

ENVIRONMENTAL DEFENDERS OFFICE ACT INC.

ANNUAL REPORT

2003-2004

PROTECTING THE ENVIRONMENT THROUGH THE LAW

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SUMMARY OF ACHIEVEMENTS IN 2003-2004

2003 –2004 saw the Environmental Defender's Office ACT (Inc) enter a new phase of growth, continuity and achievement.

We developed, launched and distributed the ACT Environmental Law Handbook funded through an Environment ACT Grant and launched by the Chief Minister to wide acclaim in November 2003. We wrote a large number of environmental law submissions, these included the proposals on the Lowlands Woodlands Submission, a Review of the Commissioner for the Environment, an additional Bill of Rights Submission, an ANEDO Submission on the US /Australia Free Trade agreement, a Crown Immunity from Prosecutions submission and finally a Cat options paper jointly with the Canberra and SE Conservation Council.

We engaged in many legal education initiatives, monthly radio presentations and media. We and represented the community perspective of environmental law on a number of committees and at various conferences. We also made appearance before many Government committees and held meeting with senior public servants to explain the EDO position on certain aspects of current legislation or proposed law reform.

CHAIR'S REPORT

The EDO (ACT)'s office moved to the Legal Aid building in Mort Street, Civic. Thank you to Legal Aid for sharing their space and resources (library, IT assistance, presentation equipment, reception desk and child friendly area, smiles, etc) EDO (ACT)'s transition to CLSIS database (from old system of NIS collection) has been a difficult but in the longer term a worthwhile transition; Staff members Kath and David had their baby daughter and as a result there was some absence from the office (Kath either on maternity leave or working from home June 03 - Dec 03,) so thanks to EDO (NSW) for assisting with ACT case load and queries over this period (testament to the excellent relationships between EDO's nationally);

EDO (ACT) met its grant obligations despite this period of maternity leave, thanks to hard work of volunteers, staff and Committee members; The EDO (ACT) Handbook on Environmental Law was launched by Chief Minister 17 Nov 2003 with excellent public attendance and resultant media interest (thanks to authors and editor, the good lawyers of Canberra giving back to the community!);

This year since the EDO's last AGM has been on all accounts a successful year. The EDO employed a solicitor Kath Taplin for the whole year with a small break for

maternity leave, contributed to the smooth running of the office and assisted in some transitional changes brought about by a new funding agreement from the Commonwealth.

During Fiona Johnstone's year as Chair, she was grateful for the support of Kasy Chambers as Deputy Chair and of Rod Griffiths our treasurer. Both Kasy and Rod contributed an enormous amount of their time to ensure the proper functioning of the EDO office focussing on governance and funding respectively. I would also like to thank the other committee members for volunteering their time, in particular Peter Nicholls as Secretary who is now studying in the UK and Hanna Jaireth for her work on submissions and assistance with community legal education.

The EDO signed a new 3-year funding agreement with the Commonwealth in January 2003. The new agreement brought about some changes to EDO reporting requirements and also to our strategic planning. Under the new agreement the EDO is required to submit a strategic plan that focussed on outputs rather than, as had been the case, inputs. The preparation of the plan gave us all an opportunity to focus on the objectives and goals of the EDO and was an extremely useful process. A recent Planning day has been held for 2004-2005

The EDO applied for and was successful in receiving funding from the ACT Government through its environment grants program. This funding provided us with the resources to engage both Kath Taplin (solicitor) and David Osborne (office manager) for additional time each week. Nevertheless, the EDO continues to seek additional funding so that we can employ a solicitor on a full time basis.

As always, the EDO relies on the support of its volunteers. Will Raymont is again to be thanked for his efforts with the EDO website. Other notable contributions were made by Lee Nelson, and Caroline Plunkett - both now Committee members.

A highlight during this past year was the publication of the ACT Environmental Law Handbook. This was achieved largely through the efforts of the editorial committee led by Susie Brown and by the book's editor, Anne Rawson. The Chief Minister, Jon Stanhope on 17 November 2003, officially launched the book. I would like to formally thank all of the people, committee members and volunteers who contributed their time to the handbook.

Another important achievement for the EDO was the submission it made on the ACT Bill of Rights. Hanna Jaireth drafted the submission on behalf of the EDO focussing on the importance of recognising the environment in any bill of rights. Unfortunately, the Consultative Committee responsible for considering the submissions did not include the environment in its draft bill that it included as part of its report to the Chief Minister. However since then amendments have been made to the bill to include a review which will address environmental rights.

I thank all of the committee members who contribute their time to the committee, submissions, stalls etc. Each contribution is appreciated by the executive and by the staff. It is difficult to run an office and to meet all of the administrative obligations placed on you by funding bodies without the support of the committee.

Thank you to David Osborne for his contribution to the running of the office. David does a great deal and like many involved with the EDO works a great deal more hours than he is paid to work. In addition, he has networked the computers in the office and ensured that the computers are suitable for the Commonwealth's new reporting system.

This past year has been one of consolidation hopefully laying a strong base from which the EDO can grow in the next year.

Welcome to James Prest the new EDO (ACT) solicitor and June Weise, the new office administrator.

Julia Pitts
Chair
(at 31 October 2004)

THE EDO NETWORK

EDOs are located in every capital city and in Far North Queensland. These offices are in regular contact and collaborate on national issues such as the Environment Protection and Biodiversity Conservation Act 1999 (Cth), and on issues of common concern such as State and Territory law reform proposals and cases raising similar or national issues. The EDO Network holds a national conference each year to discuss these issues. The EDOs also have a web page at www.edo.org.au. A national organisation 'ANEDO' ('Australian Network of Environmental Defenders' Offices') has been incorporated. Each EDO office will continue to function as an independent organisation, but the incorporated body will assist in providing a national voice for the EDO network and a vehicle for obtaining further funding.

A BRIEF HISTORY OF THE EDO NETWORK

The Environmental Defender's Office (ACT) Inc. is one of a network of community legal centres across Australia that specialise in environmental law.

The first EDO was established in Sydney in 1985, followed later by the opening of offices in Brisbane and Melbourne. Following a Commonwealth Government commitment in May 1995 to fund a national network of environmental lawyers, the other States and Territories established their offices to complete the EDO network across Australia.

The national network of EDOs was incorporated in May 2005. Most of the state and territory EDOs are now members of this national body called 'ANEDO' (Australian Network of Environmental Defenders' Offices). The establishment of ANEDO has facilitated better skills and research exchange between EDOs, leading to better services being delivered to EDO clients in the ACT, and nationwide.

THE ROLE OF THE EDO (ACT)

The EDO (ACT) has three main functions:

- (1) providing legal advice about environmental law to members of the community and community groups interested in preserving the environment;
- (2) undertaking community education about legal issues related to the environment and planning; and
- (3) researching and making submissions to government about reform of laws and policies affecting the environment.

Specific EDO services to the ACT and regional community include:

- Providing legal advice and assistance to people and groups seeking to protect the environment;
- Providing advice to people and groups wishing to appeal against administrative decisions relating to the environment;
- Presenting environmental law seminars to the community, and presenting individually tailored talks to schools and environmental groups;
- Providing environment and planning law information to the general public, such as the EDO's legal Fact Sheets and our upcoming Handbook on ACT Environmental Law;
- Researching public interest matters in environmental law;
- Working with other ACT community legal centres, indigenous groups and environmental groups to make submissions proposing improvements to environment and planning policies and laws;
- Promoting laws and law reform that helps protect the environment; and
- Publishing articles on environment and planning laws.

A BRIEF HISTORY OF OUR ACHIEVEMENTS

The EDO (ACT) was established in 1995 and was operational by mid-1996. Highlights of previous years included the following set out below.

In 1998 the EDO presented a major seminar on the ACT's new integrated pollution control and environment management legislation, as well as a number of educational presentations on tree protection legislation.

Detailed submissions were also made on the Environmental Protection and Biodiversity Conservation Bill (Cth).

In 1999 and 2000 written submissions were made on Utilities Policy and the ACT Environmental Impact Assessments as well as the National Competition Review of the *Land (Planning and Environment) Act 1991*.

In 2001, submissions were made on the Statutory Review of the *Water Resources Act 1998*. The Review resulted in a Report being tabled in the Legislative Assembly in June 2001. Submissions were also made regarding other significant law reform issues, such as heritage and tree protection.

The EDO made presentations to community groups, such as the presentation explaining defamation law to ACT community groups and activists.

In 2001, the EDO also published a set of plain English 'Fact Sheets' on ACT environmental law. The Fact Sheets were launched by the Minister for Urban Services and continue to be widely distributed by the EDO.

BOARD OF DIRECTORS AND ITS COMMITTEE

Role of the Board

The Board's primary role is the protection and enhancement of long-term environmental protection in the ACT. To fulfil this role, the Board is responsible for the overall Corporate Governance of EDO including its strategic direction, establishing goals for management and monitoring the achievement of these goals.

Composition of the Committee

The EDO's Management Committee during 2003-04 was:

Julia Pitts (Chair from November 03)
Fiona Johnstone (Chair to November 03)
Kasy Chambers (Vice Chair)
Peter Nicholas (Secretary)
Lee Nelson (Treasurer from November 2003)
Rod Griffiths (Treasurer to November 2003)
Dr Hanna Jaireth
Caroline Plunkett
Susannah Falvi
Matthew Zagor

Management of conflicts of interest

Committee members are required to keep the Chair advised, on an ongoing basis, of any interest that could potentially conflict with those of the EDO. Where the Committee considers that a significant conflict exists, the member concerned is not present at the meeting whilst the item is considered. The Committee has developed procedures to assist the Committee to disclose potential conflicts of interest.

ORGANISATIONAL MANAGEMENT

Membership of the EDO Management Committee is open to all non-corporate members, and any member may nominate or be nominated to the Management Committee in a voluntary capacity. The Management Committee determines the strategic and policy goals of the EDO and the most appropriate means to achieve those goals.

The EDO utilises volunteer workers for a range of legal, administrative and clerical functions. Volunteers are supervised at first instance by the Solicitor, and ultimately by the EDO Management Committee.

The EDO complies with all relevant professional standards contained in the *Legal Profession Act 1970* and the Professional Conduct Rules. The principal solicitor holds an unrestricted practising certificate issued by the Law Society of the ACT.

The EDO maintains appropriate insurance policies, including those covering professional indemnity, workers compensation, public liability and volunteers' insurance.

The EDO applies Equal Employment Opportunity principles and procedures in the selection of new staff and volunteers and in all office practices.

The Management Committee is elected at the Annual General Meeting in accordance with the procedures set out in the EDO's Rules of Incorporation. The Management Committee may delegate aspects of its authority to specialised sub-committees. Daily operational management of the EDO is the responsibility of the Solicitor, who works cooperatively with the Office Administrator.

EDO procedures relating to Governance are documented in a Policy and Procedures Manual, and staff are trained in their accurate and timely application.

Ethical Standards

The EDO has a staff *Policy and Procedures Manual*, and an *EDO Service Standards*, both of which are updated annually. These documents address such issues as standards for legal policy and law reform, standards of organisational management, and standards for assessing client satisfaction and managing complaints. Further, EDO complies with the performance requirements of stakeholders, such as Commonwealth and ACT governments.

OVERVIEW OF 2003/2004

The EDO had another successful year in operation, providing advice, legal education and submissions on environmental legal issues.

Unlike the 2001-02 financial year, the EDO benefited from the services and skills of its solicitor for most of the year. Kath Taplin, the EDO's solicitor, gave birth to her daughter in May 2003 and began a period of maternity leave until late November 2003. During this time, appropriate work was referred to EDO (NSW), or to private law firms on a pro bono basis.

LEGAL ADVICE AND INFORMATION PROVIDED

An indication of the minimum activities performed by the EDO (ACT) during this financial year can be gleaned from the CLSIS data – a data collection system implemented for the first time during this period. It shows that 27 information activities and legal advice activities were undertaken. There were 21 new case files opened, which required extensive, ongoing legal assistance. 8 cases were closed during the year. There were 33 non-casework projects open during the period and 22 of these were closed during the year.

Most matters were resolved via the provision of information and advice without requiring long term legal assistance. The information and advice subject matter included a variety of administrative decisions regarding the environment and planning, noise, air and water pollution, tree and vegetation protection, environmental impact assessments and various development proposals.

Some cases requiring more extensive work concerned:

- Advice on administrative decisions affecting native woodland;
- Objections to development incompatible with residential policy and use in the 'Bush Capital', particularly relating to dual occupancy;
- Possible prevention of proposed road development;
- Advice on noise pollution, particularly regarding motor sports;
- Advice regarding proposed development in heritage areas;
- Advice on environmental protesting;
- Advice regarding insurance issues facing environmental groups;
- Advice regarding possible defamatory publications by environmental groups;
- Advice regarding the application of legislation relating to animal welfare;

- Advice regarding the application of the *Environment Protection and Biodiversity Conservation Act (Cth)* to ACT plants and animals;
- Significant tree protection; and
- Legal and process advice on planning, including appeals to the AAT.

10 cases were taken on by EDO (ACT), wherein EDO (ACT) represented environmental protesters being prosecuted before the ACT Magistrates Court for alleged criminal offences such 'obstruction and hindrance'. Offences carried possible hefty fines and the possibility of imprisonment. All 10 cases were discontinued before the Magistrates Court after lengthy to-ing and fro-ing with the ACT DPP. Particular thanks must go to barristers Steven Hausfeld and Wayne Sharwood, who acted for the protesters before the Court.

Testimonials

“ I would like to submit our heartfelt thanks and appreciation to the EDO, and specifically to Ms Kath Taplin, the Solicitor, who assisted us.

Kath sourced and retained our two Barristers, recruited and briefed volunteers for research, researched our case herself, all the while providing an invaluable source of support, comfort and reassurance for the group.

Her professionalism is to be truly admired, and perhaps what we most appreciated was Kath's ability to translate what we perceived to be quite complex technical legalities, into terms and examples, which the group could understand and relate to.

At all times Kath Taplin and EDO staff member David Osborne made themselves available to the needs of the group and was thorough in updating us of developments in our cases.”

“Just a note to let you know how much your assistance was appreciated by all. Your patience, skill, energy and efforts went beyond the bounds of duty and we are all ignoramuses very much in your debt.”

COMMUNITY LEGAL EDUCATION

The seminars and presentations conducted as part of the EDO's community legal education program also contribute to community awareness of the EDO and environmental and planning law issues, as does production and distribution of the EDO newsletters and e-bulletins.

The EDO delivered an informative program of community legal education presentations. These included:

- A highly successful presentation/seminar held at the EDO premises, on aspects of *Environment Protection and Biodiversity Conservation Act 1999* featuring presentations by Lyndall Kennedy of the WWF-EPBC Unit and James Prest, environmental lawyer of Pamela Coward and Associates.
- Presentations at Canberra High, Campbell High and Darramalan High regarding aspects of environment and planning law; and
- Environmental law presentations to environmental groups such as the Australian Conservation Foundation (ACT Branch) and the Darramalan Environment Group.

In addition to the presentations, the EDO continued to distribute the EDO plain English Fact Sheets on ACT environment and planning law.

The EDO prepared an article published in the Canberra Times article regarding proposed reforms to the *Environment Protection Act 1997* (ACT), as well as publishing numerous monthly and incidental E-bulletin articles on proposed legislation.

During the year a decision was made to consolidate the production of the newsletter and the e-bulletin into a more comprehensive and regular monthly e-bulletin. The e-bulletin informs recipients of environment and planning issues current in the ACT and surrounding region, as well as issues of national environmental importance. Anyone wishing to be included on the e-bulletin circulation list can do so by contacting the EDO office. Hard copy versions of the e-bulletin remain available upon request.

The EDO ACT website continues to be an important tool for dissemination of legal education and information. The Facts Sheets and newsletters, together with copies of EDO law reform submissions, are available from the EDO website. The website can be found at www.edo.org.au/edoact.

The EDO continued to actively participate in meetings of the ACT Legal Service Bureau, the ACT Community Legal Centres Group, the ACT Division of the National Environmental Law Association and the Law Society's Planning and Environment

Committee. Important gains were also made by participating in discussions about the establishment of an ACT Pro Bono Clearing House.

On an informal level, the EDO staff maintained their strong links with relevant ACT groups, such as environmental groups and indigenous groups. Both these sectors had valuable input into aspects of the EDO's law reform projects this year. The EDO solicitor undertook cross cultural training, which will assist the EDO further in forming links with ACT community members.

Presentations and Workshops held included the following:

- Presentation to Campbell Resident's Group
- Presentations to Save the Ridge Inc.
- Presentation to ANU students
- Presentation to Gilgandra High School
- Meetings with WWF TCT EPBC unit
- Meeting with Fisher Parkland Group
- Workshop on Recent Developments in Commonwealth Environmental Law (with a focus on the *Environment Protection and Biodiversity Conservation Act 1999*) held at the EDO ACT Office .

EDO (ACT) ACT ENVIRONMENTAL LAW HANDBOOK

The 17th of November, 2003, saw the launch of the *ACT Environmental Law Handbook* by the Chief Minister, Attorney-General and Minister for Environment, Mr. Jon Stanhope.



The launch was extremely well attended by the general public, clients, friends and members of EDO, politicians, Law Society members and subsequent Handbook sales have been excellent.

The ACT Environmental Law Handbook was prepared by ACT environmental lawyers associated with the EDO. It contains plain English information regarding all significant environment and planning laws in the ACT, including applicable Commonwealth laws. It has been distributed to all ACT schools.

Mr Stanhope launches the ACT Environmental Law Handbook Photo: The Canberra Times

LAW REFORM

In relation to the EDO's law reform activities, the EDO intends to take on more pro-active role seeking to become a trigger for change. The EDO is particularly interested in the upcoming review of the Commissioner for the Environment and associated legislation review. The EDO will also remain actively involved in public dialogue regarding the ACT Government's proposed "Bill of Rights" legislation.

The EDO was involved in a number of law reform activities, primarily by way of submission on proposed legislation. A generous grant from the ACT government assists EDO to make this impact on the process.

Commissioner for the Environment Review

EDO made a submission in January 2004 to the review of the Office of the Commissioner for the Environment conducted by Walter and Turnbull

The establishment of the Office of the Commissioner for the Environment (the Commissioner) by the Commissioner for the Environment Act 1993 (ACT) ensured that the Australian Capital Territory was at the forefront of environmental protection in Australia.

The legislation provides the Commissioner with investigative powers that are independent of the Executive and its agencies. Such independence facilitates confidence that any findings made by the Commissioner are in the interest of the environment and have been prepared from a broad perspective.

"The Commissioner for the Environment Act provides the Commissioner with strong investigative powers although these are subject to some exclusions. It also requires the preparation of a broad State of the Environment report that ensures a comprehensive analysis of the ACT's environment and recommendations for its improvement.

These powers are, to varying degrees replicated in other pieces of legislation, administrative arrangements or policy decisions. However none of these are able to match the breadth of the role of the Commissioner and/or the independence of the Commissioner.

The coupling of the state of the environment reporting role with the investigative powers means that the Commissioner is able to determine whether issues require investigation based on a holistic assessment of the environmental implications.

The EDO recommends that the functions of the Commissioner remain as they currently are subject to a review of the continued appropriateness of the exclusions in sub-clause 12(2).

The creation of the Office of the Commissioner for the Environment placed the ACT at the forefront of environmental responsibility. The ACT should continue to enjoy the full powers of this innovative piece of legislation.”

Additional Bill of Rights Submission

A superb submission on the proposed ACT Bill of Rights from an environmental rights perspective was prepared and submitted.

Tree Protection Bill 2004

A submission to Environment ACT regarding the Tree Protection Bill 2004 (lodged 29 June 2004). That submission noted that the EDO assists a great number of ACT residents in relation to environmental issues, and particularly tree protection, in the ACT and surrounding region. Further it indicated the EDO's support for a permanent tree protection scheme in the ACT. It argued that public participation in environmental law, and in tree protection laws, should be appropriately legislatively enabled. Appeal rights, and rights of standing, should not be limited. The submission noted that an effective legislatively enshrined tree protection scheme relies upon the enforcement schemes underpinning it.

Submission on Crown immunities for Territory owned Corporations.

This submission reviewed ACT environmental legislation in relation to the position of statutory authorities and Territory-owned corporations which may have claimed Crown immunity in relation to environmental offences. The submission commented on provisions of the *Land (Planning and Environment) Act 1991*; the *Environment Protection Act 1997*; the *Nature Conservation Act 1980*; and the *Water Resources Act 1998*. Also, the submission noted the effect of the *Legislation Act 2001* in interpretation of questions of Crown immunity.

The submission considered whether certain statutory authorities and public corporations in the ACT, in terms of the likelihood of their activities being regulated by environmental legislation, benefit from any immunity that the Crown has. The entities considered were ACTEW Corporation ('ACTEW') and Totalcare Industries ('Totalcare') (both incorporated under the Territory Owned Corporations Act 1990); and the Australian Capital Tourism Corporation ('Tourism Corporation') (incorporated under the Australian Capital Tourism Act 1997). The EDO argued for the amendment of current environmental legislation to ensure that the Government and its entities can be held properly accountable for breaches of ACT environmental law. This may be achieved, for example, by inserting a provision into the *Land (Planning and Environment) Act 1991*, *Environment Protection Act 1997*, *Nature Conservation Act 1980*, and the *Water Resources Act 1998*, expressly stipulating that a government entity is not immune from

criminal liability, or the payment of fee, under this Act in relation to an act or omission of the entity. This would successfully override the crown immunities provisions of the *Legislation Act 2001* in relation to the ACT's environmental legislation.

Submission to the Senate Legal & Constitutional Committee's *Inquiry into Legal Aid and Access to Justice* (joint submission with Australian Network of EDOs - ANEDO),

This submission was made in August 2003. That submission addressed two key aspects affecting the ability of the public to access justice and ensure sound environmental outcomes – namely, the no litigation restriction and legal aid for public interest environmental matters. The submission noted that current arrangements regarding legal aid work against the clear and laudable developments in public interest environmental law. First, the restriction on the use of legal aid funds for “litigation-related activities” means that meritorious public interest cases often cannot be conducted unless alternative sources of funding (such as public donations) can be found. Second, only in NSW can legal aid be sought for environmental law matters in the public interest.

MEETINGS

- A number of meetings were held during 2003-04 with a number of government and non-government MLAs and their staff regarding various pieces of environmental legislation in the Territory. These discussions included reference to the proposed Human Rights Act 2004, the Gungahlin Drive Extension Authorisation Bill, the Projects of Territorial Significance Bill.
- Other meetings were conducted with members of the Executive regarding the administration of environmental law and legislation in the Territory.

Gungahlin Drive Extension

The Legislative Assembly passed enabling legislation, the *Gungahlin Drive Extension Authorisation Act 2004* at a last minute specially convened sitting in late May 2004. The legislation revokes appeal rights on any existing or future aspects of the GDE project, making the development of the road through Canberra Nature Park immune to appeal. The legislation was a political reaction to the Supreme Court's decision in the *Save the Ridge* litigation, handed down on 31 March 2004.

This raises a number of issues relevant to public interest environmental law in the ACT. From a community law perspective, it is a backward step to wipe out third party appeal rights. This is especially so with respect to environmental law, where third party appeal rights are critical to environmental protection. From an environmental perspective, it is questionable to effectively override a court decision to push through specific development.

ACCESS AND EQUITY

The services of the EDO are available to individuals and organisations in the ACT and surrounding areas with environmental law concerns, subject to the EDO's casework guidelines and newly introduced means test.

Means Testing Policy

The EDO management committee adopted a means testing policy this year. Generally stated, this policy ensures that organisations and individuals of limited means receive EDO assistance free of charge, while clients with higher income levels may contribute towards the costs of their environmental law matter. Since implementing the policy the EDO has found that its client base remains largely unchanged.

Access

The EDO is centrally located in Canberra with easy access by public transport. Both a telephone answering and email service are available for inquiries outside existing office hours. Our website is located at www.edo.org.au and is an important tool for obtaining information. The solicitor and volunteers travel to venues to give presentations and workshops to schools and community groups, as well as to meet with clients.

Membership

Membership of 'Friends of the EDO' is available to anyone who wishes to support the work of the EDO. Friends receive newsletters, invitations to social events and discounted admission to EDO seminars.

HOURS OF OPERATION

The general hours of operation of the EDO are generally from 9.30am to 5.30pm on Monday, Tuesday and Wednesday, and from 10 am until 3pm Thursday each week. A telephone and e-mail message service is available at all times. Legal advice on matters involving environmental law is given face to face or, if appropriate, over the telephone. Pre-arranged interviews with the solicitor are available outside the normal office hours, including on weekends. The EDO also gives evening and lunchtime seminars.

NEW EDO (ACT) PREMISES

The EDO (ACT) moved in December 2003 from its premises in the Centre Cinema Building, 1 Bunda Street, Civic into the Legal Aid Offices in Mort St (located in the Bus interchange in Civic), which is close by to our old office. The new office was set up in January 2004.

Many thanks are due to Legal Aid for kindly taking providing space for us and assisting EDO ACT as part of the free legal services community in the ACT. Facilitated a painless set up in the premises and helpful with everything from assistance from reception, to law library to IT troubleshooting (none of which we had previously).

VOLUNTEERS AND PRO BONO

The members of the Management Committee of the EDO are all volunteers. In addition to their role in overseeing the management of the organisation, all members of the committee contribute significantly to activities of the EDO, such as organising seminars, and submission writing. During the year the EDO received excellent support from legal practitioners, students and other volunteers. Volunteers also did many hours of administrative, legal research and legal education work.

Volunteers to whom the EDO is greatly indebted are, Steven Hausfeld (Barrister; court cases), Wayne Sharwood (Barrister; court cases), Megan Window (fact sheets update (Minter Ellison), Leisa Richardson (fact sheets update (Minter Ellison), Clare Guenther (research), Allison Gurr (excellent research), Robyn Briese (excellent research paper on crown immunity and environmental laws in the ACT), Christal George, Sue Berger as well as all our other valued contributing volunteers.

The EDO must also thank Rosemary Budavari who provides excellent advice and assistance to the EDO on an ongoing basis, and has done so for many years.

David Osborne also contributed a large number of hours on a voluntary basis in addition to his paid position as the EDO's office manager.

Volunteers have undertaken the majority of the work on the EDO Handbook. In particular, Anne Rawson, the editor of the book, has provided invaluable assistance and direction in producing the Handbook.

Gary Williams, Chartered Accountant, of Rosenfeld, Kant and Co provided his services once again to audit the EDO's accounts free of charge. Rod Griffith, Treasurer, once again made an enormous and greatly appreciated contribution in preparing the EDO's monthly accounts, as well as undertaking other activities, such as preparing grant applications.

Minter Ellison Lawyers has provided free conference room facilities and library facilities to the EDO (ACT), which have been of significant benefit to our organisation.

The solicitor undertook cultural training, which has assisted the forging of links with the various indigenous peoples of the ACT. This has assisted with some of our cases. The case work we undertake is complex and many of our clients are extremely passionate. Our solicitor found it a pleasure to work with EDO's clients, most of whom are dedicated environmentalists.

Generally speaking, EDO (ACT) has been innovative this year. We have utilised the benefits offered by the EDO's recent National Incorporation. EDOs now share information and distribute their resources generously, which is critical from the perspective of a smaller EDO office such as ours. We also benefit from excellent and ever developing relationships with other ACT community legal centres, and law firms who are prepared to provide pro bono assistance.

STAFF REPORT

The EDO (ACT) staff for the period July 2003 to June 2004 was Kath Taplin (Solicitor) and David Osborne (Office Manager). Kath and David have both been with the EDO (ACT) for some years, first as EDO volunteers, and subsequently in paid roles. Kath and David are pleased to report some 'firsts' for EDO (ACT) in the 2003 - 2004 financial year, particularly since it was their last year with the legal centre before their relocation to Java, Indonesia, to live.

2004 was the first year that EDO (ACT) became actively involved in court case work. Unlike other EDOs, EDO (ACT) has historically faced significant obstacles preventing it from being solicitor on the record for environmentalists before courts and tribunals. This financial year EDO (ACT) managed to independently fund a number of cases before a court, all of which were successful from the perspective of our clients.

EDO (ACT) acted for ten environmental protesters, each with criminal matters before the ACT Magistrates Court. The ten EDO (ACT) clients were each ACT residents arrested and charged as they protested against the construction of a road through a section of Canberra Nature Park. The charges against the protesters included 'obstruction', 'hindrance' and 'trespass'. No violence on the part of the protesters was alleged. None of the protesters were eligible for legal aid. All were environmentalists, and a number worked for environmental organisations in the ACT. All the protesters preferred the negotiated settlement of their cases, to the contesting of their matters at hearing.

EDO (ACT) retained ACT barristers Steven Hausfeld and Wayne Sharwood to act pro bono for the clients in court. Genuine thanks must be extended to these two talented counsels. After negotiations with the ACT DPP, and multiple court appearances over many months, the charges against the protesters were discontinued. Some of EDO (ACT)'s clients stated that, had they not been represented, they would have pleaded guilty, rather than face court repeatedly, despite (correctly) believing that they had been incorrectly charged. The EDO (ACT), like EDOs nationwide, is able to provide quality legal services to dedicated environmentalists (sometimes referred to by EDOs as 'defending the environmental defenders'). The EDO (ACT)'s involvement in these recent cases demonstrates the organisation's genuine commitment to access to law and justice (a recurring theme in EDO publications,) in the ever-developing environmental law sphere.

As mentioned above another first this financial year was that, after many years in a humble office in the Centre building, the EDO (ACT) moved to new premises. ACT Legal Aid were kind enough, as fellow ACT free legal service providers, to offer EDO (ACT) suitable office space. EDO (ACT) now continually benefits from the great hospitality of Legal Aid, which includes IT support, reception services, library services and a distinctly client friendly atmosphere. Many thanks to David and the volunteers who pitched in when their respective employers permitted them 'time off' to assist, as the moving could only be done during office hours.

On a related point, the EDO (ACT) office systems have greatly improved this financial year thanks to an equipment grant from the Commonwealth funder, and ongoing assistance from the Legal Aid IT staff. A small office such as EDO (ACT) genuinely benefits from such generosity.

Aside from the above, EDO (ACT)'s year was an overall success with grant commitments being met. Hard work upon Kath's return, from maternity leave combined with the dedication of EDO (ACT) volunteers, ensured the EDO (ACT) achieved its objectives in respect of casework, submissions on law reform, and community legal education.

In this regard thanks must be extended to past EDO (ACT) Chair Fiona Johnstone, who herself had a baby son, and selflessly dedicated a large portion of her maternity leave to allow the EDO (ACT) to realise its goals.

By way of thanks, the EDO (ACT) staff would like to state the following –
A sincere thanks to all for enabling the EDO (ACT)'s sole, part time solicitor a period of maternity leave. Many had to work hard to fill the gap in the solicitor's absence. The staff was very encouraged by the support offered to them over this time.
Thanks to Susie Brown (past EDO (ACT) Chair). Susie's enthusiasm and never ending ideas for improvement were always appreciated.

Thanks to Fiona Johnstone (current Chair). Fiona is always on the end of the phone (or email communication!) offering excellent daily advice to staff, and performing mountains of important work during her maternity leave.

Special thanks goes to Rod Griffiths who was a founding member of the EDO (ACT), and has been Treasurer until this financial year. Rod's unerring support of the organisation, and staff over the years, has been instrumental to the EDO (ACT)'s successes. We cannot thank Rod enough for the superb work he has done for the EDO, and for assisting to make the most out of our limited funds.

Thanks to all Committee Members, for jointly providing sage advice on a range of issues, many of them difficult, and for putting in the hard yards to keep us respectable and ever improving.

Finally, thanks to the EDO's volunteers, friends and clients, all of whom assist us to defend the environment.

May the EDO (ACT) continue to grow and achieve for the environment into the future.

THE FUTURE

The EDO (ACT) is building on its achievements of 2003-2004 in its ninth year of operation and is looking to expand its operations in the coming year, particularly if successful in gaining additional funding.

In the provision of legal advice, there is still considerable unmet demand for the EDO's services.

Members of the ACT community and local environment groups are increasingly looking to the EDO for assistance in their quest to protect the natural environment. With additional funding, the EDO will be able to better serve a larger number of people more effectively.

As has been reported in previous years, the EDO is unable to use its Commonwealth funding for the purposes of litigation. The EDO intends to seek funding from other sources during this next year and in particular to apply for funding from other Commonwealth and ACT government grant programs that can assist the EDO to better achieve its objectives and meet the needs of the ACT community.

LEGAL AID IN PUBLIC INTEREST ENVIRONMENTAL LAW MATTERS

THE NEED FOR ENVIRONMENTAL LEGAL AID

Legal aid is only available for some environmental cases in the public interest in NSW, but not in other States or the Commonwealth. An important component of such grants of aid in NSW is the provision of a costs indemnity so that, should a litigant face an adverse decision, it does not have to pay the costs of the other side. Provision for such indemnity is made in s. 47, *Legal Aid Commission Act 1979* (NSW).

Commonwealth legal aid in public interest environmental matters, together with an indemnity provision, are important examples of giving substance to a procedural right. Governments of all types have often been reluctant to enforce their own legislation. Recent practice bears this out. The Joint Select Committee on Quality of Building in NSW heard evidence in 2002 about the failure of Local Government to implement Local Environmental Plans. It was also only recently that the NSW Department of Urban Affairs and Planning first commenced proceedings to enforce planning laws (with the laws being in place since 1979). In the first two years of operation, the Commonwealth has also only recently brought its first enforcement proceedings under the *Environment Protection and Biodiversity Conservation Act 1999*, whilst the Queensland EDO has brought two sets of proceedings on behalf of both a concerned individual and a conservation group.¹

THE COMMONWEALTH'S "NO LITIGATION" RESTRICTION

Background to the "no litigation rule"

Whilst the Commonwealth has never publicly acknowledged the catalyst for the imposition of the "no litigation" rule in 1997, it is generally understood to have been a political reaction to criticism by developers of public funding for the then newly established network of small EDOs around Australia. In particular, Mr Keith Williams, developer of the controversial Port Hinchinbrook resort and marina, was publicly and prominently critical of government funding for the EDOs following EDO NSW

¹ *Booth v Bosworth* [2001] FCA 1453 (17 October 2001) and *Humane Society International Inc v Minister for the Environment & Heritage* [2003] FCA 64 (12 February 2003).

representation of the Friends of Hinchinbrook in Federal Court judicial review proceedings in late 1996.

Implementation of the “no litigation rule”

The “no litigation” restriction came into force on 1st July 1997. The implementation mechanism was through amendments to two documents which form the basis of Commonwealth funding in this area, namely the “Operational Model” and “Guidelines” for the Commonwealth Community Environmental Legal Program (CCELP). Compliance with the Operational Model and Guidelines are a requirement of the Service Agreement each EDO has with the Commonwealth.

The Operational Model provides that *“Commonwealth funding will not be provided for litigation”*. It also provides that each EDO be able to *“substantiate that adequate separation is being achieved between CCELP funding and monies received from other ‘litigation’ funds provided to the service”*.

Scope of the “no litigation” rule

The CCELP Guidelines contain fairly prescriptive tests as to what is covered by the “non litigation” rule. These include matters relating to the “process of bringing or preparing a law suit”, or “closely associated with a particular judicial proceeding or contest”. The dominant test is said to be whether a dominant purpose of the activity is “adversarial or party-party in nature”.

Alleged public policy rationale for the “no litigation rule”

The Government has not adequately explained any public policy rationale for this restriction (which it described at the time as a “new initiative”).

The “Operational Model” and “Guidelines” refer to legal services other than litigation as being “cost-effective”. Environmental litigation is described as “costly and time-consuming” and therefore presumably not cost-effective, although no supporting analysis for this proposition is provided.

Whilst not stated in any official correspondence or documents, it is generally believed that the restriction has a philosophical basis which assumes it is wrong for public funds to be used to test or challenge Government decisions. This implies a very narrow view of democracy. An alternative view would be that it is the sign of a robust democracy that governments are prepared to allow public funds to be used to test the legality or merits of government decisions that affect the environment.

Case studies showing value of public interest environmental litigation

In submissions to the previous Senate Legal Aid Inquiry and in numerous letters to the Attorney-General and other Ministers, the EDOs have described the vital role that litigation plays in reforming environmental law and policy.

It is noted that the Network raised the issue of the revocation of the “no litigation” funding restriction with this Committee the last time it looked into legal aid. In its Third Report in 1998, this Committee recommended as follows:

The EDO urges a properly structured and funded legal aid system that provides legal aid in appropriate public interest environmental matters.

FINANCES

FUNDING

The EDO is funded by an annual grant from the Commonwealth Government, which was \$38,061 in 2003 / 2004. The Commonwealth also provided \$4,320 for capital.

The grant only covers 19 hours of a solicitor's time each week. The Commonwealth's annual grant contains a restriction on litigation related activities. Unfortunately the litigation restriction makes it difficult for the EDO to offer a comprehensive legal service to the ACT community.

The EDO has made efforts to obtain alternative sources of funding and will continue to do so. Unfortunately an application by the EDO to receive funding from the ACT Law Society was unsuccessful, despite a detailed submission that clearly stated that EDO ACT applies a means test to potential clients.

The EDO received grants from the ACT Government under the ACT Environmental Grants Program for 2003/2004. The ACT grants were for Environmental Law Submissions and for Community Legal Education. Notification of continued funding for these activities in 2002/2003 has been received from Environment ACT, as well as a grant to update the Fact Sheets.

The EDO will use its ACT Environment Grant funding to print and publish the *ACT Environmental Law Handbook*.

The EDO has raised funds from membership and "Friends of the EDO" fees.

The follow activities have been undertaken to pursue additional funding:

- Lodged application with ACT Law Society in October 2004
- Approaches to political parties in ACT seeking more ACT government funding
- ANEDO network submission on lack of public interest environmental law funding
- Meetings and approaches to ACT law firms to secure pro bono assistance

FINANCIAL REPORT

INDEPENDENT AUDIT REPORT
