years unless there are further amendments to legislation.

Conclusion

The NWI creates a broad framework for States and Territories to address serious issues of over-allocation of waters in their inland rivers and to improve

administrative and institutional mechanisms relating to full cost recovery of water and water efficiency in both rural and urban areas.

The challenge for governments will be to maintain the commitment to addressing the environmental health or rivers, particularly beyond the Murray-Darling Basin, when faced with politically difficult and expensive decisions to reduce entitlements.

FOOTNOTES

1 Tasmania was unable to sign the Agreement at this time but will continue to engage with the Federal Government. WA declined to sign the Agreement because it did not offer any real benefits for that State.

2 For example, an environmental allocation of 20% of low reliability water entitlements in some areas. See Victorian Government White Paper *Securing our Water Future Togather* June 2004.

3 For example, the National Farmers Federation suggested risk be split three ways between State, Federal governments and land holders. The Senior Executive Officer's Group on water suggested risks associated with climate change and science be borne by landholders and change in government policy be borne by government. The ACF proposed a 1% reduction in allocations per year until rivers returned to health.

Continued from page 1

existing cotton growing industry, the Full Court held it was 'inescapable' that irrigation of cotton crops was within the contemplation of the proponent of the dam.

This case has wide-ranging implications for all environmental assessment under the EPBC Act in the future, with the Minister required to take a broad approach to adverse environmental impacts of proposed "actions", be they dams or not! This means better, more thorough Commonwealth environmental impact assessment.

The Minister has not sought special leave to appeal the Full Court's decision to the High Court of Australia.

The judgement Minister for the *Environment and Heritage v Queensland Conservation Council Inc [2004] FCAFC 190 (30 July 2004)* is available online at www.austlii.edu.au/au/cases/cth/FCAFC/2004/190.html.

For more information about the decision contact EDO Qld on 07 3210 0275 or edoqld@edo.org.au.

Hindmarsh Island Bridge Defamation Decision

Implications for Community Conservation Campaigns

Joanna Cull, Solicitor and Coordinator EDO NQ

The decision of the Full Supreme Court of South Australia on 9 December 2003 in *Conservation Council of SA Inc. & Ors v Chapman & Ors* [2003] SASC 398 [1] has a range of implications for any organisation or person publishing statements about a community campaign, and is particularly relevant for conservation organizations.

The case arose as a result of eleven publications made in 1994 and 1995 by the Conservation Council of South Australia ('**CCSA**') and some of its individual members in relation to the controversial Hindmarsh Island Marina and Bridge development. Defamation proceedings were brought by Tom and Wendy Chapman and their son Andrew against the CCSA and the individuals responsible for the publications.

This article focuses on the findings by the Full Supreme Court of South Australia as to the type of publication the extended qualified privilege defence will protect and the findings by the Court as to the presence or otherwise of malice on the part of the individual appellants.

On 12 August 2004, the High Court of Australia refused the CCSA's application for special leave to appeal, leaving the findings of the Full Supreme Court of South Australia undisturbed.

Background Facts and Findings of Trial Judge

The three publications found to be defamatory and indefensible by Justice Williams, and thus the subject of the Full Court appeal are detailed below. All three publications appeared in the CCSA's newsletter, 'Environment South Australia' between 1994 and 1995.

Publications 6 and 7 were written as a result of legal action initiated by the Chapmans in 1994. Interim injunctions were ordered against CCSA and named office bearers under section 45D of the *Trade Practices Act* (Cth) 1974, shortly after a rally on the steps of Parliament House in Adelaide.

At the conclusion of the rally an 'open letter' from the President of the CCSA was handed to the headquarters of Westpac Banking Corporation, the principal financier of the Chapman developments, suggesting that it would not be in the bank's interests to be seen to be involved in facilitating the Hindmarsh Island development.

Publications 6 and 7 also arose in the context of the Chapmans secretly filming attendees at an anti bridge meeting and the subsequent delivery of lawyers' letters advising attendees as to potential legal liability for participation in anti bridge activities.

Publication 6

Publication six was headed 'President's message Hindmarsh Island – Supression of Free Speech'

The words alleged to be defamatory were

> 'The legal mechanisms used to silence community groups from expressing valid concerns on the Hindmarsh Bridge issue have profound implications for free speech in Australia.
>
> We were silenced by two different mechanisms. Binalong Pty Ltd and Marine Services Co Pty Ltd acted against the Conservation Council under section 45D of the Trade Practices Act 1974.
>
> We believe that this legal process is being used simply to silence us…
>
> The mechanism being used

here is one called a 'SLAPP suit' commonly used in the United States to silence environmental groups, consumer groups and legitimate view points being put from the community…'

Publication 7

Publication 7 was headed 'A win for freedom of speech – A further update Hindmarsh Island (Kumarangk) Bridge'

The words alleged to be defamatory were:

'The people of Goolwa have been intimidated by this action and have been prevented from speaking freely on issues of concern. Whilst the Chapmans seek compensation, who compensates ordinary residents of Goolwa who have suffered greatly under the boot of Binalong?'

Publication 11

Publication 11 was headed 'Hindmarsh Island – Not So Secret Political Business'.

The words alleged to be defamatory were:

'Consultation with the relevant Aboriginal groups throughout the planning process was token. Wendy Chapman has admitted in Federal Court that Binalong never consulted directly with any of the organizations listed as a condition for building the bridge.'

Full Court's Decision

The judgment of the Full Court was split 2:1 with the minority judge, Justice Gray, being of the view that the appeal should be allowed for all parties in respect of each publication. Besanko J and Doyle CJ allowed the appeal in relation to publications 6 and 11 (detailed below) but not in relation to publication 7.

The majority judgments concluded that publications 6, 7 and 11 were defamatory.

Justice Gray on the other hand found that in the context of the robust political debate that was occurring, publications 6 and 7 were not defamatory. However, he too found publication 11 to be defamatory.

The range of findings of the four judges (including the trial judge) as to the defamatory nature or otherwise of the publications and the defences available illustrates the complexity and lack of predictability of defamation law in Australia. On this issue, it is interesting to note that the Australian Government has recently proposed developing a National Defamation Code, to improve the uniformity of the law in this area.

As is discussed below, publications 11 and 6 were excused by the majority on appeal on the grounds of one or more defences. This article will focus on findings as to applicability or otherwise of the defence of extended qualified privilege and on findings as to malice which are relevant to a range of the defences available in defamation proceedings, including traditional qualified privilege.

As noted above, on 12 August 2004, the High Court refused the CCSA's application for special leave to appeal, based on technical grounds related to the need to reopen findings of fact in order to interpret the legal issues.

Applicability of the extended qualified privilege or *Lange* defence

One of the defences raised by the respondents in relation to all three publications was the extended qualified privilege, or the implied constitutional defence, as set out in *Lange v Australian Broadcasting Commission*.[2] In this case, the High Court extended the defence of traditional common law qualified privilege to protect a communication made to the public on a government or political matter.

At common law, the traditional qualified privilege defence applies to protect defamatory publications, even if not accurate, where a person who makes a communication has an interest or duty (legal, social or moral) to make it to the person to whom it is made and the person to whom it is so made has a corresponding interest or duty to receive it, with this reciprocity being essential.

In *Lange*, the qualified privilege defence was extended on the basis that each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia. It was held that whilst the truth of the publication need not be proven, the publisher must prove reasonableness in making the publication. Further, the defence will be defeated if it can be established that the person making the publication was actuated by malice.

The majority judges in the CCSA appeal found that the extended qualified privilege defence did not apply to publications 6 and 7. Specifically, they found that publications 6 and 7 were about freedom of speech and that this was not a government or political matter attracting the *Lange* defence. Essentially, the majority view was that a publication must specifically be about the conduct of the executive or legislative branch of commonwealth or state government. In reaching this conclusion, Chief Justice Doyle, referring to *Lange,* stated that the constitutional protection is available because Australians must be able to communicate freely with each other '…with respect to matters that could affect their choice in federal elections or constitutional referenda or that could throw light on the performance of Ministers of State and the conduct of the executive branch of government'.[3]

It is also worth noting, that although the publications arose out of the controversy surrounding the approval of the Hindmarsh Island Bridge development in general, the majority took the view that publications 6 and 7 were specifically about the use by the Chapmans, and developers generally, of legal proceedings to silence and subdue opponents of proposed development, that is essentially about freedom of speech. Their honours said that the constitutional protection is not available where the publication merely relates to or has arisen out of a government or political matter. According to the majority, for the protection to be available, it has to be established that the content of the publication is 'so linked or intertwined with a communication about a matter which is government or political that it should be characterised in the same way'.[4]

The majority judges, as well as Gray J, concluded that publication 11 was

protected by the extended qualified privilege or constitutional defence. Doyle CJ found that this publication was about the role of Commonwealth and State governments in the construction of the bridge. Besanko J referred to the trial judge's finding that notwithstanding publication 11 was potentially protected because it dealt with the operation of State planning law, the defence was not available because the publication was 'actuated by malice'.[5] Besanko J found that the main topic dealt with by the publication was the justification for the establishment of a Royal Commission to examine the claims of Aboriginal women in relation to the bridge and that this is a communication on a government or political matter. He said that comments as to whether there had been any consultation with Aboriginal people in the past were sufficiently linked with that matter (the justification of the Royal Commission) to be characterised as part of the topic, and thus were defensible.

Justice Gray, in the minority , considered all three publications to be protected by the extended qualified privilege defence. He took a much broader view of the defence. He found firstly that publications 6, 7 and 11 formed part of a debate about the bridge and the wider political and government implications of its construction, and that the issues discussed in this widespread public debate were of government and political concern. He also found that the issue of the bridge and freedom of speech became 'inextricably linked'. He stated that *Lange* did not give guidance as to the precise meaning of 'government or political matters' but that nothing in the decision suggests that the protection depends on the plaintiff being a politician or other type of political figure.

It would appear from the majority decision then, that the extended qualified privilege defence will be available in relation to publications regarding the operations of executive and legislative branches of government, provided such publication was reasonable and that the individual responsible for the publication was not actuated by malice. Comments on more general political issues such as freedom of speech will not be protected unless they are very clearly linked in the publication to the operation of the executive and legislative branches of government.

Findings as to Malice

As has been discussed in an earlier *Impact* article[6], one of the most concerning parts of the judgment of Justice Williams was the finding of malice on the part of the individuals who made the relevant publications. As malice defeats the defences of traditional qualified privilege, fair comment and extended qualified privilege, the findings of Justice Williams were particularly concerning.

Justice Williams drew a distinction between 'legitimate' campaign tactics, such writing non-coercive letters to politicians and stakeholders such as banks and 'illegitimate' campaign techniques such as direct action (including non-violent picketing) and attempts to coerce changes in behaviour or policy. He said that 'illegitimate' campaign tactics indicated a desire to injure the Chapmans personally and therefore imputed malice to the individual defendants. Also of concern was Justice Williams reference to the defendants' past campaign activities, which activities were not specifically related to the publications in question.

Most importantly the majority determined that Williams J erred in characterising what fell outside his perception of a legitimate campaign as being improper and illustrative of malice. Justice Besanko said that Williams J 'placed too much weight on the distinction he drew between a proper lobbying situation and conduct designed to injure or damage the respondents. It was open to the Judge to consider the likely effect of particular conduct as that could throw light on the motives of those carrying out that conduct. However, the Judge went further than that in that he characterized what he considered to be a legitimate campaign and characterized any conduct which did not fall within that concept as conduct designed to injure or damage the respondents'.[7]

All three judges appear to have come to the conclusion that the overriding motives of the appellants were the conservation of the environment and/or the stopping of the bridge, as opposed to the purpose of simply causing harm to the Chapmans and that such overriding motives were not indicative of malice. As a result, the defence of traditional qualified privilege was available with respect to Publication 6. The appeal failed with respect to Publication 7 because the majority held that neither the extended defence nor the defence of fair comment was available.

Conclusion

In light of the High Court's refusal to grant special leave to appeal, the judgments of the Full Court are the most recent indication of how Courts will view the potentially defamatory statements of environmental organisations.

The judgments of the Full Court indicate that engaging in a concerted political campaign involving conduct such as non-violent picketing, against a particular development, will not be enough to enable a judge to impute malice in the event of a defamation claim being made against those involved in the campaign.

The judgments make it clear that activities (even some coercive activities) taken by members of a conservation organization with the intention of stopping a particular development will not necessarily be seen as imputing a desire to personally injure the developer in question (even if the result of the activities is direct financial loss to that developer).

The decision is helpful in limiting circumstances in which malice can be established in defamation proceedings, and paves the way for further debate and clarification of the scope of the extended qualified privilege defence.

Footnotes

[1] Full Court of the Supreme Court of South Australia, 9 December 2003, Doyle CJ and Besanko and Gray JJ on appeal from the decision of Williams J in *Chapman & Ors v Conservation Council of SA & Ors* [2002] SASC 4 (21 January 2002)

[2] (1997) 189 CLR 520

[3] para 571.

[4] (per Besanko J at [295])

[5] para 278.

[6] Parnell, M. Hindmarsh Island Bridge Defamation Case, Impact No. 67 Sept 2002 pp 1-3 and 14-15

[7] para 339.

The Changing Nature of Environmental Law

Recent Developments In Public Participation

Jeff Smith, Director, EDO NSW

This article is based on a paper presented at the Enterprise Sustainability Conference, held in Sydney on 2-3 June 2004.

Part One: Introduction

In recent years, the range of environmental issues has continued to expand and an increasingly complex operating context has developed. Australia's environmental health has also continued to decline in key areas, with time often being of the essence in finding solutions.[1]

Changes have been seen in the response to these complexities - as Douglas Fisher has noted:

"The focus of environmental law in Australia has moved…from protection to management of the environment and from reactive to proactive legal mechanisms.[2]"

Reflecting these developments, Australian environmental law has been expanding rapidly. The environmental landscape was completely restructured with the *Environment Protection and Biodiversity Conservation Act 1999*, which radically recast Commonwealth, State and local government responsibilities in relation to the environment and ushered in a new era of environmental management.[3] In many instances, a feature of the landscape is that strong environmental laws are in place and the role of the public and the public interest has been somewhat – if unevenly - entrenched.

In broader terms, it is now generally recognised that there is a need to shift the focus from discussion of what sustainability means, to its application. This is evident in many ways, including a greater emphasis on economic measures and new regulatory approaches, the emergence of triple bottom line accounting (environmental, social and economic) and other reporting mechanisms and the development of new relationships and partnerships between Government, industry and the community.

These developments present complex challenges for public participation, public interest environmental law and organizations such as the Environmental Defender's Office (EDO) in adapting to these changes. The EDO has been seeking to engage differently in response to this changed operating environment and faces changing community demands in terms of its services.

This paper focuses on two things. First, in Part Two it traces changes in the development of public interest environmental law in NSW and Australia. Second, Part Three highlights recent developments in public participation under environmental law in Australia, drawing on wider implications for the EDO in NSW.

Part Two: The Development of Public Interest Environmental Law

Public interest environmental law in NSW and Australia can be seen as having gone through three phases: procedural access to justice, substantive access to justice and the quest for improved environmental outcomes.[4] As the following demonstrates these phases are not absolute, but uneven and continually contested.

The **first phase** of public interest environmental law in NSW and Australia began with the remodeling of NSW planning laws and the establishment of a specialist Court in 1979. Indeed, the idea of a specialist advocacy group such as the EDO in NSW sprang from the passage of the *Environmental Planning and Assessment Act 1979* (EP&A Act) and the *Land and Environment Court Act 1979* (L&EC Act). This was manifested through the community involvement objects under the new planning laws (s 5 of the EP&A Act) and institutionalisation of the public interest in Court decisions (s 39(4) of the LEC Act).[5]

Procedural provisions conferring open standing rights in civil proceedings have become commonplace in NSW environmental legislation since that time.[6] It has also become abundantly clear that the public interest embraces the notion of public participation. As Street CJ said in *Hannan Pty Ltd v The Electricity Commission of NSW (No. 3)* (1985) 66 LGRA 306 at p 313:

"the task of the Court is to administer social justice in the enforcement of the legislative scheme of the Act. It is a task that travels far beyond administering justice inter partes."

This phase is characterized by not only a push for open standing rights[7] but also, importantly, the introduction of a suite of other participatory measures to be included in NSW and Commonwealth environmental legislation. These include right to information provisions (such as public registers and rights of inspection); community consultation and notification requirements (including a duty to consider and the giving of reasons); third party merit appeals; community representation regarding natural resource management plans; joinder;[8] and reviews of Government legislation.[9]

The **second phase** of public interest environmental law in NSW is aptly described by Justice Toohey:

"Relaxing the traditional requirements for standing may be of little significance unless other procedural reforms are made. Particularly is this so in the area of funding of environmental litigation and the awarding of costs. There is little point in opening the doors to the courts if litigants cannot afford to come in.[10]"

During this phase a number of procedural changes to complement, and give substance to, the formal right to institute proceedings were realised.

For instance, the case of *Oshlack v Richmond River Council* went to the High Court on the issue of costs. In this "key case",[11] the High Court agreed with Stein J at first instance in the Land and Environment Court (as he then was) and affirmed the width of the discretion of that Court in awarding costs, including the relevance of public interest litigation.[12]

Throughout this period, the EDO has also used public participation provisions to good effect to ensure the lawful implementation of NSW environmental laws. The Office has focused on ensuring formal compliance with planning and development laws, as well as clarifying the intent and ambit of key provisions.

As an example, in another of the *Oshlack* cases (*Oshlack v Iron Gates P/L*) the EDO sought to stop clearing for a subdivision on the controversial Iron Gates site at Evans Head. The breaches of the development consent were found to be so serious that the consent was rendered null and void. In a landmark judgement, the Court ordered a full restoration of the site upon which substantial works had been done (later upheld by the Court of Appeal).[13] This supervisory role – typified by the use of Class 4 proceedings in the Land and Environment Court - has resulted in significant gains being made over the years regarding public participation rights and the quality of decision-making.

A specific effect of this role is that the vigilance of the Office and the growing experience of environmental decision-makers may well have served to reduce the litigation opportunities for the EDO. As a former EDO Director has argued:

"Government and Local Government agencies are today more conscious of and better-informed than in the past about their roles and responsibilities under environmental legislation - something that, according to some outside observers, is in part due to the EDO's earlier casework in highlighting failures and breaches.[14]"

So, the EDO has for some time been seeking to move public interest environmental law in NSW towards a third phase of engagement – namely, a quest for improved environmental outcomes. As past EDO Chair Bruce Donald argued in the 2000-01 Annual Report:

"The last five years has seen environmental sustainability become enshrined not only as a concept but also as a virtual legal commitment for all governments and corporations; yet delivering on that promise is far from guaranteed. As all indicators of environmental health are under challenge, the EDO needs to identify the legal and policy methods for the new century which will make our institutions and businesses accountable with reference to sustainability goals and which will deliver real and positive outcomes in the public interest. The way we have worked in the past is not necessarily the way we must work from now on; an inventive and imaginative approach is called for.[15]"

This third phase has widespread implications for the practice of the EDO. These issues are addressed below.

Part Three: Recent Developments in Public Participation

This Part of the paper draws attention to some of the recent developments in relation to the role of the public in the field of practice of environmental law. It is not intended to be exhaustive and addresses these issues from an EDO perspective.

1 Contextual issues

1.1 Government enforceability

The need for public participation throughout the development process is highlighted by the fact that Governments of all types have often been reluctant to enforce their own legislation. Recent practice bears this out. The Joint Select Committee on Quality of Building in NSW heard evidence in 2002 about the failure of Local Government to implement Local Environmental Plans. It was also only recently that the former planningNSW first commenced proceedings to enforce planning laws. In the first two years of operation, the Commonwealth has also only recently brought its first enforcement proceedings under the *Environment Protection and Biodiversity Conservation Act 1999*,[16] whilst the Queensland EDO has brought three sets of proceedings on behalf of both a concerned individual and conservation groups.[17]

1.2 Circumventing Environmental Impact Assessment

It has been argued that developers are becoming "politically skilled and powerful project proponents" and have been adopting one of two approaches to obtain project approval. On the one hand, they are saying to Government that their project is too big and too important and thus requires enabling legislation or Ministerial approval. On the other hand, some proponents have sought to avoid assessment procedures by claiming the project is too small or by allegedly breaking up a proposal into smaller pieces.[18]

Special legislation has been passed in NSW on several occasions.[19] One relevant example is the *State Environmental Planning (Permissible Mining) Act 1996*, which amongst other things validated a development consent granted by the Minister (which was the subject of challenge) in relation to Bengalla Mining Company Pty Ltd in 1995.

It is, of course, true that the EDO has been involved in matters where developers have sought to avoid their environmental impact assessment obligations. Recent practice in relation to *SEPP 71 – Coastal Protection* have borne this out, with several examples of development applications being structured so as to avoid the strictures of this instrument.

1.4 Quality of public participation

The EDO and conservation groups have long been active in lobbying for comprehensive public participation provisions to be adopted into environmental legislation. These provisions must not be retreated from. At the same time, consideration needs to be given to using such public participation effectively. As the EPA has recently recognised in the context of licence reviews, there is a need to actively ensure proper public

participation in environmental decision-making beyond simply meeting the formal requirements of the legislation. Such an approach recognises the complexities of public participation in an increasingly technical, difficult and time-consuming operating environment. Recent practice has demonstrated that mechanisms for public participation need to be managed to ensure the best possible environmental outcomes.

1.5 Degree of public participation

It is an arguable case that the Government is retreating from its historical commitment to public participation and, more generally, strong environmental laws. Conservation groups have been shut out of the planning and threatened species reforms, while the natural resource management reforms – native vegetation and water – seem to be increasingly skewed towards farmers.

Also, special legislation was recently passed to overturn the Court's decision in the *Collex Clyde Waste Transfer Station* case. Moreover, the *Snowy Mountains Cloudseeding Trial Act 2004* contained privative clauses ousting all environmental laws and, indeed, all other laws.

It is not an overstatement to see these developments as a threat to many of the principles established, and perhaps taken for granted, since 1979 and the passage of the EP&A Act.

1.6 External scrutiny

Non-governmental organisations – both environmental and otherwise – have been active in monitoring corporations generally and mining companies specifically.[20] As part of this endeavour, it is arguable that NGOs have developed their own version of "smart regulation" (to use the parlance of government and the bureaucracy). NGOs have displayed an increased understanding of the drivers of corporate behaviour – such as prestige, market niche and let it be said, goodwill - and have used this knowledge to influence the behaviour of corporations.

As an example, the Wilderness Society recently used provisions under the *Corporations Act* (section 249P regarding the distribution of members' statements) to draw shareholders' attention to the logging of Tasmania's forests. The Commonwealth Bank subsequently withdrew its level of investment with the company, although apparently it stated this was on financial grounds. Brereton has also argued that this pressure from NGOs has had a flow on effect with Governments and financial institutions also increasing their scrutiny of corporate operations.[21]

1.7 Integrating environmental processes

Government continues to respond to environmental issues through redefining the centre of the universe. Pollution laws have moved from being media-specific – with discrete air, water and land pollution legislation – to integrated environment protection laws across Australia.[22] The next phase was to integrate pollution and planning law, as evidenced in Queensland in 2002 by bringing mining activities within the environmental licensing regime under the *Environment Protection Act 1994*. The NSW Government has also promised to "green" its mining laws.

Planning law – driven by sustainability considerations - is now undergoing the same process. The focus now seems on moving towards a natural resource management focus with Victoria establishing a Department of Sustainability and Environment and NSW setting up a Department of Planning, Infrastructure and Natural Resources. Media-specific laws have been put in place around these issues.

2 Legal developments

2.1 Aarhus Convention

The starting point regarding public participation under International Law is Principle 10 of the Rio Declaration. It states:

"Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."

More recently, the fundamental importance of public participation as a means of ensuring government accountability, transparency and responsiveness has made its way upwards into International Conventions such as the *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (*Aarhus Convention).

The Aarhus Convention, although regional, goes to the heart of the relationship between people and governments. The Convention is perhaps not best described as an environmental agreement, but as a Convention about government accountability, transparency and responsiveness. The Aarhus Convention grants the public rights and imposes on Parties and public authorities obligations regarding access to information and public participation and access to justice.

The Aarhus Convention links environmental rights and human rights and is founded on the premise that sustainability can only be achieved through the involvement of all stakeholders.

This Convention has been described by the Secretary-General of the United Nations, Kofi Annan, as an impressive elaboration of Principle 10 of the Rio Declaration.

The Convention entered into force on 30 October 2001.

2.2 Standing

NSW is often held up as having the most progressive and open provisions in relation to standing to sue. However, it

is arguable that public rights of standing are being eroded in certain key areas of environmental law.

For example, recent amendments to the *Coastal Protection Act 1979* provide for coastal zone management plans to be made, which must make provision for protecting and preserving beaches, carrying out of emergency works and ensuring continued public access to beaches, headlands and waterways. Provision is made for public notification, exhibition and the consideration of submissions. It is an offence to carry out work contrary to the relevant coastal zone management plan. However, under the amended Act, only the Minister or a Council may bring proceedings in the Land and Environment Court for an order to remedy or restrain a breach of a coastal zone management plan. Additionally, if the Land and Environment Court is satisfied that a breach of a coastal zone management plan has been, or will be, committed, it may make such order as it thinks fit to remedy or restrain the breach.

These developments represent a retreat from open standing provisions that have been the norm under environmental law in New South Wales for some time (see the discussion above).[23]

By contrast, the Queensland Minister recently announced his intention to allow open standing rights under the *Environment Protection Act 1994*.

2.3 Security for Costs

In *Melville v Craig Nolan & Associates Pty Ltd* [2002] NSWCA 32, the Court of Appeal considered the question of security for costs where a litigant was impecunious. At first instance, the impecunious claimant had brought proceedings under section 123 of the EP&A Act for injunctive and declaratory relief regarding the invalidity of a development consent. Security for costs were sought and granted in the Land and Environment Court under s 69 of the L&EC Act, which dealt with the power of the Court to make orders regarding security for costs.

The Court of Appeal held that whilst section 69 did confer a discretionary power, it should not be read to maintain the "basic" or general" rule that an order for security for costs would not be made against an impecunious person. Accordingly, the majority of the Court re-exercised the discretion in favour of an order for security for costs.

There are two points of particular interest arising from this decision. First, the majority (Heydon JA and Young CJ in Equity) held that to make an order for security for costs did not deprive the impecunious claimant of any right as it was not personal to her (being brought under an open standing provision). Twenty million other people and numerous corporations could also bring the action. In a strong dissent, Stein JA argued that open standing provisions actually support the retention of the general rule as people need actual, as opposed to formal, access to the courts.

Second, the judgment of Young CJ in Equity is also worth noting. Young CJ in Equity refers to the floodgates argument against open standing as well as the prospect of the straw litigants of the early 19th Century (penniless people who hired themselves out as litigants by sitting on the steps of the Court with pieces of straw) being reincarnated as the penniless pensioner of 2002. Stein JA responds to these remarks in his judgment, highlighting the fact that an order for security may frustrate a claimant's right to litigate his or her claim (which would be contrary to the objectives of public interest environmental litigation).[24] His Honour's judgment also seems to reflect a certain frustration that the floodgates argument still has currency, noting that it has no basis, if recent experience is any guide.[25]

This case was most recently distinguished in *Carriage v Stockland (Constructors) Pty Ltd and Ors* [No 5] [2003] NSWLEC 197. Justice Pain held, in upholding earlier decision by herself on the issue, that:

"I did not consider that I was bound by the majority decision in Melville as the discretion I exercised under section 69(3) of the Court Act is broad and the only limitation on me is that I exercise that discretion judicially."

In reaching this conclusion she made the following finding:

"I consider the majority judgments are wrong on this issue because these findings essentially undercut the open standing provisions which the New South Wales Parliament has conferred in s 123 of the EP&A Act by effectively imposing a requirement on those seeking to use that provision to demonstrate, in order to resist a security for costs application, that they have a special interest which would justify not awarding security for costs because that may result in the litigation being barred. This ultimately leads, in my view, to a narrowing of the right under s 123 of the EP&A Act to take action regardless of the nature of the Applicant's interest in the subject matter of the proceedings because that right could be effectively limited by interlocutory processes before a final hearing."

2.4 Costs in public interest litigation

In *Donnelly v Delta Gold Pty Ltd & Ors* [2002] NSWLEC 44 per Bignold J (27 March 2002), the applicant, an authorised representative of the Wahlabul/Malerah Bandjalung Aboriginal Communities, claimed declaratory and injunctive relief in the Land and Environment Court. He claimed that a variation of a pollution control licence granted under the *Protection of the Environment Operations Act* 1997 was null and void and all infrastructure installed in accordance with that variation be removed and the land rehabilitated. The applicant's case wholly failed, and the respondents sought orders for costs in their favour.

The applicant asked the Court to exercise its discretion to order that each party bear its own costs, on the basis that the action was "public interest litigation" as per the principles elucidated by the High Court in *Oshlack v Richmond River Council* (1998) 193 CLR 72 and further outlined in *Save the Showground for Sydney Inc v The Minister for Urban Affairs and Planning* (1998) 105 LGERA 354.

The Court accepted that the litigation was advancing the public interest insofar as the applicant sought to stop an activity which he saw as detrimental to the environment of the Timbarra Plateau and to the sacredness of this area to the Bandjalung aboriginal community. The Court also accepted that the applicant

sought no personal gain from the litigation, which he conducted with a 'deep sense of responsibility for the Bandjalung community and their association with Timbarra Plateau'. It was found that certain aspects of the *Protection of the Environment Operations Act* 1997 were judicially explored and explained for the first time and held that the applicant's case was arguable and was induced by the pre-litigation conduct of the respondents. The Court also noted that the proceedings could have been shortened had the respondents, who, unlike the applicant, were legally represented by experienced and senior practitioners, appreciated the true nature of the proceedings, and that the respondents 'to a fairly significant degree [could have been] said to have brought the proceedings upon themselves'.

The Court, having examined all the competing factors, concluded that the special circumstances established ultimately outweighed the respondents' legitimate expectation that they would benefit from a costs order, and justified a departure from the usual rule. Therefore, the Court ordered that each party bear its own costs in the proceedings.

2.5 Joinder

The EDO, on behalf of peak NSW conservation groups, successfully argued for the inclusion of a specific joinder provision under the *Land and Environment Court Amendment Act 2002*. The basis for such an amendment was that there is no automatic right for third parties to be joined to Class 1 proceedings as parties where they seek to oppose a grant of development consent (except for objectors to designated development).

In a number of decisions, the Court has permitted third parties to participate in proceedings where the Court has considered that those third parties wished to raise issues that would not otherwise be raised by the respondent council.[26] However, that participation has not amounted to joinder; accordingly, those third parties have no right of appeal against the Court's decision. Third parties who were not objectors to designated development have also not been permitted to call expert evidence.[27]

As a result of the amendment accepted by the Government, the Court may, at any time, on the application of a person or of its own motion order the joinder of a person as a party to an appeal under section 97 or 98 of the *Environmental Planning and Assessment Act 1979*, if the Court is of the opinion:

(a) that the person is able to raise an issue that should be considered in relation to the appeal but would not be likely to be sufficiently addressed if the person were not joined as a party, or

(b) that:
  (i) it is in the interests of justice, or
  (ii) it is in the public interest,

that the person be joined as a party to the appeal.

The Potts Point Action Group in NSW recently sought to use this provision, with Justice Pain allowing the joinder.

Such a provision is entirely consistent with the public nature of environmental law and further adds to the public's right of access to the Courts.

3 Ongoing challenges

3.1 Operationalising sustainability

Sustainability requires, amongst other things, the integration of economic and environmental considerations in decision-making processes and is becoming enshrined as a "universal value" in laws and policies under NSW and Australian law.[28]

This broadening or "mainstreaming" of sustainability is just beginning – emerging notions of triple bottom line accounting (which seeks to balance social, environmental and economic factors) and sustainable governance (which sees sound governance as a prerequisite to sustainability) are testament to this.

Communities also continue to push governance issues – both public and private – seeking improved environmental and social outcomes through encouraging certain actions and exposing and punishing others. Such "community regulation" uses a variety of mechanisms ranging from the Annual General Meeting to consumer boycotts to "good reputation indexes" to investment in ethical funds.

As Mitchell H. Hooke, Chief Executive Of The Minerals Council Of Australia noted in a recent address to the NSW Mining Industry Occupational Health and Safety Conference:

> "we are…increasingly subject to community scrutiny of our operations, arguably more so than any other Australian industry….Civil society is increasingly complex, often inherently contradictory in its views, actions and aspirations, and more inquiring and demanding of a pivotal role in determining public policy – and particularly social policy. And they don't just want to be a commentator, they want to influence the nature and operations of our businesses, particularly from a socio-economic and environmental perspective. This shift in social attitudes is manifest in the community's expectations of businesses' environmental and social stewardship responsibilities, standards of accountability and transparency in operations. It is particularly acute in terms of social outcomes. In terms of community expectations, the situation today, in social terms, is where we were ten years ago in environmental terms.[29]"

The mining industry has responded to this external environment by undertaking a number of voluntary measures.[30]

As Brereton has noted, these developments have partly been in response to a fear about increasing government regulation. They have also been unevenly put in place (a function of their voluntary nature).[31]

The increasing hold of sustainability as an abiding principle in modern life and the widespread adoption of voluntary approaches has drastically affected the

nature of the EDO's practice. No longer can we look solely at environmental laws in place.

The EDO has for some time been active in providing advice outside the traditional sphere of environmental law. Prior to the Olympics, the EDO provided wide-ranging advice regarding dispenser machines and the issue of ozone depleting substances and greenhouse gases emissions. The advice covered the law regarding defamation, trade practices, tort (regarding economic relations), intellectual property (such as trademarks) and criminal law.

More recently, the Office has provided advice on:

- disclosure obligations regarding superannuation funds
- the opportunities for the involvement of conservation groups in relation to corporate restructures and Foreign Investments Review Board approvals
- the legal position regarding schemes of arrangement under the Corporations Law
- corporate law mechanisms to improve environmental reporting in relation to greenhouse gas emissions
- property rights and compensation
- the Australia-US Free Trade Agreement
- advice on how legislation could be used to subject Export Finance and Insurance Corporation funding to legally binding environmental impact assessment
- the "greening" and general review of the *Mining Act 1992*
- legal and policy implications regarding Public Passenger Transport.

4.2 Improving outcomes

A fundamentally important implication for the EDO flowing from the third phase of environmental law involves a move beyond a procedural focus towards the merits or substantive issues underlying development. The EDO's involvement in *Beemery*[32] exemplifies this approach, together with the operational difficulties associated with adopting this model.

Through close liaison with Mr Bruce Wilson and other experts in the *Beemery* case, the EDO was able to draft, and negotiate, conditions that ensured that the development, despite going ahead, reflected "best practice".[33]

The former Chief Judge of the Land and Environment Court, Justice Pearlman, highlighted this shift in the operation of environmental law in her Keynote Address to the Australia New Zealand Planning Congress in 2002.

Her Honour identified five cases as developing environmental jurisprudence. One of these was *Beemery* which Her Honour saw as being of particular importance because it:

- concerned a very serious development in terms of its potential environmental impacts
- highlighted the important role that third party objectors can play in protecting natural resources
- demonstrated that the Court's processes were effective in managing the environment.

The central problem for the Office – and the development of public interest environmental outcomes more broadly – is that cost recovery in such matters is generally not available.[34] For instance, if *Beemery* had not been settled, the EDO would not have had sufficient funds to continue and this beneficial outcome would not have been achieved.

Nevertheless, EDO involvement in this matter highlights that one key way to serve the community and continue to help the development of public interest environmental law is to use the participatory framework as a means of focussing on environmental outcomes.

The EDO has been seeking to move in this direction for some time and has devised an integrated program based on outcomes (rather than procedural review) to meet the challenges posed by environmental law today. This program involves changes across all aspects of the work of the Office - litigation and advice; policy and law reform; and community education – as well as an additional "environmental advocacy" role.

In broad terms, the EDO is seeking to more truly become a "one-stop shop" which offers a range of services (legal, policy and technical), with a commitment on our part to get involved in advocacy work at an earlier stage across a range of processes. An integral part of this case management model is an expansion of services to rural and regional NSW and the need to continually update and broaden the skill base of the Office to address the new rules of engagement thrown up by sustainability.

(i) Environmental advocacy

Having helped to secure a strong public participation platform in NSW and Australia, it is felt that the EDO can now better serve the community by providing legal advice and assistance earlier in the environmental assessment process for specific proposals. The EDO recently employed its first in-house scientific advisor to marry the legal and technical aspects of environmental disputes and allow for a broader case management approach.

As Bates has argued, there has been a "channelling" of public participation opportunities to formal challenges towards such proposals in recent times.[35] The EDO is presently encouraging clients to approach it for assistance earlier in this process, including for assistance in instructing experts.

The EDO recently established an assessment and referral service for experts, complementing the Public Interest Law Clearing House (PILCH) set up by the Public Interest Advisory Centre. The EDO refers requests for scientific and technical assistance to member institutions and individuals, who provide assistance on a pro bono or reduced fee basis.[36]

The EDO's scientific advisor administers the scheme. The scientific advisor also liaises with, and provides advice to, community groups. Unlike conservation groups, the focus of this role is on the provision of practical information to these groups to inform their legal rights (for example, information about evidence gathering and meeting the legal tests regarding the need for a Species Impact Statement).

Conservation groups - including the Australian Conservation Foundation, World Wide Fund for Nature, Greenpeace, Humane Society International, Nature Conservation Council, Total Environment Centre and regional groups such as the Orange Field Naturalist and Conservation Society - have provided strong support for this new role.

A second element of the environmental advocacy role will see the Office act as a clearing house for submissions on environmental laws, policies or plans on behalf of clients, including submissions which require the assistance of experts. The role for the Office here would be in an oversight capacity, with the EDO becoming involved strategically. The EDO could analyse, for example, a particular plan (such as a water sharing plan) or operational element (such as a licence review), with this critique providing a model that could inform others.

A third element of this environmental advocacy role flows out of the challenges of sustainability noted above, including the new relations between the community, industry and government. Specifically, the Office is seeking to engage more directly with corporate entities, work with communities to make the best use of public participation opportunities and help mediate positive environmental outcomes, address corporate issues and to provide a broader range of services beyond the remit of environmental law.

(ii) Policy and law reform

The EDO will continue to take a lead role in the preparation of submissions regarding reviews of government legislation.[37] An emphasis on this sort of policy work is consistent with the desire of the Office to focus on outcomes, such reviews being necessarily concerned with operational issues and, more particularly, the extent to which sustainability is being achieved.

(iii) Education

Changes to the education activities of the EDO also reflect an outcomes-focussed approach, with a particular emphasis on rural and regional NSW. Specific initiatives include:

- producing materials and workshops focussing on the practical aspects of the development assessment process, such as submission writing, legal rights and the structure of Government
- running specialist workshops for communities engaged in a specific dispute (such as for the charcoal factory in Mogo)
- workshops which incorporate information about the civil rights of campaigners and the laws regarding defamation, where community groups are running a political campaign in conjunction with a legal challenge
- access to the EDO by rural stakeholders through a greater on-the-ground advisory presence.

(iv) Litigation

The litigation focus of the Office also reflects an emphasis on pursuing substantive, rather than procedural, remedies. For example, the Office is actively seeking to use trade practices and corporate law to achieve better environmental outcomes in the public interest.

A particular area of interest is with the misleading and deceptive provisions under the *Trade Practices Act*, which potentially offer the opportunity to deliver substantive, rather than procedural, environmental victories. The Office has adopted an exemplar role in this area, liaising widely with major conservation groups to identify opportunities under these laws. As Don Henry, Executive Director of the Australian Conservation Foundation has said:

"What strikes me as important, is the ability of the EDO to think broadly and outside the realms of traditional areas of environmental law in its advice work. For example, on a number of occasions the EDO has directed ACF to the *Trade Practices Act* and the *Corporations Act* as useful tools in achieving conservation outcomes.[38]"

Complementing this approach, the Office will continue to play its traditional, supervisory role regarding the proper enforcement of environmental laws. Recently, the EDO has been focussing more on "new" laws - such as the *Environment Protection and Biodiversity Conservation Act 1999*, and State laws regarding native vegetation and water management.[39]

Endnotes

1 See, for example, thea Commonwealth State of the Environment Report 2001 which can be found at: www.ea.gov.au/soe/2001/overview.html#conditionoftheenvironment; NSW State of the Environment Report 2001 at: www.epa.nsw.gov.au/soe/soe2000/general/c_overview.htm (particularly in relation to status and trends for biodiversity, water, land, resource consumption and generation); and Bienen L and Tabor G (2002) "Australia's Conservation Paradox: A Report to the International Conservation Community" a paper sponsored by the V.Kann Rasmussen Foundation at p 5.

2 Fisher DE (2000) "Considerations, Principles and Objectives in Environmental Management in Australia" 17 *Environmental Planning and Law Journal* at 260.

3 See Smith J and Ogle L (2002) "Where's Wally: The *(CTH) Environment Protection and Biodiversity Conservation Act 1999* and its Impact on Local Government", a paper presented as part of the 2002 CLE program, 14 March 2002. These changes are ongoing: see the *Environment and Heritage Legislation Amendment Bill (No. 1) 2002*.

4 The EDO has played a formative role in the fleshing out of these first two roles. As Bates has stated: "Some of the most important and significant cases in Australian environmental litigation have progressed through the involvement of EDOs.": Bates G (2002) *Environmental Law in Australia* 5th Edition LexisNexis Butterworths, Australia at p 18.

5 See Robinson D (1996) "The Environmental Defender's Office, NSW, 1985-1995" *Environmental Planning and*

ANEDO Website

The Australian National Environmental Defenders Office (ANEDO) Network consists of nine independently constituted and managed community environmental law centres located in each State and Territory of Australia.

The Network's website consists of:
- policy submissions
- publications
- links to each office; and
- other useful links

Vist the Network's website at **www.edo.org.au.**

Law Journal 155 at p 155 and the Keys Young Report at p 3.

6 Section 123 of the (NSW) *Environmental Planning and Assessment Act 1979* was the first and has been followed in numerous environmental statutes since then.

7 Open standing rights are common under NSW legislation, with a slightly higher threshold of "interested person" under Commonwealth legislation such as the *Environment Protection and Biodiversity Conservation Act 1999* (section 475).

8 As a specific example, the EDO recently proposed, and the government accepted, an amendment to the *Land and Environment Court Act* to allow for joinder of parties where, amongst other things, it is in the public interest.

9 See for example, *Defending the Environment: Standing in the Public Interest* (March 1997), a submission to the Attorney-General's Department in response to the Australian Law Reform Commission's Recommendations on Standing ALRC Report # 78. Other subject-specific submissions undertaken by the EDO seek to embed public participation provisions within the regulatory framework: see, for example, *The Protection of the Environment Operations Bill – the Solution to Pollution*; *Mining Law Reform – a Preliminary Discussion Paper*; *Joint submission on planFIRST – White Paper on Review of Plan Making in NSW*; *Submission on behalf of the EDO National Network regarding the Heritage Amendments*.

10 Toohey (1989) "Environmental Law – Its Place in the System" in *Proceedings of the First NELA/LAWASIA International Conference on Environmental Law* June 1989 at p 79. The passage is also contained in the judgment of Justice Stein in *Oshlack v Richmond River Council and Iron Gates Development Pty Ltd* (1994) 82 LGERA 236.

11 As defined by the Chief Judge of the Land and Environment Court in her Keynote Address to the New Zealand Planning Congress. Her Honour commented:

Both this case and [*Wilson*] are examples of how the Court has expanded traditional areas of law to cater for the type of public interest litigation that takes place in the Court.

The Honourable Justice Pearlman AM, Chief Judge of the Land and Environment Court of New South Wales *Managing Environmental Impacts - The Role of the Land and Environment Court of New South Wales* delivered as a Keynote Address at the Australia - New Zealand Planning Congress Wellington, New Zealand 9 April 2002.

12 See *Oshlack v Richmond River Shire Council & Anor* (1994) 82 LGERA 236; (1996) 91 LGERA 99; and (1997) 96 LGERA 173]. In this case, the High Court endorsed Stein J's decision that there be no order as to costs and agreed that "public interest" litigation may, incertain circumstances, constitute special circumstances to enliven the discretion not to award costs in section 69 of the *Land and Environment Court Act 1979*.

13 See at first instance [1997] NSWLEC 89 per Pearlman CJ.

14 Noted in the Keys Young Report, a report commissioned by the Trustees of the Solicitors' Trust Account Fund administered by the Law Society of NSW at p 15. This Fund is now called the Public Purpose Fund.

15 EDO Annual Report 2000-01 at p 3.

16 *Minister v Greentree* [2003] FCA 857.

17 *Booth v Bosworth* [2001] FCA 1453 (17 October 2001), *Humane Society International Inc v Minister for the Environment & Heritage* [2003] FCA 64 (12 February 2003), Minister for the Environment and Heritage v Queensland Conservation Council Inc [2004] FCAFC 190 (30 July 2004).

18 Ralf Buckley paper presented at 2002 QELA Seminar as noted in Issue 418 of the *Environmental Manager* (3 December 2002).

19 See also the *Walsh Bay Development (Special Provisions) Act 1999*.

20 Brereton D (2003) "Self-regulation of environmental and social performance in the Australian mining industry" 20 Environmental Planning and Law Journal 261 at 262.

21 Brereton D (2003) "Self-regulation of environmental and social performance in the Australian mining industry" 20 Environmental Planning and Law Journal 261at 262

22 See, For Example, the (NSW) *Protection of the Environment Operations Act 1997*; (SA) *Environment Protection Act 1993* and the (TAS) *Environmental Management And Pollution Control Act 1994*

23 In relation to the *Coastal Protection Act* amendments, it may be argued that such a breach represents a breach under section 123 of the *Environmental Planning and Assessment Act 1979* or the *Protection of the Environment Operations Act 1997* where the breach is causing or likely to cause harm to the environment. However, this is far from clear and, in any event, to have to argue it defeats the purpose of open standing provisions.

24 See paragraph 39.

25 Paragraph 42.

26 *Double Bay Marina v Woolahra Municipal Council* (1985) 54 LGRA 313; *Monaldo v Baulkham Hills Council* (1995) 87 LGERA 165; *Humphrey & Edwards Pty Ltd v Woolahra Municipal Council* [1998] NSWLEC 285; *Ziatabari v Ku-Ring-Gai Council* [1999] NSWLEC 139.

27 *Naylor Shaw Associates Pty Ltd v Sutherland Shire Council* [1999] NSWLEC 11.

28 See, for example, s 516A of the *Environment Protection and Biodiversity Conservation Act 1999* is an extremely broad provision which requires all Commonwealth agencies, authorities and companies to:

· document their activities on the environment
· identify measures to mitigate this impact
· report on how their policies, plans, programs, laws and operations accord with the principles of sustainability
· identify how specified budgetary outcomes contribute to sustainability
· identify mechanisms for review.

29 Hooke MH (2003) "Australian Minerals Industry : Operational Code for Sustainable Development". Paper presented to the NSW Mining Industry Occupational Health and Safety Conference 25 August 2003

30 One such measure is the Global Mining Initiative, which has included the development of the Mining Minerals and Sustainable Development project and the establishment of the International Council on Mining and Metals. Another is the development of an Operational Code for Sustainable Development, which the Minerals Council of Australia is presently working on. This will replace the narrower Australian Minerals Industry Code for Environmental Management. A plethora of other industry schemes and internal governance mechanisms complement (one would hope) these developments: Brereton D (2003) "Self-regulation of environmental and social performance in the Australian mining industry" 20 Environmental Planning and Law Journal 261.

31 Brereton D (2003) "Self-regulation of environmental and social performance in the Australian mining industry" 20 Environmental Planning and Law Journal 261 at 269.

32 *Bruce Wilson on behalf of Gurrungar Environment Group v Bourke shire Council* (2001) 116 LGERA 287

33 The EDO also recently adopted this approach in *Wilderness Society v Minister for Planning & Australian Silicon Operations (*commonly known as "*Mogo*"). The EDO acted for the Wilderness Society in merit proceedings seeking to stop the development. The basis for the challenge being that the environmental impact assessment for the project did not take into account the impact of taking the wood that was to used to make the charcoal. Before the matter went to hearing, Australian Silicon announced that it did not intend to defend their consent and the matter was finalised. As a result, the charcoal smelter did not go ahead at Mogo.

34 See Practice Direction 10 of 7 May 1999

35 Bates G (2002) *Environmental Law in Australia* LexisNexis Butterworths, Australia at p 98.

36 The objectives of the scheme would be to:

· identify matters of public interest which warrant assistance

· match disadvantaged and under-represented individuals, groups and non-profit organisations with experts, consultants and institutions

· utilise the diverse skills and resources of experts in a broad range of public interest matters

· provide an oversight role within the Office in relation to the proper preparation of expert evidence for specific projects

37 In 2003, the EDO has prepared submissions (or is currently doing so) in relation to the P*rotection of the Environment Operations Act 1997*, the *Contaminated Land Management Act 1997* and the *Environmentally Hazardous Chemicals Act 1985*. The Office has also undertaken such tasks before, for example, when it prepared a submission for the review of the *Threatened Species Conservation Act 1995*.

38 Testimonial letter of 22 November 2002.

39 This represents a move away from the historical focus of the Office and reflects an increased demand for these services.

EDO Network News

Australian Capital Territory

Thank you to Kath Taplin and Dave Osborne for their time and effort with the EDO as part-time Solicitor and Administrator respectively.

James Prest has stepped in as the Acting Legal Policy Officer.

New South Wales

David Jeffery has commenced as a part-time solicitor.

Samantha Magick and Peter Holt have completed their contract's with EDO. We thank them for their contribution.

Northern Queensland

Kirsty Ruddock has commenced as a solicitor.

Northern Territory

Tom Cowen is welcomed as the new Principal Lawyer.

Tasmania

Jess Feehely has commenced as Principal Lawyer.

Victoria

Sarah Toohey has started as Projects Coordinator (locum).

Western Australia

Rick Fletcher has been appointed as the new solicitor.

SUPPORT US

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