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GREENLAW

NEWSLETTER OF THE ENVIRONMENTAL DEFENDERS OFFICE (SA) Inc.

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Welcome to the October 2002 issue of Greenlaw. If you have received this in hard copy form and would prefer to receive Greenlaw electronically, let us know atedosa@edo.org.au.

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Drink to us - EDO 10th Birthday Wine Fundraiser

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For those who missed the great EDO 10th Birthday celebrations on June 21st, the party isn't over because you can now shout yourself to a birthday treat of fine organic wine from the Temple Bruer vineyards at Langhorne Creek. These specially labelled EDO wines are a bargain at only $120 per dozen with four varieties to mix and match. If you don't yet have an order form, ring, fax or e-mail us and we'll send you one. Orders close on 15th November. Profits help the EDO help South Australians to defend the environment.

EDO AGM 15th November

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Members are reminded that our Annual General Meeting will be held at 6.00pm on Friday 15th November 2002, upstairs at the Earl of Aberdeen Hotel (Cnr Pulteney and Carrington Sts). The meeting will be followed at 7pm by our annual dinner. Please try to make one or the other or both. Our guest speaker this year is barrister and academic Steven Churches.

RSVP for dinner to Chris Hales by Wednesday 6th November.

Current Hot Issues from the EDO Files:

Coffin Bay

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The EDO is representing 6 appellants in an important case involving a residential sub-division and International Health Clinic on 10 hectares of high quality coastal bushland on the outskirts of Coffin Bay. As well as from the likely vegetation clearance involved, the case will also raise issues of the appropriate use of "Deferred" zones in the Development Plan and also the perilous state of groundwater resources on Eyre Peninsula. The matter is expected to be set down for hearing in December or early 2003.

See: Nature Conservation Society of SA article: "Just Another Nail in the Coffin" at:www.ccsa.asn.au

Aquaculture

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The EDO was most disappointed at a recent decision by the State Government to zone part of Spencer Gulf for aquaculture and to remove all rights of public participation (including appeal rights) in relation to development applications in the new zone. The Minister's Plan Amendment Report for Aquaculture off Lower Eyre Peninsula creates an Aquaculture Zone of 13,000 hectares and was given immediate and interim operation on September 12th. Within 2 weeks of the decision, 25 applications had been lodged, none of which require public consultation and all of which (if approved) will have permanent development approval. Many more applications are expected.

The EDO and a number of other conservation group representatives met with Planning Minister Weatherill recently to outline our concerns. As well as the possibility of tuna feedlots being located close to sea lion breeding colonies, the EDO warned about the dangerous precedent of zoning parts of the sea for industrial purposes. We question the wisdom of applying traditional land-based planning principles to an environment about which we still know very little.

Whilst the explanatory notes to the PAR acknowledge the role of the EDO's Louth Bay cases of 1999 / 2000, they fail to mention that the real reason for the interim operation of the PAR was to avoid the need to give the tuna industry a third

consecutive year of fast-track development approvals. The fast-track mechanism for aquaculture applications of "one year or less" was introduced by the previous government one week after our Louth Bay Court win. Those changes also removed rights of public notification, representation and appeal, but only on a temporary basis.

The EDO will now seek to obtain commitments from the government to improve rather than erode hard-fought public participation rights. We will also be strongly urging the Development Policy Advisory Committee to reject the new aquaculture zoning. A copy of the EDO's submission will shortly be on our web site:http://www.edo.org.au/edosa/index.htm

Aquaculture Interstate

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On the basis of our Louth Bay experience, the EDO has been invited to speak at a number of aquaculture workshops and conferences in other States. Most recently, Mark Parnell spoke at a public meeting in Brisbane in July organised by a coalition of community, industry and local government to stop the introduction of seacage aquaculture to Moreton Bay. The meeting attracted several hundred people and it was remarkable to see the depth of feeling against the proposal. The coalition is organised by the Queensland Conservation Council and includes representatives from tourism and fishing interests as well as every adjoining local council. To find out more about the campaign, visit the QCC web site: http://www.qccqld.org.au/savethebay/index.html

Windfarms

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We are receiving an increasing number of requests from people wanting to oppose the establishment of windfarms on exposed ridges and coastlines across South Australia. This presents us with some difficulties as most of our existing conservation group clients are strong supporters of this new form of clean energy production. Of course, no-one is against windfarms - the only issue is where to put them. Planning SA has recently concluded public consultation on a package of documents including a ministerial Plan Amendment Report (PAR) with Objectives and Principles for relevant Development Plans to ensure that local councils give proper consideration to siting and amenity issues.

The Planning SA website contains a wide range of material on windfarms including links to external sites http://www.planning.sa.gov.au/windfarms/index.html. To see an example of how States have dealt with windfarm controversies, have a look at the Victorian Civil and Administrative Appeal Tribunal decision in the Toora windfarm case at: http://www.austlii.edu.au/au/cases/vic/VCAT/2001/739.html

Beachport Boat Ramp

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EDO clients at the South East coastal town of Beachport appear to have succeeded in stopping an ill-conceived boat ramp proposal. The Beachport marine

environment is already suffering from rapidly escalating seagrass loss and the boat ramp was likely to exacerbate the problem. The EDO has congratulated Minister Hill and officers of the Coast Protection Branch for instigating a more thorough study of the problem. Hopefully a more appropriate location and design will be selected.

Fisheries Act Review

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Mark Parnell is representing the EDO on a community reference panel looking into the current review of the Fisheries Act. After a few false starts, it appears the government is serious this time with a commitment to a Green & White Paper / draft Bill consultation phase.

Conservation groups see this review as a major test of the Government's commitment to sustainability and openness. Currently, the administration of this Act is one of the most secretive areas of primary industries management in SA. Recent Freedom of Information Act requests by the EDO in relation to fishing licences on publicly owned inland lakes have been refused on the grounds of secrecy provisions in the Fisheries Act. PIRSA is only obliged to provide the name and address of licence holders and not a copy of the licence itself or any details of fishing methods or catch. The EDO is calling for more transparency in decision-making and for rights of public participation to be included in the Fisheries Act.

Significant Tree Review

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The EDO recently made a submission to the review of significant tree legislation being conducted by Commissioner Alan Hutchings for Planning SA. To read the terms of reference and other background information, visit:http://www.planning.sa.gov.au/significant_trees/

A copy of the EDO submission is on our web site:http://www.edo.org.au/edosa/index.htm

Our submission contained three main points:

1. That the concept of "significant trees" needs to be replaced by one of "significant vegetation" in order to recognise the value of vegetation other than big trees. Whilst a size threshold may be a reasonable measure of amenity or landscape values, it is not a good measure of ecological or environmental values.
2. Improved rights of public comment and appeal, particularly in relation to the more controversial tree removal applications. Currently all significant tree applications are dealt with as Category 1, meaning there is no public consultation, rights of representation or rights of appeal.
3. Extension of the regime to country cities and towns.

Proposed River Murray Act

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A key component of the new State government's environment policy was the introduction of a Ministerial portfolio and new legislation to protect the River Murray. The Government has released a "Consultation Draft" of a proposed River Murray Act and will shortly commence a series of meetings with key stakeholders, including the EDO.

The proposed River Murray Act aims to ensure the health of the River is taken into account when decisions are made concerning land use, development or natural resource management. To achieve integration with other planning regimes, the Act will amend 19 other Acts to include measures aimed at ensuring planning consistency as well as a Ministerial right of veto over proposals likely to impact on the River and its environment.

The EDO will now undertake a thorough analysis of the draft Bill. When completed, our submission will be placed on our web site: http://www.edo.org.au/edosa/index.htm.

To download the draft Bill and explanatory notes, go to:http://www.dwlbc.sa.gov.au/water/river_murray/murray_page.htm

Olives

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The ongoing saga of olive grove development in the Hills Face Zone looks set to visit the Supreme Court again. This time, the issue will be whether or not development approval is necessary in situations where a property owner seeks to relocate, expand and diversify an orchard to another part of the property. Depending on the outcome of the proceedings, further law reform may be necessary to ensure that extensive community effort to remove feral olives from the Adelaide hills is not undermined by the expansion of new olive groves in inappropriate locations.

Vineyards

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Australia's international reputation as a quality wine producer and market leader is not necessarily reflected in sustainable environmental practice. A number of third party merits appeals have highlighted problems such as land clearance, water pollution, and spray drift from chemical pesticides and herbicides. The wineries themselves have also been involved in major spills leading to contamination of waterways and other environmental harm.

The Environmental Protection Authority has recently conducted an audit of the environmental management performance of SA wineries. Whilst most wineries are attempting to improve their environmental performance, areas of 'extreme risk' still exist. Environmental management planning and training of employees is recommended. To read the EPA wineries audit, visit:*http://www.environment.sa.gov.au/epa/pdfs/winery.pdf*

EDO Network Incorporation

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At the EDO National Network meeting in Sydney in June, it was resolved to formally incorporate the Network as "ANEDO", the Australian Network of Environmental Defenders Offices Incorporated. After researching various models and jurisdictions, it was agreed to incorporate in South Australia because we have one of the most "user-friendly" legislative regimes for non-profit community groups. The incorporated Network will hopefully have 9 members (being each of the current EDOs) and be used for national law reform submissions and to help obtain funding for national projects.

To read National EDO Network submissions, go to www.edo.org.au

Feature Article: Hindmarsh Island Bridge Defamation Case

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[This article is a summary of a longer article published in the September edition of IMPACT - the journal of the National Environmental Defenders Network. The full article (including footnotes) can also be found on the Conservation Council's web site:http://www.ccsa.asn.au and shortly on our own web site:http://www.edo.org.au/edosa/index.htm

On January 21 2002, Justice Horton Williams of the South Australian Supreme Court handed down his decision in the matter of *Chapman v Conservation Council of SA & Others* [2002 SASC 4] available on-line athttp://www.austlii.edu.au/au/cases/sa/SASC/2002/4.html

This defamation action was one of many brought by Tom and Wendy Chapman against a large number of defendants including conservation groups, academics, politicians, media operators, printers and individuals who have spoken out against the controversial Hindmarsh Island Bridge.

A troubled bridge over waters

The bridge (now constructed) is the same development that led to the controversial Royal Commission into Ngarrindjeri spiritual beliefs, in particular the so-called "secret womens' business". The Chapmans have also been involved in unsuccessful litigation against former Commonwealth Aboriginal Affairs Minister, Robert Tickner and others over a temporary Commonwealth ban on construction of the bridge. In short, the Hindmarsh Island Bridge is arguably now the most litigated structure in Australia. One judge described it as a "troubled bridge over waters" [Heerey J, Federal Court 19th April 1994 during s.45D injunction hearing]

Defamation

In this case, the Court held that the Conservation Council and three of its volunteer office bearers had defamed Tom and Wendy Chapman and ordered damages of $130,000 plus interest in respect of three publications. The three

defamatory articles were all published in 1994 and 1995 in the Conservation Council's quarterly journal, 'Environment South Australia'.

The publications found to be defamatory fall into two main categories. The first category relates to implications that the Chapmans had used legal mechanisms to silence their critics, including by the use of so-called SLAPP suits (Strategic Litigation Against Public Participation). The second category relates to the adequacy of consultation with Aboriginal people.

Fair comment & free speech

The defendants denied the defamatory imputations; however they also relied heavily on the defence of "fair comment upon a matter of public interest", the defence of qualified privilege for communications between people with a mutual interest and duty, and the so-called "Lange Defence" [Lange v Australian Broadcasting Corporation (1997) 189 CLR 520] of qualified privilege for discussion of "government and political matters".

The Court found that these defences did not apply because the defendants were motivated by malice. Malice was found because the defendants were engaged in a "campaign" to stop the bridge, had ‘targeted’ the Chapmans, had ill will towards them throughout the campaign, and that harm to the Chapmans was an inevitable or likely result of the campaign.

Implications for public debate

The Court's findings on both defamatory imputation and the failure of the defences are indicative of a narrow legal viewpoint which sees rights of freedom of expression on public interest matters as strictly contained within set boundaries. The aspect of the judgment of most concern is the Court's apparent distinction between "legitimate" campaign tactics and those which will not be afforded legal protection. In the category of the former are writing letters to or meeting politicians and also non-coercive communications to stakeholders such as banks. On the other hand, any form of direct action (including non-violent picketing) or attempts to coerce changes of policy or behaviour may not be protected. As in the present case these types of campaign tactics may be used to impute "malice".

Underground Campaigns

In reaching his conclusions as to malice on the part of the defendants, Justice Williams drew on the fact that much of the campaign against the Hindmarsh Island Bridge was conducted in the name of an unincorporated body known as the Kumarangk Coalition.

"Upon the whole of the evidence I conclude that Kumarangk Coalition was a device which was put in place (inter alia) to facilitate the harassment of the Hindmarsh Island marina developers and bridge builders and to frustrate any attempt to enforce the law in the event that the acts of harassment might involve an allegation of tortious or criminal action. I infer that the device must have been intended to lessen the likelihood that those involved in anti-bridge protests could be dealt with for aiding and abetting the breach of any injunction and thus provide them with some measure of comfort."

Williams J. also had before him evidence of the large number of people and

organisations who had been sued by the Chapmans. He also had evidence of the effect on recipients of Chapman legal letters and writs. Williams J. also commented adversely on the tendency of the defendant witnesses to avoid naming others associated with the Hindmarsh Island Bridge campaign. His honour interpreted the motivation of those involved in the Kumarangk Coalition as one bent on disregard for the law and seeking to avoid natural consequences of the campaign. In this regard, Williams J.'s reasoning is entirely, if regrettably, consistent with his comments on the limits of legitimate protest.

Despite these conclusions, it is unlikely that the judgment will result in less "underground campaigns". In fact, the opposite is likely to be the case. If the Court's findings are not over-turned on appeal, then a more likely scenario is for more campaigns in the future to be structured around impecunious or asset-protected spokespeople supported by an amorphous unincorporated group with no membership lists, no assets and no records. Whilst such a group should be effective in dealing with defamation threats (by ignoring them), it is also likely to result in less disciplined and publicly credible campaigns and that could be to the ultimate detriment of the conservation movement and the general community.

Defamation Law Reform

The topic of defamation law reform has been continuously on the agenda for the last 20 or 30 years. Calls for reform are made whenever a high profile case reaches the newspapers or electronic media. A discussion paper calling for the introduction of a "Protection of Public Participation Act" for South Australia has been prepared by EDO (SA). The proposed Act would ensure that those engaged in non-violent public participation are protected from threats or suits that infringe their right of free speech. Copies of the paper are available on the CCSA web site:http://www.ccsa.asn.au/HIB/PublicParticipation.htm

Note: The decision of Williams J is now being appealed to the Full Supreme Court.

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