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Environmental Defenders Office Ltd

8th Floor, 280 Pitt Street, Sydney 2000 • DX 722 Sydney • Email pegedo • Tel (02) 261 3599 • Fax (02) 267 7548

Who is running the EPA?

David Mossop
BSc LLB

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Nicola Pain departs for Canberra - see page 9

In the recent leave application in *Brown v Environmental Protection Authority & Anor*[1] the Environmental Protection Authority (EPA) made the surprising submission that the bringing of case was not in the public interest because "the question of breaches of statutes should be matters that are primarily for the EPA".[2] Quite apart from the substantive question of whether such a policy is defensible given the legislative history of the section 25 of the *Environmental Offences and Penalties Act* under which the application was made[3], this "bold submission"[4] raises the question of where such a policy is generated within the EPA and who is publicly accountable for that policy.

While this question is immediately relevant to the approach of the EPA to civil enforcement litigation it obviously also raises broader issues of control and accountability of the EPA and consequently its ability to fulfil its statutory mandate.

The EPA is a statutory corporation created by the Protection of the Environment Administration Act with objects that include (a) to protect, restore and enhance the quality of the environment of New South Wales, (b) to reduce the risks to human health and prevent the degradation of the environment by means including, inter alia,

- promoting pollution prevention
- adopting the principle of reducing to harmless levels the discharge into the air water or land of substances likely to cause harm to the environment
- promoting community involvement in decisions about environmental matters[5].

The EPA replaces the Department of the Environment which was abolished by the Act[6]. There are three entities which play a role in controlling the operations of the EPA. These are the Minister, the Board of the EPA and Director-General of the EPA.

Figure 1 shows a simplified version of the relationship between the Minister, the Board and the Director-General of the EPA. However this diagram does not reveal the full complexity of the division of power within the EPA.

The Authority is generally subject to the control and direction of the Minister[7]. It is not, however, subject to control in relation to

(1) reports or recommendations made to the Minister;

(2) a state of the environment report made under s.10 unless the Minister is directing that additional matters be included in the report;

(3) any decision to institute proceedings for offences against environmental protection legislation or action to restrain breaches of such legislation[8].

Directions of the Minister relating to inclusion of additional material in the state of the environment report or in relation to licensing decisions of the Authority must be laid before both houses of parliament within 14 sitting days of being made[9].

The Board of the EPA is a nine member board appointed by the Minister[10]. The full time member of the Board is the Director-

Contents

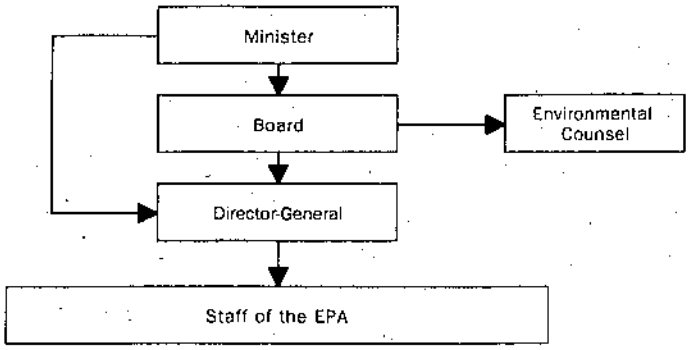

Figure 1—Relationship between the Minister, Board, Director-General and Environmental Counsel of the EPA

General who is also the deputy Chairperson of the Board[11]. The eight other members of the board are appointed by the Minister from a range of specified categories. Conservation groups and peak industry/employer organisations each have two representatives on the Board.

The functions of the Board include determining the policies of the Authority, overseeing the effective, efficient and economical management of the Authority and advising the Minister on matters relating to environmental protection[12].

The Director-General of the EPA is appointed by the Minister and is responsible for management and control of the Authority[13]. In these functions the Director-General is subject to the policies of the Board and any other decisions of the Board. Overriding this, however, are the directions of the Minister with which the Director must comply[14].

Thus the position is that the EPA is generally subject to the control of the Board but, although the Minister is not able to direct the Board as to its decisions the Minister may direct the Director-General as to how to carry out his functions whether or not these directions are consistent with the decisions of the Board.

Confusing this situation is the fact that the Minister is able to use the services of the Director-General and the staff of the Authority for providing departmental advice on government policy and matters relating to the administration of environmental protection legislation[15]. When exercising these functions neither the Director-General nor the staff of the authority are subject to the direction of the Board[16].

In relation to the Director-General this creates potential for conflict of responsibilities of the Director. At some times the Director-General is subject to the policies and decisions of the Board and is acting as the manager of an authority with specified objectives. At other times the Director-General is not subject to the Board, and is simply servicing the Minister as would an officer in any ordinary government department. While theoretically it is possible to separate the role of Director-General as manager of the Authority and the Director as a departmental functionary, in practice there is the danger that the distinct responsibilities of the Director-General will become blurred and the statutory and departmental roles of the Director confused.

The control of the Director-General by the Minister tends to marginalise the Board of the EPA or at least the members of the Board other than the Director-General. The position of the Director-General is strengthened in relation to the Board by the fact that he, like the managing director of a company, is in continual contact with and control of the operations of the authority whereas the Board members are not.

Thus, the roles and responsibilities of the Director-General vary. At one moment he is departmental confidant of the Minister subject only to the Ministers direction, at another he is the Vice Chairperson of the Board, and at yet another he is required to manage the Authority in accordance with the directions of the Board. In contrast, the responsibilities of the members of the Board are clear. Their responsibility is to the fulfilment of the parliamentary objectives of the Authority as set out in s.6.

The leading statement on the responsibilities of the members of statutory Boards are the comments of Street J in *Bennetts v Board of Fire Commissioners.*[17] In this case Street J said—[18]

> The consideration which must in board affairs govern each individual member is the advancement of the public purpose for which parliament has set up the board. A member must never lose sight of this governing consideration.

While this means that a Board member must not simply be a "listening post" for the group which he or she represents, it also means that the Board member's primary responsibility is to the objectives of parliament rather than the Minister or Director-General of the day.

Street J went on to say—

> If the members of boards ... constantly keep before them their overriding duty to the board to promote the purposes for which it exists, then they should have little difficulty in discharging honourably their public duty ... Disagreement is to be expected from time to time, having regard to the wide range of problems with which such boards must deal, but it must be disagreement

relating to what should best be done in the promotion of the purpose enshrined in the statute, this being the common interest which all the board members must serve.

It is clear from this that should a conflict arise between the statutory objects that the Board is created to achieve and either the policies of executive government or of public servants subject to the legislation then the Board's responsibilities must be to the fulfilment of its legislative objects even if this may not correspond with the political direction of the day.

Because Board members other than the Director-General are relatively isolated from direct political pressures it will be relatively easy for them to fulfil their duties. The Director-General, on the other hand, is placed in a difficult position because in addition to the duties as a member of the Board he (a) is subject to the directions of the Minister as to the management of the authority and (b) acts outside of the control of the Board when acting in his departmental capacity. These multiple responsibilities may obscure his overriding duty as a Board member to the objectives of the legislation.

Because of the immediate political pressures that may be brought to bear on both the Minister and the Director-General the extent to which the EPA remains true to the objectives set out in the Protection of the Environment Administration Act will probably be a function of the degree to which Board members can fulfil their independent duty to the goals of the legislation. Despite even the best intentions on the part of the Minister or the Director-General they will almost certainly come into conflict with the Board over some of the more politically sensitive issues.

However, if the Board is not to be marginalised by the relationship that must develop between the Minister and the Director-General, it will need to take an active role in ensuring that the work of the EPA is oriented towards the goals of the legislation. The Board of the EPA lies somewhere between the independent statutory board which is the ideal of the corporatist model and the powerless advisory committees that are so prevalent in other pieces of legislation. Unless the Board plays an active role in keeping the EPA true to its legislative objectives then the degree of independence given to the Authority through the creation of the Board will be lost, and there will be little point in maintaining the facade of an organisation separate from the Minister which it serves.

Returning to where this article began, it will remain a matter of speculation where the "bold submission" from the EPA that civil enforcement of environmental laws is not in the public interest might come from. However, that the EPA should start off so comprehensively on the wrong foot when it comes to environmental protection litigation suggests that—Who is running the EPA?—is a question that people should continue to ask in the hope of keeping the EPA true to its statutory goals.

Endnotes

1 unreported, Land and Environment Court no.40123 of 1992, Stein J, 2 July 1992.
2 Submission of Ms Murrell, counsel for EPA, 26 June 1992
3 The submission was rejected by the Land and Environment Court and the EPA was refused leave to appeal by the Court of Appeal on 27 July 1992.
4 *Brown v EPA*, supra n 1 at p 5
5 s.6(1)
6 Schedule 4, cl.4.
7 s.13(1)
8 s.13(2)
9 s.13(3)
10 s.15
11 Schedule 1 cl.2(4)
12 s.16
13 s.18
14 s.19(1)
15 s.14(1)
16 s.14(2)
17 (1967) 87 WN (Pt 1)(NSW) 307
18 At 310.

Public Participation in Environmental Decision-Making

David Robinson

Solicitor, Environmental Defender's Office

The Brown case (see "Who is running the EPA", in this issue) illustrates continuing opposition by regulatory authorities and corporations to public participation.

Contradictory trends can be identified in recent attitudes to public participation. All governments say they are in favour, yet their actions sometimes belie their stated policies. David Robinson recently analysed the issue (see enclosed EDO publications order form). The following is a summary of his findings.

A degree of public participation in environmental policy formulation and implementation is generally accepted, as illustrated by the prominent role of non-government organisations at the recent Rio de Janeiro Earth Summit and in the Agenda 21 action plan. However participation theory cuts across widely held notions of representative democracy [1].

Since the 1970s, advocates of participatory democracy in the United States have influenced thinking in Australia. The "new" administrative law at the Commonwealth level, and NSW legislation in a similar vein [2], contains elements of the participatory ethos.

More recently, however, the fashion has been to talk of efficiency rather than participation in administration. Superficially, at least, administrators who are concerned with corporatisation, privatisation, meeting budgets, cost-benefit analysis, performance indicators, asset sales, strategic plans and stripping government back to "core" activities will have less time for involving the public [3].

This paper characterises participation, considers arguments against it, considers three characteristics of participation, and concludes with comments on how to plan for public involvement.

Nature of Participation

"Political participation" is the taking part in the formulation, passage and implementation of public policies.

While participation applies to the three arms of government, participation in administrative decision-making is concentrated upon in this paper. This is because the growth of the executive has resulted in it exercising quasi-judicial and legislative powers.

Elements of what is meant by participation are listed below:

1. The right for a citizen to contribute to policy and rule formulation by administrative agencies. This may mean mere notification and allowing for public comment, or holding public hearings. Administrators must grant more than formal obeisance to arguments presented by contending groups.

2. The right of a citizen to apply to the courts if the former right is infringed ("standing").

3. The rights contained in the the legislation listed in footnotes 3 and 4, particularly the right to access information.

4. In the United States, citizens have a right to force an agency to take action where legislation requires the agency to act but the agency does not do so ("agency forcing and citizen petition rights").

5. More recent forms of public involvement include modified versions of self regulatory schemes and whistleblowing legislation to protect informers.

Arguments Against Public Participation

Five general criticisms of participatory theory can be identified.

1. Inappropriate to Adjudicative Proceedings

It is argued that participation is inappropriate in adjudicative proceedings outside administrative law such as criminal prosecutions. The right to a fair trial is a matter for private law. The defendant should not have to face more than one prosecutor - the Crown and public interest groups [4].

The "private rights" argument is extensively relied upon in environmental litigation. Anti-participationists use the argument as both a shield and a sword. As a shield, respondents contest the legal standing of public interest applicants, seek security for costs [5], raise delay as a defence [6] and argue that leave should not be given to challenge administrative decisions, such as the decision in the *Brown* case to relax the conditions of a pollution licence. As a sword, opponents of participation seek to "chill" the fervour of public interest applicants by bringing SLAPP (Strategic Litigation Against Public Participation) suits against them [7].

Private rights advocates view the activities of administrators to be more adjudicative than of a policy nature. In exercising discretion, administrators should observe the principles of natural justice, particularly with regard to procedural fairness. However, public involvement should not play a part. The concern is again the private law concept that justice for the individual is compromised if third parties are involved in the decision-making process. That concern is premised on a view that

land use and development is fundamentally a question of private rights. The premise is regarded as increasingly inapplicable, given the public nature of the environment.

A further weakness of the "private rights" argument lies in the overlap of judicial and administrative adjudications, and policy formation or implementation. For example, in pollution licensing the "prosecutable reality" policy of State Government is involved, as well as administrative and quasi judicial functions carried out by the EPA of formulating licences in accordance with the policy and determining the degree to which a particular licensee's submissions as to achievable pollution levels should be accepted.

Whilst participation is most appropriate in deciding broad policy issues, adjudicative rights can be loaded with discretionary elements. Where there is discretion, public involvement is legitimate.

2. Public Participation is Inefficient

It is argued that public participation is a recipe for inefficiency and decision-making paralysis [8].

However efficiency is to be measured broadly in a complex, pluralistic society. Efficiency is speed in a certain direction. Speedy decision-making is not efficient if the direction of development is undesirable, ultimately resulting in a reversal or change of the decision. Public participation helps determine the direction element in the efficiency equation.

3. Participation is Flawed Because it is Dependent on an Interest-Based Notion of Justice

Participatory theory supposes that various interests will be expressed at the appropriate time in the process of decision-making. However concerns of individual citizens may not be expressed by any group.

Further, if individuals do join together into an interest group, it is more likely that they will be affluent, well-organised liberals. These interest groups are over-represented. The vocal minority, it is claimed, is pandered to in public participation processes. As Priscoli points out, however, public involvement enables representation of interests and values as well as numbers.

The over and under-representation arguments raise problems for participatory theory. However, it is an illogical step to conclude that therefore participation should be reduced. If the potential for participation is not taken up by some, they should be provided with the means to do so. If others abuse the process, the quality of the process needs review so that decision-making is not hijacked by them. The likelihood of arbitrary representation of interests is reduced if a number of avenues for representation exists. For example, a number of private and public sector lawyers are available, in addition to the Environment Defender's Office, to take up public interest environmental matters.

A final version of interest-group criticism of participation is proposed by corporatists [9]. The state and the corporate sector, including the peak environmental groups and trade unions are seen to have a symbiotic link, not necessarily for the general good, but for self-preservation. The decision of the Wilderness Society not to participate in the Commonwealth Government's Ecologically Sustainable Development process in 1991-92 was based on corporatist concerns that interest groups are captured by the process [10]. Opposition is dulled through drawn-out negotiation. Wrong decisions are legitimated merely because the decision makers have spent a great deal of time and money in arriving at the outcome. Sandercock dubbed participation as "the great populist red herring of the 1970s" [11].

One response to the corporatist criticisms was made by Chayes. While administrators may be bullied by corporate elites, judges would not be. The judiciary is more independent than the administration, and will not be captured by interest groups.

Further, corporatism does not explain the emergence of and the continuing support obtained by powerful interest groups. Awareness of the need to promote the underdog who is not represented through the "peak corporations" should not be a reason for assuming that the peak interest groups do not have a critical role to play. Peak groups represent strongly supported views which deserve balancing and analysis in participatory processes to achieve worthwhile outcomes.

4. Participation is Premised on a Developmental Ethic which is False or Unmeasurable

The developmental argument is that citizens achieve personal fulfilment through participation in public life. As well, society is improved through participation.

The ethic can be criticised as too open-ended, non-specific and unable to be measured. Is faith in government improved by citizen participation? Is the quality of decision-making any better? Why should "societal improvement" be preferred to individualist philosophies of well-being?

First, the difficulty in measuring results is indicative of poor measurement methods more than it constitutes a criticism of participation.

As for the criticism that members of the public are not experts, fair and equitable limits should be based on participation so that process does not become an end in itself.

Finally, people who do not wish to participate need not do so, and can elect politicians who limit participation if prejudice resulting from remaining silent is feared.

5. Participation Leads to Procedural Formality Controlled by Self- Interested Lawyers

Participation is criticised for causing procedural formality, for example the rule-making procedures under the *Administrative Procedures Act* in the United States.

However, while participation has been historically associated, particularly in the United States, with

increased procedural formality, more regulation and black letter law, participation in informal processes is desirable and not subject to the criticism of "procedural formalism".

Participatory theory stands relatively unscathed by the legalism criticisms. Participation is necessary but insufficient for effective justice. A synthesis of other approaches, including attention to efficiency, innovative mixes of public and private funding, negotiated conflict management, coalition-building and consensus formation is needed.

Benefits of Participation

1. Participation Increases Accountability

Broader participatory rights, together with freedom of information, Ombudsman, Independent Commission Against Crime and Corruption and judicial review legislation increase the accountability of administrators. It is vital that participation be complemented with right to know legislation.

The facilitation of effective and informed public participation in decision-making should be achieved through broader community right-to-know provisions.

The theory of greater accountability through participation is supported in practice. The Greenpeace actions at the Caltex oil refinery waste water discharge into Botany Bay, and at the Port Kembla BHP plant in 1990 highlighted pollution licences which were not being enforced by the State Pollution Control Commission. By participating, in this case focussing media attention on an under-resourced and compliant regulatory agency, Greenpeace was a catalyst for amendments to the *Environmental Offences and Penalties Act 1989*, and the establishment of the Environmental Protection Authority through the *Protection of the Environment Administration Act 1991*.

2. Participation is Consistent with Expert and Efficient Administration

Participation need not be at the expense of expert assistance on technical issues. More evolved versions of participatory decision-making can accommodate the virtues of the expertise model, and avoid some of its pitfalls and assumptions.

Nor is participation inconsistent with "soft" managerialism, which balances efficiency with fairness and openness. If corporate goals, mission statements and strategies include public awareness and consensus-building, then it will be efficient to allow for the time and expense of public involvement. Other versions of managerialism, however, particularly corporatisation and privatisation, can reduce accountability as public enterprises previously subject to the new administrative law, assume private body immunity[12].

3. Participation can improve the quality of decision-making

Criticism of participation on the ground that the public is not expert has been seen to be misplaced. In some cases the opposite may be true. Participation lengthens the decision-making process and adds to costs, but increases credibility and public confidence in final decisions [13].

A second way in which public participation can improve decision-making is that it places pressure for change on politicians and administrators. Laudable law reform proposals get nowhere without a constituency driving for their implementation.

Factors to be Considered in Public Involvement Planning

Extensive literature and experience on the design of suitable consultation and public involvement strategies exists[14]. The following comments are merely indicative of some of the considerations to be included in participation planning.

1. Timing

Consultation should take place early in the process.

Time frames should balance expediency, the importance of the issue and time to allow information to disseminate, and discussion to develop.

Ongoing participation is desirable. Dialogue over the life of the policy may be more productive than public involvement at one stage only.

2. Terms of reference, methodology and agenda setting must be open to amendment

It is critical that a flexible approach be taken to the terms of reference, and the manner in which they are to be dealt with. A common pitfall is to restrict involvement to issues which the public finds unacceptable, or according to an agenda, selection of participants or timetable not considered fair or balanced.

3. Resources

The most important resource in participation is the public. Selection of participants is less desirable than allowing members of the public to come forward.

Administrators involved with public participation processes should have both sufficient seniority and awareness of the issue to make the exercise worthwhile, and ability to deal with the public. Administrators with technical expertise but who do not suffer fools gladly can frustrate participation. Resources should be available for education of both the public and of the administrators on the process itself, including techniques such as mediation and other forms of alternative dispute resolution.

Resources should extend to providing materials or introductions to major issues where appropriate and to allowing reporting back to the public as well as to other decision-makers.

Consultants to the Resource Assessment Commission identified important elements of effective participation in inquiries conducted by the Commission as follows :

• the designation of an appropriately experienced staff member to prepare and assist in implementing the public participation strategies;

• identification of affected interests and interested parties;

• assistance for disadvantaged or dispersed interests to organise and ensure adequate representation ;

• facilities for exchange of documentation and information;

• assistance in preparation of submissions;

• creation of specific opportunities for informal interaction between staff and participants and between participants; and

• publication of each participation strategy.

Clearly the participation strategy can only be chosen on a case-by-case basis. That being so, possible criticism that the above elements amount to over-spending on procedural rather than substantive matters would be misplaced. Of course relatively minor decisions deserve more abbreviated public involvement.

4. Appraisal

Participation processes should be appraised together with substantive outcomes. Improvements over time to the quality and efficiency of participatory processes can then be made. The number of participants, whether the participation increased over the period, the level of dialogue and whether options were better shaped through participation are some of the indicators to be used in participation appraisal.

Conclusion

Sceptics will continue to find much to criticise in involving the public in environmental decision-making. However participation need not be a recipe for inaction and inefficiency. Appropriate levels of participation must be considered in an ad hoc way. While the underdog (such as resident groups lacking electoral and economic strength) will always want more participation, a limit must be drawn in each case.

Public participation is a natural development in societies which have increasingly high expectations of decision-makers. Participation per se, as distinct from cases where it has been inappropriately used, remains unscathed by the five arguments against it considered in this paper.

The role of public participation, in the context of the "new" administrative law complementary package of rights, particularly the need for greater rights to information, tends to be underestimated within the dominant "expertise model" of environmental decision-making. However, forward-looking developers and administrators are likely to pay increasing attention to the form and extent of participatory processes. In so acting to meet community concerns on particular development projects, and going beyond mere compliance with legal requirements of disclosure, there may well be an element of rationality as well of faith. Secret decision-making in the public, environmental domain may well be contested in the long-term.

While participation may result in different decisions being made, its focus is to offer fairness in the process of arriving at decisions.

Endnotes

[1] Pain N, "The Earth Summit - A Brief Report", 26 (June 1992) *Impact* pp 1-3.

[2] Representative democracy entails citizen filtering their views through members of parliament, not direct participation in legislative, let alone administrative policy-making. Courts and tribunals have traditionally protected aggrieved individuals after administrators have acted. They have not allowed pressure groups to participate during the decision-making process. Harlow and Rawlings, *Law and Administration*, 1984.

[3] Administrative Appeals Tribunal Act 1975, Administrative Decisions (Judicial Review) Act 1977, Ombudsman Act 1976, Freedom of Information Act 1982.

[4] Ombudsman Act 1974; Independent Commission Against Corruption Act 1988; Land and Environment Court Act 1979; Environmental Planning and Assessment Act 1979, an object of which is "to provide increased opportunity for public involvement and participation in environmental planning and assessment" s 5(c); Catchment Management Act 1989; Protection of the Environment Administration Act 1991, which has participatory objectives (s 6(b) and establishes consultation forums and advisory committees (Part 6); Subordinate Legislation Act 1989; Regulation Review Act 1987.

[5] Participation is supported and attacked by varying elements within the major political parties. At the same time as the Greiner Government proceeded with its managerialist program of asset sales and restructuring of government, it proceeded to create ICAC and support the rule-making reforms contained in the Regulation Review Act 1987 and the Subordinate Legislation Act 1989. The Commonwealth Government has supported participation in its ecologically sustainable development process, and in the establishment of the Resources Assessment Commission, yet had no hesitation in by-passing NSW environmental impact assessment requirements with regard to the dredging of Botany Bay (and the opportunity for participation that public exhibition of an EIS offers) in order to speed up the building of a third runway at Sydney Airport. See Federal Airports Corporation Regulations 1992.

[6] Parry, cited in Craig P, *Public Law and Democracy in the United Kingdom and the United States of America*, Oxford, Clarendon Press, 1990 at 173.

[7] Craig, *op cit*, Ch 6.

[8] This is the American "hard look" doctrine, similar to the Anglo-Australian common law administrative law grounds of review of manifest unreasonableness and failure to take into account relevant considerations. See the US Administrative Procedures Act 1946 and Bonine JE and McGarity TO, "Judicial Review, Citizen Suits and Enforcement" Ch 7 in *The Law of Environmental Protection*, West St Paul, Minnesota, 1984.

[9] Braithwaite J. "Responsive Regulation in Australia", paper delivered at Australian Institute of Criminology Conference "The Future of Regulatory Enforcement in Australia" 3-5 March 1992, Canberra. The theme is developed more fully in Ayres, I and Braithwaite J. *Responsive Regulation: Transcending the De-regulation Debate*, N.Y., Oxford U.P. 1992.

[10] Harrison K, *Television Licence Renewal Inquiries* Unpublished PhD thesis 1986, Chapter 3 "Accountability and Participation".

[11] Even with regard to criminal prosecutions, however, feminist and other critiques have raised doubt as to the "private" nature of many rights. Sheehy E, "Feminist Argumentation in the Supreme Court of Canada. *R v Seaboyer* and *R v Gayme*: The Sound of One Hand Clapping", (1991) 18 *Melbourne Uni. LJ* 450.

[12] Karp L and Pain N, "Some Developments on the Standing Front", May 1990 *Impact* pp 1-4.

[13] Preston B, *Environmental Litigation*, Sydney, Law Book Co, 1989, Ch 12.

[14] Ibid.

[15] Pring GW, "SLAPPs: Strategic Lawsuits Against Public Participation", 7 1989 *Pace Environmental Law Review* pp 4-21 and Canan P, "The SLAPP from a Sociological Perspective" 7 1989 *Pace Environmental Law Review* pp 23-32. Pring and Canan studied 228 SLAPPs, of which 43% arose from development, zoning and environment issues. The SLAPP strategies involved multiple claims including defamation (53%), business torts such as interference with contract and restraint of trade (32%), judicial torts such as abuse of process and malicious prosecution ((20%), conspiracy (18%), US constitutional-civil rights violations (13%) and nuisance/other (32%). In the Australian context see Plibersek R and Jamieson R, Blake Dawson Waldron, "Legal Rights of Industry Against Conservationists", IIR Pollution Law Conference, Sydney and Melbourne October 1991.

[16] See Boer B and James D ed, *Property Rights and Environment Protection*, Environment Institute of Australia Inc, 1990, particularly Boer B "Some Legal and Ethical Issues" p 43 ff; Bonyhady T, "Property Rights" (Ch 3) in Bonyhady T ed, *Environmental Protection and Legal Change*, Sydney, Federation Press, 1992.

[17] Delli Priscoli J, "The Enduring Myths of Public Involvement" March/April 1982, *Citizen Participation* p5, see Priscoli article generally for a defence of participation.

[18] Corporatism has been defined as the system of interest representation in which peak groups are supported by the state in exchange for observing controls on the selection of leaders and articulation of their demands (Schmitter 1979, and Cawson 1982, cited in Craig, *op cit*, Chapter 3).

[19] See numerous issues of *Wilderness News* during the period 1991-92. See also AJ Brown, "Overriding Interests: Public Interest Group Manual on Public Accountability", unpublished LLB research thesis, University of NSW, 1992 which includes an analysis of the "capture" of the corporatist environmental groups such as the Australian Conservation Foundation and World Wide Fund for Nature. Brown argues that these groups participate in government environmental initiatives and processes on the condition that in return they receive the lion's share of government funding for NGOs.

[20] Craig. *op cit*, p 113.

[21] Chayes, "The Role of the Judge in Public Law Litigation" (1979) 89 *Harvard Law Review* 1281.

[22] Delli Priscoli, *op cit* as cited in Messer J, "Public Participation in Decision-Making: Participatory Democracy or Political Greenwash?", unpublished paper available from Nature Conservation Council of NSW, April 1991.

[23] For a discussion of the implementation of right to know legislation, see: Cornwell A, "Community Right to Know and the EPAs - Future Trends", paper delivered at National Environmental Law Association (NSW Division) and Environmental Defender's Office conference on Environmental Protection Authorities, 18 and 19 June 1992, Sydney; Adams P and Ruchel M, *Report to the Coode Island Review Panel*, March 1992, Hazardous Materials Action Group HAZMAG, PO Box 27, Yarraville, Vic, 3013; and National Community Advisory Panel of the Australian Chemical Industry Association, "Principles which should underlie the community right-to-know code of practice", 8 December 1991.

Implementation of the recommendations (including the right-to-know recommendations) made after the Diversey fire are sorely needed: *Report to the Minister for Industrial Relations Hon John Fahey MP, Vol 1: Summary and Inquiry Recommendations*, summary of recommendations pp 31-33, 1990.

[24] Allars, *op cit*.

[25] Donnelly S, *Corporatisation and Commercialisation: Impact on Ability to Review and Appeal Government Decisions*, Public Sector Research Centre, Unversity of NSW, Discussion Paper No 17, July 1991.

[26] A recent study of the US public participation model in energy demand planning reported that agencies perceive that "public participation results in improved technical outcomes for both the design and implementation of demand-side programmes ... The

design process will be driven by better information about consumers, their decision-making processes and the potential responses to various designs of demand-side programmes, and the process will have available a larger ideas base". Outhred H and Kaye J, "Review of Public Participation Practices in Demand Planning", unpublished, School of Electrical Engineering, University of NSW, 1990, pp 9-17.

[27] Pain N (Environmental Defender's Office), "Improving Energy Services for NSW: Legislative Reform for Energy Efficiency" in *Clean Power - a Greenpeace Report*, Sydney, September 1992 - referring to Outhred and Kaye, *op cit.*

[28] Delli Priscoli J, *Seminar Handbook: Resolving Conflict by Involving the Public in Water Planning Decisions*, Australian Water Resources Council Planning Committee / Department of Water Resources, 30 November 1989, Sydney. Materials covered include Problem Identification Processes (ch 1), Range of Public Involvement/Dispute Resolution Procedures (ch 4), Identifying Values (ch 5), Profiling a Policy Issue (ch 9), Identifying the Public (ch 10), Selecting Appropriate Public Involvement/ Alternative Dispute Resolution Techniques (Ch 11).

Sarkissan W, Perlgut D, Ballard E ed, *The Community Participation Handbook: Resources for Public Involvement in the Planning Process*, Impacts Press, PO Box 155 Roseville NSW 2069, 1986, pp 151.

Krestensen C on behalf of Consumers' Health Forum of Australia), "Common Pitfalls and Oversights in Government Consultation with Consumer Groups", unpublished, December 1990

Messer J, *op cit.*

[29] Boer B and Craig D, *The Use of Mediation in the RAC Inquiry Process*, Resource Assessment Commission, January 1991.

[30] For example, in New South Wales legal aid has been, until recently, available in public interest environmental cases in the Land and Environment Court: Legal Aid Commission of NSW, *Policy Manual*, Civil Law Grants Guidelines para 4.10(c) "Environmental Matters".

Some energy agencies in the United States have established intervener (third-party) funding programmes, with eligibility based on stated criteria, to fund community participation: Outhred and Kaye, *op cit.*.

Another funding possibility is to provide modest financial assistance to interest group participants in formal decision-making processes.

[31] Arthurs, *op cit*, ch 7.

Interview with Nicola Pain

Nicola Pain recently left the EDO after 5 years as Principal Solicitor. Nicola is now Assistant Secretary of the Environment Review Branch, Commonwealth Environment Protection Agency. Over seventy environmentalists, lawyers and Friends of the EDO bid Nicola farewell at drinks at the office on 10 September. The size and cross-section of the attendance reflected the energy, commitment and ability with which Nicola led the EDO. As she packed her bags for Canberra, IMPACT asked Nicola for her parting thoughts.

How has EDO changed since you became Principal Solicitor in 1987?

In 1987, we had a tiny office in Clarence Street with a PC which worked some of the time. We had a much narrower perception of our role, dictated largely by the lack of resources. With only 2 or 3 staff members, we literally had to stop what we were doing to take on any substantial new work. This meant that our scope of activities was limited to answering inquiries and a limited amount of case work.

By 1992 we had more staff to become involved in educational and conference activities as well as law reform. A good team spirit has enabled a small increase in staff numbers to produce a substantial increase in EDO's activities. For example, we could never have written the HSC textbook "Environment and the Law" with 2 or 3, as opposed to 5 or 6 staff members.

The other biggest change came from without. That is, the environmental groups recognised who we were and began to use us as a tool in their campaigning.

What was the highlight of your time with EDO?

That is impossible to answer. The highlight was a cumulative thing - seeing the EDO grow from a fledgling organisation to an organisation which plays a wider role.

What was the most difficult part of work with the EDO?

Too much work and too few resources to do it - an exercise in frustration which many community legal centres and other community groups well understand.

Do you think that the litigation and education roles of EDO are consistent with each other?

Yes. Litigation is an educational exercise in its own right. Obviously, less adversarial aspects of education complement the litigious role and in many cases reduce the need for it.

How has the funding situation for EDO changed over the last 5 years?

We are slightly less dependent on the Legal Aid Commission. This reflects the broader range of activities, including project and educational ones which are funded by clients and other organisations.

We have two sources of legal aid funding - a core grant and funding for litigation. Our core grant has remained steady, but the litigation funding has become increasingly difficult to obtain. This is of concern to all groups seeking to bring public interest environmental cases in NSW.

What direction do you think the EDO should take in the next 5 years?

I think that further development of a network of EDOs around the country is very important. Similar organisations exist in Brisbane, Melbourne and Adelaide and we need to help interested environmentalists and lawyers complete the network in Perth, Darwin and Hobart and in regional centres. We need a stronger network of public interest lawyers and consultants. The ELAW Directory, launched in October at the Public Interest Law Conference, is a step in the right direction.

There is also an important role for environmental law and policy development in the South Pacific Region, particularly in assisting non-government organisations. The EDO could continue the work it has commenced in the last couple of years to broaden that activity.

Opponents argue that the environment and NGO movement is now sufficiently developed and sophisticated to mount substantial media campaigns. Why shouldn't environment groups raise their own money to run cases, rather than relying on legal aid?

Even if legal aid is granted, financial contributions from clients, sometimes amounting to 4 or 5 figure amounts, are often made.

The environment groups do not pay for the media campaigns. The question assumes that media coverage reflects the financial and other resources of the groups. This is invariably not the case. Good issues attract good media regardless of the financial backing of the groups. Most groups cannot raise the funds required for public interest cases.

How important is case work?

Strategic case work is vital to highlight environmental law issues as well as to protect the environment.

Government and industry frequently underestimate the difficulty which non-government organisations have in bringing public interest environmental law cases. The EDO cannot run cases unless the clients can effectively follow up and assist in the preparation of evidence.

I admire the EDO's clients for their determination in fighting cases on a shoestring and often at great personal cost, not only in financial terms, but in time and emotional energy often at the expense of their families.

Finally, Nicola, what has the EDO meant to you?

Interesting, vital and ideologically sound work. The cameraderie of working in a professional environment where you, your colleagues and clients share many fundamental values.

I feel privileged to have had the opportunity to have seen the EDO grow over the years with such committed and effective teamwork.

Forestry and Mining in Papua New Guinea

Following a visit to EDO by Joseph Kau, one of the four staff members of the Melanesian Environment Foundation (MEF), EDO volunteer, Louisa de Farranti reports on the MEF assessment of the environmental impacts of Forestry and Mining in PNG.

The Melanesian Environment Foundation is an NGO based in Boroko, Papua New Guinea. In a recent paper by Joseph Kau, the MEF shows the continuing exploitation of the environment and local inhabitants by the forestry and mining giants in PNG.

Kau quotes from the report of the 1989 inquiry into the forestry industry in PNG. In that report, then Judge Thomas Barnett stated:-

> It would be fair to say, of some of the companies that they are now roaming the countryside with the self assurance of robber barons; bribing politicians and leaders, creating social disharmony and ignoring the laws in order to gain access to, rip out and export the last remnant of the provinces.

Kau argues that this situation has not changed since 1989. In 1991 the Department of Environment and Conservation reported that more than 70% of the logging firms were operating without approved environmental plans. Moreover, a moratorium on further logging introduced in 1990 has been continuously ignored, while the new Forestry Act passed in 1991, has been frustrated by delay and opposition from the Forestry Department.

Kau is concerned with the effects on local inhabitants, their environment and their communities, he claims -

> The destruction done to the physical environment by the majority of these logging companies is devastating. Vast tracts of virgin rainforests are reduced to barren grasslands. Fauna is displaced, crystal clear rivers are dirtied and land is exposed to erosion. The waters for washing, cooking and drinking have become polluted.
>
> The most important question for us is: "What

> are the landowners, the men, women and children getting for all the destruction that is happening to their land, to their lives?"

The MEF visited local residents in a variety of regions where mines, oil and forestry projects are to be implemented. The foundation discovered residents were generally dissatisfied and misinformed about what to expect from the projects, and in particular any potential dangers or adverse effects on communities. Moreover they found a considerable lack of communication between landowners, government, NGOs and planners in the implementation of the Tropical Forestry Action Plan.

According to Kau, the landowners are being paid royalties of as little as 1 Kina per cubic metre despite the government recommended price of 5 Kina per cubic metre. Moreover, the companies are receiving as much as 1000 Kina per cubic metre of timber on the open market. Kau describes the situation as "a gross abuse of human beings".

Similarly, the mining industry continues to be of great concern to the MEF. Kau points to the tragedy of Bougainville and warns of the impact of new mining projects such as Ok Tedi, of which BHP is a major shareholder. The Stamberg Report on Environment and Development in PNG has noted the effect of the mine on the river systems while it has also been suggested that the mine may have detrimental effects on marine life in the Great Barrier Reef.

Kau observes that:

> The company operating the Ok Tedi mine and the government brushed aside these criticisms as being those from foreigners and "those fanatical environmentalists" who had no idea what the real situation was. Those were some of the things they said about Bougainville, before the uprising. History has been known to repeat itself.

Launch of "Environment and the Law"

On 30 July, in Law Week, EDO launched its publication "Environment and the Law".

Attorney-General Mr John Hannaford officially launched the book. Mr Hannaford recalled the days in the early 70s when he was a student in the first environmental law tertiary course in Australia at the Australian National University. There weren't any materials. He would have appreciated having the sorts of materials now available, of which Environment and the Law is a significant example.

Mr Hannaford emphasised the need for environmental education, particularly about the use of law to protect the environment.

Mr Terry Purcell, Executive Director of the Law Foundation of NSW which had funded EDO $27,000 to write the book, welcomed this addition to the amount of materials available to students, particularly higher certificate legal study students.

Environment and the Law, published by CCH, is available from EDO for $24.50.

The following reviews provide two different perspectives on the book.

*In this review, **Cathy Morrison**, Social Sciences Department, Sydney Girls High School, offers a teacher's perspective.*

Environment and the Law is a new book on the market, written by solicitors from the Environmental Defender's Office (NSW). It is specifically aimed at Legal Studies students, but would also be useful for Geography and General Studies candidates. It would be of general interest to anyone wanting to know about the history and future of Environmental Law in Australia.

The table of contents clearly sets out which topics will be explored in each Chapter, and although not in the same order as the syllabus, all topics are covered. At the beginning of each chapter a list of objectives gives the reader a focus and helps them understand why particular cases are used in this chapter and this makes it easier to apply to the syllabus and exams.

A system of questions exercises and research activities is included in "Environment and the Law". These are useful for students to check their understanding of the text and to give some guidance for further issues to be investigated. The questions make the reader become personally involved with questions like "What can you do to decrease the use of chlorofluocarbons."

The size of print and variety of fonts contribute to the ease of reading. The indented lines for significant points or quotes will also help sustain the concentration of students. Cartoons, pictures and diagrams have been well chosen to complement the text.

As to the content of the book: the authors have obviously responded to the need of teachers and students to have access to relevant cases and an explanation of concepts demanded by the syllabus. The examiners comments from the 1991 HSC make particular reference to the confusion faced by candidates about how the different levels of government obtained. This is clearly enunciated with an historical outline of Federation and an explanation of Section 51 of the Constitution. The Franklin Dam Case is used to good effect here.

As far as I am aware this is the first textbook that deals solely with "Environment and the Law" rather than as a section of a general Legal Studies text. The advantage of this is it allows a greater depth of investigation.

"Protection and Preservation of the Environment" (Chapter 6) is particularly relevant to unit 3 geography students studying the Fragile Planet Option. There is good discussion on the importance of National Parks,

Wilderness areas, Aboriginal Heritage and the World Heritage list. Other issues covered include management of the coastline and wetlands, and toxic waste disposal - certainly contemporary issues.

Chapter 7 called "Taking Action" is important for counteracting the "doom and gloom" aspects of the syllabus and the feelings of helplessness many students experience when thinking about the future of our planet. It shows the success of resident action groups, trade unions and lobbyists in convincing governments to legislate for the environment. The stress is on how peaceful and non-violent action can achieve positive results.

In all these aspects "Environment and the Law" is an excellent book. Improvements I would recommend include giving captions to more of the photographs, such as the one in the chapter on International Environmental Law showing two native women, one adorned with a gas mask and holding a tray from which a mushroom cloud is rising, presumably to express trouble in paradise. Another point relates to the use of imperial measurements when describing the tunnel bringing water from the Lachlan Swamps to the growing Sydney Town. For students brought up with the metric system "two miles long and five feet high" means very little.

Criticisms aside I believe "Environment and the Law" will become a valuable addition to the professional library of Legal Studies and Geography teachers and as a textbook for students.

The second book review of "Environment and the Law" offers a student's perspective. ***Virginia Dell****, a year 10 student at Willoughby Girls High School, recently spent a week with the EDO on work experience. With students like Virginia emerging from our schools, the future of public interest environmental law looks promising!*

Environmental law. What does it mean to you? Sustainable development? Protecting our wildlife? Preventing factories from spilling toxic waste into our waterways? Environment and the Law, a senior school text book, covers all of this and more. As a Year 10 student and environmentalist, reading the text book has really inspired me to learn more.

The text book has been set out in such a way that, if you do the questions, exercises and research activities along the way, you will retain far more information than you would if you were just reading. However, I feel that it would have been very beneficial for the writers to have suggested related assignments that could be done throughout the book. This would have helped, along with the research activities, to broaden the students knowledge a little further. It would also assist teachers!

The book has a very logical flow, and this assists the reader further with understanding the importance of Environmental Law. It starts from square one and explains thoroughly just what Environmental Law is, how it is implemented, how it affects us, problems in the environment today etc. One of the best things about the book is that it not only applies to Legal Studies, but also to Economics, Geography and Environmental Studies.

Another good aspect of this book is that it is not as boring as most of the text books I now work with. This is mainly because there are plenty of exercises but they are spread through the book well and aren't in big bunches. The information that you are confronted with is also easy to understand and interesting in that it is so relevant to the concerns of today's society. The book is not only suitable for students: environmentalists, developers, scientists and loggers alike would find this book of interest.

I feel that this text book would appeal to many different people, not just environmentalists. It has a very objective viewpoint, and tends to give both sides of the story while still emphasising the environmental aspect of the situation. Many people are disinterested in environmentalism, but this text book would be very beneficial to them because it would help them to be able to see both sides of the story, which is a skill not many people have.

The questions, exercises and research activities are very thought provoking, which is why I think that this book is related to so many subjects. It gets you to think about certain issues while still leaving you to come to your own decisions.

The only other area in which I feel this text is lacking is that it should have included at least one case study in each chapter. This would perhaps further aid the student in understanding the topic, along with the previously mentioned assignment. Studies such as Coronation Hill and the extinction of sea turtles would have fitted in well and provided the reader with an excellent example of the book's perspective of Environmental Law.

Lastly, I feel that this text book is a must for every Social Science staffroom, and indeed it would be an excellent aid in a variety of lessons.

The Environmental Defender's Office

Christmas Party

Tuesday 8 December 1992 from 5.00pm

Level 8, 280 Pitt Street, Sydney

NEW SOUTH WALES

New Environment Minister visits EDO

Mr Chris Hartcher, MP Minister for the Environment and Mr Michael Photios MP assisting Mr Hartcher, visited EDO on 6 August 1992. David O'Donnell, EDO Convenor, welcomed Mr Hartcher and Mr Photios on behalf of Board and staff. He raised the possibility of professional exchanges of staff between Environment Protection Authority legal officers and EDO solicitors. Mr Hartcher indicated that the Protection of the Environment Administration Act Stage 2 draft legislation would be available for public comment over the 1992-93 holiday period. Consultation would take place at that stage not earlier, however the Minister was open to suggestions as to how consultation could productively take place earlier than the introduction of the bill. Principal solicitor Nicola Pain outlined the difficulties the office was experiencing with regard to funding litigation with the Legal Aid Commission.

NOLEAD Case

The Editor

Dear Sir,

There has been a long history of pollution problems, particularly lead contamination at Boolaroo, a suburb of Lake Macquarie, Newcastle. Many of the residents refuse to admit to this problem, which has created a division within the community. Our plight began when the Education Department, on the recommendation of the Health Department, sought to relocate children from Boolaroo Public School to nearby Speers Point Public School. This is because Boolaroo Public School is only a few hundred metres from the lead smelter. Relocation was desirable to enable lead remediation work to be carried out at Boolaroo School. However, the majority of parents refuse to relocate their children to Speers Point. These parents requested that remediation work should be carried out while the children were attending the school and during school holidays.

Knowing the dangers of the effect of lead on children, and with remediation work being undertaken, where more dust is created, thus exposing our children to greater degrees of lead, we decided to enrol our children at Speers Point School. Because of involvement with the lead campaign in Boolaroo and our support for the Education and Health Departments on their decision to relocate and remediate, we were abused in public and by telephone calls on a daily basis. We were afraid this victimisation could reflect on to our children.

The result was that in order to have our children attend another school, we could not use the nearby Speers Point School because we could not obtain permission to enrol there. We thus have to take time off work to deliver and collect our children by car each day to a distant school. If we were unable to be released from work, children's classwork was interrupted to enable them to catch the only available afternoon bus home.

We felt victimised not just by parents at the school who don't see the lead problem as being critical but also by the Education Department which would not allow our children to enrol at the nearby Speers Point School.

This injustice prompted us to write to the Environmental Defender's Office as we are members of North Lake Macquarie Environmental Action Defence (NOLEAD). The Environmental Defender's Office wrote to the Director-General of Education and now our children are enrolled after ten weeks of constant lobbying to the Education and Health Departments at Speers Point School.

As a small community group, we are fortunate to have the support of the Environmental Defender's Office which has played an effective role for our environmental group. As a result of EDO's intervention, disruption to our family life will be reduced commencing in fourth term when our children can enrol at the Speers Point School even though other parents are not sending their children there because they do not see the lead contamination at Boolaroo Public School as a problem, despite recommendations from the Health Department.

P. & R. Smith, J. & J. Halliday
5th Street
Boolaroo, NSW 2284

BEYOND THE MOUNTAINS

Funding from the Environmental Trusts enabled the EDO to conduct a series of environmental law workshops. Earlier this year workshops were held in Newcastle and Liverpool. More recently the EDO headed west and south.

What do people on the other side of the Mountains think and do about the environment? It is not just the preserve of urban concerns and 'activists'. The EDO, aka Nicola Pain and Shauna Jarrett, took the plunge and went west to bring the law to the people, conducting workshops at Dubbo on 25 July, and at Forbes on 26 July. We learnt as much as we divulged.

The workshops began by outlining the nature of environmental law and its various contexts - international, national, state and local. Discussion on the changing concept of 'environment' followed, including a comment as to why Aboriginal concepts of environmental control are not taken into consideration by the powers-that-be. The bulk of each workshop

Continued p.14

concentrated on describing the key environmental laws - the EP&A Act, Protection of the Environment Act, planning laws, pollution laws and protection of the natural environment.

The afternoon component involved an explanation of how to get organised, practical legal advice regarding FOI, defamation, incorporation, mediation, how to prepare for litigation and the workings of the Land & Environment Court.

At the Dubbo workshop participants consisted mostly of government agencies, wearing both their government and private hats, including Councils, Landcare, CALM, National Parks and Wildlife, the EPA, Water Resources and the Western Land Commission. Journalists from a local community newspaper and members of ACF, Dubbo Field Naturalists, Central and Western Environment District Network also attended.

This group had a very hands-on approach to the implementation of environmental laws. Their questions were on precise areas of the law and how it does or could affect their work. How does the FOI Act work, how does a field officer know which act has priority where there is an apparent conflict - for example where the Noxious Plant Act requires action, but native animals or fauna could be affected in the process of weed destruction.

The interaction, or lack of interaction between government bodies on environmental matters was raised and the inherent conservatism of in-house solicitors who are responsible for legal advice was raised as hurdles for the implementation of more environmentally effective policies or action.

Private citizens raised concerns such as trespass, bush regeneration and problems with local councils.

The workshop provided an opportunity not only for exposure to the law and opportunities to closely question the workings of the law, but there was interaction between government bodies and the suggestion of further workshops to include in-house solicitors.

The Forbes workshop, a Law Week activity, comprised almost entirely of local farmers and Council workers and members. Particular interest was in the role the community can play in ensuring the Local Council acted in the best interests of the environment and not merely for vested interests.

The workshop highlighted that often, unless a disaster arises, rural environmental issues and needs tend to be ignored, by urban law-makers, policy implementors and the city media. Each local community attempts to address and implement their own solutions, but the resources are not as readily available and the access to information at times impossible. There is little doubting rural people are concerned about the environment as they are directly confronted and affected by their environment. Feedback from the workshop was positive, with workshop attendees unanimous in their thanks for the information supplied by the EDO and all particpants looking forward to closer links.

We would like to thank the chairmen, Terry Korn in Dubbo and Ray Fardel in Forbes, each of whom added their own expertise and local knowledge making each workshop a success.

EDO Visits Wagga Wagga

David Robinson conducted a workshop at Charles Sturt University, Wagga Wagga on 5 September. The workshop differed from other workshops in two ways.

The interest of workshop participants was centred on the city area with few rural questions being raised. Of the 51 participants, there was a fair representation of local council and government department staff, though the majority comprised resident action groups.

The workshop involved local people - an hydrologist who spoke on the role of experts, and two local solicitors who spoke on Freedom of Information, defamation, and Land and Environment Court matters.

Again, positive feedback was received, especially on the informal format and the benefit of involving local people.

EDO Travels to Nowra

Our series of out-of-Sydney environmental workshops lead James Johnson and Shauna Jarrett to Nowra's Aboriginal Cultural Centre on Saturday 8 August, an opportune time given A J Brown's current litigation against the EPA and Australian Pulp and Paper Manufacturers concerning their mill at Nowra. The workshop had been organised at the beginning of the year and there had not been any careful campaigning to have the workshop and a rally in support of the mill fall on the same day.

The format of the workshop was along the same lines as those previously held. Organisations represented included members of the local ACF, Aboriginal Legal Service and Aboriginal Lands Council, concerned local groups such as Wollongong Escarpment Residents Group, solicitors, Aldermen and students, with 28 people in all.

The issues that arose were centred around the problems faced by community groups and individuals who were up against very powerful employers, unsympathetic media and a workforce and union representatives, who believe their jobs are on the front line whenever environmental changes are suggested. The sense of frustration was evident, but so was the spirit to preserve the local environment for the good of the community.

Our thanks to Pat Van Steenwyck for chairing, May Leatch and the local ACF branch for assistance and Carol Dalton of the Aboriginal Cultural Center.

Shauna Jarrett

What's Happening at EDO Victoria

(Extract from Environment Defender's Office, Victoria, August Newsletter)

Since my appointment in March 1992 as EDO solicitor a constant flow of client groups seeking advice and assistance have attended for appointments at our office. The regular Wednesday afternoon volunteer solicitor advice service is now generally booked out two to three weeks in advance.

Client groups have included the Collingwood High Rise Save the Playground Committee to Greenpeace, from the Mirboo North Ragwort Suppression Society to the Surfriders Foundation of Australia.

The broad scope of community groups receiving our assistance is testimony of the solid ground work put in by my predecessor Amanda Cornwell with the EDO board members and other staff. It also reflects the great need which the community has for access to professional expertise in fighting environmental battles.

The Environmental Defender's Office has achieved some excellent outcomes for clients and is working on some important issues. In summary, wins have included:

- successfully applying on behalf of a community group for access to information about energy conservation from the SEC. This information had previously been denied to the group for more than six months.

- successfully establishing dialogue with VicRoads about air pollution measurement data and the costings of alternatives to the Ringwood Bypass for a local residents group.

- obtaining information from the local water authority in relation to the LaTrobe Valley sewerage outfall issue which was more detailed than that supplied by the EPA and then liaising with a professor at Monash to enable an assessment of the data to be made.

The EDO is currently working on many worthwhile issues including:

- developing a case to protect a site in the Shire of Flinders from a use which is prohibited under the local Planning Scheme

- assisting a residents group to prevent the pollution of ground water and Lake Corangamite in country Victoria by opposing the application to convert a quarry site into a tip

- assisting a local conservation group to gain support in eliminating a noxious weed, ragwort, from a region of country Victoria

- developing a case at the request of a local aboriginal group to prevent the sandmining of Cape Bridgewater near Portland under the Heritage Act and Planning Act.

The EDO solicitor has appeared in the Administrative Appeals Tribunal to assist the Victorian National Parks Association to prevent the clearing of land on a significant area with a slope of more than 20%.

The EDO is looking forward to a really productive 1992/93 year.

As a law office the challenge facing the EDO is to make the law useful in pursuing our clients objects. This means making the law useful to environmental defence. For all its faults, the legal process does have the ability to bring an issue into focus. This seldom occurs when an environmental issue is absorbed into the bureaucracy where the tendency is to diffuse the issue and scatter community energies.

The law is a vital part of environment defence in the legal jurisdictions of North America which share our common law tradition. It has also become quite useful in New South Wales where the public now have broad rights to enforce environmental legislation. Despite much lip service from successive governments, the practical usefulness of the law as a means of protecting the environmental heritage of the State of Victoria is unfortunately somewhat more limited.

The challenge before the EDO is huge. To attempt such a challenge with a shoe string two days a week - as we are forced to operate at present, would be totally hopeless were it not for the tremendous support of the many EDO volunteers. These volunteers include leading practitioners in the field of planning and environmental law, academics and students from a variety of disciplines, as well as our typists, librarians, the person who posts the mail and the person who was able to rush vital documents to Monash for expert assessment at short notice. These are some of the people who make my two days a week at the EDO office worthwhile.

Community Right to Know

This initiative by the EDO has now been nursed through the consultation process and was launched in September. Hundreds of hours of work have been put into the project.

Our aim is to have legislation to implement this important advance to citizens rights. We will all have a better knowledge of what is going on with the environment. Forward thinking corporations should support this process.

EDO on the Move

In late August the office moved to Ross House at 247 Flinders Lane, Melbourne. This move has the advantage of having night time access for our evening environment law advice service. By remaining in the city we will also be close enough to the legal precincts for easier access by our volunteer barristers and solicitors. The legal profession continues to give us enormous voluntary support.

Chris Loorham, EDO Solicitor

QUEENSLAND

EDO (Qld) has now established a regular telephone advice line on Wednesday nights. Each Wednesday night the advice line is staffed by two solicitors from a large and enthusiastic group of volunteers.

The main types of enquiries for assistance that the office receives relate to lodgement of objections and institution of appeals under the *Local Government (Planning and Environment) Act (1990).*

As there is no up-to-date text book on town planning in Queensland, EDO is preparing a planning booklet to assist ordinary people to participate in the town planning process.

This booklet will incorporate recent changes to the *Local Government (Planning and Environment) Act (1990).* The changes to the Act include the introduction of State Planning policies to which local authorities must "have regard" in relation to a range of consents the local authority may make under the Act.

During July and August, EDO has provided advice to conservation groups in relation to drafts of the proposed Wet Tropics World Heritage Management and Protection Bill and drafts of the proposed Coastal Protection Bill. In part due to the September State election, it may be next year before the passage of the Bills.

At last, Queensland has freedom of information legislation! The *Freedom of Information Act (1992)* received royal assent on 19 August, 1992. Most of its provisions commence on 19 November, 1992.

In the last issue of Impact, mention was made of the campaign by EDO (Qld) for the insertion of "open standing provisions" in relation to the new *Nature Conservation Act (1992)* and other environmental legislation.

EDO (Qld) and conservation groups are still awaiting the Goss Government to amend the *Nature Conservation Act (1992)* by inserting open standing provisions in all legislation which impacts on the environment.

Improving Energy Services in New South Wales

Nicola Pain (1992) *Clean Power: Legislative Reform for Energy Efficiency, improving energy services in NSW*, Greenpeace, Sydney

Background

In late 1991 a Bill to corporatise the Electricity Commission of NSW was withdrawn from the NSW parliament following opposition on environmental and accountability grounds. Environmental objection to corporatisation centred on the fact that it took place in a policy vacuum. Greenpeace commissioned this report from the Environmental Defender's Office to provide a policy framework to fill the vacuum, with the twin aims of providing energy services and reducing greenhouse gas emissions in the most economically efficient way.

Efficient Energy Services

Energy costs for customers and industry are determined by both the price of energy and the efficiency with which it is used to provide services like refrigeration or lighting. Reforms like corporatisation and the national electricity transmission grid focus mainly on reducing prices. This report aims to improve the efficiency with which energy is used.

Reducing Greenhouse Gas Emissions

In NSW, power stations produce 50 percent of carbon dioxide (NSW Government *A Greenhouse Strategy for NSW. Discussion Paper* June 1990). The cheapest way to reduce greenhouse gas emissions is to improve energy efficiency.

Unfortunately the main focus of utility reform has not yet shifted to reducing the monopoly market power that electricity and gas producing utilities have over distributors and customers.

Corporatisation of the Electricity Commission of NSW without effective competition or regulation would have created an unregulated, unaccountable monopoly with increased market power. Such a body would be unlikely to implement greenhouse gas emission reductions and energy services in the most economically efficient way.

This report proposes regulatory reforms compatible with the constitutional and legal framework in NSW including

- establishment of an independent energy regulatory body, the Energy Council
- enhancement of strategic planning requirements already in the Electricity Commission Act
- expansion of the inquiry provisions of the Energy Administration Act to provide for public participation in the energy planning process

The report includes outlines of the policy changes required together with specific legislative changes that are required to implement these policies

Clean Power: Legislative reform for energy efficiency is available from the EDO for $10.00 (plus postage)