

# IMPACT!

A NATIONAL JOURNAL OF ENVIRONMENTAL LAW



## Public Interest Environmental Law in Australia: 25 Years On



Australian Network of Environmental  
Defender's Offices Inc

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# Editorial

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On 28-29 May this year the EDO held a national conference on the theme 'Public Interest Environmental Law in Australia: 25 Years On'.

The conference, which was held in Sydney, celebrated the EDO's 25th anniversary. Much has changed in that 25 years, particularly in the field of public interest environmental law. We invited our speakers to reflect on some of the key issues in the field today and to consider how public interest environmental law may evolve over the next 25 years.

We were thrilled with the quality of the presentations and have therefore decided to dedicate this edition of Impact to sharing some of the standouts. We have published papers where they were provided and arranged for some of the presentations to be transcribed.

We are sure you will agree that the articles in this edition touch on some of the more pressing and fundamental environmental issues of our time and demonstrate the important role that public interest environmental law can play in addressing these issues. They also show that much much more needs to be done before we can

claim to have effectively responded to the environmental challenges we face.

We would like to thank all of our contributors for sharing their thoughts on the state of public interest environmental law and for providing such food for thought. I hope you are as inspired by these articles as I was.

Please accept our apologies for the lateness of this edition of Impact. The next edition will be published in December 2010 and will deal with consumer protection from an environmental perspective. If you are interested in contributing an article, please contact the editor at [impact@edo.org.au](mailto:impact@edo.org.au)

Please also note that the EDO, in partnership with Maddocks law firm, holds an annual student writing prize. If you are currently enrolled in an Australian university and wish to have the chance to win \$500 and be published in the next edition of Impact, please consider contributing an article for our consumer protection edition. Please contact the editor for more information.

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# Pest or Protector – The Environmental Defence Lawyer in 2010

Chief Justice Robert French, Chief Justice of the High Court of Australia

*This paper was delivered by the Chief Justice at a dinner to celebrate the 25th anniversary of the EDO held in Sydney on 28 May 2010*

It is sometimes possible in moments of extravagant day dreaming to think of the law as a lush jungle ecology. Lawmakers, law enforcers, regulators, administrators, lawyers, judges and the members of the public who are expected to live their lives within the framework of the law are amongst its genres. Within each genus there are species. A relatively new species is the environmental lawyer. There is a taxonomic debate about whether such persons are entirely pestiferous, unattractively beneficial like the dung beetle, or a truly wonderful new example of God's ongoing creative handiwork. One thing is clear. The species is ineradicable

Evidence of the spread of the environmental lawyer is incontrovertible. It is global and perhaps, depending upon your point of view, a global challenge. John Bonine a legal academic writing in 2003 in a journal called the *Widener Law Review* described the phenomenon in rather lyrical terms:

Environmental law is being created and implemented from the forests of southern Chile to the Pacific islands off the coast of Far East Russia, from the highlands of Papua New Guinea to the high plains of Armenia in the shadow of Mt Ararat. Citizens are taking governments, polluters, and developers to court in Hebrew, Spanish, Tagalog, and Ukrainian.<sup>1</sup>

While there is some hyperbole in his statement, there are facts which give it substance. The Environmental Defender's Office of New South Wales, which was Australia's first such office, finds its place in national and global networks of similar offices and organisations. The Australian Network of

Environmental Defender's Offices, which came into existence with the help of Commonwealth funding in 1995, comprises nine independently constituted and managed community environmental legal centres in each State and Territory of Australia. The network has common objectives which are not confined to the reactive elements of defence. They are:

- protecting the environment through law;
- ensuring that the community receives prompt advice and professional legal representation in public interest environmental matters;
- identifying deficiencies in the law and working for reform of these areas;
- empowering the wider community, including Indigenous peoples, to understand the law and to participate in environmental decision-making; and
- assisting the growth of the national EDO network across Australia.

The proactive, creative and constructive role of the environmental lawyer in the development of public awareness, public policy and new and better laws is as important, if not more important, than signal victories in courts of law.

Beyond Australia's shores there are many organisations similar to the Environmental Defender's Office of New South Wales. Such organisations are to be found in the United States, Canada, the United Kingdom, New Zealand, Sri Lanka and Bangladesh, Latin America, Europe, South Africa and Tanzania. They have varying

emphases and priorities as between public policy development, public education and litigation.

Many of these organisations, including the EDO, form part of what is now the world's largest litigation and law reform environmental network, the Environmental Law Alliance Worldwide (ELAW). The ELAW network was created in 1989 at the annual Public Interest Environmental Law Conference at the University of Oregon Law School. Its founders agreed to collaborate, to replicate successful environmental policies and to learn from each other's experience. Their cross-border collaboration relies significantly on the Internet and electronic communications generally. It uses technology to expand the impact of work done in disseminating information in response to specific requests for legal and scientific assistance. Today more than 300 public interest advocates, from 70 countries participate in the ELAW network.

The Environmental Defender's Office of New South Wales tonight celebrates the first 25 years of its existence and does so as part of a global movement. The national and worldwide networking of environmental defenders and like organisations reminds us that the environment is a global concern. That concern has never been more acute than today; particularly in relation to climate change. Detailed prognoses of climate change are beset by the inherent complexity of our climatic system, which makes modelling and precise prediction difficult. However, the science, despite its difficulties, appears to have established the reality of a global warming trend. That reality will not be displaced or secured by the discourse of culture wars which informs some of the climate change debate.

By way of anecdotal pre-history, there were environmental organisations in existence around Australia before the Environmental Defender's Office was formed, some of which engaged in litigation, although not with a particularly high success rate. As a young lawyer in the late 1970s and early 1980s I went to court on occasion for environmental organisations and their members in matters arising out of bauxite mining in the south west of Western Australia and the management and exploitation of south west forests. Like most

experiences in the law, these engagements brought moments of euphoria and humour, and occasionally mild depression.

Bauxite mining in the south west of Western Australia in the late 1970s generated significant concern among local environmentalists, including such bodies as the Campaign to Save Native Forests, the South West Forests Defence Foundation and the Conservation Council of Western Australia. That concern led to litigation, in which I was involved with my helpful academic friend, Peter Johnston, in the surprisingly disparate centres of Harvey, a small south west town, Perth, and Pennsylvania. I found myself in Magistrates Courts on two occasions defending people who were charged with obstructing endeavours to mine and refine bauxite at Wagerup and other locations in the south west. These defendants were identified by alpha-numeric group names. I refer to the Harvey 11 and the Wagerup 23.

The Harvey 11 was so named because there were 11 of them and they were prosecuted in the Magistrates Court at Harvey. Their offence, as I recall it, was to obstruct the progress of mining operations by tying some form of tent rope to a bulldozer. To the best of my recollection, the magistrate found as a matter of fact that this did not amount to obstruction. The case did not enunciate any new legal principles. Its highlight came during the luncheon adjournment when a street theatre known as 'Desperate Measures' performed, in the main street of Harvey, a satirical version of the Sound of Music directed at bauxite miners, Sir Charles Court and all their friends and supporters. It is a tribute to the indifferent majesty of the law that His Worship, Mr Boyce, who ate his sandwich lunch in chambers well within ear shot of this noisy musical polemic, did not take it out on the defendants.

The Wagerup 23 generated some interesting law, a new statute and a querulous editorial from the West Australian newspaper. The protestors, who threw themselves on and in front of Alcoa's bulldozers at Wagerup, were charged with an offence, created under s. 67 of the *Police Act 1892* (WA), of obstructing somebody from doing something pursuant to an authorisation issued under a law of the State. This

time there was no doubt about the obstructing part of it. But the law of the State was said to be the government agreement between Alcoa and Western Australia, which was scheduled to an Act of the West Australian Parliament. The 23 having been found guilty in the Magistrates Court went to the Supreme Court where *Sankey v Whitlam*<sup>2</sup> was invoked for the proposition that scheduling an agreement to an Act of Parliament does not make it a law. The Supreme Court ducked the big question, but gave the appellants a win on a little point – namely, that what Alcoa had been doing was not done pursuant to an authorisation issued under the agreement.<sup>3</sup> The State appreciated that it might be in some difficulty on the big question so within a week of the Full Court decision the Government introduced the Bill which was enacted as the *Governments Agreement Act 1979 (WA)* to overcome the problem. The West Australian newspaper was bemused by the whole thing and published an editorial saying, in effect, that the law was an ass although it used more polite phrases such as: ‘common sense ... overlooked’ and ‘too silly to be true’.<sup>4</sup>

Two victorious war stories should be balanced by one of defeat. I have therefore carefully selected a defeat the blame for which can be directed offshore.

The Conservation Council of Western Australia in 1980 was very keen to find some way of agitating, in a court, its concerns about bauxite mining in the south west of Western Australia. There were considerable obstacles in its path. One was want of a cause of action. The other was want of standing, though it was said at one stage that potato farmers, threatened by increased salinity in south west water courses, might be possible plaintiffs. Surprisingly, no potato farmer was found willing to expose himself to the financial downside of speculative litigation against a multi-national mining giant. The Conservation Council then turned its gaze offshore.

Acting on the advice of a West Australian lawyer, who was in turn acting on the advice of a New York lawyer who had written about the rights of trees, the Conservation Council commenced proceedings against Alcoa and Reynolds Metals in the United States District Court of Pennsylvania. The pleading invoked somewhat elusive applications of US anti-

trust laws, specifically the Sherman and Clayton Acts. This was not the first time that environmental issues had been litigated as anti-trust law. In one such case in 1976, plaintiffs had alleged that automobile manufacturers had conspired in restraint of trade to prevent development of anti-pollution technology.<sup>5</sup>

To cut a long story short, the defendants filed a motion to dismiss. Their prospects of success on the merits were high. At this stage the Conservation Council decided to brief my firm. We had the task of preparing factual material for filing in the US Court to provide some basis for the allegation of environmental harm in the plaintiffs’ pleading which had been filed in the US Court. A number of substantial affidavits from Western Australian-based scientists and medical experts were filed.

The strike out motion succeeded. This came as no surprise. To add insult to injury, the trial judge’s judgment opened with a piece of breathtaking condescension designed to demonstrate his classical education and the plaintiff’s foolishness. It read thus:

According to Greek mythology, Palladium, a Trojan statue of the goddess Pallas Athena (represented with a spear in her right hand and a distaff in her left), fell from the heavens near the tent of Ilus, a prince who was employed in building the citadel of Troy. Apollo, by an oracle, declared that the city of Troy would never fall as long as the Palladium was contained within its walls.

Plaintiff, an Australian conservation group, seeks from this court a Palladium for the Darling Range of Western Australia. Unable to obtain one in the country from which it comes, plaintiff has travelled to the United States in an unprecedented attempt to have a United States court sit in judgment on mining and refining activities taking place entirely within the foreign country from which plaintiff comes and whose allegedly deleterious effects on that foreign nation’s environment plaintiff opposes. The case is now before this court on defendants’ motion dismiss.<sup>6</sup>

That judgment was delivered in July 1981. In the same year, while all that was going on, the Environmental Law Association of New South Wales (ELA) set up a committee which was to become the Environmental Defender’s Office of New South Wales. At that time, Murray Wilcox QC was President of the Australian Conservation Foundation and presided

over the ELA's executive. The initial concerns of the committee were to secure approval from the Law Society of New South Wales for the formation of the Environmental Defender's Office and the funding necessary to operate it.<sup>7</sup> To overcome Law Society concerns about unfair attraction of business and touting among other things, assurances were given that the Office would operate like other community legal centres and cater generally to members of the public not otherwise serviced by the legal profession.

Initial funding came from Lend Lease which donated \$10,000 and Esso, which donated \$1,000. Fortunately, the Chairman of Lend Lease had just finished reading a book called *The Extinction of the Species and the Impact thereof on Mankind*, or some such title, which as he said in a letter to Murray Wilcox, 'laid the groundwork for acceding to your request'.<sup>8</sup> Eventually other funding came from the Legal Aid Commission conditional upon the EDO becoming 'independent'. This meant its move from being a committee of the ELA to a free-standing organisation. In 1984, an interim Board of Management was established and by January 1985 the office was incorporated.

Staff recruitment was not straightforward. The first advertisement for a principal solicitor required three years experience practising in the field of environmental law by a person who will have acted 'for both proponents and opponents of both major and minor development ...' This person would also have a sound knowledge of environmental planning, local government, mining and pollution law.<sup>9</sup> As Professor Boer was to write:

The response to these advertisements was not overwhelming.<sup>10</sup>

Nevertheless, applicants for the position were found and appointments made. One of the early appointments was Brian Preston, currently the Chief Judge of the New South Wales Land and Environment Court. By 30 May 1985 the Office had opened 12 files, of which five were litigious.<sup>11</sup> In the years that followed it took a number of important cases to courts, including the High Court, covering a variety of issues concerned with development and activities impacting on the environment. Since its early years the Environmental Defender's Office

has expanded its services into a wide range of areas. In 2008 and 2009 it undertook a variety of cases involving issues of significant public concern including climate change, biodiversity issues, Aboriginal cultural heritage and planning and coastal development. Its staff dealt with over 1,000 telephone inquiries on the Environmental Law Line, some 65% of which came from rural and regional New South Wales.

Litigation conducted by the Office since its creation reflects the diversity of its practice. It has acted for groups and individuals and Indigenous communities. It has, like many such organisations, faced ongoing challenges posed by limited resources. Not unexpectedly, it has not enjoyed success in every case it has taken on. Nevertheless, its record in the face of challenges posed by limited resources is one of which those who do work with it, those who have worked with it, and those involved in its governance, can take some pride. It is an ongoing reminder to all, of the proposition which is good at the local and global level that our environment must be respected and protected. That is not just to provide gainful employment for the species known as the environmental defence lawyer. It is also to provide a liveable and survivable environment for the whole human species.

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1 J Bonnie, 'Public Interest Environmental Lawyers – Global Examples and Personal Reflections', (2003-2004) 10 *Widener Law Review* 451 at 451.

2 (1978) 142 CLR 1.

3 *Margetts v Campbell-Foulkes* (unreported, WASC, 29 November 1979, FC, SCL2764). See also Johnston and French, 'Environmental Law in a Commonwealth State Context – The First Decade' (1980) 2(2) *Australian Mining and Petroleum Law Journal* 77 at 86-87; Warnick – State Agreements (1988) 62 ALJ 878 at 896-899.

4 *West Australian*, 1 December 1979.

5 *In Re Multi District Air Pollution* 538 F.2d 931 (9th Circuit, 1976).

6 *The Conservation Council of Western Australia v Aluminium Company of America* 518 F Supp 270 (1981).

7 B Boer, 'Legal Aid in Environmental Disputes', (1986) 3 *Environmental and Planning Law Journal* 22 at 35-37; M Wilcox, 'The Role of Environmental Groups in Litigation', (1985-1986) 10 *Adelaide Law Review* 41.

8 D Robinson, 'The Environmental Defender's Office NSW 1985-1995', (1996) 13 *Environmental and Planning Law Journal* 155 at 156.

9 D Robinson, fn 8, 155 at 158.

10 B Boer, 'Legal Aid in Environment Disputes', (1986) 3 *Environmental and Planning Law Journal* 22 at 27.

11 D Robinson, fn 8, 155 at 159.



# Public Interest Environmental Law in Australia: Challenges and opportunities over the next 25 years

Professor Ian Lowe AO, President, Australian Conservation Foundation

*This is a transcription of the keynote address presented by Professor Ian Lowe at the EDO's national conference.*

I want to begin by acknowledging we're on the lands of the Gadigal people. That's become something of a ritual, but I think it's particularly significant if we're reflecting on the possibility of sustainable futures and the role of law in achieving them.

I'd remind you that the original Australians worked out over tens of thousands of years that societies only have a long term future if they live in balance with their natural resources. And the law was a significant part of the process of engaging with natural systems. The senior law people gave the Indigenous people the rules for when they could hunt and how they engaged with natural systems.

If we aspire to have a sustainable future, the legal framework has to be an integral part of that, just as the law was an integral part of the Indigenous people engaging with natural systems.

Richard Wilkinson, in his book *Poverty and Progress*, argued that it was no coincidence that when Europeans toured the world in the 18th and 19th centuries pointing the flag at anything that couldn't move and a gun at anything that did, they kept encountering hunter-gatherer societies that were living in balance with natural systems.


He argues that what the Europeans encountered was the end process of thousands of years of social evolution in which those who had figured out how to live sustainability were still around to be encountered by the Europeans and those that did not had disappeared into the mists of history.

That's an earlier version of the argument in Jared Diamond's book, *Collapse*, in which he argues that societies tend to expand until they reach limits and whether they survive or disappear, which is indicated by his subtitle, *How Societies Choose to Fail or Survive*, is determined by whether they are then able to change their mode of operation to get back in balance or whether they march determinedly into the night of extinction doing what had served them well in the past.

*"...we are already in the middle of the sixth major extinction event in the Earth's history..."*

There are vast civilisations like those at Easter Island or the Mayan civilisations or those at the Tigris and Euphrates Basin that were unable to adapt and disappeared and there are other civilisations like the Pacific Islands and medieval Japan that adapted what they were doing and transformed their society to remain in balance.

Now, we started to recognise that human activity has an impact on large-scale ecological systems only about 50 years ago. I think we can date that broader awareness from the publication of Rachel Carson's book, *Silent Spring*, so we now have about 50 years of awareness that, in the famous words "Houston, we have a problem", our engagement with natural systems is causing significant perturbation that can be measured at the global level.



It's now nearly 40 years since limits to growth reminded those who were aware, and those who weren't mortally offended by the very notion of limits to growth, that if we continued to develop in the way we had in the past we would face inevitable limits within a hundred years and that the most likely result would be ecological and social disintegration in the early to middle decades of this century.

It's now 35 years since we have had environmental law. *The Environmental Assessment Impact and Proposals Act 1974* for the first time required us to think about and act within a legal framework of assessing the environmental impact of what we were doing.

For 25 years we've had Environmental Defender's Offices taking up the cudgels on behalf of the natural environment to ensure that the legal measures were implemented.

The depressing thing is that despite the good work which EDOs have been doing for 25 years, despite the fact that we have, for 35 years, had a legal framework which is intended to protect the environment, still all the important indicators are getting worse.

Fifteen years ago I chaired the Advisory Council that produced the first national report on the state of the environment. It said we have a beautiful and unique environment and much of it is in good condition by any international standards, but we had some serious problems that we need to be addressing if we want to achieve our stated goal of developing sustainably, and I remind you that that is our stated goal.

It's now nearly 20 years since the Council of Australian Governments adopted the national statement on ecologically sustainable development, so it is, in principle, the avowed aim of State and Territory and Commonwealth governments to develop in a way which is ecologically sustainable.

That first report said that among the serious problems are the loss of our unique biological diversity, the degradation of areas of our rural land, the state of our inland rivers, the pressures on the coastal zone of increasing population and rapidly increasing greenhouse gas emissions.

The second report five years later said that all of those serious trends were getting worse and

the third report, although it couched it in more diplomatic language in its desperate attempt to say something positive to the government which had appointed them, concluded that all of those quantifiable indicators were still getting worse.

It's not just scientific assessments that have come to that conclusion. The Australian Bureau of Statistics was provoked, by the criticism of ratbags like us that they simply collected economic statistics and regarded them as proxy measures of community welfare, to start their program measuring Australia's progress.

From 1990, they collected quantitative measures of economic, social and environmental change and they've now presented three of their reports on measures of Australia's progress. All conclude that since 1990 all of the economic indicators are positive, the social indicators are mixed, with some better and some worse, and almost all the environmental indicators are heading in the wrong direction.


The only one which has improved, and it's a lesson in this age when we're encouraged to believe that if we close our eyes and trust the market everything will get better, the only measurable indicator which has actually improved is urban air quality.

The reason urban air quality has improved is that governments have regulated; regulated to require unleaded petrol, regulated to require catalytic converters which have dramatically reduced the exhaust emissions per motor vehicle.

Now we're working on the problem that this indicator is getting better by each year increasing the number of vehicles and increasing the distance they're driving so we can comfortably assume that that, too, will be getting worse in the near future.

I'd remind you that the most critical problem we face is the loss of our biological diversity. Climate change is a critical issue but if we are resolved we can stabilise the climate within a hundred years and even the long time lag changes, like increasing sea level, can be stabilised within a thousand years.

But the damage we're doing to biological systems will take geological time to repair, because that's the time that these biological systems require to evolve.



The current extinction rate for mammals and birds and amphibians is somewhere between a hundred and a thousand times the long term average over the planet's history. So, we are already in the middle of the sixth major extinction event in the Earth's history, losing species at somewhere between a hundred and a thousand times the long term average.

We know why we are losing species; it's destruction of habitat, introduced species and chemical pollution. None of those forces are slowing down. In fact, they're arguably all still increasing but they're now being compounded by climate change and the gloomy assessment of the millennium ecosystem report is that the likely extinction rate this century is somewhere between 10 and a hundred times the current rate, which is already between a hundred and a thousand times the long term average over the planet's history.

Even those whose numeracy is so limited that they have a career in politics ought to be able to work out that that's a catastrophic impact. The millennium ecosystem assessment came to the conclusion that we could easily lose 30% of all the mammal, bird and amphibian species this century. So, we're talking about a catastrophic loss of biological diversity.

I don't want to depress you, but the millennium assessment also said that there's established but incomplete evidence that our impacts on ecosystems are increasing the likelihood of non-linear changes with important consequences for human wellbeing because we deal in our politics and economics with linear systems where there are small reversible changes from one mistake to another.

But the millennium assessment gave half a dozen examples of non-linear change; the most famous is the collapse of the Newfoundland Cod Fishery which was harvested more or less sustainably, about a quarter of a million tons a year for about a hundred years, until with the benefit of improved technology, we were able to catch about three times as much fish for about five years, after which the fishery collapsed. There was a minor recovery and then it collapsed completely and it is now essentially gone.

The crucial lesson is that natural systems have critical thresholds and it is possible to push natural

systems beyond those thresholds when they change non-linearly and effectively irreversibly to a different stable state. We need to be aware that we are still cosmically ignorant of the complexity of the natural systems of this planet.

People talk rather grandiosely about environmental management, which I think is indefensible hubris.

*"...the most critical problem we face is the loss of our biological diversity."*

We estimated in the first state of the environment report that we've only even identified 10 or 15 % of the species that we share Australia with. So, in that sense, environmental management is like managing a football team where you've only even met two of the players. You don't know who the other 16 are and you have no idea how they interact or even what rules they're playing by, but you're still purporting to manage the system.

So, we have made important gains from the legal process that stopped the Franklin Dam, even the much criticised *Environment Protection and Biodiversity Conservation Act 1999*, which until recently had only been used to protect such endangered species as the rare yellow-bellied politician, has more recently been used to stop the ridiculous Traveston Crossing Dam.

But I remind people that the Traveston Crossing Dam was not stopped because it was a ludicrously inefficient proposal, it was not stopped because it was an outrageous waste of public money; it was stopped because it threatened the habitat of two endangered species.

So, environmental law can be used for good but the present system has, I believe, some critical flaws. This is a concise summary of what I see, as a person with absolutely no legal competence whatsoever, as the defects of the present system.

Firstly, it's weighted to economic development. It is presumed that developments which are economically desirable will go ahead unless there is an absolutely iron clad case that there will be outrageous environmental impacts which even the most benighted judge in an environment court cannot accept.

As an example of that, I gave evidence in a case in Queensland, which some of my colleagues from there will remember, where there was a proposal to build a shopping centre on land that was about three nanometres above the present high tide mark and only about half a metre below where the sea level will be in 50 years' time and which would have destroyed significant habitat of wetland species and the judge was not impressed by that evidence at all. He was impressed by the evidence that there were already enough shops in that area and that it probably wasn't economically desirable to build a shopping centre.

The present system is strongly weighted towards economic development and the presumption is that developments which are economically viable can go ahead.

Secondly, it does not adequately consider cumulative impacts. You may have 50 different proposals, each of which has an entirely acceptable environmental impact, but the sum total is an entirely unacceptable environmental impact upon an area. And the fact that we still don't have a system for dealing adequately with climate change is perhaps the extreme example of that.

I was called to give evidence again in a case in Queensland where the argument from those wanting the court not to put restrictions on a proposed new coal mine was that the incremental addition to climate change at one coal mine was almost undetectable and certainly no significant environmental impact could be ascribed irrefutably to that coal mine as distinct from the other coal mines or other activities burning fossil fuel and so nothing should be done to stop the proposal.

Thirdly, it deals poorly with scientific evidence, partly because the legal system usually consists of people who have not studied science, but partly also because lawyers tend to use science as a drunk uses a lamp post - for support rather than illumination. The critical issue in considering who might be called to give evidence is who will be the witness who will most strongly advance the cause.

Now the problem with that is that any competent scientist will admit that we can't have certain knowledge about complex natural systems and so

will always give a qualified opinion. It's been said that if you cut a scientist's hands off they wouldn't be able to give evidence because they couldn't say "on the one hand this but on the other hand that". They will always give a qualified opinion.

Only an incompetent or dishonest scientist will give an absolutely straight yes or no answer to a question. Now what that means is that an incompetent or dishonest scientist is a more impressive witness than somebody who tries honestly to wrestle with the complexity.

So, there's a real danger in the legal framework that junk science will trump an honest attempt to wrestle the complexity.

I've had the experience in a Queensland legal framework where the judge took it upon himself to read the meanderings of a retired marine geologist and decided that they trumped the attempts of the Intergovernmental Panel on Climate Change to wrestle with the complexities of climate science.

Fourthly, although there have been some advances in New South Wales, it's still quite rare for the legal framework to use the precautionary principle. It seems to be accepted that environmental damage has to be proven beyond reasonable doubt rather than, as I think should be the case, those who want to interfere with the environment should have to prove beyond reasonable doubt that that is acceptable.

If we adopted the precautionary principle we would set the bar much higher in looking at allowing activities whose impacts cannot be known with certainty.

As I said, the legal framework does not handle climate change at all well; we don't, for example, have a greenhouse trigger under the federal legislation for looking at environmental impacts and it's a classic case of death by a thousand cuts.

I believe the current analysis implicitly privileges this generation over all future generations because we assess proposals against the standard of what is good for this generation. It's been said that we'd make better decisions in a whole range of areas if we really asked ourselves "what will this decision look like in a hundred years' time?" But most decisions are taken by people who are concerned about this

year's election or next year's balance sheet rather than the long term implications and we're not very good at all at assessing the long term impacts of the changes we're making.

I think there are some other fundamental issues around the fact that the assessment of a proposal is done by interested parties who have been employed by a proponent to put the uncertain science in as favourable a light as possible. And you have to say that we haven't been very assiduous at going back and re-examining earlier studies and earlier decisions to ensure that those assessments were valid or even intellectually defensible.

Finally, even where conditions are imposed, we have no effective arrangements for enforcement of decisions. I was struck by the fact that the trade practices legislation, the prudential regulator, the corporations regulators all have \$50 million or more enforcement budgets. We have no national environmental enforcement budget. We don't even have an enforcement section within the Commonwealth department.

What we have is a 'decisions and approvals' section and that is, I guess, at least truth in advertising because the decisions are almost always approvals.

You would have to say that the goalposts sometimes get moved when we look like scoring; it's not at all unknown for governments to rush through special legislation to ensure that what looked like being rejected by the legislative process can be allowed after all.

I could remind you of things like the interesting legislative frameworks in the sovereign State of Tasmania which have exempted pulp mills, however outrageously polluting and however destructive of old growth forests, from normal environmental impact assessment, but this is not by any means the only example.

When we brought in national air quality guidelines, the State of Queensland passed a special Act of Parliament to exempt the area of Mt Isa from air quality legislation on the very good grounds that we would have to have cleaned up the act of the local mine and smelter if they were subject to national regulations.

I'm told that NSW is talking about changes to legislation to allow the Minister to make arbitrary decisions behind closed doors about proposals for developments in national parks. Interestingly, when this has been challenged, the Minister is reported to have said that he didn't understand why people were getting concerned because he already had these powers anyway.

That begs the rather interesting question that if the Minister already has these powers, why do we need an Act of Parliament to give the Minister these powers? You'd have to say that the Minister may be known for sartorial elegance but perhaps not for legal niceties.

So, what can we expect in the next 25 years? Well, it's been said that it's difficult to make forecasts, especially about the future, so I won't make any quantitative assessments. The future is not somewhere we're going but something we're all creating, so there is not one future which experts can predict for you.

I would remind you that a lot of people lose a lot of money every Saturday afternoon on the misguided notion that the future is essentially determined and if you're sufficiently clever you can work it out. Those who know that it's not make a lot of money every Saturday afternoon and those who think it is lose a lot of money every Saturday afternoon.

There are many possible futures and which future occurs will be a function of our decisions and actions. We're all making decisions that make some futures more likely and others less likely.

Let me say some things which are clear challenges for the next 25 years.

The first is that we will have the impacts of a growing population because of the long time lags in the system. Even if we weren't bribing women to have more children and encouraging them with facile slogans like "one for the husband and one for the wife and one for Peter Costello" or, to be bipartisan, "I believe in a big Australia". Even if we weren't encouraging people to have more children and even if we had zero net migration, because of the past bulge in the birth rate, the population would increase for the next 25 years before it stabilised

and, of course, if we're bringing in unprecedented numbers of migrants it will either stabilise later or not stabilise at all and it would stabilise by disease and starvation and fighting amongst ourselves.

But what you can say with assurance is, short of unforeseeable plague or pestilence or civil violence, the Australian population will keep increasing for the next 25 years so all of the consequences of the environmental pressures of the population will keep increasing for the next 25 years; the pressures on coastal land, the pressures on urban infrastructure, the pressures on food production, the pressures on our rivers which are used to provide water for food production and so on.

Secondly, climate change will continue for the next 25 years, again because of the long time lags in the system. The carbon dioxide I am putting into the air this minute by using dirty coal-fired electricity to project these limited thoughts will be in the air for the rest of this century. So, we are already determining climate change for at least a hundred years and if you look at the projections of the Intergovernmental Panel on Climate Change, what distinguishes all of them is that none of them has reached a maximum by the end of this century. They are all still increasing.

So, in the next 25 years, no matter how successful we are at achieving a global agreement to do something about the problem, the climate will keep changing.

I think for those two reasons, in the next 25 years we will inevitably see an accelerating loss of biological diversity. Even if we were to develop a civilised approach in which we said, for example, that every new development that requires the loss of natural areas must make a compensating investment in the restoration or enhancement of habitat, still so much natural area is inevitably going to be lost as a result of the growing population and climate change that I believe that we have to resolve ourselves to further loss of biodiversity and seek to minimise the damage.

The other comment I'd make is, in the wonderful words of Henry Nix, we have a surprise-rich future. Because we are still cosmically ignorant of the complexity of natural systems and because our science could best be described as islands of

understanding in an endless sea of mystery, we are still almost certainly pushing natural systems towards critical thresholds beyond which they will behave in ways we cannot predict.

So, we need to be aware that there are likely to be environmental problems that we cannot yet foresee in the same way as if we had been meeting 25 years ago we probably wouldn't have had climate change on the agenda.

I think it's also probable that we'll see increasing community concern. I think the surrogate debate about population and immigration in recent weeks has been a reflection of increasing community awareness that our quality of life is being impaired by the impact of growing numbers of people demanding more and more from the natural systems.

So, I have an acronym for our approach over the next 25 years. It's a rather tortured and unofficial acronym, but I like to have acronyms that will encourage people to remember the important points. It's STOP CRIME. That stands for:

**S**cientific panels informing the process,

**T**ransfer burden of proof,

**O**verhaul the standard of proof,

**P**ast advice evaluated,

**C**umulative impacts explicitly considered,

**R**ead consideration of future generations,

**I**ndependent assessment,

**M**onitoring in the light of claims, and

**E**nforcement of conditions.

Let me just underline each of those briefly.

I think rather than having competing experts and the risk of the triumph of junk science, a better process would be to have scientific panels which inform the process by saying what is known with certainty, what is believed by the majority of scientists, what is still uncertain and still an area of research so that at least there is an informed basis for making decisions.

Secondly, I think we need to transfer the burden of proof. I think we have done so much damage to natural systems that those who seek further change should have the burden of showing that that change is

acceptable, rather than having the situation in which poorly funded community groups are struggling against the State or international corporations and having to bear the burden of proving that the development is unacceptable.

Thirdly, I think past experience of the damage we've done to the natural systems through activities that were not properly regulated would justify an overhaul of the standard of proof. In the criminal jurisdiction, if I am charged with an offence, the Crown has to prove beyond reasonable doubt that I am guilty before I am locked up. It's considered that we should impose that standard of proof because the burden of me being in prison is so great that it is better for nine guilty people to go free than for one innocent person to be locked up.

Well I don't think we can say it's better for nine guilty proposals to damage the environment than for one to be forestalled. I think it is now important that we only allow developments which clearly do not do unacceptable damage to be approved. I think that those who are proposing a development which has significant impacts on the natural system should have both the burden of proving that it is acceptable and should be required to prove beyond a reasonable doubt that those impacts are acceptable.

I think experts should be held to account. I think past advice should be evaluated and people whose advice turns out, with the wisdom of hindsight, not to have been accurate should be held accountable for that advice.

I think it's clear that we need to explicitly consider cumulative impacts; it's not just climate change. If you think of the pressures on the coastal zone in coastal Queensland it's probably fair to say that no one development has damaged the coastal ecological systems but the total impact of all the coastal developments clearly has. And so we need to explicitly consider cumulative impacts in looking at the next development.

There has to be real consideration of future generations. I think there is one international corporation that has a practice of an empty chair at the board table which symbolises future generations. This reminds decision makers that their choices are

literally setting in concrete for 50 to 100 years what the future will be like and we need to explicitly consider what sort of world we are providing for future generations.


I think we would be better served if environmental impact assessment was conducted or commissioned by people who are genuinely independent rather than commissioned by the proponent with an obvious incentive to try and find an assessor that will give the answer that they want. I believe it would serve the public better if the assessment were commissioned by public agencies charged with the duty of ensuring that it is an honest and impartial assessment.

I think we need to monitor developments which have gone ahead in the light of the claims which were made at the time and if those claims turn out to be baseless or inflated or distorted, those who made the claims should be held accountable.

One of the presidents of a Latin American country at the climate change conference in Copenhagen said that just as we now have an International Court of Justice where people are held accountable for crimes against humanity, we should have an international climate change tribunal at which people who knowingly sentence future generations to unacceptable climate damage should be held accountable. I commented at the time that I thought it was a very good idea and there would probably be much more difficulty finding directors and managers for coal mining companies and electricity generators if we adopted that principle.

Finally, we need to get real. If the law is not enforced it effectively does not exist. When I lived in suburban Brisbane, in principle the speed limit in the street where I lived was 50 kilometres an hour, but since no one had ever seen a police officer or a radar trap in the street, the effective speed limit was 100 kilometres an hour. If the law is not enforced, it effectively does not exist.

If we want environmental assessments and environmental conditions to be fulfilled in practice we need to get serious about enforcing those conditions.



What's impeding this entirely reasonable set of modest proposals? I would suggest to you that the fundamental problem is that the legal system inevitably embodies community values and while we as a community esteem economic growth above environmental integrity and social cohesion, so will the law.

So, in that sense I believe that the task of those of us who are concerned about these issues is at least to try and shape civilised community values rather than hoping that legal palliatives will slow down the impacts of inappropriate values.

When I tell Queensland politicians that the Great Barrier Reef is a unique natural ecological system their eyes glaze over, but when I remind them that it supports a \$1.6 billion tourist industry and 60,000 people, many of whom live in marginal electorates, then suddenly it's a critical environmental problem.

The fundamental point that I think we need to remind decision makers of is that the economy gives us things that many of us want but many of the things that the economy gives us, we have to be persuaded to desire even though we don't really want them. As Clive Hamilton famously said, its task is to "persuade us to use money we don't have to buy things we don't want to impress people we don't like".

In that framework, as Richard Eckersley put it, the traditional seven deadly sins of pride, lust, envy, greed, laziness and so on have been repackaged as the marketing imperatives of the modern world and are used every night on television to persuade us to desire things that aren't really necessary.

But natural systems give us the things that we absolutely need, like breathable air, drinkable water and the capacity to produce our food as well as things that I believe are critically important like our sense of place and some spiritual sustenance.

I remind people that, unless I've been to an American fast food place recently, every molecule in my body was once part of the natural systems of this planet and every molecule in my body will in time again be part of the natural systems of this planet. We are just as much dependent on natural systems for

sustenance and processing our waste as gumtrees or galahs or goannas.

So, if you look at the Earth from space, you can't actually see the economy. What you see is the perilously thin membrane that supports life and some of the physical boundaries that we use to demark society like oceans and mountain ranges and rivers.

If you start from the view from space I believe you come up with a much more rational view of the world, one that recognises the economy as a subset of society, a very important subset, but there are things we expect from society, like our culture, our identity, security and companionship and love which are not part of the economy and a society is totally enclosed within and totally dependent on natural ecological systems.

So in that sense, if we want a legal framework that protects the integrity of ecological systems and secures our future, we need to develop values, community values, that are consonant with that legal framework.

Dr Paul Raskin of the Tellus Institute in Boston argues that the values which have driven society for the last hundred years are domination of nature, individualism and consumerism and he argues that while these may have served us well in the past, they are now incompatible with our goal of a sustainable future and they need to be transformed to a new suite of values if we want to have a civilised future.

Domination of nature, the notion summarised by a friend of mine in the phrase "white man speak with forklift truck" and the idea we can solve any problem by applying horsepower, needs to be replaced by what you could call 'ecological sensitivity', an awareness that natural systems have critical limits and a willingness to live within them.

Consumerism, the idea that we will be more fulfilled if we have a bigger plasma television than anyone on the block, needs to be replaced by an emphasis on the quality of life, the quality of the human experience.

Finally, individualism, the rather dotty notion that you can be a selfactualising individual in a community of 6.7 billion people, where the climate in Sydney is affected by what people do in San Diego and the



climate in San Diego is affected by what people do in Sydney, needs to be replaced by a recognition that we're all in this together, by an identification with the human family and a willingness to consider the global impacts of what we're doing. Because what we do today will determine the sort of world that we live in tomorrow. We are making decisions now that will determine what will happen in the next 25 years.

I have a fridge postcard at home that inspires me. It says in French, wonderful Gallic hubris, *nous changerons le monde*, 'we're going to change the world'. Underneath, in smaller writing, there are words that translate as "if it's not you, my little one, who will begin to change the world, who will do it?"

It's a reminder that if we want a sustainable future we have to, as Ghandi said, be the change we want to see in the world. We shouldn't be waiting for others, we shouldn't be waiting for governments, we shouldn't be waiting for corporations; we should be doing what we can now to produce that sustainable future.

Let me conclude. Despite all our efforts, despite the good work of EDOs over the last 25 years and the fact that they have clearly and measurably stopped some of the worst environmental atrocities that have been proposed, natural values are still in decline.

I think we could envisage a much better legal framework which would make it more likely that the legal framework would restrain the worst instances of damage to the natural environment and would be more likely to lead to a sustainable future.

But because the law embodies our values, if we really want a better legal framework we have to be simultaneously working on reshaping community values so that they are compatible with our goal of a sustainable future.

In that sense, I believe working for that sustainable future, working for new values is nothing less than our moral responsibility to the countless millions of other species that we share this planet with and the future generations for whom we hold it in trust.



# Access to Justice and the Need for Public Interest Environmental Lawyers

The Hon Duncan Kerr SC, MP

*This is a transcription of Duncan Kerr's keynote address in the session 'Access to Justice and the Need for Public Interest Environmental Lawyers'.*

What I'd like to do is to try and put some context around the origins of the EDO movement and then explore some of the more recent history and some of the challenges that I think those who are concerned about action to sustain our environment need to reflect on.

The environment movement as we understand it in the legal context really is a phenomenon, at least until very recently, of the United States, English speaking countries and Australia. It has grown from that basis and extended more widely.

Whilst we're now very diverse societies, multicultural societies, the cultural background that we bring with our legal traditions in most common law countries evolved out of a particular kind of relationship to the world. And it's not a relationship of the kind that, for example, the Jains practice in India where one carefully treads on the Earth lest one disturb or kill the smallest creature.

Nor is it an animist tradition where all things are part of all things and in which humans are simply part of the larger ecology.

Rather, it's a Judaeo-Christian tradition in which the biblical starting point was that God invested in man a unique characteristic and an entitlement to exploit the Earth; a responsibility to garden, to husband and to increase his reach out to the furthest corners of the world.

Many of the societies that were evolved out of that process through the colonial period went through a

process whereby not only was the natural biology of those environments in which the Europeans arrived dramatically changed but also the native communities were displaced and marginalised.

That's where Australia started from in terms of its relationship to its environment.

We all know the stories of our attempts to tame and to Europeanise the Australian environment; the bringing of new species of plants, new animals and the attempt to make fertile the lands from which the Europeans were displacing the Indigenous people.

That itself creates a whole series of knock-on consequences; with the new animals came plagues of rabbits and various other kinds of unintended consequences.

But the intended consequence is what I want to focus on because the intended consequence was to tame what was seen as almost an abundantly large continent and to subdue it and to enable a European civilisation to emerge.

The spaces in Australia and in the United States were seen as almost unlimited – I'm thinking of those great western experiences of the United States where we see a wagon train and all the movies about the western expansion of the European settlers to California.

We mirrored it in different ways in Australia with these quite heroic stories of the exploration of the interior; attempts to cross the Blue Mountains and find new arable land. You get the sense of a small

entrepreneurial exploring society dealing with what they saw as this quite profoundly untamed land of immensity.

I'd like to just reflect on my own youth, because I've lived through a change in the way we see our Australia. My father was an engineer, a Hydroelectric engineer in Tasmania. Their brief was to tame the great rivers of Tasmania in order to harness them to produce electricity. To do that they set up dams and created what we were all so proud of in my youth; this great string of hydro-dams that went up and down the various rivers of the State. I still remember them all - Wayatinah, Tungatinah. The names of the dams we had to know as a schoolboy recitation and there was this quite determined pride that we had about the way in which we had hydro-industrialised Tasmania so that we could build an industrial base.

I grew up in a household where my father was an engineer in the hydro which was one of the most prestigious things you could be in Tasmania at that time because, I think it's been said, the Hydro-electric Commission at that time ran Tasmania very largely.

One of the first jobs that I took when I was a young man was working with the Forestry Commission. I went to the north-west coast of Tasmania when I was just under 16, before I went to university, and my task was to cut tracks so that the foresters could go out and measure quarter acre blocks of trees to see how much resource was available.

Of course, again the thinking was, well this resource is nearly unlimited. There's an unlimited opportunity to tame the waters to create electricity and an unlimited opportunity to identify these forest resources that could build economic opportunities also.

In another job I was working in the mining industry in the barren hills of Queenstown, where the smelters had taken all vegetation from kilometres around the site of the smelters.

I remember still as a young boy, going down to Queenstown and seeing these moonscape landscapes, which we were quite proud of, and part of it was because we were taming this wilderness.

*"...with the new animals came plagues of rabbits and various other kinds of unintended consequences."*

Now interestingly, at the same time as I was going through those childhood experiences, other people were starting to recognise that the unlimited resources were beginning to become quite limited. It was when I was in my late high school years that the first debate that really exploded nationally in Australia about the future of the environment occurred. That was about Lake Pedder.

Lake Pedder was a relatively small but beautifully pristine lake in the middle of what is now the Southwest World Heritage Area and the hydro, having run out of truly economic rivers that could be dammed quite readily for the benefit of the production of electricity, was doing what most organisations do. They have a purpose, they have an endeavour and that endeavour in a sense becomes a rationale for continuing its own practices.

So the Hydro-electricity Commission, having built all of the dams that were reasonably foreseeable without environmental vandalism, started to go through a process of looking to see where it could find further water resources. So they decided upon the Gordon River expansion and the flooding of Lake Pedder.

It became clear, even to a young man such as myself, that this was a doomed enterprise; that this was something that was irresponsible, let alone economically unwise.

So the first protest movement of a significant nature grew up in Australia. There had probably been other instances where particular causes were identified on an environmental basis around Australia but I think it's true to say that the first environmental protest of national and international significance that occurred in Australia occurred around Lake Pedder. I got deeply involved in that because it was symbolic of a direction that could not be pursued indefinitely.

The idea in our heads that our land was unlimited, that our resources were unlimited, that we could be masters of all this and tame it, had to be confronted because we had actually reached a point at which we

were now starting to feed on and to diminish the national heritage that we had taken for granted for such a long time.

My interest in the legal side of these matters was particularly stimulated because those who were advising the protestors wanted to litigate the issue as to whether or not the Hydro-electric Commission had complied with the statutory framework under which it was obliged to operate.

At that stage the willingness of the courts to permit litigants to raise matters of public importance had yet to occur. We were seeking to raise, as a matter of law, an issue where we had no direct and individual interest and it was pretty plain that the courts would not entertain that unless we had the Attorney General's fiat.

There was no legislation which enabled people to bring matters to court for such issues. The then Attorney of the day, Mervyn Everett, wished to grant standing because Mervyn Everett, above all else, was a lawyer. He was more a lawyer than he was a politician. He ultimately served as a member of the Federal Court and had a distinguished political career as a senator, but as Tasmania's Attorney General at that time, Mervyn Everett clashed with his cabinet colleagues about his intention to grant a fiat to allow this matter to be challenged in court.

The matter was resolved in the temporising and compromising way that sometimes attends to these matters. Merv, as a matter of principle, resigned as State Attorney General, a new Attorney was appointed, the new Attorney refused the fiat, and Merv Everett was reinstated.

I don't wish to diminish Mervyn Everett's act of principle because I know that he was never guaranteed his reinstatement. This was a matter that occurred because he was simply the outstanding man to do the job and, once the issue of the day was disposed of, he returned.

But, the point that became clear to me was that we had a political and a legal set of issues that were now coming to the fore that had not been truly in our imaginations before.

The next important thing that was parallel with the evolution of a protest movement and an awakening

legal consciousness, was a book that many of you will have read, I'm certain. It was Christopher Stone's book, *Should Trees Have Standing?* which I read, I think, when I was about 17. It was quite an intellectual challenge to me. It really challenged my thinking in a very profound way because what Christopher Stone was asserting is that there should be a capacity for us, as trustees of the natural world, to speak on trees' behalf, or on behalf of inanimate objects that are subject to destruction so that those matters could be litigated in courts. That was a very powerful new idea - that we should conceptualise the inanimate world, or the animate world, but not human world, as having rights, legal rights.

The idea has never quite been adopted into mainstream thinking, but it has been a powerful influence in terms of the way in which we have modified our thinking about our relationship to the natural world. It has been an inroad into the Judaeo-Christian way in which we have conceptualised our social and legal relationships from the beginning of the colonial experience.

That kind of influence sparked many young and progressive lawyers to imagine that there would be opportunities to find ways in through the legal system to express the interests of this inanimate world.

And of course we saw the growth of the first of Australia's EDOs. The growth of small groups of lawyers who started to have a larger view of what was possible and what was able to be litigated coincided with the protest movement and a growing political attention to issues of the environment and a willingness on the courts' side to envisage new ways to enable standing rules to be got around in certain instances.

The question of entry to the court process, the issue of standing, is far from fully resolved. But in many areas legislators have been willing to legislate in a particular context to enable any citizen or any interested party to gain entry to the courts where issues can be contested.

So there is a growing entry point that has been created either by the evolution of Common Law rules around standing, or through statutory interventions

which have modified the standing rules to permit a much broader access.

The other thing that has happened, and this goes back to the 1975 period, or a little before, is the birth of legal aid as a community funded responsibility. When the Whitlam Government put forward the idea of the Australian Legal Aid Office, it was opposed in litigation by the National Law Societies all around Australia as being beyond the constitutional power of the Commonwealth and not an appropriate activity for the Commonwealth to undertake.

Now that sounds like something from a completely different century, but it does reflect the conservatism of the legal profession of that time and how challenging it was for those who were starting to build the Environmental Defenders Offices and other legal centres such as the Fitzroy Legal Service and the Redfern Legal Service.

The creation of legal aid as a national responsibility is a very recent phenomenon. The evolution of community legal centres and the growth of the Indigenous Legal Services, like the Aboriginal Legal Service in New South Wales, are very very recent and treasured phenomena. But they all came together.

Now by the time that the Keating Government was formed, there had been a consolidation of some of these elements but there was plainly a need to review where we were up to and to see whether we could expand a commitment at a national level to build on what had been achieved.

The Keating Government commissioned Ronald Sackville, then a Barrister in private practice, to do a review of all of the legal service issues relating to access to justice.

The result was *The Access to Justice Report*. You will not be surprised that when a government commissions a report it has in its mind some outcomes it will wish to achieve. I'm not suggesting in any way that Sir Ronald Sackville would be the subject of direct influence, but there was a lot of work in that process in trying to evolve a report that was capable of implementation.

One of the recommendations was a new framework for legal aid and an expansion of specialist legal

centres around Australia to cope with areas of specialist community law. One of those was the EDO. Others were women's legal centres and immigration and various other areas.

One of the things that I am really proud of - and it does show that good ideas can sometimes be cemented into social policy - is that in 1975, after the publication of *The Access to Justice Report*, in the budget process we achieved the funding to establish a network that still remains and is robust. It includes the Environmental Defenders Offices, the Women's Legal Services and the Refugee Law Advisory Service.

Let me just recall a couple of things in that process. Firstly, when Cabinet was discussing this, the rationale for funding organisations that will contest against us was questioned. Why would we want to feed the hand that bites us? The answer that I gave at that time was that that is what a socially progressive political democracy has to fund. You have to fund those people who press for advances no matter how difficult it may be on a particular issue.

Things were very different when the government changed. The EDO organisations continued, but they were subject to constraints. They were not allowed to litigate and so they were forced into a much more defensive position of providing advice but not litigation - they were gagged on litigation.

There are still continuing issues from the Justice Report. There are issues about liability for costs in public interest litigation. That is still a significant issue because even if you find a plaintiff who has standing, it is a terrible fear when you are in public interest litigation that you'll be left responsible for costs. So that is an unresolved issue from the Justice Report that was recommended to be addressed.

There is the issue of tax deductibility of legal costs. There is a great imbalance in the power of litigants in most of these areas. Corporations can write off all their costs entirely. Private litigants can't.

Of course there are still ongoing issues about the adequacy of funding under the legal aid system. Whilst it is true that it would not satisfy those who are its greatest advocates, the last budget was the first budget that saw an increase in legal aid funding

since the Keating Government went out of office. So there was an increase in funding to the community legal centre sector and to the legal aid commissions. Obviously this funding was contestable as to its adequacy but, after more than a decade, it was the first time we've got an increase.

The last two points that I will make is that the environment movement now has two very real opportunities that exist to it for entry points into litigation that did not exist so clearly before. One exists directly under Section 75 (5) of the Australian Constitution; the capacity for the High Court of Australia to hold any Commonwealth officer accountable to compliance with the law.

It's a way around standing issues because it is a direct entitlement under the Constitution. You certainly should reflect on that direct access route through Section 75 (5) to the High Court.

The second point is that there is a constitutionally entrenched entitlement to hold Commonwealth officers accountable under whatever legal framework that would apply.

A recent case called *Kirk v Industrial Relations Commission*, decided earlier this year by the High Court, was considerably referred to by the press for its industrial relations consequences as it was an industrial accident type issue. It was much more important than that - much more important. What it actually says is that State Supreme Courts, because they are referred to in the Australian Constitution, are essentially manifestations of a constitutional expression and that because, at the time of Federation, they had rights to issue prerogative writs to hold governments to account, they cannot be removed.

So the same way as the Commonwealth cannot, by a privative clause or by any legislative means, remove judicial review, so too State Parliaments cannot remove judicial review. This opens up a whole range of areas which have been prohibited from examination by the legislature.

So, it's certainly an area that you need to be ready to move through and to take advantage of and which the Parliaments of the States cannot overturn, because the High Court has made it very plain that it is so.

You're now a part of the mainstream; 24 personnel in Sydney alone. This is a big organisation; it matters. It is so important for our continuing evolution for a better understanding of where we stand as citizens with responsibilities for biological diversity, with responsibility for a response to climate change and with all the other myriad of issues the environment movement will confront in the future.

# Return of the Grumpy Old Greenies

Nicola Beynon, Senior Program Manager, Humane Society International

Michael Kennedy, Campaign Director, Humane Society International

Alistair Graham, Consultant, Humane Society International; Campaigner,  
Tasmanian Conservation Trust

Alexia Wellbelove, Senior Program Manager, Humane Society International

*Nicola Beynon presented this paper in the session 'The EPBC Act: Where to from here?'*

## Introduction

Five years ago I presented a paper to the EDO National Conference entitled *Grumpy Old Greenies - lament waiting lists, wasted opportunities and wayward pork barreling in Australia's biodiversity programs*<sup>1</sup> detailing the frustrations Humane Society International (HSI) had with the then Howard Government's disappointing performance on biodiversity and especially in implementing its own signature and powerful environmental law, the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). At the time, the ABC's Grumpy Old Men and Women series was rating well and myself and the elders at HSI, Michael Kennedy and Alistair Graham, likened our grouchy mood to theirs as we sat in the departure lounge at Canberra airport bemoaning an unrewarding day lobbying the Government to make good use of the EPBC Act in order to make a dent in the nation's biodiversity crisis. This paper sees the Grumpy Old Greenies return five years on, and after a change of government to one that has now had 3 years of its own with EPBC Act powers at its disposal, and that is promising to reform it, to take a reading on whether we are any more or less grumpy than we were in 2005 and whether we have grounds for optimism that this government will take the biodiversity crisis seriously and reform the Act accordingly.

## The good news

To start out with some good news and to report on some of the significant gains achieved under the EPBC Act in the last 5 years.

To give credit where it is due, Federal Environment Minister Garrett has shown himself to be a Minister that is prepared to use the EPBC Act to refuse developments that cause significant impacts to Matters of National Environmental Significance (MNES). In the seven years prior to Minister Garrett's stewardship of the EPBC Act, only two or three developments had been refused. In his three years as Minister, Minister Garrett has used the EPBC Act to refuse *inter alia*:

- A coal facility in Shoalwater Bay, Queensland;
- The Tasmanian Government permission to release more water from Lake Crescent which would have impacted a Ramsar site and endangered golden galaxia fish;
- Shoalhaven City Council permission to rezone land at Jervis Bay that would have isolated Booderee National Park and its nationally threatened species;
- A developer permission to clear Cassowary habitat near Mission Beach;

- Singleton Council permission to shoot at a colony of threatened flying-foxes;
- A developer permission to build next to the Commonwealth Heritage listed Nobby's Lighthouse in Newcastle;
- Permission for the Queensland Government to build the Traveston Dam;
- Approval for an ongoing WA shark fishery threatening the sandbar shark;
- The importation of hybrid savannah cats;
- Approval (suspended) for a resort development threatening the Great Barrier Reef World Heritage Area, and
- Approval for the importation of large earth bumblebees by the hydroponics industry.

It's worth remembering here that, prior to the EPBC Act, the Environment Minister didn't have the power to veto development proposals – only to advise the relevant Minister. So, perhaps that's why it took them a little while to get used to flexing these muscles.

Minister Garrett has also sped up the listing process for threatened ecological communities which stalled under Coalition Ministers after Robert Hill faced the pitch forks over the listing of HSI-nominated bluegrass lands and brigalow woodlands. Although it has to be said that listings are still only drip fed onto the EPBC schedules, with excessively long assessment timeframes given to the Threatened Species Scientific Committee (TSSC). For example, the TSSC was given three years to assess each of HSI's nominations to have the Macquarie Marshes and the Coorong and Lower Lakes listed as endangered ecological communities – when any casual viewer of frequent news bulletins on the state of these wetlands can tell you they desperately need more protection. HSI had previously recommended to Minister Garrett an Interim Habitat Protection Strategy seeking urgent action for the listing of priority ecological communities, heritage places and critical habitats, which was largely ignored.<sup>2</sup>

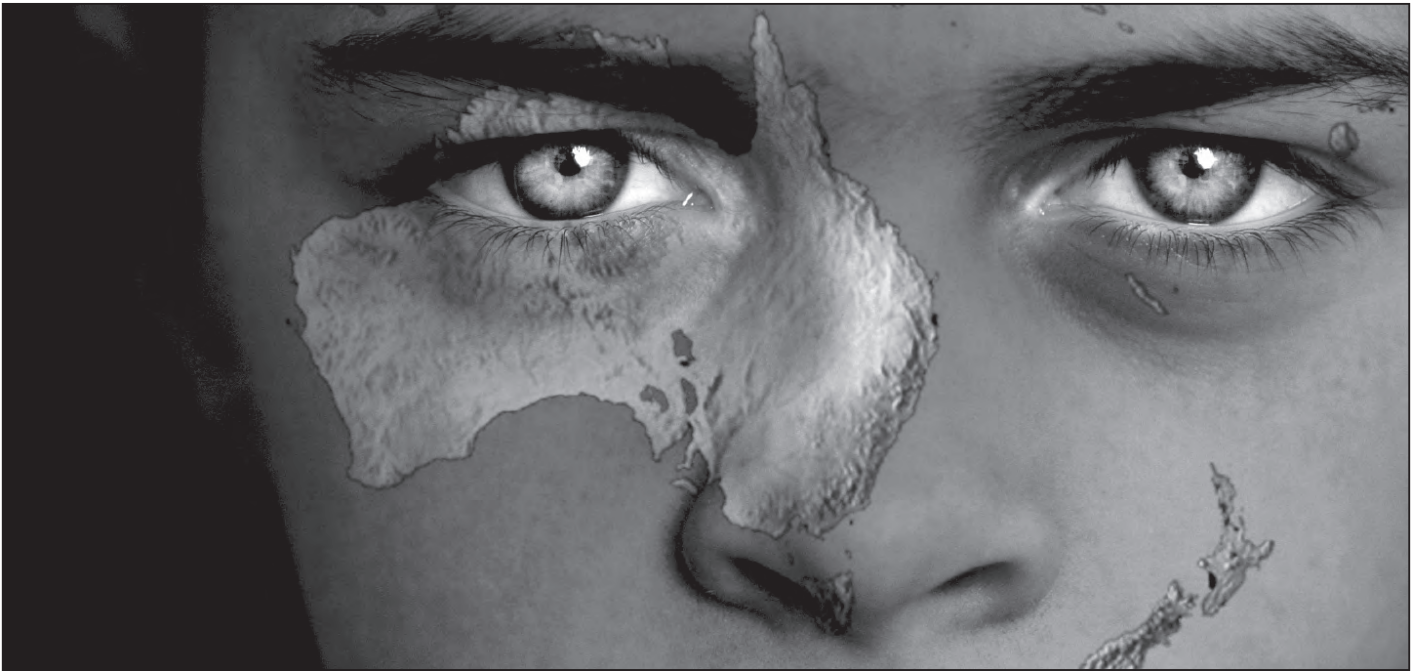
Nevertheless, the EPBC Act is progressively protecting more and more threatened habitat across Australia through threatened ecological community

listings – approximately 2.5 million hectares have been listed as a result of HSI nominations alone.

Progress is also inching forward in relation to natural heritage under the EPBC Act. HSI played a key role in the passage of the EPBC Act heritage amendments in 2004, and in the development of natural area priorities for listing under the National Heritage List (NHL). At the time of writing, the NHL contains nearly 50 natural areas (including World Heritage sites that were automatically transferred to the list). Some of the more notable natural area listings in which HSI has been involved include Ningaloo Reef, the Australian Alps, and Elizabeth and Witjira-Dalhousie Mound Springs. The EPBC Act amendments also established the Commonwealth Heritage List (CHL) which saw the immediate transfer of 32 Commonwealth-owned sites to the list, conferring increased protection, and totaling over 3 million hectares.

A decision in 2008 by Minister Garrett to assess a large area of the Kimberley for potential heritage listing is very promising. This has resulted in the recent announcement by the Minister of proposed boundaries for the addition of approximately 20 million hectares in the West Kimberley to the NHL. HSI helped ensure the assessment work in the Kimberley was prioritised, and in 2009 published its own National and Commonwealth heritage listing strategy paper.<sup>3</sup>

In the marine environment, provisions under the EPBC Act have provided the basis for the Minister to begin a series of marine bioregional plans. The current program is the result of a Government commitment to establish a nationally representative system of marine protected areas throughout Australia's 14 million square kilometre ocean jurisdiction - using an ecosystem approach which takes into account the linkages between marine species and their habitats, their role in the marine environment and relationships with human activities. The established plans will guide the Minister, sectoral managers and industry about the key conservation issues and priorities in each marine region, with a clear focus on conservation and sustainable management of the marine environment.



Progress however, as with EPBC terrestrial-based programs, has been very slow and very frustrating.


Commercially exploited marine fish are finally receiving some of the benefits of protection under the EPBC Act. This started with Coalition Minister Ian Campbell who listed the HSI-nominated orange roughy as a threatened species, though he ignored TSSC advice that it is endangered and only listed it as conservation dependent, a lesser category offering lesser protection. At the time this was legally suspect, but he subsequently amended the Act so that fish, and only fish, can be listed as conservation dependent even though they may qualify for stricter protection as vulnerable, endangered or critically endangered. All other species have to be protected in their rightful category.

This amendment has enabled the fishing industry to continue exploiting and exporting such threatened species (which is permitted under the conservation dependent category), albeit with stronger Department of Environment, Water, Heritage and the Arts (DEWHA) oversight. Minister Garrett has since made use of the amendment and listed school sharks and eastern gemfish as conservation dependent (HSI nominated them as vulnerable) and is due to decide on a listing for southern bluefin tuna by the end of June 2010.

In 2005, the TSSC determined southern bluefin tuna to be endangered following an earlier HSI nomination, but also gave the Minister the option of not listing it as endangered, claiming it was in the best interests of the species for Australia to continue fishing it!<sup>4</sup> While we expect a listing this time around, despite southern bluefin tuna qualifying for critically endangered listing, we are fearful the conservation dependent consolation prize will be utilised again.

On fisheries more generally, DEWHA and successive Environment Ministers are using the accreditation processes in the EPBC Act to slowly leverage improvements to all Commonwealth and export fisheries. In 2008, it was estimated by Gerard Early<sup>5</sup> that there had been, “23 strategic assessments of commercial fisheries managed by the Australian Government plus over one hundred assessments of the ecological sustainability of State and Territory fisheries for the purpose of granting export approvals”.

In the courts, HSI has had some success with litigation under the EPBC Act. Since the first edition of *Grumpy Old Greenies* we have completed four sets of litigation under the Act (ably represented by the EDO). One case that was brought in the Federal Court secured an injunction against Japanese whalers for killing whales in Australia’s Antarctic



territorial waters which the Government, despite pre-election promises, has declined to enforce.<sup>6</sup> Three further cases were merits appeals brought before the Administrative Appeals Tribunal. One was to try to block the importation of endangered Asian elephants<sup>7</sup> and another sought to block the export of critically endangered southern bluefin tuna.<sup>8</sup> The southern bluefin tuna case sadly failed, but the AAT did agree to place additional conditions on the import of the elephants to improve their enclosures and benefit their welfare once they arrived. A third case challenging the Minister's decision to approve exports from the Southern & Eastern Scalefish and Shark Fishery<sup>9</sup> did not go to trial after HSI negotiated important new conditions for the fishery in a settlement with DEWHA and the Australian Fisheries Management Authority (AFMA). The conditions were designed to protect Australian sea lions, albatross, eastern gemfish and deep water dogfish from being heavily impacted by the fishery and to improve observer coverage.<sup>10</sup>

HSI is now in negotiations with DEWHA and AFMA over AFMA's compliance with the condition for Australian sea lions and we are preparing for renewed litigation should these negotiations fail. The nearly 400 Australian sea lions estimated to be dying in the gill nets of the fishery every breeding season in South Australia are counting on us.

### **The bad news**

Regrettably, to say the least, after merits appeals in the AAT resulted in gains for conservation and animal welfare, in 2006 Ian Campbell amended the EPBC Act to remove the right of third parties to challenge Ministerial decisions on their merits. This is a particularly severe blow to NGOs willing to go to court to gain good policy outcomes. It should also be remembered that this legal facility was first opened to NGOs with the passage of the *Wildlife Protection (Regulation of Exports and Imports) Act 1982*. Not only is this a huge backward step with regards to public access to the courts, but Minister Garrett has made no commitment to reinstating this legal right. Judicial challenges in the Federal Court remain open to third parties, but in 2006 there were also amendments to make those challenges harder.

HSI has continued to be extremely critical of the long delays and slow processes for assessing and listing both ecological communities and heritage places under the EPBC Act, a situation worsened by 2006 EPBC Act amendments which removed the requirement for all public nominations to be duly assessed within set timeframes. The same amendments gave the Environment Minister unacceptably broad discretion to decide what will and will not be assessed for listing, and to determine the deadlines applying to such decisions.

Looking at the bigger picture, the news is profoundly concerning. The clear national powers under the EPBC Act are simply not being used effectively to stem the loss of biodiversity from the Australian continent, and there are very strong arguments for a series of strategic amendments to strengthen the Act.

The Convention on Biological Diversity objective to "achieve by 2010 a significant reduction of the current rate of biodiversity loss at the global, regional and national level as a contribution to poverty alleviation and to the benefit of all life on Earth" has come and gone and Australia did not get even close to achieving it. On the contrary, the Australian State of the Environment report 2006 concluded that "...biodiversity continues to be in serious decline in many parts of Australia".

The 2008 Terrestrial Biodiversity Assessment reported that "many of Australia's biological assets are still in decline, and threats are ongoing and compounded by climate change". In 2009 we also mourned the first probable extinction of a mammal species for over 50 years, the Christmas Island Pipistrelle.

Internationally, the 2010 United Nations Environment Program (UNEP) Global Outlook has warned, "there is a high risk of dramatic biodiversity loss and accompanying degradation of a broad range of ecosystem services if the Earth's system is pushed beyond certain thresholds".

No one is exaggerating when they say there is a biodiversity crisis upon us. Yet you would never know from the collective response from governments thus far, including our own.



## The future

When, under pressure-cooker political circumstances, HSI put its hand up for the Australian Democrats to allow passage of the EPBC Act through Parliament in 1999, our reasoning was that, while not perfect, it was a very significant improvement on previous environmental laws. At the time we said to ourselves that future governments would need to further improve the legislation. But we were not going to miss the opportunity in 1999 to secure a significantly upgraded and truly national environmental law while waiting for a change of government – which as we all know didn't come until November 2007.

So now we have that political change in Canberra and the Government was elected with a commitment to reform the EPBC Act. We are waiting to find out what they have planned following an independent review of the Act by a panel led by Dr Allan Hawke. Dr Hawke reported in December 2009 and has given Minister Garrett 71 recommendations to amend and improve implementation of the Act. HSI would agree with many of these recommendations, a few have our conditional support, some make us very nervous indeed and a couple we object to outright. The Minister has said he will give an “all of Government” response to the Hawke review in mid 2010 and this will set the policy direction for a future Bill.

## Our aspirations

HSI considers the following to be essential EPBC Act reforms. These include matters brought to the attention of Minister Garrett by combined conservation organisations.

- *Interim Greenhouse Trigger*

With the extremely unfortunate shelving of the *Carbon Pollution Reduction Scheme*,<sup>11</sup> we hope the Government will revisit its decision to ditch an election commitment for a greenhouse Matter of National Environmental Significance (MNES) ‘trigger’. The Hawke Report recommended an interim trigger at the very least. Such a trigger is essential to ensure that projects that would result in or materially contribute to large emissions of greenhouse gases are treated as controlled actions under the EPBC Act.<sup>12</sup>

- *Ecosystems of National Significance*

The Government has committed to a stronger focus on ecosystem protection, recognising the importance of conserving land/seascape scale ecological functions and processes. Sharing this ambition, HSI and fellow conservationists strongly support the Hawke recommendation to list as a MNES, ecosystems of national significance.

- *Vulnerable Ecological Communities*

Vulnerable ecological communities listed under the Act are not currently treated as Matters of National Environment Significance. We strongly support the Hawke recommendation to make them a MNES and note that this would also be consistent with the stronger focus on ecosystems the Government has promised. It is much more cost effective to intervene when the conservation status of these ecosystems is vulnerable rather than to wait for them to become endangered.

- *National Reserve System*

HSI supports other NGOs in the push for the inclusion of protected areas within the National Reserve System (NRS) formally as matters of MNES under the EPBC Act and standards to provide for consistent protection and management of all NRS protected areas.

- *Mandatory Critical Habitat*

There is simply no point protecting species without protecting their critical habitats. The EPBC Act currently has weak protections for such habitats outside of the Commonwealth jurisdiction and the Critical Habitat Register is grossly under-utilised, even as a central database. We're calling for provisions to strengthen critical habitat protection in all jurisdictions. In cooperation with WWF, HSI has recently provided the Minister with a report on critical habitats drawing attention to the role of critical habitat designation and protection in the marine environment. The joint report calls for a streamlined, systematic and cost effective approach towards identifying and protecting critical habitat in the marine environment, including the listing of critical habitats on the EPBC Critical Habitat Register.<sup>15</sup>

- *Strategic Environmental Assessments*

While Strategic Environmental Assessments (SEAs) can better take into account the cumulative impacts of multiple projects on matters of national environmental significance, and avoid the piecemealing of impacts, to date they have been rushed and have locked in poor ecological outcomes for decades. We have serious reservations about the

widespread use of them on other than a pilot basis until rigorous empirical auditing proves that they actually produce beneficial biodiversity outcomes. If they are pursued we are proposing a zoning scheme as an outcome of an SEA so that areas where specific types of actions are prohibited and areas where project-level approval will still be required are clearly identified.

- *Regional Environmental Assessments*

We support the use of regional/bioregional assessments, particularly for regions/ecosystems which span multiple jurisdictions, and propose that the independent Environment Commission should have the power to undertake bioregional assessments using independent panels or councils under a staged and rigorous assessment process, and with clear consultation processes.

- *Regional Forest Agreements (RFAs)*

HSI would prefer the exemption for RFAs to be removed from the Act entirely but at the very least we support the Hawke recommendation for a more rigorous approach to auditing RFAs and are disappointed that the Minister has rejected even this much.

- *Invasive Species*

We strongly support the Hawke recommendation to limit the unconstrained movement of thousands of invasive or potentially invasive species within Australia and provide foresight capacity to identify and address environmental threats (of all types) before they become established.

- *National Environmental Accounts*

We strongly support Hawke's recommendation for the development of a system of national environmental accounts. We also support the sub-recommendation that the Australian Bureau of Statistics (ABS) is an appropriate agency to manage national environmental accounts under a nationally standardised framework for data collection, coordination, reporting and auditing.

- *Access to Justice, Transparency and Merits Review*

We support the recommendations of the Hawke Report to improve these crucial elements of public interest participation in implementing the law. Hawke has not only recommended that third party rights to merits review be restored in relation to wildlife trade, fisheries and protected species permits, he has also recommended their expansion to decisions relating to controlled actions and level of assessment.

- *Offsets/Biobanking*

We oppose the general adoption of biodiversity offsets until empirical research on pilot programs proves they actually result in improved species recovery through the course of normal operation.

- *Exclude Socio-Economic Considerations*

We strongly agree with the Hawke Report that decisions to list or not list species or ecosystems should continue to be immune from any socio-economic considerations.

- *Marine*

We vehemently oppose the Government's amendments currently before Parliament to exempt certain species listed under the Convention for the Conservation of Migratory Species (porbeagle and mako sharks) from fishing prohibitions. More generally, we oppose any weakening of fisheries provisions in the EPBC Act in the name of streamlining.

- *Heritage*

At present the focus of the EPBC Act on avoidance of significant impacts is not consistent with Australia's obligations under the World Heritage Convention, which requires Australia to maintain or improve the heritage values of properties, not merely avoid negative impacts. Analogous to critical habitat, both the heritage values and the specific areas which protect those values need protection under the Act.

- *Listings*

HSI also wants to see the public nomination and listing process sped up and improved for species,

ecological communities, key threatening processes and heritage places. The broad discretions given to the Environment Minister to decide what they will and will not prioritise for assessment need to be repealed because they are open to abuse by Ministers wishing to avoid politically controversial nominations. Further, it is simply unfair not to provide a guarantee that all public nominations submitted in good faith will be duly assessed. Willfully condemning many public nominations to the DEWHA waste paper bin if they do not make the Minister's priority list for two consecutive years does a disservice to the hard work of public nominators on which the listing process depends.

## **The portents**

Signs so far as to whether this Government is serious about tackling the biodiversity crisis, and their plans to make progressive amendments to the Act, have not been wholly encouraging.

The Minister's first move when releasing the Hawke Report was to rule out two important recommendations for a greenhouse trigger and to make Regional Forest Agreements more accountable.

Hawke has recommended an interim 'greenhouse trigger' until an Emissions Trading Scheme is in place. Such a trigger would allow the Minister to regulate major new carbon emitting projects and was longstanding ALP policy when in opposition and an election commitment. We hope the Government's decision on this trigger will be revisited now that an emissions trading scheme has been postponed and there is a policy vacuum on industrial emissions.

The Minister's next move was to introduce into Parliament amendments to fast track a Hawke recommendation to remove protections for migratory species listed on Appendix II of the Convention on the Conservation of Migratory Species (CMS). However, the amendments, while limited to mako and porbeagle sharks, go much further than Hawke recommended. Hawke had suggested that the Act be amended to allow the take of Appendix II listed CMS species conditional on management arrangements to ensure the take is not detrimental to the species. Garrett's amendments allow a blanket exemption for recreational fishers to kill mako and porbeagle

sharks with no such management arrangements and even exempt the recreational fishers from having to report that they've killed these protected species – as everyone else has to.

HSI is appalled, particularly at the blatant political imperatives behind the amendments. The two ALP backbenchers agitating on behalf of the recreational fishers, Darren Cheeseman (Member for Corangamite) and Sid Sidebottom (Member for Braddon), hold electoral margins of just 0.9% and 2.5% respectively.

Having hailed the Minister's preparedness to reject projects with significant impacts on Matters of National Environmental Significance, the Minister has recently approved the dispersal of a threatened native species, the Grey-Headed Flying-Fox from Sydney's Royal Botanic Gardens. This dispersal has been approved until 2039 potentially sanctioning a significant impact on the species over the next 30 years!

To deepen our pessimism, Wayne Swan's recent budget shows that, no, the Government is not prepared to take the biodiversity crisis seriously, having cut \$300 million from environment programs including Caring for Our Country and Landcare over the next four years. Ironically in this context, the recent UNEP Global Biodiversity Outlook, released in the very same week as the budget cuts, notes that "for a fraction of the money summoned up instantly by the world's governments in 2008 – 2009 to avoid economic meltdown, we can avoid a much more serious and fundamental breakdown in the Earth's life support system".

## The conclusion

On the whole we are still grumpy and getting much grumpier (and older). We sincerely hope some far reaching, progressive EPBC Act amendments will be able to recover our mood and the mood of conservationists across the country. However, if the EPBC Act is to be used more effectively, amended or otherwise, more than anything it needs a significant funding investment to better implement and enforce it plus, that ever decreasing commodity, strong political will.

The truth of the matter is that the Government does not get it – does not for one second comprehend the environmental imperative facing Australia and the globe – and worse can be said for Tony Abbott. And if we are kind to them for one second and assume that they understand even a little, then their glaring inactivity and lack of response (witness the CPRS debacle) says volumes for them as leaders of integrity and more fatefully about where this country is headed.

Tim Flannery's idea about the need for an environmental 'War Cabinet',<sup>14</sup> backed by a 'war chest' but then guided by a law with powers they are willing to use,<sup>15</sup> is an idea well past its time.

- 1 Beynon, N, Kennedy, M, and Graham, A, (2005) "*Grumpy Old Greenies – lament waiting lists, wasted opportunities and wayward pork barreling in Australia's biodiversity programs*". Paper presented at the EDO National Environment Conference in Sydney, 2005.
- 2 *Interim Habitat Protection Strategy* (2008). Paper presented by Humane Society International (HSI) to Peter Garrett, Minister for the Environment.
- 3 Lambert, J. and Kennedy, M. (2009) "Conserving Australian Landscapes Beyond the National Reserve System – Developing Terrestrial Natural Heritage Priorities and Using the EPBC Act Effectively." Humane Society International- Special Bulletin, January 2009.
- 4 TSSC recommends that the list referred to in section 178 of the EPBC Act be amended by including in the endangered category: *Thunnus maccoyii* (Southern bluefin tuna). The Committee notes the importance of Australia's leadership within CCSBT to achieve long-term conservation outcomes for the SBT. In particular, the Committee recognises the need for international co-operation to address fishing impacts on the species' spawning ground. The Committee is concerned that the listing of SBT under the EPBC Act at this time may be detrimental to the survival of the species, as it may weaken Australia's ability to influence the global conservation of the species, and by implication, its conservation in Australian waters (Threatened Species Scientific Committee, September 2005).
- 5 Early, Gerard (2008) "Australia's National Environment Legislation and Human/Wildlife Interactions", *Journal of International Wildlife Law & Policy*, 11:2,101 - 155
- 6 *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2008] FCA 3
- 7 *International Fund for Animal Welfare & Ors v. Minister for Environment and Heritage & Ors* [2006] AATA 94. HSI & the RSPCA joined IFAW as applicants.
- 8 *Humane Society International v Minister for Environment and Heritage* [2006] AATA 298.
- 9 *Humane Society International v Minister for Environment and Heritage*
- 10 To view the conditions please visit [http://www.edo.org.au/edonsw/site/pdf/casesum/extract\\_sessf\\_aat080221.pdf](http://www.edo.org.au/edonsw/site/pdf/casesum/extract_sessf_aat080221.pdf)
- 11 While by no means supporting the excessive compensation given to industrial polluters in the CPRS, HSI was able to work with Malcolm Turnbull and Greg Hunt to ensure that amendments put forward by the Coalition and accepted by the Government, included important provisions for "avoided deforestation".
- 12 HSI has provided advice to Minister Garrett on a range of actions under the EPBC Act that can be taken to help mitigation/adaptation measures in the absence of and/or in addition to existing CPRS provisions.
- 13 HSI – WWF (2010) "*Protecting Marine Critical Habitats: The key to conserving our threatened marine species*", Report, 2010.
- 14 Tim Flannery, *Two degrees of separation from disaster*, Sydney Morning Herald Opinion June 15, 2004
- 15

# Access to Justice and the Need for Public Interest Environmental Lawyers

Stephen Keim SC, Barrister

*Stephen Keim presented this paper in the session  
'Access to Justice and the Need for Public Interest Environmental Lawyers'*

<sup>15</sup> "Only a government with vision, determination and considerable expertise is capable of averting a global warming disaster. To achieve an adequate response the Australian Government will, in my view, need to place itself on a war footing. This may mean instituting a war cabinet, proclaiming emergency powers and restructuring our bureaucracy". Tim Flannery, SMH 15 June 2004 (see note 14 above).

I recently discovered, in my disordered computer database, a paper, forgotten by me at least, which was co-written by Chris McGrath and me and delivered by him to an Access to Justice Conference held by Caxton Legal Service on 1 December 2001. The fact that the paper is impeccably researched suggests to me that my co-author was principally responsible for its contents. The paper was called: *Public Interest Litigation: What access to justice?*

In reading the paper, what stood out is how little has changed in eight and a half years since it was delivered. For example, we wrote:

"The central obstacles to access to justice in public interest litigation can be summarised as follows:

- Knowledge and resources;
- Standing; and
- Costs, undertakings as to damages and security for costs."

Those three factors probably remain at the top of the tree with "resources" rather than "knowledge and resources" as the first factor. On the subject of resources, we had the following smart idea:

"To redress the common, practical imbalance between parties undertaking public interest litigation and well financed opponents, a "public interest litigation fund" or the provision of legal aid for public interest litigation is necessary. The creation of such a fund, with a reasonable

annual budget to be administered by a board of trustees, including representatives from community legal centres and community groups, would substantially improve the ability of private individuals and community groups to undertake public interest litigation. Provision of legal aid based on satisfying criteria for public interest litigation would have a similar positive effect. Payments to lawyers and experts who appear for the trial can also substantially improve the prospects of success in any litigation and therefore its ability to protect the public interest."

*"I think what has impressed most about the public interest litigation...is not how influential it has been but how tragically necessary."*

The idea of a public interest litigation fund, despite a number of attempts to engage the interest of philanthropic organisations in the meantime, still sounds positively quixotic. One area in which marked improvement has occurred, in Queensland at least, is the willingness of front line firms of solicitors to provide *pro bono* assistance. Coordinated by organisations such as QPILCH<sup>1</sup> (or interstate equivalents), many firms have devoted real resources and real expertise to run real cases. Some very positive results have been achieved.

Later, we had the throwaway line:

"To use environmental law in Queensland as an example of these issues, political decision-making on environmental issues is engrained within the Queensland Government".

Under the influence of the 24 hour news cycle, it seems to me that decision-making by all governments on all issues is more politically driven than it was a decade ago. The derisory justification given for refusing to process applications for asylum from applicants from Afghanistan or Sri Lanka provides just an obvious and recent illustration of this.

To give an example more Queensland and more environmental, Chris and I had one of our rare litigation successes in the Court of Appeal in *Queensland Conservation Council Inc v Xstrata Coal Queensland P/L & Ors.*<sup>2</sup> The Court of Appeal overturned, on the grounds of natural justice, a recommendation of the Land and Resources Tribunal in respect of the extension of an Xstrata mining lease. Within hours, the State Premier, Anna Bligh, announced that the lease, which had been granted in willful denial of the pending appeal, would be validated by legislation to be presented to the Parliament in the following week. The legislation was indeed presented and passed within the week. I was less fazed by the announcement than some of my colleagues associated with the case because I had previous experience with conservative government ministers overturning court decisions within hours of their being handed down.

On standing, we referred to *ACF v The Commonwealth*<sup>3</sup> ruling the roost but somewhat undermined by cases such as *City of Enfield v Development Assessment Commission*.<sup>4</sup> I think the situation remains pretty similar. One cannot say that ACF has been formally overruled but it has continued to lose influence. I would doubt that many good public interest cases would now fail on the ground of lack of standing if a careful search for appropriate plaintiffs and suitable legislation on which to base the cause of action has been made.

On the other hand, this makes it less justified to maintain the pretence. There should be a general policy to write liberal standing provisions into all environmental regulation statutes and some attempt made to re-write the common law principles.

The illogicality of the approach of governments to standing can be seen from any survey of standing provisions in different pieces of legislation. In the *Environmental Protection Act 1994* (Qld) (EPA),

Queensland's pollution permission legislation, the inconsistencies can be seen in the same Act. When the legislation was passed in 1994, as a result of strong lobbying by the EDO and conservation groups, the Government grudgingly inserted s.505 into the Act. Section 505 was a more restrictive version of a New South Wales precedent where one had to obtain the Court's leave to litigate to enforce legislation if one were seeking "an order to remedy or restrain an offence against this Act, or a threatened or anticipated offence against this Act".

Four years later, the permissions to pollute under the EPA were being rolled procedurally into the Integrated Development Assessment System (IDAS) process laid down and administered under the planning legislation, the *Integrated Planning Act 1997* (Qld) (IPA).

Planning legislation in Queensland, as in most jurisdictions, has had open standing provisions which have proved most useful; especially when the Planning and Environment Court was given authority to grant declaratory relief. As part of this rolling-in process, in 1998 sections 507-513 were added to the EPA. In order to be consistent with the IPA, s. 507 of the EPA provided: "A person may bring a proceeding in the Court for an order to remedy or restrain the commission of a development offence".

A development offence is defined as a breach of a permission to pollute which is now in the form of a planning approval. Section 505 remains in the legislation still with its grudging approach to standing. Many of the offences to which it once applied are now subject to the more liberal regime in the sections which follow. What was a harbinger of death and destruction in the land, four years earlier, access to the Courts to enforce the provisions of the EPA, was now freely accessible to "any person". But still one had to keep up the impression by not repealing s. 505 and by pretending that it had the same meaning and the same effect.

In the 2001 paper, we also spoke about costs, adverse costs orders, orders for security for costs and undertakings for damages. These remain massive barriers to participation in the justice process. It is much more possible for community groups to engage in jurisdictions where the prevailing regime

is that there will be no costs orders. I suspect that most of the public litigation in the last decade has been in jurisdictions of that kind.

### Recent adventures

Recently, my wife and I have been, with other members of our local community, at war with the State Government over its refusal to enforce its own conditions over a tunnel construction project known as the Airport Link. Our community (and two others affected by the same project) must be the only inner city residential communities subjected to 24 hour building construction noise (for the past eight months and planned to continue for the next two years). I have had no hesitation in obtaining independent legal advice. I have had no hesitation in obtaining technical advice from a sound engineer. I think I could manage the costs of my own lawyers in any litigation that I might bring to enforce what I see as the clear meaning of the conditions. But the quantum of an adverse costs order is something over which I have no control and which is difficult to factor into my plans. And, if it is that difficult for me, how difficult is it for most people who contemplate litigation of this kind?

In our paper, Chris and I mentioned s.49 of the *Judicial Review Act 1991* (Qld). Section 49 is an innovative piece of legislation which allows an application up front for orders that the other party provide for an indemnity or that the party be responsible only for its own costs. The provision has not been widely used, as far as I can tell, and it has not been copied, as far as I know, in other jurisdictions. It has provided the occasion for some unsuccessful litigants to avoid a costs order at the end of the litigation. It has been interpreted fairly restrictively by the Courts. It is a sensible experiment that should be built on by some minor but important amendments.

### The EPBC Act: A success story

Chris and I spent the last few pages of our paper discussing the innovative standing and no undertaking as to damages provisions in the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (“EPBC Act”) looking largely at Chris’s successful handling of *Booth v Bosworth*.<sup>5</sup> That decision, eventually, led to the banning in

Queensland of the practice of wholesale electrocution of flying foxes by fruit growers. Even political timidity has to give away to logic, sometimes, when it is backed by court judgments.

The EPBC Act has provided a fertile source of public interest litigation and that litigation has, I think, been influential in terms of public policy. The decision of the Full Court of the Federal Court in *Minister for the Environment and Heritage v Queensland Conservation Council Inc*<sup>6</sup> confirmed what I thought was an obvious point, namely, that the Commonwealth Environment Department misunderstood its own legislation. The Department had ruled out of its consideration, when deciding whether a proposal was likely to be in breach of a controlling provision of the EPBC Act, the downstream impacts of the proposal. By downstream impacts, I mean the activities that were intended to and were likely to occur by developing the proposal. Since the proposal was for a large dam intended to facilitate large scale cotton growing and the Great Barrier Reef was downstream, the question of downstream impacts was pretty important. Later amending legislation largely accepted the result of the litigation.

In a less widely applicable decision, *Humane Society International Inc v Minister for the Environment & Heritage*,<sup>7</sup> the Federal Court also declared that advice being given to fruit growers as to when they could electrocute flying foxes was not authorised by law (because it too was based on a wrong reading of the EPBC Act).

I think what has impressed most about the public interest litigation with which I have had various levels of connection over the last decade is not how influential it has been but how tragically necessary. It has been so necessary because of the failure of politicians and public servants to go close to understanding and enforcing the legislation for which they are responsible.

### Access to justice or something vaguely similar

Last, I wanted to say something about the present government’s “Improving Access to Justice” statements of 17 May 2010. I must concede that an increase of \$154 million over four years for legal



assistance services sounds like a good thing. I suspect, however, knowing the crying need in most areas for funding, that that \$38.5 million per year is a drop in the bucket.

Otherwise, the statement seems to be a funding of barriers to justice. It includes a web site that refers the inquirer to Legal Aid Commissions and Community Legal Centres for almost any problem one likes to think of. The money may well be used up answering the phone.

It seems to propose to expand a “plain English” approach to writing legislation which, in the past, has, in most jurisdictions, resulted in wordier statutes.

It proposes barriers to litigation by imposing dispute resolution steps on would-be litigants. I simply cannot see where the idea comes from that much litigation is ill thought out and will be avoided by a pre-trial conference. Much litigation *is* ill thought out but, if you think you can deter those litigants with a pre-litigation conference, then good luck to you.

And then there is a referral of the discovery process to the Law Reform Commission. That is a good idea and may come up with some further good ideas. However, the idea that the obligation to make proper disclosure is a barrier to access to justice is far fetched. Certainly, as we record more and more of our life in documents, discovery has become more burdensome. However, the more that the obligation is cut back, the more likely it will be that justice is obstructed because “inconvenient” documents are not revealed to one’s opponent.

I would have been more impressed if the Attorney-General had promised \$100 million to go into my public interest litigation fund raised by Chris and me in our 2001 discussion. But, now I am the one who is losing his grip on reality.

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1 Queensland Public Interest Law Clearing House

2 [2007] QCA 338 (12 October 2007).

3 [1980] 146 CLR 493.

4 [1999] 199 CLR 135.

5 [2001] FCA 1453.

6 [2004] FCAFC 190 (30 July 2004).

7 [2003] FCA 64 (12 February 2003).

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