

GREENLAW

NEWSLETTER OF THE ENVIRONMENTAL
DEFENDERS OFFICE

The EDO ~

An Endangered Species?



ENVIRONMENTAL
DEFENDERS
OFFICE (SA) INC

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

MARCH 1997: No 6

WHAT TO DO? - THE EDO (SA) NEEDS YOUR HELP

This graceful, effective and essential animal could, not so many moons ago, only be glimpsed (if you were lucky) on the arid urban plains of Sydney and Melbourne. While the EDO NSW was a strong and vibrant example of the species, the EDO Vic was in imminent danger of extinction due to the Kennett virus that was sweeping the haunts of such socially significant animals.

It was only a year ago that a breeding programme was funded by the then Labor Federal Government to not only save the EDO Vic. from extinction but to also introduce the species to every State and Territory.

In the past year, the offspring of that breeding programme have been nurtured and treasured by broad segments of the community concerned with environmental conservation. Possibly, like the Koalas on Kangaroo Island, the EDOs have been too successful and there is now considerable pressure on the Federal Government to not merely sterilise the

EDOs but to destroy them altogether by removing all Federal funding to the EDOs.

In order to assure readers that the EDO SA is not suffering from some form of genetic funding paranoia, set out below are some quotes from an article in the Sydney Morning Herald on the 27/2/97.

“...EDOs have been told they will be stripped of funding unless they stop taking legal action against State and Federal Governments to enforce environmental laws”.

“(the Federal Attorney General) recently told the convenor of the WA EDO Board of Management of the funding threat, and urged EDOs to stop funding cases against governments on pain of losing all funding”.

“(the Federal Attorney General) would say only that EDOs are funded to provide practical legal assistance, not to support Chardonnay-set litigation or to be a political campaign post”.

If this threat to the existence of the EDO SA concerns you, please take the time to write a letter to all of the following members of the Federal Cabinet:

The Hon. John Howard, Prime Minister
The Hon. Daryl Williams QC, Attorney General and Minister for Justice
The Hon. Robert Hill, Minister for the Environment
The Hon. Alexander Downer, Minister for Foreign Affairs
The Hon. Amanda Vanstone, Minister for Employment, Training and Youth Affairs
The Hon. Ian McLachlan, Minister for Defence
all at Parliament House, Canberra, ACT 2600.

Enclosed with this newsletter is a suggested format for the letter. Unless the Prime Minister, the Attorney General and the four Federal Ministers from SA are made aware of the broad community support that exists for the EDO SA, this may be the last newsletter and more importantly the EDO SA is likely to become extinct.

EDO (SA) 1st Birthday Party

Mark Parnell and James Blindell started working for the EDO in March 1996, so we are celebrating our first birthday! Please come and enjoy drinks and nibbles with us on **Friday April 18 at 5:30pm.**

Our part-time administrator, Chris Hales, started in July 1996 and since this time more than 20 students, graduates and community members have chosen the EDO to put their volunteering efforts for the environment into action.

Work for the Dole

As the EDO is a non-profit organisation, it is eligible to receive the services of some recipients of Social Security benefits. If you wish to do voluntary work for the EDO enquire at the DSS regarding volunteering.

The EDO Network

The EDOs around Australia are enjoying the solidarity and information sharing that networking provides through a confidential e-mail conference line.

Advisory Service

Volunteer lawyers give free consultations on Thursday evenings by appointment only. The lawyers refer any public interest cases to the EDO staff lawyers for further assistance.

Workshops and Seminars

The EDO lawyers are assisting with a series of environmental workshops for the Conservation Council of SA as well as lectur-

ing on 'biodiversity and local government responsibilities' for the Nature Conservation Society. At the Reynella Neighbourhood Centre the EDO will address 'community action and access'. In early March Mark Parnell attended the state conference of the Australian Institute of Environmental Health in Mount Gambier where he spoke on the topic: 'Is the EPA a Toothless Tiger'?

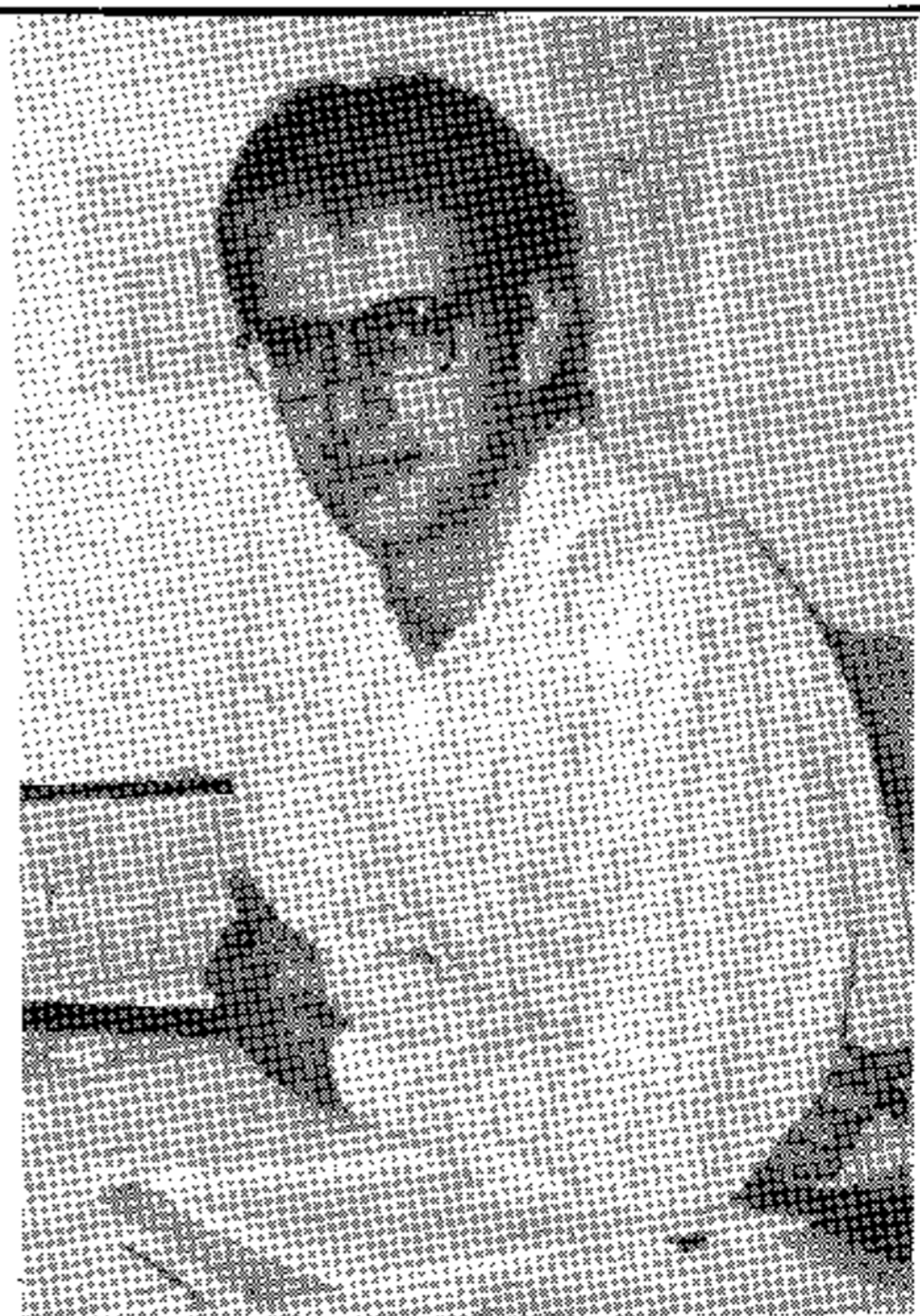
Reviews!

'Commonwealth/State reviews - role of responsibilities' - the EDO was interested in this and EDO (NSW) made a submission. 'Review of Community Legal Centres (CLC)' - the EDO met with consultants working for the State and Federal Governments who must report on the effectiveness and efficiency of all CLCs in the state. SA was the first to be reviewed.

'Legal Services Commission Review' - The LSC is concerned that its service will be cut if funding is reduced.

'Senate inquiry into Legal Aid' - a submission was prepared by our National Association of CLCs.

James Blindell is an EDO (SA) lawyer working at the office on Wednesday afternoons, Thursdays and Fridays. James previously worked for the Director of Public Prosecutions and now also tutors in constitutional law at Flinders University.



SUBSCRIPTION TIME

Now more than ever we need friends and members.

We need to keep up our member numbers so that:

1. we can work for the environment
2. we can keep our community informed
3. we can raise funds
4. we do not lose our tax deductibility on donations.

Any member who paid for membership in 1997 will be financial until June 1998.

If you have not paid please complete the enclosed form and send your subscription as soon as possible.

Thankyou.

Meetings

In the New Year the EDO has attended meetings with the Honourable David Wotton, Minister for the Environment and Natural Resources, Rob Thomas, the Executive Director of the EPA and the Environment Protection Authority itself.

The meeting with the Minister and the Executive Director provided the opportunity to give an update on the activities of the EDO and to raise a number of environmental issues directly with the Minister and the Director.

Such meetings, which occur on a regular basis, provide an invaluable opportunity for the EDO to comment upon and obtain feedback about a wide range of community concerns.

The meeting with the EPA itself was attended by a number of conservation groups. Its purpose was for the groups to communicate directly to the Authority regarding their perceptions of the EPA and their ongoing relations with the EPA. In the interest of current and future clients, the EDO attended as an observer rather than as a participant due to the different role it plays as a legal office rather than a lobby group.

The Round Table Conference

Pursuant to section 19 of the Environment Protection Act, the EPA must hold an annual conference to assist itself and the Minister for the Environment in assessing the views of interested

bodies on the operation of the EPA and the protection, restoration or enhancement of the environment under the Act.

The first conference was held on Sunday 9 February. Mark Parnell and James Blindell represented the EDO. The conference was well attended, with a number of people travelling from the country. The Honourable David Wotton, Minister for the Environment, all members of the Environment Protection Authority, the Executive Director of the EPA and many EPA staff attended. Representatives from many conservation groups and from industry also attended.

Many issues were discussed including licensing, enforcement, the community's right to access information, local government involvement in environmental protection, the EPA's strategic plan and the future direction of the EPA. The EPA is in the process of collating the information gathered at the conference and will distribute an information paper.

As with all conferences, time constraints limited the depth and range of issues dealt with. There is little doubt that future conferences should either be held more frequently (quarterly?) or for a longer period (a weekend?).

The conference was productive and is an essential step in co-ordinating the whole community's efforts to protect and enhance the environment. If the protection and the enhancement of the environment is to be undertaken in the most efficient and effective way, no sector of the community (government, the EPA, industry, conservation groups, the EDO) can afford to ignore (although not necessarily agree with!) the

concerns and aspirations of other sectors of the community with respect to the environment.

Now available from the EPA are:

- The Annual report of the EPA for 1995/96
- The Strategic Plan of the EPA.

Will Vandenberg v RC Hannaford & Artesia Pty Ltd - An update

As you will recall (see December 1996 edition of Greenlaw), the EDO, on instructions from Mr Vandenberg, commenced proceedings, pursuant to section 85 of the Development Act 1993, in the Environment Resources and Development Court alleging breaches of sections 32 and 44 of the Development Act 1993 by the owners (RC Hannaford & Artesia Pty Ltd) of allotment 2 of section 189 at Waitpinga located on the coast at Kings Head, Victor Harbor (near the Bluff).

On 12 December 1996 the owners made application to the Court seeking an order directing Mr Vandenberg to provide security for the payment of their legal costs and an order directing Mr Vandenberg to give an undertaking to compensate the owners for possible loss or damage.

On 19 December 1996, Her Honour Judge Trenorden dismissed the owners application. Her Honour considered that the Court's discretion to make such orders is unfettered and wide and

should be exercised to give effect to the Court's duty to act in the interests of justice and fairness. In the exercise of the discretion the Court took into account a number of factors including:

- **Impecuniosity** - the Court was "not persuaded on the evidence that (Mr Vandenberg) is impecunious so that he would be unable to meet an order for costs against him";
- **The likely amount of costs as a proportion of the cost of the development** - in the absence of evidence to support the estimate, an estimate by the owners that the costs could amount to 10% of the cost of the development was not sufficient to persuade the Court that the owners should not have to bear that risk;
- **The strength of the case against the owners** - at the application hearing on 18 October 1996 the Court was satisfied that the owners had "a case to answer";
- **The public interest nature of the proceedings** - The court found that "there appears to be significant public interest in the subject matter of the proceedings namely the construction of the dwelling on (the) land". The Court was satisfied that it was in the public interest that the issues raised in the proceedings, namely the enforcement of planning legislation, be determined particularly in light of the object of the Development Act 1993 "to provide for proper, orderly and efficient planning and development in the State";
- **No interim order was sought or made to stop the development pending**

determination of the proceedings;

- **The failure of the owners to provide evidence of possible loss or damage and any such loss or damage would not continue for an unknown and lengthy period of time because a hearing date had been set in January 1997.**

Following three directions hearings in the week commencing the 13 January 1997, the hearing of Mr Vandenberg's allegations proceeded from 21 January 1997 to 23 January 1997.

Of particular note are the following:

In September 1993 the Development Plan was changed to categorise building development within 400 metres of the highwater mark in this area as "non-complying". This house is about 75 metres from the coast;

When the second 1 year extension was granted the Council told the owners that there would be no further time extensions;

A short time prior to the expiration of the 5 year period a Council officer told the owners, and reported to the Council, that he considered that the house had been "substantially completed" within the 5 year period. After the Council obtained a legal opinion, the officer then advised the owners that the Council considered that the house had not been "substantially completed".

Having heard Mr Vandenberg's case, the Court found in favour of the owners without hearing the owners on the basis that, as a matter of law, the Court did not have the power to make the orders sought nor was there any order the Court could make to remedy or restrain the alleged breach of the Development Act 1993. The Court indicated that even if it did have such powers, in the circumstances and on the evidence before it, the Court would not make any of the orders sought or any other order.

Her Honour's judgement dealt with, in some detail, the Court's interpretation of the extent of its powers under section 85 to remedy or restrain a breach of the Development Act 1993.

As to the alleged breach, Her Honour Judge Trenorden, on the evidence, was "inclined to the view, contrary to the submissions by counsel for the (owners)" that the owners did undertake development after 22 July 1996 contrary to section 44(1) of the Development Act 1993 (a person must not undertake development contrary to Part 4 Division 1 of the Act) because:

- the development was not "substantially completed" within the period allowed under the planning legislation for "substantial completion" and as a result the development continued without a valid development approval and;
- a further extension of the time period within which the development could be "substantially completed", granted by the District Council of Victor Harbor on 26 August 1996 for the period 9 August 1996 to 4 November 1996, was ineffective because the original planning

authorisation lapsed on 22 July 1996.

However, Her Honour decided that she did "not have to determine whether there (had) been a breach of the Act", presumably because of the Court's finding with respect to its powers to make orders under section 85, as set out above.

While the outcome of this case is a disappointment, a number of issues of public interest were raised and dealt with. The Court provided guidelines in relation to the Court's powers to remedy or restrain breaches of the Development Act 1993 and in relation to the Court's discretion to order an applicant (such as Mr Vandenberg) to provide security for costs and undertakings as to damages; the Court indicated its view that a planning authority cannot extend a planning authorisation after it has lapsed. Should any readers wish to read the full text of Her Honour's decisions, please contact the EDO.

A word in praise of the applicant, Mr Vandenberg - he instituted these proceedings with the dual purpose of protecting the fragile Fleurieu Peninsula coastline and ensuring that the appropriate planning processes are followed. It was a time consuming and stressful undertaking for him which did not produce the outcome he hoped for. However, his commitment to those two issues remains even though his faith in the judicial process may have been shaken.

The mere fact that there are members of the community who are prepared to exercise their rights under environmental and planning legislation to challenge actions and decisions is an

enormous step in the right direction. Even though this case was lost, there is no doubt that it has sent a warning message to planning authorities and developers that there are concerned individuals and groups who are watching their activities and decisions and are prepared to take action.

THANKS TO:

Amanda Hayes for a written opinion she prepared for the EDO. Roz Daniell for assistance with the Vandenberg case and other research projects.

Dean Kent and Nicole Kelly for their development of draft fact sheets.

Gavin Brosche for his work on waste water law reform and Deirdre Heriott for her work on world heritage.

Pilot Rural Outreach Programme

The programme continues in 1997! Mark Parnell visited Mt Gambier in early March and has provided advice to a number of new and existing clients. He spoke to year 11 and 12 legal study students at Mt Gambier High School and at the state conference of the Australian Institute of Environmental Health. James Blindell will be visiting Port Lincoln in April to provide advice and present a community education seminar. The EDO plans to visit, twice yearly, the Riverland, the Iron Triangle, Mt. Gambier and Port Lincoln. There is an enormous demand for advice on environmental and planning law issues in the country which cannot be met by the provision of telephone advice. The EDO will be approaching the State Minister for the Environment in the next few months for further funding to continue this essential Programme and to make it a permanent service.

Toula Gronthos is one of EDO's volunteers and has worked on the last two issues of the GREENLAW newsletter as well as assisting in promotional work. She has a background in journalism and an interest in environmental issues and finds working at EDO worthwhile.



IMPACT

Have you got **IMPACT**? The public interest environmental law journal, published by the EDO goes *NATIONAL*. To celebrate we are offering reduced rate subscriptions. If you or your organisation doesn't already subscribe now is the time to do it.

- cutting edge test cases
- critical analysis of key law and policy developments
- up-to-date legislative changes
- four issues per year

Phone orders to EDO (NSW) on 02 9262 6989.

Donations

Donations to the EDO are tax-deductible.

The **GREENLAW** newsletter has been printed on recycled paper.

GREENLAW

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MEMBERSHIP FORM

Members receive regular newsletters about the EDO and current environmental law issues.

I wish to join the Environmental Defenders Office (SA) inc.,

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(work).....

(home).....

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E-mail.....

New Membership

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My fee of \$10 pa (\$50 corporate) is enclosed.

Donation \$.....

Total \$.....

I am interested in volunteer work:

Legal/Administration
(please circle preference)

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