



GREENLAW

NEWSLETTER OF THE ENVIRONMENTAL DEFENDERS OFFICE (SA) Inc.

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Welcome to the August 2004 issue of Greenlaw. If you have received this in hard copy form and would prefer to receive Greenlaw electronically, let us know at edosa@edo.org.au and we'll remove you from the hard copy list. The photos come out in colour on the electronic version!

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EDO Solicitor receives 2004 Jill Hudson Award

The EDO was delighted to hear that staff solicitor, Mark Parnell, was this year's winner of the Conservation Council of South Australia's "Jill Hudson Award for Environmental Protection". Mark received his award from Environment Minister, John Hill, in a special ceremony at Parliament House. In accepting the award, Mark acknowledged the efforts of his EDO colleagues including Administrator, Chris Hales, the EDO management committee and the dozens of volunteer students and lawyers who have helped to run the EDO since 1992.

The annual award is in memory of environmentalist and educator, Jill Hudson who died in 1997. For more information, including the full citation and press release, visit the Conservation Council of South Australia's web site at www.ccsa.asn.au.

EDO Back in Indonesia

EDO staff solicitor, Mark Parnell and EDO Chairperson, Prof Rob Fowler were back in Indonesia in May 2004 for an Ausaid-funded specialised legal training program in environmental law and enforcement. The visit to Semarang and Yogyakarta in Central Java was again aimed at Indonesian judges, prosecutors, police officers, EPA officials and NGO representatives.

As well as the laptops, projectors and reams of legal materials, the Australian delegation also took its cultural exchange responsibilities seriously! Whilst Waltzing Matilda had the participants a little confused, Auld Lang Syne was a popular favourite at the end of a hard week of lectures.



Photo: Rob Fowler

Our post-course study tour was to the World Heritage-listed Buddhist temple at Borobodur. What we found is that this is a popular venue for English teachers to bring their students for a chance to practice on unsuspecting tourists!



Photo: Mark Parnell

Health Impacts of Dust in Whyalla

For some time, the EDO has been advising the Whyalla Red Dust Action Group Inc. in relation to the ongoing fugitive dust emission problem from the OneSteel (formerly BHP) pellet plant at Whyalla.

On 17th March 2004, the Department of Human Services (DHS) [which has since been re-named the Department of Health] produced a Draft Paper on the health impacts of particulate matter (dust), focusing on Whyalla. This paper brings together much of the scientific literature from Australia and overseas. Important points include:

- Confirmation that there is a large body of scientific research in different countries showing consistent links between dust and health effects. These health effects include death and illness. “...*there is little doubt that PM [Particulate Matter] has a direct effect on health...*”.
- Children, asthmatics, smokers and people with heart or respiratory illness are more likely to suffer a range of adverse health impacts from exposure to particulate pollution.
- Dust in Whyalla occurs at higher concentrations, peaks at higher levels and occurs in a drier environment than dust in cities where most other studies have occurred. This is linked to higher indoor exposure and the possibility that health impacts may be worse than those predicted by other studies.

Although this draft paper has not been formally endorsed by DHS, it supports the view that there are serious public health issues to be addressed in Whyalla. It is expected that the EPA will shortly issue a new licence to OneSteel containing maximum dust standards for the first time.

The EDO’s own report of the Red Dust problem – “A Very Dirty Story” can be

downloaded from our web site:

www.edo.org.au/edosa/index.htm

NRM Bill Passed – but not without a fight!

On 5th August, the Natural Resources Management Bill was assented to following lengthy debate and many amendments in both Houses of Parliament. The new Act (yet to be proclaimed) is a consolidation and revision of existing Acts dealing with water resources, land degradation, weeds and feral animals.

Of particular interest to the EDO were the two related issues of third party civil enforcement rights in the ERD Court and the introduction of a statutory judicial discretion in relation to costs in public interest cases. The current Water Resources Act contains civil enforcement proceedings, so it was to be expected that these would be incorporated into the new NRM Act. Nevertheless, it was a close call with the relevant clause only surviving by 1 vote against a determined opposition in the Legislative Council.

The new Act also contains a provision allowing the ERD Court to decline to order costs against unsuccessful third parties. Whilst the High Court has previously said that such a discretion exists, it is important that Parliament has now also recognised the principle that public interest cases should be regarded as a special type of action where normal and prohibitive costs rules ought not apply.

Adelaide Dolphin Sanctuary Bill 2004

On 20th July 2004, the State Government introduced the Adelaide Dolphin Sanctuary Bill into Parliament. The aim of the Bill is to protect dolphins living in the Port Adelaide and Barker Inlet areas. It is designed to improve the quality of their habitat by coordinating activities taking place in the area, such as fishing, boating, sailing and commercial and industrial enterprises.



Photos: Mike Bossley (from DEH web site)
<http://www.environment.sa.gov.au/coasts/dolphin.html>

The impact of these activities on the dolphin population in the area has been substantial. Dolphins are regularly subjected to fishing line entanglements, pollutants, boat strikes, shootings and stabbings. These impacts combine to seriously threaten the future of the population.

The EDO had some criticisms of the Bill, however overall it is a step in the right direction toward protecting dolphins and their environment from the impact of human activities. Although government decision-makers have always been able to take dolphins into consideration when making their decisions, there was no specific obligation to do so. Under the new Act decision-makers will be under a legal obligation to have regard to the objects and objectives of the Act. These focus on the need to protect the dolphin population and their habitat, however they don't guarantee that the dolphins will take precedence over mining, fishing or aquaculture. This was always going to be the most difficult aspect of the Dolphin Sanctuary – superimposing new levels of protection on a highly developed industrial landscape.



Photos: Mike Bossley (from DEH web site)
<http://www.environment.sa.gov.au/coasts/dolphin.html>

Nathan Dam Victory!

On Friday 30 July 2004, the Full Federal Court (Black CJ, Finn and Ryan JJ) delivered a unanimous joint judgment dismissing the appeal by the Commonwealth Minister for the Environment and Heritage against the decision of Justice Kiefel in the Nathan Dam case.

The original Nathan Dam decision earlier this year was an important win for the EDO (QLD) who represented the QLD Conservation Council and the World Wide Fund for Nature (Aust). The plaintiffs sought judicial review of the decision of the Commonwealth Environment Minister under the *EPBC Act* 1999 (Cth) approving the construction and operation of the 880,000 megalitre Nathan Dam on the Dawson River in Central Queensland. The Dawson River is upstream of the Fitzroy River, running through to the coast and the Great Barrier Reef. Water from the dam would be used by irrigators whose activities had the potential to contaminate the river with chemicals and thus impact on the Great Barrier Reef – a Matter of National Environmental Significance under the *EPBC Act*.

At trial, the main issue was the extent of enquiry the Minister was obliged to undertake under s75 of the *EPBC Act* when making a decision. The Minister had refused to take into account the impacts of the increase in downstream pollution associated with third party activity. The Federal Court overturned the Minister's decision, holding that the Commonwealth is obliged under the *EPBC Act* to consider *all* adverse impacts of an activity. It was held that the Minister must undertake a wide enquiry that may extend to the whole, cumulated and continuing effect of the activity including the impacts of activities undertaken by third parties.

In upholding Justice Kiefel's decision, the Full Court of the Federal Court has further cemented a principle which will now apply to all *EPBC Act* referrals of proposed actions

made to the Minister. The decision may also broadly influence state-level environmental assessment.

The Full Court found that the Minister's assessment of "all adverse impacts" was not confined to direct physical impacts but included indirect impacts and effects "which are sufficiently close to the action to allow it to be said, without straining the language, that they are, or would be, the consequences of the action on the protected matter".

Ultimately, the case may not stop the dam, but it will require a proper, broad consideration of the actual impacts of the dam (including the impacts of irrigated agriculture facilitated by the Dam).

[\[Minister for the Environment and Heritage v Queensland Conservation Council Inc and WWF Australia \[2004\] FCAFC 190 \(30 July 2004\)\]](#)

Cape Jaffa Lighthouse Platform

The EDO has been pleased to advise local conservationists in the South East of the State about legal options to preserve the Cape Jaffa Lighthouse Platform. The platform, which was once home to a lighthouse and dwelling (see below) sits some 7 kms off the Coast at Margaret Brock Reef and is within an Aquatic Reserve under the Fisheries Act.



Photo: Lighthouses of Australia Inc.

Whilst the light and other buildings have been removed, the platform still remains and is

now home to South Australia's only nesting colony of Australasian Gannets.



Photo: Robert Mock

The threat to the structure (and the birds) comes from AMSA —the Australian Maritime Safety Authority – which wants to demolish the platform for safety and liability reasons. In April 2004, AMSA announced a stay of execution in relation to the proposed demolition, which will hopefully enable more discussions to take place to try to resolve a compromise that protects these magnificent birds.

Win for Wetlands and C'th in Greentree Case

Another EPBC Act case has also made big news in environmental law circles. On 11 June 2004 Justice Sackville of the Federal Court found that Ronald Greentree and the company he controlled, Auen Grain Pty Limited had contravened s16(1) of the EPBC Act by clearing vegetation, ploughing and sowing wheat on a privately owned part of the Gwydir Wetlands in New South Wales. The wetlands are listed under the RAMSAR Convention signed by Australia in 1974, which protects internationally significant wetlands. Justice Sackville found that Mr. Greentree and Auen were each liable to a civil penalty and that the basis for injunctive relief (to stop future possible illegal activities) was established. A separate hearing will determine the level of penalties and whether a remediation order is appropriate. The NSW EDO has congratulated Commonwealth

Environment and Heritage Department and Minister Kemp for this excellent result in holding farmer Greentree accountable.

For more information about the Greentree case see the Commonwealth Department of Environment and Heritage's site <http://www.deh.gov.au/epbc/compliance/judgements/index.html> or for the Judgment, see <http://www.austlii.edu.au/au/cases/cth/federal/ct/2004/741.html>.

Silencing Dissent

In June 2004 The Australia Institute released its Discussion Paper no 65, entitled "*Silencing Dissent: Non-government organisations and Australian democracy*". In this report, authors Sarah Maddison, Richard Denniss and Clive Hamilton examine the history, structure and role of non-governmental organisations (NGOs) in Australia, and analyse the interaction between NGOs and Government at both the Federal and State level. The report ultimately focuses on obstacles to NGO participation in public and political debate in Australia.

The report is highly critical of the current Federal Government. Among many significant observations, the report identifies key strategies undertaken by the Howard Government to "*silence NGOs*", including tactics such as "*freezing out and defunding uncooperative organisations, use of intimidatory methods, and micromanagement of relationships between the government and peak organisations.*" In addition the report asserts that: "*Bullying, public efforts to demean and disparage dissenting voices, attempts to 'muddy the waters', creating media distractions to deflect attention away from critics, all appear to be part of the Government's armoury in the public debate battle.*"

The report was largely based on a survey of 290 NGOs working on a wide range of welfare, community and environmental issues. Of these 290 groups, 70% reported that "their government funding restricts their

ability to comment on public policy”, and 74% believed the Government pressured NGOs to “make their public statements conform with Government policy”. Frighteningly, the authors also state that “90% of respondents believe that dissenting organisations risk having their funding cut.”

As for the ability of groups to influence Federal Government decision-making, the report claims that 61% of NGOs surveyed believed the Federal Government to be “‘often’ or ‘always’ not interested” in policy advice from NGOs.

Whilst not identified in the report, the EDO experience has been that we have maintained our level of funding from the Commonwealth over the last 8 years, however we are restricted from using this “Legal Aid” money for “litigation-related activities”. The current Federal opposition has promised to lift this restriction if elected at the next poll. Our State grant may be used for litigation advice, but not representation in Court.

The Discussion Paper is available from the Australian Institute website at www.tai.org.au

Wilderness Is Sacrosanct



Photo: Blue Mountains Conservation Society

Congratulations are in order to the New South Wales EDO for a great win in the “Stealth” case in the NSW Land & Environment Court. The case was over proposed commercial filming for the blockbuster Korean War movie “Stealth”. Filming was to take place in the fragile ecosystem and sensitive hanging swamps of the Grose Wilderness in the Blue Mountains National Park.

Environmental protestors had blockaded access to the area pending legal action by the EDO on behalf of the Blue Mountains Conservation Society against the Director-General of the National Parks & Wildlife Service, Minister for the Environment and AFG Talons Pty Ltd (the film company). An urgent injunction was sought to restrain filming on the site on the basis that the approvals and consents were in breach of the NPW Act and the Wilderness Act and contrary to the purposes of the reservation of the land as wilderness.



Photo: Blue Mountains Conservation Society

It was argued that it was beyond the Director-General's power to grant authorities for use of land contrary to the purposes of the reservation and the NPW Act and Wilderness Act.

Lloyd J in the Land & Environment Court found in favour of the EDO's client on all points and awarded costs. His Honour concluded with the comment: “In my opinion, the governing consideration [in this case] is that declared wilderness areas are sacrosanct.”

The State Government pulled out of a threatened appeal and the film crew eventually found another less sensitive place to film. A number of protestors who were part of the original blockade still have outstanding charges to defend, however it is hoped that most of these charges will be dropped.



Photo: Six Arrestees from the Blockade face the music at Katoomba Courthouse. Blue Mountains Conservation Society

Source: <http://www.bluemountains.org.au/conservation/Campaigns/Stealth/index.shtml>

PS. In South Australia, the EDO, along with the Conservation Council, Tourism SA and the National Parks & Wildlife Council is engaged in a process with the NPWS to develop policies to guide the NPWS in relation to leases or licences over National Parks and other reserves. It is hoped that this process will prevent the sort of inappropriate commercial arrangements that were evident in the Stealth Case.

Senate Inquiry into Legal Aid

In November last year, EDO staff solicitor, Mark Parnell, travelled to Port Augusta to give evidence to a Senate Legal & Constitutional Affairs Committee hearing into Legal Aid. In many respects, the inquiry was identical to one conducted in 1997. The key issue for the EDO in both inquiries was to call for the lifting of the restriction on the EDO's use of public legal aid funds for "litigation-related activities". And in both inquiries, the recommendation was that the restriction served no useful purpose and should be lifted. A minority report by government senators recommended the status quo remain.

The Federal ALP has now promised to remove the funding restriction if it wins office at the next election. The government is unlikely to alter its current position.

EDO SA in the Courts

The EDO has two matters currently before the ERD Court.

Boots & Partners v. Adelaide City Council & Others

In June, the EDO represented two clients (Wirranendi Inc. and the Christie Walk Community Corporation) in a merits planning appeal against a block of 24 flats proposed for a vacant block next to the EcoCity "Christie Walk" development in Sturt Street, Adelaide.

The case was largely argued on the basis of "overlooking" and "overshadowing". The residents of Christie Walk were concerned that much of their direct sunlight would be cut off by the proposed development. It was argued that the ground floor rooms of Christie Walk would receive less than the 2 hours of mid-Winter direct light envisaged in the Planning Scheme.

The ERD Court is yet to hand down its decision.

Castalloy v EPA

The EDO is also involved in a company appeal against an EPA licence. We represent a local resident affected by odour and noise pollution from the Castalloy, North Plympton foundry - a major car parts manufacturer.

After many years of pollution and a failed relocation proposal last year, the EPA eventually revised the company's licence with tough new odour and noise standards. The company appealed and one local resident was successful in joining, however the EDO was unsuccessful in joining another client, the Western Suburbs Residents Environmental Association Inc.

The appeal against the EPA licence and some related appeals against EPA Orders (in which the EDO is not involved) are currently being handled together at the pre-trial conference stage.

Book Review: Is the Party really over?

By Joseph Smith, Volunteer EDO researcher

According to a new book by American writer Richard Heinberg, *The Party's Over: Oil, War and the Fate of Industrial Societies* (New Society Publishers, New York, 2003), the fossil fuel joyride that the industrial nations have enjoyed for over two centuries is rapidly coming to an end. Awaiting in the world of tomorrow are the social traumas from dwindling energy resources, resource wars and impending industrial collapse. Or alternatively there is the prospect of the creation of a kinder more peaceful world where humans have at last learnt to live in harmony with the environment.

According to Heinberg, the world has now entered the last years of "cheap" oil. The evidence indicates that global oil production has now reached its peak or what is technically known as the peak of its Hubert curve. It is expected that the peak of global oil production will occur in the period from 2006 to 2015 and that there will be an average of two percent decline in energy available for use each year afterwards, forever.

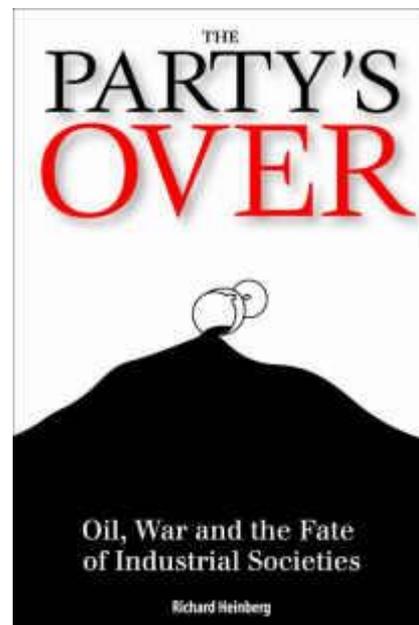
Petroleum geologists such as Colin Campbell have pointed to the US oil situation as illustrating the future of oil. Oil discovery peaked in the US in the 1930s and oil production peaked about forty years later in the 1970s. The US has had oil shortfalls every year from 1970 and has had to import oil since that time. More oil wells have been drilled in the US than in any other nation on earth. America's experience will be repeated across the globe.

Global discovery of oil peaked in the 1960s and since production curves ultimately mirror discovery curves, global oil production will eventually peak at some point in the foreseeable future. Dr Heinberg examines an emerging geological consensus on this matter and concludes that the Hubert peak for the world is around 2010, give or take a few years.

There will still be petroleum in the ground but extraction will be subjected to what economists call rising marginal costs. Every year it will become a little more expensive to extract as much oil as was extracted the year before. Unconventional oil resources such as shale oil and

oil sands are plentiful but extremely costly to extract. No foreseeable technological innovation is likely to change this cold hard reality Dr Heinberg argues.

Nor can the industrialists get much comfort from the use of alternative energy sources to fuel industrial society. Hydrogen is not an energy source at all as it takes more energy to produce a given quantity of hydrogen than the hydrogen itself will yield. Most commercially produced hydrogen comes from natural gas and natural gas production will peak only a few years after oil declines. Other energy sources such as nuclear energy have well known problems such as waste disposal.



Clearly conservation of energy must be practiced along with the use of renewable energy. However Dr Heinberg demonstrates that this will not be sufficient to fuel the present global consumer society, let alone the expanded economy of the middle of this century on the business as usual scenario. Even to make a smooth transition from non-renewable to renewable energy will take many decades and there is not a window of time for this before the Hubert peaks are reached. A complete redesign of industrial society will be needed and almost nothing has been done along these lines.

The impending oil crisis will impact on all facets of the world we know. This includes food production, international relations and social order. There is a potential for a breakdown of society to occur and some theorists such as Robert Kaplan predict a Mad Max type of anarchy of a return to the jungle being the most likely outcome.

There is however an opposing view that the fuel crisis will lead to the creation of sustainable societies where the ruling values are not based upon corporate greed and the unrestrained pursuit of profit, but on community self-reliance, solidarity and interdependence.

It is clear, at least to most of us, that the law will have a major role to play in shaping human destiny –for better or for worse. Unfortunately there have been no discussions of the role of the law in the future age of scarcity and The Party's Over does not deal in depth with the myriad of jurisprudential questions that arise from this issue. Perhaps this review may stimulate some constructive legal thought on this matter.

Wine Fundraiser

Last year, our Temple Bruer organic wine fundraiser made over \$8,000 profit for our public interest litigation fund. This year, it's on again with some new varieties of organic and traditional wines from Temple Bruer's Langhorne Creek estate.

We will be sending details to our members and supporters shortly or you will soon be able to download one from our web site: www.edo.org.au/edosa/index.htm.

Bills to Watch in State Parliament

The second half of 2004 should see a number of important Bills introduced into State Parliament. These include the "Sustainable Development Bill" and the long-promised contaminated land legislation. The EDO will be looking carefully at both Bills to ensure appropriate rights of access to information and public participation are included. Early drafts of the Sustainable Development Bill were encouraging, however there are still some worrying elements in relation to restrictions on 3rd party joinder.

Digital Projector

The EDO is now the proud owner of a digital data projector, courtesy of a small equipment grant from the Law Foundation of SA. We use the projector for presentations and legal education work, however we are also happy to lend to other non-profit conservation groups. To find out more, contact Chris or Mark in the Office.

Sponsorship

The EDO acknowledges the support of the Commonwealth Attorney-General's Department and the SA Department for Environment & Heritage

Internode

Thanks again to Internode for its generous sponsorship of ISP broadband services.



Private Firms and Organisations

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