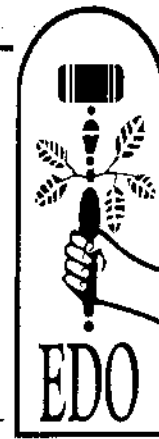

GREENLAW



ENVIRONMENTAL
DEFENDERS
OFFICE (SA) INC

NEWSLETTER OF THE ENVIRONMENTAL DEFENDERS OFFICE

*A Community Legal Centre specialising
in public interest environmental law.*

June 2001: No 14

Editorial

Welcome to the first newsletter for 2001. We know it has been a while since the last newsletter, but EDO staff have been busy defending the environment. We hope to be a bit more regular in future.

With elections looming at both the State and Federal levels, this year promises to be an interesting one for environmental law and policy. As well as looking forward to innovative environmental policy announcements from all the Parties, the EDO Network will be seeking a reversal of the policy that prevents EDOs from undertaking "litigation-related activities" using legal aid funding. The EDOs are the only Community Legal Centres prevented from running test cases or other public interest cases using public funds. This has meant that we need to use our precious fund-raising resources for this part of our work.

We have had verbal assurances from the Federal ALP that they will remove the litigation restriction if elected. We will now seek similar assurances from the Coalition.

Later this year, the EDO will pro-

vide advice to our two thousandth new client. Whilst we don't know the identity of this mystery client, chances are that his, her or its problem will be a planning or pollution matter, as these two areas dominate our advisory service. Also, there is a one-in-four chance that the matter will pass our "public interest" test and qualify for ongoing legal assistance from EDO staff and volunteers. Any ideas for a suitable acknowledgment of our 2,000th client will be gratefully received. By the way, the client statistics do not include approximately 200 law reform, education and media matters handled over the last few years.

In March this year, EDO celebrated its 5th anniversary as a funded office and in April, we celebrated the 9th anniversary of our free advisory service. Great minds are already at work to think of a suitable 10th Anniversary Function.

Southern Bluefin Tuna

Previous issues of GREENLAW have covered the saga of the Louth Bay (near Port Lincoln)

tuna feedlot appeals. The final resolution of this matter was in September 2000 when the ERD Court re-affirmed its decision of 10 months earlier to allow the Conservation Council appeals and quash the development approvals granted by the Development Assessment Commission. The matter had been remitted to the ERD Court by order of the Full Supreme Court in June last year.

Copies of all four cases are available through the internet (www.austlii.edu.au). Paper copies are available through the Office. Please ring or e-mail if you would like copies sent out to you.

Regulations thwart ERD Court win

Despite this success in South Australia's longest-ever environment trial, the tuna feedlots are now well entrenched in Louth Bay thanks to State Government fast-track Regulations which removed public rights of representation and appeal. These

"temporary" Regulations have now been used for two consecutive seasons to prevent public scrutiny of tuna feedlot applications. Planning Minister Laidlaw has now removed the loophole.

Tuna feedlot operators prosecuted

After concerns were raised by conservation groups about the lack of supervision of tuna feedlot operators in SA waters, the Parliamentary Environment Resources & Development Committee held an Inquiry in 1999 into the conduct of alleged illegal operators in Louth Bay, near Port Lincoln. The Development Assessment Commission then launched several prosecutions against tuna operators under the Development Act alleging unlawful development. The first case to come before the Court was the matter of Holland-Booker (Secretary of the DAC) v. Sarunic & Sons Pty Ltd and others [2001] SAERDC 23. The company and 3 of its directors pleaded guilty.

In fining the company and directors a total of \$11,500 for undertaking development without approval, the Court noted that the company had relied "to its detriment" on advice from the Tuna Boat Owners Association. No mention was made in the Court's sentencing remarks of the role of the State Department of Primary Industries & Resources. The EDO's submission to the Parliamentary inquiry into illegal Louth Bay tuna feedlots was that PIRSA (as the lead agency responsible

for aquaculture), had full knowledge of the existence of illegal developments, yet chose not to take any action. In fact, PIRSA issued the illegal developers with exemptions under s.59 of the Fisheries Act to avoid any need for prosecutions under that Act.

The Sarunic prosecution highlights the pressing need for law reform. It is understood that 5 further tuna feedlot operators have been prosecuted and those cases are currently before the ERD Court. Whilst the penalties handed down in the Sarunic case are substantial, it is worth noting that a single Southern Bluefin Tuna fish can sell for tens of thousands of dollars on the Japanese market.

Aquaculture Law Reform

The State government is hoping to have new legislation in place before the next tuna season. Whilst the new "Aquaculture Act" is likely to improve the existing regulatory mess, it is also feared that the new legislation will further erode rights of public notification, representation and appeal. In parallel with the proposals for a new Aquaculture Act, the government is also proceeding with a PAR process to amend the Land Not Within A Council Area (Coastal Waters) Development Plan. It is likely that this plan will also seek to remove notification and appeal rights by re-zoning areas of the sea as "aquaculture zones". The EDO in co-operation with the Conservation Council

and other environment groups will continue to lobby for appropriate public participation over decisions affecting public marine assets.

ADVISORY SERVICE

The EDO Thursday night advisory service has been in great demand and very much appreciated, as you can see by the following quotes from satisfied clients:

- 'Very helpful & a great resource'
- 'We felt grateful that this service was available to us & that we were treated with such respect & kindness'
- 'Best wishes to you and your team in keeping the bastards in line!'
- 'Thanks to your help we were well prepared' (for court)
- 'We thank you for your assistance in helping the community be heard in this'
- 'All my support & encouragement to you idealistic people'
- 'You guys are heroes'
- 'Many thanks to the young lady lawyer who was sympathetic in listening to my problem'
- 'You are doing a wonderful job, working so hard and receiving virtually no recognition'
- 'You truly are legends'



Mark and Animal Liberation representatives following the lifting of Supreme Court injunctions over videos taken inside battery hen sheds

Animal Liberation

The EDO represented Animal Liberation in a Supreme Court action resulting from our client's "late night uninvited farm visit" to a battery hen facility near Gawler on 8th August 2000. During this visit, a number of injured hens were rescued and evidence was collected to support claims of alleged breaches of the Prevention of Cruelty to Animals Act and Regulations.

The day following the "visit", the battery egg producer obtained injunctions in the Supreme Court to prevent distribution of the video footage obtained by Animal Liberation. Unfortunately (for the plaintiff) numerous copies of the video had already been distributed to Adelaide TV stations. Because the battery hen farmer did not seek injunctions against the media, the stations were free to broadcast the footage. Once

Channel 10 had broadcast the footage on its national news, the injunctions became meaningless and were eventually lifted by the Supreme Court with costs being awarded to Animal Liberation.

The EDO has now withdrawn from this matter and Animal Liberation will be represented by one of its supporters in defending further claims against it for damages resulting from the alleged trespass. Animal Liberation's sole employee, Ralph Hahnheuser, has also been joined as a defendant to the case.

In a separate but related matter, the RSPCA has now commenced a criminal prosecution of the battery hen farmer under the Prevention of Cruelty to Animals Act. This prosecution is in addition to a private prosecution brought by Animal Liberation under the Regulations to that Act. The RSPCA case has commenced in the Elizabeth Magistrates' Court and has

been adjourned until August. It is believed to be the first time that such a prosecution has been brought in South Australia.

Animal Liberation believes that the prosecutions vindicate their supporters' late-night actions, a primary purpose of which was to collect evidence for future criminal prosecutions. Whether the Supreme Court accepts this defence remains to be seen. In the meantime, the political campaign to end battery-hen egg production continues around the nation.

Research Projects

The EDO is continuing to work on a number of important research projects. One of the most interesting involves investigating options for the protection of planted native vegetation on public and private land.

Most revegetation projects are not protected by the Native Vegetation Act and over the years, the EDO has received a number of complaints about newly planted native vegetation being destroyed by grazing, neglect or deliberate clearance. This includes publicly funded revegetation projects such as Landcare and the Natural Heritage Trust.

The problem most frequently occurs when a property changes ownership and the new owners have no interest in the newly planted trees and understorey.

As part of a research project funded by the Native Vegetation Council, the EDO is putting together an issues paper and will shortly convene a meeting of stakeholders to help determine the nature and extent of the problem as well as the range of possible solutions.

Contact Mark Parnell in the office if you are interested in participating.

Linear West Residents Committee

The EDO represented the Linear West Residents Committee "LWRC" (formerly the Flinders Park Residents Association) in an ERD Court action over pollution from the Hensley foundry at Torrens-ville. Local residents have campaigned for years against the foundry which they claim produces unacceptable odour and noise. Following these complaints, the Environment Protection Authority "EPA" issued an Environment Protection Order "EPO" requiring substantial works to address odour and air pollution issues. The Foundry has appealed against the Order to the Environment Resources and Development Court, arguing that the Order is too harsh. The EDO represented Mr John Keeley (LWRC Secretary) in an application to be joined as a party to this appeal.

Usually, these types of cases are only between the polluter and the EPA. There are no automatic "third party rights" for affected residents. However, the ERD Court has a general "joinder" power and this was the basis of the application by Keeley.

In a decision on 6th February 2001, the ERD Court decided not to join Mr Keeley to the Hensley appeal. Whilst the Court ac-

cepted that he had an interest in the outcome of the case, Mr Keeley failed to satisfy the Court that he would make a contribution to the case sufficiently above that to be made by the EPA. Two critical factors were:

1. the inability of the applicant to say what, if any, expert witnesses he would call; and
2. the stated intention of the applicant to seek to argue matters beyond the narrow scope of issues raised by the "parties as of right".

This case has provided very useful guidance to future situations where residents affected by pollution seek to add their weight in support of enforcement action instituted by the EPA.

First, it is important for those seeking to be joined to identify at a very early stage what type of expert evidence they intend to call. This is a more onerous obligation than on the EPA or appellant who are only obliged to declare their evidence much closer to the trial. Secondly, it may be wise for an applicant to "keep their powder dry" in relation to possible additional submissions until after they have been joined. Otherwise there is a risk of the Court becoming frightened at the proceedings blowing-out with new issues.

In cases such as this, it is always possible for those affected by pollution to institute their own civil enforcement proceedings under s.104 of the Environment Protection Act. The risk of adverse costs orders or damages if unsuccessful mean that these proceedings are unlikely to be brought by residents other than in exceptional cases. Joining an existing appeal that is already before the Court offers a much safer way for resi-

dents to defend their local environment. The appeal by the foundry against the Environment Protection Order is still before the Court.

Publications

A number of long-standing publication projects are now nearing completion.

- The EDO "Guide to Protest Law in South Australia" is now with the designer and should be published later this month.
- Mark Parnell and Duncan Hartshorne are still working on a comprehensive "Guide to Environmental Law in SA". This is most likely to be completed in early 2002.
- The EDO "Guide to Planning Appeals" is well underway thanks to the efforts of EDO volunteer, Peter Whimpress, as well as Andrew Weinmann and Mark Parnell. Drafts will be circulated to selected members of the legal profession and the ERD Court soon for comment.
- Now available for purchase is "Disappearing Acts - A guide to Australia's Threatened Species Law". The SA Chapter was written by Mark Parnell with help from EDO volunteer lawyer, Paul Hayes. Order forms are available from the Office.

We're guilty

Mock trial
convicts us
of damaging
our lifeline

By Environment Reporter
CATHERINE HOOKLEY

THE people of EA were found guilty yesterday of reckless disregard for the River Murray.

A jury of 12 school students from across the state delivered the verdict in a mock trial.

It was held on World Environment Day by The Advertiser Greening Australia Earth Warriors and the Environmental Defender's Office.

More than 500 students from 12 primary and high schools



SAVING
THE
MURRAY

www.savingthemurray.com



UNANIMOUS: "Prosecutor" Leonie Paulson surrounded by the young jury that convicted EA yesterday of poor management of the Murray. Photo: MARTIN JACOB

EDO making the news over "River of Dreams - Trial by Jury" (Advertiser 6/6/01)

Community Legal Education

The highlight of our recent CLE activities was the successful presentation of "River of Dreams - Trial by Jury" before a capacity audience of 500 primary and secondary students at the Scott Theatre. This World Environment Day mock court trial was organised by Greening Australia with support from the EDO and Advertiser Newspapers.

Defence counsel, EDO Chairperson Mark Griffin, narrowly avoided a jail term following his shameless attempt to bribe Judge, Jury and audience with fruit and other produce from the Riverland. Prosecutor, EDO Committee member Leonie Paulson, was more subtle in her approach which included presenting the Court with a range of exhibits including stuffed (and allegedly dead) birds and other wildlife. Leonie's samples of blue-green algae bore a remarkable resemblance to dishwashing liquid.

Police crackdown on greenhouse gas emissions

\$200 disgust of wind

A MAN was convicted and fined \$200 yesterday for breaking wind near a police officer.

Fork-lift operator David John Gixti, from Werribee, southwest of Melbourne, was in the town's lock-up for being drunk when the offence occurred last August.

Werribee Magistrates Court ruled Gixti's breaking wind as he passed the front counter was intended to cause anger and disgust.

He was found guilty of offensive behaviour and fined. He plans to appeal.

EDO in EPBC cases

The EDO in Queensland has recently brought two cases seeking injunctions under the new Commonwealth Environment Protection and Biodiversity Conservation Act 1999, which came into force last year. The first case involved an unsuccessful challenge to a lychee farmer who was electrocuting spectacled flying foxes as a form of crop protection. The farm was near the Wet Tropics World Heritage Area and the destruction of the bats was alleged to be harming World Heritage values.

The second case also involved the "trigger" of World Heritage. The following case note was supplied by EDO Queensland.

CONSERVATIONIST ATTEMPTS TO STOP FRASER ISLAND DINGO CULL

Lyndon Henry Schneiders v State of Queensland [2001] FCA 553, Brisbane, 4 May 2001, Dowsett J

On 4 May 2001, EDO(Qld) represented a conservationist in a Federal Court application for an interim injunction to stop the culling of dingoes by the Queensland government in the Fraser Island World Heritage Area. The facts were that following the tragic death of a young boy on Monday 30 April 2001, the Government ordered a cull of dingoes showing 'habituation' towards human beings. Little information was made available by the Government about the likely number

of dingoes to be culled. Given that the best estimate of the dingo population on the island was between 100 and 300, conservationists were concerned about the effect a cull would have on the dingo population and also on the broader ecosystem that exists on Fraser Island.

An urgent application was made to the Federal Court by Mr Schneiders and a local tribal elder, John Dalungdalee Jones. The basis for the application was the requirement in the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) not to undertake activities likely to have a significant impact on the world heritage values of a world heritage property without Commonwealth approval. No such approval had been sought or received by the Queensland government. The argument for Mr Schneiders was that as the relatively small dingo population was part of the world heritage values of the Fraser Island World Heritage area, no cull should be undertaken without assessment and permission of the Commonwealth Minister for the Environment. The judge accepted that there was a serious question to be tried but was not satisfied that the balance of convenience favoured granting the injunction. It was only during the course of the hearing that the government made it clear that the cull would end the following day and would be capped at 30 dingoes. The judge balanced the issue of public safety against the world heritage issues and, on the basis of the government's assurances, declined to grant the urgent injunction.

Several points arise out of the case. Firstly, the Queensland government was obviously aware of the restrictions placed on it by the

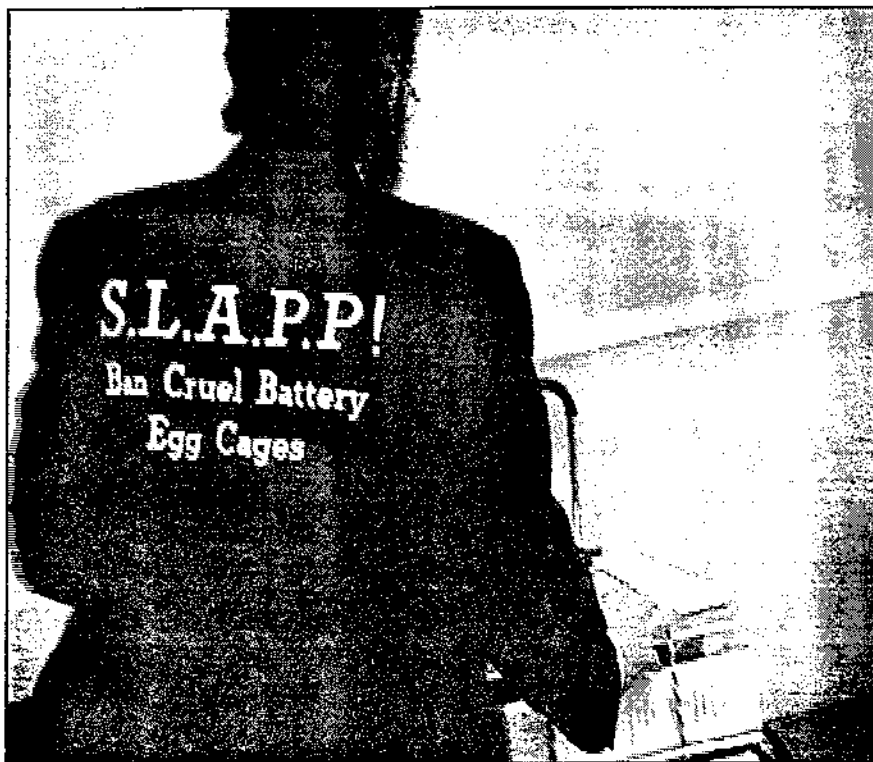
EPBC Act in deciding to limit the cull to 30 dingoes, a number which it clearly perceived would not have a significant impact on the world heritage values of the island. Secondly, taking the legal action forced the government to make its intentions clear publicly, which it had not done during the days prior to the application. Thirdly, it is a measure of the new Commonwealth legislation that 2 private citizens were able to challenge in court the actions of a state government in managing state land. This is a significant improvement over the situation which existed before the Act came into force. EDO(Qld) instructed Mr Chris McGrath of counsel and Dr Mark Pillsworth gave expert ecological evidence on behalf of Mr Schneiders.

For further information, please contact Rob Stevenson or Elisa Nichols at EDO Qld on (07)3210 0275. A copy of the decision can be found on the Austlii website at www.austlii.edu.au/au/cases/cth/federal_ct/2001/553.html.

Rural Outreach Programme

The most recent EDO country visits have been to the Riverland and Mount Gambier. Both visits were very successful with a large number of new clients as well as talks to secondary school students. The EDO's next outreach visit will be to Port Lincoln in late June, where Mark already has a full card of schools, TAFE and individual clients.

The EDO gratefully acknowledges the support of the SA Department for Environment & Heritage in funding our rural outreach program.



Anonymous EDO client setting new standards in court attire

Staff matters

The EDO staff have again been assisted by a hard-working band of loyal volunteers.

Sylvie de Villiers completed a 6-month work experience placement with the Office last year, however she has continued to come in two days per week in a voluntary capacity. Sylvie is primarily responsible for organising the Thursday evening advice service, the country outreach visits, payment of accounts and data entry for our computerised client records. Graham Marshall assists quarterly, getting 'those reports' off to Canberra.

Recent legal volunteers have included:

Andrew Baxter - our resident costs expert and champion of chickens and the victims of foundry smells

Marc Fullager - who was a regular volunteer for many months until we lost him to paid employment at the Department of Industrial Affairs

Michael Tamblyn - whose legacy will include the final edit of our soon-to-be-published Guide to Protest Law in South Australia

Emmalene Gottwald - a regular volunteer whose specialty is Mark's "too hard basket"

Chantel Veldhoen - provided excellent research during her short Summer placement with the EDO

Daniel Woods - who is being groomed to become the EDO's noise pollution expert

Stephanie Bavink - arrived from Germany on a study tour expecting to work in a criminal practice, but ended up working on chickens and Genetically-Modified Organisms instead. Stephanie is now back in Germany and well on the way to becoming a local judge.

Management Committee

The EDO management committee for 2001 is as follows:

Mark Griffin (*Chairperson*)
David Cole (*acting Secretary/Treasurer*)
Heath Barclay
Patricia Carvalho
Tony Flaherty
Duncan Hartshorne
Paul Leadbeter
Leonie Paulson
Mark Parnell (Staff rep)
Andrew Weinmann

We are still looking for a person to take on the role of treasurer. David Cole has been acting in the position for some time, but he is keen to share the warm inner glow with others. Please contact the office if you think you can help or know someone we can approach.

Mark's Handy Practice Tips #1 - Respect the Judiciary

"Finally I turn to whether, in the context I have defined, the words uttered by the defendant [a solicitor] constitute contempt of court. The matter must be judged by contemporary Australian standards. It may be offensive, but it is not contempt of court, for a person to describe a judge as a wanker."

Anissa Pty Ltd v Simon Harry Parsons (on application of the Prothonotary of the Supreme Court of Victoria) [1999] VSC 430 per Cummins J at para 22



Volunteers and staff

Andrew Baxter, Chris Hales, Sylvie de Villiers, Stephanie Bavink and Mark Parnell

GREENLAW

Articles

Mark Parnell

Layout

Toula Gronthos

Chris Hales

EDO (SA) office: 1st floor,
118 Halifax St, Adelaide.
Postal address: GPO Box 170,
Adelaide, SA 5001.
Phone: (08) 8232 7599
Facsimile: (08) 8232 7544
E-mail: edosa@edo.org.au
Country freecall: 1800 337 566
Web site: www.edo.org.au

EDO offers free legal advice on any planning or environmental issues.

A FREE Thursday night Advisory Service is available by appointment only.

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MEMBERSHIP FORM

MEMBERS RECEIVE REGULAR NEWSLETTERS ABOUT
THE EDO AND CURRENT ENVIRONMENTAL LAW
ISSUES

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

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My fee of \$16.50 pa, (\$11 pa concession) or \$55 corporate is enclosed (this includes gst)

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TOTAL\$.....

I am interested in volunteer work - **Legal or Administration**
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**ENVIRONMENTAL
DEFENDERS OFFICE (SA) INC
GPO BOX 170
ADELAIDE SA 5001**