GREENLAW

NEWSLETTER OF THE ENVIRONMENTAL DEFENDERS OFFICE (SA) Inc.

Office: 1st Floor, 408 King William St, Adelaide, South Australia
Postal Address: GPO Box 170, Adelaide, SA 5001
E-mail: edosa@edo.org.au ~ Web: www.edo.org.au
Ph: (08) 8410 3833 ~ Fax: (08) 8410 3855
Country Freecall: 1800 337 566

October 2005: No 19

Welcome to the October 2005 issue of Greenlaw. It has been a while so this is a bumper edition. 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!

In this issue

Office News

EDO in South East Sulawesi, Indonesia

Last month, EDO solicitor Mark Parnell was part of an AusAid-funded training program for Indonesia Judges, prosecutors and police officers. Held in the city of Kendari in SE Sulawesi, Mark assisted Australian team-leader (and EDO Treasurer) David Cole in presenting courses in environmental law and enforcement. Using case studies such as the TransAdelaide pollution prosecution, Ok Tedi, Tuna feedlot appeals and OneSteel civil enforcement case, we attempted to explain the range of legal options open to different stakeholders in environmental disputes.

David Cole & Mark Parnell at the home of Arsyad Sanusi, Chief Justice of the High Court in Kendari

EDO Annual General Meeting

The twelfth EDO (SA) Inc. Annual General meeting will be held on Friday 18th November 2005 at 6pm at the Astor Hotel, Corner Pulteney and Gilles Streets. Join us for drinks before and dinner afterwards. Bookings required for dinner - phone Chris on 8410 3833. $40 pay on the night. Drinks at the bar.

Mark Parnell on the hustings

After nearly 10 years with the EDO, Staff solicitor, Mark Parnell, is taking a well-deserved Long Service Leave break from the end of the 2005. Rather than spending 3 months lying on the beach, Mark will be out on the hustings campaigning for the Australian Greens in the lead-up to the 18th March 2006 State election.

In June, Mark was pre-selected as the lead candidate for the Greens in the Legislative Council. With a required "quota" of 8.3%, Mark has a good chance of being the first elected Greens MLC in South Australia.

It is likely that Mark will be replaced at the EDO by a temporary solicitor during his long service leave break. If he is elected to Parliament, a permanent replacement will be sought.

Mark Parnell with Senator Bob Brown

New on the EDO web page

We have recently re-designed our web page to make it easier to use and faster to load. Thanks to Tom Partington (brother of EDO legal volunteer, Fiona Partington) for putting together the new template. Any (helpful) feedback welcome!

Mobile Phone Towers

The EDO receives many requests from people wishing to oppose new mobile phone towers. It is beyond the scope of our resources to take these cases on, however we have put together a list of on-line materials to help our clients find their way through this complex area of law. See: http://www.edo.org.au/edosa/publications/fact_sheets/EDO%20Guide%20to%20Mobile%20Phone%20Towers.html

EDO Seminar on NRM Act

The EDO's seminar on the NRM Act 2004 was a fantastic success with over 180 delegates from a broad range of government departments, local councils, private companies, academic institutions and Environmental NGOs.

A full report of the day's proceedings including photos and copies of presentations can be found on the EDO web page at: http://www.edo.org.au/edosa/NRM/NRM%20summary.html

The EDO would like to thank our sponsors who assisted with the seminar:

- Law Foundation of SA Inc.
- Norman Waterhouse Lawyers
- SA Dept of Water, Land & Biodiversity Conservation
- SA Attorney-General's Dept
- Marine & Coastal Community Network
- University of South Australia

Shipwrecks protected

Up to 189 shipwrecks across South Australia's coastline have been given greater protection. Under the Statutes Amendment (Environment and Conservation Portfolio) Act 2005, all wrecks are regarded as "historic" and are therefore protected when they are 75 years old. Previously shipwrecks in state waters were assessed on a case by case basis to determine whether they are of historic significance. The legislation will bring South Australia in to line with other state and Commonwealth laws.

Source: Hon John Hill, Minister for Environment and Conservation News Release, 27/06/05, 'Historic Shipwrecks Protected'

OneSteel Whyalla

*"**SA Government buckles.** It is hard to imagine a more abject abandonment by a state government of its obligation to allow its environmental regulator to operate in a fair and unfettered manner than this bill." [Environmental Manager Newsletter, Thomson Legal & Regulatory Ltd no.549 September 27, 2005 - Editorial comment]*

It is hard to know where to begin in telling the story of the legal and political shenanigans surrounding the on-going saga of red dust pollution from the Whyalla Steelworks and the fight of the residents of East Whyalla for a clean and healthy environment.

Since first opening a file in 1997, the EDO has tested the effectiveness of various aspects of our legal and political systems to deliver environmental justice and found it seriously lacking in many areas.

OneSteel Pellet Plant - 1st October 2005. Photo: Bob Hannan

Pre-2000: Unlimited pollution

Our advice to our clients in 1997 was that they had a political rather than legal problem, because the then steelworks operator, BHP, was protected by a 1958 Indenture Act that authorised virtually unlimited pollution. Under s.7 of the Act, BHP was:

> *"not liable for discharging, from its works at or near Whyalla, effluent into the sea or smoke dust or gas into the atmosphere or for creating noise, smoke, dust or gas at such works, if such discharge or creation is necessary for the efficient operation of the works of the company and ... is not due to negligence on the part of the company"*

2000 First EPA licence

When the Steelworks was transferred to OneSteel following the BHP restructure in 2000, this protection was lifted and the steelworks was brought under the operation of the Environment Protection Act for the first time. A ten year licence was issued and various long term exemptions granted for certain types of pollution.

Unfortunately for the residents of East Whyalla, the 2000 EPA licence said virtually nothing about the main pollution problem affecting the steelworks' neighbours, namely fugitive dust emissions from the Pellet Plant and surrounding areas. Most importantly, the licence set no measurable standards for dust pollution.

Following increasing complaints from the community and very bad dust levels recorded in 2003, the EPA eventually decided to revise the company's licence to incorporate specific dust reduction conditions based on national health-based standards in the Ambient Air Quality NEPM. This standard was to be progressively implemented up to 2008. According to the EPA:

> the Authority considers it necessary to impose the conditions in consequence of a risk of material or serious environmental harm occurring from activities conducted at the site

Residents' Civil Enforcement Action

Despite announcing its intention in June 2003 to revise the OneSteel licence, it became clear to the residents of East Whyalla that the EPA would not be pursuing any remedy for the people affected, other than imposing new dust standards. In particular, the EPA would not be pursuing the company to clean or repair property damaged by OneSteel dust and it would not be requiring additional monitoring for the very fine particles (PM2.5) that are thought to have serious health impacts.

Therefore, the Whyalla Red Dust Action Group Inc. decided to commence "civil enforcement" proceedings under s.104 of the Environment Protection Act. This was the first time that this type of action had been brought against a large corporate polluter.

In September 2004, the ERD Court determined that the Action Group was a "person whose interests are affected" and ordered that a summons be issued against OneSteel.

Photo: Bob Hannan 4/10/05
Road dust from unwatered OneSteel roadway

Residents' case survives strike-out attempt

What then followed was 12 months of shuffling between the ERD Court and the Supreme Court arguing various technical points of law without ever getting to the heart of the issue as to whether or not OneSteel's pollution was excessive or unreasonable.

In September 2005, the ERD Court dismissed an application by OneSteel to have the summons thrown out and the Court again reiterated its earlier findings that the proceedings were properly brought and that OneSteel has a case to answer. The matter has been re-listed for a conference on November 7th.

January 2005: Second EPA licence

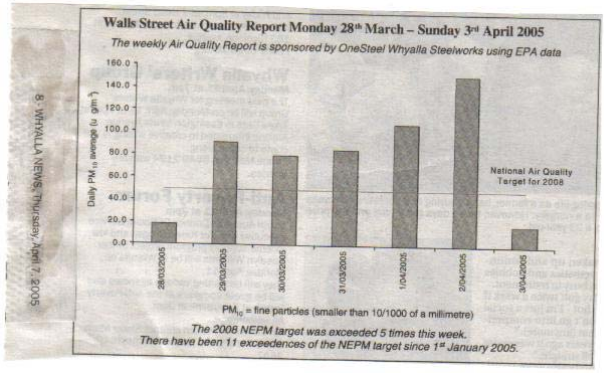
On January 31st 2005, some 18 months after announcing it would revise the OneSteel licence, the EPA finally presented OneSteel with its new operating conditions, including dust control measures for the first time. OneSteel then appealed against the new licence and the Whyalla Red Dust Action Group Inc. applied to join the case. The ERD Court granted the joinder application, however this decision was subsequently overturned by the Supreme Court. Despite making a very useful contribution to a number of unsuccessful "stay applications" lodged by OneSteel, the Action Group is no longer part of these proceedings.

Whilst the Supreme Court decision against community participation in EPA licensing disputes is disappointing, it is of little consequence in the present case because the licence appeal has been effectively killed off by political intervention. [see below]

Health-based pollution standards

Central to the OneSteel objections to the licence were requirements to reduce dust to levels below national health standards. The EPA decided that it would judge the company's environmental performance by monitoring dust levels at a monitoring site across the road from the Whyalla Town Primary School. In two years of operation, this monitoring site shows regular exceedances of the health-based national standard for "particulates". EPA chemical analysis shows that most of the dust comes from the Steelworks.

Already in 2005, the national health-based standard has been exceeded 19 times near the Primary School. The national standard provides for no more than 5 exceedances per year. In fact, the standard was exceeded on 5 consecutive days in April 2005 - a whole years "quota" of dust pollution in one week!



Five exceedances in five days
Source: Whyalla News

September 2005 - Premier Rann to the rescue

Unable to convince the independent EPA to soften its stance on dust pollution levels, OneSteel called on the State Government to intervene on the company's behalf.

Under the Environment Protection Act, the EPA is independent of government on all matters relating to licencing and enforcement. This means that it is not possible for the Environment Minister or the Premier to tell the EPA what it

should or shouldn't put in its licence. The only way the government can circumvent the EPA is to change the law - and this is exactly what it has now done.

On Monday 17th October 2005, the **Broken Hill Proprietary Company's Steel Works Indenture (Environmental Authorisation) Amendment Bill** passed through all stages of State Parliament and now only awaits Royal Assent and Proclamation. This Act is specifically designed to protect OneSteel from the pollution standards set by the "independent" EPA and also undermines the civil enforcement action brought by the Whyalla Red Dust Action Group Inc.. The Act amends the old 1958 BHP Indenture legislation and provides for a special regulatory environment for Steelworks, outside normal EPA licensing arrangements. In a nutshell, the Act replaces the EPA with the Mining Minister as regulator and replaces the EPA licence (including its health-based dust pollution standards) with a new licence written by the Minister in conjunction with OneSteel. Special "deeming provisions" prevent future legal action, provided the company meets minimal new licence standards.

For the record, the Bill was opposed only by the three Democrats and No Pokies' Nick Xenophon in the Legislative Council and Kris Hanna of the Greens in the House of Assembly.

Dust from ore loading 1st December 2004. With Project Magnet, exports of ore are expected to treble over the next few years. Photo: Bob Hannan

The EDO took the unusual step of issuing a media release to call on the Government to abandon the Bill. EDO Chairperson, Rob Fowler, highlighted the retrograde nature of the legislation, which he said was "reminiscent of the 'special deal' legislation that was commonplace in Queensland in the 1970's under the Petersen government."

Despite numerous requests over the last year, Premier Rann has refused to meet Whyalla residents to discuss the dust pollution problem. He has met OneSteel executives several times.

Where to next?

OneSteel

OneSteel has made record profits over the last year. With steel prices and export markets booming, these results will probably continue. With the removal of all measurable pollution standards from the OneSteel licence, the company is now under minimal pressure to reduce its emissions.

East Whyalla residents

Hopefully, OneSteel is correct in its claims that its proposed expansion and new "wet processing" methods (know as "Project Magnet") will reduce the pollution problem some time after 2007. In the meantime, the residents of East Whyalla will continue to be subject to massive depositions of dust on their homes and consequent risks to health.

Environment Protection Authority

The EPA is left licking its wounds and is now officially a "lame duck regulator" following the massive vote of no confidence in its regulatory abilities by Labor and Liberal politicians. Not surprisingly, there has not been a single public comment from the "independent" EPA Board. Staff moral is at rock bottom and the clear message Premier Rann is sending to industry is "if the EPA makes your life difficult by requiring tough pollution control measures, then come and see me and I'll fix it up for you with special legislation."

Environmental Defenders Office

The EDO will continue to campaign against these retrograde measures and will continue to fight for a clean and healthy environment for the people of East Whyalla.

Once we sacrifice the independence of the EPA, then the whole system of pollution regulation and control in South Australia is tainted. South Australians will no longer be confident that licensing and enforcement decisions are free from political interference.

Castalloy

For several years, the EDO has assisted the residents of North Plympton in their efforts to obtain relief from odour and noise pollution from the Castalloy automotive parts foundry. This has been a frustrating exercise for the residents, who have seen promise after promise broken by the company and every deadline for compliance passed with no improvement. Despite the fact that this one factory was the single-biggest generator of complaints to the EPA, attempts to force the company to improve its performance were unsuccessful over many years.

The matter came to a head in 2003 when the EPA finally took enforcement action in the form of Environment Protection Orders and a revised Licence. The new licence required the company to comply with specified odour and noise levels by 30th June 2004. Castalloy appealed against this licence and two third parties sought to join the appeal. This was our second attempt at such an application having previously tried to have a residents' group joined in the long-running Hensley Foundry case, at Torrensville in 2000. This time, we were marginally more successful, with the ERD Court rejecting the application by the Residents' Association, but approving an "alternative" application by Mr Ed Woltynski, one of the individual residents affected by the pollution.

Mr Woltynski (represented by the EDO) then joined the company and the EPA in over a year of fruitless negotiations in the compulsory "round table conference". By the time it was apparent that a resolution was unlikely to be reached, Castalloy (part of the Ion Automotive group) was in voluntary administration having posted record losses and suffering major operational difficulties at many of its South Australian and interstate plants.

The Administrators of the company, McGrath Nicol & Partners have now stepped into the shoes of the Directors and the Court conference was resumed with a greater sense of urgency. The Administrators were fairly quick to realise that selling the business to a new buyer would be difficult unless the environmental dispute was resolved first.

With the licence about to expire, negotiations moved to focussing on what the next EPA licence for Castalloy (or subsequent purchasers) would contain. Whilst this was outside the scope of the original appeal, it made sense to resolve it as part of the appeal, rather than go through the motions of reissuing the licence and forcing another appeal.

So, with the Court's consent, the matter was settled the day before the licence expired with all parties signing a Deed of Settlement which included a new 10 year licence. Key features of the licence include:

- Odour to be reduced to "2 odour units" by 30 June 2006
- Night time noise to be reduced to 54dB by 30 June 2006 and 50 dB by 30 June 2007.

Under the Deed, the EPA agrees not to alter the odour or noise standards during the 10 year term, however it can alter other parts of the licence. Mr Woltynski agrees not to take any legal action against the company in the period up to June 2006 in relation to pollution, except for "excessive short term intrusive noise or odour" resulting from particular work practices. Importantly, because the Residents Association was not joined to the appeal, it is not part of the settlement, therefore it could bring legal action against the company at any time if it felt that pollution levels were unacceptable.

In the final analysis, most residents will be happy that the odour and noise standards are now legally enforceable, however there is still resentment at the fact that it took far too long.

Seated: Dr Paul Vogel. Standing L to R: Environment Protection Officer Josh Bruce, Community Representative Ed Woltynski, EPA Deputy Chief Executive Max Harvey, Finlayson's Solicitor Kyra Reznikov, EPA Southern Operations Manager John Dunsford, Crown Solicitor Dr Nick Manetta, Environmental Defenders Office Solicitor Mark Parnell, and Crown Solicitor Alison Field
Photo: EPA public relations

"Marinising" NRM - are we missing the boat?

Tony Flaherty
*Acting National Coordinator, Marine & Coastal Community Network**

Tony's commitment to the marine environment is reflected in his wedding vest – featuring the state marine emblem – the leafy sea dragon

With the State government recently implementing its Natural Resources Management Act and in the process of producing its state Natural Resources Management Plan, the question needs to be asked as to whether we are taking full opportunity of the NRM planning to better mange our coasts and seas?

The word 'marinise' may not be in some dictionaries or 'spell-checkers'. It is however a word commonly used in marine engineering and boating circles when one needs to convert an ordinary car engine into a sea-going one. Whilst it would be preferable to buy a marine engine, these are costly (as are most things marine), and in many cases a 'marinised' engine 'will do' to get a vessel to its destination. Whilst not necessarily the most desirable outcome, (as opposed to dedicated integrated marine and coastal management planning mechanisms), a marinisation of Natural Resource Management is needed to make sure the 'ship' runs smoothly and can weather the storms ahead.

Australia's seascapes are facing many pressures, including: population growth, coastal development and high visitor numbers; declining water quality; habitat loss; sea level change, introduced marine pests; overfishing, the rapid expansion of aquaculture and deficiencies in knowledge and information, capacity, compliance and enforcement.

Since the 1993 Resource Assessment Commission's Coastal Inquiry much progress has been made in Australia in developing state and national marine and coastal policies and integrating community aspirations into management and conservation. Of particular note was the integration of Commonwealth, state and local governments in the delivery of Coastal Policy initiatives such as Coastcare and the Coast and Clean Seas programs in the 1990's. Most recently governments are seeking to implement a Framework for a National Cooperative Approach to Integrated Coastal Zone Management.

In recent years the Australian Government has invested significant resources into its Natural Heritage Trust (NHT) in an attempt to address a number of coast and marine issues. Under the second phase of the NHT, the planning and investment to address issues has been largely decentralised to a regional delivery model under the banner of 'Natural Resource Management' (NRM).

With the introduction of Natural Resource Management processes there have been many changes to the ways in which coast and marine programs are now delivered. Some have argued that the implementation of NRM arrangements has resulted in a lacuna in the delivery of coastal and marine programs.

NRM is being delivered through programs such as the Natural Heritage Trust and The National Action Plan for Salinity and Water Quality (NAP). To date the main focus of NRM has been on developing frameworks to deal with more terrestrial issues such as salinity, declining water quality and terrestrial biodiversity loss. The Australian Government is working with State and Territory Governments to implement Natural Resource Management (NRM) programs. The delivery of the programs is via regional planning.

This is a firm foundation for extending the approach to coastal and marine bioregions and moving towards a catchment to coast to marine approach.

Whilst the aims of the NHT and NAPs should not limit the application of programs in marine and coastal environments, it is partly due to a land-based focus in developing NRM that the opportunities for integration of coastal and marine based management have largely yet to be fully realized. Having grappled with complex terrestrial issues, many NRM groups and catchment committees are in a position to

expand into a catchment to coast to marine framework.

Many of the pressures affecting coastal systems need to be tackled across regions. This highlights the opportunity for a state NRM strategy or Plan to be able to deal effectively with some of these issues - the spectre of Introduced Marine Pests, the rapid development of aquaculture, the ongoing pollution processes affecting our seas and the dire need for marine conservation through a system of Marine Parks and species protection.

Many of these - whilst needing big picture state and National frameworks to be tackled effectively can be advanced at regional levels through integration into NRM planning processes.

To minimise impacts to marine and coastal environments there is a need to manage activities far upstream as well as along the many different regional boundaries of the coast and out to sea. Hazards to marine and coastal areas often come from diffuse, land-based activities so that potential problems may be difficult to turn around. Additionally, a single event, such as an oil spill or introduction of a marine pest can have widespread consequences, so there is a need for coordination and cooperation across regions to ensure effective responses to threats, with prevention as a major focus.

Successful marine and coastal conservation and management will also depend on community-led approaches, backed by expertise built and held in regional communities, as well as long-term certainty of resourcing and full integration with existing NRM processes.

Unfortunately a perusal of the "Consultation Document" Towards South Australia's State Natural Resources Management Plan 2005-2010 finds such marine and coastal integration still poorly progressed. Additionally effective integrated coast and marine management is perhaps also stymied by the SA NRM Act effectively stopping at the low water mark, though it has some ability to tackle land based issues that affect the marine environment.

Some integration of the much delayed marine planning processes into a revised Development Act and some marine park legislation is mooted. However there is a real opportunity to implement and more importantly resource through target regional investment strategies some of the key elements of marine and coastal management at the local level.

To secure long-term viability of community based management processes in the marine and coastal environment there is an urgent need to progress the integration of coastal and marine conservation and management throughout the NRM process and ensure that the specialist needs in community skills development and resourcing are maintained. Natural Resource Management must become *Now Really Marine.*

Yes- let's marinise NRM planning – just like Tony has marinised his wardrobe – Ed.

* **Tony Flaherty** is co-author of a recent Marine and Coastal Community Network guide to 'Taking NRM beyond the Shore - Integrating Marine and Coastal Issues into Natural Resource Management'. The Guide offers information and practical advice on how to better incorporate coastal and marine issues into regional NRM plans. The MCCN NRM Guide is available on line at www.mccn.org.au

Load Based Pollution Licensing

In 2004, the EDO became aware of an important inquiry being undertaken by the EPA. As part of its stated commitment to the "polluter pays" principle, the EPA had embarked on a process of devising arrangements for "load-based licensing". As discussed below, this is a worthy project, however it has been undermined by political considerations that seek to keep South Australia one of the cheapest places in Australia in which to pollute.

Following earlier recommendations from the Environment Resources and Development Committee of State Parliament, the EPA determined that a significant component of licence fees should be based on pollutant load. Most EPA licence fees at present are based on other factors (e.g. materials used or processed, production volumes, processing capacity etc) as proxies for environmental impact. Only discharges to the marine environment currently incur load-based fees.

From a "polluter pays" perspective, it makes sense to charge on the basis of actual pollution rather than how many "widgets" are produced or tonnes of materials processed.

The proposal is for part of licence fees to be proportional to some measure of pollution discharge. Details are yet to be set, however the proposal covers:

- Part of the fee to cover EPA administrative costs

- Part of the fee to cover sectorial environmental management costs. This would include different fees possibly depending on the location of the industry, industry specific risks and EPA costs associated with industry types.

- Part of the fee "load based". Propose to use some pollutants covered by the National Pollutant Inventory (NPI). Fee proportional to the quantity and perhaps toxicity of pollutant discharged. The advantage of this approach is that as these industries pollute less then their licence fees reduce giving a direct incentive to reduce pollution.

Key Issues "off the agenda"

Prior to the EDO's involvement in consultation some key issues had already been decided. Unfortunately, one of these "non-negotiable" issues relates to how much money polluters SHOULD PAY for the "right" to pollute the environment.

As a pre-requisite to discussions, the EPA has said that the total amount of licence fees currently gathered from SA polluters (about $6.4 million per annum) will not change except for previously agreed rises. Therefore the load-based licensing exercise is about redistribution of fees not about creating major incentives not to pollute.

To genuinely apply "polluter pays" as a concept, load based licence fees should seek to cover some of the externalities created by pollution. This is also referred to as "internalising of externalities" or in other words, that industry rather than the community or the environment should pay for the impacts of pollution. These impacts go far beyond the cost of EPA administration.

Other controversial issues

Whilst the detail of the load based licensing fee structure has not been set, some issues are certain to be controversial. For example:

- The use of the NPI to choose and or measure pollutants to create the fee structure. It is likely that the NPI will be the basis of the list of pollutants, however not all NPI listed pollutants will be included. Issues of the accuracy of NPI measurement and estimation methods may be of concern. Also, the list of pollutants under the NPI is less than a quarter of the pollutants listed under the U.S. Toxic Releases inventory.

- Some very significant pollutants are not included on the NPI, such as greenhouse gases. With global warming one of the biggest environmental issues facing the planet, it seems ludicrous to leave these gasses out of the equation. Including GHG would be a symbolic and educational change, albeit a small one in future forms of carbon accounting.

- It should also be noted that pollutants such as odour and noise would not be part of the load base. I wonder what the residents of North Plympton would think about that? The Castalloy factories have been one of the biggest sources of complaints to the EPA in recent years. The pollution complained of – noise and odour!!

- The inclusion of fugitive emissions. These pollutants are some of the hardest to measure accurately, but in some industries create a very significant pollution hazard. A robust method of including these into load based licences is needed. Ask any resident of East Whyalla what they think of "fugitive" dust emissions from the OneSteel Pellet Plant.

- Sensitive receptors. Some sectors of industry are reluctant to pay more licence fees if they are located near sensitive receptors. The industry view is that if industry was in an area first and residents came later then industry should not be penalised by increased licence fees.

Currently the EPA is undertaking extensive negotiations to determine the structure of the new fee structure. New regulations may come in force after July 2007.

Public consultation is still not the EPA's strong point

One disappointing part of the process is that the EPA had commenced detailed consultation with industry, but had no intention of inviting community representatives to the table until the EDO complained. The EPA set up an "Industry Reference Group" some time in 2004 with the task of finalising recommendations to the EPA Board. This Group consisted entirely of industry representatives and EPA staff.

Opportunities for public input were via written submissions on a Discussion Paper (see: http://www.epacomments.sa.gov.au/default.asp?CAT_ID=2)

Given the technical and complex nature of the topic, we felt it was important to have an appropriately qualified person to represent community views. Unfortunately, part way through the process, our representative, Dr April Muirden, became employed by the EPA and was precluded from further involvement.

According to the Government's Tenders web site http://www.tenders.sa.gov.au/, a further non-competitive contract has been let to consultants – the BDA Group – for $54,200 to develop "a detailed licence fee structure and prepare a discussion paper for consultation." The completion date is 21st October 2005. Presumably this means that there will be further scope for written submissions later this year.

Whilst the EDO has been unable to replace Dr Muirden with a similarly qualified person, we will make a final written submission that will address both the terms of reference of the Review and also those aspects that are off the official agenda – namely the "cap" on global pollution licence fees.

Lessons for the EPA

There are a number of lessons that the EPA should learn from this exercise:

1. The EPA should NEVER assume that it is appropriate to invite polluters onto review committees and not conservation groups or relevant residents' associations. To do so harks back to the early days of the EPA when only the polluters were regarded as the "clients" of the EPA with scant regard given to the community the EPA is charged with protecting.

2. The EPA should adequately resource community participation. This means paying appropriate sitting fees to non-profit respresentatives on committees and working groups. There is no need to pay industry lobbyists – they already have a vested commercial interest in the outcome.

Government of South Australia EPA Consultation EPA South Australia

At the end of the Load-Based Licencing Review, the most likely outcome is a new "Fees & Levy" Regulations to come in force after July 2007.

Additional Resources:
SA Consultant's Report:
http://www.epa.sa.gov.au/pdfs/lfs_report.pdf
NSW EPA load based licensing:
http://www.epa.nsw.gov.au/licensing/lbl/

Victory for the "McLibel 2": Questions for Australia

By Fiona Partington,
PLT student and EDO Legal Research Volunteer

On February 15 this year an interesting twist was brought into the infamous UK "McLibel case" saga. The European Court of Human Rights ruled that the British government violated the rights of two environmental activists who had been found to have defamed McDonald in what is still the longest-ever civil case in UK legal history. The rulings and discussion of the ECHR are of particular interest to Australian lawyers and activists in relation to the rights of environmental & social activists to a "fair trial" and the extent of their rights to "freedom of expression."

Background of the McLibel Case

The McLibel trial began after McDonald's Restaurants sued two Greenpeace London activists for defamation for handing out leaflets called "What's Wrong With McDonalds" accusing the company of exploiting children, cruelty to animals, destroying rainforests, paying low wages and peddling unhealthy food. The two activists, David Morris and Helen Steel, both unemployed or on a low wage, were refused legal aid and so represented themselves throughout the trial and appeal, with only some help from volunteer lawyers. The trial turned into the longest in British history, lasting a mammoth 313 days of testimony, eight weeks of closing speeches and six months of deliberation. Although Morris and Steel were successful in winning a ruling that some of the claims in the leaflet were true, McDonalds won a defamation award against the pair for the remaining claims and Morris and Steel were ordered to pay £76,000 in damages.

Progression to the ECHR

In keeping with their fighting spirit, the pair refused to pay these damages and instead went to the European Court of Human Rights in Strasbourg, claiming that the UK laws were unfair and that they were denied a fair trial because of the lack of legal aid. The ECHR found that the British government had denied Morris and Steel the rights to a "fair trial" under Article 6, section 1 of the Convention of the ECHR by not providing them with legal aid. It also found that by making such a large damages award their "freedom of expression", under Article 10 of the Convention was also violated.

The court ruled that the UK laws had failed to protect the public's rights to criticise massive corporations whose business practices can affect people's lives, health and the environment. The ECHR overturned the ruling of the British Court, cancelled the penalty against Morris and Steel, and ordered furthermore that in order to provide "just satisfaction to the injured party," the Scottish government must pay 35,000 Euros to the pair for "non-pecuniary damage" that they suffered by having their rights denied and 47,000 Euros for their costs and expenses before the ECHR.

Could this happen in Australia?

The ability of Morris and Steel to take their case to the ECHR sets their situation apart from similarly aggrieved parties in Australia. Here, the equivalent course of action would be to make a complaint to the Human Rights and Equal Opportunity Commission, which is empowered by the *Human Rights and Equal Opportunity Commission Act* to investigate complaints of individuals against the Commonwealth under some international human rights instruments. The Commission attempts to conciliate complaints however if they cannot be conciliated the Commission does not have the authority to hand down a legally-binding determination. Instead it can prepare a report for Federal Parliament which may examine current laws, policies and practices to see if they are discriminatory; make recommendations to address discrimination or human rights violations; or propose new policies or programs for government to adopt. The inability of the

Commission to make such binding decisions raises questions about whether the Australian government's accountability is sufficient or whether external review processes are needed.

Is there a right to a fair trial in Australia?

The ECHR court ruled that a "fair hearing" must be "determined on the basis of the particular facts and circumstances of each case", including "the applicant's capacity to represent him or herself effectively". The ECHR found that Morris and Steel could not do this and therefore were not afforded a fair trial. Whilst this line of reasoning seems just at first glance, in defamation cases the result is often that the costs outweigh the damages, courts are preoccupied with trivial arguments and the time it takes to get a result often cancels out any attempt to protect the plaintiff's reputation. The question thus arises whether in a court system that is overflowing with cases for legal aid are such libel cases the best way to spend legal aid funding? But if legal aid is not to be afforded to such defendants should the absence of a fair trial mean the case is dropped or should they be left to defend themselves incapably?

Corporations, free speech and human rights?

The ECHR ruled that it is not a violation of freedom of expression for a country to allow corporations to file defamation suits, but that it is a violation of freedom of expression for a country to allow defamation lawsuits to go forward unless the country provides "a measure or procedural fairness and equality of arms" between the parties in the case. In addition, freedom of expression requires that the remedy that a corporation may win in a defamation lawsuit must have "a reasonable relationship of proportionality of the injury to reputation suffered." They found that the sum of £40,000 against a citizen environmental campaigner was not proportionate to that legitimate aim of providing a remedy to a corporation. But what really is the legitimate aim of the remedy in libel cases? For in this world of mass communications few people's opinions are likely to be changed by a libel action and therefore, what is the benefit in allowing cases to proceed in which defendants will have to use up legal aid resources defending an action that has no effective remedy? For as the McLibel case shows, and the statement that it is "the worst corporate PR disaster in history" suggests, pursuing such cases is just as likely to be detrimental to a 'defamed' company than beneficial. This is especially true given that McDonalds spent $20m fighting against activists distributing leaflets with a print run of a thousand, and in the process publicised the activists' cause to the world.

The McLibel case raises many questions that cannot easily be answered, but the legacy of the case is that such questions have been newly raised, and the issues they encompass have been brought so clearly into the public arena. For Morris and Steel, the ruling of the ECHR gives hope to those who dare to fight for "greater public scrutiny and criticism of powerful organisations whose practices have a detrimental effect on society and the environment". For the government and the legal system, the case gives a new need for review of their role in the regulation of this activism and their role in the ensuring that any legal action that may occur is both fair and effective.

References

- McSpotlight –the official McLibel web site: http://www.mcspotlight.org/
- Statement of Claim in the European Court of Human Rights http://www.mcspotlight.org/case/trial/verdict/Echr.html
- Press release European Court of Human Rights http://www.echr.coe.int/Eng/Press/2005/Feb/ChamberjudgmentSteel&MorrisvUnitedKingdom150205.htm

The Precautionary Principle - Its origins and role in environmental law

By David Cole, LL.B., M Env. Studies
Environmental Lawyer
Treasurer, EDO (SA) Inc.

February 2005

This article is an edited version of a short paper first written by David Cole in February 2005 which looks at the application of the precautionary principle in more detail, including reference to its application in Indonesia. To view the full paper, visit the edo web site:
http://www.edo.org.au/edosa/index.htm

The Concept

The precautionary principle in the context of environmental protection is essentially about the management of scientific risk. It is a fundamental component of the concept of ecologically sustainable development (ESD) and has been defined in Principle 15 of the *Rio Declaration (1992):*

> *Where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.*

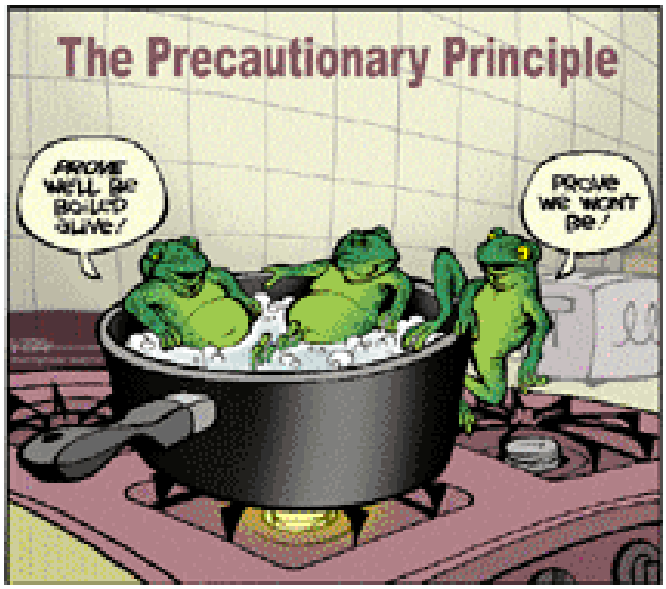
Although the term "measures" is not entirely clear it has generally been accepted to include actions by regulators such as the use of statutory powers to refuse environmental approvals to proposed developments or activities

Australian Environmental Legislation

Australia has adopted ESD as a guiding principle of environmental management. The *National Strategy for Ecologically Sustainable Development* (1992) adopts the precautionary principle as a "core element" of ESD as does the Inter-Governmental Agreement on the Environment, which is the basis for the current distribution of governmental responsibility for environmental management in Australia also.

The precautionary principle has been included either specifically or by inference as part of ESD in numerous Australian environmental statutes. For example, the South Australian *Environment Protection Act 1993* (which deals with pollution and waste management) states that one of the objects of the Act is "to apply a precautionary approach to assessment of risk of environmental harm although the term "precautionary approach" is not defined.

The Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* which, amongst other matters, contains the Commonwealth requirements for environmental impact assessment (EIA), states as an object the promotion of ecologically sustainable development which includes the precautionary principle. In making certain decisions, including whether or not to approve a proposed development as part of the EIA process the Minister for the Environment and Heritage must take this principle into account.



The Application of the Principle Internationally

Internationally, the precautionary principle has been directly or impliedly applied or referred to in judicial decisions in several countries. Justice Stein refers to cases decided in Britain, India, Pakistan and New Zealand and also refers to judgements of the International Court of Justice and the European Court of Justice.

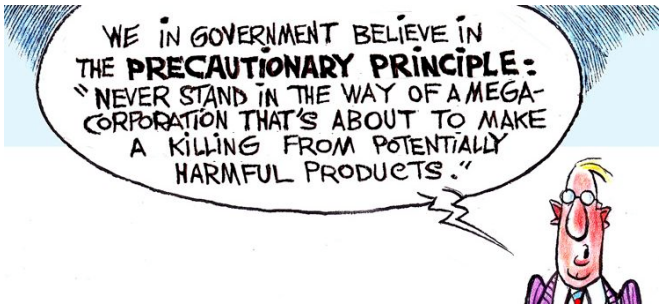
It is apparent that whether or not the precautionary principle is specifically referred to in relevant legislation such as pollution control

Acts or environmental impact assessment legislation, courts throughout the world are increasingly inclined to accept the principle as a means of dealing with scientific uncertainty in environmental disputes. The principle may fairly be regarded as an evidentiary tool in resolving dispute over the risks presented to the environment and to human health by certain types of development.

Additionally, there is now a considerable body of judicial opinion placing the burden of proving the acceptability of a proposal in this respect on the proponent, not the person arguing that it is environmentally unacceptable.

The principle also acts as a guideline to administrators and the courts in making decisions involving competition between economic development and the maintenance of environmental quality where the potential impacts are unclear.

For full references and a more detailed look at legislation and case law both in Australia and overseas – see the full version of this paper on the EDO web site:
http://www.edo.org.au/edosa/index.htm



Climate evidence finds us guilty as charged

New Scientist magazine reports on indisputable evidence that humans are causing global warming. The claims are made by a team at the Scripps Institution of Oceanography in La Jolla, California studying the extent and pattern of the rise in ocean temperatures. The oceans eventually absorb 84 per cent of the Earth's extra heat, and the distribution of that heat closely matches what climate models predict would be the effect of human activity. Natural causes are ruled out, the team says. Analysis of 40 years of ocean temperatures records found that oceans have warmed by around 0.5 °C at the surface, and the warming extends to a depth of several hundred metres. Potential causes of the warming were also examined; such as increased solar radiation, changes in the amount of sulphate particles from volcanic emissions in the air, natural fluctuations and human activity. The human component included both the warming effect of greenhouse gases and the shading effect of the aerosols in urban smog and forest fires, which prevent radiation from reaching the Earth's surface. Computer simulations of human effects agreed with observations "with a confidence exceeding 95 per cent". Source: abridged from Climate evidence finds us guilty as charged, New Scientist magazine, 11/06/05, http://www.newscientist.com/channel/earth/mg18625034.800

Acknowledgments

Articles
Mark Parnell, David Cole, Tony Flaherty & Fiona Partington

Production:
Mark Parnell & Chris Hales

The EDO is supported by a variety of public and private sources including:

- Commonwealth Attorney-General's Department (Legal Aid)
- South Australian Department of Environment & Heritage
- Membership fees, Tax-Deductible Donations & Fundraising

EDO
Environmental
Defenders Office SA Inc

Donations to the EDO of $2 or more are tax deductable.

Phone: (08) 84103833
Fax: (08) 8410 3855
Post: GPO Box 170, Adelaide, SA, 5001
E-mail: edosa@edo.org.au

Environmental Defenders Office (SA) Inc.

MEMBERSHIP FORM

Supporting the EDO will help create lasting legal solutions to environmental issues.

I wish to join the Environmental Defenders Office (SA) Inc:

NAME .....

ADDRESS .....

.....

TELEPHONE (W)(...).....

(H)(...).....

FACSIMILE (...).....

E-MAIL .....

SIGNATURE .....

My annual membership fee of **$33.00**, (**$16.50** concession) or **$55.00** corporate is enclosed

FEE $.....

DONATION (tax deductible) $.....

TOTAL $.....

Payment (CHEQUE, MONEY ORDER, CASH) enclosed or

Credit card (circle one) *Visa* *Mastercard* *Bankcard*

Name on Card……..……..……..Signature……..

Card No _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ *Expiry Date:……*

Please forward to:

Environmental Defenders Office (SA), GPO Box 170, Adelaide 5001
For more information: Phone Chris Hales, EDO Administrator on 8410 3833