

GREENLAW



Photos courtesy of the fabulous Bill Doyle

Environmental Defenders Office (SA) Inc.

SEPTEMBER 2009 GREENLAW # 29

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ADVANCE NOTICE TO MEMBERS ANNUAL GENERAL MEETING

WHERE: South West Community Centre,
171 Sturt St, Adelaide

WHEN: Wednesday, 21 October at 6.00pm

Please feel free to join us for dinner after the formalities of the meeting. Dinner venue to be advised but will be just a short walk from the meeting place. Our guest speaker will address attendees on the issue of marine parks.

APPROVAL OF THE BEVERLEY FOUR MILE MINE

The Beverley Four Mile Uranium Mine received approval from the Federal Minister for the Environment, Peter Garrett on the 13th July 2009. Approval was given under the *Environment Protection and Biodiversity Conservation Act Cth (1999)*.

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The information contained in this newsletter is not a substitute for proper legal advice. Contact the EDO or your solicitor for more detailed legal advice if you have a specific problem on an environmental law issue

The Minister's decision is not subject to review based upon its merits. Any potential avenue of review is by way of judicial review which looks at any procedural errors by the Minister in the assessment of the proposal. The EDO is considering this matter.

The mine will use the controversial acid in-situ leach (ISL) technique to extract the uranium. This method involves injecting chemicals into aquifers, contaminating groundwater and poisoning the underground environment.

The conditions attached to the approval purport to reduce the potential environmental impacts. Arguably though they fail to provide sufficiently for the protection or rehabilitation of aquifers directly affected by the proposed acid in-situ leaching process.

Mining operations cannot commence until the developer Qasar Resources Pty Ltd is granted a Mining Lease under the Mining Act 1971 (SA) and various supplemental plans are given governmental approval.

Melissa Ballantyne, EDO Solicitor

THURSDAY NIGHT ADVISORY SERVICE

Clients make appointments with our volunteer lawyers who are on a roster to give advice on environmental and planning issues. There are usually times for two appointments starting at 6pm. Please ring 8410 3833 to book a time to see a lawyer should you have an issue concerning environmental and planning law.

MARINE PARKS IN SOUTH AUSTRALIA

On 23 July, Minister Weatherill announced that the outer boundaries of South Australia's marine park network will remain largely intact. This means that the final boundaries account for approximately 42% of the State's waters.

The Environmental Defenders Office welcomes this development. South Australia is home to a far greater level of unique marine life than the Great Barrier Reef – up to 90% of species found here are found nowhere else.

The marine park outer boundaries were released for public comment in January this year. Over 2,300 written submissions were received, the overwhelming majority of which were supportive of marine parks. However, the main issue which remains is the zoning of the parks.

The 2003 International Union for Conservation for Nature World Parks Congress endorsed sanctuary zones which are sufficient to protect a minimum of 20-30% of all habitat types. Such zoning accords with the primary object of the *Marine Parks Act* which is to protect and conserve marine biodiversity and habitats.

This office was involved in the consultation process set up to inform Minister Weatherill on the outer boundaries.

Ruth Beach, EDO solicitor

THE PROPOSED OLYMPIC DAM MINE EXPANSION – PUBLIC CONSULTATION ON THE DRAFT ENVIRONMENTAL IMPACT STATEMENT

The proposed expansion of the Olympic Dam mine is the largest project of its type in South Australia's history. The environmental impacts will be significant including high levels of greenhouse gas emissions, impacts on water resources, waste disposal and the effects of the proposed associated desalination plant on the delicate marine ecosystem of the upper Spencer Gulf.

To access the draft Environmental Impact Statement and public submissions please visit www.olympicdamis.sa.gov.au

For information on some of the environmental issues associated with this project we suggest visiting ACF's website http://www.acfonline.org.au/articles/news.asp?news_id=2324

The EDO's submission has been posted to our website.

LAW REFORM SUBMISSIONS & EDUCATIONAL FORUMS

Do you need help with a law reform submission? Would you like one of our staff to give a presentation on a particular environmental law topic? If yes please call our office on 8410 3833 or 1800 337 566 (country callers).

THE COORONG, LAKE ALEXANDRINA AND LAKE ALBERT

High Court challenge

In March this year the Premier, Mike Rann, announced a “*constitutional court challenge that I am prepared to take all the way to the High Court*”, with the objective of returning “*sufficient fresh water to the river [Murray] to restore its health*”¹.”

On 29 April this year, Mr Rann said in a press release that “*South Australia expects to be ready to lodge its High Court challenge toward the end of July*”². It is now August and the High Court challenge has not been lodged.

Regulators

In the meantime, the Federal Minister for the Environment, Heritage and the Arts, Mr Peter Garrett has approved the State Government’s proposal to build regulators³ across the Goolwa channel at Clayton and in the mouth of the Fin-niss River and the mouth of Currency Creek on certain conditions including the pumping of water from Lake Alexandrina.

This action is part of the State government’s “emergency response for the crisis management of acid sulfate soils” in the region.

However, the release of environmental flows to this region would be likely to obviate any need for regulators and so this office urges the State government to bring the High Court challenge to enable such flows.

The River Lakes and Coorong Action Group Inc are maintaining a peaceful protest at the work site for the regulator at Clayton.

Wellington Weir Environmental Impact Statement

On 10 July, the South Australian Department of

Environment and Heritage submitted the supplementary environmental impact statement to the federal minister, Mr Peter Garrett. Mr Garrett will make a decision whether or not to approve the weir at Wellington by 4 September 2009⁴.

The building of a weir (if approved) is likely to permanently impact the wetlands habitat of the region and the international listing of the lower lakes as a Ramsar site, that is, a site with fresh water to slightly salty water.

Long Term Plan

The Department for Environment and Heritage has released a long term plan for the region in a document called “The Coorong, Lower Lakes and Murray Mouth : Managing for a Healthy Future”. Comments are due by 11 September. Please contact this office if you would like assistance in making a submission.

Ruth Beach, EDO Solicitor

Footnotes:

1. Hansard records the full speech at page 1885. See: <http://hansard.parliament.sa.gov.au/pages/loaddoc.aspx?i=77263>
2. <http://www.ministers.sa.gov.au/news.php?id=4692&print=1>
3. A regulator is similar to a weir
4. <http://www.environment.sa.gov.au/cilmm/temporaryweir.html>

MINISTER FOR ENVIRONMENT HERITAGE AND THE ARTS V LAMATTINA [2009] FCA 753

On 17 July 2009 Justice Mansfield of the Federal Court ordered Rocky Lamattina & Sons Pty Ltd to pay the Commonwealth of Australia \$220,000 for clearing an area of native vegetation within the designated nesting habitat of the South Eastern Red-tailed Black Cockatoo.

Lamattina admitted to being in contravention of section 18(3) of the *Environment Protection and Biodiversity Conservation Act 1993* (Cth) which requires that a person must not take an action that will, or is likely to have a significant impact on a listed threatened species. The contravention arose from the clearance of 170 native trees within Hynam in the State’s south-east. The area is mapped as a nesting habitat for the bird species and considered critical for its survival. The species is endangered due to its small population size and continuing loss of habitat.

Approval to clear the trees had previously been declined by the SA Native Vegetation Council. Lamattina admitted to being aware of this fact, and to knowing that the clearance was likely to adversely impact on the native wildlife. Lamattina had previously been fined \$119,000 in the SA Magistrates’ Court for unlawful clearing of native vegetation under the *Native Vegetation Act 1991* (SA) in 2005.

James Nicolson, Law Clerk,
Norman Waterhouse Lawyers

Thanks to Felicity Niemann of Norman Waterhouse Lawyers for editing this edition of Greenlaw.

DONATE TO THE EDO!

The EDO relies on the generosity of our supporters to provide vital legal assistance to the community on all environmental issues You can donate via our secure online facility at:
<http://www.edo.org.au/edosa/index.htm>

PROPOSED AMENDMENTS TO THE MINING ACT 1971

The Department of Primary Industries and Resources has released a draft bill to amend the *Mining Act 1971*. Over 60 amendments have been proposed including:

- a definition of ‘environment’
- provision for the Minister to declare any land exempt from mining;
- wider powers for authorised officers to pursue non-compliance;
- greater Ministerial authority to vary lease or licence conditions;
- a requirement for holders of mining tenements to submit, if instructed, a detailed program for environment protection and rehabilitation;
- new Ministerial power to direct tenement holders to prevent or minimise environmental damage, and to rehabilitate land if required.

The stated aims for the amendments include improved transparency, implementation of sustainable development principles, and triple-bottom-line accountability.

http://www.pir.sa.gov.au/minerals/public_notices/mining_act_amendments

Public consultation on the proposed amendments has now closed. The EDO submission has been posted to our website.

Melissa Ballantyne, EDO Solicitor

MURRAY V DISTRICT COUNCIL OF LOWER EYRE PENINSULA [2009] SAERDC 52

In the decision of *Murray v District Council of Lower Eyre Peninsula* [2009] SAERDC 52, the ERD Court considered whether it was appropriate to impose a condition on a proposed land division where part of the land to be divided was potentially contaminated.

In this case, the developer proposed to divide rural land within the Settlement Zone into five community allotments and a common property driveway. The Council approved the proposed division, subject to nine conditions, two of which were appealed.

Condition 2 of the development plan consent granted in respect of the proposed land division was:

“The Community Scheme Description is to be amended to restrict the use of allotments 4 and 5 for small scale commercial and/or retail uses to cater for the needs of the community only, and not allow them to be used for sensitive uses such as any kind of residential, child care centre, kindergarten, etc.”

The Council, and on appeal the Court, had before it a letter from the land owner setting out his knowledge of the previous uses of the site, together with an environmental report from an environmental engineer of Maunsell Australia Pty Ltd.

The Council relied particularly upon Principle 153 of its development plan, and it is clear that the Court in its judgment also relied upon that principle. The Court noted that it was common ground that potentially contaminating activity had occurred on proposed lots 4 and 5. The Court said:

“In all of the circumstances, the Council had an adequate basis for the imposition of provisional development plan consent condition 2, and an adequate basis for

refusing to remove that condition from the development approval. It is prudent to limit the use of lots 4 and 5 so that residential uses, or uses such as child care centres or kindergartens, where children may come into very close contact with the soil on the land frequently are not established unless and until soil samples have been taken and analysed. Should that process show that there is no contamination which could be potentially injurious to human health, then the condition could be reconsidered. Should contamination be present, then a decontamination process may have to be undertaken should any of the sensitive land uses be proposed.”

Accordingly, the Court dismissed the appeal. It is interesting to note that the Court upheld a condition which we respectfully consider was potentially ambiguous and/or of uncertain scope and which in any event did not address potential contamination directly (because it only required modification of the community scheme description, and did not directly constrain the future use of lots 4 and 5).

However, the lesson to be taken from this case is that, where a Council has an adequate basis to suspect that land may be contaminated or has previously been exposed to potentially contaminating activities it may well be appropriate to constrain the use to be made of allotments which are to be created from such land by way of conditions which require a further contamination assessment should sensitive land uses be proposed. The decision may indicate that the Court is likely to approach matters of contamination in a conservative manner.

David Billington, Senior Associate
Norman Waterhouse Lawyers

MAUDE BARLOW AND THE GLOBAL WATER CRISIS

The human and environmental issues surrounding the critically low flows of the Murray River, proposed lower lake weirs and the Port Stanvac desalination plant set the stage for one of the world's leading advisors on Water Scarcity, Maude Barlow, to converse with around 200 people from Adelaide and regional communities earlier this year.

Maude Barlow's contribution to water equality and protection has seen her recently appointed as the first Senior Advisor on water issues by Miguel d'Escoto Brockmann, President of the 63rd session of the United Nations. Among other notable achievements, she is also a recipient of Sweden's Right to Livelihood Award (the "Alternative Nobel").

Integrating concern for global and local water scarcity issues with the potential for ordinary people to make a collective difference, Maude Barlow was an inspiring realist. Since the 1950's the global population has tripled, and human water use has increased 7 fold. If we continue our current ways, two-thirds of the World's population will face water scarcity by 2025.

The fact that we are running out of fresh water is not due to cyclical drought but rather a direct result of mismanagement of our water resources. Australian groundwater extraction increased 90% in the 1990s. Governments and businesses have built a model of economic growth on the false assumption that fresh water is an infinite resource. The consequences of this false assumption is evidenced by Australia's rapidly increasing desertification, salinity, water pollution, lower rainfall and recharge rates, destruction of 90% of the Murray's wetlands and major rivers that no longer meet the sea.

We, as South Australians, join with others in the world in asking: How do we manage and distribute our water? Ms Barlow started with the fundamental and undeniable fact that humans cannot live without access to fresh water. Hence the right to water is a basic human right. From this foundation follows two important realisations:

1. Water is a basic human right to be used for our people and our environment, not a tradeable commodity to be used for profit. Hence, Australian water should be held by the people of Australia in a public trust.

The State of Vermont (USA) is a successful example of the law

guarding the State's water resources in a public trust for its people and environment. Putting our water into a public trust is arguably one of the most important legacies we could give to Australia's future.

2. The right to water is not currently recognised by the United Nations. Official recognition of the right to water as a social and cultural asset in a UN Covenant is a vital step in giving people, communities and nations a moral and legal basis on which to claim a right to water and hence to life. At present, Mrs Barlow estimates that approximately 87 UN member States support the official UN recognition of the right to water. Australia is not one of them.

Maude Barlow encouraged Australia to develop a vision for the management and distribution of our water. This will give focus to policy and decision makers and enable them to make critical distinctions such as water for local and overseas consumption and water to be allocated to preserving our environment and heritage.

Importantly, Ms Barlow warned of our blind faith in high-technology water solutions. Dams, desalination and diversion are energy and capital intensive, expensive, create massive amounts of greenhouse gas emissions and produce other poisonous by-products. For example, Ms Barlow highlighted that sources estimate that South Australia could recycle 60% of storm and waste water to produce 100 Gigalitres per year of potable water at a cost of \$300 million. The Port Stanvac desalination plant will produce 50 Gigalitres of potable water per year for \$1.2 billion.

Despite what the current government and corporate attitude would have us believe, Ms Barlow argued that this is not the answer to our water scarcity crisis or an answer that will have just outcomes for our people, environment and future.

For more information see: *Blue Covenant, The Global Water Crisis and the coming Battle for the Right to Water*, by Maude Barlow (2007) Published by Black Inc.

Bridget Saint
EDO Volunteer

EDO SEMINAR ON CLIMATE CHANGE LAW

The EDO's June seminar on Climate Change Law "*Changing Climate Changing Laws*" attracted approximately 80 delegates from a broad range of government departments, local councils, private companies, academic institutions and Environmental NGOs.

Our speakers were David Klingberg, Chair of the Premiers Round Table on Climate Change, Katherine Wells, Climate Change Consultant, Adjunct Professor Rob Fowler, University of SA, Felicity Niemann, Solicitor Norman Waterhouse Lawyers, Verity Sanders, Port Adelaide Enfield Council, Lois Boswell, Dept of Planning & Local Government, Brian Foster, Eyre Peninsula NRM Board, Melissa Ballantyne, EDO, Evyenia Adamopoulos, Solicitor DLA Phillips Fox Lawyers, Suzanne Dickey, Partner Finlaysons Lawyers and Paul Leadbeter Partner Norman Waterhouse Lawyers. Copies of presentations from the day's proceedings can be found on the EDO web page at <http://www.edo.org.au/edosa/index.htm>

The EDO would like to thank all speakers who graciously volunteered their time. Many thanks also to our sponsors the University of South Australia and the SA Department for Environment and Heritage.

BECOME A VOLUNTEER WITH THE EDO!

Currently Seeking:

Lawyers:

If you have an unrestricted practicing certificate, experience in environmental law and the odd free Thursday evening, you may be interested in volunteering for our advisory service.

Law students:

Especially if you have completed an Environmental Law course.

Fundraiser:

We are after someone to research and undertake fundraising activities for the EDO. This position would suit someone with previous fundraising experience and the ability to commit for a reasonable period of time.

EDO SUBSCRIPTION

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ENVIRONMENTAL DEFENDERS OFFICE (SA) INC MEMBERSHIP FORM

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I enclose my annual fee of \$44.00
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All memberships expire on 30th June

If you are happy to receive this newsletter by email please contact Kathy Whitta at edosa@edo.org.au

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