

ENVIRONMENTAL DEFENDER'S OFFICE NSW

# ANNUAL REPORT 2010/11





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The Environmental Defender's Office (NSW) is a community legal centre specialising in public interest environmental law. The EDO provides legal advice and representation in public interest environmental law matters. In addition to the provision of legal services, the Office takes an active role in law reform and the formulation of policy, provides technical scientific advice to help the community understand environmental documents, and carries out community programs on environmental law. The EDO has an office based in Lismore to service the Northern Rivers area and the Sydney office covers the remainder of the State. The offices are open Monday to Friday during business hours.

Any questions or concerns about the content of this Report should be addressed to the EDO Director. The EDO also has a process for handling complaints. Any complaints should be directed to the Director on (02) 9262 6989.

This report was published on 14th October 2011.

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The past year has been a formative one for the EDO, reflecting both the continued development and maturation of an organisation that entered its 26<sup>th</sup> year.

The Northern Rivers Office reached a significant milestone in 2011 as it celebrated its fifth anniversary. The office has gone from strength to strength since its inception, and has clearly become a fundamental and instrumental part of the landscape in the Northern Rivers area.

As the Annual Report here shows, there is an enormous breadth, complexity and sophistication to the work that we do. For my report, I do not wish to amplify on this further, except to profusely thank staff, the Board and the host of people and organisations who make up the wider EDO and contribute to the protection of the environment through law. It is always a pleasure to work with them and I feel privileged to be part of it.

In a few brief words, I wish to focus on two developments this year. The first is our name change. Throughout the year, the Board and staff reflected on the work we do and what we stand for. Ultimately, the Board resolved to trade under the name EDO NSW, rather than Environmental Defender's Office. We are in the process of doing this now. Many know and describe us by the short-hand in any event, so this will not be a huge change in some respects. However, it was felt the new name will better connote an organisation which is independent,

accessible, expert-based and seeks to hold decision-makers and others to account, while also making an obvious nod to our past. The name comes with a bold new look and a tagline which we feel sums up the multi-disciplinary legal office we have become: defending the environment \* advancing the law.

The second development relates to an independent evaluation conducted by a consultant, WestWood Spice. The brief was simple – let us know if there is anything we can do better. The evaluation team spoke to a large number of people (over 200) in compiling the report. I had no doubt the evaluation report would speak to the fantastic work of the EDO over the years, while also identifying areas for improvement. And so it turned out. The report noted:

*the EDO is very highly regarded by its diverse stakeholders. It is seen as an invaluable organisation, providing high quality services and expertise that cannot be accessed elsewhere; its role as the key vehicle for challenging government on environmental matters is viewed as essential.*

Furthermore, in its conclusion to the Executive Summary, the report stated:

*Overwhelmingly, the successes of the EDO are attributable to strong leadership and the integrity and quality of the highly competent staff whose passion, professionalism and commitment to environmental causes is viewed as outstanding by its stakeholders. Having the capacity to engage very effectively*

*with a diversity of stakeholder groups, together with striving to provide client friendly services of a very high standard in response to client needs are key contributors to EDO achievements. The ability of the EDO to hold a bigger picture perspective of government structures and national and state legal frameworks is a valuable factor in providing an overarching framework for the broad suite of policy and litigation work which is taken on.*

The successes noted above would not be possible without the support of our funders. The EDO receives triennial grants from the Commonwealth and NSW governments, the MacArthur Foundation (for international capacity-building), the Environmental Trust (through the LECG program) and the Public Purpose Fund (PPF), the latter being our major funder. The PPF funding in particular allows us to realise our goal of being independent, accessible and to hold others to account through high quality legal services.

The full evaluation report will be on our website shortly ([www.edo.org.au/edonsw](http://www.edo.org.au/edonsw)). I urge you to read it and the Annual Report contained herein.



**Jeff Smith**  
Director

## National EDO Network

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EDO NSW is one of nine independent EDO offices located across Australia who formally operate together through the Australian Network of Environmental Defender's Offices (ANEDO).

The different offices share information, resources and ideas and meet regularly as a network, either face-to-face or via teleconference. Across Australia, around 50 staff work for the various EDOs, of whom over 30 are solicitors. All EDOs have demonstrated a commitment to a more coordinated approach to national environmental issues and matters of national environmental significance which fall within State and Territory boundaries.

A key focus of ANEDO (and thus the EDO in NSW) over the past year has, once again, been in the area of policy and law reform, with work done on biodiversity offsets, illegal logging, carbon farming, product stewardship and the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

# EDO NSW

## Introduction

The EDO's mission is to promote the public interest and improve environmental outcomes through the informed use of the law.

The EDO has five core areas of operation, with staff working together in a multi-disciplinary way to achieve that mission.

This Report has been divided into three main sections, parts A, B and C.

Part A of the Report will outline the functions of the EDO and provide brief updates from each of these core areas of operation, namely:

- Litigation and legal advice;
- Policy and law reform;
- Scientific and technical advice;
- Community programs (community legal education, international and Indigenous engagement); and
- Media and communications.

Part B of the Report will outline the work of the EDO within its identified 'priority areas', that is, environmental issues that the EDO has identified, in close collaboration with our stakeholders and clients, as requiring particular attention.

These priority areas are:

- Climate Change and Energy;
- Environmental Planning and Development;
- Biodiversity Conservation;

- Natural Resource Management;
- Environmental Justice; and
- Corporate Social Responsibility and Governance.

This section of the Report will set out how each of the key functions of the EDO contributed to protecting the environment in these areas.

Finally, Part C of this Report will cover the reporting and governance issues involved in the day-to-day running of the Office. The staffing, funding and financial aspects of the EDO are included in this section.

## EDO: A Green Office

The EDO is committed to operating in an environmentally sustainable way.

This year, the EDO measured its carbon footprint using a GHG calculator with associated procedures for calculating GHG emissions.

In calculating the carbon footprint of the Office, we included:

- All work-related travel (excluding travel to and from work) by EDO NSW employees, but not by contractors;
- Emissions associated with Office paper use and disposal, and paper used in EDO NSW publications;
- Emissions associated with electricity use; and
- Emissions associated with waste disposal and recycling.

Gold standard accredited carbon offsets were purchased to offset work-related travel emissions, based on the GHG calculations. This amounted to 69 tonnes of carbon dioxide equivalent offsets.

Emissions associated with car travel were about six times higher than the previous financial year. This can be attributed to the inclusion of taxi travel in our calculations of GHG emissions. In contrast, emissions associated with air travel more than halved. This is due to there being significantly less international travel than in the previous reporting period.

Emissions associated with paper use increased by roughly 12%, and the emissions associated with EDO publications increased seven-fold. In addition, emissions from waste sent to landfill increased substantially due to EDO's office relocation, which resulted in the clearing out of nearly a decade's-worth of accumulated clutter.

Electricity use in the Sydney Office increased by 18%, and this is an area for improvement.

The EDO also sought to manage and reduce its ecological and carbon footprint by:

- Encouraging the use of public transport by staff, volunteers and clients;
- Purchasing 100% GreenPower for the Office;
- Identifying areas where energy efficiency can be improved and incorporating these into operations; and
- Purchasing equipment and consumables with waste avoidance, closing the recycling loop and reduction of environmental impacts in mind.

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# PART A: CORE FUNCTIONS OF THE EDO

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## Litigation and Legal Advice

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The EDO represents individuals and community organisations in public interest litigation to protect the environment. In 2010-2011, the EDO pursued a number of cases involving issues of significant public concern including climate change, mining, biodiversity issues, Aboriginal cultural heritage, planning and pollution. Over 20 EDO cases are featured in this Report, some of which have been determined, while others are either awaiting judgment or are still to be heard.

The environmental impacts of mining, including the climate change impacts, are an increasing part of our work. This year the EDO has commenced two merits appeals to challenge coal mine approvals under Part 3A of the *Environmental Planning and Assessment Act 1979* (NSW). These cases are the first merits appeals that the EDO has commenced against coal mines.

*Hunter Environment Lobby v Minister for Planning & Ors* involves a challenge to the approval of the Ulan coal

mine near Gulgong on the grounds of climate change, groundwater and biodiversity impacts. Importantly, this is the first case in NSW to consider the use of offsets to address climate impacts. *Ironstone Community Action Group v Minister for Planning & Ors* is a case challenging a coal mine at Duralie due to the mine's impacts on water quality, biodiversity and community health. Before this matter went to Court, the EDO actively assisted the community to register their concerns about the proposal. The community were grateful for this early engagement.

*Thank you for all your help regarding Duralie, we couldn't have got this far without your help. You have written some excellent letters on our behalf and given us some very helpful information. We can't thank you enough for your help to try and save our precious river system. I think we need a miracle but I hope we succeed.*

We are also involved in other cases relating to coal issues.

In another first, the EDO has commenced the first case challenging coal seam gas activities in NSW. *Barrington Gloucester*

*Stroud Preservation Alliance Inc v Planning Assessment Commission and AGL Upstream Infrastructure Investments Pty Limited* will be heard before the NSW Land and Environment Court in October 2011 and will focus on the consideration of the environmental impacts of the proposed development.

Our ground breaking climate litigation continues with the case *Gray and Naomi Hodgson v Macquarie Generation*. Following a motion by Macquarie Generation to have the case dismissed, Justice Pain allowed the case to proceed and the Land and Environment Court will be asked to determine the extent of Macquarie Generation's authority to emit carbon dioxide. Macquarie Generation has appealed this decision. Sadly, our client Pete Gray passed away in May 2011, a significant loss for the environmental community. Naomi Hodgson is continuing this case.

In other climate change litigation, the EDO is also challenging a number of decisions of the Minister for Planning to approve three coal-fired power stations.

The EDO also brought an important water case in 2010-2011. *Snowy River Alliance Inc v Water Administration Ministerial Corporation* focused on whether the Snowy licence review process was flawed by a failure of the Snowy Scientific Committee to produce state of environment reports as required by law.

Biodiversity continues to be a priority for the Office. In *Bat Advocacy v Minister for Environment*

*Protection, Heritage and the Arts*, our client challenged the Federal Environment Minister's approval for the relocation of grey headed flying foxes from the Royal Botanic Gardens in Sydney. Grey headed flying foxes are protected under State and federal threatened species laws. Loss of habitat is considered to be a key threat to this species. This case sought to challenge the Minister's decision on the grounds that he had not properly considered critical habitat for the species.

The EDO has also been involved in an important appeal to improve access to the Courts in public interest matters. In ongoing litigation, the EDO secured a protective costs order for the Blue Mountains Conservation Society in their water pollution case against Delta Electricity. Delta Electricity appealed this decision to the NSW Court of Appeal which upheld the protective costs order. Both judgments serve as important precedents on protective costs orders in public interest litigation.

The EDO has continued its role in challenging planning decisions in order to improve government accountability. The case *Australians for Sustainable Development v Minister for Planning & Ors* focused on the failure of the proposed Barangaroo development to comply with the requirements for remediation of contaminated sites and the failure of the Planning Minister to consider relevant State Environmental Planning Policies. In an extraordinary move, the Planning Minister made an executive order just prior to the judgment being handed down,

which removed the requirement for the Barangaroo development to comply with contamination laws. In his judgment, Justice Biscoe was highly critical of the Minister's conduct and noted that he would have found in favour of the EDO's client but for the Minister's intervention. We also successfully mediated a second case for Australians for Sustainable Development on the basis of the Coalition Government's commitment to a review of the planning process for Barangaroo in response to community concern about the process.

The EDO was also involved in the first challenge to a sea dumping permit which allowed for the scuttling of the ex-HMAS Adelaide off Avoca Beach on the NSW Central Coast. *No Ship Action Group v Minister for Environment, Heritage and the Arts* was heard before the Administrative Appeals Tribunal (AAT). The AAT imposed significantly stricter conditions on the permit which required the removal of lead based paints and PCB materials from the ship before it was sunk. Prior to the decision being handed down, the EDO received a letter of thanks from our client, which read:

*Without the faith and resolve of the EDO our community would have been forced to accept what we perceive as an act of environmental vandalism that would in all probability affect our community for several future generations.*

*Our community possessed the passion, local knowledge and commitment to seek the truth.*

*By combining our attributes with the professionalism and hard working ethos of the EDO, we have produced a legal challenge that has given the environment of our beautiful beach every chance of retaining its natural state.*

*Whatever the outcome, we feel we have been represented in the best possible manner and given every conceivable chance to achieve the most positive outcome.*

The EDO's work with environmental activists has assisted a number of protestors to defend themselves against criminal charges and compensation orders. In particular, members of Rising Tide avoided paying a \$600,000 compensation order that was sought as a consequence of their protest at the Newcastle Coal Loader. The judgment clarifies the type of evidence required to establish a compensation order for protest activity.

The EDO provides free initial telephone advice and, if necessary, written advice on environmental law and policy. The EDO's toll-free telephone advice service, the *Environmental Law Line* is staffed by a duty solicitor between 2pm-5pm Monday-Thursday in Sydney and 9am-5pm Monday to Friday in the Northern Rivers Office.

In 2010-2011, the EDO dealt with 1,052 telephone inquiries on the *Environmental Law Line*. Of these, about 65% came from rural and regional New South Wales, which is consistent with past years. The subject matter of these inquiries is

varied, but most concern planning and development, tree disputes, zoning, public land management, compliance and enforcement, Part 3A developments, freedom of information, Aboriginal cultural heritage, pollution and contamination, threatened species, private conservation, biobanking, defamation and activism including protest issues, community rights, mining and coal seam gas activities, water, forestry and misleading and deceptive conduct.

180 casework files were opened during the reporting period, representing matters involving litigation and detailed written advices, many with significant scientific input. Of these, 23 casework files were closed in the reporting period (a large number of files were closed just outside the reporting period, with the administrative delay due to a change of premises). 53 minor assistance files were opened during the period and 47 were closed.

## Policy and Law Reform

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The EDO actively engages in environmental policy and law reform activities in New South Wales, at a federal level, and internationally where relevant to domestic law and policy.

In 2010-2011, the EDO drafted over 30 submissions in response to legislative reviews, government proposals and parliamentary inquiries, many of which had extensive scientific input. On the basis of its submissions, the EDO is regularly requested to address State and federal parliamentary inquiries and public forums; and to meet with government agencies and environment groups that lobby for law reform.

The Office's submission work in 2010-2011 was fairly evenly spread between five of our priority areas: climate change and energy, biodiversity conservation, natural resource management, planning and development, and environmental justice.

The EDO provides law reform advice to environmental and community groups on current, proposed and potential environmental laws and policies. The EDO also provides legal and policy advice on potential legislative amendments to members of the cross-bench, Opposition and Government via formal briefing sessions and meetings.

In 2010-2011, this included advice on:

- The review of the *Threatened Species Conservation Act 1995* (NSW);
- Amendments to the Environmental Outcomes Assessment Methodology under the *Native Vegetation Act 2003* (NSW);
- The *Illegal Logging Prohibition Bill 2011* (Cth);
- The *Carbon Farming Initiative Bills 2011* (Cth); and
- The *Product Stewardship Bill 2011* (Cth).

The EDO is regularly retained to give policy advice on a particular area of law or to develop law reform proposals for environment groups or the Government on a consultancy basis. Major advice projects in 2010-2011 included:

- Advice to Greenpeace on banning the import of illegal timber;
- An overview of domestic and foreign law and policy relating to sea level rise, erosion and inundation for the Sydney Coastal Councils Group; and
- A review of compliance with NSW forestry laws for the Nature Conservation Council of NSW (NCC).

These projects complement proactive policy work on issues that the EDO identifies as requiring law reform. Our proactive projects included:

- A major report for the NCC and Total Environment Centre

on the *State of Planning in New South Wales*; and

- A law reform paper on *Mining law in NSW*.

EDO policy work also involved participation on various stakeholder panels. The EDO's input at such forums is expertise-based, and is a crucial element of its key stakeholder and law reform role. In 2010-2011, the EDO continued to provide feedback to the Department of Environment, Climate Change and Water (and subsequently the Office of Environment and Heritage) as a member of:

- The Ministerial Reference Group on Biobanking;
- The Beverage Container Deposit Group; and
- The Contaminated Land Management Committee.

The EDO was also consulted by the federal Department of Sustainability, Environment, Water, Population and Communities (SEWPAC) on biodiversity offset policies, and implementing reforms to the federal *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act).

The EDO also assists environment groups with advice on law reform issues. For example, we continued to advise the Environment Liaison Office (a coalition of nine NSW environmental groups), the NCC Mining Group and the NCC Water Group.

Often the EDO's policy work is presented to the community through workshop presentations

and guest speaker appearances at conferences. In this way, the EDO's policy work complements the EDO's Education Program.

## Scientific and Technical Advice

The role of the Scientific Advisory Service is to provide objective scientific advice to the EDO and its clients on public interest environmental matters. This advice contributes to the range of work undertaken by the EDO.

The Scientific Advisory Service comprises:

1. Two in-house environmental scientists;
2. A Technical Advisory Panel, which comprises academic experts who provide strategic advice to the EDO on scientific issues on a pro-bono basis; and
3. An Expert Register, which comprises over 130 scientific experts in a range of fields who assist the EDO from time to time on a pro bono basis.

Members of the Technical Advisory Panel during the year were:

1. Professor Richard Kingsford, Professor of Environmental Science, University of NSW;
2. Dr Iain MacGill, Senior Lecturer in Energy Policy and Technology, University of NSW; and
3. Professor Chris Dickman, Professor of Terrestrial Ecology, University of Sydney.

The scientific advice work provided by the Scientific Advisory Service can be categorised as follows:

- Pre-decision and casework;
- Compliance and monitoring;
- Policy and law reform; and
- Community legal education.

## Pre-decision and casework

The Scientific Advisory Service provides advice on proposed developments or actions prior to a decision being made. This mainly involves advice on the impacts of developments and the adequacy of environmental impact assessments to assist clients in the preparation of submissions to decision-makers. If the matter progresses to Court, the in-house scientists get involved in aspects of casework, such as identifying and briefing expert witnesses.

In the reporting period, the Scientific Advisory Service has been heavily involved in two merits cases, both challenges to coal mine approvals: *Ironstone Community Action Group Inc. v Minister for Planning & Duralie Coal Pty Ltd*; and *Hunter Environment Lobby Inc. v Minister for Planning and Ulan Coal Mines Ltd*. For these two cases, the Scientific Advisory Service sourced and assisted with briefing expert witnesses in the areas of groundwater, water quality, threatened species and endangered ecological communities, air quality and climate change. The Scientific Advisory Service also made a significant contribution to the case *Australians for Sustainable Development*

*Inc v Minister for Planning*, where expert evidence was used to support the client's arguments relating to contamination on the Barangaroo site.

To assist with their work, the in-house scientists have also consulted and worked with over 25 experts in the past 12 months, both from and outside the Expert Register.

## Compliance and monitoring

The Scientific Advisory Service provides advice on approved developments or actions. This mainly involves advice on the compliance of developments and actions with conditions of approval or regulatory requirements, as well as assisting clients to prepare submissions to regulatory authorities.

The in-house scientists have reviewed environmental assessment documents, undertaken research and provided advice on specific technical issues for around 15 matters in the reporting period.

## Policy and law reform

The Scientific Advisory Service contributes to the EDO's policy and law reform submissions and discussion papers. This involves research and advice on the scientific aspects of government policy proposals and the EDO's priority law reform areas.

In 2010-2011, the in-house scientists assisted with the preparation of 12 EDO or ANEDO policy submissions, including submissions on the draft Guide to the Murray Darling Basin Plan and the Carbon

Farming Initiative, and proposed changes to the methodologies for biocertification, biobanking and native vegetation clearing. The Scientific Advisory Service also contributed to EDO discussion papers on marine biodiversity and climate change and mining reform.

## Community legal education

The Scientific Advisory Service presents at workshops and seminars, provides advice on scientific aspects of plain English publications, and prepares fact sheets on scientific issues.

In 2010-2011, the in-house scientists have had input to a number of EDO publications, given presentations, arranged for members of the expert register to speak at EDO seminars and have continued to lead the Green Office program.

# Community Programs

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In 2010-2011 the EDO's community programs were:

- The Community Legal Education Program;
- The International Program; and
- The Indigenous Engagement Program.

## I. COMMUNITY LEGAL EDUCATION PROGRAM

The Community Legal Education Program aims to empower the community to protect the environment through law. This is achieved through a range of education tools, specifically community workshops, seminars and plain English publications. The Education Program helps to build community capacity to engage effectively in environmental decision-making and to respond to environmental issues.

Through the Education Program, the EDO is able to engage early in particular matters and help communities to take a more proactive approach to the environmental issues they face.

The Education Program is focused on rural and regional NSW. This allows the EDO to stay abreast of the environmental issues facing rural and regional communities and to ensure its services are directed to where they are most needed.

## Workshops

A total of 29 free community legal education workshops were held throughout rural and regional New South Wales during the past 12 months. Workshops covered a range of environmental law issues, including mining, planning, coastal law and climate change, private conservation and various aspects of natural resource management. Through workshops, the EDO was able to provide topical legal education to over 1000 people.

Workshops allow the EDO to engage early in environmental law issues and provide the community with timely information about how to engage in decision-making processes. The community greatly appreciates this assistance. As one workshop attendee commented:

*I'd like to express my thanks for the great job done on the day. It was interesting, informative and a magnificently sustained effort on [the part of the speaker]. Everyone I spoke to after the meeting were impressed and came away with a broader insight into the issues.*

## Seminars

Eight free seminars covering a range of topical issues were held in the Sydney metropolitan area and throughout the Northern Rivers region during 2010-2011. These seminars were attended by over 300 people. EDO seminars focus on new and emerging environmental law topics and are presented by relevant experts. They provide

an opportunity to examine a legal environmental issue from different perspectives and also to encourage discussion, including of new ideas for law reform. In Sydney, most of the seminars were part of the EDO's urban sustainability seminar series, a project funded by the City of Sydney. In the Northern Rivers, the seminars addressed the use of pesticides and the energy sources for the Northern Rivers region.

## Publications

The EDO's plain-English publications are an important feature of the Education Program. Publications help the EDO to engage with a broad cross section of the community and to increase the reach of the Office. Publications cover a wide range of subjects and come in various formats, all of which are available free to the community, either as hard copies or online. In 2010-2011, the EDO's publications were:

- *Caring for the Coast: A Guide to Environmental Law for Coastal Communities in NSW*

The EDO printed 10,000 copies of this new publication during the year and they are available for free upon request. *Caring for the Coast* is a guide to the various laws that address coastal environmental and planning issues in NSW. It aims to assist coastal communities to engage in decisions that affect coastal environments. The booklet is funded by the Federal Government's Caring for Our Country Program.

- **A Guide to Private Conservation in NSW**

This publication was updated and reprinted in the reporting period. The booklet outlines and critically analyses the various options for private conservation that are available in NSW and aims to increase the uptake of private conservation in NSW. The funding for this project came from the NSW Government through its Environmental Trust. 20,000 copies have been printed and are available for free upon request.

- **Rural Landholder's Guide to Environmental Law in NSW**

The EDO updated and printed a third edition of the *Rural Landholder's Guide to Environmental Law in NSW* in the reporting period. This publication has been funded by the NSW Government through its Environmental Trust and remains one of the EDO's most popular publications. To date, approximately 50,000 copies of this free publication have been distributed. It covers a range of natural resource management issues, including native vegetation, water, bush fires, the use of chemicals, stock control and private conservation.

- **Getting the Drift: A Community Guide to Pesticides Sprayed in the NSW Northern Rivers**

The first edition of this booklet was produced by the EDO in conjunction with the National Toxics Network and published in October 2010. It explains the regulatory framework for pesticides and details those

most likely to be used on the major crops in the Northern Rivers.

- **Caring for Country: A Guide to Environmental Law for Aboriginal Communities**

The EDO has continued to provide this free publication upon request. The publication was updated during the reporting period and plans are underway to print more copies for distribution. This booklet is designed to assist Aboriginal communities to understand and utilise environmental laws to protect their land and their cultural heritage.

- **Campaigning and the Law in NSW: A Guide to Your Rights and Responsibilities.**

This online publication provides practical information to campaigners about the possible criminal and civil implications of their actions and is used as a reference guide by many of the major campaigning organisations as well as local community groups and individual campaigners.

- **Environmental Law Fact Sheets**

The EDO's online environmental law fact sheets are perhaps the most popular service provided by the Education Program. The fact sheet homepage is the second most visited page on the EDO website (after the home page). The fact sheets are regularly reviewed and updated to ensure their currency. During the reporting period, some new fact sheets were added to the collection, including a fact sheet on the new legal regime for accessing government information. A small

range of science fact sheets is also available and there are plans to expand this range in the coming year.

Fact sheets are often used by the public to help them understand the law as it applies to them and can be a first point of contact with the law, as well as with the EDO. As one individual commented:

*I just discovered that a mining exploration licence has been granted that includes my property on the Upper Murrumbidgee River. Your fact sheet on the subject gave me all the information I need to understand the situation, including citing the relevant provisions of the legislation. Thank you! This is a very confusing area of law and I'd never have found such clear information without you.*

### • IMPACT!

This is a bi-annual journal that examines topical environmental law issues from a range of perspectives. EDO NSW produces this publication on behalf of ANEDO. Issue 90 was entitled 'Public Interest Environmental Law in Australia: 25 Years On' and comprised a selection of papers presented at the EDO's National Conference held in May 2010. Issue 91 was entitled 'Ecologically Sustainable Development'.

### • e-bulletin

The EDO's free weekly e-bulletin continues to be a popular resource with a subscriber list of over 2,000 and nearly 5000 downloads in the reporting period. The e-bulletin updates subscribers on EDO news and events, including

media coverage, developments in environmental law and policy, opportunities to participate in State and federal environmental decisions and community events with an environmental focus.

### • Climate Law Bulletin

The EDO's climate bulletin is a bi-monthly e-bulletin dedicated to climate change law and policy. It provides an overview of developments in climate law and policy at both the national and international level.

### • Mining and the Law: A guide for the community

The EDO has received funding from the NSW Environmental Trust to produce a new booklet on mining law in NSW. Work on this publication began in May 2011 and it is due for release in 2012. This booklet is intended to provide a comprehensive guide to the regulation of coal and coal seam gas mining in NSW, with a focus on landholder rights and advocacy strategies.

## Papers and presentations

EDO staff members are often invited to provide a public interest perspective at external forums covering environmental or legal themes. In 2010-2011, EDO staff delivered 40 presentations at conferences, universities and community legal education seminars.

EDO staff also published 10 papers in journals, bulletins and books, including:

- Thorpe, A (2010) "Bringing Plan-making Back Into Planning," 99 *Architecture Australia* 25
- Ruddock, K (2010) "Why Major Projects Legislation is Bad for the Environment and Public Participation: The NSW Experience," 25 *Australian Environment Review* 9 & 10, p. 5
- Smith, J (2010) "How Adaptable Are Our Conservation Regimes?" in Bonyhady et al (eds) *Adaptation Law and Policy*, Federation Press
- Ruddock, K (2010) "Case Note on Coxs River Case," *National Environmental Law Review*
- Poisel, T (2010) "The Power of a Roads Authority to Remove Trees Trumps the EPA Act", 25 *Australian Environment Review*, 9 & 10, p. 11
- Ruddock, K and Howarth, R (2010) "Climate Law Reform- Victoria Leads the Way", CCH Climate Law newsletter
- Ruddock, K (2010), "Protective Costs Orders and Access to Justice: The Coxs River Case", *National Environmental Law Review*, 2 & 3, p. 47
- Thorpe, A and Ogle, L (2010) "Staying on Track: Tackling Corruption Risks in Climate Change" New York, United Nations Development Programme
- Millner, F and Ruddock, K (2011) "Climate Change Litigation- Lessons Learned and Future Opportunities" 36 *Alternative Law Journal* 1, p. 27
- Hallinan, J (2011) "Environment and the Law" 23 *Legal Date* 1, p. 2

## Website

The EDO website contains an extensive range of information on the EDO's core functions such as information on access to the EDO's services, copies of policy submissions, case notes on litigation, information on up-coming workshops and seminars, copies of most EDO publications and links to EDO offices in other States.

In 2010-2011, a total of 375,000 web pages were viewed on the EDO NSW website. This amounts to an average of over 30,000 page downloads per month, an increase of 23% over the previous year.

The website regularly receives positive feedback from the community. One individual commented:

*I just need to say how amazing your site is and your fact sheet section is especially great. Thank you for de-comodifying the law.*

The address of the EDO website is [www.edo.org.au/edonsw](http://www.edo.org.au/edonsw)

## 2. INTERNATIONAL PROGRAM

The EDO is committed to improving the effectiveness of environmental law as a tool for defending the environment internationally. For a number of years, the EDO has worked with partner organisations to build capacity in public interest environmental law in the South Pacific, primarily in Papua New

Guinea (PNG), Fiji and the Solomon Islands. The EDO's international work also involves policy development, placing volunteers through AusAID's AYAD, VIDA and AVI programs, and participating in international networks.

The EDO is a signatory to the Australian Council for International Development (ACFID) Code of Conduct. The EDO is committed to full adherence with the Code. For further information on the Code please refer to the ACFID Code of Conduct Implementation Guidance available at [www.acfid.asn.au](http://www.acfid.asn.au). This site also includes information about how to make a complaint in relation to any breach of the Code by the EDO.

### **Capacity-building in the South Pacific**

The EDO has provided legal assistance to organisations in the South Pacific since 1991, and since 1998 has received funding from the MacArthur Foundation to conduct capacity-building work in the region. In 2010-2011 the EDO provided assistance to organisations in PNG, the Solomon Islands, Fiji, Vanuatu, Kiribati, Nauru and Timor-Leste.

In addition to continuing requests for legal advice, partner organisations are increasingly seeking assistance with policy and scientific matters. Whilst climate change continues to be the significant issue for partner organisations, a notable proportion of our capacity building work in 2010-2011 related to challenges to illegal logging operations and large scale mining proposals.

Highlights of the EDO's capacity-building work in 2010-2011 include:

- Conducting training on negotiating multilateral environmental agreements (MEAs) and United Nations processes in conjunction with the Secretariat of the Pacific Regional Environment Programme in the Solomon Islands, Fiji and Timor-Leste. Participants gained a working knowledge of key MEAs and the capacity to negotiate and make interventions in an MEA meeting.
- Bringing lawyers from the Solomon Islands to attend training, watch EDO matters before the Land & Environment Court and meet with judges, barristers, scientists and others practising law. This training gave participants an insight into public interest environmental litigation from a New South Wales perspective, with the potential for the knowledge gained, where relevant, to be applied in the Solomon Islands.
- Drafting and publishing a booklet entitled 'Reducing Emissions from Deforestation and Forest Degradation (REDD): A Guide for Landowners and Forest Communities in the Pacific', which has assisted and will continue to assist landowners and forest communities to understand REDD projects.

With regards to this book, one of our partners in the Pacific commented:

*Thanks for your generosity in supplying the very informative*

booklet. As a promoter of carbon trade, I always give what is best available to landholders to read to make good judgement whether or not to reserve their forests or have them logged as well as students who have graduated from the Solomon Islands College of Higher Education and are doing teaching in rural areas.

- Providing legal, scientific and policy advice to groups in PNG, Fiji, the Solomon Islands, Samoa and Vanuatu on issues including development assessment, constitutional law, coastal law, fisheries, forestry law and United Nations processes. This support has provided lawyers in our partner organisations with examples of thorough and professional legal and scientific research and writing. In addition, our work in this area has raised the communities' understanding of their legal rights and enabled the prosecution of ground breaking public interest environmental litigation in the Pacific, including the first public interest environmental law case in the Solomon Islands which, through work undertaken by an EDO volunteer, resulted in an injunction preventing the illegal logging of over 20,000 hectares of forest on Kolombangara Island, Western Province, as well as a historic award of damages of K225.5 million (approx. AUD\$100 million) to four tribes in the Western Province of PNG for environmental destruction (including pollution of river systems) caused by illegal logging.

In response to the award of damages, local lawyers contacted the EDO personally to share the good news:

*I am writing to let you know about the Court decision handed down today by Justice Cathy Davani. She ordered the logging company to pay massive K226.500 000. She relied on reports by our three scientists... to reach the decision. This is the first time any court in PNG has made such a decision against a logging corporation so should send a clear signal to the loggers. We are very happy with the decision and are holding a celebration today. Thank you all for your support with this case. It's a victory for the local landholders and for us all.*

## Volunteer placements

The EDO is an Australian Partner Organisation for the Australian Youth Ambassadors for Development (AYAD), Volunteering for International Development from Australia (VIDA) and Lawyers Beyond Borders (LBB) programs. These schemes enable the EDO to create AusAID funded-placements for Australians with organisations in the Pacific and Asia. EDO engagement with these programs has expanded significantly in the past two years, enabling the placement of record numbers of volunteers to provide much needed-support to partner organisations.

The EDO facilitated the creation of 13 new volunteer assignments in 2010-2011. The assignments were in the areas of climate change, biodiversity,

environmental impact assessment, natural resource management, land owner advocacy, human rights and environmental management. Roles ranged from legal advisory roles, through to policy, education and advocacy positions. Host countries included Fiji, PNG, Tonga, Samoa, the Solomon Islands, Vanuatu, Kiribati, Timor Leste, Mongolia and Vietnam.

## **International policy engagement**

In 2010-2011, climate change and biodiversity continued to be the focus of the EDO's international policy work.

The EDO attended the Transparency International Workshop on Corruption in Climate Change Governance, Berlin, Germany, in June 2010. The EDO also undertook considerable work on international climate change policy during the year, including in relation to human rights and climate change and climate change adaptation.

On biodiversity, the EDO attended meetings of the *Convention on Biological Diversity* (CBD). The EDO participated through the International Indigenous Forum on Biodiversity (IIFB) in a number of key meetings, including the Interregional Negotiating Group of the Ad Hoc Open-ended Working Group on Access and Benefit-sharing, Montreal, Canada and the 10<sup>th</sup> Conference of Parties of the Convention on Biological Diversity, Nagoya Japan.

At COP 10, an EDO staff member was lead negotiator in

the contact group to finalise text on the "Tkarihwaié:ri Code of Ethical Conduct on the Respect for the Cultural and Intellectual Heritage of ILCs Relevant to the Conservation and Sustainable Use of Biological Diversity" that was adopted at the meeting.

As with the last reporting period, EDO staff provided updates to the National Indigenous Peoples Organisations (IPO) network meetings coordinated through the Australian Human Rights Commission on a quarterly basis and annually to the Australian Law Reform Commission Aboriginal Advisory Group.

## **International networks**

The EDO and its staff continued to participate actively in a range of networks in 2010-2011, particularly the Environmental Law Alliance Worldwide (E-Law), an international network of public interest environmental lawyers and scientists, and the International Union for the Conservation of Nature (IUCN), an international network of over 1,000 governments and NGOs and over 11,000 scientists, legal and other experts.

In November 2010, an EDO staff member attended the annual E-Law meeting which was held in Costa Rica. The 3-day meetings provide an opportunity for members to discuss and work together on key environmental issues facing the international community.

## 3. INDIGENOUS ENGAGEMENT PROGRAM

A key element of the EDO's Indigenous Engagement Program is the employment of an Aboriginal Solicitor working on litigation, legal advices, policy, international advocacy and community education.

As with the previous reporting period, the EDO has continued to build relationships with existing clients as well as developing relationships with new clients, with increasing requests for legal and policy advices.

Examples of legal advices specific to Aboriginal interests have included advice on nominating Aboriginal cultural heritage sites under the *Heritage Act 1977* (NSW) and the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth). The EDO has also provided ongoing assistance to an Aboriginal Land Council to pursue an action for the damage of a registered Aboriginal site in Cromer. The EDO has also provided ongoing assistance to Aboriginal clients in relation to Taylor Oval in Moree and an Aboriginal keeping place that was dismantled.

The EDO has been represented on the Office of Environment and Heritage Aboriginal Cultural Heritage Law Reform Working Party that held its inaugural meeting in November 2010 and a second meeting in February 2011. The outcomes of the EDO's Aboriginal Cultural Heritage Roundtables have informed this process.

The Aboriginal Solicitor has participated in international text based negotiations for the Nagoya Protocol which concluded at the 10<sup>th</sup> Conference of Parties in Japan after 5 years of negotiations.

Further work of the Aboriginal Solicitor includes:

- Providing advice to the Australian Law Reform Commission in her capacity as a member of the Aboriginal Advisory Committee;
- Providing advice to the Forest Stewardship Council (FSC) on its Indigenous engagement strategy and the establishment of an Indigenous Advisory Committee; and
- Participating in quarterly meetings as part of the Indigenous Peoples Organisations network hosted by the Australian Human Rights Commission.

The Aboriginal Advisory Committee has continued to provide invaluable input into the work of EDO on an ad hoc basis, in particular providing guidance on the Aboriginal culture and heritage law reform process through the Office of Environment and Heritage Aboriginal Cultural Heritage Law Reform Working Party.

In 2010-2011, the members of the Aboriginal Advisory Committee were:

1. Tony McAvoy, Barrister, Frederick Jordan Chambers;
2. Anthony Seiver, Senior Policy Officer, NSW Department of Aboriginal Affairs;
3. Clare McHugh, Director Policy Unit, NSW Aboriginal Land Council;
4. Natalie Rotumah, Executive Services Officer, NSW Native Title Services;
5. Gavin Andrews, Aboriginal Liaison Officer, NSW Office of Environment and Heritage;
6. Professor Megan Davis, Director, Indigenous Law Centre;
7. Tabatha Timbery-Cann, Catchment Officer, Sydney Metropolitan Catchment Management Authority; and
8. Constance Chatfield, Aboriginal Liaison Officer, Local Government and Shires Association.

The EDO wishes to thank all the members of the Aboriginal Advisory Committee for their input to the work of the Office over the past year.

## Media and Communications

The media is important to the EDO as it provides an effective means of highlighting the issues we engage with and promoting the work of the Office.

In 2010-2011, the EDO has received significant media exposure, either through direct mentions, or through its clients where the media reported on one of the Office's matters.

The majority of the EDO's media exposure comes from newspapers, including many regional newspapers. EDO staff members also occasionally participate in radio interviews to discuss the environmental issues the Office is engaging with. From time to time, EDO cases will also be covered on television.

The EDO or matters it engaged with received over 120 media mentions in 2010-2011. Media coverage centred around several high-profile cases that were conducted during the reporting period. The court challenge to the Barangaroo development (*Australians for Sustainable Development Inc v Minister for Planning*) attracted the most media attention, with over 18 newspaper articles dealing with that case, including:

- *Sydney Morning Herald*: Taxpayers to foot \$100 million Barangaroo cleanup bill (4 July 2010)
- *Sydney Morning Herald*: City residents back legal action

- as pollution fears aired (13 September 2010)
- *Sydney Morning Herald*: Barangaroo plans are deeply flawed (24 September 2010)
- *Sydney Morning Herald*: 30 years to clean up Barangaroo (13 February 2011)
- *The Australian*: Sydney's Barangaroo development excised from NSW planning law (3 March 2011)
- *Sydney Morning Herald*: Judge lashes Kelly over Barangaroo law (11 March 2011)
- *Sydney Morning Herald*: Harbour Project Rethink Ordered (11 May 2011)

Another case that attracted significant media attention was the challenge to the approval for the scuttling of the ex-HMAS Adelaide (*No Ship Action Group Inc v Minister for the Environment, Heritage and the Arts & Anor*). That case was covered in both local, State-wide and international newspapers, including:

- *Central Coast Express Advocate*: Ex-HMAS Adelaide sinking: hearing hinges on PCBs (6 July 2010)
- *Sydney Morning Herald*: Navy ship's paint is toxic with lead (9 July 2010)
- *Central Coast Express Advocate*: Adelaide warship sinking decision weeks away (2 September 2010)
- *Sydney Morning Herald*: Judge orders tough new rules for scuttling (16 September 2010)

- *The NZ Herald*: Frigate scuttled off NSW coast after dolphin delay (13 April 2011)

The Snowy River case (*Snowy River Alliance Inc v Water Administration Ministerial Corporation*) was covered by newspapers and radio, as follows:

- ABC News: Court battle looms over Snowy River flows (24 July 2010)
- *Sydney Morning Herald*: Wong pledges water deal to save Snowy River (12 August 2010)
- ABC South East NSW: Snowy River flows dispute reaches court (14 March 2011)

The EDO commenced two challenges to coal mine approvals, one in the Gloucester area and the other at Ulan near Mudgee. These cases have been extensively covered in television as well as newspaper and radio. For example:

- ABC Central West: Environment lobby group challenges Ulan Mine expansion (21 January 2011)
- *The Newcastle Herald*: Licence concern on mine dust (31 March 2011)
- Gloucester Advocate: Mine Appeal in Court (11 May 2011)
- Port Stephens Examiner: Mine Plan 'Toxic' to Waterway (18 May 2011)
- ABC Lateline: Climate change used as legal challenge to mine (6 June 2011)
- ABC Newcastle: Court hears dispute over Gloucester coal mine expansion (28 June 2011)

The Moree Champion provided in depth coverage of the EDO's case challenging plans to build a Big W over a recreational oval and a significant Aboriginal site in Moree. The media exposure helped to raise awareness of the important issues in dispute.

One non-litigious issue that has drawn significant media attention is the EDO's work around illegal logging. The EDO's report into forestry breaches by NSW Forests was instrumental in raising awareness of ongoing and systemic breaches of forestry laws in NSW. Media coverage has included:

- *Independent Media Centre Australia*: New report slams Forests NSW illegal logging (8 February 2011)
- *Green Left Weekly*: Forests NSW accused of illegal logging (13 February 2011)
- *ABC North Coast Radio*: Conservationists seek action for logging breaches (1 July 2010)
- *Sydney Morning Herald*: When trees fall in forests (12 November 2010)

Through the Northern Rivers Office, the EDO has published regular columns in the *Northern Rivers Echo* and the *Byron Shire Echo*. Columns have covered the Lismore Local Environmental Plan, the use of chemicals and pesticides, future energy sources for the Northern Rivers, and coal seam gas.

# PART B: PRIORITY AREAS

## Climate Change and Energy

### Casework

#### Seeking to limit greenhouse gas emissions

*Pete Gray and Naomi Hodgson  
v Macquarie Generation*

On behalf of Peter Gray and Naomi Hodgson, the EDO has commenced civil enforcement proceedings in the Land and Environment Court against Macquarie Generation. The Applicants are seeking a declaration that the State-owned company has been wilfully or negligently disposing of waste at their Bayswater Power Station by emitting carbon dioxide into the atmosphere in a manner that has harmed or is likely to harm the environment in contravention of the *Protection of the Environment Operations Act 1997* (NSW). They are also seeking an injunction requiring Macquarie Generation to immediately cease disposing of waste

through the emission of carbon dioxide into the atmosphere.

Bayswater Power Station, located in the Upper Hunter Valley, has the highest carbon dioxide emissions of all power stations in NSW. It has been issued with an environment protection licence which licences the company to emit certain waste, but not carbon dioxide.

Macquarie Generation filed a motion to have the matter dismissed. Justice Pain found that the Applicants' argument that Macquarie Generation is not authorised to emit any carbon dioxide at all was unlikely to succeed and dismissed that part of their case. However, Justice Pain did not dismiss the Applicants' secondary argument. This was that, even if Macquarie Generation has an implied authority to emit some amount of carbon dioxide in generating electricity, that authority is limited to an amount which has reasonable regard and care for people and the environment. This part of the Applicants' case was permitted to proceed to trial

Macquarie Generation is appealing to the NSW Court of Appeal against the decision of Justice Pain to allow the Applicant's secondary argument

to proceed to trial. Macquarie Generation is arguing that Justice Pain was wrong in finding that Macquarie Generation's licence to pollute contains an implied limitation on how much carbon dioxide can be released. The matter has been listed for hearing on 13 September 2011.

### **Challenging new coal-fired power stations**

#### ***Ned Haughton v Minister for Planning & Ors***

The EDO acted for Ned Haughton, a student and environmental activist, in two sets of Land and Environment Court proceedings in which he challenged the Minister for Planning's approvals of two new coal or gas fired power stations – Bayswater B Power Station and the Mount Piper Power Station extension.

Mr Haughton challenged the validity of the approvals on several grounds but, most significantly, on the ground that the Minister failed to consider the impact of the projects (both alone and together) on climate change. Mr Haughton argued that the Minister was required to do so as part of his duty to consider the public interest. Similarly, Mr Haughton sought to establish that the Minister failed to consider the principles of ecologically sustainable development (ESD), particularly the precautionary principle and the principle of intergenerational equity, as he was also required to do as part of his duty to consider the public interest.

Both proposals were declared to be 'critical infrastructure' projects under the *Environmental Planning and Assessment Act 1979* (NSW) (EPA Act), which means that the approvals cannot be challenged by third party objectors without the Planning Minister's permission. Mr Haughton sought approval from the Minister to commence the cases and was refused so these cases also involved a challenge to the validity of the privative clause.

The cases were heard in September 2010. Judgment has been reserved.

#### ***Hunter Community Environment Centre v Minister for Planning***

The EDO is acting for the Hunter Community Environment Centre Inc (HCEC) in Land and Environment Court proceedings challenging the Minister for Planning's approval of the revival of the Munmorah Power Station.

The proposal by Delta Electricity to revive the Munmorah Power Station has been declared to be a 'critical infrastructure' project under the EPA Act.

If the power station is powered entirely by coal, it will generate approximately 4.2 million tonnes of greenhouse gases per year.

HCEC will be challenging the validity of the project approval on the ground that the Minister failed to consider the principles of ecologically sustainable development, particularly the precautionary principle and the principle of intergenerational equity,

as he was required to do as part of his duty to consider the public interest.

The proceedings also involve a challenge to the operation of a privative clause in the EPA Act which purports to prevent judicial review of breaches of the EPA Act in respect of critical infrastructure projects.

The matter is not yet listed for hearing.

## Legal and Technical Advice

Climate change and its impacts continue to be of concern to EDO clients. Our work in this field can be categorised as encouraging either mitigation or adaptation.

We are regularly asked to provide advice on legal strategies designed to avoid climate change. For example, we provided ongoing advice to conservation groups on possible Class I challenges to approvals for new coal mines.

We also regularly advise clients about the best way to respond to the threats posed by climate change. For example, we have advised our clients and written to councils about the sea level rise risks associated with new coastal developments at Lakes Beach and Long Reef.

Energy production is a major contributing factor to climate change and the EDO has worked with the community on a number of issues relating to energy production, including:

- Advice regarding the Transgrid Australian Energy Regulator investigation;

- A GIPA application to the Australian Energy Regulator; and
- A GIPA appeal to the Information Commissioner on electricity contracts and price rises.

## Policy and Law Reform

Climate change has been a key focus of the Federal Government over the past year and the EDO has monitored and responded to the Government's climate policies. For example, we contributed to an ANEDO submission to the Department of Climate Change and Energy Efficiency (the Department) on the architecture and implementation arrangements for a carbon pricing mechanism. We also worked with ANEDO on a submission to the Department on the key elements needed to effectively regulate a domestic Carbon Farming Initiative (CFI) offsets scheme. The EDO's in-house scientists assisted with the technical aspects of that submission. EDO Victoria then went on to prepare ANEDO's further submission to a Senate Committee Inquiry into the CFI Bills, with assistance from EDO NSW.

Climate change mitigation and adaptation measures are of growing significance to NSW coastal communities. This year the Sydney Coastal Councils Group commissioned the EDO to undertake a detailed comparative analysis of legislation and policy that deals with sea level rise, coastal erosion and inundation in Australian jurisdictions. Additional case studies were drawn from

New Zealand, the UK, South Africa and several US states. The paper also outlined recommendations for NSW law reform.

## **Education**

EDO staff members have been involved in a number of events, workshops and presentations concerning climate change and energy.

The EDO has had ongoing involvement with the North Coast Energy Strategy, which culminated in the North Coast Energy Forum in Mullumbimby in June 2011.

The EDO also held community workshops on coastal law and climate change in Coffs Harbour and Narooma.

EDO staff presented seven papers on climate change to various forums, including the NELA Conference and the Armidale Sustainable Living Expo. A paper co-written by EDO Principal Solicitor Kirsty Ruddock and Donna Green entitled "What Legal Recourse Do Non-State Islands Have for Adaption to Climate Change?" was presented by Donna at the Drowning Islands Conference held at Columbia University. EDO staff also presented a paper entitled "Audit of sea level rise, coastal erosion and inundation legislation and policy" at the Sydney Coastal Councils Group and CSIRO Workshop.

# Environmental Planning and Development

## Casework

### Promoting sound strategic planning

#### *Friends of Turramurra Inc v Minister for Planning [2011] NSWLEC 128*

The EDO acted for Friends of Turramurra Inc who commenced proceedings in the Land and Environment Court to challenge the decision of the Minister for Planning to gazette the *Kuring-gai Local Environmental Plan (Town Centres) 2010* (LEP).

The case focused on whether the correct procedures were followed for making a new LEP under the *Environmental Planning and Assessment Act 1979* (NSW) (EPA Act), with particular focus on biodiversity issues and public participation.

The matter was heard in November/December 2010.

[Postscript: Judgement was handed down on 28 July 2011. Justice Craig found that the LEP had been made contrary to the provisions of the EPA Act and was therefore of no legal force or effect. In particular, his Honour agreed that the changes made to the LEP after public exhibition had

significant impacts and the LEP should have been re-exhibited.]

### Challenging inappropriate urban development

#### *Australians for Sustainable Development v Minister for Planning [2011] NSWLEC 33*

In November 2010, the EDO commenced Land and Environment Court proceedings on behalf of Australians for Sustainable Development Inc (AfSD) to challenge two approvals of the Minister for Planning in relation to a major urban development at Barangaroo, East Darling Harbour.

The approvals being challenged related to the excavation of a building footprint and a car park for almost 900 cars and the early works for a headland park and northern cove, including use of the excavated fill from the car park for the public park.

Part of the Barangaroo site and surrounds contain poisonous toxins from gas works that were once conducted in the area. Investigations by the Environment Protection Authority found that there were reasonable grounds to believe that the site was contaminated in such a way as to present a significant risk to human health and the environment.

AfSD claimed that carrying out excavation works before cleaning up the source of the contamination posed a serious risk of these toxins flowing into Sydney Harbour. They argued that before any action could be taken, the site needed

to be remediated in line with *State Environmental Planning Policy 55* (SEPP 55) which relates to contaminated land. Because the remediation plan for the site did not comply with SEPP 55, AfSD sought declarations that the approvals were invalid and of no effect.

The matter was heard in early February 2011. Just prior to a decision being handed down, the Minister for Planning issued an order to exempt the development from the application of SEPP 55.

Justice Biscoe delivered judgment on 10 March 2011, noting that he would have upheld the appeal if it were not for the Minister's intervention. The judgment records the Court's significant criticism of the remediation plans for the site and concern that the plans failed to adopt clear remediation goals. As a result, the Judge made an order for the Applicant's costs to be paid by the Respondents and an indemnity costs order against the Minister for Planning.

#### *Australians for Sustainable Development Inc v Minister for Planning, Lend Lease (Millers Point) Pty Ltd and Barangaroo Delivery Authority*

The EDO also acted on behalf of Australians for Sustainable Development Inc in a second case challenging the concept plan for the Barangaroo site.

The challenge related to the fourth modification to the concept plan for the Barangaroo site and the scope of the power to modify a Part 3A approval.

The Applicant claimed that the decision of the Minister for Planning to approve the modification was in error because the proposal was substantially and materially different in its nature, extent and environmental consequences from the concept plan.

The most controversial change was a hotel proposed to be built over Sydney Harbour.

The case was listed for hearing in May 2011. However, the case was adjourned after the parties agreed to mediate the proceeding. Following mediation, the Minister for Planning announced he would undertake an independent review of the Barangaroo development. The AfSD withdrew their case completely once the terms of reference of the review were announced.

The review ultimately recommended changes to the site, including removing the hotel from its planned position over the harbour.

### **Legal and Technical Advice**

EDO solicitors often utilise planning laws to achieve environmental outcomes. Advising communities on how to engage in the development assessment process can result in better decision-making. Where the community is concerned about environmental issues associated with planning decisions or where legal errors are made in the decision-making process, the EDO advises communities about their legal options.

This year, much of the advice work in this field once again focused on

Part 3A of the EPA Act. This part of the Act sets out the assessment process to be followed by the Department of Planning when assessing major projects and critical infrastructure. It is these types of projects that tend to generate the most community concern and requests for EDO assistance.

Some of the advice provided by the EDO on Part 3A projects included:

- Advice to residents about a Railcorp project that involved the acquisition of heritage houses;
- Advice on the State significant listing of sites under the SEPP (Major Development) 2005
- Advice on a Part 3A proposal to rebuild Cardinal Freeman Village at Ashfield;
- Advice regarding Class 4 proceedings in relation to a Part 3A approval at Hearnes Lake;
- A letter to the Department of Planning about the compliance of the environmental assessment for the north Nowra link road with the Director-General's requirements; and
- Advice on plans to expand Berowra Waters East marina.

Council decisions to approve local development can also be controversial. The EDO has assisted affected residents to have their voices heard by local councils. In particular we have:

- Advised on a possible challenge to Bega Council's decision to approve a Pellet Mill at Eden;

- Written to Nambucca Shire Council alerting council to errors in the characterisation and use of land as a piggery at Tewinge;
- Advised residents regarding possible grounds for challenging a subdivision approval by Byron Shire Council;
- Written to Bega Council about Bega tip on behalf of affected residents; and
- Written to Wyong Council about concerns regarding its coastal foreshore area and council's proposal to develop the area.

The EDO also assisted clients to engage in the strategic planning framework, particularly with regards to the development of Local Environmental Plans (LEPs). The EDO assisted local residents to ensure that new LEPs were compliant with legal requirements. In particular, the EDO assisted Ku-ring-gai residents with issues regarding rezoning in the Ku-ring-gai LEP. We also advised Penrith residents on grounds for challenging the Penrith LEP.

The community has a key role to play in ensuring planning laws are complied with. The EDO is often asked to assist the community to enforce breaches of the law, particularly breaches of conditions of consent. For example, this year the EDO has:

- Written to Richmond Valley Council regarding pollution of land and water due to use of land for an industrial purpose with no development consent

- or environmental pollution mitigation measures in place;
- Advised Cheltenham residents about an alleged breach of development consent by a local school;
- Written to Lismore City Council regarding an alleged breach by a truck depot of its development consent resulting in allegations of pollution of Lismore's main Wilson's River;
- Advised on the compliance of a convention centre proposed over Crown Land with the Newcastle LEP and *Crown Lands Act 1999* (NSW);
- Advised on the compliance of a sand mining facility with the requirements of the *Environmental Planning and Assessment Act 1979* (NSW). We also provided calculations on groundwater use and interception; and
- Written to the Minister for Lands about the compliance of a development at King Edward Park, Newcastle with the Plan of Management for the park.

## Policy and Law Reform

In late 2010, the Total Environment Centre and the Nature Conservation Council of NSW commissioned the EDO to undertake a review of NSW planning laws. The 'State of Planning in NSW' report concluded that the planning system had become complex and highly politicised, disconnected from local communities, and was no longer facilitating good environmental

outcomes. The Report stated that over 70 amendments were needed to fix the planning laws. The Report was described by one NSW resident as 'a breath of fresh air amidst the stench of the NSW planning system'.

The 'State of Planning in NSW' report suggested that the *Environmental Planning and Assessment Act 1979* (NSW) should be replaced by a new Act. The Report identified 10 key elements for a new planning Act that are needed to achieve ecologically sustainable development (ESD), and restore balance, transparency and accountability to the planning system.

### Case Study: Reconnecting the Community with the Planning System

Prior to the 'State of Planning in NSW' report, the Total Environment Centre (TEC) and EDO collaborated on a project designed to reconnect the community with the planning system. The EDO prepared a discussion paper outlining the key features of the planning system, and encouraging readers to consider which features they would and would not retain in a 'best practice planning system'. The TEC and EDO then conducted several community workshops throughout NSW to gauge the public's views of the planning system. This feedback was then incorporated into a report by the EDO.

The report, 'Reconnecting the community with the planning system'

(August 2010), aimed to provide the Department of Planning with an informed assessment of how people view the current planning system, and recommended ways that the Department could reconnect the community with the system. The main conclusion was that the community generally felt disconnected from the planning system, highly frustrated, and cynical about the value of engaging with it. Recommendations were provided across 10 themed areas.

Following the report's release, the Department of Planning outlined a plan in response – 'The Community and the Planning System – Action Plan'. It noted a number of initiatives for reconnection, and deferred some issues for consideration to any future review of the *Environmental Planning and Assessment Act 1979* (NSW) or its successor. The August 2010 report and the Department's response are available on the Department's website.

## Education

Over the past year, local councils throughout NSW continued to update their local environmental plans (LEPs) to comply with the State Government's Standard Instrument. This provided a unique opportunity for communities to have a say about how their local areas develop in coming years. The EDO held a number of workshops to assist the community to engage effectively in the LEP-making process. Workshops were held in Coffs Harbour, Evans Head, Springwood and Nowra.

EDO staff also presented a workshop on planning law and Aboriginal cultural heritage at Batemans Bay.

Last year the City of Sydney funded the EDO to present a series of seminars exploring the sustainability of Sydney. Each seminar focused on a different measure of sustainability such as homes, food and transport. This year, the EDO completed the series with two urban sustainability seminars; the first dealing with trees and the second dealing with buildings and workplaces.

EDO staff also presented a number of papers addressing NSW planning laws, including a continuing legal education seminar for practising lawyers organised by Legalwise and a lecture on planning law to students studying at the University of NSW.

# Biodiversity Conservation

## Casework

### Promoting ecologically sustainable development

#### *Sweetwater Action Group Inc v Minister for Planning [2011] NSWLEC 106*

The EDO acted on behalf of the Sweetwater Action Group Inc (SWAG) which challenged a decision of the Minister for Planning to enable the rezoning of land in the Hunter Valley to allow for the development of the Huntlee Town Centre for 20,000 residents. The area contains one of the last remaining habitats of the *Persoonia pauciflora*, a critically endangered native shrub, and is also highly contaminated.

The challenge focused on whether the Planning Minister considered the requirements of *State Environmental Planning Policy No. 55* (for remediation of contaminated land), and the enforceability of a Voluntary Planning Agreement proposed for the site which was designed to protect the habitat of the *Persoonia* and provide for additional conservation areas.

The challenge also raised the issue of bias in relation to the Lower Hunter Regional Strategy which contemplated certain development on the site in exchange for conservation offsets, reflected in a Deed of Agreement with the Planning Minister that was set

aside in previous court proceedings in which the EDO also acted.

This matter was heard in the Land and Environment Court in June 2011, with judgment handed down on 7 July 2011. The Court found in favour of SWAG on two of its three grounds, declaring that the decision of the Minister to recommend the making of an amending SEPP to give effect to the rezoning was void, and that the amending SEPP was also void.

The Sweetwater Action Group had this to say about the case:

*Since 2005 when the group was formed, we have at times wondered if it was possible to win against massive odds, but ever since we were able to gather enough facts for the EDO to make a case, your dedication to achieving the right result has been an inspiration to us all, firstly in 2009 and more recently in July of this year.*

### Fighting to protect endangered fauna

#### *Bat Advocacy v Minister for Environment Protection, Heritage and the Arts [2011] FCA 113*

The EDO, on behalf of Bat Advocacy NSW Inc, commenced proceedings in the Federal Court challenging a decision of the Minister for Environment Protection, Heritage and the Arts to approve the relocation of grey-headed flying-foxes from the Royal Botanic Gardens in Sydney.

The grey-headed flying fox is listed as vulnerable to extinction. The Botanic Gardens colony of flying foxes is one of the largest camps

in the Sydney metropolitan area, representing approximately 8.5% of the total species population. Loss of roosting habitat is identified in the National Recovery Plan for the grey-headed flying fox as a high priority threat and the impacts of the loss of long-term camps are not known.

The challenge was brought on the grounds that the decision was an improper exercise of power because the Minister failed to take into account a number of matters, including: whether the Botanic Gardens is critical habitat for the flying fox; the social matters involved in moving the flying fox to areas outside the Botanic Gardens; and all possible adverse impacts of the decision given the approval was to remain effective until 2039.

The Court dismissed the application on all grounds. Bat Advocacy appealed against the Court's decision on the ground that the Minister failed to consider whether the Botanic Gardens is critical habitat for the flying fox. The Full Court of the Federal Court dismissed the appeal.

### ***Yass Environmental Responsibility Network Inc v Yass Council & Anor***

The EDO, on behalf of Yass Environmental Responsibility Network Inc has commenced judicial review proceedings in the Land and Environment Court to challenge development consent to a 175 lot subdivision at Yass. The primary issue in dispute is the impact that the development will have on a listed threatened species, being striped legless lizards (*Delma Impar*), and

the fact that the proponent did not prepare a species impact statement to accompany the application.

Mediation of the dispute is scheduled to take place in August 2011.

### **Legal and Technical Advice**

The conservation of Australia's unique biodiversity remains a priority for many EDO clients, particularly in light of climate change. There are several laws designed to protect both terrestrial and marine threatened species, ecological communities and critical habitat. The EDO regularly advises clients on ways to use these, and other laws, to protect biodiversity at the State and federal level.

At the State level, we have provided detailed legal advice on issues such as:

- The biobanking statement associated with Baulkham Hills Council's biobank site at Kellyville;
- The treatment of koalas under the *Draft Lismore Local Environmental Plan* (LEP), with a view to ensuring local planning controls provide adequate protection of the local koala population; and
- The impacts of a quarry proposal in the Northern Rivers on threatened species.

The EDO provided Gosford residents with advice on the inclusion of biodiversity mapping in the Gosford LEP. As a result of this advice, the residents were successful in getting biodiversity maps incorporated into the LEP.

We have worked for many years with western Sydney residents to ensure the ADI site at St Marys is developed in a way that does not significantly impact the critically endangered Cumberland Plain Woodland. This year, we consulted with experts and advised on plans to subdivide the site which required the clearing of some Cumberland Plain Woodland. As a result of our intervention, the application to clear the site has been withdrawn and the proponent has undertaken a species impact study.

The EDO has begun receiving requests for advice from landholders interested in undertaking private conservation on their properties. This can be attributed to the EDO's publication 'A Guide to Private Conservation in NSW' which outlines and critically analyses the different private conservation options available in NSW. The EDO has partnered with the Public Interest Law Clearing House to create a pro-bono referral service to provide landholders wishing to pursue private conservation with free legal advice.

At the federal level, much of our work relates to the operation of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act). This Act can be utilised in various ways to achieve biodiversity outcomes. In particular, we have been acting for clients seeking to utilise the provisions of the EPBC Act to gain stronger protections for Australian sea lions under the Southern Eastern Scalefish and Shark Fishery (SESSF). In a related matter, we have also advised on whether bycatch of seabirds

associated with the SESSF triggers the operation of the EPBC Act.

We regularly advise on whether proposed developments are likely to trigger the operation of the EPBC Act and assist our clients to bring such developments to the attention of the federal Environment Minister. This often requires the involvement of scientific experts and the review of technical reports. As a result of EDO advice, residents at Baulkham Hills and the community at Majors Creek were successful in having proposed developments referred for assessment by the Federal Government under the EPBC Act.

## **Policy and Law Reform**

As with last year, the EDO's biodiversity policy work has focused on the biobanking and biocertification schemes developed under the *Threatened Species Conservation Act 1995* (NSW).

This year the EDO made a submission to the NSW Department of Environment, Climate Change and Water (DECCW) outlining concerns with the biocertification methodology – particularly around offset rules for threatened species. This submission incorporated scientific expert evidence. We also lodged a submission with DECCW outlining concerns with the proposal to 'streamline' aspects of the biobanking methodology.

The EDO continued to advise the NSW Government as a member of the Ministerial Reference Group on BioBanking throughout the year.

The statutory review of the *Threatened Species Conservation Act 1995* (NSW) arose during the reporting period. The EDO participated in the review through a submission to the DECCW, arguing that the Act is failing to address the decline in threatened species and needs to be more effectively resourced, implemented, and protected from being overridden by other laws such as planning and mining laws. The EDO drew extensively from the expertise of a number of ecologists in its submission.

## **Education**

As reported last year, the NSW Environmental Trust has funded the EDO to undertake a Private Conservation Project. The aim of the project is to promote the uptake of private conservation in New South Wales through a plain English publication and complementary workshops. The 'Guide to Private Conservation in NSW' has been made available for free to interested NSW landholders. We have also presented a number of community workshops on private conservation to explain the different options and discuss their legal implications. In 2010-2011, private conservation workshops were held in Inverell, Branxton, Braidwood, Nowra, Comboyne, Murrays Run, Goulburn and Dapto.

The EDO also presented a workshop in Sydney on biobanking and biocertification and held a seminar on biodiversity and law reform.

Some of the presentations that EDO staff delivered on biodiversity conservation include a lecture on adaptation, the coastal zone and biodiversity conservation to students at the University of Sydney and a presentation on animals and the law for the Animal Law and Education Project.

# Natural Resource Management

## Protecting marine environments

*No Ship Action Group Inc v Minister for the Environment, Heritage & the Arts & Anor [2010] AATA 212*

The EDO acted for the No Ship Action Group Inc (NSAG) in proceedings in the Commonwealth Administrative Appeals Tribunal (AAT) challenging a decision to grant a permit allowing the scuttling of the ex-HMAS Adelaide. The proposal was to scuttle the ship approximately 1.7km off Avoca Beach for the purpose of an artificial reef. NSAG's concerns included the likelihood of PCBs leaching into the environment.

The proceedings considered whether the decision to grant the permit was the correct or preferable one on the basis of expert evidence. The Tribunal concluded that environmental considerations are paramount when deciding whether or not to grant a permit, and economic and other matters could only be considered "at the margins".

The Tribunal ultimately decided that a permit should be granted. However, it imposed additional conditions relating to the removal of canvas and insulation, the removal of exfoliating or exfoliated red lead-based paint, the removal of remaining

wiring which may be associated with PCBs and the conduct of a more extensive monitoring program.

## Defending prime agricultural land

*Caroona Coal Action Group v Minister for Mineral Resources [2010] NSWCA 353*

As reported last year, the EDO represented the Caroona Coal Action Group Inc (CCAG) in proceedings in the Land and Environment Court challenging the exploration licence and coal authorisation granted to Coal Mines Australia Pty Ltd by the Minister for Mineral Resources.

In the proceedings, CCAG argued that the licence was invalid on three grounds. The Court rejected two of those grounds. With regards to the third ground, the Court found that, although established, it was not significant enough to render the grant of the licence void.

In November 2010, Caroona Coal Action Group Inc appealed the decision on two grounds. Firstly, that the Minister for Mineral Resources did not satisfy himself that special circumstances existed to justify the renewal of the licence over an area larger than half of the land area as required by the *Mining Act 1992*; secondly, that the Minister and Coal Mines Australia were required under the *Mining Act 1992* to sign a document comprising an 'instrument of transfer', but failed to do so.

The Court of Appeal rejected both grounds of appeal.

In a related judgment, the Land and Environment Court ordered CCAG to pay the costs of both Respondents (Coal Mines Australia and the Minister for Mineral Resources), including the costs of the application for costs.

In further related proceedings, CCAG argued that the public interest in the principle of open justice should defeat the confidentiality orders sought by Coal Mines Australia Pty Limited to restrict public access to its Expression of Interest (EOI) in the Caroona mining exploration licence.

The Court rejected CCAG's arguments; finding that particular statements and data in the EOI were confidential. However, the Court held that confidentiality orders should be made which would continue to restrict access to the whole EOI solely to CCAG's legal advisors; a Redacted EOI be produced and filed which would allow public access to the EOI without the confidential material; and that these orders would not offend the principle of open justice.

## Enforcing water pollution laws

### *Delta Electricity v Blue Mountains Conservation Society Inc*

In this ongoing case, the EDO is representing the Blue Mountains Conservation Society (BMCS) in civil enforcement proceedings in the NSW Land and Environment Court against Delta Electricity for causing water pollution.

On 9 September 2009, the EDO successfully obtained a protective costs order (PCO) in the amount

of \$20,000. The PCO caps the costs payable by the BMCS to Delta if the BMCS loses the case. The BMCS could not afford to continue with the proceedings unless its liability was limited.

Delta appealed the PCO in the NSW Court of Appeal.

The Court of Appeal handed down its judgment on 18 October 2010.

Delta's appeal was dismissed and Delta was ordered to pay BMCS's costs of the appeal.

On 2 December 2010, the Land and Environment Court heard an application by Delta to have the case summarily dismissed. Delta argued that the *Protection of the Environment Operations Act 1997 (NSW)* does not permit civil proceedings to remedy or restrain a contravention of section 120 of the Act (under which it is an offence to pollute waters). Delta argued in the alternative that part of BMCS's summons and points of claim should be summarily dismissed on the basis that they allege past breaches and there is no utility in the Court making a declaration or granting remedial orders in respect of past breaches of the Act.

Justice Pepper has reserved her decision on whether the case should be struck out.

## Fighting for better regulation of the Snowy River

### *Snowy River Alliance Inc v Water Administration Ministerial Corporation [2011] NSWSC 652*

The EDO acted for the Snowy River Alliance Inc (SRA) in their challenge to the Water Administration Ministerial Corporation's (WAMC) review of the Snowy Hydro water licence and a subsequent variation to the licence.

The *Snowy Hydro Corporatisation Act 1997* (NSW) requires the WAMC to conduct a review of the obligations under the licence relating to the "Snowy River Increased Flows" and to exhibit a copy of any state of the environment reports prepared by the Snowy Scientific Committee (SSC).

On 23 July 2010, the EDO commenced proceedings in the Supreme Court of NSW on behalf of the SRA challenging the validity of the review. The SRA argued that the WAMC's review failed to meet the description of "review" as required by the Act and failed to exhibit any SSC reports prior to the review. If the review was found to be invalid, the variation to the licence may also be invalid.

The matter was heard before the Supreme Court on 14 March 2011. On 30 June 2011, the Court delivered judgment dismissing the legal challenge.

## Challenging the merits of coal mines

### *Hunter Environment Lobby v Minister for Planning & Ors*

In December 2010, the EDO commenced proceedings in the Land and Environment Court on behalf of the Hunter Environment Lobby Inc to challenge the merits of the Minister for Planning's approval of certain coal mining activities at the Ulan Coal Mine, located 40 kilometres northeast of Mudgee.

The approvals allow for the expansion of the mine's existing longwall mining operations and a new open cut mining operation.

The mine expansion is predicted to have a significant impact on groundwater, which is expected to take 200 to 400 years to recover. It will also result in the clearing of 409 hectares of vegetation, including 69 hectares of endangered ecological communities, 150 specimens of a threatened flora species and habitat for several threatened fauna species. The greenhouse gas emissions from the mine are expected to add approximately 12.7 million tonnes of carbon dioxide per year to the atmosphere, exacerbating global anthropogenic climate change.

The hearing took place in June 2011. The Hunter Environment Lobby Inc has asked the Court to impose a condition requiring Ulan to offset its greenhouse gas emissions pending the commencement of any Federal Government scheme to regulate greenhouse gas emissions.

The Court has reserved its judgment.

## ***Ironstone Community Action Group v Minister for Planning & Ors***

The EDO is acting for the Ironstone Community Action Group (ICAG) in Land and Environment Court proceedings challenging the merits of an approval for the extension of the Duralie Coal mine, an open cut coal mine between Stroud and Stratford in the Barrington Tops area.

The ICAG is concerned about the impact of the mine on the water quality of the Mammy Johnsons Creek and beyond and on habitat for the endangered Giant Barred Frog. The group is also concerned about dust impacts from the mine on the health of people and the environment.

The matter was heard throughout May, June and July 2011. Judgment has been reserved.

## ***Challenging coal seam gas developments***

### ***Barrington Gloucester Stroud Preservation Alliance Inc v Planning Assessment Commission and AGL Upstream Infrastructure Investments Pty Limited***

The EDO, on behalf of the Barrington-Gloucester-Stroud Preservation Alliance Inc, is challenging two decisions of the Planning Assessment Commission (PAC) to approve the concept plan and stage one of the Gloucester Gas Project.

The concept plan involves extraction of coal seam gas within a 210km area between Barrington and Great Lakes, transporting the gas from the processing facility to the

existing gas supply network via a 95-100 km pipeline, and a gas delivery station at Hexham. The stage one project approval is for 110 gas wells and gas and water pipelines between Gloucester and Stratford, a central processing facility, gas transmission pipeline and the Hexham gas delivery station.

The case will focus on the PAC's consideration of the environmental impacts of the project. It will be argued that the PAC failed to adequately consider a number of important issues such as risks to surface and groundwater quality and quantity, management of the polluted waste water and uncertainty about the chemicals used in the extraction process.

The matter is listed for hearing in late October 2011.

## ***Legal and Technical Advice***

Consistent with previous years, natural resource management issues dominated the EDO's advice work. This area includes native vegetation management, water management, forestry, mining and other extractive industries. With the exception of native vegetation management, the EDO's work in this area was fairly evenly split across these issues. However, mining is emerging as the principal source of inquiries from the community.

### ***Mining, Coal Seam Gas and Quarries***

The EDO has received a growing number of calls from members of the community who are concerned

about the impacts of mining and coal seam gas exploration and production in their areas. Such projects are notoriously difficult to stop, but the EDO remains committed to advising the community about their legal rights in relation to mining and coal seam gas projects.

For example, the EDO provided advice to the community on a proposal to develop the Bulli Coal Seam over the Dharawal Conservation Area. We also wrote to the Minister for Environment about the impact of mining on the conservation area. As a result of PAC findings, the EDO and community action, the proponent withdrew their application so far as it related to the Dharawal Conservation Area and the Coalition Government has announced a commitment to declare the area as a national park.

The EDO has also been providing ongoing advice to the Majors Creek and Araluen communities about a proposed gold mine at Majors Creek. The community is particularly concerned about the accuracy of the proponent's environmental assessment and the impact the mine may have on surface and ground water in the region. The EDO's in-house scientists have assisted the community to respond to the proponent's environmental assessment and our ongoing advice has been directed at helping the community to engage effectively in the assessment process.

Other mining related work included:

- Advising on the exploration operations of Gloucester Coal, particularly with regards to potential impacts on matters of national environmental significance under the EPBC Act. As part of the process, the EDO engaged an expert to provide advice on issues relating to potential water pollution at the site;
- Advising numerous landholders whose properties are subject to exploration licences on negotiating access arrangements in the Gloucester and Southern Highlands regions;
- Advising the community about coal seam gas exploration at Keerrong;
- Advising on the Review of Environmental Factors for coal seam gas exploration on the Liverpool Plains;
- Advising on aspects of the Environmental Assessment for the Camden Gas Northern Expansion Project to mine coal seam gas in south-western Sydney;
- Advising on various coal seam gas issues and protection of environmentally sensitive areas in the Darkes Forest/Illawarra area;
- Advising about vegetation clearing associated with an Eastern Star Gas proposal for coal seam gas production near Narrabri; and
- Lodging a GIPA application for documents relating to the Pilliga and Clarence Morton petroleum exploration licenses for coal seam gas exploration.

With regards to quarries, the public tends to be concerned about the quarry's compliance with conditions of consent. For example, the EDO has been asked to advise on alleged illegal water use by Roclà Quarry. The EDO wrote to the Minister for Water to bring these concerns to the attention of the regulator.

We've also been asked to advise the community on how to object to quarry proposals, especially where there are concerns that the quarry will have negative impacts on threatened flora and fauna. The EDO provided advice to Wardell residents about two proposed quarry expansions in their area. As a result of our letter of advice, the council decision on these proposals has been deferred. We also provided detailed advice to the community about a number of issues associated with the Cedar Point Quarry. The community's concerns related to the environmental impact statement, the consultation requirements, the impact on threatened species, noise and buffers. The community also sought advice on attending meetings of the Joint Regional Planning Panel.

## Water

The EDO is asked to provide advice on many different aspects of water management, from the management of regulated rivers to advice on the impacts of developments on water quality and quantity.

For example, the EDO wrote to the Director-General and Minister for Planning about misleading information contained in the

environmental assessment for the proposed Tillegra Dam. The Tillegra Dam was proposed as a 450GL dam on the upper Williams River in the Dungog Shire. The community raised a number of concerns about the environmental assessment that accompanied the project proposal. As a result of a sustained community campaign, the Tillegra Dam proposal was abandoned.

We also provided ongoing advice to clients in Barraba who were concerned about the impacts of bore use on the water levels of the Manila River, including highlighting the inadequacies of the assessments undertaken. As a result of a sustained campaign from the community, the bore use has been discontinued.

As part of our ongoing engagement with rural landholders, we have provided advice on issues relating to the taking of water, including advice on the illegal taking of water in the Lowbidgee area and advice about water rights and water works to capture flood waters at Corowa.

## Forestry

Forestry issues are frequently raised by the community and the EDO has provided a range of advice on both public and private native forestry activities, especially with regards to alleged breaches of the law.

State Forests in NSW are managed according to a system of Integrated Forestry Operations Approvals. The EDO has received numerous calls from various parts of the State indicating that these approvals are

being consistently breached by forestry operators. In response, the EDO has written several letters of advice for the community to outline their legal options and this has been complemented by letters to the Minister for Environment to alert the Minister to the problem and encourage the Minister to take appropriate enforcement action. Areas of particular concern have been the upper north east of NSW and the south east forest region, and include Girard State Forest, Mumbulla Mountain State Forest, Doubleduke State Forest and Grange State Forest.

In order to support our work in this area, the EDO has made a request under the *Government Information (Public Access) Act 2010* (NSW) (GIPA Act) to the Department of Industry and Investment seeking access to information regarding public forest management and sustainability.

Private native forestry has also been raised as an issue by our clients. In the past year we have written to the Environment Minister regarding alleged breaches of the Private Native Forestry Code of Practice which resulted from a landholder felling a tree with a koala in it. We have also provided advice on the possibility of commencing a legal challenge for breaches of the Private Native Forestry Code of Practice.

Other advice relating to forestry has included:

- Advice to a client and Brief to Counsel on a possible action in equity to challenge breaches of forestry licences in the south east

forests region. We also compiled expert ecological evidence to survey logged and soon-to-be-logged compartments to provide a detailed comparison of the two environments;

- Advice to a landowner on illegal clearing near Tomerang; and
- Advice regarding habitat tree retention under the upper north east Integrated Forestry Operations Approval.

## Policy and Law Reform

Mining, water, and forestry and native vegetation were the major natural resource management issues requiring input from the policy team this year.

### *Mining and Coal Seam Gas*

In April 2011, the EDO submitted to the NSW Labor Government's Coal and Gas Strategy consultation paper. The EDO argued that the development of such a strategy must be done in conjunction with a package of legislative reforms.

In June 2011, the EDO launched a discussion paper, 'Mining Law in NSW'. The paper considers the need to reform the laws that regulate mining in NSW. With a focus on coal and coal seam gas extraction, the paper mainly considered the *Mining Act 1992* (NSW), the *Petroleum (Onshore) Act 1991* (NSW) and the *Environmental Planning and Assessment Act 1979* (NSW). Drawing on the EDO's multidisciplinary expertise, it identified key inadequacies with the system across three related areas:

- Environmental assessment and planning issues;
- Community issues; and
- Compliance and enforcement issues.

The paper also made 21 recommendations for legislative change to make the current processes more sustainable, robust, equitable and transparent.

## Water

The ongoing development of the Murray Darling Basin Plan (MDB Plan) was a central issue in EDO water policy work this year. The NSW Office contributed to an ANEDO submission to the Murray Darling Basin Authority on the Guide to the MDB Plan.

The submission focused on the interpretation of the Water Act 2007 (Cth); whether legal requirements would be met based on the Guide's approach; and on the Authority's use of scientific data (assisted by the EDO's science team). ANEDO argued that priority must be given to restoring the Basin to health, based on the Water Act's recognition that long term social and economic values depend on environmental health. The submission was also submitted to the two parliamentary inquiries looking at the Guide to the Basin Plan.

## Forestry and Native Vegetation

The EDO dealt with a number of forestry issues this year. The NSW Government undertook a review of NSW Forest Agreements and Integrated Forestry Operations

Approvals (IFOAs). This provided an important opportunity for the EDO to raise serious concerns about ongoing breaches of the Forest Agreements and IFOAs. We argued that public forests are not currently being managed in a way that complies with the principles of ecologically sustainable development or respects Aboriginal heritage values.

In related work, the EDO was commissioned by the Nature Conservation Council of NSW to prepare a report on the systemic non-compliance with Forest Agreements and IFOAs. The report, 'If a Tree Falls', details a pattern of illegal logging operations that has resulted in the destruction of old growth forest and endangered ecosystems, as well as habitat for threatened species across the State.

At the federal level, the Office drafted an ANEDO submission to the Senate Rural Affairs and Transport Committee on a draft *Illegal Logging Prohibition Bill 2011* designed to prohibit the sale of illegally logged timber. The submission supported the Bill generally but outlined concerns with too much detail being left to regulations; the need for clearer objectives; and a stronger, tiered penalty regime. EDO staff also gave evidence to the Committee regarding penalty regimes and a whole chain-of-supply approach to regulation. The Committee's majority report did not support the EDO's preferred approach in these areas, but it did factor in US and EU declaration requirements; regular audits and risk-based investigations;

and legislative review measures. The dissenting report supported a range of added measures put forward by the EDO and others.

Prior to this work, EDO NSW also undertook a consultancy for a major conservation group to advise on the requirements for an effective law to address illegal logging. We concluded that such a law should have seven characteristics: ambitious objectives and scope; prohibition of the importation and distribution of illegal timber products in Australia; broad coverage of timber products; due diligence requirements for all operators in the supply chain; strong penalties; effective and transparent enforcement; and legislation review periods.

Finally, with the assistance of the EDO's in-house scientists, the Office prepared a submission to the NSW Natural Resources Commission, expressing concerns with the proposal to insert a new 'streamlined' assessment option into the native vegetation assessment methodology, under the *Native Vegetation Act 2003* (NSW).

## Education

A range of EDO education projects addressed natural resource management, including several workshops on rural landholder's law. These were held in Adelong, Comboyne, Corowa and Savernake. These workshops complement the EDO's publication '*The Rural Landholder's Guide to Environmental Law in NSW*' which was funded

by the NSW Environmental Trust. Workshops cover a range of laws applicable to rural landholders, including laws relating to native vegetation, water, bush fires, pest and weed control, agricultural chemicals and construction and development.

A workshop dealing specifically with pesticides was held at Murwillumbah.

Coal and coal seam gas mining has emerged as the big issue facing the NSW community and the EDO has received many requests for community workshops to explain how coal and coal seam gas mining is regulated in NSW. In 2010-2011, we held mining workshops in Mandalong, Lithgow, Mudgee and Rylstone. Coal seam gas workshops were held in Lismore, Grafton and Murwillumbah.

The EDO also held a seminar on mining law in Sydney which doubled as the launch of the EDO's discussion paper '*Mining Law in NSW*'.

EDO staff presented a number of papers on natural resource management throughout the year, including a paper on water law reform to the Nature Conservation Council Regional Conference in Gulgog and a presentation on forestry laws to the Forestry Forum in Batemans Bay. EDO staff also addressed the Coal Seam Gas forum held in Sydney and addressed the Hunter Environment Lobby on coal and coal seam gas approvals and landholder rights.

# Environmental Justice

## Casework

### Protecting Aboriginal cultural heritage

#### *Munro and Nean v Minister for Lands & Ors*

In an ongoing dispute, the EDO acted for a representative of the Moree Murri Taskforce, Lyall Munro, in his challenge to a decision of the Minister for Lands to approve the sale, and the decision of the Lands Administration Ministerial Corporation to consent to sell, Taylor Oval in Moree. The case focuses on whether the Minister for Lands and the Lands Administration Ministerial Corporation complied with the requirements of the *Crown Lands Act 1989* (NSW).

The Minister for Lands consented to the sale of Taylor Oval to Fabcot Pty Ltd (Woolworths) to facilitate the development of the site for a Big W department store.

Taylor Oval is the most central rugby league and cricket ground in Moree and is also a significant site for the local Aboriginal community who believe it is situated near a burial ground for the Gomeroi nation. Bodies of Aboriginal persons were excavated on the site in 1903 and the ashes of Cheeky McIntosh, an Aboriginal leader and elder were scattered on the oval in the 1970s.

The site has also been important for reconciliation in the town as an area where both Aboriginal and non-Aboriginal people have mixed over the generations, and which is historic sporting facility.

The case settled prior to hearing

### Supporting environmental activists

#### *Police v Matthew Breen, Scott Danes, Shawn Douglas, Ned Haughton, Scott Mackenzie, Carly Phillips and Jamie Pomfrett*

The EDO acted on behalf of Rising Tide protestors who were involved in significant climate change protests at coal loaders at the Port of Newcastle on 26 September 2010. Nine protestors entered coal terminals and climbed onto coal loaders at Carrington and Kooragang Island. Some of these protestors attached themselves to the loaders.

Two of the protestors were charged with entering inclosed lands and the remaining seven were charged with both entering inclosed lands and remaining on inclosed lands.

The Newcastle Local Court dealt with the two protestors charged with entering inclosed lands to finality; providing a dismissal under section 10 of the *Crimes (Sentencing Procedure) Act 1979* (NSW) to one protestor and a fine of \$300 with \$76 costs to the other.

Of the remaining seven protestors, an agreement was reached with police to drop the entering charge in exchange for the protestors agreeing to plead

guilty to the remaining charge. The Court provided a section 10 dismissal to one protestor and convicted the six others. The matter was adjourned for sentencing and consideration of the police prosecutor's application for a victim's compensation order under the *Victim's Support and Rehabilitation Act 1996* (NSW) on behalf of Port Waratah Coal Services (PWCS).

PWCS initially indicated their loss in relation to the alleged disruption to their operations was in the order of approximately \$97,000. In Court, PWCS ultimately claimed a sum of \$525,000. On 3 March 2011, Magistrate Elaine Truscott delivered a comprehensive judgment in which she dismissed the claim for compensation because, firstly, the prosecution and PWCS failed to establish any actual loss; and secondly, PWCS made the application for the wrong purpose, namely, to deter the protestors from future protests rather than because it wanted compensation for any loss.

The EDO solicitor and Barrister that acted for the protestors received this note of thanks:

*Thank you both so much for being such an amazing legal pair. The 7 of us are very lucky to have such dedicated people supporting us and we are very grateful for both of your time and expertise.*

#### **Alcorn & Ors v DPP**

The EDO acted for 49 protestors who were charged with various offences related to the 2010 Climate Camp for Action, a national event which challenged the NSW

Government's proposal to build a new coal-fired power station next to the existing Bayswater power station site.

The protestors appealed against convictions and fines imposed by the Muswellbrook Local Court in January 2011. The appeals were heard in the East Maitland District Court on 16 June 2011.

The Court allowed the appeals of 47 of the 49 appellants, finding the protestors to be "impressive and remarkable individuals". The Court noted that the protestors were genuinely motivated to protect the community from the impacts of climate change. The Court took into account their good character and community spirit, their commitment to social justice and the environment evidenced by their volunteer hours and the fact that their actions were peaceful as part of a non-violent direct action.

The Court dismissed the charges against the protestors under section 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

#### **R v Ryan Benjamin Castle**

Ryan Castle was arrested and charged with breaches of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) and *Forestry Act 1916* (NSW) while protesting against the illegal logging of an Aboriginal Place in Mumbulla State Forest. The EDO provided initial advice on possible defences to the local solicitor representing Mr Castle.

The Goulburn Local Court acquitted Mr Castle on the basis that he had

a reasonable excuse to protest because the logging was unlawful.

## Facilitating access to justice for public interest litigants

### *Olofsson v Minister for Primary Industries & Ors*

The EDO is acting for Mrs Olofsson, the secretary of the Camberwell Common Trust, in proceedings in the Land and Environment Court concerning a mining lease application lodged by White Mining over the Camberwell Common.

The Camberwell Common is located just south of Camberwell Village, and has been used by the local commoners for grazing and other activities since 1876 when it was established as a temporary commonage.

Mrs Olofsson is challenging decisions of the (then) Minister for Lands to revoke the Camberwell Common, reserve it as a Crown reserve, and grant a licence to Ashton Coal to facilitate its plans for an open cut coal mine over the Common. Importantly, she is also seeking a maximum costs order to limit her liability should she lose the case.

[Postscript: On 11 August 2011, Justice Pain of the Land and Environment made a maximum costs order limiting the liability of Mrs Olofsson in the proceedings to \$10,000. The decision was a major win for Mrs Olofsson, who Justice Pain recognised is bringing the case in the public interest.

Without the maximum costs order

Mrs Olofsson would not have been able to continue with her case.]

## Legal and Technical Advice

The EDO's environmental justice work encompasses the protection of Aboriginal cultural heritage, public health issues, access to justice and criminal matters.

### *Aboriginal Cultural Heritage*

The EDO is committed to providing assistance to Traditional Owners and Local Aboriginal Land Councils (LALCs) about a range of matters concerning the management and protection of Aboriginal cultural heritage.

For example, in 2010-2011 we have:

- Advised a Traditional Owner about their right to access land belonging to the Sydney Catchment Management Authority;
- Advised and assisted with submissions in relation to the unlawful use of Aboriginal sculptures by an Art Gallery in the Blue Mountains;
- Assisted a LALC member with the preparation of an affidavit as part of legal action against a quarry and giving evidence in a Class I appeal;
- Written a letter of complaint to the Department of Environment, Climate Change and Water regarding the destruction of an Aboriginal site at Cromer;
- Assisted with applications under the *Aboriginal and*

- Torres Strait Islander Heritage Protection Act 1984 (Cth);*
- Advised on a number of cultural heritage issues associated with the Hunter Expressway; and
  - Advised on an injunction sought to stop celebrations of the Tent Embassy at Sandon Point.

### **Public Health**

Environmental pollution and public health issues are often closely related. This year, a number of requests for advice about pollution have had a public health aspect to them. Some of the issues dealt with by the EDO include:

- Advice on risks associated with naturally occurring asbestos at a quarry near Molong;
- Advice and assistance to residents of Kandos dealing with cement dust pollution;
- Advice to Lake Macquarie residents on the Bullaroo Lead Abatement Scheme;
- Advice and assistance to Forbes residents dealing with pollution from a Graincorp facility;
- Advice regarding a landfill pollution problem at Myocum;
- Advice on levels of soil and groundwater contamination on Lismore Community Land;
- Engagement of a hydrologist to review the proposed leachate management proposal in an Environmental Assessment of a regional landfill at Armidale;

- Advice to Norfolk Island residents on issues relating to *ecoli* in drinking water and the use of the smart ash incinerator as a waste disposal method to improve air quality;
- Advice on particulate pollution levels in Singleton and Muswellbrook in comparison with National Environment Protection Measures;
- Advice on the use of un-flued gas heaters in schools; and
- Assistance in the preparation of a direct brief to Counsel regarding grounds to challenge a decision by ROUS Water to fluoridate a regional water supply.

### **Access to Justice**

A key objective of the EDO is to improve access to justice for the NSW community. Much of the work we do is geared towards achieving this objective. There are, however, some areas of our work which are more specifically related to access to justice – they include costs jurisprudence and access to information.

In 2010, the NSW Government enacted a new regime for accessing government information. The EDO has assisted several clients to utilise the provisions of the *Government Information (Public Access) Act 2010* (NSW) to access information.

We have also advised several clients about recovering court costs and on the potential liability of a non-party to court proceedings.

## Criminal Matters

The EDO regularly advises environmental activists. This year we advised on the risks associated with a protest action and assisted forestry activists to defend charges stemming from an action at Mumbulla Mountain. We also provided advice on a number of protest activities.

## Policy and Law Reform

### Aboriginal Cultural Heritage

The EDO has continued its work to promote reform to Aboriginal cultural heritage laws. This year the Office prepared a background paper on current cultural heritage legislation to inform the work of the Cultural Heritage Working Party which was established by the then NSW Environment Minister to advise on law reform in this area.

At the federal level, the EDO lodged a submission with the Department of Foreign Affairs and Trade urging the Federal Government to ratify the *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits under the Convention on Biological Diversity*.

### Access to Justice

On broader access to justice issues, the EDO's law reform work included a submission to the NSW Attorney-General supporting the intent of the draft *Civil Procedure Amendment (Supreme Court Representative Proceedings) Bill 2010* (NSW). The EDO supported the adoption of the Victorian and Federal Court class action models (with certain changes)

that have enabled individuals to bring class actions in those jurisdictions.

The EDO also made a submission to the NSW Department of Justice and Attorney-General supporting the proposal for a legislative framework for judicial review in the NSW court system. The submission recommended an up-to-date model that builds on best practice and other States' laws.

At the federal level, the Office drafted an ANEDO submission to the Administrative Review Council consultation paper on Judicial Review in Australia. The submission focused on encouraging greater recognition of public interest litigation in judicial review proceedings, and improving access to justice, particularly in relation to environmental and related issues.

## Education

The EDO held a workshop on trespass and evidence collection in Lismore and presented a seminar on defamation in Mullumbimby.

In addition, EDO staff delivered a number of presentations on public interest litigation, including lectures to students at Sydney University and the University of NSW. Other presentations focused on Torts and the environment, and social justice and the law.

# Corporate Social Responsibility

## Legal and Technical Advice

From time to time the EDO is asked to advise clients about the activities of corporations or the application of Corporations Law to environmental problems.

For example, EDO clients are exploring innovative ways to use the law to respond to climate change. The EDO has been asked to advise on requirements under the Corporations Law to disclose climate risk and shareholder resolutions to force such disclosure. We have also assisted with a complaint against 2GB for lack of fair reporting on climate change and provided advice on trade practices issues associated with banks investing in power stations.

In addition to climate change issues, the EDO has:

- Advised on whether major banks are engaging in misleading conduct in relation to support of coal fired power and coal mines;
- Briefed Counsel about a private prosecution for a breach of the *Food Act 2003* (NSW) in relation to the labelling of genetically modified organisms in infant formula;
- Advised on matters associated with potential breaches of the *Trade Practices Act 1974* (Cth) in a developer's advertising material;
- Advised on the Australian Standard for wood heaters;

- Advised on competition law issues associated with Cobbora mine;
- Advised on boycotts and secondary boycotts;
- Advised on the interpretation of the constitution of a conservation organisation; and
- Advised on whether a mining prospectus breached the *Trade Practices Act 1974* (Cth).

## Policy and Law Reform

The emerging issue for corporate social responsibility this year has been product stewardship – where a product's environmental impacts are responsibly managed across the entire life cycle (from the materials selected and process of manufacture, through to appropriate recycling and disposal).

EDO NSW drafted an ANEDO submission to the Australian Department of Sustainability, Environment, Water, Population and Communities supporting the introduction of new laws to promote product stewardship and extended producer responsibility. We later prepared a submission to the Senate Environment and Communications Legislation Committee on the *Product Stewardship Bill 2011*.

ANEDO's submission focused on the appropriate role for the Federal Government, governance of the scheme, product coverage, and monitoring and review of decisions. The *Product Stewardship Act 2011* (Cth) passed into law in July 2011. The Act implements several recommendations supported by ANEDO, including on civil penalties and injunctions; mandatory regulation of hazardous substances; and related notification processes.

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# PART C: REPORTING AND GOVERNANCE

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## EDO Clients

In 2010-2011, the EDO provided legal assistance to hundreds of clients, including a diverse range of individuals and community organisations. Organisations assisted by the EDO during the year include:

- Australian Climate Justice Program
- Australian Coal Alliance
- Australians for Sustainable Development Inc.
- Ballina Environment Society
- Barrington Gloucester Stroud Preservation Alliance
- Bat Advocacy
- BBK Group – Wahroonga Inc.
- Boolaroo Community Centre
- Camberwell Common Trust
- Cabarita Beach Bogangar Residents Association
- Cabarita Residents Association
- Capertee Valley Alliance Inc.
- Cardinal Freeman Village Residents Committee
- Catherine Hill Bay Progress Association
- Clarence Environment Centre
- Communities of Congewai Catchment Inc.
- Evans Head Memorial Aerodrome Com Inc.
- Friends of Freshwater Village Inc.
- Friends of the Koala
- Friends of Narrabeen Lagoon Catchment
- Friends of Turramurra
- Gerroa Environment Protection Society Inc.
- Greenpeace
- Gwandalan Summerland Pint Action Group
- Humane Society International Inc.
- Ironstone Community Action Group
- Jetty Action Group
- Ku-ring-gai Residents Alliance
- Lakes Beach Landcare
- Millers Point Dawes Points Rocks Residents Action Group
- Moree Local Aboriginal Land Council

- Morpeth Heritage Conservation Group
- Mowanjum Art & Culture Centre
- Nimbin Environment Centre
- NTS Corp.
- Rising Tide
- Running Stream Water Users Association
- Sandy Hearnes Action Group
- Save Nimbo Creek
- Scenic Hills Association
- Snowy River Alliance
- South East Forest Rescue
- South East Regional Conservation Alliance
- Southern Highlands Coal Action Group
- Sweetwater Action Group
- The Coastwatchers Association
- The Wilderness Society
- Tomaree Ratepayers Association
- Valley Watch Inc.
- Wennona Head Action Group
- Western Sydney Conservation Alliance

# Acknowledgements

## Volunteers

The Sydney Office has capacity for up to six volunteers per day and the Northern Rivers Office also engages volunteers from time to time. Volunteers assisted with the work of the Office across all functions but primarily with the provision of legal advice and casework services.

Volunteers greatly enhance the capacity of the Office to provide accurate and timely assistance to clients. The EDO would like to thank the following volunteers from 2010-2011 for their commitment and hard work:

- Sarah Ahern
- Joanna Alessi
- Deniz Aslan
- Jonathan Avila
- Melissa Baker
- Andrea Bassett
- Andrew Brickhill
- Brendan Cahill
- Alicia Carter
- Rachael Chick
- Chris Chie
- Lilien Chua
- Erin Chung
- Anne Corbett
- Saul Deane
- Brooke Delbridge
- Phillip Divisek
- Felicity Douglas

- Fleur Downard
- Caroline Doyle
- Sylvie Ellsmore
- Bianca Fernandes
- Lauren Fieldus
- Eliana Fischman
- Amy Fox
- Jennifer Garrick
- Tarsha Gavin
- Rosa Grahame
- Yvonne Hales
- Charlotte Hanson
- Sharon Hill
- Katie Ho
- James Hodge
- Ebony Holland
- Peter Hutchison
- Albert Hwan
- Shu Kakizaki
- Sharon Kan
- Roger King
- Sue Lane
- Juliana Liskov
- Clara MacDermott
- Lise Maddocks
- Tanja Maley
- Mary McCafferty
- Alessandra Peldova McClelland
- Bavani Moodley
- Ana Carolina Napoli Carneiro
- Felicia Nevins
- Clare Nightingale
- Corrina Novak
- Clancy O'Donovan
- Joanna Orton
- Rachel Pascall
- Adam Phillips
- Jeremy Pinto
- Sahil Prasad
- Belinda Rayment
- Frances Richards
- Matt Roberts
- Emily Ryan
- Emma Ryan-McGinn
- Kirsten Storey
- Yuxiang Tao
- Steve Tree
- Katerina Tsiolkas
- Arie van der Ley
- Megan Whelan
- Kylie Wilson
- Li-Ann Wong
- Andrew Wu
- Sharon Yu-Ting Kan
- Joanna Zhou

## **Pro Bono Assistance**

The legal and scientific community also lend invaluable support to the work of the EDO, providing legal and advisory services for a reduced fee or, in many cases, for no charge. The EDO is deeply grateful to the many barristers, solicitors, scientists and experts for their ongoing commitment to the provision of pro bono assistance in public interest matters.

## ***Legal Assistance***

The EDO would like to thank the following barristers, solicitors and firms who provided their time

and assistance with EDO litigation and other matters in 2010-2011:

- Christine Adamson SC
- Ken Averre
- Chloe Burnett
- Louise Byrne
- Marion Carpenter
- Philip Clay
- Lisa Doust
- Sandra Duggan SC
- Dr Peggy Dwyer
- DLA Piper
- Nick Eastman
- Stephen Free
- Freehills
- Jackie Gleeson
- Prof Reg Graycar
- Tom Howard
- James Hutton
- James Johnson
- Geoffrey Kennett SC
- Angela Ketas
- Jeremy Kirk
- Richard Lancaster SC
- Patrick Larkin
- Jason Lazarus
- Craig Leggatt SC
- Craig Lenehan
- Ian Lloyd QC
- Sarah Mahmut
- Bruce McClintock SC
- Scott Nash
- Chris Norton
- Dr Melissa Perry QC
- Susan Phillips

- Andrew Pickles
- Dr Sarah Pritchard
- Fleur Ramsay
- Dr James Renwick
- Leigh Sanderson
- Mark Seymour
- Ashley Stafford
- Dr Kristina Stern
- Brett Walker SC
- Robert White
- Neil Williams SC
- Lucinda Wilson
- Houda Younan

### ***Scientific and Technical Assistance***

The EDO would like to thank the following experts, both on and off the Expert Register, who provided assistance during 2010-2011, and all those who provided assistance anonymously:

- Stephen Ambrose
- Sarah Bekessy
- Paul Boon
- Adrian Brown
- Paul Cooper
- Craig Dalton
- Wayne Davies
- Peter deFur
- Dr Mark Diesendorf
- Martin Fallding
- Stephen Gale
- Georgia Garrard
- Ian Goodwin
- Nigel Holmes
- Werner Hoyt
- Guy Marks

- Iain MacGill
- Andy Marr
- Wendy Morrison
- Gavin Mudd
- Ravi Naidu
- David Newell
- Hugh Outhred
- Steve Paulsen
- Philip Pells
- Matthew Peters
- Steve Philips
- Andy Pitman
- Martin Predavec
- Debasish Raha
- Brendan Ryan
- Brett Stevenson
- Tim Stubbs
- Scott Wilson
- Harley Wright
- DLA Piper
- Cate Faehrmann
- Helen Gillam
- Sylvia Hale
- Felicity Hall
- Dr Ronnie (Helen) Harding
- Murray Hogarth
- Frank Hubbard
- Michael Jeffery
- Dr Andrew Kelly
- Michael Kennedy
- Robert Kinnane
- Judy Lambert
- Richard Babik Merzian
- Ilona Millar
- Warwick Pearse
- Patricia Ryan
- James Tedder
- Volunteer Penguin Wardens
- Philippa Walsh
- John Weate

## Donors

As a non-government and non-profit organisation, the EDO gratefully accepts support from a range of sources. The support received helps the Office to achieve its mission and in no way compromises the independence of the organisation. The EDO would like to acknowledge the following individuals and organisations (as well as those who choose to remain anonymous) for their generous financial and/or in-kind support:

- Barbara Adams
- Australian Speleological Federation
- Geoffrey Ball
- Andrew Chalk

# EDO People

## Staff

At 30 June 2011, the staff of the EDO comprised:

### Director

Jeff Smith

### Principal Solicitor

Kirsty Ruddock

### Senior Solicitors

Ian Ratcliff (Northern Rivers)  
Sue Higginson (Northern Rivers)  
Jessica Wood – currently on leave (Northern Rivers)

### Solicitors

Neva Collings  
Natasha Hammond-Deakin  
Elaine Johnson  
Corrina Novak

### Policy Director

Rachel Walmsley – currently on leave  
Nari Sahukar – Acting Policy Director

### Policy Officers

Richard Howarth  
Zsofia Korosy

### Scientific Director

Tanya Wansbrough – currently on leave  
Anna Lashko – Acting Scientific Director

### Scientific Officer

Christine Ball

### Education Director

Jemilah Hallinan

### Education Officers

Mark Byrne (Northern Rivers)  
Nicholas Angel

### Project Officer

Sahil Prasad

### International Programs Officer

Bj Kim

### Operations Manager

Meredith MacDonald

### IT/Administrator

John Scanlan

### Receptionist/Administrator

Diana Beaton

### Administrative Assistant

Jo Groves (Northern Rivers)

## Staff Changes

The EDO has experienced quite a few changes during the past year and, as with last year, many of the changes are related to the continuing baby boom.

In the Policy Team, Robert Ghanem resigned after nearly five years at the EDO. Nari Sahukar replaced him as Policy Officer. However, as Rachel Walmsley went on maternity leave from April, Nari has been Acting Policy Director. His Policy Officer position was filled by the return of Heidi Evans briefly and then by Zsofia Korosy. Gillian Duggin left her temporary position as Policy Officer, following the return of Richard Howarth from extended leave, working as a volunteer in Fiji.

Amelia Thorpe resigned as International Programs Director and the position was restructured to an International Programs Officer position which was taken up by Bj Kim who transferred from his solicitor position at the EDO.

Melissa Jolley left the Litigation Team and has been replaced by Elaine Johnson who has previously worked at the EDO as a locum and maintained her association with the EDO during a volunteer placement in the Solomon Islands. Corrina Novak was appointed to fill the vacancy created by BJ Kim; she had previously worked at the EDO as a volunteer and paralegal.

The increased activity in the Northern Rivers led to the employment of Jo Groves as a part-time Administrative Assistant. Jessica Wood has been on maternity leave throughout this year.

In the Science Team, Anna Lashko has been Acting Scientific Director while Tanya Wansbrough has been on maternity leave and Christine Ball took up the Scientific Officer position in August 2010, replacing Kristy Graham.

In the Education Team, Rosemary Bullmore moved on from her temporary position as Project Officer and Elise Trask was employed until December to complete Rosemary's projects. The EDO was successful in securing another project grant which led to the employment of Sahil Prasad as a new temporary Project Officer from April 2011.

The Office was fortunate in being able to employ a number of casual staff and interns for various periods during the year: Gabrielle Brine and Anthea Stouffers provided support to the Operations Team; Yvonne Hales worked on updating our fact sheets; Alexandra Cave worked as a

Science Intern; and Fleur Downard as an International Program Intern.

## **Staff Training and Development**

The EDO continues to support the training and development of its staff to enhance their capacity to deliver high quality services. The Office is committed to allocating funds for external staff training and development, in addition to undertaking internal education sessions on specific topics with special relevance for the EDO's operations.

## **Board of Management**

The EDO is a non-profit company limited by guarantee and its volunteer Board provides strategic direction and governance to the Office. The Board is elected at each annual general meeting. Board members attend six-weekly meetings, planning days and some community education events. They make a major contribution to the work of the Office, guiding its development and devoting considerable time and expertise to the work.

The EDO Patron and members of the Board during 2010 – 2011 comprised:

**Patron**

**Mr Hal Wootten AC QC**  
Chair

**The Hon. Murray Wilcox AO QC**

Retired Judge  
Attended 9 of 9 meetings

**Vice-Chair**

**Ms Barbara Adams, PSM**  
Retired Senior Public Servant  
Attended 8 of 9 meetings

**Secretary**

**Mr Andrew Burke**  
Solicitor  
Attended 6 of 9 meetings

**Ms Kate Smillie**

Regional Manager, Nature  
Conservation Trust of NSW  
Attended 7 of 9 meetings

**Treasurer**

**Ms Helen Gillam**  
Lecturer (Accounting, University of  
Technology, Sydney)  
Attended 5 of 9 meetings

**Ms Louise Byrne**

Barrister  
Term ended 26/10/10  
Attended 2 of 3 meetings

**Mr John Connor**

Chief Executive Officer,  
The Climate Institute  
Appointed 1/12/10  
Attended 4 of 6 meetings

**Mr Andrew Cox**

Environmental Consultant  
Term ended 26/10/10  
Attended 1 of 3 meetings

**Dr Ronnie Harding**

Retired Academic (Environmental  
Studies, University of NSW)  
Attended 8 of 9 meetings

**Mr Frank Hubbard**

Principal, Worthwhile Projects Pty Ltd  
Attended 6 of 9 meetings

**Prof. Michael Jeffery QC**

Queens Counsel and Professor  
(Environmental Law, University of  
Western Sydney)  
Attended 5 of 9 meetings

**Mr Michael Kennedy**

Campaign Director, Humane Society  
International (Australia)  
Appointed 9/2/11  
Attended 3 of 5 meetings

# Funding and Financial Report

## Funding from Grants

The EDO is overwhelmingly dependent on grants to fund its operations at their current level. The major source of funding for the organisation is the Public Purpose Fund (PPF). This is triennial funding and the current grant is for the period 2009 to 2012. The PPF provided \$1,602,075 or about 68% of the EDO's income in 2010-2011.

Triennial funding is also received from both the Commonwealth Attorney-General's Department and Legal Aid NSW through the Community Legal Services Program (CLSP). The current Funding Agreement covers 2010–2013. CLSP funds from the NSW Government accounted for \$183,681 or about 7.8% of the EDO's income in 2010-2011; Commonwealth funding amounted to \$93,928 or 4% of overall revenue.

The EDO also benefitted from a triennial grant from the NSW Government through its Environmental Trust under the Lead Environmental Community Groups Grants Program which contributes to the organisation's administrative costs. The EDO was awarded \$180,000 in funding for the period 2009–2012. As only \$36,000 of this grant was taken up last year, \$72,000 was available this year and the same next year.

The John D. and Catherine T. MacArthur Foundation is another

major funder of the EDO with triennial funding of \$US210,000 from 1 July 2010 to 30 June 2013. This funding is for legal capacity building work in Papua New Guinea and the Pacific.

In addition to the triennial grants outlined above, the EDO received a number of smaller grants allocated for a shorter time and for specific projects during 2010-2011. These were:

- NSW Government through its Environmental Trust for publication and distribution of a revised edition of the Rural Landholders Guide
- NSW Government through its Environmental Trust for the Private Conservation Program
- NSW Government through its Environmental Trust for Mining and the Law: A Guide for the Community
- The Commonwealth Department of Agriculture, Fisheries and Forestry under its 'Caring for our Country' program to develop and distribute a publication, Caring for the Coast: A guide to environmental law for coastal communities in NSW
- The Commonwealth Government through AusAID's Australian Leadership Awards Fellowship Program
- City of Sydney Council for a series of seminars on urban sustainability
- Environment and Planning Law Association (NSW) Inc. for an annual research fellowship grant.

## Income Generation

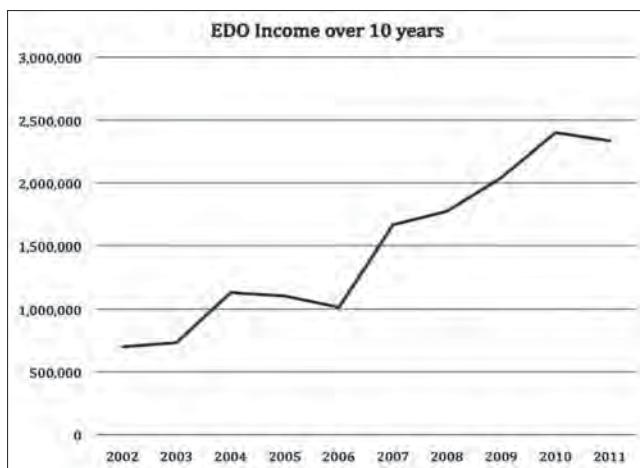
In addition to the income received from grants, the EDO generated other income from fees charged for its professional services, education activities, memberships, donations and bank interest. This money enables the EDO to undertake work which is strategically important but cannot be done within the terms of funding contracts.

In 2010-2011, the EDO generated other income of \$242,040. A significant proportion of this was income from fees (\$113,119). The EDO's fees for litigation are usually covered by grants of legal aid or capped at a low rate unless there is a successful costs award in favour of the Office's client. Unusually, fees did not constitute the majority of non-grant income as in previous years. Part of the reason for this was that the EDO benefited from the wind up of another environmental organisation, Waterkeepers Australia Ltd. as the Office received \$43,695 from the distribution of their remaining

assets. This was combined with a higher than a usual level of donations and income from bank interest.

## Financial Performance

In 2010-2011, the EDO achieved a surplus of \$9,916. This is consistent with the outcomes achieved in most years where the surplus/deficit is within 5% of annual revenue. The Board had planned on a deficit result for this financial year, however unexpected revenue from the winding up of Waterkeepers and additional donations contributed to the positive result for the year. This will assist the Office to meet higher rent commitments arising from the move to new Sydney premises in June 2011, providing space for more staff and volunteers. It will also allow the Board to commit funds to the cost of developing more effective internal systems, better suited to the expanded and more complex organisation that the EDO has become.



## ENVIRONMENTAL DEFENDER'S OFFICE LIMITED A.C.N. 002 880 764

### DIRECTORS' REPORT FOR THE YEAR ENDED 30 JUNE 2011

The Directors present this report on the company for the financial year ended 30 June 2011.

#### Directors

The following persons held office of director as at balance date:

Barbara Adams

Andrew Burke

John Connor

Helen Gillam

Ronnie Harding

Frank Hubbard

Michael Jeffery

Michael Kennedy

Kate Smillie

Murray Wilcox

#### Net Profit After Income Tax

The net profit of the company for the financial year was \$9,916 (2010 – \$134,934).

#### Review of Operations

A review of the company operations during the financial year and the results of those operations are as follows:

The company's operations during the year performed as expected in the opinion of the directors.

#### Significant Changes in State of Affairs

There have been no significant changes in the state of the company's affairs during the financial year.

#### Principal Activities

The principal activities of the company during the course of the year were the provision of Environmental Law services

There have been no significant changes in the nature of these activities during the year.

#### After Balance Date Events

No known matters or circumstances have arisen since the end of the financial year which significantly affected or may significantly affect the company's operations, the results of those operations or the state of affairs of the company in subsequent financial years.

#### Future Developments

The company expects to maintain the present status and level of operations and hence there are no likely known developments in future financial years.

#### Environmental Issues

The company's operations are not regulated by any significant environmental regulation under

a law of the Commonwealth or of a State or Territory.

## Dividends

The Memorandum of Association of the company prohibits the company from paying dividends and, accordingly, no dividends have been declared or paid during the financial year.

## Options

No options over issued shares or interests in the company were granted during or since the end of the financial year. Furthermore, there were no options outstanding at the date of this report.

## Indemnities Granted

There have been no indemnities granted or insurance premiums paid, during or since the end of the financial year, for any person who is or has been an officer or auditor of the company.

## Actions

No person has applied for leave of Court to bring proceedings on behalf of the company or intervene in any proceedings to which the company is a party for the purpose of taking responsibility on behalf of the company for all or any part of these proceedings.

The company was not a party to any such proceedings during the year.

A copy of the auditor's independence declaration as required under Section

307C of the Corporations Act 2001 is set out on the next page.

This statement is made in accordance with a resolution of the Board of Directors and is signed for an on behalf of the directors by:

### Directors

Andrew Burke  
Barbara Adams

Dated this 7th day of September 2011

## BALANCE SHEET AS AT 30 JUNE 2011

	Note	This year (\$)	Last year (\$)
<b>ASSETS</b>			
<b>CURRENT ASSETS</b>			
Cash and Cash Equivalents	5	873,872	706,788
Trade and Other Receivables	6	135,017	150,348
Other Financial Assets	7	87,063	52,650
<b>TOTAL CURRENT ASSETS</b>		<b>1,095,952</b>	<b>909,786</b>
<b>NON CURRENT ASSETS</b>			
Property, Plant & Equipment	8	64,003	56,541
<b>TOTAL NON CURRENT ASSETS</b>		<b>64,003</b>	<b>56,541</b>
<b>TOTAL ASSETS</b>		<b>1,159,955</b>	<b>966,327</b>
<b>LIABILITIES</b>			
<b>CURRENT LIABILITIES</b>			
Trade and Other Payables	9	400,658	230,711
Short Term Provisions	10	122,182	132,284
<b>TOTAL CURRENT LIABILITIES</b>		<b>522,840</b>	<b>362,995</b>
<b>NON CURRENT LIABILITIES</b>			
Long Term Provisions	11	59,088	35,221
<b>TOTAL NON CURRENT LIABILITIES</b>		<b>59,088</b>	<b>35,221</b>
<b>TOTAL LIABILITIES</b>		<b>581,928</b>	<b>398,216</b>
<b>NET ASSETS</b>		<b>578,027</b>	<b>568,111</b>
<b>EQUITY</b>			
Retained Earnings		578,027	568,111
<b>TOTAL EQUITY</b>		<b>578,027</b>	<b>568,111</b>

The accompanying notes form part of these financial statements and should be read in conjunction herewith.

# Independent Audit Report

We have audited the accompanying financial report of Environmental Defenders Office Limited (the company), which comprises the statement of financial position as at 30 June 2011, statement of comprehensive income, statement of change in equity and cash flow statement for the year ended on that date, a summary of significant accounting policies and other explanatory notes and the directors' declaration.

## The Responsibility of the Directors for the Financial Statements

The directors of the company are responsible for the preparation and fair presentation of the financial statements in accordance with Australian Accounting Standards (including Australian Accounting Interpretations) and the *Corporations Act 2001*. This responsibility includes designing, implementing and maintaining internal controls relevant to the preparation and fair presentation of the financial statements that are free from material misstatement, whether due to fraud or error; selecting and applying appropriate accounting policies; and making accounting estimates that are reasonable in the circumstances.

## Auditor's Responsibility

Our responsibility is to express an opinion on the financial statements based on our audit. We conducted our audit in accordance with Australian Auditing Standards. These Auditing Standards require that we comply with relevant ethical requirements relating to audit engagements and plan and perform the audit to obtain reasonable assurance whether the financial statements are free from material misstatement.

An audit involves performing procedures to obtain audit evidence about the amounts and disclosures in the financial statements. The procedures selected depend on the auditor's judgment, including the assessment of the risks of material misstatement of the financial statements, whether due to fraud or error. In making those risk assessments, the auditor considers internal control relevant to the entity's preparation and fair presentation of the financial statements in order to design audit procedures that are appropriate in the circumstances, but not for the purpose of expressing an opinion on the effectiveness of the entity's internal control. An audit also includes evaluating the appropriateness of accounting policies used and the reasonableness of accounting estimates made by the directors, as well as evaluating the overall presentation of the financial statements.

We believe that the audit evidence we have obtained is sufficient and appropriate to provide a basis for our audit opinion.

## **Independence**

In conducting our audit, we have complied with the independence requirements of the Corporations Act 2001. We confirm that the independence declaration required by the *Corporations Act 2001*, provided to the directors of Environmental Defenders Office Limited on 12 September 2011, would be in the same terms if provided to the directors as at the date of this auditor's report.

## **Auditor's Opinion**

In our opinion:

- a. the financial report of Environmental Defenders Office Limited is in accordance with the Corporations Act 2001, including:
  - i. giving a true and fair view of the company's financial position as at 30 June 2011 and of its performance for the year ended on that date; and
  - ii. complying with Australian Accounting Standards (including Australian Accounting Interpretations) and the *Corporations Regulations 2001*;
- b. the financial report also complies with International Financial Reporting Standards as disclosed in Note I.

Joe Pien, Chartered Accountant  
Suite 503, Level 5, 276 Pitt Street, Sydney, NSW, 2000

Dated this 12th day of September, 2011

## **PROFIT AND LOSS STATEMENT FOR THE YEAR ENDED 30 JUNE 2011**

	2011 (\$)	2010 (\$)
<b>INCOME</b>		
Grants Received	1,956,684	2,002,165
MacArthur	69,505	113,304
Donations and Memberships	64,825	12,453
Conferences, Publications & Workshops	82,999	48,029
Professional Fees	95,469	172,760
Interest Received	74,569	51,484
	<b>2,344,051</b>	<b>2,400,195</b>

## **EXPENDITURE**

Auditor's Remuneration - Financial Statements	12,420	13,785
Accountancy and Bookkeeping	31,938	34,100
Bad Debts Written Off	3	-
Bank and Government Charges	3,029	2,005
Board Costs	1,495	1,189
Casual Staff	7,514	-
Conferences, Publications & Workshops	93,952	109,326
Consultants Fees	12,107	-
Depreciation	25,707	22,412
Doubtful Debts	986	3,856
Employees Entitlement Provision	13,765	42,189
Employee Expenses	10,117	8,900
Insurance	12,583	12,560
Legal Fees	6,938	3,698
Light & Power	7,863	5,804
Loss on Disposal - Fixed Assets	664	656
MacArthur Expenses	57,103	116,406
Equipment Lease	8,791	6,205

**PROFIT AND LOSS STATEMENT  
FOR THE YEAR ENDED 30 JUNE 2011 (Continued)**

	2011 (\$)	2010 (\$)
<b>EXPENDITURE (Continued)</b>		
Office Costs	26,442	18,529
Organisational Development	79,853	27,498
Postage & Couriers	3,955	1,115
Printing & Stationery	17,714	23,104
Rent - Office	133,964	117,660
Repairs & Maintenance - General Repairs & Maintenance	45,833	2,766
Salaries & Wages	1,483,316	1,462,103
Staff Training & Welfare	14,942	14,179
Staff Amenities	6,314	3,522
Staff Recruitment	3,129	1,290
Subscriptions	22,851	22,824
Superannuation Contributions	129,706	127,941
Telephone & Internet	31,862	36,147
Travelling Expenses	27,279	23,492
	<b>2,334,135</b>	<b>2,265,261</b>
<b>OPERATING PROFIT BEFORE INCOME TAX</b>		
	<b>9,916</b>	<b>134,934</b>

[Note – this is an abridged copy of the Financial Report for the year ended 30th June 2011. For a full copy of the Report, please see our website <http://www.edo.org.au/edonsw/site/annualreports.php> or contact the offices of the Environmental Defender's Office Ltd.

The EDO is a signatory to the Australian Council for International Development (ACFID) Code of Conduct (the Code). The summary financial report included in this Annual Report has been prepared in accordance with the Code.]



2010/

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Office  
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[www.edo.org.au/edonsw](http://www.edo.org.au/edonsw)